EVEN WHEN THE RECORD DOESN'T HOLD A CLUE . . .

by Vicki Firstman [1]

We were appointed to represent Dave Bautista[2] in May of 2002. He had appealed after entering a plea to a charge of possession of marijuana for sale (Health and Saf. Code, § 11359) for which he had received a 16-month prison term. The record on appeal disclosed a weak suppression claim, and no other arguable issues. Other than the fact that Dave had need of a Spanish interpreter during the trial court proceedings, the record on appeal gave virtually no hint of the complex immigration issues which would eventually lead to the overturning of Dave's conviction.

As with the cases showcased by Dallas Sacher and Lori Quick, this case teaches the value of listening to your client, taking every case seriously, and undertaking a thorough and complete habeas investigation once you know enough to know that something just doesn't seem right. This case also provides an invaluable lesson about teamwork. In Dave's case, there were a series of successes, each spurred on by the combined efforts of a team of attorneys, all striving to find the best legal strategy for victory at every important crossroad. Without these combined efforts, this case might have turned out very differently. Finally, as with the *Magnan* and *Jones* cases, a little bit of luck doesn't hurt, either.

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1. Certain portions of this article are taken from pleadings prepared by Meredith Fahn, the declaration of Michael Mehr, and from the Court of Appeal's opinions in *People v. Bautista* (2004) 115 Cal.App.4th 229, and *In re Dave Bautista*, H026395.

2. Since this case involves both Dave Bautista and his brother, Michael Bautista, they will be referred to by their first names for ease of reference.

DAVE BAUTISTA'S STORY

INTRODUCTION

Dave Bautista was born in Mexico and came to this country with his family when he was about 11 years old. At the time the writ petition in this case was filed, Dave was 28 years old. He had been in the United States more than 17 years and was a lawful permanent resident living with his family in San Jose. His parents and five siblings were all American citizens. He and his wife, Gabriela, had two young children, both citizens, and Gabriela was in the process of attaining legal residency. Dave had no prior felonies, but had suffered several Vehicle Code convictions, none of which would have had any adverse immigration consequences. However, the events of July 6, 2000, put Dave on a collision course with the criminal justice system and a federal immigration scheme which leaves no room for individual equities.

THE UNDERLYING OFFENSE

On July 6, 2000, Drug Enforcement Agent Muenchow arranged to have an army narcotics detection dog and his handler brought to a San Jose storage facility. As the dog, "Rocko," and his handler passed a locker unrelated to their investigation, Rocko repeatedly alerted. As a result, Muenchow obtained the rental agreement for the locker which identified Michael Bautista, Dave's brother, as the renter and Dave as an individual with access to the locker. Muenchow obtained a search warrant for the locker on the same day. The subsequent search resulted in the seizure of approximately 100 pounds of marijuana. The following day, Muenchow conducted a consensual search of Dave and Michael's residence

where he found a small bag of marijuana in Michael's bedroom.

THE TRIAL COURT PROCEEDINGS

On July 11, 2000, the District Attorney of Santa Clara County filed a felony complaint charging Dave and Michael with possession for sale of marijuana pursuant to Health and Safety Code section 11359. At the preliminary hearing on September 12, 2001, Dave and Michael moved to quash the search warrant and for suppression of the marijuana on the ground that the evidence was obtained in violation of the Posse Comitatus Act, codified at 18 U.S.C. § 1385.[3] The motion was denied and Dave and Michael were held to answer.

Following the filing of an information in superior court, both Dave and Michael renewed their motion to suppress. The motion was heard and denied. Thereafter, on the advice of his trial attorney, Dave pled as charged in exchange for a prison term of 16 months. Michael also entered a plea for the same sentence.

Unbeknownst to Dave, this conviction qualified as an aggravated felony under federal immigration law. (8 U.S.C. § 1101, subd. (a)(43(B).) Conviction of an aggravated felony results in the individual's mandatory deportation and exclusion from the United States. (8 U.S.C. § 1227, subd. (a)(2)(A)(iii).) While "'deportation'" means removal from the United

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3. The Act prescribes military participation in matters of civilian law enforcement and provides, in relevant part: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." On appeal, Ms. Fahn, along with Rex Williams, appellate counsel for Michael Bautista, attacked the denial of the suppression motion on the ground that the evidence supporting the search warrant was obtained in violation of the Posse Comitatus Act.

States and does not necessarily preclude readmission," "'exclusion' means permanent removal and banishment," which entails the "denial of reentry into the United States at any time or for any purpose." (*People v. Bautista* (2004) 115 Cal.App.4th 229, 237, fn. 5.) An alien subject to deportation for conviction of certain criminal offenses may be eligible for relief under current immigration laws, but there is no relief possible for aggravated felons. Thus, no matter the equities involved, an aggravated felon will forever be banished from this country and separated from family members who remain here.

THE HABEAS PETITION - STAGE 1
THE INVESTIGATION, THE WRIT, AND THE COURT OF APPEAL'S INITIAL DECISION

The Sixth District Appellate Program (SDAP) assigned Dave's case to panel attorney Meredith Fahn. My first involvement in the case came when Ms. Fahn called to tell me that Dave was being held by the Immigration and Naturalization Service (INS) in a detention center and was currently in removal proceedings.[4] Unlike his brother Michael, who had been born in the United States, and had simply been released on parole after serving his prison term, the INS had detained Dave upon his release from prison on October 23, 2002. Dave had then been transported to a detention center in El Centro where he had been informed that he would be deported on the basis of the present offense.

I advised Ms. Fahn to contact attorney Michael Mehr, an expert in immigration matters. When Mr. Mehr realized that there was an appeal pending, he recommended filing

4. It wasn't until March 1, 2003, that INS jurisdiction was transferred to the Department of Homeland Security.

a motion to terminate deportation proceedings on the ground that the conviction was not final. (Immigration and Nationality Act § 236(c), 8 U.S.C. § 1226(c).) After further consultation with Ms. Fahn and with Dave's family, Mr. Mehr filed the motion, which resulted in the termination of the deportation proceedings and Dave's release from custody. This was the first important crossroad in the case and Mr. Mehr's involvement proved to be pivotal, as it would in many other instances during Dave's legal journey.

In the meantime, having become aware of the devastating immigration consequences Dave was facing, Ms. Fahn began a habeas investigation. In consultation with Michael Mehr, we settled on a strategy. The first step was to determine whether Dave's trial attorney had advised him that a conviction for possession for sale of marijuana would result in his permanent exclusion from the United States. The second step was to find out whether trial counsel had made any attempt to obtain a more favorable plea bargain. Specifically, we wanted to know if counsel had made efforts to have Dave "plead up" to a non-aggravated felony such as offering to sell or transport marijuana[5] (Health & Saf. Code, § 11360), even though that crime carries a more severe sentence than the possession for sale charge to which Dave had pled. While such a crime would render Dave "deportable," it is not an aggravated felony and Dave would remain eligible for "Cancellation of Removal" by virtue of his long

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5. A conviction for section 11360 is not an aggravated felony under immigration law if the "record of conviction" (the complaint, information, plea sentence, and admissions at the time of the plea) show that the defendant was convicted of "offering" to transport, sell, furnish or give away a controlled substance. (*U.S. v. Rivera-Sanchez* (9th Cir. 2001) 247 F.3d 905.) In addition, transportation of marijuana for personal use is not considered an aggravated felony. (*United States v. Casarez-Bravo* (9th Cir. 1999) 181 F.3d 1074, 1077.

term legal residency and the strength of other equitable factors such as the lack of any serious criminal record and his close family ties to relatives with lawful status.

Dave told Ms. Fahn that his trial lawyer had advised him that he could "possibly be deported" if convicted but since the motion to quash and to suppress had been denied, "there was nothing else we could do but enter [a] plea for the best sentence possible and take a chance that deportation would not come to pass." Trial counsel had never mentioned the possibility of exclusion from the United States, nor had he discussed the possible benefits of pleading to a different, non-aggravated felony charge which would not require his mandatory deportation. Dave insisted that had he known of the immigration consequences flowing from an aggravated felony, he would never have agreed to enter a plea to the possession for sale charge, but would have asked his attorney to take every legal step possible to avoid or minimize the adverse immigration consequences. Dave's statements were reduced to a declaration which was ultimately filed in support of the habeas petition.

Meanwhile, Ms. Fahn broached the thorny subject of ineffective assistance of counsel with Dave's trial counsel, who eventually agreed to provide a declaration. In his declaration, he stated he had known from the outset that Dave was not a citizen and that he faced "the possible consequence of deportation." Accordingly, he had advised Dave if he were convicted, "he would be deported . . . unless for some reason an INS hold was not placed on him." After denial of the de novo motion to quash and to suppress, the trial attorney said his defense strategy "shifted to negotiation of a plea bargain with the most lenient sentence possible." Counsel stated that he considered the plea bargain for a 16-month sentence "the best possible disposition." The trial attorney did admit, however, that he did not attempt to

"plead upward" and had no tactical explanation for this omission: "The possibility of pursuing a negotiated plea for violation of a greater offense, such as sale, transport, or offer to sell or transport, under Health and Safety Code section 11360, never entered my mind in this case. Accordingly, I never advised Mr. Bautista that an upward plea such as sales would carry a stiffer prison sentence yet would not result in deportation."

In addition to Dave and the trial attorney's declarations, Ms. Fahn obtained the declarations of Dave's wife, Gabriela, and his brother, Michael, who attested to the fact that Dave's mother, siblings and children were American citizens and also discussed the hardship that Dave's permanent exclusion would have on their family. While we could have filed the writ with these declarations alone, we had consistently been consulting with Mr. Mehr, who believed that it was essential to support the habeas petition with an expert declaration on the standard of care for the representation of criminal defendants facing adverse immigration consequences.

As a result, Ms. Fahn sought authorization from the Court of Appeal for funds to pay for such a declaration. The request for fees was filed on July 22, 2003, but as time dragged on without a ruling, we decided that the Court of Appeal might be deferring the request until after the petition was filed so as to be able to more accurately assess the requested fees. Regardless of the reason for delay, we concluded we could not wait any longer to file the writ. This was because the briefing on appeal had been completed on June 9, 2003, and we wanted the writ filed while the Court of Appeal maintained jurisdiction over the case. Mr. Mehr agreed to provide the declaration before the court ruled on the request for fees, fully understanding that we could not pay him if the request was denied.

The resulting declaration was twelve pages long and set out, in painstaking detail (1) the actual immigration consequences of Dave's conviction, (2) why trial counsel's representation fell below prevailing professional norms, (3) the reasonable probability of obtaining a plea bargain with less adverse consequences, or failing that, of going to trial with a reasonable defense, and (4) the reasonable probability that Dave would obtain discretionary immigration relief if convicted of a removable but non-aggravated offense such as an offer to sell or transportation.

Mr. Mehr opined that trial counsel had provided ineffective assistance because he had failed to tell Dave that upon conviction he would face permanent banishment or removal from the United States with no right to any form of immigration relief and no right to naturalization in the future. Mr. Mehr believed trial counsel had also affirmatively misadvised Dave by telling him "of the 'possibility of deportation,' when, in truth and in fact, once the judgment of conviction became final, the conviction would trigger mandatory removal." Finally, Mr. Mehr stated that there was yet another ground for a finding of constitutionally defective representation in trial counsel's failure to seek an alternative plea bargain involving a non-aggravated felony. In one portion of his declaration, Mr. Mehr made a potent statement in language the Court of Appeal would later repeat in its decision: "I am convinced that had [trial counsel] researched the immigration consequences himself or if he had made a 5 minute phone call to an immigration attorney. . . , he would have discovered the actual immigration consequences of the plea in this case and the alternative plea bargains that could have avoided or minimized the immigration consequences."

Armed with these declarations, Ms. Fahn filed a habeas petition arguing that trial

counsel had provided ineffective assistance of counsel in two respects: (1) by failing to advise Dave that he would be subject to mandatory deportation and exclusion; and (2) by failing to attempt to negotiate a plea to a charge which would not carry such disastrous immigration consequences.

As for the first claim, Ms. Fahn argued that "it was a substantial misadvisement" to inform Dave "that he *might* face deportation, and not to even mention exclusion, when in fact mandatory deportation and exclusion from the United States are a certainty upon conviction under Health and Safety Code section 11359. Ms. Fahn also argued there was defective representation in trial counsel's failure to advise Dave "of the possibility of pleading to an equivalent or even greater charge to which mandatory deportation does not attach." Giving credence to this last assertion was Dave's declaration that he would have "agreed to serve a greater sentence by pleading to a non-aggravated felony such as offer to sell marijuana if his doing so would have eliminated the immigration consequences of mandatory deportation." Ms. Fahn pointed out that this was "directly contrary to counsel's stated primary objective of obtaining the most lenient prison sentence possible."

Ms. Fahn made a convincing argument for prejudice taking into account many factors, including the relatively innocuous facts, the minimal evidence against Dave as opposed to that against his brother, the primary actor, and the grave disparity in the effective punishment imposed on these two defendants. She used all these factors to argue that it was reasonably probable that the prosecution would have been willing to allow Dave to plead up to a non-aggravated felony or, in the alternative, that Dave would have had a reasonable defense had he gone to trial, a factor relevant to evaluating prejudice. (*In re Resendiz*

(2001) 25 Cal.4th 230.) In the end, Ms. Fahn argued that while the trial attorney had accomplished his goal of obtaining the most lenient sentence possible, his failure to appreciate the most severe consequences to Dave's plea resulted in a situation where he had "won the battle but lost the war."

The writ was filed on September 4, 2003. On September 26, 2003, the court finally issued a favorable ruling on the request for expert fees. On October 7, 2003, the Sixth District Court of Appeal issued an order to show cause returnable in the appellate court. The court set a schedule for the filing of a return and traverse, and informed the parties they could request oral argument. The writ had become a "cause" entitling the parties to oral argument and to a decision in writing with reasons stated. (Cf. *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895.) This was the second major crossroad in our journey.

There was also another significant aspect to the court's order to show cause. In most cases where the Sixth District issues an order to show cause, it orders the return and traverse filed in the superior court, thereby relinquishing jurisdiction over the writ. In this instance, however, the Court of Appeal maintained jurisdiction by ordering the return and traverse filed in the appellate court. Another piece of luck, as it turned out.

As we shifted to the next stage of the proceedings involving the filing of the return and traverse, Ms. Fahn, Mr. Mehr and I continued to work as a team in an attempt to maximize our chances of success and to come up with the best possible strategies for relief. As I had from the beginning of the case, I was also able to obtain valuable advice and input from Michael Kresser, our executive director, which I discussed with Ms. Fahn or Mr. Mehr. It was truly a team effort.

The return filed by the Attorney General was poorly done. It was not only procedurally defective, but raised arguments which were premised upon a misunderstanding of the relevant immigration statutes. Ms. Fahn's traverse took full advantage of these errors and effectively rebutted the Attorney General's arguments.

The court held oral argument on December 9, 2003, and Ms. Fahn and Mr. Mehr, who also attended, came away cautiously optimistic. Their optimism was validated when the court issued a published decision on January 27, 2004, in which it affirmed the judgment on appeal but issued an order to the trial court "for a reference hearing to take evidence and resolve factual issues relating to defendant's legal advice at the time of his plea. A report shall be made to this court at the conclusion of the reference hearing." (*People v. Bautista*, *supra*, 115 Cal.App.4th 229, 242.) Citing the California Supreme Court's decision in *People v. Totari* (2002) 28 Cal.4th 876, 884, the Sixth District found that "if Dave's position prevails with a referee, he has made a persuasive case: (1) that he was not properly advised of the immigration consequences of his plea; (2) that there was more than a remote possibility that the conviction would have one or more of the specified adverse immigration consequences, namely that the INS has notified him that he will be deported when decision on his appeal is rendered; and (3) that he was prejudiced by the nonadvisement, that is, it is reasonably probable that he would not have pleaded guilty if properly advised. . . " (*Bautista*, *supra*, 115 Cal.App.4th at p. 241.) Under *Totari*, these are the factors a criminal defendant must establish to prevail on a motion to vacate a plea for lack of the mandated

immigration advisements under Penal Code section 1016.5.[6] Pointing to trial counsel's admission that the "techniques for defending against adverse consequences never crossed his mind," the Sixth District went on to acknowledge the "'[t]remendous personal stakes involved in deportation and exclusion.' [Citation.]" (*Bautista*, *supra*, 115 Cal.App.4th at pp. 241-242.) The court then concluded: "In our case, considering the relatively innocuous facts about the crime, (namely that Michael was the primary renter of the locker and had marijuana at home in his bedroom, and that Dave had no marijuana or contraband, and no firearms or violence were involved), the disparate effects of the sentences (Michael, a citizen, and Dave, a noncitizen, each received 16 months in state prison but Dave's prison term will be followed by deportation, and exclusion and loss of his 'job, his friends, his home, and maybe even his children, who must choose between their [parent] and their native country' [citation], and the facts that Dave . . . was a permanent resident of the United States, and had his entire family here including his parents, brothers, wife, and two young children, Dave may have been prejudiced by trial counsel's failure to investigate, advise, and utilize defense alternatives to a plea of guilty to an 'aggravated felony.'" (*Id*. at p. 242.) In

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6. Section 1016.5 provides in relevant part: "(a) Prior to the acceptance of a plea of guilty or nolo contendere . . . the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the law of the United States." Under subdivision (b), if the court fails to make the mandated advisement, and the defendant shows that the conviction may have the consequence of deportation, exclusion, or denial of naturalization, "the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty."

reaching its decision, the court gave great credence to Mr. Mehr's declaration, validating his conclusion that an expert declaration was essential for success.

In effect, the Sixth District's decision set a new legal standard for representation in cases involving legal immigration issues. It found a viable claim of ineffective assistance of counsel not only for failure to give proper advisements and for giving affirmative misadvice (see, e.g., *People v. Soriano* (1987) 194 Cal.App.3d 1470; *In re Resendiz, supra*, 25 Cal.4th 230, 250), but also for the failure to attempt to utilize defense alternatives to a plea of guilty to an aggravated felony. In this respect, the Court of Appeal went a step further than any other previous California decision. This was the third crucial crossroad in Dave's case and it set the stage for the next phase of the proceedings.

THE HABEAS PETITION - STAGE 2
BACK IN THE TRIAL COURT AGAIN . . .

As it had previously, the Court of Appeal maintained jurisdiction over the writ by ordering the trial court to act as a referee and report back to the Court of Appeal following an evidentiary hearing. This fact, in itself, was critical since it meant that SDAP would remain counsel of record and would therefore be in control of Dave's representation for the evidentiary hearing. Yet another piece of luck.

At this point, Ms. Fahn, Mr. Mehr and I began discussions concerning the best approach for Dave's representation. We all believed it would be essential to have an immigration expert who could testify about the immigration consequences for any possible disposition of the case as well as the standard of competency for the representation of

noncitizens like Dave. In the event that the district attorney took the position that it would never offer an alternative plea, the expert could also testify to situations where an alternative plea had been offered. We considered various scenarios about who should be lead counsel and who we should use for our immigration expert. After much discussion back and forth, Mr. Mehr suggested it would be best if we used him as the expert witness because he could testify to personal experiences where a district attorney had agreed to allow individuals to plead up to a non-aggravated felony to avoid the kind of drastic immigration consequences Dave was now facing. We also settled on a local trial attorney as lead counsel. Eric Geffon, a former public defender who had gone into private practice, was well known to SDAP and respected for his litigation abilities. We also believed that it would be in Dave's best interests to use a local trial attorney who was known by the Santa Clara County bench and bar and respected as a litigator. It was decided that Ms. Fahn, with her strong appellate skills and her intimate knowledge of Dave's case, would be best utilized as Mr. Geffon's associate in the trial court proceedings and the person who could prepare any necessary pleadings. This represented another major crossroad in the case because the ultimate outcome could well hinge on how the litigation was conducted during these critical proceedings.

The emails between Ms. Fahn and I flew back and forth at this stage with Mr. Mehr and Mr. Geffon always in the loop and commenting as necessary. Michael Kresser also continued to provide advice. Early on, Ms. Fahn and I were concerned that the case might not be returned to the trial judge, James Emerson. Ms. Fahn and I believed that Judge Emerson was an optimal choice as he has shown himself to be an independent judge who is not a rubber stamp for the prosecution. Consequently, Ms. Fahn wrote to Judge Emerson

presuming that the matter would be heard in his court and requesting a scheduling conference. It is unclear whether our efforts made any difference, but in the end, the case was assigned to Judge Emerson, another piece of good fortune.

Prior to the conference, we considered various issues, including the pros and cons of filing a trial brief and also whether we should pursue a possible settlement. The settlement would involve an upwards plea up to an offer to sell or transportation charge and serving additional jail time if necessary. As it turned out, at the scheduling conference, Judge Emerson himself brought up the idea of a settlement. However, the district attorney assigned to the case, Joyce Ferris-Metcalf, flat-out refused. As a result, a date for the evidentiary hearings was set and we began to prepare for the hearings. Ms. Fahn and Mr. Geffon made plans to meet with Dave to prepare him for his testimony. Since Dave is primarily Spanish-speaking, we also made sure we would have a Spanish interpreter at the hearings.

One of the issues that arose at this pre-hearing stage was concern about the judge's possible reluctance to make a finding that the trial attorney had rendered ineffective representation. Trial counsel was well-known and well-liked in the local legal community. In fact, at the outset, Ferris-Metcalf began raising concerns about the effect that a finding of ineffective assistance would have on his reputation, whether it could result in state bar disciplinary proceedings and the fact that the trial attorney was actually named in the published opinion instead of being referred to as "trial counsel." We had suspicions, later validated, that this was a feigned concern on her part. Nevertheless, believing that we might be able to call Ferris-Metcalf's bluff and force her into settlement negotiations, Ms. Fahn, Mr. Geffon and I looked into the procedure for deleting the trial attorney's name from the

opinion which, though published, was still in the "Advance Sheet" stage. We contacted the Reporter of Decisions who advised us that we still had time to make the change and told us the proper procedure. We then made a joint request to the Court of Appeal asking that the trial attorney's name be removed from the opinion. The authoring justice, Eugene Premo, granted the request.

Around the same time, Ms. Fahn also checked state bar records concerning disciplinary action for attorneys found to have rendered ineffective assistance in isolated instances. She submitted a memo to Judge Emerson confirming her finding that not a single lawyer in her search had been subjected to public discipline based on one such incident. Not surprisingly, however, this made absolutely no difference in the D.A.'s position. The equities be damned, the D.A. was not willing to deal, though perhaps our efforts enhanced our credibility and good faith with Judge Emerson. In any event, the D.A.'s intransigence led to the next step of this incredible journey – the contested evidentiary hearing.

Prior to the hearing, Ms. Fahn submitted a trial brief which defined the scope of the reference hearing, set forth the petitioner's standard of proof, and focused the issues. Ms. Fahn sent drafts of the trial brief to Mr. Mehr, Mr. Geffon and me for comments and input before finalizing her draft. In the brief, Ms. Fahn took the position that the Court of Appeal's decision had essentially determined that there had been ineffective assistance counsel and that the main issue to be addressed by the referee was the question of prejudice, i.e., would Dave have entered a guilty plea had he known of the drastic immigration consequences of his plea. In so arguing, Ms. Fahn relied in great part on trial counsel's declaration in which he had admitted telling Dave he would be deported "unless" the INS

did not place a hold on him and where he also admitted never giving a thought to an alternative plea.

The reference hearing took place over three days, October 28th, and December 6th and 7th. As is so often the case with ineffective assistance claims, the trial attorney here testified for the prosecution as did his partner and the attorney who had represented Michael. Dave's attorney testified he had spoken to Dave through various interpreters, including his own daughter, Michael's trial attorney, and Dave's mother and brother, Michael. Trial counsel testified he told Dave he would be deported "for sure if he pled guilty. . . . " His goal was to keep Dave "out of jail and out of sight of the immigration people and then win the [Posse Comitatus] motion so they would have to dismiss the case." As for an upwards plea, trial counsel again admitted that it had not crossed his mind. He also attempted to squelch this issue by testifying that even if the idea had occurred to him, the D.A. would not have agreed to an alternative plea and that such a plea would not have protected Dave from the adverse immigration consequences at issue.

Corroborating trial counsel's testimony, his law partner testified she had been present when Dave entered his plea and heard trial counsel tell Dave through an interpreter that he would be deported if he pled guilty. This occurred outside the courtroom before the plea. Michael's trial lawyer testified that at his first meeting with Dave, Michael, and their mother, he told Dave that the charge was an aggravated felony and that he would be deported if he were to plead guilty. This attorney used Michael as interpreter for Dave on that occasion. Michael did not translate word-for-word, however and the attorney realized early on there was a conflict between the two brothers and referred Dave to another lawyer. He also

advised Dave to consult an immigration lawyer.

Representatives of the D.A.'s office testified that the D.A.'s policy did not permit upward pleas to avoid immigration consequences when there is no factual basis for the alternative plea. In Dave's case, an alternative plea would not have been offered because there was no factual basis for offer to sell or transportation under section 11360. Giammona testified, however, that if he had believed there was a factual basis for a section 11360 charge in Dave's case, he would have considered the offer had it been made to him.

During these proceedings, despite all of this adverse testimony from the defense lawyers and prosecutors, Mr. Geffon did some excellent trial work. Perhaps the most important piece of evidence he elicited was that there was another police report that Giammona had never seen, which actually did provide a factual basis for an 11360 charge. This report recounted a statement Michael made to a police officer, telling the officer that he and Dave brought the marijuana to the storage locker together.

Dave handled himself well, testifying consistently with his declaration. Among other things, he testified that trial counsel had told him he "could be deported if he went to prison." This was consistent with trial counsel's testimony that he had some clients who went to prison but were never picked up by the INS. Dave also testified that trial counsel did not tell him he would be permanently excluded and that he could never be naturalized or return to the United States. Dave said he did not know anything about immigration law and relied on his attorney for advice. Had he known deportation was mandatory, he would have asked his attorney to get him a longer sentence if it meant the case could be resolved in a way that avoided mandatory deportation. Regarding communication with counsel, Dave stated that

when he first spoke with Michael's lawyer, with Michael and his mother present, Michael translated for him. Dave remembered Michael's lawyer saying he *could* be deported, not that he would be deported. Moreover, at the time, Dave thought that deportation was not important because he did not think he was going to prison and believed he'd get a local sentence.

Once again, Mr. Mehr's assistance proved invaluable. Not only did he correct the district attorneys' and the defense lawyers' misstatements concerning federal immigration law, but he also testified, as anticipated, about situations where upward pleas had been accepted due to collateral immigration consequences. He also decimated trial counsel's claim that he had clients who had gone to prison but were never picked up by the INS. To the contrary, Mehr testified there was almost a 100 percent screening rate in prison for persons who are deportable and that it is "virtually certain that a person with a deportable offense would be detected, detainer would be moved on and removal proceedings would be commenced."

After the close of the evidentiary phase of the hearing, the parties submitted proposed findings of fact. They both used as headings the three *Totari* criteria cited by the Sixth District in its initial published decision. However, each party stated the issue in a manner favorable to its position. Thus, our proposed headings were: (1) that Dave was *not* properly advised of the immigration consequences of is plea; (2) that there was more than a remote possibility of adverse immigration consequences; and (3) that Dave was prejudiced by the improper advisements. Conversely, the prosecution's headings were that Dave was properly advised and that he received effective assistance of counsel. As there was no factual dispute

over the adverse immigration consequences, the differences in this section were not significant.

On December 27, 2004, Judge Emerson, acting as the referee, filed his Findings of Fact with the Court of Appeal. Interestingly, Judge Emerson phrased his headings in the language used by the district attorney. Thus, heading number one stated: "Petitioner, Dave Bautista, was properly advised of the immigration consequences of his plea." Heading number three stated: "There is a reasonable probability that Petitioner would still have pled guilty to the above named offense."

If intended as factual findings, these headings would have been devastating to our case. Yet, the individual factual findings listed under each section were, for the most part, favorable to our position. Thus, it appeared that the headings were not really in conformance with the actual findings. This was another point when emails and telephone calls flew amongst the team of lawyers who had been working so hard on Dave's case. It was also an occasion where the involvement of a local trial attorney paid off. Based on his knowledge of Judge Emerson and his solid instincts, Mr. Geffon believed that Judge Emerson had not intended these headings to be factual findings. As a result, after much consultation, Ms. Fahn urged Mr. Geffon to write Judge Emerson with a request that he clarify whether he intended the headings to be factual findings. The letter went out on January 10, 2005, and we held our breath waiting for a response. To our great relief, on January 18th, Judge Emerson sent a letter to the Court of Appeal in which he stated that the headings did not constitute findings of fact, were merely taken from the court's opinion as guidance, "and are simply meant to function as descriptive categories about which the court gathered evidence

and made factual findings."

Judge Emerson's letter put the seal of finality on the trial court proceedings and set the stage for the next phase in the Court of Appeal. It also represented another major crossroad in this amazing case.

THE HABEAS PETITION – STAGE 3
THE ONCE AND FUTURE COURT OF APPEAL

With the trial court proceedings having concluded, we now faced an uphill battle to win the writ. While Judge Emerson's letter had removed what might have been insurmountable obstacles, we still had much adverse testimony to deal with as well as certain factual findings we believed to be objectionable. Ms. Fahn took the lead here. She believed we needed to file exceptions to some of Judge Emerson's findings and to seek a briefing schedule. There was also the matter of ensuring that Judge Emerson's letter of clarification was included in the record on appeal. After discussion of this point, Ms. Fahn and I agreed she should file a motion to augment the record.

Initially, though, Ms. Fahn filed a successful motion for the setting of a briefing schedule. In response, the court ordered the parties to file simultaneous letter briefs. Ms. Fahn then drafted a brief which she sent to Mr. Mehr and me for questions and comments. The letter brief she drafted did an excellent job of framing the evidence in the best possible light while remaining faithful to the record.

The letter brief included exceptions to certain of the referee's findings, including Judge Emerson's finding that Dave's trial attorney was "one of the leading criminal defense

attorneys in the state." She skillfully used this particular exception to undermine the district attorney's attempt to "cast the reference hearing as an unfair threat to trial counsel's professional well being." Arguing that the prosecutor's "posturing to arouse sympathy for counsel was inappropriate" she contended that the finding as to the trial attorney's reputation was irrelevant and outside the scope of the reference order. Rather, she argued, the only relevant question was whether trial counsel had adequately advised and defended against the devastating immigration consequences attendant to Dave's plea. This was a sound tactical strategy intended to keep the court's eye on the ball.

Ms. Fahn also attacked a finding by Judge Emerson that the district attorney's policy was to exclude consideration of a defendant's citizenship when reaching a plea agreement, arguing that this particular finding was unsupported by the evidence. In fact, as Ms. Fahn pointed out, the prosecution's testimony was that the District Attorney's Office did allow alternative pleas, based on immigration considerations, in cases where defendants were charged with both possession for sale and transportation She directed the court to testimony by Giammona conceding that he would have considered such a plea in this case had there been a factual basis for a transportation charge. Of course, she then cited the evidence supporting such a charge. This was a critical fact for the ineffective assistance claim insofar as it related to the contention that trial counsel had an obligation to attempt to seek an alternative plea.

On the merits, Ms. Fahn made strong arguments supporting the original habeas claims and pointing to evidence at the reference hearing supporting those contentions. Among other things, she stressed trial counsel's failure to advise Dave about exclusion, his ambiguous and

erroneous advisements about deportation, and his failure to advise about the existence of an alternative plea. On the prejudice component, Ms. Fahn discussed possible defense strategies for trial to support Dave's testimony that had the prosecutor refused to offer an alternative charge, he would have gone to trial.

Simultaneously with the filing of the letter brief, Ms. Fahn filed a motion to augment the record with Judge Emerson's clarification letter. When Justice Premo denied that request, it caused some real concern on our part that the court would reject Judge Emerson's letter entirely.

The case was orally argued on September 13, 2005. Mr. Mehr attended and once again, he and Ms. Fahn came away cautiously optimistic. Again, we held our breath. The court issued its decision, this time unpublished, granting the writ on September 22, 2005. Among other things, the decision first proved our concerns about Judge Emerson's letter to have been unfounded. The decision, authored by Justice Premo with Justice Rushing concurring, set out very carefully Judge Emerson's clarifications and factual findings, explaining that the headings were not themselves findings of fact. Conversely, the dissent by Justice Bamattre-Manoukian, treated the headings as factual findings and completely ignored Judge Emerson's letter. This only goes to show that a little bit of luck in the composition of our panel also went a long way toward the ultimate outcome of the case.

On the merits, the majority opinion held that Dave's trial attorney had provided constitutionally defective representation. The court first found that counsel did not adequately advise Dave of the immigration consequences. Interestingly, on this point, the court held that trial counsel's "statement in his declaration (that Dave would be deported

unless the INS did not pick him up) and trial counsel's testimony about other imprisoned clients who unaccountably were not picked up by the INS, impeaches the testimony that Dave was properly advised and corroborates Dave's testimony that trial counsel told him he *could*, not *would*, be deported." The court also emphasized the fact that it was "uncontroverted that trial counsel did not inform Dave he would be permanently and mandatorily excluded from admission to the United States, and that he could never be naturalized, return legally . . . or hold a green card. . . ." In sum, the court found that there was substantial evidence that trial counsel "did not properly advise Dave of the immigration consequences of his plea."

Significantly, the appellate court also held that trial counsel "failed Dave in the critical plea bargaining stage of the criminal process" because an alternative plea to a transportation charge did not cross his mind and because he was unaware of the police report which contained a factual basis for a transportation charge. Pointing to Lawson and Giammona's testimony, the court found that had trial counsel called the transportation evidence to Giammona's attention, "it is likely that Giammona would have offered Dave a plea to the transportation charge." This would have been a proper disposition of the case, the court held, because the charge was a reasonably related offense (*People v. West* (1970) 3 Cal.3d 595, 612) and because it would have also served the District Attorney's stated commitment "to considering charging decisions and plea negotiations with a concern for overall fairness and the desire that the charges reflect the conduct committed. This is in keeping with '[t]he duty of the prosecutor . . . to seek justice, not merely to convict.' [Citation.]" Even if an alternative plea had not been offered, however, the Sixth District

found Dave's stated willingness to go to trial credible and adopted the defense strategies pointed out by Ms. Fahn. Thus, the court found that Dave was prejudiced by counsel's ineffective performance. Another major crossroad. . . .

BACK TO SQUARE ONE – THE CLIFFHANGER

With the granting of the writ, SDAP's formal involvement came to an end, as did Ms. Fahn's and Mr. Mehr's. The story is not over, though, and the outcome remains in doubt. Mr. Geffon continues as Dave's trial attorney and the trial date is fast approaching. However, the district attorney has adamantly refused to offer a transportation or offer to sell charge. This, despite Lawson and Giammona's testimony that such pleas are routinely considered so long as there is a factual basis for the charge. This, despite the fact that there *is* a factual basis for the charge in this case. It seems the D.A. is bitter over losing the writ and, as in the cases highlighted in Mr. Tulsky's recent San Jose Mercury News series, is once again adhering to a "win-at-all-cost" philosophy. Justice has taken a back seat.

Nevertheless, Dave's story is an eloquent tribute to what can be accomplished by grit and effort, teamwork and diligence, and true dedication to the client. Here, where the record didn't hold a clue, as events unfolded, the record on appeal became almost insignificant when compared to the true story brought to life in the writ petition and the subsequent evidentiary hearing.

This case is also a true testament to the commitment and generosity of the attorneys involved and demonstrates, in the most positive light, the role that SDAP's status as counsel of record can play. When I spoke to Ms. Fahn as I prepared this article, she described this case as an amazing adventure – and it was for all of us. In the end, thanks to each member

of this remarkable team, the law in California has been changed for the better and Dave at least has a fighting chance to remain in this country with his family where he belongs.