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Attorney for Petitioner
JOSEPH NUCCIO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN JOAQUIN

In re JOSEPH HATHORN NUCCIO, Petitioner On Habeas Corpus.	Case No. STK-CR-FMISC-2021-0006365 **PETITIONER'S TRAVERSE TO THE RETURN TO THE ORDER TO SHOW CAUSE AND SUPPORTING POINTS AND AUTHORITIES** Judge: Hon. Linda R. Clark

COMES NOW PETITIONER JOSEPH NUCCIO and enters for his Traverse to the Return to the Order to Show Cause:

1. Petitioner initially alleges that the Return contains only argument and no factual contentions or denials supported with evidence as required by the Rules of Court. (See Cal. Rules of Court, rule 4.551, subd. (d).) Petitioner charges that Respondent's Return is legally insufficient. Moreover, as Petitioner's evidence is uncontroverted, this Court must accept Petitioner's factual allegations in his Amended Petition for Writ of Habeas Corpus (hereafter "Petition") as true and grant the relief requested.

2. Petitioner specifically alleges that Respondent has failed to minimally cite evidence in the Return to challenge Petitioner's allegations and supporting evidence as presented in the Petition. To this end, Respondent has failed to provide any affidavits from the state actors with firsthand knowledge of the case and allegations set forth by Petitioner. Respondent has further failed to provide any documentary evidence in support of their arguments contesting Petitioner's allegations and evidence as set forth in the Petition. The lack of evidence is particularly notable as Petitioner's evidence in support of his allegations in the Petition are largely derived from the record on appeal, as well as Respondent's files and records as provided during the discovery process under Penal Code section 1054.9(a). Indeed, Respondent's Return does not provide any affirmative statements or evidence to counter the allegations and evidence in the Petition.

3. Petitioner realleges that he is actually innocent of the underlying conviction in this case and reasserts that there is a sufficient, credible factual basis to support his claim as set forth in the underlying record, which is further supported by the new DNA evidence which affirmatively excludes Petitioner as a DNA contributor to the murder weapon.

4. Petitioner admits the procedural history of the case as alleged by Respondent in paragraphs 1-2 and 4-5 of the Admissions of the Return.

5. Petitioner denies that trial counsel filed a motion pursuant to Penal Code section 1405 as alleged in paragraph 3 of the Admissions in the Return. Petitioner initiated the proceedings *pro se*, and this Court subsequently appointed trial counsel to represent Petitioner in the proceedings. Petitioner otherwise admits that the motion was granted.

6. Petitioner acknowledges Respondent's admission, as set forth in paragraph 6 of the Admissions in the Return, that the post-Penal Code section 1054.9(a) discovery of

1994 Stockton Police report (SPD CR#94-42225) was suppressed by the state until April 2023.

7. Petitioner further acknowledges Respondent's admission, as set forth in paragraph 6 in the Admissions of the Return, that the California Law Enforcement Telecommunications System (CLETS) report for Terry Sprinkle which was sealed by the trial court and ordered unsealed during the court ordered post-conviction discovery proceedings was not provided to trial counsel or post-conviction counsel prior to its unsealing in 2023.

8. Petitioner acknowledges Respondent's admission as set forth in paragraph 7 of the Admissions in the Return. Specifically, Petitioner acknowledges that the Stockton Police received blood-like spattered clothes, shoes and cash confiscated by FBI Task Force Officer Fields during a search of Terry Sprinkle's residence in the days following Zunino's murder, and that the items were never put into evidence in the case and have been lost.

9. Petitioner acknowledges Respondent's admission as set forth in paragraph 8 of the Admissions in the Return, and adds that the admission must also include the Stockton Police's destruction of Petitioner's tire tread models without a court order on August 2, 2012, along with the crime scene tire tread evidence. Respondent did not admit or deny this allegation in the Return, thus it should be deemed admitted.

10. Petitioner denies Respondent's claims of legal sufficiency regarding the new DNA evidence presented in the Petition, as set forth in paragraph 1 in Respondent's Denials of the Return. Petitioner realleges that the DNA evidence presented by Petitioner was derived from underneath the knife handle, which had not been cleaned prior to swabbing. (See Inf. Reply, Exhs. 3, 4, 5, 6, 8, and 9.) Petitioner further realleges that the original blood evidence taken from the knife with the swabs, identified as Evidence # 13, are not currently accounted for in the chain of custody for this case. The last reference to

the evidence appears in the secondary report from the Department of Justice, Ripon, report. Petitioner realleges that this report is secondary to a report that was filed by the Department of Justice, Ripon, on October 25, 2001. (See Inf. Reply, Exhs. 5, 6.) Petitioner realleges that the 3-page report cited by Officer Anderson was never discovered to Petitioner, and this report is critical to the chain of custody for the initial evidence presented for forensic testing. Petitioner further admits that he has subpoenaed this report, and the state has filed a Motion to Quash which is pending before this Court.

11. Petitioner acknowledges that Respondent has failed to present evidence to support its denial that Respondent relied upon the theory that the knife was the murder weapon during the trial as set forth in Respondent's paragraph 2 in the Denials of the Return. Petitioner realleges that Respondent relied upon and presented the jury with the theory that the knife found next to Zunino's body was the murder weapon in this case.

12. Petitioner acknowledges that Respondent contends, generally, that they did not suppress exculpatory material under *Brady v. Maryland* (1963) 373 U.S. 83 (hereafter "*Brady*"), as set forth in Respondent's paragraph 3 in the Denials of the Return. Petitioner realleges the uncontroverted underlying evidence in support of Petitioner's claims under *Brady* as set forth in full in the Petition.

13. Petitioner denies that Respondent's general denials, as set forth in paragraphs 4-9 in the Denials of the Return, are legally sufficient. Respondent fails to affirmatively allege alternate facts which might challenge the integrity of the evidence underlying Petitioner's allegations and factual presentation. Petitioner realleges that the record on appeal, the chain of custody and the evidence presented in his Petition provide a sufficient factual basis for his *Brady*. Petitioner's evidence underlying the *Brady* claims remain uncontroverted, as Respondent has not provided any alternative evidence to challenge or undermine the substantial evidence presented in the Petition.

14. Petitioner acknowledges that Respondent contends, generally, that they did not lose, fail to maintain or destroy the missing evidence in this case under *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 (hereafter "*Youngblood*") or *California v. Trombetta* (1984) 467 U.S. 479, 489 (hereafter "*Trombetta*"), as set forth in Respondent's paragraph 11 in the Denials of the Return. Petitioner realleges the uncontroverted underlying evidence in support of Petitioner's claims under *Tombetta/Youngblood,* as set forth in full in the Petition. In addition, Petitioner alleges that state officials failed to collect and preserve the evidence in this case pursuant to the basic elements of police procedure, as set forth in full in the expert witness report by Beth A. Mohr, attached hereto as Exh. 14. Mohr notes, "the cumulative weight of the sheer number and variety of issues with the investigation, evidence collection, and chain of custody of evidence in this case is gravely concerning." (Exh. 14 at p. 11.) Indeed, the "stunning" nature of the cumulative failures provides additional evidentiary support for Petitioner's allegation of "bad faith" in support of his *Trombetta/Youngblood* claims. (See Exh. 14.)

15. Petitioner denies that Respondent's general denials, as set forth in paragraphs 12-20 in the Denials of the Return, are legally sufficient. Respondent fails to affirmatively allege alternate facts which might challenge the integrity of the evidence underlying Petitioner's allegations and factual presentation. Petitioner realleges that the record on appeal, the chain of custody and the evidence presented in his Petition provide a sufficient factual basis for his *Trombetta/Youngblood* claims. Petitioner's evidence underlying the *Trombetta/Youngblood* claims remain uncontroverted, as Respondent has not provided any alternative evidence to challenge or undermine the substantial evidence presented in the Petition.

16. Petitioner acknowledges that Respondent contends, generally, that they did not present false evidence under *Napue v. Illinois* (1959) 360 U.S. 264 (hereafter "*Napue*") as set forth in Respondent's paragraph 21 in the Denials of the Return.

Petitioner realleges the uncontroverted underlying evidence in support of Petitioner's claims under *Napue,* as set forth in full in the Petition. Petitioner further alleges that expert witness Mohr's review of Criminalist Yoshida's analysis and testimony provides additional evidence in support of Petitioner's allegation that her testimony was false and the prosecution failed to correct the false evidence. (See Exh. 14, at p. 4, 5, 6, 7-8.)

17. Petitioner denies that Respondent's general denials, as set forth in paragraphs 2-23 in the Denials of the Return, are legally sufficient. Respondent fails to affirmatively allege alternate facts which might challenge the integrity of the evidence underlying Petitioner's allegations and factual presentation. Petitioner realleges that the record on appeal and the evidence presented in his Petition provide a sufficient factual basis for his *Napue* claim. Petitioner's evidence underlying the *Napue* claim remains uncontroverted, as Respondent has not provided any alternative evidence to challenge or undermine the substantial evidence presented in the Petition.

18. Petitioner denies all allegations not otherwise admitted, realleges all the allegations as set forth in his Petition and Informal Reply to the Response, the memorandum of points and authorities attached thereto, and incorporates them along with the associated exhibits by reference.

CONCLUSION

For the reasons set forth herein, in the Amended Petition for Writ of Habeas Corpus, and in the Informal Response to the Reply, the relief prayed for should be granted.

Dated: August 13, 2023

Respectfully submitted,

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Jennifer M. Sheetz
Attorney for Petitioner

VERIFICATION

I, Jennifer M. Sheetz declare:

1. I am the attorney for Petitioner.
2. The Petitioner is currently detained in Soledad, California.
3. The admissions and Traverses and allegations in the Traverse to the Return are true and correct based upon my information and belief.
4. I am making this Traverse because my client is distant from counsel.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct, and that this verification was executed in Mill Valley, California on August 13, 2023.

_____

Jennifer M. Sheetz

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

> "The Habeas Corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume."
>
> --Thomas Jefferson

Respondent in their Return have made a fatal procedural error: Respondent failed to file a Return substantively controverting any of Petitioner's factual allegations and evidence as set forth in the Amended Writ for Petition of Habeas Corpus (hereafter "Petition"). Moreover, Respondent failed to provide any reliable evidence at all to support their legal arguments challenging Petitioner's claims. As Petitioner's evidence is uncontroverted, this Court should accept Petitioner's factual allegations in his petition for writ of habeas corpus as true.

Petitioner notes that Respondent's failure is more than a minor procedural default. It goes to the heart of the proceeding. (See Cal. Rules of Court, rule 4.551, subd. (d); *People v. Duvall* (1995) 9 Cal.4th 464, 475; *In re Saunders* (1970) 2 Cal.3d 1033, 147 ["In a habeas corpus proceeding the return to the writ or order to show cause alleges facts tending to establish the legality of the challenged detention and is analogous to the complaint in a civil proceeding."]; Pen. Code[1], § 1480.) Thus, by the Rules of Court, in addition to both case law and statutory law, Respondent was required to include any and all material statements and facts in the Return to support their argument in response to the factual allegations set forth in the Petition. (Cal. Rules of Court, rule 4.551, subd. (d) ["Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding."]; *People v. Duvall*, supra, 9 Cal.4th 464, 480 ["[T]he respondent is deemed to have admitted those material factual allegations that they fail to dispute"]. Respondent provided argument instead of evidence.

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1 Subsequent unspecified statutory references are to the Penal Code.

The issuance of an Order to Show Cause, anticipating the interplay between a Return by the People and a Traverse by Petitioner, both sets into motion the process by which the issues are framed for judicial determination (*People v. Duvall, supra*, 9 Cal.4th at p. 477), and affords Petitioner the opportunity to present additional evidence in support of the truth of the allegations in the petition. (*Id*. at p. 480; see also *In re Clark* (1993) 5 Cal. 4th 750, 781, fn. 16; *In re Hochberg, supra*, 2 Cal.3d at p. 876, fn. 4.) This is significant because it is the petitioner who bears the ultimate burden of proving the factual allegations that serve as the basis for his or her request for habeas corpus relief. (See *People v. Duvall, supra*, 9 Cal.4th at p. 474; *In re Sassounian, supra*, 9 Cal.4th at p. 546.)

The purpose of the Traverse is to admit or deny the specific factual allegations set forth by Respondent in the Return. (See *In re Marquez* (2007) 153 Cal.App.4th 1, 12; Pen. Code, § 1484; Cal. Rules of Court, rule 4.551, subd. (e) ["Any material allegation of the return not denied is deemed admitted for purposes of the proceeding. Any Traverse must comply with Penal Code section 1484 and must be served on the respondent."].) Again, much as with the Return, the law provides that Petitioner must specifically admit or deny the facts set forth by Respondent in the Return or else have them deemed admitted under the law. Respondent's failure to file a Return with renders a true response to underlying the factual dispute in the Traverse impossible. Therefore, rather than responding solely to Respondent's argument, Petitioner sets forth additional evidence in support of the truth of the allegations in the petition. Petitioner presents the report and analysis from police procedure expert, Beth Mohr.

Absent factual issues in dispute, Petitioner's request for relief should be granted without the need for an evidentiary hearing. If, however, the Court finds the need for further development of the factual allegations set forth in the Petition, then Petitioner asks that the Court Order an Evidentiary Hearing forthwith.

ARGUMENT

I. RESPONDENT'S FAILURE TO CONTROVERT THE FACTS ALLEGED IN THE PETITION FOR WRIT OF HABEAS CORPUS CONSTITUTES AN ADMISSION OF THOSE FACTS

Any material allegation of the Petition not controverted by the Return is deemed admitted for purposed of the proceeding. (See Cal. Rules of Ct. Rule 4.551(d).) The return must comply with Penal Code section 1484. (*Ibid.*) When a court issues an Order to Show Cause, it finds the factual allegations, taken as true, establish a *prima facie* case for relief. (*People v. Duvall*, 9 Cal.4th 464, 474-475 (1995) (citations omitted).) Issuance of an Order to Show Cause, therefore, indicates the issuing court's *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved. (*Ibid.*)

Courts require more of the Return than mere compliance with the literal language of section 1480; courts require the return to allege facts tending to establish the legality of Petitioner's detention. (*Id.* at p. 476.) In addition to stating facts, the Return should also, where appropriate, provide such documentary evidence, affidavits or other materials as will enable the court to determine which issues are truly disputed. (*Ibid.*) If admitted by failure to controvert, habeas relief may be granted without a hearing. (*Id.* at 477.)

General traverses in Returns are insufficient. (*Id.* at 479.) Respondents should recite the facts upon which the traverse of petitioner's allegations is based, and, where appropriate, should provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed. (*Id.* at 180.) Such nebulous or general traverses which fail to contest specific facts fail to fulfill the function of narrowing facts and issues to those that are truly in dispute. (*Ibid.*) Moreover, failure to specifically allege facts in the return prevents petitioner from controverting those facts in his Traverse. (*Id.*)

In general, points and authorities state *legal* arguments, not *facts*, and thus will fail to narrow the factual issues that must be determined to resolve the dispute. (*Id.* at 482.) If Respondent wishes to incorporate controverted facts into the points and authorities, the

disputed facts should be incorporated into the Return. (*Id.*) Additionally, Respondent must still allege additional facts that contradict Petitioner's allegations. (*Id.*)

Here, the only pleading received from the District Attorney by Petitioner's counsel was Respondent's Return, which offers no facts, no documentary evidence, no affidavits, or other materials that controvert the evidence set forth in the Petition. Petitioner's counsel received no other document. As such, this Court's preliminary assessment that Petitioner should be entitled to relief if the factual allegations are proved, should be determinative that the Petitioner has met his burden where no factual issues are disputed by Respondent. Thus, as the facts are uncontroverted, Petitioner has clearly met his burden of proof and this Court should grant this Petition without a hearing.

II. THE NEWLY DISCOVERED DNA EVIDENCE CONSTITUTES STRONG EVIDENCE OF PETITIONER'S ACTUAL INNOCENCE

If, however, this Court accepts Respondent's filing as a sufficient Return, then Petitioner reasserts that he has set forth sufficient evidence to establish his actual innocence under the law. (See Penal Code § 1473(b)(3).) Respondent challenges Petitioner's claim, setting forth three separate arguments: 1) that their theory identifying the knife as the murder weapon is no longer their theory; 2) that the DNA evidence of two unidentified male DNA profiles (which excludes Petitioner) discovered under the knife handle in 2019 is not "new" evidence; 3) and it is either untimely or "is not sufficient to more likely than not have changed the outcome of the trial." (Return at 19-27.) Respondent offers no evidence to support their arguments, and the evidence in the record shows that they are wrong in every respect.

Initially, it is important to understand the chain of custody for the evidence related to the knife and original evidence derived from the knife in this case. Petitioner has claimed his innocence since he was first interrogated by Stockton Police Officer, Det. Rodriguez and arrested with the approval of San Joaquin County District Attorney, Robert Himelblau, on October 6, 2006. (Inf. Reply, Exh. 1.) Further, during the initial interrogation, Det. Rodriguez confronted Petitioner with the state's theory of the case, suggesting that the murder weapon, a knife, was being tested for his DNA. Det.

Rodiguez suggested that the knife had never been tested for DNA in 2001, but the technology had progressed. (Inf. Reply, Exh. 1.) Petitioner then "challenged" the state to find his DNA on the murder weapon. (Inf. Reply, Exh. 1.)

The evidence related to the murder weapon is emblematic of the broken and missing chains of custody related to the evidence collected during the initial investigation in 2001, as well as the lost evidence and suppressed evidence throughout the case against Petitioner. Here, the knife has been a central piece of evidence to the murder investigation since Jody Zunino was found stabbed to death, with a knife next to her body. The knife and knife swab evidence are symbolic of the basic lack of integrity in the murder investigation presented in this case. As such, Petitioner offers the procedural history and chain of custody with respect to the forensic testing of the knife as symbolic of the absence of constitutional protections and due process in this case of wrongful conviction.

Initially, swabs of "blood" evidence were taken from the bottom of the knife blade and control swabs were taken from the top of the blade on 9/28/01. (See Inf. Reply, Exh. 8.) Photos of the knife indicate the presence of blood with arrows in the direction of where the knife was swabbed. (Inf. Reply, Exh. 8.) A police report indicates that Det. Anderson sent the swabs from the knife, along with other crime scene evidence to the DOJ – Ripon for testing. (Inf. Reply, Exh. 6.) The original DOJ testing identifies the knife swabs as Item #4 (and Item #13 from the evidence locker). (Inf. Reply, Exh. 5.) Det. Anderson acknowledged receipt of an initial DOJ report filed by the DOJ on 10/25/01. (See Inf. Reply, Exh. 6.) Remarkably, this report is missing from the record. It was never discovered to Petitioner prior to trial, during trial, or during post-conviction discovery. It is the subject of Petitioner's subpoena for evidence directly from the DOJ – Ripon Office, which is currently being challenged with a Motion to Quash. The report is important to establish the forensic testing conducted on the original swabs as well as to establish a proper chain of custody for the swabs – which have seemingly disappeared from the evidence in this case and replaced has been replaced with the 2007 swabs created from a "cleaned" knife. It is unknown who cleaned the knife, but the knife has

been in custody of the state since it was initially discovered with blood on it and taken into evidence on September 28, 2001. This evidence is critical to the integrity of this case.

There is strangely no mention of the 2001 swab evidence related to the murder weapon after the initial DOJ testing requested by Det. Anderson on 10/06/01. The chain of custody for the original knife swabs is lost with the 10/06/01 request for testing, with the second DOJ report stating that the anal swab evidence was sent to DOJ – Richmond for DNA analysis, and the rest of the evidence was "inventoried but not examined." (Inf. Reply, Exh. 5.) As noted by expert witness Mohr, the loss of the original knife swab blood evidence, "the first and best" evidence, is critical to the investigation of Zunino's murder, and its loss is devastating. (See Mohr Report, attached hereto as Exh. 14, at p. 7.)

As noted, there are two DOJ - Ripon reports acknowledged by Det. Anderson in his initial and only forensic investigation of Zunino's murder. Only the second report was included in the discovery to Petitioner. Anderson's first acknowledgement is 5 pages, citing a DOJ report filed 10/25/01. (Inf. Reply, Exh. 6.) His second police report cites a DOJ report filed 1/22/02. (Inf. Reply, Exh. 5.) The initial referenced DOJ report is not attached to Anderson's report, nor is it anywhere in the record. (See Inf. Reply, Exh. 6.) The second DOJ report, filed on 1/22/02, describes most of the evidence as "inventoried, not examined." (Inf. Reply, Exh. 6.) This is the last record which cites to the original swab evidence taken from the knife on 9/28/01 (Item #13 in the evidence locker).

The 10/06/01 request for DOJ testing is the only reference to any testing of the original knife swabs, and it is the last reference to the swabs in the chain of custody. This would be remarkable in any other case, but in the present case it is just an example, albeit a very important example, of the lack of evidence integrity throughout this case.

On October 10, 2006, Det. Rodriguez personally checked out of the evidence locker the following items: the knife, the victim's blood sample, and Petitioner's buccal swab. (Inf. Reply, Exh. 2.) Det. Rodriguez drove the assembled pieces of evidence together to DOJ – Ripon for testing. (Inf. Reply, Exh. 2.) Ostensibly, the reason that Det.

Rodriguez provided for the evidence removal and transport to DOJ for testing was "latent print analysis" on the knife. No latent print analysis was done by DOJ on the knife at that time. Rather, the DOJ tested the knife for blood. (Inf. Reply, Exh. 3.) Remarkably, the DOJ found no trace of blood on the knife during this test in 2006. (Inf. Reply, Exh. 3.) Without explanation, the DOJ took 6 **new** swabs of evidence from the cleaned knife and handle on or about 12/20/07. (Exh. 3.)

Present counsel located a random document in discovery from Sylvia related to the second set of knife swabs, including a DOJ "Notification Report" on 12/20/07, which references the testing as the "11th" request for DOJ testing and lists "Terry D. Sprinkle" as a subject. (Inf. Reply, Exh. 3.) Petitioner does not have access to all 10 prior testing requests and results, nor does Petitioner have any DOJ reports that reference Terry Sprinkle at all (the 1/17/02 DOJ report lists the suspect as "unknown.") These swabs were provided with new evidence item numbers - #16 A-C. (Inf. Reply, Exh. 3.) There is no mention of the original knife swabs, nor is there any chain of custody or request for testing of these swabs. The swabs created on 12/20/07 were then sent to the DOJ Richmond DNA Laboratory via FedEx. (Inf. Reply, Exh. 3.) The 2007 swabs were the subject of the DNA testing of the murder weapon that was presented at trial. There is no mention of the swabs originally taken from the knife on 9/28/01, and the DOJ report related to these swabs (filed on 10/25/01) is not in the record and was not discovered to Petitioner prior to trial or in post-conviction proceedings.

The above narrative related to the knife evidence is critical to understanding Petitioner's innocence claim as well as his claims under *Brady* and *Napue*. In the absence of distinct chains of custody a pattern or practice emerges of lost evidence related to the initial investigation of Zunino's murder. Some of the evidence is directly related to the investigation of the initial suspect, Terry Sprinkle. Some of the evidence, *like the original knife swabs* and the swab from the bloody handprint left on Zunino's back, constituted important initial physical evidence which would have been critical to investigating the murder. All of the evidence that has been suppressed, lost and tampered

with since 2001 has seemingly deprived Petitioner of exculpatory evidence – some of it critical to the presentation of third party culpability.

A. Respondent Is Estopped From Changing Their Theory Presented To The Jury That The Knife Discovered Next To Zunino's Body Is The Weapon Used To Murder Her

Initially, Respondent disavows its own theory of the murder and identification of the knife as the murder weapon (since Petitioner secured DNA testing in 2017). (Return at 22-23.) Respondent's various suggestions and arguments are both contrary to the law and the evidence in the record and should be understood in the context of the troubling forensic testing and chain of custody related to the knife set forth above.

Initially, Petitioner notes that the District Attorney's theory of the murder was that Petitioner personally used the knife found next to the body to stab the victim to death. (See RT 851, 912, 913, 915.) The first time that the District Attorney's Office changed its theory was in response to Petitioner's post-conviction DNA testing of the knife. Respondent's suggestion that they did not repeatedly present the knife as the murder weapon to the jury is patently false. (Return 22-23.) The prosecution emphasized the knife as the murder weapon throughout their closing argument, arguing that Petitioner had cleaned the knife and repeatedly identifying Jody Zunino's DNA on the knife as proof that it was used to murder her. (RT 851, 912, 913, 915.) The prosecution even doubled down on the theory that the knife was the murder weapon in their opposition to a new trial, suggesting that the victim's DNA on the knife presented uncontroverted evidence that the knife was the murder weapon. (RT 1089.)

" ' " "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary.'" [Citation.] The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position

(i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." [Citations.]' [Citations.]" (*People v. Castillo* (2010) 49 Cal.4th 145, 155, original emphasis omitted.)

In this case, there is no question that the same parties are involved. There is also no question that the prosecution has taken two positions as to the evidence when the post-conviction testing and discovery disproved their theory of Petitioner's guilt. The prosecution's two positions are totally inconsistent, and their strategy is patently unfair and lacks integrity. Here, the prosecution very specifically and repeatedly relied upon the theory that the knife was the murder weapon throughout their investigation of the case, throughout trial, and the prosecution specifically cited this theory in their closing argument and rebuttal closing argument. Accordingly, judicial estoppel prevents the prosecution from changing their theory of guilt in the post-conviction context to fit the evidence in a disingenuous manner.

B. The DNA Evidence Discovered Under the Knife Handle in 2019 Is New Evidence

Respondent erroneously contends that the newly discovered DNA evidence excluding him from the knife and implicating two male suspects is not "new." (Return at 19-24.) Furthermore, the newly discovered DNA evidence is indeed "new." As a practical matter, the DNA evidence presented at trial was derived from the testing the 2007 knife swabs created from the cleaned knife. (See Exhs. 3, 4.) The DNA evidence discovered by FACL in 2019, was collected after removing the handle of the knife. (See Exh. C, p. 8.) A photograph of the collection area of the knife depicts a dried blood-like substance. (Exh. Exh. C, p. 8.) No prior testing had collected biological material from under the handle (by removing the handle itself). The photographs of the FACL knife swab collection depict the uncovered surface of the knife beneath the handle which appears to have biological material on it. (See Pet. Exh. C, p. 7.) The swabs collected from the area by FACL appear to have a dark reddish color, like dried blood. (Pet., Exh. C, p. 7.) The only other reported forensic testing of the knife in the record was done on

the 2007 knife swabs. At the time of the swab collection, the knife was depicted as "clean," with "no blood detected." (Exh. 3.) The FACL report identified two male contributors to the DNA on the knife, and the quality of the DNA evidence was such that FACL suggested additional comparison testing. Based upon this suggestion, Petitioner has sought additional testing and continues to seek the results of the initial CODIS review as well as outstanding DOJ reports pertaining to the evidence in this case.

In order to understand the significance of the newly discovered DNA evidence in the context of this case, the chain of custody of the evidence and forensic testing related to the murder weapon must be considered. In the realm of broken chains of custody within this case, the evidence related to the forensic testing of the murder weapon is the most disconcerting and suggestive of lacking evidence integrity. Moreover, the record suggests that there are missing DOJ reports regarding this evidence from the initial investigation in 2001-2002, as there is a missing report from Det. Anderson's October 2001 inquiry and there is a subsequent DOJ notation referring to "Terry D. Sprinkle" as a subject and the Stockton Police Department's request for testing of the knife as "Request #11." (See Inf. Reply, Exhs. 4, 5, and 6.) Petitioner does not have the October 2001 DOJ report, nor the 10 prior Stockton Police Department Requests, nor does Petitioner have any DOJ documents identifying "Terry D. Sprinkle" other than the DOJ received from Mr. Sylvia with Petitioner's file. Again, these DOJ reports are the subject of Petitioner's challenged subpoenas which the DOJ has motioned to quash.

The knife was taken into evidence on or about 9/28/01, after it had been swabbed at autopsy. (See Photos of the knife on 9/28/01 denoting the swab collection, as Exhs. 14, 15.) The original photos of the knife and biological evidence collection denotes the presence of blood and the collection of this evidence with swabs, along with a set of control swabs on the back side of the blade. (See Exhs. 14, 15.)

As noted above and in the recusal litigation, Det. Anderson originally sent the original knife swabs (Item #'s 13 A-C)[2] to the Department of Justice (DOJ) for testing on or about 10/6/01. (See Exh. 7.) Photographs of the knife taken at autopsy specifically identifies the "blood" which was sampled from the end of the blade on two of the swabs. (See Exh. 8.) Another photograph of the knife depicts the location of the back side of the blade, where the control swab was taken. (Exh. 8.)

In an initial police report, Det. Anderson acknowledged the receipt of a three-page DOJ report, filed 10/25/01. (Exh. 6.) The 3-page DOJ report was not included in the discovery or anywhere else in the record. Det. Anderson also authored a second police report which acknowledges a DOJ report received on 1/22/02. (Exh. 7.) The 2-page DOJ report identifies the evidence and acknowledges the request for testing, but then notes that the evidence sent for testing was not in fact tested, but "inventoried." (Exh. 7.) This record suggests that no testing was conducted on the swabs from the murder weapon in the second report (Items #13 A-C). The second, 1/22/02 DOJ report is the last reference to the original knife swabs in the discovery and the record. The original swabs, "the first, and best" evidence from the murder weapon were submitted to the DOJ, but it is unknown if they were ever tested. If they were tested, the results were suppressed. However, the analysis of the original swabs would be closest to the 2019 FACL DNA analysis.

Ultimately, Respondent's argument is contradicted by the evidence in the record. The DNA evidence from the cleaned knife swabs created in 2007, which was presented at trial, is not duplicative to the 2019 FACL evidence, as the evidence source was not comparable as set forth in full above. Accordingly, Respondent's argument that the DNA evidence from 2019 is not new is baseless and without support.

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[2] Each letter of Items #13 and 16 correlate to 2 swabs from the same source, with "A"

C. The DNA Evidence Discovered Under the Knife Handle in 2019 Is Timely Presented And Material

Respondent also contends that the newly discovered DNA evidence is untimely and immaterial. (Return at 19-24.) Respondent's contentions are not supported by the facts or the law.

To the extent Respondent intends to assert that counsel had a duty to conduct an "unfocused investigation having as its object uncovering any possible factual basis for a collateral attack on the judgment," the courts have expressly rejected that view. (*In re Clark* (1993) 5 Cal.4th 750, 784; see also Hilary S. Ritter, *It's the Prosecution's Story, But They're Not Sticking to it: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 Fordham L. Rev. 825 (2005).) Further, Respondent fails to cite any deadline or time restrictions related to DNA testing under Penal Code section 1405, and Petitioner is unaware of time restriction for post-conviction DNA testing. Absent any citation to authority and in light of the Court ordered DNA testing completed in 2019, Respondent's argument should be rejected as baseless.

Furthermore, Petitioner presented the new evidence in a timely manner once he received it from his attorney. Petitioner received the DNA reports and evidence at the end of December 2019. The COVID pandemic closed down access to the law library and legal assistance approximately 2 months later. Petitioner filed his innocence claims and related request for discovery in January and February of 2021, before the CDCR law libraries re-opened. Accordingly, there is no delay in Petitioner's assertion of his claim of newly discovered DNA evidence.

In the present case, the exculpatory DNA evidence excluding Petitioner from the murder weapon is not collateral or merely impeaching. The newly discovered DNA evidence both exonerates Petitioner and implicates a male suspect as the responsible party. In addition, given the presence of Jody Zunino's DNA as a major contributor to the DNA specimen found on the knife, the evidence corroborates the prosecution's theory

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from the blade, "B" from the handle, and "C" being the control swabs.

that the knife was indeed the murder weapon. As set forth in the Petition in full, and as D.A. Rasmussen aptly pointed out, "If [Petitioner] had brought up – if the DNA on the knife, on the blade or the handle, had shown that it was possibly another person because it could not be the victim in this case, we would have an issue." (RT 1089.) We now present the Court with *that* issue, undermining all evidence of guilt based upon the prosecution's theory.

III. THE STATE FAILED TO DISCLOSE MATERIAL, EXCULPATORY EVIDENCE THAT UNDERMINED CONFIDENCE IN THE OUTCOME OF PETITIONER'S TRIAL IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER *BRADY*

Respondent declares that there are no *Brady* violations in this case. (Return 27.) In support of this broad declaration, Respondent offers no documentary evidence or affidavits. Remarkably, Respondent further suggests, with unintended irony, that the presentation of suppressed exculpatory evidence in March 2023 is arguable evidence of their *Brady* compliance. It's not.

Respondent's contentions regarding its past disclosure of evidence is largely based upon conclusory arguments, not evidence in the record or representations that District Attorney Himelblau made to Petitioner and the Court in 2021, during the initial discovery requests related to Terry Sprinkle. Present counsel requested and received all of the discovery in the case received by Jeffrey Silvia from his representation of Petitioner at trial and during the post-conviction DNA testing, from 2017-2019. (Inf. Reply, Exh. 9.) The Stockton Police Department photographs from the interior of Sprinkle's car were not included in this box of evidence. (Inf. Reply, Exh. 9.) Present counsel did question Mr. Sylvia regarding the photographs, the DOJ photographs and notes, as well as Terry Sprinkle's blood vial. Mr. Sylvia denied knowledge of this evidence. (Inf. Reply, Exh. 9.)

Mr. Sylvia did not have access to these photos prior to Petitioner's trial, nor was he aware that Terry Sprinkle's blood was originally taken and put into evidence in the

underlying murder case. (Inf. Reply, Exh. 9.) This fact is underscored by the fact that the vial is not identified in the evidence locker, and FACL noted that blood vial had no label or chain of custody information on it. (Inf. Reply, Exh. 9.) Again, much of the noted evidence that was suppressed, moved without proper chain of custody, lost or destroyed implicates Terry Sprinkle. It presents as a pattern. The transcript on appeal denotes trial counsel's efforts to discover evidence related to Sprinkle, as he filed repeated Formal Discovery Motions pertaining to this evidence which he had hoped to use as part of a Third Party Culpability Defense. The litigation of the Third Party Culpability is in the record on appeal. As a contemporaneous record, it is far more accurate than trial counsel's recollection of evidence from over a decade ago. It is also far more accurate than Respondent's uncorroborated assertions that the evidence was provided to trial counsel because the Bates stamp numbers on the discovery provided in 2021 and 2022 have sequential numbering. (See Return 28-40.)

Much of Respondent's assertions as to the discovery of evidence are counter to the representations made on the record in open court throughout the past 2 years[3]. (See Exhs. 10, 11, 12.)

A. Photographs of Terry Sprinkle's Vehicle

Respondent has no answer to Petitioner's argument on the third party culpability claim, that Petitioner had never been given any evidence related to Sprinkle's vehicle – they "never got to see any of that." (RT 66; Pet. Exh. HH.) In particular, the photos of Sprinkle's vehicle and the DOJ notes and photos clearly contradict the prosecution's arguments and testimony of state witnesses. For example, one of the Stockton Police Department photos of Sprinkle's Bronco clearly shows a dark, blood-like pool on the floorboard, next to an evidence placard #1. (See Pet., Exh. J; Exh. 13.) As Det.

[3] Petitioner asks the Court to take Judicial Notice of the discovery process under Penal Code section 1054.9(a), and Petitioner further provides the transcripts from several early discovery requests under 1405(c), in 2021 (attached to Petitioner's Informal Reply to the

Rodriguez acknowledged in his testimony at trial, the placards are placed at the scene when evidence is taken, and they are used to identify a particular piece of evidence. (RT 247.) In the context of the Stockton Police Department photographs of Sprinkle's Bronco, the photograph memorializing evidence placard #1 next to a pool of blood-like substance would suggest that evidence was found in Sprinkle's Bronco – contrary to the subsequent assertions. If Petitioner was given the Stockton Police Department photographs, at the very least, he would have argued that this photograph contradicted the state's assertion that "no evidence" was discovered in the Bronco. Moreover, there is no assertion by the prosecution that cites the photographs in response to Petitioner's repeated requests for evidence related to Sprinkle's Bronco for viewing and analysis.

Moreover, as discussed in expert witness Mohr's report in full, the police and DOJ processing of Sprinkle's vehicle was entirely improper and lead to many failures in the collection, testing and analysis of the vehicle as a potential crime scene. (Exh. 14 at pp. 3-4.) Arguably the most fundamental failing was Criminalist Yoshida's improper leuchomalachite green (LMG) testing, where she failed to subject evidence to the required two-step process. (Exh. 14 at pp. 3-4.) In failing to perform the test properly by following the second step, Yoshida was not able to determine whether the blood-like spatter throughout the Bronco was in fact blood or another substance. (Exh. 14 at pp. 3-4.) Yoshida's fatal error was made worse by the fact that she did not photograph the swabs or preserve them as evidence, as the swabs could have been later tested for DNA. (Exh. 14, at pp. 3-4.) As Mohr concluded, Yoshida's error had a "snowball effect" in the subsequent failures to properly collect, preserve and analyze evidence in this case. (Exh. 14 at p.10.) Thus, the evidence of blood-like spatter throughout Sprinkle's Bronco was exculpatory evidence which corroborated numerous other facts suggesting that it was a crime scene.

Response as Exhs. 10, 11, 12) as well as the prosecution's ordered Evidence Log (Exh. 13), filed with the Court in May 2022.

Accordingly, the suppression of the photographs of Sprinkle's Bronco depicting blood-like spatter and stab marks constitute a *Brady* violation.

B. Suppressed Statements of Terry Sprinkle

Respondent contends that there are no suppressed statements of Terry Sprinkle, relying primarily on a reference to Petitioner's statement of facts. (Return at 31.) Respondent does not address the evidence that Sprinkle told Det. Anderson that he was in Stockton, on Pinchot near Wilson Way, between 1 a.m. and 3 a.m. on Wednesday, September 26, 2001, and picked up a prostitute who had a knife in her person. (See Pet., Exh. K.) This statement was referenced in the DOJ notes related to Sprinkle's Bronco, and it informed the DOJ search of the Bronco. (Pet., Exh. K.) Respondent does not address this evidence at all. As such, it should be deemed an admission. As set forth in the Petition in full, this evidence reflects a statement from Sprinkle to Det. Anderson that was suppressed from Petitioner. The statement was undoubtedly exculpatory, as it placed Sprinkle at the "scene of the crime," and it corroborated the observations made by eyewitnesses.

In their Return, Respondent incorporates argument about other witnesses and challenges the statements cited by Petitioner. (Return at 30-31.) This is entirely unrelated to the underlying evidence relied upon by Petitioner in the underlying *Brady* claim, but Petitioner addresses it nonetheless. (See Pet., at pp. 36-37.) Respondent contends that the statements from witnesses identifying Sprinkle's Bronco as the last vehicle that Zunino got into are "not true." (Return at 31.) They are in fact true, and they exist in several of the documentary pieces of evidence attached to the Petition, including: Det. Anderson's Affidavit Attached to Search Warrant (Pet., Exh. AA at pp. 6-8, 15-17), Det. Rodriguez's Initial Police Report (Pet., Exh. DD. at p.13), Det. Anderson's Initial Police Report (Pet., Exh. EE, at p. 8.), and Initial Interview of S. Valtierra by Off. Garcia Report (Pet., Exh JJ at p. 6.) In fact, in Det. Anderson's Affidavit, signed under penalty of perjury, he claimed that the unidentified black male

who gave him the slip of paper with Sprinkle's license plate number also described him as a white male in his 40's, balding, with a mustache. (See Pet., Exh. AA.)

Petitioner realleges that there are statements recorded in the record which were attributed to Sprinkle, such as the statement reflected in the DOJ notes, and these suppressed statements were exculpatory for Petitioner. The suppression of these statements constitute a *Brady* violation.

C. Negative Strips

Respondent contends that the negative strips are not exculpatory, and suggests that there is no indication that the photographic evidence bears any relation to the crime. (Return at 32.) Respondent does not provide any additional documentary evidence or affidavits in support of their claim. Moreover, the procedural history and chain of custody substantially contradicts their claim, as the negative strips were removed from the evidence locker on numerous occasions, including for use at trial. One of the chain of custody entries suggests that they were released on 10/15/2007 and returned on 2/1/2018. There were no prints of the negative strips made prior to 2022. Pursuant to the 1054.9(a) discovery in this case, Respondent took the negative strips out of evidence and printed them. Respondent represented to Petitioner and the Court that there were no existing prints in 2022. Again, Respondent is silent as to this evidence, and they do not provide any documentary evidence or affidavits to counter Petitioner's allegations.

It is apparent from the current state of the evidence that the original negative strips found next to Zunino's body are not in evidence. It is unclear when they were lost or destroyed or misplaced. Respondent offers no evidence to this end. It is only known that Petitioner's counsel repeatedly requested prints from the negative strips. (See Pet., Exh. O.) No prints from the original negative strips (as depicted from crime scene photos) were ever discovered to Petitioner or his counsel. Accordingly, they were suppressed.

As noted in the Petition, the negative strips were introduced as exhibits during Petitioner's trial. Given the prosecution's reliance upon this evidence, and its placement before the jury as two separate exhibits, it was relevant to Petitioner's case and

conviction. Indeed, given the importance of exhibits to the judicial process, courts have long recognized a "common law" right for public access of court records, including exhibits introduced at trial. (*KNSD Channels 7/39 v. Superior Court* (1998) 63 Cal.App.4th 1200, 1202-1204.) Moreover, the chain of custody for the negative strips suggests that they were both relevant and important. Indeed, they were presented to the jury as evidence in Petitioner's case.

The suppression of this evidence constitute a *Brady* violation.

D. Suppressed DOJ Notes And Photographs

As with the Stockton Police Photographs of Sprinkle's car, Respondent suggests that the DOJ notes and photographs are not exculpatory. (Return at 33.) The DOJ notes include references to Sprinkle's admission that he was at the location that Zunino was last seen alive, at the time she was last seen, and that he had picked up a prostitute at that intersection, and that she had a knife in her purse. (Pet., Exh. K.) The notes also refer to cleaning of the vehicle which had recently occurred. (Pet., Exh. K.) The DOJ photographs depict blood-like spatter throughout the passenger area and back seat of the Bronco. (Pet., Exh. K.) As set forth in full in the Petition and uncontroverted in the Return, the record on appeal provides affirmative evidence that the DOJ notes and photographs were not provided to Petitioner prior to or during trial.

Petitioner, through present counsel on a *pro bono* basis, filed a discovery motion for chain of custody under Penal Code section 1405, subd. (c), in January of 2021. (See Transcript of 2/8/21 hearing, Inf. Reply, Exh. 10.) At a hearing on the motion, District Attorney Himelblau requested a 3-month extension of time for a response. (Exh. 10.) Petitioner objected to the lengthy request for extension of time given the nature of the request – records from the case showing the chain of custody of the physical evidence. (Exh. 10.) In the hearing, present counsel acknowledged receiving the trial file and discovery from the section 1405 litigation from trial counsel, Jeffrey Silvia, but noted that none of the evidence related to the physical evidence connected to the initial suspect, Terry Sprinkle, was included in these documents. (Exh. 10, at pp. 3-6.)

On March 25, 2023, present counsel and District Attorney Himelblau appeared in court on the motion, where the parties discussed the discovery of evidence related to Terry Sprinkle. (Inf. Reply, Exh. 11.) During the exchange, present counsel informed the Court of an email that she had received from the District Attorney's Office the night before court which explained that they had looked through the file and did not find a filed DOJ report on the car or a list of evidence discovered, investigated or collected from the vehicle. (Inf. Reply, Exh. 11, at p.2.) District Attorney Himelblau noted that they located and turned over DOJ "report number 2" to present counsel, and further suggested that he would request that the DOJ provide their notes and photos from the investigation, as well as any photographs that were taken of the vehicle. (Inf. Reply Exh. 11, at pp. 8-11.) At no time during this hearing or during the following hearing on June 8, 2021, did the prosecution present evidence to suggest that the photographs, DOJ notes or any other evidence related to Terry Sprinkle had been previously disclosed to Petitioner. (See Inf. Reply Exhs. 10, 11, and 12.) In addition, the record on appeal contradicts Respondent's claims that the evidence was discovered to Petitioner prior to or even during trial. Respondent offers no acknowledgment of receipt of discovery forms (which are customary in most cases, especially during formal discovery) or other contemporaneous evidence to counter to the numerous citations in the record of appeal which suggest the evidence was not turned over to the defense prior to or during trial.

This evidence was highly incriminating for Sprinkle, as it was evidence of a crime scene. Expert witness Mohr emphasizes that the Bronco appeared to be a crime scene, and the DOJ failed to employ basic investigative measures to secure the crime and collect evidence. Given the significant corroborating evidence of motive, means and opportunity that implicated Sprinkle, the DOJ notes and photographs of Sprinkle's car constituted significant exculpatory evidence for Petitioner.

The suppression of this evidence constitute a *Brady* violation.

E. Suppressed Blood Vial of Terry Sprinkle

Respondent suggests that the writ has become "theater" with their argument denying that Sprinkle's blood vial has been suppressed. (Return at 34.) Despite this dramatic proclamation, Respondent offers no evidence to support their contention that the blood vial was not suppressed. Rather, without any chain of custody evidence to support their argument, Respondent suggests that, despite their presentation to the Court and Petitioner to the contrary in 2022, that Sprinkle's blood vial has been located at the Stockton Police evidence locker. (Return at 34-35.)

As noted by expert witness Mohr, the basic tenets of police procedure require that ever piece of evidence collected from a crime scene be properly located, accurately identified, and labeled with the relevant details, before putting it into evidence in a case. The blood vial from Sprinkle did not comport with that basic tenet. As noted by the FACL technician, they did not test the vial because it was not properly identified and labeled, nor had it been properly stored (it was described as dark brown in color). (See Pet., Exhs. B and C; Inf. Reply, Exh. 9.) Trial counsel denied knowing about the existence of Sprinkle's blood vial and noted that the vial was added to the Order for DNA testing by the D.A. amendments to the Order. (Inf. Reply, Exh. 9.) Respondent offers no transcript, documentary evidence or affidavit to support the contention that trial counsel and Judge Hoyt were aware that "blood vial" in the evidence locker was Sprinkle's blood vial which had been put into evidence on 9/28/01 as one of the first pieces of evidence in the murder investigation. (Return at 37.) Moreover, Respondent themselves contradicted this assertion throughout the post-conviction discovery proceeding – presenting to Petitioner and the Court repeatedly that the case did not contain any DNA sample for Sprinkle. (See Inf. Reply, Exhs. 10, 11, 12.)

Respondent does not offer any evidence to explain their own admission that they did not know that Sprinkle's blood vial was in evidence in this case throughout the protracted post-conviction section 1054.9(a) discovery, nor do they refute the ample evidence in the record that suggests that the evidence was suppressed by obscuring the

chain of custody for the vial, failing to properly label the vial and failing to properly maintain the vial as biological evidence so that it might be identified with forensic testing.

Here, the fact that Sprinkle's blood was one of the first pieces of evidence lodged in this case is significant and exculpatory for Petitioner – in and of itself. Its existence in evidence in this case belies the suggestion that Sprinkle was not considered a suspect. Moreover, its entry into evidence in the murder case further suggests that Sprinkle was arrested following his interview on 9/28/01 as a suspect in the murder of Zunino. This fact is exculpatory for Petitioner. Accordingly, the suppression of Sprinkle's blood vial constitutes a *Brady* violation.

F. Suppressed Criminal History of Terry Sprinkle

Respondent argues that the sealing of Sprinkle's CLETS in the present case along with the admitted suppression of a 1994 Stockton Police report involving Sprinkle stabbing a prostitute with his knife (from his knife belt) at a hotel on Wilson Way did not constitute suppression of exculpatory evidence under *Brady*. (Return at 2 and 37.) As set forth in the Petition, the record on appeal provides contemporaneous evidence of the suppression of this evidence, as Petitioner filed several formal discovery motions for the disclosure of this evidence prior to trial. As acknowledged by Respondent, this evidence was never disclosed prior to trial. In fact, the 1994 police report was only discovered to Petitioner this year. The evidence of Terry Sprinkle's criminal history was material to Petitioner's defense based upon third party culpability. The suppression of this evidence deprived him of a very strong defense. Accordingly, the suppression of Terry Sprinkle's criminal history – including the improperly sealed CLETS and the suppressed 1994 Stockton Police report - constitutes a *Brady* violation.

G. Suppressed DA File On Terry Sprinkle's Lodi Murder

Respondent contends, without any evidentiary support, that they did not suppress the District Attorney file on Terry Sprinkle's Lodi murder. (Return at 38.) Again, the record on appeal and Mr. Rasmussen's presentation to the court that the Lodi murder was

merely a "bar fight," and he was not able to "find the D.A. file," contradicts Respondent's assertions. (See RT 89-90.) Respondent suppressed the file in an effort to prevent Petitioner from presenting a third party culpability defense based upon Terry Sprinkle. Respondent's suppression of Terry Sprinkle's Lodi murder case file which was never prosecuted constitutes a *Brady* violation.

H. Suppressed "Full" Statement of Terry Sprinkle

Respondent contends, contrary to reason and the record, that the prosecution did not suppress the full interview of Terry Sprinkle and cites the record in support of this contention. (See Return at 27-28.) The portion of the transcript cited by Respondent does not support his contention. It is the same portion of the transcript that Petitioner relies upon to support his allegation that the Respondent offers no additional evidence in support of his contention.

The transcript represents the last day of the prosecution's presentation of evidence, and the Court is considering Petitioner's request to present the transcript of Sprinkle's interrogation to the jury as part of a third party culpability defense. In this context, it makes sense that Petitioner would want the more incriminating "version" of the transcript, or the "full interview" of Sprinkle, not the edited version of the first half of the interview where the reference to the severity of Sprinkle's defensive wounds is greatly diminished. Further, it is clear that the transcript is the edited version provided by the state from the District Attorney's file (where it is saved as 9/16/01 Interview of Terry Sprinkle). The edited version of the interview that is in the record is approximately 25-30 pages, as noted by the District Attorney, whereas the full interview transcript is more than twice that many pages. Respondent's contention regarding this *Brady* violation is emblematic of the disingenuous defenses and bad faith integral to all suppressed evidence in this case, as the assertions defy basic reason based upon the record of this case.

Accordingly, the suppression of Terry Sprinkle's "full" interrogation constitutes a *Brady* violation.

I. Suppressed Evidence Of Det. Anderson's Misconduct And Internal Affairs Investigation in 2006

Respondent contends that they bore no responsibility for revealing Det. Anderson's misconduct and the Internal Affairs investigation which coincided with the "reopening" of the murder investigation in the present case. (Return at 41.) Respondent is wrong, as the subject of Det. Anderson's official misconduct – dereliction of duty - is directly relevant to the Petitioner's case and would have supported a cohesive defense where the investigation "essentially, and inexplicably, stopped" within two weeks of Zunino's murder. (See Expert Report of Beth A. Mohr, attached hereto as Exh. 14, at p. 4.) Moreover, it is in this context that the holding in *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998 is both relevant and persuasive in this case. Contrary to Respondent's contention, the *Milke* case is persuasive because the underlying police misconduct at issue in the case was directly relevant to the defendant's defense that she had not confessed during her unrecorded interrogation. Here, Petitioner was deprived of the defense that his cold-case prosecution was related to the 2006 internal affairs investigation of Det. Anderson for dereliction of duty in cases where he failed to investigate crimes that were assigned to him as a peace officer. As in *Milke*, Det. Anderson's past misconduct was directly relevant to the subject of Petitioner's potential defense, further undermining the confidence in the outcome of the trial.

Accordingly, the suppression of Det. Anderson's professional misconduct constitutes a *Brady* violation.

IV. THE STATE FAILED TO MAINTAIN AND DISCLOSE MATERIAL AND EXCULPATORY EVIDENCE THAT UNDERMINED CONFIDENCE IN THE OUTCOME OF PETITIONER'S TRIAL, IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER *TROMBETTA* AND *YOUNGBLOOD*

Respondent contends that the state did not violate Petitioner's due process rights under *Trombetta* because there is no evidence of bad faith. (Return 43-46.) As argued in the Amended Petition in full, the state was required to maintain the exculpatory evidence that was discovered during the original investigation of the murder in this case as its

material value was apparent at the time it was discovered. Moreover, should the Court find that the exculpatory value of the evidence was not discernable at the time of discovery, then this Court should find that the collective suppression, "loss" and destruction of evidence related to the initial suspect, in violation of *Brady* and contrary to basic law enforcement procedure, establishes bad faith under the law. (See *Arizona v. Youngblood, supra* , 488 U.S. at pp. 57-58; see also *People v. Fultz* (2021) 69 Cal.App.5th 395, 424.) Respondent, again, offers no evidence in support of their argument contesting Petitioner's claim. None of the excuses for the overwhelming amount of lost potentially exculpatory evidence proffered by Respondent are reasonable. Further, Respondent fails to provide any corroborating evidence to support its repetitive conclusory arguments which are counter to the record.

" ' "Due process does not impose upon law enforcement 'an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.'" [Citation.] At most, the state's obligation to preserve evidence extends to "evidence that might be expected to play a significant role in the suspect's defense."' [Citation.] Whether the loss of evidence rises to the level of a due process violation is governed by the principles set forth by the United States Supreme Court in *Trombetta* and *Youngblood*. [Citation.] Under *Trombetta,* law enforcement agencies must preserve evidence only if the evidence possesses exculpatory value that was apparent before it was destroyed and if the evidence is of a type not obtainable by other reasonably available means. [Citations.] As an alternative to establishing the apparent exculpatory value of the lost evidence, *Youngblood* provides that a defendant may show that'" 'potentially useful'"' evidence was destroyed as a result of bad faith. [Citations.]" (*People v. Fultz,* supra, 69 Cal.App.5th at pp. 424-425, fn. omitted, *citing Trombetta, supra*, 467 U.S. at pp. 488-489 and *Youngblood, supra*, 488 U.S. at p. 58.)

"It is axiomatic that the constitutional due process guaranty is a bulwark against improper state action. '[T]he core purpose of procedural due process [is] ensuring that a

citizen's reasonable reliance is not frustrated by arbitrary government action.' [Citation.] If the state took no action, due process is not a consideration, because there is no 'loss of evidence attributable to the Government.'" (*People v. Velasco* (2011) 194 Cal.App.4th 1258, 1263.) Nevertheless, the California Supreme Court and United States Court of Appeals, Ninth Circuit, have at times suggested that there may be an appropriate case where the failure to collect evidence might warrant due process considerations. (*People v. Montes* (2014) 58 Cal.4th 809, 838 ["we have suggested that cases may arise in which the failure to collect evidence could justify sanctions against the prosecution at trial"]; *Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, 1119 [sanctions for bad faith failure to collect evidence].)

Petitioner reasserts that the state had an obligation to maintain or properly collect the following evidence: 1) Blood-like spattered clothing, shoes and $30 cash from Terry Sprinkle's Residence within 48 hours of the murder; 2) Blood-like Spatter and Pooling Documented in Sprinkle's Bronco; 3) Latent Fingerprint Cards Taken by Stockton Police And Never Put Into Evidence Locker; 4) Stab Marks in the Passenger Seat and Ceiling of Sprinkle's Bronco; 5) Tire Treads from Sprinkle's Bronco, the Murder Scene, and Petitioner's Vehicle; 6) Terry Sprinkle's Blood Vial; 7) Negative Strips #3 and #6 Found Near Zunino's Body; 8) Photographs of Sprinkle's Hands with Defensive Wounds 48 hours After the Murder. (See *Trombetta, supra,* 467 U.S. at p. 489.) In addition to the evidence alleged in the Petition, Petitioner adds the report of expert witness Beth A. Mohr who opines:

> As a retired police officer, nationally certified law enforcement trainer, investigator, and expert witness with over 30 years of experience, I have never seen a case where so many things went so wrong, with so many pieces of evidence, via so many different means, in a single case. I have seen various cases where evidence was lost, destroyed, improperly collected, or simply missed, and where investigations went awry in nearly every way imaginable. However, prior to this matter, I have never seen them all occurring in the same case.

> The failure of the Stockton Police Department's investigators and evidence technicians along with DOJ Criminalist Yoshida, to properly plan the investigation, collect and preserve evidence, process that evidence using appropriate forensic techniques, all the while maintaining a proper chain of custody, is quite stunning. These actions are not consistent with the minimum accepted standards of professional police procedures, and is not consistent with how law enforcement and criminal investigative personnel are trained to conduct themselves in a serious criminal investigation such as a homicide.

(Exh. 14, at p. 11.)

Accordingly, Petitioner further asserts that this Court should find that the collective suppression, "loss" and destruction of evidence related to the initial suspect, in violation of *Brady* and contrary to basic law enforcement procedure, establishes bad faith under the law. (See *Arizona v. Youngblood, supra* , 488 U.S. at pp. 57-58; see also *People v. Fultz, supra,* 69 Cal.App.5th at p. 424.)

V. THE PROSECUTION PRESENTED FALSE TESTIMONY AND FALSE EVIDENCE THROUGHOUT PETITIONER'S TRIAL, UNDERMINING THE CONFIDENCE IN THE OUTCOME OF PETITIONER'S TRIAL IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER *BRADY* AND *NAPUE*

Finally, Respondent contends that there is no evidence that the prosecution knew that Criminalist's conflicting and contradictory testimony was false. (Return at 55; see also *Napue v. Illinois* (1959) 360 U.S. 264.) Again, Respondent offers no evidence to refute Petitioner's allegations and evidence. Respondent's argument is entirely disingenuous.

As set forth in the Petition in full and the record on appeal, the prosecutor presented the jury with conflicting evidence from Criminalist Yoshida regarding the tire tread evidence related to Petitioner's tires. Yoshida testified twice, with her follow-up testimony constituting corrective testimony. In her follow-up testimony, Yoshida testified that her opinion was that the evidence related to Petitioner's tires was inconclusive, and she could not say that the tires made the tread marks found next to

Zunino's body. In addition, Petitioner offers the additional evidence from expert witness Beth A. Mohr's report, finding that Yoshida's corrective testimony represents a "series of extremely fine distinctions" which juries tend not to understand. (Exh. 14, p. 5.) The confusion of Yoshida's contradictory testimony was exacerbated by the prosecution's repeated reliance upon Yoshida's initial report and testimony, which included false evidence, in his closing argument to the jury.

Accordingly, the prosecution's failure to correct the false evidence presented by Yoshida constituted a violation of *Napue.*

CONCLUSION

Petitioner respectfully requests that this Court grant the relief requested, vacating the conviction on the grounds of actual innocence without the necessity of a hearing as no factual disputes exist as to the evidence presented by Petitioner which was found to support the Order to Show Cause. In the alternative, this Court should grant the Petitioner's request for an evidentiary hearing and allow for the development of the evidence in support of Petitioner's claim of actual innocence.

Dated: August 13, 2023

Respectfully submitted,

_____

Jennifer M. Sheetz
Attorney for Petitioner

PROOF OF SERVICE

Re: In re Joseph Nuccio

I declare that I am over the age of 18, not a party to this action and my business address is 38 Miller Ave., PMB 113, Mill Valley, California 94941. My electronic service address is jmsheetz@hotmail.com/jennifermsheetz@gmail.com. On August 14, 2023, I served Petitioner's Traverse to the following parties hereinafter named by placing a true copy thereof enclosed in a Priority Mailing envelope and mailing the envelopes to the physical addresses below:

Rob Bonta, Attorney General
c/o Eric Christoffersen, Deputy Attorney General
Attorney General's Office
1300 I St., Ste. 125
Sacramento, CA 94244-2550

San Joaquin County District Attorney
c/o Robert Himelblau, Chief Deputy District Attorney
222 E. Weber Ave., #202
Stockton, CA 95202

I declare under penalty of perjury the foregoing is true and correct. Executed this 14th day of August 2023, at Mill Valley, California.

_____
Jennifer M. Sheetz

TABLE OF EXHIBITS

Exhibit	Document
14.	Expert Witness Report, Beth A. Mohr, CFE, CFCS, CAMS, CCCI, PI

Exhibit 14