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5 Attorney for Defendant
A. DEFENDANT
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7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF CONVICTION
10

11 In the Matter of the) Case No.: SS 1234567
12 Application of)
13 A. DEFENDANT,) **PETITIONER'S TRAVERSE TO**
14 Petitioner,) **PETITION FOR WRIT OF HABEAS**
15 For the Writ of Habeas Corpus) **CORPUS**
_____)

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18 TRAVERSE TO PETITION FOR WRIT OF HABEAS CORPUS

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20 TO THE HONORABLE PRESIDING JUDGE OF
21 THE ABOVE ENTITLED COURT
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1 Petitioner A. Defendant, by and through his attorney CRIMINAL DEFENSE ATTORNEY
2 hereby replies to the Return filed by Deputy District Attorney Prosecuting Attorney (herinafter
3 DDA Prosecutor) on behalf of Respondent State of California on August 7, 2008. By this
4 verified pleading, petitioner responds as follows:

5 **TRAVERSE**

- 6 3. Petitioner A. Defendant is the party for whose relief this petition is intended and
7 prosecuted. Petitioner is confined pursuant to a judgment of imprisonment of thirteen
8 years, eight months rendered on Sentencing Date in Conviction County Superior Court,
9 No. SS 1234567, the Hon. Jane Doe, Judge.
- 10 4. Petitioner incorporates his verified Petition for Writ of Habeas Corpus, Exhibits A-F and
11 its accompanying Memorandum of Points and Authorities (hereinafter collectively
12 referred to as “Original Verified Petition.”)
- 13 5. The People of the State of California, through the Office of the District Attorney for the
14 County of Conviction, are responsible for initiating and continuing the prosecution
15 against the petitioner described in paragraph 1 above, and have an interest in the outcome
16 of this writ proceeding. Thus, the People of the State of California are the Real Party in
17 Interest herein.
- 18 6. Petitioner admits respondents Return ONLY as to the uncontested facts that may be
19 relevant in the Original Verified Petition. Petitioner denies Paragraph VII of respondent’s
20 Return and realleges that his conviction is unlawful, having been obtained in violation of
21 his constitutional rights as set forth in the Original Verified Petition.
- 22 7. Petitioner is entitled to issuance of a writ of habeas corpus, as he suffers from illegal
23 restraint after receiving ineffective assistance of counsel as guaranteed by the Sixth and
24 Fourteenth Amendments to the United States Constitution and article I, section 15, of the
25 California Constitution.

26 (a) Respondent’s Return contains evidence that contradicts the assertion that
27 petitioner’s trial counsel was “Eminently Justified” in negotiating the plea
28 agreement at issue in this case. Specifically, investigation by the co-defendant’s

1 attorney Codefense Counsel highlights the discrepancies surrounding Walt
2 Witness' identification of petitioner Defendant as the shooter. In addition, the
3 circumstances surrounding both Walt Witness' and co-defendant's statements
4 linking Mr. Defendant to the shooting make the identification inherently
5 unreliable.

- 6 7. Petitioner refers to and incorporates herein by reference the attached Memorandum of
7 Points and Authorities.
- 8 8. Petitioner has no plain, speedy, or adequate remedy at law to raise the above claim. He
9 has not presented the grounds for relief raised here in any other petition, motion, or
10 application to any court to date.

11 **JURISDICTION**

- 12 8. This Court has jurisdiction to review this case pursuant to Article VI, § 10 of the
13 California Constitution. Petitioner maintains that his reliance on attorney Trial Counsel's
14 insufficient advice deprived him of his constitutional rights to effective assistance of
15 counsel and to his right to trial by jury. Consequently, petitioner was denied his due
16 process rights to a fair trial. Penal Code section 1484 allows the Court to act as required
17 in the interests of justice in a particular case.

18 As such, Code of Civil Procedure section 187 provides

19 [w]hen jurisdiction is, by the Constitution or this Code, or by any other statute,
20 conferred on a Court or judicial officer, all the means necessary to carry it into
21 effect are also given; and in the exercise of this jurisdiction, if the course of
22 proceeding be not specifically pointed out by this Code or the statute, any suitable
process or mode of proceeding may be adopted which may appear most
conformable to the spirit of this Code. (Cal. Code Civ. Proc. § 187.)

23 In addition, Code of Civil Procedure section 576 allows “[a]ny judge, at any time before
24 or after commencement of trial, in the furtherance of justice, and upon such terms as may
25 be proper, may allow the amendment of any pleading or pretrial conference order.” (Cal.
26 Code Civ. Proc. § 576.)

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9. Petitioner has no plain, speedy, or adequate remedy at law to raise the above claim. Prior to filing the instant petition, he has not presented the grounds for relief raised here in any other petition, motion, or application to any court to date.

PRAYER

WHEREFORE, petitioner prays for judgment as follows:

1. That a writ of habeas corpus be granted, directed to John J. Boss, Warden for California State Prison commanding him or her to have the body of A. Defendant brought before this Court at a specified time;
2. That the sentence imposed on A. Defendant is ordered reversed and set aside; and,
3. For any other and further relief as the court may deem proper.

Dated: _____

CRIMINAL DEFENSE ATTORNEY
Attorney for Petitioner
A. DEFENDANT

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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF CONVICTION
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11 In the Matter of the) Case No.: SS 1234567
12 Application of)
13 A. DEFENDANT,) **MEMORANDUM OF POINTS AND**
14 Petitioner,) **AUTHORITIES IN SUPPORT OF**
15 For the Writ of Habeas Corpus) **TRAVERSE TO PETITION FOR WRIT**
) **OF HABEAS CORPUS**
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17 **I.**

18 **THE EVIDENCE PROFFERED IN THE RETURN DOES NOT ESTABLISH THAT**
19 **TRIAL COUNSEL WAS “EMINENTLY JUSTIFIED” IN NEGOTIATING THE PLEA**
20 **AGREEMENT**

21 Respondent’s Return contains conflicting evidence that supports petitioner’s assertions of an
22 invalid plea. As is well settled, “[t]he longstanding test for determining the validity of a guilty
23 plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative
24 courses of action open to the defendant.’” (*Hill v. Lockhart* (1985) 474 U.S. 52, 56; 106 S. Ct.
25 366, 369; 88 L. Ed. 2d 203, 208, quoting *North Carolina v. Alford* (1970) 400 U.S. 25, 31; see
26 *Boykin v. Alabama* (1969) 395 U.S. 238, 242; *Machibroda v. United States* (1962) 368 U.S. 487,
27 493.). Furthermore, the United States Supreme Court has held that “[w]here . . . a defendant is
28 represented by counsel during the plea process and enters his plea upon the advice of counsel,
the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of

1 competence demanded of attorneys in criminal cases.’” *Id* at 56; 88 L.Ed.2d at 208, quoting
2 *McMann v. Richardson* (1970) 397 U.S. 759, 771.) Specifically, “[t]he defendant can be
3 expected to rely on counsel’s independent evaluation of the charges, applicable law and
4 evidence, and of the risks and probable outcome of trial. [Citations.]” (*In re Alvarez* 2 Cal.4th
5 924, 933.)

6 The report prepared by Officer Number One indicates that the area where Walt Witness
7 observed the shooting was “heavily illuminated by a streetlight and the porch light at 2036
8 Starfish Court.” (see original petition Exhibit B, Report by Officer Number One paragraph 3.)
9 In contrast, the report prepared by attorney Codefense Counsel ’ investigator Walter Dahl
10 indicates that the streetlight in question “gives off an amber glow **and is hidden by a large**
11 **eucalyptus tree**, [which] is situated between the light and the front yard of 2036 Starfish Ct[.]”
12 (Return Exhibit 2, Investigative Report by Codefense Counsel’s Investigator, page 2, paragraph
13 5, emphasis added.) According to Codefense Counsel’s Investigator, the streetlight “does not
14 afford much more than a soft glow onto the street below.” (Return Exhibit 2, Investigative
15 Report by Codefense Counsel’s Investigator, page 2, paragraph 5.)

16 Indeed, as shown by the letter to the Deputy District Attorney by Codefense Counsel, Walt
17 Witness later stated:

18 The **light was bad** and the streetlight was behind the Asians. He saw the
19 individual with the rifle (who was larger than the other Asians). He could not
20 actually recognize the shape of a pistol, although he thought there was more than
21 one pistol present and fired. He **could not see the faces of the shooters**, both
22 because **it was dark** and because the Asians had black (?) or blue **bandannas over**
23 **their faces**. Mr. Walt Witness **identified the shooter of the rifle because of his**
size and clothing, and he identified my client solely by the dark clothing. (Return
Exhibit 3, Letter to the Deputy District Attorney by Codefense Counsel ,
emphasis added.)

24 The conflicts inherent in these two reports, combined with Walt Witness’ absence during
25 the preliminary hearing clearly weakens the reliability of Walt Witness’ identification of
26 petitioner Defendant as the shooter.

27 Moreover, the circumstances surrounding co-defendant’s subsequent identification of
28 petitioner Defendant as the shooter raise doubt as to its reliability. In *Ohio v. Roberts*,

1 (1980) 448 U. S. 56 (the governing standard at the time of petitioner’s case) the United
2 States Supreme Court established that hearsay statements used against an accused are
3 considered reliable when “(1) the evidence falls within a firmly rooted hearsay
4 exception” or (2) it contains "particularized guarantees of trustworthiness" such that
5 adversarial testing would be expected to add little, if anything, to the statements'
6 reliability.” (*Ohio v. Roberts*, (1980) 448 U. S. 56, 66.) Codefendant’s allegations do not
7 satisfy the requirements of this test.

8 When Codefendant identified petitioner as the shooter, he was in the midst of
9 discussions with his probation officer **after being charged with the same crime**. These
10 statements were not made under oath, or in any proceeding that would enable the Court to
11 otherwise test their veracity. Indeed, the circumstances in which Codefendant made these
12 statements highlight his motivation to escape prosecution for this incident.
13 Consequently, there is no “particularized guarantee of trustworthiness,” inherent in this
14 identification.

15 CONCLUSION

16 The evidence contained in Respondent’s Return supports petitioner’s assertion that the
17 evidence against him did not justify a plea of nolo contendere. The documentation relating to
18 attorney Codefense Counsel ’s representation of co-defendant indisputably undermines the
19 reliability of Officer Number One’s police report of Walt Witness’ identification. Moreover, the
20 circumstances surrounding Codefendant’s identification of petitioner as the shooter clearly
21 render it unreliable. Codefendant’s statement was not made under oath or in any proceeding that
22 could be used to test its veracity. Moreover, as Codefendant was being charged for the same
23 crime, his underlying motive for making the identification is undoubtedly suspect. Consequently,
24 the evidence was insufficient for attorney Trial Counsel to convince petitioner to plead no
25 contest.

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For the above-stated reasons, the sentence imposed on petitioner A. Defendant should be ordered reversed and set-aside.

Dated: _____

CRIMINAL DEFENSE ATTORNEY
Attorney for Petitioner
A. DEFENDANT

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VERIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF CONVICTION,) ss.

I, CRIMINAL DEFENSE ATTORNEY, hereby declare as follows:

1. I am an attorney licensed to practice law in the State of California.
2. I represent petitioner A. Defendant who is confined in restraint of his liberty at California State Prison, located in Another Town, California.
3. I am authorized to file this traverse on petitioner’s behalf. I make this verification because I believe it is more appropriate that I, rather than petitioner, verify the arguments contained in this traverse. The claims are legal ones, based on the evidentiary record with which I am ore familiar than petitioner.
4. I have read the foregoing petition and its incorporated memorandum of points and authorities and exhibits. Pursuant to Penal Code section 1474, as construed by *In re Robbins* (1998) 18 Cal.4th 770, 783, fn. 5 (holding that verification by counsel satisfies the requirements of §1474), I declare that all allegations in the petition and memorandum not otherwise supported by citations to the record or other documents are true to the best of my knowledge, ability, and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Anytown, California on May_____, 2009.

CRIMINAL DEFENSE ATTORNEY
Attorney for Petitioner
A. DEFENDANT