**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SANTA CLARA**

| | |
|---|---|
| In re<br><br>[INSERT NAME],<br><br>On Habeas Corpus<br>_____/ | _____<br>**(Related Proceedings-- Santa Clara County Sup. Ct. No. C0000000; Sixth District Court of Appeal No. H000000)** |
| | |

**PETITION FOR WRIT OF HABEAS CORPUS**

FROM JUDGMENT OF THE SANTA CLARA COUNTY SUPERIOR COURT
HONORABLE ROBERT P. AHERN, JUDGE PRESIDING

[NAME]

P00000, I1-000 up
California Medical Facility
P.O. Box 0000
Vacaville, CA 95696

In Propria Persona

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SIXTH APPELLATE DISTRICT**

| | |
|---|---|
| In re<br><br>[INSERT NAME],<br><br>On Habeas Corpus<br>_____/ | _____<br><br>**(Santa Clara County Sup. Ct. No. C00000000)** |
| | |

**PETITION FOR WRIT OF HABEAS CORPUS**

**TO THE HONORABLE PRESIDING JUDGE AND THE JUDGES OF THE SUPERIOR COURT OF STATE OF CALIFORNIA, COUNTY OF SANTA CLARA:**

Petitioner [INSERT NAME] hereby petitions this court for a writ of habeas corpus and by this verified petition sets forth the following facts and cause for the issuance of the writ.

**I**.

Petitioner was the named defendant in the criminal action entitled "The People of the State of California, Plaintiff, v. [INSERT NAME]," Superior Court of Santa Clara County case No. C9884181. Petitioner is presently unlawfully confined and restrained of his liberty by the Director of the California Department of Corrections, at Vacaville Medical Facility, Vacaville, California, serving a sentence of 16-years-to-life pursuant to the judgment entered on June 00, 1999 (Honorable Robert P. Ahern, Judge presiding), following his conviction by a jury of second degree murder in violation of Penal Code section 187, and true finding as to the allegation that

petitioner personally used a deadly weapon (a knife) during the commission of the offense. (C.T. 251-252.)[1]/

**II.**

This Petition is being filed in this Court pursuant to its original habeas corpus jurisdiction. (California Constitution, article VI, section 10.)

**III.**

Petitioner appealed his conviction to the California Court of Appeal, Sixth Appellate District, (People v. [INSERT NAME], 6 Crim. No. H020276). Petitioner was represented in that proceeding by court-appointed counsel, Attorney [NAME],[ADDRESS]. In that appeal, petitioner sought reversal of his life sentence on four separate grounds: (1) The trial court erred in excluding cultural evidence and giving incomplete instructions on the issue whether there was adequate provocation to mitigate the offense from murder to manslaughter; (2) Trial counsel was constitutionally ineffective in failing to request a modification of the standard instructions on manslaughter to require the jury to consider cultural evidence in determining the legal adequacy of provocation; (3) The trial court's refusal to allow petitioner to testify in English violated petitioner's constitutional right to testify in his own defense; and, (4) The trial court committed prejudicial error in failing to instruct sua sponte on the defense of unconsciousness. The Court of Appeal issued its written opinion affirming the judgment on February 16, 2001. Petitioner subsequently petitioned for rehearing in the Court of Appeal which petition was denied. Petitioner sought review in the California Supreme Court (No. S000000), and the petition for review was denied. The remittitur on appeal was issued on May 21, 2001, and the appeal became final at that time.

**IV.**

Concurrently with the appeal, petitioner, by and through his counsel [NAME], brought a petition for writ of habeas corpus in the Court of Appeal (No. H000000) on January 17, 2001.

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[1]The conventional designations "C.T." and "R.T." are utilized herein when referring to the Clerk's Transcript and Reporter's Transcript on Appeal.

The writ alleged the following grounds for relief: (1) The intimidation of the defense cultural expert by elders belonging to the victim's Oromo/Muslim community deprived petitioner of due process of law and a fair trial under the fifth, Sixth and Fourteenth Amendments to the federal Constitution and article I, section 15 of the California Constitution; (2) The trial court's rejection of petitioner's request to testify in English rather than Amharic deprived petitioner of his constitutional rights to testify in his own defense, due process of law, to present a full defense, and his Fifth Amendment privilege against self-incrimination; (3) Petitioner was deprived of his Sixth Amendment right to effective assistance of counsel. On January 26, 2001, the Court of Appeal issued the following order: "The court requests that the People serve and file on or before February 13, 2001, an informal response to the petition for writ of habeas corpus." After receiving extensions of time, the People filed an informal response on April 26, 2001. (Exh. 27.) Petitioner filed his informal reply on May 31, 2001. (Exh. 28.) On June 20, 2001, the Court of Appeal denied the petition without prejudice to refiling the petition in the Superior Court. (See Exhibit 25.)

**V.**

This petition for writ of habeas corpus is being filed to establish through evidence partly outside the appellate record before the Court of Appeal in People v. [INSERT NAME] (H020276; H022485), namely the declarations of petitioner, petitioner's trial counsel, [NAME], [NAME] ( [NAME] supervisor at Public Defender's Office), student intern, [NAME], [NAME] ( [NAME]'s cousin), [NAME] ( [NAME]'s Uncle), [NAME], petitioner's counsel, [NAME], and Professor [NAME] (cultural anthropologist), that petitioner was deprived of the following state and federal rights guaranteed by the Constitutions of the United States and California and by federal law: (1) petitioner's constitutional right to due process of law under the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution, and article I, section 15 of the California Constitution, in that petitioner was deprived of a fair trial because of the intimidation of the defense cultural expert by elders belonging to the victim's and defense expert's Oromo community; (2) the constitutional right to testify in his own defense under the Fifth and Sixth

Amendments because the court refused to allow him to testify in English; and (3) effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution. (See People v. Pope (1979) 23 Cal.3d 412, 426, fn. 7; People v. Fosselman (1983) 33 Cal.3d 572, 581-582; Strickland v. Washington (1984) 466 U.S. 668, 684-687; People v. Ledesma (1987) 43 Cal.3d 171, 215-218.) Accordingly, consideration of petitioner's claim for relief necessarily includes all matters of record on appeal in action (H000000), and the decisions and orders rendered by the Court of Appeal. Petitioner has lodged with the court the record on appeal consisting of a one-volume Clerk's Transcript and a three-volume Reporter's Transcript as well as a set of exhibits. Petitioner requests that this court take judicial notice thereof pursuant to Evidence Code sections 452, subdivision (d), and 459, subdivision (a) the order of the Court of Appeal filed June 20, 2001 directing that this petition for writ of habeas corpus be brought in the Superior Court. This petition is also based upon the above-named declarations; and the petition is further supported by the factual allegations in this petition and accompanying points and authorities in support of the within Petition for Writ of Habeas Corpus. Petitioner incorporates in this petition as more fully set forth herein each and all of the items mentioned in this paragraph as supporting his claim for relief.

**VI.**

Petitioner suffers from illegal restraint on the grounds that his defense expert was intimidated which deprived him of his due process right to a fair trial under the Fifth and Fourteenth Amendments. Petitioner also suffers from illegal restraint on the grounds that he was denied his Fifth and Sixth Amendment right to testify in his own defense when the trial court refused to allow him to testify in the English language. Lastly, petitioner suffers illegal restraint on the grounds that he was deprived of his federal and state constitutional rights to the effective assistance of counsel on four separate grounds: (1) the defense cultural expert was ineffective and burdened by a conflict of interest; (2) trial counsel failed to request an instruction (mandated by the federal and state guarantees of equal protection and existing California law) informing the jury that it must consider petitioner’s cultural background in determining whether he acted in the

heat of passion upon sufficient provocation (the instruction counsel should have requested can be found in Forecite, F 8.42e); (3) trial counsel failed to conduct an adequate investigation and to call logical witnesses in support of the defense; and (4) trial counsel presented an undeveloped and inadequate cultural defense.

**VII.**

The contentions in support of this Petition are fully set forth in the accompanying Memorandum of Points and Authorities, documentary evidence contained in the attached Exhibits, and the Declarations of petitioner, [NAME], [NAME], [NAME], [NAME].

**VIII.**

Petitioner has no other plain, speedy or adequate remedy at law to seek reversal of the judgment based on the denial of his constitutional rights to testify, due process of law, and to the effective assistance of counsel. The grounds urged herein for relief could not be briefed on direct appeal because the crucial facts necessary to determine petitioner's claim were not a part of the record in petitioner's pending case, People v. [NAME], 6 Crim. H000000. Further, the Court of Appeal directed that this petition be filed in the Superior Court.

**IX.**

No other petitions for extraordinary relief raising the same grounds have been considered on the merits by any court.

WHEREFORE, petitioner respectfully prays:

1. That this court take judicial notice of the clerk's transcripts, reporter's transcripts, filed in People v. [NAME], 6 Crim. H000000; the opinion of the Court of Appeal in case no. H000000 (Exh. 29); the briefs filed in the Court of Appeal in the habeas proceeding (H000000); the order of the Court of Appeal issued June 20, 2001 directing petitioner to file this petition in the Superior Court (Exh. 25;

2. That this court issue its Order to Show Cause to the Director of the Department of Corrections to inquire into the legality of Petitioner’s present confinement; 3. If this Court concludes an evidentiary hearing is required in this matter, order a hearing to be held;

4. After a full hearing, issue the writ, vacating the judgment of conviction with instructions to grant Petitioner a new trial;

5. And for such other and additional relief as this court may deem just and proper.

DATED: _____, 2001

Respectfully submitted,

[NAME]
In Propria Persona

**VERIFICATION**

STATE OF CALIFORNIA )
) ss.
COUNTY OF MONTEREY )

I, [NAME], declare as follows:

I am the petitioner in the above-entitled action. I have read the foregoing Petition for Writ of Habeas Corpus and verify that all the facts alleged therein not otherwise supported by citations to the record are true and are supported by the attached declarations.

I declare under penalty of perjury that the foregoing is true and correct

Executed this _____ day of _____, 2001, at Vacaville, California.

_____
[NAME]

## STATEMENT OF THE FACTS

### A. Facts Established by Trial Record

Prosecution Evidence

The Incident

On May 1, 1998, Officer [NAME] was dispatched to [ADDRESS] at 6:19 a.m. after neighbors reported hearing a woman screaming. Officer [NAME] and other officers knocked on the door to apartment 12 and announced that they were police officers. Upon getting no response, one officer used his knife to cut the screen to the window and reached in and unlocked the door. In the kitchen was the dead body of a woman lying on her back somewhat propped up against the stove. The woman had been stabbed numerous times with several kitchen steak knives. Broken steak knives lay scattered about the kitchen. (R.T. 89-93.) A broken knife blade protruded from the victim's clothing by the left elbow. (R.T. 115.) A drawer in the kitchen was open and there were blood drops on the inside of the drawer. (R.T. 106-118.)

[INSERT NAME] was flat on the floor in the living room in a pool of his own vomit writhing with pain. (R.T. 80-88.) A kitchen knife was underneath his legs. He had slashed his wrist. There was also a strong odor of Liquid Draino in the air. Officer [NAME] told [NAME] it appeared as though he was going to die and asked him what happened. [NAME] said "Finish me." He said this three times. [NAME] repeated his question and after a minute or so [NAME] answered, "I killed her." [NAME] asked him why and he said, "She betrayed me." [NAME] asked additional questions but [NAME] was not responding. (R.T. 94-106, 109.)

[NAME] met [NAME] in Ethiopia. They worked together at Care International for five to six years. [NAME] and [NAME] were married in Ethiopia. In the beginning of 1996, a year or so after their marriage, [NAME] and [NAME] emigrated to the United States. They settled in Atlanta, Georgia. [NAME] emigrated to the United States with her husband in the later part of 1996. [NAME] eventually settled in San Jose in the latter part of 1997. [NAME] spoke with [NAME] and [NAME] by telephone on a weekly basis. In December 1997, [NAME] told

[NAME] that she did not want to live with [NAME] anymore. (R.T. 147-157.) This was surprising to [NAME] because she had never observed any problems in [NAME]'s and [NAME]'s marriage. [NAME] gave no reason for wanting to leave. About 15 days later, [NAME] called [NAME] and told her she was leaving [NAME] and coming to San Jose to stay with [NAME]. [NAME] moved in with [NAME] around Christmas time in 1997. [NAME] did not tell [NAME] she was leaving. [NAME] asked [NAME] not to tell [NAME] where she was. (R.T. 161-163, 171-179.)

[NAME] called [NAME] repeatedly over the next several days inquiring about [NAME]. Eventually, [NAME] could not continue with the subterfuge and handed the phone to [NAME] and told her to speak to [NAME]. [NAME] and [NAME] reconciled and [NAME] moved to San Jose about a month later. [NAME] and [NAME] were working at Atmel in San Jose. During the last week of April 1998, [NAME] told [NAME] that she did not want to live with [NAME] anymore. [NAME] asked [NAME] to intervene and speak with [NAME]. [NAME] told [NAME] that he and [NAME] were not speaking to each other. [NAME] was humiliated by this silence especially when it occurred in front of his Ethiopian co-workers. (R.T. 164-184.)

[NAME], [NAME] and [NAME] had lunch together on Wednesday, the 29th of April. [NAME] did not go to work that day. [NAME] spoke with [NAME] and [NAME] again on the next evening. [NAME] did not go to work that day either. (R.T. 164-171.)

Defense Case

[INSERT NAME] testified that he was born in Ethiopia on January 1, 1967. He earned a degree in physics and went to work for Care International Relief Organization on October 5, 1990. [NAME] came to work for Care in 1991 and [NAME] was her supervisor. They became boyfriend and girlfriend. In 1996, [NAME] and [NAME] applied for the Visa lottery to emigrate to the United States. [NAME]'s name was selected. [NAME] and [NAME] were married and then emigrated to Atlanta, Georgia in 1996. (R.T. 192-195.)

[NAME] had no friends or family in Atlanta. [NAME] and [NAME] lived with their sponsor (a family relation to [NAME]) for the first three months and then got an apartment of their own.

When [NAME] came home from work and found that [NAME] had left him he was very upset. She left a note saying that she was visiting a friend whose father had just died but she left no phone number. [NAME] made inquiries and the sponsor told him that [NAME] had left Atlanta. [NAME] blamed himself. He thought [NAME] had left because he would not convert to Islam. [NAME] was Christian and [NAME] Muslim. He was confused and frustrated. (R.T. 197-200, 223, 237-238, 268.)

[NAME] became suicidal. He eventually found out through [NAME] that [NAME] was staying with her. [NAME] moved to San Jose at the end of January 1998 and got a job at Atmel where [NAME] was working. All seemed well until Tuesday, April 28th when [NAME] told him that she wanted him to move out. He became depressed and stayed home from work. He threatened to drink Liquid Draino if [NAME] left him. [NAME] took the chemical away from him. He suffered from insomnia. (R.T. 209-212, 240-243.)

On Wednesday, April 29th, [NAME] again tried to convince [NAME] to stay with him. [NAME] joined them for lunch and they discussed their difficulties. On Thursday, [NAME] stayed home from work. (R.T. 243-244.)

[NAME] lay awake when [NAME] arrived home from work at about 5:25 a.m. on Friday, May 1, 1998. She asked him why he wasn't working. They began arguing in the kitchen. [NAME] accused [NAME] of being a loafer. [NAME] responded that this was the first time he had ever missed any work. [NAME] demanded that [NAME] leave; she wanted him out of her sight. [NAME] begged her to let him stay at which time [NAME] spit in his face. [NAME] told her not to spit on him but she continued to do so. [NAME] was crying. The spitting made him feel worthless. It was an extreme insult to be spit on in Ethiopia. It meant you were no better than garbage. [NAME] grabbed something and stretched his hand toward [NAME] a couple of times as she was coming toward him. He did not remember picking up a

knife. He helped [NAME] to the floor and then saw the blood. (R.T. 212-215, 219-221.) [NAME] did not remember holding the knife under [NAME]'s chin or against her face. (R.T. 264-265.)

[NAME] wanted to kill himself. He was confused and panicked. He took a knife from the drawer and ran about the apartment with the knife in his hand. He called 911 but did not speak to anyone. In the bathroom he cut his wrist. He found the bottle of Liquid Plumber and drank it. He then used the knife he was carrying to cut his wrist. When the police arrived, he told them to kill him. (R.T. 217-219, 257-264.)

**Cultural Evidence**

[NAME] is employed at the office of research administration at Stanford University, and is a professor at San Jose State University. He teaches African-American studies. At the time of trial, he was a doctoral candidate at Stanford. He was born in Ethiopia and spent most of his life there. He was found qualified by the court to testify concerning Ethiopian culture, religion, and more specifically, the problems experienced by Ethiopian immigrants in the United States. (R.T. 270-275.)

In Ethiopia, both the nuclear and extended family are very close. Entire villages will travel to the airport to wish a family member farewell. Eighty-five percent of the country is still rural. Friends are chosen with care and there is an unspoken Ethiopian loyalty that friendships will continue for a lifetime. Personal matters and feelings are shared within the circle of family and close friends, but it is considered undignified to talk with others about personal troubles. A group of elders mediate marital disputes. This kind of support structure is very hard to establish in the United States. (R.T. 276-280, 300-301.)

The two major religions within Ethiopia are Christianity and Islam. Historically, there have been great tensions between these religious groups which is still the case in politically active groups. Normally, when two people of different religions marry, one person converts. (R.T. 281-286, 298.)

Ethiopia is still a patriarchal society, and for a woman to leave her husband without explanation would cause the husband to suffer a great deal of shame and humiliation. Ethiopia has a more medieval puritan society than the United States and gestures have more meaning attached to them. In Ethiopia, there is no greater insult than spitting on someone. It is a declaration of war for a man to spit on another man. When a woman spits on a man, she is telling him he is useless and out of her life. (R.T. 287-288, 295-297.)

**Psychiatric Evidence**

[NAME], a forensic psychologist, was retained by the defense to evaluate [NAME]'s mental state at the time he killed his wife. When the relationship between [NAME] and [NAME] broke down his feelings of rejection were intense. He became suicidal. The suicide attempt indicated extreme despair, desperation, and perhaps guilt. (R.T. 304-325, 326-329, 334-335.)

It was not surprising to [NAME] that [NAME] did not have total recall of the killing given the highly emotionally charged state he was in at the time. (R.T. 330-332, 338.) The multiple stab wounds were consistent with someone in a highly charged emotional state. (R.T. 338-339.)

**Prosecution's Rebuttal**

[NAME], a medical examiner for Santa Clara County, performed the autopsy on [NAME]. There were superficial cuts on [NAME]'s face and chin. (R.T. 443-450.) There were slash type wounds on the victim's arms which appeared to be defensive injuries. There were stab wounds in the center of the chest and the right side of the chest. Two of the wounds entered the heart. (R.T. 449-456.)

### B. Facts Established by Declarations

Prior to his testimony, defense cultural expert [NAME] was paid two visits by several elders in the Oromo/Muslim community. Like the victim, [NAME] is from the Oromo tribe. [NAME] has related three different versions of these incidents to Petitioner's appellate counsel. On two occasions he admitted that a visit occurred before trial. On another occasion he denied that he was visited before trial. However, in all three renditions of the story by [NAME], the Oromos told him that ethnic and religious differences between the petitioner and victim had nothing to do with the victim's death. [NAME] was surprised by the fact that the elders of the victim's tribe were closely watching this case. Later, at the courthouse just before he was to testify, the Oromos surrounded [NAME] and told him that the killing was a cold-blooded murder and he should not get involved. (Decls. of [NAME], Exh. 1; [NAME], Exh. 6.)

When [NAME] first related this incident to Petitioner's appellate counsel over the telephone on November 11, 2000, [NAME] stated that the small group of elders came to his office at Stanford. He said that one of the elders who visited him there had sat on the elder council with [NAME] when the Ethiopian Community Center ("Ethiopian Community Services, Inc.") was established in San Jose. [NAME] described this individual as "mildly influential" in the community. (Exh. 1; Exh. 6.) This gentleman is a Moslem from Harar which [NAME] describes in his declaration as a hotbed of Oromo Nationalism and Islamic Fundamentalism. (Exh. 6.) The victim was from this region as well. (Exh. 6.) [NAME] did not tell defense counsel about this visit by the elders. (Decl. of [NAME], Exh. 3.) Petitioner's appellate counsel prepared a declaration for Awetu based upon their conversation and e-mailed it to him on November 12, 2000. (Carico Decl., Exh. 1.)

Petitioner's appellate counsel sent several e-mails to [NAME] enquiring as to the status of his declaration. He responded on November 30, 2000, that he was looking over it and would send a "slightly modified" version by December 1, 2000. The declaration did not turn up. Petitioner's appellate counsel contacted [NAME] by phone on December 12, 2000. At that time,

[NAME] stated that the "first contact" with the Oromos "was at the courthouse" the day before he testified. The meeting was "brief and pointed." They told him not to get involved. (Ibid.)

Given this discrepancy between [NAME]'s statements regarding the meeting with the Oromos, Petitioner's appellate counsel arranged to meet [NAME] personally in Palo Alto on December 17, 2000. A personal friend of Petitioner's appellate counsel (Fred [NAME], Pacific Grove, CA) was also in attendance. At that meeting, [NAME] acknowledged that there had indeed been two meetings with the Oromo elders. One had occurred at [NAME]'s home before the trial. The Oromos showed up unexpectedly to talk about the case. [NAME] knew these individuals but had not seen them for some time. They told [NAME] that ethnicity and religion had nothing to do with the case. The person [NAME] had previously described as "mildly influential" was not present at that time.

[NAME] has given defense counsel a floppy disk with a version of his declaration on it [2], but did not sign a declaration. He was given almost two months to sign a declaration before the petition was filed. He gave assurances that he would do so, but failed to keep any of his promises to sign the declaration. (Exh. 19-20.)

According to [NAME], if [NAME] or her parents were strict believers in the Moslem faith, the expectation would have been that [NAME] would have had to convert to the Moslem faith according to Islamic law. "A Moslem woman cannot marry outside of her religion unless the husband converts." If [NAME] did not convert, [NAME] would be considered "an apostate, whether or not the marriage was sanctioned under civil law." (Exh. 16.) Within defense counsel's file is a letter from [NAME]'s sister's husband inquiring whether she is "living in the Muslim way," and demanding a response to his inquiry. (Exh. 17.) None of this information was introduced at trial.

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[2] The original of the floppy disk which [NAME] gave to appellate counsel is attached as Exhibit 22. The writing on the exterior of the disk is [NAME]'s. The disk contains one file which is [NAME]'s declaration. Appellate counsel printed out the file from the disk and deleted from the printed version those portions of the declaration counsel prepared, so that the only material remaining in the declaration was prepared by [NAME] himself. This printed version of the declaration was sent to [NAME] on January 3, 2001, with a cover letter requesting that he sign his declaration. No response has been received to that request. The unsigned declaration is included herein as Exhibit 6.

At the courthouse, the influential individual informed [NAME] that "he had actually been trying to contact [[NAME]] and that both he and his colleagues wanted very much to relay to [him] that this was a cold-blooded murder in which neither religion nor ethnicity were factors. He told [[NAME]] that [he] should not get involved." (Decl. of [NAME] Simesso, Exh. 6.)

Defense attorney, [NAME], declares that [NAME] never mentioned to her that the Oromo elders "had given him their opinion concerning the case." (Exh. 3.) Neither she nor [NAME] investigated the victim's connection with the Nationalistic Oromo Liberation Front. It also appears that very little investigation was done into [NAME]'s background, whether she had Oromo friends, or even why the Oromo community was showing up in mass at the trial or paid thousands of dollars to send her coffin back to Ethiopia. (Exhs. 1 & 3.) [NAME] states that she relied upon her "cultural expert to let [her] know the importance and significance of the sponsors possible involvement in the Oromo Liberation Front, but that was not communicated to me." (Exh. 26.) If she "had been aware of the link between the sponsors and/or the value of that information I would have presented that information at trial." (Ibid.) [NAME] also states that [NAME] never told her the elders had approached him before trial and told him not to get involved. Had she known of his conflict of interest, she would have hired a different expert. (Exh. 3, ¶ 4.)

[NAME] declares that there was a group of elders at the court hearings. They were in contact with the prosecutor. (Exh. 3.) The prosecutor, Matthew Braker, told Petitioner's appellate counsel that he discussed [NAME]'s testimony with them. (Exh. 1.) [NAME] was "very vague" with [NAME], "concerning the reasons why the elders were present and his relationship to them." (Exh. 3.) In a memo to her investigator (Suellen Huntington) dated May 1, 1999, Ms. Banks charged Ms. Huntington with determining who they were. Exh. 18.)

Ms. Huntington declares that on May 5, 1999, the day before [NAME] testified, there was a "group of eight or nine older African men in the corridor outside the courtroom." [NAME] told her the "men were members of his and the victim's tribe." He excused himself

"saying something about needing to talk to them to tell them why he was there and to explain how the American courts worked." (Exh. 8, ¶ 8.)

The defense had decided that it was necessary to contact [NAME]'s relatives in Ethiopia to obtain an accurate assessment of the degree of difficulty [NAME] was having in acculturating to his new environment. The defense was interested in possible character witnesses as well. At a meeting on April 8, 1999, involving [NAME] (the defense psychologist), Barbara Fargo, David Walker, and [NAME] Simesso, the importance of contacting the relatives was discussed. [NAME] had a list of questions he needed answered. (Exh. 7.) The defense investigator was put in charge of arranging a conference call with the relatives. Aynalem [NAME], who testified at the trial, gave Ms. Huntington the phone number for [NAME]'s sister, Tersit. (Exh. 8.)

The phone conference had not occurred by April 20-21, 1999, so [NAME] delegated the task of contacting the relatives to [NAME]. (Exh. 3, ¶ 3.) Tersit's phone number was given to [NAME]. (Exh. 3, ¶ 3; Exh. 8.) Ms. Huntington states that [NAME] called her on May 3, 1999 (the first day of trial) and apologized for never returning her phone calls. He said he would call Tersit that night and [NAME]'s Uncle if possible. (Exh. 8.) Neither [NAME] nor anyone else in the public defenders office ever contacted [NAME]'s relatives. Petitioner's appellate counsel has contacted [NAME]'s relatives, and a declaration from the relatives has been provided. (See Declarations of Tegegne Tefera and Aweke Mesfin; Exhs. 9 & 10.) The defense psychologist has stated in a letter to appellate counsel that he would need to conduct a reassessment of petitioner "in light of this new information, and I would need direct contact with family and cultural experts to verify statements and ask additional questions." (Exh. 24.)

[NAME]'s views concerning the influence of ethnicity and religion on the intramarital conflict between the victim and petitioner was "muted" by this visit from the elders. (Exh. 1.) He admitted to Petitioner's appellate counsel that the defense team did not put forward an "aggressive defense" of petitioner. (Ibid; see also Decl. of [NAME], Exh. 11, ¶ 6.) Defense counsel, [NAME], has averred that [NAME]'s testimony was unexpected and "watered down" in

several respects.[3] (Exh. 2.) Suellen Huntington gave [NAME] a ride home after his testimony. During this trip [NAME] exclaimed that he had "hoped he made the District Attorney happy too." (Exh. 8.) Although he was told by defense counsel that he would be compensated for his services, he never submitted a bill to defense counsel. (Exh. 3, ¶ 6.)

In order to get the opinion of an independent expert concerning the cultural issues in this case and the performance of [NAME], Petitioner's appellate counsel retained [NAME], a cultural anthropologist who has worked with the Ethiopian immigrant population in the U.S. for almost twenty years. He states that in Ethiopian culture, the locus of identity in in the group rather than the individual as is the case in America. An Ethiopian cannot afford to lose face with or be excluded from his group. (Exh. 15, ¶ 3, pp. 3-4.) Further, elders have a great deal of authority. (Exh. 15, ¶ 3.) It is also the case that Ethiopians in the United States normally keep to themselves and do not take public positions on issues. (Id., ¶ 13.) He opines that "once the Oromo community became involved politically in [NAME]'s case, [NAME] could no longer function independently from their role in the case. There is plenty of evidence that the Oromo community was politically involved. The fact that the Oromo elders showed up in groups at [NAME]'s trial indicates that this case was a political phenomenon. . . . Further, the fact that the Oromo community raised money to ship [NAME]'s body is also indicative of the importance of this matter to the Oromo community. The Oromos attending would have had a visceral hatred for the Amhara group in general, and [NAME] sepcifically. The hatred engendered by ethnic separatism is intensified in immigrant communities." (Id., ¶ 13.)

Petitioner's appellate counsel has averred that all of his communications with [NAME] have been in English. He met with [NAME] at the California Medical Facility and had no problem communicating with him in English. Petitioner's appellate counsel's face-to-face contact with [NAME] convinced Petitioner's appellate counsel that this is a highly intelligent man who fully comprehended the complicated issues raised in the briefs. (Exh. 1.)

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[3] The ways in which Mr. [NAME]'s testimony was "watered down" will be discussed more fully in Argument I.

Petitioner's appellate counsel's assessment of [NAME]'s ability to speak and understand English is confirmed by trial counsel and by David Walker, a Stanford Law Student who interviewed [NAME] extensively in preparation of the case for trial. Trial counsel states that it was her belief that "most times, the English ability of the defendant was equal to or superior to that of the interpreters provided by the court." (Exh. 4.) One of the many functions Mr. Walker performed "was to interview [NAME] to obtain information concerning his background, culture, and the circumstances leading up to and including the homicide." At all times he spoke to [NAME] in English. He "never used an interpreter to facilitate" their conversations. He was able to tell [NAME] about "the theories of the case that the defense was developing," and in turn, [NAME] was able to "communicate information to [Mr. Walker] bearing upon his defense." (Exh. 14.)

Trial counsel and Mr. Walker have provided declarations concerning their in chambers discussion with the trial judge regarding the topic of [NAME] being allowed to testify in English. (Exhs. 4, 5, & 14.) Mr. Walker declares that the "judge made it clear that he would not accommodate the defense request to allow [NAME] to testify in English." (Exh. 14, ¶ 5.) Trial counsel provides a detailed description of the defense efforts to alleviate any concerns the judge may have had in dismissing the interpreter. Defense counsel states that she "suggested that [NAME] could testify in English and have the Ethiopian interpreter right there by him to assist him if there was anything said in English that he didn't understand." (Exh. 5, ¶ 4.) She also "suggested that if there were any words [NAME] could not express in English, and wanted to say them in Ethiopian, that the interpreter could then translate those words."[4] (Ibid.) She also

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[4] . There are at least 70 languages spoken as mother tongues in Ethiopia. More than 50 of the languages–and certainly those spoken by the vast majority of Ethiopia's people-are grouped within three families of the Afro-Asiatic super-language family: Semitic (represented by the branch called Ethio-Semitic and by Arabic), Cushitic, and Omotic. The most important Ethio-Semitic language is Amharic which is petitioner's native tongue. He also speaks Oromo as well. Amharic is spoken by about 30% of the population. With a few exceptions, the Amhara are Ethiopian Orthodox Christians. Ethiopia: A Country Study, Federal Research Division, Library of Congress (4th ed. 1993) pp. 91-93.)

The Oromo constitute the largest and most ubiquitous of the East Cushitic speaking peoples. About 40% of the total population of Ethiopia speak this language. (Id. at p. 94.) Oromo constitute a large potion of the Muslim population. (Id. at p. 116.) The victim was a member of the Oromo group. (R.T. 197.)

"suggested that [NAME] could be questioned in Ethiopian but allowed to respond in English." The court would "not agree" to any of the defense attorney's "accommodations." (Ibid.)

## ARGUMENT

### I.
### THE INTIMIDATION OF THE DEFENSE CULTURAL EXPERT BY ELDERS BELONGING TO THE VICTIM'S OROMO/MUSLIM COMMUNITY DEPRIVED PETITIONER OF DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION

Defense expert [NAME] believed that ethnic and religious differences were a factor in the intramarital conflict between the petitioner and the victim. However, he never fully developed that theory because he was intimidated by Oromo/Muslim elders of the victim's and his own tribe. They came to him before trial and told him that ethnic and religious differences had nothing to do with the case. These elders were at every court hearing and the trial. Their very presence in the courtroom would have been intimidating to [NAME] because [NAME] could not risk alienating members of his own Oromo group. (See Decl. of Yosef Ford, M.A., Exh. 15.) Moreover, before [NAME] testified, a group of ten or so of the Oromo group surrounded him and told him not to get involved. (Exhs. 6 & 8.) They met with the District Attorney, Matthew Braker, during [NAME]'s testimony during which time the District Attorney asked them for their opinions concerning [NAME]'s testimony. (Exh. 1.)

Although [NAME] has not directly admitted that he was intimidated by the Oromo/Muslim community elders, he certainly implies that this is the case. In a statement which he delivered unsigned to Petitioner's appellate counsel, he states that he believes it is "possible that the visit of the Oromo/Muslim elders might have muted" his assessment of the influence of

religion and ethnicity on the couple's marital difficulties. He admits that he did not aggressively defend [NAME] and adopted a "neutral" or "middle-of-the-road" stance concerning the case. He felt "hand bound" by the Muslims and Oromos that ethnic and religious differences were not a factor. (Exh. 1.)

Petitioner retained a cultural expert to explain the cultural paradigm in which the crime in this case took place and to offer an opinion on the objectivity and veracity of the testimony and opinions expressed by [NAME]. He has opined that once the Oromo community became politically involved in this case that [NAME] could no longer function independently from their expectations of him as a member of their community. The Oromos political involvement is evidenced by the fact that they showed up in a group at the trial. This is unusual for Ethiopian immigrants who as a rule will stay away from any controversy or situation where they could be deemed to be taking a position. The reason for [NAME]'s inability to function independently of his group is that the locus of identity for Ethiopians who emigrate to the U.S. in adulthood is in the group. This is the case even for those immigrants who have lived in the U.S. for decades. Alienation from the group means loss of personhood. Neither [NAME] nor any other Ethiopian could risk this loss of personhood for the sake of someone outside of his group–in this case, the defendant. (Exh. 15.)

Further, there is strong circumstantial evidence that [NAME] is fearful of antagonizing the Oromo community. Most telling is his failure to execute a declaration to assist [NAME]. [NAME] was retained by the defense as a defense expert. He has personal knowledge of facts which indicate that he was negligent and that the defense was inadequate. He has given examples of the inadequacy of the defense. (Exh. 1.) Despite [NAME]'s personal knowledge of these omissions and his contractual and ethical obligation to assist in the defense, he has failed to execute the declaration that he prepared and delivered to appellate counsel. (Exh. 6.)

Further, [NAME]'s changes in his story regarding the visits by the Oromo elders suggests that he is fearful. He has stated to Petitioner's appellate counsel and to [NAME] that he is at no personal risk as long as he does not attempt to influence public opinion contrary to the Ethno-

Nationalistic philosophy of the ruling regime. (Exh. 1.) However, according to cultural anthropologist Yosef Ford, taking a strong stance in favor of an Amhara who is charged with a crime against an Oromo when you are Oromo is a political act. It was seen as a political act by the Oromos because it was contrary to the philosophy of the ruling regime and the political group to which [NAME] belonged. The ruling regime in Ethiopia supports separatist movements and stratification of society based upon ethnic identity. (Exh. 15; see also Exh. 6, ¶ 4; R.T. 283-285.)

The Oromo community in San Jose certainly felt at liberty to try and convince [NAME] to discontinue his assistance of [NAME]. The victim's sponsors were active in the Oromo Liberation Front. (Exh. 1; Exh. 6, ¶ 4.) The fact that the Oromo community felt a strong connection to the victim is evidenced by the fact that they raised thousands of dollars to assist in her funeral. (Exh. 1.) These facts suggest that [NAME] was so constrained by the politics of the Oromo community that he was unable to function in the role of a defense expert.

At trial, [NAME] testified that a mixed marriage between an Amhara and Oromo would not be cause for concern unless the couple were politically active. (R.T. 286.) From their discussions, defense counsel expected him to say "that although there were some instances where the conflicting religious and tribal membership caused no problems that was more the exception than the rule. I expected him to explain the problems that would likely occur in such a relationship and why that would be important to consider in the defendant's marriage, even if there was no political involvement." (Exh. 26 [original emphasis].) Yosef Ford states that "from his reading of [NAME]'s testimony, [he] noted [[NAME]'s] inability to stand up to cross-examination and his agreement with the prosecutor on matters that were clearly not only harmful to [NAME] but also incorrect from a cultural standpoint." (Exh. 15, ¶ 15.)

"The right to a fair trial is a fundamental liberty." (Estelle v. Williams (1976) 425 U.S. 501, 503 [48 L.Ed.2d 126, 96 S.Ct. 1691].) It is inferred from the Sixth Amendment to the United States Constitution which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defense." This amendment is binding upon the States through the due process clause of the Fourteenth Amendment. (Duncan v. Louisiana (1968) 391 U.S. 145, 158-159 [20 L.Ed.2d 491].)

"A criminal defendant has the right to be tried in an atmosphere undisturbed by public passion." (Norris v. Risley (9th Cir. 1989) 878 F.2d 1178, 1181.) "Indeed, 'the constitutional safeguards relating to the integrity of the criminal process . . . embrace the fundamental conception of a fair trial, and . . . exclude influence or domination by either a hostile or friendly mob." (Norris v. Risley [hereinafter "Norris II"] (9th Cir. 1990) 918 F.2d 828, 831.)

In this case, Oromo elders exerted influence upon [NAME] and issued veiled threats to [NAME] outside the courtroom, and then these individuals showed up at the courthouse to emphasize their point. Further, the presence of the Oromos in the courtroom resulted in a trial before an angry and hostile mob in which the Ethiopian witnesses (including Aynalem [NAME]) and the defense expert [NAME] Simesso would have been intimidated. It can be surmised from the record that the "large group" of African individuals helping the District Attorney during [NAME]'s testimony were likely Oromo and not Amhara. (Exh. 1, ¶ 11; Exh. 2, ¶ 6; Exh. 3, ¶ 5.) These Africans were in contact with the District Attorney during the court breaks and did not contact the defense. (Ibid.) A large group of Ethiopians would not have attended a trial unless it was a political cause for them, and the only Ethiopians for whom this trial was a political cause were the Oromos. Further, since there is a visceral hatred among politically active Oromos and Amharas (Exh. 15, ¶ 13), it is extremely unlikely that both Amharas and Oromos were assisting the District Attorney.

As Mr. Yosef Ford has stated to Petitioner's appellate counsel, the Oromos in attendance at petitioner's trial were engaged in a political act. Their very presence in the courtroom would have signified this to all the Ethiopian witnesses in attendance. The absence of any support in the Amhara community for [NAME] made their presence even more foreboding. The Oromos attending the trial would have had a visceral hatred for the Amhara group in general, and for [NAME] specifically. They made this view known to the expert before he got to the stand to

testify by telling him not to get involved. The defense expert could not risk alienating himself from this group. If he did alienate them, he would be cast out of the group and considered a nonperson. The knowledge of Aynalem [NAME] that Oromo extremist groups commit violent acts to support their cause would have intimidated her. The influence and domination of the Oromo group deprived petitioner of a fair trial.

"Moreover, both state and federal decisions have recognized that the right to counsel and to due process may include the right to expert and investigative services." (Sand v. Superior Court (1983) 34 Cal.3d 567, 575.) A defendant whose trial counsel has retained the services of an expert or had an expert appointed by the court "has a right to assume that [the expert] is competent and is presenting all potentially meritorious arguments" in favor of his defense. (Cf. In re Sanders (1999) 21 Cal.4th 697, 715-720 [state created right to counsel in collateral habeas corpus proceedings entitles the defendant to the effective assistance of counsel in the collateral proceeding].)

In addition to depriving petitioner the right to a fair trial, the conduct of the Oromo/Muslim elders interfered with petitioner's fundamental constitutional rights to compulsory process, due process, and the right to present a defense. Criminal cases commonly involve complex issues revolving around social science and cultural factors. Frequently, in these types of cases, it is absolutely vital that a defense attorney consult an expert for guidance and interpretation. The function of the defense expert is to assist in preparing and presenting a defense. In this role, the defense expert can be partisan. As stated by the Colorado Supreme Court, "the nature of the adversary process, the confidentiality surrounding legal representation and professional norms and ethics of particular experts all may foster this attitude of loyalty to the defendant." (Hutchinson v. People (Colo. 1987) 742 P.2d 875, 882.)

The intimidation of the defense expert by the Oromo/Muslim elders completely undermined the role of the defense expert in this case. His loyalty was divided, if not completely severed. Following the "visit" by the elders, the defense expert was convinced that he had to take a "neutral" stance. He failed to contact [NAME]'s relatives even though he was told it was

important for him to do so. He told the defense investigator that he hoped he had made the prosecutor "happy too." (Exh. 8, ¶ 9.)

The "neutrality" of which [NAME] speaks was actually a role reversal in which he became an advocate for the prosecution. By failing to investigate his own theory that political, religious, and ethnic strife were influential in the couple's problems, the defense expert became an advocate for the prosecution's position that these factors were not influential. Although [NAME] knew that the victim's sponsors were active in the OLF (Giniat's husband was the Secretary of the OLF) and influential in [NAME]'s life, he states noncommittally that he "could not totally dismiss that these differences could not but have been sources of tension." (Exh. 6, ¶ 4.)

[NAME] said nothing about the nationalistic fervor of [NAME]'s sponsors to the court or jury even though it was critical for him to do so. (R.T. 286-287, 301-302.) He failed to communicate the significance of the sponsors involvement in the Oromo Liberation Front to defense counsel. (Exh. 26.) He did not even mention this to defense counsel until the trial had began. (Ibid.)

[NAME] had told the court and jury that ethnicity would cause pressure on a marriage if the people were involved in political organizations. (R.T. 286.) The trial judge questioned him and elicited the opinion that diverse Ethiopian ethnicity would not be problematic for a married couple as long as they were not politically active. (R.T. 302-303.) However, no information was divulged by [NAME] that the victim's group was politically active.

Under these circumstances, petitioner's right to a fair trial and compulsory process were undermined. He had a right to call witnesses in his favor. One of those witnesses he had a right to call was a defense cultural expert. The intimidation by the Oromo elders so undermined the defense expert's confidence in himself that he no longer functioned adequately in his role as a defense expert. Accordingly, petitioner's federal constitutional rights were violated.

Moreover, even if the misconduct by the elders did not deprive petitioner of any fundamental federal constitutional rights, reversal is required if the "[m]isconduct . . . is of such a

character as to prejudice the defendant or to influence the verdict." (People v. Craig (1978) 86 Cal.App.3d 905, 920; see also People v. Spain (1984) 154 Cal.App.3d 845, 851; see also 53 Am. Jur., Trial, § 42.) In the absence of a showing of actual prejudice, the reviewing court must determine whether the misconduct of the elders was "so inherently prejudicial as to pose an unacceptable threat" to petitioner's right to a fair trial. (Norris II, supra, 918 F.2d at p. 830.)

Prejudice is adequately established by this record. There has been an actual showing that the misconduct influenced the testimony of the defense expert. (Cf. People v. Spain, supra, 154 Cal.App.3d 845, 851 [spectator misconduct harmless where there was no showing that any witness was influenced.) [NAME] admitted that the intimidation may have "muted" his assessment of the situation. (Exh. 1.) Further, defense counsel [NAME] remembers that she was disappointed after [NAME]'s testimony. She believed it was watered down in several respects.

[NAME] waffled on his view that spitting was a far greater insult in Ethiopian culture than in

ulture. At trial, he said that there was no difference between spitting in Ethiopian culture and in American culture. The prosecutor asked the following question: "Sounds like what your saying is spitting in Ethiopia is the same as it is here. Would that be a fair statement?" [NAME] answered, "I think so." (R.T. 288-289.) This testimony is in fact false. According to Yosef Ford, the act of spitting in Ethiopian culture is an insult to everything that the individual is a part of and would degrade every member of the individual's family. (Exh. 15.) This is certainly not the case in American culture.

In discussions between Ms. Banks and [NAME] before trial, [NAME] was confident that ethnic and religious differences were a factor leading to the homicide. (Exh. 2, ¶ 4.) However, at trial, [NAME] testified that ethnic and religious differences might have been a factor only if the parties were politically active. (R.T. 286-287.) He stated that the majority are not politically active. (R.T. 286.) Moreover, for those "people who grew up in the city with a certain amount of education and who don't have that deep rooted feeling wouldn't see anything wrong, you know, with cross-religion or cross ethnic relationships." (R.T. 293-294.) Thus, one would expect problems in a marriage between different faiths if the couple were in politically active fundamentalist groups, such as the Islamic Front for the Liberation of Oromia, but not otherwise. (R.T. 299.) He testified that in such groups, "if you marry a non-believer or a Kaffir, then there would be, I suspect that there would be the isolating of that party from the community. . . ." (R.T. 300.)

[NAME]'s trial testimony as stated above differs from his actual assessment of the effect of ethnic and religious differences upon [NAME] and [NAME]. According to [NAME]'s trial testimony, [NAME] and [NAME] were both educated city dwellers and therefore excluded from the fundamentalist groups that would have had difficulties with cross-ethnic and cross-religious marriage. However, the viewpoint expressed in his declaration and in a letter to Petitioner's appellate counsel is that the cross-ethnic and cross-religious aspect of their marriage "must have" caused tension while the couple were living with [NAME]'s sponsors in Atlanta because of the connection of [NAME]'s sponsors with the Oromo Liberation Front. Further, [NAME]

acknowledges that religious tensions might have existed even if neither [NAME] nor [NAME] were politically active. For instance, [NAME] states in a letter that although [NAME] seemed to be "unusually independent" and "neither a devout Moslem nor a nationalist Oromo," that this "would not mean that she would not want [NAME] to convert[.]" She would want him to convert "because in the absence of his conversion, according to Islamic law, she would be considered an apostate. . . ." (Exh. 16.)

Additionally, according to Ms. [NAME] and the trial transcript, [NAME] seemed to suggest at trial that [NAME] had the option of obtaining elder mediation at the Ethiopian Community Center if he and his wife agreed to a mediator. (R.T. 279.) However, nothing said by [NAME] to defense counsel led her to believe that this was an option for [NAME]. Ms. [NAME] expected him to say that there were no similar options available to him in this culture. (Exhs. 2, 23.) Further, [NAME] admitted that [NAME] would have been experiencing a great deal of shame about his abandonment by his wife. (R.T. 286-287.) He was too ashamed to tell his family about it. (Exh. 7.) [NAME] told Petitioner's appellate counsel that [NAME] would have felt too ashamed by his failure as a husband to have taken his problems to strangers at the Ethiopian Community Center. (Exh. 1.) Further, [NAME] has stated that ethnic conflict was a problem at the Community Center, and that it was not functioning well enough to be a resource for [NAME]. (Exh. 11, ¶ 5.) Thus, it is clear from the record that [NAME] failed to advocate facts known to him that were supportive of the defense position.

[NAME]'s failure to inform the judge and jury of the ethnic and political activity of the victim's family and friends is especially troubling. [NAME] did not volunteer the information that he knew the victim to be from the Harer region of Ethiopia which is a stronghold of Islamic fundamentalism. He did not state that the wife's sponsors were members of the Oromo Liberation Front even though he belonged to the Oromo community and had obtained information that they were members.[5] He did not tell defense counsel that he had been visited

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[5] . [NAME] has told Petitioner's appellate counsel that Giniat Ousso's husband was the Secretary for the Atlanta, Georgia chapter of the OLF. (Exh. 1.)

by the Muslim/Oromo elders and was told not to get involved. (Exh. 3, ¶ 4.) In fact, Simesso told defense counsel that there was no need to further investigate the OLF connection of [NAME]'s sponsors even though he knew the Oromos were actively involved in trying to change his opinion. (Exh. 26.) He could have alerted counsel, judge, and jury to these undisclosed facts.

The undisclosed information would have portrayed the victim's family and friends as politically active. These facts would have supported the hypothesis that political and ethnic tensions were a factor in the intramarital conflict between [NAME] and [NAME]. In fact, the political, ethnic, and religious conflict were being played out in the very courtroom within which this case was tried.

Somebody in the victim's family or extended circle must have tipped off the local Oromo community that [NAME] was involved in the case and was considering the role of ethnicity and religion. [NAME] states that he discussed the subject with Giniat Ousso and her husband in Atlanta who were adamant that religion and ethnicity were not a factor even though it must have been a factor. The Oromos in San Jose then paid [NAME] an unsolicited visit before the trial and confronted him with their view that ethnicity and religion had nothing to do with the case. (Exhs. 1 & 6.)

These facts would have been a basis for an order excluding the elders from the courtroom and from any further contact with the witnesses. These facts would have been a basis for a mistrial so that the defense could retain another expert. Defense counsel declares that she "would have retained a different cultural expert," had she known of these facts.

Additionally, petitioner retained Yosef Ford, M.A., to review [NAME]'s testimony. He found [NAME]'s testimony to be off-the-mark in several details that were damaging to [NAME]'s case. He has opined that the culmination of factors at play, including cultural factors, could have caused a reasonable person in [NAME]'s position to temporarily lose his mind and have led him to kill his wife and attempt suicide. (Exh. 15. )

Accordingly, petitioner's present confinement is illegal and a writ of habeas corpus should issue so that this matter may be retried in a fair and impartial manner.

II.

**THE TRIAL COURT'S REJECTION OF PETITIONER'S REQUEST TO TESTIFY IN ENGLISH RATHER THAN AMHARIC DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHTS TO TESTIFY IN HIS OWN DEFENSE, DUE PROCESS OF LAW, TO PRESENT A FULL DEFENSE, AND HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION**

During the prosecution's case, counsel for petitioner indicated that she intended to call petitioner as a witness, and that it was her desire to have him testify in English. According to counsel, his native language was Ethiopian, but that given the extent of his education, his work for the CARE relief organization in Ethiopia, and the years he had spent in the United States, he had "mastered the English language to some degree." Defense counsel had requested an interpreter for the proceedings up to that point because there was legal terminology that he had never heard before and she felt it was important for him to understand that terminology.

Defense counsel explained to the court the importance of having petitioner testify in English:

> "This is a case where our defense is that he acted in the heat of passion. And I think to use an interpreter will have the effect of basically acting as a filter between what he is saying and what the interpreter says. The interpreter cannot interpret it and give the same passion and meaning and feeling and emotion to the words as Mr. Wendemagengehu would give." (R.T. 134.)

Defense counsel also indicated that they were willing to "waive any issues relating to him [petitioner] not having an interpreter during his testimony, which includes direct and cross-examination. And Mr. Wendemagengehu would state for the record the same thing that I am stating to you. We would also be willing to put it in writing if the court felt that that was more binding on the appellate court." (R.T. 135.)

The court examined the file and observed that an Ethiopian interpreter was present at the preliminary hearing. (R.T. 135.) The court questioned defense counsel why there was an interpreter appointed for petitioner if only for the point of explaining technical legal terms to him. Defense counsel responded that petitioner requested an interpreter because there were certain things he did not understand. Defense counsel was able to effectively communicate with him in English, but there were times when she had to ask a question in different ways until he understood what she was asking. (R.T. 142.)

The declarations from [NAME], and student intern, David Walker, establish that [NAME] could speak and understand English well enough to testify in the English language. [NAME] states that "it was [her] belief that most times, the English language ability of the defendant was equal or superior to that of the interpreters provided by the court." (Exhibit 4.) David Walker states that "at all times [he] was able to effectively communicate with [NAME] in English." (Walker Decl. (Exhibit 14, ¶ 4.) While there were "times that [NAME] would ask [Mr. Walker] to talk more slowly, or to say something in a different way," Mr. Walker was nonetheless able to "tell [[NAME]] about the theories of the case that the defense was developing" and [NAME] "was able to communicate . . . information bearing upon his defense." (Ibid.)

[NAME]'s sophistication in the English language is dramatically demonstrated by his analysis of the People's informal reply to the petition for writ of habeas corpus filed in the Court of Appeal. Petitioner's appellate counsel incorporated some of petitioner's work product into the petitioner's informal reply which was subsequently filed in the Court of Appeal. A copy of petitioner's work product is included as an attachment to appellate counsel's supplemental declaration. (Exh. 31.)

Defense counsel has averred that she tried numerous ways of convincing "the judge that [NAME] should be allowed to testify in English. . . ." ([NAME] Decl. (Exh. 5), ¶ 4.) She suggested that the interpreter be present on standby if needed. (Ibid.) She offered to allow the questions to be asked in Amharic and petitioner's responses to be in English. (Ibid.) She offered

to excuse the interpreter completely during his testimony and to "waive" any appellate issues associated with the absence of the interpreter during his testimony. (R.T. 135.) The court conducted no inquiry of [NAME] concerning his ability to speak and understand the English language and in condescending fashion the court reasoned that this university graduate in physics might not understand the concept of "waiver" such that the waiver would be valid. (R.T. 143-144.) Thus, the court refused to permit [NAME] to testify in English. ([NAME] Decl., ¶ 4; R.T. 143-144.)

### E. The Ruling Prohibiting Petitioner from Testifying in English Violated His Federal Constitutional Rights to Testify in his own Behalf

The right to testify in one's own "behalf in a criminal trial has sources in several provisions of the Constitution." (Rock v. Arkansas (1987) 483 U.S. 44, 51 [107 S.Ct. 2704].) "It is one of the rights that 'are essential to due process of law in a fair adversary process" within the meaning of the Fifth and Fourteenth Amendments. (Ibid.) "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." (Id. at p. 52.) "Even more fundamental to a personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure of the [Sixth] Amendment,' [citation], is an accused's right to present *his own version of events in his own words*. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness." (Rock v. Arkansas (1987) 483 U.S. 44, 52 [107 S.Ct. 2704, 2709] [Emphasis added].)

A criminal defendant forced to testify through a foreign language interpreter or not at all may choose not to testify in order in order to forego the stigmatizing effect of testifying in a foreign language. As one commentator has noted, it is an erroneous assumption that "a defendant would invariably want the services of an interpreter and

would always benefit from those services. . . . First, the appointment of an interpreter alters the natural cadence of the trial and can even impede the testimony, thereby underscoring and possibly stigmatizing the defendant's foreignness within our English-only justice system. Second, the interpreter's role with respect to defendants can be coercive rather than helpful, especially when the defendant is testifying." (Leslie Dery, *Disinterring the "Good" and "Bad Immigrant": A Deconstruction of the State Court Interpreter Laws for Non-English-Speaking Criminal Defendants* (1997) 45 Kan. L.Rev. 837, 873 [hereinafter "Dery, '*Good' and 'Bad' Immigrant*"].) The interpreter can control the speech of the defendant who is testifying on the stand as well as the flow of testimony. The interpreter can urge the defendant to speak or request him to remain silent. Hand gestures may be used to prevent a defendant from answering a question to which an objection was made. Such interventions by the interpreter may cast a disparaging light on the defendant and make him appear less competent than a monolingual English-speaking defendant who would normally be cut off only verbally. The interpreter can also make mistakes. (Id. at pp. 873-874.)

As the foregoing makes clear, testifying through an interpreter is not the equivalent of telling the jury one's story in one's own words. Accordingly, if the criminal defendant has sufficient command of the English language to be understood by the jury, a rule requiring that he testify in English simply because he has asked for the assistance of an interpreter violates his constitutional right to testify.

### F. **The Ruling Prohibiting Petitioner from Testifying in English Violated His Privilege Against Self-Incrimination**

"The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." (Ibid.) "'[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . .

The choice of whether to testify in one's own defense is an exercise of the constitutional privilege.'" (Id. at p. 53 quoting Harris v. New York (1971) 401 U.S. 222, 230 [91 S.Ct. 643].)

In Brooks v. Tennessee (1972) 406 U.S. 605 [92 S.Ct. 1891, 32 L.Ed.2d 358], the United States Supreme Court struck down a Tennessee statute which required a criminal defendant desiring to testify to do so before any other testimony for the defense was heard in the case. A defendant could not be forced to testify before surveying the strength or weakness of the other evidence in the defense case and whether his testimony would help or hinder his defense. "Whether he shall testify or not; if so, at what stage in the progress of his defense, are equally submitted to the free and unrestricted choice of one accused of crime, and are in the very nature of things beyond the control or direction of the presiding judge. Control as to either is coercion, and coercion is denial of freedom of action.'" (Id. at p. 608, quoting Bell v. Miss (1889) 66 Miss. 192, 5 So. 389.)

In this case, petitioner prefaced his relinquishment of the privilege with the proviso that he desired to testify in English. He was fully capable of testifying in the English language even though his native tongue was Amharic. His request was not honored by the court, hence petitioner's condition for relinquishing the privilege against self-incrimination was not honored.

Whether the defendant chooses to testify, and in what language he testifies, should be "submitted to the free and unrestricted choice of one accused of crime," unless there are competing concerns of the court that outweigh the defendant's right to testify in the language of his choice. The purpose of defense/party and proceedings interpreters have been to benefit the defendant. Hence the decision in United States ex. rel. Negron v. New York (2d Cir. 1970) 484 F.2d 386, recognizes implicit Fifth and Sixth Amendment rights to interpreter services. The purpose of a witness

interpreter has historically been to serve the judge primarily by ensuring an accurate record and a smooth running trial.

For instance, if the defendant's language difficulties in English would prohibit his being understood by the jurors, counsel, or the presiding judicial officer, then the presiding judicial officer could require the defendant to testify through a foreign language interpreter. (See Cal. Standards Jud. Admin., § 18(a)(2).) However, although the judge began to doubt petitioner's need for an interpreter, he conducted no investigation into [NAME]'s ability to speak English and therefore had no factual basis for exercising his supervisory power to control the proceedings in a way that interfered with [NAME]'s exercise of a constitutional right.

The court expressed concerns that the petitioner may not understand the consequences of his waiver. (R.T. 143-144.) However, since the constitutional right to an interpreter could only be waived by petitioner, it was incumbent upon the court to ensure that the waiver was knowing and intelligent and to make an inquiry. (United States ex. rel. Negron v. New York (2d Cir. 1970) 484 F.2d 386, 390.) The court conducted no inquiry of petitioner regarding his wishes; therefore, there is no record upon which this court can say that the fair administration of justice required the court to deny petitioner's request to waive the interpreter's presence so that he could testify in English.

### G. The Ruling Prohibiting Petitioner from Testifying in English Violated His Federal Constitutional Right to Due Process of Law

In Brooks v. Tennessee, supra, the Supreme Court held that the Tennessee rule that a defendant must testify first violated the due process clause because it interfered with an important tactical decision "as well as a matter of constitutional right." (Brooks v. Tennessee, supra, 406 U.S. 605, 612.) "[T]he penalty for not testifying

first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial." (Ibid.)

A rule prohibiting a criminal defendant from testifying in English simply because his language difficulties in English inhibit his comprehension of the legal proceedings interferes with "a matter of constitutional right." If the defendant speaks English well enough to be understood directly by the jury, then the choice of whether to testify in his native tongue or in English is a matter within the sound professional judgment of counsel and the desires of the client. "The accused is . . . deprived of the 'guiding hand of counsel'" when the court interferes with the decision whether the defendant will testify in a foreign tongue or in English. (Ibid.)

The courts are disallowed from controlling the defendant's defense/legal destiny in several areas: (1) when a defendant wants to appear in pro per; (2) when a minor (and counsel) opts to be tried in adult court; (3) when a convicted defendant decides to refrain from putting on a defense in the penalty phase of a death penalty case; (4) when a convicted defendant waives his/her right to an automatic appeal; and (5) when a defendant refuses to waive time for trial. If the courts have to acknowledge the defendant's control over the defense in these areas, then certainly in the area of interpreter refusal, the courts have to similarly accept the defendant's waiver.

Further, a rule requiring a defendant to testify in his primary language rather than in English also interferes with the defendant's constitutional right to an interpreter.[6] A

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[6] . Several federal circuits have held that the due process clause guarantees a criminal defendant the right to an interpreter when his comprehension of the proceedings or ability to communicate with counsel is impaired. (See, e.g., United States v. New York (2d Cir. 1970) 434 F.2d 386, 389; United States v. Martinez (5th Cir. 1980) 616 F.2d 185, 188 (per curiam); United States v. Carrion (1st Cir. 1973) 488 F.2d 12, 14 (per curiam); Amadou v. INS (6th Cir. 2000) 226 F.3d 724; United States v. Joshi (11th Cir. 1990) 896 F.2d 1303, 1309 [acknowledging that the Court Interpreters Act, 28 U.S.C. § 1827, was intended to protect the existing constitutional rights of non-English speaking criminal defendants]; see also United States v. Mayans (9th Cir. 1994)

defendant faced with the prospect of being forced to testify in a foreign tongue if he requests the assistance of an interpreter may choose to give up the right to an interpreter. In this sense, the defendant is penalized for asserting his constitutional right to an interpreter.

### H. The Ruling Requiring Petitioner to Testify in Amharic Violated His Fifth and Sixth Amendment Rights to Present a Full Defense

"[I]t is fundamental in our system of jurisprudence that all of a defendant's pertinent evidence should be considered by the trier of fact." (People v. Miser (1961) 195 Cal.App.2d 261, 269.) The defendant's due process right to a fair trial and his right to compulsory process under the California and federal Constitutions requires that the defendant be allowed to present all relevant evidence of significant probative value to the defense. (People v. Reeder (1978) 82 Cal.App.3d 543, 552-553; Chambers v. Mississippi (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297]; Washington v. Texas (1967) 388 U.S. 14, 23 [87 S.Ct. 1920, 18 L.Ed.2d 1019].)

The defense attorney deemed it important that [NAME] express himself directly to the jurors rather than through the intermediary of an Amharic language interpreter. (R.T. 134.) According to defense counsel, the issue was whether [NAME] acted in the heat of passion, and therefore it was important that he be allowed to tell the jurors directly what he was feeling at the moment the homicide occurred. She told the court that "[t]he interpreter cannot interpret it and give the same passion and meaning and feeling and emotion to the words as Mr. [NAME] would give." (R.T. 134.) True enough, it is often difficult for men to access their emotions in a public forum, and

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17 F.3d 1174, 1181 [an interpreter may be required in order to effectuate the defendant's Fifth Amendment right to testify on his own behalf or his Sixth Amendment right to confront witnesses].) In California, the right to an interpreter is guaranteed by article I, section 14 of the California Constitution.

they are even less likely to do so when interrupted. The interruptions in [NAME]'s testimony occasioned by the use of an interpreter could have had a dramatic effect upon his ability to impart emotion to a jury. Moreover, the interpreter in this case delivered emotional expressions by petitioner in a monotone to the jury. (Exhibit 4.) Whatever emotion petitioner could express was filtered through this monotone. Accordingly, it was important to honor petitioner's request to testify in English if by doing so he could more readily impart the necessary emotion to the jury.

## I. The error cannot be deemed harmless beyond a reasonable doubt on this record

The violation of a fundamental constitutional right is presumed prejudicial if it is reasonably possible that the complained of error affected the verdict. "The Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' The requirement of harmlessness of federal constitutional error be clear beyond a reasonable doubt embodies the standard requiring reversal if there is a """reasonable possibility that the evidence complained of might have contributed to the conviction."""" (Yates v. Evatt (1991) 500 U.S. 391 [114 L.Ed.2d 432, 448].)

Petitioner's inability to testify in English cast him as an outsider to a Santa Clara County jury in a case in which it was crucial for petitioner to convince this jury that his behavior and mental state fell within the normative "reasonable person" standard. The prejudice from this state of affairs is not hard to imagine. "English language and Americaness are construed to be the norm. An immigrant non-English speaker is therefore abnormal. . . ." (Dery, *"Good" and "Bad" Immigrant*, supra, 45 Kan. L.Rev. 837, 875.) "By highlighting the defendant's native language and foreignness, it serves to reaffirm the defendant's identity as an outsider, someone who is neither within nor a part of the dominant English-speaking society." (Id. at p. 874.)

"Moreover, the dominant culture views an immigrant . . . who manages financial success without fully acculturating, as likely to alter and control the current social order. In response, the dominant culture uses the linguistic imperfections of non-native speakers as the means to rationalize and accomplish their subordination." (Dery, *Amadou Diallo and the "Foreigner" Meme: Interpreting the Application of Federal Court Interpreter Laws* (April, 2001) Univ. of Fla. L.Rev. [text corresponding to footnotes 302-305 of manuscript slated for publication].)

The prosecutor made it very clear in his summation to the jury that the jurors should judge petitioner by their own perceptions of how a "normal, everyday person" or a "reasonable Joe and Betty" would have behaved under similar circumstances. (R.T. 540-541.) Petitioner's addressing the jury through the aid of an interpreter would have reinforced the perception of him as an "outsider." This would have been especially true here when the language heard was Amharic, a Semitic language derived from the same source as Arabic languages spoken today. (Ethiopia a Country Study, supra, at p. 91.) "[T]here is a hierarchy of accented speech in white America." (Dery, *Amadou Diallo,* op.cit.supra.) Arabic is not high on the list. The terrorist activities of Arabic Nations against the U.S. have engendered stereotypes of Arabs as a fanatic and unreasonable race.

It is a matter of common knowledge that people have a far easier time connecting with others who share the same culture and language. The jurors needed some connection to petitioner in order for them to place themselves in petitioner's shoes. The court's refusal to permit petitioner to testify in English undoubtedly affected the jury's ability to connect and empathize with petitioner. It cannot be said beyond a reasonable doubt that there was no negative effect on the jury's perception of petitioner when he spoke to them in Amharic rather than in the English language. Accordingly, the judgment must be reversed.

## III.
## PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution afford a criminal defendant the right to the effective assistance of counsel, meaning the reasonably competent assistance of a lawyer "acting as his diligent and conscientious advocate." (In re Cordero (1986) 46 Cal.3d 161, 180.) In order to establish that trial counsel rendered ineffective representation justifying relief, a defendant must demonstrate that (1) trial counsel failed to act in a manner to be expected of reasonably competent counsel acting as a diligent advocate and (2) it is reasonably probable that a more favorable result would have occurred in the absence of counsel's omissions. (People v. Lewis (1990) 50 Cal.3d 262, 288; People v. Turner (1992) 7 Cal.App.4th 1214, 1219.) In establishing this second prong of the required showing, a defendant must demonstrate "a significant but something-less-than-50-percent likelihood of a more favorable verdict." (In re Howard (1987) 190 Cal.App.3d 41, 48.)

### J. Petitioner was deprived of effective assistance of counsel because of the defense cultural expert was burdened by a conflict of interest

The right to counsel includes the right to effective assistance of counsel. (McMann v. Richardson (1970) 397 U.S. 759, 771 [25 L.Ed.2d 763].) The federal and state constitutions envision the role of counsel as critical to the ability of the adversarial system to produce just results. (Strickland v. Washington, supra, 466 U.S. 668, 685.) The premise of the right to effective assistance of counsel – indeed, the premise of our adversary system in general - is that partisan advocacy on both sides of

a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. (United States v. Cronic (1984) 466 U.S. 648, 655 [80 L.Ed.2d 657].) The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. (Id., at p. 655.) If the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. (Id., at pp. 656-657.)

In carrying out the duty to provide effective legal assistance, defense counsel owes the client a paramount duty of loyalty. (Cuyler v. Sullivan (1980) 446 U.S. 335, 346 [64 L.Ed.2d 333].) To carry out this mandate, counsel has a duty to make a proper investigation of the case. Further, proper trial preparation may require a defense attorney to consult an expert. "In some instances, an expert may be needed as a defense witness to establish a defense or to rebut a case built upon the powerful investigative arsenal of the state. Consequently, it cannot be denied that a defense counsel's access to expert assistance is a crucial element in assuring a defendant's right to effective legal assistance, and ultimately, a fair trial." (Hutchinson v. People, supra, 742 P.2d 875, 881; see also In re Gay (1998) 19 Cal.4th 771, 798.)

The right to effective assistance of counsel entitles indigent defendants to access to public funds for expert services. (Ake v. Oklahoma (1985) 470 U.S. 68, 76-85 [84 L.Ed. 2d 53, 61-68, 105 S.Ct. 1087]; Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319; People v. Young (1987) 189 Cal.App.3d 891, 902.) The California Supreme Court has "recognized that the right to counsel and to due process may include the right to expert and investigative services." (Sand v. Superior Court, supra, 34 Cal.3d 567, 575 & fn. 4; see also Corenevsky v. Superior Court, supra, 36 Cal.3d at pp. 318, 324.) Ake indicates that the defense is entitled to an expert "who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." (Ake, supra, 470 U.S. at p. 83.)

Moreover, in Ake, the Court all but overruled United States ex rel. Smith v. Baldi (1953) 344 U.S. 561, 73 S. Ct. 391, 97 L. Ed. 549, where the state had supplied neutral psychiatrists. As stated by the Tenth Circuit, the Court's duty to appoint a defense expert under Ake "cannot be satisfied with appointment of an expert who ultimately testifies contrary to the defense. . . . The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution." (United States v. Sloan (10th Cir. 1985) 776 F.2d 926, 929; see also United States v. Crews (10th Cir. 1986) 781 F.2d 826, 833-34.) The jury or judge can only make a principled decision when there is a "battle of the experts" where truth is more likely to emerge through each side presenting its own case. While a defendant is not entitled to an expert who will testify to the issues in a way that the defendant wishes, the expert must be "partisan" in the way a retained expert would provide assistance to the defense. (See generally Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma* (1986) 84 Mich. L. Rev. 1326, 1349-54; Comment, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System* (1988) 37 Emory L.J. 995, 1008, 1018-22.)

An expert burdened by a conflict of interest cannot be a “partisan” in the way a defense expert would provide services and testimony for the defense. In an analogous context, the Supreme Court has established a two-part test for analyzing ineffective assistance claims based on a conflict of interest. (See Strickland v. Washington, supra, 466 U.S. 668, 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052; Thomas v. Foltz (6th Cir. 1987) 818 F.2d 476, 480. In such circumstances, a defendant must first demonstrate that his attorney had an actual conflict of interest. (Thomas, supra, 818 F.2d at 480.) In other words, the defendant must show that his attorney "actively represented conflicting interests." (Strickland, supra, 466 U.S. at 692.) A defendant must next establish that this conflict of interest adversely affected his attorney's performance in representing

him. (Id., at p. 692; Thomas, supra, 818 F.2d at 480; People v. Bonin (1989) 47 Cal.3d 808, 842.) Thus, this test directs a reviewing court to presume prejudice if the defendant shows that his counsel's deficient performance was the result of an actual conflict of interest. (See Strickland, supra, 466 U.S. at p. 692; Thomas, supra, 818 F.2d at p. 480; see also In re Sixto (1989) 48 Cal.3d 1247, 1257 [actual prejudice need not be shown to establish ineffective assistance of counsel where there is a breakdown in the adversarial process].)

As previously discussed, [NAME] did not feel at liberty to aggressively pursue his theory that ethnic and religious differences had strained petitioner's marriage because [NAME]'s Oromo tribesmen had a conflicting view. In [NAME]'s own words he states that "in light of Giniat's husband's insistence that politics had no place in the relationship between [NAME] and [NAME], I could not proceed with the surety that ethnic and religious differences were central to the conflict." (Exh. 6.) As the defense expert, [NAME] had no duty of allegiance to the Oromo sponsors of the victim; however, as a member of the Oromo tribe, pressures were brought to bear on him which he could not ignore.

Further, the conflict of interest adversely affected [NAME]'s performance. Defense counsel was surprised when [NAME] conceded to the prosecutor that spitting was no more opprobrious in Ethiopian culture than it is in American culture. (Exh. 2, ¶ 5.) In conversation with the defense investigator after his testimony, [NAME] acknowledged that his testimony was incorrect in this regard. (Exh. 8, ¶ 9.) He must have known this at the time of his testimony given the fact that insults directed at an individual in Ethiopia degrade the entire group to which the individual belongs. (Exh. 15.) [NAME] acknowledged to Petitioner's appellate counsel and Mr. [NAME] that his testimony concerning the availability to [NAME] of the services of elders at the Ethiopian Community Center was misleading. He explained that the services of the center were not a viable option for [NAME]. (Exh. 11, ¶ 5.)

On the basis of this record it is apparent that [NAME] was burdened by a conflict of interest and that this conflict adversely affected his performance as the defense expert. This conflict of interest undermined the central function of a criminal trial which is the ascertainment of the truth via the adversary process. Accordingly, petitioner was deprived of the effective assistance of counsel.

### K. Trial counsel acted incompetently in failing to make any effort to follow the lead afforded by information in her possession and to contact necessary witnesses

There are irreducible minimums of performance expected of counsel in cases such as petitioner's because the "[r]epresentation of an accused murderer is a mammoth responsibility." (In re Gordon Hall (1981) 30 Cal.3d 408, 434.) One duty is to "become thoroughly familiar with the factual and legal circumstances of the case...." (Keenan v. Superior Court (1982) 31 Cal.3d 424, 431.) "Investigation is an essential component of the adversary process." (Wade v. Armontrout (8th Cir. 1986) 798 F.2d 304, 307.)

"[W]here the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel." (People v. Pope, supra, 23 Cal.3d at pp. 425-426; see also In re Cordero, supra, 46 Cal.3d 161, 181.) A defendant is deprived of effective assistance of counsel when counsel fails to investigate and call witnesses to corroborate the defense. (People v. Shaw (1984) 35 Cal.3d 535, 541-542; People v. Rodriguez (1977) 73 Cal.App.3d 1023, 1032.) "When counsel knows of the existence of a person or persons who possess information relevant to his client's defense, and he fails to use due

diligence to investigate that evidence, such a lack of industry cannot be justified as 'strategic error.' [Citation.]" (Jennings v. State (Okla. Crim. App. 1987) 744 P.2d 212, 214.)

[NAME] testified about the importance of family and elders in mediating disputes between married couples. (R.T. 276-277.) Personal matters are only shared within the circle of family and close friends, and family relationships are very close. There is also a group of elders who are called upon to mediate disputes. (R.T. 276-280.)

Unbeknownst to defense counsel, [NAME]'s father-figure and the head of his family, [NAME], was an elder. (Exh. 12; ¶ 3.) Thus, the system of elder mediation of disputes and the symbolic meaning of elders in social life was a tangible presence in [NAME]'s life in Ethiopia.

The importance of the fact that [NAME] was faced with a life crisis without the resource of his uncle Tegegne to assist him cannot be overstated. The locus of authority in Ethiopian communities "rests mainly with councils of elders at the village, neighborhood, lineage, and clan levels." (Hamer, *Myth, Ritual, and the Authority of the Elders in an Ethiopia Society* (1976) Africa [Journal of the Int'l African Institute] vol. 46, no. 4 [Univ. Press Oxford], at p. 327 [hereinafter "Hamer, Africa"].) At every meal, the elders must be served first. On ceremonial occasions, there are certain acts of etiquette which "must be followed in deference to elders as a means of distinguishing them from ordinary mortals. This deference continues after death, for when a man dreams of his dead father it is invariably of a demand by the latter to be honored with the offering of a bull, ram, or honey." (Id. at pp. 327-328.) Elders are carefully selected from the community by a group of elders based upon combinations of factors such as lineage, age (those having survived the longest given greater deference), divination and dreams, and empirical considerations such as wisdom and circumspection, perceptiveness of human nature, and physical health. (Id. at pp. 331-332.) "The elaborate rites and mythology encompassing living and dead elders, with

the varying images of purity, power, and virtue, give the [clans] . . . a sense of pride and invulnerability. ***It is this deeply rooted sense of identity which provides stability when people must face the contradictions and adversities that come with sociocultural change.***" (Id. at p. 337 [Emphasis added.])

[NAME] was uprooted from this sense of identity when he emigrated to the United States. There was no comparable group to which he could belong in this country that would have provided the sense of stability that his family and the elders in his native country could have provided in his time of crisis. Further, it would have been contrary to [NAME]'s sociocultural upbringing to bring his difficulties to strangers for assistance. To make matters worse, it was a source of shame for him as an Ethiopian male that his wife was disrespecting him, and this shame made it even less likely that he would seek outside help.

The defense team "collectively decided at a staff meeting that the need to contact [NAME]'s family for the preparation of the defense outweighed [NAME]'s personal desires to the contrary." (Decl. of Barbara Fargo, Exh. 7.) The fact that defense counsel and the defense psychologist (Exh. 7, ¶ 4, Exh. 24) believed it was necessary to contact petitioner's relatives to prepare the defense requires a finding that counsel was ineffective in failing to do so. The defense psychologist deemed that it was important to contact the family to get baseline information regarding [NAME]'s character and ability to handle stress. (Ibid.) Further, [NAME] was depressed and ashamed of what he had done which limited his ability to assist in his defense. Despite the necessity of contacting [NAME]'s family, the defense failed to follow up and obtain the information necessary for a complete picture of [NAME]'s background.

An investigative report by the defense investigator to defense counsel, dated April 26, 19XX, contains an interview of Aynalem [NAME]'s ex-husband,[NAME], who grew up in the small town of [PLACE], where [NAME]'s mother and brother still live. Mr. [NAME] reported that [NAME]'s uncle is a "very successful trader." He also

states that "[i]n order to talk to the uncle, one can get in touch with one of his daughters, [NAME], and ask her to reach her father and arrange for him to either receive a call, or, more likely, give him a choice of times to call." (Exh. 13.) The defense had [NAME]'s phone number. The defense investigator gave it to Petitioner's appellate counsel who checked the number with [NAME] and [NAME] verified that the number was correct. (Exh. 1.)

The defense investigator never did contact the uncle or other family members because she was instructed not to do so by defense counsel. (Exh. 8, ¶ 5.) According to [NAME] and the defense investigator, contacts with family were to be arranged through the defense expert, [NAME]. (Exh. 3, ¶3; Exh. 8, ¶ 5 & 6.) The defense expert never did speak with [NAME]'s uncle or other family members. (Exhs. 1; 6, ¶ 5; 8, ¶ 7.)

It is inconceivable that petitioner's family was not contacted when family and community elders form the core of the Ethiopian immigrant's sense of stability. One of the critical issues for the defense was the psychological effect of the uprooting of petitioner from his sociocultural circumstances. What better source than petitioner's relatives in Ethiopia was there to learn about the influence of the change in circumstances and environment upon petitioner?

Uncle [NAME] and [NAME] had valuable information on [NAME]'s character and Ethiopian culture which would have assisted the defense. This information would have been utilized by [NAME], the attorneys, and [NAME] or a competent cultural anthropologist such as Yosef [NAME] in the preparation of the defense regardless of whether they appeared personally. [NAME] believed it was important to contact the family in order to gain "clarity." (Exh. 1, ¶¶ 7, 8.) [NAME] states that "[w]ithout communicating with members of [NAME]'s family or relatives, it was impossible to discern clearly whether or not they approved of the inter-ethnic, interreligious marriage, and, therefore, difficult to assess with precision the roles played by these

factors in the tragedy." (Exh. 6, ¶ 5.) This is no longer a mystery. They did approve. (Exh. 9, ¶ 6; Exh. 10, ¶ 13.) Professor [NAME] declares that the fact that they did approve was important because it would have increased the shame for [NAME] when their marriage failed. He had failed his family who had approved of the marriage. (Exh. 15, ¶ 4 ["When [NAME]'s marriage failed, he would have experienced intense shame because his failure reflected his family's failure as well."]) Further, Professor [NAME] utilizes the information provided by these witnesses to state that petitioner's social and emotional functioning and family support of the marriage suggested a healthy bonding rather than the psychological dependency the defense psychologist projected onto petitioner. (R.T. 311-332.)[NAME], the defense psychologist, "needed to know such things as how well [NAME] was doing in Ethiopia as compared to the United States . . . ." (Exh. 7, ¶ 4.)

The declarations of [NAME] and [NAME] also reveal that they could have offered crucial character evidence as well as information concerning petitioner's family and social background which was not presented at trial by the experts valuable character evidence to offer on [NAME]'s behalf. There was regular contact between petitioner and his uncle because petitioner sent money to his uncle and contacted him "often." (Exh. 9, ¶ 5.) Teffera raised petitioner and Mesfin lived with him.

The defense experts have all stated that an accurate family and social history was necessary to present an "aggressive" defense. (Exh. 6, ¶ 5, Exh. 7, ¶ 4; Exh. 15, ¶ 5.) [NAME] and [NAME] would have testified that it was a complete shock to them that petitioner killed his wife. (Exh. 9, ¶¶ 3, 6; Exh. 10, ¶ 4.) There had been no history of violence in petitioner's background. Petitioner had excelled intellectually and socially in Ethiopia. (Exhs. 9 & 10.) The witnesses could have spoken directly to the role of elders in their family ([NAME] is a respected elder) and the likely effect that the absence of this structure would have had on him. (Ibid.) Their testimony would have contradicted [NAME]'s false testimony that the Ethiopian Community Center could

have supplanted the role of petitioner's family and elders. (Exh. 11, ¶ 5.) [NAME] and [NAME] would have provided an emotional context to the cultural evidence that [NAME] did not begin to provide due to the fact that he had to appear "neutral" in order to appease the Oromos. (Exh. 1, ¶ 8.) [NAME] declares that spitting is slightly less than killing on the scale of wrongs in Ethiopian culture and that a person who is spit on would experience a permanent diminishment of that person's value. (Exh. 10, ¶ 9.) [NAME] said nothing of the sort. He said spitting is the ultimate insult, but then conceded on cross-examination that insult to an Ethiopian from being spit upon was no greater than the insult to an American. (R.T. 287-289.) Americans do not experience a permanent loss of value when someone spits on them. It is not an insult to an American's entire family and everything he stands for when someone spits on him. In American culture, spitting it is more a reflection upon the person who spits than it is on the person who is being spit upon. The jury would have obtained accurate cultural evidence and character evidence had these witnesses been contacted. The failure to contact them was prejudicial to petitioner.

Thus, the declarations highlight the defense cultural expert's minimization of the impact of the cultural dislocation and isolation upon [NAME]. The declarations

discredit the defense psychologist's testimony that [NAME]'s dependence upon his

he result of some psychopathology. (R.T. 326-327; see also Exh. 24 [defense psychologist suggests that a reassessment of petitioner should be done in light of the new information].) In contrast to the testimony of the defense psychologist, these witnesses state that the efforts to which [NAME] went to try and put himself back in [NAME]'s favor, including threatened suicide, were evidence of his great love for his wife. "Till death do us part" is taken seriously in Ethiopian culture. There has only been one divorce in [NAME]'s extended family, and that occurred over twenty years ago. (Exhs. 9 & 10.) (Cf. United States v. Gray (3rd Cir. 1989) 878 F.2d 702 [defense counsel's failure to go to scene of defendant's arrest to locate potential witnesses or hire an investigator to track down potential witnesses was ineffective assistance of counsel despite defendant's reluctance to subpoena witnesses to compel their attendance at trial.])

Here, "'[b]y failing to make any effort at all to follow the lead af[NAME]ed by information in [her] possession counsel precluded [herself] from making a rational decision on the question'" of whether to call [NAME]'s family members as witnesses. (People v. Bess (1984) 153 Cal.App.3d 1053, 1061 quoting People v. Frierson (1979) 25 Cal.3d 142, 163.) The failure to contact these witnesses also led to the presentation of an underdeveloped, inadequate, and factually inaccurate cultural defense. (Exh. 1. )

### L. Trial counsel acted incompetently in failing to introduce evidence supportive of a provocation defense

"Fosselman explained that 'in cases in which a claim of ineffective assistance of counsel is based on acts or omissions not amounting to withdrawal of a defense, a defendant may prove such ineffectiveness if he establishes that his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings. [Citations.]" (People v. Dyer (1988) 45 Cal.3d 26, 53.) "Using this

standard, the courts are not limited to searching for the loss of potentially meritorious defenses as was required under People v. Pope (1979) 23 Cal.3d 412 [Citation]. Instead, the courts can now look to whether a defendant was prejudiced by his or her attorney's inadequate performance." (People v. Oden (1987) 193 Cal.App.3d 1675, 1681.)

[NAME] states that his "hypothesis in this case was and remains that ethnic and religious differences might have been contributing factors in the homicide. [NAME] and [NAME] come from two distinct and, at times, including now, pronouncedly antithetical ethno-national and religious groups. . . ." (Exh. 6, ¶ 3.) However, despite the fact that this was the expert's theory of the case, trial counsel failed to develop this theory at all during the trial. She asked [NAME] but one question on this topic at trial and received the following response:

> "Q. (BY MS. [NAME]) For immigrants coming from Ethiopia from a mixed marriage, one Amharic, one Oromo, what types of pressures would you expect to find in an area such as Atlanta?
>
> A. If the people are active in the political organizations. Not all are. And as always, you know, the majority of people probably don't like politics. But those that are vocal, that are active, and if they are affiliate with, let's say the Oromo Liberation Front, which is by far the most popular group overseas, if either associated with those, then yes, you would certainly find strong disapproval." (R.T. 286.)

Defense counsel did not follow this up with any questions of the expert or evidence linking [NAME] or her sponsors to the OLF. In his questioning of [NAME], the trial judge made it clear to the jury that political differences were irrelevant in this case. [NAME] agreed with the judge that tension or stress would arise only in situations where the couple or their associates were politically active. (R.T. 301-302.) Although [NAME]'s own investigation had revealed a strong connection between [NAME]'s sponsors and the OLF (Exh. 6, ¶ 5), counsel failed to elicit this information

from him.[7] [NAME] states that the connection of [NAME]'s sponsors to the OLF "further fuelled [sic] my speculation, despite [NAME]'s discomfort in talking about it, that during [NAME]'s and [NAME]'s sojourn in Atlanta ethnic and religious tensions must have existed." (Ibid.) Accordingly, the principle theory of the defense was jettisoned by counsel's failure to tie in the defense theory with the facts developed by the defense expert's investigation.

### M. Trial counsel acted incompetently in failing to request an instruction informing the jury that it could consider petitioner's cultural background in determining whether he acted in the heat of passion upon sufficient provocation.

Defense counsel has an obligation to ensure that the trial court does not omit critical instructions. (See People v. York (1966) 242 Cal.App.2d 560, 572.) The Supreme Court has underscored this dimension of defense counsel's obligation to his client: "We deem it appropriate to emphasize that the duty of counsel to a criminal defendant includes careful preparation of and request for all instructions which in his judgment are necessary to explain all of the legal theories upon which his defense rests." (People v. Sedeno (1974) 10 Cal.3d 703, 717, fn. 7.) As the Eighth Circuit has recently concluded, there can be no tactical reason for failing to request an instruction that can only benefit the defendant. (Woodward v. Sargent (8th Cir. 1986) 806 F.2d 153, 157.)

Defense counsel has provided a declaration concerning her discussions with the District Attorney and the judge about the prosecution's objection to the testimony of a cultural expert and jury instructions on the "reasonable person standard." She states that she offered a cultural expert on the question of the objective reasonableness of petitioner's conduct. According to counsel, the testimony of the cultural expert would have "allow[ed] the jury to

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[7] During an Evidence Code section 402 hearing, [NAME], [NAME]'s sponsor, denied that she or her husband had any connections to the OLF. (R.T. 354.) [NAME] and petitioner, both, have stated that her husband was actively involved. (Exh. 1; Exh. 6.)

judge the conduct of the defendant in 'the same circumstances' in which he was placed and 'the facts that confronted him such that would have aroused the passions of the ordinarily reasonable person faced with the same situation.'" (Exh. 5, ¶ 5.)

Notwithstanding the fact that the testimony of the cultural expert was offered on the question of whether the victim's conduct would have provoked a reasonable person to act in the heat of passion, defense counsel did not ask the trial judge to modify the standard CALJIC instructions on provocation so that the jury could consider whether a reasonable person in petitioner's position as an Ethiopian immigrant would have had his passions aroused by the victim's conduct. Such a modification is envisioned by the publishers of Forecite in the following supplemental instruction:

> **The [defendant] [and] [or] [the prosecution] has introduced evidence that the defendant has a cultural background that may be unique to you. Such cultural evidence may be relevant to your evaluation of whether the provocation in this case was of such a character and degree as to cause a reasonable person in the position of the defendant to have lost self-control and to have acted upon impulse rather than deliberation and reflection. You should give this evidence whatever weight you think it deserves. However, you may not reject this evidence out of caprice or prejudice because the defendant has cultural beliefs or practices different from your own.**

(Forecite, F. 8.42e.)

Defense counsel's professed reason for not requesting this instructional modification is that the "law" would not "support" it. (Id., ¶ 5.) This explanation is inconsistent with the very purpose for which the evidence was offered: to allow the jury to evaluate the objective reasonableness of petitioner's conduct.

Moreover, defense counsel appears to equate the phrase "circumstances in which the defendant was placed" with his *cultural* circumstances.[8] It is highly unlikely that a jury

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[8] CALJIC No. 8.42 (6th ed. 1996) provides in pertinent part:

> "The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the

would have done so in this case without appropriate instruction from the trial judge. Professor Maguigan has observed that "[w]hen a defendant offers cultural evidence to explain his or her reasonableness and therefore to rebut the prosecution's proof of criminal mens rea, most decision makers will not be able to evaluate the reasonableness claim unless the trial court both admits social framework information ***and*** *explains to the finder of fact its significance as context for the evaluation of a defendant's mental state*." (Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformer's on a Collision Course in Criminal Courts* (1995) 70 N.Y.U. L.Rev. 36, 85 [Emphasis added].)

The prosecutor as much told the jury to ignore the cultural evidence in determining whether the provocation was legally sufficient. During opening argument the prosecutor told the jury what the "reasonable person standard" was not: "It is not the ordinary reasonable Ethiopian. That has nothing to do with it. It's not the ordinary reasonable immigrant. It's not the ordinary reasonable person who is suffering from abandonment anxiety. That's what the doctor said he had. It's what you determine to be the ordinary reasonable person here." (R.T. 502.)

In the defense counsel's argument, the defense attorney argued that "to determine whether there's adequate provocation in a situation such as this, you have to look at the individual. . . . So just for a minute here try to put yourselves in the shoes of my client [INSERT NAME]." (R.T. 520-521.) This argument drew an immediate objection from the prosecutor as follows:

> "[Mr. NAME]: Your honor, I apologize for interrupting but I would object to that line of argument, asking the jury to get in the shoes of the defendant.
> [The Court}: I can't hear you.
> [Mr. NAME]: I object to that line of argument asking the jury to get in the shoes of the defendant.
> [The Court]: The comment is noted. The objection is overruled. I will allow both of you latitude in you final summations. Proceed." (R.T. 521.)

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circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation."

In closing argument, the prosecutor told the jury his version of the reasonable person standard: "a reasonable person, a normal person, everyday person . . . the average Joe and Betty. . . ." (R.T. 540-541.)

"Provocation" is defined by California case law to mean conduct which "would have aroused the passion of the ordinarily reasonable person faced with the same situation." (California Jury Instructions [CALJIC] (6th ed. 1996) No. 8.42, p. 425.) This does not mean that the killing is reasonable in response to the provocation because a reasonable killing would not be a crime at all. Rather, it means that the killing in response to the provocation is at least understandable to a reasonable person. (2 W. LaFave & A. Scott, Substantive Criminal Law (1986) § 7.10, p. 256 ["What is really meant by 'reasonable provocation' is provocation which causes a reasonable [person] to lose his [or her] normal self-control; and although a reasonable [person] who has thus lost control . . . would not kill, yet his [or her] homicidal reaction to the provocation is at least understandable"]; see also People v. Coad (1984) 181 Cal.App.3d 1094, 1107.)

The absence of jury instructions guiding the jury on the use of cultural evidence and the prosecutor's ethnocentric bent on the reasonable person standard meant that the jury was unlikely to consider the critical issue whether petitioner's shame and humiliation would have been more severe under the circumstances of this case because of his Ethiopian heritage than the shame and humiliation experienced by similarly situated males socialized in mainstream North America.[9]

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9 . The fact that a married man or woman in a foreign country would experience abandonment by his or her spouse with greater foreboding than would have been the case if the abandonment had occurred in his or her hometown is not a difficult matter to comprehend. Certainly, a U.S. citizen who had recently emigrated to the horn of Africa, a war-torn region encompassing Ethiopia, Eritrea, and Somalia, would likely feel a sense of panic if his or her only source of emotional comfort and stability had suddenly left without warning. The panic felt by this person might abate momentarily if the spouse were discovered living somewhere else in the country and the couple reconciled. However, suppose then that the abandoned spouse then uproots himself from whatever security he has established in his surroundings and then follows his companion to another remote region of Ethiopia, only to be abandoned again a couple of months later. His future prospect is life in a foreign country with no family, no friends, no place to live, and no money. Any money he had was spent in following his spouse to Ethiopia. Furthermore, when he objects to his abandonment and mistreatment, what follows is severe humiliation.

The need for instruction in these cases is no less crucial than in the situation of the battered woman who reacts violently to conduct that may appear to be innocuous to an outside observer. In the case of the battered woman, it is reasonable for her to believe that otherwise innocuous behavior may foretell physical violence to her because of her past experience. Likewise, in the case of cultures other than our own, it is reasonable for a person from a different culture to believe that his psychological and physical well-being is under assault from certain provocatory conduct even though that the same conduct may appear to be innocuous to an outside observer from this culture. This is the case here, where the wife's conduct in leaving petitioner and spitting on him was every bit as harmful to him as a blow likely to cause great bodily injury. (Exh. 15.) (Cf. People v. Van Nguyen (2000) 22 Cal.4th 872, 885 [the logical extension of the holding in Van Nguyen that a threat of psychological harm alone may justify a conviction for aggravated kidnaping is that cultural evidence should be relevant to determine whether there has been a threat of psychological harm].)

Here, despite the substantial evidence that an ordinarily reasonable person in [NAME]'s position as an Ethiopian immigrant male without the resource of elders or family would have reacted in the heat of passion to his betrayal, abandonment, and humiliation as occurred in this case, [INSERT NAME] was convicted of murder. The defense was undermined by defense counsel's failure to tie together the evidence of [NAME]'s socialization into a culture where marital disputes were a community concern rather than an individual concern with an instruction from the court highlighting the significance of this cultural evidence. The cultural dislocation experienced by [NAME] was relevant to the issue of petitioner's mental state and the objective reasonableness of his conduct. The jury should have been so advised.

In the absence of instructions to tie together the cultural evidence and the reasonable man standard, the focus of defense counsel's closing arguments became whether the defendant's depressed psychological state and the victim's act of spitting on [NAME] was sufficient excuse for him killing her. As the prosecutor noted to the jury (R.T. 502), [NAME]'s depressed psychological state was irrelevant to the question of provocation and

manslaughter. (In re Thomas C. (1986) 183 Cal.App.3d 786, 798.) Further, the defense cultural expert testified that the act of spitting alone would not lead to homicide. (R.T. 289.) Thus, the result of defense counsel's failure to request an instruction relating the cultural evidence to the reasonable person standard was an underdeveloped cultural defense. (People v. Pope, supra, 23 Cal.3d 412, 425 ["If counsel's failure to perform these obligations results in the withdrawal of a crucial or potentially meritorious defense, '"the defendant has not had the assistance to which he is entitled."'"].)

Defense counsel acknowledges that the Santa Clara County Public Defender's Office is now requesting a modification of the standard CALJIC instruction on provocation along the lines suggested here when cultural evidence is relevant to the reasonable person standard. (Exh. 5, ¶ 6.) Counsel has a duty to advocate "changes in the law if argument can be made supporting change." (People v. Feggans (1967) 67 Cal.2d 444, 447.) Accordingly, trial counsel was ineffective in failing to advocate this modification of the standard CALJIC instruction on provocation on behalf of Mr. [NAME].

**N. Petitioner Was Prejudiced by his Attorney's Inadequate Performance**

With the defense expert functioning as a de facto witness for the prosecution, there was a complete breakdown in the adversarial process. In circumstances such as this, no actual showing of prejudice is necessary. (In re Sixto, supra, 48 Cal.3d 1247, 1257.) Moreover, even if a showing of prejudice must be made, the instant record shows an abundance of prejudice.

The central issues in this case were petitioner's state of mind at the time of the killing and whether the conduct of the victim constituted adequate provocation. Was petitioner acting in a subjective state of heat of passion and was the conduct of the victim sufficient to arouse the passion that petitioner labored under?

There was strong evidence that petitioner acted in a state of "high-wrought emotion" or heat of passion before, during, and after the killing. Petitioner was depressed and suicidal before the killing. He had missed work for a couple of days and could not eat or sleep. (R.T. 329.) He purchased Liquid Draino and threatened to drink it if [NAME] left him. (R.T. 241.) The multiple stab wounds he inflicted on [NAME] were consistent with a state of turmoil. Petitioner did not have total recall of the killing which was consistent with someone in a highly emotionally charged state. (R.T. 332.) After the killing he attempted suicide by drinking Liquid Draino which is about as horrible a way to die as one can imagine. Indeed, petitioner had lost his ability to think rationally. He asked the police several times to kill him. (R.T. 101-102.) These actions manifested extreme despair and desperation. (R.T. 325.)

Given that petitioner's conduct before, during, and after the killing indicated that he was in a high degree of emotional distress at the time of the killing, it is likely that his guilt of murder or manslaughter hinged on the question of provocation. The investigation of petitioner's cultural background was vital to an accurate and adequate presentation of the sociocultural factors which contributed to petitioner's deteriorated mental state. Absent an adequate presentation of this sociocultural evidence, the jury could only conclude that petitioner's intense reaction to his wife's conduct was the product of petitioner's inability to cope with stress.

In this regard, it was incumbent upon counsel to research petitioner's family, social, and cultural background. Petitioner's ability to cope was stress was an issue the defense psychologist wanted and needed an answer to. Had an adequate investigation been conducted, the answer could have been found. The fact is that petitioner copes quite well with stress in his native sociocultural environment in Ethiopia. The declarations of [NAME] and [NAME] indicate that petitioner was a responsible, intuitive, and good-natured man who had no history of violence or inability to cope with stress. (Exhs. 9 & 10.) This information would have lent

credence to the theory that a change in sociocultural circumstances had much to do with petitioner's inability to cope with the marital crisis he was faced within the U.S.

Defense counsel's incompetency also led to an inadequate presentation of evidence showing the change in petitioner's sociocultural circumstances from Ethiopia to the United States. For instance, defense counsel wanted to show how the ethnic Ethiopian immigrant subculture in the United States is less accepting of cross-ethnic and cross-religious relationships than is the case in mainstream American culture. [NAME] severely hampered defense counsel's efforts in this regard by failing to accurately and truthfully state his opinion that "ethnic and religious tensions must have existed." Nonetheless, defense counsel could have proven that there would have been ethnic and religious intolerance for [NAME]'s marriage to [NAME]. The active support of [NAME]'s Muslim sponsors for extremist political groups such as the OLF meant that ethnic division was a central tenet of their social and political life. Additionally, there was evidence of pressure upon [NAME] to live according to Muslim religious practice which would have required [NAME]'s religious conversion under Islamic law. Although the contribution of ethnic and religious divisiveness to the tensions in [NAME]'s marriage to [NAME] was a concrete reality, the jury heard that the contrary was true: that there would have been no social or cultural pressures on [NAME] and [NAME] due to religious and ethnic differences.

Further, because of inadequate investigation and incompetent representation, the defense failed to establish that [NAME] was without traditional means of communal support in a crisis. The jury was left with the false impression that traditional means of support in a time of crisis were available to [NAME] in this country. (R.T. 278-279; Exh. 11, ¶ 5.) The jury should have been aware that [NAME] had a system for mediating marital disputes with which he was familiar; that this resource was unavailable to him in this country; that he reached out to [NAME] who was the only person whom he knew could assist him with his relationship difficulties with his wife;

and that this resource failed him leaving him with no other alternatives.[10] (Cf. United States v. Rangel-Gonzales (1980) 617 F.2d 529, 531 [the fact that the consul could have assisted the defendant in obtaining affidavits from family members and social service groups to assist in his defense substantiated defendant's claim of prejudice from lack of consular notification].)

Further, there is compelling evidence in this case suggesting that a variety of pressures acted simultaneously to cause [NAME] to temporarily lose his mind. It is also evident from the record that defense counsel failed to develop a coherent theory for the defense. Defense counsel would ask one or two questions on a topic, and then fail to develop it any further. For instance, she elicited from [NAME] that it would be shameful to a husband "within traditional Ethiopia country" for his wife to leave him without explanation. (R.T. 286-287.) She also elicited evidence that spitting was very insulting, but no more so in Ethiopian culture than in the American culture. (R.T. 287-289.) This was essentially as far as the defense case was developed. A far more compelling case for manslaughter existed.

For one, [NAME] would have experienced a massive social adjustment to this unfamiliar and entirely different American culture. He had come from a culture where people live in extended families to a situation where his family consisted of one individual: his wife. There would have been a profound sense of alienation in making this cultural transfer. [NAME]'s wife's action in leaving him was emotionally devastating to [NAME] (who began having suicidal thoughts) and would have been equally devastating to any similarly situated Ethiopian immigrant. The wife's action

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[10] . On Tuesday the 28th of April 1998, a couple of days before the killing, the victim, [NAME], told [NAME] that he had five days to gather up his belongings and leave the apartment. (R.T. 209-212.) [NAME] asked [NAME], the couple's only friend, to intervene and speak with [NAME]. [NAME] came to their apartment. (R.T. 167, 183-184, 243-244.) [NAME] would not give reasons why she was discontented. (R.T. 179-180.)

would have meant that he was somehow unworthy as a husband, and that his entire family was unworthy as well. [NAME]'s cultural isolation meant that he was without any institutional or family support for dealing with this crisis. He was truly alone and had to handle it by himself which would have been the equivalent of mental and spiritual death for him. The locus of identity is in the group in Ethiopian culture, and [NAME] had no group and therefore no personhood. To add to this, when [NAME] tried to reassert himself with his wife, he was spat upon. This insult was humiliating to the core of everything [NAME] stood for which was family and community. This final gesture by the wife, in addition to all of the others, could have caused [NAME] or any other reasonable person in his position to have lost his mind and become temporarily insane.

The prosecutor told the jury that it could not consider the cultural evidence in determining whether there was provocation. The standard was how the "average Joe and Betty" would have acted, and the average Joe or Betty would not have killed someone over a spitting incident. (R.T. 540.) This grotesque characterization of the law of provocation went unchallenged by defense counsel. Counsel offered no instructions to rebut the prosecutor's argument that a "reasonable Joe or Betty" was the appropriate legal standard for determining the reasonableness of petitioner's conduct.[11] Cultural evidence along very similar lines has resulted in a manslaughter

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[11] . It is true that in the direct appeal the Court of Appeal believed that the absence of a pinpoint instruction was nonprejudicial. However, in the direct appeal the Court of Appeal was concerned with an isolated instance of possible error. In this habeas proceeding, the court is concerned with several errors instead of an isolated instance of error. Further, these errors in combination altered the jury's perception of the strength of the cultural evidence and its relevance to the objective reasonable person standard. (People v. Cardenas (1982) 31 Cal.3d 897, 907; People v. Holt (1984) 37 Cal.3d 436, 459 [question is whether "[i]t is reasonably probable that in the absence of the cumulative effect of these errors the

verdict in other cases. In one such case, Chinese immigrant Dong Lu Chen did not deny that he had killed his wife, also an immigrant from China, by bludgeoning her with a claw hammer. {Fn. omitted.] Instead, during his 1988 murder trial, he offered evidence that he had killed her after learning of her infidelity. The trial court admitted defense testimony from an anthropologist that in Chinese culture, a woman's adultery is proof of her husband's weak character and a source of great shame. However, adultery seldom results in a wife's murder in China. The cultural expert testified that in Chen's village in China others would have intervened before the event resulted in a killing. Unfortunately, Mr. Chen, having recently immigrated to the United States a year before the killing, was without resources for emotional support, and was "off the edge as he knew it." Largely on the basis of the cultural evidence, the defendant was convicted of manslaughter and sentenced to five years probation, the lightest sentence possible for second-degree manslaughter, a charge that had already been reduced from second-degree murder. (See Anh Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders* (1993) 1 Asian Amer. Pac. Is. L.J. 49, 66; Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformer's on a Collision Course in Criminal Courts* (1995) 70 N.Y.U. L.Rev. 36, 37.)

In sentencing Dong Lu Chen to probation, the trial judge stated:

> "Were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court would have been constrained to find the defendant guilty of manslaughter in the first degree . . . . But based on cultural aspects, the effect of the wife's behavior on someone who is essentially born in China, raised in China, and took all his Chinese culture with him except the community which would moderate his behavior, the Court . . . based on the peculiar facts and circumstances of this case . . . and the expert testimony . . . finds the defendant guilty of manslaughter in the second degree." (Maguigan, supra, at p. 78.)

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jury would have reached a result more favorable to appellant."])

The facts of this case state a more compelling case for manslaughter. Unlike Mr. Chen, petitioner sought help from the only resource that he had in Aynalem [NAME]. It is highly unlikely [NAME] would have killed his wife if the identical circumstances had occurred while [NAME] and [NAME] were living in their native country of Ethiopia. Counsel's failure to establish this with evidence, instructions, and argument most definitely undermines confidence in the outcome of this case. Accordingly, "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." (Strickland v. Washington, supra, 466 U.S. 668, 693-694; In re Sixto, supra, 48 Cal.3d 1247, 1257.)

**CONCLUSION**

Our adversarial system of criminal justice is based on the premise that the truth will be discovered if two competing adversaries with a duty of loyalty to their respective clients marshal all of the resources at their disposal in an attempt to win the day in court. When that loyalty is undermined, there is no legally constituted trial, and it would be a farce to believe that the truth would somehow emerge from such a corrupted event.

The duty of loyalty owed by the defense team to [INSERT NAME] was undermined in this case when the defense expert was made a de facto prosecution witness by pressures brought to bear by members of the victim's and expert's tribe. The expert's duty of loyalty was so divided that he could not even give accurate and truthful evidence regarding cultural differences between Ethiopian immigrants and Americans, nor could he testify freely according to his conscience, or state his opinion concerning the role that ethnicity and politics played in the tragic events leading to the homicide. He could not even sign his name to a declaration that he prepared for fear of alienating the prosecution and the victim's tribe. I have to make the "DA happy too," he told the defense investigator. Under these circumstances, it would be an

egregious violation of Fourteenth Amendment due process and a miscarriage of justice to affirm this conviction based on a trial that did not bear the remotest resemblance to a legitimate contest between competing adversaries with corresponding duties of loyalty to their respective clients.

Those who would have influenced the outcome of this case by their tactics of intimidation should not be rewarded. Those individuals should be told in no uncertain terms that their efforts to subvert the criminal justice system in this country have failed and will not be tolerated in the future. While in some countries intimidation and corruption is the order of the day, it is not so in the United States of America.

Petitioner's trial was also corrupted by the trial court's refusal to allow petitioner to tell his story in his own words, and by the ineffective assistance of his trial counsel. We have interpreters to protect a defendant's right to a fair trial, not to subvert it. The use of an interpreter against the will of [INSERT NAME] and his trial attorney was a subversion of the trial process. [NAME]and his attorney wanted the jury to hear his story from his own mouth. Instead they heard the English monotone of an interpreter whose English faired no better than [NAME]'s. How maddening it would have been for any of us to have been placed in a similar situation with our freedom on the line and have been forced to have our story told by an interpreter whom we knew spoke in a monotone and less eloquently about our situation than we could have.

In the words of the defense expert and trial counsel, [NAME]did not have an "aggressive" defense. (Exh. 1, ¶ 8; Exh. 2, ¶ 5.) The defense did not even get "warmed up" to borrow another phrase of the defense expert. (Exh. 11, ¶ 6.) In fact, it was worse than that, the defense did not even get started. Although there was a compelling case for a verdict of manslaughter due to cultural pressures brought to bear on [NAME], this defense was never fully investigated or presented at trial. Defense counsel delegated the job of contacting crucial witnesses to the defense expert, and she did not follow through to make sure that the witnesses had been contacted and their

statements recorded. Counsel states that [NAME] misled her into believing that the witnesses had been contacted (Exh. 3, ¶ 3); however, her own investigator knew that the witnesses had not been contacted. (Exh. 8, ¶ 7.) The defense experts believed that the information these witnesses could have provided was necessary for the defense. (Exh. 6, ¶ 5; Exh. 7, ¶¶ 3-4.) Petitioner's successor counsel contacted them with little effort. (Exh. 1, ¶¶ 23-24.) Indeed, these witnesses had useful cultural and character evidence to provide; evidence which contradicted [NAME]'s testimony in crucial respects, and evidence which proved categorically that the violence in this case was out of character for [NAME]and the result of extreme stress and cultural dislocation.

Further, defense counsel was aware of [NAME]'s theory concerning the contributing role of ethnicity and religion to the homicide. It was her "understanding that it would even be more important, if one or both were involved in a politically active organization." (5/25/01 decl.) She received no information prior to trial that there had been investigation to determine the degree of political involvement of the victim's relatives and sponsors. [NAME]'s family were not contacted. Counsel states that she did eventually learn of the political involvement of the victim's sponsors in the OLF from [NAME]. (Ibid.) However, despite this knowledge, she did nothing to build upon the theory that ethnicity and religion played a role in the homicide. It was dismissed as a theory at trial with one question. (R.T. 286.)

Counsel's failure to request a pinpoint instruction left the door open for the prosecutor to argue to the jury that cultural evidence was irrelevant to the issue of provocation. (R.T. 540.) Thus, the entire defense as it was could have been jettisoned based upon the jury's misconception of the law. Petitioner cannot imagine how counsel's failure to request an instruction under these circumstances is consistent with conscientious and diligent advocacy. A far more compelling factual and legal case for manslaughter existed than was presented by trial counsel to the jury.

This petition is meritorious on the grounds stated. Petitioner submits his present confinement in Santa Clara County Case No. C9884181 is illegal, and a writ of habeas corpus should issue.

DATED:_____, 2001.

Respectfully submitted,

[NAME]
In Propria Persona