

## THE INVESTIGATION AND PRESENTATION OF A PETITION FOR WRIT OF HABEAS CORPUS IN THE SIXTH DISTRICT.

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There is often a disconnect between the existing law and the dictates of moral conscience. The California Supreme Court has said that appointed appellate defense counsel has no duty to either investigate or prosecute a habeas petition on behalf of a client. (*In re Clark* (1993) 5 Cal.4th 750, 783-784, fn. 20.) However, as a matter of fact, habeas is often the only procedure by which appellate counsel can obtain a remedy in a particular case. Since we are taught from the first day in law school that our highest duty is to zealously represent our clients, it follows that the morally conscious lawyer will not hesitate to pursue habeas relief in an appropriate case.

An inexperienced appellate lawyer may believe that habeas practice poses difficulties since it involves arcane rules and methods that cannot be easily learned. The good news is that habeas practice is actually not that complex. Like any other area of the law, a conscientious attorney can master habeas corpus litigation with a reasonable amount of study and hands-on experience.

The present article is designed to assist appointed counsel in investigating and presenting habeas petitions in the Sixth District. Many of the lessons imparted in this article may be applied to habeas work in other courts. However, the various Superior Courts and Courts of Appeal in California all have their own unwritten idiosyncracies regarding habeas practice and compensation for the work performed on the case. When a lawyer is preparing a habeas petition for the first time in a particular appellate district or Superior Court, it is a good idea to obtain guidance from the local appellate project or hometown counsel.

There are two components to habeas corpus practice: (1) the investigation of the possible issues; and (2) the presentation of the issues. There are simple methods that allow for an efficient and timely investigation. These methods will be detailed below. As for presentation of the claim, there are several precise requirements which must be fulfilled. These requirements will be spelled out. Once these methods and requirements are studied, you will be on your way to becoming a successful habeas practitioner.

## I.

### WHEN IS RESORT TO HABEAS CORPUS REQUIRED?

Direct appeal is a preferred remedy. If an issue is cognizable on appeal, it should be raised on appeal. Indeed, the failure to raise an issue on appeal will preclude subsequent habeas relief regarding the issue. (*In re Harris* (1993) 5 Cal.4th 813, 829 [“an unjustified failure to present an issue on appeal will generally preclude its consideration in a postconviction petition for a writ of habeas corpus. [Citation.]”].)

An attorney appointed by the Court of Appeal will need to resort to a habeas petition in one of two situations: (1) direct appeal cannot provide a timely remedy; or (2) where it is necessary to utilize facts outside the record in order to state a claim for relief. In order to understand these categories, the following examples should be helpful.

Occasionally, a case may arise where direct appeal is simply not a sufficiently speedy remedy. For example, assume that a defendant is sent to state prison following the revocation of a grant of probation which had in fact expired prior to the revocation. Under these circumstances, the prison sentence would be unlawful and habeas relief would lie. (*In re Daoud* (1976) 16 Cal.3d 879, 882.) Insofar as a habeas action may be expeditiously decided by the Court of Appeal, it would be appropriate to seek such relief rather than awaiting the result of the slower process of appeal. (*In re Newbern* (1960) 53 Cal.2d 786, 789-790 [habeas corpus is a proper remedy where the defendant’s sentence will be served before an appeal can be decided].)

In the usual case, a habeas petition will be filed when it is necessary to advert to facts outside the record on appeal. Typically, these facts will be employed to establish the evidentiary basis for a claim of ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 426-427, fn. 17 [a habeas petition is properly filed with a direct appeal in order to establish a Sixth Amendment violation].) However, there are a number of other issues which may be raised via habeas.

Although the following list is not intended to be exhaustive, habeas relief may be sought based on: (1) jury misconduct (*In re Carpenter* (1995) 9 Cal.4th 634, 645-646); (2) the presentation of false evidence by the prosecutor (Penal Code sections 1473, subd. (b)(1) and 1473.6, subd. (a); *In re Malone*

(1996) 12 Cal.4th 935, 965-967); (3) newly discovered evidence that establishes the defendant's innocence (Penal Code section 1473.6, subd. (a)(1); *In re Hardy* (2007) 41 Cal.4th 977, 1016-1018); (4) the government's failure to disclose material evidence under the rule of *Brady v. Maryland* (1963) 373 U.S. 83 (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1312-1323); (5) new evidence that the defendant suffered from intimate partner battering and such evidence was not heard by the jury (Penal Code section 1473.5); (6) evidence that the government intimidated defense witnesses (*In re Martin* (1987) 44 Cal.3d 1, 30-31); and (7) judicial misconduct (*In re Freeman* (2006) 38 Cal.4th 630, 634).

## II.

### HABEAS JURISDICTION DOES NOT LIE UNLESS THE CLIENT IS IN CUSTODY.

A California court lacks habeas jurisdiction unless the petitioner is in custody. (*People v. Villa* (2009) 45 Cal.4th 1063, 1069.) Custody exists if the petitioner is incarcerated or is at liberty on parole or probation. (*Ibid.*) So long as the petitioner was in custody when the petition was filed, the court retains jurisdiction even if custody lapses before the petition is adjudicated. (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217.)

Given the jurisdictional requirement of custody, it is vital that a habeas investigation be promptly undertaken when the client's probation or parole will be ending in the near term. If the client has a viable claim, it must be raised before the court loses jurisdiction.

## III.

### OBTAINING POSTCONVICTION DISCOVERY FROM THE DISTRICT ATTORNEY OR THIRD PARTIES.

Appellate counsel may receive a lead that either the District Attorney or a third party is in possession of a document or information that might form the basis for a legal claim. Regrettably, the law is not helpful in terms of investigating such a lead.

Under California law, a defendant seeking habeas corpus relief may not file a discovery motion or issue a subpoena duces tecum unless an order to

show cause has issued. (*In re Steele* (2004) 32 Cal.4th 682, 690.) The sole exception is that a court may order discovery in cases involving a death sentence or a sentence of life without the possibility of parole. (Penal Code section 1054.9.)

Given the state of the law, defense counsel's investigation is subject to the mercy of either the District Attorney or the third party. Counsel should approach the District Attorney and third parties in a forthright and professional fashion. However, there is little recourse if the contacted party is uncooperative.

Nonetheless, it should be noted that a prosecutor has a continuing duty pursuant to *Brady v. Maryland*, supra, 373 U.S. 83 to disclose materially favorable evidence even though judgment has been entered in the trial court. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.) If defense counsel has reason to believe that the prosecutor is in possession of favorable evidence that has not been previously disclosed, the evidence should be formally requested in writing.

Finally, there is a special statutory procedure by which an incarcerated felon may seek belated DNA testing by filing a motion in the trial court. (Penal Code section 1405.) If appellate counsel learns of vital evidence that was not previously tested and which may support a claim of innocence, a motion should be brought.

#### IV.

PURSUANT TO SDAP'S PROTOCOL, A PANEL ATTORNEY MUST CONSULT WITH SDAP BEFORE BRINGING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The topic of ineffective assistance of counsel is an unhappy one. Trial lawyers do not want to talk about it and appellate courts are not pleased to deal with it. Given the touchiness which surrounds the subject, SDAP has developed a protocol that requires a panel attorney to consult with SDAP before bringing a claim of ineffective assistance of counsel. The protocol is attached as Appendix A. The Court of Appeal views the protocol as important and has indicated that compensation for habeas work may be denied if counsel does not comply with the protocol.

SDAP staff attorneys have many years of experience in investigating possible claims of ineffective assistance of counsel. If you have never investigated such a claim or only done so on rare occasion, we encourage you to solicit our assistance and guidance. By engaging in collegial dialogue with our office, you may be able to quickly weed out meritless claims and discern an efficient method for conducting your investigation.

## V.

### LISTENING TO THE CLIENT.

A primary source of information concerning a claim of ineffective assistance of counsel is the client. Of course, some clients are no help since they fail to respond to your letters. At the opposite end of the universe are those clients who will send hundreds of pages of correspondence. While the natural tendency is to stop reading after the first hundred pages, this is a dangerous thing to do.

The client has a unique advantage that is unavailable to appellate counsel. The client was a percipient witness to the trial court proceedings and the events in the case. The client also conducted contemporaneous discussions with trial counsel. Given these experiences, the client is in a position to provide information that may otherwise be unavailable. For this reason, it is critical that you take note of everything that the client has to say.

I can personally attest to the tedium of reading a voluminous letter from a client. However, I have been involved in cases where a vital nugget of information was found buried in the midst of endless pages of nonsense. By paying attention to every word that the client communicates, you may find something that results in the client's liberation.

## VI.

TRIAL COUNSEL SHOULD NOT BE CONTACTED UNTIL  
APPELLATE COUNSEL HAS FULLY AND CAREFULLY  
ASSESSED ALL POSSIBLE CLAIMS OF INEFFECTIVE  
ASSISTANCE.

It is a given that trial counsel will be less than pleased to hear from you when the subject of ineffective assistance of counsel is broached. Trial

counsel will be even unhappier if you conduct your investigation in a piecemeal fashion by repeatedly returning with new and different lines of inquiry. Since trial lawyers are extraordinarily busy on their pending cases, it is important to show consideration to counsel by having done your homework before contacting them.

To this end, several obvious steps should be taken before you consult with trial counsel. First, you should complete your review of the record on appeal. While you need not necessarily wait for small pieces of the record that will be forthcoming on a motion to augment the record, you will certainly lose trial counsel's respect if you profess ignorance of the full record. Moreover, it is impossible to reach a fair judgment about counsel's performance unless you have actually reviewed the full performance.

Similarly, you should conduct a careful review of the relevant law before contacting trial counsel. Obviously, you cannot fault counsel for failing to file a certain motion or make a particular objection unless you are certain that the law supported such action.

It is also imperative that you fully consult with the client or other relevant witnesses before contacting trial counsel. While you may believe that counsel erred based on the contents of the record, a simple conversation with the client or a witness may reveal information that fully explains what counsel did.

As was discussed above, it may be fruitful to consult with your SDAP buddy before contacting trial counsel. Oftentimes, two perspectives are better than one. The SDAP staff attorney may assist you in rejecting meritless claims or in focusing on the true nature of a possible claim.

In short, your goal should be to prepare a narrow inquiry for trial counsel which can hopefully be addressed in a relatively short period of time. While followup questions are often unavoidable after your initial consultation with trial counsel, your relationship with counsel will be greatly enhanced if your preparation has resulted in an efficient and focused interchange.

## VII.

### TRIAL COUNSEL IS BEST CONTACTED BY WAY OF A

## LETTER.

Like many things in both life and the practice of law, there is no definitive manner by which trial counsel should be contacted. Nonetheless, in my experience, the best results are achieved if communication is initiated by way of a letter. Several reasons support this conclusion.

First, a letter is quite simply more efficient than communication by telephone. A succinct letter puts trial counsel on notice as to exactly what is at issue. Upon receiving a letter, counsel can retrieve the file and prepare a response in a careful and thoughtful manner. By contrast, if you telephone counsel out of the blue, the response will almost certainly be that counsel will need to get back to you. There is little reason to waste time on a superfluous phone call.

Second, a letter should call upon trial counsel to respond in writing. The benefit of this method is that trial counsel will hopefully provide a full and clear answer to your inquiry. If the answer does not demonstrate that counsel performed effectively, you will then be able to proceed with the certainty that counsel has committed to a specific version of events.

Third, trial counsel is not always willing to sign a declaration. In this situation, counsel's letter can be submitted as an exhibit in lieu of a declaration. (See pages 29-30, *infra*.)

An objection to the use of a letter is that some trial attorneys may take umbrage at what appears to be an impersonal form of communication. While there is some merit to this concern, discomfort is sometimes unavoidable in the adult world. To the extent that no one is comfortable in dealing with a claim of ineffective assistance of counsel, it is to be hoped that trial counsel will deal with a letter in a professional and dispassionate manner.

It is also worth noting that many trial attorneys actually prefer to receive a letter. And, at least in the case of the Santa Clara County Public Defender's Office, we have been told that the attorneys are required to respond to ineffective assistance of counsel inquiries in writing.

In preparing a letter, appellate counsel must bear in mind that an investigation is still in progress. The letter should solicit information and should not state the conclusion that appellate counsel already believes that a claim of ineffective assistance of counsel will be made. It is unfair to trial

counsel to reach any conclusions before receiving a response. Moreover, your communication will likely be unpleasant and counterproductive if you pronounce judgment on counsel without first ascertaining what counsel has to say.

The tone of the letter should be polite. After all, trial counsel and appellate counsel are on the same side. The letter should pose direct questions in clear language. In no instance should appellate counsel make denigrating comments about the quality of trial counsel's performance.

Human nature being what it is, some trial attorneys will delay in responding to your inquiry. While you have an obligation to provide counsel with a reasonable amount of time to respond, you do need a timely response. My approach is to calendar a date for a followup letter. Absent unusual circumstances, I will generally send a second letter to trial counsel if I have not received a response within 15 days. If there is no response to the second letter, I will then take the necessary step of either seeking a court order or contacting the lawyer's superior at the Public Defender's Office. (See the following section.)

#### VIII.

TRIAL COUNSEL HAS A DUTY TO PROVIDE THE CLIENT'S FILE UPON REQUEST AND TO RESPOND TO QUESTIONS POSED BY APPELLATE COUNSEL. IF TRIAL COUNSEL FAILS TO SATISFY THESE DUTIES, A MOTION TO COMPEL COMPLIANCE MAY BE FILED IN THE COURT OF APPEAL.

A trial attorney has a continuing duty of loyalty to a former client. (*People v. Davis* (1957) 48 Cal.2d 241, 256; *Frazier v. Superior Court* (2002) 97 Cal.App.4th 23, 35.) Trial counsel therefore has a responsibility to act in an open and honest manner when contacted by appellate counsel. In particular, trial counsel has two specific obligations: (1) to provide the client's file to appellate counsel; and (2) to respond to all reasonable inquiries made by appellate counsel.

With respect to the file, the rules could not be clearer. The file is the property of the client. (California Rules of Professional Conduct, rule 3-700 (D)(1).) Upon request, trial counsel must tender the file to the client or appellate counsel. (*Ibid*; *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950.)



In a similar vein, trial counsel has an ethical obligation to respond to appellate counsel's questions. Given counsel's duty of fidelity to the client, counsel has a duty "to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel." (The State Bar of California Standing Committee on Professional Responsibility And Conduct, Formal Opinion No. 1992-127, p. 3 - attached as Appendix B.) Of course, counsel are held to "high standards of honesty and candor" in their unsworn statements. (*Mosesian v. State Bar* (1972) 8 Cal.3d 60, 66.)

If trial counsel fails to respond to your inquiry and is employed at a Public Defender's Office, you can likely secure cooperation by communicating with a supervisor. SDAP can assist you in this process by providing the identity of the appropriate supervisor.

In the unusual circumstance where trial counsel either fails to produce the client's file or refuses to answer questions, the Court of Appeal will likely compel counsel's compliance. (See *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006.) A sample motion to compel is available on the SDAP website. If counsel fails to obey the court's order, a contempt motion should follow.

In terms of timing, you should not delay in seeking the assistance of the court. While trial counsel is entitled to a reasonable amount of time in which to respond to your inquiry, counsel has no right to unduly delay the investigative process.

## IX.

IN THE SITUATION WHERE TRIAL COUNSEL AND THE CLIENT HAVE PROVIDED CONFLICTING INFORMATION, APPELLATE COUNSEL IS ENTITLED TO RELY ON THE CLIENT'S REPRESENTATIONS UNLESS THEY ARE CONTRADICTED BY OTHER EVIDENCE.

Occasionally, a case will arise where trial counsel's factual representations are contradicted by the client. When such a circumstance arises, appellate counsel is ethically entitled to rely on the client's assertions unless the weight of the evidence establishes that the client's representations

are not credible.

At the outset, it must be emphasized that it is manifestly unethical (and illegal) for an attorney to knowingly present false testimony from a criminal defendant. (*Nix v. Whiteside* (1986) 475 U.S. 157, 166; *People v. Pike* (1962) 58 Cal.2d 70, 97; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1339.) Obviously, this rule precludes appellate counsel from prosecuting a collateral action based on false evidence.

Given this unobjectionable proposition, the question remains as to the test that counsel should employ in determining whether the client's factual representations are sufficiently credible to be employed as the basis for a habeas claim. Under existing authority, the standard leans in favor of reliance on the client's credibility.

In several cases, courts have held that defense counsel is bound to present a defendant's testimony absent a "firm factual basis" or a "firm basis in fact" for disbelieving the client. (*Commonwealth v. Mitchell* (2003) 438 Mass. 535 [781 N.E.2d 1237, 1247]; *United States v. Long* (8th Cir. 1988) 857 F.2d 436, 445; *United States ex. rel. Wilcox v. Johnson* (3rd Cir. 1977) 555 F.2d 115, 122.) Importantly, the *Long* court observed that "[c]ounsel must remember that they are not triers of fact, but advocates." (*Long*, supra, 837 F.2d at p. 445.)

In applying the "firm factual basis" standard, counsel must be sensitive to the specific facts presented in each case. In some instances, either the client's version or trial counsel's version will be corroborated by other evidence. If corroborating evidence supports trial counsel's version, appellate counsel may reasonably decline to bring a habeas petition if the corroboration is of significant weight.

In determining whether the client's assertions are sufficiently credible to merit a habeas petition, counsel is not required to suspend common sense. If a claim is far-fetched or implausible, it need not be pursued. However, it is equally true that a claim may be meritorious notwithstanding a conflict in the stories told by the client and trial counsel. If there is no compelling evidence that supports trial counsel's version, appellate counsel may file a habeas petition based on the facts represented by the client.

X.

IN A PROPER CASE, COUNSEL SHOULD SEEK EXPERT WITNESS OR INVESTIGATIVE FEES FROM THE COURT OF APPEAL.

In some cases, a proper inquiry will require consultation with an expert witness or the use of a professional investigator. While the Court of Appeal will authorize funds for these purposes upon a sufficient showing, counsel must take several steps before seeking funds from the court.

Before seeking funds for an investigator, counsel should determine whether the relevant witnesses will be cooperative and easy to contact. If this is the case, counsel can conduct the necessary investigation by phone call or mail. If the witness is friendly, there should be no problem in procuring a sworn declaration which can be used as an exhibit to the habeas petition and as admissible hearsay if it is necessary to impeach the witness at an evidentiary hearing.

In a worst case scenario, appellate counsel can testify to the witness's prior statement at the evidentiary hearing. This is true even if appellate counsel is personally handling the evidentiary hearing. (California Rules of Professional Conduct, Discussion to rule 5-210 [attorney may be both advocate and witness in a non-jury adversarial proceeding].)

If counsel concludes that the services of an investigator are required, a licensed private investigator should be contacted. Before conversing with the investigator, counsel should carefully assess the exact nature of the required investigation. Armed with this information, counsel should consult with the investigator and determine the number of hours that the investigation will require. Although the compensation guidelines do not specify an hourly rate for investigators, the guidelines require that the investigator be paid a "reasonable" fee. A good rule of thumb is to ask the investigator to work for the hourly rate paid by the local Superior Court in indigent criminal cases.

Once the investigator has quoted a fee for the necessary work, an ex parte motion should be filed in the Court of Appeal under seal. (See Penal Code section 1241 [appellate court has the authority to award compensation for "necessary expenses"].) In the motion, a specific sum should be requested. A supporting declaration should be provided in which counsel precisely explains: (1) the legal issue to which the investigation is related; (2) the need for the investigation; and (3) the fact that counsel has consulted with a named

investigator and been told that the sum requested is necessary to perform the investigation.

On occasion, the court will grant the motion but will authorize only a portion of the amount requested. In this situation, counsel will have to carefully confer with the investigator in order to prioritize the investigator's tasks.

Aside from an investigator, some cases will require counsel to consult with experts such as physicians, psychologists or any number of forensic specialists. Before contacting an expert, counsel should engage in a process of self education regarding the subject at issue.

For example, if the issue at trial was the cause of death and trial counsel failed to consult an expert, appellate counsel should take a few hours to study books and articles on the matter. In the internet age, it is relatively easy to locate relevant materials in both libraries and electronic sites.

After obtaining a basic understanding of the science, counsel should then contact an expert. In my experience, most expert witnesses are willing to spend some uncompensated time on the phone in order to provide preliminary opinions based on the facts that are orally provided. During the conversation, counsel should obtain a quote from the expert regarding the cost for reviewing the relevant materials and preparing a declaration.

The protocol for obtaining money for the expert is identical to that for seeking investigative fees. In an ex parte motion filed under seal, counsel should specify the amount sought. In a declaration, counsel should precisely lay out: (1) the underlying legal issue; (2) the necessity for guidance from an expert; and (3) the nature of the work that the named expert agreed to perform during your telephone consultation. A sample motion is available on the SDAP website.

As is true of investigative fees, the court may award less money than is requested. At that point, you will have to carefully negotiate with the expert in order to ascertain what the expert is willing to do for the amount awarded. A reasonable accommodation might include the delivery of an oral report instead of a written report. Or, if you are lucky, the expert may agree to perform all of the necessary work for a reduced fee.

## XI.

IF THE COURT OF APPEAL DENIES A MOTION FOR INVESTIGATIVE OR EXPERT WITNESS FEES, COUNSEL SHOULD STILL GO FORWARD WITH THE HABEAS PETITION IF A PRIMA FACIE CASE FOR RELIEF CAN BE STATED.

In an instance where the Court of Appeal has declined to award investigative or expert witness fees, it may still be possible to go forward with a petition. This is so since counsel may be able to develop sufficient personal knowledge to verify the bona fides of a claim or claims.

A habeas petition may be filed in good faith so long as the factual allegations stated in the petition would entitle the defendant to relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) If counsel has personally obtained sufficient information, there may well be a sufficient basis to go forward with a petition. An example of this situation is as follows.

Assume that the client has been convicted of molesting a young child. At trial, the child denied that any molestation occurred. However, the prosecutor called a police officer who recounted an extrajudicial interview where the child revealed an act of molestation. Based on your reading of a transcript of the interview, you conclude that trial counsel erred in failing to call an expert witness who could have testified that the officer employed improperly suggestive techniques. (See *Sanders v. Ryder* (9th Cir. 2006) 2006 U.S. App. Lexis 16991 at \* 11-12; *Mullins v. State* (2002) 30 Kan.App.2d 711, 717-718 [46 P.3d 1222, 1226] [ineffective assistance of counsel found where counsel failed to call an expert on the subject of suggestive child interviewing techniques.]) Insofar as there is a substantial body of literature and case law on the topic, it is entirely proper to plead an IAC claim without the benefit of an expert witness.

In proceeding in this manner, it is vital to plead the facts as authoritatively as is possible. Under a newly decided U.S. Supreme Court case, the failure to exhaustively plead facts may be fatal to the client's chances of prevailing in federal court.

In *Cullen v. Pinholster* (April 4, 2011, 09-1088) \_\_\_ U.S. \_\_\_ [11 D.A.R. 4795], the court announced a new rule of federal habeas procedure.

In the usual case, a federal court reviewing a state judgment is now “limited to the record that was before the state court that adjudicated the claim on the merits.” (*Id.* at p. 4799.) Thus, in the situation where the state court summarily denied a habeas petition, the federal court may only consider the facts that were pled in the petition as well as any supporting exhibits and the record on appeal. (*Id.* at pp. 4805-4806, fn. 12.) Given this rule, counsel must plead the facts in a highly detailed manner.

Appellate counsel should not be deterred from pursuing habeas relief merely because the court has not provided the necessary funds for a full investigation. Since the filing of a habeas petition is merely the first step in obtaining a remedy, counsel may ethically proceed without an expert so long as a prima facie case can be stated based on the information that counsel has personally developed.

## XII.

A HABEAS PETITION SHOULD BE FILED NO LATER THAN THE TIME WHEN THE REPLY BRIEF IS FILED IN THE RELATED APPEAL.

There is no statutory time limit for the filing of a habeas petition. However, the Supreme Court has cautioned that the “petition should be filed as promptly as the circumstances of the case allow. [Citation.]” (*In re Stankewitz* (1985) 40 Cal.3d 391, 397, fn. 1.) Given this directive, a factual investigation that may lead to a habeas petition should be expeditiously conducted. (*In re Sodersten*, *supra*, 146 Cal.App.4th 1163, 1221.)

As a matter of practice, the Sixth District has treated habeas petitions as being timely filed if the petition is filed no later than the time when the reply brief is filed in the related appeal. Of course, this is not to say that work on the petition should be delayed until the respondent’s brief on appeal is filed. Given the duty to proceed in an expeditious manner, counsel should diligently work on the petition so that it is ready for filing as soon as possible.

## XIII.

THE HABEAS PETITION MUST INCLUDE ALL OF THE VIABLE CLAIMS AVAILABLE TO THE CLIENT.

Under California law, a habeas petition must include all of the client's known claims. This is so since a successive petition raising new claims will be summarily denied absent unusual circumstances. (*In re Clark*, supra, 5 Cal.4th 750, 767-768.)

Given this procedural rule, appellate counsel should be certain that all of the possible issues have been carefully investigated before the petition is filed. In this way, procedural default can be avoided.

If a new issue is discovered while a petition is pending, an amended or supplemental petition may be filed. (*In re Clark*, supra, 5 Cal.4th 750, 781, fn. 16.) However, leave of court must be obtained in order to file the new pleading. (*Ibid.*)

#### XIV.

#### THE HABEAS PETITION HAS FIVE NECESSARY COMPONENTS.

Habeas corpus is a proceeding which is separate and apart from the related appeal. For this reason, the Supreme Court has indicated that a habeas petition must be a complete document in and of itself. (*In re Ronald E. (1977)* 19 Cal.3d 315, 322, fn. 3.) It is improper to seek incorporation of other briefs by reference. (*Ibid.*)

In the interests of judicial efficiency, the petitioner need not reproduce relevant portions of the record on appeal. It is entirely proper to include a request for judicial notice of the record on appeal in the pleading section of the petition. (See Appendix C, pp. 2, 7.) To date, the Sixth District has uniformly granted judicial notice of the record on appeal.

There are five components to a habeas petition: (1) the pleading; (2) the verification; (3) a Statement of Facts; (4) the points and authorities; and (5) any supporting exhibits. Careful attention must be paid to each of these aspects of the presentation.

#### A. The Pleading Section Must Contain A Recitation Of The Facts On Which The Claim For Relief Rests.

The pleading section must, standing alone, state a prima facie case for relief. (*People v. Duvall*, supra, 9 Cal.4th 464, 474-475.) The pleading must allege: (1) an unlawful restraint of the petitioner's liberty; (2) if the petitioner

is incarcerated, the place of his imprisonment and the identity of his custodian (i.e, CDCR director or official in charge of the county jail); or if the petitioner is in constructive custody, the identity of the relevant official (i.e. Chief Probation Officer or Chairperson of the Board of Parole Hearings); (3) the judgment upon which the petitioner's restraint is based; (4) the existence of the related pending appeal and whether prior habeas petitions have been filed; (5) the essential procedural and substantive facts on which the claim for relief rests; (6) the legal claim upon which relief is sought; and (7) a prayer for relief. (See Penal Code section 1474.)

The most critical aspect of the pleading section is the obligation to "state fully and with particularity the facts on which relief is sought [citation]. . . ." (*Duvall*, supra, 9 Cal.4th at p. 474.) In the absence of the specification of "facts," the court may summarily deny the petition since "[c]onclusory allegations made without any explanation of the basis for the allegations do not warrant relief . . . ." (*Ibid.*) Since new evidence may generally not be presented on federal habeas, counsel must carefully plead all of the helpful facts that are presently available. (*Cullen v. Pinholster*, supra, 11 D.A.R. 4795, 4799, 4805-4806 and fn. 12.)

Critically, the necessary "facts" include both the procedural facts and the substantive facts. The attached sample petition provides an example of this proposition. (Appendix C, pp. 1-7.)

In the sample petition, the claim was raised that trial counsel had performed ineffectively by failing to present controlling evidence in support of a Fourth Amendment suppression motion. In the pleading section, it was alleged that trial counsel had filed and litigated a Penal Code section 1538.5 motion. (Appendix C, pp. 4-5.) The petition also alleged that there were material facts which counsel failed to properly present and argue. (Appendix C, pp. 3-6.) Obviously, it was necessary to plead both the procedural and substantive facts in order to state a prima case for relief.

Technically, the factual allegations in the pleading section need not be followed by citations to the record on appeal or supporting exhibits. This is so since the verification serves to establish the bona fides of the allegations. However, a pleading will bear an authoritative appearance if citations to the record and exhibits are included.

B. The Verification Must Be Premised On Personal



### Knowledge.

A habeas petition must be verified. (Penal Code section 1474, subd. 3.) Although the defendant may be called upon to sign the verification, it is the customary practice for counsel to execute the verification.

The verification must state that the contents of the petition are based on “personal knowledge.” (*People v. McCarthy* (1986) 176 Cal.App.3d 593, 596-597.) Absent this assertion, the verification is defective. (*Ibid.*)

For purposes of the verification, “personal knowledge” includes information that counsel has gleaned from review of the record and exhibits. A verification is proper when it states that the facts alleged in the petition are “supported by citations to the record or the exhibits submitted” to the court. (Appendix C, p. 8.)

### C. The Statement of Facts

The Statement of Facts should be taken verbatim from appellant’s opening brief. In this way, you will ensure that the court has a complete recitation of the evidence.

### D. The Memorandum of Points And Authorities

The legal argument in a habeas petition should be framed in the same manner as argument that is contained in an appellant’s opening brief. (See Sacher, *Some Thoughts on Persuasive Brief Writing* (2010) pp. 7-21, available from SDAP.) However, there are two special rules that apply when a claim of ineffective assistance of counsel is advanced.

First, if trial counsel has been cooperative, you will have either a letter or declaration that will be an exhibit to the petition. In many cases, trial counsel will have advanced a tactical justification for the manner in which the case was handled. It is vital that the justification be fully discussed in the argument. Insofar as the court is bound to presume that counsel performed effectively (*Strickland v. Washington* (1984) 466 U.S. 668, 689), it is essential that the defects in counsel’s reasoning be exposed in detail.

Second, the prejudice prong of *Strickland* requires a showing that there was a “reasonable probability” of a different result absent counsel’s error.

(*Strickland*, supra, 466 U.S. at p. 694.) There is a very useful technique for showing prejudice.

The goal of any prejudice argument is to demonstrate that something went dramatically wrong in the trial court. The best way to make this showing is to compare the trial that actually occurred with the one that should have occurred. (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 834 [in assessing prejudice, the court should “compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently.”].) By comparing and contrasting the two trials, counsel can often persuade the court that the defendant did not receive a fair trial.

#### E. The Exhibits

A habeas petitioner bears the burden of producing an adequate record in support of the claims for relief. (*People v. Duvall*, supra, 9 Cal.4th 464, 474; *Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187.) In the typical case, a petition will be supported by declarations, police reports, investigative reports and any other relevant forms of documentary evidence.

If at all possible, a declaration should be obtained from trial counsel when a claim of ineffective assistance of counsel is at issue. A declaration is a preferred form of evidence since it is executed under penalty of perjury. If counsel declines to sign a declaration, a letter written by counsel is a credible substitute that the court will likely view as authoritative. If a letter is used as an exhibit, it should be accompanied by your declaration which authenticates the letter and states that trial counsel was asked to submit a declaration and did not do so.

Sometimes, trial counsel will decline to put anything in writing. In this circumstance, you will have to submit your own declaration which specifies either what counsel told you or counsel’s failure to say anything. (See Appendix C, Exhibit B, p. 2.)

#### F. There Are Special Word Limits And Technical Requirements For A Habeas Petition.

A habeas petition must bear a red cover and have a Table of Contents and a Table of Authorities. (California Rules of Court, rules 8.40(b)(1) and 8.384(a)(1).) Absent permission granted by the Presiding Justice, the

memorandum of points and authorities may not exceed 14,000 words. (California Rules of Court, rules 8.204(c) and 8.384(a)(2).) However, there is no word limit for the pleading section.

The exhibits may be either attached to the petition or submitted in a separate volume or volumes. (California Rules of Court, rules 8.384(b)(3) and 8.486(c)(1).) In either event, the exhibits must be preceded by a Table of Exhibits and must be both tabbed and consecutively numbered. (*Ibid.*) A single volume of exhibits may not exceed 300 pages. (*Ibid.*) When an exhibit is cited in the petition, the index tab and page number must be referenced. (California Rules of Court, rule 8.384(a)(3).)

In the Court of Appeal, counsel must file the original and 4 copies of the petition. (California Rules of Court, rule 8.44(b)(3).) Only a single set of separately bound exhibits need be submitted. (California Rules of Court, rule 8.44(b)(5).)

#### XV.

#### THE SIXTH DISTRICT HAS A FAIRLY UNIFORM METHODOLOGY FOR HANDLING HABEAS PETITIONS.

After a habeas petition is filed, the Sixth District will issue a standard order that states that the petition will be “considered” with the appeal. As will be discussed below, the wording of the order has significance should the need to file a petition for review arise. (See pp. 35-36, *infra.*)

Absent a need for expedited treatment, the court will typically take no action on the petition until the accompanying appeal is fully briefed. At that point, the court may ask the Attorney General to file an informal response to the petition. (See California Rules of Court, rule 8.385(b)(1).) In the same order, the court will allow the petitioner to file a reply to the informal response.

As a matter of practice, the Sixth District often precludes counsel from discussing a pending habeas petition at the oral argument on the direct appeal. If counsel believes that it is important to address the petition, a motion can be made in advance of the oral argument for leave to discuss the petition.

On the same date as it issues the opinion on the direct appeal, the court will issue an order on the habeas petition. The court will either: (1) summarily

deny the petition; or (2) issue an order to show cause (OSC). In virtually every case, the OSC will be made returnable in the Superior Court. In a rare case, the court will make the OSC returnable to itself and order the Superior Court to make findings of fact which are to be reported to the Court of Appeal. (See *In re Hochberg* (1970) 2 Cal.3d 870, 874, fn. 2 [OSC can be made returnable in either the appellate court or the Superior Court].)

Occasionally, a habeas petition may present a pure issue of law that does not require fact finding. In this situation, the Court of Appeal may retain jurisdiction and resolve the case itself.

A. Counsel's Duties When An OSC Is Issued.

If an OSC is made returnable in the Superior Court, the trial court is required to appoint counsel for the client. (*In re Clark*, supra, 5 Cal.4th 750, 780.) Each Superior Court has its own protocol for the appointment of counsel.

In Santa Clara County, counsel will be appointed by the Independent Defense Counsel Office (IDO). If appellate counsel wishes to remain on the case, an appointment will generally be forthcoming from IDO. However, IDO has specific malpractice insurance and indemnification requirements that must be satisfied. In some instances, a SDAP staff attorney may be available to handle the case in the Superior Court.

If the Superior Court appoints a new lawyer, appellate counsel should ensure a smooth transfer of responsibility. New counsel should be sent the trial transcripts and all of the relevant pleadings and documents. A letter summarizing the proceedings to date and issues to be determined should accompany the materials.

If the Court of Appeal issues the OSC returnable to itself, appellate counsel will remain on the case in the Superior Court. However, appellate counsel may associate with another lawyer to assist in the handling of the evidentiary hearing.

B. The Preparation Of A Traverse Requires Special Attention To Detail.

When an order to show cause is issued, the People are required to file

a return that must either admit or deny the factual allegations made in the petition. (*People v. Duvall*, supra, 9 Cal.4th 464, 476-477.) Significantly, “[t]he factual allegations of the return will be deemed true unless the petitioner in his traverse denies the truth of the respondent’s allegations and either realleges the facts set out in his petition, or by stipulation the petition is deemed a traverse.” [Citations.]” (*Id.* at p. 477, emphasis deleted.)

The quoted rule bears repeating. The traverse must: (1) reallege all of the facts necessary for relief to be granted; and (2) deny any untrue factual allegations made by the People. While it is permissible to allege “additional facts,” in the traverse, “wholly different factual bases” for relief may not be included. (*Duvall*, supra, 9 Cal.4th at p. 478.) New factual bases may be alleged only by way of an amended or supplemental petition. (*In re Clark*, supra, 5 Cal.4th 750, 781, fn. 16.)

There may be an unusual case where the People do not controvert the petition’s factual allegations in their return. In this circumstance, an evidentiary hearing is not required. (*Duvall*, supra, 9 Cal.4th at pp. 477, 480.) As a result, the Court of Appeal has the authority to grant relief on the issues of law that are presented. (*Ibid.*)

## XVI.

GIVEN THE SIXTH DISTRICT’S MANNER OF ADJUDICATING HABEAS PETITIONS, A SEPARATE PETITION FOR REVIEW MUST BE TAKEN FROM THE SUMMARY DENIAL OF RELIEF.

If the Court of Appeal denies habeas relief, there is a choice of remedy. Counsel may file either a petition for review or a new habeas petition in the California Supreme Court. However, the court has stated a preference for the filing of a petition for review. (*In re Reed* (1983) 33 Cal.3d 914, 918, fn. 2, overruled on other grounds in *In re Alva* (2004) 33 Cal.4th 254, 260.) Moreover, it is in the interests of both the client and counsel to proceed by way of a petition for review.

The primary benefit of a petition for review is that the Supreme Court is jurisdictionally required to rule on the petition within 90 to 100 days. (California Rules of Court, rule 8.512 (b)(1).) However, there is no time limit for a ruling on a habeas petition. Since the client will usually want speedy relief, the expeditious resolution of the state action will allow the client to promptly file his federal habeas petition.

A new habeas petition also places a burden on counsel. Whereas the

filing of a petition for review requires only that counsel attach a copy of the summary denial order to the petition, a new habeas petition requires the filing of a set of exhibits that includes all of the documents filed in the Court of Appeal habeas proceeding. (California Rules of Court, rule 8.384(b)(1).) Obviously, this is a burden best avoided.

In the usual case, the Sixth District will issue a summary denial of a habeas petition on the same day as it files its opinion in the related direct appeal. Since the Sixth District does not formally consolidate the habeas action with the appeal, separate petitions for review are required for the appeal and habeas actions. (California Rules of Court, rule 8.500(d) [“If the Court of Appeal decides an appeal and denies a related petition for writ of habeas corpus without issuing an order to show cause and without formally consolidating the two proceedings, a party seeking review of both decisions must file a separate petition for review in each proceeding.”].)

Assuming that the habeas petition was summarily denied on the same day as the appeal, the petition for review is due no later than 40 days after the filing of the order denying the petition. (California Rules of Court, rules 8.366(b)(1) and 8.387(b)(2)(B).) However, if a summary denial was filed on a day other than when the appeal was decided, the petition for review is due within 10 days. (California Rules of Court, rules 8.387(b)(2)(A) and 8.500(e)(1).)

If habeas relief is denied following issuance of an order of show cause, the court will issue an opinion. A petition for review will be due within the usual 40 day period. (California Rules of Court, rules 8.387(b)(1) and 8.500(e)(1).)

If counsel should miss the filing deadline for a petition for review, a new habeas petition may be filed in the Supreme Court. However, in order to avoid any possible procedural default for untimeliness, the new habeas petition should be filed as soon as possible.

## XVII.

THE GOAL OF THE PETITION FOR REVIEW IS TO OBTAIN AN ORDER REMANDING THE CASE TO THE COURT OF APPEAL WITH DIRECTIONS TO ISSUE AN ORDER TO SHOW CAUSE.

Ordinarily, the goal in a petition for review is to demonstrate that the issue presented involves an important or unsettled point of law. (California

Rules of Court, rule 8.500(b)(1) [stating the criteria for a grant of review].) However, this goal need not be achieved in order to obtain a grant of review from the summary denial of a habeas petition.

The Supreme Court has the authority to grant review and remand the case to the Court of Appeal with directions to issue an order to show cause. (California Rules of Court, rule 8.528(d).) Unless a particular case actually presents an important or unsettled issue, this is the remedy that should be sought in the petition for review. The remedy is often granted upon a showing that there was likely a miscarriage of justice in the case.

## XVIII.

### GETTING PAID IN THE SIXTH DISTRICT.

Under the Sixth District's protocol, SDAP has the authority to provide reasonable compensation of up to 12 hours for work on a habeas petition. If a claim exceeds the 12 hour limit, SDAP will make a recommendation regarding reasonable compensation and the Presiding Justice will make the final determination concerning compensation.

As a practical matter, roughly the same guidelines used to assess an appellant's opening brief are employed in reviewing a habeas petition. Counsel can expect to receive 3 to 4 hours for the preparation of a 10 page pleading section. The various arguments will be compensated depending on their length and complexity (i.e. whether they are simple, average or complex). A rule of reason will be applied in awarding compensation for the preparation of declarations used as exhibits.

In our experience, the court has been scrupulously fair in awarding compensation for habeas work. Counsel can expect to receive a reasonable award for the work performed.

### CONCLUSION

In many cases, direct appeal will not provide an adequate remedy. Fortunately, California law provides a defendant with the opportunity to rely on facts extrinsic to the record in order to demonstrate that something went terribly wrong in the trial court.

In order to secure relief, appellate counsel must conduct a careful investigation and must obey the technical rules attendant to pleading a habeas petition. It is hoped that this article has provided a small measure of guidance that will allow you to procure relief for your wrongly convicted clients.