THE LESSONS TO BE LEARNED FROM THE PAUL MAGNAN CASE.

By: Dallas Sacher

If one practices criminal defense long enough, a few cases will come along which either break your heart or provide a rare victory in which ultimate justice is achieved. Having practical criminal defense for over twenty years, I have handled several cases which still inhabit my dreams. The case of Paul Magnan is one where the dream ends happily. This article will explore the lessons which can be learned from Mr. Magnan's case.

In my commentary, I detail a number of errors which were made by Mr. Magnan's several post-conviction lawyers (myself included). In making these criticisms, I intend no disrespect to the lawyers in question. All of Mr. Magnan's lawyers performed in a dilignet and ethical manner. The mistakes made by counsel are discussed solely as an educational vehicle and not as a means to dishonor the hard working lawyers who desired to do an excellent job for Mr. Magnan.

I.

THE LIFE STORY OF PAUL MAGNAN.

Mr. Magnan was born in Minnesota in 1952. Upon completing high school, Mr. Magnan enlisted in the Air Force. Although he avoided Vietnam, Mr. Magnan acquired a heroin habit in the service.

Back home in Minnesota, Mr. Magnan struggled with his drug addiction. However, he remained a productive citizen and obtained training and employment as an electronics

technician.

In 1981, Mr. Magnan succumbed to his drug addiction and committed two separate pharmacy robberies. Although no one was injured during the robberies, Mr. Magnan was sentenced to five years in prison.

Following his release, Mr. Magnan battled his addiction for twelve years. As was noted by a drug counselor with whom Mr. Magnan was in frequent contact, he "many times sought treatment when there was no coercive motivation such as a criminal charge driving him there as an alternative to incarceration." (March 7, 2001 letter of Dan Cain.)

In the course of his drug addiction, Mr. Magnan committed minor crimes. In 1989 and 1997, Mr. Magnan was sentenced to short prison terms for possession of burglary tools and being an ex-felon in possession of a firearm.

In 1994, Mr. Magnan entered a relationship with a woman. A daughter was born to the couple. When the relationship broke up, Mr. Magnan retained custody of his daughter.

In 1999, a lifelong friend who had relocated to California asked Mr. Magnan for his assistance in moving back to Minnesota. When Mr. Magnan arrived in California, his friend changed her mind and decided not to move. Mr. Magnan was left adrift without employment but with a drug addiction.

II.

A RESUME OF THE LEGAL PROCEEDINGS.

The following pages provide a fairly authoritative account of the proceedings in Mr.

Magnan's case. This account provides the necessary background for the lessons to be learned.

A. The Facts Adduced At Trial.

Events of May 5, 1999

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.

Events of June 11, 1999

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 which 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. However, Officer Forbes also 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 Ms. 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 Tellifson testified as an expert regarding whether methamphetamine is possessed for sale. Officer Tellifson 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 Charges.

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 charged under the Three Strikes law. Ms Mhoon was not charged.

In his closing argument, defense counsel, David Epps, conceded Mr. Magnan's guilt

as to all counts except for the possession for sale of methamphetamine. As to that count, Mr. Epps argued that the methamphetamine was possessed by Ms. Mhoon.

C. The Verdict and Punishment.

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.

D. The Initial Communication From Mr. Magnan.

Vicki Firstman was the first SDAP staff attorney assigned to Mr. Magnan's case. Before the record on appeal was filed, Vicki received a lengthy letter from Mr. Magnan. In material part, Mr. Magnan indicated that the $300 found on his person had been sent to him by his family via Western Union. Mr. Magnan concluded his letter by noting that he was looking for "any help you can give (miracles included)."

E. The Initial Review Of The Record On Appeal.

We assigned Mr. Magnan's case to panel attorney Steve Antler. When Vicki became ill, I took over the case as the assisting attorney.

Upon my initial review of the record, I was left with a disquieting feeling. The case made no sense to me. For all the world, Ms. Mhoon looked like the guilty party. The methamphetamine was found at her feet in a vehicle which was under her control. Ms.

Mhoon was an admitted meth freak whereas Mr. Magnan tested positive for opiates on the night in question.

In my judgment, there was only a single piece of legitimate evidence which pointed to Mr. Magnan's guilt: The methamphetamine was found in pack of Camels and Mr. Magnan had a full pack of Camels in his pocket. However, insofar as the pickup was littered with trash, it was quite plausible that Ms. Mhoon had retrieved an empty Camel's pack from the mountain of garbage in the vehicle.

As I read the record, I was struck by the absurdity of the primary theory advanced by the prosecutor in his closing argument. Insofar as 21.69 grams were found in the vehicle, the prosecutor assumed that the owner of the drugs had already sold 7 grams from what was originally an ounce (i.e. 28 grams). Since his "expert" had testified that 7 grams would sell for $300, the prosecutor argued that Mr. Magnan possessed the drugs since he had $300. In my view, this reasoning was entirely circular. In the absence of *any* evidence that Mr. Magnan was selling drugs, his possession of $300 proved nothing.

In my assisting memo to Mr. Antler, I suggested that he would need to investigate several possible claims of ineffective assistance of counsel. These claims included: (1) whether Mr. Epps had investigated Mr. Magnan's assertion that he had received $300 from his family; (2) whether Mr. Epps had erred by failing to object to the prosecutor's argument to the jury that Mr. Magnan's poverty was proof of his motive to sell drugs; (3) whether Mr. Epps had erred by adducing the fact that the police had found the Camel pack on Mr.

Magnan's person even though the prosecutor had not yet broached the topic; and (4) whether Mr. Epps had investigated Mr. Doyle's criminal history. With regard to the latter point, I dispatched the SDAP paralegal to the Santa Clara County Superior Court in search of any criminal cases which had been brought against Mr. Doyle.

F. Mr. Antler's Investigation.

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

Mr. Antler conducted a telephone interview with Mr. Epps. Mr. Antler made contemporaneous notes of the conversation. Mr. Epps told Mr. Antler that Mr. Magnan had informed him during trial that he had received the $300 from his mother via Western Union. Mr. Epps 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 Mr. Antler's request, our paralegal examined the Superior Court files for any additional cases involving Ms. Mhoon. As a result, we 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 light of the police report, Mr. Antler wrote to the trial prosecutor and demanded that he divulge the "information" regarding Ms. Mhoon's drug dealing. Mr. Antler advised the prosecutor that he was required to reveal the "information" pursuant to *Brady v. Maryland* (1963) 373 U.S. 83. The prosecutor did not provide the "information" in question.

G. Mr. Antler's Habeas Petition.

Mr. Antler 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* by failing to disclose the criminal records and police reports regarding Ms. Mhoon and Mr. Doyle; (2) Mr. Epps had performed ineffectively when he failed to investigate the criminal records of Ms. Mhoon and Mr. Doyle; (3) Mr. Epps performed ineffectively when he adduced the fact that a Camel pack had been found on Mr. Magnan's person; and (4) Mr. Epps 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.

Mr. Antler did not raise any claim regarding Mr. Epps' failure to investigate the $300 found on Mr. Magnan's person. In making this decision, Mr. Antler accepted Mr. Epps' explanation that he was unable to conduct an investigation since Mr. Magnan did not know where he had picked up the money. However, Mr. Antler failed to contact Mr. Magnan's mother in Minnesota.

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

The Court of Appeal 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 attorney Andrew Tursi to represent Mr. Magnan.

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,* Mr. Tursi did not take any further investigative steps. Rather, he simply argued in his traverse that the trial prosecutor had failed to disclose material evidence.

In preparing his traverse, Mr. Tursi worked with a fledgling attorney Derryl Molina. Unlike Mr. Antler, Ms. Molina finally took the step of calling Mr. Magnan's mother, Carol White. In their conversation, Ms. White confirmed that she had wired money to Mr. Magnan from the Western Union office in Brainerd, Minnesota.

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

I. The Ruling Of The Superior Court.

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." (Order of September 15, 2004, p. 2.) 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.

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

Following the denial of relief in the trial court, I personally undertook Mr. Magnan's representation. I recognized that the trial court's analysis was correct insofar as it held that Mr. Tursi had failed to factually develop his theories.

It was easy to remedy the deficiency concerning the Western Union money order. I contacted Mr. Magnan who informed me that he had told Mr. Epps about the money order well before trial. Mr. Magnan provided a declaration to this effect.

As for the *Brady* claim, I wrote to the District Attorney and clearly and unequivocally demanded that Officer Manion be compelled to reveal the nature of the "information" which he had received. In response, the District Attorney advised me that the "information" had come from the managers of the storage facility who had witnessed foot traffic at Ms. Mhoon's unit.

In the renewed habeas petition, I included all of the claims which had originally been pled by Mr. Antler. I also raised the new claim that Mr. Epps 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.

In pleading the new theory, I was well aware that it was arguably subject to the discretionary rule that new claims may not be raised in a successive petition. (*In re Clark,* supra, 5 Cal.4th 750, 774.) However, I made a tactical decision not to discuss the issue. It was my hope that both the Court of Appeal and the Supreme Court would summarily deny relief. In this way, the claim could be brought in federal court without the burden of a state procedural default. (See *Lee v. Kemna* (2002) 534 U.S. 362, 375; *Coleman v. Thompson* (1991) 501 U.S. 722, 729 [discussing the problem of state procedural default].)

Aside from the new issue regarding the Western Union money order, I also noticed another claim which I had missed on my original review of the record on appeal. At trial, the prosecutor argued to the jury that Mr. Magnan must have tossed the drugs into the pickup when he first saw the police. However, at the preliminary hearing, Officer Gonzalez had testified that Mr. Magnan's hands were above his head when the police came on the scene. Since Mr. Epps had failed to introduce this evidence, I advanced a claim of ineffective assistance of counsel due to this omission.

The Court of Appeal summarily denied the petition. Within the requisite ten days, I filed a petition for review. (California Rules of Court, rules 24(b)(2)(A) and 28(e)(1) [petition for review is due within 10 days when habeas petition is summarily denied and a direct appeal is not decided the same day].)

K. The Proceedings In the California Supreme Court.

To my amazement, the Supreme Court directed the Attorney General to file an answer to our petition for review. As I had feared, 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, I marshaled a number of arguments: (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 Mr. Tursi'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 Mr. Epps rendered the trial "fundamentally unfair." (*Id*. at p. 797, fn. omitted.)

Miraculously, 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...." (Supreme Court order of July 13, 2005.)

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L. The New Proceedings In The Superior Court.

Following the Court of Appeal's issuance of the order to show cause, I resolved to personally represent Mr. Magnan in the Superior Court. I contacted Steve Avilla who runs

the Santa Clara County Conflicts Program. Mr. Avilla agreed to appoint me.

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

After reviewing Mr. Epps' declaration, I contacted Mr. Antler. Fortunately, Mr. Antler had preserved his notes from his November 9, 2001 phone conversation with Mr. Epps. As a result, Mr. Antler prepared a declaration in which he indicated that Mr. Epps 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.

In my traverse, I solicited the District Attorney's stipulation concerning the truth of Mr. Antler's declaration. Failing such a stipulation, I requested an evidentiary hearing. Soon thereafter, Judge Gilbert Brown calendared an evidentiary hearing.

M. The Evidentiary Hearing.

At the evidentiary hearing, it was our burden to establish that Mr. Epps' failure to investigate the money order was an error which fell below the objective standard of prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In order to shoulder this burden, I determined that it would be helpful to present expert testimony concerning the standard of care in the community.

I consulted with Mr. Avilla who agreed to provide a fee for an expert. Mr. Avilla

suggested that I should contact veteran San Jose attorney Allen Schwartz. After I provided Mr. Schwartz with the facts of the case, he agreed to testify. Ms. Schwartz offered his opinion that: (1) Mr. Epps should have talked to Mr. Magnan about the genesis of the money prior to trial; and (2) even if he did not learn about the source of the money until the middle of the trial, Mr. Epps erred by failing to take the simple investigative step of phoning Mr. Magnan's mother.

By the time of the evidentiary hearing, Mr. Epps' memory had been refreshed by Mr. Antler's declaration. Mr. Epps testified that Mr. Magnan had told him about the Western Union money order during either the testimony of Ms. Mhoon or Officer Tellifson. Mr. Epps conceded that he should "probably" have sought a continuance to investigate the information. However, he acknowledged that he had made no attempt to conduct an investigation.

For his part, Mr. Magnan testified that he had told Mr. Epps 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 Tellifson's testimony.

When Mr. Schwartz was called to the witness stand, he was greeted with enormous cordiality by Judge Brown. Before a single question could be asked, Judge Brown suggested that the District Attorney should stipulate that Mr. Schwartz was qualified to testify as an expert on the defense of possession for sale cases. Mr. Schwartz testified to his opinion that Mr. Epps had erred by failing to conduct an investigation of the information provided by Mr.

Magnan.

At the conclusion of the first day of the hearing, Judge Brown suggested that the "issue was going to be prejudice." Taking the judge's hint, I prepared a brief on the issue prior to the next hearing. A copy of the brief is attached to this article.

On the second day of the hearing, Judge Brown read his decision from the bench. Judge Brown noted that Mr. Schwartz is "a recognized expert in the field of criminal law ...." (Superior Court order of January 5, 2006, p. 2.) Judge Brown held that Mr. Epps had erred by failing to investigate the source of the $300. With regard to the issue of prejudice, Judge Brown acknowledged that the prosecutor had substantially relied on the thesis that the $300 was the fruit of drug dealing. Judge Brown 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." (Superior Court order of January 5, 2006, pp. 2-3.)

N. The Ultimate Resolution Of The Case.

Following the granting of the habeas petition, Mr. Schwartz took over as Mr. Magnan's lawyer. Shortly thereafter, the District Attorney elected not to retry the possession for sale count. However, Mr. Magnan remained potentially liable for a life sentence due to his possession of heroin conviction.

Mr. Schwartz 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 had 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. Mr. Magnan is on parole and will most likely have to remain in California until his maximum parole period of November 7, 2007 is reached.

III.

THE LESSONS TO BE LEARNED.

It is a truism that the hardest lessons learned in life are those which have the greatest staying power. In Mr. Magnan's case, his attorneys failed him on a number of occasions. However, at the end of his journey through the legal system, Mr. Magnan received justice. The following aspects of Mr. Magnan's case may be of benefit to counsel in handling future appeals and habeas petitions.

A. Appellate Counsel Must Pay Close Heed To What The Client Has To Say.

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 pay sufficient attention to the information which he provided.

Upon my initial review of the record on appeal, it was starkly apparent that a key aspect of the government's case was the thesis that Mr. Magnan was a drug dealer since he had $300 in his possession. The prosecutor repeatedly argued this point to the jury. (RT 307

["He's got $300. Bingo, Bingo."].) Thus, it was manifest that reversal could be obtained by showing that the prosecutor's thesis was entirely false.

Significantly, in the early stages of the appeal. Mr. Magnan provided his mother's name and phone number to Mr. Antler and indicated that she would be helpful in tracking down documentary proof that she had wired him money shortly before his arrest. Although it would have been a simple task to perform, Mr. Antler failed to call Mr. Magnan's mother. Had he done so, the exculpatory Western Union document might have been obtained in 2002 instead of 2004 when successor counsel finally contacted Mr. Magnan's mother.

The lesson to be learned is that appellate counsel must pay close attention to what the client has to say. Although our clients often barrage us with irrelevant or misleading information, it is also true that clients sometimes provide a glistening nugget of information which can lead to freedom.

In this case, successor counsel Derryl Molina listened to Mr. Magnan and spoke to his mother. As a result, Mr. Magnan is a free man today.

B.	A Habeas Investigation Must Be Thorough And Complete.

It is important to note that Mr. Antler made a conscientious effort to investigate Mr. Magnan's claim regarding the Western Union money order. Mr. Antler contacted Mr. Epps and learned that Mr. Epps had not investigated the matter since Mr. Magnan could not recall the location of the Western Union office where he received the money. After obtaining this information from Mr. Epps, Mr. Antler made a nearly fatal decision when he failed to further

his investigation.

The critical error made by Mr. Antler lies in the fact that he abandoned his investigation even though he had not ascertained the truth or falsity of Mr. Magnan's account. This was a serious mistake since the omitted evidence, if it existed, went to the heart of the case. Given the importance of the evidence, the investigation should not have been concluded without, at the very least, a phone call being made to Mr. Magnan's mother.

The identical lesson can be drawn from Mr. Tursi's failure to adequately investigate the *Brady* issue. While the case was on appeal, Mr. Antler made a written demand to the trial prosecutor for the disclosure of Officer Manion's "information" that Ms. Mhoon was dealing drugs. Insofar as the prosecutor stonewalled the request, Mr. Antler was powerless to do anything further other than to allege a *Brady* violation in his habeas petition.

However, the legal circumstances shifted dramatically once the Court of Appeal issued an order to show cause. At that point, Mr. Magnan's counsel had every right to compel the District Attorney to disclose the "information." If the District Attorney refused to do so voluntarily, Mr. Tursi could have filed a discovery motion. (*In re Scott* (2003) 29 Cal.4th 783, 814; *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1241-1242 [discovery motion may be filed once OSC is issued].)

As a result of Mr. Tursi's failure to press for disclosure of the "information" known to Officer Manion, the trial court rejected the *Brady* claim as factually undeveloped. While I was able to subsequently jawbone the District Attorney and obtain the factual basis

underlying the "information," the witnesses in question were never contacted since the eventually issued OSC did not include the *Brady* claim.

It is a matter of speculation as to whether the *Brady* claim would have succeeded had Mr. Tursi made a concerted effort to learn the identities of the witnesses who believed that Ms. Mhoon was dealing drugs. However, Mr. Tursi most certainly dropped the ball by truncating his investigation. In future cases, we should be sure that we do not make the same mistake.

C. It Is Never Too Late To Investigate An Issue.

Derryl Molina has a valuable lesson to teach. In 2004, Ms. Molina was a brand new lawyer with no experience in criminal law. Nonetheless, she was instrumental in securing Mr. Magnan's release.

Although Mr. Antler had failed to contact Mr. Magnan's mother, Ms. Molina did so. Notwithstanding her inexperience, Ms. Molina recognized the significance of the source of Mr. Magnan's $300. Through her contact with Mr. Magnan's mother, sufficient information was gleaned so that a subpoena duces tecum could be issued to Western Union. The document sent by Western Union led to Mr. Magnan's habeas remedy.

Mr. Magnan was tried in 2000 and his appeal began in 2001. Several years passed before Ms. Molina conducted her investigation. Like Yogi Berra, Ms. Molina has taught us the lesson that "It's never over until it's over."

There is an interesting coda to this story. Ms. Molina has told me that she will never

again work on a criminal case. Although Mr. Magnan eventually won his case, Ms. Molina found it to be too painful when habeas relief was initially denied by the trial court.

D. It Is Never Too Late To Raise A Meritorious Issue.

I personally undertook Mr. Magnan's representation after the Superior Court had already denied habeas relief. After I took over, I realized that two strong issues had not been raised. I was not deterred from belatedly presenting the claims.

The primary issue involved the source of Mr. Magnan's $300. Although the issue was mentioned in the traverse filed in the Superior Court, the point was procedurally defaulted since the filing of an amended or supplemental petition was required. (*In re Clark,* supra, 5 Cal.4th 750, 781, fn. 16.)

Indeed, when the California Supreme Court asked the Attorney General to file an answer to Mr. Magnan's petition for review, the Attorney General argued that the issue had been defaulted. Fortunately, the Supreme Court did not agree. The message from this result is that a good issue should be raised even if it is late in the day.

While I was preparing Mr. Magnan's renewed habeas petition to be filed in the Court of Appeal, I noticed an issue which I had missed upon my initial review of the record in 2001. Although the prosecutor argued to the jury that Mr. Magnan must have tossed the drugs into the pickup when the police arrived on the scene, there was powerful evidence to the contrary which Mr. Epps had failed to introduce. At the preliminary hearing, Officer Gonzalez testified that Mr. Magnan's hands were above his head on top of the pickup when

he was first sighted. Although the original habeas petition did not include a claim that Mr. Epps had performed ineffectively when he failed to introduce this evidence, I did not hesitate to include the claim in my petition. While the Supreme Court did not issue an order to show cause on the issue, I continue to believe that it was meritorious.

The profound lesson of this case is that counsel should never give up on a meritorious issue. Due to the good graces of the California Supreme Court, the government's procedural default claim was not credited. Hopefully, some future clients will be equally lucky.

E. <u>When Interviewing A Witness, Thorough Notes Should Be Taken.</u>

The point made in this section is both obvious and trite. However, had Mr. Antler not taken thorough notes, it is quite possible that Mr. Magnan would be serving a life sentence today.

In November 2001, Mr. Antler conversed with Mr. Epps by telephone. As recorded in Mr. Antler's handwritten notes, Mr. Epps admitted that Mr. Magnan had informed him that he received money from his mother shortly before his arrest.

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

It is possible that Mr. Antler 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 Mr. Epps' testimony that he learned about the source of the money during the trial. Given this factual concession, Judge Brown had no problem in holding that Mr. Epps had erred by failing to investigate the information which Mr. Magnan gave him.

Mr. Antler acted as a diligent and competent lawyer when he took contemporaneous notes of his conversation with Mr. Epps. We should all emulate Mr. Antler's example.

F. Be Sure To Fully And Carefully Comply With All Procedural Rules.

Although this point has already been addressed above, Mr. Magnan's case demonstrates the importance of avoiding procedural defaults. Mr. Tursi made a fundamental error when he raised a new issue in his traverse. (*Clark,* supra, 5 Cal.4th 750, 781, fn. 16; *Board of Prison Terms v. Superior Court,* supra, 130 Cal.App.4th 1212, 1235.) Mr. Tursi could easily have avoided the problem by the simple step of obtaining leave to file an amended or supplemental petition. (*Ibid*.)

As with all legal matters, the successful prosecution of a habeas petition requires a close attention to detail. In this case, Mr. Magnan's meritorious claim might have been lost due to procedural default. By good fortune, the Supreme Court allowed Mr. Magnan's claim to be heard on the merits.

G. Victory Can Be Achieved On A Habeas Claim (Or A Direct Appeal Claim) If The Error In The Proceedings Goes To The Heart Of The Government's Case.

Mr. Magnan's case illustrates a central truth about appellate practice: 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 here.

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; and (2) Mr. Magnan possessed $300 which was supposedly the proceeds from drug sales. Importantly, 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.

A a slowing of prejudice can often be 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 Camel. 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, it is manifest that the People's case was deficient absent the weak theory that the $300 was the fruit of prior drug sales. (See *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 940 ["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.' [Citation.]".].)

H. The Filing Of A Habeas Petition Provides The Court With Broad Remedial Power.

An overlooked aspect of California habeas jurisprudence is that the court is vested with broad remedial power "to fashion" an appropriate remedy. (*In re Crow* (1971) 4 Cal.3d 613, 619-620, fn. 7; *Board of Prison Terms v. Superior Court*, supra, 130 Cal.App.4th 1212, 1236.) This principle was vital to the successful resolution of Mr. Magnan's case.

At the beginning of the appellate process, Mr. Magnan stood convicted of two counts: possession of heroin and possession of methamphetamine for the purpose of sale. The sentencing court had imposed a sentence of 25 years to life as to each count. Thus, even if the possession for sale count was reversed, Mr. Magnan still fared a life sentence for the possession count. Given these circumstances, the habeas petition sought not only a reversal of the possession for sale count but a remedy for the possession count as well.

In this regard, it was argued that Mr. Magnan was entitled to a new *Romero* hearing on the possession count if the possession for sale count was reversed. This argument rested on the common sense basis that the possession of .91 grams of heroin is a materially different criminal act from the possession for sale of 21.69 grams of methamphetamine. Indeed, in denying *Romero* relief after the trial, the judge specifically noted her concern that Mr. Magnan was "a danger to the community" since he was selling drugs.

Judge Brown was persuaded that a new *Romero* hearing was required on the possession count if the District Attorney elected not to retry the possession for sale count.

Thus, he vacated the sentence on the possession count. Subsequently, *Romero* relief was granted and Mr. Magnan is a free man today.

I. When Litigating An Evidentiary Hearing, It Is Helpful To Become Familiar With The Local Players.

In planning for the evidentiary hearing, I made the decision that it was necessary to call an expert witness on the standard of care for the defense of drug cases. In selecting an expert witness, I consulted with attorney Steve Avilla who runs the conflict program in San Jose. Mr. Avilla advised me that attorney Allen Schwartz is well respected by the bench. Based on Mr. Avilla's recommendation, I retained Mr. Schwartz as my expert witness.

As it turned out, Mr. Avilla's advice was golden. In preparing for the evidentiary hearing, I consulted with Mr. Schwartz regarding the best approach to take with the witnesses. Mr. Schwartz gave excellent guidance which led to a strategy that pleased the court.

In addition, Mr. Schwartz made a wonderful witness. When Mr. Schwartz was called to the witness stand, Judge Brown solicited the District Attorney's stipulation that he was qualified to testify as an expert. In his order granting relief, Judge Brown referred to Mr. Schwartz as "a recognized expert in the field of criminal law." (Order of January 5, 2006, p. 2.)

These circumstances point to an obvious conclusion. A local jurisdiction is run by local customs and is populated by locals. When appellate counsel arrives in town for an evidentiary hearing, his best chance of success is to associate himself as intimately as

possible with the provincial ways of doing things. In this case, Mr. Magnan greatly benefitted from the assistance afforded by Mr. Schwartz.

J. Be Lucky.

In his initial letter to my office, Mr. Magnan requested a "miracle." He was afforded one. For whatever reason, the California Supreme Court selected his case as one of those rare instances where it issued an order to show cause.

Mr. Magnan's case teaches a lesson which is quite sad in one respect. As every criminal appellate lawyer knows, there are many more meritorious cases than victories. No one can predict which meritorious case will prevail and which will be tossed into the ashcan. When lightning strikes and a remedy results, we can only be grateful.

CONCLUSION

The work of an appellate lawyer is difficult and time consuming. There are no shortcuts to victory. In Mr. Magnan's case, a remedy was achieved when a hard working lawyer listened to Mr. Magnan and contacted his mother. Additional investigation led to the documentary evidence which provided the basis for a meritorious legal theory. A well written brief finally caught the eye of the California Supreme Court. Thereafter, a well chosen expert witness helped to persuade the court that a miscarriage of justice had occurred.

Many years ago, my father told me that success is impossible without a close attention to detail. Mr. Magnan's case is a testament to this truth.