

## SOME THOUGHTS ON PERSUASIVE BRIEF WRITING

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### INTRODUCTION

Much to my amazement, I have spent over thirty years in the practice of law. During this time, I have read thousands of briefs in my capacity as both a Court of Appeal research attorney and as an advocate. I have also had the opportunity to converse with numerous appellate justices and lawyers concerning the attributes of a persuasive brief. This article serves as a summary of what I have learned about the contours of an effective brief.

If there is a single lesson to be learned by reading this article, it is this: An appellate brief is merely a conduit of information. The goal of the writer cannot be self expression or glory. Rather, the purpose of the appellate brief is to provide a concise, precise and clear exposition of the relevant facts and law. By pursuing the goals of brevity, precision and clarity, the writer will well serve the client and enjoy the respect of the judiciary.

It is no myth that a lawyer's reputation in the Court of Appeal means something. Having read countless briefs, the justices and their staff attorneys recognize those attorneys who have repeatedly provided a faithful recitation of the facts and law. Contrarily, the court also knows which lawyers are not to be trusted. In a close case, an attorney's long-time fidelity to the honest

practice of law may make a difference in the result.

In preparing this article, I reviewed two thoughtful pieces by other criminal appellate lawyers. (O’Connell, *Confessions of a Brief Reader* (2009), available from FDAP and *Rudman*, *Effective Argumentation* (2000), available in the Appellate Advocacy College 2000 materials on the Judicial Council website.) I commend these articles to the reader’s attention.

## I.

### THE GUIDING PRINCIPLE: LESS IS MORE.

We have all heard the old expressions. “If I had more time, I would have written a shorter brief.” Or, “brevity is the soul of wit.” (Shakespeare, *Hamlet* (1602).) These expressions contain a central truth: All things being equal, a short brief has a better chance of persuading the court than a long one.

A short brief is superior to a long brief since it suits the needs of the court. Like all busy professionals, justices and research attorneys only have so many hours in a work day. By providing a short brief, counsel assists the court in a profound way.

Conversely, a long brief is viewed as an annoyance. No one wants to read such a brief since it is time consuming to digest a lengthy legal document. The reader will be unhappy. A displeased reader will be disinclined to look favorably on the author’s case.

There is no polite way to state the truth. If you have a practice of writing long briefs (i.e. over 50 pages in a routine jury trial case), you are disserving your clients. While you may believe that you are filing detailed and thorough briefs, the reality is that the reader believes that the briefs are cumbersome and tedious.

Of course, this is not to say that a long brief should never be filed. There is occasionally a long record case that presents a large number of solid issues. In such a case, there is no way to avoid the preparation of a long brief.

Having defined the goal that our briefs should be as brief as possible, the question remains as to how one should go about writing a brief that is both concise and authoritative. There are a number of techniques that will advance your pursuit of this goal.

I have read Statements of the Case which go on for five or six pages. A Statement of this length is entirely unnecessary. A proper Statement of the Case should contain only: (1) the charges set forth in the information; (2) the existence and resolution of any motions that will be at issue in the appeal; (3) the adjudication of the charges by plea or trial; (4) the total sentence and its components; and (5) the filing of the notice of appeal and issuance of a certificate of probable cause if there is one. In the usual case, the foregoing information can be set forth in two pages or less. This information is all that

the reader needs to know.

A similar rule applies to the Statement of Facts. The goal is not to cite every single piece of testimony or evidence. Rather, the Statement should include only those facts that are material to the charges and the issues on appeal. For example, if it is undisputed that the defendant shot the victim, it is unnecessary to recount the testimony of the six witnesses that saw the shooting. In this situation, it is sufficient to note: “The defendant fired a single shot into the victim’s chest. (2 RT 322.)” This is all that the reader needs to know.

Similarly, if it is undisputed that the defendant is a gang member, it is unnecessary to recite the contents of the 100 pages of testimony given by the People’s gang expert. If no issue is going to be raised about the testimony, the reader only need be told that the expert testified and indicated that “the defendant belonged to the VHS gang. (4 RT 582.)”

The same rule applies to forensic testimony. Unless there is an issue concerning the testimony, it is sufficient to say that the criminalist found the defendant’s fingerprints on the gun.

If testimony from several witnesses was cumulative, the testimony can be confined to a single paragraph. For example, the reader can be told: “The defense presented eight witnesses who saw the defendant at the OK Corral at

8 p.m. (3 RT 422, 441; 4 RT 620, 642; 5 RT 821, 853.)”

As a final point concerning the Statement of Facts, it is highly annoying to see facts recounted in a footnote. If the facts are so inconsequential that they are relegated to a footnote, they are inconsequential enough to be deleted from the brief.

When it comes to preparing legal arguments, there are a number of simple techniques for shortening the text. None of these techniques will cause the brief to be less authoritative.

The easiest way to shorten a brief is to avoid redundancy. In many briefs, counsel will repeat the same point several times. This is unnecessary. The justices and staff attorneys are all intelligent people. The ceaseless repetition of your argument will likely cause you to lose your audience. In the immortal words of Psycho Killer, “say something once, why say it again?” (Talking Heads: 77.)

The “Psycho Killer” rule has special application to the discussion of prejudice. An essential component of a persuasive brief is a detailed discussion of prejudice. However, the entirety of that discussion need not be repeated with respect to every issue. Rather, if you have addressed the usual criteria for showing prejudice in your first issue (i.e. lengthy jury deliberations, jury questions or requests for readbacks, close facts, etc.), you can simply

incorporate the discussion by reference in the subsequent arguments by saying:

“As appellant has already shown (see pp. \_\_\_\_\_ 15-20, *supra*), . . . .”

Another technique for shortening a brief is to avoid the use of lengthy quotations from cases. We have all seen briefs where counsel included a two page quote from a case. Once again, this is unnecessary. It will be a rare case where all two pages are material to the issue at hand. Generally speaking, the relevant portion of a precedent can be provided in a few sentences.

The same rule holds true for the citation of cases. When stating a settled principle of law, it is a waste of space to cite three or four cases. The citation of a Supreme Court case on point is all that you need in order to establish the *bona fides* of your legal premise.

Another method for shortening a brief is to excise any and all references to tangential points. For whatever reason, some lawyers feel compelled to demonstrate their erudition by including lengthy footnotes that mention points that are not at issue in the case at hand. While such a footnote might increase the self esteem of the author, the reader could care less. The reader’s duty is to decide *this* case. Intellectual musings are seldom of interest to a busy appellate court.

Finally, Oliver Wendell Holmes was of the view that the lifeblood of the law is experience. (Holmes, *Common Law* 1 (1881).) Appendix A to this

article is a two and a half page appellant's opening brief. The Court of Appeal found the brief to be persuasive and reversed the judgment.

## II.

### THE COMPONENTS OF A PERSUASIVE APPELLANT'S OPENING BRIEF.

Many years ago, I saw Dennis Riordan deliver a lecture on persuasive brief writing. Dennis made the point that a brief should be so authoritative that the reader will not feel compelled to reach for the transcripts or casebooks while perusing the brief. Dennis is absolutely correct. If you can cause the reader to believe that the brief contains everything that there is to know about the case, you are well on your way to persuasion.

The authoritative aura of a brief begins with the Statements of the Case and Facts. It is critical that the reader believe that everything in the Statements is accurate and that nothing important has been left out. There are two necessary steps in achieving this goal.

First, you should cite to the record at the end of every sentence in the Statements. In this way, the reader will enjoy a feeling of certainty that every assertion is supported by the record.

Second, you must give the reader a *complete* version of the facts. In other words, you must state all the "bad" facts which support the People's case. There is nothing to be gained by minimizing or shading the "bad" facts.

The facts truly speak for themselves. However, this does not mean that the “bad” facts cannot be placed in the context of the full record. To this end, it is useful to include an Overview section at the beginning of the Statement of Facts. (See Appendix B for a sample.)

The purpose of the Overview section is to provide the court with a snapshot of the entirety of the case. Since the snapshot will be evenly balanced and will include the defense version of the facts, the reader will be conditioned to believe that the case was closely contested. This will hopefully cause the reader to give full and careful consideration to the legal arguments.

In organizing the Statement of Facts, it is seldom appropriate to use a witness-by-witness account. Rather, a chronological approach is far more effective. This is so for two reasons.

First, a witness-by-witness account is tedious to read. You do not want to bore the reader. In all likelihood, a witness-by-witness account will cause the reader to lose attention.

Second, a witness-by-witness account is a poor way to tell a story. Since most stories are told from beginning to end, the reader feels most comfortable with a chronological approach. Moreover, a chronological tale is far easier to follow than one which is constantly shifting in time.

In telling the story of the case, it is inappropriate to editorialize. The

Statement of Facts should stick to the facts. If the testimony of a witness was ridiculous (i.e. he drank fifteen beers but did not feel intoxicated), there is no need to say that the testimony was “ridiculous.” The reader knows that the testimony was ridiculous.

If a case presents a substantial amount of evidence, it will be helpful to the reader if the evidence is broken into categories. For example, categories might include gang evidence, forensic evidence, or descriptions of events which occurred on different days.

In many cases, the defense does not present any evidence. However, this does not mean that you cannot include a Defense section in the Statement of Facts. Rather, it is entirely appropriate to include a short summation of the contents of defense counsel’s closing argument. (Appendix C.)

I would note that my colleague, Bill Robinson, has written a highly detailed and useful article which describes techniques for preparing a quality Statement of the Facts. (Robinson, How to Write Effective Statements in Criminal Appeals (2000), available in the Appellate Advocacy College 2000 materials on the Judicial Council website.) Even experienced lawyers will benefit from reading Bill’s excellent article.

Once the Statement of Facts is done, the next section of the brief should be an Introduction. (See Appendix D.) Unlike the Statement of Facts, this is

your opportunity to editorialize. In a succinct way, you should foreshadow the issues and the reasons why reversal is required. By including an Introduction, you let the reader know that this is a serious appeal that merits careful consideration.

I would note that some attorneys prefer to put the Introduction before the Statements of the Case and Facts. In my view, the Introduction is more effective if the reader has first become familiar with the facts of the case. Nonetheless, reasonable minds can differ on this point.

In preparing the Introduction, you cannot ignore reality. If the facts of the case are heinous (i.e. a rape murder), you have to deal with human nature: The reader's emotions will cry out for punishment! The proper approach is to acknowledge the horrible nature of the facts while showing that the defendant was nonetheless denied a fair trial. (See Appendix D.) By focusing on the possibility that a miscarriage of justice occurred, you will leave the reader with an open mind regarding your legal issues.

In the Introduction, you will also want to introduce the theme of your case (assuming that you can formulate one). An example of a good theme is as follows.

I once had a case where the client was convicted of murdering his 84 year old adoptive mother on the theory that he persuaded her to desist from

taking her prescribed medications. The hole in the People's case was that their own medical expert was unable to posit a cause of death. Thus, the lead issue was that there was insufficient evidence to prove that the actus reus (i.e. the client's advice to his mother) was the proximate cause of death. Significantly, I was able to pair this argument with a claim of ineffective assistance of counsel since the trial attorney had failed to call an expert witness who would have testified that the mother's physical condition was such that she could have died from four or five causes which would not have been prevented by her medications. These two issues tied together in a very neat way and supported the theme that there was a substantial doubt as to whether the client had actually "killed" his mother.

In the usual case, your various issues will not be as closely related as they were in the foregoing example. Nonetheless, you can still have a theme. For example, if the trial court committed five separate evidentiary errors, your theme will be that the trial was a shambles since the People were allowed to introduce a mountain of unreliable and/or prejudicial evidence while the exculpatory evidence was excluded. Or, in a case involving multiple instructional errors, the theme may be that the jury was hopelessly confused.

It is important to note that not every case has a theme. Sometimes, a case will present several good issues which involve entirely separate areas of

the law. In such a case, you do not want to lose credibility by manufacturing a less than credible theme.

Having presented your theme in the Introduction, the next decision to be made is the order in which the issues should be presented. Although common wisdom holds that you should always lead with your strongest issue, this may not necessarily be the best tactic.

I have seen jury trial appeals where counsel included a sentencing claim as the first issue. This is obviously a bad decision. By placing a sentencing issue in first place, counsel has told the court that the trial issues are hopeless. This is plainly contrary to the client's interests.

In general, issues should be arranged in chronological order (pre-trial, trial and sentencing). As for trial issues, those which might afford the greatest relief should go first. Since a sufficiency of the evidence claim can lead to double jeopardy protection, it is logically the lead issue in those cases where it can be raised. Similarly, issues that will result in a complete reversal should precede issues that will allow for the reversal of less than all counts.

The suggested approach does have a danger. Since your goal is to persuade the court, you may lose some credibility by placing a weak sufficiency of the evidence issue ahead of a strong instructional issue. The answer to this dilemma is to be careful in deciding what issues to include. If

a particular issue is hopeless, it is best left out.

However, the inclusion of an arguable, but ultimately losing, sufficiency of the evidence issue has a great virtue. By including the issue as your first claim, you are educating the reader concerning the weaknesses of the People's case. This type of education may well tip the reader towards the conclusion that your other issues require reversal since the case was a close one.

If possible, it is always a good idea to pair compatible issues. For example, if there is a claim that there is insufficient evidence regarding an element of the offense, it is very useful to pair the issue with a claim of instructional error regarding the element. Or, if the trial court overruled the defense objections to several types of prejudicial evidence (i.e. gang evidence, evidence of the defendant's drug use or prior acts of violence), a multi-part argument can be mounted that the defendant was denied a fair trial due to the cumulative weight of the inadmissible evidence.

Having decided on the order of your issues, you are ready to present the claims. In so doing, it is critical that you state a *prima facie* case for relief in every argument. The elements of the *prima facie* case are: (1) the material facts and procedural history underlying the claim; (2) the objection or offer of proof (or assertion that no objection or offer of proof was required) and ruling on the claim; (3) a precise statement of the legal basis for your claim (i.e.

Confrontation Clause, specific Penal Code statute, etc.); (4) the standard of review; (5) an exposition of the law establishing that error occurred; and (6) a showing of prejudice.

Shockingly enough, there are a number of appellant's opening briefs which do not state a prima facie case. If you do not state a prima facie case, your client cannot be granted relief.

In stating the relevant facts and procedural history, do not forget our guiding principle: Be brief. The reader already has a full and complete recitation of the evidence in the Statement of Facts. When arguing an issue, you should limit your recitation solely to those facts that bear on the issue at hand. (See Appendix E.)

In order to be cognizable on appeal, most issues require an objection in the trial court. (Evidence Code section 353.) You should state the precise nature of the objection and the place in the record where the objection was made. If the claim involves the exclusion of evidence, you must cite to the place in the record where defense counsel made an offer of proof. (Evidence Code section 354.)

A deficiency in many briefs is that counsel attempt to fudge about the sufficiency of the objection or offer of proof. This will not work. The Attorney General is trained to dissect the sufficiency of the objection or offer

of proof. If there is any doubt as to whether an adequate record was made below, you will need to add a backup claim of ineffective assistance of counsel. The claim has to be made under a separate heading or subheading and the prejudice test of *Strickland v. Washington* (1984) 466 U.S. 668 must be addressed. (See California Rules of Court, rule 8.204(a)(1)(B) [each point in a brief must be stated “under a separate heading or subheading summarizing the point . . . .”].)

In stating the legal basis for your claim, you must be as clear as possible. The Court of Appeal is required to adjudicate only those issues that are discernibly raised. It is your duty to *expressly* state the legal bases that support your position.

The standard of review is the court’s guidepost for deciding the appeal. If you fail to cite the standard, your credibility with the court will be shot. As with the objection requirement, you cannot fudge on the standard of review. If the standard is unfavorable (i.e. abuse of discretion), you will simply have to do your best to show that the standard is satisfied.

In advancing the merits of the issue, it is important to first set forth the thesis of your argument. Once the thesis is stated, you can then discuss the relevant legal principles which support your position. In so doing, you should not forget our guiding principle: Present your argument with brevity and

precision.

A common belief of young attorneys is that it is necessary to discuss each case precedent in detail with respect to both its facts and reasoning. This is simply untrue. The appellate court is interested in the bottom line. The resolution of your case will turn on whether the *holdings* in prior cases support your position. Unless there is a case specific reason to do so, you should cite cases solely for their holdings and those details that are relevant to your case.

The best technique for efficiently citing case law is to summarize the holding in a single sentence. For example, if the issue before the court involves the proper interpretation of a statute, you can synopsise a holding in the following manner: “(*People v. Hodges* (2009) 174 Cal.App.4th 1096, 1102, fn. 5 [Penal Code section 1237.1 requires the defendant to “raise the issue at sentencing, or, upon later discovery of miscalculation, by motion for correction of the record in the trial court. [Citation].”].) As the example shows, the reader has been quickly given the relevant principle stated in the case.

In preparing your legal analysis, you will be confronted with the tactical decision as to whether you should address the counter-arguments that might be made in opposition to your position. Although this decision has to be made on a case-by-case basis, there are two applicable rules of thumb.

First, if you have no doubt that the counter-arguments will be advanced by the People, they should be addressed. By raising the issues in the first instance, you will demonstrate to the court that you are a thorough, thoughtful and fair minded advocate. By fostering this reputation, you will help the present client and your future clients.

Second, counsel should be wary of the problem of arguing “uphill.” If you are bright and well informed, you can always imagine more arguments against your position than will ever be presented by the People. In my experience, the Attorney General typically raises only the most obvious arguments and does not worry about more esoteric points. As a result, you should do the same. If a possible counter-argument is not obvious, you should not bring it to the Attorney General’s attention.

In addition, you must be sensitive to the appearance that there are simply too many obstacles in front of you. I have read opening briefs where counsel addressed numerous possible counter-arguments. This type of briefing has usually left me with the feeling that we are going to lose since the road to victory is blocked by too many hurdles.

The most important portion of your prima facie case is the showing of prejudice. The drafting of this section of the brief requires careful attention.

While I have argued that brevity is a virtue, the discussion of prejudice

is the one exception to the rule. We have all had the experience of reading an opening brief where thirty pages were devoted to the exposition of error and one page was given to the prejudice analysis. Unless the error is reversible per se, this single page has virtually no chance to persuade the reader.

In formulating your prejudice discussion, you must first set forth the applicable test. Most issues can be framed as federal constitutional error which implicates the standard of *Chapman v. California* (1967) 386 U.S. 18. If it is questionable that the *Chapman* test applies, you should also argue the state test of *People v. Watson* (1956) 46 Cal.3d 818. Since the tests are different in nature, it is vital that you separately apply them. This attention to detail will impress the reader.

The prejudice section of your argument is the place where you wrap up the theme that you first advanced in your Introduction. For example, if you notified the reader in the Introduction that the case was factually close as evidenced by the fifteen hours of deliberations and numerous jury questions, you hammer the point home in your discussion of prejudice.

In order to make a persuasive showing of prejudice, counsel should marshal every single piece of helpful material in the record. Prejudice can be found in: (1) the behavior of the jury (lengthy deliberations, a prior hung jury, acquittals on some counts, questions and requests for readback); (2)

prosecutorial exploitation of the error; (3) error which disproportionately impacted on the defense case (i.e. the only defense witness was erroneously impeached); (4) error which disproportionately helped the People's case; (5) error which went to the central issue in the case; and (6) anything else that might show prejudice. In preparing the prejudice argument, counsel can take advantage of several articles which catalogue useful arguments and case authorities. (See Sacher, A Primer on Prejudicial Error: The Applicable Tests And How To Satisfy Them (2009), available from SDAP; O'Connell and Ternus, Appellate Standards of Review And Prejudice For Instructional Error (2008), available from FDAP; Torres, Standards of Prejudice on Appeal (2000), available on Judicial Council website - prepared for the Appellate Advocacy College 2000; Sevilla, A Pool of Prejudice: Prejudicial, Reversible And Harmless Errors On Appeal (1982), available in the 1982 State Public Defender's Criminal Appellate Practice Manual.)

In a proper case, a claim of cumulative prejudice should be made as the final argument. For purposes of properly exhausting the claim for federal court, the issue must be raised under a separate heading and as a separate claim in a petition for review. (*Wooten v. Kirkland* (9th Cir. 2008) 540 F.3d 1010, 1026 [cumulative prejudice claim was rejected since it was not specifically pled in the state petition for review]; see *Chambers v. Mississippi* (1973) 410

U.S. 284, 302-303 [cumulative prejudice found under the federal Constitution]; accord, *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928.].)

The goal of a cumulative prejudice argument is to show that the errors were interrelated and thereby caused the foundation of a fair trial to crumble. A useful model for showing cumulative prejudice is to compare the trial that actually occurred with the one that would have occurred absent the errors. (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 834 [in assessing prejudice, the court should “compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently.”].)

In employing the comparative model, you want to demonstrate that the People’s case was artificially strengthened and the defendant’s case was unfairly diminished. By showing that the entire balance of the trial was skewed, you can persuade the reader that a new (and fair) trial is required. (See Appendix F for a sample cumulative prejudice argument.)

The final piece of the opening brief is the Conclusion. In this section, you should concisely and precisely describe the relief that should be afforded. If different issues will lead to different remedies (i.e. if one argument would require a full reversal and another argument might require reversal of only a

single count), you should be sure to request remedies in the alternative. By carefully describing the appropriate remedies, you will assist the court in drafting its disposition of the appeal.

### III.

#### THE PURPOSE OF A REPLY BRIEF IS TO REFUTE THE PEOPLE'S ARGUMENTS.

The reply brief is the most important weapon in our arsenal. We get the last word. The reply brief is so important that former Sixth District Presiding Justice Nat Agliano employed the practice of reading the reply brief before any of the other briefs. Plainly, Justice Agliano was looking to cut to the chase.

The central feature of a persuasive reply brief is that it actually responds to the arguments made in the People's brief. While this may seem obvious, the point has been missed by many of our colleagues.

I have read numerous reply briefs which contain no citations to the respondent's brief and which barely mention what the Attorney General had to say. Instead, counsel merely reiterates the contents of the opening brief. This type of reply brief is worthless to both our clients and the court.

There are three simple techniques which may be used in preparing a proper reply brief: (1) briefly remind the reader of the nature of your argument; (2) enumerate the People's arguments and discuss them separately; and (3) employ citations and quotes from the respondent's brief. These techniques

will allow you to clearly and efficiently refute the People's presentation.

In order to set the stage for your reply, it is very helpful to remind the reader as to *exactly* what is at issue. The initial paragraph of your argument should concisely restate the analysis advanced in the opening brief. (See Appendix G.)

Once the reader is reminded of the nature of the issue, you should foreshadow the contents of your reply by enumerating the points made by the Attorney General. (Appendix G.) The virtue of this enumeration is that you are demonstrating to the court that your analysis will be thorough and that you have an answer for everything that the Attorney General had to say. After all, if you cannot respond on every point, you will not win the case.

In addressing the Attorney General's points, it is vital that you cite to those places in the respondent's brief where the points were made. In so doing, you greatly assist the reader and you also establish your own reputation for thoroughness.

It is very useful to quote the exact contention made by the Attorney General. This tactic serves two purposes. First, you establish that you are fair minded and thorough in that you are accurately portraying your opponent's position. Second, the Attorney General often makes ridiculous or half baked assertions that can be blown to bits. If you can show in a tactful way that the

Attorney General has made points which cannot be taken seriously, the court will necessarily take a much closer look at the case.

Finally, it is important to include analysis on all of your issues in the reply brief. If an issue was deemed to be strong enough to include in the opening brief, it is strong enough to warrant discussion in the reply brief. If you say nothing about an issue, the reader will perceive your silence as a de facto admission that the contention is meritless.

However, this is not to say that it is improper to withdraw an issue. We all err in the practice of law. If you have overlooked something in including an issue and the Attorney General demonstrates that your argument is truly meritless, it is a wise tactic to acknowledge error and withdraw the issue. The court will take your concession as the action of an honorable advocate.

#### IV.

#### A PETITION FOR REHEARING SHOULD BE NO MORE THAN A FEW PAGES.

The chances of obtaining a grant of rehearing are generally slim. In order to preserve one's credibility, petitions for rehearing should be judiciously filed.

If the opinion of the Court of Appeal fairly states your contention, there is little to gain by seeking rehearing. You have already argued your points. It is futile to reargue the case in a petition for rehearing.

However, if the court has failed to address a significant point or has omitted a key fact or precedent, it is entirely appropriate to seek rehearing. This is so since the error or omission in the opinion might conceivably be remedied by renewed consideration. In bringing a mistake to the court's attention, you must be respectful. The error should be presented in plain, unadorned language (i.e. "the court's opinion mistakenly states that the defendant was detained for two minutes whereas Officer Jones testified that he detained the defendant for ten minutes"). If you attack the court or its motives, you will get nowhere.

Brevity is of extreme importance in a petition for rehearing. Once it files an opinion, the court has closed the book on the case. It is disinterested in opening the book again. If you file a fifteen page petition for rehearing, it

is unlikely to be seriously considered. If the court made a significant mistake in the opinion, you should be able to show the error in a few pages or less.

Occasionally, the court will screw up its disposition of the case. The court may intend to grant a particular remedy but word it in the wrong way. In this situation, the court will be grateful for a succinct petition for rehearing that allows it to correct its error. (Appendix H.)

## V.

### DEALING WITH ADVERSE CASE AUTHORITY.

Attorneys have an ethical duty to cite case authority which is contrary to their position. In my experience, most attorneys attempt to circumvent adverse Court of Appeal authority with the claim that “its distinguishable.” While this is sometimes an appropriate tactic, it is more often an example of ineffectual advocacy.

The attempt to distinguish non-distinguishable precedents is a poor technique. Appellate courts have an institutional interest in following precedent. It makes their jobs easier. In the usual case, you will lose credibility with the court by asserting implausible points of distinction between a precedent and the case before the court.

In general, the best method for dealing with an adverse Court of Appeal precedent is to simply argue that it was wrongly decided. Since many cases *are* wrongly decided, it is an easy task to argue against the reasoning of the precedent. By being forthright, you will likely earn the admiration, if not the votes, of the justices.

In arguing that a prior case was wrongly decided, you must be careful to avoid any disparagement of the court as an institution. You should simply show in a matter-of-fact tone that the court got it wrong. Since all fair minded justices recognize that they do get it wrong from time to time, the present

justices will not be troubled by your approach.

Given the power of *stare decisis*, it is helpful to argue in a proper case that an adverse Court of Appeal precedent is implicitly contrary to a later decided Supreme Court case. This type of argument gives the present court a stronger sense of justification in disagreeing with their colleagues.

In conjunction with our guiding principle of brevity, you should minimize your discussion of adverse case authority. If there are three Court of Appeal cases which are contrary to your position, it is foolish to discuss the cases in exacting detail. Instead, you should succinctly summarize the *ratio decidendi* of the cases and then explain why the rationale is unpersuasive.

If you conclude that a precedent is truly distinguishable for whatever reason, there is, of course, nothing wrong with advancing the argument that the case is inapposite. If possible, it is useful to also argue that the policy and reasoning of the prior case actually favors your cause despite its adverse holding. An example of this approach is as follows.

There are a myriad of cases which hold that the complainant in a sex case may be impeached with evidence that he or she made prior false accusations about being attacked. (See *People v. Franklin* (1994) 25 Cal.App.4th 328, 335, conviction reversed in *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270; *People v. Adams* (1988) 198 Cal.App.3d 10, 18; *People v. Wall*

(1979) 95 Cal.App.3d 978, 983-989.) While acknowledging this principle, the Third District has held that such evidence may be excluded under Evidence Code section 352 when it is less than clear that the prior accusations were false. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456-1458.) Needless to say, *Tidwell* is now frequently cited by the People.

*Tidwell* is easy to counter. The case does not challenge the general principle that prior false accusations constitute relevant evidence. Thus, in a proper case, *Tidwell* can be factually distinguished on the grounds that the present record does show that the prior accusations were false. *Tidwell* is not to the contrary.

Finally, I am not suggesting that it is always appropriate to assail adverse authority. At times, an appeal can still be won even in the face of a concededly correct case that harms your position. Nonetheless, counsel should not hesitate to be aggressive and creative in the treatment of adverse authority. Appellate courts are far more likely to be swayed by a courageous intellectual argument than they are by a timid and bogus claim that “it’s distinguishable.”

## VI.

### A WORD ABOUT CLARITY AND WRITING STYLE.

In some sense, good writers are born. While everyone can be taught the rules of grammar, not everyone can pen eloquent prose. Nonetheless, the application of two rules can enhance the quality of your legal writing.

First, the highest virtue in legal writing is clarity. After examining your brief, the reader should have absolutely no doubt regarding the applicable rules of law and the nature of your arguments. While it is difficult to proofread one's own work, any draft of a brief must be slowly and carefully edited for clarity. An attempt should be made to read the text with fresh eyes to be sure that it is readily understandable.

A method for achieving clarity is to use simple, short sentences. A brief on evidentiary error is not going to be measured against *War and Peace*. Short and simple sentences are a blessing to an overtaxed legal reader.

Second, a legal brief is not the place for self expression. You are representing a client, not yourself. While there is nothing wrong with an occasional cute phrase or line, a steady diet of "clever" writing will annoy a legal reader. Flowery words and arcane adjectives are not going to obtain relief for the client.

## VII.

### THE ACT OF PERSONALIZING THE LITIGATION WILL HARM THE CREDIBILITY OF YOUR CAUSE.

We have all had to deal with an annoying opponent. For whatever reason, some attorneys enjoy making sarcastic comments about opposing counsel or their arguments. Being human, our emotions demand that we respond in kind. Unfortunately, a sarcastic response will not be well received by the court. If you want to be viewed as a persuasive advocate, you must turn the other cheek and ignore the snide insults of your opponent.

However, there is one type of insulting argument that does require a response. In a rare case, your opponent will employ the tactic of repeatedly making the false claim that you have misstated the facts and law. The use of such a tactic compels a measured, but direct response. In a succinct way, you should acknowledge your opponent's assertions and assure the court that your briefing does not contain any misrepresentations. Instead of attacking your opponent, you should encourage the court to decide the case based on the facts and law and not on the unsupported assertions of opposing counsel. A sample argument is attached as Appendix I.

## VIII.

### CRITICISM OF THE “SYSTEM” WILL FALL ON DEAF EARS.

Regardless of the reality perceived by the defense bar, appellate justices generally believe that police officers tell the truth, prosecutors are honorable and trial judges are fair minded. Given these beliefs, it is counter-productive to fill a brief with *ad hominem* attacks on the “system.” The justices simply do not want to hear this message. In order to persuade an appellate court, your chances of success are much greater if you use terms like “the court erred” or the “prosecutor made a mistake.”

Like all matters involving the judicial system, there is an exception to this rule. Occasionally, you will come across a player in the system who has been judicially determined to be untrustworthy. In this circumstance, it is entirely appropriate to cite the individual’s record for failing to play by the rules. (*People v. Hill* (1998) 17 Cal.4th 800, 847-848 [Supreme Court took judicial notice that the prosecutor had previously been found to have committed misconduct]; *Jonathon M. v. Superior Court* (2006) 141 Cal.App.4th 1093, 1096-1098 [trial judge criticized for failing to follow a published opinion which reversed her prior ruling].)

## IX.

### THE USE OF OUT-OF-STATE AUTHORITY WILL SOMETIMES LEAD TO A REVERSAL.

For the most part, California appellate courts are disinterested in out-of-state authority. If there is an abundance of California precedent on a point, you are unlikely to get anywhere by citing out-of-state authority. However, there are two situations where out-of-state cases can make a difference.

Appellate courts crave case authority. If there is none in California, the court may well be persuaded by favorable precedent from elsewhere. If you have an issue of first impression, you should be sure to cite whatever favorable out-of-state authority that you can find. (See *People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104 [court relied on Minnesota and federal case authority in construing Evidence Code section 702 in the defendant's favor].)

Aside from novel issues, federal authority can be particularly helpful in fact specific cases. For example, claims of ineffective assistance of counsel can arise in an almost unlimited number of ways. There may not be a factually close California case. However, given the large universe of the federal courts, you are likely to find some helpful cases. You also have the advantage that you can cite an unpublished federal opinion. (*People v. Flores* (2009) 176 Cal.App.4th 1171, 1179, fn. 7 [unpublished federal authority is citable].)

In addition, the citation of federal authority will allow you to plan for

federal habeas proceedings if they become necessary. By citing federal authority in the state appeal, you will lay the foundation for later success in federal court.

## X.

### THE PROPER USE OF CITATIONAL FORM ENHANCES THE PERSUASIVE EFFECT OF A BRIEF.

As a component of professionalism, a lawyer is required to employ the citational form used in the particular court in which the brief is to be filed. In California, counsel must use the form described in the California Style Manual. In federal court, counsel must comply with the Harvard Bluebook. Appellate counsel should scrupulously follow the rules set forth in the two texts.

Although young lawyers often fail to comprehend this fact, the attention to detail is a trademark of the effective lawyer. Since the appellate courts use proper citational form every day, the justices and research attorneys are painfully aware of the improper citations that they see in briefs. If your citational form is poor, the reader may draw the same conclusion about the quality of your analysis.

If you have any doubt about the proper form, it is easy to check your work. All you need to do is examine a recently filed opinion from the court in which you are appearing. If your form matches that found in the opinion, you

are on safe ground.

A distracted reader is an unhappy reader. By using the proper citational form, you will make your reader happy and more likely to be swayed by your argumentation.

## XI.

### DO FOOTNOTES SERVE ANY USEFUL PURPOSE?

I have left this subject for last since it is a matter of some controversy. At a SDAP seminar, Justice Mihara declared that footnotes are an annoyance and should not be used. At a different SDAP seminar, Presiding Justice Rushing indicated that he is not disturbed by footnotes. For my part, I have gravitated towards Justice Mihara's view.

As a young attorney, I believed that footnotes were useful to flesh out the parameters of the relevant law. If a point or a precedent was not directly relevant to my issue, I would include a footnote for the court's greater understanding of the law. I have ceased this practice. Although I occasionally use a footnote to provide a verbatim recitation of a statute or jury instruction, I do not discuss the law in footnotes. I have two reasons for this practice.

First, footnotes are distracting. They cause the reader to break off from reading your argument. The reader loses the flow of the argument. This cannot be a good thing.

Second, a brief should not include marginally relevant information. A brief is not a law review article. Your goal is to make a persuasive argument, not to catalogue the law. For this reason, the discussion of collateral matters in a footnote will only waste the reader's time and will be useless in attaining your goal of persuading the reader.

Finally, even if you believe that the use of footnotes is not harmful, you should nonetheless be judicious concerning their number. I have read briefs which contain dozens of footnotes. The eyes inevitably glaze over. No brief should contain more than a couple of footnotes. Otherwise, you will lose your audience.

### CONCLUSION

In order to persuade a court, your presentation must be user friendly. It must be concise, precise and comprehensible. You must be polite and respectful. While you might lose a particular case where your issues are not particularly strong, the use of proper persuasive techniques may make all the difference in a close case. And, at the end of the day, there is great virtue in preparing a well crafted brief since you will have diligently served both your client and the court.

# APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN NELSON NIXON,

Defendant and Appellant.

NO. H010623

(SANTA CLARA CO.  
SUPERIOR COURT  
NO. 136988)

STATEMENT OF APPEALABILITY

The instant appeal is taken from a final judgment entered after a hearing on remand from this court. As such, the judgment is appealable pursuant to Penal Code section 1237.

STATEMENT OF THE CASE AND FACTS

On September 30, 1992, this court issued its opinion in appellant's earlier appeal, H008879. In its disposition of the appeal, this court remanded the case to the Superior Court "for the limited purpose of conducting a hearing on appellant's *Marsden* motion." (Opinion, p. 36.)<sup>1</sup>

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<sup>1</sup> Under separate cover, appellant has requested this court to take judicial notice of its own records in H008879. In so doing, this court will have proof of the salient procedural facts discussed herein.

On or about November 4, 1992, appellant filed a timely petition for review. On December 30, 1992, the petition was denied. On January 5, 1993, this court issued its remittitur.

In the meantime, the Superior Court conducted a *Marsden* hearing over two days on December 8 and 9, 1992. (CT 41, 43.) On December 9, 1992, the *Marsden* motion was denied and the judgment was reinstated. (CT 43.) On December 16, 1992, a timely notice of appeal was filed.

I. THE JUDGMENT MUST BE REVERSED SINCE THE SUPERIOR COURT LACKED JURISDICTION TO CONDUCT THE MARSDEN HEARING.

In its opinion in appellant's earlier appeal, this court directed the Superior Court to conduct a *Marsden* hearing. In pursuit of this order, the Superior Court conducted a hearing on December 8 and 9, 1992. (CT 41, 43.) However, as will now be explained, the Superior Court lacked jurisdiction to conduct the hearing. As a result, the court's order denying relief is void and a new hearing must be held.<sup>2</sup>

As this court's records reveal, the remittitur was issued to the Superior Court on January 5, 1993. Prior to that date, jurisdiction over appellant was vested solely in the appellate courts. (*People v. Perez* (1979) 23 Cal.3d 545, 554.) Thus, when the Superior Court heard appellant's *Marsden* motion, it had no jurisdiction. Such being the case, its judgment is void.

In this regard, *People v. Sonoqui* (1934) 1 Cal.2d 364 is dispositive. In *Sonoqui*, the People filed a notice of appeal from an order granting a motion for new trial. Soon thereafter,

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<sup>2</sup> Appellant did not register a jurisdictional objection at the renewed *Marsden* hearing. However, no objection was required. (*People v. Chadd* (1981) 28 Cal.3d 739, 757; *People v. Cavanna* (1989) 214 Cal.App.3d 1054, 1059; subject matter jurisdiction cannot be conferred by consent, waiver or estoppel.)

the appeal was dismissed by stipulation of the parties. Then, prior to the issuance of the remittitur, the defendants were convicted at a new trial. Subsequently, the Supreme Court reversed the judgment on the grounds that the trial court had no jurisdiction to proceed prior to the issuance of the remittitur. (*Id.*, at pp. 366-367.)

Without spilling needless ink, it is manifest that the identical result is compelled here. As has been noted above, the Superior Court proceeded in this case long before the remittitur was issued. As a result, its judgment is void and a new *Marsden* hearing must be held. (*People v. Sonoqui, supra*, 1 Cal.2d 364, 366-367.)

#### CONCLUSION

For the reasons expressed above, the judgment must be reversed with directions to conduct a new *Marsden* hearing.

Dated: April 1, 1993

Respectfully submitted,

*Dallas Sacher*

DALLAS SACHER  
Attorney for Appellant,  
JOHN NIXON

## APPENDIX B

morning of December 11, 2006, the jury began its deliberations. (CT 1153.) On the late afternoon of December 14, 2006, the jury returned its verdicts. (CT 1173.) Appellant was convicted of second degree murder. (CT 1166.) The gun use enhancement was found true and the jury hung on the gang enhancement. (CT 1166.)

On January 30, 2007, appellant was sentenced to state prison for the term of 40 years to life. (CT 1199-1200.) Appellant received 15 years to life for his conviction for second degree murder and 25 years to life for the Penal Code section 12022.53, subdivision (d) enhancement. (CT 1199-1200.)

On February 2, 2007, a notice of appeal was filed. (CT 1201.)

## STATEMENT OF FACTS

### OVERVIEW

Cesar Sanchez was a Sureno gang member. At approximately 8:25 one evening, Mr. Sanchez was shot and killed on the front porch of his home. The People's theory was that appellant murdered Mr. Sanchez since he was an opposing gang member.

On the evening in question, appellant was wearing a 49er's jersey with the number 80. Members of Mr. Sanchez' family gave varying accounts as to whether his killer wore a 49er's jersey. Mario Torres told the police on the night of the shooting that the killer wore a red Sharks jersey. However, Juan

Torres testified that the shooter wore a 49er's jersey.

Marcelino "Boo" Carranza was the primary witness for the People. Mr. Carranza testified that he saw appellant shoot Mr. Sanchez. By his own admission, Mr. Carranza had recently been incarcerated for stabbing someone multiple times.

The defense theory of the case was that Francisco "Pico" Carrillo was the killer. Mr. Carrillo wore a red Sharks jersey on the night of the murder. At the time of the shooting, several neutral witnesses heard a woman scream "Francisco, Francisco." Mr. Carrillo was a convicted child molester. Two months after the shooting in this case, Mr. Carrillo was arrested for his involvement in a stabbing.

#### The Government's Case

#### The Alleged Gang Milieu

On March 7, 2005, appellant was 16 years old. (ACT 2.) During the late afternoon and early evening, appellant was in the company of a group of young men who were associated with two separate Norteno gangs. The men included Alejandro Mariscal, Marcelino Carranza, Fernando Morales, Joel Gutierrez, Francisco Carrillo and Javier Medina. (RT 2348.)<sup>1</sup>/ According to

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<sup>1</sup>Several of the men were also known by nicknames. The glossary of characters is as follows.

Marcelino Carranza - Boo (RT 673)

## APPENDIX C

arrested and \$252 was taken from his wallet. (RT 329.)

The parties stipulated that appellant had sustained a conviction for the foregoing conduct. The jury was advised that appellant "pled no contest to possession for sale of methamphetamine and being under the influence of methamphetamine in [the] case that Officer Torres" testified about. (RT 337.)

#### Defense Case

The defense did not present any witnesses. The defense introduced appellant's 2007 wage records from the Family Community Church. (RT 342-343.)

In his closing argument, defense counsel contended that the People had failed to prove that appellant was in possession of the methamphetamine. (RT 393-396.) In this regard, counsel noted that Mr. Orville and Anthony Badilla had ample opportunity to put the drugs in appellant's room during the 45 to 60 second period while the police were announcing their presence. (RT 393-396.)

As an alternative theory, defense counsel suggested that appellant possessed the drugs for personal use. (RT 398-403.) Counsel noted that there was no evidence that cutting agents or pay-owe sheets were found with the drugs. (RT 401.)

## APPENDIX D

## INTRODUCTION

It is said that the truth will set you free. The truth in this case is twofold: (1) Ms. Perez died a brutal and horrible death; and (2) petitioner was unconstitutionally convicted. While our human instincts demand that someone must pay for Ms. Perez' death, the reality remains that petitioner has been made to pay in a manner which does not conform to due process. It therefore falls to this court to ensure that the rule of law prevails over our more emotive sense of justice.

By the time of trial, petitioner was the only person who could be punished for the killing. Due to the untimely death of the co-defendant, Mr. Martinez, the jury never heard Mr. Martinez' testimony regarding the manner in which Ms. Perez met her end.

Notwithstanding the horrible facts of the case, the California Court of Appeal recognized that petitioner did not receive a fair trial. Through his testimony, petitioner presented the substantial defense that Mr. Martinez killed Ms. Perez after petitioner left the scene. We know to a certainty that the jury actively considered this version of the facts since they posed a question regarding petitioner's liability if he was not the actual killer. Although CALJIC No. 8.27 set forth the correct principles, the trial court did not read it to the jury. Given the trial court's failure to properly answer the jury's question, the Court of Appeal reversed the judgment under the federal Constitution.

When the case reached the California Supreme Court, the facts of the case were no less horrible. Given the facts, the Supreme Court did the human thing: It issued a ruling which condemned petitioner to spend the rest of his life in prison. However, in rendering its decision, the court employed reasoning which cannot survive scrutiny under the governing standard of *Neder v. United States*, 527 U.S. 1 (1999) or the court's own prior authorities.

As will be shown below, the jury should have been given CALJIC No. 8.27 which would have advised the jury that petitioner could be found liable for Mr. Martinez' act of killing Ms. Perez only if Mr. Martinez participated in the underlying rape. Under *Neder*, the omission to instruct on an element of the offense can only be deemed harmless if the evidence regarding the omitted element was "overwhelming" or "uncontroverted." *Neder*, 527 U.S. 1,

1 17-18. Since the evidence concerning Mr. Martinez' participation in the rape was far from  
2 "uncontroverted," reversal is compelled. Nonetheless, the California Supreme Court failed  
3 to cite *Neder* or its test. By acting in this fashion, the court acted "contrary" to federal law and  
4 the murder conviction must be reversed.

5 Aside from its failure to honor the *Neder* rule, the California Supreme Court violated  
6 due process by retroactively enlarging the scope of the felony murder rule. Prior to the  
7 California Supreme Court's decision in this case, the controlling rule was that a nonkiller  
8 could not be held liable unless the killer maintained the specific intent to aid and abet the  
9 underlying felony committed by the nonkiller. This rule was so well settled that it was  
10 included in No. 8.27. Nonetheless, the California Supreme Court ignored the rule in this case  
11 and held that Mr. Martinez did not have to hold the requisite intent. By retroactively applying  
12 its new rule, the California Supreme Court violated due process. *Bouie v. City of Columbia*,  
13 378 U.S. 347, 353-354 (1964).

14 Petitioner has contended that there is insufficient evidence to support his aggravated  
15 kidnapping conviction since the law at the time of the alleged offense in 1997 required  
16 asportation of at least 90 feet and Ms. Perez was asported only 25 feet. In rejecting this claim,  
17 the California Supreme Court held that the 1997 law did not necessarily require asportation  
18 for any specific distance. However, this is untrue as is reflected by the court's 1999 decision  
19 in *People v. Martinez*, 20 Cal.4th 225 (1999) and the court's 2007 decision in *People v.*  
20 *Morgan*, 42 Cal.4th 593 (2007). As a result, the court's refusal to apply the 1997 rule resulted  
21 in another federal due process violation. *Bouie v. City of Columbia*, 378 U.S. 347, 353-354.

22 Petitioner also challenged his aggravated kidnapping conviction on the grounds that  
23 there was insufficient evidence to establish that the asportation of Ms. Perez was not incidental  
24 to the rape. Insofar as Ms. Perez was moved only 25 feet from the road to a safer, more  
25 comfortable location for the commission of a sex act, the asportation was manifestly incidental  
26 to the rape. By holding to the contrary, the California Supreme Court engaged in an  
27 unreasonable application of federal law.

28 Finally, petitioner argued on his state appeal that the trial court had erred by failing to

1 instruct on the defense of reasonable good faith belief in consent with respect to the rape  
2 charge. In its analysis on this point, the California Supreme Court omitted to discuss the  
3 critical facts which supported the theory. Thus, the court once again engaged in an  
4 unreasonable application of federal law.

5 In urging reversal on the foregoing grounds, petitioner does not ignore the obvious.  
6 Ms. Perez suffered an unjustified and miserable death. However, if the government wishes  
7 to hold petitioner accountable for the death, it must first comply with the federal Constitution.  
8 Insofar as the record reveals numerous prejudicial errors, petitioner must be afforded a new  
9 trial along with a judgment of acquittal on the unsupported kidnapping count.

10 I.

11 THE MURDER CONVICTION MUST BE REVERSED PURSUANT TO  
12 *NEDER v. UNITED STATES*, 527 U.S. 1 SINCE THE TRIAL COURT  
13 FAILED TO INSTRUCT THE JURY WITH CALJIC No. 8.27.

14 A brief resume of the relevant facts and procedural history is in order. In his testimony,  
15 petitioner admitted that he had sex with Ms. Perez. He also implied that Mr. Martinez had  
16 killed Ms. Perez since she had been left alone with the enraged Mr. Martinez. Based on this  
17 evidence, defense counsel argued to the jury that petitioner should be acquitted since Mr.  
18 Martinez was the sole perpetrator of the killing. (RT 684.)

19 The only theory offered by the government was that petitioner was liable as a  
20 participant in a rape felony murder. In light of this theory, the court instructed the jury with  
21 CALJIC Nos. 8.10 and 8.21 which generally describe felony murder liability when the  
22 defendant is the perpetrator of the killing. (RT 706.)

23 At the time of trial, CALJIC No. 8.27<sup>1</sup> was the standard jury instruction which defined

24 <sup>1</sup>CALJIC No. 8.27 provided:

25 "If a human being is killed by one of several persons engaged in the commission or  
26 attempted commission of the crime of (felony), all persons, who either directly and actively  
27 commit the act constituting that crime, or who with knowledge of the unlawful purpose of the  
28 perpetrator of the crime and with the intent or purpose of committing, encouraging, or  
advice its commission, are guilty of murder of the first degree, whether the killing is

## APPENDIX E

introduce relevant evidence. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-56; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) As will be demonstrated below, appellant suffered a fundamental deprivation of due process in this case.

A. The Trial Court Erred By Excluding The Testimony Of Dr. Reidy.

The autopsy conducted on Mr. Carrillo revealed that he had .62 milligrams per liter of methamphetamine in his system. (6 RT 1540.) The coroner classified this amount as potentially toxic. (6 RT 1540.)

Prior to trial, appellant made known to the People that he intended to call Dr. Reidy “to testify about the effects of methamphetamine on the body and the correlation with violent behavior.” (2 CT 41.) The People registered relevancy and Evidence Code section 352 objections. (2 CT 41.) The People argued that Dr. Reidy’s testimony could not shed any light on Mr. Carrillo’s behavior. (2 RT 315.)

Defense counsel contended that Dr. Reidy was qualified to offer an opinion that the use of methamphetamine can cause “aggressive” behavior. (2 RT 316.) In counsel’s view, the testimony would support the defense theory that appellant acted reasonably in self defense since Mr. Carrillo’s aggressive behavior and demeanor caused appellant to fear him. (2 RT 316.)

The trial court first indicated that it would allow admission of the

evidence that Mr. Carrillo was under the influence of methamphetamine. (2 RT 317.) However, the court excluded Dr. Reidy's testimony.

"As to the testimony of Doctor Reidy, I don't believe that's relevant or admissible, and so the Court will grant the motion to exclude Doctor Reidy's testimony about the effects of methamphetamine ingestion." (2 RT 318.)

At the outset, it must be noted that the trial court's ruling was internally illogical. The rule is well settled that evidence of drug use is inadmissible unless it is supported by expert testimony concerning the effect of such use. (*People v. Wilson* (2008) 44 Cal.4th 758, 794.) Thus, once the court admitted the evidence concerning Mr. Carrillo's methamphetamine use, it should have taken the next step of allowing Dr. Reidy to testify.

The court ruled that Dr. Reidy's testimony was irrelevant. (2 RT 318.) The ruling was erroneous.

Pursuant to Evidence Code section 210, relevant evidence is that evidence which has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence is relevant "if it 'tends "logically, naturally, and by reasonable inference" to establish material facts'" which are at issue. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Here, Dr. Reidy's testimony was offered to show that the use of methamphetamine can cause people to act in an aggressive fashion. This

## APPENDIX F

VII.

PETITIONER WAS DEPRIVED OF A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS DUE TO THE CUMULATIVE PREJUDICE FLOWING FROM THE SEVERAL ERRORS WHICH OCCURRED AT HIS TRIAL.

Assuming that this court should conclude that none of the errors identified above individually warrant reversal, the cumulation of the errors compels a finding of prejudice. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *People v. Hill* (1998) 17 Cal.4th 800, 844.) In establishing this conclusion, it is helpful to compare the trial which actually took place with the one which should have occurred. (*Bonin v. Calderon* (9<sup>th</sup> Cir. 1995) 59 F.3d 815, 834 [in assessing prejudice, the court should "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently."].)

Had the case been properly litigated, the defense would have strongly impeached the People's evidence. In the absence of the testimony of Dr. Abbott, the jury was misled into believing that Justin's extrajudicial statements were credible. Similarly, in the absence of the testimony of Dr. Crawford, the jury had no clue that Ms. Ritter's findings scarcely supported a finding that Justin had been molested. Moreover, Ms. Ritter testified with a false aura of credibility since the jury did not know that she chronically concealed videotapes and gave misleading testimony in other cases. The jury also did not know that Ms. Ritter ritualistically failed to comply with Penal Code section 13823.5.

In addition, the People's case was unfairly strengthened when the jury improperly learned that petitioner had a criminal record. This highly prejudicial evidence undoubtedly caused the jury to overlook the fundamental weaknesses in the government's case.

The bottom line is that a conviction was obtained on the basis of two pieces of evidence: (1) Justin's extrajudicial statements; and (2) Ms. Ritter's testimony that the superficial fissure found in Justin's anus was "consistent" with sexual penetration. As we now know, both of these pieces of evidence were subject to powerful rebuttal. Given this reality, it simply cannot be said that petitioner received a fair trial.

*Sanders v. Ryder*, supra, 2006 U.S. App. Lexis 16991 so holds. In *Sanders*, as here, defense counsel failed to introduce expert testimony which would have impeached extrajudicial statements made by the complainant and the forensic findings introduced by the prosecution. The Court of Appeals found that these errors required reversal.

“There was no rational reason for defense counsel’s failure to challenge the only pieces of evidence offered by the state - - the child hearsay statements and the limited forensic evidence - - both of which could have been severely undermined by the presentation of expert testimony. Counsel not only failed to present such experts at trial, but also failed to consult them pre-trial, thereby depriving himself of critical knowledge necessary to the formulation of a defense. As noted, without the child’s hearsay statements, there would have been insufficient evidence to support a conviction, and yet counsel made no argument against admissibility at the pre-trial hearing. Further, as emphasized by the prosecution’s closing argument at trial, counsel failed to offer witnesses to impeach the credibility of the state’s key witness - - the child’s mother - - or to corroborate Sanders’s version of events. Given such deficiencies, no reasonable court could maintain confidence in the jury’s verdict. Accordingly, we reverse the district court’s denial of Sanders’s habeas petition and remand for issuance of the writ.” (*Sanders*, supra, 2006 U.S. App. Lexis 16991, at \* 12-13).

The bedrock of our judicial system is the concept that a criminal defendant must be given a fair trial. Petitioner was convicted in a proceeding which was marred by fundamental error. A remedy must be provided.

VIII.

RELIEF MUST BE GRANTED PURSUANT TO THE DUE PROCESS  
CLAUSE OF THE FOURTEENTH AMENDMENT SINCE PETITIONER IS  
FACTUALLY INNOCENT.

The full record before this court demonstrates that petitioner is actually innocent of the charges against him. As petitioner has demonstrated, the People's evidence is so flimsy that no reasonable trier of fact would return a conviction. Under these circumstances, petitioner's convictions must be set aside. (See *Herrera v. Collins* (1993) 506 U.S. 390, 417 [court assumed that the execution of an innocent man would be an unconstitutional act].)

## APPENDIX G

### III.

APPELLANT WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO CALL WITNESSES UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT EXCLUDED VITAL DEFENSE EVIDENCE.

In his opening brief, appellant established that the trial court erred by excluding defense evidence. (AOB 35-49.) The evidence involved Mr. Carrillo's prior conviction for possession of a loaded firearm for a gang purpose and expert testimony that methamphetamine use can cause a person to act aggressively. The People contend that the court's rulings were proper. In the sections which follow, appellant will demonstrate that the People's claims are meritless.

A. The Trial Court Erred By Excluding The Testimony of Dr. Reidy.

Appellant made an offer of proof that Dr. Reidy would testify that the use of methamphetamine can cause "aggressive" behavior. (2 RT 316.) The evidence was admissible to support appellant's testimony that he feared that Mr. Carrillo would use a weapon since he appeared to be "psyched or loaded." (8 RT 2187.)

The People contend that: (1) the trial court properly ruled that the evidence was irrelevant; and (2) exclusion of the evidence constitutes harmless error. (RB 37-38.) The People are mistaken.

## APPENDIX H

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

**PEOPLE OF THE STATE OF CALIFORNIA,**  
Plaintiff and Respondent,  
v.  
**RAYMUNDO RIVERA,**  
Defendant and Appellant.

No. H033633

(Santa Clara County  
Superior Court No.  
CC632875)

I.

THIS COURT SHOULD MODIFY ITS DISPOSITION TO  
PROVIDE THAT THE TRIAL COURT IS TO PREPARE AN  
AMENDED ABSTRACT OF JUDGMENT.

This court has held that the trial court erred by failing to impose a Penal Code section 654 stay as to appellant's robbery conviction. (Opinion, pp. 9-15.) In its disposition, this court "remanded for resentencing . . ." (Opinion, p. 17.) This is not the appropriate disposition.

Appellant was convicted on only two charges: first degree murder and robbery. The only permissible sentence for first degree murder is 25 years to life. Insofar as the punishment for the robbery conviction is to be stayed pursuant to section 654, the only possible sentence is 25 years to life.

Given these circumstances, the proper disposition is to direct the trial court to prepare an amended abstract of judgment that reflects a section 654

stay on the robbery conviction with a consequent reduction in the sentence to 25 years to life. In this way, an unnecessary "resentencing" hearing will be avoided.

CONCLUSION

For the reasons expressed above, this court should modify its disposition to provide that the judgment is reversed with directions to issue an amended abstract of judgment that reflects a Penal Code section 654 stay for the robbery conviction and a total sentence of 25 years to life for the murder conviction.

Dated: February 25, 2010

Respectfully submitted,



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DALLAS SACHER  
Attorney for Appellant,  
Raymundo Rivera

# APPENDIX I

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	]	
	]	NO. H026552
Plaintiff and Respondent,	]	
	]	(SANTA CLARA CO.
vs.	]	SUPERIOR COURT
	]	NO. EE015964)
DAVID RUEZGA,	]	
	]	
Defendant and Appellant.	]	

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INTRODUCTION

This is a serious case which raises a number of difficult and complicated constitutional issues. In his opening brief, appellant made a diligent and good faith effort to present his contentions in an objective manner which paid allegiance to both the record and legal precedent.

As an apparent strategic choice, the People have responded to appellant's contentions by repeatedly alleging that appellant has not faithfully represented the record and the law. (RB 35-38, 41, 45, 47, 51, 55, 59, 61, 65.) Needless to say, appellant does not agree. In the interest of professional

decorum, appellant will reply to the People's baseless allegations only to the extent that it is reasonably necessary to demonstrate the bona fides of his claims of error.

Appellant intends no disrespect to the People. However, it is regrettable that the People have resorted to inflammatory rhetoric rather than confining their analysis to the issues at hand. Once the rhetoric in the People's brief is put aside, appellant is confident that a fair analysis of the legal issues will result in the remedy to which he is entitled.

I. APPELLANT WAS DEPRIVED OF DUE PROCESS UNDER THE FEDERAL CONSTITUTION WHEN THE TRIAL COURT GAVE CALJIC NO. 5.55.

In his opening brief, appellant established that the trial court erred by giving CALJIC No. 5.55 since it had no application to the facts of the case. (AOB 17-26.) In response, the People offer a series of contentions: (1) the instruction was appropriately given since appellant orchestrated the incident; (2) even if appellant did not orchestrate the episode, the instruction properly applied to the second set of shots which he fired; (3) regardless of the facts of the case, appellant has distorted the legal principle found in No. 5.55; and (4) any error was harmless. (RB 33-43.) Each of these meritless contentions will be separately rebutted below.

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