October 20, 2010 ADI Seminar
Nuts and Bolts of Habeas Corpus Practice

The writ of habeas corpus provides an avenue of relief from unlawful custody when direct appeal is inadequate.

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I. ADI Policy.

(ADI Manual, §§8.2-8.4.)

ADI expects appointed counsel to be attentive to possible issues requiring habeas or other writ remedies and to pursue those reasonably necessary and within the scope of appellate responsibilities.

Counsel should consult with the assigned ADI staff attorney when considering a writ investigation or petition. Questions to consider:

1. whether available evidence and current law or signs of potential changes support petition;
2. whether and how off-record claims should be investigated;
3. whether, where, and when a petition should be filed;
4. whether the client would be benefit from the remedy; and
5. whether there are any adverse consequences by pursuing writ relief

II. Authorities.[1]

A. Federal Authorities

Antiterrorrism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2241, et. seq.
Strickland v. Washington (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] [to establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings];

[1] This is not an exhaustive list of applicable authorities.

B. State Authorities

Penal Code sections 1473, et. seq. [Chapter 1. Of the Writ of Habeas Corpus]; 1054.9 [access to discovery materials re post-conviction writ for LWOP and death penalty cases].

California Rules of Court, rules 4.550 - 4.552 [Habeas Corpus in Superior Court]; 8.380 - 8.388 [Habeas Corpus in Court of Appeal].

People v. Ledesma (2006) 39 Cal.4th 641 [in cases where ineffective assistance is raised, the relief sought must be by way of a petition for writ of habeas corpus where the record on appeal sheds no light on the challenged conduct, that is, why counsel acted or failed to act]; *People v. Duvall* (1995) 9 Cal.4th 464 and *People v. Romero* (1994) 8 Cal.4th 728 [describing general state habeas corpus procedure, law, and theory in the context of challenging a criminal conviction].

C. ADI Manual

1. Chapter 8, Putting On the Writs: California Extraordinary Remedies, <http://www.adi-sandiego.com/PDFs/Manual%20August%202010/8%20Chapter%208%20-%20State%20writs.pdf>

2. Chapter 9, The Courthouse Across the Street: Federal Habeas Corpus, <http://www.adi-sandiego.com/PDFs/Manual%20August%202010/o-Ch%209%20-%20Federal%20habeas%20corpus.pdf>

III. Spotting and Investigating a Habeas Issue.

A. <u>Illustrations</u>

1. Failure to Investigate and Subpoena an Exonerating Witness - Austin
   a. Issue Discovered: Review of record.
   b. Background: Possession of firearm by felon offense; 25 years to life. Client's car passenger, JP, had shotgun in backpack. When officers arrived following suspicious circumstances call, client detained; car searched and gun found. JP got away; later provided letter exonerating client. Attorney had the letter and had a few calls with JP. JP made admissions to attorney and to DA witness, MP. Off record, attorney unsuccessfully sought at eve of trial a continuance to subpoena JP. Came to light on the record during subsequent evidentiary hearing. Attorney was aware of JP about 1 ½ years. Jury struggled during deliberations, which habeas attributed to having a doubt about who the gun actually belonged to & client's lack of knowledge of it.

2. Misadvisal Inducing Client to Plead Guilty to a Defensible Case - Burke
   a. Issue Discovered: Review of the record (weakness of the case); complaints by appellant and his grandmother.
   b. Background: Vehicle stopped because petitioner-passenger not wearing seatbelt; petitioner-passenger had been seen getting into vehicle only moments before vehicle stop; search of co-D driver found cocaine; passenger sitting atop "pay-owe" sheet (scrap of paper in Spanish with names, numbers); both arrested. On appeal, denial of 1538.5 reversed as to driver, but affirmed as to petitioner (no standing as to search of driver's person).

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Facts re representation: petitioner was learning-disabled, dyslexic, dysgraphic, and schizophrenic, with no previous felony record who consistently asserted his innocence; retained counsel had not prepared for trial; counseled defendant to plead guilty, because otherwise, if found guilty at trial, would go to prison.

State courts summarily denied habeas re IAC/involuntariness of plea, notwithstanding *Blackledge v. Allison* (1977) 431 U.S. 63 [97 S.Ct. 1621, 52 L.Ed.2d 136] [plea record indicating voluntariness, although imposing, is not invariably insurmountable; in administering habeas corpus, federal courts cannot fairly adopt a per se rule of voluntariness].

3. Abandoning the client - Consiglio
   a. Issue Discovered: Review of record and conversations with client.
   b. Background: Consiglio was accused of raping a woman. His defense was based on a phone record which suggested that he could not have been in the park, committing the crime, at the time the rape occurred. After the D.A. poked some holes in the "telephone" defense, Consiglio wanted to testify. Trial counsel told him that, if he did, he would be on his own. When Consiglio testified, trial attorney failed to make any objections to the D.A.'s questions. Trial counsel later told judge that he believed that alibi witness lied on the stand.

B. <u>Initial Assessment/Legal Research</u>:

1. Austin
   - Researched admissibility under Evidence Code section 1230, declaration against interest. Even if JP subpoenaed and refused to testify, letter and verbal exonerating statements to DA witness MP and to trial counsel were arguably admissible. Letter must be authenticated.
   - Prejudice - jury had trouble deciding case; asked for readbacks (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror questions and requests to have testimony

reread are indications the deliberations were close]); credibility of JP and MP (wit who saw exonerating letter and JP made admissions to) important to look into and assess.

2. Burke
   - Conferred in detail with Burke's grandmother re Burke's background; conferred in general with Riverside criminal law specialist/expert witness (CLS/EW); requested and received copy of defense counsel's file – counsel was otherwise not cooperative as to why he did not go to trial.
   - Prejudice – if trial counsel was mistaken re the law, failed to take necessary action (e.g., move to dismiss improper allegations) and advised defendant of unwarranted consequences, defendant's plea would not be voluntary since he had insisted on his innocence and wanted to go trial.

3. Consiglio
   - Researched two issues: whether trial counsel's duty to be a zealous advocate ceases when client pursues strategy that lawyer thinks inappropriate and the ethical duty of an attorney if he believes that a witness has lied.

C. Investigation and Gathering of Evidence

Keep in mind requirement to establish a *prima facie case* warranting relief and what may be important at an evidentiary hearing. (*People v. Duvall, supra,* 9 Cal.4th at p. 474 [petitioner bears a heavy burden to plead sufficient grounds for relief in the petition and then later to prove them]; *People v. Romero* (1994) 8 Cal.4th 728, 740 [if the petition establishes a prima facie case warranting relief, the court *must* issue either a writ of habeas corpus or an order to show cause].)

Trial counsel's obligation to cooperate and turn over files –
see *Rose v. State Bar* (1989) 49 Cal.3d 646, 655; *Finch v State Bar* (1981) 28 Cal.3d 659, 665; California State Bar Formal Opinion No. 1992-127 [http://ethics.calbar.ca.gov/Ethics/Opinions/1992126to1997151.aspx];
Business and Professions Code section 6068, subd. (n); California Rules of Professional Conduct, rule 3-700(D)(1).

Limited discovery rights –
In re Steele (2004) 32 Cal.4th 682, 691; *Curl v. Superior Court* (2006) 140 Cal.App.4th 310 [post conviction discovery in LWOP and death penalty cases];
People v. Garcia (1993) 17 Cal.App.4th 1169, 1179 [after trial, prosecution continues to have an ethical duty to disclose exculpatory information].

Resources –
Funds: will need preapproval, perhaps court order, for experts, such as investigators, attorneys (specialists), forensics. ADI may approve reasonable fees for some experts, e.g., investigator without court approval for no more than $900 per February 21, 2008 court order. Attorney must submit to ADI a realistic estimate of total anticipated costs and an explanation of the need for the expenditure. Any total amounts that is beyond the $900 must be submitted to the court. Because these expenses are usually high as compared with ordinary expenses, a receipt or other documentation is ordinarily required.

For expert referrals, contact –
Division One cases: Professor Jan Stiglitz, Innocence Project, js@cwsl.edu
Division Two cases: Attorney John Aquilina, aquilina@sbcglobal.net
Division Three cases: Attorney Correen Ferrentino, cori@ferrentinolaw.com

Penal Code section 1405 (DNA testing) motion

Electronic Technology (e.g., Google, Facebook, MySpace, etc.) –
Did trial counsel employ same effectively?
Can appellate counsel employ same to investigate trial counsel?

1. Austin
   - Asked trial counsel by letter what he did to investigate and subpoena JP and why he asked for a continuance on eve of trial; asked for defense file; counsel was cooperative and professional.
   - Review of file revealed no investigative efforts done except a few phone calls to/with JP. Attorney believed he did not have JP's contact/personal information to provide to investigator and to subpoena him but file showed contrary. Witness was never subpoenaed. File had original signed letter from JP exonerating client. Attorney provided a declaration.
   - ADI clerk went to SD Superior Court using the personal information to see if any cases on file for JP. Found adult criminal file with JP's signatures and contact information. (He was on probation.)
   - Compared signatures from court file docs with signature on exonerating letter and they matched. This helps establish a degree of authentication.
   - Client's sister contacted who informed that DA trial witness, MP, who had been client's girlfriend at the time of the offense, was aware of letter and had helped JP get to court to give a statement to the DA.
   - Contacted witness MP, who confirmed this and gave a declaration including that exonerating wit had shown her the original signed letter and made a verbal admission to her. Corroboration and helps in authenticating the letter. She is a

straight shooter, responsive to questions, worked for the school district, did not come across as a sketchy witness, she testified well for the prosecution. I did not develop any concerns about her credibility.

- Initial efforts to locate exonerating witness - Client's sister tried contacting JP via My Space and he was responding to her communications but not agreeing to give a declaration nor telling her where he was.
- Contacted local investigator who did initial search to locate JP who provided computer results and second investigator who went out to speak with JP's sister and mother. Had a possible state.
- Legal research on subpoena of out of state witness.
- I called PD office in the other state. PD office informed they had represented him but case was over. He was in another state. That office sent me doxs on him. Called the other state PD office who confirmed he was a client but would not speak to me about details or where he was. JP was on probation in that other state.
- I prepared my declaration re: discussions with trial counsel, review of defense file and what was in there and not in there.

2. Burke
   - With authorization from client, reviewed his special education school records, e.g., IEPs, documenting low IQ, dyslexia, dysgraphia; obtained stipulation of A.G. in lieu of having Federal Defenders subpoena custodian.
   - Had CLS/EW review discovery, defense counsel's file, pertinent portions of appellate record; conferred with CLS/EW as to potential defenses at trial and/or potentially better plea bargains; *key* was *former* Penal Code section 1203.07, subdivision (a)(1) [probation ineligibility for possession of heroin for sale].
   - Prepared grandmother for trial with practice direct and cross-examination.
   - Prepared Burke for trial with practice direct and cross-examination.

3. Consiglio
   - First contacted alibi witness to determine whether trial counsel's representation regarding her alleged perjury was factually correct. Alibi witness disagreed with counsel's version of what witness purportedly said in a phone conversation which preceded counsel's chambers conference with the judge.
   - Then contacted trial counsel regarding his actions in the case.

III. Preparation of Petition and Ensuing Court Orders

(ADI Manual, §§ 8.21-8.27.)

"The purpose of a habeas corpus petition is to set forth facts and law sufficient to state a prima facie cause– i.e., if the facts stated are assumed true, the petitioner would be entitled to relief."

(ADI Manual, § 8.20.)

"If the petition establishes a prima facie case warranting relief, the court *must* issue either a writ of habeas corpus or an order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728, 740; Pen. Code, § 1476, Cal. Rules of Court, rule 8.385(d).) The issuance of the writ or order establishes a cause of action. (*Romero,* at p. 740.) It is a preliminary determination that the facts as alleged in the petition, if true, state a cause for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4." (ADI Manual, §§8.32.)

1. Austin

Habeas writ filed with following exhibits in Court of Appeal and consolidated with appeal:

- Declaration of trial counsel
- Declaration of DA witness MP
- Declaration of Appellate Counsel
- Signed original letter exonerating client with JP signature
- Criminal file records of JP showing his signatures

Petition established a prima facie case. Court of Appeal issued an Order to Show Cause and ordered a return and a traverse. Purpose: to define and narrow the contested issues.

Court informed parties that it was considering ordering an evidentiary hearing and asked the parties to file briefing suggesting the factual issues to be resolved by the referee. After reviewing the briefing, Court of Appeal ordered a hearing in the superior court and listed the specific disputed factual issues for the referee to resolve.

2. Burke

Standard state forms with supplemental points and authorities with declarations by appellant and appellate counsel filed in state courts. Federal district form with no supplemental points and authorities permitted filed in district court. Key pleading was traverse. Federal district court (magistrate judge) issued OSC and calendared evidentiary hearing.

3. Consiglio

Prepared petition for writ of habeas corpus and filed it in conjunction with the appeal (which also contained an IAC claim). The petition included a declaration from alibi witness indicating that she had not recanted her trial testimony and never told the trial counsel that she had lied. On appeal,

argued that, even if the witness had recanted, trial counsel had no right to report this to the judge. With regard to the failure to object to the D.A.'s question when client took the stand, had an affidavit from experienced trial counsel in the writ which indicated that there could be no strategic reason for allowing one's client to be crucified on the stand.

IV. Evidentiary Hearing

Appointment of Counsel –

Appellate/superior court may require/deny appellate counsel remain counsel of record
Alternatively, appellate counsel may serve formally/informally as associate counsel

"If the return and traverse present no disputed material factual issue, the court may dispose of the petition without the necessity of an evidentiary hearing. (*People v. Romero* (1994) 8 Cal.4th 728, 739, and cases cited therein.) If there are disputed facts and the petitioner's right to relief may turn on the resolution of a factual matter, then a hearing is required. (*Id.* at pp. 739-740; see Pen. Code, § 1484; Cal. Rules of Court, rule 3.386(f)(1).) (¶) Evidentiary hearings are normally conducted in the superior court before a judge of that court, even if the Court of Appeal has retained jurisdiction over the cause. (See Cal. Rules of Court, rule 3.386(f)(2).) (¶)The petitioner bears the burden of proving, by a preponderance of the evidence, the facts on which the claim depends. (*In re Large* (2008) 41 Cal.4th 538, 549.)" (ADI Manual, § 8.39.)

Court of Appeal issues order framing the specific factual issues that are in dispute for the referee to answer.

Discovery: Parties can use the usual tools for producing evidence, such as subpoena witnesses, and the court is authorized "to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." (Pen. Code, § 1484.)

Factual findings by any referee the court may have appointed are not binding, but are entitled to great weight when supported by substantial evidence, especially findings that require resolution of testimonial conflicts and assessment of witnesses' credibility. (*In re Sakarias* (2005) 35 Cal.4th 140, 151; *In re Hamilton* (1999) 20 Cal.4th 273, 296-297; *In re Ross* (1995) 10 Cal.4th 184, 201; *In re Marquez* (1992) 1 Cal.4th 584, 603.) (ADI Manual, § 8.43.)

1. Austin

Appointed appellate counsel provided evidentiary attorney with all investigative results regarding whereabout of exonerating witness and with legal research regarding subpoena process for out of state witness. That attorney then had her investigator followup and ultimately subpoenaed JP with the help of the sister state jurisdiction. JP showed up at the

hearing but invoked his 5th Amendment. An expert testified as to his opinion regarding the signatures on the exonerating letter and court documents as being written by the same person (JP). MP testified at the hearing consistently with her declaration that she saw JP's letter and he made admissions to her.

2. Burke

- Exhibits
  1. Plea transcript
     A. When A.G. attempted to cross-examine petitioner about plea, defense objection sustained that transcript was best evidence, spoke for itself.
     B. Transcript contained an interjection, "What?" consistent with grandmother's/petitioner's testimony re poke in the ribs.
     C. All of petitioner's answer's were simple yes's or no's.
  2. IEPs
  3. Plea form
     A. Petitioner's "signature" was in printing, i.e., can sign his name but not well or quickly; "signature" was on the attorney's signature line.
     B. Attorney had not signed
  4. Complaint/information (KEY)

- Witnesses (note – it was unknown whether the People would present the trial judge; they did not):

  1. Grandmother – provided transportation to court; background of petitioner re learning disabilities, etc., and conduct of the plea.
  2. Burke – insistence of innocence; lack of contact with attorney; conduct of plea; NOTE: low IQ, both advantageous and disadvantageous – subject to manipulation by cross-examination by A.G., but tried to minimize by proper objection; BUT petitioner not very cunning or manipulative himself, and, hence, credible.
  3. Trial Attorney – NOT at all cooperative; always would rationalize a decision; key issue was why the case would have been a prison sentence but for a plea bargain; centered on allegation on probation ineligibility allegation in complaint/information (former Pen. Code, § 1203.07, subd. (1)(1)); induced attorney to confirm his "strategy" was dictated by the probation ineligibility allegation.

  NOTE: this inducement was the centerpiece of the strategy of the habeas and the conference with the expert witness and was not disclosed in the points and authorities filed with the court.

CLS/EW – very defensible case, i.e., petitioner entered vehicle only moments before stop, was only sitting on top of the paper which he could not read, no admission by him or implication by other defendant; if any liability of "hiding" "pay-owe" sheet, culpability perhaps as accessory after the fact (wobbler) rather than as aider/abettor of transportation or possession for sale; with no felony record and learning disabilities, etc., probation highly likely, even after trial and any conviction; former Penal Code section 1203.07, subdivision (a)(1) inapplicable, since it applied solely to heroin, not cocaine; effective assistance would have pursued section 995 motion to have dismissed the allegation from the information to increase leverage in any plea negotiation; any advice based upon allegation was deficient performance; would not have advised petitioner to have pleaded guilty.

3. Consiglio

Employed an expert witness (experienced trial attorney) to discuss problems of client control and how problems early on resulted in a breach in the relationship between Consiglio and trial counsel. He also testified that even if you disagree with a client's decision to testify, you must continue to assist. In fact, the need to assist and be a diligent advocate is all the more critical when your client pursues a risky strategy. He also discussed how to deal with ethical problems raised when there is a possibility that a defense witness has lied.

Also had the alibi witness testify at the hearing. She testified that she never told trial counsel that she lied or that she was sure that the telephone record was inaccurate. Instead, she told him that she was not 100% sure that her memory of the date of the call matched the phone record reflecting the call. However, there was only one lengthy call with Consiglio, and she had no reason to believe that the phone record showing the date of that call was inaccurate.

V. Post Hearing Outcomes

1. Austin

Further briefing requested and oral argument.
COA opinion: The court reversed based on IAC for failure to investigate and subpoena JP.

It implicitly rejected the referee's unfavorable findings as to MP's credibility. It held: The trial court found JP would have invoked his right against self incrimination and not testified. But it also found that witness's letter could have been authenticated. Defense counsel performed deficiently by failing to subpoena the witness, whose refusal to testify would have allowed the defense to offer the letter as a declaration against interest. A reasonable probability exists that the admission of the letter would have led to a more favorable result for defendant.

On remand, client faced retrial. Plea negotiations followed. 6 years, time served.

2. Burke

Immediate post-hearing conference held with counsel in which magistrate judge (MJ) indicated he did not believe "that lying SOB [trial counsel]," but was not certain of a finding of the prejudice prong of *Strickland*. MJ inquired if the parties had thought of any settlement. I indicated I had – withdraw the plea to the felony; plead guilty anew to misdemeanor, credit for time served, no probation. (Note: in the interim, client had been arrested for being a felon in possession of ammunition; the withdrawal of the felony would also eliminate the current prosecution.) Although initially reluctant, A.G. did agree. Upon dismissal of the felony and plea to the misdemeanor, petitioner moved to dismiss the habeas. MJ considered petitioner the prevailing party and ordered attorney fees for ADI.

3. Consiglio

The petition was granted and Consiglio was retried. He was again convicted although on fewer counts and with no enhancement. As a result, Consiglio was sentenced to 9 years instead of 18. By the time of the retrial, the alibi witness was so confused that her testimony was not helpful. In addition, over objection, the D.A. was allowed to present Consiglio's testimony from the first trial to the jury during the retrial. On appeal, I argued that this was error, because his testimony was the product of IAC and would not have been elicited but for the IAC. That argument was rejected.