FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
January 17, 2014

GUILTY PLEA APPEALS – BEYOND FEES AND CREDITS

RICHARD SUCH
Staff Attorney
First District Appellate Project
January 2014

Finding Winning Issues in Guilty Plea Appeals

I. Obtaining a certificate of probable cause

A. Soliciting trial counsel's help - especially in cases in which a motion to withdraw plea was denied – remember Hoffard (a certificate good for any issue is good for all)

People v. Hoffard (1995) 10 Cal.4th 1170

B. Petition for Writ of Mandate

C. Certificate or habeas issue? See asterisks below.*

In re Waltreus (1965) 62 Cal.2d 218

II. Exploring 1170(d) recall of sentence

III. Potential issues

A. Issues related to competency to stand trial

1. Evidence of mental illness

2. Evidence of developmental disability

People v. Ary (2004) 118 Cal.App.4th 1016

3. Evidence of medication

The "Moran" cases:
Moran v. Godinez (9th Cir. 1992) 972 F.3d 263;
Moran v. Godinez (9th Cir. 1995) 57 F.3d 690.
U.S. v. Howard (9th Cir. 2004) 381 F.3d 873.

4. Sources of information

(a) Relatives

(b) Jail and prison medical records

(c) "SVP psychologists"

B. Some issues related to validity of plea*

1. Knowledge of elements of offense

Henderson v. Morgan (1976) 476 U.S. 637

2. Factual basis for plea

3. Knowledge of consequences

(a) Immigration consequences (direct and collateral consequences)

Padilla v. Kentucky (2010) 559 U.S. 356;
People v. Martinez (2013) 57 Cal.4th 555

(b) Registration consequences

i. Mandatory registration

ii. Discretionary registration

iii. Lifetime nature of registration

People v. Zaidi (2007) 147 Cal.App.4th 1470

(c) Probation ineligibility

(d) Parole eligibility limitations

People v. Barella (1999) 20 Cal.4th 261

4. Improper inducements to plea

(a) Promise of benefits by judge

People v. Collins (2001) 26 Cal.4th 297

(b) Threats of adverse effects of not pleading

5. Illusory promise of ability to raise pre-plea issues

People v. Kaanehe (1977) 19 Cal.3d 1

C. Brady error*

D Unlitigated search and seizure issues*

People v. Mashburn, No. A138252 (Dec. 12, 2013) 2013 WL 6918991

E. Violation of plea bargain

1. Failure of DA to keep it

2. Failure of court to observe it

3. Failure of court to give opportunity to withdraw plea

4. Impossible conditions

5. Motion to vacate judgment or petition for coram nobis are alternatives to appeal

People v. Collins (1996) 45 Cal.App.4th 849, 863

F. Denial of motion to withdraw plea*

A. Representation by conflict-free counsel

B. Ineffective assistance – failure to move on grounds listed in "B" above

G. Some sentencing related errors

1. Failure of trial counsel to present evidence of mitigating factors

2. Denial of fair hearing and failure to make findings necessary for ordering discretionary registration

People v. Hofsheier (2006) 37 Cal.4th 1185

3. Failure of court at re-sentencing to obtain updated probation report

4. Failure of court to give reasons – or "good" reasons – for *middle* term

5. Post Prop 36 (2012) denial of Romero motion

Re: Our Mutual Client, Mr. X

Dear Trial Counsel:

I have been appointed to represent Mr. X on appeal from the judgment entered after his plea of guilty or no contest.

I have received the Notice of Appeal he filed/you filed on his behalf on _____, 2014.

I assume that you consulted with Mr. X as is required of competent counsel by Roe v. Flores-Ortega (2000) 528 U.S. 470 about the possible grounds for appeal, his desire to appeal, and how to perfect an appeal, which might require a certificate of probable cause.

I see from the Notice that you (checked the box for sentencing error only and) did not apply for a Certificate of Probable Cause to appeal. The lack of a certificate would prevent me from raising any issues relating to the validity of the plea.

The time for seeking such a certificate will run out on _____, 2014. If the sentencing judge received an application for a certificate on or before that date, s/he would have the next 20 days within which to grant it (Rule 8.304(b)(2)).

I have not yet received the record in the case, so I do not know whether any grounds for challenging the plea exist. Certainly, if Mr. X made a motion to withdraw his plea, some grounds would exist.

The judge is not supposed to rule on the merits of such a challenge, but is allowed merely to decide whether or not there is "any cognizable issue for appeal which is not clearly frivolous and vexatious." (People v. Holland (1978) 23 Cal.3d 77, 84.) Some judges follow that rule and liberally grant certificates; others do not. You know your judge better than I do, so you will know what his/her practice is and whether there would be a need to remind him/her in some way of that standard.

For these reasons, I would like to ask you to think about whether there might be grounds for appeal which go to the validity of the plea, and, if there are any, to file an application for one before the above deadline. Please keep in mind that, if the judge grants a certificate *as to any issue*, then the defendant may raise *any other issue* on appeal (People v. Hoffard (1995) 10 Cal.4th 1170), so, if there is some issue as to which you think that the judge would grant a certificate, even if it is not the best issue and even if s/he might not grant a certificate on the best issue, then please apply for one on the issue or issues which you think would be most likely to result in the granting of a certificate.

Yours truly,

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

THOMAS CARSON, Petitioner, -vs- SUPERIOR COURT OF DEL NORTE COUNTY, Respondent PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	**No. _____** **(Related Appeal Pending, No. A107876)** **(Del Norte County Sup. Ct. No. CRF 04-9183)**

PETITION FOR A WRIT OF MANDATE

AND/OR ALTERNATIVE RELIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR:

Petitioner, THOMAS CARSON, alleges:

I

Petitioner is the defendant in People v. Carson, No. 04-9183 in the Del

Norte County Superior Court and the appellant in People v. Carson, No. A107876, in this Court. In No. 04-9183, petitioner was charged by an Information, filed May 12, 2004, with the following offenses:

Count 1: First degree murder (Pen. Code, § 187) of Daniel Sartuche, with personal and intentional "use" of a firearm causing GBI or death (§ 12022.53, subd. (d));

Count 2: Attempted murder (§§ 664/187) of Deputy Villareal, with personal and intentional "discharge" of a firearm (§ 12022.53, subd. (c));

Count 3: Attempted murder of Sgt. McManus, with personal and intentional "discharge" of a firearm;

Count 4: Attempted murder of Deputy Oxford, with personal and intentional "discharge" of a firearm;

Count 5: Attempted murder of Deputy Wiley, with personal and intentional "discharge" of a firearm;

Count 6: Attempted murder of Officer Tibbetts, with personal and intentional "discharge" of a firearm;

Count 7: Possession of firearm by convicted felon (§ 12021).

Petitioner was also charged with a prior "serious felony" conviction under the Three Strikes law and a prior-prison-term enhancement, based on a 1995 Del Norte County conviction of violation of Penal Code section 288, subdivision (a). (CT[1] 20-22)

[1] CT references are to the Clerk's Transcript in No. A107876.

II

According to the attached Declaration of Richard Such, the police investigation reports of the incident (including the Supplemental Report of Detective Fleshman, a copy of which is attached as Exhibit A) show that on February 21, 2004, petitioner was living in a trailer in a trailer park, and, when the park manager was informed that he was a convicted sex offender and that an allegation had been made that his nephew, when he visited the park several months earlier, had groped a 13-year-old boy, she gave him 60-days notice to move. Shortly thereafter petitioner was observed by another resident of the park to be distraught and crying. He then began to shoot a .22 rifle from the bathroom window of his trailer. The police later found 20 expended cartridge casings on the floor. Petitioner appears to have been shooting at a propane tank and a jeep, each of which were hit by four bullets. A neighbor, Daniel Sartuche, with whom petitioner had no quarrel, was also hit by four bullets. It appears that he may have been hit accidentally, because a diagram of the trailer park and trajectories of the bullets from petitioner's window and a picture taken from the window show that his body was obscured by a large bush or small tree. (See Trajectory Diagram and page 4 of Physical Evidence Examination Report attached as Exhibit B.) Numerous law enforcement officers responded to the report of the shooting and some of them took positions from which they could shoot at appellant's trailer. He

fired a number of rounds in their general direction, but, judging from the fact that several hit the ground near their feet, it is unclear whether he was shooting directly at them, with intent to hit them. At one point he said over the telephone to a mental health worker that he was going to shoot at the police so that they would shoot him. They fired a total of about 23 rounds into petitioner's trailer, striking him in the chest and abdomen and causing a major wound to his lungs. In the end, he threw his rifle out the door of the trailer and then fell out himself and was taken into custody.

III

According to records of petitioner's treatment for the gunshot injuries (which, as shown by the Declaration of Richard Such, he obtained from petitioner's trial counsel but trial counsel did not obtain until after June 16, 2004), petitioner had an "elevated blood alcohol on admission" of "214," which probably means .214 %. The doctor who performed surgery on him, Jana Jaderborg, M.D., wrote in the Discharge Summary of March 5, 2004, that the "discharge diagnoses" included "delirium tremens" and "depression with schizoaffective disorder." The surgeon also mentioned that, when petitioner was discharged from the hospital on March 5, 2004, he was allowed to take "his own medications," which were Wellbutrin and Zyprexa. (Exhibit C) According to the Declaration of Richard Such, Del Norte County Jail medical records show that, going back to October of

1995, petitioner had a "long history of lower back pain." Records of the Del Norte County Community Health Center show that between about June 2003 and February 2004 petitioner was prescribed Neurontin and OxyContin. A note by Dr. Warren Rehwaldt, M.D., of July 30, 2003, said that petitioner was suffering from "chronic pain syndrome" and was taking 3600 mg. of Neurontin and was advised to increase it to 4400 mg. and that he had "self-increased" his OxyContin, which a note of July 11, 2003 said was 40 mg. 3 times a day. Petitioner was also taking an anti-depressant, which, according to a note by Dr. Rehwaldt of March 2003, was changed from Wellbutrin to Effexor in that month.

IV

On May 5, 2004, when the matter was set for preliminary hearing, petitioner, represented by a court-appointed "contract" public defender, Rick McClendon (see CT 58), waived such hearing. (CT 19) On May 14, 2004 – at which point Mr. McClendon had spent 9 ½ hours working on the case (CT 59) – petitioner pleaded guilty "as charged" to the offenses listed on pages 1-2 above. (See transcript of change-of-plea proceedings attached hereto as Exhibit D.) Petitioner's plea was constitutionally invalid in several ways.

Petitioner was charged in Count 1 with "first degree murder" but not with *deliberate, premeditated* murder, and the record does not show that he was aware of that element of first degree murder or that he understood the

element, as required by Henderson v. Morgan (1976) 426 U.S. 637, 644-645. He did not admit a deliberate, premeditated murder. The court did not make any finding that there was a factual basis for a plea to such murder, as required by People v. Holmes (Feb. 19, 2004) 32 Cal.4th 432. No evidence was presented to the court upon which it could have made such a finding. (Exhibit D.) In fact, the police reports do not contain any evidence of a deliberate, premeditated killing. (Declaration of Richard Such.)

Petitioner was charged in Counts 2 - 6 with "attempted murder" of five individuals referred to as "Deputy," "Sgt.," or "Officer," but he was not charged with (A) attempted *deliberate, premeditated* murder, (B) attempted murder of a peace officer known to be a police officer in the performance of his duties, or (C) *express* malice aforethought, and the record does not show that petitioner was aware of or understood those elements, as required by Henderson v. Morgan, supra. An attempted second degree murder is punishable by 5, 7, or 9 years (§ 664, subd. (a)); attempted *deliberate, premeditated* murder is punishable by life imprisonment *if* those elements are charged and admitted (ibid.); attempted murder of a peace officer known to be in the performance of his duties *with express malice aforethought* is also punishable by life imprisonment (subd. (e)); attempted *deliberate, premeditated* murder of a peace officer known to be in the

performance of his duties is punishable by 15 years to life *if* those elements are admitted or found to be true. (Subd. (f).) Petitioner did not admit any of those elements. The court did not find a factual basis for them, as required by People v. Holmes, supra, and no evidence was admitted on the basis of which it could do so. (Exhibit D.) The police reports do not provide a factual basis for the deliberation, premeditation, and express malice elements. (Declaration of Richard Such.)

The court failed to make a finding that petitioner's plea was knowing, intelligent, or voluntary, as required by Boykin v. Alabama (1969) 395 U.S. 238, 243-244 , Godinez v. Moran (1993) 509 U.S. 389, 400-401, and Parke v. Raley (1992) 506 U.S. 20, 28-29.

V

The actual consequences of petitioner's plea were as follows:

Because no "special circumstances" (Pen. Code, § 190.2) were alleged or admitted, the penalty for Count 1 was 25 years to life – not death or life without the possibility of parole (§ 190, subd. (a)).

Because it was not alleged or admitted that the attempted murders were committed with express malice aforethought or that the victims were peace officers known to be in the performance of their duties (§ 664, subd. (e)), or that the attempted murders were deliberate and premeditated (subds.

(a) and (f)), the penalty for Counts 2 - 6 was 5, 7, or 9 years (subd. (a)) – not life imprisonment (subds. (a) and (e)) or 15 years to life (subd. (f). The upper term could not be imposed without a statement of reasons and a jury finding of the truth of the reasons, based on proof beyond a reasonable doubt, unless they were admitted or a jury trial was waived.

The penalty for violation of section 12021 was "state prison" - i.e., 16 months, 2, or 3 years.

Those terms were subject to being doubled under the "second strike" provisions of the Three Strikes Law. Because all of the counts arose from the same set of circumstances, the court was not required to impose consecutive terms – i.e., consecutive terms were discretionary (and required a statement of reasons). (§ 1170.12, subd. (a)(6).) Those terms were also subject to the "one third the middle base term" rule, and it has been held that the firearm enhancement for consecutive terms is also subject to that rule. (People v. Moody (2002) 96 Cal.App.4th 987.)

Hence, the maximum punishment to which petitioner was, in fact, exposed was:

Count 1: 50 years to life for murder, plus 25 years to life for the firearm enhancement;

Count 2: 14/3 years for attempted murder, plus 20/3 years for the firearm enhancement (a total of 34/3 or 11 1/3 years);

Count 3: 14/3 years for attempted murder, plus 20/3 years for the firearm enhancement (a total of 27/3 or 11 1/3 years);

Count 4: 14/3 years for attempted murder, plus 20/3 years for the firearm enhancement (a total of 34/3 or 11 1/3 years);

Count 5: 14/3 years for attempted murder, plus 20/3 years for the firearm enhancement (a total of 34/3 or 11 1/3 years);

Count 6: 14/3 years for attempted murder, plus 20/3 years for the firearm enhancement (a total of 34/3 or 11 1/3 years);

Count 7: 4/3 years

Plus 1 year for the prior prison term. The maximum aggregate term would be 133 years to life. On the 50-to-life sentence for first degree murder, petitioner would not be eligible for any reduction of the sentence for good time or work time credits. (Pen. Code, § 190, subd. (e).) He would be eligible for such credits for the enhancement and on the attempted murder counts, but, because some of the offenses were "violent felonies" under Penal Code section 667.5, subdivision (c), he would be eligible only for a 15% reduction, under Penal Code section 2933.1, and, therefore, would have to serve a minimum of 50 years, plus 85% of the remaining 83 years, which is a total of 120 ½ years.

VI

The advice petitioner received as to the consequences of his plea was inaccurate, incomplete, misleading, and confusing:

First, the prosecutor told him that the maximum for the murder in Count 1 would be "life without" but that "the realistic expectation is 25 to life." Then the court asked if petitioner could receive "life without possibility of parole" ("LWOP"), and the prosecutor answered that the three possibilities were death, LWOP, and 25 to life, but that the parties agreed that this was not a capital case. (Exhibit D, p. 3.) The first reference to "life without" was incorrect, because, since no "special circumstances" were alleged, that was not a possible punishment. The second reference to LWOP informed petitioner only that LWOP was a "possible" penalty, like death, not that it was a penalty which would be imposed. The reference to the "realistic expectation" informed petitioner that *the maximum punishment he could expect would be 25 years to life*.

Second, after the firearm enhancements under section 12022.53 were mentioned (Exhibit D, pp. 4-6), the prosecutor said "he's got the 25-year enhancement under 12022.53," which must have been a reference to the one firearm enhancement to Count 1 under subdivision (d) of that section. *This failed to inform petitioner (A) of the 20-year enhancements to Counts 2 - 6 under subdivision (c) or (B) that those enhancements were mandatory.*

Third, although the "strike" prior was mentioned (Exhibit D, p. 6), the only reference to its effect on petitioner's sentence was the prosecutor's

later obscure statement, in response to the court's question about "exposure on the secondary terms," that petitioner "reaches the exposure on the strike, doubling of whatever the Court does – does in fact impose ...." (P. 8.) *This did not have the effect of informing petitioner that his admission of the prior would require the doubling of the terms on all of the counts.*

Fourth, the prosecutor stated that petitioner had "up-to-life terms for the attempted murders." (Exhibit D, p. 9.) It is not clear what he meant by "up-to-life" but a reasonable interpretation would be a straight "life" term. This was incorrect because there is no such punishment for attempted murder without deliberation and premeditation (§ 644, subd. (a)) or of a person known to be a peace officer in the performance of his duties and with express malice aforethought, and, as shown above, the correct punishment was 5, 7, or 9 years. Then the court said to petitioner that "you can be sentenced to – to – consecutive terms of 25 years to life on Counts II, III, IV, V, and VI as to each of those counts ...." (P. 9.) This was not the correct punishment. Then, the court asked petitioner if he understood what was meant by "consecutive" (p. 10), *but did not explain the word to him, and, as was shown by the hearing on petitioner's motion to withdraw his plea, he thought it meant "everything ran together."* (Exhibit E, pp. 8, 15.)

Fifth, petitioner was again misinformed that he could be sentenced

to either LWOP or 25 years to life. (Exhibit D, pp. 10, 13, 14)

In sum, although petitioner was informed in various ways that he could be sentenced to longer terms than he could be sentenced to, he was not informed of mandatory enhancements, required doubling of terms, the significance of consecutive terms, or the limitations on reduction of terms, and he was led to believe that he would probably receive one term of 25 years to life.

VII

The sentence petitioner actually received on September 9, 2004, was different from and greater than he was led to believe and was actually about 2 ½ times greater than he *could* legally receive:

Count 1: 50 years to life for murder, plus 25 years to life for the firearm enhancement (a total of 75 years to life);

Count 2: 30 years to life for attempted murder, plus 20 years for the firearm enhancement (a total of 50 years to life), consecutive;

Count 3: 30 years to life for attempted murder, plus 20 years for the firearm enhancement (a total of 50 years to life), consecutive;

Count 4: 30 years to life for attempted murder, plus 20 years for the firearm enhancement (a total of 50 years to life), consecutive;

Count 5: 30 years to life for attempted murder, plus 20 years for the firearm enhancement (a total of 50 years to life), consecutive;

Count 6: 30 years to life for attempted murder, plus 20 years for the firearm enhancement (a total of 50 years to life), consecutive;

Count 7: 6 years, concurrent.

Plus one year for a prior prison term, a total of 326 years to life.

Thus petitioner's guilty pleas were unconstitutional, in that the record failed to "'disclose that the defendant voluntarily and understandingly entered his guilty plea'" in that the court failed to "make sure he has a full understanding of what the plea connotes and of its consequences." (Boykin v. Alabama, supra, 395 U.S. 238, 243-244 [emphasis added].)

VIII

On July 1, 2004, petitioner filed a Motion to Withdraw Guilty Plea. (CT 33) The grounds for the motion appear in a Motion for New Trial [*sic*], Defendant's Declaration, [and] Points and Authorities in Support," filed July 27. (CT 36-37) They appear to be that (A) prior to *petitioner's arrest*, he was taking OxyContin, Neurontin, Effexor, Wellbutrin, and Zyprexa[2] and (B) at the time of *petitioner's plea*, he was suffering from chronic back pain, pain from the gunshot injuries, burning pain in his abdomen, depression, and a hearing impairment, (C) he was not thinking clearly and just wanted to get through the proceedings, and (D) he did not understand that he could receive a sentence of more than 25 years to life and believed that "all counts would run together for a single sentence of 25 years

[2] Zyprexa is a trade name for olanzapine, which is an antipsychotic and neuroleptic, used in cases of schizophrenia and acute manic episodes in bipolar disorder. (Mosby's Nursing Drug Reference (2003) 725.)

to life." (CT 36-37)

IX

At the hearing on the motion to withdraw plea on August 26 and September 1, 2004, appellant presented his own testimony and that of a physician's assistant, Howard Crow, who worked for the county jail.

> Mr. Crow testified that during the incident, which occurred on February 21, 2004, petitioner suffered major injuries to his chest and abdomen. According to Mr. Crow, petitioner was in intensive care for about twelve days. (RT 8/26/04, p. 8.) A lot of tissue had to be removed from his chest, including a couple of ribs and one lobe of his lung. (P. 10) He had an exit shot gun wound that was healing very slowly. (P. 8.) Mr. Crow said that petitioner was suffering before this incident from alcoholism and a "psychoaffective disorder" which was "related to problems with reality, orientation, and maintaining healthy relationships with human beings." (P. 12) Petitioner acknowledged "depressive type feelings based on the amount of trouble he was in." (P. 13.) He had been taking Wellbutrin for depression. (P. 8.) After his surgery and hospitalization, he was taking Naprosyn, Neurontin, Codeine, and "Hydrocortisone" [*sic*][3] for

[3] Probably "Hydrocodone." "Hydrocortisone" is an anti-inflammatory which has side-effects on the cardio-vascular system and would probably be contraindicated for a person recovering from trauma. "Hydrocodone" is an analgesic sold as

pain, as well as a number of other medications, but by May 14 he had been weaned off the narcotic medication, except he was still taking Tylenol with Codeine. (Pp. 8-9) At the time, he was also taking Zyprexa for his schizoaffective disorder, and that drug had side-effects of "somnolence, agitation, insomnia, hostility, and anxiety." Neurontin, which is used both as a pain medication and as a psychotropic medication, had similar side-effects, as well as confusion. (Pp. 9, 11, 20)

Petitioner testified at the hearing on the motion to withdraw plea that he had been hearing voices for about two years. (RT 9/1/04, p. 8) He had been treated at a mental health clinic "for depression and schizo [*sic*]." (P. 9) Prior to the incident of February 21, 2004, he had been on medication for depression, sciatic nerve damage, and bladder dysfunction. (Pp. 5-6) He suffered the nerve damage in 1985, and it had "lighted up" after a car accident in 1992 and had caused constant pain since then, for which he had taken various medications. (Pp. 9-10) For the six months preceding the incident, he had taken the notorious OxyContin. (See fn. 3 supra.) At the time of the incident, he was taking OxyContin and several other

---

Vicodin. (Mosby's Nursing Drug Reference (2003) 493-495.) It is not to be confused with "Oxycodone" (sold as OxyContin). (See Adler, "In the Grip of a Deeper Pain," Newsweek (Oct. 20, 2003), available >http://opioids.com/oxycodone/oxycontinrev.html.)

medications, including Naproxen and Neurontin, 600 mg.[4] per day of the latter and more than was prescribed of the former; he built up a tolerance for the pain medication and had to keep upping the dosage. (Pp. 6, 11, 13) Petitioner had sciatic nerve pain all the time. (Pp. 6-7) He was still taking Neurontin, Naproxen, and codeine. (P. 7.) He was not thinking clearly on the day of his plea, May 14, but just wanted to get it all over with. The medications affected his thinking: "My mind tends to wander." (Pp. 8, 16) That day his chest and stomach were "burning." (P. 16) The jail's policy was not to provide narcotics: "They don't care if you're in pain or not." Petitioner would take showers as hot as he could stand it to reduce the pain. (P. 14) On the day of his plea, his pain was twice as bad as it had been a month or two earlier. (P. 18) Petitioner did not know what the medication was doing to him but he said that he could not "keep my mind focused on – you know – my mind – you know – from wondering off." (P. 16)

Petitioner also testified that, when he received the probation report, he was surprised: he thought that the maximum sentence he would get was 25 years to life and that all the counts were going to run concurrently. (Pp. 9, 14) He did not understand the doubling of the terms and the 20-year

---

[4] The medical records show that, actually, petitioner was prescribed 3600 mg. of Neurontin daily and was advised to increase it to 4400 mg. In the jail, he was started on 300 mg., three times a day. (RT 8/26/04, p. 15.)

enhancements on top of that because he thought everything as going to run together. (Pp. 14-15) When the judge said that the terms would be "consecutive," he thought "consecutive meant it all ran together ...." (Pp. 15-16) "I thought I did know the meaning of consecutive but I had it mixed up with concurrent." (P. 17)

The court denied petitioner's motion to withdraw his plea, ruling that he fully understood what he was doing, that he had been asked whether he was taking any medication and whether it affected his ability to think clearly,[5] and whether he understood the rights that he was giving up and that he could be sentenced to life without the possibility of parole. (Pp. 20-21) The court concluded that, since petitioner was aware that he could be sentenced to LWOP,[6] that made any confusion on his part about concurrent and consecutive sentences irrelevant. (P. 21)

X

The facts of which the court became aware at the hearing on petitioner's motion to withdraw his plea on August 26 and September 1, 2004, and at the

---

[5] The court asked only if petitioner were taking medication that affected his ability to think and did not ask whether he was taking *any* medication or what it was. (Exhibit D, pp. 14-15)

[6] It is true that petitioner was mistakenly informed that he could be sentenced to LWOP, but in the same breath the prosecutor informed him that "the realistic expectation is 25 to life." (Exhibit D, p. 3.)

sentencing hearing of September 9, raised a reasonable doubt about petitioner's competence to stand trial, under a number of cases, including Godinez v. Moran, supra, 509 U.S. 389, Moran v. Godinez (9th Cir. 1992) 972 F.3d 263,[7] and United States v. Howard (9th Cir. 2004) 381 F.3d 873.[8] In the present case, the same

---

[7] In Moran, the Ninth Circuit panel, on review of the U.S. District Court's denial of habeas corpus, held that the state trial court's failure to conduct a competency hearing at the time of the change-of-plea was a denial of due process. The factors which should have raised a doubt as to Moran's competence were: (1) Moran's suicide attempt (i.e., his shooting himself after he shot his ex-wife), (2) his depression and desire to plead guilty and prevent the use of mitigating evidence at sentencing, (3) his terse responses to the court's inquiry as to his understanding of what he was doing, and (4) the fact that he was on medication. (972 F.3d at p. 265; see 509 U.S. at p. 394, fns. 3, 4.) The court went on to hold that the record did not support a finding that Moran was competent *under a higher standard applicable to guilty pleas*. This *latter holding* was reversed by the United States Supreme Court in Godinez v. Moran, supra. On remand to the Ninth Circuit, that court, in Moran v. Godinez (9th Cir. 1995) 57 F.3d 690, *adhered to its holding* that the trial court, at the time of the change-of-plea proceedings, should have entertained a doubt as to Moran's competence to stand trial, because of the four factors mentioned above: his use of medication, his suicide attempt, his desire to fire his attorneys and plead guilty, and, hence, his desire to die. The failure to hold a contemporaneous competency hearing was a violation of his right to procedural due process. (57 F.3d at p. 695.)

[8] The present case is quite similar to Howard, where the defendant pleaded guilty to several drug offenses. At the time of the plea, he was asked whether he was "under the influence of or affected in any way by any alcoholic beverage or narcotic drug of any kind." He responded "no" but hesitated, and on the court's inquiry said that he was taking pain medication (for an old leg injury), referred to by him as "Percocet" and by the judge as "Percodan," which the judge characterized as "pretty tough stuff." Percocet and Percodan are similar drugs, both containing oxycodone, "an opiod with attributes similar to morphine." (04 C.D.O.S. at p. 7839, fn. 2.) On his habeas petition under 28 U.S.C. § 2255, the District Court denied an evidentiary hearing. A certificate of appealability was not issued as to a "direct" claim that the appeal should be vacated on the ground that the court made an inadequate inquiry as to the defendant's competence but only on

factors are present which raised a reasonable doubt about Moran's competence to stand trial and plead guilty: (A) suicide attempt, (B) depression, (C) desire to plead guilty and not fight the death penalty, and (D) medication. There was an additional factor: (E) petitioner's pre-existing mental illness.

(A) **Attempted suicide.** Petitioner's whole encounter with the

---

the "indirect" claim that his attorney was ineffective for permitting him to plead guilty when he was incompetent. (Id. at p. 7839, fns. 3 and 5.) The 2-judge majority held that there was sufficient evidence to warrant an evidentiary hearing on this claim. (Id. at pp. 7841-7842.) The dissenting judge "share[d] the majority's concern about the inadequacy of the district court's inquiry" but doubted that the attorney was ineffective. The majority held:

> Both Percocet and Percodan contain the active ingredient oxycodone, an opioid with attributes similar to morphine and which may impair the mental and physical abilities required for the performance of potentially hazardous tasks. Physician's Desk Reference 1245-1246 (2004) [fn. omitted]. The most frequently observed adverse reactions include lightheadedness, dizziness, sedation, nausea and vomiting; other adverse reactions include euphoria and dysphoria. Id. at 1246. It is at least arguable that a normal dose leading to some of these reactions would have seriously interfered with Howard's ability to make a reasoned choice among the alternatives presented to him. See Miles [v. Stainer], 108 F.3d [1109] at 1112 [99th Cir. 1997)]; Dziurgot [v. Luther], 897 F.2d [1222] at 1225 [1st Cir. 1990]. The district court – although acknowledging the "pretty tough" nature of the drug – did not inquire about the dosage of Percocet/Percodan, when Howard had taken it, whether Howard had mixed the Percocet/Percodan with non-narcotic drugs and, most importantly, its effects on Howard's competence. Absent such information, we cannot conclusively determine whether or not the Percocet/Percodan adversely affected Howard's competency to plead guilty.
>
> (381 F.3d at p. 880.)

police, leading to the charges of attempted murder, was an attempt to get the police to shoot petitioner – i.e., attempted "suicide by police." Petitioner was seen earlier in the day, crying and distraught. He said he was going to the hospital and would not be getting out. (Probation Report filed June 25, 2004, p. 6.) Petitioner talked to a mental health worker during the stand-off and said that he was going to start shooting at the cops to get them to "take me out" because he did not have anything to live for. (P. 6.)

(B) **Depression**. At the hearing on petitioner's motion to withdraw his plea, he presented the testimony of the physician's assistant Howard Crow as to his depression and medication for depression. (RT 8/26/04, p. 8.) Mr. Crow also testified that petitioner was suffering before this incident from alcoholism and a "psychoaffective disorder" which was "related to problems with reality, orientation, and maintaining healthy relationships with human beings." (P. 12) The Probation Report filed June 25, 2004, stated that petitioner suffered from depression. (P. 8.) Petitioner testified at the hearing on the motion to withdraw plea that he had been hearing voices for about two years. (RT 9/1/04, p. 8) He had been treated at a mental health clinic "for depression and schizo [*sic*]." (P. 9)

(C) **Desire to plead guilty and not fight death penalty.** At the change-of-plea hearing, petitioner said that he had told his lawyer that, if

the prosecutor dropped all the charges but first degree murder, he would "plead to the death penalty." (Exhibit D, p. 12.)

(D) **Medication**. The main factor was not only the powerful pain medication, including narcotic pain medication that petitioner was taking at the time of his plea (Tylenol with Codeine), which had side effects of somnolence and confusion, but also the pain which he continued to suffer in spite of the medication, the combination of which interfered with this ability to think clearly.

(E) **Mental illness**. There was a factor in this case additional to those found to raise a reasonable doubt in Moran, that petitioner had a history of mental illness, consisting of his treatment at a mental health clinic for "schizo" (-affective disorder?) and that he heard voices, which is, of course, a symptom of schizophrenia.

These factors, individually and collectively, raised a doubt about petitioner's competence to stand trial, which required the court to order proceedings under Penal Code section 1368 to resolve.

XI

Petitioner was denied his right under the United States and California Constitutions by the failure of his court-appointed attorney adequately to investigate defenses to the mental elements of the crimes – particularly to the

"deliberation" and "premeditation" elements of the crime. On March 24, 2004, the attorney obtained the appointment of a psychologist, Dr. Edwin Jenesky, Ph.D., who spent 1 hour interviewing petitioner and testing him. (CT 30) However, the psychologist did not have petitioner's medical records and, thus, had no documentation as to the heavy doses of Neurontin and OxyContin which petitioner was taking and as to the facts that his blood alcohol was "214" upon admission to the hospital and that he was diagnosed as suffering from delirium tremens. Dr. Jenesky's bill shows that he spent 1.5 hours reviewing the "PD" file, 1 hour interviewing petitioner in jail, 0.5 hours scoring and interpreting a personality test, and a little more than 2 hours writing a report. (CT 30) The attorney's bill states that he met with petitioner for at most 2 hours prior to his guilty pleas (some of that time concerned with securing petitioner's false teeth and glasses and copy work), and that on May 12, 2004 (2 days before petitioner pleaded) the attorney spent a total of 1.5 hours conferring with the DA about the plea, conferring with petitioner about it, and conferring with Dr. Jenesky, the last of which is likely to have been for less than 0.5 hours. (CT 59) The attorney did not spend *any* time obtaining or reviewing medical reports. Thus, both the psychologist and the attorney were probably ignorant of the high doses of medication and alcohol which petitioner had consumed at the time of the shooting and the effect of these substances on his mental condition. This would be

ineffective assistance under any number of cases, including In re Sixto (1989) 48 Cal.3d 1247, 1265; In re Cordero (1988) 46 Cal.3d 161, 187; People v. Ledesma (1987) 43 Cal.3d 171, 221-224; People v. Mozingo (1983) 34 Cal.3d 926, 934; and People v. Frierson (1979) 25 Cal.3d 142, 163-164.

XII

Petitioner's attorney prematurely, on September 1, 2004 (the date on which the court denied the motion to withdraw plea but before petitioner was sentenced on September 9), orally moved for a Certificate of Probable Cause to appeal, which the court denied. (CT 48) Then, after petitioner was sentenced, the attorney filed a written application, seeking a certificate on the same grounds as the motion to withdraw plea but mentioning also that petitioner's confusion was caused by "mental illness." (CT 51-53) This application was also denied. (CT 50) Petitioner's undersigned attorney filed a renewed application on or about November 8, 2004, accompanied by a letter which pointed out to the trial judge that the deadline for granting or denying a Certificate would be November 28, 2004. (Exhibit F.) The grounds on which a Certificate was sought by this application are stated in the next paragraph (subparagraphs A - J). On December 10, 2004, the attorney inquired as to the status of the application and was informed by the judge's secretary that it was on his desk. On December 14, 2004, she telephoned the attorney and told him that the judge would not be granting a

Certificate. He has not, however, received any written ruling on the application.

XIII

Petitioner believes that the following reasonable constitutional, jurisdictional and other grounds, going to the legality of the proceedings, exist, such that a Certificate of Probable Cause should be issued:

A. Petitioner was not properly advised as to the consequences of his plea, which, therefore, was involuntary – i.e., not knowing and intelligent.

B. Petitioner was denied the effective assistance of counsel in that he obviously was not correctly advised by his attorney of the punishment for the crimes he admitted, since the attorney did not object when petitioner was erroneously advised of the punishment at the time he pleaded guilty or when petitioner was sentenced to erroneous terms.

C. The court failed to find a factual basis for the plea and there was no factual basis for the plea, particularly as to the elements of deliberation and premeditation.

D. The record of the plea fails to show that petitioner was aware of the nature of the charges – e.g., that they required deliberation and premeditation and what those concepts meant.

E. Petitioner was denied his right to the effective assistance of counsel in that his court-appointed attorney failed to inform him that to be

guilty of first degree murder or attempted first degree murder he had to have deliberated and premeditated the killing.

F. Petitioner was denied his right to the effective assistance of counsel in that his attorney advised him to plead guilty to first degree murder and attempted murder, in spite of the lack of evidence that he deliberated and premeditated the killing and that he intended to kill the alleged victims of the attempted murder, probably because the attorney mistakenly believed that petitioner was exposed to a possible death or LWOP sentence and because he failed to conduct adequate legal and factual investigation.

G. Petitioner was denied due process of law in that the court was presented with evidence which raised a reasonable doubt about his competence to stand trial, and the court failed to conduct a hearing to resolve those doubts.[9]

H. The court failed to find that petitioner's plea was intelligent and voluntary.

I. The court erred in denying petitioner's motion to withdraw his plea.

---

[9] In addition, petitioner was denied the effective assistance of counsel by the failure of his attorney to present evidence that he was incompetent to stand trial, such as medical records that he had a history of hearing voices.

J. Petitioner was denied his right to the effective assistance of counsel because his attorney failed to conduct an adequate investigation of defenses based on mental illness.

K. Petitioner was denied his right to the effective assistance of counsel because his attorney failed to conduct an adequate investigation of defenses based on drug and alcohol intoxication.

XIV

Petitioner has no other plain, speedy, or adequate remedy at law. No appeal lies from the order of respondent superior court denying his request for a Certificate of Probable Cause, and no appellate review of the above grounds for appeal is available unless the Certificate is issued.

WHEREFORE, petitioner prays that:

1. A peremptory writ of mandate be issued, directing respondent superior court to vacate its order denying petitioner's request for a Certificate of Probable Cause, and entering in its place a new order issuing the Certificate; or that

2. An alternative writ of mandate be issued, directing and requiring real party in interest to show cause before this Court why the relief prayed for should not be granted; and that

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

and just.

Dated: January 14, 2014

_____
RICHARD SUCH
Staff Attorney
FIRST DISTRICT APPELLATE PROJECT
Attorneys for Petitioner
THOMAS CARSON

VERIFICATION

I, RICHARD SUCH, declare:

I am an attorney admitted to practice law in the State of California. I have been appointed by the Court of Appeal to represent petitioner herein, who is confined at Wasco State Prison.

I am authorized to file this petition for writ of mandate on petitioner's behalf. I am making this verification because petitioner is incarcerated in a county different from that of my law office.

I have read the foregoing petition for writ of mandate and declare that the contents of the petition are true to the best of my knowledge.

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

Executed this 28th day of December, 2004, at San Francisco, California.

_____
RICHARD SUCH
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

The relevant procedural facts are stated in Paragraphs I, IV, V, VII, VIII, and XII of the above Petition.

STATEMENT OF FACTS

The relevant facts are stated in Paragraphs II, III, IX, and XI of the above Petition.

STATEMENT OF THE LAW

Petitioner is entitled to a certificate of probable cause to appeal. (Pen. Code, § 1237.5.)

As petitioner's claim seeks, in effect, to set aside his plea, a certificate of probable cause is required. (People v. Panizzon (1996) 13 Cal.4th 68.) The obtaining of a certificate, however, is a purely procedural requirement (People v. Mendez (1999) 19 Cal.4th 1084, 1095), whose sole function is to "promote judicial economy by screening out wholly frivolous guilty and nolo contendere appeals, and to do so in a regular and timely fashion." (Ibid.) It is not a vehicle by which the trial court may adjudicate the merits of a nonfrivolous issue.

As the Supreme Court has repeatedly said, "'The impact of section 1237.5 relates to the procedure in perfecting an appeal from a judgment based on a plea of guilty, and not to the grounds upon which such an appeal may be taken.' (People v.

Ribero [(1971) 4 Cal.3d 55] at p. 63, fn. omitted.)" (People v. Hoffard (1995) 10 Cal.4th 1170, 1178.) The statute does not allow a trial court to "determine whether its own actions gave cause for reversing the judgment" (ibid.), but only to determine "'whether the appeal is clearly frivolous and vexatious.'" (Ibid.)

If the appeal is not clearly frivolous and vexatious, it is an abuse of discretion for the trial court to withhold the certificate. Mandamus will lie to compel the trial court to issue it. (Hoffard, supra, at p. 1180, citing In re Brown (1973) 9 Cal.3d 679.)

As petitioner shows in Paragraphs IV, VI, X, and XI of the above Petition, there are at least the *eleven* nonfrivolous issues listed on pages 23-25, which go to the legality of the proceedings.

CONCLUSION

For the foregoing reasons, the issues petitioner seeks to raise on appeal are meritorious. This Court should issue its writ of mandamus, directing the trial court to grant a certificate of probable cause under section 1237.5.

Dated: January 14, 2014 Respectfully submitted,

_____

RICHARD SUCH
Staff Attorney
FIRST DISTRICT APPELLATE PROJECT
Attorneys for Petitioner
THOMAS CARSON