

**STATE OF NEW YORK
COUNTY OF CAYUGA**

**THE PEOPLE OF THE STATE
OF NEW YORK,**
Plaintiff-Respondent,

v.

ROY A. BROWN,
Defendant-Petitioner

X

Indictment No.: 91-46

**AFFIRMATION IN
SUPPORT OF
MOTION TO VACATE
CONVICTION AND
SENTENCE
PURSUANT TO
C.P.L. §440.10(1-g)**

NINA MORRISON, an attorney duly admitted to practice law in the State of New York, hereby affirms under penalty of perjury that the following is true and correct:

1. I am a Staff Attorney at the Innocence Project, Inc., in New York, New York. Since 2004, the Innocence Project, along with co-counsel James McGraw and Katy Karlovitz at the McGraw Law Firm in Syracuse, NY, has represented Defendant-Petitioner Roy Brown (“Petitioner”) on a *pro bono* basis in his efforts to obtain post-conviction DNA testing on biological material collected by Cayuga County during its investigation of the 1991 homicide of Sabina Kulakowski. After a jury trial, Mr. Brown was convicted of Ms. Kulakowski’s murder on January 23, 1992 and sentenced to a prison term of 25 years to life.

2. Unless otherwise specified, all of the information in this affirmation is based upon personal knowledge, inspection of the record in this case, information derived from legal authorities and public records, and information directly communicated by government officials and/or other persons as referenced herein.

Summary of New DNA Evidence and Grounds for Relief

3. In the early morning hours of May 23, 1991, the body of Sabina Kulakowski was discovered near a dirt road in the town of Aurelius, some 300 feet from the farmhouse in which she lived. The crime was a horrific one. Investigators quickly determined that Ms. Kulakowski, whose body was marked by defensive wounds and injuries, had engaged in a protracted struggle to the death with her assailant -- who had viciously assaulted her, bit the victim all over her body, dragged her from her home, and, finally, stabbed and strangled her to death. The murder also appeared highly personal in nature, as there was no evidence that her home had been burglarized, nor that she had been raped.

4. The victim's red, bloodstained nightshirt was found on top of some tall grass in an adjacent field, in a location directly between the farmhouse and the corpse. Chemical tests later revealed that the shirt was also stained with saliva in at least seven separate locations, *i.e.*, consistent with an assailant's attempts to bite the victim. The County Coroner, upon inspection of the nightshirt and the scrape patterns on the victim's nude body, determined that she had been dragged from her home while wearing the shirt.

5. The victim's body was discovered around 3:00 AM – over an hour after a team of nearly fifty firefighters first responded to the scene, to put out a blazing fire that had also been set to Ms. Kulakowski's home. Assorted neighbors and family members of the victim quickly arrived as well. The following day, Sheriff's investigators began to collect written statements from a number of persons present at the scene and other relevant witnesses.

6. Four of these initial affidavits, each prepared and signed on May 24, 1991, concerned the unusual conduct of one man who had arrived at the scene later in the night and drawn investigators' interest: Barry Bench. Mr. Bench was both a volunteer firefighter for the county and the brother of the victim's long-time companion, Ronald Bench. Ronald Bench and the victim had dated for seventeen years, but had separated two months before her death. Prior to their separation, Ronald and Sabina had lived together on the farm in Aurelius where Sabina was ultimately killed, and which was owned by the Bench family; Ronald moved to a house in Auburn, while Sabina continued to live, alone, on the Bench family farm.

7. The four sworn affidavits taken by the officials investigating Sabina's murder regarding Barry Bench's conduct that evening (by his longtime girlfriend, Tamara Heisner; the fire dispatcher, Mike Besner, who lived across the street; and Mr. Besner's wife Tina) recorded a number of facts that the investigators appeared to find noteworthy – with good reason. They documented, among other things, the fact that Barry Bench, who was already under an order of protection, got into a domestic dispute with Tamara Heisner at 5 p.m. after “pushing [her] around,” and left his house. He went to a local bar, but did not arrive back home until between 1:30-1:45 AM – the same time that the victim's neighbors alerted the authorities that the Aurelius farmhouse was on fire.

8. The statements further noted that Mr. Bench, who arrived home highly intoxicated, had left the bar at approximately 12:30 AM. That left *60-75 minutes unaccounted for* until his arrival at home -- even though he lived only a mile from the bar. This unaccounted-for window of time also coincided directly with the time at which, based upon neighbors' reports and subsequent investigation, the fire at the Aurelius farm

began. When Mr. Bench arrived home, according to Ms. Heisner, he immediately went inside to “wash up” his face and arms, then turned off his fire monitor and went to bed; he told investigators the next day that he turned it off because he had been drinking, claiming he never responded to fire calls when in that condition. The statements also indicated that when Mr. Bench and Ms. Heisner went to the farm after being alerted to the fire that night (after repeated calls to their home line from the dispatcher), he walked away from the search party to a nearby road, saying he was “trying to find evidence or find Sabina” –right near the spot where Ms. Kulakowski’s body was later discovered by others. The next day, Tamara told a friend that she was “quite concerned when she found out that the body was found right where Barry was looking.” And the day after the murder, the investigators’ statements further noted, Mr. Bench contacted the fire dispatcher, Mike Besner, asking him not only “why fire control was looking for Besner, but also: “Was the Sheriff’s Department looking to talk to you?”

9. For reasons that are unknown, it appears that investigators did not further pursue the questions about Bench’s conduct raised by these statements. Instead, they turned their focus to Roy Brown, who was arrested and charged with Sabina Kulakowski’s murder two days later, on May 26th.

10. Unlike Barry Bench, Mr. Brown had no known connection to the victim. Instead, investigators focused on Mr. Brown – and ultimately prosecuted and convicted him of her murder – on the theory that he had killed her in a rage because the agency which employed her, the Cayuga County Department of Social Services, had placed his daughter in a residential care facility earlier that year. Mr. Brown had, in fact, recently been granted early release from jail after pleading guilty to a charge of making harassing

phone calls to the D.S.S. director eight months earlier. But Ms. Kulakowski was not the caseworker assigned to his daughter's case, nor was there any evidence that the two had ever met or even spoken to one another. Indeed, after the jury's verdict in his murder trial, an emotional Petitioner told the Court and spectators, "I never knew Ms. Kulakowski, and I had nothing to do with that woman's death . . . I had nothing to do with this crime. I am truly innocent." See "Syracuse Man Receives 25 Years for Killing; The Convicted Man Maintains He Did Not Murder a Cayuga County Social Services Worker," POST-STANDARD (Syracuse, NY), Feb. 14, 1992, at B1.

11. It took thirteen more years for Mr. Brown to uncover documentary evidence which led him to believe that he had – at last – identified the man who actually did commit the crime. From his prison cell in Elmira, New York, armed only with notebook paper, stamps, and a copy of the state's Freedom of Information Law, Mr. Brown wrote to the Sheriff's Department in 2003. He requested a copy of what an anonymous source had told him was a "hidden" affidavit from a jailhouse informant who had testified against him at trial. No such statement existed – but the clerk, faithfully abiding by FOIL's requirements, provided Mr. Bench with a typewritten list of all other statements from the case in the Department's possession. On that list were eleven Affidavits from witnesses that Mr. Brown was confident that neither he nor his lawyers had ever seen before – including the four statements pertaining to Barry Bench's suspicious conduct before and after the murder.

12. Mr. Brown, without an attorney or the funds to retain one, immediately drafted and filed a *pro se* motion under CPL 440.10 upon receipt of these statements, alleging that they had been withheld from him prior to trial in violation of the State's

Brady and *Rosario* obligations. His motion highlighted the disturbing facts elicited in the Bench statements; familiar with the geography of the area, he further noted the implausibility of Barry Bench's claim that he left the bar and drove directly home -- since, in passing directly by the victim's home at that hour, Mr. Bench could not have missed the site of his own family's farmhouse being consumed (according to the affidavit of a neighbor, Judith Schluter) by "flames shooting into the air . . . as high as the trees in front of the house."

13. In its response, the People contended that all of the affidavits cited by Mr. Brown had been turned over to his trial counsel, although with respect to the Barry Bench affidavits (and unlike certain other affidavits which were listed on the *Rosario* transmittal documents from trial), they had no documentary evidence of their production. Nonetheless, the People asserted, and this Court agreed, that even assuming *arguendo* that these statements constituted undisclosed *Brady* material, Mr. Brown had not shown prejudice; that is, that the information contained therein was not, on its own, of such an exculpatory nature as to provide a basis for overturning Mr. Brown's conviction. *See* Affirmation of Christopher Valdina in Opposition to Defendant's Motion dated July 21, 2003; Memorandum Decision and Order dated September 16, 2003.

14. After the motion was denied, Mr. Brown decided to confront Barry Bench directly about his suspicions. On December 24, 2003, he mailed an angry letter to Mr. Bench, informing him that he had obtained new affidavits which evidenced Mr. Bench's guilt; accusing him of committing the murder while Mr. Brown languished in prison; and urging him to confess to the crime. He also warned Mr. Bench of his intent to obtain a DNA test that would scientifically prove his own innocence and inculcate Mr. Bench: "I

figure the only way to prove the truth is by GOD's hand," he wrote. "Judges can be fooled and juries make mistakes, [but] when it comes to DNA testing there's no mistakes. DNA is GOD's creation and GOD makes no mistakes." Five days after this letter was mailed, Barry Bench committed suicide, by throwing himself in front of an Amtrak passenger train. (*See* letters, news article, and 1991 witness statements, attached as Composite Exhibit A.)

15. Now, three years later, the very DNA test results that Roy Brown told Barry Bench he would someday obtain are in hand. In September, upon a motion by new counsel for Mr. Brown, this Court issued an order for state-of-the-art, expedited DNA testing at the New York State Police Forensic Investigation Center crime laboratory. Last month, the laboratory issued its report, revealing that as many as seven saliva-stained areas of Sabina Kulakowski's nightshirt all contain DNA material from a single man – and that man is not Roy Brown. Additional testing conducted in December has gone further, linking that evidence to Barry Bench himself. After Mr. Bench's suicide, of course, no sample of DNA could be taken from him directly. So Petitioner's counsel pursued the next best option, which was readily available: a sample of DNA voluntarily donated by Barry Bench's biological daughter, Katherine Eckstadt. And the testing performed on Ms. Eckstadt's sample yielded dramatic results: there is a 99.99% probability that the man who deposited his saliva on Sabina Kulakowski's nightshirt is Ms. Eckstadt's father, *i.e.*, Barry Bench.

16. In combination, these DNA results provide overwhelming and logically irrefutable evidence that Barry Bench – and not Roy Brown – is the man who deposited his saliva on the victim's nightshirt on May 23, 1991, during the violent assault which

preceded her death. As this Court and the People are well aware, Petitioner need not affirmatively establish that fact in order to prevail here; whether at trial or in a C.P.L. §440.10 (1-g) motion, a defendant does not bear the burden of proving his innocence, nor must he prove who actually committed the crime of which he is accused.

The Instant Motion

17. Accordingly, counsel for Petitioner now submit this Affirmation in support of a new motion to vacate his conviction and sentence pursuant to New York Criminal Procedure Law §440.10 (1-g). He is plainly entitled to relief. For at the very least, the combined effect of these new DNA test results – which were not available to either party at Petitioner’s 1992 trial – are “of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant,” which is all that is required to obtain relief pursuant to N.Y. C.P.L. §440.10 (1-g).

18. In light of the extraordinary nature of the new DNA test results and in the interest of expediting resolution of this matter, undersigned counsel submits this Affirmation in brief support of Petitioner’s claim for relief. Since the DNA results were obtained by undersigned counsel in November, District Attorney James Vargason has participated with Petitioner’s counsel in substantial discussions about the DNA testing data and the evidentiary significance of the DNA test results. At this writing, the District Attorney is still considering whether the People will consent to the *vacatur* of Petitioner’s conviction and sentence.

19. However, should the People, upon further review, decline to support Petitioner’s claim for relief, undersigned counsel request that this Court provide

Petitioner an opportunity to further develop the record, both through additional briefing and an evidentiary hearing. Undersigned counsel has not, for example, yet received the underlying DNA testing data from the NYSPFIC laboratory (which was requested at the beginning of the month) and thus has not yet had the opportunity to have that data reviewed and interpreted by an independent expert; that review could provide still further compelling information in support of Petitioner's claim of innocence, and/or prove necessary to rebut any challenges to the significance of the reported results that may be raised by the People, should they oppose the instant Motion.

Recent proceedings pursuant to CPL 440.30(1-a)

20. On April 19, 2006, Petitioner filed a motion for post-conviction DNA testing pursuant to C.P.L. §440.30 (1-a) on various items of evidence collected by Cayuga County law enforcement officials in connection with their original investigation of Ms. Kulakowski's 1991 homicide, to wit: (1) remnants of cotton swabs of bite marks from the victim's left thigh and shoulder; (2) the saliva- and blood-stained nightshirt worn by the victim during the violent assault that preceded her death ("the victim's nightshirt"); (3) fingernail clippings from the victim; and (4) vaginal swabs and/or smear slides from the victim. The motion sought to utilize Short Tandem Repeat ("STR") DNA testing, a method of DNA analysis that was not available at the time of Petitioner's trial, nor at the time (1994-95) that he filed his prior motion for DNA testing under C.P.L. §440.30 (1-a).

21. In the Motion and accompanying Memorandum of Law, counsel for Petitioner contended that state-of-the-art STR DNA test results obtained upon the requested items, whether alone or in combination, had the potential to provide compelling new evidence to support (or, if the results were inculpatory, disprove) Petitioner's

longstanding claim of actual innocence, and thus satisfied the requirements of C.P.L. §440.30 (1-a). Counsel further specifically contended that additional grounds for conducting the requested testing were provided by the recent suicide of Barry Bench – insofar as any male DNA profile(s) obtained from the crime scene evidence which excluded Petitioner as the source might also turn out to be consistent with Mr. Bench’s DNA profile, thus providing truly compelling new evidence in Petitioner’s favor. The motion also included an affidavit from Barry Bench’s former common-law wife and the mother of his children, Tamara Heisner Eckstadt. Mrs. Eckstadt attested that Mr. Bench was an alcoholic who was physically violent with her for many years – including at least one incident in which, in the course of forcing her to have sexual intercourse against her will, he bit her violently. She further confirmed that after Mr. Bench arrived home, drunk, on the night of Sabina Kulakowski’s murder, he deliberately unplugged his fire radio so that the Department could not alert him to respond to any fire scenes – which, contrary to Mr. Bench’s own 1991 statement to authorities, was something he normally did *not* do, even when he had been drinking.

22. In early 2006, approximately two months prior to filing the 2006 motion for DNA testing, undersigned counsel provided the District Attorney with a copy of the memorandum of law to be filed in support of the motion. After a review of the record and further discussions between the parties, the District Attorney informed undersigned counsel of his conclusion that, with respect to the material remaining on the bite mark swabs from the victim’s body -- which in 1991 had been subjected to inconclusive serological (blood-type) analysis – Petitioner satisfied the legal requirements of C.P.L. §440.30 (1-a), and the People would consent to DNA testing on the swab remains. The

District Attorney subsequently submitted an Affirmation to that effect dated April 27, 2006, and this Court entered an order for testing the remains of the swabs. The parties agreed to defer consideration of Petitioner's request to subject the remaining items of evidence to STR-DNA testing in the interim.

23. On June 6, 2006, the New York State Police Forensic Investigation Center crime laboratory ("NYSPFIC") issued its first report, setting forth the results of the tests it conducted upon the material which remained on the bite mark swab and the glass vials used to store those swab remains. The NYSPFIC was unable to obtain any human DNA profile(s) (either from the victim or any other source) from the swab remains or the glass vials. (*See* NYSPFIC report dated 6/6/06, attached hereto as Exhibit B.)

24. The parties then turned to Petitioner's request to conduct STR-DNA testing on the remaining items, submitting supplemental pleadings and conducting further conferences with this Court. Mr. Vargason, in an Affirmation dated August 3, 2006, opposed testing upon these items, but at conferences with the Court indicated the People's willingness to cooperate in expediting such testing should the Court find that Petitioner was legally entitled to it. By order dated August 8, 2006, this Court found that Petitioner had satisfied the statutory requirements with respect to the items sought to be tested, which requires a showing that if exclusionary DNA test results "had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant." C.P.L. §440.30 (1-a).

25. Upon receipt of the Court's Order, the People conducted a thorough search for the items of evidence to be tested and forwarded them to the NYSPFIC laboratory. Due to Petitioner's advanced liver disease, the People also requested that the NYSPFIC

laboratory make the case a “priority” matter and conduct testing on these items on an expedited basis.

26. In addition, by letter dated August 28, 2006, Mr. Vargason provided undersigned counsel and the Court with bench notes from the original Monroe County Crime Laboratory analysis (conducted in 1991) which, upon his request, the County had retrieved from storage. The bench notes indicated that the Monroe County serologist who forensically examined the victim’s nightshirt in 1991 had detected seven (7) separate stains on the nightshirt that tested positive for salivary amylase – a chemical indication of the presence of saliva. Although the Monroe County analyst did not diagram the areas of the T-shirt on which the stains were found, the notes indicated the positive amylase tests performed on these seven stains under listings designated “#1,” “#2,” “#3” (etc.) in the laboratory notes. (*See Monroe County Laboratory Notes, annexed hereto as Exhibit C.*) Indeed, when the shirt was transferred to the NYSPFIC laboratory for DNA testing in 2006, the shirt itself contained written markings of “#1,” “#2,” “#3,” and so forth – with each notation next to small holes that had apparently been cut from the cloth of the shirt during the 1991 serological analysis.

The New DNA Evidence

A. STR-DNA Test Results on the Victim’s Nightshirt

27. On November 16, 2006, the NYSPFIC issued its second DNA analysis report in this case, setting forth the results of STR-DNA testing conducted upon the victim’s nightshirt, vaginal smear slides, and fingernail clippings (“the November NYSPFIC Report” or “the Report”). The Report was provided to undersigned counsel by this Court on November 27, 2006.

28. The Report indicated that no spermatozoa were detected on the vaginal smear slides, and no interpretable DNA profiles foreign to the victim were obtained from the fingernail clippings or the vaginal smear slides. In testing conducted upon seven separate stained “cuttings” taken from various areas on the victim’s nightshirt, however, the NYSPFIC laboratory did obtain full or partial male STR-DNA profiles, with multiple alleles (DNA markers) from a contributor other than the victim, suitable for analysis. (See NYSPFIC report dated 11/16/06, annexed hereto as Exhibit D).

29. As set forth in the Report, one of these seven stains – cutting #4F, from the lower right front side of the victim’s nightshirt – contained a full STR-DNA profile from a single donor, who is male. See Exhibit D at p.6. The male DNA profile obtained in this stain does not match Petitioner’s DNA, conclusively excluding him as the source. *Id.* Thus, as noted in the Report, the stain “must have originated from a single unknown male donor,” whom the NYSPFIC laboratory designated for reference purposes as “John Doe.” *Id.*

30. And this was not the only area of the shirt in which male DNA consistent with “John Doe” was detected. Indeed, the Report goes on to explain that six additional cuttings from the shirt yielded DNA “mixtures” – *i.e.*, stains containing contributions of DNA from more than one individual – and that at least one of the donors to each stain was male. See Exh. D at p.7. With respect to two of the stains (#4G, from the central left chest area of the shirt, and #4J, from the back lower side of the shirt), the laboratory reported that the male DNA found was “consistent” with the DNA profile of “John Doe” – *i.e.*, the unknown male donor detected in stain #4F. By contrast, the laboratory did not report the detection of any male DNA profiles on the shirt consistent with Petitioner.

31. Upon receipt of the Report, undersigned counsel and Peter Neufeld, Co-Director of the Innocence Project, reviewed the NYSPFIC's testing data and conferred with the laboratory analysts regarding our interpretation of that data. This review included a detailed review of the "allele charts" set forth at pp. 4-6 of the Report, which documented the particular DNA markers obtained at all 13 genetic locations tested and analyzed in each cutting, as well as the corresponding markers for the victim and Mr. Brown.

32. In a telephone conference conducted on November 29, 2006, the NYSPFIC laboratory analyst who supervised the DNA testing conducted in this case confirmed the accuracy of three conclusions reached by counsel for Petitioner in our own review of the data. *First*, the laboratory confirmed that in each of the six "mixed" stains containing male DNA, all alleles detected which were "foreign" to the victim herself – that is, DNA markers which must have come from someone other than the victim – are also found in the corresponding DNA profile of the unidentified "John Doe" from stain #4F. *Second*, the laboratory confirmed that every single DNA allele detected in all six "mixed" stains were shared by either John Doe and/or Sabina Kulakowski. *Third*, the laboratory confirmed that in each of these six "mixed" male-female stains, "foreign" alleles were detected which could not have come from either the victim or from Petitioner.

33. On the same date it transmitted the November NYSPFIC Report to the undersigned, this Court also provided counsel with the bench notes from the NYSPFIC's DNA testing, which the District Attorney had obtained from the laboratory. (See Notes from NYSPFIC laboratory, annexed hereto as Exhibit E.) Review of the bench notes, in

conjunction with the notes from the original 1991 Monroe County laboratory analysis of the nightshirt, provides still further evidence of the significance of the above-referenced STR-DNA test results.

34. Specifically, the 2006 laboratory notes provide strong additional indications that at least some – and probably all -- of the “John Doe” DNA material detected on the victim’s nightshirt likely came from deposits of this man’s saliva. This is because several of the areas of the shirt tested by the NYSPFIC (which were selected for DNA analysis after a fluorescent light source indicated those areas were positive for the presence of biological material) are the exact same areas of the shirt which tested positive for the presence of saliva in 1991. This conclusion is based upon the following: (1) when examined in 2006, the shirt contained pre-existing markings (presumably from the 1991 analysis) labeled “ABO #1, “ABO #2,” “#3,” “#4, “#5,” etc.; (2) the 1991 Monroe County bench notes also designate the stains which tested positive for salivary amylase as “#1, “#2, “#3,” etc.; (3) “ABO” is recognized as shorthand for serological analysis utilized in forensic examination prior to the advent of DNA testing, *i.e.*, tests which attempt to determine the blood type of the donors pursuant to the international ABO blood group system; and (4) several of the cuttings upon which male DNA consistent with the profile of “John Doe” was detected in 2006 (#4F, #4G, and #4H, as well as others which the NYSPFIC laboratory may not have indicated on the diagram of the shirt) are from areas directly adjacent to those in which the Monroe County analyst had taken cuttings which previously tested positive for saliva. *See* Exh. E at p.1 (noting that shirt “has numerous markings in black and small holes apparently from previous exam”); *id.* at p.11 (laboratory diagram of shirt reflecting prior markings and adjacent cuttings

tested for DNA, with handwritten notation stating, “# = markings on t-shirt → not all markings shown”).

35. STR-DNA technology cannot alone determine what type of biological material is present in the cuttings which contained DNA consistent with “John Doe.” But when considered alongside the results of the previous analysis on the shirt, the conclusion that at least one of the sources of biological material in some (if not all) of these “John Doe” stains is saliva is a highly logical one.

36. In addition, it bears emphasizing that at least one of the mixed male-female stains (“#4G) which the NYSPFIC laboratory reported contained DNA consistent with “John Doe” was taken from an area of the nightshirt which appears to correspond to the victim’s left breast area (*see* Exh. C at p.7, Exh. D. at p.11). That is also an area where the Medical Examiner noted the presence of a distinct bite mark at the victim’s autopsy. (T.379)

37. As noted in counsel’s previous submissions to this Court, it has never been disputed that the perpetrator of Ms. Kulakowski’s murder bit the victim all over her body during the violent struggle that preceded her death. Furthermore, the forensic evidence offered by the People at trial further established – and the defense never disputed – that (1) the bruising and other forensic characteristics of the bite marks on the victim’s body indicated she was bitten while still alive and struggling with her attacker, and (2) the scrape marks on her body indicated that she had been dragged from her home while still wearing the nightshirt. On these facts, a jury would not need a sophisticated understanding of DNA analysis to grasp the significance of numerous locations on the

nightshirt, directly corresponding to areas of the shirt where saliva was detected, all containing DNA from a male who is not Petitioner.

B. Additional DNA Testing: “John Doe” DNA on Nightshirt Consistent with Alternate Suspect Barry Bench

38. Counsel next sought to compare the unknown “John Doe” DNA on the nightshirt with that of Barry Bench. Because of Mr. Bench’s suicide, a sample from him was unavailable. However, his surviving daughter, Katherine Eckstadt, agreed to give a sample of her own. STR-DNA analysis on a sample from a surviving first-degree relative is widely recognized as a proper basis for identifying a decedent – indeed, the same method of DNA testing and paternity analysis performed on Miss Eckstadt’s sample here was employed by state and federal officials to identify the remains of the victims of the September 11th terrorist attacks and Hurricane Katrina.

39. On Friday, December 1, 2006, Katherine Eckstadt appeared in the offices of Petitioner’s representative at the Central New York Investigation Bureau, Inc., in Syracuse, and provided a DNA sample in the form of a buccal (saliva) swab. The procedure was videotaped by the licensed investigator who collected the sample. The sample was then sealed and sent by secure weekend overnight delivery to ReliaGene Technologies, Inc., a private DNA laboratory in New Orleans, LA (“ReliaGene”) that is certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board and offers, among other services, highly expedited (five-day) processing of DNA material.

40. Undersigned counsel requested that ReliaGene conducted STR-DNA testing on the buccal swab provided by Miss Eckstadt, and to compare her DNA profile with the single male “John Doe” profile (cutting #4F) listed in the NYSPFIC’s November

2006 DNA report. Specifically, we asked the laboratory to determine whether an analysis of Miss Eckstadt's DNA profile indicated that "John Doe" could be her biological father.

41. On December 6, 2006, ReliaGene issued the report of its analysis. *See* ReligaGene report dated 12/6/06, annexed hereto as Exhibit F. As set forth in the report, the analysis of Miss Eckstadt's DNA sample establishes, beyond a reasonable doubt, that her father, Barry Bench, is the "John Doe" who deposited his DNA in the saliva stains on Sabina Kulakowski's nightshirt.

42. Specifically, ReliaGene's analysis reveals that "John Doe" is not excluded as the biological father of Katherine Eckstadt – and, indeed, that one-half (*i.e.*, one parent's contribution) of her DNA profile perfectly matches an allele at every single locus (genetic location) in the DNA profile reported by the NYSPFIC in the single "John Doe" stain.

43. ReliaGene also calculated the statistical frequency of these DNA markers (alleles) according to the national Paternity Index ("PI") database. The Paternity Index revealed that the "probability of paternity" – *i.e.*, that "John Doe" is the father of Katherine Eckstadt -- is 99.99%. This figure far exceeds the Paternity Index probability calculation – 95% – which, under New York law, legally establishes the paternity of a decedent unless conclusively rebutted by other evidence. *See* N.Y. C.P.L.R. §4518(d).

Legal Significance of the New DNA Evidence Under C.P.L. §440.10 (1-g)

44. In New York, a defendant is entitled to have a conviction and sentence vacated after trial upon the presentation of new evidence which "could not have been produced by the defendant at the trial even with due diligence on his part and which is of

such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.” *Id.* (emphasis supplied). Counsel for Petitioner respectfully submits that the new STR-DNA evidence, which was obtained with the use of forensic technology that was unavailable to either party at the time of trial, satisfies this legal standard, and entitles Petitioner to *vacatur* of his conviction and sentence accordingly.

45. The new evidence provides objective, scientific support for Petitioner’s longstanding claim that he was not the man who bit, stabbed, and strangled Sabina Kulakowski to death on May 31, 1991. At a minimum, it establishes to a scientific certainty the following objective facts: (1) that DNA from an unknown male is present in at least three, and probably seven, separate stained areas of the victim’s nightshirt that had previously tested positive for saliva; (2) that Petitioner is excluded as the “John Doe” male who deposited this saliva; and (3) that there exists a 99.99% probability that the father of Katherine Eckstadt -- Barry Bench -- is “John Doe.” Particularly given the coroner’s testimony that Ms. Kulakowski was dragged from her burning home while wearing the nightshirt, each of these scientific facts would provide compelling new grounds upon which a jury could well credit Petitioner’s claim – first made in a *pro se* motion he filed without the assistance of counsel in 1998 – that he did not commit this brutal crime, and that Barry Bench did.

46. Of course, in order to grant relief, neither the People nor this Court must find that the new evidence conclusively establishes either Petitioner’s actual innocence or Mr. Bench’s guilt. For it is not Petitioner’s burden to prove his innocence – neither at trial, nor on a 440.10 motion. Nor must he demonstrate who actually committed the

crime for which he was prosecuted and convicted. All he must demonstrate is a reasonable “probability” that, had the jury which convicted him heard this new evidence, the verdict would have been “more favorable” to him – that is, that the new evidence would probably have led the jury to harbor a reasonable doubt about his guilt.

47. This is particularly so when one considers that the jurors in this case were bound to apply the particularly demanding standard that governs prosecutions which rely (as this one did) on circumstantial evidence. As this Court explained in its charge to the jury in 1992:

So to reiterate, if the conclusion to be drawn from the facts is just as consistent with innocence as it is with guilt, it cannot support a conclusion [of guilt]. In other words, you must accept that avenue that leads to innocence.

The inference of guilt must be clear, strong, and logical. It must naturally flow from the facts which have been proven and it must be consistent with all of those facts.

To justify a finding of guilt, the evidence must be such as to exclude to a reasonable doubt every reasonable hypothesis except that of guilt.

(T.1061). *See also People v. Sanchez*, 61 N.Y.2d 1022, 1024 (1984); *People v. Afrika*, 787 N.Y.S.2d 774 (4th Dep’t 2004).

48. The verdict that would necessarily flow from the jurors’ faithfully applying the law to this new DNA evidence is clear. For the jury could not, as a matter of law, convict Petitioner unless the People affirmatively disproved Petitioner’s “reasonable hypothesis” of innocence: that Barry Bench, and not Petitioner, deposited his DNA on Sabina Kulakowski’s nightshirt during the course of biting and murdering her. Mere conjecture about other ways that Mr. Bench’s saliva could possibly have been left on the nightshirt the victim happened to be wearing just prior to her violent death – if

the People even present such a theory – is, of course, legally insufficient to meet the People’s heavy burden of *conclusively rebutting*, beyond a reasonable doubt, Petitioner’s theory of innocence.

49. Moreover, the “new” evidence in support of this claim for relief is not limited to the new DNA test results (although they are, clearly, the primary basis for and vital to the instant motion). There are two other categories of evidence in support of this claim which were not available at trial, but which create a still greater likelihood that the jury, had it known of them, would harbor – at the very least – a reasonable doubt about Mr. Brown’s guilt.

50. First, there is the circumstantial evidence regarding Barry Bench’s conduct, which further supports a strong inference that the numerous stains containing DNA consistent with Mr. Bench’s was deposited during the homicide rather than on another occasion unrelated to the murder. This evidence includes, as noted above: (1) the contemporaneous statements of witnesses indicating suspicious conduct by Mr. Bench on the night of the murder (including the fact that his whereabouts were unaccounted for during a 60-75 minute time period directly coinciding with the estimated time of Ms. Kulakowski’s death); (2) a statement by the mother of his children, alleging that he was frequently physically abusive during their relationship, including at least one instance during which he bit her violently; and (3) last, but certainly not least, the fact and timing of Mr. Bench’s 2003 suicide – *i.e.*, within days of receipt of a letter from Petitioner, in which Petitioner urged Mr. Bench to confess to the crime, and specifically warned him of Petitioner’s intent to obtain a DNA test on evidence from the murder for the purpose of

scientifically exculpating Petitioner and inculpating Mr. Bench. *See* Def. Mem. of Law filed April 19, 2006 at pp. 5-6, 40-42, and Exh. A.

51. Second, the nearly fifteen years since Petitioner's trial has yielded significant new research indicating that the method of "bite mark" analysis conducted by the People's expert in 1991 (that is, comparison of Petitioner's dentition with two-dimensional photographs of tooth marks on pliable human skin) is insufficiently reliable to constitute proof of identity in a criminal proceeding. This research, which was in its infancy at the time of Petitioner's trial, has shown that the error rate in determining whether human bite marks on skin are consistent with a criminal suspect's dental impressions is extraordinarily and unacceptably high. *See generally* Def. Mem. of Law dated April 19, 2006 at pp.29-32. Indeed, reputable odontologists who conduct examinations in far more legitimate and accepted circumstances (for example, to compare the actual teeth of a decedent's remains against pre-existing dental X-rays) have, in recent years, publicly decried the errors and unreliability of the type of "bite mark" analysis used to convict Petitioner. Moreover, the years since trial have been accompanied by numerous highly-publicized cases from around the nation in which defendants who were convicted on the basis of "bite mark" testimony had their convictions reversed based upon new and exculpatory DNA evidence. *See, eg.,* Def. Mem. at 22, 29. No wonder the defense expert, even at the time of trial, sharply disputed the claim of the People's expert that the bite marks on the victim's body were "entirely consistent" with Mr. Brown's dentition, particularly since the most distinct bite mark showed indentations from six upper teeth, while Mr. Brown (missing two teeth) had only four.

52. As acknowledged by the People in earlier proceedings, the expert testimony regarding the alleged consistencies between the bite marks on the victim and Petitioner's teeth was absolutely critical to his 1992 conviction. *See People v. Brown*, Brief for Plaintiff-Respondent on Direct Appeal, May 4, 1993, at p.19 ("Indeed, it could be argued that apart from the unique bite mark evidence, the defendant's identity as the murderer *could not be conclusively established*") (emphasis supplied). Yet there now exists a wealth of data which, if known at trial, makes it doubtful that the expert testimony regarding the bite marks would have even satisfied the criteria for admissibility under *Frye v. United States*, 293 F.3d 1013 (1923). *See People v. Wesley*, 83 N.Y.2d 417, 422 (1994).

53. Even without this earlier concession by the People, it would be clear that the remaining evidence offered against Petitioner at trial surely cannot outweigh this array of new evidence. By no means is it of such a character that it conclusively defeats the substantial doubts about Petitioner's guilt that are engendered by the new DNA results and related evidence.

54. Indeed, each remaining item of evidence offered against Petitioner at trial is equally susceptible to a reasonable interpretation or defense that is entirely consistent with his claim of innocence. For example, the State's theory that Petitioner's motive for the murder was to retaliate against Ms. Kulakowski for the fact that his children were placed into temporary custody by D.S.S. was undermined by the undisputed, countervailing fact that the victim had no involvement with his children's case, nor was there any evidence that he had ever been in personal contact with her. The reliability of the jailhouse informant, Gordon Wiggins, is countered by (among other things) the fact

that Wiggins claimed that Petitioner “confessed” to him in a conversation occurring one month after Wiggins had previously made the same allegation to the grand jury, and by his flatly incredible claim that – although he “came forward” with this information only when under arrest himself on a weapons charge, and was never prosecuted for that charge -- he received no benefit whatsoever in exchange for his testimony in Petitioner’s case. Similarly, the claims of Petitioner’s two ex-wives were countered by an allegation by Petitioner (and the admission of at least one of the wives) that they testified falsely against him only out of fear that the County would take away custody of their children if they did not do so; Petitioner also countered the claim that he had given police a false alibi by asserting that, having had no involvement in the murder, he was confused about the date at issue at the time he was questioned.

55. Surely, even if the jury were to *suspect* that Petitioner might have committed the crime based on this evidence (and notwithstanding the new DNA evidence – a big “if”), the Court’s instruction requiring jurors to “accept that avenue that leads to innocence . . . [and] every reasonable hypothesis of innocence” would preclude a guilty verdict as a matter of law. At the very least, there is a reasonable *probability* of such an outcome – all that is needed to entitle Petitioner to relief on this motion.

Analogous Cases

56. Perhaps because the legal significance of DNA test results such as these is so self-evident, there are precious few reported decisions in this State or nationally in which courts have actually been required to rule on a contested motion for a new trial based upon such evidence. But this is not because DNA evidence has failed to have a profound impact on this State and nation’s criminal justice jurisprudence, or that

prosecuting attorneys and courts do not recognize the profound impact that exclusionary DNA evidence has on juries. Indeed, there are, at this writing, at least 188 individuals who have been conclusively exonerated by post-conviction DNA evidence; the overwhelming majority of these individuals had their convictions vacated, and indictments dismissed, with the consent of the prosecution. *See* www.innocenceproject.org/case/search_profiles.php (listing post-conviction DNA exonerations nationally, and summarizing history of each case).

57. Twenty-one of these exonerations occurred in New York. *See id.* In all twenty-one cases, the conviction was vacated in a motion under C.P.L. §440.10 that was joined and/or consented to by the People; and in all but one of these cases (John Kogut, Nassau County, who was acquitted at retrial in 2005), the People also moved to dismiss the defendants' underlying indictments. *See, e.g., People v. Wise*, 194 Misc.2d 481, 752 N.Y.S.2d 837 (2002); *People v. Dabbs*, 154 Misc.2d 671, 587 N.Y.S.2d 90 (1991). Upon information and belief, no defendant in New York State has ever filed and lost a motion under C.P.L. §440.10 (1-g) based upon exclusionary DNA test results on evidence relevant to the perpetrator's identity – particularly where, as here, the results not only exclude the defendant as the source, but were thereafter directly linked to an alternative suspect against whom other disturbing evidence also existed.

58. To the extent that analogous cases have been subject to contested litigation, the results from around the nation are also strongly supportive of Petitioner's claim. *See, e.g., State v. Armstrong*, 700 N.W.2d 98 (Wis. 2005) (ordering new trial for defendant convicted of murder on basis of DNA tests excluding him as source of semen stain and hairs recovered from victim's bathrobe); *People v. Starks*, 2006 WL 771969

(Ill. App. 2nd Dist. Mar.23, 2006) (ordering new trial for defendant convicted of sexual assault, after DNA test results excluded him from semen stain on victim's underwear); *People v. Bradford*, Case No. 96-1-00583-1 (Yakima (WA) Sup. Ct., October 25, 2006) (on file with counsel) (finding that evidence excluding defendant as source of DNA on adhesive tape used by rapist to cover up eyeholes of stocking mask he forced victim to wear would "probably change the result at retrial," in that jury could well find that "the person who prepared the mask is more likely than not the person who committed the crime"). Notably, in the aforementioned cases, the new DNA evidence raised sufficient doubts about the defendant's guilt as to warrant *vacatur* of the conviction, even though the male DNA detected on the victim's clothing at the crime scene had not – unlike here – also been linked to a specific individual whom the defendant had previously contended was the one who committed the crime.

WHEREFORE, Petitioner respectfully requests that this Court GRANT his Motion to Vacate Conviction and Sentence pursuant to N.Y. C.P.L. §440.10 (1-g), and immediately order that he be released from custody on his own recognizance pending further proceedings and/or dismissal of the underlying indictment. If the People do not join in the Petitioner's motion for relief, Petitioner requests this Court set a schedule for an evidentiary hearing, additional briefing, and oral argument on the Motion.

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