IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

6 Crim. H000000

In re [INSERT NAME],

On Habeas Corpus

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(Santa Clara County Sup. Ct. No. C0000000)

PETITION FOR REHEARING

Petitioner, [INSERT NAME] respectfully petitions this court for a rehearing pursuant to rule 25 of the California Rules of Court.

ARGUMENT

I.

THIS COURT SHOULD VACATE ITS OPINION AND GRANT A REHEARING BECAUSE THE UNDISPUTED EVIDENCE SHOWS THAT APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE DEFENSE EXPERT ABANDONED THE CULTURAL DEFENSE WHICH WAS APPELLANT'S ONLY DEFENSE TO THE CHARGE.

This court has rejected petitioner's claim that the defense expert changed his mind from being able to support a provocation defense to be unable to do so due to outside pressure by members of the victim's tribe. In rejecting the claim, the court relied upon the factual finding of the judge who listened to [INSERT NAME] and judged him credible. However, the judge in the evidentiary hearing did not make any findings with respect to claims of ineffective assistance of counsel brought before this court.[1] In rejecting the ineffective assistance of counsel claim, this court omits important factual matters bearing upon the claim. For instance, the court concludes incorrectly that the record fails to show that [INSERT NAME] changed his opinion about the viability of a cultural defense. In so concluding, the court avoids discussing the reason for the change in opinion: intimidation or ineffective assistance of counsel. Having rejected intimidation as the reason, the court is left with the reason proffered by the defense expert which is ineffective assistance of counsel. The expert claims he was not given sufficient

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[1] The scope of the evidentiary hearing held below because it was limited to the issue of intimidation and excluded the ineffective assistance of counsel claim. (Traverse, Exh. 18, pp. 2-3.)

information to support his initial hypothesis of the centrality of ethnic and religious factors to the events leading up to the homicide. This court does not discuss this contention in the opinion, including the impact on the trial when defense counsel was blind-sided by an expert who had changed his mind and could not support the only viable defense.

A. ***The record is undisputed that the defense expert changed his mind regarding the centrality of cultural factors to the case and concluded that they were not central to the case.***

Although the court does not say so explicitly in the opinion, it appears that this court rejects petitioner's argument that [INSERT NAME] changed his opinion from supporting a provocation defense based upon cultural factors to dismissing such a defense without informing defense counsel of this change in opinion. However, the basis upon which the court rejects this argument is an incomplete rendering of the record.

In footnote three, the court cites to a portion of a declaration written by trial counsel after the evidentiary hearing in the superior court where counsel indicated that it was her hypothesis that cultural and religious factors affecting the petitioner at the time of the homicide had been "adequate provocation," and that [INSERT NAME] "confirmed the significance of these cultural and religious factors." (Slip Opn. Pp. 6-7 fn. 3.) The court states that this "falls far short of demonstrating that [INSERT NAME] had formed an opinion about this case, let alone had formed an opinion that he compromised at trial because of outside pressure." (Ibid.) However, the court omits an important part of the sentence which reads in full as follows: "Mr. [INSERT NAME] confirmed the

significance of these cultural and religious factors before I determined it was necessary to retain an expert to present a cultural defense *and he would support my hypothesis.*" (Traverse, Exh. 19, ¶ 5.) The hypothesis [INSERT NAME] said he would support was that the cultural and religious factors constituted "adequate provocation." (Ibid.) Defense counsel's recollection in this regard is supported by [INSERT NAME]'s own declaration in which he states that his initial hypothesis was that "the complex of ethnic (in this instance, Amhara-Oromo,) and/or religious (in this instance, Orthodox/Coptic-Moslem,) conflict . . . might have been a significant, if not determining, factor in the homicide." (Traverse, Exh. 3, § 4.)

Thus, [INSERT NAME] went from thinking that ethnic and religious tensions were significant enough a factor to support a jury finding of adequate provocation to the conclusion that these factors were insignificant. He concluded that "neither religion nor ethnicity were central" to the case, and began looking for "other cultural factors that could be pertinent to the case." (Slip Opn. at p. 6; See also Traverse, Exh. 3, ¶ 4.) He never communicated to defense counsel that he could no longer support a provocation defense based upon ethnic and religious strife in the marriage. (Exh. 19, ¶ 8.) He "substantially watered down [his] initial hypothesis of whether religion and ethnicity were . . . factors in the relationship of petitioner" to his wife. (Slip Opn. P. 5.)

The unexpectedness of [INSERT NAME]'s change of heart took defense counsel by surprise at the trial. (Exhibit 6.) Defense counsel attempted to elicit from [INSERT NAME] the importance of ethnic and religious differences to the marital

tensions and was rebuffed. Upon questioning by the court, [INSERT NAME] conceded that the differing ethnicities and religions of the defendant and victim were not a factor in their marital tensions because the couple was neither politically nor religiously active. (R.T. 286, 301.) Defense counsel states she would not have called [INSERT NAME] as a witness and would have "requested a postponement of the trial to explore other options" if she had known his trial testimony would be "watered down." (Exh. 19, ¶ 8.)

B. ***According to the defense expert's testimony, the reason for his change in opinion from being able to support a defense of adequate provocation to being unable to support it was trial counsel's failure to supply him with necessary information.***

Defense counsel chose a provocation defense based on the theory that the victim's conduct sparking ethnic and religious tensions in the relationship were adequate provocation to reduce the offense from murder to manslaughter. Having chosen this defense, defense counsel was constitutionally obligated to adequately prepare this defense. (*People* v. *Frierson* (1979) 25 Cal.3d 142, 158.) Counsel determined that consultation of and presentation of the testimony of a cultural expert was necessary to present the defense, but she did not properly prepare the expert for his testimony.

The defense expert claims not to have been given crucial information necessary to the formulation of his opinion. For instance, he claims he was not told by the defense that the victim had asked her husband to change his religion. (Evidentiary Hearing Transcript pp. 26, 205-206.) He also claims to have never been given letters from the victim's relatives to the victim and petitioner calling on the victim to leave

petitioner if he did not change his religion. (Evidentiary Hearing pp. 200-201, 210.) He testified at the evidentiary hearing that the information he learned after the trial suggested that pressures were put on the couple to separate. (Ibid.) Thus, according to the expert, he was not given information by defense counsel which would have supported his initial hypothesis that ethnicity and religion were determinative factors leading up to the homicide.[2] As a result, he had to remain "neutral" toward the case instead of supporting the defense hypothesis. (Evidentiary Hearing pp. 41, 76, 200.)

The superior court found [INSERT NAME] to be "believable" and "earnest and honest in his views." (Slip Opn. p. 6.) If that is the case, then one should also find that he was being truthful when he testified that the defense counsel did not adequately prepare him to testify resulting in his "watered down" and "neutral" testimony.

C. ***Petitioner was prejudiced by his trial counsel's incompetence.***

This court reduces petitioner's Sixth and Fourteenth Amendment claims to the contention that "counsel did not introduce better cultural-defense evidence." (Slip Opn. p. 14.) On the contrary, defense counsel utterly failed to present a case for provocation . This court cites to some cultural evidence that defense counsel elicited from [INSERT NAME] (Ethiopians have close-knit family and spitting is the ultimate insult), but the evidence [INSERT NAME] gave at trial was in keeping with his position that he could not support a provocation defense. Concerning the subject of ethnicity and

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of the claim of ineffective assistance of counsel is set out at pages 18 through 20 of the Traverse.

religion, [INSERT NAME] testified that it was only a factor if the couple was politically active and there was no evidence to support a finding that they were. (Trial transcript, pp. 286, 301.) (In the absence of evidence to the contrary, [INSERT NAME] adopted the opinion of the Oromos that ethnicity and religion was not a factor, and therefore did not pursue the theory that the pressures placed on [NAME] by her family and sponsors caused the separation.) The "other cultural factors" were insignificant according to [INSERT NAME], including the importance of family, because of the availability of the Ethiopian Cultural Center to mediate family disputes. (Trial Transcript p. 279.)

This court does not dispute that the evidence supported a provocation defense. The court notes the declarations of petitioner's "two experts to the effect that no reasonable person could have maintained self-control in the face of the socioeconomic pressures placed on and [NAME]'s humiliation of him." (Slip Opn. p. 14.) Indeed, the experts opined that petitioner exhibited "a high degree of tolerance" under the circumstances. Petitioner was living with his wife's OLF sponsors who would have hated petitioner's tribal group. [NAME] attacked petitioner's identity in several respects then shamed and humiliated him when he was already depressed from prior provocatory acts. Ethiopian identity in general is rooted in the community/family connection and Amhara identity in particular is further rooted in the Christian religion and courageous character. [NAME]'s family and sponsors encouraged [NAME] to leave petitioner unless he converted his religion to the Moslem faith. To an Amhara like Israel, conversion to the Moslem faith would mean giving up his identity. While asking petitioner to give up his

identity, [NAME] repeatedly humiliated him by leaving him without notice in Atlanta then telling him to leave once he had relocated to be with her in California. When [NAME] abandoned petitioner, he would have "felt as though he had been killed." (Exh. 22, ¶ 8.) The failed marriage reflected petitioner's family's failure as well indicating that they were unworthy. When petitioner responds by falling into depression, [NAME] raises the ante by attacking his manliness (calling him a freeloader) and defiling him and his family by spitting on him repeatedly. According to the experts, given the amount of shame and humiliation leveled on petitioner by [NAME], the only alternative open to him at the time would have been "altruistic suicide, removing both his wife and himself from a society that he would expect to perceive him and his wife as a disgrace." (Id. at ¶ 11, p. 10.) This is in fact what he attempted by killing his wife then cutting his wrist and drinking poison.

The evidence adduced at the evidentiary hearing established that defense counsel was ineffective in failing to furnish the defense expert with enough information to support his hypothesis that ethnic and religious conflict was a determinative factor in the events leading up to the homicide. The defense expert adopted a neutral position as the result of this omission rather than asserting the defense of provocation at trial. No additional showing of prejudice is required for a reversal of the judgment. Defense counsel's failure to develop a potentially meritorious defense is reversible error. (*People* v. *Frierson*, *supra*, 25 Cal.3d 142, 164 ["we need not speculate as to the likely prejudicial effect of counsel's omissions, for counsel's failure to take reasonable investigative

measures actually resulted in the presentation to the jury of an incomplete, undeveloped diminished capacity defense."]) Accordingly, this court should vacate its opinion and grant a rehearing of the case.

II.

THE COURT SHOULD GRANT A REHEARING TO CONSIDER THE CLAIM THAT THE HEARING AFFORDED PETITIONER IN THE SUPERIOR COURT WAS CONSTITUTIONALLY INADEQUATE.

Petitioner filed a pro per petition for habeas corpus in this court reasserting claims made by appointed counsel in this court in a previous habeas petition. Petitioner did not attack the fairness of the evidentiary hearing in the superior court in his petition. This court issued an order to show cause, and thereafter appointed counsel for petitioner who argued in the traverse that the hearing afforded petitioner on his petition in the superior court was constitutionally inadequate. This court declined to address the issue because it was not raised in the petition by the pro per petitioner. Petitioner asks that this court exercise its discretion to hear the claim.

This court cites *People* v. *Duvall* (1995) 9 Cal.4th 464, 475 for the proposition that a traverse may not introduce additional claims or wholly different factual bases for the claims already alleged or specified. (Slip Opn. p. 3.) That being said, it is also clear that reviewing courts have considered such claims in specified circumstances, such as when the petition is filed in pro per and counsel is subsequently appointed and raises additional claims in the traverse.

The Supreme Court in *Ex parte Connor* (1940) 16 Cal.2d 701, issued an

order to show cause on a pro per petition and subsequently appointed counsel who raised new claims in the traverse. The court cited the general rule that new claims could not be raised in the traverse, but then added, "notwithstanding this rule, our review of the record discloses that the contentions are without merit." (*Id*. at p. 711.)

Likewise, in *In re Gallegos* (1967) 252 Cal.App.2d 997, 1003, the court stated that "[j]ust prior to oral argument [the] petitioner filed a 'traverse' in which he set forth a number of alleged facts raising additional issues to those stated in his original petition. Neither the facts nor the additional issues appear in the petition. We have decided to consider the traverse as a new and additional petition for habeas corpus, and it will be acted upon separately."

The Ninth Circuit follows a similar rule in federal cases. The court has the discretion to consider claims raised for the first time in a traverse, and the matter will be remanded unless that discretion is exercised. (*Boardman* v. *Estelle* (9th Cir. 1992) 957 F.2d 1523, 1525; *United States* v. *Pons* (9th Cir. 1995) 61 F.3d 914; *Jackson* v. *Roe* (9th Cir. 2005) 425 F.3d 654, 662.) The Ninth Circuit counsels courts to give *pro se* litigants (such as petitioner, at the time his petition was filed) "the benefit of the doubt." (*Brown v. Roe* (9th Cir. 2002) 279 F.3d 742, 746.)

In this case, not only is petitioner a pro se litigant, but he is also a litigant for whom trial counsel requested an English language interpreter because legal concepts were being lost in the translation. This court upheld the trial court's ruling refusing to waive the interpreter for petitioner to testify in English finding a rational basis for the trial

court's "concern about petitioner's ability to testify and to respond to cross-examination in English. . . ." (Slip Opn. p. 8.) Thus, it is unreasonable to expect that petitioner would have been able to raise the new claim of the inadequacy of the evidentiary hearing in the petition when there had been no prior briefing on that point for petitioner to follow.

It is true that after this court appointed counsel for petitioner, appointed counsel could have sought leave to file a supplemental petition raising the additional issue. This court has recently recognized as such. *(Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1235.) Under these circumstances, appellate counsel's failure to request leave to file a supplemental petition constituted ineffective assistance of appellate counsel.

The issue concerning the fairness of the evidentiary hearing is particularly important to petitioner's case. For example, this court has stated that the declarations submitted by petitioner fell short of demonstrating that [INSERT NAME] had changed his opinion. (Slip Opn. pp. 6-7, fn. 3.) Although petitioner disputes this statement and believes the evidence sufficient to show a change of opinion, petitioner could have been on even firmer ground had the superior court allowed petitioner to call defense counsel and her supervisor as witnesses to testify to conversations they had with [INSERT NAME] about the defense. The superior court utilized Evidence Code section 352 to preclude the petitioner from calling these witnesses to testify to inconsistent statements made by [INSERT NAME]. (R.T. 212-213.) The court also precluded cross-examination of [INSERT NAME] on the efforts he did undertake on behalf of the defense making it

difficult to ascertain what he did versus what should have been done to develop a provocation defense. (R.T. 40, 98-99.) The court refused to allow the defense to make an offer of proof concerning statements [INSERT NAME] made to the defense attorneys regarding the centrality of ethnicity and religioun to the case. (R.T. 99.) The limited nature of the evidentiary hearing prejudiced petitioner's ability to prove the ineffective assistance of counsel claim.

Petitioner requests that this court follow *Gallegos* and treat the claim concerning the adequacy of the evidentiary hearing as a separate petition. Accordingly, petitioner requests that this court modify the opinion by removing the paragraph on page three of the court's opinion declining consideration of petitioner's "fourth point" in the traverse, and consider the claim as a separate petition.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this court grant his petition for rehearing.

DATED: November 4, 2005

Respectfully submitted,

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[INSERT NAME]
Attorney for Petitioner