Appellate Advocacy College 2000

Lecture

Writs in Criminal Appeals

Carmela Simoncini

QUIZ

1. The defendant's notice of appeal was filed 3 days late. The defendant is incarcerated and signed the notice of appeal within the 60 day limitation period, but do to prison mail procedures, the notice was not received by the court within the time limit. What procedure should appellate counsel employ to have the notice of appeal deemed timely?

2. The defendant pled guilty and agreed to a sentence term. A year and a half later, while researching in the prison law library, the defendant learns the sentence was unauthorized.

   1) Should he file a petition for writ of error coram nobis?

   2) Why or why not?

   3) If not, what is the proper procedure?

3. The defendant was advised to plead guilty because the state of the law at the time of his plea precluded a judge from exercising discretion to strike prior serious felony convictions under the Three Strikes Law. After the decision in the Romero case (People v. Superior Court (Romero) (1996) 13 Cal.4th 497) his attorney filed a petition for writ of error coram nobis in the trial court, seeking an order striking the priors. Was this the correct procedure?

   1) If so, is the denial of the writ or error appealable?

4. Assume the same facts, except the attorney has filed a petition for writ of error coram nobis to vacate the plea of guilty on the ground it was induced by a mistake of law or a change in the law. Was this the correct procedure?

5. Defendant filed a petition for writ of habeas corpus in the trial court. It was denied.

   1) What should you/defendant do to obtain appellate court review of the denial?

   2) Assume the Court of Appeal affirms the denial. What

should the you/defendant do to obtain Supreme Court review of the order?

6. Defendant pled guilty because his trial attorney misrepresented to him the risks of trial and the maximum prison exposure he faced in the event of conviction. He filed a notice of appeal seeking to challenge the validity of the plea. He requested a certificate of probable cause, but the trial court denied issuance of the certificate. You have been appointed within the 60 day notice of appeal period. What should you do to preserve the challenge to the guilty plea?

7. Assume the same facts but that the 60 day period for the notice of appeal has passed. What should you do in order to raise the challenge to the guilty plea?

WRITING HABEAS AND OTHER WRITS

1. HABEAS CORPUS

This article will attempt to scratch the surface of the substance and procedure of proceedings in habeas corpus. It will first cover some situations in which habeas corpus is an appropriate vehicle for a remedy. Later, it will discuss how to investigate, prepare, file, and litigate the merits of the petition.

1. WHEN APPROPRIATE

Habeas corpus, the "great writ," is the vehicle used to challenge unlawful restraint of an individual. It is the primary vehicle for review of orders where appeal is precluded or would be an inadequate remedy. It is also utilized to bring to the court's attention matters outside the record which resulted in the violation of a guaranteed constitutional right, thereby rendering the defendant’s restraint of freedom unlawful. It should be noted that actual detention in prison is not an indispensable condition precedent to issuance of the writ. Persons on probation and parole, deemed to be in constructive custody, are entitled to the writ upon the proper showing.

The denial of a petition for writ of habeas corpus at the superior court level is non-appealable. If the trial court has

denied a writ, the proper remedy is to file a new petition for writ of habeas corpus, in the Court of Appeal, addressing the appellate court's original jurisdiction. If the writ is denied by the Court of Appeal, however, you do not need to file a new petition for writ of habeas corpus in the Supreme Court. The denial of the writ by the Court of Appeal is reviewable by a petition for review in the Supreme Court.

A petition for writ of habeas corpus may also be used to correct the erroneous denial of a right to an effective appeal, to determine that an appeal is pending, and to effect preparation of the record so as to perfect the appeal. In fact, the failure to timely file a notice of appeal in some courts is only curable via the writ. Check with the appellate project in your district.

1. Habeas Corpus as a Vehicle to Raise IAC or Other Evidence Outside the Record.

A petition for writ of habeas corpus is the proper vehicle for bringing into an appeal evidence which is not in the record on appeal but which is crucial to an appellant's claims for relief. (In re Bower (1985) 38 Cal.3d 865, 872; People v. Pope (1979) 23 Cal.3d 412, 426, fn. 17; In re Baker (1988) 206 Cal.App.3d 493, 499; People v. Apodaca (1978) 479, 489, fn.3.)

Probably the most frequent use of the petition for writ of habeas corpus by appellate practitioners is to address problems

relating to ineffective assistance of trial counsel. If appellate challenge to actions of a trial attorney is made, it is frequently necessary to file a writ of habeas corpus as a companion to the appeal, in order to establish counsel's inadequacy, where the record is inadequate.

2. Habeas Corpus as a Vehicle to Introduce Newly Discovered Evidence.

Newly discovered evidence may justify relief by habeas corpus when it completely undermines the entire structure of the case upon which the prosecution was based. (In re Lindley (1947) 29 Cal.2d 709, 723.)

Habeas relief has been granted in cases where newly discovered evidence could not have been discovered prior to or during the trial. (In re Hall (1981) 30 Cal.3d 408.) The Supreme Court held in Hall that a habeas corpus petitioner must first present newly discovered evidence that raises doubt about his guilt; once this is done, he may introduce "any evidence not presented to the trial court and which is not merely cumulative in relation to evidence which was presented at trial. (Ibid.; see also In re Branch (1969) 70 Cal.2d 200, 214.)

Newly discovered and credible evidence which undermines the prosecution's case warrants habeas corpus relief. (In re Hall,

supra, 30 Cal.3d 408.) As the California Supreme Court held in In re Clark (1993) 5 Cal.4th 750, at page 766:

> "It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. (In re Hall (1981) 30 Cal.3d 408, 417 [179 Cal.Rptr. 223, 637 P.2d 690]; In re Weber (1974) 11 Cal.3d 703, 724 [114 Cal.Rptr. 429, 523 P.2d 229]; In re Branch (1969) 70 Cal.2d 200, 215 [74 Cal.Rptr. 238, 449 P.2d 174].) '[A] criminal judgment may be collaterally attacked on the basis of "newly discovered" evidence only if the "new" evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.' (People v. Gonzalez (1990) 51 Cal.3d 1179, 1246 [275 Cal.Rptr. 729, 800 P.2d 1159].)"

3. Habeas Corpus as a Vehicle to Correct Sentencing Error.

Habeas corpus is available to correct sentencing errors where the conviction or sentence are in excess of the court's jurisdiction. The writ has also been used in various cases where the trial court has sentenced a defendant to a term in excess of the maximum provided by law. It will always issue to review an invalid sentence, when without the redetermination of any facts,

the judgment may be corrected to accord with the proper determination of the circumstances. (In re Estrada (1965) 63 Cal.2d 740, 750; Neal v. State of California (1960) 55 Cal.2d 11, 16-17.)

The People v. Superior Court (Romero) (1996) 13 Cal.4th 497, the Supreme Court specified a petition for writ of habeas corpus filed in the sentencing court was the proper remedy for defendants sentenced under the Three Strikes provisions, where the sentence was:

> imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice pursuant to section 1385(a) . . .

(People v. Superior Court (Romero), supra, 13 Cal.4th at p. 530, fn. 13.) Romero relied on the decisions in People v. Belmontes (1983) 34 Cal.3d 335, 348, fn. 8, and People v. Tenorio, (1970) 3 Cal.3d 89, p. 95, fn. 2.

4. Successive Writs

Generally speaking, a second or "successive" habeas corpus petition is deemed an "abuse of the writ" unless the petitioner can establish that the "factual basis for the claim was unknown and he had no reason to believe that the claim might be made" at the time of the original habeas petition. (In re Clark (1993) 5 Cal.4th 750, 782.) Absent a change in the applicable law or the

facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. (Id., 5 Cal.4th at p. 767.)

However, denial of a petition for writ of habeas corpus in a lower court is accomplished by filing an original petition in the next higher reviewing court.

2. HABEAS CORPUS WRIT PRACTICE–State

1. Scope and Purpose of Writ

The previous section outlines many of the appropriate uses of the habeas corpus procedure. Habeas will not lie to correct procedural error which is not of fundamental jurisdictional character. (In re Sands (1977) 18 Cal.3d 851, 857.) It is a collateral attack upon a judgment which has a narrower scope than an appeal. Habeas corpus cannot serve as a second appeal (In re Harris (1993) 5 Cal.4th 813, 825)[1], nor can it serve as a substitute for appeal. (In re Hochberg (1970) 2 Cal.3d 870, 875; In re Shipp (1965) 62 Cal.2d 547, 552; In re Dixon (1953) 41 Cal.2d 756, 759.)

[1]Note that a petitioner may raise issues previously rejected on direct appeal when there has been a change in the law affecting the petitioner. (In re Harris, supra, 5 Cal.4th at p. 841, citing In re Terry (1971) 4 Cal.3d 911, 916.)

Habeas corpus is available to test the constitutionality of legislation under which a petitioner is held. (In re Petersen (1958) 51 Cal.2d 177, 181.) It will also lie to test the adult court's jurisdiction over a minor. (In re Harris (1993) 5 Cal.4th 813, 838-840.)

2. Investigation

Before writing the petition, the factual matters to be alleged must be fully investigated. A prima facie entitlement to relief must be stated with specificity in the petition. In the early stages, determine the following:

a) Do you need an investigator?

b) How do you find an investigator?

c) Who pays for the investigator?

d) Will you be reimbursed for any or all investigation expenses?

Careful inquiry -- almost always direct contact with trial counsel -- is mandatory, particularly before raising IAC based on a tactical decision.

Because habeas addresses jurisdictional and constitutional defects, it is imperative to be prepared to prove what you assert would have been proven but-for the constitutional violation or jurisdictional defect. In IAC situations, valid tactical reasons

for presenting or not presenting certain evidence will defeat a petition. Thus, if the client asserts trial counsel failed to call defense witnesses, appellate counsel must first investigate those witnesses and be prepared to prove to the reviewing court that their testimony would have helped your client's case.

An assertion that rights were violated for want of introduction of expert opinion on a given issue requires that you obtain that opinion and incorporate it into your writ petition. It is not enough to say that petitioner's trial was fundamentally unfair because no psychiatric evidence was introduced on the defendant's behalf unless you already have psychiatric evidence that would have benefitted your client. (See People v. Webster (1991) 54 Cal.3d 411, 437 [not IAC to fail to advance mental defense where counsel had had defendant examined but report did not encourage pursuit of the defense].)

See also, In re Hwamei (1974) 37 Cal.App.3d 554, where appellate counsel, through his own efforts, developed much information tending to show that the defendant was suffering from mental illness, and that a defense of insanity or diminished capacity (under former law) was available had the proper investigation been undertaken. In short, it is not enough to say that particular evidence was not presented to the trial court, or

that a particular defense was not offered; counsel for a habeas petitioner must offer at least prima facie proof to support the allegations of the petition.

3. Obtaining Investigation Funds

No matter what ground is asserted for the collateral attack, investigation is essential to uncover the evidence which will support the claim for relief. Sometimes, a few telephone calls to witnesses willing to provide declarations in support of the petition is sufficient. This type of investigation does not involve ancillary costs, but may involve an investment of time. Before investing more than a minimal amount of time investigating a potential writ, contact the appropriate appellate project to obtain (a) approval for the expenditure of time, and (b) advice on how to proceed. To optimize chances of pre-approval, carefully outline what investigation you actually require, and the amount of money needed to fund that investigation.

In the First, Second, Fourth and Sixth Appellate Districts, a formal motion to expand appointment is not required. However, the different districts have varying requirements for preapproval of ancillary investigation expenses. For instance, in the Second District, for expenses up to $350, counsel should seek approval from the appellate project. For expenses over that amount, court

approval for ancillary investigation expense is required. The Second District Court of Appeal also urges filing the habeas petition as contemporaneously as possible with the AOB.

In the Third and Fifth Appellate Districts, it is necessary to file a motion to expand your appointment before investing any time or expense on a petition for writ of habeas corpus.[2]

In the Fourth Appellate District, the general rule is seek pre-approval. Contact the appellate project to determine whether informal or formal (court) preapproval of ancillary investigation expense is necessary before engaging in any investigation.

In the Sixth Appellate District, there is no requirement for seeking court preapproval of ancillary investigation expense. However, when submitting the claim for reimbursement, the Sixth District Appellate Project will determine if the claim for habeas time and expense complies with the AOC guidelines. If the project recommends payment over the 12 hour habeas allowance, the claim is triggered for review of the time and expense relating to the habeas petition by the court, which will either approve the recommendation, or recommend a cut.

[2]The same proviso applies to other petitions seeking extraordinary relief.

If ancillary investigation expenses are necessary, you will need to consult the appellate project before expending the time or money. The project can tell you if an application for preapproval of such funding is necessary. Although this application is frequently prepared in the form of a motion, be aware that it is, in reality, a separate petition for extraordinary relief. If you do need to seek court pre-approval for investigation, your application will need to include an estimate of the amount needed. The court needs to know a finite dollar amount to order. You will therefore need to shop around for an investigator, explain your scenario, and obtain an estimate of the amount of time it will take to perform that investigation, and the rate to be charged.

4. Allegations of the Petition

a) **Illegal Restraint**. The purpose of habeas corpus is to inquire into the lawfulness of a person's imprisonment or restraint of his or her liberty. (Pen. Code, §1473.) However, actual physical custody need not be shown. Persons constructively under restraint (on bail, parole, probation, committed to state hospital) by penal or other authorities are entitled to apply for relief by way of habeas corpus. (In re Bandmann (1959) 51 Cal.2d 388, 396-397; In re

Petersen (1958) 51 Cal.2d 177, 181.)

Although a court of review may refuse to issue a writ of habeas corpus when it appears that the application should first have been made in the lower court (see In re Hillery (1962) 202 Cal.App.2d 293, 294), it is not always necessary to seek relief in the superior court first. Where it "is necessary to establish that a defendant has been denied a fundamental constitutional right, resort to habeas corpus is not only appropriate, but required." (In re Bower (1985) 38 Cal.3d 865, 872.) For this reason, resort to a reviewing court in the first instance, rather than first filing in a superior court, may be proper. (In re Moss (1985) 175 Cal.App.3d 913, 922.)

The restraint-constructive or actual-and violation of fundamental rights are two essential elements of a petition for a writ of habeas corpus.

b) **Exhaustion of Remedies.** It is also necessary to show the petitioner has exhausted any available administrative remedies before relief in the courts will be afforded. (See In re Muszalski (1975) 52 Cal.App.3d 500, 503.) For this reason, a petitioner claiming a right violation by the Department of Corrections may be required to show he or she has exhausted the administrative review procedure or the petition may be summarily

denied.

c) **No Adequate Remedy at Law**. As with other extraordinary writ procedures, the petitioner must establish the lack of adequate remedy at law. As mentioned earlier, an extraordinary writ procedure such as habeas corpus is not intended to serve as either a second appeal, or a substitute for appeal, unless an appeal would not provide an adequate remedy.

The inadequacy of appellate remedy can be established if the client would be released from the current confinement before the issue can be decided in the ordinary appellate process. A court always has discretion to issue the writ if it believes an appeal is not an adequate remedy or if a prompt disposition is required in the interests of justice. (In re Newbern (1960) 53 Cal.2d 786, 789-790; In re Duran (1974) 38 Cal.App.3d 632, 635; In re Fry (1971) 19 Cal.App.3d 177, 182.)

Habeas review is also available in the first instance where it appears on the face of the record that the trial court lacked jurisdiction to impose the order or judgment pursuant to which the petitioner is held in custody. (In re Clark (1959) 51 Cal.2d 838, 840.)

Proceedings by way of habeas corpus are also available to seek review of a conviction based upon changes in the law after

the conviction. (See In re Johnson (1970) 3 Cal.3d 404, 417.) Thus, where decisional authority establishes the unconstitutionality of a statute under which the petitioner was convicted, habeas corpus will lie.

Note that habeas corpus procedure is the exclusive means to obtain review of a denial of bail or to challenge the amount of bail. (People v. Norman (1967) 252 Cal.App.2d 381, 394.) It is also the appropriate vehicle to review extradition proceedings. (In re Russell (1974) 12 Cal.3d 229, 232.) The writ of habeas corpus may also be used by a defendant lawfully in custody to seek relief from default in perfecting an appeal. (In re Serrano (1995) 10 Cal.4th 447, 454; In re Martin (1962) 58 Cal.2d 133, 137.

d) **Diligence**

Habeas corpus is an equitable remedy. Thus, the defense of laches may be raised to deny relief. In any investigation, as well as in the petition itself, diligence and timeliness in locating, investigating, and presenting the application is a pre-requisite to a grant of relief.

There is a tension between society's desire for finality of its criminal judgments and its insistence the person being punished is actually guilty of the crimes of which he or she was

convicted. A party seeking relief by way of a petition for extraordinary relief is required to move expeditiously. (In re Swain (1949) 34 Cal.2d 300, 304 [a convicted defendant must allege with particularity the facts upon which he would have a final judgment overturned and fully disclose his reasons for delaying in the presentation of those facts]; In re Moss (1985) 175 Cal.App.3d 913, 921.) One way to resolve this tension is to require collateral challenges be filed promptly, but to excuse delay on a showing of good cause. (In re Sanders (1999) 21 Cal.4th 697, 704.) Laches is therefore a defense to a petition for writ of habeas corpus.

For capital appeals, a presumption that the petition was filed without substantial delay may arise if the filing of the petition complies with one of four policies. The four circumstances include:

(1) A petition is presumed filed without substantial delay if it is filed within 90 days after the final due date for the filing of appellant's reply brief on the direct appeal, or within 24 months after appointment of the habeas corpus counsel.

(2) A petition filed more than 90 days after the final due date for filing the appellant's reply brief or more

than 24 months after appointment of habeas corpus counsel in capital appeals may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting the claim *and* (b) became aware, or should have become aware of the legal basis for the claim.

(3) If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay, i.e., particular circumstances sufficient to justify substantial delay.

(4) Even if the petition was filed after a substantial delay without good cause, the petitioner comes within one of the four exceptions outlined in In re Clark (1993) 5 Cal.4th 750.

Any petition that fails to comply with these requirements may be denied as untimely. (Sup. Ct. Policies Re. Cases Arising from Judgments of Death, 1-1.1– 1-3.)

Although these specific policies apply specifically to capital cases, in all habeas proceedings, the petitioner must establish diligence in pursuing relief or will be barred under the doctrine of laches.

5. Format of Petition

The First Appellate District requires that petitions prepared by attorneys be formal pleadings, not form petitions. However, be aware that rule 56.5 of the California Rules of Court requires that a petition to a reviewing court for a writ of habeas corpus in non-capital cases, or for any other writ within its original jurisdiction (e.g., mandamus, prohibition, certiorari) "shall be on a form approved by the Judicial Council." rule 56.5(b) permits filing of petitions that do not comply with rule 56.5(a) for good cause.

This rule, which refers to petitions seeking the release from or modification of the conditions of custody of one who is confined under the process of any court, or in a State or local penal institution, hospital, narcotics treatment facility or other institution, may or may not be limited to persons in actual restraint, depending on the jurisdiction. Some scholars interpret the rule language to exclude petitions prepared by counsel for persons who are in constructive custody. (C.E.B., *Appeals and Writs in Criminal Cases*, §2.136, p. 313.)

Many practitioners include the completed form at the beginning of their petition, and attach a memorandum of points and authorities, binding the entire document together. Other

practitioners insert the form, but prepare a formal petition, in addition to the memorandum of points and authorities, and bind them together. The practices vary from district to district, and even from intra-district division to intra-district division. Therefore, it is advisable to either check with the appropriate appellate project or the court clerk, to determine what format is required in a specific court.

Note: petitions for writ of habeas corpus must have a red cover.

6. Verification

The petition for writ of habeas corpus must be verified. (Pen. Code, § 1474, subd. 3.) Because counsel may apply for habeas corpus relief on behalf of his or her client, it follows that when appointed counsel does so, verification by counsel satisfies the statute. (In re Robbins (1998) 18 Cal.4th 770, 783, fn. 5, citing In re Davis (1979) 25 Cal.3d 384, 389.) Verification by counsel is particularly appropriate where the facts on which the petition are based were investigated by counsel or discerned from review of the record, court files, or other repositories of information of which counsel has personal knowledge.

On the other hand, if the petition is based upon

information, evidence or other matters within the personal knowledge of the petitioner, then it is logical to have the petitioner verify the accuracy of the assertions in the petition.

1. Order to Show Cause

Issuance of an order to show cause signifies a preliminary determination that petitioner has made a sufficient statement of specific facts which, if established, entitle him or her to habeas corpus relief under existing law. (In re Hochberg (1970) 2 Cal.3d 870, 875.) The issuance of the order to show cause creates a "cause" giving the People a right to reply to the petition by a return, and to otherwise participate in the court's decision-making process. (People v. Pacini (1981) 120 Cal.App.3d 877, 884.) The order to show cause directs the government to show cause why relief should not be granted. It may also establish deadlines for the filing of the return and traverse.

8. The Return

The return is the principal pleading, analogous to a complaint in a civil proceeding, the facts of which are deemed true unless denied by petitioner in the traverse. (In re Lawler (1979) 23 Cal.3d 190, 194.) Any material allegation of the petition not controverted by the return is deemed admitted. (Rule 260 (b), Cal.Rules of Court.) If there are no disputed

material factual allegations, the court may dispose of the petition without the necessity of an evidentiary hearing. (In re Lawler, supra.) In the return, the respondent should recite facts upon which the denial of petitioner's allegations is based, and, where appropriate, should provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed. (In re Lewallen (1979) 23 Cal.3d 274, 278, fn.2.)

9. The Traverse

As the return must allege specific facts which warrant a denial of relief, the traverse must raise factual matter to controvert those factual issues. “The traverse, which may incorporate the allegations of the petition, must deny or controvert each material fact or matter alleged in the return or such fact or matter will be deemed admitted; it is therefore analogous to the answer in civil actions.” (In re Lewallen, supra, 23 Cal.3d 274, 277.) Unless denied, the allegations of the return will be deemed admitted. (In re Lawler (1979) 23 Cal.3d 190, 194.)

The traverse (which is called a “denial” when filed in the superior court [Rule 260(b), Cal. Rules Ct.) may (a) deny and controvert any facts in the return; (b) raise questions of law;

(c) take exception to the sufficiency of the return [demurrer]; and (d) allege additional facts to show petitioner is entitled to the relief sought. The traverse should follow the same general form as the petition.

The interplay between the return and the petitioner's response in a pleading called the traverse, frames the issues the court must decide in order to resolve the case. (People v. Duvall (1995) 9 Cal.4th 464, 478.) If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing. Conversely, consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, in which event the court may deny the petition without a hearing. However, if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, the court should order an evidentiary hearing. (People v. Romero (1994) 8 Cal.4th 728, 739-740.)

Bear in mind that if the government does not file a return, it foregoes the opportunity to participate in the court's determination of the merits of the petitioner's claim. If it declines to file a return, then no disputed factual questions

exist for resolution. Under these circumstances, the court may accept as true the petitioner's undisputed factual allegations in the absence of a reference hearing, and decide the merits of the case accordingly. (In re Serrano (1995) 10 Cal.4th 447, 455.) In such a situation, the court should not reject the petitioner's undisputed factual allegations on credibility grounds without first conducting an evidentiary hearing. (Id., 10 Cal.4th at p. 456.)

Where the return and traverse reveal there are disputed factual matters, an evidentiary hearing will be ordered, and the case will probably be referred to the trial court (if it has not been remanded already) for those proceedings, because courts of appeal are not designed for evidentiary proceedings.

As a practical matter, the setting of an evidentiary hearing triggers the need to prepare to call witnesses and present evidence. Since a "cause" has been established, discovery may be sought, with appropriate showings. Few appellate attorneys have experience in evidentiary proceedings and may be intimidated. Many seek the appointment of a trial attorney in the trial court to conduct the hearing. This practice may have disadvantages as well as advantages, so consultation with the project should be undertaken before such a decision is made.

The advantages include trial counsel's familiarity with discovery and other motion procedure in the trial court, foundational aspects for introduction of evidence, and issuance of subpoenas. Many an appellate attorney has felt the sting of frustration when the government declines to produce discovery simply because the appellate attorney did not properly word the request.

Most appellate courts are reluctant to compensate for proceedings conducted in the trial court. For this reason, the practice has developed of filing the petition in the first instance in the Court of Appeal. Where the matter is made returnable in the trial court, appellate counsel may seek to be appointed by filing a motion in that court.

The disadvantages include the fact few trial counsel litigate evidentiary hearings in habeas corpus proceedings. The misunderstanding can lead to failure to present the proper documentary and testimonial support to prove the essential elements needed to win habeas corpus relief.

10. Discovery

There is no absolute *right* to post-conviction discovery, and the bare filing of a claim for post-conviction relief does not trigger a right to unlimited discovery. Instead, counsel

must establish a "prima facie case" for relief in order to obtain court-ordered discovery to fund a habeas investigation. (See People v. Gonzalez (1990) 51 Cal.3d 1179, 1258-1259.) If the court grants leave to conduct discovery, counsel will need to refer to practice guides for trial counsel to aid in preparation of requests for discovery, or motions to enforce discovery.[3]

This means you may not obtain preapproval for funding just because your client has complained that all the witnesses in his trial committed perjury. However, by using the information obtained to support the initial claims, and by garnering some evidentiary support for the existence of proof of the claims, a prima facie case of relief may justify an order for post-conviction discovery expense from the trial court.

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[3]A good source, which comes complete with forms, is the Continuing Education of the Bar (C.E.B.) reference entitled *California Criminal Law, Practice and Procedure,* with its companion *California Criminal Law Forms Manual*. These volumes are updated annually. Another excellent source, published by Matthew Bender, is the multi-volume set by Erwin, Millman, Monroe, Sevilla and Tarlow, entitled *California Criminal Defense Practice*.

If the Court of Appeal denied the petition for writ of habeas corpus without prejudice to refile in the superior court, an application for appointment of an investigator at county expense should be made in that court. Again, it is necessary to establish a prima facie case for relief to obtain an order appointing an investigator.

Most county courts have lists of approved investigators who are familiar not only with the claim procedure, but are also familiar the amount that court is likely to consider reasonable.

If the application for funding is made first in the trial court, denial of the application may be reviewed in the appellate court– by way of petition for writ of habeas corpus.

Some cases may require confidential investigation. This may be achieved by filing the application for pre-approval of investigation on an ex parte, in camera basis. The application should have a cover indicating it is submitted ex parte, and the body of the application should contain an explanation of the need for confidentiality. Confidentiality issues may arise when counsel seeks to have the client evaluated by an expert, to preserve the attorney-client privilege as well as the Fifth Amendment privilege. A sample of such a motion is included in

these materials.

11. Review of Denial of Petition for Writ of Habeas Corpus.

The government may appeal from an order granting a petition for writ of habeas corpus. (Pen. Code, §1506; In re Chessman (1955) 44 Cal.2d 1, 4-6; People v. Huffman (1975) 46 Cal.App.3d 361, 364-365.) However, an order denying a petition is not an appealable order. The proper remedy for denial of a petition by the superior court is to file a petition for writ of habeas corpus in the intermediate appellate court (People v. Griggs (1967) 67 Cal.2d 314, 317; People v. Dowding (1960) 185 Cal.App.2d 274, 277); review of a denial by the Court of Appeal may be sought by way of a petition for review in the Supreme Court. (See In re Michael E. (1975) 15 Cal.3d 183, 193, fn. 15.)

3. INEFFECTIVE ASSISTANCE OF COUNSEL AS A BASIS FOR HABEAS CORPUS.

Not every act or omission of trial counsel constitutes a violation of the accused's constitutional right to effective assistance of counsel. At the trial level, counsel are faced with tactical decisions of critical dimension from the date the criminal complaint is filed in the municipal court in felony cases, or the date of the receipt of the petition in juvenile

cases. These decisions may be grounded on many factors: the type of witness the client will make; the availability of witnesses on the client's behalf; the credibility of any witnesses either favorable or adverse to the client; the existence of circumstantial evidence which either supports or refutes the client's position or theory of the case; the existence of extrajudicial admissions or confessions by the client; and the rules of admissibility with respect to all of these factors.

It is not unusual -- nor is it by any means necessarily incompetent -- for an attorney to advise his or her client not to testify; counsel may have concluded, for example, that the client would make a bad witness for one reason or another. Nor is it necessarily incompetent for counsel to waive cross-examination of a key witness, or to forego the making of a specific motion.

The current standard of review of claims of ineffective assistance of counsel is governed by the case of Strickland v. Washington (1984) 466 U.S. 668. The Strickland test is a two-pronged inquiry: (1) whether the trial attorney's performance fell below an objective standard of reasonableness; and (2) whether it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have

been different.

The failure to make objections during a trial or other proceeding is generally considered to be a matter of trial tactics as to which an appellate court will not exercise judicial hindsight. (People v. Lanphear (1980) 26 Cal.3d 814, 828-829.) Where an objection or motion would have been futile, the failure to object or make a particular motion does not constitute ineffectiveness. (See People v. Robinson (1989) 209 Cal.App.3d 1047, 1056.)

It should be noted that California decisions have long held it is not sufficient to allege merely that an attorney's tactics were poor, or that the case might have been handled differently. (People v. Floyd (1970) 1 Cal.3d 694, 709.) Reviewing courts recognize trial counsel ordinarily were in the best position to determine trial tactics in light of his or her observations of the proceedings and therefore will refrain from indulging in judicial hindsight. (People v. Najera (1972) 8 Cal.3d 504, 516-517.)

However, the fact that other attorneys or the client do not approve of the trial attorney's choice of tactics, or that the tactics simply did not work, will not in itself establish IAC. Even the most competent counsel may from time to time make

decisions or act in a manner which might be criticized by other equally competent counsel, but that is not the measure of competency of counsel on review by an appellate court. (People v. Wallin (1981) 124 Cal.App.3d 479, 485.)

Thus, before appellate counsel attacks a tactical decision made by trial counsel, it necessary to establish that no reasonable trial attorney would have made such a tactical decision, i.e., that under an objective standard the tactic was not one which any reasonably competent attorney would have employed in the same circumstances. It must be demonstrated, under Strickland, that there is a reasonable probability that but for such a tactical approach the defendant would not have been convicted. According to the high court, "a reasonable probability" is a probability sufficient to undermine confidence in the outcome.

This is certainly not to say trial tactics are never the proper subject of a claim of IAC. Tactical decisions may demonstrate incompetence if made without benefit of substantial inquiry, or reflection, or in ignorance of the applicable law. (People v. Frierson (1979) 25 Cal.3d 142, 163 [where defendant's sole defense was diminished capacity, but counsel made a tactical decision not to obtain expert evaluation of defendant nor offer

expert opinion on the effects of Quaalude and angel dust on his mental state because he feared the jury would react negatively]; People v. Bess (1984) 153 Cal.App.3d 1053, 1061 [IAC for failure to interview robbery witnesses on grounds of tactical decision where the record developed at new trial motion demonstrated their testimony would have cast doubt on prosecution theory, but counsel feared they would be impeached].)

In other words, if appellate counsel can show there was no plausible tactical explanation to justify trial counsel's acts or omission, IAC may be established. (People v. Zimmerman (1980) 102 Cal.App.3d 647, ;People v. Sundlee (1977) 70 Cal.App.3d 477 [IAC for counsel's failure to object to tapes and a transcript of radio conversations of police officers on a surveillance];People v. Guizar (1986) 180 Cal.App.3d 487 [ineffective assistance of counsel based on counsel's failure to object to portions of a tape introduced into evidence, where witness discussed the fact defendant had committed two murders in the past].)

An argument that trial counsel's tactical decisions deprived appellant of effective assistance of counsel requires careful investigation of facts which will support the claim. It is of no benefit to the appellant to argue that trial counsel should have called potential defense witnesses unless you have previously

determined those witnesses would actually have assisted the defense. Bear in mind that in order to establish defense counsel was incompetent for failing to discover and present evidence, appellate counsel must prove the un-presented evidence would have undermined the prosecution's entire case. (In re Clark (1993) 5 Cal.4th 750, 766.) The petition must demonstrate not only that counsel knew or should have known that further investigation was necessary, but must establish the nature and relevance of the evidence that counsel failed to present or discover. (In re Clark, supra; People v. Williams (1988) 44 Cal.3d 883, 937.)

For this reason, challenging counsel's failure to present a mental health defense requires proof of a mental condition that would justify such a claim. (People v. Webster (1991) 54 Cal.3d 411, 437 [not IAC to fail to advance mental defense where counsel had had defendant examined but report did not encourage pursuit of the defense].) Similarly, an argument attacking counsel's tactical decision to forego an objection or motion will not avail the appellant if the objection or motion was not meritorious.

If, after reviewing the entire record, it appears that a viable and valid claim of IAC may exist, counsel should contact one of the appellate project staff attorneys. If it is an assisted case, counsel would, of course, consult the assisting

attorney. The staff attorney can give provide a "second opinion" and also help plan a proper way of investigating the issue.

Careful investigation into the circumstances behind the questioned tactic will help appellate counsel evaluate whether the trial attorney in fact had valid reasons for the act or omission. Before raising any claim of IAC you should discuss the questioned act, omission or tactic with trial counsel to rule out the existence of any valid tactical reason. Trial counsel is ethically bound to cooperate in this regard. (See rules 3-400, 30700(A)(2), and 3-700(D)(1), Rules of Prof. Cond.)

Counsel should also discuss the potential issue with the appropriate appellate project before engaging in expensive, time-consuming investigation. An ill-considered petition for writ of habeas corpus based upon IAC can undermine counsel’s credibility with the court, particularly where the misunderstanding of trial counsel’s tactical purposes is based upon appellate counsel’s unfamiliarity with trial practice. Discussing the questions with the appellate project and with trial counsel will aid in eliminating frivolous claims of IAC. Additionally, open discussion with trial counsel and review of trial counsel's files may reveal a valid tactical explanation for counsel's actions. The suggested protocol and investigation will therefore help

eliminate inappropriate claims of IAC, and insure that, when raised, the issue is appropriate.

Decreasing the frequency of ungrounded IAC claims will reduce the overall hostility of the bench and trial bar to the issue generally, enhance the credibility of the issue when it is well-founded, and ensure a more thoughtful review of the meritorious issues involved in a given appeal.

1. ESTABLISHING IAC

Once consultation with the appellate project and investigation have led to the conclusion an issue relating to IAC must be raised, the next question is how to get the issue before the Court of Appeal. In People v. Pope, supra, the Supreme Court noted that if the act or omission is shown on the record, and an unacceptable tactical reason is apparent on the record, or there is no conceivable proper tactical reason, the issue may be raised on direct appeal from the judgment. Where the record is silent as to counsel's act or omission or the reasons behind it, the claim of ineffective assistance of counsel must be made in a petition for writ of habeas corpus.

Assuming the petition will be grounded on matters outside the record, you will need to include supporting declarations and

other supporting documents with your petition.

Trial counsel may be uncooperative in preparing a declaration asserting he or she had no deliberate tactical reason, or an improper tactical reason, even if he or she was candid orally. To avoid having to become a witness, it is advisable to have a third person participate in your discussions with trial counsel. (Naturally, if these discussions are on the telephone, inform trial counsel that the other person is listening.) Any conversations should be confirmed by letter to trial counsel, summarizing what was said. Lack of objection to such a letter may constitute an adoptive admission by trial counsel in the event he or she is reluctant to sign a declaration memorializing those matters. In that event, appellate counsel - or the third party - may execute the declaration regarding the contents of the conversation, and the confirmation letter can be attached as an exhibit.

In addition to contacting counsel, appellate counsel will have to go beyond the record to establish the lack of a valid tactical reason for counsel's act and to demonstrate the necessary prejudice. If the omission related to a failure to call defense witnesses, for example, it is essential to secure declarations from those witnesses setting out the nature of the

favorable testimony which would have been presented had the witnesses been called.

Or, if resources are available to retain an expert in a case where favorable expert testimony might have resulted in a different judgment, counsel should obtain a declaration of the expert. In such a situation, failure to do so will result in an adverse decision. However, before expending any funds for investigation or retaining experts, contact the appropriate appellate project for advice on whether and how to proceed, to insure funding or reimbursement.

The client's own statement as to what was said or done, or not said or done, might be of value. Even if trial counsel does not recall or declines to sign a declaration regarding what he did or did not tell the client, the client is usually competent as a witness to make a declaration in support of the claim. Particularly where the client has pled guilty pursuant to advice from counsel, in order to seek relief from the plea, the client needs to establish that but-for the representations of counsel, he would not have waived his constitutional trial rights and entered a plea. (In re Alvernaz (1992) 2 Cal.4th 924, 936-941 [IAC in advising client to reject plea bargain].)

Keep in mind that if the superior court issues an order to

show cause, it will probably conduct an evidentiary hearings to decide a claim of IAC brought by way of writ. At such a hearing, trial counsel may be subpoenaed/called to testify as to his or her reasons for doing or not doing the challenged acts. The attorney-client privilege will probably be deemed waived at this hearing and counsel will be asked to explain why he or she did or did not do whatever is in issue. Be aware that most petitions for writs of habeas corpus, filed in the first instance in the Court of Appeal, are denied without prejudice to refile in the superior court.

Also be aware that the evidentiary hearing procedure can prove to be a double-edged sword, working to the great detriment of the client. At the hearing, the prosecution will have an opportunity to learn facts about the defense case and/or theory which would otherwise be deemed privileged and confidential. Should the matter be reversed and remanded for retrial, the prosecution will be better armed and you may have scored a very hollow victory.

Claims of incompetence flowing from tactical decisions present special problems for the appellate practitioner, just as the tactical choices themselves presented problems to trial counsel. The decision to raise the issue should be well

considered to avoid the risk of distracting the court from the client's strongest points on appeal, alienating your natural ally (trial counsel), and exposing the client to potential prejudice. Thoughtful discretion in preparation of the appeal where a meritorious claim does exist will work to guarantee the client a better result on appeal as well as on remand. This will also contribute to fulfilling appellate counsel’s duty of providing effective assistance of counsel on appeal.

SAMPLES

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re	)	
	)	
MARILYN MAY SUROVIK,	)	
Petitioner,	)	Case No. _____
	)	
On Habeas Corpus.	)	(Related Appeal:
_____	)	Case No. E017074)

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE MANUEL A. RAMIREZ, PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Petitioner, Marilyn May Surovik, by and through her attorney, Carmela F. Simoncini, State Bar No. 86472, petitions for a writ of habeas corpus, and by this verified petition states as follows:

I

Petitioner is unlawfully incarcerated and restrained at Central California Women's Facility, at Chowchilla, California, by Teena Farmon, Warden, Department of Corrections, pursuant to a

judgment pronounced by the San Bernardino County Superior Court, in Case No. SCR 45711, on August 29, 1995.

II

By a petition to revoke probation filed on May 11, 1995, in the San Bernardino County Superior Court, petitioner was charged with failure to pay court ordered restitution and failure to keep the probation officer informed of petitioner's whereabouts. Petitioner was arraigned on August 15, 1995, and denied the violation of probation. (CT 22-27.)[4]

IV

The judgment of conviction is presently on appeal before this Court in Case No. E017074, and an opening brief is being filed simultaneously with this petition.

V

Petitioner suffers from illegal restraint. Her imprisonment is illegal and in contravention of the rights guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, section 15, of the California Constitution.

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[4]/ Because this petition is related to the appeal pending in Case No. E017074, appellant will refer to the record on appeal in that case.

Petitioner was denied her constitutional rights to Counsel and Due Process in the following manner:

The lower court lost all jurisdiction over petitioner when it failed to issue a commitment to state prison upon timely notification in 1989 that petitioner had been committed to state prison on another case, as provided in Penal Code section 1203.2a. Further, even if the court had jurisdiction to extend petitioner's probation in 1989, the lower court lacked authority to impose a probationary period in excess of 5 years, by virtue of Penal Code section 1203.1, subdivision (a). Thus, by operation of law, petitioner's probation had expired prior to the alleged violation and revocation proceedings in violation of petitioner's State and Federal Constitutional rights.

Petitioner was not advised of the lower court's lack of jurisdiction either by the court or by counsel in the proceedings below. Petitioner was permitted to be subjected to revocation proceedings and to admit a violation when there was no jurisdiction over her, in contravention of her rights to effective assistance of counsel and due process of law.

VI

The facts supporting the ground set forth in paragraph V are as follows: Petitioner was initially placed on probation in

1987, pursuant to a guilty plea to a charge of welfare fraud. (CT 7-14.) On September 8, 1989, the probation officer, having been duly notified of petitioner's commitment to state prison on another case in Los Angeles, petitioned for revocation of probation, and recommended imposition of a state prison term. (See Probation Report, filed with the Record on Appeal in E017074.)

On September 17, 1989, the court imposed a 3 year state prison term, but failed to issue the commitment. Instead, it suspended execution of the sentence, and placed petitioner on probation for a new period of 5 years, presumably to run from that date. (CT 20.) However, the minutes of that hearing showed probation would expire on July 27, 1995, which would be approximately 6 years after the re-grant of probation. (CT 20.)[5]

A subsequent petition for revocation of probation was filed on May 11, 1995, **more than 5 years after the order placing petitioner on probation, and more than 60 days after the notification that petitioner had been committed to state prison on the other case.**

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[5]/ Assuming this date reflects some sort of intent to have the commencement of probation occur upon petitioner's release from the commitment in the Los Angeles case, there is no authority for such an order. (People v. Cramer (1983) 149 Cal.App.3d 1135, 1138.)

By operation of law, the trial court lost all jurisdiction over petitioner as early as 60 days after the notification of her state prison commitment, which occurred in 1989, or as late as September 26, 1994, when the 5 years of probation actually expired by operation of statute.

VII

No other applications, petitions or motions have been presented or filed in this or any other court, state or federal, in regard to the matters complained of herein, except insofar as presented in petitioner's direct appeal pending before this Court in Case No. E017074.

VIII

Petitioner has no other plain, speedy or adequate remedy at law in that she is presently incarcerated based upon an admission of a violation of probation as to which the trial court had no jurisdiction to proceed. Petitioner was not advised of the illegality of the proceedings, or the lack of jurisdiction of the court by the court or by counsel. As a result, her admission of the violation of probation was not knowingly and intelligently made, and in violation of her constitutional rights. The sentence is thus **void**.

The matters raised in this petition constitute grounds

establishing constitutional or jurisdictional challenges to the legality of the proceedings, which can only be challenged by direct appeal if the defendant has filed with the trial court a written statement setting forth such grounds, and the trial court has executed and filed a certificate of probable cause for such appeal as provided in Penal Code section 1237.5, subdivisions (a) and (b).

Because these matters may not be reviewable in the companion appeal, and petitioner is serving time on a sentence that is void, there is no adequate remedy at law.

IX

This petition is addressed to this Court's original habeas corpus jurisdiction in the first instance because petitioner's appeal and the accompanying record are presently before this Court.

WHEREFORE, petitioner respectfully request that this Court:

1. Take judicial notice of the record on appeal in People v. Surovik, Case No. SCR 45711, pursuant to Evidence Code section 452(d)(1) and 459, which record is referred to herein to clarify and amplify various allegations;

2. Issue a Writ of Habeas Corpus or Order to Show Cause to the Director of the Department of Corrections to inquire in the

legality of petitioner's incarceration;

3. After a full hearing, issue the writ vacating the judgment of conviction and sentence imposed thereon; and

4. Grant petitioner such other and further relief as the Court may deem proper.

Respectfully submitted,

Dated:

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner

VERIFICATION

I am an attorney admitted to practice before all the courts of the State of California and have my office in San Diego, County. I am the attorney for petitioner herein and am authorized to file this petition. Petitioner is unable to make the verification because she is absent from the county where I maintain my office due to her confinement in Central California Women's Facility, in Chowchilla, California, and for that reason I make this verification on petitioner's behalf. Additionally, because the facts upon which this petition is based are discernible only by reviewing court documents in the San Bernardino County Superior Court, petitioner is not in a position to verify this petition. I have read the foregoing Petition for Writ of Habeas Corpus and know the contents thereof to be true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California, on January 25, 1996.

_____
Carmela F. Simoncini
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS AND CASE

In a felony complaint filed May 7, 1987, petitioner Marilyn May Surovik, was charged with unlawfully obtaining Aid to Families with Dependant Children in an amount greater than $400 (Welfare Fraud), in violation of Welfare & Institutions Code section 10980, subdivision (c) (2), in count one of the complaint, knowingly and unlawfully filing an application for Aid to Families with Dependent Children for a fictitious and non-existent person, in violation of Welfare & Institutions Code section 10980, subdivision (b), in counts two and three, and perjury on an application for aid and medical assistance provided for in Welfare & Institutions Code sections 11054 and 11265, in violation of Penal Code section 118, in counts four through ten. (C.T. pp 1-6.)

On July 2, 1987, petitioner entered a plea of guilty to count one of the felony complaint, unlawfully obtaining Aid to Families with Dependent Children (W&I Code § 10980 (c)(2)), in exchange for the dismissal of counts 2 through 10. (C.T. pp 7-9.)

On July 27, 1987, the court suspended imposition of sentence, and granted probation for a term of five years. Counts

2 through 10 were dismissed per the plea agreement. In addition, petitioner was ordered to pay a restitution fine in the amount of $5501 to the San Bernardino Department of Public Social Services Aid to Families with Dependent Children Program, pursuant to Penal Code section 1203.1 and San Bernardino County Ordinance 3026. Petitioner's probation was later modified, on February 5, 1988, to include a term of 180 days in county jail with 11 days credit for time served. (C.T. pp 10-14.)

On June 29, 1989, the probation department filed a petition to initiate proceedings to revoke petitioner's probation, and on July 5, 1987, the court revoked petitioner's probation for violating her probation after she was arrested for forgery, in violation of Penal Code section 470, and sentenced to three years state prison by Los Angeles County on March 23, 1989. It was further alleged that petitioner had not been making payments on her restitution account. (C.T. pp 15-16.)

On September 27, 1989, a hearing after revocation of probation was held at which petitioner was found to be in violation of her probation. A formal **Vickers** Hearing was waived and petitioner admitted the probation violation. She was sentenced to the upper term of three years in state prison, but execution of the sentence was suspended and petitioner was placed

on probation again until July 27, 1995. She was ordered transported to the California Rehabilitation Center (CRC), at Norco. It was also ordered that petitioner begin her first restitution payment within 30 days of being released from CRC. (C.T. pp 20-21.)

On May 11, 1995, the probation department filed a petition for revocation of probation and bench warrant, and on May 16, 1995, petitioner's probation was ordered revoked for not keeping her probation officer informed of her address and failing to pay the balance on her restitution account as prescribed by the terms and conditions of her probation.[6] Shortly thereafter, on June 16, 1995, a bench warrant was issued for petitioner for failure to appear as ordered and her custody status was changed to fugitive. (C.T. pp 22-26.)

On August 15, 1995, petitioner appeared with her appointed attorney for the arraignment on the Petition/Bench Warrant. The court recalled the bench warrant and a **Vickers** Hearing was ordered reserved. Petitioner denied the violation of

[6] There are two orders for revocation of probation found in the clerk's transcript, one on pages 22 & 23, and one on pages 25 & 26. The order found on pages 22 & 23 is for a Diana K. Zepeda of Waupun, Wisconsin, case number SCR-50637/FSB-264016. It is not clear whether this order was misfiled or if it actually pertains to appellant, Marilyn May Surovik, case number SCR-45711/FSB-263573.

probation allegation and was ordered to reappear for a hearing on August 29, 1995. (C.T. p. 27.)

On August 29, 1995, a Hearing on Petition after Revocation of Probation was held at which petitioner admitted the probation violation and waived a **Vickers** Hearing. The court ordered that petitioner's probation remain revoked and imposed the previously suspended sentence. On that same date, petitioner was sentenced to the aggravated term of three years state prison with a total of 121 days credit for time served. In addition, the court imposed a restitution fine in the amount of $2000. (C.T. pp 28-29.) (R.T. pp 1-2.)

On October 3, 1995, petitioner filed a timely notice of appeal in the related appeal. (C.T. pp 30-31.) No certificate of probable cause was requested or issued.

ARGUMENT

I

RELIEF BY WAY OF HABEAS CORPUS IS APPROPRIATE WHERE PETITIONER IS INCARCERATED UNDER AN UNLAWFUL SENTENCE.

Habeas corpus will lie where a trial court has exceeded its jurisdiction by sentencing a defendant "to a term in excess of the maximum provided by law" (In re Estrada (1965) 63 Cal.2d 740, 750), or to correct a misinterpretation of statute resulting in a confinement "in excess of the time allowed by law." (In re Huffman (1986) 42 Cal.3d 552, 555, quoting Neal v. State of California (1960) 55 Cal.2d 11, 18.) The Supreme Court in Huffman, supra, acknowledged the availability of relief by way of habeas to challenge the constitutionality of a statute. (Ibid.; see also In re Harris (1989) 49 Cal.3d 131, 134, fn.2.)

Thus, where a habeas corpus petitioner raises a legitimate claim that the trial court acted in excess of its jurisdiction, that is to say, fundamental jurisdictional defect, relief by petition will lie. (In re Harris (1993) 5 Cal.4th 813, 840.)

Here, petitioner raises two separate challenges to the lower court's jurisdiction to sentence her in 1995: (1) the court lost jurisdiction by failing to comply with the provisions of Penal

Code section 1203.2a, which mandate the imposition of sentence and issuance of the commitment within 60 days of being notified by the probation officer of petitioner's commitment to state prison on another case, and (2) the court lost jurisdiction to revoke probation because the petition to revoke was filed after 5 years had passed from the re-grant of probation.

Moreover, as petitioner will show, by failing to advise her of the court's lack of jurisdiction, both the court and counsel in the proceedings below permitted petitioner to be subjected to revocation proceedings, and a state prison sentence, in excess of the court's jurisdiction. Her waivers of constitutional rights and admission of the allegation were thus obtained in violation of her constitutional rights to due process and effective assistance of counsel.

Since these matters may be determined to be beyond the reach of the review by this Court on the related appeal, in the alternative, the errors alleged in the instant petition are remedial by way of habeas corpus.

II

THE JUDGMENT OF IMPOSITION OF SENTENCE IS VOID BECAUSE BY FAILING TO ISSUE ITS COMMITMENT ON THE SENTENCE IMPOSED ON PETITIONER FOLLOWING NOTIFICATION IN 1989 OF HER COMMITMENT TO STATE PRISON IN ANOTHER CASE, THE TRIAL COURT WAS DEPRIVED OF ALL JURISDICTION OVER PETITIONER.

The record reveals that in 1989, the Probation Department was notified petitioner had been sentenced to state prison on three counts of forgery from Los Angeles County. By an interoffice memo dated September 8, 1989 (file stamped September 12, 1989 by the San Bernardino County Clerk), from the probation officer to Judge Duke D. Rouse, the probation officer notified the court in writing of the commitment. Prior to this memo, probation was revoked on July 26, 1989, upon petition by the probation officer, in which the probation officer alleged petitioner had violated the terms of probation because she had been arrested for Penal Code section 470, "and was sentenced to three years in Prison by Los Angeles County on March 23, 1989... " (CT 15-16.)

At the hearing on the revocation of probation on September 27, 1989, the court imposed the recommended 3 year sentence, but

suspended execution of the term. The trial court then reinstated probation and extended it to expire on July 27, 1995. (CT 20.) Petitioner was then remanded to the custody of the California Rehabilitation Center (CRC) forthwith. (CT 20.)

By suspending execution of the prison term **without issuing the commitment therefor**, the trial court lost jurisdiction.

Penal Code section 1203.2a governs the sentencing of a probationer who has been committed to state prison for another offense. That section grants the court which released a probationer the jurisdiction to impose sentence upon notification that a probationer has been committed to a prison in this state or another state for another offense. By its terms, the section requires imposition of sentence and issuance of the commitment to state prison in order for the trial court to retain jurisdiction. The third paragraph of that section provides:

> Upon being informed by the probation officer of the defendant's confinement, or upon receipt from the warden or duly authorized representative of any prison in this state or another state of a certificate showing that the defendant is confined in prison, **the court shall issue its commitment** if sentence

has previously been imposed. **If sentence has not been previously imposed** and if the defendant has requested the court through counsel or in writing in the manner herein provided to impose sentence in the casein which he or she was released on probation in his or her absence and without the presence of counsel to represent him or her, **the court shall impose sentence and issue its commitment, or shall make other final order terminating its jurisdiction over the defendant in the case in which the order of probation was made.** If the case is one in which sentence has previously been imposed, the court shall be deprived of jurisdiction over defendant if it does not issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 60 days after being notified of the confinement. **If the case is one in which the sentence has not previously been imposed, the court is deprived of**

> **jurisdiction over defendant if it does not impose sentence and issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 30 days after defendant has, in the manner prescribed by this section, requested imposition of sentence.** [Emphasis added.]

The final paragraph of the statute states:

> In the event the probation officer fails to report such commitment to the court or the court fails to impose sentence as herein provided, the court shall be deprived thereafter of all jurisdiction it may have retained in the granting of probation in said case.

The term "as herein provided," can only refer to the imposition of sentence **accompanied by the issuance of the commitment**. The language of the statute is mandatory.

Here, there is no dispute that the probation department was duly notified of the petitioner's state prison commitment in the Los Angeles County case. Pursuant to that notification, the probation officer recommended revocation of probation and

imposition of sentence. At that point in 1989, the trial court had only two options: (1) impose a state prison sentence and issue the commitment to state prison, or (2) make other final order terminating jurisdiction over the defendant in the case in which the order of probation was made. (Pen. Code, §1203.2a.)

The intent of the statute was to give the offender the benefit of statutes providing that sentences shall be concurrent unless a court expressly orders otherwise. (People v. Young (1991) 228 Cal.App.3d 171, 181.) The statute was not intended to penalize a defendant in any way but rather to facilitate means of receiving a concurrent rather consecutive sentence. (Ibid.) The purpose of section 1203.2a is to prevent inadvertent consecutive sentences which would deprive defendant of the benefit of Penal Code section 669, providing that sentences shall be concurrent unless the court expressly orders otherwise. (In re Walters (1995) 39 Cal.App.4th 1546, 1553.)

In Walters, the reviewing court observed that "As to a probationer who has previously been sentenced but execution of whose sentence has been suspended, section 1203.2a is unambiguous in indicating when the trial court's statutory time within which to issue its commitment commences. (Id., 39 Cal.App.4th at p. 1554.) It held the obligation commences upon being informed by

the probation officer of the defendant's confinement, or upon receipt from the warden, etc., of a certificate showing that the defendant is confined in prison. The opinion goes further to state that if the court **does not issue its commitment** within 60 days after being notified, the court's jurisdiction over the defendant is terminated.

Here, the trial court imposed the sentence on September 27, 1989, but failed to issue the commitment, choosing instead to extend probation until 1995. Having failed to issue the commitment in conformity with the mandatory provisions of Penal Code section 1203.2a which directs "impos[ition of] sentence as herein provided," the trial court was deprived of all jurisdiction over the defendant.

The sentence is therefore void and must be vacated, and an order must be entered terminating and discharging petitioner from probation.

III

THE PREVIOUS ORDER OF 9/27/89 EXTENDING PROBATION UNTIL 7/25/95, WAS VOID; THUS THE ATTEMPT TO IMPOSE SENTENCE AFTER PROBATION EXPIRED WAS VOID.

Probation, which had previously been granted, was originally revoked on July 26, 1989, upon petition by the probation officer. (CT 17.) On September 27, 1989, the trial court reinstated probation, and extended it to July 27, 1995. (CT 20.) The instant revocation proceedings were instituted by way of a petition filed on or about May 11, 1995, which resulted in the order summarily revoking probation on May 16, 1995. (CT 22.) As petitioner will show, the order revoking probation on May 16, 1995, was null and void, because probation expired, at the very latest, in September of 1994.

Penal Code section 1203.3, subdivision (e), permits a trial court to <u>again</u> place a person on probation "for that period and with those terms and conditions as it could have done immediately following conviction." However, pursuant to Penal Code section 1203.1, the period of probation may not exceed 5 years. (Pen. Code, §1203.1, subd. (a).)

The five year period expired by operation of law on July 26,

1994 (1989 + 5 years = 1994). While the length of the probationary period might be subject to modification prior to the expiration of that 5 years, and even to extension during that time, the trial court is nevertheless limited to grants of probation in increments of 5 years only, by virtue of Penal Code section 1203.1, subdivision (a).

The power of the court with regard to probation is strictly statutory, and the court cannot impose a condition of probation which extends beyond the maximum statutory term of probation. (In re Bolley (1982) 129 Cal.App.3d 555, 557; In re Acosta (1944) 65 Cal.App.2d 63, 64.) If a defendant's period of probation was five years' maximum, any attempt by the court to extend probation beyond that period would be null and void, even if the defendant consented. (People v. Gilchrist (1982) 133 Cal.App.3d 38, 44; In re Bolley, supra, 129 Cal.App.3d at p. 557.)[7]

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[7]/ The minutes of the September 27, 1989, hearing do not reflect an advisement that appellant was being placed on probation for 6 years. Nor do the minutes reflect an advisement that the probation period cannot exceed 5 years, pursuant to Penal Code section 1203.1, subdivision (a). Since one may not be deemed to have waived that of which one is ignorant (In re Thomas S. (1981) 124 Cal.App.3d 934, 939; People v. Connor (1969) 270 Cal.App.2d 630, 634), and since the error is jurisdictional, it may be raised for the first time on appeal. (People v. Franco (1993) 19 Cal.App.4th 175, 183; People v. Williams (1989) 207 Cal.App.3d 1520, 1524; People v. Loera (1984) 159 Cal.App.3d 992, 998.) This rule applies to permit pressing a contention despite a defendant's admission or previous inaction, or by the failure

to secure a certificate of probable cause normally required by Penal Code section 1237.5. (People v. Loera, supra, 159 Cal.App.3d at p. 998; see also Menna v. New York (1975) 423 U.S. 61, 62 [46 L.Ed.2d 195, 197-198, 96 S.Ct. 241] [permitting defendant to raise double jeopardy violation for first time on appeal, despite the fact conviction was "entered pursuant to a counseled plea of guilty"].)

The order extending probation until July 27, 1995, imposed a 6 year, 2 day period of probation, if one assumes the date upon which probation commenced is the date of the original revocation (July 26, 1989). If deemed to commence on the date of the hearing, the 5 year period would run from September, 27, 1989, to September 26, 1994. In any event, by operation of law, the period of probation expired within 5 years from the date of the order granting probation, and any attempt to impose a 6 year period of probation, even if the defendant agreed to it, is null and void.

The trial court, during the probation revocation proceedings of September 27, 1989, therefore made a null and void attempt to establish a period of probation longer than the maximum period provided by law. Since the court lacked jurisdiction to impose a period of probation longer than 5 years, the order revoking her probation on August 29, 1995, and imposing a state prison sentence, was likewise void. As a consequence, any sentence imposed based upon the purported revocation of probation is similarly void.

IV

THE TRIAL COURT'S FAILURE TO ADVISE PETITIONER OF ITS LACK OF JURISDICTION TO REVOKE HER PROBATION, AND COUNSEL'S FAILURE TO DISCOVER THIS DEFECT, RENDERED HER ADMISSION OF THE PROBATION VIOLATION CONSTITUTIONALLY INVALID.

The record on appeal reflects petitioner was re-ordered on probation in 1989, and informed probation would not expire until July 27, 1995. It appears she was never informed that the probationary period is limited to 5 years, pursuant to Penal Code section 1203.1, as the minutes contain no notation to the effect that she waived (if she was legally capable of so doing) this jurisdictional defect to the probation order.

The record is also silent as to whether or not she was advised in September, 1989, when execution of the sentence was suspended, that the trial court would lose all jurisdiction over her within 60 days from the date the probation officer notified the court of her commitment to state prison in the Los Angeles case. Indeed, because no special plea was made at her arraignment on the alleged violation of probation proceedings in 1995, and no advisal is apparent from the record of the court's minutes, the contrary must be presumed: petitioner was never

advised by the court or by counsel that the proceedings in 1995 were in excess of the court's jurisdiction.

A defendant is entitled to rely on the advice of counsel in entering pleas. (In re Alvernaz (1992) 2 Cal.4th 924, 933-934.) Aside and apart from that right, it seems fundamental to our notions of fairness that the court be required to admonish an accused of a jurisdictional defect when it intends to conduct proceedings against her in excess of its jurisdiction. After all, in order for the record to show a knowing and intelligent waiver, a defendant must be advised of her constitutional rights. (Boykin v. Alabama (1969) 395 U.S. 238 [23 L.Ed.2d 274, 89 S.Ct. 1709]; In re Tahl (1969) 1 Cal.3d 122.) Seemingly, this would include the right against being criminally prosecuted and punished in the absence of jurisdiction.

Since the record of the trial court proceedings reflects no such advice or admonishment, her admission to the violation of probation must be deemed to have been made in flagrant violation of her rights to due process of law under the Fifth and Fourteenth Amendments to the Federal Constitution, as well as Article I, section 15, of the State Constitution. To the extent reasonably competent counsel should have noticed that more than 5 years had passed since the order placing petitioner on probation

and investigated that defense to the revocation proceedings, and should have investigated the court's lack of jurisdiction over her due to the court's failure to comply with Penal Code section 1203.2a, petitioner's plea is constitutionally invalid because she was not effectively represented.

Because the notice of appeal filed in the companion matter was not accompanied by a certificate of probable cause showing the existence of the within constitutional and jurisdictional grounds affecting the legality of the proceedings, this court may choose to not reach these issues in the companion appeal. Thus, she will have not adequate remedy at law address the illegal sentence.

CONCLUSION

As can be seen from the foregoing arguments, the trial court lacked jurisdiction to entertain probation revocation proceedings or sentence petitioner to state prison. The petition for writ of habeas should be granted and petitioner should be ordered immediately released.

Respectfully submitted,

Dated: APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner

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SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re CLEMENTE BARRAZA,	)	
	)	Superior Court No.
	)	SCR 56645
on Habeas Corpus.	)	[Court of Appeal No.
	)	E011825]

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE MALCOLM LUCAS, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and Appellant Clement Barraza, petitions for for a writ of habeas corpus, and by this verified petition states as follows:

I

Petitioner is unlawfully incarcerated and restrained at Centinela State Prison, at Imperial California, Rosie Garcia, Warden, Department of Corrections, pursuant to a judgment pronounced by the San Bernardino County Superior Court, in Case No. SCR 56645, on October 22, 1992.

II

Following a jury trial, petitioner was convicted of and subsequently sentenced to state prison on October 22, 1992, for a total term of 14 years, for violations of Penal Code section 182

(conspiracy to sell or transport cocaine (Health & Saf. Code, §11352) and Health and Safety Code section 11351 (possession of cocaine for sale). The verdicts included special findings with respect to the conspiracy count that the quantity of substance exceeded 25 pounds. (Health & Saf. Code, former §11370.4, subd.(a)(3).) With respect to the count regarding possession of cocaine for sale, the verdict included a finding that the quantity of substance exceeded 10 pounds. (Health & Saf.Code, former §11370.4, subd. (a)(2).)

III

Petitioner filed a timely notice of appeal following the conviction. On appeal, petitioner was represented by Richard Fusilier, who was retained. Richard Fusilier filed opening and reply briefs on behalf of petitioner.

IV

Petitioner's imprisonment is illegal and in contravention of rights guaranteed by the Sixth Amendment to the United States Constitution and by article I, section 15 of the California Constitution. Petitioner was denied the effective assistance of counsel in his appeal in Case No. E011825 in the following manner:

(a) Retained counsel Richard Fusilier abandoned petitioner

during the pendency of the appeal, by (1) moving out of state in December, 1993, after briefs had been filed but before argument, decision, or further review of the case had been exhausted, (2) being enrolled as an inactive member of the State Bar of California following public reproval by the State Bar of California, without informing the Court of Appeal or filing a substitution of counsel.

(b) Retained counsel failed to raise arguable and potentially meritorious issues on appeal. Petitioner's sentence for drug related offenses had been enhanced for being personally armed with a firearm, within the meaning of Penal Code section 12022, subdivision (c). From a reading of the briefs and the opinion, this sentence enhancement should have been challenged as improper pursuant to People v. Balbuena (1992) 11 Cal.App.4th 1136.

Additionally, Health & Safety Code section 11370.4, subdivision (a) precludes imposition of the quantity enhancement in the absence of a finding by the trier of fact that the defendant conspirator was "substantially involved in the planning, direction, execution, or financing of the underlying offense." No such finding was made in petitioner's case. An arguable issue to the additional 10 year term imposed against

petitioner pursuant to this enhancement was thus overlooked.

Because of the above omissions and the fact the record on appeal has not been made available to petitioner's present attorney, it is reasonably probable other potentially meritorious issues were overlooked.

(c) Retained counsel argued as assignments of error the introduction of certain incriminating statements attributable to petitioner during the trial to which no objection had been made to preserve such issue. Similarly, retained counsel raised an issue of prosecutorial misconduct respecting the manner in which certain questions of petitioner were asked but as to which no objection had been made at trial.

(d) Reasonably effective appellate counsel would have challenged the propriety of the imposition additional imprisonment pursuant to the enhancements under Penal Code section 12022, subdivision (c) and Health and Safety Code, section 11370.4, subdivision (a). Reasonably effective counsel would not have raised issues not properly preserved at trial by timely objection or a motion for new trial. In light of these errors and omissions, it is probable that retained counsel failed to raise other potentially meritorious issues, which may be determined only upon a transfer of the matter to the Court of

Appeal for appointment of counsel for appellant and reconsideration of his appeal.

V

The foregoing allegations are further explained and amplified in the Declaration of Carmela Simoncini attached hereto, including the exhibits, as well as by reviewing appellant's opening brief in People v. Barraza, E011825.

VI

Petitioner has no other plain, speedy or adequate remedy at law in that the present petition is based on material not included in the record on appeal in Case No. E011825, and, consequently, the issue presented here is only fully reviewable by a consideration of the facts presented in this petition.

VII

No other applications, petitions or motions have been filed in regard to the matters complained of herein, except for the matters raised in the attached Petition for Review, which pertain to a separate issue. This petition is addressed to this Court's original habeas corpus jurisdiction because petitioner's petition for review is presently before this Court.

/ / / /

/ / / /

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

A. Issue a writ of habeas corpus or order to show cause to the Director of the Department of Corrections to inquire into the legality of petitioner's incarceration;

B. Consolidate this petition for consideration with petitioner's petition for review from the appellate court's decision in Case No. E011825, which petition for review is filed herewith, Supreme Court No. S_____.

C. Transfer this cause to the Court of Appeal, Fourth Appellate District, Division Two, with directions to appoint counsel for appellant and to reconsider his appeal.

D. Grant petitioner such other and further relief as is appropriate in the interests of justice.

Respectfully submitted,

APPELLATE DEFENDERS, INC.

Dated: _____

_____
Carmela F. Simoncini
State Bar No. 86472

VERIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO) ss.

I, CARMELA SIMONCINI, declare:

I am an attorney admitted to practice before all the courts of the State of California and have my office in San Diego County. I am the appointed attorney now representing petitioner herein, who is restrained of his liberty and confined in Centinela State Prison at Imperial, California. I am authorized to file this petition. Because Mr. Barraza is in custody of this county and because the facts upon which this petition is based are discernible only by reviewing court documents obtained from the Fourth District Court of Appeal, Division Two, as well as information obtained by me personally, he is not in a position to verify this petition. I have read the foregoing petition for writ of habeas corpus and know the contents thereof to be true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California.

Executed on _____, 1994, at San Diego, California.

_____

Carmela Simoncini

MEMORANDUM OF POINTS AND AUTHORITIES

I

RELIEF BY WAY OF HABEAS IS AVAILABLE TO A PETITIONER SEEKING RELIEF FROM INEFFECTIVE ASSISTANCE OF RETAINED COUNSEL ON APPEAL.

The due process clause of the Fourteenth Amendment guarantees a criminal defendant the right to effective assistance of counsel on his first appeal as of right. (Evitts v. Lucey (1985) 469 U.S. 387, 397 [83 L.Ed.2d 821, 830, 105 S.Ct. 830.) This constitutional guarantee of effective assistance of counsel applies without regard to whether counsel is retained or appointed. (Evitts v. Lucey, supra, 469 U.S. at 395 [83 L.Ed.2d at 829]; People v. Frierson (1979) 25 Cal.3d 142, 161-162.)

Where the record on appeal sheds no light on the challenged conduct, relief must be sought by way of a petition for writ of habeas corpus. (People v. Haynes (1980) 104 Cal.App.3d 118, 123-124.)

With respect to matters yet pending in the Court of Appeal, it has been held to be an appropriate procedure to file a petition for writ of habeas corpus contemporaneously with the opening brief. (People v. Frierson, supra, 25 Cal.3d at 158) A claim of incompetency of appellate counsel is also cognizable in

a habeas proceeding. (In re Banks (1971) 4 Cal.3d 337, 343; In re Spears (1984) 157 Cal.App.3d 1203, 1209-1210.) Where it is alleged that appellate counsel rendered ineffective assistance by abandoning the appeal and failing to raise meritorious issues, but the remittitur has not issued, a similar procedure appears equally appropriate in the Supreme Court.

The facts in support of petitioner's claim he was not effectively represented on appeal are outside the four-corners of the record. The need to resort to information and matters outside the record justifies utilization of procedures relating to habeas corpus.

II

BARRAZA WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE HIS RETAINED APPELLATE ATTORNEY ABANDONED THE APPEAL AFTER BEING DISCIPLINED BY THE STATE BAR, WITHOUT MAKING PROVISION FOR A SUBSTITUTION OF ATTORNEYS, AND FAILED TO RAISE MERITORIOUS ISSUES ON APPEAL.

1. **Abandonment by Disciplined Attorney**

As demonstrated in the attached declaration, retained appellate counsel was publicly reproved by the State Bar of California in 1992, and subsequently enrolled on the inactive list the State Bar when he failed to provide proof of taking and passing the professional responsibility exam. Instead of advising his client of this fact, in 1993 he informed Mr. Barraza he was retiring, moving to Texas, and that appellant would be representing himself. He did not notify the Court of Appeal of his inactive status, nor did he file "substitution" of counsel, leaving appellant in propria persona.

He did not request oral argument, and did not petition for rehearing or review. His enrollment on the inactive list, which he was aware would take place, without making provision for

appellant's continuted representation on appeal is nothing short of pure abandonment.

A few cases have dealt with this type of professional misconduct. Some cases have held that a violation of the right to counsel is established by evidence the petitioner was represented by a person who, although formerly licensed, has resigned from the State Bar, because an essential element of the constitutional right to counsel is counsel's status as a member of the State Bar. (In re Johnson (1992) 1 Cal.4th 689, 701.)

In People v. Hinkley (1987) 193 Cal.App.3d 383, appellant's public defender disappeared sometime between the date of the verdict and the subsequent sentencing. After investigation and disciplinary proceedings were conducted, the attorney was enrolled as an inactive member of the State Bar and the Superior Court assumed jurisdiction of his law practice. At appellant's sentencing hearing, the public defender's office sent another attorney to represent appellant. He made a perfunctory motion for new trial without citing authority or making an argument on the ground of the questionable status of the attorney who had previously represented appellant. In other words, appellant was not properly informed his attorney was no longer an active member of the State Bar.

The appellate court distinguished Hinkley's case from that of People v. Medler (1986) 177 Cal.App.3d 927, where the attorney's inactive status was related solely to his nonpayment of dues, because that type of suspension does not go the competency of counsel to represent litigants or the personal qualities of the attorney. By contrast, appellant's attorney had been enrolled as an inactive member due to incompetence to represent clients. The Court of Appeal noted at pages 390-391,

> " Inherent in the attorney-client relationship are extensive ethical and professional obligations of an attorney to his client. Those obligations cannot be met by analogizing the performance of the attorney to one who drives an automobile with a suspended driver's license. A criminal defendant's right to be informed that his attorney has been found to be incompetent to practice law outweighs any inclination to affirm a judgment on the merits for judicial convenience.
> " In McGregor v. State Bar (1944) 24 Cal.2d 283, 288 [148 P.2d 865], the Supreme Court stated: '"The right to practice law not only presupposes in its possessor integrity, legal standing and attainment, but also the exercise of a special privilege, highly personal and partaking of the nature of a public trust. ..."'[Citations omitted.]
> " A criminal defendant has a right to
>
> participate meaningfully in his defense and
>
> in making important decisions. **To exercise**
>
> **those rights, he necessarily has the right to**

> **receive important information from his attorney.** The failure of Mays to advise appellant of the State Bar and [Business and Professions Code] section 6190 et seq. proceedings deprived appellant of his right to participate meaningfully and amounted to a violation of Mass's professional responsibility to supply important information to his client. In this instance, for example, it deprived appellant of the important right to have Mays replaced or to represent himself." [Emphasis added.]

From this reasoning, the Court of Appeal concluded that a conviction obtained in a proceeding in which the defendant was represented by an attorney who the State Bar and a superior court has determined to lack the capacity to represent clients "reeks with the appearance of unfairness" and required reversal. (Id., 193 Cal.App.3d at p.391.)

Petitioner's counsel's failure to participate in the appellate proceedings from December, 1993, by itself prejudiced petitioner. In People v. McGraw (1981) 119 Cal.App.3d 582, the defendant had retained an attorney. However, because defendant

was not able make immediate payment, the attorney attempted to withdraw as counsel on the day before trial. His motion to be relieved was denied. Nevertheless, the attorney absented himself from the majority of the proceedings. The Court of Appeal found the attorney's calculated failure to participate in jury selection deprive appellant of a fair jury, and his absence at closing argument and sentencing, ostensibly with the court's permission and appellant's consent, denied him effective assistance of counsel.

In a similar vein, a judgment was reversed in the case of People v. Shelley (1984) 156 Cal.App.3d 521, where the trial attorney was physically present but refused to participate because of his feeling the defendant could not receive a fair trial. The reviewing court noted that even though the attorney attempted to give a tactical explanation for his nonparticipation, the mere characterization of an attorney's decision or course of conduct as "tactical" does not insulate from constitutional scrutiny. (Id., 156 Cal.App.3d at p. 529.)

The appellate court also noted the trial court was vested with inherent power to exercise reasonable control over all proceedings, and has an obligation to safeguard both the rights of the accused and the interests of the public. (Id., at p. 530.)

It could therefore have handled the problem by holding counsel in contempt, or relieving him on the court's own motion. (Id., 156 Cal.App.3d at p. 531.)

In the present case it is interesting to note the Court of Appeal became aware of counsel's "retirement" before the cause had been submitted for decision. From a review of the docket (Exhibit "A", p. A-8), it appears this information caused the Court of Appeal to contact Mr. Fusilier's office. It further appears the Court was made aware Mr. Fusilier "left cases hanging." At that time, Mr. Fusilier could have been relieved, and substitute counsel appointed, preventing any prejudice to petitioner.

As will be more fully explained in the next section, Mr. Fusilier did not effectively represent petitioner even while he was active. Nevertheless, abandoning petitioner upon his enrollment as an inactive attorney, without fully informing petitioner, deprived petitioner of an important right to move for replacement of Mr. Fusilier at a point during the appeal when supplemental briefs, oral argument or petition for rehearing would have operated to prevent prejudice. Under the circumstances of this case, fairness requires that this cause be transferred to the Court of Appeal for appointment of counsel and

reconsideration of the appeal.

2. **Ineffectiveness Based Upon Failure to Raise Arguable Issues.**

The failure of appellate counsel to raise an arguable issue has been held to constitute ineffective assistance of counsel which entitled the defendant to a recall of the remittitur. (People v. Valenzuela (1985) 175 Cal.App.3d 381, 389-390.) Petitioner need not establish he was entitled to a reversal in order to show prejudice in the denial of counsel. (In re Smith (1970) 3 Cal.3d 192, 203-204.)

In In re Smith, this Court held appellate counsel was not required "to contrive arguable issues," but that where each of the counts on which petitioner was convicted was "potentially vulnerable to legitimate and provocative appellate contentions that should have been manifest to an alert and responsive attorney," appellate counsel did not render the thoughtful assistance to which petitioner was entitled. (Id., 195, 202.)

To be considered an "arguable issue," it must be such that, if resolved favorably to the appellant, the result will be either a reversal or a modification of the judgment. Due process is abridged when counsel on appeal inexcusably fails to raise crucial assignments of error which amount to potentially successful contentions on appeal. (In re Smith, supra, 3 Cal.3d

at p. 203; People v. Valenzuela, supra, 175 Cal.App.3d at p. 391.)

The procedural status of the instant case is very similar to that which was presented in People v. Barton (1978) 21 Cal.3d 513. In that case, an attorney was appointed to handle the appeal and had filed briefs raising some issues. However, the attorney failed to augment the record to include the reporter's transcript of the evidentiary portion of the suppression hearing which was the subject of an issue raised on appeal. After briefing, a decision was filed affirming the judgment. However, appellate counsel did not file a petition for rehearing. Appellant himself filed a petition for hearing in the Supreme Court, alleging he had not been afforded adequate assistance of counsel on appeal. The petition was granted.

While the nature of the ineffectiveness which was at issue in that case is different from the alleged ineffectiveness in the present case, that decision does suggest that where the time for filing a petition for review has not expired, a petition seeking relief may be addressed to the Supreme Court on grounds relating to the ineffectiveness of appellate counsel. In that case, this Court transferred the cause back to the Court of Appeal with directions to appoint new counsel and to reconsider his appeal,

citing People v. Lang (1974) 11 Cal.3d 134, 142.

The attached declaration, based upon substitute counsel's review of the briefs and the opinion in the instant case, and limited research on the issues, strongly suggests there were arguable issues which could have resulted in a significant modification of the judgment, if not a reversal. A challenge to the drug quantity enhancement to the conspiracy count would have reduced petitioner's sentence by 10 years. A challenge to the weapon enhancement would prevent the possession for sale count from becoming a serious felony prior.

A proper analysis of the issue relating to the multiple sentences, referencing the identity of the offense alleged in count 3 with the overt acts alleged respecting the conspiracy in count 1, would have compelled a different conclusion than that reached by the Court of Appeal. Without access to the record on appeal, present substitute counsel cannot offer an opinion as to the existence of other issues, which would be discernible only after a thoughtful review of the transcripts. Nevertheless, based solely on the limited information available, it appears appellate counsel failed to consider several arguable issues, and improvidently considered several un-arguable issues.

Such facts constitute a prima facie showing that petitioner

was not competently represented on appeal. A reasonably competent appellate attorney is expected to analyze the elements of the offenses of which the appellant was convicted and to make any arguable challenge which has a potential for reversal or modification of the judgment. Mr. Fusilier failed to do so. As a consequence, this matter should be transferred to the Court of Appeal for appointment of counsel and reconsideration of the appeal.

CONCLUSION

For all the foregoing reasons, petitioner respectfully prays for relief as set forth in the petition, specifically, that his cause be transferred to the Fourth District Court of Appeal, Division Two, for appointment of appellate counsel and reconsideration of the appeal.

Respectfully submitted,

Dated:

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner

DECLARATION OF CARMELA SIMONCINI

IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I, CARMELA SIMONCINI, declare:

1. I am an attorney, licensed to practice law before all the courts of the State of California. I employed as a staff attorney at Appellate Defenders, Inc. ("ADI"). I have personal knowledge of the matters stated herein, and, if called as a witness, am competent to testify thereto.

2. I have been a staff attorney at ADI for nearly 8 years, and have represented numerous clients on appeal since 1979, in civil, criminal and juvenile matters. As a staff attorney I regularly assist panel attorneys appointed to represent indigent appellants with issue identification, selection, evaluation and analysis. I receive assignments of approximately 100 new assisted cases per year, in which one of my responsibilities is to point out potentially arguable issues. One of my other regular duties is to read and evaluate the quality of briefs submitted by appointed appellate counsel on behalf of appellants.

3. Additionally, my duties as staff attorney at ADI include serving as administrative liaison, or ambassador, to Division Two of the Fourth District Court of Appeal. In this capacity I meet regularly with the Presiding Justice, Chief Deputy Clerk, and

Principal Attorney regarding criminal and juvenile appeals and assist the Court with issues relating to panel attorneys or indigent appellants seeking appointed counsel on appeal.

4. On March 16, 1994, I received a telephone call from Division Two of the Fourth District Court of Appeal. I was informed in that conversation the court had received a letter from an appellant in a criminal matter, Clemente Barraza. Mr. Barraza had written to the court requesting appointment of counsel to pursue a petition for rehearing on his behalf because his retained attorney had "retired" and moved to Texas.

The court informed me the appellant had previously written in December, 1993, advising the court of his attorney's retirement. However, no action was taken at that time. The Court of Appeal expressed concern that appellant had been abandoned by his retained attorney and may have been prejudiced in the event there had been grounds for rehearing or review. The opinion had been filed on February 15, 1994. No oral argument had been requested and had been deemed waived by the court. I was asked to look into the matter before the Court of Appeal lost jurisdiction on March 17, 1994. The Court of Appeal sent to me, by facsimile transmission, copies of the Docket Sheet of the Court of Appeal, appellant's letters to the court as well as the

opinion of the Court of Appeal filed on February 15, 1994. Those materials are attached to this Declaration as Exhibit "A" and by this reference made a part of this declaration.

The cover memorandum and attached court docket sheet appear at pages A-1 through A-10 of Exhibit "A." Appellant's first letter to the Court of Appeal is located at page A-11 of Exhibit "A," the opinion is found at pages A-12 through A-28, and appellant's second letter to the court is at pages A-29 through A-32.

5. Later that same day, I participated in a conference call with Associate Justices Thomas Hollenhorst and Art McKinster, as well as Deputy Attorney General Laura Halgren. I was informed that although Justice Howard Dabney was acting presiding justice and author of the opinion, he would be out of town until the following Monday, after the court lost jurisdiction in the case. In his absence, Justice Hollenhorst reiterated the court's concern that appellant may have been abandoned by his retained attorney and asked me to review the materials which had been faxed in order to determine if any action were necessary. The justices indicated the court's dockets (A-3 through A-10 of Exhibit "A") showed that at no time did Mr. Fusilier file a substitution of counsel by which Mr. Fusilier was relieved as

attorney of record for Mr. Barraza. We discussed the possibility that the court could appoint me to pursue any remedy I deemed necessary for the protection and preservation of appellant's rights.

6. On March 16, 1994, that same afternoon, I telephoned the offices of the State Bar of California. I was informed that Richard Fusilier was no longer an active member of the bar, and that he had provided a change of address to the State Bar indicating a move to Texas in December, 1993. I was further informed that in 1992, Richard Fusilier had been publicly reproved by the State Bar. He was given time to provide proof of passing the professional responsibility exam, but failed to do so. He notified the State Bar of a change of address to Texas in December, 1993. He was subsequently enrolled on the inactive list, effective January 1, 1994. Certified documents evidencing these items, are attached to this declaration as Exhibit "B."

7. On March 21, 1994, I was appointed by the Fourth District Court of Appeal to represent Mr. Barraza in order to pursue the attached petition for review and for relief on habeas corpus.

8. Upon reviewing the copies of briefs, which were provided to me by Deputy Attorney General Laura Halgren, it appears Mr. Fusilier omitted to raise a potentially meritorious issue

regarding the propriety of the sentence enhancement imposed pursuant to Penal Code section 12022, subdivision (c). My opinion is grounded upon the description of appellant's arrest and the description of the discovery of the weapon as contained in the opinion and in the briefs. Since I do not have the record on appeal, my opinion is limited to these matters and based upon the decision of People v. Balbuena (1992) 11 Cal.App.4th 1136, which involved a description of circumstances similar to the descriptions contained in the briefs and opinion in this case.

The true finding respecting the personally armed allegation will have serious deleterious ramifications for Mr. Barraza because such a finding renders the conviction a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(23), even though the actual prison term was stayed.

9. Upon reading the opening brief, I also noted Mr. Fusilier had raised a number of arguments concerning evidentiary matters without indicating whether these issues had been properly preserved by timely objection. A review of respondent's brief, in which the People argued waiver in response to such assertions, as well as the court's treatment of such issues in the opinion, confirmed my opinion that retained counsel had raised issues which had been waived. 10. Additionally, in the opening brief,

Mr. Fusilier argued the illegality of the search of appellant's house and seizure of evidence found therein, which, according to the opinion and the respondent's brief, addressed grounds not raised in the trial court proceedings on the motion to suppress. Since he did not address an argument based upon grounds litigated in the trial court and upon which the suppression motion was denied, appellant may have been deprived of appellate review of a potentially meritorious issue on such ground.

11. In his argument relating to multiple punishment for counts 1 and 3, Mr. Fusilier did not mention whether or not the petitioner's alleged possession for sale as alleged in count 3 was one of the overt acts alleged in count 1, the conspiracy. The appellate court makes a brief reference to petitioner's possession of the cocaine (on the same date as the offense in count 3) as an overt act supporting the finding he was involved in the conspiracy, at page 11 of the typed opinion. This was not pointed out to support his argument, although such a fact has been viewed as a very compelling factor in determining whether improper multiple punishment has been imposed. (See In re Cruz (1966) 64 Cal.2d 178, 180; People v. Birdwell (1967) 253 Cal.App.2d 621, 633.)

In his argument regarding the sufficiency of evidence to

support the conviction for conspiracy to sell or transport cocaine, retained counsel relied in part on the decision of People v. Samarjian (1966) 240 Cal.App.2d 13, for the proposition that mere aiding and abetting is not enough to create liability for conspiracy. (AOB 51.) However, in the Samarjian case, the appellate court was careful to say that the necessary common knowledge to impute knowledge of a conspiracy to an aider and abettor of a forgery charge was different in narcotics cases. In drug cases, the appellate court observed that "knowledge of the probability of a conspiracy involving his customer can legitimately be attributed to the original supplier." (People v. Samarjian, supra, 240 Cal.App.2d at p. 20.)

In my opinion, competent appellate counsel would not rely upon such decisional authority without addressing the implied exception to its holding as noted in that opinion. Moreover, from the Court of Appeal's discussion of the sufficiency of evidence to support the conspiracy in the instant appeal, it appears Mr. Fusilier failed to mention pertinent facts adduced at trial. (See pages 10 through 12 of the typed opinion, included in Exhibit "A.")

In addition, Mr. Fusilier did not raise a challenge to the multiple findings relating to the quantity of drugs pursuant to

Health and Safety Code, former section 11370.4, subdivisions (a)(2) and (a)(3). A meritorious challenge to the conspiracy enhancement could have been made based upon the statutory language of the section in which the legislature provided, "The conspiracy enhancement provided for in this subdivision shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense." Based upon the appellate court opinion's description of appellant's involvement, and the fact it does not appear the trier of fact made a finding that appellant was "substantially involved" in the conspiracy, this enhancement could have been stricken.

12. In the alternative, a challenge to the multiple allegations could have been raised. Since the conspiracy to sell or transport cocaine was continuous in nature, including the date of appellant's possession for sale as alleged in count 3, the quantity of cocaine found at appellant's house, was necessarily included in the greater quantity allegation respecting the continuous conspiracy to sell and transport. In this regard the lesser enhancement was necessarily included in the greater quantity enhancement.

Although the term for the enhancement on count 3 was stayed, in the event of a successful challenge to the conviction on count 1, the term could be imposed to appellant's prejudice. An effective challenge might result in a striking of the lesser enhancement.

13. By failing to notify appellant and the court of his move to Texas, Mr. Fusilier deprived appellant of an opportunity to have an attorney orally argue the appeal or petition for rehearing following the decision. This deprived appellant of important appellate rights. Additionally, by failing to promptly request to be relieved and have a substitute attorney appointed, appellant was deprived of an opportunity to have the errors and omissions of Mr. Fusilier corrected in a timely manner. By abandoning his client, Mr. Fusilier prevented the appointment of competent substitute counsel who could have sought leave to file supplemental briefs raising omitted issues, could have orally argued the case and petitioned for rehearing.

14. Although the record on appeal has not been transmitted to me, I feel, based upon the rendition of facts and analysis of the issues in the briefs and the opinion, that Mr. Barraza was not effectively represented on appeal. I am concerned these errors and omissions may be just "the tip of the iceberg;" I feel it is

highly likely other meritorious issues may have been overlooked, and that the issues which were raised were not effectively presented. However, this can only be determined upon a review of the record on appeal, which I do not have in my possession.

15. For the above reasons, I feel Mr. Barraza was not effectively represented on appeal and the interests of justice would be served by transferring this cause to the Court of Appeal for appointment of counsel and reconsideration of the appeal.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California.

Executed on _____, 1994, at San Diego, California.

_____
Carmela Simoncini

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	Court of Appeal No. E011825
v.	
CLEMENTE BARRAZA,	Superior Court No. SCR 56645
Defendant and Appellant.	

APPEAL FROM THE SUPERIOR COURT OF SAN BERNARDINO COUNTY

Honorable Dennis G. Cole, Judge

PETITION FOR WRIT OF HABEAS CORPUS FOR DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Staff Attorney
State Bar No. 86472
233 "A" Street
Suite 1310
San Diego, California 92101
(619) 696-0282

Attorneys for Petitioner

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

In re:	) Court of Appeal) No. D017656
FREDERICK RENE DAYE	) Superior Court) No.CR 67014
On Habeas Corpus	)

Proceeding on Habeas Corpus

APPLICATION FOR PRE-APPROVAL
OF INVESTIGATION EXPENSE

Petitioner, by and through his newly appointed counsel, Appellate Defenders, Inc., makes application to this Court for pre-approval of investigation expense in the amount of $2000.00, pursuant to the guidelines adopted by the Supreme Court of the State of California, which became effective on July 22, 1991. An explanation of the requested expenses is included in the attachments to this application.

The grounds for this request are set forth in the attached appointment order dated October 15, 1992, the declaration of Carmela F. Simoncini, Staff Attorney and such other supporting evidence or documents as may be attached thereto in support of this request.

WHEREFORE, Petitioner prays for approval of investigation expenses an amount not to exceed $2000.00, or such other amount as the Court may deem proper.

Respectfully submitted,

Dated: APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

In re:	) Court of Appeal) No. D017656
FREDERICK RENE DAYE	) Superior Court) No.CR 67014
On Habeas Corpus	)

Proceeding on Habeas Corpus

DECLARATION OF CARMELA SIMONCINI
IN SUPPORT OF APPLICATION
FOR APPROVAL OF INVESTIGATION
EXPENSE

I, Carmela Simoncini, declare:

I am an attorney licensed to practice law before all the courts of the State of California. I am a staff attorney employed by Appellate Defenders, Inc., attorney of record for petitioner Frederick Rene Daye. I have personal knowledge of the matters stated herein, and, if called as a witness, am competent to testify thereto.

In June or July, 1992, I assisted Mr. Daye in preparing a petition for writ of habeas corpus, which he filed in propria persona in the Court of Appeal for the Fourth District Court of Appeal, Division One, Case No. D017656. On August 11, 1992, the

petition was denied but remanded to the Superior Court to determine whether attorney Thomas Miles should be relieved as counsel of record. Appellate Defenders, Inc., did not receive a copy of that order since it was not attorney of record.

No action was taken by the Superior Court. In September, 1992, Mr. Daye corresponded with me to inquire about any action taken by the Superior Court pursuant to this Court's order. A subsequent search of the court files found the Court of Appeal's order filed along with the criminal file, and placed back in the Archives in the basement of the Superior Court. No action had been taken on this Court's order.

Upon learning that no action had been taken by the Superior Court to relieve attorney Miles, I wrote a letter on behalf of Mr. Daye to the Court of Appeal, seeking clarification of its prior order. A copy of that letter is attached hereto as Exhibit "A" and by reference made a part of this declaration. In response, the Court of Appeal appointed Appellate Defenders, Inc. to represent Mr. Daye. Attached hereto as Exhibit "B" is a copy of this Court's order appointing Appellate Defenders, Inc. to represent petitioner.

Attorney Michael Meaney, who represented David Pringle in Case No. CR 68057 in the San Diego County Superior Court, has

obtained, and provided to attorney Thomas Miles, a declaration under penalty of perjury by David Pringle, exonerating petitioner of any criminal liability arising out of the incident which formed the basis for the convictions against both defendants in their separate trials. Petitioner was arrested some time prior to Pringle based upon a general description of the perpetrator, and was tried and convicted on the basis of eyewitness identification separately from and before Pringle's trial.

By his declaration, which was attached to petitioner's petition for writ of habeas corpus herein, Pringle stated he had committed the offense with Eddie Smallwood. He stated was unaware of Daye's conviction and would have come forward sooner had he known that someone else had been convicted of the offense. This declaration was provided to attorney Thomas Miles, upon his appointment by the Superior Court in order to seek post-judgment relief from the conviction in 1990. However, Mr. Miles filed the declaration in Pringle's criminal court file, and failed to take further action for more than two years on Mr. Daye's behalf.

In order to refile the petition for writ of habeas corpus in the Superior Court, and in order to make the prima facie showing necessary to obtain appointment of new counsel at the trial level and obtain a hearing on the merits of the petition in the

superior court, it is necessary to conduct certain investigation into the statements made under penalty of perjury by David Pringle. I have received information that Mr. Pringle has information about the location of Eddie Smallwood, and other witnesses who could confirm Smallwood's participation in the offense which led to Daye's conviction.

I have contacted several investigators in order to obtain estimates of the cost of investigation of this type of matter. The most economical estimate was presented by Mr. Charles Small, a licensed private investigator, who charges $40.00 per hour, plus expenses.

Investigator Small indicates he would need to interview David Pringle in person at California Men's Colony at San Luis Obispo, in order to obtain information about Pringle's role in the offense, as well as information relating to the location Eddie Smallwood, with whom Pringle appears to have maintained contact in the years since his conviction. Thereafter, Mr. Small would need to locate and interview Eddie Smallwood, or any witnesses competent to testify about any incriminating statements made by Smallwood in connection with the offense of which Mr. Daye was erroneously convicted. Mr. Small estimates it would cost $2000.00 (which includes travel expense to CMC, San Luis

Obispo) in order to investigate and report on this matter.

As appointed counsel, Appellate Defenders, Inc., owes an ethical and legal obligation to follow up and investigate the claim that Mr. Daye was erroneously convicted of an offense allegedly committed by Eddie Smallwood, acting in concert with David Pringle. The allegation that previously appointed counsel failed to follow up on this information resulted in the filing of the petition by Daye in propria persona and in turn led to the substitution of attorneys by order of this Court on October 15, 1992. In light of these facts, it is incumbent upon Appellate Defenders, Inc. to act diligently in following up on this information in order to competently discharge its duty in representing petitioner.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California, on October 28, 1992.

_____
Carmela F. Simoncini
Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)	Case No. CR 67014 ORDER FOR APPOINTMENT OF INVESTIGATOR AT COUNTY EXPENSE

This matter came on ex parte application by petitioner above-named by and through counsel Appellate Defenders, Inc. Counsel for petitioner moved ex parte for an order appointing an investigator. Evidence having been presented in declarations submitted in support of the motion, and arguments having been made:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that an investigator is appointed to interview witnesses and perform other investigative functions associated with the preparation and presentation of the issues on habeas corpus.

IT IS FURTHER ORDERED that the costs and expenses of such investigation will be paid by the Auditor of the County of San Diego, California upon certification of such costs and expenses to him by this Court, pursuant to the policies of the Alternate Defense Counsel

Office. /////

/////

Provided the Court finds the petitioner indigent, Alternate Defense Counsel will pay costs per its guidelines and policies, provided any funding requests are pre-approved by Alternate Defense Counsel.

Dated: _____

_____
JUDGE OF THE SUPERIOR COURT

Approved as to form and content:

Dated: _____

_____
ALTERNATE DEFENSE COUNSEL

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)	Case No. CR 67014 APPLICATION FOR EX PARTE ORDER FOR APPOINTMENT OF INVESTIGATOR AT COUNTY EXPENSE

TO THE HONORABLE FREDERIC L. LINK, Judge of the Superior Court for the State of California, County of San Diego:

Frederick Rene Daye, through his appointed counsel Appellate Defenders, Inc., applies for an ex parte order for appointment of an investigator at county expense, to assist him in the ascertainment of facts and collection of evidence in support of his petition for writ of habeas corpus.

This application is based upon the accompanying Declaration of Carmela Simoncini as well as the attachments thereto.

Dated: _____

_____
CARMELA F. SIMONCINI, Staff

Attorney

Appellate Defenders, Inc.
Attorneys for FREDERICK R. DAYE

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

In re:	)	Case No. CR 67014
	)	
FREDERICK RENE DAYE,	)	DECLARATION OF CARMELA F.
Petitioner,	)	SIMONCINI IN SUPPORT OF
	)	APPLICATION FOR EX PARTE
On Habeas Corpus.	)	ORDER FOR APPOINTMENT OF
	)	INVESTIGATOR AT COUNTY EXPENSE

I, Carmela F. Simoncini, declare:

1. I am an attorney licensed to practice law before all the courts of the State of California. I am employed as a staff attorney at Appellate Defenders, Inc. [ADI], which was appointed by the Court of Appeal to prepare the ancillary petition for writ of habeas corpus on behalf of Frederick Daye on October 15, 1992. I have personal knowledge of the matters stated herein, and, if called as a witness, am competent to testify thereto.

2. On January 27, 1993, this Court issued an Order to Show Cause, directing the People to file a return by February 22, 1993. The Court, in the Order to Show Cause, found that petitioner had made a prima facie showing of entitlement to the relief requested in the petition.

3. On February 16, 1993 the Court granted the People (appearing by and through the Office of the District Attorney) an extension of time, up to March 24, 1993, to file its return, in order to permit the People to conduct investigation.

4. The prayer for the relief requested in the petition includes a request for appointment of counsel and an order for investigation expense in order to facilitate an evidentiary hearing. Since the Court has given the People additional time in order to facilitate investigation, fairness requires that petitioner be permitted to conduct certain investigation in preparation for the hearing for the same reasons. Unless investigation is permitted, petitioner will not be able to address any evidence presented by the People at the hearing on the order to show cause.

5. I am informed and believe that there are witnesses located in San Diego, California who would corroborate Pringle's declaration and exonerate Petitioner. I wish to have such witnesses located and interviewed.

6. I am also aware that the victim's clothing is still in evidence under David Pringle's case number, CR 68057. Because the convictions in this case took place before DNA was considered acceptable evidence, the clothing has not been subjected to DNA or other genetic "fingerprinting" to exclude petitioner as the perpetrator of the sexual assault. I have communicated with forensic scientists at Cellmark Laboratories in Texas, regarding the possibility of testing in a case this old. I am informed that certain testing may still be done if semen is present on the clothing. The laboratory charges $350

dollars for each blood sample tested and would require three samples (from petitioner, Pringle, and the victim) in order to render an opinion.

7. ADI is a non-profit corporation under contract with the Administrative Office of the Courts and the Court of Appeal. ADI's budget does not include funding for investigation expenses, and for this reason, an application for appointment of an investigator is required in order to competently discharge the duties of counsel for Mr. Daye.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California, on March 4, 1993.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)))))	Case No. CR 67014 ORDER FOR RELEASE OF EXHIBITS IN CR-68057

This matter came on ex parte application by petitioner above-named by and through counsel Appellate Defenders, Inc. Counsel for petitioner moved ex parte for an order releasing exhibits presently found in CR 68057, pertaining to the case of the People of the State of California v. David Pringle. Evidence having been presented in declarations submitted in support of the motion, and arguments having been made:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the clothing of the victim, any rape kit evidence, and any blood samples presently in exhibits in connection with CR-68057, be released to Petitioner, his attorney, investigator, or other authorized agent or representative, for forensic testing.

Dated: _____

_____
JUDGE OF THE SUPERIOR COURT

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)	Case No. HC 12614 [Superior Court No. CR 67014] TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE AND

1. Petitioner, Frederick Rene Daye, realleges and incorporates by reference, all the allegations in his petition for writ of habeas corpus. Further, petitioner offers the following matters to controvert the issues raised by the return.

2. Petitioner denies the allegations of Paragraph I of the Respondent's Return to Order to Show Cause (hereinafter referred to as the "return"), to wit: that Petitioner is in the lawful custody of the California Department of Corrections pursuant to a judgment and

sentence based upon petitioner's convictions in Case No. CR 67014, on August 14, 1984. Petitioner has at all times maintained that he was mis-identified as a perpetrator in that case, that Eddie Smallwood, whom he resembles, was the actual perpetrator, and that the conviction as to petitioner is illegal.

3. Petitioner further denies the relief requested in the petition is unwarranted on the grounds it fails to meet "the strict legal standard for habeas corpus relief." As will be more fully set forth in the accompanying memorandum of points and authorities, controlling authority holds that the "strict legal standard for habeas corpus relief" was never intended to impose a hypertechnical requirement that each bit of prosecutorial evidence be specifically refuted. Petitioner specifically denies the assertion that the evidence is not newly discovered, credible or conclusive. To the contrary, since Pringle, as respondent admits in Paragraph LV of its return, exercised his Fifth Amendment right against self-incrimination when called as a witness at petitioner's trial, he was unavailable as a witness. His statements on petitioner's behalf at the present time constitute newly discovered evidence, within the meaning of the cases cited in the within memorandum of points and authorities, as well as the authorities cited in the petition for writ of habeas corpus. Moreover, since the statements made by Pringle in the declaration in support of the petition for writ of habeas corpus, constitute admissions of a criminal defendant, and declarations against his penal interests, they are considered by law to be reliable, irrespective of the credibility of Pringle at his own trial.

4. Petitioner denies the allegations of Paragraphs III through LXXXVI generally and specifically as they constitute nothing more than a recitation of the evidence adduced at the respective trials of petitioner and Pringle. The recitations do not, as respondent suggests, support the position taken by respondent.

To the contrary, the assertions of the return confirm petitioner's contentions that he was mistakenly convicted in place of Smallwood: he bears resemblance to Eddie Smallwood in terms of race, size and metallic front tooth (I RT 221, 232-233; 474, 508, 551, 581-582)[8]; Eddie Smallwood was a known associate of David Pringle (I RT 478); David Pringle denied (at his **own** trial) even knowing petitioner (IV RT 365-367); and shortly after the offense, Smallwood was in recent possession of property stolen from the victim (I RT 561-562).

[8]/ For convenience, petitioner refers to the exhibits submitted by respondent and uses the same method of citation.

5. Petitioner denies the correctness of respondent's assertion that Pringle's declaration, offered in support of the petition for writ of habeas corpus, does not constitute newly discovered evidence. As admitted by respondent in Paragraph LX, Pringle, when called as a witness at **petitioner's** trial exercised his Fifth Amendment right against self-incrimination (I RT 470, 471-473). He was therefore unavailable as a witness at petitioner's trial.[9] Pursuant to the authorities cited in support of the petition and as provided herein, under such circumstances, his present statement, made when he became available as a witness, constitutes newly discovered evidence because it could not have been presented at petitioner's trial.

6. Petitioner denies the allegations of Paragraph LXXXVII, to wit: that Pringle's declaration is legally insufficient to warrant the granting of a writ of habeas corpus as it does not constitute new evidence. The exhibits attached in support of the return support petitioner's assertions that Pringle was unavailable as a witness at his 1984 trial but that he now is available, and, more importantly, is willing to provide material evidence in support of petitioner's claim of innocence.

7. Petitioner denies the allegations of Paragraph LXXXVIII of the return regarding the insufficiency of Gonzalez' statement.

8. Petitioner denies the allegations of Paragraph LXXXIX of the return that the clothing of the victim is legally insufficient to

[9]/ Furthermore, respondent acknowledges that Pringle testified at his **own** trial that he was unfamiliar with petitioner. (IV RT 365-367.)

warrant the granting of relief. The respondent does not deny that the victims clothing are maintained in evidence[10]. The fact that DNA testing has not yet been done respecting the clothing does not negate the fact that the clothing is available for testing. Respondent does not and cannot assert there are no semen stains on the clothing.

9. Petitioner denies the allegations of Paragraph XC of the return, to wit: that petitioner was not convicted based upon misidentification. As more fully set forth in the attached memorandum of points and authorities, the fact the victim was positive in her identification of petitioner does not mean she **correctly** identified him. The same is true with respect to witness Wells.

10. Petitioner generally and specifically denies all other allegations of the return.

WHEREFORE, petitioner respectfully request that this Court:

1. Take judicial notice of the superior court files in People v. Frederick Rene Daye, Case No. CR 67014, the record of the trial and the opinion of the Fourth District Court of Appeal, Division One, Case No. D002073, and the pleadings relating to the proceedings on habeas corpus brought in the appellate court in Case No. D017133, and all attachments thereto, as well as the decision therein, pursuant to

[10]/ Petitioner obtained an order directing the retention of the exhibits in the case of People v. David Pringle.

Evidence Code section 452(d)(1) and 459;

2. Issue a Writ of Habeas Corpus or Order to Show Cause to the Director of the Department of Corrections to inquire in the legality of petitioner's incarceration; or in the alternative,

3. Vacate the appointment of Thomas Miles and appoint other counsel to investigate the newly discovered evidence and present same in a competent fashion at an evidentiary hearing;

5. Authorize investigation expense in an amount not exceeding $2000.00 to facilitate proper investigation of the newly discovered evidence to present to this court at an evidentiary hearing; and

6. Grant petitioner such other and further relief as the Court may deem proper.

Respectfully submitted,

APPELLATE DEFENDERS, INC.

Dated:

Carmela F. Simoncini
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

I

SINCE DAVID PRINGLE WAS UNAVAILABLE TO TESTIFY AT PETITIONER'S TRIAL BY VIRTUE OF EXERCISING HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, HIS RECENT DECLARATION IN SUPPORT OF PETITIONER'S CLAIM OF INNOCENCE CONSTITUTES NEW EVIDENCE WHICH JUSTIFIES RELIEF ON HABEAS CORPUS.

Respondent's return argues there is no new evidence to support his claim of innocence. Respondent asserts that Pringle's declaration is of no evidentiary value since it shows no personal knowledge, and that it is not a credible statement because Pringle presented an alibi defense at his own trial. Respondent is in error on both points.

A. Pringle was Unavailable as a Witness to Testify at Daye's Criminal Trial. His Current Declaration Therefore Constitutes Newly Discovered Evidence.

Respondent refers to Pringle's testimony at his own trial and argues his present statement is not newly discovered evidence, but, rather, a recantation which should be viewed with distrust. However, has ignored the critical point of inquiry relevant to the instant case: when called as a witness in **petitioner's trial, Pringle exercised his Fifth Amendment right against self-incrimination**. Under controlling authorities, when a witness exercises the Fifth Amendment right against self-incrimination, he or she becomes unavailable as a matter of law.

Evidence Code section 240 defines "Unavailable as a Witness," in pertinent part as follows:

> "(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:
>
> "(1) **Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.**"

In interpreting the provisions of Evidence Code section 240 in connection with declarations of third parties against their penal interests, California Courts have been uniform in holding that such third party declarants are deemed "unavailable as a witness" by virtue of asserting an exemption by privilege from testifying concerning the matter. (People v. Malone (1988) 47 Cal.3d 1, 23; People v. Smith (1970) 13 Cal.App.3d 897, 902.)

Respondent mistakenly believes that the fact Pringle testified at his **own** trial negates the finding of unavailability at petitioner's trial. Respondent refers to the declaration of Pringle in support of the instant petition for writ of habeas corpus as a "retraction." (See Return to Order to Show Cause [hereinafter cited as "ROSC"] p. 38.) However, Pringle was tried and convicted after petitioner had been tried and convicted. The fact he may have waived his privilege in connection with his own **later** trial, after claiming it at petitioner's earlier trial does not constitute a retraction. Nor does the fact he denied complicity in the criminal offense at his own trial constitute a retraction of his claim of privilege at petitioner's earlier trial.

Since he offered no testimony at petitioner's trial, his present statements against his own penal interest do not constitute a retraction.

Here, the respondent acknowledges that Pringle was called to the stand during petitioner's trial and that he exercised his privilege against self-incrimination. (ROSC p. 21; I RT 471-473.) Pringle was therefore, as a matter of law, unavailable to testify at petitioner's trial. The fact he may be subject to impeachment with a prior inconsistent statement from a different trial involving a different defendant does not alter the fact his testimony was unavailable at petitioner's trial.

B. Pringle's Testimony at His Own Trial that He Did Not Know Petitioner Corroborate the Statements Made in the Declaration. In These Significant Respects, Pringle's Statements Are Credible.

Respondent also asserts that Pringle's statements are not credible because he offered testimony relating to an alibi defense at his own trial and changed his testimony. (ROSC 38.) However, in respects most important to the present proceeding, his testimony at his own trial was unwaveringly constant. He testified at his own trial that he did not know petitioner. (ROSC 37; IV RT 365-366.) Thus, the statement that he did not know petitioner was not refuted; nor is the inference that if Pringle committed the crime with Smallwood, petitioner must be innocent.

Evidence at petitioner's trial established that Pringle knows Smallwood. Thus, Pringle's statement in the declaration that "The person who was with me was Eddie Smallwood, although Smallwood was never arrested nor charged," is corroborated by the allegations of the return

which fail to refute the connection between Pringle and Smallwood. Evidence from other witnesses at petitioner's trial established that David Pringle did know Eddie Smallwood (I RT 477-479.) Far from controverting the assertions of the petition for writ of habeas corpus, these acknowledgments of the return (ROSC 21, 22, 25) corroborate petitioner's statements.

C. Pringle's Declaration is Credible Where His Statements Qualify as Declarations Against His Penal Interest.

Respondent's final challenge to the sufficiency of Pringle's declaration to satisfy a basis for relief in this proceeding is the assertion that his statement does not "...constitute an admission of guilt." (ROSC 37.) Respondent is in error.

An admission is an extrajudicial recital of facts by a defendant which tends to establish guilt when considered with the remaining evidence in the case. (People v. McClary (1977) 20 Cal.3d 218, 230; People v. Brackett (1991) 229 Cal.App.3d 13, 19.) Admissions carry their own indicia of credibility based upon the common understanding that people do not lightly admit a crime. (See United States v. Harris (1971) 403 U.S. 573, 583, 29 L.Ed.2d 723, 734, 91 S.Ct. 2075.) There is thus, in the nature of the statement, an internal guaranty of reliability. (People v. Garcia (1981) 115 Cal.App.3d 85, 101.)

Pringle's statement constitutes an express admission of his complicity in the commission of the offense. At page 1 of his declaration, which is attached as Exhibit "B" to the Petition for Writ of Habeas Corpus, Pringle states, "He [Daye] did not have anything to do with the crime and I do not know Frederick Daye. **The person who was**

with me was Eddie Smallwood, although Smallwood was never arrested nor charged." The reference to "the crime" relates to the crime of which both Daye and Pringle, in separate proceedings, were convicted. Pringle clearly states, in reference to that particular crime, that the person who was with him was Eddie Smallwood. This is an express acknowledgment of guilt of the offense.

This statement is corroborated by other evidence that Smallwood has made admissions of his own complicity in the commission of the offense, shortly after petitioner's conviction, which were offered at that time in support of a motion for new trial. (ROSC, Exh.8.) In this regard, respondent argues that Smallwood's conduct and statements do not meet the requirements for a declaration against interest pursuant to Evidence Code section 1230. (ROSC 39-40.) However, the evidence proffered by Ethel Gonzales in support of the motion for new trial was that Smallwood was in possession of rings and credit cards removed from the victim of the rape/robbery, and that he had left town because of his involvement in the offense. The obvious import of the statement was that Smallwood made himself "unavailable" as a witness by fleeing the jurisdiction to avoid arrest for the offense. His conduct, attempting to hock stolen property which had been stolen from the victim of the rape, evidences the requisite "guilty knowledge" to qualify as a declaration against penal interest.

It is ironic that the respondent, which frequently proffers admissions to prove guilt in various criminal proceedings, would adopt a different standard for the believability of admissions in these circumstances. The People have no interest in keeping innocent people

in state prison. If Smallwood, rather than Daye, committed the offense of which Daye was convicted, no social or moral or penal purpose is served by keeping Daye in state prison and punishing him for the crime of another.

II

THE FACT THE VICTIM WAS POSITIVE IN HER IDENTIFICATION OF PETITIONER AT TRIAL DOES NOT REFUTE OR CONTROVERT THE ALLEGATION HE WAS MISTAKENLY CONVICTED WHERE SUCH EYEWITNESS IDENTIFICATION IS HIGHLY UNRELIABLE.

Throughout the return, respondent refers to the victim's certainty in her identification of Daye as her attacker. (ROSC 10, 33-34.) However, as will be pointed out, the fact a witness is positive in the identification made does not mean the identification is reliable or accurate. As the relief sought in these proceedings is merely appointment of counsel and approval of investigation funds, petitioner will be able, at an evidentiary hearing, to establish that the identification by the victim was inaccurate.

Importantly, respondent refers to many items in its return which support petitioner's assertion of mistaken identity. It points to witnesses who testified that Daye looks similar Smallwood, that both have a metallic front tooth, and the composite drawing of the suspect resembles both Daye and Smallwood. (ROSC 21-22.) The fact that semen found on the victim's clothing does not support the conclusion the identification was corroborated by independent evidence. The nature of the testing performed in this case indicated only the blood type grouping of the semen donor, which in this case happened to be type O, the most common type. (I RT 187-188.)

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken

identification." (United States v. Wade (1967) 388 U.S. 218, 228, 18 L.Ed. 2d 1149, 1158, 87 S.Ct. 1926; People v. McDonald (1984) 37 Cal.3d 351, 363.) "The number of mistaken identifications leading to wrongful convictions, combined with the fact that eyewitness testimony is accepted too unquestioningly by juries, presents a problem for the legal community." (Loftus, Eyewitness Testimony (Harvard Univ. Press, 1979) p.201.)

Respondent does not refute or controvert the assertions of the petition that he was mistakenly identified as the perpetrator in place and instead of Eddie Smallwood. The victim attempted to make a cross-racial identification of the perpetrator and was presented with the photograph of petitioner, whose features are similar to those of Smallwood's. At an evidentiary hearing, with funding for an expert, petitioner will be able to establish the identification of petitioner as a the perpetrator of this crime was erroneous.

III

PETITIONER IS NOT REQUIRED TO SATISFY ANY HYPERTECHNICAL REQUIREMENT IN ORDER TO DEMONSTRATE ENTITLEMENT TO RELIEF ON HABEAS CORPUS.

Respondent cites In re Hall (1981) 30 Cal.3d 408, in support of its assertion that petitioner is not entitled to relief by way of habeas corpus. Specifically, respondent relies upon language found in Hall, which derived from In re Weber (1974) 11 Cal.3d 703, 724, that newly discovered evidence will not undermine the entire case of the prosecution unless it is conclusive and "points unerringly to innocence."

A closer reading of the language of Hall reveals respondent overlooked an essential caveat which immediately followed the quotation:

> "In so holding, however, we did not intend to impose either the hypertechnical requirement that each bit of prosecutorial evidence be specifically refuted, or the virtually impossible burden of proving there is no conceivable basis on which the prosecution might have succeeded. It would be unconscionable to deny relief if a petitioner conclusively established his innocence without directly refuting every minute item of the prosecutions proof, or if a petitioner utterly destroyed the theory on which the People relied without rebutting all other possible scenarios

> which, if they had been presented at trial, might have tended to support a verdict of guilt. (Cf. People v. Superior Court (1972) 7 Cal.3d 186, 198-199 [101 Cal.Rptr. 837, 496 P.2d 1205], and cases cited.) The nullification of the Lara brothers' testimony by their retractions and by the evidence amassed subsequent to trial completely destroys this case against petitioner. No more need be shown to warrant relief." [Emphasis by Court.]

In the Hall case, the petitioner was convicted based upon eyewitness testimony by the Lara brothers. After the trial, the Lara brothers recanted their testimony both in writing and under oath at the habeas corpus hearing. They admitted petitioner had not been at the scene and that an individual named Oscar Sanchez was the gunman.

In that case, the Attorney General argued, as the District Attorney does now, that the recantations must be discredited. (In re Hall, supra, 30 Cal.3d at p. 417-418.) The Supreme Court acknowledged that recantations are routinely viewed with suspicion. However, it noted that at the evidentiary hearing held in connection with the habeas corpus proceeding, petitioner offered the testimony of another witness who tended to exculpate the petitioner.

Petitioner seeks only to have the same opportunity as that afforded to Hall under similar circumstances. Hall was able to introduce the necessary exculpatory evidence by virtue of the fact an evidentiary hearing was ordered and he was represented by counsel who was able to conduct investigation. If counsel were appointed to represent

petitioner, investigation funds were approved and an evidentiary hearing were ordered in this case, petitioner would be able to provide independent corroboration for his assertions.

Petitioner's prayer for relief is simply a request for the opportunity to provide the simple facts which would exonerate him. Prior to Pringle's admission, there was no reliable evidence to support petitioner's theory that Eddie Smallwood was actual perpetrator.

The Court already has before it significant information which raises the question of whether in fact Eddie Smallwood is guilty of this offense. The state has no interest in leaving that question unanswered simply because another person, who happens to share some of Smallwood's physical characteristics, was mistakenly convicted in his place.

CONCLUSION

The return fails to refute or controvert the matters set forth in the petition for writ of habeas corpus. The petition requests nothing more than the appointment of counsel, approval of funds for investigation and/or experts, and an opportunity at an evidentiary hearing further explore the distinct probability that he was mistakenly identified in place of Eddie Smallwood.

The State of California has a valid interest in punishing the guilty. However, no valid social purpose is served by imprisonment of an innocent person while the guilty runs free. Respondent had 60 days to refute the assertions of the petition by investigating the truth of the Pringle's allegations, and locating Eddie Smallwood. Instead, the People chose only to reiterate excerpts of the trial proceedings of Pringle and Daye.

If the People will not investigate these charges and affirmatively controvert them, the Court must grant petitioner the means to do the job for them.

Respectfully submitted,

Dated:

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner
Frederick R. Daye

II. WRITS OF ERROR CORAM NOBIS/VOBIS

Petitions for writs of error coram nobis and coram vobis are the same type of writ. Each is a writ of error; coram nobis is filed in the trial court; coram vobis is filed in the reviewing court. The writ of error coram nobis or coram vobis typically lies where the following conditions are met: (1) At the time of the judgment, an error of fact existed; (2) The fact does not appear in the record and does not involve the merits of the issues actually litigated; (3) The fact was not introduced at trial either (a) because it was not discovered at the time of trial, due to no fault or negligence of the defendant, or (b) because of duress, fraud, or excusable mistake; and (4) knowledge of the fact would have prevented the rendition of the judgment. (See In re Imbler (1963) 60 Cal.2d 554, 570; see also In re Lindley (1947) 29 Cal.2d 709, 726.)

The case of People v. Shipman (1965) 62 Cal.2d 226, discusses the purpose and procedure relating to a petition for writ of error coram nobis. In Shipman, the California Supreme Court observed at page 230:

> The writ of coram nobis is granted only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." ([Citations omitted].) (2) Petitioner must also show that the "newly discovered evidence ... [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." ([Citations omitted].) This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. ([Citations omitted].) (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in

> the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. ..." ([Citations omitted].)

The writ of error coram nobis is an appropriate procedure for a post-judgment challenge to a guilty plea allegedly induced by mistake, fraud, or coercion. (People v. Wadkins (1965) 63 Cal.2d 110, 113; People v. Chaklader (1994) 24 Cal.App.4th 407, 409.)

A motion to vacate the judgment is considered a petition for writ of error coram nobis or coram vobis. (People v. Griggs (1967) 67 Cal.2d 314, 316.) The function of coram nobis or coram vobis, as well as the extent of review, was described in People v. Adamson (1949) 34 Cal.2d 320, pages 326-327:

> "Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court . . . . The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he as stated no ground for relief.' [Citations omitted."

Proceedings in coram nobis or coram vobis are usually used after judgment to withdraw a guilty plea which was wrongfully induced. Technically, a motion to withdraw a plea of guilty pursuant to Penal Code section 1018 should not be made after judgment has been entered, although frequently this occurs. The writ of error coram nobis is the appropriate method of vacating a plea of guilty, after judgment, where it was entered under a mistake of fact.

The writ of error coram nobis is an appropriate procedure for a post-judgment challenge to a guilty plea allegedly induced by mistake, fraud, or coercion. (People v. Wadkins (1965) 63 Cal.2d 110, 113; People v. Chaklader (1994) 24 Cal.App.4th 407, 409.)

The proper procedure is to file the petition for writ of coram nobis in the court in which the defendant was convicted. A motion to vacate a judgment is the equivalent of a petition for writ of error coram nobis. (People v. Shipman, supra, 62 Cal.2d at 229, fn.2; People v. Griggs (1967) 67 Cal.2d 314, 316.) In a few cases, courts have ruled that a motion to strike a prior conviction alleged as an enhancement was the equivalent of a petition for writ of error coram nobis. (See People v. Gage (1980) 126 Cal.App.3d 918, 922.)

In addition to showing that the facts upon which the petitioner relies were not known to him and could not, in the exercise of reasonable diligence, have been discovered, a petition for writ of error coram nobis or vobis must demonstrate the petitioner has pursued his or her remedy with due diligence. Like a habeas proceeding, coram nobis/vobis is a civil proceeding in equity, and laches is an affirmative defense.

A petition for writ of error coram nobis/vobis may not be used to obtain an adjudication of issues or errors that could have been remedied or corrected on a motion for new trial or on an appeal from the judgment. Additionally, it will not lie if an error of law is alleged, as opposed to a mistake of fact, if the error should have been discovered earlier, or if the fact, the absence of which induced the plea, would not have produced a different result if known to the court.

If the petition for writ of error coram nobis is denied, the defendant may file a petition for writ of error coram vobis in the court of appeal, although the order is also appealable. (In re Carr (1948) 31 Cal.2d 503, 504.)

This form of relief, while infrequently invoked, is useful in situations where factual mistakes resulted in an improvident plea, which would not otherwise be subject to challenge on direct appeal or by way of habeas corpus.

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v.	)
	) Superior Court
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	)
Defendant and Appellant.	)[RELATED APPEAL
	) NO. E016529]

Proceedings to Vacate Judgment Rendered in the Superior Court of Riverside County

Honorable B.J. Bjork, Judge

PETITION FOR WRIT OF ERROR CORAM VOBIS

TO THE HONORABLE MANUEL A. RAMIREZ, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Petitioner, Mark Anthony Montellano, petitions this Court for a Writ of Error Coram Vobis to vacate a judgment rendered against petitioner and entered on or about June 12, 1995, in the Superior Court of the State of California for the County of Riverside, Superior Court Case No. ICR 22068. Petitioner has a companion appeal currently pending in this Court, Case No. E016529. References to proceedings and pleadings filed in the trial court will rely upon the record on appeal, and cite to the transcripts in the companion appeal.

Petitioner respectfully represents that:

1. On April 20, 1995, a complaint was filed in the Riverside Municipal Court, Indio Branch, in Case No. ICR 22068. The complaint alleged possession of methamphetamine (Health and Saf. Code, §11377 (a)), being under the influence of controlled substance (Health and Saf. Code, §11550 (a)), driving a motor vehicle while under the influence of drugs (Veh.Code, §23152 (a)), and driving on a suspended license. (Veh. Code, §14601.1.) It was further alleged petitioner had convicted previously of a serious felony, within the meaning of Penal Code section 667, subdivision (c) and (e)(1). (C.T. 1-2.)

2. On or about April 20 and 27, 1995, petitioner applied for a release on his own recognizance (OR) in order to be with his mother in the hospital when she underwent brain surgery. Petitioner supplied verification of the impending surgery and indicated willingness to comply with all reasonable conditions of an OR release. The Deputy District Attorney was unwilling to stipulate to pretrial release OR unless and until petitioner entered a guilty plea with a conditional sentence pursuant to People v. Cruz (1988) 44 Cal.3d 1247. Because petitioner was desperate to be with his mother, and despite counsel's advice not to plead guilty, petitioner accepted the plea bargain, and pled guilty and admitted the serious felony prior conviction, in order to be released OR. The complaint was amended to add count 5, a violation of Health and Safety Code section 11350 (possession of cocaine) and appellant pled guilty to this count as well as count 3, the driving under the influence, along with the admission of the prior conviction allegation.

3. Petitioner returned to court as promised in the OR agreement on June 12, 1995, and made a motion to withdraw the plea on the grounds of coercion. The motion was denied, and petitioner was sentenced to state prison for 32 months, and imposed a restitution fin in the amount of $200.

4. The consent to the entry of the plea of guilty by petitioner, the forgoing of a jury trial on the merits and defenses relating to the current charge as well as to the special allegations, and the failure to protest resulted from petitioner's free will and judgment and being overcome by certain representations made by the trial court to petitioner, to wit: that the court would not consider releasing him from custody to be with his mother when she underwent brain surgery unless and until petitioner waived all constitutional rights and pled guilty to the charges then pending.

5. In addition, petitioner's free will and judgment were affected by a mental disorder, of which his trial counsel was unaware at the time of the trial level proceedings. Petitioner suffered from a delusion that certain third persons had "given" his mother the cancer, and were monitoring his thoughts through a device implanted near his spine. Petitioner feared, and still fears, these persons were and are trying to give him cancer as well.

6. The expressed intent of the trial court in imposing said condition was to insure petitioner's subsequent attendance at court hearings.

7. Because of the desperate circumstances of petitioner in desiring to be with his mother at such a critical time, which

circumstances were made worse by the fact petitioner suffered from a mental disorder which affected his judgment, the representations made by the trial court caused petitioner to believe a guilty plea was the exclusive means by which pretrial release from custody could be obtained.

8. Petitioner was unaware, because he was not so advised, that his subsequent attendance at court hearings could be insured by means less drastic than a total relinquishment of all pretrial constitutional rights.

9. Petitioner subsequently attempted to withdraw his guilty plea, prior to pronouncement of judgment upon his timely appearance at the scheduled court date, upon learning he had been improperly coerced into forgoing his fundamental due process rights.

10. Petitioner at all time has desired a full trial on the merits of the charges against him before a jury. However, Petitioner was continuously advised he would have to waive his right to a trial in order to be released from custody prior to his mother's surgery. This coercion, exacerbated by his mental condition, forced petitioner to assent to the terms of the OR release, which included the requirement that he plead guilty.

11. Petitioner has at all times maintained innocence to the charges in the complaint. Petitioner has a good and meritorious defense to the charges insofar as the quantity of controlled substance with which he was criminally charged with possession was not a usable quantity. Moreover, the allegations of the prior serious felony conviction, made pursuant to Penal Code section 667, subdivisions (b)

through (i) could not be proven if the case ever went to trial because no record of the prior conviction exists.

12. Petitioner believed and relied upon the representations of the trial court that he was not entitled to be released OR unless and until he would plead guilty. But for this unreasonable condition, petitioner would not have waived his right to a trial by jury and would not have entered a plea of guilty to the charge.

13. Many of the substantial facts pertaining to the circumstances alleged in this petition do not appear of record and the trial court was not aware of petitioner's mental condition at the time the judgment was entered. Petitioner submits documents as exhibits to this petition to corroborate the allegations made herein. Said exhibits are incorporated by reference herein as though fully set forth.

14. Petitioner was deprived of his constitutional right to a trial as guaranteed by the Fourteenth Amendment of the Constitution of the United States and Article I, §7, of the Constitution of the State of California. As a result of this denial of petitioner's constitutional rights, petitioner is under sentence of imprisonment for 4 years in the Correctional Training Facility at Soledad, which would not have occurred but for the matters set forth above.

15. A companion appeal is pending in this Court, Case No. E016529. However, this petition is based upon matters outside the record of that appeal. Thus, there is no other plain, speedy, or adequate remedy available except a Writ of Error Coram Vobis.

WHEREFORE, petitioner prays that a Writ of Error Coram Vobis be issued directing that the judgment and sentence in Case No. ICR 22068 be

vacated, or, in the alternative, that respondent show cause, if any, why the judgment and sentence should not be set aside, and for such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

Dated: APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner

VERIFICATION

I am an attorney admitted to practice before the courts of the State of California and have my office in San Diego County. I am attorney of record for the petitioner in these proceedings, who is imprisoned at California Correctional Facility in Soledad, in Monterey County. Because petitioner resides out of the county where I maintain my office, and because the facts upon which this petition is based are discernible only by reviewing court documents in the Riverside County Superior Court, petitioner is not in a position to verify this petition.

I have reviewed the above Petition for Writ of Error Coram Vobis and know the contents to be true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____, 1995, at San Diego, California.

_____
Carmela F. Simoncini
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF

PETITION FOR WRIT OF ERROR CORAM VOBIS

STATEMENT OF THE CASE

On April 20, 1995, a four-count complaint was filed in Riverside Municipal Court charging appellant, Mark Montellano in count one with a violation of Health and Safety Code section 11377, subdivision (a) (possession of a controlled substance: methamphetamine). Count two alleged a violation of Health and Safety Code section 11550, subdivision (a) (under the influence of a controlled substance). Count three alleged a violation Vehicle Code section 23152, subdivision (a) (driving while under the influence). Count four alleged a violation of Vehicle Code section 14601.1 (driving while privilege was suspended). In addition, the complaint alleged a prior serious felony pursuant to Penal Code sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1). (C.T. pp. 1-2.)[11]

[11]/ All references are to the Clerk's Transcript and/or Reporter's Transcript on Appeal in the companion appeal, Case No. E016529.

On April 27, 1995, the complaint was amended to add count five, alleging a violation of Health and Safety Code section 11350 (possession of a controlled substance: cocaine). (C.T. pp. 6-7.) On the same date, Mr. Montellano plead guilty to count three, driving under the influence, and count five, possession of a controlled substance. (C.T. pp. 8-15.) In addition, Mr. Montellano admitted his prior conviction of a serious felony pursuant to Penal Code section 667, subdivision (d) and (e). (C.T. pp. 9-10.) The parties agreed to a stipulated sentence of 32 months, consisting of the low term of 16 months for the possession charge, and doubled this term pursuant to Penal Code section 667, subdivision (e)(1) for the prior serious felony conviction. (C.T. pp. 13-15.) In exchange for the plea, the court released Mr. Montellano on his own recognizance, subject to a Cruz[12] waiver, until the date of sentencing. (C.T. pp. 13-15.)

On the date of sentencing, June 12, 1995, the court denied Mr. Montellano's motion to withdraw his plea, and imposed the stipulated sentence of 32 months in state prison. (R.T. pp. 4-7.) A restitution fine of $200 was imposed pursuant to Penal Code section 13967, subdivision (a), and Mr. Montellano was awarded a total of 21 days of

[12]People v. Cruz (1988) 44 Cal.3d 1247. If Mr. Montellano failed to appear at sentencing the court stated that it would impose the upper term of three years on the possession count multiplied by a factor of two for a six year term pursuant to Penal Code section 667, subdivision (e)(1). (C.T. p. 13.)

presentence credits - 15 days of actual credit and 6 days of Penal Code section 4019 credits. (C.T. pp. 59, 61.) The court granted appellant's request for a certificate of probable cause. (C.T. p. 63; R.T. p. 7.)

A timely notice of appeal was filed on June 22, 1995. (C.T. pp. 62-64.)

STATEMENT OF THE FACTS

As appellant pled guilty prior to preliminary hearing and waived referral to probation for a probation report. (C.T. p. 59.) The parties stipulated to a factual basis for the plea. (C.T. 14-15.) As to Count III, appellant admitted that on April 18, 1995, he did wilfully and unlawfully drive a vehicle under the influence of an alcoholic beverage and drug and under their combined influence. On that same date he did wilfully have in his possession a controlled substance, to wit, cocaine, as alleged in Count V. (C.T. 6-7.)

ADDITIONAL FACTS

In the trial court, in his Declaration in Support of the Motion to Withdraw his Guilty Plea, petitioner referred to the fact he was taking medication prescribed for him by a doctor, possibly a psychiatrist. (C.T. 55, 56.) Petitioner's trial attorney was unaware of the nature of the prescription medication, nor any effect it might have had while the case was pending in the trial court. (See Exhibit "A," Letter From Dean Benjamini.)

During the pendency of the appeal, petitioner sent a series of letters to his appointed appellate attorney. (See Declaration of Carmela Simoncini, attached hereto.) In these letters, petitioner refers to a perceived need for a "legal letter" in order to have prison doctors X-ray his back. Petitioner felt it was imperative to receive this treatment because he thought a device had been implanted in his back, through which his thoughts were monitored and he was told what to say.

Appointed counsel for petitioner contacted a licensed psychiatrist,

who is one of the approved court-appointed psychiatrists in the County of San Diego, for the purpose of obtaining an opinion regarding the mental state of the person who wrote the letters, that is, petitioner. Dr. Haig Koshkarian, reviewed materials provided to him and rendered an opinion in the form of a letter. (See Exhibit "B.") In the opinion of Dr. Koshkarian, petitioner is suffering from a "serious psychotic mental disorder," involving "symptoms of paranoid delusions, thought broadcasting, and auditory hallucinations." (Ibid.)

In Dr. Koshkarian's opinion, the elaborateness of the delusional system manifested in the content of the letters would take time to develop, usually more than a few months, and probably preceding his arrest and prosecution for this offense. (See Exhibit "B.") Dr. Koshkarian pointed to the fact petitioner did not attempt to connect his delusional thinking and perceptions to the criminal charges as an indication of the genuineness of the psychotic symptoms. (Ibid.)

Petitioner's appointed appellate counsel also attempted to investigate the validity of the prior conviction which was alleged as a "Strike" in the complaint. (See Declaration of Carmela F. Simoncini.) A request was sent to the Clerk of the Court of the Long Beach Superior Court, which was the court in which said conviction occurred, in Case Number A023747. The request was returned to counsel with a handwritten notation at the bottom, "file transferred to Riverside County 7-29-83." (See Exhibit "C.") Petitioner's counsel thereupon attempted to locate the file in Riverside County by checking the files in the Central/Main court, as well as the branch court in Indio. No file was located.

ARGUMENT

I

RELIEF BY WAY OF WRIT OF ERROR CORAM VOBIS IS APPROPRIATE IN THIS CASE.

The case of People v. Shipman (1965) 62 Cal.2d 226, discusses the purpose and procedure relating to a petition for writ of error coram nobis. Writs of error coram vobis (filed in the appellate court) are essentially the same as writs of error coram nobis (filed in the trial court) (In re Imbler (1963) 60 Cal.2d 554, 570; see also In re Lindley (1947) 29 Cal.2d 709, 726), so discussion of the grounds for issuance of the latter is instructive. In Shipman, the California Supreme Court observed at page 230:

> The writ of coram nobis is granted only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." ([Citations omitted].) (2) Petitioner must also show that the "newly discovered evidence ... [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." ([Citations omitted].) This second requirement applies even though the evidence in question is not discovered until after the time

> for moving for a new trial has elapsed or the motion has been denied. ([Citations omitted].)
>
> (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. ..." ([Citations omitted].)

The writ of error coram nobis is an appropriate procedure for a post-judgment challenge to a guilty plea allegedly induced by mistake, fraud, or coercion. (People v. Wadkins (1965) 63 Cal.2d 110, 113; People v. Chaklader (1994) 24 Cal.App.4th 407, 409.)

In the present case, petitioner has alleged, and the exhibits submitted amply show, he entered a plea of guilty to a criminal charge at a time when both he and his counsel were unaware he was laboring under the influence of a psychotic thought process, which may well have interfered with his judgment and was unknown to himself or his trial counsel, and he was coerced into pleading guilty because he was informed that was the only way the court would agree to his pretrial release from custody.

The allegations relating to the convergence of these two factors, either one of which would have warranted an order permitting petitioner to withdraw his plea of guilty, satisfy the pleading requirements vis-a-vis the propriety of relief on a writ of error coram vobis. Relief by way of petition for writ of error coram vobis is therefore appropriate.

II

WHY THE WRIT OF ERROR CORAM VOBIS SHOULD ISSUE.

In People v. Shipman, supra, 62 Cal.2d 226, the California Supreme Court had before it the issue of whether an indigent defendant was entitled to appointment of counsel upon the ordering of hearing on the merits of his petition for writ of error. In that case, the petition alleged the defendant had been insane at the time of the offense but did not present this defense because he was also insane at the time of the plea. Petitioner had admitted shooting two police officers but contended he was "hopped up" on benzedrine tablets and had not slept except for very brief periods for during the past nine days. The allegations were supported by affidavits from associates who corroborated his drug usage and alleged he was known to suffer from delusions of police persecution. The petition was further supported by a report of the prison psychiatrist concluding the defendant suffered from toxic psychosis, and that this toxic state existed prior to and during the acts for which he was convicted. (Id., 62 Cal.2d at p. 233.)

The California Supreme Court concluded on page 233, "Defendant's allegations, if true, would meet the requirements for a writ of coram nobis. His legal sanity at the time of the crime is a material question that was neither put in issue nor tried. [Citations omitted.]"

Here, appellant has alleged he was coerced into entering a guilty plea in order to obtain a pretrial OR release in order to be with his mother during her brain surgery. As argued in the Appellant's Opening Brief, this condition was unlawful and by itself constitutes coercion.

However, when viewed in light of the existence of a thought disorder by which petitioner was under the impression his mother had been given cancer by unknown individuals who were also attempting to give him cancer, his susceptibility to the undue condition placed upon his pretrial release from custody becomes more apparent. Additionally, the fact he likely suffered from this psychotic thought process at the time of the plea casts doubt on the validity of the plea as a knowing and intelligent waiver of his constitutional rights.

Knowledge of the existence of a mental disorder which affected his judgment is a fact which, without any fault or negligence on his part was not presented fully to the trial court. A careful review of petitioner's declaration in support of the motion to withdraw the plea reveals he did inform the court he was taking medication, but was not sure of the purpose. (C.T. 55-56.) A notation in the margin gives rise to the assumption the trial court struck these references. Thus, the first requirement is met.

The issue of petitioner's coercion in pleading guilty and the existence of a mental disorder contributing to the coerciveness experienced by petitioner does not go to any issue of fact litigated in the trial court. Whether or not petitioner was coerced into waiving his right to a trial and plead guilty, and whether this coercion was exacerbated by his own mental state does not affect the merits of the criminal case. (In fact, the notion petitioner has not attempted to excuse the conduct which is the subject of the criminal charges due to the mental illness was cited as an indicium of the sincerity of the symptoms.) Thus, the second requirement has been met.

Finally, the facts upon which petitioner relies were not known to him and could not have been discovered substantially earlier. It is apparent his mental condition has continued to deteriorate from the time he was first taken into custody. His trial counsel was unaware of the nature of his illness, although he was aware petitioner was being medicated in jail. Since trial counsel attempted to withdraw the guilty plea on grounds of coercion, it is reasonably likely he would have asserted the existence of a mental condition affecting that coercion had he known of it. Thus, the third requirement for relief by way of writ of error coram vobis has been established.

Having satisfied the three criteria for the issuance of a writ of error vacating or setting aside the judgment, relief should be granted as prayed.

III

IF PETITIONER HAD NOT PLED GUILTY, A DIFFERENT RESULT WOULD HAVE OBTAINED.

As alleged in the papers filed in support of the motion to withdraw the plea of guilty which was filed in the trial court, but for the plea of guilty which was coerced as a condition of pretrial release from custody, it is unlikely petitioner would have been convicted as charged. (C.T. 17-57.) Counsel set forth factors showing why a conviction for possession of a usable quantity of controlled substance was unlikely in the absence of the plea due to the minuscule quantity which was found. (C.T. 30.) Further, counsel indicated there was no locatable record of the prior conviction which was alleged as a strike. (Ibid.)

Petitioner's appellate counsel confirmed the file (and its contents) relating to the prior conviction for the serious felony is no longer in the court where it originated, and could not be located in the Riverside County Court. Unless the District Attorney maintains that Long Beach court file in its personal possession, it is unlikely the People would be able to prove the existence, or, in the event of a challenge, the constitutional validity of the prior conviction.

Therefore, it is highly likely a different result would have occurred if the plea had been permitted to be withdrawn, upon the timely request of the petitioner.

CONCLUSION

For all the foregoing reasons, the relief prayed for in the petition for writ of error coram vobis should be granted.

Respectfully submitted,

Dated:

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner

DECLARATION OF CARMELA SIMONCINI IN SUPPORT
OF PETITION FOR WRIT OF ERROR CORAM VOBIS

I, CARMELA F. SIMONCINI, declare:

1. I am an attorney at law admitted to practice before all the courts of the State of California, under State Bar No. 86472. I am an employee of Appellate Defender's, Inc., and in my capacity as staff attorney, was appointed to represent Mark Anthony Montellano on appeal in Case No. E016529 on August 23, 1995.

2. On September 20, 1995, I received two separate letters from Mr. Montellano. In each letter, which were written on different dates, Mr. Montellano requested that I write a "legal letter" so the doctors in the prison institution to which he had been committed would perform X-Rays of his back. Mr. Montellano informed this procedure was necessary because, unknown to him, someone had implanted a device near his spine through which his thoughts could be monitored and his speech controlled. He informed me the device had been implanted some time previous to the time of the criminal charges and he felt the same "people" who gave mother cancer of the brain were going to do the same thing to him.

3. On September 25, 1995, I contacted Dr. Haig Koshkarian by telephone. Dr. Koshkarian is a licensed psychiatrist who is on the approved appointed list for the Superior Court of San Diego County. I asked Dr. Koshkarian for his thoughts on the information contained in the letters I had received from Mr. Montellano. In particular, I wished to know if Mr. Montellano was feigning symptoms. Dr. Koshkarian asked to see the letters and any other relevant material before he could render any opinion. I forwarded the letters and a copy of Mr.

Montellano's declaration in support of the Motion to Withdraw the Guilty Plea to Dr. Koshkarian that day.

4. On October 6, 1995, I received a letter from Dr. Koshkarian which is attached to the petition as Exhibit "B."

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 6, 1995, in San Diego, California.

_____
Carmela F. Simoncini

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	Court of Appeal
	)	No. E016529
v.	)	
	)	Superior Court
MARK ANTHONY MONTELLANO,	)	No. ICR22068
	)	
Defendant and Appellant.	)	
	)	

Appeal from the Superior Court of Riverside County

Honorable B.J. Bjork, Judge

PETITION FOR WRIT OF ERROR CORAM VOBIS

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Staff Attorney
State Bar No. 86472

233 "A" Street
Suite 1200
San Diego, California 92101
(619) 696-0284 Ext. 28

Attorneys for Defendant and Appellant

III. MANDAMUS and/or PROHIBITION

Appeals provide review of convictions as a matter of right, conferred by statute. However, some situations required extraordinary relief, either because the order or judgment is not appealable, or because the appellate remedy is inadequate, as a matter of law. Extraordinary writs, governed by California Code of Civil Procedure, sections 1084-1108, are discretionary in nature in order to provide appropriate relief in extraordinary situations.

Code of Civil Procedure section 1085 provides a writ of mandate may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins. The superior court, intermediate appellate courts, and the Supreme Court have original jurisdiction to issue writs of mandate.

In California, "mandamus" is the remedial writ used to correct those acts and decision of an administrative nature which are in violation of law, where no other adequate remedy is provided. (Bodinson Mfg. Co. v. California Employment Comm. (1941) 17 Cal.2d 321, 328-329.) Mandamus is a special proceeding used to compel the performance of ministerial duties, or "to compel the performance of an act which the law specially enjoins." (Ibid.)

However, mandate is also used to compel a court to exercise discretion where it has refused to do so. (Payne v. Superior Court (1976) 17 Cal.3d 908, 925.) And when a court's discretion can legally be exercised in only one way, mandate will lie to compel that exercise if there is no adequate remedy at law. (Agricultural Labor Relations

Bd. v. Superior Court (1976) 16 Cal.3d 392, 401-402; Babb v. Superior Court (1976) 3 Cal.3d 841, 851.) The writ must be issued in all cases showing there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc., §1086.) The petition must be verified. (Ibid.)

The counter-part of mandamus is prohibition, whereby a petitioner seeks to restrain the court from action which will case irreparable harm to the client and there is no adequate remedy at law. Prohibition arrests the proceedings of any tribunal when such proceedings are without or in excess of the jurisdiction of the tribunal. (Code Civ. Proc., §1102.) As with mandate, the superior court, intermediate appellate courts, and the Supreme Court have original jurisdiction to issue such writs. The two types of petition are frequently combined, requesting mandate (to compel inferior tribunal action) and/or prohibition (to restrain the court from proceeding in excess of its authority).

Also like mandamus proceedings, the circumstances for issuance of the writ require a showing that there is no plain, speedy and adequate remedy in the ordinary course of law. The petition seeking prohibition must also be verified. (Code Civ. Proc., § 1103.)

For criminal appellate practitioners, the opportunity and obligation to file either mandamus or prohibition petitions is somewhat limited. However, occasionally circumstances arise which require the use of the extraordinary writ petition. For instance, the denial of a certificate of probable cause is not an appealable order. Review of the denial of the certificate must be sought by way of a petition for writ

of mandate. (In re Brown (1973) 9 Cal.3d 679, 683; People v. Warburton (1970) 7 Cal.App.3d 815, 820, fn.2.)

Although mandamus is not properly invoked to correct all legal error committed by an inferior court, it does lie to compel acts by a court and its officers to do that which is specifically enjoined by law. (See Chapin v. City Comm'r of Fresno (1957) 149 Cal.App.2d 40, 46; Texas Co. v. Superior Court in and for Los Angeles County (1938) 27 Cal.App.2d 651, 654.) Mandamus is an appropriate means of reviewing an otherwise nonappealable order of a trial court where the issue presented is one of law and it was in the public interest to have prompt determination of that question. (Tri-County Elevator, Inc. v. Superior Court of Santa Barbara County (1982) 135 Cal.App.3d 271, 273, fn.1.)

Prohibition is frequently invoked at the trial level to test the constitutionality of statutes under which a defendant is being prosecuted. Where a criminal statute or ordinance sought to be enforced is alleged to be unconstitutional on its face, a petition for writ of prohibition is an appropriate method of seeking relief. (Dulaney v. Municipal Court (1974) 11 Cal.3d 77, 81.) The petition in such a case alleges that irreparable harm would accrue to the defendant by forcing him or her to trial under the statute, exposing the defendant to the risk of conviction and consequent punishment, in violation of fundamental constitutional rights.

For trial practitioners, the extraordinary writ procedures provide expeditious review of non-appealable orders, and orders which would result in irreparable harm if allowed to stand. For instance, an order denying a motion to dismiss pursuant to Penal Code section 995, or a

motion to suppress evidence pursuant to Penal Code section 1538.5, may be reviewed by way of extraordinary writ petition. (Pen. Code, § 1510.) Orders compelling or denying discovery may be reviewed by way of extraordinary writ petition, as may orders granting or denying continuances (see Jones v. Superior Court (1994) 26 Cal.App.4th 92, relating to question whether sanctions may be imposed for omitting facts from petition), or orders relating to demurrers. (See Strand Property Corp. v. Municipal Court (1983) 148 Cal.App.3d 882, 886, fn. 4; In re Geer (1980) 108 Cal.App.3d 1002, 1004.)

Administrative orders by the court of appeal, such as denial of an extension or augment requests, would not be reviewable by petition for review at the end of the case, so mandamus or prohibition in the Supreme Court is the only available review of such administrative, ministerial orders.

Because the petitions for mandamus and/or prohibition seek extraordinary relief, they are only granted in extraordinary circumstances. Thus, the petitions should include the essential allegations to compel the reviewing court to exercise its original jurisdiction in the urgent circumstances.

The format of the petition will include a paragraph asserting each of the following jurisdictional facts: (1) Identification of the inferior court or tribunal whose order is being challenged; (2) Procedural status of case; (3) Prior objection or request for relief denied; (4) Ground for extraordinary relief: inferior court exceeded jurisdiction [prohibition], or mandate required to compel court to act in manner law specifically enjoins; (5) Threatened action; (6) Parties

properly joined/beneficial interest; (7) Exhaustion of remedies/No prior petitions; (8) No plain, speedy, or adequate remedy at law; (10) Prayer for relief; (11) Verification. The petition should also be accompanied by a memorandum of points and authorities, and supporting documents or documentary evidence. If a stay of proceedings is needed, this should be stated on the cover of the petition, and an assertion relating to the need for a stay should be included in the body of the petition.

In mandamus/prohibition petitions, the respondent is the tribunal which issued the challenged order. The government is the real party in interest. (Palma v. Indusrial Fasteners, Inc. (1984) 36 Cal.3d 171, 180.) Frequently, the reviewing court, upon review of the petition, will seek an informal response from the real party in interest before taking any action on the petition. The informal response is frequently prepared as a letter brief, and leave may be granted for petitioner to file an informal reply to that response. In unusual circumstances, where no factual dispute exists, and additional briefing is unnecessary, such as where petitioner's entitlement to relief is either so obvious that no purpose would be served by plenary consideration of the issue, or where entitlement is conceded, and where there is an unusual urgency requiring acceleration of the normal process, the court may issue a peremptory writ in the first instance without informal response. (Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1240-1241.)

Section 1088 authorizes the court to issue a peremptory writ in the first instance. However, the authority to do so is limited so as not to become routine, and a peremptory writ may not issue in the first instance unless the parties adversely affected by the writ have received

notice, from the petitioner or the court, that issuance of the writ in the first instance is being sought or considered. Further, the writ itself may not be issued before the judgment or order directing that it issue has been filed and has become final, to provide an opportunity for review of the order by the Supreme Court. (Alexander v. Superior Court (1993) 5 Cal.4th 1218, 1222-1223; Ng v. Superior Court (1992) 4 Cal.3th 29, 34.) The accelerated Palma procedure "is the exception[.]" (Ng v. Superior Court, supra, 4 Cal.4th at p. 35.)

In most cases, the court will issue an alternative writ commanding the respondent to show cause why the relief should not be granted. The same is true of cases seeking prohibition. The alternative writ is in the form of an order to show cause, and functions in much the same way as the order to show case. When an appellate court issues an alternative writ or an order to show cause, the matter becomes a "cause" which must be decided "in writing with reasons stated." (Palma v. Superior Court, supra, 36 Cal. 3d at p. 178, fns. 5 and 6.) When an appellate court issues an alternative writ or an order to show cause, the parties are usually given an opportunity for oral argument, but this is not as a matter of right. (Lewis v. Superior Court, supra, 19 Cal.4th at p. 1241.) If an alternative writ/order to show cause is issued, a formal return will be ordered, as in a habeas proceeding.

The legal effect of the designation of the matter as a "cause" not only requires a formal opinion on the merits of the petition, it also confers res judicata effect as law of the case, once final, even in pretrial proceedings. (Kowis v. Howard (1992) 3 Cal.4th 888, 894-895.) In rare occasions, where a writ is denied without issuance of an

alternative writ, it may be accorded law of the case effect, but only if the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears the denial was intended to be on the merits. (Hagan v. Superior Court (1962) 57 C al.2d 767, 770.) However, the general rule is that a summary denial does not establish law of the case.

Review of a court's judgment in extraordinary writ proceedings in the trial court is by way of appeal of that judgment or order. (Mellinger v. Municipal Court (1968) 265 Cal.App.2d, 843, 845.) Review of a Court of Appeal's ruling in extraordinary writ proceedings may be obtained by a petition for review of the decision. The time for filing the petition for review may depend on whether the petition was summarily denied, without an opinion, or whether the matter became a "cause," for which an opinion was issued. As pointed out in Ng v. Superior Court, supra, the opinion is not the writ itself, and it has no effect until it becomes final. (Ng v. Superior Court, supra, 4 Cal.4th at p. 34.) The judgment or order directing that the writ issue must be entered before the writ may be issued by an appellate court, and that judgment or order is subject to a petition for review. (Ibid.)

In the case of a summary denial, the order denying the petition is final immediately, and the petition for review must be filed within 10 days. Where a peremptory writ has been ordered or an alternative writ issued, the decision is not final for 30 days, after which the petition for review must be filed within 10 days.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LUCIO CABANA, Petitioner, vs. CONSOLIDATED SUPERIOR/MUNICIPAL COURTS OF RIVERSIDE COUNTY, Respondent. PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	) Case No._____)) [Court of Appeal) No. E020048])) Superior Court) No. CR69199

Proceedings in Mandate from Clerical Actions in the Consolidated Superior/Municipal Courts of Riverside County

Honorable Robert G. Spitzer, Judge

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE MANUEL A. RAMIREZ, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, DIVISION TWO:

Petitioner, Lucio Cabana, respectfully petitions this Court for a writ of mandate directed to respondent court, and by this verified petition alleges that:

I

Petitioner is the defendant and appellant in an appeal now pending in Division Two of the Fourth District Court of Appeal of the State of California, Case No. E020048. Petition's counsel was appointed by this court on May 21, 1997, to represent petition on appeal. Respondent is the trial court, the Consolidated Superior/Municipal Courts of the County of Riverside.

II

Petitioner's counsel reviewed the record on appeal, and noted appellant's claim his plea was induced by representations he would be placed on probation. His appeal is from the denial of a motion to withdraw the plea. However, the notice of appeal did not indicate the appeal would challenge the validity of the plea, and appellant did not seek the issuance of a certificate of probable cause. By inadvertence or mistake, petitioner checked the box on the on the notice of appeal form, which indicates the appeal is from the sentence or other order after judgment. The record on appeal was certified filed on April 8, 1997, and the current due date for the Appellant's Opening Brief is June 30, 1997.

III

On June 5, 1997, petitioner, through his appointed counsel on appeal, submitted a Request for Issuance of a Certificate of Probable Cause to the Respondent court. (See Exhibit "A".) Petitioner explained to respondent court that the appeal would not be operative without the requisite certificate of probable cause, and that the notice of appeal omitted to seek a certificate of probable cause by inadvertence or

mistake. This request was submitted in order to lay a foundation for an Application to Amend the Notice of Appeal, and to save time on appeal. Having a certificate of probable cause already granted means that if the motion to amend the notice of appeal is granted, all that is left to do before filing the Appellant's Opening Brief is the ministerial act of filing the amended notice.

IV

On June 17, 1997, the Request was returned to Petitioner's counsel with the explanation that the case was already certified to the Court of Appeal, and the document should be submitted to the Court of Appeal. (See "Exhibit "B.") Respondent declined to rule upon the request.

V

Without a certificate of probable cause, the major issue of concern to appellant may not be raised in the briefs. Review of denial of a motion to withdraw a guilty plea is considered a challenge to the guilty plea. Such an appeal is inoperative in the absence of a certificate of probable cause. The respondent's court's action of returning the documents to appellant with directions to submit them to the Court of Appeal means the appeal is rendered inoperative. The procedure of obtaining a decision by the Court of Appeal on the issue of whether a request for a certificate can be considered by the trial court will cause delay in the appeal and delay in ruling by the trial court on the request. Delay in ruling on the request for a certificate of probable cause thus means either delay in preparing the Appellant's Opening Brief is Appeal No. E020048, or deprivation of the right to have the Court of Appeal review the merits of the sole issue in the appeal.

VI

Petitioner is aggrieved by respondent court's actions, because without a ruling on the request for a certificate of probable cause, the appeal is inoperative as to the major issue of the case, and no work can be done on the Appellant's Opening Brief is Case No. E020048. Appellate counsel can neither brief the issue, nor rule it out, without knowing whether the trial court will grant or deny the request.

VII

The parties directly affected by the instant proceeding now pending are petitioner [appellant in Appeal No. E020048], by and through counsel; respondent court; and Real Party in Interest, the People of the State of California.

All the proceedings about which this petition is concerned have occurred within the territorial jurisdiction of respondent court and of this court.

VIII

No other petition for a writ has been made by, or on behalf of, this petitioner relating to this matter. Because this petition addresses an administrative or procedural matter relating to ordinary requests for a certificate of probable cause, which are nonappealable and normally treated as ex parte applications, a petition for writ of mandate is appropriate.

IX

Petitioner has no other plain, speedy, or adequate remedy at law. Direct appeal does not lie from respondent court's declination to rule, so review by way of appeal is unavailable. The appeal is inoperative

unless or until a ruling has been made on the request. Petitioner is incarcerated pursuant to a sentence pending his appeal from the denial of his motion to withdraw his guilty plea in the trial court. The issue on appeal is arguable, so any order affecting his right to seek review of the trial court's order would deny him a substantial right to appellate review of that judgment.

WHEREFORE, petitioner prays that:

1. A peremptory writ of mandate be issued in the first instance directing and compelling respondent court to consider and rule upon petitioner's application for a certificate of probable cause; or

2. An alternative writ directing respondent to show cause why the relief prayed for in the petition should not be granted; and

2. Petitioner be granted such other and further relief as may be appropriate and just.

Date: Respectfully submitted,

Carmela F. Simoncini
State Bar No. 86472
Attorney for Petitioner and Appellant

VERIFICATION

I am attorney appointed by the Court of Appeal for the Fourth District Court of Appeal of the State of California, Division Three, assigned to represent petitioner in this action.

I have read the foregoing petition and the exhibits attached thereto or lodged with this court, and know the contents thereof to be true.

The reason the foregoing petition is verified by me and not petitioner is that petitioner is absent from the county in which I have my office. Further, the facts contained in the foregoing are within my personal knowledge based on my representation of petitioner.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____ at San Diego, California.

_____
Carmela F. Simoncini
Staff Attorney, SBN 86472
APPELLATE DEFENDERS, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I

WHY MANDAMUS IS APPROPRIATE

In California, "mandamus" is the remedial writ used to correct those acts and decision of an administrative nature which are in violation of law, where no other adequate remedy is provided. (Bodinson Mfg. Co. v. California Employment Comm. (1941) 17 Cal.2d 321, 328-329.) Mandamus is a special proceeding used to compel the performance of ministerial duties, or "to compel the performance of an act which the law specially enjoins." (Ibid.)

Pursuant to Rule 31(d), if a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. In the present case, appellant timely filed a notice of appeal, but, through inadvertence or mistake, checked the box indicating the appeal is from an order after judgment, and failed to check the appropriate box which indicates the appeal raises constitutional or jurisdictional grounds affecting the legality of the plea.

Appellant's mistake in preparing the notice of appeal is excusable because an order denying a motion to withdraw a plea is technically an order after judgment. However, as petitioner pointed out in the request for a certificate of probable cause, decisional law make the issue

nonappealable without a certificate of probable cause. (People v. Ribero (1971) 4 Cal.3d 55, 63-64.)

Although mandamus is not properly invoked to correct all legal error committed by an inferior court, it does lie to compel acts by a court and its officers to do that which is specifically enjoined by law. (See Chapin v. City Comm'r of Fresno (1957) 149 Cal.App.2d 40, 46; Texas Co. v. Superior Court in and for Los Angeles County (1938) 27 Cal.App.2d 651, 654.)

In this regard, it was held long ago that mandamus lies to compel inferior tribunals to act within the line of duty. (Johnson v. Superior Court in an for San Diego County (1929) 102 Cal.App. 178, 191.) More recently, it was held that mandamus is an appropriate means of reviewing an otherwise nonappealable order of a trial court where the issue presented was one of law and it was in the public interest to have prompt determination of that question. (Tri-County Elevator, Inc. v. Superior Court of Santa Barbara County (1982) 135 Cal.App.3d 271, 273, fn.1.)

Here, petitioner seeks to preserve for appellate review the denial of motion to withdraw his guilty plea, which requires a certificate of probable cause in order to be operative. The superior court's declination to rule and direction to submit the request to the Court of Appeal is non-appealable and will otherwise escape review except by mandate. Denial of a request for certificate of probable cause is reviewable by petition for writ of mandate. Mandamus is therefore the proper vehicle to review the court's action here.

II

UPON REQUEST BY APPELLANT, THE TRIAL COURT MAY BELATEDLY ISSUE A CERTIFICATE OF PROBABLE CAUSE.

Petitioner set out, in his application for the certificate of probable cause, the relevant rules regarding circumstances in which issuance of the certificate is appropriate. Petitioner relied in large part on the decision of People v. Ribero, supra, 4 Cal.3d 55, which also established the requirement for a certificate of probable cause extends to appeals from denials of motions to withdraw the guilty plea, despite the fact such proceedings technically are matters occurring after the plea.

In order to appeal following a guilty plea, the trial court must execute and file a certificate of probable cause for such appeal as required by Penal Code section 1237.5 and California Rules of Court, rule 31(d). A defendant is entitled to relief where, through inadvertence or mistake, his timely notice of appeal does not correctly describe the grounds for appeal.

The power to grant relief from default in filing notices of appeal is to be liberally construed to protect the right to appeal. (People v. Ribero, supra, 4 Cal.3d at p. 65, citing People v. Acosta (1969) 71 Cal.2d 683, at p. 685; People v. Camarillo (1967) 66 Cal.2d 455.) Under these authorities, the trial court may cure a mistake in failing to properly designate the ground for appeal and seeking a certificate of probable cause.

The failure to indicate the proper ground is therefore curable by way of an amended notice of appeal. However, without a certificate of

probable cause, such an amended notice of appeal would be inoperative.

CONCLUSION

For all the foregoing reasons, relief should be granted.

Date:

Respectfully submitted,

Carmela F. Simoncini
State Bar No. 86472
Attorney for Lucio Cabana

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LUCIO CABANA, Petitioner, vs. CONSOLIDATED SUPERIOR/MUNICIPAL COURTS OF RIVERSIDE COUNTY, Respondent. PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	Case No._____ [Court of Appeal No. E020048] Superior Court No. CR69199

Proceedings in Mandate from Clerical Actions in the Consolidated Superior/Municipal Courts of Riverside County

Honorable Robert G. Spitzer, Judge

PETITION FOR WRIT OF MANDAMUS

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Staff Attorney
State Bar No. #86472

233 "A" Street, Ste. 1200
San Diego, CA 92101
(619) 696-0284 Ext. 28

Attorneys for Defendant
and Appellant

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)))))	Case No. HC 13336 [Related Case No. CR 67014] ORDER FOR EXPENSES RELATING TO FORENSIC TESTING OF EVIDENCE

This matter came on ex parte application by petitioner above-named by and through counsel Appellate Defenders, Inc. Counsel for petitioner moved ex parte for an order for approval of expenses for additional forensic testing of evidence. Evidence having been presented in declarations submitted in support of the motion, and arguments having been made:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the costs and expenses related to any additional forensic or pathological testing of evidence in an amount not to exceed $700.00 is approved.

/////

/////

/////

Provided the Court finds the petitioner indigent, Alternate Defense Counsel will pay costs per its guidelines and policies, provided any funding requests are pre-approved by Alternate Defense Counsel.

Dated: _____

_____
JUDGE OF THE SUPERIOR COURT

Approved as to form and content:

Dated: _____

_____
ALTERNATE DEFENSE COUNSEL

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)	Case No. HC 13336 [Case No. CR 67014] APPLICATION FOR EX PARTE ORDER FOR EXPENSES RELATED TO FORENSIC TESTING

TO THE HONORABLE J. MICHAEL BOLLMAN, Judge of the Superior Court for the State of California, County of San Diego:

Frederick Rene Daye, through his appointed counsel Appellate Defenders, Inc., applies for an ex parte order for expenses related to forensic testing of evidence, incurred prior to the granting the petition for writ of habeas corpus. The expenses for additional testing were incurred based upon the San Diego County District Attorney's stated intent to retest all of the evidence in the case, not just those attributed to Frederick Rene Daye.

This application is based upon the accompanying Declaration of

Carmela Simoncini as well as the attachments thereto.

Dated: _____

_____
CARMELA F. SIMONCINI, Staff Attorney
Appellate Defenders, Inc.
Attorneys for FREDERICK R. DAYE

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

In re:	)	Case No. HC 13336
	)	[Case No. CR 67014]
FREDERICK RENE DAYE,	)	DECLARATION OF CARMELA F.
Petitioner,	)	SIMONCINI IN SUPPORT OF
	)	APPLICATION FOR EX PARTE
On Habeas Corpus.	)	ORDER FOR EXPENSES
	)	RELATED TO FORENSIC TESTING.

I, Carmela F. Simoncini, declare:

1. I am an attorney licensed to practice law before all the courts of the State of California. I am employed as a staff attorney at Appellate Defenders, Inc. [ADI], which was appointed by the Court of Appeal to prepare the petition for writ of habeas corpus on behalf of Frederick Daye which was filed on or about June 3, 1994. I have personal knowledge of the matters stated herein, and, if called as a witness, am competent to testify thereto.

2. An Order to Show Cause was issued on July 5, 1994, directing the

People to file a return by August 8, 1994. The Court, in the Order to Show Cause, found that petitioner had made a prima facie showing of entitlement to the relief requested in the petition based upon new DNA evidence which excluded petitioner as the possible donor of semen on clothing worn by the victim.

3. On August 5, 1994, the Court granted the People (appearing by and through the Office of the District Attorney) an extension of time, up to September 7, 1994, to file its return, in order to permit the People to conduct independent DNA testing with respect to the evidence. However, in addition to retesting of the samples relating to petitioner, respondent also conducted DNA testing on the samples pertaining to David Pringle, as well as Eddie Smallwood, and the victim, Ms. Desiree Coleman. In addition, petitioner obtained fresh samples of blood from petitioner and Pringle to be tested in order to assure the correctness and validity of the prior testing. Respondent was aware that petitioner would want to be able to retest any samples relating to evidence not previously tested.

4. Since Respondent had taken the position that retesting was necessary because it was possible the results of testing obtained by petitioner was unreliable, and because respondent had ordered testing of Pringle's blood to be compared against the samples in evidence which had been attributed to him, it was necessary for petitioner to request that similar tests be run by Cellmark. This testing was performed and a

report dated November 10, 1994, was received by petitioner's counsel on November 18, 1994.

5. The laboratory charged $350 dollars for each new sample tested. Cellmark has prepared and delivered to petitioner a bill for $700.00 for the additional testing. A copy of the invoice is attached to this declaration. Thus, petitioner requires funding for the additional scientific testing.

6. The San Diego County District Attorney's independed retesting was apparently completed on or about September 26, 1994, and confirmed the original results of Cellmark's testing which exonerated petitioner. This resulted in the District Attorney's stipulation to the relief requested in the petition and the subsequent release of petitioner from state prison, as well as relief from the erroneous conviction. However, prior to this time, Cellmark had already commenced its testing of the samples pertaining to Pringle. Because it had already begun such testing, and had incurred the expense, Cellmark subsequently finished up what was started and prepared the report. Petitioner was able to mitigate expenses by advising Cellmark of the lack of need to test any further samples.

7. ADI is a non-profit corporation under contract with the Administrative Office of the Courts and the Court of Appeal. ADI's budget does not include funding for investigation expenses. Because the petition for writ of habeas corpus was pending in the Superior Court,

the Court of Appeal would not pay for additional expense. I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California, on November 18, 1994.

Carmela F. Simoncini
Attorney for Frederick R. Daye

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)	Case No. CR 67014 Prior Petition: HC12614

PETITION FOR WRIT OF HABEAS CORPUS

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
State Bar #86472
233 "A" Street
Suite 1310
San Diego, California
92101
(619) 696-0282
Attorney for Petitioner

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APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)))))	 Case No. CR 67014 Prior Petition: HC12614

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JAMES R. MILLIKEN, PRESIDING JUDGE:

Petitioner, Frederick Rene Daye, by and through his attorney, Appellate Defenders, Inc., petitions for a writ of habeas corpus, and by this verified petition states as follows:

I

Petitioner is unlawfully incarcerated and restrained at California State Prison - Solano (CSP), Vacaville, California, by P. L. Kernan, Warden, Department of Corrections, pursuant to a judgment pronounced by the San Diego County Superior Court, in Case No. CR 67014, on August 14, 1984.

II

Following a jury trial, petitioner was convicted of and subsequently sentenced to state prison on August 14, 1984. The charges of which he was convicted included kidnap for robbery (Penal

Code section 209), 2 counts of rape in concert (Penal Code sections 262[2] and 264.1), and unlawful taking of an automobile (Vehicle Code section 10851). In addition, a true finding was made that petitioner had suffered a prior conviction of a serious felony (Penal Code section 667(a).) The defense at trial was mistaken identification.

III

Petitioner has at all times, and does now, maintain his innocence to the charges. He has at all times averred his conviction rested upon a mistaken identification, in that he resembles the general description of the true perpetrator of the offense, Eddie Smallwood, and that a tainted identification procedure contributed to the finding of guilt by jury.

IV

The judgment of conviction was affirmed on February 29, 1986, in Case No. D002073. The issues raised in the appeal related to erroneous admission of tainted identification evidence, trial counsel's failure to seek suppression of the out-of-court identification, improper impeachment with prior convictions, and instructional errors.

V

Petitioner suffers from illegal restraint. There is recently discovered evidence, not available at the time of petitioner's trial, which supports his innocence of the charges of which he was convicted, and further supports his assertions that a third party, Eddie Smallwood, committed the offense of which he was convicted in concert with David Pringle (who was convicted of the same charges at a later

date in Case No. CR 68057).

The recently discovered evidence includes, but is not limited to: (1) A report of forensic DNA testing of semen samples on clothing worn by the victim which excludes petitioner as the source of the DNA from the semen attributed to him by virtue of A-B-O blood typing performed during the investigation of the case prior to charges being filed against him. A true and correct copy of the report is attached to this petition as Exhibit "A" and, by this reference, made a part of this petition.

(2) A declaration under penalty of perjury by David Pringle that he [Pringle], along with Smallwood, committed the offense of which Daye was convicted and that Daye was not involved in the commission of the offense. A copy of this declaration was submitted to this court in connection with petitioner's previous application for a writ of habeas corpus. A copy of the same declaration is attached to this petition as Exhibit "B" and, by this reference, made a part of this petition.

VI

Petitioner has been diligent in pursuing this claim. Petitioner first learned of the existence of David Pringle's statement in 1989, after his conviction and sentence had been affirmed on appeal. Upon obtaining a signed declaration under penalty of perjury, Appellate Defenders, Inc., in February, 1990, made a request in the San Diego County Superior Court to appoint counsel for petitioner in order to follow up on this information. Attorney Thomas Miles was duly appointed by the San Diego County Superior Court to investigate the information and to pursue appropriate post-judgment relief. Attorney

Miles failed to properly investigate the newly discovered information or to pursue any post-judgment relief based thereon in a timely manner, as more fully set forth in the Declaration of Carmela F. Simoncini, attached to this petition as Exhibit "C" and, by this reference, made a part of this petition. In 1992, when it was learned attorney Miles had not pursued any post-conviction remedies, he was relieved by the Court of Appeal and Appellate Defenders, Inc. was appointed.

Petitioner has been diligent in his attempts to present newly discovered evidence, but has been delayed by refusal to cooperate by the District Attorney in obtaining reports of forensic evidence from the trial level proceedings, as well as by limitations of funding for post-conviction investigation. Appellate Defenders, Inc. has been diligent in seeking and obtaining funds for investigation from both the Superior Court and the Court of Appeal, interviewing witnesses, submitting clothing for testing, obtaining forensic reports, and petitioning both this court and the Court of Appeal for relief from this wrongful conviction.

VII

Petitioner's imprisonment is illegal and in contravention of the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution guaranteeing due process of law, and Article I, section 7, and Article VI, section 13, of the California Constitution. Both the federal and state constitutions guarantee due process of law and effective assistance of counsel. Additionally, by failing to investigate and present the newly discovered evidence which would

exonerate petitioner, and failing to locate evidence to submit for forensic testing, attorney Miles violated petitioner's right to effective assistance of counsel, and extended his erroneous commitment to state prison by more than two years.

VIII

The facts supporting the ground set forth in paragraph V are more fully set forth in the declaration of Carmela F. Simoncini, attached hereto as Exhibit "C."

IX

No other applications, petitions or motions have been presented or filed in this or any other court, state or federal, in regard to the matters complained of herein, except as follows: petitioner's direct appeal in Case No. D002073; a petition for habeas corpus in Case No. D017133, filed in the Fourth District Court of Appeal, which was denied without prejudice on August 11, 1992, and remanded to the Superior Court with directions to consider whether to vacate the appointment of attorney Thomas Miles (see Exhibit "D"); a petition for writ of habeas corpus in Superior Court No. HC 12614, denied on June 1, 1993, without an evidentiary hearing (see Exhibit "E"); a petition for writ of habeas corpus in the Court of Appeal, Case No. D019078, approving $2000.00 investigative funds and permission seek habeas corpus relief after investigation of the DNA issue (see Exhibit "F").

Appellate Defenders, Inc. was appointed by the Court of Appeal for the purpose of representing petitioner with respect to his applications for post conviction relief (see Exhibit "G").

X

Petitioner has no other plain, speedy or adequate remedy at law in that the present petition is based on material not included in the record on appeal in Case No. D002073 and, consequently, the issue presented here is only fully reviewable by a consideration of the facts presented in this pleading which could not be presented at any earlier proceeding for the following reasons: (a) DNA testing of evidence was not available in 1984 when petitioner was convicted; (b) the clothing of the victim was not located until 1992, when David Pringle's trial attorney was notified the exhibits in his case would be disposed of and said attorney notified Appellate Defenders, Inc.; (c) the clothing and semen stains thereon could not be subjected to DNA testing until the Court of Appeal issued the writ of habeas corpus approving investigative funds for such purpose after the Superior Court had denied petitioner's application for such relief; (d) the results of the testing were first available to petitioner from Cellmark by way of a report dated April 21, 1994, which was received on April 25, 1994.

XI

Petitioner seeks an order granting the instant petition, vacating his conviction and freeing him from his unlawful restraint.

WHEREFORE, petitioner respectfully request that this Court:

1. Take judicial notice of the following: the Superior Court files in People v. Frederick Rene Daye, Case No. CR 67014, the record of the trial and the opinion of the Fourth District Court of Appeal, Division One, Case No. D002073; the decision of the Court of Appeal,

Fourth District, Division One in Case No. D017133; the decision of the Superior Court in HC 12614; and the decision of the Court of Appeal, Fourth District, Division One in Case No. D019078, pursuant to Evidence Code section 452(d)(1) and 459;

2. Issue a Writ of Habeas Corpus to the Director of the Department of Corrections directing the immediate release of petitioner; or

3. Order an evidentiary hearing to inquire in the legality of petitioner's incarceration, at which petitioner may present such scientific evidence as exoneration of the crimes of which he has been convicted; and

4. Grant petitioner such other and further relief as the Court may deem proper.

Respectfully submitted,

APPELLATE DEFENDERS, INC.

Dated:

Carmela F. Simoncini

Attorney at Law
Attorney for Petitioner

VERIFICATION

I am an attorney admitted to practice before all the courts of the State of California and have my office in San Diego, County. I am the attorney for petitioner herein and am authorized to file this petition. Petitioner is unable to make the verification because he is absent from the county where I maintain my office due to his confinement in California State Prison - Solano, in Vacaville, California, and for that reason I make this verification on petitioner's behalf. Additionally, because the facts upon which this petition is based are based upon developments of which I have personal knowledge and petitioner does not, petitioner is not in a position to verify this petition. I have read the foregoing Petition for Writ of Habeas Corpus and know the contents thereof to be true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California, on _____, 1994.

_____

Carmela F. Simoncini
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF CASE AND FACTS

Frederick Daye was convicted of the same offense as David Pringle in a separate trial, in Case No. CR 67014, in 1984. He was sentenced to state prison for a term of 14 years, 8 months plus life with possibility of parole. (Vol.VIII RT 40 [D002073; People v. Daye, Superior Court No. CR 67014].) David Pringle was convicted of the charges in a later, separate trial, in Case No.CR 68057.

The sole issue during petitioner's trial was mistaken identification, and this issue was pursued on appeal, in Case No. D002073. Daye presented an alibi defense at trial. Daye's conviction was affirmed on appeal and the Supreme Court denied review. During Daye's trial, evidence was presented that one of the rapists had Type O+ blood, as did the victim Desiree Coleman, while the other rapist had Type B blood. Daye's blood was tested and he was found to have Type O+ blood; Pringle's blood was tested and he was found to have Type B. (RT 187-189, D002073 [People v. Daye, Sup.Ct. No. CR 67014].)

At trial, semen was found on carpeting from the victim's car and in three areas on the victim's jeans: in the croch area, the left leg and the right leg. The stains from the carpeting were identified as blood Type B. The stains found in all areas bore some results identified as blood Type O. However, at trial, the expert witness testified that although she could not conclusively state Daye and Pringle were responsible for the semen stains, the types found on the right and left legs of the jeans were consistent with Daye, and the type found in the crotch area of the jeans and the carpeting were

consistent with Pringle. (Vol. II RT 193.)

In November, 1989, Appellate Defenders, Inc. ("ADI"), was contacted by Elliott Lande of the office of Alternate Defense Counsel, and apprised of the existence of exonerating evidence respecting a defendant in an earlier appeal. He referred the ADI duty attorney to Mr. Michael Meaney, who had represented the co-defendant in the prior proceedings. (See Declaration of Carmela Simoncini in Support of Petition for Writ of Habeas Corpus, [hereinafter referred to as "Decl. of CFS"], Exhibit "C.")

Thereafter, in February, 1990, Mr. Meaney provided to ADI a declaration under penalty of perjury by David Pringle, signed on February 1, 1990. (See Exhibit "B.") In an ex parte proceeding, ADI, in conjunction with Mr. Meaney, sought appointment of counsel by the Superior Court in order to further investigate the matters stated in the declaration and to present the exonerating evidence in an application for post-judgment relief. Judge Jesus Rodriguez made the order appointing counsel, and Thomas Miles was assigned to handle the post-judgment proceedings. (Decl. of CFS, p.2, Exhibit "C.")

Upon the appointment of Mr. Miles, ADI met with him and provided to him the original declaration signed by David Pringle, along with copies of all the briefs in the appeal of People v. Daye, Case No. D002073. (Decl. of CFS, p.2-3, Exhibit "C".)

In July, 1990, ADI received a letter from an Iowa attorney named Robert Nading, inquiring about the status of Mr. Daye's post-judgment application for relief on behalf of Mr. Daye's mother. Mr. Daye had not yet been contacted by his appointed attorney as he was unaware

that he had an attorney. (Attachment to Decl. of CFS, Exhibit "C.")

In April, 1992, ADI received a telephone call from another Des Moines, Iowa attorney, Mr. Jeffrey Courter, inquiring about the status of the post-judgment relief on behalf of Mr. Daye's mother. A confirming letter was sent on April 9, 1992, enclosing copies of correspondence between Mr. Courter and Mr. Miles' secretary. Upon contacting Mr. Miles, it was learned that no action had been taken. (Attachment to Decl. of CFS, Exhibit "C.")

In June or July, 1992, ADI assisted Mr. Daye in preparing a petition for writ of habeas corpus, which he filed in propria persona in the Court of Appeal for the Fourth District Court of Appeal, Division One. On August 11, 1992, the petition was denied but remanded to the Superior Court to determine whether attorney Thomas Miles should be relieved as counsel of record. (See Exhibit "D.")

However, no action was taken by the Superior Court. A subsequent search of the court files found the Court of Appeal's order filed along with the criminal file, and placed back in the Archives in the basement of the Superior Court. ADI wrote a letter to the Court of Appeal seeking clarification of its order based upon the foregoing. In response to this letter, the Court of Appeal appointed ADI to pursue the within ancillary petition in the Superior Court. (Exhibit "G.")

ADI sought investigative funds from the Court of Appeal. However, the Court of Appeal denied the request on the grounds it would be ancillary to a petition to be presented to the Superior Court and the request should be directed to that court. (See Exhibit "H.")

A petition for writ of habeas corpus was filed in the Superior Court, based upon the declaration of David Pringle, requesting investigative funds to hire an investigator, access to clothing in evidence for testing, and an evidentiary hearing. (See HC 12614.) Additionally, application was made to the Superior Court through the Office of Alternate Defense Counsel in order to hire an investigator, resulting in an approval for $1000.00 for that purpose. (See Exhibit "I.")

Although an Order to Show Cause was issued on January 27, 1993 (see Exhibit "J"), the writ was denied on June 1, 1993, without an evidentiary hearing. (See Exhibit "E.") Petitioner pursued his claim by filing a successor petition for writ of habeas corpus in the Court of Appeal, Case No. D019078, which resulted in an order dated September 17, 1993, approving $2000.00 investigative funds for the purpose of conducting DNA testing on the victim's clothing. (Exhibit "F.")

On September 29, 1993, petitioner sought and obtained an ex parte order for release of exhibits which had been admitted in the case of People v. Pringle, Case No. CR 68057, which included the clothing of the victim, and blood samples drawn from the victim, Pringle, and Daye, to be submitted for DNA testing. (See Exhibit "K.") The exhibits were then forwarded to Cellmark Diagnotics for DNA analysis.

On April 25, 1994, I received a report from Cellmark Diagnostics indicating that DNA testing, using polymerase chain reaction (PCR), excluded Daye as the donor of the semen on the left leg, one of the samples which had previously been attributed to him by virtue of the

O+ blood-grouping evidence. The right leg sample yielded no PCR products so no conclusion could be reached regarding that sample. (Exhibit "A.")

This petition follows.

ARGUMENT

I

RELIEF BY WAY OF HABEAS CORPUS IS AVAILABLE TO PRESENT NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence may justify relief by habeas corpus when it completely undermines the entire structure of the case upon which the prosecution was based. (In re Lindley (1947) 29 Cal.2d 709, 723.)

Habeas relief has been granted in a case which is strikingly similar to the present case. In In re Hall (1981) 30 Cal.3d 408, prosecution witnesses identified the defendant at the scene of the crime as the killer, and testified against him at trial. Following the conviction, independent investigation was conducted, which caused the two homicide detectives who had investigated the case before trial to suspect the wrong person had been convicted.

After Hall's trial, the two brothers who had inculpated him at trial expressly recanted their testimony both in writing and under oath at the habeas corpus hearing. They admitted their identification was erroneous, that petitioner had not been present at the murder, and that one Oscar Sanchez was the actual gunman. The Supreme Court noted there was no evidence of ulterior motive or dishonesty on the part of these witnesses and the suggestive conditions under which they had originally identified petitioner added credibility to their confession of mistake. (Id., 30 Cal.3d at p. 418.)

In granting the writ of habeas corpus, the Supreme Court noted at page 420 that the information tending to exonerate petitioner and

implicating Sanchez:

> "...either was known or could have been discovered by diligent investigation before trial. It would therefore not qualify as 'newly discovered evidence' for the purpose of a motion for new trial. (People v. Williams (1962) 57 Cal.2d 263, 270 [18 Cal.Rptr. 729, 368 P.2d 353].)"

However, the Court held this did not bar relief by way of habeas corpus, because it went on to state at page 420:

> "Yet, in In re Branch (1969) supra, [sic] 70 Cal.2d 200, 214, we considered similar evidence to be relevant to the new-evidence ground of habeas corpus relief, reasoning that 'it is so fundamentally unfair for an innocent person to be incarcerated that he should not be denied relief simply because of his failure at trial to present exculpatory evidence.'"

The Supreme Court thus held that a habeas corpus petitioner must first present newly discovered evidence that raises doubt about his guilt; once this is done, he may introduce "any evidence not presented to the trial court and which is not merely cumulative in relation to evidence which was presented at trial. (Ibid.; see also In re Branch (1969) 70 Cal.2d 200, 214.)

The attachments to the instant petition raise a similar question regarding the correctness of the conviction of petitioner. Although the record of the trial and the motion for new trial by petitioner's trial counsel reveal that he relied upon inferences Eddie Smallwood was the actual co-perpetrator of the offense, until David Pringle came forward, and until petitioner obtained the results of the DNA testing of the victim's clothing, there was no corroboration for this position. Although Pringle's declaration alone was not enought to warrant relief under the principles discussed above in his prior habeas petition, when considered in light of the newly received DNA

evidence, there is now a fundamental doubt on the accuracy and reliability of the proceedings insofar as it undermines the prosecution's entire case.

In this petition, petitioner will address only the merits of the DNA test results as they impact his entitlement to relief, since previous applications have resulted in determinations (without an evidentiary hearing) that Pringle's statement alone was not sufficient credible evidence. Nevertheless, when considered together, the DNA results, coupled with Pringle's statements, the evidence of third party culpability presented by petitioner at his trial, as well as discrepancies which cast doubt on the accuracy of the victim's identification of petitioner as perpetrator, the conclusion is inescapable that the conviction was erroneous and petitioner must be released immediately.

II

THE DNA TEST RESULTS EXCLUDING PETITIONER AS THE DONOR OF SEMEN ON THE RAPE VICTIM'S CLOTHING, WARRANT RELIEF FROM THE CONVICTIONS.

As mentioned in the previous section, a petition for writ of habeas corpus may be based upon newly discovered evidence. Newly discovered and credible evidence which undermines the prosecution's case warrants habeas corpus relief. (In re Hall, supra, 30 Cal.3d 408.) As the California Supreme Court recently held in In re Clark (1993) 5 Cal.4th 750, at page 766:

> "It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. (In re Hall (1981) 30 Cal.3d 408, 417 [179 Cal.Rptr. 223, 637 P.2d 690]; In re Weber (1974) 11 Cal.3d 703, 724 [114 Cal.Rptr. 429, 523 P.2d 229]; In re Branch (1969) 70 Cal.2d 200, 215 [74 Cal.Rptr. 238, 449 P.2d 174].) '[A] criminal judgment may be collaterally attacked on the basis of "newly discovered" evidence only if the "new" evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.' (People v. Gonzalez (1990) 51 Cal.3d 1179, 1246 [275 Cal.Rptr. 729, 800 P.2d 1159].)"

The DNA evidence, standing alone is sufficient to warrant an order vacating the judgment in this case, and releasing petitioner from the penalties therefor. As petitioner will explain, DNA test results have achieved recognition as reliable evidence, generally accepted in the scientific community. More frequently than not, the prosecution offers DNA test results as proof of a suspect's guilt of a

crime. The same standards for determining admissibility and reliability of test results should be applied when the accused offers them as exoneration. The results excluding petitioner as rapist constitute credible evidence which undermines the prosecution's case.

Although there has been a debate in the past regarding the reliability of DNA evidence, the primary focus of that debate has centered around the statistical significance accorded the conclusions relating to the frequency with which each band representative of a DNA fragment appears in a broad data base where the DNA found on evidence matches the suspect's DNA. (See People v. Barney (1992) 8 Cal.App.4th 798, 814-826.) However, aside from the statistical calculations, the current trend of decisions reflects the acceptance of DNA testing by the scientific community and the reliability of the procedure. (People v. Axell (1991) 235 Cal.App.3d 836, 856; quoted at length in People v. Pizarro (1992) 10 Cal.App.4th 57, 68-71.)

Since the evidence excludes petitioner, rather than matching him, any debate in the scientific community regarding the statistical frequency of matches is irrelevant.

The quality of the newly discovered evidence must be viewed as credible in order to constitute a basis for granting relief. (In re Hall, supra, 30 Cal.3d at pp. 417-418; People v. Hairgrove (1971) 18 Cal.App.3d 606, 611 [Inculpatory statement of third party deemed credible: "We think it axiomatic that a court should make every effort to hear a witness who appears in court to confess to a crime for which someone else stands convicted."].) In the present case, the newly discovered evidence, DNA test results which exclude petitioner as the

source of semen on the stain which had formerly been attributed to him, constitutes credible evidence which points unerringly to petitioner's innocence. (In re Clark, supra, 5 Cal.4th at p. 766.)

There were three areas on the victim's clothing in which semen was originally detected, and one area on the carpet of her car. Blood-typing of the carpet stains revealed that sample could not have come from petitioner, since it was deposited by one having type B blood, while petitioner has type O. (Vol.II RT 187, 192, D02073.) The donors of the samples found on the clothing were identified at trial by blood grouping evidence indicating the presence of two blood types, O and B. Two perpetrators were alleged to have committed this crime, one a type O, the other a type B (Pringle). At trial, it was assumed the stain deposited by the type O perpetrator was caused by petitioner. However, based upon DNA testing, it has been concluded the type O stain on the left leg does not match Daye.

Unless there were three rapists, this means he was also excluded as the donor of the other type O stain on the right leg, despite the fact no DNA results could be obtained from that sample. The DNA fragment which was subjected to the PCR amplification was a fragment of a sperm, not vaginal fluid. Therefore, it could not have come from the victim. Only one rapist was alleged to have type O blood, so it is logical to conclude if Daye was eliminated as the donor of one stain, he was not the type O rapist. Since the other rapist was type B, not type O, Daye could not be either. In other words, petitioner was not one of the rapists. If he was not one of the rapists, he was also not one of the kidnapers, robbers, or thieves of the automobile.

In short, he was not guilty of any crime committed against victim Coleman.

These factors, coupled with other evidence there was other evidence tending to implicate Eddie Smallwood in the crime of which petitioner was convicted, raise doubt about Daye's guilt of the charges. (In re Hall, supra.)

Thus, relief is available by way of a petition for writ of habeas corpus and petitioner is entitled to a writ of habeas corpus, relieving him of the penalties and burdens of the erroneous conviction, and freeing him from incarceration for a crime he did not commit.

II

THE NEWLY DISCOVERED DNA TEST RESULT EVIDENCE, COUPLED WITH THE DISCREPANCIES NOTED AT TRIAL, UNDERMINE THE THE PROSECUTION'S ENTIRE CASE.

At trial, petitioner presented alibi evidence. (Vol.II RT 250-279; Vol.III RT 279-326, D002073.) There were discrepancies between the victim's description of the assailants and Daye's characteristics, as well as discrepancies relating to which suspect committed which acts. For instance, victim Coleman was sure Daye was the initial rapist, that he withdrew prior to ejaculation and that he ejaculated on the carpet of the car. (Vol.I RT 74-75, 112, D002073.) She described this attacker as being approximately 25 years of age. (Vol.I RT 116, D002073.) She described Daye's hair as combed back and chemically straightened. (Vol.I RT 86.) However, Daye wore his hair in a "natural," "nappy," or "frizzed up" at the time of the offense. (Vol.II RT 261; Vol.III RT 308, 413, D002073.)

The person later identified as Daye was described as walking pigeon-toed, being approximately 24 years of age, and having facial hair. (Vol.III RT 379, D002073.) These descriptions fit Smallwood. Latent fingerprints lifted from within the vehicle did not match petitioner. (Vol.III RT 377, D002073.) Jewelry described by the victim as being stolen during the attack was given by Eddie Smallwood to Dana Kellough, his girlfriend's sister, to pawn. (Vol.I RT 62-63; Vol.V RT 557-559.) Eddie Smallwood has a gold tooth and walks pigeon-toed. (Vol.V RT 532, D002073.) However, as defense counsel pointed out to the jury, petitioner, who was observed by the jury, was not pigeon-toed. (Vol. V RT 647, D002073.)

Viewed together with the newly obtained DNA test results, the discrepancies in the suspect identification, petitioner's alibi evidence, and the statement by Pringle that Smallwood was the perpetrator of the offense, constitute compelling evidence that petitioner did not participate in any of the offenses of which he was convicted and for which he has been serving a prison sentence. The DNA evidence, either alone or viewed with the other factors, constitute credible evidence which undermines the entire prosecution case.

The State of California has no valid interest in keeping an innocent person in state prison. In previous applications, the court has discussed Pringle's lack of credibility. As has been demonstrated herein, Pringle's credibility has received a "shot in the arm" in the nature of independent credible DNA test results as corroboration. No matter how the court views Pringle's statements that Daye is innocent of these offenses, it cannot ignore competent scientific evidence which exonerates him.

A writ of habeas corpus should immediately issue.

III

ANY DELAY IN BRINGING THIS PETITION IS NOT ATTRIBUTABLE TO ANY LACK OF DILIGENCE ON THE PART OF PETITIONER. THIS COURT SHOULD VACATE THE APPOINTMENT OF THOMAS MILES AND APPOINT SUBSTITUTE COUNSEL TO INVESTIGATE THE CLAIMS SET OUT HEREIN.

The declaration of Pringle was signed in February, 1990, but not presented until a later time due to the failure of counsel then assigned to investigate the newly discovered evidence and not the result of petitioner's lack of diligence. When provided to Appellate Defenders, Inc., by Pringle's trial counsel, a motion for appointment of counsel was promptly made in the superior court, and attorney Thomas Miles was assigned to follow up on investigation and preparation of pleadings in connection with any application for post-judgment relief.

Ultimately, after petitioner's pro se petition for writ of habeas corpus was denied without prejudice by the Court of Appeal, and Appellate Defenders, Inc. (ADI) was appointed to proceed on petitioner's behalf, ADI presented Pringle's declarations first to the Superior Court and subsequently to the Court of Appeal. Each application was denied on the ground Pringle was not a reliable witness, based solely on the record of his own trial. No evidentiary hearing was ordered or conducted. Since Pringle refused to testify at Daye's criminal trial, he has never had the opportunity to examine Pringle under oath.

However, the Court of Appeal's denial was coupled with an approval of investigation funds to have the victim's clothing submitted for DNA testing, and leave was granted to present a new

petition when those results were obtained. Because of Cellmark's case load, it took several months for the testing to be complete. The results ultimately were received and are favorable. This is that new petition based upon the recently received results.

As can be seen by the declaration attached hereto, petitioner has been diligent in pursuing relief from the wrongful conviction. Any delay in presenting the instant application is attributable first to the lack of diligence of Thomas Miles; further delay was occasioned by the length of time it took the courts to ultimately grant leave for scientific testing of the clothing, and the length of time for the testing to be conducted and completed.

At all times prior to the initial pro se petition filed by Daye in the Court of Appeal, Daye attempted to find out the status and progress of the proceedings, but was not contacted by Mr. Miles. Through the intervention of petitioner's mother, whose attorney maintained contact with Appellate Defenders, contact was finally made with attorney Miles and it was learned that he had prepared and filed no pleadings, had not requested investigation expenses, and had done nothing but to file the original of Pringle's declaration in Pringle's own criminal file. For this reason, Appellate Defenders assisted petitioner in preparing the pro se petition filed in the Court of Appeal, which did not have the original of the Pringle's declaration.

It should not require citation of authority to establish that a reasonably competent attorney, acting as a diligent advocate, would investigate and follow up on indications there were witnesses available who could exonerate petitioner. Although a petitioner must

show that counsel knew or should have known that further investigation was necessary and must establish the nature and relevance of the evidence that counsel failed to present and discover in order to establish ineffectiveness of counsel (In re Sixto (1989) 48 Cal.3d 1247, 1257), that requirement has been met in the present case. The names of the witnesses, as well as the original of the declaration of David Pringle were given directly to Miles who was appointed for the exclusive purpose of following up on such evidence to produce in a post-judgment proceeding.

After nearly three years, no tactical purpose could excuse counsel's failure to present critical, relevant, and wholly exonerating evidence to the trial court. This is particularly true where counsel apparently did not even apply for investigation expenses in order to look into the potential exonerating evidence. In the end, petitioner had to seek the intervention of Appellate Defenders to bring Miles' inaction to the attention of the courts and to seek further review of the circumstances of his conviction. The failure to apply for post-judgment relief is not attributable to any dilatory action or lack of diligence on the part of petitioner.

Since the substitution of attorneys, petitioner has diligently followed through with requests for investigation funds and applications for relief. The first petition filed in the superior court (HC 12614), which was based upon Pringle's statement, requested funds for testing of the victim's clothing, but was denied. The Court of Appeal granted this request in the subsequent petition (D019078.) The exhibits were then promptly obtained from evidence, and

transmitted to Cellmark for testing.

In short, petitioner has been diligent and any delays were attributable either to Mr. Miles failure to follow up on post-judgment investigation leads, the denial of funds by the courts, or the time required to conduct the tests, and not due to any inaction on his part. Petitioner is therefore entitled to relief.

CONCLUSION

The proffered evidence undermines the entire structure of the case upon which the prosecution was based. Thus, relief by way of a petition for writ of habeas corpus is available to present newly discovered evidence to the trial court.

For all the reasons set forth herein, petitioner's confinement is illegal and a writ of habeas corpus must be granted.

Respectfully submitted,

Dated: APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner
Frederick Rene Daye

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)	Case No. CR 67014 ORDER FOR APPOINTMENT OF INVESTIGATOR AT COUNTY EXPENSE

This matter came on ex parte application by petitioner above-named by and through counsel Appellate Defenders, Inc. Counsel for petitioner moved ex parte for an order appointing an investigator. Evidence having been presented in declarations submitted in support of the motion, and arguments having been made:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that an investigator is appointed to interview witnesses and perform other investigative functions associated with the preparation and presentation of the issues on habeas corpus.

IT IS FURTHER ORDERED that the costs and expenses of such

investigation will be paid by the Auditor of the County of San Diego, California upon certification of such costs and expenses to him by this Court, pursuant to the policies of the Alternate Defense Counsel Office.

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Provided the Court finds the petitioner indigent, Alternate Defense Counsel will pay costs per its guidelines and policies, provided any funding requests are pre-approved by Alternate Defense Counsel.

Dated: _____

_____
JUDGE OF THE SUPERIOR COURT

Approved as to form and content:

Dated: _____

_____
ALTERNATE DEFENSE COUNSEL

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)))))	Case No. CR 67014 APPLICATION FOR EX PARTE ORDER FOR APPOINTMENT OF INVESTIGATOR AT COUNTY EXPENSE

TO THE HONORABLE FREDERIC L. LINK, Judge of the Superior Court for the State of California, County of San Diego:

Frederick Rene Daye, through his appointed counsel Appellate Defenders, Inc., applies for an ex parte order for appointment of an investigator at county expense, to assist him in the ascertainment of facts and collection of evidence in support of his petition for writ of habeas corpus.

This application is based upon the accompanying Declaration of Carmela Simoncini as well as the attachments thereto.

Dated: _____ _____

CARMELA F. SIMONCINI, Staff Attorney
Appellate Defenders, Inc.
Attorneys for FREDERICK R. DAYE

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

In re:	)	Case No. CR 67014
	)	
FREDERICK RENE DAYE,	)	DECLARATION OF CARMELA F.
Petitioner,	)	SIMONCINI IN SUPPORT OF
	)	APPLICATION FOR EX PARTE
On Habeas Corpus.	)	ORDER FOR APPOINTMENT OF
	)	INVESTIGATOR AT COUNTY EXPENSE

I, Carmela F. Simoncini, declare:

1. I am an attorney licensed to practice law before all the courts of the State of California. I am employed as a staff attorney at Appellate Defenders, Inc. [ADI], which was appointed by the Court of Appeal to prepare the ancillary petition for writ of habeas corpus on behalf of Frederick Daye on October 15, 1992. I have personal knowledge of the matters stated herein, and, if called as a witness, am competent to testify thereto.

2. On January 27, 1993, this Court issued an Order to Show Cause,

directing the People to file a return by February 22, 1993. The Court, in the Order to Show Cause, found that petitioner had made a prima facie showing of entitlement to the relief requested in the petition.

3. On February 16, 1993 the Court granted the People (appearing by and through the Office of the District Attorney) an extension of time, up to March 24, 1993, to file its return, in order to permit the People to conduct investigation.

4. The prayer for the relief requested in the petition includes a request for appointment of counsel and an order for investigation expense in order to facilitate an evidentiary hearing. Since the Court has given the People additional time in order to facilitate investigation, fairness requires that petitioner be permitted to conduct certain investigation in preparation for the hearing for the same reasons. Unless investigation is permitted, petitioner will not be able to address any evidence presented by the People at the hearing on the order to show cause.

5. I am informed and believe that there are witnesses located in San Diego, California who would corroborate Pringle's declaration and exonerate Petitioner. I wish to have such witnesses located and interviewed.

6. I am also aware that the victim's clothing is still in evidence under David Pringle's case number, CR 68057. Because the convictions in

this case took place before DNA was considered acceptable evidence, the clothing has not been subjected to DNA or other genetic "fingerprinting" to exclude petitioner as the perpetrator of the sexual assault. I have communicated with forensic scientists at Cellmark Laboratories in Texas, regarding the possibility of testing in a case this old. I am informed that certain testing may still be done if semen is present on the clothing. The laboratory charges $350 dollars for each blood sample tested and would require three samples (from petitioner, Pringle, and the victim) in order to render an opinion.

7. ADI is a non-profit corporation under contract with the Administrative Office of the Courts and the Court of Appeal. ADI's budget does not include funding for investigation expenses, and for this reason, an application for appointment of an investigator is required in order to competently discharge the duties of counsel for Mr. Daye.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California, on March 4, 1993.

_____
Carmela F. Simoncini
Attorney for Frederick R. Daye

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)	Case No. CR 67014 ORDER FOR RELEASE OF EXHIBITS IN CR-68057

This matter came on ex parte application by petitioner above-named by and through counsel Appellate Defenders, Inc. Counsel for petitioner moved ex parte for an order releasing exhibits presently found in CR 68057, pertaining to the case of the People of the State of California v. David Pringle. Evidence having been presented in declarations submitted in support of the motion, and arguments having been made:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the clothing of the victim, any rape kit evidence, and any blood samples presently in exhibits in connection with CR-68057, be released to Petitioner, his attorney, investigator, or other authorized agent or representative, for

forensic testing.

Dated: _____

_____
JUDGE OF THE SUPERIOR COURT

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)))))	Case No. HC 12614 [Superior Court No. CR 67014] TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE
AND		MEMORANDUM OF POINTS
AND		AUTHORITIES

1. Petitioner, Frederick Rene Daye, realleges and incorporates by reference, all the allegations in his petition for writ of habeas corpus. Further, petitioner offers the following matters to controvert the issues raised by the return.

2. Petitioner denies the allegations of Paragraph I of the Respondent's Return to Order to Show Cause (hereinafter referred to as the "return"), to wit: that Petitioner is in the lawful custody of the California Department of Corrections

pursuant to a judgment and sentence based upon petitioner's convictions in Case No. CR 67014, on August 14, 1984. Petitioner has at all times maintained that he was mis-identified as a perpetrator in that case, that Eddie Smallwood, whom he resembles, was the actual perpetrator, and that the conviction as to petitioner is illegal.

3. Petitioner further denies the relief requested in the petition is unwarranted on the grounds it fails to meet "the strict legal standard for habeas corpus relief." As will be more fully set forth in the accompanying memorandum of points and authorities, controlling authority holds that the "strict legal standard for habeas corpus relief" was never intended to impose a hypertechnical requirement that each bit of prosecutorial evidence be specifically refuted. Petitioner specifically denies the assertion that the evidence is not newly discovered, credible or conclusive. To the contrary, since Pringle, as respondent admits in Paragraph LV of its return, exercised his Fifth Amendment right against self-incrimination when called as a witness at petitioner's trial, he was unavailable as a witness. His statements on petitioner's behalf at the present time constitute newly discovered evidence, within the meaning of the cases cited in the within memorandum of points and authorities, as well as

the authorities cited in the petition for writ of habeas corpus. Moreover, since the statements made by Pringle in the declaration in support of the petition for writ of habeas corpus, constitute admissions of a criminal defendant, and declarations against his penal interests, they are considered by law to be reliable, irrespective of the credibility of Pringle at his own trial.

4. Petitioner denies the allegations of Paragraphs III through LXXXVI generally and specifically as they constitute nothing more than a recitation of the evidence adduced at the respective trials of petitioner and Pringle. The recitations do not, as respondent suggests, support the position taken by respondent.

To the contrary, the assertions of the return confirm petitioner's contentions that he was mistakenly convicted in place of Smallwood: he bears resemblance to Eddie Smallwood in terms of race, size and metallic front tooth (I RT 221, 232-233; 474, 508, 551, 581-582)[1]; Eddie Smallwood was a known associate of David Pringle (I RT 478); David Pringle denied (at his **own** trial) even knowing petitioner (IV RT 365-367);

[1]/ For convenience, petitioner refers to the exhibits submitted by respondent and uses the same method of citation.

and shortly after the offense, Smallwood was in recent possession of property stolen from the victim (I RT 561-562).

5. Petitioner denies the correctness of respondent's assertion that Pringle's declaration, offered in support of the petition for writ of habeas corpus, does not constitute newly discovered evidence. As admitted by respondent in Paragraph LX, Pringle, when called as a witness at **petitioner's** trial exercised his Fifth Amendment right against self-incrimination (I RT 470, 471-473). He was therefore unavailable as a witness at petitioner's trial.[2] Pursuant to the authorities cited in support of the petition and as provided herein, under such circumstances, his present statement, made when he became available as a witness, constitutes newly discovered evidence because it could not have been presented at petitioner's trial.

6. Petitioner denies the allegations of Paragraph LXXXVII, to wit: that Pringle's declaration is legally insufficient to warrant the granting of a writ of habeas corpus as it does not constitute new evidence. The exhibits attached in support of the return support petitioner's

[2]/ Furthermore, respondent acknowledges that Pringle testified at his **own** trial that he was unfamiliar with petitioner. (IV RT 365-367.)

assertions that Pringle was unavailable as a witness at his 1984 trial but that he now is available, and, more importantly, is willing to provide material evidence in support of petitioner's claim of innocence.

7. Petitioner denies the allegations of Paragraph LXXXVIII of the return regarding the insufficiency of Gonzalez' statement.

8. Petitioner denies the allegations of Paragraph LXXXIX of the return that the clothing of the victim is legally insufficient to warrant the granting of relief. The respondent does not deny that the victims clothing are maintained in evidence[3]. The fact that DNA testing has not yet been done respecting the clothing does not negate the fact that the clothing is available for testing. Respondent does not and cannot assert there are no semen stains on the clothing.

9. Petitioner denies the allegations of Paragraph XC of the return, to wit: that petitioner was not convicted based upon misidentification. As more fully set forth in the attached memorandum of points and authorities, the fact the

[3]/ Petitioner obtained an order directing the retention of the exhibits in the case of People v. David Pringle.

victim was positive in her identification of petitioner does not mean she **correctly** identified him. The same is true with respect to witness Wells.

10. Petitioner generally and specifically denies all other allegations of the return.

WHEREFORE, petitioner respectfully request that this Court:

1. Take judicial notice of the superior court files in People v. Frederick Rene Daye, Case No. CR 67014, the record of the trial and the opinion of the Fourth District Court of Appeal, Division One, Case No. D002073, and the pleadings relating to the proceedings on habeas corpus brought in the appellate court in Case No. D017133, and all attachments thereto, as well as the decision therein, pursuant to Evidence Code section 452(d)(1) and 459;

2. Issue a Writ of Habeas Corpus or Order to Show Cause to the Director of the Department of Corrections to inquire in the legality of petitioner's incarceration; or in the alternative,

3. Vacate the appointment of Thomas Miles and appoint other counsel to investigate the newly discovered evidence and present same in a competent fashion at an evidentiary hearing;

5. Authorize investigation expense in an amount not exceeding $2000.00 to facilitate proper investigation of the newly discovered evidence to present to this court at an evidentiary hearing; and

6. Grant petitioner such other and further relief as the Court may deem proper.

Respectfully submitted,

APPELLATE DEFENDERS, INC.

Dated:

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

I

SINCE DAVID PRINGLE WAS UNAVAILABLE TO TESTIFY AT PETITIONER'S TRIAL BY VIRTUE OF EXERCISING HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, HIS RECENT DECLARATION IN SUPPORT OF PETITIONER'S CLAIM OF INNOCENCE CONSTITUTES NEW EVIDENCE WHICH JUSTIFIES RELIEF ON HABEAS CORPUS.

Respondent's return argues there is no new evidence to support his claim of innocence. Respondent asserts that Pringle's declaration is of no evidentiary value since it shows no personal knowledge, and that it is not a credible statement because Pringle presented an alibi defense at his own trial. Respondent is in error on both points.

A. Pringle was Unavailable as a Witness to Testify at Daye's Criminal Trial. His Current Declaration Therefore Constitutes Newly Discovered Evidence.

Respondent refers to Pringle's testimony at his own trial and argues his present statement is not newly discovered

evidence, but, rather, a recantation which should be viewed with distrust. However, has ignored the critical point of inquiry relevant to the instant case: when called as a witness in **petitioner's trial, Pringle exercised his Fifth Amendment right against self-incrimination**. Under controlling authorities, when a witness exercises the Fifth Amendment right against self-incrimination, he or she becomes unavailable as a matter of law.

Evidence Code section 240 defines "Unavailable as a Witness," in pertinent part as follows:

> "(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:
>
> "(1) **Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.**"

In interpreting the provisions of Evidence Code section 240 in connection with declarations of third parties against their penal interests, California Courts have been uniform in holding that such third party declarants are deemed "unavailable as a witness" by virtue of asserting an exemption by privilege from testifying concerning the matter.

(People v. Malone (1988) 47 Cal.3d 1, 23; People v. Smith (1970) 13 Cal.App.3d 897, 902.)

Respondent mistakenly believes that the fact Pringle testified at his **own** trial negates the finding of unavailability at petitioner's trial. Respondent refers to the declaration of Pringle in support of the instant petition for writ of habeas corpus as a "retraction." (See Return to Order to Show Cause [hereinafter cited as "ROSC"] p. 38.) However, Pringle was tried and convicted after petitioner had been tried and convicted. The fact he may have waived his privilege in connection with his own **later** trial, after claiming it at petitioner's earlier trial does not constitute a retraction. Nor does the fact he denied complicity in the criminal offense at his own trial constitute a retraction of his claim of privilege at petitioner's earlier trial. Since he offered no testimony at petitioner's trial, his present statements against his own penal interest do not constitute a retraction.

Here, the respondent acknowledges that Pringle was called to the stand during petitioner's trial and that he exercised his privilege against self-incrimination. (ROSC p. 21; I RT 471-473.) Pringle was therefore, as a matter of law,

unavailable to testify at petitioner's trial. The fact he may be subject to impeachment with a prior inconsistent statement from a different trial involving a different defendant does not alter the fact his testimony was unavailable at petitioner's trial.

B. Pringle's Testimony at His Own Trial that He Did Not Know Petitioner Corroborate the Statements Made in the Declaration. In These Significant Respects, Pringle's Statements Are Credible.

Respondent also asserts that Pringle's statements are not credible because he offered testimony relating to an alibi defense at his own trial and changed his testimony. (ROSC 38.) However, in respects most important to the present proceeding, his testimony at his own trial was unwaveringly constant. He testified at his own trial that he did not know petitioner. (ROSC 37; IV RT 365-366.) Thus, the statement that he did not know petitioner was not refuted; nor is the inference that if Pringle committed the crime with Smallwood, petitioner must be innocent.

Evidence at petitioner's trial established that Pringle knows Smallwood. Thus, Pringle's statement in the declaration that "The person who was with me was Eddie Smallwood, although

Smallwood was never arrested nor charged," is corroborated by the allegations of the return which fail to refute the connection between Pringle and Smallwood. Evidence from other witnesses at petitioner's trial established that David Pringle did know Eddie Smallwood (I RT 477-479.) Far from controverting the assertions of the petition for writ of habeas corpus, these acknowledgments of the return (ROSC 21, 22, 25) corroborate petitioner's statements.

C. Pringle's Declaration is Credible Where His Statements Qualify as Declarations Against His Penal Interest.

Respondent's final challenge to the sufficiency of Pringle's declaration to satisfy a basis for relief in this proceeding is the assertion that his statement does not "...constitute an admission of guilt." (ROSC 37.) Respondent is in error.

An admission is an extrajudicial recital of facts by a defendant which tends to establish guilt when considered with the remaining evidence in the case. (People v. McClary (1977) 20 Cal.3d 218, 230; People v. Brackett (1991) 229 Cal.App.3d 13, 19.) Admissions carry their own indicia of credibility based upon the common understanding that people do not lightly admit a crime. (See United States v. Harris (1971) 403 U.S.

573, 583, 29 L.Ed.2d 723, 734, 91 S.Ct. 2075.) There is thus, in the nature of the statement, an internal guaranty of reliability. (People v. Garcia (1981) 115 Cal.App.3d 85, 101.)

Pringle's statement constitutes an express admission of his complicity in the commission of the offense. At page 1 of his declaration, which is attached as Exhibit "B" to the Petition for Writ of Habeas Corpus, Pringle states, "He [Daye] did not have anything to do with the crime and I do not know Frederick Daye. **The person who was with me was Eddie Smallwood,** although Smallwood was never arrested nor charged." The reference to "the crime" relates to the crime of which both Daye and Pringle, in separate proceedings, were convicted. Pringle clearly states, in reference to that particular crime, that the person who was with him was Eddie Smallwood. This is an express acknowledgment of guilt of the offense.

This statement is corroborated by other evidence that Smallwood has made admissions of his own complicity in the commission of the offense, shortly after petitioner's conviction, which were offered at that time in support of a motion for new trial. (ROSC, Exh.8.) In this regard,

respondent argues that Smallwood's conduct and statements do not meet the requirements for a declaration against interest pursuant to Evidence Code section 1230. (ROSC 39-40.) However, the evidence proffered by Ethel Gonzales in support of the motion for new trial was that Smallwood was in possession of rings and credit cards removed from the victim of the rape/robbery, and that he had left town because of his involvement in the offense. The obvious import of the statement was that Smallwood made himself "unavailable" as a witness by fleeing the jurisdiction to avoid arrest for the offense. His conduct, attempting to hock stolen property which had been stolen from the victim of the rape, evidences the requisite "guilty knowledge" to qualify as a declaration against penal interest.

It is ironic that the respondent, which frequently proffers admissions to prove guilt in various criminal proceedings, would adopt a different standard for the believability of admissions in these circumstances. The People have no interest in keeping innocent people in state prison. If Smallwood, rather than Daye, committed the offense of which Daye was convicted, no social or moral or penal purpose is served by keeping Daye in state prison and

punishing him for the crime of another.

II

THE FACT THE VICTIM WAS POSITIVE IN HER IDENTIFICATION OF PETITIONER AT TRIAL DOES NOT REFUTE OR CONTROVERT THE ALLEGATION HE WAS MISTAKENLY CONVICTED WHERE SUCH EYEWITNESS IDENTIFICATION IS HIGHLY UNRELIABLE.

Throughout the return, respondent refers to the victim's certainty in her identification of Daye as her attacker. (ROSC 10, 33-34.) However, as will be pointed out, the fact a witness is positive in the identification made does not mean the identification is reliable or accurate. As the relief sought in these proceedings is merely appointment of counsel and approval of investigation funds, petitioner will be able, at an evidentiary hearing, to establish that the identification by the victim was inaccurate.

Importantly, respondent refers to many items in its return which support petitioner's assertion of mistaken identity. It points to witnesses who testified that Daye looks similar Smallwood, that both have a metallic front tooth, and the composite drawing of the suspect resembles both Daye and Smallwood. (ROSC 21-22.) The fact that semen found

on the victim's clothing does not support the conclusion the identification was corroborated by independent evidence. The nature of the testing performed in this case indicated only the blood type grouping of the semen donor, which in this case happened to be type O, the most common type. (I RT 187-188.)

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." (United States v. Wade (1967) 388 U.S. 218, 228, 18 L.Ed. 2d 1149, 1158, 87 S.Ct. 1926; People v. McDonald (1984) 37 Cal.3d 351, 363.) "The number of mistaken identifications leading to wrongful convictions, combined with the fact that eyewitness testimony is accepted too unquestioningly by juries, presents a problem for the legal community." (Loftus, Eyewitness Testimony (Harvard Univ. Press, 1979) p.201.)

Respondent does not refute or controvert the assertions of the petition that he was mistakenly identified as the perpetrator in place and instead of Eddie Smallwood. The victim attempted to make a cross-racial identification of the perpetrator and was presented with the photograph of petitioner, whose features are similar to those of

Smallwood's. At an evidentiary hearing, with funding for an expert, petitioner will be able to establish the identification of petitioner as a the perpetrator of this crime was erroneous.

III

PETITIONER IS NOT REQUIRED TO SATISFY ANY HYPERTECHNICAL REQUIREMENT IN ORDER TO DEMONSTRATE ENTITLEMENT TO RELIEF ON HABEAS CORPUS.

Respondent cites In re Hall (1981) 30 Cal.3d 408, in support of its assertion that petitioner is not entitled to relief by way of habeas corpus. Specifically, respondent relies upon language found in Hall, which derived from In re Weber (1974) 11 Cal.3d 703, 724, that newly discovered evidence will not undermine the entire case of the prosecution unless it is conclusive and "points unerringly to innocence."

A closer reading of the language of Hall reveals respondent overlooked an essential caveat which immediately followed the quotation:

> "In so holding, however, we did not intend to impose either the hypertechnical requirement that each bit of prosecutorial evidence be specifically refuted, or the virtually impossible burden of proving there is no conceivable

basis on which the prosecution might have succeeded. It would be unconscionable to deny relief if a petitioner conclusively established his innocence without directly refuting every minute item of the prosecutions proof, or if a petitioner utterly destroyed the theory on which the People relied without rebutting all other possible scenarios which, if they had been presented at trial, might have tended to support a verdict of guilt. (Cf. People v. Superior Court (1972) 7 Cal.3d 186, 198-199 [101 Cal.Rptr. 837, 496 P.2d 1205], and cases cited.) The nullification of the Lara brothers' testimony by their retractions and by the evidence amassed subsequent to trial completely destroys this case against petitioner. No more need be shown to warrant relief."

[Emphasis by Court.]

In the Hall case, the petitioner was convicted based upon

eyewitness testimony by the Lara brothers. After the trial, the Lara brothers recanted their testimony both in writing and under oath at the habeas corpus hearing. They admitted petitioner had not been at the scene and that an individual named Oscar Sanchez was the gunman.

In that case, the Attorney General argued, as the District Attorney does now, that the recantations must be discredited. (In re Hall, supra, 30 Cal.3d at p. 417-418.) The Supreme Court acknowledged that recantations are routinely viewed with suspicion. However, it noted that at the evidentiary hearing held in connection with the habeas corpus proceeding, petitioner offered the testimony of another witness who tended to exculpate the petitioner.

Petitioner seeks only to have the same opportunity as that afforded to Hall under similar circumstances. Hall was able to introduce the necessary exculpatory evidence by virtue of the fact an evidentiary hearing was ordered and he was represented by counsel who was able to conduct investigation. If counsel were appointed to represent petitioner, investigation funds were approved and an evidentiary hearing were ordered in this case, petitioner would be able to provide independent corroboration for his assertions.

Petitioner's prayer for relief is simply a request for the opportunity to provide the simple facts which would exonerate him. Prior to Pringle's admission, there was no reliable evidence to support petitioner's theory that Eddie Smallwood was actual perpetrator.

The Court already has before it significant information which raises the question of whether in fact Eddie Smallwood is guilty of this offense. The state has no interest in leaving that question unanswered simply because another person, who happens to share some of Smallwood's physical characteristics, was mistakenly convicted in his place.

CONCLUSION

The return fails to refute or controvert the matters set forth in the petition for writ of habeas corpus. The petition requests nothing more than the appointment of counsel, approval of funds for investigation and/or experts, and an opportunity at an evidentiary hearing further explore the distinct probability that he was mistakenly identified in place of Eddie Smallwood.

The State of California has a valid interest in punishing the guilty. However, no valid social purpose is served by imprisonment of an innocent person while the guilty runs free.

Respondent had 60 days to refute the assertions of the petition by investigating the truth of the Pringle's allegations, and locating Eddie Smallwood. Instead, the People chose only to reiterate excerpts of the trial proceedings of Pringle and Daye.

If the People will not investigate these charges and affirmatively controvert them, the Court must grant petitioner the means to do the job for them.

Respectfully submitted,

Dated:

APPELLATE DEFENDERS, INC.

Carmela F. Simoncini
Attorney at Law
Attorney for Petitioner
Frederick R. Daye

APPELLATE DEFENDERS, INC.
Carmela F. Simoncini, State Bar #86472
233 "A" Street, 12th Floor
San Diego, CA 92101
Telephone No. (619) 696-0282

Attorney for Petitioner FREDERICK RENE DAYE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

In re:	)	Case No. CR 67014
	)	
FREDERICK RENE DAYE,	)	DECLARATION OF CARMELA F.
Petitioner,	)	SIMONCINI IN SUPPORT OF
	)	APPLICATION FOR EX PARTE
On Habeas Corpus.	)	ORDER FOR RELEASE OF EXHIBITS
	)	TO PRIVATE INVESTIGATOR

I, Carmela F. Simoncini, declare:

1. I am an attorney licensed to practice law before all the courts of the State of California. I am employed as a staff attorney at Appellate Defenders, Inc. [ADI], which was appointed by the Court of Appeal to prepare the ancillary petition for writ of habeas corpus on behalf of Frederick Daye on October 15, 1992. I have personal knowledge of the matters stated herein, and, if called as a witness, am competent to testify thereto.

2. On September 17, 1993, the Court of Appeal issued an order making $2000 of investigative funds available in order to conduct testing on the clothing of the victim for the presence of semen and for further DNA testing on any such semen stains in order to support petitioner's claim he was misidentified and convicted by mistake. A copy of the Court's

order is attached hereto as Exhibit "A." The order contains a brief history of the post-conviction procedures which have led to this point. The Court of Appeal denied petitioner's request for an evidentiary, but did so without prejudice for petitioner to renew his habeas corpus application in the superior court after further investigation is completed.

3. I am also aware that the victim's clothing is still in evidence under David Pringle's case number, CR 68057. Because the convictions in this case took place before DNA was considered acceptable evidence, the clothing has not been subjected to DNA or other genetic "fingerprinting" to exclude petitioner as the perpetrator of the sexual assault. I have communicated with forensic scientists at Cellmark Laboratories in Texas, regarding the possibility of testing in a case this old. I am informed that certain testing may still be done if semen is present on the clothing.

4. In order to determine if there are any semen stains remaining on the clothing which may be tested, the clothing must be released from Exhibits for delivery to Cellmark Laboratory.

5. If stains are present and testable, the laboratory will require a sample of petitioner's blood and a sample of Eddie Smallwood's blood in order to make the necessary comparisons. An order permitting prison medical officials to draw a blood sample from Eddie Smallwood, who is presently incarcerated at Richard J. Donovan Correctional Facility, is therefore necessary. His prisoner I.D. number is E-35735. He is scheduled to be released in October, 1993.

An order permitting prison officials to draw a blood sample from petitioner is also necessary. Petitioner is presently housed at California State Prison, Solano, in Vacaville, California. His prisoner I.D. number is C-91321.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California, on March 4, 1993.

Carmela F. Simoncini
State Bar #86472

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)	Case No. CR 67014 ORDER FOR RELEASE OF EXHIBITS IN CR-68057

This matter came on ex parte application by petitioner above-named by and through counsel Appellate Defenders, Inc. Counsel for petitioner moved ex parte for an order releasing exhibits presently found in CR 68057, pertaining to the case of the People of the State of California v. David Pringle. Evidence having been presented in declarations submitted in support of the motion, and arguments having been made:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the clothing of the victim, any rape kit evidence, any blood samples and/or any other item of evidence presently in exhibits in connection with CR-68057, be released to Charles H. Small, Private Investigator, or his authorized agent or representative, for delivery to Cellmark Laboratory for examination and forensic testing.

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/////

IT IS FURTHER ORDERED that upon completion of examination, testing and analysis, the items of evidence described above shall be returned to the custody of the San Diego County Superior Court Evidence Room.

Dated: _____ _____

JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)))))	Case No. CR 67014 ORDER RE DRAWING OF BLOOD SAMPLES FROM PRISONER

TO THE WARDEN OF THE DEPARTMENT OF CORRECTIONS, CALIFORNIA STATE PRISON, SOLANO:

Since Petitioner Frederick Rene Daye obtained funding for investigation to test clothing for stains which can be subjected to forensic testing by Cellmark Laboratory in Texas, and since it is necessary, in order to conduct forensic tests, that a sample of the blood of petitioner must be drawn in a medically approved manner and delivered Charles H. Small, Jr., a licensed private investigator (PI 3947) for transmittal to Cellmark Laboratory,

IT IS HEREBY ORDERED that a blood sample be drawn from petitioner Frederick Rene Daye, in a medically approved manner, and delivered to Charles H. Small, Jr., for delivery to Cellmark Laboratory for forensic testing.

Dated: _____

_____

JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

FREDERICK RENE DAYE, Petitioner, On Habeas Corpus.	)))))	Case No. CR 67014 ORDER RE DRAWING OF BLOOD SAMPLES FROM PRISONER

TO THE WARDEN OF THE DEPARTMENT OF CORRECTIONS, RICHARD J. DONOVAN CORRECTIONAL FACILITY:

Since Petitioner Frederick Rene Daye obtained funding for investigation to test clothing for stains which can be subjected to forensic testing by Cellmark Laboratory in Texas, and since it is necessary, in order to conduct comparative forensic tests, that a sample of the blood of Eddie Smallwood, inmate number E-35735, must be drawn in a medically approved manner and delivered Charles H. Small, Jr., a licensed private investigator (PI 3947) for transmittal to Cellmark Laboratory,

IT IS HEREBY ORDERED that a blood sample be drawn from Eddie Smallwood, inmate number E-35735, in a medically approved manner, and delivered to Charles H. Small, Jr., for delivery to Cellmark Laboratory for forensic testing.

Dated: _____

_____

JUDGE OF THE SUPERIOR COURT