

THE LESSONS TO BE LEARNED FROM ACTUAL CASE
STUDIES IN THE INVESTIGATION AND PRESENTATION
OF PETITIONS FOR WRITS OF HABEAS CORPUS.

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Oliver Wendell Holmes famously opined that the lifeblood of the law is experience. (Holmes, Common Law 1 (1881).) Consistent with Justice Holmes' view, the goal of this article is to illustrate a few valuable lessons that may be gleaned from examining real life habeas cases that were prosecuted in the Sixth District Court of Appeal. Although no two cases are identical, it is my hope that the reader will draw both guidance and inspiration from the stories told in this article.

I.

THE CASE OF RYEN AISETEWA TEACHES THE LESSON
THAT EQUITY IS IMPORTANT AND THAT A REMEDY
MAY BE OBTAINED EVEN IF THE TECHNICAL RULES
OF HABEAS CORPUS DO NOT FAVOR A GRANT OF
RELIEF.

Rylen Aisetewa was innocent of the crimes for which he was convicted. Our judicial system failed Mr. Aisetewa since his case eventually ended in a felony conviction. Nonetheless, Mr. Aisetewa's case illustrates that habeas corpus is a highly flexible procedure that will allow for the pursuit of justice even if the technical rules of the procedure seem to bar relief. In Mr. Aisetewa's case, habeas corpus allowed for an important, if not complete,

remedy to be obtained.

A. The Facts of the Case.

Four year old Justin often visited his grandmother at her trailer. Mr. Aisetewa was Justin's uncle and resided in the trailer.

During the period from November 24 to November 26, 1997, Justin stayed with his grandmother. The grandmother noticed that Justin was scratching his rectum and had "little red circles" in the area. The grandmother testified at trial that Justin did not know how to properly clean himself after going to the bathroom.

Upon his return home, Justin complained that his "butt" hurt. He told his father that he had injured himself while "playing at grandma's in the magic rocks." For reasons that were never explained, Justin's parents lept to the conclusion that Mr. Aisetewa had done something to Justin. Justin's 14 year old stepbrother, Roy, was told to question him regarding "what's been going on with him and Uncle Ryen."

Roy approached Justin and immediately asked him "whether uncle Ryen had done something bad to his butt." Justin indicated that Mr. Aisetewa had sodomized him.

On December 4, 1997, Justin was taken for a SART examination. The SART nurse, Mary Ritter, saw a 3 millimeter fissure in Justin's anus. Ms.

Ritter testified that the fissure was “consistent” with the commission of an act of sodomy. Ms. Ritter disclosed her photographs of the examination but did not mention that the examination had also been videotaped.

Subsequent to the SART examination, Justin was interviewed by a police detective. Justin indicated that Mr. Aisetewa had touched his “butt” area with “his wee-wee.” Justin said that this act felt “okay.” Justin variously indicated that the act occurred at night or in the morning and was committed at either his own home or his grandmother’s trailer.

On December 14, 1997, Justin told his mother that Mr. Aisetewa put his “pee-pee” in his butt at night while playing loud music. Although Justin screamed for his grandmother to help him, she told him to shut up and go to sleep.

At both the preliminary examination and at trial, Justin denied that Mr. Aisetewa had hurt him. He specifically denied that Mr. Aisetewa had touched his “butt.”

B. The Trial Proceedings.

Mr. Aisetewa was charged with forcible sodomy and a forcible lewd and lascivious act on a child. Although Mr. Aisetewa had two prison priors for theft related offenses, he had no sex convictions or history of committing such crimes.

The prosecutor rested her case on two pillars: (1) Justin's extrajudicial statements; and (2) the 3 millimeter fissure found in Justin's anus. Without objection, the prosecutor told the jury that Mr. Aisetewa was a "monster." Justin's father mentioned to the jury that Mr. Aisetewa was on parole. Although an objection was rendered, the jury was not admonished to disregard the testimony.

Defense counsel did not consult with any experts. In his six page closing argument, defense counsel did not discuss the anal fissure. His sole argument was that Justin came from a dysfunctional family and his extrajudicial statements should not be believed.

The jury returned convictions on both counts. After Mr. Aisetewa made a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, new counsel was appointed.

A lengthy motion for new trial was presented. Defense counsel presented a declaration from Dr. Paul Herrmann who reported that he could not see a fissure in the SART photos. Assuming that a fissure existed, Dr. Herrmann indicated that there should have been evidence of healing given the time lag between the supposed act of sodomy and the SART examination. Counsel also presented the report of a polygraph examiner who opined that Mr. Aisetewa was truthful when he denied that he had sodomized Justin.

The motion for new trial was denied. Mr. Aisetewa was sentenced to

8 years in prison.

C. The Appellate Proceedings.

On appeal, Mr. Aisetewa raised a variety of issues including a challenge to the trial court's order denying his motion for new trial. A habeas petition was also filed. The petition raised a multifaceted claim of ineffective assistance of counsel. Among other claims, it was argued that trial counsel had erred by: (1) failing to consult with a medical expert regarding the genesis of the injury suffered by Justin; and (2) failing to obtain an admonition that the jury was to disregard the evidence that Mr. Aisetewa was on parole. Both the appeal and the habeas petition were denied and the California Supreme Court declined to grant review.

D. The Case Is Reopened.

As a result of the trial court proceedings in *People v. Uribe* (2008) 162 Cal.App.4th 1457, it came to light that the SART personnel at Valley Medical Center in San Jose had been videotaping examinations since 1991 without providing disclosure of the videotapes. In *Uribe*, the Sixth District held that concealment of a videotape would violate the rule of *Brady v. Maryland* (1963) 373 U.S. 83 in a proper case. (*Id.* at p. 1463.)

In the wake of *Uribe*, the Santa Clara County District Attorney agreed to belatedly provide discovery of videotapes in cases that had resulted in a

conviction. The videotape in Mr. Aisetewa's case was provided to SDAP.

SDAP retained the services of Dr. James Crawford-Jakubiak who is the Medical Director of the Center for Child Protection at Children's Hospital and Research Center in Oakland. After viewing the videotape, Dr. Crawford-Jakubiak agreed with Ms. Ritter that a small fissure was present in Justin's anus. However, Dr. Crawford-Jakubiak provided valuable information that had not been heard by the jury.

Dr. Crawford-Jakubiak first noted that the majority of anal fissures are caused by factors other than sexual abuse. Fissures are frequently seen in young children since they commonly suffer from constipation, diarrhea and poor hygiene.

Dr. Crawford-Jakubiak indicated that it was unlikely that Justin's fissure was caused by an act of sodomy performed nine days prior to the SART examination. This is so because the very small injury depicted in the videotape would almost certainly have healed in nine days.

Armed with Dr. Crawford-Jakubiak's opinion, SDAP conducted a full reexamination of Mr. Aisetewa's case. The review led to the conclusion that a miscarriage of justice had occurred. Aside from the virtual certainty that Mr. Aisetewa was factually innocent, it was apparent that the jury had been left in the dark concerning both the significance of the fissure and the credibility of Justin's extrajudicial statements.

In order to properly assess the method by which Justin was interviewed, SDAP consulted with forensic psychologist Brian Abbott. After reviewing the trial testimony and the transcript of the police interview of Justin, Dr. Abbott concluded that Justin had been subjected to suggestive questioning by both his brother, Roy, and the police. Dr. Abbott opined that there was reason to doubt the veracity of Justin's initial claim that he had been molested.

E. The Successive Habeas Petition.

The general rule is that a court should not entertain a successive habeas petition. (*In re Martinez* (2009) 46 Cal.4th 945, 956.) Similarly, a court should not hear a repetitive claim absent a showing that there has been a change in the facts or law. (*In re Martin* (1987) 44 Cal.3d 1, 27, fn. 3.) In Mr. Aisetewa's case, there was a substantial procedural problem in that there had been a prior habeas petition where a substantial IAC claim was litigated. Notwithstanding this obstacle, SDAP was determined to seek relief for Mr. Aisetewa. It was decided that a mix of new and recycled claims would be advanced.

The lead claim was that Mr. Aisetewa had been deprived of the effective assistance of counsel since his lawyer had failed to consult with a medical expert such as Dr. Crawford-Jakubiak. It was also argued that counsel had been ineffective since he failed to consult with a forensic

psychologist such as Dr. Abbott and had not sought an admonition that the jury was to disregard the evidence that Mr. Aisetewa was on parole.

The petition also raised a *Brady-Uribe* claim on the grounds that the videotape was helpful new evidence. This was a tricky proposition since the videotape actually confirmed Ms. Ritter's trial testimony concerning the existence of the fissure. This point was finessed on the grounds that the photographs disclosed to the defense did not depict the fissure. It was argued that the defense had not been previously provided with an opportunity to actually see and evaluate the very small injury.

The petition also presented a claim of newly discovered evidence that rested on the premise that Ms. Ritter's credibility had only recently come into question. It was alleged that Ms. Ritter had acted improperly by concealing videotapes and by failing to use a state mandated form that would have required her to disclose that her examinations had been videotaped. It was alleged that Ms. Ritter had given erroneous testimony in other cases.

The successive petition problem was addressed head-on. Among other grounds, a successive petition is allowed when: (1) the petitioner is actually innocent; or (2) it is shown that there were constitutional errors of such magnitude that no reasonable jury would have convicted the petitioner absent the errors. (*In re Martinez*, supra, 46 Cal.4th 945, 956.) Both of these

grounds were pled.

On December 23, 2009, the Superior Court issued an order to show cause. Over the course of the next two years, discovery proceedings were held and a supplemental habeas petition was filed which alleged a number of new cases where Ms. Ritter gave erroneous testimony. An evidentiary hearing was set to begin on February 21, 2012.

F. The Resolution of The Case.

On February 14, 2012, the District Attorney made a settlement offer. In exchange for a stipulation that habeas relief should be granted, the District Attorney offered a plea to a felony charge of child endangerment with a great bodily injury enhancement. Since Mr. Aisetewa had already completed his prison and parole terms, the District Attorney agreed that Mr. Aisetewa would remain a free man. The virtue of the offer was that Mr. Aisetewa would no longer have to register as a sex offender and would have only one rather than two strikes on his record.

Mr. Aisetewa had found it difficult to live with a sex conviction and all of its collateral consequences. He accepted the District Attorney's offer.

On February 22, 2012, Mr. Aisetewa was sentenced to a seven year

term for child endangerment with a great bodily injury enhancement. On February 23, 2012, SDAP wrote to the California Department of Justice and requested that Mr. Aisetewa be removed from Megan's List and the list of those California citizens who must register as sex offenders.

G. The Lessons To Be Learned.

There is at least one profound lesson to be gained from Mr. Aisetewa's saga. It is never too late to challenge a miscarriage of justice. Although the case presented an enormous procedural hurdle insofar as Mr. Aisetewa's initial habeas petition was denied eight years before the new petition was filed, there were available grounds to deal with the procedural problem. Given the substantive merits of the case, there was every reason to go forward on Mr. Aisetewa's behalf. (*Hirabayashi v. United States* (9th Cir. 1987) 828 F.2d 591 [criminal conviction in Japanese internment case vacated 45 years after it was obtained].)

Of course, we need to be fully cognizant of the California limits concerning habeas jurisdiction. 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.*) In Mr. Aisetewa's case, the petition was filed in the dying days of his parole term. Since the petition was timely filed, jurisdiction

remained even though Mr. Aisetewa's parole term expired. (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217 [habeas relief granted for deceased petitioner].)

Another vital lesson lies in the substantive merits of the case. When assessing whether a defendant has been deprived of a fair trial due to ineffective assistance of counsel, "it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 834.) In Mr. Aisetewa's case, the application of this test revealed a patent miscarriage of justice.

The People's trial presentation rested on Justin's extrajudicial statements and the results of the SART examination. Although there were available expert witnesses who could have been called to counter the People's evidence, defense counsel did nothing. By any reasonable measure, the jury did not receive a full and fair presentation concerning the relevant facts and science.

Every reasonable lawyer and judge should have felt queasy about the result of Mr. Aisetewa's trial. The eventual remedy was far from perfect. However, it is a hopeful sign that the "system" did not entirely ignore the patent defects in the case against Mr. Aisetewa.

II.

THE CASE OF PAUL MAGNAN TEACHES THAT COUNSEL MUST NEVER FAIL TO LISTEN TO THE CLIENT AND MUST FOLLOW UP ON THE INVESTIGATIVE LEADS THAT ARE PROVIDED.

I have previously reported at length concerning Mr. Magnan's case. (Sacher, The Lessons to be Learned From the Paul Magnan Case (2006) SDAP seminar syllabus.) Since the case presents a critical lesson, I am including an abbreviated version of my earlier article.

One of the primary duties of counsel is to listen to the client. Insofar as many criminal defendants do not have sterling characters or may be mentally challenged, much of what they say is false or difficult to believe. Nonetheless, counsel must avoid the temptation to disregard the information supplied by the client. In Mr. Magnan's case, he was almost condemned to spend the rest of his life in prison due to his lawyers' failure to listen to him.

A. The Facts of the Case.

At midnight on May 5, 1999, Officer John Robb stopped Mr. Magnan's motor vehicle since it had a broken taillight. Mr. Magnan admitted that he did not have a driver's license. Officer Robb determined that Mr. Magnan was under the influence of an opiate. It was stipulated that a urine test revealed metabolites for opiates and methamphetamine.

At 11:45 p.m. on June 11, 1999, Officers Jay Forbes and Miguel

Gonzalez were on patrol. The officers saw a pickup truck which was in the rear of a vacant parking lot that was adjacent to closed businesses. The officers drove towards the pickup with their lights off. When they got within 100 feet of the pickup, the officers illuminated the pickup. According to Officer Forbes, Mr. Magnan was standing inside the open door of the pickup with his back towards the front of the vehicle. Ms. Mhoon was sitting in the driver's seat. Officer Forbes saw Mr. Magnan's hands inside the pickup. However, neither Officer Forbes nor Officer Gonzalez saw Mr. Magnan throw anything.

Officer Gonzalez determined that Mr. Magnan was under the influence of a controlled substance. A search of Mr. Magnan's person revealed a small balloon of heroin in his pocket. The heroin weighed .91 grams. A pack of Camels and \$300 were also seized from Mr. Magnan. A subsequent blood test revealed that Mr. Magnan had opiates in his system.

Ms. Mhoon admitted that she was under the influence of methamphetamine. A white powder residue resembling methamphetamine was found in her purse along with a burnt piece of aluminum foil, a razor and a mirror.

Ms. Mhoon consented to a search of the pickup. Officer Forbes found a Camel's pack which was to the side of the driver's seat and a "little bit"

under the seat. Officer Forbes also inconsistently indicated that the pack was at “the edge” of the steering wheel.

For his part, Officer Gonzalez testified that the pack was found inside a brown paper bag. Officer Gonzalez said that the bag was found directly below the steering wheel and a “little” under the seat. In addition to the bag, the interior of the pickup was “pretty dirty” and was littered with “clothing and garbage” including “brown bags.”

The Camel pack contained a baggie of methamphetamine. The methamphetamine weighed 21.69 grams.

Ms. Mhoon testified as a government witness. Ms. Mhoon indicated that the pickup was owned by her ex-boyfriend, John Doyle. Ms. Mhoon had been in possession of the pickup all day.

Ms. Mhoon admitted that she was in the habit of using as much as a gram of methamphetamine per day. She also categorized Mr. Doyle as a methamphetamine user. However, she denied that Mr. Doyle sold methamphetamine. Ms. Mhoon testified that she smokes Misty Ultra Light cigarettes and Mr. Doyle does not smoke.

Ms. Mhoon testified that she had been dating Mr. Magnan since April 1999 and that they were in love. Mr. Magnan was living in the homeless camp behind the parking lot where they were found by the police. Ms. Mhoon

indicated that she and Mr. Magnan had been together since 6 p.m. that evening. Although Mr. Magnan had been a passenger in the pickup when they went to a liquor store, Ms. Mhoon did not see any methamphetamine in his possession. Moreover, she had never seen the methamphetamine which was found in the Camel pack.

Officer Rick Telifson testified as an expert regarding whether methamphetamine is possessed for sale. Officer Telifson indicated that drugs are often sold in 3.5 gram allotments known as 8-balls. Since 8-balls sell for \$130 to \$150, the sale of two 8-balls might result in a profit of \$300.

B. The Trial Proceedings.

Based on his May 5, 1999 arrest, Mr. Magnan was charged with two misdemeanor violations: (1) driving without a license; and (2) being under the influence of an illegal substance. As a result of the June 11, 1999 arrest, Mr. Magnan was charged with two felonies: (1) possession for sale of methamphetamine; and (2) possession of heroin. Mr. Magnan was also charged with the misdemeanor of being under the influence of a controlled substance. Mr. Magnan's 1981 Minnesota robbery convictions were alleged under the Three Strikes law. Ms Mhoon was not charged.

In his closing argument, defense counsel conceded Mr. Magnan's guilt as to all counts except for the possession for sale of methamphetamine. As to

that count, counsel argued that the methamphetamine was possessed by Ms. Mhoon. For his part, the prosecutor repeatedly argued that the \$300 found in Mr. Magnan's possession was the fruit of his prior sale of an 8-ball.

The jury convicted Mr. Magnan on all counts. The trial court found that Mr. Magnan's strike priors were true. At the sentencing hearing, the trial court denied Mr. Magnan's *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 motion since his conviction for possession for sale demonstrated that he was "still a danger to the community." Mr. Magnan was sentenced to prison for the term of 25 years to life.

C. The Appellate Proceedings.

Upon being delivered to prison, Mr. Magnan sent a lengthy letter to SDAP. Among other things, Mr. Magnan indicated that the \$300 found on his person had been sent to him by his family via Western Union. SDAP appointed a panel attorney to represent Mr. Magnan.

On October 11, 2001, Mr. Magnan wrote to appellate counsel and stated that his mother had sent him money via Western Union. Mr. Magnan provided his mother's phone number and assured counsel that his mother would "help in any way possible."

Appellate counsel conducted a telephone interview with trial counsel. Appellate counsel made contemporaneous notes of the conversation. Trial

counsel told appellate counsel that Mr. Magnan had informed him during trial that he had received the \$300 from his mother via Western Union. Trial counsel indicated that he had not investigated this assertion since Mr. Magnan could not recall where or when he had received the money.

On a separate front, the SDAP paralegal learned that Mr. Doyle and Ms. Mhoon had been jointly prosecuted for the possession of methamphetamine. At appellate counsel's request, our paralegal examined the Superior Court files for any additional cases involving Ms. Mhoon. It was learned that Ms. Mhoon had a second case in which she had been found in a storage locker with a small amount of methamphetamine. Significantly, the police report from that case indicated that Officer Manion had gone to the storage facility based on "information" that Ms. Mhoon was "possibly dealing meth out of her storage locker. . . ."

In addition to raising numerous issues on appeal, counsel filed a petition for writ of habeas corpus in the Court of Appeal. The petition raised four issues: (1) the prosecutor had violated his duties under *Brady v. Maryland*, supra, 373 U.S. 83 by failing to disclose the criminal records and police reports regarding Ms. Mhoon and Mr. Doyle; (2) defense counsel had performed ineffectively when he failed to investigate the criminal records of Ms. Mhoon and Mr. Doyle; (3) defense counsel performed ineffectively when

he adduced the fact that a Camel pack had been found on Mr. Magnan's person; and (4) defense counsel had performed ineffectively when he failed to object to the prosecutor's argument that Mr. Magnan had a motive to sell drugs due to his poverty.

Appellate counsel did not raise any claim regarding trial counsel's failure to investigate the \$300 found on Mr. Magnan's person. In omitting the issue, appellate counsel accepted trial counsel's explanation that he was unable to conduct an investigation since Mr. Magnan did not know where he had picked up the money. However, appellate counsel failed to contact Mr. Magnan's mother in Minnesota.

The Court of Appeal affirmed the judgment on appeal. In the habeas proceedings, the court issued an order to show cause returnable in the trial court. The order to show cause included all of the claims raised in the petition. Upon receiving the order, the Superior Court appointed a new attorney to represent Mr. Magnan.

D. Proceedings Back in the Trial Court.

In her return, the District Attorney did not reveal or discuss the “information” which Officer Manion had received regarding Ms. Mhoon. Rather, the District Attorney simply argued that there was “no evidence” that Ms. Mhoon was selling drugs.

Notwithstanding the District Attorney’s failure to honor her obligation under *Brady*, defense counsel did not take any further investigative steps. Instead, he argued in his traverse that the trial prosecutor had failed to disclose material evidence.

In preparing his traverse, defense counsel worked with a fledgling attorney. Unlike appellate counsel, the novice attorney finally took the step of calling Mr. Magnan’s mother, Carol White. In the ensuing conversation, Ms. White confirmed that she had wired money to Mr. Magnan from the Western Union office in Brainerd, Minnesota.

Defense counsel issued a subpoena duces tecum to Western Union. In response, Western Union provided documents which established that Ms. White had wired \$400 to Mr. Magnan in San Jose on June 4, 1999. The document revealed that Mr. Magnan had picked up the money on that very day.

In his traverse, defense counsel argued for the first time that trial

counsel had erred by failing to procure the Western Union document. However, this was not the proper method for raising the issue. Under settled law, counsel was required to file either a supplemental or amended petition. (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.)

The trial court did not order an evidentiary hearing. The court rejected the *Brady* claim since the defense had “not actually developed the evidence to show how it would have been admissible.” With regard to the new Western Union evidence, the court held that Mr. Magnan had not established “how his attorney should have known” about it.

E. The Renewed Habeas Petition In The Court Of Appeal.

Following the denial of relief in the trial court, SDAP undertook Mr. Magnan’s representation. It was recognized that the trial court’s analysis was correct insofar as it held that habeas counsel had failed to factually develop his theories.

It was easy to remedy the deficiency concerning the Western Union money order. Mr. Magnan provided a declaration that he had told trial counsel about the money order well before trial.

A renewed habeas petition was filed in the Court of Appeal. The petition included all of the claims which had originally been pled by appellate counsel. The new claim was raised that trial counsel had performed

ineffectively when he failed to adduce the fact that the \$300 found in Mr. Magnan's possession had been received from his mother. The Court of Appeal summarily denied the petition.

F. The Proceedings In the California Supreme Court.

A petition for review was filed. The Supreme Court directed the Attorney General to file an answer. The Attorney General raised the procedural objection that the issue involving the Western Union money order had been defaulted since it was not included in the first habeas petition.

In response, a number of arguments were marshalled: (1) the claim was not "successive" since it had never before been raised in the Supreme Court; (2) the issue had been adjudicated on the merits in the Superior Court; (3) the court should entertain the issue since any default was occasioned by counsel's error in failing to file a supplemental or amended petition (*In re Clark*, supra, 5 Cal.4th at p. 780); and (4) the error committed by trial counsel rendered the trial "fundamentally unfair." (*Id.* at p. 797, fn. omitted.)

The Supreme Court directed the Court of Appeal to issue an order to show cause. The order was limited to the issue of whether Mr. Magnan was "entitled to relief based on ineffective assistance of trial counsel for failing to investigate and present evidence that the \$300 found on petitioner's person

had been sent to him by wire transfer....”

G. The New Proceedings In The Superior Court.

In her new return, the District Attorney included a declaration from trial counsel. In his declaration, counsel averred that he had no recollection as to whether Mr. Magnan had advised him about the Western Union money order. He further stated that he would have investigated the matter if it had been brought to his attention.

Fortunately, appellate counsel had preserved his notes from his November 9, 2001 phone conversation with trial counsel. Appellate counsel prepared a declaration in which he asserted that trial counsel had told him that he was aware of the Western Union evidence but had failed to conduct an investigation since Mr. Magnan could not recall where he had received the money order.

H. The Evidentiary Hearing.

An evidentiary hearing was held. By the time of the hearing, trial counsel’s memory had been refreshed by appellate counsel’s declaration. Trial counsel testified that Mr. Magnan had told him about the Western Union money order during either the testimony of Ms. Mhoon or Officer Tellifson. Trial counsel conceded that he should “probably” have sought a continuance to investigate the information. He acknowledged that he had made no attempt

to conduct an investigation.

For his part, Mr. Magnan testified that he had told trial counsel about the Western Union money order during a pretrial meeting in the jail. In addition, Mr. Magnan recalled that he had brought up the matter a second time during Officer Telfison's testimony.

On the second day of the hearing, the court read its decision from the bench. The court held that trial counsel had erred by failing to investigate the source of the \$300. The court found that the error was prejudicial since the prosecutor had substantially relied on the thesis that the \$300 was the fruit of drug dealing. The court concluded that "[h]ad the defense presented rebutting evidence by showing an alternate source of the \$300, a jury may well have had a reasonable doubt as to its source and acquitted petitioner."

I. The Ultimate Resolution Of The Case.

After the habeas petition was granted, new counsel took over as Mr. Magnan's lawyer. The District Attorney elected not to retry the possession for sale count. Nonetheless, Mr. Magnan remained potentially liable for a life sentence due to his possession of heroin conviction.

Defense counsel filed a new *Romero* motion which was heard by Judge Wetenkamp who had presided at the trial. At the hearing on the motion, the District Attorney took the position that Judge Wetenkamp "would not abuse

her discretion” if the motion were granted. The motion was granted and Judge Wetenkamp resentenced Mr. Magnan to a two strikes sentence of 6 years. Mr. Magnan was released from custody with credit for time served.

J. The Lessons To Be Learned.

The primary lesson is that counsel must carefully listen to the client and pursue the investigative leads that are provided. Mr. Magnan did everything that he was supposed to do. At his first opportunity, Mr. Magnan informed both his trial attorney and his appellate lawyer that vital exculpatory evidence could be obtained by contacting his mother. Regrettably, Mr. Magnan's lawyers failed him when they did not contact his mother to track down the documentary proof that she had wired him money shortly before his arrest. Although it would have been a simple task to perform, counsel failed to call Mr. Magnan's mother.

Our clients often barrage us with irrelevant or misleading pieces of information. However, a client will sometimes provide a glistening nugget of information which can lead to freedom. Counsel must be ever sensitive to the possibility that the client will say something that changes the result of the case.

Although it is almost too obvious to mention, Mr. Magnan's case illustrates the need for counsel to carefully document the investigation that is undertaken. In November 2001, appellate counsel conversed with trial counsel by telephone. As was recorded in appellate counsel's handwritten notes, trial counsel admitted that Mr. Magnan had informed him that he received money from his mother shortly before his arrest.

In 2005, trial counsel initially professed to have no recollection regarding the source of Mr. Magnan's funds. Trial counsel gave the District Attorney a declaration to this effect. However, once appellate counsel provided a contrary declaration based on his notes, trial counsel changed his story and conceded that Mr. Magnan had told him about the money.

It is possible that appellate counsel would have remembered the 2001 conversation without the benefit of his notes. However, the importance of his notes cannot be doubted. At the District Attorney's request, the notes were produced at the evidentiary hearing. Thereafter, the District Attorney did not challenge trial counsel's testimony that he learned about the source of the money during the trial. Given this factual concession, the court had no problem in holding that counsel had erred by failing to investigate the information which Mr. Magnan gave him.

Appellate counsel acted as a diligent and competent lawyer when he took contemporaneous notes of his conversation with trial counsel. We should all emulate this example.

Mr. Magnan's case also illustrates a vital lesson regarding the proper manner for developing a habeas claim. In order to obtain a remedy, the defendant must be able to establish that the posited error went to the heart of the case. This is exactly what happened in Mr. Magnan's case.

At trial, the prosecutor was able to point to only two incriminating pieces of evidence: (1) the drugs were found in a pack of Camels and Mr. Magnan had a pack of Camels on his person; and (2) Mr. Magnan possessed \$300 which was supposedly the proceeds from drug sales. The prosecutor relentlessly repeated the latter theory during closing argument.

In light of the Western Union money order, we were able to demonstrate that the essence of the prosecutor's case was simply untrue. Given this reality, a finding of prejudicial error was a virtual certainty.

As was also true in Mr. Aisetewa's case, a showing of prejudice was made by comparing the trial which occurred with the one which would have occurred had error not infected the trial court proceedings. In Mr. Magnan's case, an error free trial would have been one where the prosecutor was left solely with the incriminating inference which might be drawn from the two packs of Camels. Insofar as Ms. Mhoon could well have obtained an empty pack of Camels from either Mr. Magnan or the extensive trash which littered the pickup, the People's case was manifestly deficient absent the theory that the \$300 was the fruit of prior drug sales. (*Bonin v. Calderon*, supra, 59 F.3d 815, 834 [in order to determine whether counsel's errors prejudiced the outcome of the trial, "it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had

counsel acted differently.”].)

Mr. Magnan was one of our lucky clients. A lawyer listened to him and recognized that it was vitally important to follow up on the investigative lead that was provided. In order to be effective post-conviction lawyers, we must all be equally attentive to this example.

III.

THE CASE OF DAVID VIGIL TELLS US THAT A REMEDY MAY SOMETIMES BE SOUGHT EVEN WHEN THE RECORD ON APPEAL APPEARS TO SHOW THAT THE CASE IS HOPELESS.

David Vigil is the type of defendant that was targeted by the Three Strikes law. He has prior convictions for robbery and assault with a deadly weapon. His present offense involves a criminal threat to kill his former girlfriend and a forced entry into her home. To make matters worse, Mr. Vigil pled no contest to the new charges and admitted his two strike priors.

Notwithstanding this rather bleak picture, Mr. Vigil actually has a meritorious habeas claim. While Mr. Vigil has not obtained relief, his story demonstrates that every record must be carefully combed for the issue that may be found lurking within an otherwise hopeless case.

A. The Facts of the Case.

Mr. Vigil and Jennifer Scaggs began a dating relationship in 2004. Ms. Scaggs has two children from a prior relationship. At one point, Ms.

Scaggs obtained a restraining order against Mr. Vigil. However, since Mr. Vigil had nowhere else to live, Ms. Scaggs allowed Mr. Vigil to remain in her home.

Early on the evening of March 30, 2006, Mr. Vigil consumed eight or nine shots of whiskey. Shortly before 8 p.m., Mr. Vigil walked to a nearby convenience store in order to obtain cigarettes. At the store, Mr. Vigil saw Ms. Scaggs and her children.

Mr. Vigil accused Ms. Scaggs of cheating on him with another man. According to the probation report, Mr. Vigil held a steak knife to Ms. Scaggs' stomach and stated: "I'll kill you, you fuckin, bitch."

Ms. Scaggs drove home with her children. Soon thereafter, Mr. Vigil gained entry into the house by breaking a living room window with his fist. When Ms. Scaggs attempted to call the police, Mr. Vigil seized the phone. Ms. Scaggs obtained another phone and went outside. By then, the police had been summoned by a neighbor.

Upon being informed that Ms. Scaggs' children were inside the house, the police kicked in the door. Mr. Vigil attempted to exit the house through the bathroom window. After a struggle, Mr. Vigil was subdued.

For his part, Mr. Vigil denied that he had brandished a knife. Mr. Vigil also denied that he had intentionally broken into Ms. Scaggs' home. Mr.

Vigil indicated that he fell into the front window as he stood on a paint container for the purpose of turning off an outside light.

B. Facts Regarding Mr. Vigil's Criminal History.

On October 26, 1982, Mr. Vigil was 19 years old. Mr. Vigil and Mr. Sanchez attacked a 14 year old boy on the street and stole his portable radio. Mr. Vigil was convicted of robbery and sentenced to six months in jail.

On July 29, 1984, Mr. Vigil was confined in county jail for a probation violation. Mr. Vigil escaped from the jail. As a result, Mr. Vigil received a ten month sentence.

On August 24, 1988, Mr. Vigil attended a party in Turlock with his wife. During the course of an alcohol fueled day, Mr. Vigil's wife quarreled with one of his sisters. After the 18 year old boyfriend of one of Mr. Vigil's nieces pulled the hair of Mr. Vigil's wife, Mr. Vigil stabbed him with a knife. Mr. Vigil also struck his sister with a baseball bat. Mr. Vigil was convicted of assault with a deadly weapon and sent to prison for four years.

On November 12, 1994, Mr. Vigil stole some merchandise at a J.C.Penney store. Mr. Vigil then got into an altercation with two security guards in the parking lot. Mr. Vigil was convicted of petty theft with a prior and battery. He was committed to prison for six years.

Following his release from prison, Mr. Vigil sustained a number of misdemeanor convictions. In 2005, Mr. Vigil was convicted of corporal injury on a spouse and battery. All told, Mr. Vigil's criminal history includes five

prior felony convictions and 39 prior misdemeanor convictions.

C. Mr. Vigil's Social History

Mr. Vigil is one of eleven children. Mr. Vigil's father was an alcoholic roofer. (CT 14.) When Mr. Vigil was a child, the family frequently moved and he was unable to develop any lasting friendships. Of Mr. Vigil's siblings, four have developed alcohol or substance abuse issues.

Mr. Vigil was a poor student and stayed back in the seventh grade. While in the seventh grade, Mr. Vigil began using alcohol and marijuana. After dropping out of high school, Mr. Vigil started using PCP, cocaine and methamphetamine.

In 1985, Mr. Vigil met Lupe Loyola. In 1987, the couple married and had a daughter. Mr. Vigil worked as a driver of a vacuum truck in order to support his family.

Following his release from prison in 1990, Mr. Vigil returned to his family. Mr. Vigil found a job where he constructed the wooden boxes used to house stage lighting for concerts. Subsequently, Mr. Vigil worked for a moving company.

In 1991, Mr. Vigil was the victim of an assault and fell into a coma which persisted for a week. As a result, Mr. Vigil suffered problems with his memory.

In 1994, Mr. Vigil and his wife divorced. However, his ex-wife maintains that Mr. Vigil has remained an attentive and thoughtful father.

At the sentencing hearing, defense counsel observed that Mr. Vigil had become “virtually unemployable” due to his criminal record. Nonetheless, Ms. Scaggs advised counsel that Mr. Vigil continued to look for work. When he failed to find employment, Mr. Vigil returned to drinking. Ms. Scaggs felt sadness and frustration regarding Mr. Vigil’s fate.

D. The Trial Court Proceedings.

Mr. Vigil was charged with making a criminal threat and resisting arrest. Two strike priors were alleged. Mr. Vigil pled nolo contendere to both charges and admitted the strike priors.

Defense counsel filed a motion pursuant to *People v. Superior Court (Romero)*, supra, 13 Cal.4th 497 and asked the court to dismiss Mr. Vigil’s strike priors. In denying the motion, the court placed special reliance on the probation report which indicated that Mr. Vigil had used a knife in the commission of the present offense and then denied such use. The court indicated that it would have “probably” reached a different result but for Mr. Vigil’s denial that he had used a knife and his additional denial that he had intentionally broken the window of Ms. Scaggs’ home. The court also commented on Mr. Vigil’s “fondness for knives” as revealed by his prior

conviction for assault with a deadly weapon.

Mr. Vigil was sentenced to prison for 25 years to life for the criminal threats conviction. A concurrent 30 day jail term was imposed for the resisting arrest conviction.

E. The Appellate Proceedings.

Mr. Vigil's case appeared to be entirely hopeless. The case law affords a sentencing court broad discretion in ruling on a *Romero* motion. Given the unsavory facts of Mr. Vigil's past and present offenses, nothing could be argued on appeal. A brief was filed pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

However, as was true in Mr. Magnan's case, a helpful nugget of information became known to appellate counsel. Ms. Scaggs called counsel and indicated that she had informed trial counsel before the sentencing hearing that she had not seen a knife in Mr. Vigil's hands.

Appellate counsel decided that it was necessary to obtain relevant documents from trial counsel's file. Notwithstanding repeated requests for the documents, trial counsel failed to produce the requested items. Appellate counsel filed a motion in the Court of Appeal and requested an order that trial counsel produce the sought documents. The court issued the requested order. Trial counsel still failed to produce the documents. A contempt motion was filed. At that point, counsel provided the relevant items from his file.

Among the documents, appellate counsel found a written report prepared by a defense investigator. The report was prepared long before the sentencing hearing. The report memorialized Ms. Scaggs' statement to the investigator that she did not see the item brandished by Mr. Vigil. Although Ms. Scaggs indicated that the object felt "sharp" when it was placed against her side, she opined that it "could have been a pen."

The report was a bombshell. Obviously, trial counsel should have alerted the court to the fact that Ms. Scaggs was not at all certain that Mr. Vigil had threatened her with a knife.

When he was asked why he failed to introduce Ms. Scaggs' statement, trial counsel replied that "while she didn't see anything, I didn't want to add her speculation to the mix." Plainly, this "tactical" decision was nonsensical. The only evidence before the court was the assertion in the probation report that Mr. Vigil had brandished a knife. There was no conceivable down side to informing the court that Ms. Scaggs could not actually identify the object held by Mr. Vigil.

A petition for writ of habeas corpus was filed on the grounds that Mr. Vigil had been deprived of the effective assistance of counsel due to the omission to introduce Ms. Scaggs' statement. In arguing prejudice, appellate counsel noted that the court had made three references to knife use in denying

the *Romero* motion: (1) the brandishing of the knife was a “nightmare” for Ms. Scaggs; (2) Mr. Vigil had a “fondness for knives” as was revealed by his prior conviction for assault with a deadly weapon; and (3) the court would “probably” have granted relief but for Mr. Vigil’s denial that he had used a knife. Faced with this substantial showing of prejudice, the Court of Appeal issued an order to show cause returnable in the Superior Court.

F. The Superior Court Habeas Proceedings.

The Superior Court did not conduct an evidentiary hearing. In denying relief, the court made no finding on prong one of the test of *Strickland v. Washington* (1984) 466 U.S. 668 as to whether counsel’s performance had been deficient. Instead, the court found that any error was harmless. The court completely ignored the comments that the sentencing judge had made. The court reasoned that “whether petitioner used a knife or other ‘sharp object’ in the commission of the crime is irrelevant; the nature of the threat and the fear instilled in the victim is the same.” The court also concluded that Ms. Scaggs’ statement was of “limited value.”

G. The Subsequent Legal Proceedings.

Mr. Vigil has not enjoyed good fortune. The Court of Appeal summarily denied his renewed habeas petition and the Supreme Court denied a petition for review.

A federal habeas petition was filed. However, Mr. Vigil fell victim to a bizarre precedent issued by the Ninth Circuit.

In order for a state prisoner to obtain habeas relief, it must be shown that the state court failed to follow “clearly established Federal law, as determined by the Supreme Court of the United States” (28 U.S.C. section 2254(d)(1).) In applying section 2254, a federal court must look to the holdings of the Supreme Court that were extant at “the time of the relevant state-court decision.” (*Williams v. Taylor* (2000) 529 U.S. 362, 412.)

In a rational universe, Mr. Vigil would have had no difficulty in satisfying section 2254. In 2001, the U.S. Supreme Court held that the *Strickland* standard was applicable to errors made by counsel at a noncapital sentencing hearing. (*Glover v. United States* (2001) 531 U.S. 198, 202-204.) Unfortunately, in apparent ignorance of *Glover*, the Ninth Circuit held in 2005 that a state prisoner could not advance a *Strickland* claim under section 2254: “Since *Strickland*, the Supreme Court has not decided what standard should apply to ineffective assistance of counsel claims in the noncapital sentencing context. Consequently, there is no clearly established law in this context.” (*Cooper-Smith v. Palmateer* (9th Cir. 2005) 397 F.3d 1236, 1244.)

Although the holding in *Cooper-Smith* is assuredly wrong, both the district court and the Ninth Circuit held that Mr. Vigil could not satisfy section

2254. At the moment, Mr. Vigil's last hope is flickering as he awaits the resolution of his petition for writ of certiorari that was filed in the U.S. Supreme Court on March 2, 2012.

H. The Lessons To Be Learned.

Although it is likely that Mr. Vigil's life sentence will remain in place, his story demonstrates that appellate counsel must be ever sensitive to the possibility that a meritorious issue may exist even when a case appears to be utterly hopeless. Before Ms. Scaggs spoke to appellate counsel, there was no reason to believe that anything could be done for Mr. Vigil. There were no issues for direct appeal and the existing record seemed to show that trial counsel had vigorously argued the *Romero* motion. Of course, as it turned out, trial counsel made a glaring error that should have resulted in a grant of relief.

The message from the case is straightforward. Appellate counsel cannot afford to go half speed on *any* case. By being attentive to every detail, counsel may be able to transform a hopeless case into a smashing victory.

A second lesson from Mr. Vigil's case is that appellate counsel cannot be deterred by trial counsel's refusal to cooperate. Although trial counsel had

an ethical obligation to promptly provide documents from his file, he failed to do so. Counsel continued his intransigence even when the Court of Appeal ordered him to disgorge the documents. It was only the threat of a contempt citation that stirred counsel to fulfill his duty to Mr. Vigil. While it is certainly unpleasant to file a contempt motion, the interests of the client must necessarily prevail over those of trial counsel.

We cannot win every case. However, as Mr. Vigil's case demonstrates, we can often advance a meritorious claim in the face of bad facts and delay occasioned by trial counsel.

IV.

THE CASE OF MILAN PAKES TEACHES THAT APPELLATE COUNSEL SHOULD NOT BE DETERRED FROM SEEKING RELIEF EVEN IN THE FACE OF A FACTUALLY DIFFICULT CASE.

Milan Pakes is another victim of the Three Strikes law. Mr. Pakes has suffered two prior strikes for violations of Penal Code section 288. In an exercise of very poor judgment, Mr. Pakes drove recklessly on the freeway and city streets as he sought to escape from the scene of a minor car accident. Due to poor lawyering, Mr. Pakes was enticed to enter a guilty plea that led to a life sentence.

Mr. Pakes' trial lawyer encouraged him to enter a guilty plea by providing erroneous advice. Subsequently, trial counsel stonewalled appellate

counsel. When trial counsel was eventually deposed by order of the federal district court, he told a story that would have doomed Mr. Pakes if it was believed. Trial counsel repeated his story on the witness stand. Due to a bit of luck, appellate counsel was able to show that trial counsel was not a credible witness. A fair minded federal magistrate and district court judge agreed that trial counsel was not credible and relief was granted. The obvious lesson is that appellate counsel cannot be afraid to wage a credibility contest in order to obtain a remedy for a client.

A. The Facts of the Case.

In the summer of 2001, 12 year old Adrienne Fugate was residing in a mobile home park with her family. Ms. Fugate met Mr. Pakes one day while they were both throwing away garbage. Mr. Pakes became a family friend. Mr. Pakes was a daily visitor at the Fugate home.

Mr. Pakes drove a pickup truck that he used in his occupation as a chimney sweep. On more than ten occasions, Mr. Pakes allowed Ms. Fugate to drive the pickup around the mobile home park. Mr. Pakes told Ms. Fugate that the seatbelts in the pickup did not work.

On the evening of December 14, 2001, Mr. Pakes slept on the living room couch at the Fugate home. Upon awakening, Mr. Pakes asked Ms. Fugate if she wanted to accompany him on a chimney sweeping job. Ms.

Fugate's parents gave her permission to go.

Mr. Pakes and Ms. Fugate drove to the job in Mr. Pakes' pickup. By Ms. Fugate's account, Mr. Pakes drove fast. After the chimney sweeping job was completed, Mr. Pakes again drove fast as they began the return trip on Highway 87. Ms. Fugate was not wearing a seatbelt.

As Mr. Pakes neared the Curtner Avenue exit, traffic became bumper to bumper. Mr. Pakes was driving in the left lane. Mr. Pakes rear-ended a Toyota SUV which was being driven by off-duty San Jose police officer David Gonzalez. Officer Gonzalez's vehicle suffered two "dings" to the rear gate. Officer Gonzalez pulled to the left shoulder of the road with the expectation that Mr. Pakes would also pull over to exchange information. Officer Gonzalez rolled down his passenger window as Mr. Pakes pulled abreast of him. Mr. Pakes also rolled down his window. Instead of stopping, Mr. Pakes drove forward in the left lane and then moved onto the left shoulder. Mr. Pakes drove on the shoulder at 40 to 50 mph. Officer Gonzalez followed on the shoulder at 35 mph. Officer Gonzalez used his cell phone to advise the police dispatcher of the chase.

At the Alma exit, Mr. Pakes got back on the road. By Officer Gonzalez's account, Mr. Pakes cut off approximately five cars as he repeatedly changed lanes. Mr. Pakes was driving at 40 to 50 mph. Officer

Gonzalez indicated that Mr. Pakes came within ten feet of cars which had to “slam on their brakes.” As he observed this conduct, Officer Gonzalez was fifty yards to a quarter-mile behind Mr. Pakes.

For her part, Ms. Fugate was scared. She was screaming. Mr. Pakes told Ms. Fugate to “shut up and duck down so they don’t see you.”

Mr. Pakes exited Highway 87 and got onto southbound Highway 280. According to Officer Gonzalez, Mr. Pakes drove “erratically” and cut off two or three cars. As Mr. Pakes swerved, Officer Gonzalez saw Ms. Fugate sliding back and forth against Mr. Pakes and the door.

Mr. Pakes exited 280 at Seventh Street. Officer Gonzalez was about twenty seconds or less than a quarter-mile behind Mr. Pakes. Officer Gonzalez exited at Seventh Street and saw Mr. Pakes’ vehicle ahead of him.

Mr. Pakes made a right turn and headed westbound on Keyes Street. After he turned onto Keyes, Officer Gonzalez saw a marked police car at Second or Third and Keyes. The police car was stationary and was facing south. Officer Gonzalez pulled over. He did not see Mr. Pakes drive the wrong way on a one way street nor did he do so himself.

San Jose Police Sergeant Robert St. Amour was driving a marked police car on the day in question. After hearing a police dispatch about the accident on Highway 87, Sergeant St. Amour was on the lookout for Mr.

Pakes' pickup. As he was driving north on First Street, Sergeant St. Amour looked to his right and saw Mr. Pakes' pickup driving west on Humboldt Street. Humboldt is one way in the other direction. Mr. Pakes then turned north on Second Street which is one way southbound.

Second Street has three lanes. Sergeant St. Amour did not see any other cars in the righthand lane in which Mr. Pakes was driving. However, three or four cars passed Mr. Pakes in other lanes. For her part, Ms. Fugate testified that a car had to swerve out of Mr. Pakes' way.

Sergeant St. Amour drove up First Street and made a right on Keyes. As he turned on Keyes, Sergeant St. Amour activated his red light and siren. Sergeant St. Amour positioned his vehicle at the intersection of Second and Keyes. The vehicle was facing east such that Sergeant St. Amour was looking down Second Street through his passenger window. As he looked down Second Street, Mr. Pakes was still 75 to 100 feet south of the intersection.

Mr. Pakes made a right turn onto Keyes. He was able to do so since there was just enough room between the front end of Sergeant St. Amour's vehicle and the curb. As Mr. Pakes drove on Keyes, Sergeant St. Amour was delayed in his pursuit since his glasses fell off. Sergeant St. Amour drove at "a very slow speed" while he put his glasses on.

Mr. Pakes took a left onto Third Street. Although the speed limit was

30 mph, Mr. Pakes traveled at 35 mph.

Mr. Pakes turned left onto Virginia and then took a left on Second Street. Mr. Pakes traveled at 35 mph on Second Street.

Mr. Pakes lawfully drove in the left lane on one way Second Street. Before reaching Martha Street, Mr. Pakes drove up onto the curb. Both of the front tires were on the curb and the vehicle was sticking out into the road. Although he was not “100 percent” certain, Sergeant St. Amour recalled that Mr. Pakes had turned onto the curb without signaling.

Mr. Pakes ran to the porch of his father’s house at 868 Second Street. Mr. Pakes was apprehended by Sergeant St. Amour.

By Sergeant St. Amour’s account, his pursuit of Mr. Pakes took 55 seconds and covered one-half mile. Sergeant St. Amour measured the starting point of the pursuit as Third and Keyes.

While Mr. Pakes was being arrested, Ms. Fugate was screaming. Ms. Fugate was uninjured.

B. The Trial Court Proceedings.

Mr. Pakes was charged with felony child endangerment, felony evading the police, felony annoying or molesting a child and misdemeanor hit and run. Mr. Pakes’ two strike priors for lewd and lascivious acts with a minor were also charged. A prison prior was alleged as well.

Following a preliminary examination, defense counsel brought a Penal Code section 995 motion with regard to the annoying or molesting a child charge. The motion was granted.

On the eve of trial, the prosecutor offered a plea bargain by which the evading the police charge would be dismissed. Mr. Pakes accepted the offer. After his *Romero* motion was denied, Mr. Pakes was sentenced to 26 years to life.

C. The State Court Appellate Proceedings.

Appellate counsel determined that there were no issues for appeal. A *Wende* brief was filed.

While examining the record, appellate counsel became convinced that the plea bargain accepted by Mr. Pakes was entirely illusory in that it actually afforded no benefit whatsoever. The two felony charges (endangering a minor and evading the police) were committed with the single motive that Mr. Pakes was seeking to escape the accident scene. If Mr. Pakes had gone to trial and been convicted on both counts, Penal Code section 654 would have applied to limit his exposure to a sentence of 25 years to life. Viewed from this perspective, there was no value to the plea bargain. This was especially true since Mr. Pakes had viable defenses to the felony charges.

With regard to the child endangerment charge, it was the People's

burden to prove that Mr. Pakes' conduct rendered it "likely" that great bodily injury would result from his bad driving. (Penal Code section 273a, subd. (a).) Since jurors see reckless driving on freeways and city streets on virtually a daily basis, a skillful trial attorney could defend against the charge by arguing that great bodily injury was not "likely" since such injury only rarely occurs due to improper driving. This defense could be supported by an acknowledgment that Mr. Pakes should be convicted of the lesser included offense of misdemeanor child endangerment that does not require a likelihood of great bodily injury.

As for the evading the police charge, there was an obvious legal defense. Vehicle Code section 2800.2 comes into play only when a driver seeks "to elude a *pursuing* peace officer" (Emphasis added.) The plain meaning of "pursuing" is "[t]o follow in an effort to capture or overtake." (Webster's II New Riverside University Dictionary (1984) p. 957, col. 1.) Given this meaning, section 2800.2 applies only to that driving that occurs after a police officer is behind a suspect's vehicle. This understanding of the statute is confirmed by the requirement that the officer must display a red light which is "visible from the front" (Vehicle Code section 2800.1, subd. (a)(1).) Obviously, this requirement makes no sense absent the corollary requirement that the police officer must be behind the suspect.

Mr. Pakes was arguably innocent since he drove like an angel after Sergeant St. Amour got behind him. A strong defense existed.

Appellate counsel consulted with Mr. Pakes regarding the advice that he had been given by his trial attorney. Mr. Pakes reported that counsel told him that he would be convicted of both felonies if he went to trial and would be sentenced to 51 years to life in prison. Counsel also told Mr. Pakes that the trial judge was lenient and was likely to grant a *Romero* motion. Counsel advised Mr. Pakes to accept the plea bargain.

Appellate counsel wrote to trial counsel and asked for his version regarding the advice that had been given to Mr. Pakes. Trial counsel failed to respond to the inquiry. Trial counsel also failed to turn over his file as had been requested by appellate counsel.

Appellate counsel filed a habeas petition. It was alleged that trial counsel had performed ineffectively by advising Mr. Pakes to enter the plea bargain. It was argued that counsel's advice was erroneous in four respects: (1) counsel failed to advise Mr. Pakes that he had a legal defense to the evading charge; (2) counsel failed to advise Mr. Pakes that his maximum exposure was only 26 years to life since Penal Code section 654 would bar punishment for both felonies; (3) counsel failed to advise Mr. Pakes that he could defend against the felony child endangerment charge by seeking a

conviction for the lesser included offense of misdemeanor child endangerment; and (4) counsel misadvised Mr. Pakes by telling him that any judge was “likely” to grant his *Romero* motion.

The Court of Appeal summarily denied the petition after soliciting an informal response from the People. A petition for review was denied.

D. The Federal Court Proceedings.

With appellate counsel's assistance, Mr. Pakes filed a habeas petition in the federal district court. After an order to show cause was issued, appellate counsel entered a formal appearance as counsel of record.

Following the filing of the People's answer and Mr. Pakes' traverse, the court asked for supplemental briefing on the question of whether Mr. Pakes could have been convicted of evading the police had he stood trial. After the supplemental briefing was filed, the court referred the case to a magistrate for an evidentiary hearing.

At a status conference, appellate counsel made it known that trial counsel had failed to cooperate. The magistrate authorized a deposition of trial counsel. A subpoena was issued to compel counsel's appearance at the deposition and the production of his file.

At his deposition, trial counsel testified that he had fully advised Mr. Pakes of all possible defenses including the likely application of Penal Code section 654 to his case. Counsel indicated that he had advised Mr. Pakes to accept the plea bargain since the case was hopeless.

A review of trial counsel's file failed to provide any corroboration for his testimony. The file was bereft of any contemporaneous notes regarding the advice given to Mr. Pakes. There was also no documentary proof of other

than extremely minimal legal research.

It was apparent to appellate counsel that the evidentiary hearing would be a stark credibility contest between trial counsel and Mr. Pakes. Appellate counsel communicated with Mr. Pakes in order to ascertain if he had any corroborating witnesses or documents. Fortunately, he did.

While the case was pending in the trial court, Mr. Pakes' mother, father and brother all had occasion to converse with trial counsel. In material part, the family members were able to corroborate Mr. Pakes' version of what trial counsel had told him. Appellate counsel was also able to unearth a letter that proved to be vital.

Several months after the sentencing hearing, Mr. Pakes wrote a letter to his father. The letter was sent before Mr. Pakes ever communicated with his appellate lawyer. In the letter, Mr. Pakes discussed his decision to plead guilty and stated that he "probably" would have gotten 50 years to life had he gone to trial. Obviously, this contemporaneous account of his mental state established that trial counsel had not told Mr. Pakes that he could only get 26 years to life if he went to trial.

A three day evidentiary hearing was held before the federal magistrate. The witnesses included trial counsel, Mr. Pakes, the trial prosecutor, a defense *Strickland* expert and Mr. Pakes' family members. In a lengthy report, the

magistrate recommended a grant of relief. The magistrate rejected trial counsel's testimony as being less than credible. The magistrate found that Mr. Pakes' testimony was corroborated by: (1) his mother; (2) his letter to his father; and (3) the complete absence of any notes or memoranda in trial counsel's file establishing that he had conducted legal research.

The Attorney General filed objections to the report and accused the magistrate of being biased. The district court judge accepted the magistrate's findings and granted relief. The Attorney General did not appeal.

E. The Subsequent State Court Proceedings.

Mr. Pakes stood trial on the felony charges of evading the police and child endangerment. Convictions were returned on both counts. At the sentencing hearing, the court found that Penal Code section 654 did not apply. The court granted *Romero* relief on one count and imposed a sentence of 29 years to life (25 to life for the child endangerment conviction and 4 years for the evading conviction). The punishment for the prison prior was stricken pursuant to Penal Code section 1385.

The Court of Appeal issued a published decision and held that a police officer can be "pursuing" a driver within the meaning of Vehicle Code section 2800.2 even if the officer is not behind the driver. (*People v. Pakes* (2009) 179 Cal.App.4th 125, 130-132.) The court affirmed both convictions.

However, the court held that Penal Code section 654 precluded multiple punishment. On remand, the trial court again denied *Romero* relief and imposed a sentence of 25 years to life.

Aside from his appeal, Mr. Pakes filed a habeas petition in the Court of Appeal. The petition presented three primary claims: (1) trial counsel had performed ineffectively when he agreed to a stipulation that Mr. Pakes fled from the accident scene because he reasonably believed that he would go to prison if he was apprehended by the police; (2) the prosecutor had violated his duty under *Brady v. Maryland*, supra, 373 U.S. 83 by failing to disclose the written policy of the San Jose Police Department that prohibited high speed chases of drivers who had committed minor traffic violations; and (3) the off-duty police officer had testified falsely when he indicated that he had not pursued Mr. Pakes by driving the wrong way on one way streets. The Court of Appeal issued an order to show cause on the ineffective assistance of counsel claim.

The trial court denied relief without conducting an evidentiary hearing. The Court of Appeal summarily denied a renewed habeas petition and the California Supreme Court denied a petition for review.

At present, the case is pending in the federal district court. The court has issued an order to show cause and Mr. Pakes is awaiting the filing of the

Attorney General's answer.

F. The Lessons To Be Learned.

The primary lesson from Mr. Pakes' case is that appellate counsel should not be dissuaded from vigorously seeking a remedy merely because a daunting evidentiary burden must be borne. Ordinarily, a trier of fact is unlikely to credit the testimony of a convicted criminal over that of his trial lawyer. However, in Mr. Pakes' case, appellate counsel was able to produce corroborating evidence that established that Mr. Pakes was telling the truth. While this result will not occur on a frequent basis, Mr. Pakes' case demonstrates that it can be done.

A secondary and related lesson is that persistence is an enormous virtue in habeas litigation. In state court, trial counsel was able to successfully stonewall the investigation into his performance. However, appellate counsel did not give up. When the case reached federal court, appellate counsel was finally able to depose trial counsel and examine his file. While the investigation was delayed, it was eventually completed with an excellent result for Mr. Pakes.

The final lesson is that the pursuit of justice is nearly as important as the achievement of justice. In the first instance, Mr. Pakes was persuaded to enter a plea bargain that was worthless. Due to the diligent pursuit of habeas relief, Mr. Pakes was able to obtain the jury trial that he was previously

denied. While the trial did not end as well as Mr. Pakes would have liked, he nonetheless secured the satisfaction of having his peers adjudicate the question of guilt or innocence.

Of course, the final chapters of Mr. Pakes' story have not yet been written. The issues that will be litigated in federal court are strong and go to the heart of the case against him. With any luck, Mr. Pakes may yet be able to avoid the life sentence that resulted from his lapse in judgment.

CONCLUSION

A successful habeas lawyer must marshal multiple skills. Counsel must be attentive to the information that is provided by the client. Counsel must also be relentless in seeking information from both trial counsel and third parties. In examining the record on appeal, counsel must carefully consider whether any of the new information goes to the heart of the case. If it does, a successful habeas petition may be in the offing.

Habeas litigation is not for the faint of heart. The odds are stacked against the petitioner and the other players in the system are unsympathetic to habeas claims. Nonetheless, habeas corpus is often the only route to justice. I wish you the best of luck in traveling that road.