From: Pettigrew, Stacie, DA
To: Chris Sansoe
Subject: FW: P v. Andrew Hoeft-Edenfield
Date: Monday, April 12, 2021 9:56:01 AM
Attachments: Hoeft-Edenfiled Return Final Draft Ready.pdf

Hi Chris,
See attached. Hope this helps. Good luck!

Stacie M. Pettigrew
Deputy District Attorney
Alameda County DA's Office
Office: (510) 272-6225

-----Original Message-----
From: Beltramo, Shara, DA <Shara.Beltramo@acgov.org>
Sent: Monday, April 12, 2021 9:34 AM
To: Pettigrew, Stacie, DA <stacie.pettigrew@acgov.org>
Subject: RE: P v. Andrew Hoeft-Edenfield

Hi Stacie! I am so sad to hear that she is still up to her old ways. I know Judge Goodman reported her to the state bar after our habeas hearing concluded since he actually found she committed IAC. I guess nothing ever happened to her by the state bar?

The only thing I have left from this case is the brief (my return) that I filed before we went to hearing. I have attached it to this email for you. Unfortunately, when I left the office to go to the law firm, I lost a lot of my work. Hopefully this brief will help?

Please keep me updated if you hear anything about what happens in the Contra Costa case.

Thanks!
Shara

-----Original Message-----
From: Pettigrew, Stacie, DA <stacie.pettigrew@acgov.org>
Sent: Thursday, April 8, 2021 10:29 AM
To: Beltramo, Shara, DA <Shara.Beltramo@acgov.org>
Subject: FW: P v. Andrew Hoeft-Edenfield

Hi Shara!
Hope you're well and enjoying your week off!!
Do you by chance still have access to any of your Yolanda Huang documents? This DA from Contra Costa is specifically interested in any of the Habeas documents outlining her IAC/conflict of interest.
I got PTSD reading his email outlining her current actions because she clearly has not changed... Hoping you have some stuff saved electronically. If not, maybe we can get the file guys to find the files.
LMK
Thanks!
Stacie

-----Original Message-----
From: Chris Sansoe <CSansoe@contracostada.org>
Sent: Thursday, April 8, 2021 10:14 AM
To: Pettigrew, Stacie, DA <stacie.pettigrew@acgov.org>

Subject: RE: P v. Andrew Hoeft-Edenfield

Hello,
Of course I don't want to interrupt trial time. Ill be brief.

I have a 4 co-defendant home invasion robbery. My 4 defendants are from Oakland. Three of them are college students. They buy weed from Vic. The next day they feel like they were shorted. That night they arm themselves with baseball bats and a handgun and go back to rob Vic in his home. Vic, his fiancé, his 9 month old child, his mother, and his brother are all assaulted and robbed in the home. Vics were able to get 911 call off and Defendants were caught leaving the house with all proceeds. All in all great case with no real factual issues.

My issues are with Huang. She came is an as the heavy defendants attorney. She is his 3rd attorney.

She has since taken the following actions:
1. Immediately demanded restorative justice for her defendant. When I told her that this was a state prison case and we were at 6 years prison she lost it; 2. Filed two discovery motions pursuant to the Racial Justice Act-PC 745. Her contention has been that our office/ and myself have been racist in our filing of charges in the case. This was denied 2x; 3. Filed a blanket Pitchess against all officers for the case. This was denied; 4. Has got a community activist to start an online petition to have me removed from the case; 5. Has given people from this petition my direct line number and our office email to send emails demanding my removal and demanding diversion/restorative justice; 6. Has now filed for mental health diversion and retained an "expert" to conduct a forensic exam - expert is Daniela Kantarova (from Wright Institute in Berkeley); 7. Has sent her "investigator" to my victims house to explain why restorative justice is best for them and to explain what could happen to them if they go to trial.

Yea it has been fun. I was reaching out to see if ALCO has any interaction with Huang and how attorneys from ALCO have dealt with this type of behavior. She really does not do much criminal work and she appears to be totally incompetent when it comes to actual procedure.

Based on your experiences do you have any thoughts or suggestions for how to deal with this level of behavior? Do you know anyone else who has dealt with her?

Sorry to bother you during trial. Thank you for your time,

Chris Sansoe

-----Original Message-----
From: Pettigrew, Stacie, DA <stacie.pettigrew@acgov.org>
Sent: Thursday, April 8, 2021 9:56 AM
To: Chris Sansoe <CSansoe@contracostada.org>
Subject: RE: P v. Andrew Hoeft-Edenfield

Hi Chris,

I'm in trial. Any questions in particular? I did not do the actual trial. I had the PX and handled the plea once the case was reversed at the Habeas level.

She's a nightmare. The case was reversed on Habeas because the court found that she had an actual conflict of interest because she had filed a civil suit against Cal, the IFC, etc. all the while representing the defendant in his murder case (thus having a personal monetary interest in pursuing the criminal case). What should have (and eventually did) result in a manslaughter plea bargain went through trial and ended in a first degree murder conviction.

She is incredibly inexperienced in the criminal arena. She had a convicted murderer acting as her investigator. Let me know if you have any specific questions of me. I'm kind of slammed right now but I will try to get back to you as soon as I can.

Good luck!

Stacie M. Pettigrew
Deputy District Attorney
Alameda County DA's Office
Office: (510) 272-6225

-----Original Message-----
From: Chris Sansoe <CSansoe@contracostada.org>
Sent: Wednesday, April 7, 2021 8:03 PM
To: Pettigrew, Stacie, DA <stacie.pettigrew@acgov.org>
Subject: P v. Andrew Hoeft-Edenfield

Hello Ms. Pettigrew,
My name is Chris Sansoe and I am a DA in Contra Costa County. I was told that you were the assigned DA to the above 2014 murder case. I am reaching out because I am dealing with a defense attorney named Yolanda Huang. She was defense in your case.
I was hoping to pick your brain regarding her behavior in your case.

Please give me a call at your convenience. My cell phone number is 925-787-2961.

Thank you,

Chris Sansoe
Deputy District Attorney
Contra Costa County

Sent from my iPhone

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

IN RE ANDREW HOEFT-EDENFIELD On Habeas Corpus.	Case No.159202 Dept: 9 July 10, 2013

RETURN TO THE ORDER TO SHOW CAUSE;
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

NANCY E. O'MALLEY
District Attorney
County of Alameda

Shara Beltramo
Deputy District Attorney
[State Bar #227246]

Micheal O'Connor
Senior Deputy District Attorney
[State Bar # 124655]

900 Courthouse
1225 Fallon Street
Oakland, CA 94612-4292
(510) 272-6222

TABLE OF AUTHORITIES

CASES **Page(s)**

INDEX TO EXHIBITS TO RETURN TO THE ORDER TO SHOW CAUSE

Exhibit No.	Document Title
1	Reporter's Transcript on Appeal Volume 22, pages 5013-5016
2	Jury Verdict Forms
3	Clerk's Docket and Minutes from 5/13/10
4	Reporter's Transcript on Appeal Volume 22, pages 5156-5157
5	Abstract of Judgment
6	Clerk's Docket and Minutes from June 10, 2010
7	Inspector Brian Medeiros' notes from interview with Adam Russell
8	Ex Parte Application for Stay of Proceedings Pending Underlying Criminal Appeal & Case Management Order
9	Civil Suit Complaint for Damages Filed May 3, 2010
10	Reporter's Transcript on Appeal Volume 17, pages 3886-3937
11	Transcript of jail call between petitioner and Bill Harris on November 21, 2009
12	Transcript of jail call between petitioner and Rebecca Young on November 22, 2009
13	Declaration by Senior Deputy District Attorney Richard Moore
14	Reporter's Transcript from Dept. 11 on November 20, 2009, pages 1-7
15	Declaration by Senior Deputy District Attorney Allison Danzig
16	Verified Answer by Judge Jacobson
17	Declaration by M. Gerald Schwartzbach
18	Inspector Brian Medeiros' notes from interview with M. Gerald Schwartzbach
19	Inspector Brian Medeiros' notes from interview with Rebecca Young
20	Declaration by Deputy District Attorney Stacie Pettigrew
21	Declaration by Lois Haney
22	Reporter's Transcript on Appeal Volume 22, pages 5105-5109.

NANCY E. O'MALLEY
District Attorney
County of Alameda
900 Courthouse
1225 Fallon Street
Oakland, CA 94612-4292
(510) 272-6222

Shara Beltramo
Deputy District Attorney
[State Bar #227246]

Micheal O'Connor
Deputy District Attorney
[State Bar #

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

IN RE ANDREW HOEFT-EDENFIELD On Habeas Corpus	Case No. 159202 Dept: 9 July 10, 2013 RETURN TO THE ORDER TO SHOW CAUSE; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the Alameda County District Attorney's Office to state in return to the order to show cause issued on February 20, 2013 as follows:

I.

On May 3, 2008, Christopher Wootton, an undergraduate student of the University of California at Berkeley and a member of the Sigma Pi Fraternity, was stabbed to death by petitioner after an argument ensued between petitioner, petitioner's friends, victim and victim's friends. At one point during the argument, petitioner pulled out a pocket knife and brandished the knife at victim and his friends. (RT 1155-1158; 6 RT 1425; 9 RT 2013-2015; 10 RT 2279, 2332; 16 RT 3686-3687.) Petitioner said to victim and his friends, "Who wants to go first?" and "Who wants to

get shanked?" (RT 2103, 2108.) Victim yelled to petitioner, "Look, I'm calling the F[uck]ing cops," "Get out of here," and "You guys are Fucked." (5 RT 1172.) As victim was on the phone with 911, the conflict intensified. (5 RT 1179-1181; 6 RT 1302-1303, 1431, 1434; 9 RT 2104, 2114-2115; 10 RT 2197-2198, 2207-2208, 2286-2287, 2335; 14 RT 3350, 3375-3376; 16 RT 3688.) Victim placed petitioner in a "bear hug" and then swung petitioner around, resulting in petitioner being thrown off balance. (9 RT 2119, 2121; 10 RT 2206, 2292-2293, 2295.) Victim then staggered into the crowd with a stab wound to the chest. (8RT 1181; 9 RT 2121-2122.) Petitioner fled the scene, but petitioner's friends were stopped by police a couple of blocks from away. (9 RT 2028, 2030; 10 RT 2306-2307; 12 RT 2728-2729.) An officer canvassing the area found the murder weapon in some bushes a few blocks from the scene. (8 RT 1923, 1926.) Petitioner was located the next morning at his friend's house where he admitted he had thrown his clothes in the washing machine to wash off the blood. (8 RT 1976-1977, 1981; 13 RT 2933.) Petitioner was identified in a subsequent investigation as being the person who was wielding the knife on the night of the incident. (6 RT 1390-1391; 9 RT 2137; 10 RT 2309-2310; 13 RT 2865-2869, 2947-2948.) On a recorded jail call after his arrest, petitioner told his friend Chris Wilcox that, "I done basically told them you were about to punch some guy; you punched him, I punched him, and then got jumped by 30 people. And I thought I was fixing to die on the ground by getting my head stomped on. Do you know what I am saying?" Petitioner also told Mr. Wilcox that, "I just want you to tell Adam that story and you guys get that shit straight." (11 RT 2515-2516; 12 RT 2746-2747.)

II.

On May 13, 2010, a jury in Alameda County Superior Court convicted petitioner of second degree murder (Pen. Code § 187)[1] and found the personal-use enhancement true. (§ 12022, subd.(b)(1).) (Exhibit 1, Exhibit 2, Exhibit 3.) The jury was polled and the verdicts recorded. (Exhibit 1.)

III.

On June 10, 2010, Petitioner was sentenced by Judge Jeffrey W. Horner in the Superior

[1]All further statutory references are to the Penal Code unless otherwise indicated.

Court of the State of California in and for the County of Alameda as follows:

> "Accordingly, the sentence of this Court is as follows:
>
> Probation is denied.
>
> For a violation of Section 187(a) of the California Penal Code, murder fixed by the jury as murder in the second degree, the defendant is sentenced to serve an indeterminate sentence from 15 years to life in the California State Prison pursuant to the provisions of Penal Code Section 190(a).
>
> For the allegation that in the commission of the above offense of murder, the defendant did personally use a deadly and dangerous weapon, to wit, a knife, within the meaning of Penal Code Section 12022(b)(1) found to be true by the verdict of the jury, the defendant is sentenced to serve an additional and consecutive one year in state prison." (Exhibit 4, p. 5156.)

On May 5, 2011, petitioner filed his opening brief on direct appeal. (Case No. A128780.) On November 7, 2011, petitioner filed in the First District Court of Appeal a petition for a writ of habeas corpus. (Case No. A133643.) On June 29, 2012, the Court of Appeal affirmed the judgment and denied the habeas petition. Petitioner filed with the California Supreme Court a petition for review in the appeal and on October 10, 2012, the court denied review.[2]

IV.

Petitioner filed the instant petition for writ of habeas corpus on August 16, 2012.[3] On September 19, 2012, the Court requested petitioner file an informal response and invited the respondent to obtain a declaration from trial defense counsel.[4] Trial counsel refused to speak with respondent about the facts of the case, citing an American Bar Association opinion which recommends that trial counsel not discuss confidential matters with the prosecution team.[5]

On February 20, 2013, the Court issued an order to show cause directing respondent to show cause as to three issues: why petitioner is not entitled to relief based on his allegation that counsel

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[2] Procedural facts adopted from page 1 of the Informal Response to Petition for Writ of Habeas Corpus filed by Deputy Attorney General Bridget Billeter on November 1, 2012.

[3] Ibid.

[4] Ibid.

[5] Ibid.

rendered ineffective assistance:

1. by representing petitioner and defense witness Adam Russell in a related civil suit against the Inter-Fraternity Council;

2. by refusing to enter into plea negotiations at the plea bargaining stage; and

3. by misleading petitioner about the risks and potential consequences of going to trial.

V.

Petitioner is guilty in fact, is lawfully and constitutionally under a sentence of 16 years to life imposed on June 10, 2010 in Dept. 13, by Judge Jeffrey W. Horner in the Superior Court of the State of California in and for the County of Alameda, and is lawfully confined by the California Department of Corrections. (Exhibits 1-6**.**) The underlying judgment in Alameda County Superior Court No. 159202 is valid and is neither infected nor impaired by error. Respondent denies petitioner's allegations to the contrary.

VI. Civil Suit and Potential Conflict

A. Petitioner's Factual Allegations

With regard to whether petitioner's counsel rendered ineffective assistance of counsel as a result of her representing both petitioner and Adam Russell in a related civil suit, petitioner alleges the following:

1. Sometime in June of 2009, trial counsel indicated she intended to represent Adam Russell and petitioner in a civil suit against Sigma Pi fraternity and the University of California. (Petn. Writ 8/17/12 at p. 15.)[6]

2. Trial counsel believed that each fraternity had large insurance polices and that any money awarded through a settlement or a judgement in a civil case, would finance her costs of representing petitioner at his criminal trial. (Petn. Writ 8/17/12 at p. 15.)

3. According to petitioner, trial counsel was informed that filing a civil suit could detrimentally affect petitioner's trial because the prosecution could cross-examine both petitioner

[6] Petitioner filed a Writ of Habeas Corpus on August 17, 2012 and an Informal Reply to Informal Response to Petition for Write of Habeas Corpus on November 16, 2012.

and Mr. Russell about the civil suit and how it may influence their testimony. (Petn. Writ 8/17/12 at p. 15.)

4. Petitioner alleges that this civil suit was filed by trial counsel on May 3, 2010, the same day as commencement of closing arguments in petitioner's criminal trial. (Petn. Writ 8/17/12 at p. 15.)

5. Mr. Russell falsely testified at petitioner's criminal trial that trial counsel did not represent Mr. Russell's interests in any other matters. (Petn. Writ 8/17/12 at p. 16.)

6. Trial counsel intentionally omitted facts regarding Mr. Russell's culpability for the murder of Christopher Wooten in the civil documents. (Petn. Writ 8/17/12 at p. 16.)

7. Trial counsel simultaneously represented petitioner and Mr. Russell at the time Mr. Russell testified in petitioner's criminal case.

B. Petitioner's Contentions

Petitioner argues it was ineffective assistance of counsel for trial counsel to represent Adam Russell and petitioner in a civil suit because it created a conflict of interest. That conflict of interest resulted in trial counsel having a personal interest in the outcome of petitioner's criminal case because trial counsel hoped to recover money from the civil suit. Thus, trial counsel was financially motivated to dissuade petitioner from taking a plea deal because any conviction in the criminal case would have destroyed trial counsel's ability to recover any civil monetary damages.

C. Respondent's Factual Allegations

In response to the above allegations, respondent alleges:

1. Adam Russell met with representatives from the District Attorney's Office on May 28, 2013. Mr. Russell stated that trial counsel approached him sometime before the start of petitioner's criminal trial to discuss the possibility of Mr. Russell becoming a plaintiff in a civil suit. (Exhibit 7, p. 1.) Trial counsel asked Mr. Russell if he would like to join petitioner as a plaintiff in this "class action" lawsuit against the fraternities. (Exhibit 7, p. 1.) Mr. Russell stated that trial counsel informed him that she would create a website with the hope of attracting more plaintiffs to this "class action" lawsuit. (Exhibit 7, p. 2.) Mr. Russell subsequently signed a civil contract agreeing to join this civil suit and for trial counsel to represent him in the suit. (Exhibit 7, p. 2.) Mr. Russell did

not give trial counsel any money up front for her representation in the civil case. (Exhibit 7, p. 1.) As part of this civil suit, Mr. Russell did not expect to gain any money. (Exhibit 7, p.2.) Rather, he understood any money recovered by way of civil judgement would go to trial counsel in order to recoup the money she had lost as a result of representing petitioner in his criminal case.(Exhibit 7, p. 1.) Mr. Russell was also under the belief that some of the money might go to petitioner's mother, who had been diagnosed with cancer. (Exhibit 7, p. 1.) Mr. Russell explained that he has moved several times since signing this civil contract and as a result, he has been unable to locate it. (Exhibit 7, p. 3.) At some point in 2010 or 2011, Mr. Russell informed trial counsel by phone that he no longer wanted to be a part of the civil suit. (Exhibit 7, p. 3.)

2. Mr. Russell's attorney, Stuart Hanlon, informed representatives of the District Attorney's Office and petitioner's attorney that Mr. Russell told him that trial counsel had Mr. Russell sign a criminal contract in addition to the civil contract. It was understood by Mr. Russell that this criminal contract was an agreement for trial counsel to represent Mr. Russell if he were to be charged criminally for the events of May 3, 2008. (Exhibit 7, p.5.)

3. Mr. Russell also informed Mr. Hanlon that trial counsel instructed Mr. Russell to minimize how many times the two of them had met if asked by the district attorney on cross-examination. Mr. Russell acknowledged that he did minimize the number of times he met with trial counsel when he was cross examined by Deputy District Attorney Connie Campbell at petitioner's trial on April 26, 2010. (Exhibit 7, p. 5.)

4. Respondent alleges that trial counsel filed the civil suit on May 3, 2010, the last day allowed for a filing before the running of the statute of limitations. (Exhibit 8.)

5. Respondent denies trial counsel omitted facts in the civil documents regarding Mr. Russell's culpability for the murder of Christopher Wooten.(Exhibit 8.)

D. Respondent's Contentions

Based on the facts alleged above, respondent alleges that petitioner has not met his burden of showing that joint representation of petitioner and Mr. Russell in the civil suit affected trial counsel's representation of petitioner in his criminal case. In order to meet his burden, petitioner must show deficient performance by trial counsel and as a result of that deficient performance,

Office of the
District Attorney
Alameda County
California

petitioner was prejudiced. (***Strickland v. Washinigton*** (1984) 466 U.S. 668, 694.) A showing of prejudice is made if, but for trial counsel's deficient performance, the result of petitioner's criminal case would have been different. (***Ibid.***) When addressing conflict of issue claims, petitioner must show that there was an actual conflict that adversely affected trial counsel's performance. (***Cuyler v. Sullivan*** (1980) 446 U.S. 335, 348.) As argued below, respondent contends that petitioner has not met his burden of proving that the joint representation of Russell and Petitioner caused any actual conflict. As to the filing of the civil suit, petitioner has failed to show that the filing of the suit caused any prejudice or created any conflict as to counsel's performance at trial. Defendant has failed to show that the filing of the civil suit caused any prejudice during plea bargaining.

VII. Engagement in Pretrial Negotiations

A. Petitioner's Factual Allegations

With regard to whether trial counsel rendered ineffective assistance by refusing to enter into plea negotiations at the plea bargaining stage, petitioner alleges the following:

1. Trial counsel did not enter into any meaningful negotiations regarding case settlement. (Petn. Informal Reply, 11/16/12 at p. 14.)

2. Trial counsel incorrectly informed petitioner concerning the strengths and weaknesses of the prosecution case. (Respondent will address this issue in section VII of this Return.)

3. Petitioner wanted to accept and would have accepted the offer. (Petn. Informal Reply, 11/16/12 at p. 16.)

4. Petitioner alleges it is clear that the court would have accepted the plea. (Petn. Informal Reply, 11/16/12 at p. 16.)

5. Keith McArthur observed trial counsel refuse to enter into any meaningful negotiations regarding case settlement. (Petn. Writ, 8/17/12 at p. 29.)

B. Petitioner's Contention

Petitioner argues that trial counsel did not engage in any pretrial negotiations on behalf of petitioner, and that he would have accepted an offer to dispose of the case for a reduction to manslaughter and a sentence of 12 years. As a result, trial counsel performed deficiently and

petitioner was prejudiced because he is now facing life in prison rather than a determinate sentence.

C. Respondent's Factual Allegations

In response to the above allegations, respondent alleges:

1. Deputy District Attorney Stacie Pettigrew was assigned petitioner's case for preliminary hearing. At an informal meet and confer conference with Judge Jacobson and trial counsel, Ms. Pettigrew or Senior Deputy District Attorney Allison Danzig, indicated they may be willing to offer a voluntary manslaughter plus the use of the knife for twelve years in state prison. However, neither Ms. Pettigrew nor Ms. Danzig were willing to convey that as a formal offer until they spoke with the victim's family and unless petitioner was willing to accept that type of resolution. Ms. Pettigrew said trial counsel refused to engage in any meaningful negotiations and trial counsel expressed her belief that this homicide was justifiable. (Exhibit 20.)

2. Senior Deputy District Attorney Richard Moore did engage in pretrial negotiations with trial counsel shortly before the commencement of petitioner's criminal trial. However, it appeared to Mr. Moore that trial counsel had a different viewpoint regarding the value of the case. Mr. Moore told trial counsel that he might consider making a voluntary manslaughter offer plus the use of the knife for the maximum sentence of twelve years; however, he would not make that offer without speaking with the victim's family. Mr. Moore also told trial counsel that petitioner would have to be willing to accept that type of resolution before he would approach the victim's family to discuss this as a potential resolution. Trial counsel responded by saying, "Absolutely not. That is way too much time." Thus, Mr. Moore never conveyed an offer to trial counsel. (Exhibit 13.)

3. On November 20, 2009, Deputy District Attorney Connie Campbell stated on the record that trial counsel expressed to Ms. Campbell that she was not interested in any negotiations and that petitioner was fully aware that he was facing life in prison. Trial counsel responded on the record by stating, "I wouldn't say that I'm not interested in negotiations, just that our points of view are slightly divergent on this case." Judge Jacobson then asked Ms. Campbell if there was an offer in this case and Ms. Campbell responded by saying, "No." (Exhibit 14, p. 2.)

4. Senior Deputy District Attorney Alllison Danizg met with Judge Jacobson and trial counsel prior to the preliminary hearing. According to Ms. Danzig, trial counsel was completely

unwilling to engage in any discussions. Trial counsel refused to make eye contact and sat stoically in Judge Jacobson's chambers. Ms. Danzig did not convey a formal offer to trial counsel because it appeared trial counsel was unwilling to discuss any negotiations. Ms. Danzig did informally indicate that she may accept the petitioner pleading guilty to a voluntary manslaughter plus the use of the knife for a maximum sentence of twelve years in prison. Trial counsel expressed no interest in this type of resolution and responded by saying, "He's never going to get convicted." Thus, Ms. Danzig never made an offer in this case. (Exhibit 15.)

5. Respondent alleges that Judge Jacobson observed trial counsel's refusal to engage in any meaningful negotiations over a period of eighteen months. Judge Jacobson told trial counsel that he would strongly encourage the District Attorney to accept a plea agreement of the mid term on a voluntary manslaughter plus the use of the knife for a total of seven years in state prison. Trial counsel responded by telling Judge Jacobson she would consider nothing above probation. Judge Jacobson became concerned that trial counsel was not acting in the best interest of her client by refusing to discuss any type of plea agreement. (Exhibit 16, p. 17.)

6. Although petitioner contends that he would have accepted a twelve-year offer, his assertion is belied by other evidence.

Petitioner expressed this sentiment to Bill Harris in a jail call dated November 21, 2009;

> Petitioner: "I wanna take – I wanna take a deal. They're offerin' this 12 years to zero plea and I just want – I want Rebecca to talk to Yolanda and just try to get me the best deal possible. Yolanda said she can get me ten, you know, if I get ten then they knock off two years for the 80%, I've already did about two years, so I'll be only doin' 6 years. So they can give me ten or – 'cause I don't wanna do this zero to 12 thing because that's not legit, it's not for sure, you know, I could get 12 years – I don't want 12 years. (Exhibit 11, p. 5.)

The conversation between petitioner and Mr. Harris continued:

> Petitioner:: "…uh, no, yeah and I just know that yo-, uh, Yolanda's kind of upset because I just didn't wanna go to trial and now I'm switchin' up 'cause she said – she could've got me a good deal and she could've worked towards a deal but, I decided – I wanna go to trial, now I wanna switch up. Which I – I've already assigned…"
>
> Mr. Harris: "She – she – she kinda – she kinda, — left her…"
>
> Petitoner: "Yeah, she's just frustrated with me. Sounds like she told me to call Rebecca…"
>
> Mr.Harris: "…well that's another – that's another problem with experience there."

> Petitioner: "Yeah. So – so what I've been tryin' to say is that I've already made my mind that I'm – I'm gonna punt and shoot for this deal and I'll – whatever yo- whatever the best I can get, that's what I'm takin', I've already decided that's – that's what I wanna do, 'cause I just…"
>
> Mr. Harris: "Why, now yeah is that du- uh, purely because you don't like the gambling aspect?"
>
> Petitioner: "I just don't like, yeah – I don't like the gambling aspect, too many people gettin' life sentences – I don't wanna deal with that. I can't, you know – you know, what I'm sayin', I still got – if I get out - I mean c'mon now, even 12, I still get out I'll be like 30, 29, 28, you know, I still got my whole life ahead of me, I've got another 40 years to live, you know?" (Exhibit 11, p. 14.)

In this jail call, petitioner understood he was facing life in prison, but he wanted a better deal than what the prosecution was even willing to consider. This conversation illustrates the fact that even though petitioner claims in his declaration that he wanted to take the twelve year offer before trial, he did not truly want to accept a twelve year offer. Thus, the failure to take a deal is not attributable to deficient performance by trial counsel, but rather by the fact that petitioner was never given an offer lower than twelve years.

Petitioner also discussed taking a deal with Rebecca Young, a family friend and public defender in San Francisco, by way of a jail call on November 22, 2009. (Exhibit 12) It seems clear from the jail call with Ms. Young that petitioner wanted to take a deal; however, he wanted less time than what the prosecution was willing to consider. (Exhibit 12, p. 2.) During this call to Ms. Young, petitioner spoke about other defendants in Alameda County receiving plea deals for less than twelve years. It appears from the phone call, petitioner expected he should get fewer than twelve years when he stated,

> "Well, see the thing is they just offered it when I went to court on Friday. And I told Yolanda, I said, you know, that uh, I was considering it, you know? Um, I don't want to – I don't want to take what they're trying to say. I'm trying to get Yolanda to get something better basically."
>
> Ms. Young: "Okay. Okay. And this is – this is the 12 year thing?"
>
> Petitioner: "Yeah."
>
> Ms. Young: "12 year (unintelligible) with an open plea right?"
>
> Petitioner: "Yeah. Twelve with an open plea. So twelve to zero years."

(Exhibit 12, p. 2.) In this call, Ms. Young went on to say,

Ms. Young: "Did he get ten? Did you hear that?"

Petitioner: "Yep. Nate got ten years."

Ms. Young: "So why should you get 12?"

Petitioner: "Yeah, I know. It's crazy. The last guy took the same deal that I got but he got six but Jacobson was saying he was trying to put his personal opinion on it saying that his case is better than my case, which ain't true at all. But then I guess Jacobson told Yolanda that I was looking at 8 to 12.

Ms. Young: "Jacobson said that?"

Petitioner: "Yeah. Now that's what she told me like the very first time but I said I wa- "I'm not taking the deal." I said, "I'm not taking it." And then they offered it again the last I went – when I went to court this time. And I just got to thinking, you know, Yolanda been told me, she said, "I can get you like ten." And I'm thinking we can do a little better if we can get like – at least like eight or some – somewhere close to that. And my mom and dad ain't feeling it at all. I just talked to them today. They're not feeling it all. They're like "No, you should go to trial." But I'm like, I don't want to – this – Alameda County is, you know, it's no joke. They're playing for keeps. They're definitely not – and, you know, and there's just so many different aspects to my case that I just, you know, don't really want to go to trial. And there's so many ways to look at it. There's so many different witnesses. How do I know what everybody's going to say? Somebody can lie and say something, you know, and then if they lie then, you know, I could get a lot of time and I'm not trying to deal with that. I'm just trying to do the for sure thing." (Exhibit 12, p. 3-4.)

Later in the jail call, Ms. Young told petitioner "I really don't think you should take more than four." (Exhibit 12 p.5.) Petitioner stated he would be willing to accept six. (Ibid.)

This jail call between petitioner and Ms. Young continues to illustrate the fact that petitioner did not want to take a twelve year offer, but rather he thought he was entitled to something less than twelve years. Petitioner believed he had a good case compared to the other defendants in Alameda County.

7. Judge Jacobson might have accepted petitioner's plea to a voluntary manslaughter plus the use of the knife for twelve years in state prison had defendant offered it; however, there is no evidence suggesting that Judge Jeffrey W. Horner, the trial judge, would have accepted that offer.

8. At sentencing, petitioner provided a statement to Judge Horner. In this statement, petitioner never mentioned his desire to have taken a plea deal rather than go to trial. (Exhibit 22.)

D. Respondent's Contentions

Based on the facts alleged above, respondent contends that petitioner has not met his burden of showing that trial counsel performed deficiently at the plea bargaining stage. First, though

counsel did not come to an agreement with the prosecution, defendant has not demonstrated that she did not engage in pretrial negotiations. Second, defendant has not suffered prejudice because, although he is willing to accept a twelve-year offer today, he was unwilling to accept a twelve-year offer before trial. Since the prosecution was unwilling to accept anything less than twelve years, there could have been no plea bargain and thus defendant has suffered no prejudice.

VIII. Advisement of Risks and Consequences of Going to Trial

A. Petitioner's Factual Allegations

With regard to whether petitioner's counsel rendered ineffective assistance of counsel by misleading petitioner about the risks and consequences of going to trial, petitioner alleges the following:

1. Petitioner alleges that trial counsel told him the worst he could be convicted of if he went to trial was a voluntary manslaughter. (Petn.8/17/12 at P. 29 and Petitioner's Declaration.)

2. Petitioner alleges that the only chance for petitioner's success at trial was for petitioner to take the stand and express his need to use self-defense. If trial counsel feared petitioner would not have been a good witness, petitioner alleges trial counsel should have encouraged petitioner to take a deal. (Petn. 8/17/12 at p. 30-31.)

B. Petitioner's Contention

Petitioner alleges that trial counsel did not professionally evaluate the strengths and weaknesses of both the prosecution and defense case. Petitioner argues that he was incorrectly informed of the risks of proceeding to trial. As a result, petitioner was prejudiced because he would have accepted the offer if trial counsel had explained the dangers and disadvantages of going to trial.

C. Respondent's Factual Allegations

In response to the above allegations, respondent alleges:

1. Petitioner was personally made aware of the risks and consequences of going to trial as a result of Judge Jacobson informing petitioner on the record that he was facing life in prison if convicted at trial. Judge Jacobson told petitioner and trial counsel,

> "The downside for your client is huge. There is a series of facts in this case as I understand it from having dealt with the bail issue that if a jury finds that series of facts to be true there is some possibility, maybe even a likelihood, that a jury is going

> to convict your client of first or second degree murder, in which case he'll end up with a life sentence." (Exhibit 14, p. 3.)

2. Petitioner admitted to knowing the risks and consequences of going to trial as a result of the two jail calls with Bill Harris and Rebecca Young where petitioner told both of them that he wanted to take a deal because he did not want a life sentence. (See above.)

3. Lois Haney, a jury consultant, was present at a jailhouse visit with trial counsel and petitioner on November 13, 2009. (Exhibit 21, p.2.) At this meeting, trial counsel told petitioner his worst case scenario if convicted at trial would be a manslaughter conviction. (Exhibit 20, p.2.)

4. Respondent alleges that M. Gerald Schwartzbach, a private criminal defense attorney with forty-three years of experience practicing law, believed petitioner had a defensible even a winnable case if petitioner were to testify. Mr. Schwartzbach expressed to trial counsel that petitioner should take the twelve year offer if petitioner was not going to testify. (Exhibit 17, p. 2 and Exhibit 18, p. 2.)

5. Respondent alleges that Rebecca Young, an experienced public defender in San Francisco County, believed petitioner had a triable case because there was only one stab wound and petitioner had no prior contacts with the criminal justice system. However, Ms. Young expressed some concern that trial counsel did not believe in the theory of self-defense and as a result, trial counsel would have a difficult time convincing the jury that petitioner acted in self-defense. (Exhibit 19, p. 5.) Ms. Young claims trial counsel told her that the worst petitioner could do at trial was a manslaughter conviction. However, despite her experience, Ms. Young told trial counsel anything could happen with a jury. (Exhibit 19, p. 4-5.)

6. At sentencing, petitioner addressed Judge Horner and the victim's family. During this statement, petitioner never mentioned that his trial attorney misinformed him about the risks and consequences of going to trial. (Exhibit 22.)

D. Respondent's Contention

Based on the facts alleged above, respondent alleges that petitioner has not met his burden of showing deficient performance in advising of the risks and consequences of going to trial. Even if the court finds it was deficient performance, petitioner has failed to show that he was actually

Office of the
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prejudiced as a result of trial counsel telling petitioner that the worst he could be convicted of at trial was a voluntary manslaughter.

IX.

Except as expressly admitted above, respondent denies, specifically and generally, each allegation of the petition.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for writ of habeas corpus should be denied and the order to show cause discharged, unless petitioner disputes any material assertion contained herein. If petitioner does deny any material fact asserted herein, a referee should be appointed and an evidentiary hearing should be convened to resolve such disputed fact or facts, after which the petition for writ of habeas corpus should be denied and the order to show cause discharged.

Dated: July 10, 2013

Respectfully submitted,
NANCY E. O'MALLEY
District Attorney

By: _____

Shara Beltramo
Deputy District Attorney

_____

Micheal O'Connor
Senior Deputy District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. Burden under Habeas Corpus

A habeas corpus proceeding is a collateral attack upon a criminal judgment, which because of society's interest in the finality of judgements, is presumed to be valid. (***People v. Duvall*** (1995) 9 Cal.4th 464, 474; ***In re Clark*** (1993) 5 Cal.4th 750, 764.) Such attacks are limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court and claims of constitutional dimension. (***In re Clark***, *supra*, at 766-767.)

Petitioner bears "a heavy burden" to plead sufficient grounds for relief. (***People v. Visciotti*** (1996) 14 Cal.4th 325, 351.) To satisfy this burden, petitioner is required to plead with particularity the facts supporting each claim, along with reasonably available documentary evidence, such as affidavits or declarations. (***People v. Duvall***, *supra*, 9 Cal.4th 474.) Petitioner "must set forth specific facts, which if true, would require issuance of the writ," and a petition that fails in this regard must be summarily denied for failure to state a prima facie case for relief. (***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1258, superceded by statue on another ground as stated in ***In re Steele*** (2004) 32 Cal.4th 682, 691.) "[Petitioner] bears the burden of proving [those] facts...by a preponderance of the evidence." (***In re Sassounian*** (1995) 9 Cal.4th 535, 546 (internal quotations and citations omitted.)

The function of an order to show cause is to institute a proceeding in which issues of fact are to be framed and decided. (***In re Hochberg*** (1970) 2 Cal.3d 870, 876, fn 4, rejected on another ground in ***In re Fields*** (1990) 51 Cal.3d 1063, 1070, fn 3.) The issuance of an order to show cause is a "preliminary assessment that the petitioner is entitled to relief if the factual allegations in the petition are proven." (***In re Hardy*** (2007) 41 Cal.4th 977, 1018.) "[T]he issuance of an order to show cause creates a 'cause' giving the People a right to reply to a petition by a return and to otherwise participate in the court's decision making process." (***In re Serrano*** (1995) 10 Cal.4th 447, 455.) The order to show cause delineates the scope of the proceeding and a petitioner cannot expand upon that scope by raising additional claims or "wholly different factual bases in a traverse." (***People v. Duvall***, *supra*, 9 Cal.4th at 475; ***In re Clark***, *supra*, 5 Cal.4th at 781, fn 16.) Any habeas

claims not encompassed in the order to show cause are implicitly determined to have failed to state a prima facie case for habeas corpus relief. (***In re Williams*** (1994) 7 Cal.4th 572, 611.)

The return addresses only those claims in the petition identified in the order to show cause. (***In re Clark***, *supra,* 5 Cal.4th 781, fn 16.) The respondent's burden is one of pleading, not proof. (***People v. Duvall***, *supra*, 9 Cal.4th at 483, fn 6.) In addition to stating facts "when appropriate," the return should also "provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed." (***Id***. at 476.)

If consideration of the written return and matters of record persuade the court that the contentions of the petition lack merit, the court may deny the petition without an evidentiary hearing. (***People v. Romero*** (1994) 8 Cal.4th 728, 729.)

II. Ineffective Assistance of Counsel Standard

In ***Strickland v. Washington*** (1984) 466 U.S. 668, the United States Supreme Court stated that the "benchmark for judging any claim of ineffectiveness must be whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (***Id***. at 686.) To establish ineffectiveness under ***Strickland***, a petitioner must show both a deficient performance by the attorney and prejudice to the petitioner. (***Id.*** at 693.) Prejudice is not established by demonstrating "some conceivable effect on the outcome of the proceeding." (***Ibid.***) Rather, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. (***Id***. at 694 [emphasis added].) A reasonable probability is one "sufficient to undermine confidence in the outcome." (***Ibid***.) Petitioner bears the burden of alleging and proving ineffective assistance of counsel and prejudice. (***In re Avena*** (1996) 12 Cal.4th 694.)

In regards to an allegation of deficient performance as it relates to a plea deal, defendant must show that "the outcome of the plea process would have been different with competent advice." (***Strickland***, *supra* at 694.) In order to establish prejudice, a defendant must show that but for an attorney's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. (***Ibid.***)

The United States Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' [Citation]" (***Wiggins v. Smith*** (2003) 539 U.S. 510, 521.) However, "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics found upon adequate investigation and preparation." (***In re Marquez*** (1992) 1 Cal.4th 584, 602.)

"[A] court must indulge a 'strong presumption' that counsel's conduct falls within the range of reasonable professional assistance." (***Bell v. Cone*** (2002) 535 U.S. 685, 702.) Moreover, counsel's conduct must be evaluated from the perspective of the time the acts or omissions complained of occurred. (***People v. Davenport*** (1995) 11 Cal.4th 1171, 1235-1236; ***People v. Freeman*** (1994) 8 Cal.4th 450, 513.) "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (***In re Jackson*** (1992) 3 Cal.4th 587, 610, disapproved on other grounds in ***In re Sassounian*** (1995) 9 Cal.4th 535, 545.) Petitioner must point to a "deficiency so egregious that his attorney's conduct fell outside the 'wide range of reasonable professional assistance...." (***People v. Hart*** (1990) 20 Cal.4th 546, 633.) The Supreme Court has stated, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence...." (***Strickland***, *supra*, 466 U.S. at 689.) Thus, a petitioner must show that counsel's alleged error was not attributable to a tactical decision that a reasonably competent defense attorney would make. (***People v. Gurule*** (2002) 28 Cal.4th 557, 661; ***In re Sixto*** (1989) 48 Cal.3d 1247, 1257.)

Ineffectiveness claims can, and often should, be disposed of solely based on failure to demonstrate prejudice. (***Strickland***, *supra*, 466 U.S. at 697; *accord* ***In re Ross*** (1995) 10 Cal.4th 184, 204.) That assessment must be made in light of the totality of evidence before the trier of fact. (***Strickland***, *supra*, at 695; ***Ross***, *supra*, at 205.) Judicial scrutiny of counsel's performance is "highly deferential." (***Id.*** at 689; ***People v. Mincey*** (1992) 2 Cal.4th 408, 449.) There is a "wide range of reasonable professional conduct," and a "strong presumption" that counsel's conduct fell within that range. (***Id.*** at 689; ***Bell v. Cone***, *supra*, 533 U.S. at 698.) "[A] court must be careful not

to narrow the wide range of conduct acceptable under the Sixth Amendment....” (***Nix v. Whiteside*** (1996) 475 U.S. 157, 165.)

III. ARGUMENT AS TO REFERENCE QUESTIONS

A. Whether counsel rendered ineffective assistance by representing petitioner and Adam Russell in the suit against the Inter-Fraternity Council.

Petitioner has not met his burden of showing that there was an actual conflict caused by trial counsel’s joint representation of Petitioner and Mr. Russell. It is difficult to ascertain whether Mr. Russell was speaking truthfully when he informed Respondent that he did not expect to receive any money from the civil suit and that any money awarded by way of a civil judgement would have gone to trial counsel. Mr. Russell has a history throughout this case of being untruthful. Mr. Russell admitted on cross-examination by Deputy District Attorney Connie Campbell that he lied to the police when he was arrested on the night of the murder. (Exhibit 10, p. 3928-3929.) Mr. Russell admitted that he was trying to say whatever was necessary to the police in order to get released from the police station. (Exhibit 10, p. 3924.)

Mr. Russell testified under oath that trial counsel was not his attorney, despite the fact that he signed two contracts agreeing for trial counsel to be his lawyer. (Exhibit 10, p. 3887.) Unfortunately, Mr. Russell claims he cannot find the civil contract he signed with trial counsel, so this court is asked to believe, without more, that Mr. Russell is telling the truth about the financial arrangements for the civil suit. Respondent is skeptical of Mr. Russell’s truthfulness and there appears a need for corroboration of what was said by Mr. Russell in order to accurately ascertain the truth. Even assuming that Mr. Russell’s account is accurate, however, petitioner has failed to show that the filing of the civil suit entitles him to relief.

1. Petitioner failed to show that the joint representation of Russell and Petitioner created any actual conflict.

The Sixth Amendment provides a criminal defendant with the right to effective assistance of counsel and representation free from conflict. (***Strickland v. Washington*** (1984) 466 U.S. 668, 688.) “In order to establish a violation of the Sixth Amendment [based on conflict of interest], a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely

affected his lawyer's performance." (***Cuyler v. Sullivan*** (1980) 446 U.S. 335, 348.) An "actual conflict" is a "conflict that affected counsel's performance-as opposed to a mere theoretical division of loyalties." (***US v. Wells*** (2005) 394 F.3d 725,733 citing ***Mickens*** v. Taylor (2002) 535 U.S. 162 at 171.) If this standard is met, prejudice is presumed. (***Mickens***, supra at 166.) The presumption of prejudice does not attach to every conflict, but rather it is appropriate to attach when conflicts give rise to a high probability of prejudice with a corresponding difficulty of demonstrating such prejudice. (***Mickens***, *supra* at 175.)

Where the defendant complains that a conflict is the result of counsel's joint representation of two individuals involved in the same crime, a defendant must establish that an actual conflict of interest adversely affected trial counsel's performance. "The mere possibility of conflict is insufficient to impugn a criminal conviction." (***People v. Cooks*** (1983) 141 Cal.App.3d 224, 289 (citations and quotations omitted).)

In ***People v. Owen***, a husband and wife were charged with theft-related offenses involving an elderly man. The wife had been employed as a private nurse to care for the man in his home. The husband often accompanied his wife to the victim's home. When many items of the victim's property went missing, the police searched the couple's home pursuant to warrant and recovered the victim's property. Both husband and wife were charged with the theft. At trial they were jointly represented by a retained attorney; no warnings were given or waivers taken as to any conflict of interest on the part of the defense lawyer. The defendants were both convicted of some of the counts. Both appealed arguing that they should have been warned against joint representation. The appellate court ruled that defendants must demonstrate the existence of an actual conflict of interest to be entitled to relief. The court found that the defendants had failed to show an actual conflict:

> Appellants claim a conflict arose because "a great amount of the testimony related to the theft of monies charge, which dealt almost exclusively with Mrs. Owen." Appellants have not established how their interests diverged on that matter, since the record indicates that Mr. Owen was just as involved in [the victim's] financial affairs as his wife. Mr. Owen testified that he often sat at the same table with his wife and [the victim] as bills were paid and checks were written.

(***People v. Owen*** (1989) 210 Cal.App.3d 561, 567.)

In the instant case, petitioner has failed to show how his interests were adverse to the interests of Mr. Russell. Both men were friends; both were on the same side during the assault on

the victim. Petitioner does not contend that anyone but he wielded the knife that struck the fatal blow. Petitioner has never contended that Mr. Russell was responsible for the murder; indeed Mr. Russell testified on petitioner's behalf. Petitioner claims that trial counsel omitted facts relating to Mr. Russell's involvement in the civil suit, and that Mr. Russell falsely testified that trial counsel did not represent him in other matters. Petitioner fails to show how these allegations prejudiced him. The content of these allegations, had they been proved to the jury, could not have caused the jury to look more favorably on petitioner. In short, nothing about trial counsel's joint representation of Mr. Russell affected the outcome of the case in any way.

2. Petitioner failed to show that the filing of the civil suit caused any prejudice or created any conflict as to counsel's performance.

When considering whether attorney compensation causes a conflict of interest, the leading case is ***People v. Doolin*** . (2009) 45 Cal.4th 390), 4111-31.) In ***Doolin***, the defendant claimed there was an inherent and irreconcilable conflict of interest because both counsel's compensation and the costs for investigation were covered by a lump-sum fee. The defendant argued the conflict of interest arose not because of a conflict among clients, but rather a conflict between his attorney's interest in maximizing his fees verses the defendant's interest for the case to be fully investigated. (***Id***. at 419.)

The court in ***Doolin*** decided to apply the federal standard, as presented in ***Mickens v. Taylor*** ((2002) 535 U.S. 162), rather than the then-existing California standard, to decide whether there was a conflict of interest. Under the ***Mickens*** standard, a conflicts of interest is a form of potential ineffective assistance of counsel that is evaluated under the ***Strickland*** test. (***Doolin***, *supra*, 45 Cal.4th at 417.) When addressing a conflict of interest claim, a showing of deficient performance is made if counsel labored under an actual conflict of interest that affected counsel's performance-as opposed to a mere theoretical division of loyalties.' (***Ibid***; citing ***Mickens***, *supra* 535 U.S. at p. 171.) "An actual conflict of interest for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. (***Ibid***; citing ***Mickens***, *supra* 535 U.S. at p. 172.) Under the federal analysis, once a defendant establishes an actual conflict that adversely affected the lawyer's performance, prejudice is presumed. (***Mickens***, supra at 166.) "In any circumstance in which

defendant succeeds in demonstrating an actual conflict affected counsel's performance, we will then address the prejudice prong of the federal standard, applying the standard under ***Strickland***." (***Doolin***, *supra* at 422.)

Doolin noted that, under ***Mickens***, "a presumption of prejudice need not attach to every conflict, but was appropriate for conflicts giving rise to a high probability of prejudice and corresponding difficulty of demonstrating such prejudice." (***Id.*** at 428.) Adopting the reasoning of a federal case, the court noted that "the presumption of prejudice should be limited to the context of multiple concurrent representation because only in that context 'is the duty of loyalty so plain. Only then is the risk of harm high enough to employ a near-*per se* rule of prejudice." (***Id.*** at 428 (*quoting* ***Beets v. Scott*** (5th Cir.1995) 65 F.3d 1258, 1270).) Under this analysis, a potential conflict of interest as regards attorney compensation is not entitled to the presumption of prejudice:

> In a sense, every representation begins with a lawyer-client conflict. If the representation is for a fee, the lawyer's economic interest will be to maximize the amount of the fee and the client's will be to minimize it. Conversely, if the representation is for a flat fee, the attorney's interest will be to minimize the amount of time spent on the case, and the client's interest will be to maximize it. Thus, the application of a presumption of prejudice would swallow the ***Strickland*** rule if it were applied to every case in which a criminal defendant complains that his lawyer failed to investigate a witness or a defense, neglected to perform an experiment, did not hire a witness, or otherwise failed to take action because the attorney decided that it was not worth the time or the expense.

(***Id***. at 429 (*quoting* ***Beets v. Scott*** (5th Cir.1995) 65 F.3d 1258, 1297 (*dis. opn. of King, J*)).) The court concluded that "[r]ather than being immobilized by conflicting ethical duties among clients, a lawyer who represents only one client is obliged to advance the client's best interest despite his own interests or desires." (***Ibid***.)

The court ultimately denied defendant's federal constitutional conflict of interest claim. (***Id***. at 421.) Accordingly, the court found that the presumption of prejudice standard did not apply because a conflict over attorney compensation was not an actual conflict, such as one that would arise from multiple concurrent representation. (***Id***. at 429.) In addition, the court stated that the defendant failed to "demonstrate a reasonable probability that he would have obtained a more favorable result in the absence of counsel's failure to investigate defense abli witnesses." (***Id***. at 430.)

The court stressed that the remedy for a Sixth Amendment violation should be tailored to the injury suffered by the defendant. (***United States v. Morrison*** (1981) 449 U.S. 361, 365-366; holding that the dismissal of an indictment was too drastic of a remedy because defendant failed to show demonstrable prejudice or substantial threat of prejudice as a result of a conflict.) Therefore even in the face of an actual conflict, reversal is not necessarily required.

In the instant case defendant has failed to demonstrate that the filing of the lawsuit poses a conflict with trial counsel's performance at trial. As argued above, the multi-representational aspect of the lawsuit causes no conflict because in this context the interests of petitioner and Mr. Russell do not conflict, and because no prejudice resulted. As to the act of filing the civil lawsuit, counsel's interests at trial were the same as her interests in the civil suit. In both the trial and the lawsuit, counsel was equally motivated to win.

3. Petitioner failed to show that the filing of the civil suit caused any prejudice or created any conflict during plea bargaining.

As to the effect of the civil lawsuit on counsel's efforts to advise petitioner and to engage in plea-bargaining, respondent first notes that this aspect of the lawsuit does not concern dual representation. Thus there is no presumption of prejudice. Of course, defense counsel stood to gain attorney's fees from a successful prosecution of the civil lawsuit. And one could speculate that the strength of the civil lawsuit would be diminished in the event petitioner were to be convicted of a crime. But, as noted in ***Doolin***, there is an inherent conflict in any fee arrangement between an attorney and her client. Such a conflict requires correction only if the petitioner proves that the conflict adversely affected counsel's performance and that defendant suffered prejudice as a result. As argued below, petitioner has established neither.

B. Whether Counsel Rendered Ineffective Assistance by Refusing to Enter into Plea Negotiations at the Plea Bargaining Stage.

1. Petitioner failed to show that trial counsel did not engage in pretrial negotiations.

Criminal defendants have the right to effective counsel during plea negotiations. (***Missouri v. Frye*** (2012) __U.S.__, 132 S.Ct. 1399, 1407 -1408.) The inquiry as to how to define the duty and responsibilities of defense counsel in the plea bargain process poses a difficult question that was

discussed in the United States Supreme Court case of ***Missouri v. Frye***:

> The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision. [Citation.] Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process.

(***Id.*** at __U.S.__, 132 S.Ct. 1408 (*citations and quotations omitted*).)

At a minimum, defense counsel have the duty to communicate to their client any formal offers from the prosecution. (***Ibid.***)

Petitioner has not met his burden to show that trial counsel refused to engage in negotiations. In the months before trial, trial counsel met with several prosecutors where the possibility of settlement arose: with Deputy District Attorneys Pettigrew and Campbell, and Danzig. No representative of the District Attorney conveyed a formal offer, but on several occasions, the prosecution indicated a willingness to consider a twelve-year offer, and to discuss such an offer with the victim's family, but only if defendant were willing to accept the offer. As petitioner admitted in a jail call to Mr. Harris, trial counsel communicated that offer to him, but he rejected it.

Though the parties never arrived at an agreement, that does not mean that counsel was unwilling to engage in negotiations. When at one stage, the prosecutor stated that trial counsel was not interested in resolving the case, trial counsel said, "I wouldn't say that I'm not interested in negotiations, just that our points of view are slightly divergent on this case."

Trial counsel expressed a willingness to negotiate at other points. At one stage, she told Judge Jacobson and the prosecutor that the defense would consider nothing above probation. Significantly, it would have been the fact of petitioner's *conviction*, not the length of his sentence, that would have impacted the civil suit. Her willingness to entertain even a probation offer shows that she placed the interests of the criminal case above the interests of the civil case.

After petitioner told Mr. Harris and Ms. Young to inform trial counsel of a desire to plead–to something above probation but something less than twelve years–trial counsel again approached Mr. Moore. Mr. Moore again made no formal offer, but again expressed a willingness to discuss a twelve-year offer with the victim's family. Trial counsel stated that the offer was too high. This is

consistent with petitioner's statement to Ms. Young that he would be willing to take six, but felt he should not have to plead to the maximum. He noted that trial counsel had told him that she thought she might be able to get a ten-year offer.

This evidence shows that trial counsel did in fact engage in plea bargaining. As the Supreme Court noted, plea bargaining is a nuanced dance which must take into account the individual styles of counsel. Another defense lawyer may have engaged in a style that was more akin to haggling. The haggler might "offer" three years–low term on the manslaughter, hoping that the prosecutor would meet halfway with a six year offer. Trial counsel's style was more akin to the "take-it-or-leave-it" style of negotiation. The prospective buyer hopes that by walking away from the deal, the merchant will call her back for a substantial discount before she steps out the door. Though no discount materialized here, there was nevertheless a valid tactic. Where ***Strickland*** error is concerned, the courts will not second guess tactics such as this. In any case, as discussed more fully below, neither tactic would have proved successful.

It is not unreasonable that trial counsel believed she had a defensible case and thus, she stood her ground when it came to negotiating the case. This was a tactical decision supported by her opinion of the worth of the case. Others shared her view of the case. According to Mr. Schwartzbach, a very high-profile and experienced criminal defense attorney, trial counsel had a "defensible" and even "winnable" case if petitioner was to testify. Rebecca Young also agreed that this was a defensible case because there was only one stab wound and petitioner had no prior criminal record. Judge Jacobson also recognized that petitioner might have had a successful self-defense argument. Therefore, it was not unreasonable for trial counsel to take a firm stand with pretrial negotiations in this case.

Petitioner claims that defense investigator, Keith McArthur, believed trial counsel did not engage in any meaningful pretrial negotiations. However, Mr. McArthur is not a lawyer, he is an investigator. In addition, he was not present for the conversations between Senior Deputy District Attorney Richard Moore, Senior Deputy District Attorney Allison Danizg, Deputy District Attorney Stacie Pettigrew and trial counsel. Therefore, Mr. McArthur's opinion does not hold much weight.

Counsel listened to the overtures of the prosecution. She communicated those to her client. She listened to his stated desire to plead to something less than twelve years and she conducted negotiations accordingly. Counsel fulfilled the obligations set forth in ***Frye***.

2. Since defendant was unwilling to accept twelve years and the prosecution was unwilling to offer less, there could have been no plea bargain.

A defendant seeking relief under ***Frye*** must show that counsel has failed to convey any *formal* offer to her client. (***Frye***, *supra*, __ U.S. at __, 132 S.Ct. at 1408.) "The fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations." (***Id.*** at __ U.S.__, 132 S.Ct. at 1409.)

As in any case involving ineffective assistance of counsel, petitioner must also establish prejudice.

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.
> (***Ibid.***)

Even if a defendant establishes that he would have accepted the offer, he must also prove a reasonable probability that the prosecution would stand by the offer and a reasonable probability that the trial court would have accepted it. If the defendant fails to establish these requirements, "there is no ***Strickland*** prejudice." (***Id.*** at __ U.S.__, 132 S.Ct. at 1411.)

Defendant fails to overcome the several barriers to relief posed by the ***Frye*** requirements. First, defendant has failed to show that he was ever tendered a formal offer. At each and every occasion the prosecution expressed nothing more than a willingness to discuss a twelve year offer with the family, and then only if defendant expressed a willingness to accept it. Never at any time before the reaching of the verdict did defendant express a willingness to accept a twelve-year deal. Never at any time did the District Attorney discuss with the family the terms of such a resolution.

Though ultimately it is the prosecutor, and not the family, that must make that decision, the views of the family have significant influence over the prosecutor's final decision. Since the prosecution never made a formal offer and never learned the family's views on the matter, it would be sheer speculation to say that defendant was ever made an offer, and sheer speculation to say that the prosecution would not have cancelled even the informal discussion that took place.

Defendant also has failed to show that the trial court would accept the offer. Although there is some indication that Judge Jacobson would have approved the offer, the matter ultimately reached the trial court. There is no showing that Judge Horner would have approved such an offer.

Finally, defendant has failed to establish that he himself would have accepted the offer. Petitioner has provided a declaration stating he would have accepted the voluntary manslaughter offer for twelve years in state prison, however he wrote this declaration after he was convicted of murder. Declarations by petitioners are self-serving and should be highly scrutinized. Furthermore, the declaration is contradicted by the two jail calls discussed above. True, petitioner wanted trial counsel to engage in plea bargaining in order to get him the best possible deal. However, as discussed above, petitioner's conversation with Ms. Young demonstrates that he did not want to take twelve years–the maximum sentence for a manslaughter with use–but instead was hoping for six. He specifically noted the case of a fellow inmate who received ten years, and petitioner thought his own situation deserved no more than that. Thus, despite his misgivings, he persisted in believing that he should be sentenced to something less than the maximum. Prior to trial, petitioner never informed the court that he wanted to accept the twelve year offer. In fact, even at the time of sentencing, petitioner spoke to the court and never once mentioned to Judge Jeffrey W. Horner that he had been willing to accept a plea prior to trial, but that his attorney prevented him from doing so.

Petitioner has failed to prove any deficiency in trial counsel's performance. Petitioner has failed to prove that the prosecution ever made a formal offer. Petitioner has failed to show that the District Attorney would not revoke an offer had she made one. Petitioner has failed to show that Judge Horner would have approved the offer. Petitioner has failed to show even that he would have accepted a twelve-year offer. All that petitioner has proved is that he has "buyer's remorse" for not accepting a plea deal the prosecution would have considered, but never offered.

C. Whether Counsel Rendered Ineffective Assistance by Misleading Petitioner about the Risks and Potential Consequences of Going to Trial.

"When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences." (***Brady v. United States*** (1970) 397 U.S. 742, 756.) In addition, an attorney must advise a defendant of the risks of rejecting a plea deal and proceeding to trial. However, in order for a defendant to prove that the attorney was ineffective, the defendant must show that the advice was "not within the range of competence demanded of attorneys in criminal cases." (***Tollett v. Henderson*** (1973) 411 U.S. 258, 266, quoting ***McMann v. Richardson*** (1970) 397 U.S. 759, 771.) The United States Supreme Court has found that,"[t]actical errors are generally not deemed reversible and counsel's decision making must be evaluated in the context of available facts." (***Strickland***, supra 466 U.S. at p. 690.)

The two-prong test developed in ***Strickland*** is what must be applied when evaluating whether an attorney failed to advise a defendant of the risks and consequences of proceeding to trial. (***Strickland***, supra, at 1390-1391.)

The United State Supreme Court recently addressed the issue of ineffective advisement by counsel at the plea bargaining stages in the case of ***Lafler v. Cooper***. ((2012) __U.S.__, 132 S.Ct. 1376.) The defendant in ***Lafler*** was charged with felony assault with the intent to murder and various other offenses after the defendant pointed a gun at the victim's head and fired. (***Id.*** at __U.S.__, 132 S.Ct. 1383.) The defendant's shot initially missed the victim, but the defendant followed the victim, firing repeatedly. (***Ibid.***) The victim was eventually shot in her "buttock, hip and abdomen but survived the assault." (***Ibid.***)

The prosecution made formal offers to the defendant a plea deal on two occasions, which would have allowed him to plead guilty to one count for a sentence of 51 to 85 months. (***Ibid***.) The defendant communicated to the court that he wanted to plead guilty and accept the offer. (***Ibid.***) However, he later rejected the offer on both occasions. (***Ibid.***) ***Lafler*** alleged that he rejected the offer after his attorney convinced him that he should go to trial because the prosecution would be unable to prove the intent element required for the charge of assault with the intent to commit murder. (***Ibid***.) The attorney believed the prosecution would not be able to prove the intent element

because defendant's shots hit the victim below the waist. (***Ibid***.) A jury convicted the defendant on all counts, and he was sentenced to prison for 185 to 360 months. (***Ibid***.)

The United States Supreme Court held that a petitioner is prejudiced when trial counsel ineffectively advises a petitioner to reject a plea agreement and go to trial. (***Id.*** at 1390-1391.) The Court applied the two-part test as developed in ***Strickland v. Washington*** in order to evaluate whether ***Lafler*** was prejudiced as a result of ineffective assistance of counsel. (***Id***. at 1384, citing ***Stickland v. Washington*** (1984) 466 U.S. 668.)

The first part of the ***Strickland*** test requires a showing of deficient performance by the attorney. (***Ibid***.) Deficient performance was conceded by all parties in ***Lafler***. (***Ibid***.) The second part of the test requires a defendant to show he was prejudiced as a result of the deficient performance. (***Ibid***.) Prejudice results when a defendant proves that, but for the deficient performance, the outcome of the proceedings would have been different. (***Ibid.***)

The Court found ***Lafler*** satisfied the second prong of the ***Strickland*** test because ***Lafler*** was prejudiced by the deficient performance of his attorney, meaning, but for counsel's deficient performance, there is a reasonable probability that the trial court would have accepted the guilty plea. (***Id***. at 1390-1391.) ***Lafler*** also made the showing that as a result of this deficient performance, he received a minimum sentence three and one half times greater than he would have received under the plea. (***Id***. at 1391.) Thus, the Court found the standard presented in ***Strickland*** had been satisfied. (***Id***. at 1391.)

In ***Lafler***, the Supreme Court ordered the state to reoffer the plea offer in order to remedy the ***Strickland*** prejudice. (***Ibid***.) The Supreme Court stated that if ***Lafler*** accepted the offer, then the state trial court could exercise its discretion in deciding whether to vacate the conviction and re-sentence ***Lafler*** according to the plea agreement or to allow the conviction and sentence from trial to remain undisturbed. (***Ibid***.)

While the United States Supreme Court provided the above remedy for when there is ***Strickland*** prejudice as a result of ineffective assistance of counsel during plea negotiations, the California Supreme Court has also provided a separate remedy for this type of prejudice.

In the case of ***In re Alvernaz*** (1992) 2 Cal. 4th 924, the California Supreme Court identified the appropriate method for remedying ineffective assistance of counsel after a defendant's decides to reject an offered plea bargain as follows:

> "After the granting of relief by the trial court (on a motion for new trial or in a habeas corpus proceeding) or by an appellate court, the district attorney shall submit the previously offered plea bargain to the trial court for its approval, unless the district attorney within thirty days elects to retry the defendant and resume the plea negotiation process. If the plea bargain is submitted to and approved by the trial court, the judgement shall be modified consistent with the terms of the plea bargain."

(***Id***. at 944.)

Thus, under California law, the prosecution has the discretion to re-try the criminal case if there has been ***Strickland*** prejudice for ineffective assistance of counsel when a defendant rejects a plea bargain. The federal law indicates that the prosecution would not have the discretion to re-try the case; however, the prosecution would be required to offer the original plea bargain and the trial court would have the discretion to accept that offer or allow the conviction to stand.

In the ***Lafler*** case, all parties, including the State, conceded that the advice given by counsel was ineffective. The Supreme Court thus had no occasion to discuss the standard for effectiveness in the context of pretrial advisement about trial risk. The People make no such concession here.

Two attorneys of considerable criminal experience and even some renown opined that petitioner's case was defensible. Mr. Schwartzbach, a private criminal defense attorney with forty-three years of experience practicing law, believed petitioner had a defensible even a winnable case if petitioner were to testify. Rebecca Young, an experience criminal defense attorney from the San Francisco Public Defender's Office, also opined that trial counsel had a defensible case. Advising petitioner to proceed to trial was clearly a tactical choice, and clearly a choice within the scope of a competent criminal defense lawyer.

Defendant contends that defense counsel failed to advise him of the risks of going to trial. Respondent contends that the evidence proffered by defendant is insufficient to show that she failed to advise him.

Even if defendant were to establish that trial counsel's advisement was incomplete, defendant's showing of prejudice would still fall short because petitioner clearly knew the risks and

consequences of going to trial. Judge Jacobson informed petitioner on November 20, 2009 that there was a likelihood that petitioner may be convicted at trial and as a result, petitioner would receive a life sentence. Judge Jacobson even informed petitioner that the trial attorney for the District Attorney's Office was a skilled and experienced lawyer, who had tried several murder cases. Judge Jacobson also informed petitioner that trial counsel was not experienced in the area of murder. Therefore, petitioner was on notice that there was a likelihood he would be convicted of murder.

Petitioner's jail calls to Bill Harris and Rebecca Young also show that petitioner knew the risks and consequences of going to trial. Petitioner told both Mr. Harris and Ms. Young that he had witnessed several inmates receive life sentences in Alameda County and that he did not want to end up like those defendants. He said, "Alameda County is, you know, it's no joke. They're playing for keeps. ... [A]nd there's just so many different aspects to my case that I just, you know, don't really want to go to trial. And there's so many ways to look at it. There's so many different witnesses. How do I know what everybody's going to say? Somebody can lie and say something, you know, and then if they lie then, you know, I could get a lot of time and I'm not trying to deal with that." (Exhibit 12, p. 4.)

Petitioner knew the risks and consequences of going to trial, and knowing those risks, he decided to go to trial. Therefore, petitioner has failed to show that but for trial counsel misleading him about the risks and consequences of going to trial there would have been a different outcome in his case. Petitioner has failed to show prejudice, and his petition should therefore be denied.

IV. Conclusion

For reasons asserted in the return, respondent respectfully requests the Court deny the habeas petition.

VERIFICATION

I, Shara Beltramo, am a Deputy District Attorney with the Alameda County District Attorney's Office, and am licensed to practice law in the State of California. I have read the attached return to the Order to Show Cause, know its contents and assert that they are true to the best of my knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and that this declaration was executed July 10, 2013, in Oakland, California.

_____
Shara Beltramo

I, Michael O'Connor, am a Senior Deputy District Attorney with the Alameda County District Attorney's Office, and am licensed to practice law in the State of California. I have read the attached return to the Order to Show Cause, know its contents and assert that they are true to the best of my knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and that this declaration was executed July 10, 2013, in Oakland, California.

_____
Micheal O'Connor

AFFIDAVIT OF SERVICE BY MAIL AND EMAIL

The undersigned deposes and says:

That I am a citizen of the United States; that I am over the age of eighteen years and not a party to the aforementioned actions; that my business address is the Office of the District Attorney, Rene C. Davidson Alameda County Courthouse, 1225 Fallon Street, Room 900, Oakland, California 94612-4292;

That I have served a true copy of the return to the Order to Show Cause and Supporting Memorandum of Points and Authorities in the matter of;

In re ANDREW HOEFT-EDENFIELD

by placing a printed copy in an envelope addressed to:

Ms. Andrea Auer
Law Office of Andrea Auer
1611 Telegraph Ave. Suite #1611
Oakland, California 94612

which envelope was on July 10, 2013 deposited in the United States mail at Oakland, California.

A copy in Adobe Acrobat format was also transmitted to counsel via e-mail to the following address: aauer@auerlaw.com

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

DATED at Oakland, California, July 10, 2013.

_____
Shara Beltramo