

ZEN AND THE ART OF ISSUE SPOTTING (2016 REWRITE)

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ZEN AND THE ART OF ISSUE SPOTTING¹

Introduction

Michael Millman said it well 35 years ago: “I read records and come up with assignments of error, but it is not at all clear to me that I know how to do it – or that I can communicate what I do to anyone else.”²

In preparing the first draft of this article in 2004, I was assisted by some of the best practitioners of issue spotting I knew at the time: George Schraer, Mark Greenberg, Kyle Gee, Kat Kozik, Alan Siraco, Julie Schumer, Courtney Shevelson, Lori Klein, Dennis Riordan, and Stephen Greenberg. In preparing this re-write, I got in touch with new pack of superb appellate lawyers – a select group of graduates of the “Greening Training” Program administered by the appellate projects which has been off and running for about ten years now. Lacking the resources to get either the first group or the second group together in one room or on a conference call, I sent each group an e-mail asking for responses to some very general questions about the mental mind-set or “gestalt” of issue spotting. Much of what follows borrows from the very thoughtful and nuanced comments of these two outstanding, very experienced groups of appellate lawyers.³

The responses received from this group suggest that a host of seemingly diverse mental approaches, habits, and practices inform the art of issue spotting. I will try to

¹The original footnote here read “I admit it, I know next to nothing about Zen, and just wanted a catchy title.” Then I spoke to the late, great Michael Millman, who actually knew a lot about Zen Buddhism; he told me that there really *was* a Zen to issue spotting, and that I was somewhat on to it. Many years later, and after Mike’s untimely passing, I am still honored by his comment.

²Millman, “Training Memo: Looking for Issues on Appeal,” State Public Defender’s Appellate Practice Manual, 1981, p. 201. Having received the author’s permission in the first version of this article to borrow here and there from this very useful “early” work on this subject, I will continue to do so in tribute to Michael.

³When quoting from the e-mail responses, I have taken it upon myself to act as editor only to elucidate the meaning of the comments or to correct the few obvious typos that come with the e-mail mode of communication

summarize them in some sort of rough analytical order. The goal is to give you, as criminal appellate practitioners, some ideas about different approaches to issue spotting that work for others.

Many of the approaches and suggestions here will appear familiar. Some will seem fairly mechanical, others more abstract. Issue spotting is an *art*, not a science. Of course, there are many ways of making fine art, and wise folk since Socrates have understood that you can't always rely on an artist being able to explain how he or she does it. So, use what seems useful, consider what might seem new or unusual, and hopefully emerge with some new energy about issue spotting, the critical genesis-point of appellate practice.

A. **Mental Set**

We can start with some important precepts about issue spotting suggested by Michael Millman. Take your time. Be curious. Allow yourself to be intrigued by a possible issue, outraged by an obvious unfairness, and troubled about something that seems just plain wrong.

Many years ago, when I was a graduate student, I had a great mentor, John Schaar, a very wise teacher of political theory. A fellow student once asked Schaar how he approached the reading of a particular great work of political philosophy. "With ardor and shyness," he responded, with his usual precision. I like that approach. But I will alter it for our more mundane purposes to "ardor and humility." You need to be *ardent* about your search for arguable and winnable issues, for you are the embodiment of the diligent conscientious advocate to which our clients are entitled under our constitutional system. But you also need to be *humble* about your own state of knowledge about the case before you, and about possible issues and arguments, no matter how experienced and practiced you are in this field of law.

Every one of us can probably tell a story about a potential issue which was initially examined and passed over – because of bad facts, a failure to preserve the issue at trial, or some seemingly immovable contrary case law authority – but which ultimately, after

further research, consultation with colleagues, new case authority, and/or creative issue development, turned into a winning claim for the client (or one that should have won – which sometimes is more or less the same thing in our line of work). Be *curious* about matters which you may not quite understand, whether it is a particular procedural issue which comes up in a case, or a body or point of law that is unfamiliar to you. Filling in the gaps may lead you to a great issue, either in the present case or in another one somewhere down the road.

B. Mantras of Issue Spotting.

OK, here I go again, misusing Eastern metaphysics. But I couldn't miss the fact that most of the respondents to my issue spotting e-mail had a key concept, or prime directive (for Star Trek fans), that was described as a frequently helpful pathway to finding winning issues. These approaches seem to divide up into four different general approaches. Here they are.

1. If It Stinks, Go For It! If it Doesn't Sit Well, Get Up and Do Something About It!

Julie Schumer described a “bad feeling” litmus test which helps lead her toward spotting meritorious issues.

Most of my winners have been because something felt “wrong” in the case, though I could not necessarily at first articulate it and pigeon-hole it into an arguable issue as we know them. There is a good deal of instinct involved. Once I have the psychic feeling, I then try to translate that into some kind of legal argument with a liberal dose of due process.

Dennis Riordan gives this concept a catchy name. After describing the more typical appellate approach of starting with what we know about legal errors and reviewing a transcript carefully to find them, he describes how the converse approach of “moving from the record to the law” is equally important.

We identify every piece of evidence, or argument, or instruction that hurt our client under the “Sitwell” doctrine: if it doesn't sit well, it must be wrong. We then research the issue to see if the law could possibly provide

an arguable claim that, until this point, we had no idea existed.

I have always thought of this approach as a kind of “stink” test. If something really smells bad, if it outrages you with its unfairness, presume there’s an issue there and then go and find it. Don’t be daunted by the lack of clear authority, or even by what looks like contrary authority.

A good example of this is the *Westfall* case, where I assisted a former SDAP panel attorney Gerald Clausen. This felony drunk driving case featured a pretty good version of the familiar defense of, “Was he *driving* drunk or just passed out after drinking while sitting in his truck?” When, after a half day of deliberations, the jury told the judge they didn’t think they could reach a verdict, he advised them to “mull it over tonight.” There was no objection to this comment. The next day, after returning, the jury pretty quickly reached a verdict.

The judge’s comments to the jury really stunk. But I couldn’t easily figure out the legal basis for attacking it. This was not a case where the jurors were advised to violate the admonition against discussing the case with others outside of deliberations, but only to “mull it over” on their own. And there was no objection. But it still stunk. So, I went to the case law, to all the applicable instructions, and to FORECITE, and ultimately found some helpful language – but no clear case law – about the jury’s duty to “keep an open mind” during deliberations and to not form opinions about the case except in the context of deliberations. The absence of an objection could be overcome if we could show that this was an improper judicial instruction which told the jurors to violate the defendant’s constitutional right to an impartial jury. On these scant suggestions, Gerry Clausen did a lot more research and put together a strong argument attacking the judge’s “mull it over” directive. To our very pleasant surprise, the argument led to a full (unfortunately unpublished) reversal in the case.

Greening Grad Julie Dunger adds another phrase to the “Sitwell-Stink” test, which she calls “the John McGlaughlin ‘Wrong!’ test.”

If something just seems wrong while reading the record, I will keep it in mind and compare it to other facts and issues as I go along. Often the things that bug me will further develop into an issue or a subpart of an issue. I annotate my notes with these “{}” in purple. An example: { huh?} or {later arg’d for the truth?} I look through my notes later to see if those items go with anything else I have spotted.

Julie Dunger identifies an important issue trigger that bears emphasis: when something does not seem right between the prosecutor and one of his key witnesses.

If a normally friendly prosecution witness (i.e. cop, lab personnel) seems hostile, irritable, or if there is something just Wrong! about the interaction with the DA, there might be a reason for it. In *People v. Jandres* (2014) 226 Cal.App.4th 340, I noticed there was something off about the DNA lab tech’s responses to the DA’s questions in the very short examination/cross-examination about the DNA evidence in the case. When I went to look at the DNA report, which was a trial exhibit, I found that the DA either misunderstood the report or misrepresented the contents of the report. Sadly, trial counsel just accepted the DA’s representation about what the report showed and did not catch that the DA was wrong. The published reversal was on a different issue (i.e. prior bad act admitted under 1108 should have been excluded under 352!!). This was the only oral argument I have attended where two justices were actually emotionally worked up over the DA’s misconduct and did discuss misconduct in the opinion. The misconduct issue might have been the impetus to reverse on the evidentiary issue, which was not so different from other equally deserving evidentiary/352 issues routinely ignored.

2. **Going for the Jugular⁴ – Attacking the Prosecution’s Weak Point and Focusing on the Impingement of the Defense’s Strong Points.**

Many of the respondents to my two informal surveys described an alternative mind set which they believed to be critical to good issue spotting. This approach focuses not on what smells bad from the case, but on the strengths and weaknesses of the prosecution and defense cases. We all know that appeals are won or lost based on the strength of the *prejudice* arguments as much, if not more, than on the merits of the claim of trial court

⁴I recognize that the great legal scholar Pooh Bear identified this creature as a “Jagular,” but could not figure out how to include this in the present essay.

error. This second approach permits you to zoom in on the areas of the case where the strongest prejudice arguments will be found, then locate the errors and arguable issues which will make such prejudice arguments fly.

George Schraer describes a method he uses which he got from Jeannie Sternberg.⁵ The first thing George does is figure out what it was the prosecution *absolutely needed to prove* to win the case. What was the tough part for them? Once you've sorted this out, you work backwards from this, figuring out what evidence, arguments and sometimes deceitful practices it took for the prosecutor to get to where he or she had to go. This then leads you to the areas where you can successfully attack the conviction. In effect, you're starting your issue spotting out by first identifying where the strongest *prejudice* argument will be found, even before you find or identify the issue.

George reminds us that if you are on to something that feels promising with regard to this type of issue, don't be discouraged or intimidated by what appears to be adverse authority, and don't be frozen into inaction because there is no clear authority on the issue, or indirectly unfavorable authority. Think it through: What do I need to make this into a winning argument? Sometimes you must argue that a Court of Appeal case is wrongly decided, but usually there are better ways of arguing that you're right. Keep looking for favorable authority, even if it's not exactly on the same point, but only a related topic, and look for ways of putting together two holdings on unrelated subjects to make up a unified argument for your case.

As an example, George cited a case where he won on the merits of the issue (but lost on harmless error analysis), *People v. Henderson* (2003) 110 Cal.App.4th 737. The issue there involved a novel combination of hitherto unrelated subjects: the defense's entitlement to instructions on third party culpability, and the generally prosecution-friendly practice of instructing the jury on "flight" as showing "consciousness of guilt."

⁵Unlike my other respondents, George did not e-mail me, but called on the phone. The comments that follow are from my notes of our conversation, which I have since destroyed pursuant to standard procedure.

In George's case, there was evidence that the potentially culpable third party fled after the crime. George persuaded the appellate court that in these circumstances there was a sua sponte duty to instruct on flight as demonstrating consciousness of guilt on the part of the third party.

George reminds us that artful *packaging* of issues is very important. When there isn't authority directly on point, weave between cases which are helpful to construct a fluid argument. If that doesn't work, then grab the court's interest by suggesting that it's an issue of first impression. In other words, do whatever you can to make the issue appear more appealing and interesting to the reviewing court. This will lead you to obtain more reversals, or at least more published opinions.⁶

Mark Greenberg has a global approach to issue spotting that is a complementary converse to the approach suggested by George Schraer. Once Mark is thoroughly acquainted with the facts of the case, and with the defense theory of the case in terms of guilt, degree of culpability, alibi, affirmative defense, etc., "then *anything* that somehow interferes with the effective presentation of the defense theory of the case is a potential issue." This is especially true, Mark reminds us, for jury instruction issues, where it's often "open season" even without an objection. But it also holds for evidentiary issues or pretrial motions, even when not too ably presented or preserved by trial counsel.

Once you have the potential issue, then you just play with it until you get it into presentable form. Sometimes it will fit an already defined niche, sometimes you will have to work it out by analogy to another defined issue, and sometimes you'll just have to push the envelope.

Mark requires "at least logical coherence" for an issue for which there is no authority or where there is contrary authority which can be criticized or distinguished.

Courtney Shevelson gives another version of this same approach, focused on a careful review of the prosecutor's arguments to the jury.

⁶It also helps to be George Schraer.

Closing arguments frequently highlight how what looked like a ho-hum evidentiary ruling against the defense actually went to something that the trial litigants thought was quite important. The arguments of counsel can also reveal that a jury instruction as given and as used by the DA in argument did not adequately cover the law that was actually applicable in the peculiar circumstances of the case. So, when I hunt through the arguments for DA exploitation of errors that I have already decided to argue, I try to keep my eyes open for ways in which points of controversy which I initially thought were no big deal might actually have made a difference in the case. It's kind of a process of trying to find prejudice in the DA's argument and then working backwards to see if you can attach the prejudice to some arguably erroneous evidentiary ruling or instructional omission.

Which brings us back to the theme of this part of the discussion: prejudice is everything, or almost everything, for most appellate issues. Find the weak thread, then trace it back to the spot where you can pull it to unravel the conviction.

3. Jury Instructions and the “Stealth Juror”.

Stephen Greenberg has another very creative issue spotting approach which, like the preceding ones, focuses on strong prejudice arguments as the key to locating winning issues.

In reviewing jury instructions, I see myself not as a defense attorney, but as a “stealth” juror at the trial. By “stealth,” I mean secretly working for the prosecution and in favor of conviction. My goal as stealth juror is to find what is essentially a *shortcut* to conviction, one I can sell to my fellow jurors so we can more easily find the defendant guilty and head home. If I spot such a shortcut – whether within a single instruction or across several in combination – then I also need to be able to convince my fellow jurors that my interpretation of the instructions is *reasonable*.⁷ If I've gotten that far, I can switch back to my role as criminal defense advocate and try to

⁷Which addresses the prerequisite to a claim of jury instruction error, i.e., the requirement that there be a “reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

develop an argument that this “reasonable” shortcut using the instructions given represents an instance of fundamental instructional error.

In addition to the *Estelle v. McGuire* rule discussed in the footnote, Stephen notes two other “guiding principles” which make this approach fruitful: that the concern of a reviewing court is what a jury of laypersons may have understood the court to have meant with its instructions (*People v. Crossland* (1960) 182 Cal.App.2d 113, 119); and that jurors are not law students with an independent motive for legal study, but, “at best . . . well-meaning temporary visitors attempting to comprehend a foreign language.” (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 251.)

Stephen suggests that principles of *statutory construction* are useful guides when undertaking a “reasonable” interpretation of the meaning of jury instructions, since “both are supposed to be based on principles of common sense.” As an example of this, Stephen describes how he used legal maxim “*expressio unius est exclusio alterius*” (i.e., ‘that a specific legislative grant of power implies that no other power passes’) to demonstrate instructional error. In one of his cases, the court instructed on “motive” as probative of guilt without ever telling the jury that evidence of motive alone was insufficient to establish guilt. A number of other instructions given to the jury included the principle that particular facts, while probative of guilt, could not alone establish it. (See, e.g., *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [instruction as to effect of reasonable doubt between first and second degree murder, and between involuntary manslaughter and justifiable homicide, but not as between murder and manslaughter, left jury with clearly erroneous implication that the rule did not apply to latter situation]; and *People v. Salas* (1976) 58 Cal.App.3d 460, 478 [when generally applicable instruction is specifically stated with respect to one aspect of the charge and not repeated with respect to another, the inconsistency may be prejudicial error].)

The “stealth juror” or “shortcut to conviction” approach is one which I have also found very helpful, even before I knew Stephen’s great title for it. In particular, I have used this approach whenever a judge makes an ad lib response to questions from a

deliberating jury. In a case involving a series of sex crimes against two unconscious victims, where my client and two other men were alleged perpetrators, the deliberating jury asked whether aiding and abetting instructions “‘pertain to the specific act (charge) or to the entire series of events?’” The judge’s responses, which emphasized that the instructions applied to “an offense or offenses . . .” was inadequate, I argued, because it failed to comprehend the reasonably plain meaning of the jury’s question, which asked, in effect, “If the defendant’s words or actions somehow contributed to criminal conduct by his accomplices, does his conduct make him guilty only as to the act he intended to facilitate or commit, “the specific charge,” or culpable for “the entire series of events,” i.e., all the crimes committed against the victims.’ From this, I argued, that what the jury really wanted to know about was derivative liability for unintended criminal acts under the “natural and probable consequences” doctrine. ‘(*People v. Croy* (1985) 41 Cal.3d 1, ‘12, fn. 5.)’ Thus, I contended, the court’s response to the jurors erred by failing to inform them of this principle, and misleadingly suggested to them that any conduct by defendant intended to facilitate any of the charged crime made him culpable for all of them as an aider and abettor, giving them a very convenient shortcut to conviction on all charges.

Of course, the virtue of this type of argument, focused on a jury’s query to the judge and a misleading or erroneous response, is that the prejudice prong is basically a slam dunk, since “‘there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury’s inquiry during deliberations.” (*People v. Thompkins, supra*, 195 Cal.App.3d at pp. 252-253.)

4. **“Let Me Introduce Exhibit 28 . . .”**

Julie Dunger came up with a very good suggestion, much akin to one we will later see under the rubric of habeas issue spotting: the need to carefully review important prosecution and defense exhibits in the case. Julie describes two cases ‘where this “made a difference or resulted in a good issue.”’

In the first, the *America V.* juvenile case, the minor stabbed her sister's DV-prone husband in the stomach with a knife after he made some arguably aggressive and threatening statements to her. It was a self-defense case, with good evidence to support it. Julie says that "seeing the layout of the kitchen where the stabbing occurred in photos and in a diagram with measurements, made clear that the minor's back was almost literally against the wall with no means of escape when she 'assaulted' (i.e. acted in reasonable self-defense against) her brother in law." Julie notes that even though we lost in the appellate court, during oral argument "Presiding Justice Rushing twice noted that it was 'close case.'" Julie also notes, in a more favorable vein, that immediately after the appeal – and presumably, at least in part because of the quality of her briefing on the self-defense issue – "the trial court reduced the crime to a misdemeanor, dismissed the wardship probation, and promised to seal the record." Justice done, albeit indirectly.

Julie also described a second case, *Irving Reyes*, a Greening training case involving an attempted murder charge, in which there was a "surveillance DVD of a shooting in front of a bar." When Julie reviewed of this video in slow-motion – which trial counsel had never done -- "it revealed previously unknown evidence of a *defense of others* defense not raised at trial."

Slow motion viewing showed that appellant's friend had been hit once by the security guard with a metal baton and was about to be hit a second time, when appellant stepped forward and fired a single shot. Trial counsel did not know the tape could be reviewed slowly, did not review the surveillance video with her client before trial, and client was too drunk at the time of the shooting to remember any helpful or neutral facts from that night, including why he stepped forward to shoot.

Based on statements that Reyes made to the police, the case was tried on *self-defense*, which made little sense given Reyes's distance from the baton-wielding security guard, as shown in the video. Based on her "due diligence in watching a surveillance tape . . . from two angles . . .", Julie was able to put forward a superb IAC argument about the defense-of-others claim that counsel failed to present, which dovetailed nicely with the trial

court's instructional error for not including this aspect of a self-defense claim.

5. But then Again Keeping All the Balls in the Air.

Julie Schumer suggests another important rule about issue spotting, argumentation, and the finding of winning issues. This rule can well be expressed in New York parlance as, "Ya never know *where* it's gonna come from." Julie reminds us not to prejudge an issue because you think it's weak or has no meaningful chance of winning, noting two reversals she obtained on issues she felt were not-so-good involving wrongful admission of prior bad acts.

They weren't so bad as not to raise them but they were clearly not winners in my estimation based on how we know the courts function today, plus a huge reservoir of past experience with the same issue. Yet for reasons that remain obscure to me, I won on both issues.

In other words, the obligation to raise all arguable issues is more than just an empty exercise of the client's due process right to effective counsel on appeal, or a mechanism for preserving issues for federal habeas review. It can lead to reversals and helpful remedies for your client.

This reminded me of the first reversal I ever won in a murder case a couple decades ago, a case with a very strong unconsciousness defense that had lots of evidence and expert opinion to support it. The best issue, I thought, had to do with the court's failure to define the term "unconscious" for the jury. Unfortunately, the issue looked pretty hopeless in light of *People v. Clark* (1993) 5 Cal.4th 950, which rather disingenuously held that instructions given to the jury in that case (and in my case) were sufficient to define "unconscious" for the jury. There were two other issues in my case – misinstruction on intoxication evidence, and misdescription of the lesser crime of involuntary manslaughter based on unconsciousness as requiring general criminal intent (when it really is based on a negligence standard). But these two issues looked like garden variety claims which appellate courts typically slither over or find harmless. Still, I briefed all three issues, doing my best to focus the prejudice arguments on the strength

of the unconsciousness defense in the case. To my great surprise, the Court of Appeal reversed my client's murder conviction in an unpublished opinion based on the latter two issues. I was astonished. In fact, I didn't even orally argue the case. But I couldn't help but notice that the court, in a footnote, after acknowledging that there was no clear authority for the requirement of an instruction defining unconsciousness, ordered the trial court on retrial to give the missing instruction defining unconsciousness.

There's three lessons from that case. The first harkens back to the discussion above about Mark Greenberg's approach of focusing on the defense theory of the case, then working backwards from there to find every arguable issue which relates to the impairment of that defense. The second lesson is that there really is a good reason to carefully and rigorously brief all the arguable issues, even those that don't burn a hole in the gut or don't seem to you to go to the heart of the case. And the third is that when you've got an issue that is powerful and compelling, and goes to the heart of defense case, but which seems hemmed in by adverse authority, try to find a way to raise it anyway. I have always felt that the compelling issue – the absence of any definition of “unconsciousness” on which I *could not* win in state court because of *Clark* – actually led to the favorable result on the other issues.

And remember, “Ya never know where it's gonna come from.” Alan Siraco put this amusingly in his e-mail response. “Sometimes I feel like Don Knotts in the Reluctant Astronaut. My failures are well-executed, but my successes are rather bumbling.” Keep plugging, don't let the “well-executed failures” bother you too much – we will always have a large share of these, sadly. So, make sure to put all those balls in the air and not drop too many.

C. Be Prepared, Knowledgeable, or at Least Well Connected.

Effective issue spotting requires a reservoir of knowledge and experience regarding where issues, new and old, can be found. Spotting and developing winning issues requires you to know what you *do* know, and know what you *don't* know, remembering, of course, that the latter quality – knowing what you don't know – is

precisely what the great philosopher Socrates defined as “wisdom.”

Every effective appellate advocate has a different way of storing and retrieving his or her issue spotting lore. Some, like Dallas Sacher or Brad O’Connell, keep it all in their gray lobes, and seem able to call up the name and cite of the key case at the drop of a question. Others, like my colleague Jonathan Grossman, meticulously organize issues and key cases in computer files and/or index cards. My own haphazard storage and recall system is harder to describe. I mostly use my own thirty-plus-year stock of old briefs and 20-plus years worth of assistance memos, which I constantly mine for issues and cases that sound familiar when I run across them. My own internal wiring makes it hard for me to remember names of useful case law (let alone the cites), and I frequently find myself remembering that I did brief a similar issue once, but unable to recall the name of the case in which I did it.⁸ Computers make this process easier, allowing me to do word searches for key phrases or case names, both from my own materials and from legal research sources. And the advances in search programs like Lexis and Westlaw often mean that I can use them for a shortcut to find my way back to what I kind-of remember about the issue. The key is knowing yourself, understanding your strengths and weaknesses as an appellate advocate, and learning to use your textual, electronic, and human resources efficaciously to round out your efforts.

By all accounts, the assistance of one’s colleagues is absolutely invaluable to this part of issue spotting. When you run across something that smells wrong, seems unfair, or goes to the heart of the case against or for your client, but can’t quite figure out how to package it into a winnable appellate issue, it’s time to run it by a knowledgeable and issue-sensitive colleague. For me these days, as a SDAP staff attorney, that usually means a stroll down the hall (or the virtual hall, these days) where wise and experienced colleagues can be found. For most panel lawyers, it takes a bit more effort – making a phone call, sending an e-mail, or, at least in simpler times, setting a time to go across

⁸ As Christopher Robin said, “I try to remember, and then when I do remember, I forget.”

town (or into town) to talk in person with a fellow practitioner.

Of course, your appellate project “buddy” on a case will normally be happy to try to play this role for you in both Assisted and Independent cases; well, some of us anyway. The best course, though, is to cultivate dialogue with friends and colleagues whose abilities balance off your strengths and/or weaknesses. Some people have encyclopedic minds, and can remember cases by volume number when you mention an issue. Others are strong at intuitive thinking or linking disparate ideas into a single and unique analytical twist; and there are a few who have balanced strengths in both these areas. Know what you’re good at, and where you need input from others; share your wisdom and talent with others, and reap the benefit of that sharing.

Alan Siraco again makes a fine point about this.

Making a living at what we do, under the economic pressures of AIDOAC and Guidelines requires quick assessments. I often feel I have not had the time to do all the research I want on a spotted issue. So, effective issue spotting, including briefing those issues spotted, requires a certain feel for what’s valid. Most of us also do this in a relatively isolated setting. Brainstorming with respected colleagues is an invaluable resource, especially in cases which seem to reveal no issues or an issue about which I am uncertain.

Greening Grad Alex Coolman makes a similar set of points about “knowing what you don’t know” and the need to confer with colleagues.

There is always at least the potential for what that great legal scholar Donald Rumsfeld called “unknown unknowns” – i.e., stuff that’s screwed up that we just can’t recognize as screwed up because we don’t know enough to recognize the problem. Our own intuition or “spider sense” just isn’t going to be helpful in flagging these problems no matter how many cups of coffee we’ve had.

Therefore, it helps, for me anyway, to get out and talk with real people, attend seminars, and try to learn stuff from new sources. There is something about physical action and real interaction with other people that makes my mind work in a way that sitting in a chair reading Westlaw does not. So I find it helpful to get out of the chair, and I think that regularly doing so can reduce the likelihood of

falling victim to intellectual complacency and “unknown unknowns.” ‘

Finally, Greening Grad Shannon Chase recommends a print resource which she used often when she started as panel attorney and which she continues to employ to find issues. She describes the book, *Avoiding Reversible Error in Criminal Cases*, by Garrett Beaumont, published by West, as “probably a little out of the ordinary for most defense attorneys,” adding that “just reviewing the table of contents and index can be helpful. It even has a ‘Lessons learned from a Tai Chi Master’ in the preface.”

D. Reading the Record the Right Way.

The Gestalt of Issue Spotting also has a critical nuts and bolts component: record review. A number of my e-mail respondents zoomed in on this part of the appellate advocacy process in general, and on their own methods of issue spotting in particular, as integral to the process of spotting issues.

Here again, it is clearly important to figure out what works best for you. Some appellate advocates adopt an approach towards record review which emphasizes reading the record through from start to finish, “like a screenplay” (Alan Siraco), or “a badly constructed mystery novel” (Kyle Gee). Others, like Courtney Shevelson and me, will begin with a focus on key parts of the record – closing arguments of counsel, jury instructions, pretrial motions, etc. – as a way of getting revved up for the issue spotting to follow. Kat Kozik strongly recommends getting copies of police reports and trial opening statements as adjunct material to help find potential appeal and habeas issues. Lori Klein recommends “listening to every audiotape and viewing every videotape that the jury sees” in connection with record review.

The central idea that unites all these suggestions is the concept that record review is the starting point for finding issues, and requires the employment of one’s own developed practices for thoroughly combing through a record while remaining fired up about the case and attentive to finding potential issues. Remember: we didn’t write the bad novel that is presented to us in the form of the appellate record. But it’s our job to

turn it into a thrilling (or, at least, readable) story about *what went wrong* in the story of our client's conviction.

Everyone has different approaches to record review. Kyle Gee and I have distinctive ways of working through an appellate record. In the original version of this article, I included a description of these two contrasting approaches. When I asked the Greening Grads for their input about issue spotting, I received a very helpful description of a third approach from Heather McKay, which I also include below. Each approach, in its different way, relates very much to the art of issue spotting and may be helpful to your own efforts.

- 1. Kyle Gee's Approach: Read the Bad Novel Straight Through and Get Organized!**

Kyle likes to start with a complete "blank slate" about the case. He begins with the clerk's transcript (CT) review, carefully going over the CT contents with the exception of the preliminary hearing and jury instructions. From this he develops a careful chronology and writes a draft Statement of the Case, even before he has begun reading the reporter's transcript (RT), because he finds that this draft of the Case Statement helps him get the scope of the case clear in his mind. Kyle does a very cursory skim of the RT at this point, but only to locate any required record augmentations, which he likes to get out of the way before beginning the RT review in earnest.

For Kyle, it is essential to have large blocks of time for getting into the review of the RT.

I read all of the RT chronologically, creating a RT summary containing references to both the evidence and the potential issues. The exception to the "chronological" rule is that I never begin my review of the trial transcript by reading the DA's opening statement (if there is one). Otherwise I read the trial in the order that events occurred. Unlike some people, I never read the arguments first. I prefer to see what I think the evidence shows, and what instructions the evidence supports, before I see what the attorneys felt about the evidence. It is only during my review of the

Reporter's Transcript of the instructions that I also go through the instructions as they appear in the CT. (I also have CALJIC [and, he would add now, CALCRIM] there to double-check for deviations.)

Kyle describes his procedure for moving from record review to issue locating after he has completed his record review and constructed a detailed document on the computer containing his summary of the record.

After I have my RT summary, I do a lot of playing with that file. Except in very short cases, I will split the RT summary into two files, which I call "RT-SF" [Statement of Facts] and "RT-ISS" [Issues], even though these tend to overlap to some extent. I then plow through "RT-ISS," creating headings for each individual issue and sub-issue, and creating a topical index of the issues and sub-issues.

I then "carve away" from "RT-ISS" everything that I believe not to be a valid issue, dumping those parts into an "ISS-OUT" file. As I do research, other issues get dumped into the "ISS-OUT" file (this file is useful later for the "unbriefed issues" portion of the comp. claim). This is not always a one-way street. Sometimes issues move from the "ISS-OUT" file back into the "RT-ISS" file.

Somewhere along the way – it varies from case to case when this occurs – I tackle the draft of the Statement of the Facts, knowing that identifying the potential issues helps focus the factual summary, and that the drafting of the factual summary tends to focus, eliminate, or even reveal an issue.

I usually then return to the issues and arguments, not returning to the SF until the arguments are largely complete. The last part is usually the re-writing of the prejudice arguments.

This is the way I like these things to go, and this is the way they often go. However, there are 100 variations on all of this, depending on the case, its complexity, time pressure from the court, and – of course – the compensation guidelines.

Kyle Gee's approach, as you can see, is very organized, and relies heavily on creating computer files in which he separates the two key parts of brief writing – the fact summary and issue development. For Kyle, this makes the creative process work best.

I can only stay interested and focused during the RT review if I read it like a badly constructed mystery novel. If I read the ending first (the arguments), I tend to become careless in reading the record.

I like to start the record review with a blank piece of mental paper. I feed the information into the grinder and let it settle into a back mental compartment for a while. Record review (and drafting the SC) is the information input phase. Doodling on the screen with RT-ISS and ISS-OUT is just a way of moving everything to the front of my mind for a while. Somehow it works for me.

2. **The Bill Robinson Approach: Selective Skimming, Deep Review, Diving at Issues When You Find Them.**

My approach is more haphazard than Kyle's, and summarizing it may do nobody any good. Yet, "somehow it works for me."⁹ Here, in outline form, is how I do it.

a. **Before Doing a Thorough Reading: Peruse Selectively.**

I have always done this. It gets me fired up, and takes care of some practical details (augmentations, credit issues) early on in the game.

Preliminarily, I note that it's common to come across apparently meritorious issues in the introductory review of the record. I have learned not to go too far with these quickly spotted issues. I make a note of them, dig up an old brief or read a case to familiarize myself with the issue, then move on.

My preliminary review starts with the Clerk's Transcript. I first go to the back of the book to look at the Abstract of Judgment, if there's a prison sentence, or the minute order if there is not. Many times there are obvious sentencing errors or potential adverse consequences which can be spotted, and it's good to know about these as soon as possible. Also, it's staggering how many times one finds obvious credit errors, which can be corrected by a letter to the court while you are completing record review,

⁹The one point on which Kyle and I agreed in our e-mail exchange was that the prerequisite to developing effective issue spotting technique is "figuring out who you are and what works for you."

augmentation, or work on other cases.

Next I'll peek at the appeal notice. Every once in a while, trial counsel will comply with his or her statutory duty under Penal Code section 1240.1 and list the potential issues. Sometimes – OK, rarely – those will be your winning issues.

I skim through any and all motions in the CT – pretrial 1538.5 and *Miranda* motions, in limine or other trial motions (e.g., for a mistrial, or for or against admission of evidence), post-trial motions (new trial, plea withdrawal, *Romero*, etc.). Skimming these can tell you a lot about the case and possible issues, and also give you a good “heads up” about the quality (or lack thereof) of the representation by counsel.

Lastly, I skim through the jury instructions. The idea here is to just get the lay of the land, saving the necessary thorough review for after you've carefully reviewed the RT of the trial. Keep an eye out for home-made DA instructions, always a source of error and appellate issues, and any obvious instructional red flags, such as refusal of defense requested instructions or any current hot button instructional error issues.

I skim selective parts of the RT. I read over the sentencing transcript, fishing for obvious issues. In jury tried cases, I skim through closing arguments, to get a good glimpse of “what really mattered” to the prosecution and the defense in the case, having found that this facilitates issue spotting. If there's a denial of a suppression motion, skim through the RT of the motion to see what happened there and how it adds to the potential merits of the issue, or whether it reveals a potential IAC claim regarding presentation of the motion.

In short record and guilty plea cases, I will frequently skim through the whole record without taking detailed notes. This can be done quickly and allows me to flag obvious issues (e.g., *Walker* error as to the restitution fines) or give me a sense that the case is probably a *Wende*.

One of the Greening Grads, Patricia Lai, likes to read the entire record through a first time without annotation beyond “sticky notes on the pages where there might be issues (IAC, prosecutorial misconduct, etc.) . . .” which gives her “ a sense of the case or

the storyline and also some hints on what the issues might be.” When she reads the record through the second time – like me – she does so with the key issues already in mind.

Like Patricia, I also want to start identifying and looking into potential issues during the early record perusal. I list possible issues, do some quick research, as needed, to inform myself about the possible issue (e.g., find out if some court has already decided your clever issue adversely), but try not to get too attached to the list yet, because it’s very tentative until I’ve done a thorough record review.

b. Thorough Record Review – Now Get Serious.

A detailed review of the record and very careful notes are the key to good issue spotting, as well making it possible to write effective statements of the facts and procedural summaries. (Although this is a different subject than the present one, it is often recognized that clear and effective statements are key to strong and successful appellate work.)

i. The CT.

Obviously, there’s parts of the CT which don’t require going through with a fine toothed comb. Here’s some suggestions as to what requires your careful and detailed attention:

— Read the Information carefully; then look at the jury instructions and the statutory language involved. You would be surprised how often this leads to potential winning issues. Get very curious when your client is charged with a crime you’ve never heard of or dealt with.

— Reviewing pretrial minutes is one of the dullest parts of our work, and skimming is usually good enough. But keep your eyes open for unusual proceedings, motions, *Marsdens*, denied continuance requests, etc. There may be potential issues (for what was done or not done), and bases for augmentation of the record.

— Trial minutes used to be all hand-written, and were sometimes a great challenge to decipher. They are usually computerized these days. I strongly recommend reading these with care. Although it can be a dull slog, the trial minutes give you an outline of what happened and are bristling with important information about the case. Minutes can flag in limine issues, 402 hearings, evidentiary issues during trial, instructional disagreements, misconduct issues, deliberations problems, etc.

— If I have skimmed the jury instructions already, I pass over them during the more detailed CT review, saving a more careful review for the time after I have completed the RT of the trial. Take a careful look at any and all notes from the jury and responses by the trial court. It's good to have the potential issues concerning this flagged for you before reading the RT.

— I always read over the probation report (skipping the “offense summary” portion), because I have learned by experience that when there are errors in sentencing, restitution fines, victim restitution, or credits, they often begin with the probation officer's report.

ii. **RT Review.**

Once I'm at this point, I like approach record review about the same way as Kyle Gee: try, insofar as possible, to read the trial RT through from beginning to end. Of course, this is rarely possible. The next best thing is to make sure you have big blocks of time each day, or nearly each day, to get through the record.

I can't say enough about how important it is to take careful, detailed RT notes. I used to take these by hand, until I got to where I couldn't read my own handwriting any more. Then I started writing my notes in a computer file. Lacking the necessary third hand, this turned out to be a much bigger chore, but produced a far more useful set of notes which was much neater, better organized, and far more easily searchable. As we transition to the inevitability of fully electronic records, new adaptations will be required – e.g., two monitors, one with the record, the other with the notes; or a workable split screen if, like many of us, you are working off a laptop. (One benefit of electronic records

is the elimination of the need for that third hand to hold the transcript pages open while you type!)

In my notes in longer record cases, I use the column format, with page numbers on the narrow left column, and substantive notes on the right. For me, note taking serves three purposes. First, it *imprints* in my mind the key details of the trial, such that I can recall most key facts without looking at my notes. Second, the notes create the basis for the Statement of Facts which I will later write using the RT notes. And third, the notes are the place where I start to flag any and all potential issues.

In taking notes, keep in mind that you may really need them six months later, when you return to this case to write the AOB after a much-delayed augmentation and several extensions based on your overwhelming workload. Your thorough, detailed notes make it possible for you not to have to reread much of the record in order to write your statements of the case and facts and prejudice arguments.

iii. **Jury Instructions.**

Much has been said on this subject already, but it can never be enough. Go through all the key instructions, comparing the RT version with the CT version, and both with CALCRIM, CALJIC and any applicable statutes. Use all the issue spotting tools discussed above, and remember that some ridiculously high percentage of winning issues come from jury instructions.

c. **When to Draft the Fact Summary.**

This is one area where I differ in my approach from Kyle Gee. I resist the impulse to begin a draft the Statement of Facts until after I have a solid handle on the issues I plan to raise on appeal, and a good sense of which issues have the strongest chance of success. (Of course, that often means it's months after record review; but then my detailed notes bail out my flagging memory.)

For me, the Fact Statement and, to a lesser extent, the Statement of the Case, should not just support your substantive arguments, but actually *make the arguments for*

you whenever possible. As an example, imagine you have a murder case where the focus of the defense case as presented at trial was alibi and identification. Imagine further that after you have reviewed the record and done some research, you determine that this defense was incredibly weak, depending on pretty hopeless credibility contests, but that there was, at the same time, a rather poor case presented by the prosecution for first degree murder, with a number of strong arguable issues concerning the failure to give required instructions on lesser degrees or crimes, or confusing instructions on elements of crimes or lessers. Your fact summary should, of course, discuss the identification and alibi testimony; but if you are doing little or nothing with that defense in terms of issues presented, you want the emphases of your fact summary to be on the weakness of the proof that the crime was premeditated, felony murder, or what have you. You want the reader to finish the Statement of Facts thinking, “*that was a pretty weak first degree murder case!*” Of course, until you have identified the issues and assessed their strength, you won’t know this, and a Fact statement drafted before this would have to be substantially reworked.

d. Flagging and Developing the Issues.

When and how do I flag issues during record review? It’s a bit quirky. I utilize a “stew” composed of many of the practices described by my e-mail contributors above. If, during review of the RT or CT, anything appears of interest in the trial – a bad evidentiary ruling, a bit of obvious ineptitude by counsel in not objecting to damaging evidence, etc. – I put little asterisks [**] next to the notes about what happened. This allows me to later search for the asterisks to relocate the possible issues and assemble a list of flagged subjects for further inquiry. My review of jury instructions will produce *lots* of little asterisks and potential issues. Most of these disappear before the AOB is filed, but sometimes the kookiest whims can turn into the best issues.

In the old days, I’d take my annotated handwritten record notes with asterisks and head over to the local law library. Nowadays, I mix research and issue development in with record review. If an issue seems interesting or promising from the RT, I’ll dig right

in and check it out, using Lexis, my personal brief and assist memo bank, LaFave, Witkin, FORECITE, or whatever resource works best to get me some kind of handle on the possible issue. I will also talk over the possible issue with a colleague. Frequently, I will put the results of this preliminary research into the RT notes, then return to that part of my notes as I develop the issue further. Of course, issues will drop away during this process, and new ones will show up.¹⁰

When I'm finished with record review, and the preliminary research I've done with it, I generally print out my record review summary; like Julie, I then go through it page by page, making a long list of all potential issues, copying and pasting whatever notes I've already taken and tidying this up a bit. Issues will drop off at this point, or be followed by the parenthetical note "(WEAK)". And new issues will arise from this review in bursts of creative cleverness – some of which will, of course, end up falling to the wayside when that "acid-flash"-like moment has passed.

Sometimes I will create separate Word Perfect files (yes, I still use that excellent fossil) for each issue, both to organize the issue into a coherent, sequential argument, and to accumulate and sort my research. I do a lot of cutting and pasting from key cases found on Lexis, portions of which often end up being quoted or paraphrased in the arguments in the AOB.

3. Heather MacKay's Approach

Heather describes her record review strategy as "a variation of the bad crime novel/movie strategy." I will let her say the rest in her own words.

I first peep at the ending (the AOJ) to avoid getting overly excited about issues related to counts that ended up dropping out along the way. I read the CT

¹⁰Julie Schumer's approach is similar. "What I do is think about the case for a while, then get out my notes and start with page 1, reviewing the whole thing again. I have FORECITE at the ready, plus other articles, seminar handouts, etc. that I think may have something pertinent. I try to keep abreast of any new issues that might be percolating around, such as with jury instructions, etc. If I have an idea I think might be a bit oddball, I call a colleague and get their opinion.

and RT chronologically, in tandem. My first pass through the record is non-judgmental; I just get a feel for the big picture and create a summary of the process and evidence. I skim the motions and get the gist of what they were about and what grounds they were decided on. I mark potential issues in my summary using the low-scrutiny “eyebrow twitch” test – if my eyebrow twitches when I read something, I put !! next to it.

I then go over my summary from start to finish, drafting the statement of the case and a preliminary version of the statement of facts. As I go along, I copy all the !! items into an Issues document, along with cites to material in the record that are relevant to those issues. That way I have a clump of information for each potential issue from which it’s easy to locate everything in the record I might need (the motions in limine, trial objections, related evidence, instructions, closing arguments).

After this, I research and ruminate. I get a handle on the basic legal framework, check for pending issues on the CCAP website, browse the CADC briefbank to see what creative arguments folks have dreamed up, and look for any cases where courts found error . . . heck, maybe even harmful error. At this juncture, it’s easy to identify the “Really Good Issues” and the “It Only Takes a Second Glance to Realize This Doesn’t Amount to a Hill of Beans Issues.” What I struggle with is figuring out whether to brief the issues that seem to fall in the middle so I can LET GO OF THE TOO-WEAK-TO-LIVE ISSUES WITH A CLEAR CONSCIENCE. What works for me is to keep the same mindset as when I was writing Greening memos: “Can I articulate reasons for not briefing the issue that would satisfy a reasonably experienced buddy?” If I decide not to brief the issue, I write a sentence or two summarizing why and move that material to my Unbriefed Issues folder. I do not re-visit it unless the Angel of Appellate Advocacy visits me with an epiphany or the Demons of Second Thought start chattering loudly. If I do decide to brief the issue, I gets moved its own file and worked up into a full argument.

Sometimes I know I have an issue, but I am perplexed as to what type of issue it is. The trial court arguments and rulings may get to the meat of the issue or they may be red herrings. I try to keep an open mind as to whether the issue is fish or fowl or maybe something more along the lines of a platypus. I argue all the plausible options. It’s especially satisfying when I manage to put together several legal grounds, sub-issues and/or independent issues that create a coherent

ecosphere (and more powerful prejudice arguments).

I think there is value in raising those arguments that appeal to a gut sense of fairness even if I know damn well that the court is not going to rule in my client's favor. I feel better if I do it. My client will (hopefully) look upon me with good will for being a zealous advocate. Moreover, a practice that is routinely accepted today may end up being the target of next year's block-buster case (think *Crawford*, *Blakely* or *Miller*) – but that won't happen if we don't keep pursuing righteous arguments.

This last point is a terrific one! I couldn't have said it better myself. Push the envelope, and never mind that gluey taste of failure that comes from too much envelope pushing.

E. **Issue Articulation and Tactics.**

Brief writing is a related but separate topic, which I won't try to cover here. But there is one last subject concerning the writing process in an AOB which I did not cover in the original article, and which needs to be mentioned here as an important part of the puzzle of creating winning issues.

The years have taught me a lot of lessons about the art that comes *after* issue spotting, namely, the *refinement* and *development* of issues which you have spotted and researched. It is one thing to identify an issue – even one that looks promising based on the various techniques of identifying and developing possible winners explained in this article. It is quite another thing to work this issue-concept into a potentially winning argument and figure out the most efficacious manner of seeking a meaningful remedy for the client.

There are a lot of complicated factors that go into our ability to bridge the gap between spotting an issue and bringing home a meaningful victory. Some of it, of course, is luck: what court are you in, who is on the panel that decides the case, and what side of the proverbial bed did the appellate justice or the attorney who does the leg work for him or her wake up on when it was the day to make decisions about your case? Leaving those factors aside for the moment, it strikes me that the rest of the answer relates to two

factors: your ability to skillfully, articulately, and concisely lay out the issue and the reason why reversal is required; and your ability to tactically frame and position the issue in a way that will lead to a favorable remedy for the client.

The art of brief writing is too vast a subject to try to cover in a section of this discussion. There are many good articles about it - none by me. But it seems to me that the skillful packaging of an issue in a framework that will give it the best chance to lead to a favorable remedy for the client is a subject that has not been covered all that well. I think the following factors are critical to doing this right. Some of these will be fairly obvious; others, perhaps less so.

(1) **Federalize!** You all know this. But it continues to elude many of you here and there in an issue, sub-argument, or sometimes even an entire brief.

So: be sure to effectively federalize issues to obtain both a more favorable standard of direct appellate review and leave open the chance for your client to win via collateral review in federal court, with or without your help. When I think of the most significant results for clients in my career, a good chunk ended up as either reversals under *Chapman* or on federal habeas review. A couple of examples of this will help to explain this.

A failure to grant a pretrial *Faretta* in Anthony Mack's case ended up saving him from a 35 to life sentence under the Three Strikes law for a strong-arm robbery. The issue was not exciting, and went nowhere in state court, where the request for self-representation was found "untimely" because it was made two days before trial. But I won in federal court under then-controlling law (pre-AEDPA bad case law on deference in *Faretta* cases), Mr. Mack got a full reversal in district court, and the DA agreed to plead it down to a second strike sentence when the case came back with Mr. Mack represented by counsel, of course – which the trial judge called "curious" in light of the reversal on *Faretta* grounds. But for this federal remedy, Mr. Mack would still be serving life.

In the Juan Valdez case, I won a wonderful reversal and made good case law in *People v. Mendoza* (1998) 18 Cal.4th 1114, on the requirement of intoxication

instructions as to both the intent and knowledge components of aiding and abetting, only to see victory slip away in an unpublished Sixth District affirmance finding the instructional error harmless under *Watson*. The case took an odd and lengthy journey on federal collateral review – ask me and I will give you the dirty details – but the conviction was ultimately reversed on federal habeas based on prejudicial failure to instruct on the defense theory of the case. Back in state court, Mr. Valdez was allowed to plead down to manslaughter. He is now a law abiding husband and father, driving a tow truck in Watsonville instead of doing life for a murder he was not really guilty of.

I could tell you more. I could also tell you five times more horror stories about dismal failure in federal court, culminating with one of those dreadful two page memorandum opinions by the Ninth Circuit at the end. But the point I am trying to make is that proper federalizing can sometimes make all the difference in the world. So do it!

(2) **Eyes on the Prize.** Focus on issues with some chance of a *meaningful* remedy for the client. Getting a client’s 150 to life sentence reduced to 100 to life will likely mean nothing; but knocking it down to a 35 year determinate term could give him a shot at freedom somewhere down the line, and eliminating the “life” component of a sentence can sometimes be the difference between hope and no hope for the client. Sometimes the meaningful remedy won’t reduce prison time or a conviction, but could have some helpful collateral effect, e.g., reducing a penal fine or restitution which can badly effect the quality of life for the client in prison, knocking out a probation condition which impact’s the client’s freedoms and associations, etc.

(3) **Get Your Ducks in Order.** Sort your issues out into an order that makes sense in terms of the remedies and results at which you have your best shot. Sometimes this can mean putting a weak-but-arguable sufficiency of evidence argument in front of a more promising instructional error argument involving the same element of the charge which is arguably deficient in proof; other times it could mean leading with an issue that is not “logically” the first issue, e.g., putting a winning, cutting edge evidentiary issue

(e.g., *Crawford*,) ahead of a weak but arguable *Batson-Wheeler* issue.

Sometimes you will decide your issue-order and priorities from the get-go. But other times, as is often the case, the issues morph, grow, and shrink as you work your way through a complicated AOB. When you are finished, give some thought to reorganizing the order of the issues so that what's really important occupies the foreground, and grabs the reader's attention.

(4) And Now, Introducing . . .” – Introductions and Tables of Contents.

Another way of focusing on key issues, which really goes to the issue of skillful brief writing, is by preparing a concise but effective Introduction to the brief. This is your chance to tell the reader about the issues that really matter in the case, the theme of the arguments, and to set up the more complicated and, hopefully, dazzling discussion which is to follow. Some folks like to put introductions at the very beginning of the brief, before the Statements. Others, put them after the statements, at the beginning of the Argument section. My own practice varies. But I increasingly use introductions the way a good trial lawyer uses the opening statement – as a kind of “roadmap” of what is to come.

I also very much believe that my Table of Contents can and should read like a mini-introduction to the opening brief. Thus, when I draft my headings and subheadings, I try to make them as descriptive as possible without being overly verbose. If you do this right, opening the brief to the Table of Contents – the very first page past the cover – will get the reader started at understanding what important issues are really at stake in this case. Subheadings are very important for this – including subheadings for the Statements of Case and Facts when these advance the telling of the stories you need to impart.

(5) Prioritize the Possible; Downplay or Eliminate the Impossible. Our emphasis should always be on *winnable* remedies, while avoiding, or at least downplaying, relatively impossible ones. This part is not easy. It's hard to sort out what's possible and what is not, and often our very best issues are real longshots. But

good strategy and tactics often require us to carefully pick through several possible theories of error or remedies and run with the one that is the most promising. What follows is a pair of examples from two recent cases of mine concerning those recent initiative resentencing measures, Prop. 47 and Prop. 36, which will hopefully illustrate something of what I mean by this.

(a) **Winter is Nigh:** Mr. Winter’s case is one of the many under Prop. 47 which concern a conviction for violating Vehicle Code section 10851, and the then-disputed issue whether a conviction for this offense is covered as a form of theft under section 490.2, which is now a misdemeanor under Prop. 47 - if the value of the car stolen is less than \$950. (The issue was partly resolved in our favor in *People v. Page* (2017) 3 Cal.5th 1175.) In preparing my briefing in this case, I naturally borrowed from and updated sample briefing on the 10851 issue; nothing exciting there. The challenge came on the \$950 element. There was an issue whether it is the petitioning defendant or the state who has the burden to prove this – which I briefed – again, nothing exciting there.

But I also argued that the record of conviction contained insufficient evidence to show the car was worth more than \$950. Mind you, the police reports, which were the “factual basis for the plea” contained descriptions of statements by the owner saying the car was worth \$2000. Did that sink the ship? No, because I could make two, or possibly three, arguments against this. Argument 1 was my favorite one that I could borrow from prior Prop. 36 briefing: that *Apprendi* and *Descamps* applied, and that disqualifying facts had to be pled and proven elements of the crime in order to make a finding of ineligibility. It’s an elegant argument, and I think it is correct. But I also knew that this argument had as much chance of prevailing in the Courts of Appeal as a snowman surviving in hell.

So, I backed that up with the stronger claim that the evidence in the police reports did not qualify under the *Guerrero* line of cases as part of the record of conviction – the very standard which most of the better appellate opinions on Prop. 36 held applies to determine eligibility exceptions like “arming.” (See, e.g., *People v. Bradford* (2014) 227

Cal.App.4th 1322.) Under this standard, I could make a good argument because (a) police reports, like probation reports, aren't considered part of the record of conviction, and (b) the statement about value was multiple level hearsay, which is also no good under *Guerrero*. So I had a *Guerrero* argument.

The question was whether I would take this argument to the next level of admissibility below *Guerrero*, where proof of the amount of the stolen property could be treated as a “mere sentencing fact” subject to much lesser restriction. I toyed around with various ways of arguing that these statements were unreliable, based on some good federal court case law which precludes sentencing courts from relying on unsupported hearsay and unsubstantiated allegations to prove sentence facts which affect punishment. (See, e.g., *United States v. Weston* (9th Cir. 1971) 448 F.2d 626 [unreliable hearsay] & *United States v. Juwa* (2d Cir. 2007) 508 F.3d 694, 700-701 [dismissed charges].) But I kept running up against the notion that a sentencing court at – for example – a restitution hearing, would find nothing unreliable about a victim's statement about the value of his/her property.

That left me with a tactical decision – should I raise a weak “sentencing facts” argument, which I had outlined and begun to draft? Or should I just scrap it entirely? Judging that the *Guerrero* argument was strong enough, I decided to ditch the “sentencing facts” sub-argument on tactical grounds.

Was this last part “arguable”? Probably. But its likelihood of success was low. Tactically, I decided, it was much better to hitch my wagon to the *Guerrero* “record of conviction” analysis the court was likely to adopt, and try to win the argument that way. The last thing I wanted to do was give the court an “out” by arguing a lower standard - used all the time for “sentencing facts” - under which I would be hard-pressed to make a winning argument.

b. The Next Page. In a later Prop. 36 resentencing case, Page, I faced a fairly novel situation. Mr. Page was doing 80 to life for three separate crimes under the former

Three Strikes law based on a series of offenses he committed with codefendants in 1994 and 1995. In 2013, his resentencing petition was denied because *one* of his counts of conviction on which a life sentence was imposed was for a serious felony. I was able to rescue his case from default and get an appeal reinstated. Meanwhile, the Supreme Court decided *People v. Johnson* (2015) 61 Cal.4th 674 favorably to us on this issue, holding that a person's eligibility for resentencing is determined count-by-count, and that persons like Mr. Page are eligible for life terms for qualifying current offenses even if another life term was imposed for a serious felony offense. So the table was set for arguing his right to resentencing. But the state of the record in terms of the other two convictions on which life terms were imposed made this a very murky area, and I had to figure out how best to raise the question of his eligibility as to the nonserious felony convictions.

As to one of the convictions, for attempted vehicle taking, the path appeared very straight. This plainly is not a serious or violent felony. And while there was evidence from the lengthy trial record in the original case that Mr. Page had employed a crowbar – an instrument which, if used against a person, could be a deadly weapon – to attempt to break into the car, I was able to show that use of a crowbar as a *tool* did not amount to a disqualifying arming with, or use of, a deadly weapon, again citing a favorable holding on this point from *Bradford* that a pair of wire cutters used as an instrumentality of theft did not amount to arming with a deadly weapon. Thus I could argue, based on the “record of conviction” approach adopted by *Bradford* and most courts in terms of Prop 36 eligibility, that Page was eligible as to this offense.

The messy part was for the third conviction on which a life term was imposed. And this really mattered because getting the now-elderly Mr. Page a meaningful chance to get out of prison before he was a dotard meant finding a way to get his sentence down to 30 to life, not 55 to life.

The third sentence was imposed for a violation of former section 245(a)(1). The good news was that it was clearly the non-strike version of the offense, assault by means of force likely to produce great bodily injury. The bad news was twofold. The record of

conviction very strongly suggested that in the course of this offense, Mr. Page personally used one or two deadly weapons - an axe and a metal fire extinguisher, to strike the victim in the head. Yikes. The second bad news was that he had a stayed sentence under section 654 on a separate count from the same transaction for a residential burglary which had been charged, on the odd facts of this case, as “entry into a residence with the intent to commit felony assault.” Do you see the problems?

Problem One: If the record of conviction showed that he personally used a deadly weapon when he committed aggravated assault, he is ineligible for resentencing as to this offense.

Problem Two: even if the 245(a)(1) did not require a life sentence, the residential burglary was a strike, and did require such a sentence as to the same 654-related set of acts.

Ship sunk? No. But I had to be creative and very tactical.

As to the 654 problem with the burglary, I had two options: ignore this side issue, and hope that no one noticed it, then deal with it in the trial court; or take it on directly and find a way around it. And there was a way around it, albeit tentative and circuitous.

Under the current version of section 654, a court must impose the greater sentence when one of two convictions must be stayed. But that was not the state of the law when Mr. Page committed his crimes back in late 1994, when there was no such requirement, and courts had consistently held that a judge had discretion to impose a lesser or greater term when two convictions were subject to the restrictions of section 654. (See, e.g., *People v. Salazar* (1987) 194 Cal.App.3d 634, 639.) And a lovely 9th Circuit case expressly held that applying the new version of section 654 to crimes committed before the amendment violated the ex post facto prohibition by increasing punishment. (*Williams v. Roe* (9th Cir 2005) 421 F.3d 883, 886-887.)¹¹ So, I decided not to avoid this matter, and addressed it head-on, explaining why the issue of eligibility as to the 245(a)(1) was

¹¹ Having treaded through numerous ex post facto challenges in past cases, and even written an article on the Clause, this part of the argument was fairly easy for me to spot.

not moot because of the serious felony burglary since, if the sentencing judge granted the resentencing petition, he or she would have discretion to impose the lesser or greater sentence.

The other problem was even knottier. Obviously, I would make an *Apprendi-Descamps* argument that it made no difference if the evidence in the record showed personal use of a weapon because it was not pleaded and proven and there was no reason to contest the question whether Mr. Page, or someone else, used the weapons, or whether a weapon was even used or not, because the unpled, unproven facts had no bearing on findings of guilt or punishment in the case. It helped that the evidence about weapon use was decidedly all over the place, with witnesses saying different things at different times, a fair amount of testimony suggesting that another codefendant used the weapons, and some bases to doubt if the weapons were ever used.

But what about *Guerrero*? Could I make an argument that under the *Guerrero* doctrine there was insufficient evidence of personal use of a weapon to establish this fact? Remember, I was dealing with a jury trial transcript, so the typical *Guerrero* issues about what's reliable and part of the record were out the window. The evidence was, as I suggested, all over the place; so maybe there was room for such an argument. But when I looked at this through the lens of the unfavorable sufficiency of evidence review standard, I got a weak feeling in my gut. Of course there was substantial evidence showing he used the weapon, in the form of witness testimony on this point and prior statements confirming it. I began to get the sinking feeling that I couldn't win this one, argue though I try.

It was at this point in the process that I came to a critical realization which led me to the tactical breakthrough on this sub-issue. Sufficiency of evidence review didn't really make sense here. Why? Because no trial court, either at the original trial, or in the Prop. 36 petition proceedings, had ever made any kind of decision – express or implied – as to whether Mr. Page had used a weapon. Can a reviewing court engage in sufficiency of evidence review on such a record? I thought not. But was this an established legal

principle I could explain?

So I started going down the hall to talk to my learned colleagues. And one of them, Jonathan Grossman, came up with a good analogous situation – Fourth Amendment cases, the resolution of which, because of an appellate legal ruling different from a trial court, would turn on the determination of a factual matter that the trial court had never addressed. In those situations, case law holds that the proper remedy is to remand the case to the trial court to decide the disputed factual issue - e.g., an officer’s “good faith” - in the first instance. (See, e.g., *People v. Superior Court (Tunch)* 80 Cal.App.4th 665, 683.) I then did some snooping and found lots of appellate cases, mostly civil, where the reviewing court remanded for a “first instance” finding of fact by a trial court which had not been made. (See, e.g., *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1171-1172 [ordering remand to allow merits of unconscionability defense to be “determined by the trial court in the first instance”].)

Now I had a new focus. If the Court of Appeal disagreed with me about the *Apprendi-Descamps* argument – and I knew they would until told otherwise by one or another Supreme Court – the proper remedy was to remand the matter, as to the aggravated assault count, to the trial court for a “first instance” finding of eligibility based on arming/use of a deadly weapon. I chose, for tactical reasons, to make no *Guerrero* argument on appeal, believing it was (a) bound to lose and (b) not on target in terms of the posture of the finding at issue.

Was this a smart tactical decision? There were some other factors to consider. How, for example, was the unfriendly superior court judge deciding these eligibility issues in Santa Clara County likely to decide this “personal use” issue on remand? Probably badly. But at least there would be a chance to marshal the best argument from the crazy, lengthy, confusing trial record. And maybe – just maybe – the kind of rare mercy one occasionally sees in the trial court might show up, and the DA and judge would decide that 30 to life for an aging, unhealthy, semi-retired sociopath was enough justice. It was his best shot, and I went with this tactical approach.

Of course, I knew when I was writing this brief that the proof would be in the pudding, and, that Mr. Page would probably end up with the functional LWOP of 55 to life. But I firmly believed that the tactical way I decided to resolve this issue would give him his best shot of getting out of prison with enough life left to enjoy something of the world. When it comes down to it, that's what was most important in this case, and my focus had to be on this goal.

Afterword: we got a reversal on appeal with all the decisions as to sentencing left to the trial judge; and my co-conspirator at the PD's Office, Michelle Vasquez, somehow got the case to a favorable judge, employed much of my briefing in the trial court, and got the judge to resentence Mr. Page to 30 to life. So, my struggles with tactics and issue articulation ended up paying off big time!

(5) Knowing Your Courts and Panels and the Limits of the Possible. Finally, bear in mind that strategizing about how to set up a winning issue requires you to pay some attention to the courts and justices who are likely to decide the case. Thinking of the best way to package an issue requires some flexibility depending on the "audience" for your argument. Some appellate courts – or divisions within the larger courts – are more liberal or conservative than the norm. And within certain courts, particular sets of issues may already be red-flagged as "hot" issues.

I often wish there was a way to know, when I am writing the brief, what panel of justices will be deciding the case. But it doesn't work that way. You can, however, spice up your briefs, when possible, with citations to helpful published opinions by justices in the court or division where the case is being decided, or highlight that court's opinions when discussing a split within the appellate courts.

Our strategies about framing and packaging issues also need to take into account the significant changes at the California Supreme Court based on the four most recent appointments to that Court by Governor Brown. During the dark days of the Lucas Court, and the only-slightly-less-dark days of the George Court, the prospect of a case being

picked up for review typically made us shudder. I often found myself packaging potentially winning issues on appeal in a manner which made them less interesting as legal issues so as to avoid the risk of a published decision and a grant of review. Now the tables have turned considerably. We can now consider raising issues with cutting edge components with the hope – instead of the fear – that these issues could lead to a grant of review.

And not only that. I think that many of the more outrageously bad, result-oriented decisions of the Lucas and George Courts can be challenged as unsound. Stare decisis is never easy to buck; but one thing that those Courts have given us that is favorable is the notion that the High Court can and should overrule prior precedents which are unsound. (See, e.g., *People v. King* (1993) 5 Cal.4th 59 [overruling *In re Culbreth* (1976) 17 Cal.3d 330 on multiple firearm enhancements]; or *People v. Breverman* (1998) 19 Cal.4th 142 [overruling then-settled test of *People v. Sedeno* (1974) 10 Cal.3d 703 as to standard of prejudice for failure to instruct on an LIO].) And quite a number of such bad decisions have fallen already (see, e.g., *People v. Chun* (2009) 45 Cal.4th 1172 [overruling *People v. Hansen* (1994) 9 Cal.4th 300 as to applicability of “merger” doctrine to assaultive shooting offenses]; *People v. Gallardo* (2017) 4 Cal.5th 120 [overruling *People v. McGee* (2006) 38 Cal.4th 682 and, implicitly, *People v. Guerrero* (1988) 44 Cal.3d 343 with respect of the applicability of *Aprandi* to proof of prior convictions and the restriction of such proof to the elements of the prior crime].) So, as an addendum to the notion, discussed above, about not being turned aside by seemingly unfavorable case law, we can and should find ways to package issues which challenge prior CSC decisions – especially 4-3 decisions – that were poorly reasoned and contrary to prior settled authority.

I have written a separate article where I discuss a whole group of George and Lucas Court decisions which are ripe for challenge, and which is available on our website for your review (or available from me if you send me an email). The point here is that we should not take bad case law precedent as a given any more, and should dive in with direct challenges to such case law when such a challenge is feasible and can help our

clients.

F. Keeping the Issue Spotting Magic Alive After You've Filed the AOB.

After writing and filing an AOB, I end up feeling as exhausted as Zeus after Athena burst out of his brain fully formed. The last thing you want to do, at least until you get the AG's brief, is work on new issues in the case. Yet experience has shown that it is common for great issues to reveal themselves to you after the AOB is filed.

Thus, the "ardor and humility" of issue spotting, the spirit of curiosity and zealous effort for the client, must continue post-AOB. When you see a case in the advance sheets which makes you think, "My God! Why didn't I raise that in the *Smith* case?" go for it! Do thorough research. And don't ever be afraid to ask leave to file a supplemental brief because you, well, missed it first time through. I have done it many times, and have yet to have a motion denied, or be notified by the State Bar that the Court of Appeal has reported me for my ineptitude ab initio. In any case, even if appellate judges and clerks think I'm a lightweight for this, so be it. The point is to get the relief my client is entitled to, or to raise and preserve an possible winning federal habeas claim.

Alan Siraco provides two great example of how this can work in practice.

War story: Years ago, in an assisted criminal case, I suffered a published loss. I got a call from Mark Harvis at the LA Public Defender, who in reading the advance sheet, noticed that my client was arrested for possession of Valium without a prescription. He told me he had won demurrers on the argument that this was not illegal in California, though it was a federal offense. So, I took this issue, unspotted by trial counsel, assisting project staff and myself, and parleyed it into a reversal through a petition for rehearing and habeas petition.

Moral: take nothing for granted; check the elements of every offense and the language of every jury instruction, and don't assume issue spotting is done once the AOB is filed.

Another war story. In a dependency case, there was a potential issue regarding my client erroneously being denied "presumed" father status. Trial counsel felt she had set it up well, but I thought the facts weren't

there. My project buddy convinced me that a thin thread existed, enough to pass through the frivolous filter. So, I reluctantly briefed it – to a panel that had recently rejected the same claim, and which previous rejection had been taken up the California Supreme Court by that time. We lost, but for different reasons. A petition for rehearing addressing those different reasons resulted in a 180 degree switch and a reversal for my client.

Moral: sometimes, it's not so much the spotting of the issue as tenaciously hanging onto it.

Of course, it's generally best to raise post-AOB issues in a supplemental brief, to forestall the problem of procedural default from presenting issues for the first time in a reply brief or rehearing petition. However, when it's too late for a supplemental brief, don't quit; find a way to raise the issue somehow via rehearing, a motion to recall the remittitur, or even a pro per habeas you prepare for your client alleging appellate IAC.

Many moons ago, in my pre-SDAP days, I spotted an issue for the first time when I reread the court's unpublished opinion *after* review had been denied. It turned out there was an enhancement imposed which was never pleaded – the pleading was for a lesser-related weapon enhancement, not the greater one imposed. Basically, everyone in the trial court had failed to spot this, and I had missed it clear through the appellate process! What could I do to remedy this at such a late juncture of the case? I got creative and wrote up a “motion to recall the remittitur,” laying all this out, and falling on the sword of my own appellate IAC on top of trial counsel IAC and clear error by the trial court. To my joy and surprise the 5th District panel issued an order treating the motion as a habeas corpus petition, and asking the AG to informally respond if it saw any reason not to grant the requested modification! There was no such reason, the sentence was modified, and my client ended up getting out of prison a couple years earlier! And did he ever call to thank me? (Actually, I think he did.)

Just goes to show you – never quit.

G. Habeas Issue Spotting – Expanding the Horizon.

In many senses, the spotting of potential habeas issues tends to fit into the “stink” test formula discussed above, but on a wider playing field. In a habeas, for example, an unexplained failure to object to damaging and improper evidence or instructions creates fertile grounds for an arguable issue.

As Kat Kozik reminds us, the possibility of a habeas claim gives rise to new ways of spotting issues. While you are confined on direct appeal to issues that can be found through careful review of the record, Kat’s issue spotting suggestions show how these limits change for habeas cases.

(1) Get and review as many materials about the case as you can, including opening statements for any possible reason, and the police report, because you might be delightfully surprised at what you find. Never underestimate the possibility that trial counsel failed to investigate something really obvious and/or that the DA suppressed favorable info. One of our roles is to uncover obvious mistakes. The more obvious, the easier to get relief.

Here’s an example of how review of an opening statement led to a winner in one of my earliest cases. The client complained bitterly about IAC for failure to call defense witnesses and for many other things. In an augment motion, I threw in that I wanted the defense attorney’s opening statement because of numerous IAC allegations by the client – a very general request. The opening statement was added to the record (perhaps because it was one of several items requested and I had articulated better cause for getting the others). I was delightfully surprised to discover that defense counsel promised in his opening to produce witnesses he never called at trial, and found case law holding that such a “broken promise” to the jury is a special type of IAC because of the terrible impression it creates. (I wasn’t expecting/suspecting this when making the augment request – the client had just complained about the failure to present the witnesses, not the broken promise angle.) We presented a writ alleging IAC for failure to present the defense witnesses and IAC for failing to do so after promising to. The client ultimately won in federal court on the second claim. The

court said it wouldn't have second-guessed the failure to present the witnesses if the omission were judged on a clean slate, but that the broken promise to the jury was inexcusable. I felt that getting the opening statement and discovering the broken promise in it was a stroke of luck at the time. But now I know to look for this issue.

Another example involving a Police Report shows the extent of some defense attorney's failure to investigate! My client was prosecuted for selling drugs to a buyer in front of a drug house. The buyer was arrested near the scene and wound up testifying against my client (ID'ing him as the seller) in exchange for immunity. The client complained about IAC for many reasons, so I got the police report to assess his complaints. His complaints didn't pan out. But the police report contained a wonderful surprise that was the basis for some very strong IAC/*Brady* issues: it said that the buyer's blood was drawn at the police station after his arrest and was sent to the drug lab (he probably looked high to the arresting officers). This was news to me – not mentioned by the client, not in evidence at trial. Trial counsel didn't bother to find out the results of the lab test. The DA didn't disclose them to the defense. The lab sent me the results: positive for drugs. It would have been nice if the jury had known this in order to assess the witness's ability to ID my client.

2) Ask “*what if*” questions and hypothesize answers favorable to the client, then see if you can discover the favorable information with some investigation. Sometimes, what you ultimately find is useful for a purpose other than the one that originally motivated the investigation.

I had a shooting case where the house where the shooting occurred had been boarded up at the time of trial and abandoned. No one knew why. My client kept saying the place was a drug house and the people who lived there had beefs with lots of folks who could have been the shooters. The defense elicited that the house was a filthy dilapidated pit, but got denials from the DA witnesses about any connection to drugs. I wondered if the government might have shut the place down as a drug house, hence the boarded up windows. I made a public records requests. Turned out that the police department and city inspectors condemned the building as a nuisance/blight because of its dilapidated condition/garbage/pests and forced the occupants to move. There was no hard evidence of it being a

drug house. End of story? No! The police department is an “arm” of the prosecution team. It’s shutting down the building and forcing the occupants to move six months before my client’s trial undermined the DA’s claim that the prosecution exercised due diligence in going to the condemned house two weeks before trial and expecting to find a witness still living there. The trial court found due diligence and let the witness’s prelim testimony be read to the jury. I filed a writ raising IAC/Brady error for the info not coming out at the due diligence hearing.

Kat’s “what if” approach is crucial for good habeas issue spotting, as can be seen by looking at the subject of expert testimony. Have you ever read over a record and asked yourself why in the world defense counsel failed to get an expert to testify as to some key aspect of the case? It happens to me all the time. This aspect of the “something stinks” test can be turned into a winning issue. For example, in a case with weak eyewitness identification evidence, where a number of recognized factors suggest possible misidentification, the failure to call an eyewitness identification expert to testify as allowed under *People v. McDonald* (1984) 37 Cal.3d 351 can often amount to IAC.

Or, as happened to me some years ago, a defense expert may testify in a case, but leave you wondering why counsel didn’t pursue what looked like an obvious area for inquiry with the expert. In my case, the charges involved sex with unconscious teenage victims; there was evidence of physical injuries to the victims consistent with sex on an unconscious person, but also strong evidence of PCP use by the victims. The defense was that the victims weren’t unconscious and had consensual sex. The expert, the late Dr. Stephen Pittel, was utilized to show that the victims couldn’t have instantly passed out as they claimed based on a dose of PCP in their mixed drinks. However, Dr. Pittel was never asked if the victim’s injuries to their anal and vaginal area could have been consistent with consensual sex while under the influence of PCP, a drug which both reduces inhibitions and causes a person under its influence to basically feel no pain. When I spoke with Dr. Pittel, he advised me that this subject had never been covered with defense counsel, and had strong substantive merit, but that he was, in fact, unaware of the

victims' injuries. So, I had a habeas. (Which I lost in the Sixth District, and which, alas, was forfeited in federal court for reasons too complicated to go into here.)

Habeas issue spotting gives you a chance to think like a good trial lawyer, and figure out what defenses *should* have been explored and developed, but *weren't*.

Careful record review also can lead to finding winning habeas issues. Lori Klein notes that she "listens to every audiotape and views every videotape that the jury sees," and gives an example of how careful record review of an audio tape led her to a winning habeas issue.

Listening to and viewing tapes does several things: (1) it brings the "cold" transcript to life, often in unexpected ways; (2) it alerts me to issues that I might not have noticed had I not looked at/listened to that evidence; and (3) it generally increases my sensitivity to the whole flow of a case, so that I am more likely to pick up something that "smells bad."

Furthermore, I do this whether I am familiar with the language on the tape or not. This resulted in a huge pay-off in Sunny Nguyen's appeal – I listened to the taped police interrogation, including the part at the beginning that was (in part) in Vietnamese. During my review, I noticed that there were two distinct voices on the tape, and I could sense that this part of the tape was not as "inaudible" as the reporters had said. This ultimately led (with some luck) to the reversal of the convictions against him.

Well, it was only part luck. Lori scoured around and found a Vietnamese speaking radio broadcaster from Southern California who was able to both enhance the tape and translate it into English for her. It turned out that the "inaudible" portion was clear enough to be translated, and involved very favorable defense evidence. So, a hunch from listening to an original tape recording in a language which Lori could not understand at all led to a winning issue.

Habeas, of course, is a vast subject. However, I hope the above suggestions will help you to come up with winning issues in this critical area of appellate work.

CONCLUSION

Well, we have come to the end, and my story has grown in the retelling; but I guess that was the idea of a rewrite. Thanks again to all those who helped me to put this together, a decade ago and more recently during the first revision.

As I said the first time around, this has been a somewhat haphazard tour through the Gestalt of issue spotting. But if it has given you some useful tips, and will help to energize your efforts for our clients in this crucial part of our work as criminal appellate advocates, then it was worth the effort.