INVESTIGATION AND PRESENTATION OF HABEAS CLAIMS IN THE STATE APPELLATE COURT

By: Paul Couenhoven

Panel attorneys generally call themselves appellate attorneys. Panel attorneys work with programs which all have the word "appellate" in their titles. The meat and potatoes (or tofu and broccoli for vegetarians) of the work is reading the appellate record, spotting appellate issues, doing legal research and writing appellate arguments.

However, this familiar process assumes that everything is out in the open. Nothing is hidden. Everything important was said on the record. Nothing which affected the fairness of the proceedings has been left out of the record. Trial counsel made all appropriate motions and objections. We know that isn't always so. Because the process and the players are imperfect, the record on appeal does not always tell the whole story. What if the defendant was hallucinating during the trial? What if trial counsel was going to Reno every night during trial, sleeping during portions of the trial and snorting cocaine to stay awake? What if defendant was visibly shackled but no one mentioned it on the record? What if counsel gave defendant patently incorrect advice about whether to accept or reject a plea offer? What if counsel knew defendant had a brain injury but did nothing to investigate it? Such events happen all too frequently but there may be no reference or only passing reference in the record, insufficient to argue the issue on appeal.

These situations require investigation. If the investigation leads one to conclude something happened which affected the fairness of the trial, the proper avenue for raising the issue is a habeas corpus petition, which allows you to bring documents and declarations before the court which are not part of the record on appeal as a basis to argue for reversal.

This article examines the landscape of habeas corpus work in the state court, with an emphasis on practical aspects of this work. What kinds of things should alert you to consider a habeas petition? How do you go about checking into a possible habeas claim? How do you prepare a petition so it has a likely chance of success? These are the questions addressed here. Some samples are included.

I. NO FISHING EXPEDITIONS, BUT WHAT IF SOMETHING SMELLS FISHY?

According to the California Supreme Court, "appointed counsel in noncapital appeals do not have an obligation to investigate possible bases for collateral attack on the judgment." (*In re Clark* (1993) 5 Cal.4th 750, 783, fn. 20.) However, if attorneys become "aware of a basis for collateral relief" while pursuing an appeal, "they have an ethical obligation to advise their client of the course to follow to obtain relief, or to take other appropriate action." (*Ibid*.)

What does this mean? You have no obligation to go on fishing expeditions. That is, you do not have an obligation to go looking for habeas issues you have no idea potentially exist. You are not obliged to locate and call up jurors, trying to discover if there is a basis for a juror misconduct

claim. You are not obliged to contact everyone who testified for the prosecution at trial to see if they will recant or admit to perjury. However, while engaged in the appeal process many times something will smell fishy. Something happens at trial which to you seems outrageous but counsel does not object. There is a passing reference in the record to something important (a shackled defendant), but nowhere in the record is there any discussion or argument about the issue. Your client tells you there were five people who saw someone else shoot the victim, but none of them testified at trial. Your client tells you s/he pled no contest only to avoid a life sentence, and you see nothing in the record which suggests the possibility of a life sentence. Under any of these circumstances, you have become "aware of a basis for collateral relief," and you have an ethical obligation to do something about it. According to the Supreme Court, you can either tell your client what to do about it, or "take other appropriate action."

Whichever way you choose to go, you need to investigate the possible basis of collateral relief. It is difficult to advise the client what course s/he could take without knowing all the facts. Your investigation might show there is no issue which could result in a reversal. On the other hand, your investigation might uncover facts which are essential to advising your client what course to take or to taking other appropriate action.

In most cases merely advising your client what course to take is to guarantee that nothing will come of the potential issue. Our clients are generally incapable of adequately preparing a habeas petition and adequately supporting them with declarations and other documents. This is particularly true of the increasing numbers of clients for whom English is not their primary language. If you advise your client how to investigate a potential habeas claim and how to present that claim by preparing a habeas petition, suspecting that your client is incapable of doing the job correctly, it's difficult to say you have fulfilled your ethical obligation.

Therefore, in almost every case your ethical obligation will be to "take other appropriate action." This means that if after investigation you determine there are possible bases for collateral relief, you should prepare a habeas petition and support it with a declaration or other documents.

However, if after investigating you determine there is a possible basis for collateral relief but believe pursuing it would be detrimental to your client's interests, you have no ethical obligation under *Clark* to prepare and file a habeas petition. The classic example is where there is a basis to challenge the validity of a plea, but you conclude it would be a bad idea to do so because the plea bargain was very favorable, and pursuing the case carries a high risk of conviction and a much longer sentence. On appeal, if the client insists on going forward even after you advise them there are negative consequences (e.g., an unlawful sentence in the client's favor), you are obligated to pursue the appeal. The same is not true as to habeas petitions. Under *Clark*, your ethical obligation is fulfilled if you advise your client "of the course to follow to obtain relief." If they want to shoot themselves in the head, so be it. On a collateral attack, you are not obligated to file a habeas petition if you think it is a bad idea to do so, even if the client insists.

II. DISCUSS POTENTIAL HABEAS ISSUES WITH CO-COUNSEL

One of the first things you should do when you become aware of a potential habeas issue is call the SDAP staff attorney assigned to your case and discuss the matter. Don't forget, unless a conflict has been declared we are co-counsel on the case. You do not undertake a major new endeavor in a case without discussing the matter with co-counsel. Furthermore, our agreement with the Sixth District Court of Appeal is that panel attorneys must consult with a SDAP staff attorney before filing any habeas petition. Not so long ago, you would not be compensated at all for filing a habeas petition unless you first applied to the court to expand your appointment, and the application was granted. This has changed. You do not need prior permission from the court to guarantee some compensation for preparing a habeas petition. However, you should call the SDAP staff attorney to discuss the matter. If you don't, there is the risk the staff attorney might decide the habeas petition is frivolous, and recommend no payment.

III. DEVELOP A NOSE FOR FISHY SMELLS

The start of any habeas investigation is becoming "aware of a basis for collateral relief," that is, spotting a potentially meritorious issue which cannot be raised on appeal. This is often similar to issue spotting when you read the record. Many habeas issues in non-capital cases originate with the record. Other issue sources are the client, the client's family, or even trial counsel.

Many issues on appeal are apparent. Counsel objects but is overruled. Counsel files a motion which is denied. Other appellate issues are more subtle. Take jury instructions. The judge may have failed to give an essential instruction, or may have misinstructed on an element, or given an instruction which is an impermissible conclusive presumption. Such appellate issues are not always readily apparent. They require some background knowledge and a keen eye for issues. Habeas issues are like these. They usually will not jump out at you like an overruled objection or a denied motion. Just like when you investigate jury instructional errors, you should be on the lookout for possible bases of collateral relief.

A. Habeas Issues Arising From The Record.

When you review the record, you should be alert for possible bases for collateral attack on the judgment. In some cases a collateral attack may be essential to preserving an issue you raise on appeal. The most frequent basis for collateral attack you will spot from reading the record is a claim of ineffective assistance of counsel.

1. The most common situation where you may have to file a habeas is when you argue an issue on appeal which is waived for failing to object. You argue there was inadmissible and prejudicial evidence admitted at trial. Counsel never objected to the evidence, or failed to make the right objection. You argue there was outrageous prosecutorial misconduct. Counsel never objected. You argue there was sentencing error. Counsel never objected. Under any of these situations, the issue is ordinarily waived on appeal. (Evid. Code, § 353, subd. (a); *People v. Garceau* (1993) 6 Cal.4th 140, 179 [failure to object to evidence on basis argued on appeal waives the issue]; *People v. Green* (1980) 27 Cal.3d 1, 27-29 [prosecutorial misconduct claims are

waived if there was no objection]; *People v. Scott* (1994) 9 Cal.4th 331, 353 [most sentencing issues are waived for failure to object].)

You can still argue the issue on direct appeal. You can argue the failure to object was excused because it would have been futile to object. (See *People v. Welch* (199) 5 Cal.4th 228, 237; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692.) You can argue on direct appeal that counsel was ineffective for failing to object. However, this contention will usually be rejected. "'[U]nless there simply could be no satisfactory explanation [for counsel's failure to act],' the claim on appeal must be rejected." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) The Attorney General and the appellate courts have an amazing ability to dream up the most absurd reasons why counsel tactically chose not to object to obviously prejudicial matters. Usually, you should bolster your appellate claim of ineffective assistance of counsel with a habeas petition which includes a declaration from trial counsel either stating s/he had no tactical reason for failing to object or giving a reason which you can demonstrate was not reasonable.

2. Another situation where the record on appeal may suggest the need for a habeas is where an issue is potentially waived because it is subject to a due diligence requirement. Continuance motions and new trial motions based on newly discovered evidence are both subject to a due diligence requirement. (*People v. Roybal* (1998) 19 Cal.4th 481, 504 [continuance to obtain testimony from a witness requires showing of due diligence]; Penal Code section 1181, subd. (8) [new trial based on newly discovered evidence requires showing of reasonable diligence].) If you fear the appellate court might reject your claim on the basis counsel did not exercise due diligence, you should file a habeas petition supported by a declaration from counsel. "In many cases [] proof of counsel's lack of diligence to discover evidence will demonstrate that counsel was constitutionally inadequate." (*People v. Martinez* (1984) 36 Cal.3d 816, 825.)

3. When your review of the record shows a defendant admitted "strike" priors which require evidence of facts beyond the mere fact of conviction, you should obtain documents from the record of the prior to determine whether there was sufficient evidence to prove the required facts. The most common examples involve personal use of a deadly weapon or personal infliction of great bodily injury, factors which make any prior conviction a strike. (See Pen. Code, § 1192.7, subds. (c)(8) and (c)(23) .) If the prior conviction is for assault with a deadly weapon or battery with serious bodily injury and there was no enhancement for personal use of a weapon or personal infliction of great bodily injury, the "strike" prior may not be valid. Such convictions may be based on aiding and abetting liability, where there was no personal use of a weapon or personal infliction of injury. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 [ADW conviction qualifies as strike only if entire record of conviction proves personal use of deadly weapon or personal infliction of great bodily injury].) If counsel advised the defendant to admit priors which could

not have been proven, s/he provided ineffective assistance of counsel. (See *People v. Plager* (1987) 196 Cal.App.3d 1537.)

4. Sometimes the judge or defense counsel will tell a pleading defendant on the record that his or her sentencing exposure is a number which your research shows is incorrect. (See, e.g., *People v. Johnson* (1995) 36 Cal.App.4th 1351 [pleading defendant told he faced 38.8 years when his actual sentence exposure was 27]; *People v. Huynh* (1991) 229 Cal.App.3d 1067 [defendant who waives jury is told he would be eligible for parole in 7 years for second degree murder; under law had to serve minimum of 15 years].) Or the district attorney offers to dismiss a prior or an enhancement which could not have been proven. (See, e.g., *People v. McCary* (1985) 166 Cal.App.3d 1 [district attorney offers to dismiss serious felony prior as part of plea bargain where current offense committed before Pen. Code, § 667 was enacted].) Sometimes the issue can be argued on direct appeal. In most cases, however, you will have to pursue a habeas to prove prejudice: the defendant would have never entered a plea had s/he been correctly advised.

5. On reading the record, you may wonder why trial counsel failed to bring a suppression motion, or some other motion which would have resulted in a dismissal (e.g., statute of limitations, double jeopardy). It used to be you could make an argument on direct appeal that an attorney who fails to pursue a meritorious suppression motion provided ineffective assistance. (*People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1203 [appeal available for failure to bring suppression motion]; *People v. Farley* (1979) 90 Cal.App.3d 851, 868 [conviction reversed for failure "to make the appropriate suppression-of-evidence motions"].) After *People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266, it will be a rare case where such an argument can be won on direct appeal. A habeas petition will usually have to be pursued to show that counsel had no good tactical reason for the omission.

6. There may be some mention in the record of an event which raises red flags. Here are some examples, which are hardly exhaustive:

   - The judge advises jurors not to draw any adverse inference from a defendant in shackles, but there was never any discussion of the need for shackling and none is apparent in the record. You should determine whether the issue was ever litigated and if not, why not. If you determine there was no good reason to shackle the defendant, a habeas petition will be necessary to raise the issue since the record on appeal will not be adequate to do so.

   - The defense is alibi and mistaken cross-racial identification, but defense counsel calls no alibi witnesses other than defendant and offers no identification expert. This bears investigation. (See e.g., *Rose v. Superior Court (People)* (2000) 81 Cal.App.4th 564 [among other failings, failure to

produce identification expert might constitute ineffective assistance of counsel] .)

- Defendant testifies s/he drank massive quantities of alcohol and consumed drugs before the offense, and the record reflects a blood sample was taken from defendant upon his arrest. Counsel presents an intoxication defense yet there is no testimony about the blood alcohol level or presence of drugs in defendant's blood sample. One should investigate whether counsel had the blood sample tested and if not, why not. (See *In re Sixto* (1989) 48 Cal.3d 1247 [failure to investigate blood alcohol level and PCP usage to present diminished capacity defense, which was still available at that time].)

- Your client is pro per and argues s/he is being denied his law library privileges and cannot prepare for trial. The courtroom deputy responds this isn't true, and the court does nothing. You should investigate whether the client's contention is true by obtaining the law library logs from the jail.

B. The client.

The client is another obvious source of possible bases for collateral attack. For example:

- The client might tell you his attorney told him to plead to avoid a life sentence, where you can discern no possibility of a life sentence.
- The client might tell you s/he was shackled and the jury could see the shackles, and you can discern no reason why shackling was required.

- Your client might complain s/he told the lawyer about numerous witnesses to the crime or to an alibi, and the lawyer did not contact any of them.

- The client might allege counsel told him or her if s/he plead, it would not count as a future strike, but you know it does.

A client's family might be the source of similar information. If the client tells you something which, if true, would provide a basis for collaterally attacking the judgment, you should investigate.

C. The attorney.

Finally, the attorney might also reveal something which suggests a possible basis for collateral attack.

IV. DETERMINE WHETHER A DEAD FISH IS CAUSING THE ODOR

Whether you are going to advise your client what to do or file a habeas petition yourself, you must investigate to determine whether there is a valid basis for seeking collateral relief in a habeas

petition. There are two basic ways of determining whether a possible claim has merit: talking with people and obtaining documents. Remember that whereas an appeal is "limited to the four corners of the [underlying] record on appeal ...." (*In re Carpenter* (1995) 9 Cal.4th 634, 646), habeas corpus is not. (See, e.g., *People v. Pope* (1979) 23 Cal.3d 412, 426-427, fn. 17.) In a habeas petition you can bring to the court's attention matters outside the record on appeal which have a bearing on the question whether your client received a fair trial.

A. Communicate With Trial Counsel.

Most habeas claims will involve ineffective assistance of counsel. If there is any possibility of an ineffective assistance of counsel claim, you must communicate with trial counsel. An ineffective assistance of counsel claim based on failing to object to something at trial requires a showing counsel had no informed tactical reason for that omission. (*People v. Pope*, *supra*, 23 Cal.3d at p. 425.) Habeas corpus provides the opportunity for counsel "to explain the reasons for his or her conduct." (*People v. Wilson* (1992) 3 Cal.4th 926, 936.) "Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence." (*People v. Pope*, *supra*, at p. 426.)

Trial counsel must also be asked about any other suspected basis for a claim of ineffective assistance: why no suppression motion? Why no identification expert? Why no alibi witnesses? Whatever you are investigating, trial counsel should be asked about it.

B. Obtain Trial Counsel's File

In addition to speaking with trial counsel about his or her reasons for certain acts or omissions at trial, you should obtain trial counsel's file in the case. Documents in the file might cast light on your belief that counsel provided ineffective assistance and had no informed tactical reason for decisions made. The important parts of trial counsel's file are the documents which are *not* part of the record on appeal: police reports, interviews with the client, investigation requests, reports concerning possible witnesses, documents pertaining to a prior, an attorney's notes about the case. A review of these documents might help you determine whether counsel had a basis for not pursuing a suppression motion, or whether counsel investigated possible defenses, interviewed potential witnesses or checked the validity of priors.

Trial counsel has a continuing duty to the client, which includes the duty of cooperating with appellate counsel. (See State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1992-127.) Most trial attorneys will willingly provide a copy of their file and answer questions about their conduct in the case, though some might need repeated prompting, or may request a release from the client (a sample release is included with these materials). If trial counsel will not provide the file or return phone calls after repeated attempts, you should file a complaint with the State Bar. Most attorneys will call you back if they receive a phone call from a State Bar investigator concerning their lack of cooperation.

C. Obtain Other Records

Besides trial counsel's file, other documents which might be essential to determining whether a potential habeas issue has merit include:

1. Records from a prior case, especially to determine the validity of an admitted "strike" prior which is based on a claim of personal use of a deadly weapon or personal infliction of great bodily injury. If the prior is from the Sixth District, you can call the SDAP staff attorney assigned to your case and ask that our paralegal obtain the record for you. If the record is from some other county, call the county clerk's office and request the pertinent documents. You need to obtain the charging document, the minutes of any plea, the abstract of judgment, the probation report and the preliminary hearing transcript to determine whether there would have been a factual basis to prove the prior. (See *People v. Rodriguez, supra*, 17 Cal.4th at pp. 261-262; *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356 [entire record of conviction may be used to prove elements of prior].)

2. Records from a third party, such as a jail, prison, parole office or a health provider.

   - Parole records may be relevant to a claim the client was unlawfully denied credits based on a parole violation.

   - Health records could be relevant to a claim counsel provided ineffective assistance by failing to present a mental defense or by failing to present mitigating evidence at sentencing.

   - If you have a *pro per* defendant, jail records could be relevant to a claim your client was denied adequate access to the law library to present his or her case.

Obtaining records from a third party pertaining to your client will require a release from the client (sample release included with materials). When you ask your client to sign a release, be sure the release makes specific reference to the type of documents you want to obtain. If you want to obtain psychiatric records to investigate a possible claim of incompetence to stand trial, or an involuntary waiver, or a failure to present a mental defense at trial, be sure to specify "psychiatric records" in your release. If you want various types of documents, have your client sign a release which broadly includes every possible type of record. If the records you are seeking pertain to someone other than your client you are probably precluded from obtaining them unless that person is willing to sign a release, an unlikely scenario. There is no right to subpena records while on appeal or while investigating a habeas claim. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1256-1258.)

Once you have a release signed by your client, contact the institution which has the records you want to obtain. Most institutions will collect and send records pertaining to your client after receiving a faxed or mailed copy of the release.

D. Talk to People.

In addition to record collection, determining whether a potential habeas claim has merit will often involve talking with people besides trial counsel.

1. The most obvious person you must speak with is your client. Many habeas petitions will require a declaration from the client, especially if you need to establish prejudice flowing from incorrect advise concerning a plea. The client must allege s/he would have made a different decision concerning rejecting or accepting a plea offer to establish a claim of ineffective assistance of counsel. (See *Hill v. Lockhart* (1985) 474 U.S. 52, 60.)

2. Determining whether there is a valid basis for collateral relief may also require speaking with third parties, particularly if the claim involves failing to investigate witnesses or present a defense. To establish such a claim you must include declarations or documents which demonstrate what the attorney should have discovered and/or presented.

3. If you think trial counsel should have consulted with an expert or presented expert testimony on an issue (e.g., identification expert, mental health expert, ballistics expert, *Stoll* (*People v. Stoll* (1989) 49 Cal.3d 1136) expert) you should attempt to locate and speak with an expert on the subject. This is more difficult than other investigative methods suggested because experts normally charge for their consultation, and the Sixth District is notorious for denying any and all requests for funds to pay an expert. However, that might be changing. The Sixth District recently granted a request for expert funds. While the case was unusual because the attorney had already provided an expert declaration in support of a habeas petition and had been billed for that service, perhaps there will be a change in prior practice. It doesn't hurt to ask for expert funds, as you will be compensated for the motion. However, you should attempt to make a compelling showing for the need for expert services. Get a copy of the expert's resume. Ask the expert to direct you to scientific journal articles relevant to the issue you want to investigate. Do as much as you can to show that there really should have been an expert used in your case, and that the failure to use an expert was prejudicial. Then ask for the money and see what happens.

E. Do Some Legal Research

Finally, determining whether a habeas claim is valid requires some legal research to ascertain whether you have the legal basis to allege a prima facie claim for relief. Legal research might also suggest what investigation you need to undertake to establish your claim.

V. EXPOSE THE DEAD FISH YOU FOUND: PREPARE THE PETITION

A. Personally File a Habeas Petition

Clark speaks of taking "other appropriate action" once counsel becomes aware of a basis for collateral relief. If the facts you learn from investigating present a substantial basis for seeking relief, and you see no possible adverse consequences, I believe "other appropriate action" means preparing and filing a habeas corpus petition in conjunction with the appeal. Advising a client of "the course to follow to obtain relief" on their own is usually equivalent to providing no help at all. Very few of our clients have the ability to determine whether a claim has probable merit or to produce a pro per habeas petition with supporting documents. This is especially the case with the growing pool of non-English speaking clients. While our clients could seek the help of jail-house lawyers, such persons generally do not understand the requirements of a habeas petition. They write pleadings long on legal argument but short on the facts, a method which is fatal to most habeas claims. Usually the client's only hope for relief is if appellate counsel will personally pursue a collateral attack on the client's behalf.

B. If You Believe There Are Adverse Consequences, Do Not File a Habeas Petition, Even If You Believe It Has Merit

You are under no obligation to file a habeas petition if you believe the granting of the writ could have adverse consequences for the client. For example, you might determine that a client would be ill advised to seek to withdraw a plea because the chances of winning at trial are minimal and the probable sentence much worse than the one obtained under a favorable plea bargain. Even if you could establish a valid claim (e.g., IAC in giving improper advice about the consequences of failing to plea), you might decide pursuing habeas relief would be foolish. If that is your conclusion, do not file a habeas petition. Your ethical obligation is complete if you advise the client it would be unwise to pursue a habeas and send him the *pro per* habeas form if s/he insists on doing so.

A habeas is different than an appeal. A client has a right to appeal and a constitutional right to counsel on appeal. (*Evitts v. Lucey* (1985) 469 U.S. 387; *In re Jordan* (1992) 4 Cal.4th 116, 125.) Once appointed, we are obligated to represent the client and must "abide by a client's decisions concerning the objectives of the representation." (ABA Model Rules Prof. Conduct, rule 1.2(a).) On appeal, you should advise a defendant to abandon the appeal if you believe the potential benefit is outweighed by likely adverse consequences. However, if the client insists on going forward it is your obligation to do so. Even if you believe going forward is a bad idea, you have the duty to prepare a brief "setting forth all arguable issues." (*People v. Barton* (1978) 21 Cal.3d 513, 519; *People v. Scott* (1998) 64 Cal.App.4th 550, 564.)

A habeas is different. There is no constitutional right to counsel in a habeas. (*Coleman v. Thompson* (1991) 501 U.S. 722, 756-757; *People v. Kipp* (2001) 26 Cal.4th 1100, 1139-1140.) Since the client has no right to representation, you have no obligation "to abide by a client's decisions concerning the objectives of the representation." You do not have to file a habeas if you think it is a bad idea.

On the other hand, if you can foresee no adverse consequences and determine a habeas claim has probable merit, the appropriate action is to file a habeas corpus petition with the court of appeal in conjunction with the direct appeal. Even though you have no constitutional obligation to do so, and cannot be found ineffective for failing to do so, it is the right thing to do.

C. State a Prima Facie Case in the Habeas Petition

In the petition, you should "state fully and with particularity the facts on which relief is sought." (*In re Clark*, *supra*, 5 Cal.4th at p. 474.) A petition passes muster if "it states facts which, if true, entitle the petitioner to relief." (*Id*., at p. 769, fn. 9.) Be sure to plead all facts essential to establish your legal claim. Do not incorporate the memorandum of points and authorities by reference.

For example, if your claim is ineffective assistance of counsel, first set forth the salient facts underlying the claim. Briefly describe the charges and the procedural background (plea? trial?). If the facts of the charged crimes are important to the issue raised, briefly summarize the facts. Then state what counsel did or failed to do. Allege this decision fell below the standard to be expected of reasonably competent attorneys. If you have a case which supports this claim, include a citation to the case, but do not argue the matter; just state it. If the issue involves failing to object or failing to bring some motion, allege counsel had no informed tactical reason for the act or omission. Then allege prejudice: it is reasonably likely the result would have been different had counsel done the right thing. If the IAC claim is in the context of a plea, allege that defendant would have made the opposite decision had s/he been correctly advised. Include a citation for each claim; to the record for backgrounds facts; to attached declarations or documents for facts outside the record. Some samples are included at the end of this article.

D. Attach the Fruits of Your Investigation

A habeas corpus petition should also "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) However, if your petition is being filed in conjunction with the direct appeal, you need not attach portions of the trial transcripts. You can instead ask the court to take judicial notice of the transcripts on direct appeal. Do attach any declarations you have obtained from the client, from trial counsel and from third parties. Also attach any documents which you rely upon to establish your claim. A few sample declarations are included at the end of these materials.

VI. FOLLOW UP

Your work on a habeas case is generally finished once the petition is filed. Ordinarily there is no additional briefing. The court may request an informal response (rule 60, California Rules of Court), but that is rarely done in the Sixth District. If the court does request an informal response, be sure to take advantage of your right to reply to the informal response even if the court fails to advise you of that right. (See *ibid*.) Under rule 60, you have 15 days to file a reply to the informal response.

Follow up after the case is over. If the appellate court denies the petition, file a petition for review. Almost every claim you make in a habeas petition will involve a federal constitutional right. You should at least preserve the issue for possible federal review by seeking review from the California Supreme Court. The Sixth District ordinarily denies the habeas on the same day it affirms the judgment on appeal, either in the same opinion or in a separate order. When the two proceedings are decided on the same day, your time for filing a review petition is the same as on an appeal. (See rules 24(b)(4), rule 28(e)(1).) You have 40 days after the issuance of the court of appeal opinion to seek review. However, you must file a separate review petition for the habeas unless the two cases were consolidated by the court of appeal. (Rule 28(d).) You cannot merely include the habeas issue in the review petition you file on the appeal. If for some reason the court of appeal denies the habeas on a day which is different than the day it decides the appeal, or if you filed a habeas petition apart from an appeal, you only have 10 days to file a review petition. (See rules 24(b)(2)(a), rule 28(e)(1).) Don't worry if you miss this deadline. You can always file an original habeas petition in the Supreme Court raising the same issue.

If the court of appeal issues an order to show cause, try to follow up to assure a competent attorney is appointed to handle the habeas in the superior court. Talk with your SDAP staff attorney concerning who you might contact to ensure competent counsel is appointed to the case.