THERE'S ALWAYS SOMETHING

By Lori Quick

David Letterman does a skit called "Is This Anything?" in which a short act is presented after which Letterman and his sidekick Paul Shaffer discuss whether the act was something or nothing. As appellate counsel, we need to approach even a short record with the thought - at least the hope - that it's always something. Many times, particularly in guilty or nolo contendere plea cases, we begin our record review with the preconceived notion that absent a certificate of probable cause there will be virtually nothing to say. While this may be true much of the time, it is important to approach each case, regardless of whether there was a jury trial, a court trial, or a plea, with the attitude that there's always something.

In reviewing a record, it must be kept in mind that there is virtually no part of the record that can be considered unimportant. We have all read countless probation reports and most of the time, they consist of nothing more than a regurgitation of what was written in the police reports, which by their very nature will almost never be favorable to your client. We usually approach these reports anticipating perhaps very little need for legal analysis. However, there are cases, such as the case of Walter Jones, where even the probation report and the police reports raise huge red flags that must be heeded.

I.

THE CASE OF WALTER JONES

"The truth is rarely pure and never simple." - *Oscar Wilde* (1854-1900), The Importance Of Being Earnest, 1895, Act I

A. Who Is Walter Jones?

Walter Jones was born on December 30, 1961. His childhood was normal and by and large uneventful. He was a popular boy who never exhibited any aggressive tendencies. In November of 1984 at the age of almost 23, Mr. Jones was a passenger in a Porsche 911 when it hit a tree at a speed of approximately 100 miles per hour, ejecting all occupants from the vehicle. Mr. Jones suffered a right parietal temporal depressed skull fracture. An emergency CT scan revealed frontal effacement and subdural and epidural blood. An emergency craniotomy was performed and his life was saved. Mr. Jones remained in a coma for 30 days, and was hospitalized for three months.

Unfortunately, his recovery was not total. He was left with both physical and mental deficits including memory impairment. Mr. Jones was never the same. His behavior was like that of a child. He was very easily agitated and extremely attached to his mother. His thought patterns and behavior were at best eccentric and at worst bizarre. This led to others being impatient and intolerant of him, which exacerbated his paranoia and sense of being different and unfairly punished. He frequently misinterpreted the actions, comments, and intentions of others.

Because of the neurocognitive changes subsequent to his head injury, Mr. Jones was subject to unexpected periods of anger which could be triggered by minor, inconsequential events that a normal person would disregard. Mr. Jones suffered from unpredictable mood swings and would

harbor grudges for long periods of time. These were permanent disabilities and resulted in Mr. Jones being dependent on his parents for support. Over the years, Mr. Jones' behavior remained abnormal. He suffered from chronic dementia with impulsivity and a tendency to have behavioral outbursts. In 1993, Walter's father died. Walter was devastated and had a difficult time accepting his father's death. Walter continued to live with his mother, Trinidad "Linda" Jones. Linda eventually developed a relationship with a man named Lowell Noble. Noble was very good to Linda, but really did not want Walter in their lives. In 1998 Noble arranged for Walter to go to a recovery home run by Heaven's Gate, an organization now notorious for its members' commission of mass suicide in hopes of boarding a space ship. It was after that stay that Walter began talking about communicating with angels, demons, and animals.

B. What Happened On May 15, 1999?

On May 15, 1999, Noble, then age 72, asked Walter what he had done with a radio Noble had lent him. Walter replied that he had sold it. An argument ensued, and Walter began slapping Noble. Linda, who was then age 71, asked him to stop, but he knocked Noble to the ground. Linda immediately called 911. She then tried to intervene to protect Noble and Walter shoved her against the wall and began choking her. He continued to kick Noble as he lay on the floor. The 911 operator could hear Walter yelling obscenities and screaming "You are a demon!", "You are gonna die!", and "Die, you!" Linda lost consciousness. When she came to, she saw Walter still kicking Noble. She asked him to stop, and he left the house.

When police arrived at the house, Walter came out and refused to surrender. He screamed obscenities at the police. The confrontation eventually became a physical struggle during which a police officer used his baton and pepper spray to subdue him. Despite this, Walter fled, kicking a

pursuing officer in the stomach. He was finally subdued and taken into custody.

Linda Jones lost the vision in one eye due to severe facial trauma sustained when Walter slammed her against the wall. She also suffered a closed head injury and bruising all over her face and both arms. Noble fared far worse. He was maintained on life support for four days, and remained in the hospital for over a month. He had suffered a diffuse axonal injury, meaning there was bruising caused by linear and rotational force placed on the brain which tears the strands of the nerves. He had experienced bleeding throughout the brain. Little could be done to reverse the injury, and so while he was hospitalized his treatment was focused on preventing secondary injuries such as strokes. The prognosis was that he would never be the same in that he would always have some deficits. This proved to be true. Prior to the incident, Noble had lived independently and had run his own technology business. He had been an inventor with 17 patents to his name. Afterward, he admitted to his daughter that he was confused by a restaurant menu. His vision was also impaired.

II.

THE LEGAL PROCEEDINGS

"If you really want to do something, you will find a way. If you don't, you will find an excuse."
- *Anonymous*

A. The Charges

Based on the events of May 15, 1999, Walter Jones was charged with one count of aggravated mayhem (Penal Code section 205); two counts of elder abuse under circumstances likely to produce great bodily harm or death (Penal Code section 368, subd. (b)(1)), each of which carried

great bodily injury enhancements (Penal Code section 12022.7, subd. (c)) and allegations that the victim was 70 years of age or older (Penal Code section 368, subd. (b)(2)(B)); and one count of battery on a peace officer (Penal Code sections 242-243, subd. (b).)

B. The Plea And Sentence

On September 15, 1999, on the advice of counsel, Walter pled guilty to all charges and admitted all enhancements. He was sentenced to the mandatory term of life with possibility of parole for the mayhem. He was sentenced to serve the upper term of four years on one of the elder abuse charges, plus a consecutive five year term for the great bodily injury enhancement. The sentence for the other elder abuse charge was stayed pursuant to Penal Code section 654. His total prison commitment was life with possibility of parole consecutive to nine years.

Upon reading the probation report during a Wende review, it was abundantly clear that Mr. Jones had serious mental health issues. Even more clear was the fact that the elements of aggravated mayhem (Penal Code section 205) simply could not be proved.

C. The Initial Review Of The Case

The case was assigned on an independent basis to a panel attorney. He submitted the record to me for a Wende review. I immediately determined that the record was incomplete. Only a portion of the sentencing hearing, which was rather a lengthy one, had been transcribed. Thus, we did not have a reporter's transcript of testimony by Walter's mother and sister; a friend who had known him since the fourth grade; and a psychiatrist who had been retained by defense counsel to evaluate (1) whether Walter suffered from organic impairment and irrational thought processes; and (2) if so, whether they were mitigating factors in explaining his conduct.

Even without this portion of the record, I was deeply concerned about whether Walter had

been adequately represented by trial counsel. First of all, to be guilty of aggravated mayhem, Penal Code section 205 requires the specific intent to cause the maiming injury. (People v. Lee (1990) 220 Cal.App.3d 320, 324-325; People v. Ferrell (1990) 218 Cal.App.3d 828, 832-833; see also People v. Hill (1994) 23 Cal.App.4th 1566, 1569, fn. 2.) Evidence which shows no more than an indiscriminate attack on the body of the victim is insufficient to prove the specific intent to commit mayhem under section 205. In addition, that specific intent cannot be inferred solely from evidence that the injury inflicted constitutes mayhem; instead, there must be other facts and circumstances which give rise to an inference of intent to maim rather than attack indiscriminately. (Lee, supra, at p. 325; Ferrell, supra, at p. 835.)

Based on the information I had, it appeared that Walter's attack on his mother was nothing more than an indiscriminate attack. In fact, it appeared that the injury to Mrs. Jones' eye occurred when she was shoved against the wall. This clearly does not give rise to the inference that Walter intended the maiming injury. Thus, I believed there may have been insufficient evidence to support the charge, and Walter should not have been advised to plead guilty.

In addition to the factual scenario possibly not supporting an aggravated mayhem charge, the psychiatric evaluation clearly indicated that Walter may very well not have known right from wrong at the time of the offense, yet he pled to the sheet before preliminary hearing. For some reason trial counsel did not have the psychiatric evaluation done until **after** the plea despite the knowledge that Walter had brain damage. And then, once she received it, she made no efforts to have the plea withdrawn.

Evidence of a mental disorder is admissible solely to negate whether or not the defendant actually formed a required specific intent when a specific intent crime is charged. (Penal Code

section 28, subd. (a); People v. Reyes (1997) 52 Cal.App.4th 975, 982.) Thus, it appeared to me that there may have been a defense even in addition to that of insufficiency of evidence. I was also concerned when I saw that trial counsel asked the court to sentence Walter to a state hospital or to a "short prison" sentence despite the fact that the court had no discretion to do that since Penal Code section 205 mandates a sentence of life with possibility of parole.

I asked the panel attorney to obtain the rest of the reporter's transcript of the sentencing hearing and to contact trial counsel to find out why Walter was advised to plead to the aggravated mayhem charge despite the case law above which indicates that the evidence may have been insufficient to support such a charge. I also asked him to find out why trial counsel asked the court to sentence Walter to something other than life with possibility of parole without providing the court with any legal authority permitting it to do so. I was also concerned, given Walter's mental state, that perhaps he had not quite understood the consequences of the plea.

I urged the panel attorney to investigate whether counsel was ineffective in failing to investigate a defense based on appellant's history of mental illness. To render reasonably competent assistance, an attorney in a criminal case must perform certain basic duties. Generally, the Sixth Amendment and article I, section 15 of the California Constitution require counsel's diligence and active participation in the full and effective preparation of his client's case. Criminal defense attorneys have a duty to investigate *carefully* all defenses of fact and of law that may be available to the defendant. (People v. Pope (1979) 23 Cal.3d 412, 425-426.)

The California Supreme Court has also repeatedly held that to render reasonably competent assistance, an attorney bears certain basic responsibilities, *including the investigation of available defenses* and, in an appropriate case, the obtaining of a psychiatric examination. (People v. Frierson

(1979) 25 Cal.3d 142, 160-161; Pope, supra, at pp. 424-425.) Under the circumstances of a particular case, the failure of defense counsel to investigate cannot be considered reasonable; consequently, the resultant choice of defense strategy cannot be justified as an informed tactical decision. (In re Hall (1981) 30 Cal.3d 408, 426.) The dereliction of the duty to investigate available defenses is especially significant where trial counsel decides to withhold a mental or psychiatric defense from trial without first investigating the availability of such a defense. (Frierson, supra, at pp. 162-163, citing In re Saunders (1970) 2 Cal.3d 1033, 1048-1049 [counsel's decision was made without the benefit of *substantial factual inquiry* into the specifics of petitioner's mental condition where he undertook no serious efforts to obtain available medical reports or to have petitioner examined by a psychiatrist. Although counsel's decision not to raise the defense was made for "tactical" and "strategic" reasons, the failure of counsel to avail himself of information relevant to the defense removed all rational support from that decision. By failing to make any effort at all to follow the lead afforded by information in his possession counsel precluded himself from making a rational decision on the question].) Even if counsel has legitimate tactical reasons for introducing no evidence, her performance is still inadequate if evidence supporting a potentially meritorious defense remains unexplored. (In re Cordero (1988) 46 Cal.3d 161, 181.)

Federal courts relying on the Strickland decision have held that a failure to investigate defenses based upon the defendant's mental health is ineffective assistance. (Bouchillon v. Collins (5th Cir. 1990) 907 F.2d 589, Profitt v. Waldron (5th Cir. 1987) 831 F.2d 1245, Beavers v. Balkcom (5th Cir. 1981) 636 F.2d 114.)

Walter is a man who by all accounts suffered severe and permanently debilitating brain damage in 1984. Trial counsel did not bother to investigate this defense even though he was charged

with a specific intent crime which carried a life term. Even when she obtained the psychiatric evaluation indicating that Walter may not have known right from wrong at the time, she did nothing with it except to ask the court to impose a "short prison sentence". She did not ask the court to dismiss the aggravating portion of the charge pursuant to Penal Code section 1385 so to make Walter eligible for a determinate term. Nothing in the record suggested that she had considered the possibility of doing so.

Obviously, a very aggressive habeas investigation needed to be done here. Trial counsel had to be contacted so that it could be determined why she advised Walter to plead to the aggravated mayhem charge; why she thought there was sufficient evidence of aggravated mayhem despite case law to the contrary; why she did not have a psychiatric evaluation done until after the plea; why she did not ask the court to appoint counsel to bring a motion to withdraw the plea once she received the psychiatric evaluation; and why she thought the court could sentence Walter to a state hospital or to a short prison sentence in spite of the language of section 205.

D. The Panel Attorney's Investigation

"Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing every happened." - *Sir Winston Churchill* (1874-1965)

The panel attorney first submitted a letter pursuant to California Rules of Court, rule 35(e)[1] for the remainder of the reporter's transcript of the sentencing hearing. When we received the transcript, it revealed that Walter had never been aggressive or violent until after the accident in

[1] Now renumbered to rule 32.1(b).

which he sustained brain damage. It further revealed that it was after his association with Heaven's Gate that he began believing he communicated with demons and angels. Most telling was the testimony of Dr. David Echeandia, who opined that Walter was experiencing acute symptoms of a mental disorder during the assault on Linda and Noble. Dr. Echeandia pointed out that during the incident, Walter had referred to the victims as "demons", and stated that several sources of information led him to believe that Walter was actually seeing one if not both of the victims as demons.

Dr. Echeandia noted that jail staff recorded Walter's references to demons, angels, and inventions. Walter thought Noble was a demon because he often wore red. These references were made immediately upon being booked. Jail medical staff had determined that Walter was psychotic. He suffered through an extended period of psychotic disturbance for a couple of weeks before the anti-psychotic medications caused the more acute symptoms to recede. Dr. Echeandia's diagnosis was that Walter suffered from dementia and organic personality disorder.

Armed with this very important information, the panel attorney also contacted Walter's trial attorney, a Santa Clara County public defender. Interestingly enough, Walter's case was one of the last cases, if not the last case, that she had handled before retiring. Trial counsel stated in a letter that she had thoroughly discussed the case with her supervisors and they all concurred that Walter would be "more successful" if he did not have a trial. She acknowledged that Walter had suffered a serious head injury with subsequent psychological and neuropsychological dysfunction which led to cognitive deficits, behavioral outbursts, impulsivity, and aggressive behavior. She stated that she did not believe an insanity defense would be successful, though she had considered whether Walter's mental deficiencies could be used as a defense to negate specific intent. She also stated

that she had not tried to use an insanity defense because "if it was successful, Mr. Jones would never be released from psychiatric custody, because his behavior stemmed from a brain trauma which would not respond to treatment." With respect to her request for a short prison sentence, trial counsel stated that she had "requested a short determinative [sic] prison sentence before he would begin his life sentence with eligibility for parole. However, I did explain to Mr. Jones that in my opinion he would never be released from custody."

Because trial counsel's letter did not address the paucity of evidence to support the aggravated mayhem charge, the panel attorney wrote to her again specifically asking her to summarize the evidence that suggested to her that Walter had a specific intent to cause the injury as a result of which Linda Jones lost the sight in one eye.

E. The Petition For Writ Of Habeas Corpus In the Court Of Appeal

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"Facts do not cease to exist because they are ignored." - *Aldous Huxley* (1894-1963), "Proper Studies", 1927

The panel attorney filed a Wende brief accompanied by a petition for a writ of habeas corpus. The petition argued that the judgment of guilt should be reversed because defense counsel made numerous errors which had the cumulative effect of depriving appellant of the effective assistance of counsel. The panel attorney pointed out that a forensic report prepared prior to the entry of Walter's guilty plea suggested that an insanity defense could possibly be raised, and stated that further studies should be done to determine whether such a defense could in fact be raised. Despite this, trial counsel had failed to request any additional mental examinations; failed to advise Walter of the possibility of raising an insanity defense; and failed to make a motion to withdraw the guilty

plea.

The Sixth District Court of Appeal affirmed the judgment and summarily denied the petition for writ of habeas corpus.

F. The Petition For A Writ Of Habeas Corpus In The California Supreme Court

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"Victory belongs to the most persevering." - *Napoleon Bonaparte* (1769-1821)

Following the affirmance of the judgment and denial of the petition by the Court of Appeal, the panel attorney filed a petition for review as well as a new petition for writ of habeas corpus in the California Supreme Court. The petition was virtually identical to that filed in the Court of Appeal with one very important addition: a declaration from trial counsel's supervisor contradicting her story that she had thoroughly discussed the case with him and that he had concurred with her decision to advise Walter to enter a guilty plea.

This information was obtained somewhat serendipitously. Michael Kresser, executive director of SDAP, had been a personal acquaintance of the supervising attorney for many years and was quite surprised by trial counsel's rendition of events. Michael contacted the supervising attorney, who was equally surprised. Michael relayed this information to me, and I in turn tipped off the panel attorney. He then contacted the supervising attorney who prepared a declaration stating that he had read the petition for writ of habeas corpus as well as trial counsel's letter to the panel attorney describing her thought process. The supervising attorney stated further that had he known all the facts which were set forth in the petition, he would not have recommended an early guilty plea without a thorough consideration of how certain facts, such as Walter's head injury, would

support a plea of not guilty by reason of insanity or would support a defense to specific intent charges or might mitigate the sentence. The supervising attorney further stated that he could not imagine that he would have advised trial counsel to have Walter plead to all counts and enhancements, including an aggravated mayhem, had he been presented with all the available facts.

G. Issuance Of The Order To Show Cause And The Proceedings In The Trial Court

The Supreme Court issued an order to show cause returnable in the trial court where following an evidentiary hearing, Walter's conviction was reversed. The district attorney chose to retry him, charging him with two counts of attempted murder as to Linda Jones and Lowell Noble (Penal Code sections 664/187); two counts of elder abuse under circumstances likely to cause great bodily injury as to Linda Jones and Lowell Noble (Penal Code section 368, subd. (b)(1)), each with a great bodily injury enhancements (Penal Code section 12022.7, subd. (e)); two counts of assault by means of force likely to cause great bodily injury as to Linda Jones and Lowell Noble (Penal Code section 245, subd. (a)(1)); one count of resisting, delaying, or obstructing a peace officer (Penal Code section 148, subd. (a)(1)); and one count of battery against a peace officer (Penal Code section 243, subd. (b).) Interestingly enough, the charge of aggravated mayhem was dropped. As to the two attempted murder counts, the information alleged that Walter acted willfully, deliberately, and with premeditation. (Penal Code sections 664, 187, 189.) As to all of the charges with the exception of the two involving peace officers its was alleged that Walter personally inflicted great bodily injury on a person more than 70 years old. (Penal Code section 12022.7, subd. (c).)

Walter pled not guilty by reason of insanity. Following the guilt phase, the jury deliberated for more than five days before advising the court that it was hopelessly deadlocked as to the

allegations that Walter had acted willfully, deliberately, and with premeditation on the two attempted murder charges. As to those allegations, a mistrial was declared. The jury later returned verdicts of guilty on all eight counts and found all remaining special allegations to be true.

Following the sanity phase of the trial, the jury concluded that Walter was sane. He was sentenced to a total term of 16 years in state prison as opposed to his initial sentence of life in prison with possibility of parole consecutive to nine years.

III.

CONCLUSION

> "Here lies Jack Williams. He done his damnedest." - epitaph on a grave marker in the cemetery at Tombstone, Arizona

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Walter Jones, a man who had suffered a severe injury resulting in irreversible brain damage and who basically operates at the intellectual and emotional level of a 10-year-old, was sentenced to life in prison because his attorney simply did not take a good, hard, analytical look at the facts surrounding the offenses Walter had committed. This error was almost compounded when the panel attorney failed to ensure that the record was complete, and failed entirely to recognize that Walter had not been effectively advised before entering his guilty plea. Cases like that of Walter Jones have important lessons to teach.

A. Approach The Record With Curiosity

In reading a record, have the mind set that anything could have happened. This case involved a guilty plea following a serious crime in which two people were severely injured. Absent a certificate of probable cause, one's initial expectation would be that if anything, there would be

nothing more than some minor sentencing issues. A perfunctory reading of the record would reveal that Walter was appropriately voir dired before entering his plea, and that he was correctly sentenced to the crimes to which he admitted. But if we begin our record review with the idea that there's almost always something, we may be surprised at what will turn up.

B. Be Sure The Record Is Complete

There is virtually no part of the record that does not at least have the potential to be important to the appeal. In the case of Walter Jones, I saw that a large portion of the reporter's transcript of the sentencing hearing was missing. This portion turned out to contain the testimony given by Walter's family and friends attesting to his mental state, and more importantly, the testimony of a mental health professional whose opinion it was that Walter was experiencing acute symptoms of a mental disorder during the assault.

C. Was The Client Properly Advised To Plead Guilty?

Even in guilty plea cases, always check to see whether it appears there was sufficient evidence to support the charges which the client was advised to admit. Granted, there may be times when it is wise to advise a client to plead to something that perhaps the district attorney possibly could not prove to avoid being charged with something worse that certainly could be proved. However, whenever the charge appears to be unsupported by what is known about the facts of the case, start investigating. Ask both the trial attorney and the client for the strategy behind the plea. There may be a reasonable strategy, and there may not be, in which case there is some explaining to do. In this case, it did not appear that there was sufficient evidence to support an aggravated mayhem charge. Trial counsel's strategy was to advise the client to plead to this to avoid two attempted murder charges. This was not a reasonable strategy since the aggravated mayhem carried

a mandatory sentence of life in prison. The client received no real benefit from that plea bargain. So the reasons given by counsel must be carefully considered to determine whether there was a strategic decision to proceed in a particular way, and if so, whether it was a reasonable one.

D. Don't Be Afraid To Ask The Tough Questions And To Follow Through

No one wants to unnecessarily ruffle feathers. Unfortunately, it is sometimes necessary. In this case, the panel attorney did not simply accept at face value trial counsel's assertions that her supervisors agreed with her strategy. By questioning the veracity, or at least the accuracy, of that statement, he discovered that it wasn't necessarily so. Her supervisors had not been aware of all the facts at the time the case was discussed. So it paid off here to check further and verify what had occurred with each person along the time line from arraignment to sentencing.

E. Don't Hesitate To Ask SDAP For Help Or Advice

Many times, we at SDAP have resources available to us that panel attorneys may simply not be in a position to know about. For example, in the case of Walter Jones, Michael Kresser just happened to have a personal relationship with the supervising attorney, disbelieved trial counsel's assertion that the supervising attorney had agreed with her handling of the case, and was able to discuss the case with him. The resulting declaration contradicting trial counsel in all probability played a large part in the Supreme Court's decision to issue the order to show cause. Feel free to discuss with us what your investigation has turned up. We may be able to tap into resources that may not otherwise be available or known to you.

F. Closing

In closing, habeas work can be difficult, demanding, and time consuming. It can also be extraordinarily rewarding to you as appellate counsel, and invaluable to your client. We at SDAP

will do all we can to support your efforts in this area where there exists a legitimate basis for a habeas petition.