**POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S MOTION FOR DNA TESTING POST-CONVICTION**

##### State of California

##### March 2003

**ARGUMENT**

**DEFENDANT IS NOT ENTITLED TO DNA ANALYSIS OF EVIDENTIARY**

**MATERIAL IN THE INSTANT CASE**

 Defendant seeks post-conviction forensic DNA testing pursuant to newly effective Penal Code section 1405. Defendant’s motion for testing should be denied. The facts presented in the trial of the Defendant, a defendant also previously convicted of murder as a juvenile in an unprovoked murder, do not support his claim of self-defense and hence DNA typing is inappropriate.

 In addition, no potential biological evidence remains that can be examined, inasmuch as the Police Department has not retained any of the minimal blood evidence collected at the scene of the murder. Furthermore, no bloodstain evidence was admitted during the trial. As a result, the evidence, which Defendant seeks to test, no longer exists and is not available for testing. Finally, Defendant has failed to satisfy the statutory standard for such testing, which requires him to demonstrate a “reasonable probability that, in light of all the evidence,” his verdict or sentence “would” have been more favorable if the results of DNA testing had been available at the time of conviction.

 The Legislature recently enacted post-conviction DNA testing legislation (SB 1342;

Stats. 2000, ch. 821, effective Jan. 1, 2001.) Under new Penal Code section 1405, subd. (a)(1)(B), a person filing a motion for post-conviction DNA testing is required, inter alia, to explain in his motion “in light of all the evidence how the requested DNA testing would raise a reasonable probability that the convicted person’s verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.” (Emphasis added.)

 The court shall grant the motion for DNA testing if it determines that eight specific requirements have all been met, including:

“(5) The requested DNA testing would raise a reasonable probability that, in light of all the evidence, the convicted person’s verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was intro-

duced at trial.” (Pen. Code, § 1405, subd. (d)(5); emphasis added.)

 The showing made by the person seeking post-conviction DNA testing must be considered in light of “all the evidence,” including, of course, the evidence presented at trial. The statute effectively requires the court to balance the showing made by the convicted

person seeking DNA testing against the evidence of the person’s guilt in order to determine whether there is a “reasonable probability” that the convicted person’s verdict or sentence “would” have been different if the results of DNA testing had been available at the time of conviction.

 The statutory standard is substantial. The Legislature did not see fit, as it might have, to authorize post-conviction DNA testing in every case in which the convicted person requests it. Nor did the Legislature see fit to authorize post-conviction DNA testing when

there is only a “possibility,” or even a “reasonable possibility,” that the convicted person’s verdict or sentence might be changed.

 Instead, the Legislature selected a standard that requires the convicted person to demonstrate a “reasonable probability” that the convicted person’s verdict or sentence “would” – not just “might” or “could” – be changed if the results of DNA testing had been available at the time of the person’s conviction. The “reasonable probability” standard, in conjunction with the word “would,” means that a court considering such a motion must not assume the result of DNA testing would be exculpatory. Likewise, it is not sufficient for the court to conclude that because DNA testing “could” or “might” turn out to be exculpatory, and that there is no way to know unless the testing is first done, the statutory standard has been satisfied. If that were the case, post-conviction DNA testing would be required in nearly every case. If exculpatory

DNA testing results were to be assumed for purposes of ruling on the motion, it is apparent

that the statutory standard which requires the convicted person to demonstrate a “reasonable probability” that their verdict or sentence “would” be changed if the results of DNA testing

had been available is illusory and essentially meaningless.

 To the contrary, as the statute expressly states, a court must determine under

Penal Code section 1405, subdivision (d)(5), whether the convicted person has demonstrated a “reasonable probability” that DNA testing not available at the time of trial “would” change the verdict or sentence.

 The Legislature’s selection of the “reasonable probability” standard is advertent, and not a matter of happenstance. It is consistent with the proposition that post-conviction DNA testing should be reserved for those cases in which there is a “reasonable probability” that the DNA testing will conclusively resolve the identity or non-identity of the perpetrator –rather than simply providing additional evidence which may be either inculpatory or exculpatory or neutral.

 More importantly, the “reasonable probability” standard is well established in

the law and has been applied by the United States Supreme Court in related and analogous contexts involving the validity and integrity of the outcome at trial. It is the same standard

applied to assess a claim of ineffective assistance of counsel. In order to obtain relief on the ground of ineffective assistance of counsel, a defendant is required to demonstrate “a reasonable probability” that absent counsel’s unprofessional errors “the result of the proceeding would have been different.” (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Ibid*.) A verdict “only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” (*Id*. at p. 696.)

 The “reasonable probability” standard is also the same standard used by the United States Supreme Court to judge *Brady* claims of suppression of evidence. Evidence is material under *Brady v. Maryland* (1963) 373 U.S. 83, such that the failure to disclose it violates due process and the right to a fair trial,

“. . . only where there exists a ‘reasonable probability’ that had the evidence been disclosed the result at trial would have been different. (*Wood v. Bartholomew*, 516 U.S. 1, 5, 116 S. Ct. 7, 133 L.Ed.2d 1,

6 (1995) (per curiam) (emphasis added), citing *Kyles v. Whitley*,

514 U.S. 419, 433-434, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.).” (*Strickland v. Washington, supra,* 466 U.S. at p. 685 [White, J., concurring in part and concurring in judgment]; see also *Strickler v. Greene* (1999)

527 U.S. 263, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286.)

 *Brady* involves an analogous context to post-conviction DNA testing, in that both situations involve the absence of possible additional evidence, which it is alleged might have altered the outcome of the trial if it had been presented. Not every failure to disclose evidence – even evidence known to be exculpatory – satisfies the “reasonable probability” standard. Although the term “ ‘*Brady* violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence,” that is to “any suppression” of so-called *Brady* material, “strictly speaking, there is never a real ‘*Brady* violation’ unless the nondisclosure

was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” (*Strickler, supra*, 527 U.S. at \_\_\_, 119 S.Ct. at 1948; emphasis added; footnote omitted.)

 The United States Supreme Court has emphasized that a reasonable “possibility” the suppressed evidence might have produced a different result is insufficient to establish a “reasonable probability of a different result.” (*Strickler, supra*, 527 U.S. at \_\_\_, 119 S.Ct. at 1953, citing *Kyles*, 514 U.S. at 434 [emphasis by the Supreme Court in *Strickler*].) “The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” (*United States v. Agurs* (1976) 427 U.S. 97, 109-110; emphasis added.) Similarly, the mere “possibility” that DNA testing, had it been available at the time of trial, might have changed the outcome of the trial is insufficient to satisfy the reasonable probability standard adopted by the Legislature in Penal Code section 1405, subdivision (d)(5).

 In *Wood v. Bartholomew*, *supra*, the United States Supreme Court reversed the Court of Appeals because its judgment finding a *Brady* violation was “based on mere speculation, in violation of the standards we have established.” (*Id.* at p. 6; emphasis added.) Most recently, in *Strickler v. Greene*, *supra*, 527 U.S. at p. \_\_\_, 119 S.Ct. at p. 1953, the United States Supreme Court held that evidence is not material if there is only “a reasonable possibil-ity that either a total, or just a substantial, discount of [a witness’s] testimony might have

produced a different result.” (Emphasis by the Supreme Court; cf. *Kyles v. Whitley*, *supra*,

514 U.S. at 422, n. 1 [“There is nothing speculative, however, about Kyles’ *Brady* claim.”;

emphasis added].)

 The question under *Brady’s* “reasonable probability” standard is whether the

favorable evidence not presented to the jury “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” (*Strickler,* *supra*, 527 U.S. at \_\_\_, 119 S.Ct. at p. 1952; emphasis added; citing *Kyles*, 514 U.S. at p. 435.) With respect

to post-conviction DNA testing, we submit the proper corresponding inquiry, under Penal Code section 1405, subdivision (d)(5), is whether “in light of all the evidence,” there is a “reasonable probability” (not just a “reasonable possibility”) that DNA testing “would” (not just “might”

or “could”) “put the whole case in such a different light as to undermine confidence in the

verdict.” (*Strickler*, *supra*, 527 U.S. at \_\_\_, 119 S.Ct. at p. 1952; emphasis added.)

 The “reasonable probability” standard was also applied by the United States

Supreme Court in *Boyde v. California* (1990) 494 U.S. 370. In order to establish that an

ambiguous instruction, which is subject to an erroneous interpretation which violates the

defendant’s constitutional rights, a defendant “need not establish” that the jury was “more likely than not” to have been impermissibly inhibited by the instruction, but the defendant

must establish a “reasonable likelihood” that the jury has applied the challenged instruction in

a way that prevents the consideration of constitutionally relevant evidence.” (*Id*. at p. 380.)

In reaching this conclusion, the United States Supreme Court significantly observed:

 “In other contexts, we have held that a defendant cannot

establish a constitutional violation by demonstrating that an alleged trial-related error could or might have affected the jury. To establish that ineffective assistance of counsel violates the Sixth Amendment, for example, a defendant must show a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). Deportation of potential defense witnesses does not violate due process unless ‘there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.’ *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 874 (1982). And failure of the prosecution to disclose allegedly exculpatory evidence to the defense violates due process ‘only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ *United States* v. *Bagley*, 473 U.S. 667, 682 (1985). To receive a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence would more likely than not lead to a different outcome. See *INS* v. *Abudu*, 485 U.S. 94, 107, n. 12 (1988).” (*Boyde*, *supra,*

494 U.S. at pp. 380-381, n. 4.)

 The “reasonable probability” standard is also the familiar standard which has long been the prejudicial error standard in this state. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837; see e.g. *People v. Staffiero*, *supra*, 53 Cal.2d at 823 [no “reasonable probability” that a more favorable verdict would have been returned absent the alleged error]; *People v. Boyde,* *supra,* 46 Cal.3d at p. 242 [no “reasonable probability” Boyde would have obtained a more

favorable result had certain evidence been excluded].) In *Watson*, the California Supreme Court emphasized that the test of prejudicial error “must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated.” (*People v. Watson*, *supra*, 46 Cal.2d at p. 837; emphasis added.) Whether to hold a hearing on the motion is discretionary with the trial court. (Pen. Code, § 1405, subd. (b) [the trial court, “in its discretion, may” order a hearing on the motion].)

INSERT FACTUAL ARGUMENT

 As noted previously, no potential blood evidence remains that can be examined since the Police Department has not retained any of the minimal blood evidence collected at the scene of the murder and none was admitted into evidence during the trial. Notwithstanding that fact, Defendant has failed to demonstrate a reasonable probability that his verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction, even if that evidence still existed.

CONCLUSION

 Accordingly, for the above reasons, it is respectfully requested that defendant’s motion to exclude evidence be denied.

 Dated:

 Respectfully submitted,

 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Deputy District Attorney