FDAP

STATE HABEAS CORPUS

Preparing and Presenting Simple Habeas Petitions To Supplement Related Claims Raised on Direct Appeal

Webinar, December 9, 2021

FDAP Staff Attorneys Shannon Chase and Lauren Dodge

Introduction

- Goals of today's webinar:
  - The basics: The what, when, how and why of state habeas practice
  - Working with trial counsel
  - Compiling and filing the petition and exhibits
  - Overview of appellate court habeas process and procedures
  - Getting project approval (when necessary)
  - Getting funding
  - Getting paid

Important note: This webinar is geared toward practice in the First District. Polices may vary in other districts. If your case is outside the First District, consult your project.

Grounds: Penal Code § 1437

- Presentation of false evidence "at a hearing or trial relating to his or her incarceration"
  - Discredited expert testimony = false evidence (§ 1473, subd. (e)(1), *In re Richards* (2016) 63 Cal.4th 291, 309-311)
- False physical evidence that was "material factor directly related to the plea of guilty"
- New evidence "of such decisive force and value that it would have more likely than not changed the outcome of the trial"
- Where "competent and substantial expert testimony relating to intimate partner battering and its effects .... was not presented" (§ 1473.5)
- Grounds "not exhaustive" (§ 1473, subd. (d))

Most common habeas claim = IAC/*Strickland* Error

"[W]here the appellate record does not reveal whether counsel had a legitimate reason for a litigation choice, we generally reserve consideration of any ineffective assistance claim for possible proceedings on petition for writ of habeas corpus." (*People v. Snow* (2003) 30 Cal.4th 43, 95)

A habeas petition is properly joined with a direct appeal in order to establish a Sixth Amendment violation. (*People v. Pope* (1979) 23 Cal.3d 412, 426-427, fn. 17.)

Omissions and Failures That Can = IAC

- Failure to investigate/interview witnesses
- Failure to consult with or present expert testimony
- Failure to present mental health or other defenses
- Failure to make proper motions or objections
- Misadvising client about consequences of plea
- Failure to explain risks of rejecting plea
- Failure to strike a biased juror
- Making unfulfilled promises in opening statement
- The list goes on…

Other grounds (where facts to support claim are outside record on appeal)

- Prosecutorial/judicial misconduct in jury selection *(In re Freeman* (2006) 38 Cal.4th 630)
- Juror misconduct (*In re Carpenter* (1995) 9 Cal.4th 634)
- *Brady* violations (*In re Pratt* (1999) 69 Cal.App.4th 1294)
- Government intimidation of defense witnesses (*In re Martin* (1987) 44 Cal.3d 1)
- "False Evidence … substantially material or probative …" including evidence "repudiated by expert or "undermined by later scientific research." (§ 1473(b)&(e)(1); *In re Richards* (2016) 63 Cal.4th 291)
- "New Evidence … of such decisive force and value that it would have more likely than not changed the outcome of the trial" (§ 1473(b)(3))
- Prosecutorial misconduct in closing argument (*People v. Jones* (2003) 30 Cal.4th 1084, 1110)
- Unauthorized sentence
- Jury instructions involving constitutional issues (*In re Wagner* (1981) 119 Cal.App.3d 90, 109)
- Correct an unauthorized sentence (*In re Harris* (1993) 5 Cal.4th 813, 839.)

Appellate Counsel's Duty To Pursue Habeas

- There is NO duty to investigate or prosecute a habeas petition. (*In re Clark* (1993) 5 Cal.4th 750, 783, fn. 20)

BUT

- If counsel "learns of such facts," which could support a habeas petition, counsel has the "ethical obligation to advise their client of the course to follow to obtain relief, or to take other appropriate action." (*Ibid.*)

Why Appellate Counsel *Should* Pursue Habeas

- For many clients, this is the only chance for a counseled petition; few families can afford retained habeas counsel
- Pro per state petitions almost never get OSC and appointment
- For pro per defendants, there is a huge risk of procedural default and even with appointment on federal petition (rare), claims will likely be inadequately exhausted and developed
- When filed as companion to direct appeal, can help sway the court to go your way on appeal

FDAP

Pre-AOB Due Diligence

Steps and strategies after appointment

Record on Appeal: First Things First

- Review trial attorney and client information sheets
  - FDAP solicits information from the client and counsel about potential issues, including habeas issues
  - Clients often list IAC as a potential ground. Make note and ask your client follow up questions
  - Note potential issues on appeal listed by trial counsel and keep in back of your mind during record review
- Quickly peruse the record for motions made by trial counsel to get a sense of counsel's performance. No motions (or boilerplate motions) = red flag

Contact the client

- When you initially write client, ask about:
  - evidence or witnesses not presented
  - general impressions of the case
  - relationship with trial counsel and any conflicts
  - important discussions with counsel, including plea offers or outcome promises
  - anything that occurred *off record* that you should know about
  - if any confidential (medical, etc) documents need to be obtained, send a confidentiality waiver and a HIPAA (Health Insurance Portability & Accountability Act) release (sample included in materials)

Contact Trial Counsel And (if necessary) Obtain File

- First contact (phone or email) should be casual
- Consider telling counsel that you have not read the record, which might allay defensiveness
- Inquire about any juror misconduct, *Brady* violations, deals offered/accepted by witnesses
- Ask about anything that occurred outside the record that you should know about
- Inquire about voir dire/opening statements to assess whether to augment
- Need to see the file? If you live close to trial counsel's office, offer to pick up portions of the file or meet at local court
- Alternatively, ask for electronic file
- ⚠Document all communication with trial counsel in case you need to set forth a timeline in a supportive declaration⚠

Raising IAC: It's not personal

- Remember: We have an ethical duty to assure the effective assistance of counsel and to seek justice
- Defense counsel has a duty to cooperate (State Bar Formal Opinion # 1992-127)
- As a general rule, lawyers normally are **not** at risk for bar sanctions merely because they made a mistake
- Cal Bar concerned with "grossly incompetent representation" or "incompetent representation." (Bus. & Prof. Code, §§ 6068, subd. (o)(7) [self-reporting duty] and 6086.7, subd. (a)(2) [court reporting duty])
- Reality: Vast majority of cases: no state bar sanction for IAC finding

Review the Record With Habeas in Mind

- What did the trial look like? What *could* the trial have looked like?
- What were the motions, defenses, instructions?
- Was there lay or expert witness or evidence mentioned on or off the record that never materialized?
- Where there defenses not presented, leads not followed, questions unanswered? What players in the story *didn't* testify?
- Any comments, notes, or on/off the record discussions pointing to juror/judicial/attorney bias against the defendant?
- Did any prosecution expert witness testify to a scientific opinion where the science is unsettled or still evolving?
- Any later deals or rewards given to witnesses?

Review Trial Counsel's File (or select portions of file)

- Was there evidence that was not presented but should have been?
- Is there any evidence that should have been produced by the prosecution but was not?
- Are there witnesses who should have been, but were not interviewed?
- What paths were not taken and which rocks left unturned?
- Review trial counsel's notes to assess awareness of issues and any tactical reasons for not pursuing defenses
- Review recordings of critical witness statements to compare to written police summaries

Review Trial Exhibits

- Part of the appellate record, but may be necessary to review
- General rule: You want to see/hear what the jury has seen/heard
- Any time the jury is shown an exhibit and the parties urge the jury to interpret it in conflicting ways, you need to review it yourself
  - Example: Where there's an issue about identity, and the parties dispute whether the client resembles the person in a surveillance video

Contact Potential Witnesses

- Consider reaching out to a *cooperative* witness
  - Family and friends
  - Defense expert retained but not called
- For a cooperative witness, prepare draft declaration and send it for editing/signature. (If the witness later refuses to cooperate, you may need to file your own declaration regarding what was said)
- ⚠You can end up as a witness! If possible, the better practice is to have an investigator contact and obtain the declaration in case a witness turns uncooperative⚠

Follow the News and Conduct Online Searches

- Google, Westlaw, Lexis searches for police officers, pathologists, other prosecution experts
- Review medical and forensic publications
- Check online court dockets and databases
- Newspaper articles on police misconduct by officers involved or noted problems or scandals with government agencies/employees
- Keep up to date on case law, talk to other practitioners, subscribe to listservs and forums
- Be on the lookout for expert testimony on subject you hadn’t seen before

Hire an Investigator (Project authorization required)

- For witnesses who have disappeared, are homeless or uncooperative
- FDAP can pre-authorize up to $900 ($125/hour for expert; $65/hour investigator)
  - Counsel must file ex parte application with the court for anything **exceeding $900** or those hourly rates
- Ask project for referrals; it can be challenging to find an investigator who will accept our rates, which are lower than many counties for trial work (i.e. Alameda pays $75/hour for investigators)
- Save time/money by preparing needed declarations
- TIP: For basic companion habeas based on IAC, likely unnecessary to hire an investigator

Consult an Expert

- Evidence Code section 720: Expert is a person who “has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates”
- Common uses:
  - To contradict testimony/opinion from a prosecution expert
  - To explain a concept or offer an opinion
  - To conduct a mental health evaluation of your client

Tip: For basic companion habeas based on IAC, likely won’t be necessary to hire your own expert

Habeas on the cheap: Alternatives when you can't get a declaration or expert authorization

- Be creative and resourceful!
- Recycle. Consider using expert testimony or declarations from other trials or habeas petitions (one of your own cases, or obtain transcript from a case where you know it was presented)
  - Works well where testimony not case-specific (i.e. unreliability of eyewitness ID in general)
  - Support claims with journal articles, criminal justice studies, etc.
- RJA habeas: Check the OSPD sharepoint site for studies, statistics, expert declarations specific to your county

FDAP

Post-AOB Due Diligence

Steps and strategies

The petition as a work in progress

The petition can be broken down into three parts:

1) The Allegations
2) The Memorandum of Points and Authorities
3) The Exhibits: Purpose of habeas is to produce evidence not found in the record on appeal

- *Post-AOB focuses on setting out factual allegations and preparing/gathering exhibits in support*
- For IAC claim raised in AOB, the Memo of Ps & As in petition can be the same as the AOB, **but indicate what is new**
- Later add supporting facts from the compiled and paginated exhibits and make necessary edits

Initial Allegations

- Allegations that begin the petition: See the Habeas Petition Checklist at the end of SDAP attorney Jonathan Grossman's Elements of a Habeas Petition (included in materials)
- These requirements include:
- Petitioner's name and the person who is restraining the petitioner (i.e., Warden) (PC §1474)
- The Court order resulting in restraint (§ 1473)
- Petitioner is illegal restrained (§ 1473; 1474)
- The petition is timely
- The court has jurisdiction (Cal. Const., art. VI, § 10)
- There is no plain, speedy and adequate remedy at law, i.e., claim requires documents outside the appellate record or requires expeditated resolution)
- No other habeas petition has been filed (or explain if there was) (§ 1475)
- Legal claim for relief and factual allegations (§ 1474)
- Prayer for relief (§ 1474)
- Verification by attorney (§ 1474)

Legal Claim and Supporting Factual Allegations

- For IAC claim: Set out the *Strickland* standard, stating a violation of the Sixth and Fourteenth Amendments
- Set out factual allegations that prove deficient performance and prejudice
  - Avoid bare conclusions: Counsel was deficient for failing to object on x basis
  - Compound statements are more easily denied without admitting anything
  - Use facts and explain in Steps: 1. Counsel did not object to x; 2. Counsel has a duty to make all necessary objections … (citation); 3. Trial counsel was deficient for failing to object to x
  - Keep in mind: If the court issues an Order to Show Cause, the AG will have to admit or deny each of the factual allegations

Exhibits to Support Factual Allegations: Declarations

- Courts require competent proof of facts
- Declarations by witnesses who could testify or judicially noticeable or other self-authenticating documents
  - Defendant's declaration of self-serving statements must be corroborated (*In re Alvernaz* (1992) 2 Cal.4th 924, 945-946)
- "'It has long been the rule of California that factual allegations on which a petition for habeas corpus are based must be "in such form that perjury may be assigned upon the allegations if they are false." (*Ex parte Walpole* (1890) 84 Cal. 584 [24 P. 308].)'" (*People v. McCarthy* (1986) 176 Cal.App.3d 593, 597)

Exhibits: Other Sources

- Items subject to judicial notice (i.e. court records and “facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonable indisputable accuracy” (Evid. Code, §452, subds. (d), (h))
- Government studies and reports
- American Bar Association’s Model Rules or publications for description of counsel’s duties to establish deficient performance
- Official documents, such as medical records, police reports, transcripts from other cases (If exhibits contain confidential or sealed material, follow Cal. Rules of Court, rules 8.46 & 8.47)
- Expert declaration from another case on same issue
- TIP: Designate exhibits by letter or number as you decide to use them

Finalizing Exhibits: Continue Conversations, Investigate and Conduct Research

- Provide draft declarations to declarants with directions to change wording and make all changes to better reflect the truth
- May involve more than one round of edits as conversations and investigation continues
- Revise if necessary after the AG files respondent's brief
  - For IAC, if AG presents a hypothetical tactical basis for act or omission, ask defense counsel about it and add responses to declaration
  - Update declaration with any AG concessions (See sample petition, filed after respondent's brief where AG conceded error)
- Client declaration needed and time is tight? Send partially-prepared declaration with space for your client to complete statements
- Tip: If exhibits modified, you may need to revise citations in factual allegations and Ps & As

What to do when trial counsel stops communicating

- Depends on the stage of the case
- If counsel does not respond to repeated contact attempts, send a letter pointing out counsel's duty to cooperate with appellate counsel (State Bar Formal Opinion # 1992-127)
- If communication stops at the point you request a declaration or after counsel answered questions, file your own declaration relaying counsel's prior responses
- Be specific and accurate and include dates and whether the communication was by phone or email
- If you have counsel's email response, consider attaching part or all of the email
- The same is true for other witnesses. Have the investigator, if any, submit a declaration for interviews with missing or uncooperative witnesses

Compiling the Petition

- Recommend using a good qualify PDF editing program
- Assemble electronic version of the petition and add exhibits
- Pagination: The electronic page counter for the electronic document must match the page number for each page of the document
- The page numbering of a document filed electronically must begin with the first page or cover page as page 1 and thereafter be paginated consecutively using only Arabic numerals (e.g., 1, 2, 3) (Rule 8.74)
- Go through petition, check accuracy of exhibit page citations
- Bookmark, sign the verification, Ps & As, etc.

Important Notes About Habeas Timing: Generally around the time of the reply brief

- No fixed rules or benchmarks for non-capital petitions
- File without "unreasonable delay," and explain any such delay (*In re Clark* (1993) 5 Cal.4th750; *In re Robbins* (1998) 18 Cal.4th770)
- Time runs from when petitioner or counsel knew or should have known of "triggering facts" (*Robbins*)
- Usually not a problem when filed during pendency of the appeal
- Worried? You can include a declaration explaining the timing and circumstances causing delay and reflect theses facts in the petition section for a timely petition
- Most districts: Court will consider timely if filed during briefing phase of appeal Prefer at or around filing of reply brief; First District may NOT consider the petition if filed too close to oral argument
- Late-in-appeal or post-affirmance petitions: COA will likely deny without prejudice to filing in superior court; refile in superior court and request appointment of counsel

Truefiling: This is an Original Filing

- Although filed as a companion habeas to the pending appeal, it will be filed as an original filing
- Choose action: Initiate a new case
- Case type: Criminal original Proceedings
- AG is responding party
- After you upload the petition, must separately upload proof of service

What will happen next?

- Court will issue order that it will consider petition along with the appeal; Or Court will consolidate habeas with the appeal (Less common)
- Court may order no briefing
- Court may order informal briefing and calendar the AG's informal response and the informal reply; OSC may follow
- Order to Show Cause: This indicates a "preliminary assessment" that petitioner would be entitled to relief if factual allegations are proven (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475)
- The court cannot grant habeas relief based on informal briefing (*People v. Romero* (1994) 8 Cal.4th 728)
- Pre-opinion OSC:

  *Court stays appeal pending superior court habeas disposition

  *Court retains jurisdiction and orders reference hearing in superior court;

  *Court orders OSC returnable before itself (not usual for IAC or cases requiring factual development); but if so, AG files Return, you file Traverse
- At same time as opinion: OSC issued separate from appeal and returnable in superior court at time of opinion
- And yes, you may seek appointment in superior court to handle the habeas hearing but if you do not, you should contact public defender or conflicts panel to ensure counsel is appointed
- If habeas relief is denied in superior court, even after OSC, this is not an appealable order, must file new habeas petition in court of appeal

Options Following Denial of PWHC

If the Court of Appeal denies the petition, the petitioner may:

- File a petition for discretionary review in the Supreme Court where the court "review[s] the Court of Appeal's rulings on the claims presented in the previous petition." (*Robinson v. Lewis* (2009) 9 Cal.5th 883, 896); or
- File "a new, original petition for a writ of habeas corpus in [the Supreme Court] invoking [that] court's original jurisdiction"
- "Far more petitioners file an original petition ... than file a petition for review ...." (*Ibid*.)
- Either way, goal is for CSC to issue OSC returnable in lower court

Important Deadline Distinction for Petition for Review

Same 40-day deadline as the appeal: If the court denied the petition following an OSC or issued summary denial on the same day as the opinion, deadline for filing PFR is same as direct appeal

However, **if the court issues summary denial that is not on the same day as the appellate decision – deadline is 10 days to file a PFR**, no deadline to file original petition

File **separate petitions for review, unless the court consolidated the appeal and habeas, not simply ordered them considered together

FDAP

Getting Project Authorization and Getting Paid

Project authorization

- In First District, no need for special motion to “expand appointment” to include habeas
- You **do** need preapproval for any ancillary expenses, including expert or investigator (see page 19 for authorized rates)
- Beware the rabbit hole! Check in early and often with your consulting attorney before spending too much time on research/investigation

Getting Paid: General Tips

- Guideline for companion habeas petition (line 11) = 12.0 hours
- More can be justified where appropriate and depending on complexity of issues, extent of investigation needed and other factors
- ⚠At or approaching guideline? Check in with your consulting attorney! ⚠
- Keep detailed time records broken down for each particular task and include that explanation in the claim
- Did you research and investigate habeas claim, but no petition filed? Explain on line 11 and provide a detailed breakdown of your time
- As with all claims, “reasonableness remains the underlying touchstone” (Statewide Claims Manual, available on FDAP’s website or https://www.capcentral.org/claims/statewide_claims_manual.pdf)

Getting paid: Sample Line 11 explanation

Hours Spent On Habeas Corpus Services

- Communications with client and trial counsel re habeas: [include number and length of letters, number and length of phone calls, and any other pertinent information] 2.7 hours
- Investigation: [describe tasks, such as review of files, interviews with witnesses, work with investigator, etc.] 4.5 hours
- Draft declaration(s): 1.8 hours
- Research and draft petition: 8.5 hours
- Organizing and compiling exhibits: 1.5 hours

Expenses Incurred

- Photocopying ($23 – 230 pages – petition)
- Postage ($15.75 – petition)
- Mileage ($35 – Travel to view trial counsel file)

For More Information…

- For the nuts and bolts of drafting the petition, see Jonathan Grossman's materials, "Elements of a Habeas Petition." (Available at: http://www.sdap.org/downloads/research/habeas/hcppfc.pdf)
- For more tips on practice and procedures (including timing, procedural bars and the prima facie standard), see Brad O'Connell's materials, "State Habeas Corpus: Principles, Practice and Perils!" (Available at: https://www.fdap.org/wp-content/uploads/2021/12/State-Habeas-Corpus-Principles-Practice-and-Perils.pdf)

FDAP

Questions…?

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION _____

In re _____ PETITIONER, ON HABEAS CORPUS.	A_____ Related Court of Appeal No. _____ _____ County Superior Court No. _____

PETITION FOR WRIT OF HABEAS CORPUS

Petition for Relief through Habeas Corpus from the Judgment of the Superior Court of the State of California for the County of _____

THE HONORABLE _____, JUDGE

[NAME]
Bar No. _____
[ADDRESS]
Telephone: _____
Email: _____
Appointed through the Sixth District Appellate Program,
_____ Case
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

California Rules of Court

Other

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION _____

In re _____ PETITIONER, ON HABEAS CORPUS.	A_____ Related Court of Appeal No. A_____ _____ County Superior Court No. _____

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner [redacted] through his attorney, files this Petition for Writ of Habeas Corpus and by this verified petition, sets forth the following facts and causes for issuance of a writ:

I.

[NAME] is unlawfully restrained of his liberty by the [California Correctional institute or specify other], [Warden's name] Warden, pursuant to a [year] guilty plea and a six-year sentence for burglary and access card fraud, with an on-bail enhancement (Penal Code §§459; 667.5, subd. (c); 484i, subd. (c); 12022.1), in [redacted] County Superior Court case numbers _____ and _____, the Honorable [judge], presiding. (CT __; 1RT __.)

II.

This petition is filed in the court of appeal as the direct appeal is currently pending before this Court, appeal number, A_____. (*In re Mancillas* (2016) 2 Cal.App.5th 896, 904-905.) Under Article Six, section 10 of the California Constitution, this Court has original jurisdiction over a petition for writ of habeas corpus.

III.

Petitioner presents a claim of error rooted in the constitutional right to effective assistance of counsel and right to due process of law. (U.S. Const. 5th, 6th, 14th Amends; Cal. Const., Art. 1 § 15.) The claim requires presentation of evidence beyond the record on appeal. Thus, there is no plain, speedy, or adequate remedy at law to address the issue. (*In re Harris* (1993) 5 Cal.4th 813, 825-829, fn. 7; *People v. Pope* (1979) 23 Cal.3d 412, 526, fn. 17.) An ineffective assistance of counsel claim is properly raised through habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

IV.

Summary of the Case and Facts

The facts as presented in this petition are taken from the factual basis presented at the time of the plea and from the Probation Report prepared on [redacted]. (CT [redacted].)

1. Case No. _____

On [redacted], petitioner was apprehended by police during a search of multiple connected hotel rooms ("the suite") at the American Best Value motel. At the time, petitioner was on Post-

Release Community Supervision and subject to a search condition. (CT .) In the suite's front bedroom, the police found a digital scale, black residue consistent with heroin, and a suitcase with a credit card embosser and magnetic strip modifier. (CT .)

On , the County District Attorney filed a criminal complaint ( ) charging petitioner with felony possession of access card manufacturing equipment with intent to make counterfeit access cards (§484i, subd. (c)). (CT .) In addition, the complaint alleged two prior prison terms and one prior "strike" offense (§§ 667.5, subd. (b); 667, subds. (b)-(i)). (CT .)

2. Case No. _____

On , at ., while out on bail for the first offense, petitioner and were out driving around at night when they ran out of gas and approached a home. The homeowner saw them crawl under a partially open garage door. (CT .) Later, the homeowners reported several items missing from their front door, including a dog bed, a foam pad, and a blanket. (CT .) One of the cars inside the garage was discovered with the interior light on and the glove box opened. (CT .) A red blanket and pillow were missing. (CT .)

The next morning, the police responded to a call by another homeowner and detained petitioner and . did not cooperate and petitioner provided police with a false name. (CT .) The police discovered their identities and searched petitioner, finding a screwdriver and flashlight. (CT .)

On [redacted], a separate complaint ([redacted]) was filed charging petitioner with a violent felony, first degree burglary, with an allegation that someone, not an accomplice, was present in the residence during the offense (count one; §§459; 667.5, subd. (c)). (CT [redacted]) Count two alleged a misdemeanor, giving false identification information to a police officer (count two; §148.9, subd. (a)). (CT [redacted]) The complaint also alleged two prior prison term enhancements, one prior "strike" offense, and an on-bail enhancement (§§ 667.5, subd. (b); 667, subds. (b)-(i); 12022.1). (CT [redacted].)

3. Waiver of Trial Rights, Plea, Sentencing, Resentencing

On [redacted], petitioner waived his trial rights and entered guilty pleas, admitting the burglary, the strike prior, the on-bail enhancement, and the access card fraud as part of a negotiated disposition that included a six-year sentence and dismissal of other charges. (CT [redacted]; 1 RT [redacted].)

On [redacted], the court sentenced petitioner to six years, made up of a two-year low-term for the burglary, count one, in case number [redacted], doubled based on the strike prior, with an additional two years for the on-bail enhancement. ([redacted]. RT [redacted].) The court awarded 332 days of actual days of custody credit and [redacted] days of conduct credit. ([redacted] RT [redacted].) The court imposed a concurrent, mid-term of two years for the access fraud, case number [redacted]. ([redacted]. RT [redacted].)

Eight months later, on [redacted], the California Department of Corrections and Rehabilitation (CDCR) notified the superior court of two sentencing errors. (CT [redacted].) On January 3,

[redacted], the court responded to the CDCR letter, holding a hearing. (3 RT [redacted].) Petitioner was not present at the resentencing hearing, had not been given notice of the hearing, and signed no waiver. (3 RT [redacted]; Exhs. A, B.)

The court accepted the reformulated six-year sentence presented by the attorneys and struck the on-bail and prior strike allegation, imposing an aggravated six-year term for the burglary and a concurrent two-year mid-term for access card fraud. (3 RT [redacted].) The court reduced the days of conduct credit from 332 to 49 based on the burglary being a violent felony. (3 RT [redacted].)

On January [redacted], the CDCR issued a Release Date Change Notice. On February [redacted], petitioner filed a timely notice of appeal. (CT [redacted].)

V.

FACTUAL ALLEGATIONS ESTABLISHING A VIOLATION OF THE RIGHT TO BE PRESENT AT SENTENCING AND TO EFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffective assistance of counsel requires a showing that: (1) Defense counsel's performance was deficient in falling below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability of a more favorable result in the absence of counsel's deficient performance. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1985) 466 U.S. 668, 687-696; U.S. Const. 6th, 14th Amends.)

Petitioner alleges the following facts proving the due process violation from his absence at resentencing and deficient performance for ineffective assistance of counsel:

1. The California Constitution provides generally that as part of a defendant's trial rights, the "defendant in a criminal cause has the right … to be personally present with counsel … ." (Art. I, § 15; Pen. Code §§ 977 and 1043; see *People v. Cutting* (2019) 42 Cal.App.5th 344, 347-348.)
2. Penal Code section 977, subdivision (b)(1) ensures defendants' the right to be present unless there is a written waiver in open court. It states: "[I]n all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present . . . ." At other times of trial, a defendant may simply choose to be voluntarily absent. (§1043, subd. (b)(2).)
3. "A constitutional right to counsel has also been recognized to attach to a deferred sentencing hearing "'even when [sentencing] is accomplished as part of a subsequent probation revocation proceeding.' [Citations.]" (*People v. Bauer* (2012) 212 Cal.App.4th 150, 155, quoting *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781.)" *People v. Rouse* (2016) 245 Cal.App.4th 292, 297.)

4. The resentencing hearing was held on January [redacted], after the CDCR pointed out what appeared to be two sentencing errors: 1) In case number [redacted], count one for felony burglary was charged as a violent felony, yet the Abstract of Judgment did not have the appropriate box marked, leaving the CDCR to question if he pled to a violent felony and how to award credits. (CT [redacted].) 2) Based on the on-bail enhancement imposed per section 12022.1, the CDCR questioned whether the sentencing could be imposed, as the court did, concurrently as opposed to consecutively. (CT [redacted].)
5. Petitioner was not present at the resentencing hearing. (3 RT [redacted].)
6. Petitioner did not waive his appearance at this resentencing hearing. (Exh. A p. 1.)
7. Defense counsel did not send a letter to petitioner about the resentencing because she was only aware of the hearing a few days before it was scheduled to take place. (Exh. B.)
8. Petitioner was not aware of the resentencing until after the resentencing took place. He received a notice and letter from the CDCR dated January [redacted], [redacted], informing him there was a change in his sentence. (Exh. A pp. 1, 3.)
9. The letter from CDCR informed petitioner that in addition to a reduction in his credits, a change in sentencing resulted in a change to his EPRD, earliest possible release date. (Exh. A, p. 3.)
10. The record shows that defense counsel had not considered how to reformulate the sentence until the very morning of the

hearing, discussing the matter with the prosecutor and coming "up with a way to correct the sentence. . . ." (3 RT 504.)

11. Defense counsel considered the court's intent at the hearing was to restructure the sentence. (Exh. B.)

12. At the hearing, defense counsel initially offered an aggravated term on the battery for six years with the court striking the on-bail enhancement, yet there was a problem as this sentencing structure did not account for the strike prior. (Exh. B, p. 2 (#16).)

13. The attorneys conducted new sentencing discussions and agreed to an aggravated six-year term for robbery, striking both the prior strike and on-bail enhancements. (Exh. B, p. 2 (#17).)

14. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Strickland, supra*, 466 U.S. at p. 690.)

15. Defense counsel did not conduct reasonable investigation by preparing for the hearing to advocate for her client.

18. In assessing a new sentencing structure, defense counsel did not consider the impact on petitioner's eligibility for Proposition 57 early parole consideration. (Exh. B p. 2 (#18).)

19. Counsel was unaware of *In re Mohammad* (2019) 42 Cal.App.5th 719. (Exh. B p. 2, (#20).)

20. In *In re Mohammad,* the defendant was held eligible for early parole after a plea to nine violent felony counts of second degree robbery, and six non-violent felony counts receiving stolen property where the sentencing court designated the principal term as one count of receiving stolen property and ran the remaining counts consecutively, as subordinate terms. The defendant was eligible for early parole under Prop. 57 after serving principal term (3 years) on that 29-year sentence.

21. Based on the authority of *In re Mohammad,* petitioner was eligible for Proposition 57 early parole consideration if the nonviolent felony were made the principal term.

22. One available sentencing structure for a six-year sentence, would have been to designate the access fraud, the nonviolent felony, as the primary term: Two-year term for the access card felony (§1170, subd. (h)), two-years for the on-bail enhancement (§12022.1), and a consecutive two-year term for burglary (§461).

    a. This formulation for a six-year sentence required less judicial action, with the burglary sentence remaining, as originally imposed, a two-year mitigated term.

    b. The on-bail enhancement would not need to be stricken.

    c. The strike would have had to be stricken, but it was stricken anyway under the agreed upon sentencing structure.

23. *In re Mohammad, supra,* 42 Cal.App.5th 719, (S25999), was granted review on February 19, 2020, and remains citable authority for the principle that a defendant who pleads to a violent felony is eligible for early parole under Proposition 57 if the principal term is for a non-violent felony.[1] (Cal. Rules of Court, Rule 8.1115, subd. (e)(1)(B).)

24. Counsel should have been aware of *In re Mohammad*: "Counsel 'is expected . . . to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.' (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358.)" (*People v. McCary* (1985) 166 Cal.App.3d 1, 8 [counsel deficient for failing to adequately research law to determine sentence enhancements the prosecutor offered to dismiss in exchange for plea were invalid].)

Petitioner alleges the following facts establish there is a reasonable probability of a more favorable result in the absence of counsel's deficient performance.

1. Defense counsel would have suggested a term that secured [redacted]'s Prop. 57 early parole eligibility had she been aware of a sentencing structure that allowed for it. (Exh. B p. 2 (#21.).)

---

[1] See also *In re Chavez* (2020) 51 Cal.App.5th 748, 753, rev. gr. Sept. 16, 2020, S263584 [Restrictive CDCR regulations applying to Prop. 57 early parole inconsistent with California Constitution's broad mandate under Article I, section 32].)

2. At the resentencing hearing, the prosecutor was open to discussing sentencing.
3. The prosecutor agreed to two different sentencing structures, including the one accepted by the court, which required striking the on-bail enhancement and prior strike.
4. The Proposition 57 sentence would have achieved a six-year sentence.
5. There is at least a reasonable probability such a sentencing structure, if offered by defense counsel, would have been accepted by the prosecutor and court.
6. But for defense counsel being unaware of *In re Mohammad*, supporting a sentence to achieve the early parole eligibility and failure to alert petitioner to the hearing, it is reasonably probable that petitioner would have secured a sentencing structure that would have made him eligible for Proposition 57 early parole consideration.

VI.

No other habeas petition has been filed in this case. (Pen. Code, § 1475.)

VII.

The allegations of this petition are supported by references to the appellate record in petitioner's direct appeal, [redacted], and by the accompanying Exhibits A through C. The foregoing allegations are amplified in the accompanying Memorandum of Points and Authorities, which is incorporated by reference. Petitioner also

incorporates by reference the Appellant's Opening Brief and Appellant's Reply Brief.

VIII.

This habeas petition is timely filed. "For noncapital cases in California, there is no express time window in which a petitioner must seek habeas relief. [Citation.] Rather, the general rule is that the petition must be filed 'as promptly as the circumstances allow . . . .' " (*In re Douglas* (2011) 200 Cal.App.4th 236, 242, quoting *People v. Clark* (1993) 5 Cal.4th 750, 765, fn. 5.)

PRAYER FOR RELIEF

Wherefore, petitioner [redacted], asks this Court to:

1) Take judicial notice of the pleadings and record filed in this case and related appeal, [redacted].

2) Issue an Order to Show Cause, directing the State to show cause why the matter should not be remanded for resentencing based on the claim raised.

3) Following consideration of the Return and Traverse and any further proceedings ordered by this Court, issue a Writ of Habeas Corpus vacating the sentence.

4) Grant whatever further relief this Court finds appropriate and in the interests of justice.

Date: [redacted]

Respectfully submitted

[redacted]
Attorney for Petitioner

VERIFICATION

I, [redacted], declare:

I am a member of the Bar of the State of California and the appointed attorney for petitioner [redacted] and authorized to file this petition for writ of habeas corpus on his behalf. I am making this verification on his behalf because the matters alleged here are more within my knowledge and he is incarcerated outside of [redacted] County.

I have read the foregoing petition and hereby verify that the facts alleged are true of my own personal knowledge or are supported by citations to the record in [redacted] or by citations to the accompanying exhibits.

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

Executed on [redacted], at [redacted] County, California.

[redacted]
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO GIVE HIM NOTICE OF THE RESENTENCING HEARING AND FAILURE TO INVESTIGATE AND PRESENT FAVORABLE AUTHORITY AND ARGUMENT FOR THE AGREED UPON SIX YEAR TERM THAT WOULD HAVE SECURED PROPOSITION 57 EARLY PAROLE ELIGIBILITY AT TWO YEARS (6th & 14th Amends. U.S. Const.)

A. Background and Resentencing

The resentencing hearing was held on [redacted], and the court and attorneys agreed with CDCR that the original sentence formulation was unlawful. Defense counsel told the court that she and the prosecutor, that very morning, had come up with a way to correct the sentencing errors. (3 RT [redacted].) The prosecutor added that "[a]dditionally we need to clarify that there is a person present" for the home invasion robbery, which the CDCR letter noted would make the crime a violent felony. (3 RT [redacted].)[2]

As the attorneys were explaining the reformulation to the court, they discovered they had not considered the prior-strike admission and the court passed the matter to allow further discussion. (3 RT [redacted].) After other matters were heard, the prosecutor announced: "Your Honor, we've been able to determine how to get to 6 years. In case [redacted] the People are going to be striking the strike prior and the 12022.1 . . . for an aggravated term of 6 years on Count I." (3 RT [redacted].) The prosecutor added: "And it

---

[2] Appellant entered a plea to the section 459 "as charged" and the complaint included an allegation that the offense was a violent felony pursuant to section 667.5, subdivision (c).) (1 RT [redacted]; CT[redacted]

needs to be clarified that it's person present so it's a violent strike. Then case [redacted] is going to be concurrent." (3 RT [redacted].) The court "amended the abstract" to impose six years for Count I, a "violent felony" as there was a person present, striking the prior strike and on-bail enhancement. (3 RT [redacted].) In the case ending in 859, the court imposed the same originally imposed two-year term. (3 RT [redacted].) The court pointed out that petitioner was no longer eligible for the same credits, with a violent felony, and reduced the conduct credits from 332 to 39 days. (3 RT [redacted].)

B. Petitioner had the Right to be Present at Resentencing to Reformulate the Six Year Sentence; Modification Made the Sentence More Onerous

Petitioner was not present at the resentencing hearing. (3 RT [redacted].) He did not waive his appearance for the resentencing hearing. (Exh. A, p. 1.) Defense counsel did not send a letter to petitioner about the resentencing as she was only aware of the hearing a few days before it was scheduled to take place. (Exh. B.)

Petitioner was not aware of the resentencing until after it took place, when he received a notice and letter from the CDCR dated January [redacted], informing him there was a change in his sentence. (Exh. A pp. 1, 3.) The letter from CDCR informed petitioner that in addition to a reduction in his credits, a change in sentencing resulted in a change to his EPRD, earliest possible release date. (Exh. A, p. 3.)

Just as petitioner had the right to be present at the initial sentencing when the court was going to impose the agreed-upon six-year sentence, he had the right to be present at resentencing for that six-year term. A defendant has the right to be present where a

trial court is called upon to restructure a sentencing package. (See *People v. Rouse* (2016) 245 Cal.App.4th 292, 297 (*Rouse*); *Hall v. Moore* (11th Cir. 2001) 253 F.3d 624, 627-628.) Respondent does not contest this. (RB 8.)

In petitioner's absence and without notice from his attorney, he was unable to express his concerns or interests in the manner in which a new sentence was formulated. There was more than one way to achieve the six-year sentence. Depending on the choices made for setting the principal and subordinate terms, striking alternative sentencing or enhancements, petitioner would either be eligible for Proposition 57 early parole consideration at two years or not at all.

By the time of resentencing*, In re Mohammad, supra,* 42 Cal.App.5th 719, was authority allowing early parole consideration, under facts similar to those here, of a plea to a violent robbery conviction and a nonviolent felony. The defendant in *In re Mohammad* entered a plead to nine violent second degree robbery counts, but the court designated one count of receiving stolen property as the principal term, with the remaining counts to run consecutively as subordinate terms. (*Id.* at p. 723.) The appellate court held that with a non-violent felony as the principal term, the defendant was eligible for early parole under Prop. 57 after serving principal term (3 years) on the 29-year sentence.)

C. Petitioner Had the Right to Effective Representation under the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 15 of the California Constitution

"'A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) When a defendant has the right to assistance of counsel, he has the right to effective assistance of counsel.

"The Sixth Amendment right to the assistance of counsel applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake." (*People v. Crayton* (2002) 28 Cal.4th 346, 362.) A critical stage of the proceedings is a stage that holds significant consequences for the accused. (See *Bell v. Cone* (2002) 535 U.S. 685, 695-696.) Resentencing is a critical stage in the proceedings when it is more than purely a ministerial act with no discretion. (*Hall v. Moore, supra,* 253 F.3d at pp. 627-628.)

As explained in *People v. Rouse, supra,* 245 Cal.App.4th at p. 297, a case upholding a defendant's right to counsel where the court is called upon to restructure the sentencing package, even where the court is prohibited from imposing a greater sentence, the right to counsel in postconviction proceedings is ensured through the 14th Amendment right to equal protection and to due process. (*Rouse, supra*, 245 Cal.App.4th at p. 300, citing *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 155; see also *Douglas v. California* (1963) 372 U.S. 353, 356–357.)

D. Petitioner was Deprived of his Right to Effective Representation

A claim of ineffective assistance of counsel requires a showing that: (1) defense counsel's performance was deficient in falling below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability of a more favorable result in the absence of counsel's deficient performance. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1985) 466 U.S. 668, 687-696; U.S. Const. 6th, 14th Amends.)

1. Deficient Performance

i. Competent Counsel's Duties

A defense counsel's duties in providing competent representation include investigation into the law and facts of the case, consultation with the client, knowledge of law, all with an overarching purpose of advocating for the client:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan, supra*, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S., at 68-69.

(*Strickland, supra*, 466 U.S. at p. 688.)

ii. Counsel Failed to Consult with Petitioner Prior to the Hearing and Conduct Necessary Research

Defense counsel did not consider how to reformulate the sentence until the very morning of the hearing. (3 RT [redacted].) Defense counsel did not consider the impact of resentencing on petitioner's eligibility for Proposition 57 early consideration. (Exh. B p. 2 (#18).) Counsel was unaware of *In re Mohammad, supra,* 42 Cal.App.5th 719 (S25999), allowing early parole consideration in a similar circumstance to the present case, following a plea to both violent and non-violent felonies, where the sentence was structured with the non-violent felony as the principal term. (Exh. B p. 2, (#20).)

Had counsel been aware of *Mohammad* and a sentencing structure that allowed for early parole, she would have suggested that term. (Exh. B p. 2 (#21.).) Defense counsel could have offered a sentencing structure for a six-year sentence, using the access fraud, the nonviolent felony, as the primary term: Two-year term for the access card felony (§1170, subd. (h)), two-years for the on-bail enhancement (§12022.1), and a consecutive two-year term for burglary (§461). This formulation for a six-year sentence was more in line with the original sentence agreed to and required less judicial action. The burglary would remain a two-year mitigated term, just as it had originally been imposed, and the on-bail enhancement would not need to be stricken.

This structure for resentencing would have achieved the six-year sentence more in accord with original sentencing, which did not include an aggravated term for the home invasion robbery, while preserving petitioner's early parole eligibility after serving

two years. (Cal. Const., Art. I, §32(a)(1)(A) [for early parole consideration, defines the "full term for the primary offense" to mean "the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, [a] consecutive sentence, or [an] alternative sentence."].)[3]

Defense counsel should have advocated for this formulation. Counsel should have been aware of the authority for advocating for such a sentencing structure to allow for early parole consideration. "Counsel 'is expected . . . to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.' (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358.)" (*People v. McCary*, *supra,*166 Cal.App.3d at p. 8 [counsel deficient for failing to adequately research (invalid) sentencing enhancements that the prosecutor offered to dismiss].)

2. There is a Reasonable Probability of a More Favorable Result Absent Counsel's Deficient Performance

In meeting the standard for prejudice from deficient performance or omission, it is unnecessary to show counsel's errors determined the outcome, even by a preponderance. Instead, a lower standard applies and "[t]he defendant must show that there is a

---

[3] The California Constitution, article I, section 32 (a)(1) states: "(1) Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense."

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at p. 695.)

"[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." (*Id*. at p. 696.)

There is a reasonable probability that had counsel been aware of the favorable sentencing structure and suggested it, that both the prosecutor and court would have agreed to it. The prosecutor agreed to two very different sentencing structures at the hearing, after agreeing to the original formulation. The court seemingly would accept the agreed-upon formulation of the attorneys. Also, the favorable formulation of the six-year sentence would keep the original mitigated two-year burglary term and the two-year on-bail enhancement. There is at least a reasonable probability such a sentencing structure would have been acceptable, requiring remand to the trial court to allow an opportunity for resentencing where petitioner is afforded the right to be present and the right to effective representation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to issue an Order to Show Cause based on the prima facie showing that petitioner was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel at resentencing.

DATED: [redacted]

_____
[redacted]
Attorney for Petitioner

EXHIBITS TABLE OF CONTENTS

Declaration of [redacted] CDCR # [redacted]

I, [redacted], declare as follows:

1) I was originally sentenced on [redacted] to six years in prison, made up of two years for burglary that was doubled as a second strike, and two years for an on-bail enhancement.
2) I was awarded 332 days of actual credit and, at that time, 332 days of conduct credit.
3) A resentencing hearing took place [redacted]0, and I was not informed by anyone that the hearing would take place and did not sign a waiver of my right to be present.
4) Late in January, I received a letter, dated [redacted], from CDCR, [redacted], informing me there had been a change in my sentence.
5) The letter stated that the "courts made some changes to your sentence that have changed your EPRD," which is my Earliest Possible Release Date. The letter is attached to this declaration.
6) Th new EPRD is no[redacted] which appears to be my release date after serving the six-year term imposed, taking into account the credits I have earned so far.
7) Had I been given notice of the resentencing hearing, I would have let my attorney know that my priority in restructuring the sentence was to ensure my eligibility for Proposition 57 early parole at the earliest date.
8) I would also have asked my attorney to restructure the sentence with the priority of my eligibility for early parole at the earliest date.

I declare under penalty of perjury that the foregoing is true and correct. Executed at [redacted] County in California, on [redacted]

Office [redacted]

[redacted] [redacted] [redacted]

[redacted] Attorney [redacted]

Declaration of [redacted], Attorney at Law, California State Bar No. [redacted]

1) I, [redacted], am a Deputy Public Defender in [redacted] County, with [redacted].
2) I have been a criminal defense attorney for over 21 years.
3) On [redacted], I was appointed to represent [redacted] in several matters, including [redacted] Superior Court case numbers [redacted] and [redacted]
4) In case no. [redacted] t was facing a charge of unlawful access card activity (Pen. Code, §484i, subd. (c)), charged as a second strike, with two prison-priors (§667.5, subd. (b)).
5) In case no. [redacted] was facing first degree burglary, also charged with one prior strike, with two prison-prior enhancements and one on-bail enhancement.
6) I negotiated a plea agreement with the prosecution, whereby [redacted] would plead guilty as charged in case no. [redacted] and to the charge of access card fraud in [redacted], in return for a stipulated six-year sentence.
7) On [redacted], [redacted] entered a no contest plea and admitted the prior strike and on-bail enhancement in case no. [redacted] He also entered a no contest plea to the felony charge of access card fraud in [redacted] and the additional allegations were dismissed.
8) On [redacted] in [redacted], the court imposed a six-year sentence, including a low-term of two years for the burglary, doubled to four years as a second strike, with a two-year on-bail enhancement. In [redacted], the court imposed a concurrent two-year mid-term.
9) On that date, the court dismissed two other pending probation revocation cases, case nos. 1[redacted] and [redacted] and in one other case, no [redacted], the court found a probation violation and terminated probation.
10) At that time, I calculated actual credits to be 332 days and I agreed with the court's pronouncement of 332 conduct credits, for a total of 664 days of credit. I was not aware the District Attorney alleged the allegation this was a violent felony under Penal Code Section 667.5 nor do I have any recollection of the court making a finding of this allegation during the plea.

11) On [redacted] I returned to court to address sentencing issues raised by the California Department of Corrections and Rehabilitation (CDCR), including whether the burglary was a violent felony and the impact of the on-bail enhancement to the concurrent sentencing.

12) The court brought this to my attention a few days prior to the [redacted] court appearance.

13) I did not send a letter to [redacted] informing him of this hearing as it was set a few days after the court noticed myself and the District Attorney that he would be correcting the error.

14) The intent of the court was to just restructure the sentence without changing the negotiated six-year term.

15) I had the files pulled so I would have the documents in court for the resentencing.

16) At the [redacted] hearing, the issue addressed was how to achieve the six-year stipulated sentence. I initially offered a solution of imposing the aggravated term on the burglary, of six years, with the court striking the on-bail enhancement. Then, I realized the court would also need to strike the prior strike allegation. The court passed the matter to allow me and the prosecutor another chance to discuss the sentence composition.

17) I announced an agreement with the prosecutor, who would strike the prior strike and on-bail enhancement, allowing a total six-year sentence if the court imposed the upper term for the burglary.

18) In discussing and considering the sentencing options, I did not consider the impact on [redacted] eligibility for early parole under Proposition 57.

19) I did not consider or suggest a six-year sentence where the court would impose the low-term for burglary and the on-bail enhancement, with a two-year consecutive term for the access card felony.

20) At the resentencing hearing on [redacted] I was not aware of *In re Mohammad* (2019) 42 Cal.App.5th 719, rev. gr. Feb. 19, 2020; S259999.

21) If I had been aware of a sentencing structure that achieved the six-year agreed upon term that would have also secured [redacted]'s Prop. 57 early parole eligibility at the earliest point, I would have suggested it.

22) A two-year low-term for the burglary with a two-year on-bail enhancement with a consecutive two-year term for access fraud would have required the court to strike the prior strike, which it did anyway, yet kept the on-bail enhancement and fulfill the requirement of consecutive sentencing.

I declare under penalty of perjury that the foregoing is true and correct. Executed at [redacted] County in California, on [redacted]

CALIFORNIA DEPARTMENT of
Corrections and Rehabilitation

[redacted]

RELEASE DATE CHANGE NOTICE

INMATE NAME: [redacted]	**CDC #** [redacted]
FACILITY: [redacted]	**HOUSING:** A[redacted]
[redacted] C. Hardcastle **ASSIGNED CORRECTIONAL COUNSELOR:** B. Meek	**REASON FOR RELEASE DATE CHANGE:** Sentence structure changed
CONTROLLING RELEASE DATE	**TYPE OF DATE**
BEFORE: [redacted]	EPRD
[redacted]	EPRD

* See attached letter.

CDCR SOMS OTCR122
RELEASE DATE CHANGE NOTICE

[redacted]
03:00:00

[redacted] [redacted]

[redacted]

Mr. [redacted]

Amended court documents were received on case [redacted] from [redacted] Superior Court today [redacted]. The courts made some changes to your sentence that have changed your EPRD.

You were originally sentenced as a Striker on Ct 1 to the L term of 2 years x 2 for a total of 4 years. The courts imposed a bail enhancement of 2 years making your total term 6 years on that case. Credits that were granted were 664 on that case and your credit earning rate was 33% which meant you were serving 66% of your sentence with 33% off.

The amended AOJ received by the courts changes C1 to the upper term of 6 years and makes C1 Violent due to a person being present during the commission of the burglary. Pursuant to Penal code section 667.5(c)(21).They also removed the strike enhancement of your term being doubled and the bail enhancement. Your total term remained 6 years but your credit earning changed from 33% striker to 20% violent. Which means your will serve 80% of your term with 20% off. If you are eligible for Camp when you go to camp your credit earning will go to 50%.

PC 667.5(c) For the purpose of this section, "violent felony" shall mean… subsection (21) of 667.5 (c) Any burglary of the first degree, as defined in subdivision(a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.

Per CDCR Policy and PC Section 667.5(c) any person confined to State Prison with a conviction of a violent offense will be calculated at 20% credit earning rate. Your new **EPRD is** [redacted].See attached old LSS and new LSS with the changes made to your case. Along with the new amended AOJ.

Any additional questions or requests regarding your sentencing should be directed to the sentencing court or your attorney.

Thank you

[redacted]

DECLARATION OF LAUREN E. DODGE (SBN 225583)

I, Lauren E. Dodge, declare as follows:

1. I am the attorney of record for CLIENT, appointed by the First District Court of Appeal on July 3, 2018 to represent him in his appeal of his conviction for first degree murder.

2. On February 27, 2019, undersigned counsel spoke by telephone with petitioner's trial counsel, attorney JOHN DOE. During the call, I asked Mr. DOE if he investigated other meanings of the term "hit a lick," and whether he considered introducing evidence or testimony to rebut prosecution witness [Redacted]'s testimony that the term means "a robbery or burglary." Mr. DOE told me he did not investigate potential experts or consider presenting the testimony of such an expert because even if he found someone who said that "hit a lick" meant something else, that person would also have to concede that it also means a robbery. He told me he did not want to risk having another witness testify that the term "hit a lick" can mean a robbery.

3. On June 12, 2019, I emailed Mr. DOE to ask if he would be willing to sign a declaration about his strategy and tactics in declining to provide the jury an alternate meaning of the term "hit a lick." I asked him to confirm whether he consulted any online resources (such as urbandictionary.com), or whether he contacted any potential expert witnesses about the meaning of the term. As of the date of this declaration, Mr. DOE has not responded to my email.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this ____ day of _____, 2019 in _____, California.

_____
Lauren E. Dodge