VACATING CONVICTIONS RESULTING FROM GUILTY PLEAS BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL RELATED TO IMMIGRATION CONSEQUENCES

By Michael Mehr and Vicki Firstman

I. Appellate Attorney Will Encounter This Issue Usually In Two Contexts:

A. Appointed on Direct Appeal and Investigation Shows That Defendant Faces Immigration Consequences or is in Removal Proceeding

1. To vacate guilty plea for IAC a related habeas corpus petition is necessary because facts related to IAC are not in the record

Note: A "conviction" is not final and cannot be used for immigration purposes if the conviction is on direct appeal. A motion to terminate can be filed in immigration court and the court must terminate proceedings.

But, if conviction is not on direct appeal and there is other post-conviction relief pending, the immigration court can proceed with removal proceedings.

B. Appointed on appeal from denial of motion to vacate in Superior Court

1. Even in this case a related habeas corpus petition might need to be filed if a motion to dismiss appeal is filed. (See VI below.)

II. Immigration Consequences of Criminal Convictions

A. Aggravated Felonies

1. Consequences-Permanent Banishment

2. Crimes

a. Certain Offenses Regardless of Sentence

b. Other Offenses only if sentence of one year or more

c. Other offenses based on amount of loss or potential sentence

B. Deportable Offenses

C. Inadmissible Offenses

D. Immigration Relief–"Cancellation of Removal" and other relief.

Resources: www.ilrc.org chart and notes and juvenile benchbook
www.criminalandimmigrationlaw.com
www.usdoj.gov/eoir
California Criminal Law and Immigration (ILRC)
Ch. 48 in California Criminal Law and Procedure (CEB)

Note: Immigration law is rapidly changing with a vast number Of BIA and Ninth Cir. decisions.

III. Issues in Vacating Guilty Pleas

Performance prong - "reasonable under prevailing professional norms" *Strickland* v. *Washington* (1984) 466 U.S. 668, 688

A. Does an attorney have duty to inquire as to defendant's immigration status?

1. No California case on subject but no case turns on the requirement of knowledge of defendant's alien status.

2. ABA Standards require inquiring as to alien status. American Bar Ass'n, ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (3d Edition, 1999), Standard 14-3.2(f) states: "To the extent possible, defense counsel should determine and advise the defendant,

sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."

3. Implied by *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1481 which requires "[I]nformed decisions...reached after meaningful consultation" concerning immigration consequences.

4. AG may argue that there is no duty unless attorney alerted that defendant might be noncitizen following Colorado case of *People v. Pozo,* 746 P2d 523 (Colo. 1987)

   a. Police report/Booking Report/Probation Report will usually show place of birth and at least this part should be included as an exhibit

   b. Foreign name, appearance, and accent should also be set forth in declaration or pictures to show that attorney should have investigated further

B. Does an attorney have a duty to advise about immigration consequences?

1. *People v. Soriano, supra,–Yes*

2. *People v. Bautista* (2004) 115 Cal. App.4th 229 follows *Soriano*

3. *In re Resendiz* (2001) 25 Cal.4th 230, 250 "[Q]uestion not squarely presented."

   Note: *Resendiz* did not overule *Soriano*. Any implied criticism is *dicta. Resendiz* notes that an IAC claim is an intensely fact-bound inquiry and depends on the facts of the particular case. *Resendiz* cites *United States v. Mora-Gomez*

(1995) 875 F. Supp. 1208, 1212 which states that "[T]here is no clear reason in principle or policy why this type of alleged error [failure to advise] like an affirmative misstatement, should not be evaluated under the familiar *Strickland* analysis."

C. What is "adequate advice" under *Soriano* and *Bautista?*

1. *Soriano*-advising a defendant that a plea "might" have immigration consequences is not an adequate effort to inform a defendant about the immigration consequences of a conviction. A defendant should be able to make "informed decisions" after "meaningful consultation with his attorney." A pro forma caution in the language of P.C. 1016.5(b) is not adequate.

2. *Bautista*-A defendant is not properly advised about immigration consequences even if an attorney tells his client that he "would" be deported for a plea to an "aggravated felony" where the other immigration consequences (e.g., permanent banishment) and alternative dispositions are not discussed.

D. Can Affirmative Misadvice About Immigration Consequences Constitute IAC?

1. *Resendiz*-Yes

2. The trend in other states and in unpublished decisions in California is to find that telling a client that he "may" "might" "can" or "could" be deported, when deportation is mandatory or the offense is definitely a deportable offense is misadvisement. This is the holding of the recent Sixth District Court of Appeal's unpublished decision in *People v. Sanchez- Martinez* (April 2, 2004) 2004 Cal. App. Unpubl. LEXIS 3047 (H025745)
Note: This is the strongest argument for deficient attorney performance

E. Does an Attorney Have the Duty to Defend Client Against Adverse Immigration Consequences (Assuming it is a High Priority for Defendant)?

1. Implied by *Soriano, People v. Barocio* (1989) 216 Cal.App.3d 99 and P.C. 1016.5.

2. *Bautista*-Places affirmative duty on counsel to utilize defense techniques to avoid a plea of guilty to an "aggravated felony" such as pleading up to a more serious offense or related offense or seeking 364 days rather than 365 days where a sentence of one year or more is an "aggravated felony."

   Note: Instead of agreeing to felony probation where 364 vs. 365 is an issue, did counsel ask for an indicated sentence? A conditional sentence? Two 364 day consecutive sentences? Waiver of credits? If D.A. refuses to agree to 364 day sentence could counsel have had a reasonable chance of pleading to all counts with an indicated sentence of 364 days thereby bypassing an unreasonable prosecuting attorney? Could defendant have agreed to a "strike" in exchange for a 364 day sentence? Was there a chance of obtaining a substituted charge or change in the information so that a conviction and sentence of 365 or more would not be an "aggravated felony?"

F. Does an Attorney Have a Duty to Defend Against an Adverse Sentence?

1. *People v. Barocio*–Yes–Counsel committed IAC by failing to advise of potential sentencing option which could have avoided adverse immigration consequences.

2. *Soriano*-Implied–Counsel failed to attempt to negotiate a 364 day sentence

3. *Bautista*-Yes (*dicta)*

4. *People v. Guzman*-(2/3/03) Yes-unpublished 6th District decision - H022726. 5 year suspended sentence with 30 days jail for violation of P.C. 114. "Fundamental fairness requires that sentencing decisions stem from a trial court's *informed* discretion." Manoukian concurring states that defendant was denied effective counsel for failure of counsel to request Imposition of Sentence Suspended rather than Execution of Sentence Suspended.

Prejudice Prong - Reasonable probability that but for counsel's errors defendant would not have plead guilty. Reasonable probability may be less than 50% but must be enough to undermine confidence in the outcome.

A. Is Defendant's Declaration Corroborated Independently by Objective Evidence? *People v. Alvernaz* (1992) 2 Cal.4th 924, 938*; In re Resendiz*

1. Declarations by family/friends as to defendant's deep ties to the community. The need to protect these ties corroborates defendant's assertion he would not have plead guilty.

2. Is there a reasonably probable meritorious defense or dispositive motion?

3. Did the defendant have a reasonably probable chance of an alternative disposition? (E.g., pleading upward, reasonably related plea, a slight change of sentence–even a stiffer sentence (2 consecutive 364 day sentences.)

   Note: Offering to Plead to a greater offense, a reasonably related offense with the same exposure, a slight change in the information especially where there is a factual basis, or offering to plead for a stiffer sentence (e.g., two consecutive 364 day sentences) adds credibility

4. If the court was advised of immigration consequences and an alternative disposition would this have made a difference in plea bargaining or sentence?

B. Can the defendant's alternative dispositions/defenses be corroborated by declarations or expert witnesses? See e.g., Bautista.

C. Declarations by the prosecuting attorney that he/she would not have accepted any other disposition should be deemed irrelevant. Under *Strickland v. Washintgon* (1984) 466 U.S. 668, 695, court must consider issue in abstract without regard to "unusual propensities toward harshness or leniency" on the part of a particular decision maker. In *Hill v. Lockhart* (1985) 474 U.S. 52, the court cited *Strickland* for the proposition that an assessment of prejudice should be based upon a "reasonable decision maker."

IV. Nuts and Bolts On Preparing Habeas

A. Consult with Immigration Attorney experienced with immigration consequences of criminal convictions

B. Obtain file of trial counsel including notes. (See attached State Bar Ethics Opinion)

C. Interview Trial Counsel

D. Declarations of Trial Counsel, Client, Immigration Attorney, Family and Friends; also consider appropriateness and necessity of the Declaration of an Expert Witness.

V. Other Remedies

A. Is client a U.S. citizen without knowing it?

B. Expungements per 1203.4/Dismissal for Deferred Entry of Judgment/Dismissal for Prop. 36 for first offense simple possession with no prior diversion.

C. P.C. 17 to reduce felony to misdemeanor to qualify for petty offense exception

D. P.C. 1018

E. P.C. 1016.5

F. Coram Nobis–Def. thinks he is a U.S. citizen

G. Modification of Sentence or Recall of Sentence

H. Other Constitutional Infirmities

I. Was motion counsel ineffective?

VI. Procedural Issues

A. Habeas–

1. Is there a viable basis for a related habeas petition and is such a petition necessary to fill in evidentiary gaps in the record on appeal?

B. Appeal of Denial of Motion to Vacate

Note: Motions to Vacate for IAC are frequently filed instead of a habeas for two reasons: 1) The defendant is in removal proceedings and needs fast relief - a motion can be placed on the motion calendar within approximately 15 days; and 2) If the defendant is no longer on probation or parole, habeas corpus action could be barred because a habeas requires that the defendant is in custody or constructive custody.

1. Arguably the courts have inherent authority to consider motions to vindicate constitutional rights. *Murgia v. Municipal Court* (1975) 15 Cal.3d 286; *People v. Fosselman* (1983) 33 Cal.3d 572 (specifically applied to IAC in motion for new trial even though P.C. 1181 does not enumerate IAC as ground).

2. This non-statutory motion is conceptually different than coram nobis. IAC cannot be raised in coram nobis.

3. Is a denial of a motion to vacate appealable? Arguably, under 1237, subdivision (b) it is appealable as an "order made after judgment, affecting the substantial rights of the party." (See e.g. *People v. Totari* (2002) 28 Cal. .4th 876 [1016.5 Statutory Motion to Vacate is appealable per 1237, subd. (b) since evidence outside of the record must be submitted; this qualifies under the "silent record" exception to the general rule of non-appealability of a post-judgment order of denial.])

4. An appellate court could disagree but go on to hear the merits of the case by treating the appeal as a habeas petition. (See e.g. *In re Peredes* (2003) 2003 Cal.App. Unpub. LEXIS 11466 citing *People v. Gallardo,* 77 Cal.App.4th 971, 976, 987-989.) Alternatively, the court could affirm the denial of the motion to vacate because the appeal is frivolous, or dismiss the appeal and require the filing of a writ of habeas corpus.

   Note: If the People move to dismiss a defendant's appeal of an order denying a motion to vacate, the recommended practice is to obtain the approval of SDAP to file a related habeas corpus.

COMPENSATION FOR HABEAS WORK IN SDAP CASES

Prior to 1998, a panel attorney in the Sixth District had to make a motion to expand appointment in order to receive any compensation for work done on habeas petitions. In 1998, the court changed its policy, and allowed SDAP to determine both if the bringing of a habeas petition was reasonable, and to award compensation up to the compensation guideline of twelve hours. If a claim for a habeas petition exceeded the guideline, and an amount over the guideline was being recommended by SDAP, that recommendation had to be sent to the Presiding Justice for determination of reasonable compensation for the habeas petition. The policy change was approved by the Sixth District Court of Appeal with the understanding that it would apply only to petitions in which the panel attorney had consulted with SDAP and received approval prior to filing the petition.

In some cases, the assistance of a professional investigator or expert would greatly advance the client's interests. Pursuant to Penal Code section 1241, the Court of Appeal has the authority to award a reasonable sum for "necessary expenses." In some appellate courts, appointed counsel is entitled to expert investigation funds without prior approval. (See California Supreme Court Policies Regarding Cases Arising From Judgments of Death, Section 2-2.3; "[w]ithout prior authorization of the court, counsel may incur expenses up to a total of $3000 for habeas corpus investigation . . . .")

The Sixth District does not reimburse investigative expenses unless the court has approved them. Thus, unless you are willing to risk paying for investigative expenses out of your own pocket, you should not expend investigative fees until they have been approved by the Court of Appeal.

In order to seek investigative or expert fees, counsel must file an ex parte motion. The motion must specify the lines of inquiry which the investigator or expert will pursue. (*People v. Faxel* (1979) 91 Cal.App.3d 327, 330.) The showing must be as specific as possible. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 320.)

If the Court of Appeal denies the motion, this fact should be mentioned in the pleading section of the habeas petition. It should be alleged that the defendant would have made a better factual presentation had the motion been granted. In this way, the defendant will be able to broaden his factual showing in a subsequent federal habeas proceeding if he is able to obtain investigative funds from the federal district court.

Insofar as the format of the petition is concerned, there are four essential components: (1) the pleading; (2) the verification; (3) the points and authorities; and (4) any supporting exhibits. Obviously, each of these portions requires careful attention.

With respect to the pleading, it is essential to note that a habeas action is a proceeding

which is separate and apart from a pending appeal.[1] Thus, the pleading must, standing alone, state a prima facie case for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) In order to state such a case, the pleading must allege: (1) an unlawful restraint on the petitioner's liberty;[2] (2) if he or she is incarcerated, the place of imprisonment and the name of the prison custodian; (3) the judgment upon which the petitioner's restraint is based; (4) the essential procedural and substantive facts of the case; (5) the legal claim upon which relief is sought; and (6) a prayer for relief.

Insofar as the verification is concerned, it may be signed by the petitioner. However, if time is wasting and the petitioner is located outside the jurisdiction, counsel may execute the verification. Importantly, the verification must be based on personal knowledge. In this context, personal knowledge may be based on a review of transcripts and court documents. However, if the verification is made on other than personal knowledge, it will be defective and the petition will be denied. (*People v. McCarthy* (1986) 176 Cal.App.3d 593, 596-597.)

Following the verification, the next portion of the document should be a memorandum of points and authorities. The document should closely resemble an appellant's opening brief. Thus, it should commence with an appropriate statement of facts which should be followed by legal argument. Importantly, even if the habeas action is related to a pending appeal, the facts and legal argument must stand alone and cannot be incorporated by reference from another brief. This is so since the habeas action is a separate legal proceeding unless and until it is formally consolidated with the appeal. (*In re Ronald E.* (1977) 19 Cal.3d 315, 322, fn. 3.)

As the final portion of a habeas petition, counsel will want to include any relevant declarations or other exhibits which bear on the issues in the case. If the exhibits are few in number, they may be included at the back of the brief so long as they are properly labeled. If the exhibits are lengthy, they should be lodged with the court under separate cover. Only a single copy of the exhibits need be lodged.

The denial of a petition becomes final immediately if the Court of Appeal has not previously issued an alternative writ or order to show cause. (Cal. Rules of Ct., rule

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[1] However, when a related appeal is pending, the cover of the habeas petition should reveal that fact. In addition, in the interests of judicial economy, the pleading can contain a request that the court take judicial notice of the record on appeal. In the absence of such a request, the burden falls on the petitioner to otherwise present an adequate record in support of the petition. (See *Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187; *In re Saunders* (1970) 2 Cal.3d 1033, 1047-1048.) Although California Rules of Court, rule 22(a)(1) requires a separate motion in support of a request for judicial notice, the Clerk of the Sixth District has informally indicated that the court will not enforce rule 22(a)(1) in habeas proceedings.

[2] When a defendant is on probation or parole, habeas relief lies since he or she is deemed to be in the constructive custody of the state. (*In re Azurin* (2001) 87 Cal.App.4th 20, 23.)

24(b)(2)(A).) That means that a petition for review from summary denial of a petition for writ of habeas corpus must be filed within ten days. (Cal. Rules of Ct., rule 28(e)(1).)

However, the denial of a petition for writ of habeas corpus that is filed on the same day as the decision in a related appeal becomes final at the same time as the related appeal. (Cal. Rules of Ct., rule 24(b)(4).) In this circumstance, a petition for review in the habeas proceeding is due between the 31st and 40th days following the Court of Appeal's order denying relief. (Cal. Rules of Ct., rule 28(e)(1).)

It is essential to note that Rule 28(d), California Rules of Court, requires the filing of two separate petitions for review if the Court of Appeal denied a petition without an order to show cause and did not formally consolidate the appeal and writ proceedings. For example, if the habeas petition is denied on the same day, either by separate order or in the appellate opinion, but the appeal and habeas were not formally consolidated, two petitions for review must be filed (i.e. one for the direct appeal and one for the habeas petition). Each petition would be due within 31 to 40 days of the Court of Appeal's resolution of the two proceedings.