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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SANTA CLARA

11 In re Bulos Zumot,

12  
13 Petitioner,

14 On Habeas Corpus.

No. H040124  
BB943863

**NOTICE OF MOTION AND MOTION  
FOR EVIDENTIARY HEARING RE:  
POSSIBLE PROSECUTORIAL  
MISCONDUCT**

Date: July 22, 2014

Time: 9:00 a.m.

Court: Dept. 42, Hon. David A. Cena

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20 PLEASE TAKE NOTICE that on the above-stated date and time, or as soon as the matter  
21 may be heard before the Honorable David A. Cena, petitioner Bulos Zumot will and hereby does  
22 move the Court for an order setting an evidentiary hearing to determine the facts and  
23 circumstances surrounding the apparent submission of false and misleading statements to the  
24 Court of Appeal in this matter. This motion will be based on the instant notice, the attached  
25 memorandum of points and authorities, the concurrently-submitted declaration of counsel, the  
26 files and records in this case, and upon such argument as may be presented at the hearing.  
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1           However, it is not just that the State failed to inform the Court of Appeal and the  
2 defendant about what it knew about the source of the August 24 call. The State also withheld  
3 exculpatory information that undermined testimony offered at trial about other threats Ms.  
4 Schipsi had received. When Mr. Endemann spoke with Detective Sunseri, he admitted that he  
5 had on multiple occasions called Ms. Schipsi from a blocked line and that he had done so to help  
6 create false evidence that those calls had come from Mr. Zumot. The revelation that Ms. Schipsi  
7 had coordinated with Mr. Endemann in creating false evidence to incriminate Mr. Zumot casts  
8 doubt on the veracity of evidence that Mr. Zumot had threatened Ms. Schipsi. This information,  
9 central to the issues the State argued in its opposition, was concealed from the Court of Appeal.  
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11           Indeed, it was only after the Court of Appeal granted the order to show cause the matter  
12 was proceeding to hearing that the State produced the Endemann recording. And it was then that  
13 petitioner's counsel learned the District Attorney's Office had directed this interview take place,  
14 they had been informed of the interview after it was completed, and that no written report of the  
15 interview was ever made.  
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17           Mr. Zumot respectfully requests an evidentiary hearing to learn the circumstances  
18 surrounding the State's false and misleading argument to the Court of Appeal so that if  
19 misconduct occurred, the Court can craft an appropriate remedy.  
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## 21       **II.       FACTUAL BACKGROUND**

### 22           **A.       Relevant Allegations in the Petition**

23           On September 13, 2013, petitioner Bulos Zumot filed a petition for habeas corpus raising  
24 two claims for relief based on the State's presentation of false evidence at trial. One of the  
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1 claims involved an August 24, 2009 telephone call.<sup>1</sup> At trial, the prosecution presented evidence  
2 that Ms. Schipsi told police she had received a call from a blocked number on August 24, 2009.  
3 She told police the caller was Mr. Zumot and that he threatened to kill her. The prosecution also  
4 presented evidence from Leslie Mills, who testified that Ms. Schipsi told her on August 24 that  
5 Mr. Zumot had threatened to kill her and burn her house down. Mr. Zumot, who testified at trial,  
6 denied making the call. The prosecution argued that this telephone call showed Mr. Zumot  
7 intended to kill Ms. Schipsi. (*See* Petition at 20-21.)

9 After trial, habeas counsel obtained a police report showing Ms. Schipsi reported the  
10 threatening call as having been made at 12:50 p.m. (*Id.* at 21.) Ms. Schipsi's telephone records  
11 reveal that she did receive a blocked call at 12:50 p.m. and that she called the Palo Alto police  
12 department immediately afterwards, at 12:51 p.m. However, the records also reveal that the  
13 blocked call did not come from Mr. Zumot but from the telephone of Roy Endemann. Roy  
14 Endemann's telephone records show that at 12:50 p.m., he called Ms. Schipsi's telephone. Prior  
15 to dialing her number, he dialed the digits \*67, which is how callers block their number from  
16 appearing on the screen of the person they are calling. (*Id.* at 22-24.) Thus, petitioner argued,  
17 the State's argument and evidence that Mr. Zumot called Ms. Schipsi on August 24 and  
18 threatened to kill her were false.

21 The State's response to the petition was originally due on October 9, 2009. On October  
22 7, the State requested a 30-day extension of the deadline. The Court of Appeal set the deadline  
23 for November 4, 2009.

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26 <sup>1</sup> The other claim for relief presented the petition is not directly relevant to this motion. Briefly  
27 stated, it concerns the prosecution's presentation of false evidence in using surveillance footage  
28 to refute Mr. Zumot's alibi defense.

1           **B.       The State’s Interview with Roy Endemann**

2           Sometime on or before October 14, 2013, Deputy District Attorney Charles Gillingham,  
3 the prosecutor who tried the Zumot case, instructed Detective Aaron Sunseri of the Palo Alto  
4 Police Department to interview Roy Endemann concerning the allegations made in the petition  
5 about the August 24 telephone call. (Swanson Decl., ¶ 3.) On October 14, Detective Sunseri  
6 met with Roy Endemann at the Palo Alto Police Department. During the interview, Mr.  
7 Endemann admitted repeatedly calling Ms. Schipsi’s telephone using a blocked number. He  
8 explained that the purpose of these calls, which were made at Ms. Schipsi’s direction, was to  
9 fabricate evidence in support of an application for a temporary restraining order:  
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11           Endemann: Well at one point I remember that Jennifer was trying to file a, um,  
12 like an emergency order – stay away order.

13           Sunseri: Okay.

14           Endemann: And he had already been, um, around that time, calling a lot – calling  
15 her a lot. And so, um, she was having me call from a blocked number so then it  
16 looked like she had more blocked calls.

17           ...

18           Sunseri: Do you remember how many times that happened?

19           Endemann: Um, I don’t remember exactly how many times that happened. But,  
20 um, I do remember doing it at some point. I do remember doing it and even I  
21 remember like calling – just calling her from a blocked number and then calling  
22 her like from my regular number or whatever. Or just talking to her, being like,  
23 you know, she – or she’d be like oh why did you call me from a blocked number?  
24 And then I’d be like, oh, because I wanted to put more blocked numbers.

25           Sunseri: Okay so did you, uh –

26           Endemann: Cause I know that she was trying to make sure that they gave her the  
27 stay away order. . . . Then the – at the point I think the only – for some reason,  
28 the only way that it would be good is if she had more blocked calls.

1 Sunseri: Is this something she specifically asked you to do or something you did  
2 on your own?

3 Endemann: No, yeah, well, I mean it was something that she wanted me to do.

4 Sunseri: Okay. Do you remember how many times that happened?

5 Endemann: I don't.

6 Sunseri: But was it more than once?

7 Endemann: Um, yeah, I'm sure it was more than once[.]

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9 (Endemann interview [Exhibit A to Swanson Decl.], at 6-7.) Although Mr. Endemann could not  
10 specifically recall August 24, 2009, he stated that the call on that day was "probably" from him:

11 Sunseri: So do you remember on that day, the 24th of August, if you called her  
12 from a private number for the purposes of making it look like she was getting  
13 harassing phone calls from Paul?

14 Endemann: I'd say yeah. I mean, I couldn't really guarantee if it was actually that  
15 day, but I know all that stuff was kind of going on around that time. And if the  
16 last date of the – If the date of her filing that stay away order is really close to that  
or like right after that happened, within like a couple of days, then, um, I would  
say probably.

17 (*Id.* at 9.) Mr. Endemann denied threatening Ms. Schipsi in the August 24 call. (*Id.* at 13.)

18 Detective Sunseri told undersigned counsel that he did not prepare a report of the  
19 interview. However, he did discuss the interview with DDA Gillingham. (Swanson Decl., ¶ 3.)

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21 **C. Relevant Arguments in the State's Opposition to the Petition**

22 On November 4, 2013, three weeks after interviewing Endemann, the State (through the  
23 Attorney General's office) filed its opposition to the petition. With respect to the August 24 call,  
24 the State argued that petitioner had failed to present a *prima facie* case that the evidence  
25 presented about that call was false. Specifically, the State argued, there was no evidence that Mr.  
26 Zumot did not use *Mr. Endemann's* telephone to make the blocked call:  
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1 Petitioner also fails to establish the prosecutor presented false evidence that  
2 petitioner made the phone call threatening Jennifer’s life on August 24, 2009. . . .  
3 Even assuming petitioner's factual allegations are true, at most, they establish the  
4 threatening phone call was made from Roy's phone, not that petitioner did not  
5 make the call. Petitioner does not allege and presents no evidence that Roy had  
6 exclusive use of or access to his phone at 12:50 p.m. on August 24, 2009.  
7 Petitioner does not even present a hearsay assertion that Roy admitted making the  
8 call, much less a declaration from Roy. Accordingly, petitioner fails to establish a  
9 prima facie case that evidence of the threatening phone call presented by the  
10 prosecutor was false.

11 (Opposition to Petition for Writ of Habeas Corpus, at 10-11 [record citations omitted].)

12 Similarly, in arguing that Mr. Zumot’s trial counsel was not ineffective for failure to  
13 present evidence that the call came from Mr. Endemann’s telephone, the State argued that “it is  
14 entirely plausible that trial counsel did not introduce Roy’s records into evidence because he  
15 learned that Roy did not in fact make the August 24 phone call. . . . [F]or all the record shows,  
16 counsel knew petitioner had borrowed Roy’s phone and used it to make the call.” (*Id.* at 23.)

17 The State also claimed the newly-discovered information about the August 24 call was  
18 immaterial. This was because other evidence “overwhelmingly established petitioner’s guilt,”  
19 including “extensive evidence of Jennifer’s fear that petitioner would ultimately kill her.” (*Id.* at  
20 15; *see also id.* at 2 [describing other evidence of purported threats], *id.* at 24 [claiming  
21 “overwhelming evidence of . . . intent to kill”].)

22 The State asked, on the basis of these and other arguments, that the petition be summarily  
23 denied. (*Id.* at 24.) The State did not mention the October 2013 Endemann interview or discuss  
24 any information Mr. Endemann had provided.

#### 25 **D. The State’s Disclosure of the Endemann Interview**

26 On December 12, 2013, the Court of Appeal issued an order to show cause returnable to  
27 this Court. On March 14, 2014, the Court granted the State’s request for an extension of that  
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1 deadline, making the State's return due June 13, 2014. On May 5, 2014, the State informed  
2 undersigned counsel that Mr. Endemann had been interviewed. On May 12, the State finally sent  
3 undersigned counsel a recording of the interview it had conducted with Mr. Endemann seven  
4 months earlier. (Swanson Decl., ¶ 2.) Because the recording did not appear complete, counsel  
5 requested any further recordings. (*Id.* at ¶ 4.) On May 28, 2014, the State sent a more complete  
6 recording of the same interview, although the recording still appears somewhat incomplete. (*Id.*)  
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### 8 **III. ARGUMENT**

#### 9 **A. The Significance of the State's Arguments in Opposing the Petition**

10 Having learned from Mr. Zumot's petition that telephone records contradicted the  
11 prosecution's argument at trial about who called Ms. Schipsi on August 24, the State interviewed  
12 Roy Endemann. Mr. Endemann said he had made numerous blocked calls to Ms. Schipsi and  
13 that although he could not specifically recall the August 24 call, it was likely him. At no point  
14 did Mr. Endemann suggest Mr. Zumot may have used his (Endemann's) telephone to call Ms.  
15 Schipsi. The State then filed an opposition brief in which it did not mention the Endemann  
16 interview, did not mention his admission that he likely made the August 24 call, and did not  
17 mention that he had made numerous blocked calls to Ms. Schipsi at her request. The State's  
18 arguments were at best incorrect and at worst intentionally misleading, in two respects.  
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21 First, the State argued that there was no evidence Mr. Endemann had made the August 24  
22 call, criticized Mr. Zumot for failing to "even present a hearsay assertion that Roy admitted  
23 making the call," and even suggested trial counsel knew Mr. Zumot had used Mr. Endemann's  
24 telephone to threaten Ms. Schipsi. The evidence the State failed to disclose directly refutes the  
25 theory it chose to espouse about who made the blocked call.  
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1 Second, the Endemann interview contradicts another key argument by the State: that  
2 there was overwhelming evidence that Ms. Schipsi had been repeatedly threatened by Mr.  
3 Zumot. Exculpatory evidence the State failed disclose shows that Ms. Schipsi (acting in concert  
4 with Mr. Endemann) *fabricated* evidence to incriminate Mr. Zumot, casting serious doubt on this  
5 claim.  
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7 The State's goal in its opposition brief was to convince the court of appeal to summarily  
8 deny the petition. If the State had succeeded, there would have been no hearing. If there had  
9 been no hearing, presumably the State would not have turned over the recording of the October  
10 2013 interview; it is hard to imagine that, if the State did not feel it necessary to turn over the  
11 recording when the contents of the recording were directly relevant to issues pending before the  
12 Court of Appeal, it would have felt obligated to produce it when that court had denied the  
13 petition. As a result, had the State prevailed based on its misleading presentation, petitioner  
14 would presumably never have learned that Mr. Endemann admitted making the August 24 call  
15 and never have learned of evidence that significantly undercut the State's argument that Mr.  
16 Zumot had repeatedly threatened Ms. Schipsi. Thus, the result – if the Court of Appeal had  
17 granted the State's request – could have been the suppression (likely permanently) of evidence  
18 favorable to the accused.  
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21 **B. Matters for Determination at the Hearing**

22 Mr. Zumot seeks an evidentiary hearing to determine the circumstances surrounding the  
23 State's failure to disclose the Endemann interview to the Court of Appeal and to petitioner. For  
24 example, Mr. Zumot and the Court should be entitled to learn who at the District Attorney's  
25 Office knew of the petition's allegations regarding the August 24 telephone call; why DDA  
26 Gillingham directed Detective Sunseri to interview Roy Endemann; whether and when the  
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1 Attorney General's office was involved in or aware of the interview request; why Detective  
2 Sunseri did not prepare a report of that interview; who at the District Attorney's office knew  
3 what Mr. Endemann told Det. Sunseri; and whether and when the Attorney General's office  
4 learned what Mr. Endemann said in his interview. Following that hearing and the determination  
5 of the relevant facts, the parties and the Court can determine what remedy, if any, lies for the  
6 State's conduct.  
7

8 **IV. CONCLUSION**

9 Based on the foregoing, Mr. Zumot respectfully requests that the Court set an evidentiary  
10 hearing to inquire in the possible prosecutorial misconduct evidenced by the Endemann  
11 interview and the State's brief in opposition to Mr. Zumot's habeas petition.  
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14 Dated: June 12, 2014

Respectfully submitted



Edward W. Swanson  
August Gugelmann  
SWANSON & McNAMARA LLP  
Attorneys for Bulos Zumot

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**PROOF OF SERVICE**

I, the undersigned, certify that I am a citizen of the United States, over the age of eighteen years, and not a party to the within cause; I am employed in the City and County of San Francisco, State of California; my business address is 300 Montgomery Street, Suite 1100, San Francisco, CA 94104.

On this date, I caused to be served on the interested parties hereto, a copy of:


**MOTION FOR EVIDENTIARY HEARING RE: POSSIBLE PROSECUTORIAL MISCONDUCT**

**DECLARATION OF EDWARD W. SWANSON IN SUPPORT OF MOTION FOR EVIDENTIARY HEARING**

- (X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as set forth below.
- ( ) By personally delivering a true copy thereof to the person set forth below, and/or the office of the person at the address set forth below.
- ( ) By delivering a true copy thereof to "Federal Express" to be delivered to the person at the address set forth below.
- ( ) By serving a true copy by facsimile to the person and/or office of the person at the address set forth below.

Kaci Lopez  
Santa Clara County District Attorney's Office  
70 West Hedding Street, West Wing  
San Jose, CA 95110

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this certificate has been executed on June 12, 2014 at San Francisco, California.

  
\_\_\_\_\_  
Alex Barkett