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## A rarity: Success on habeas

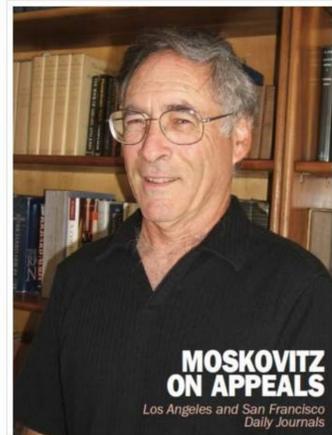
**Last March, the California Supreme Court vacated the conviction and sentence of a death row inmate. This rarely happens.**



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Moskovitz Appellate Team is a group of former appellate judges and appellate research attorneys who handle and consult on appeals and writs. The Daily Journal has named M.A.T. as one of California's top boutique law firms. David was a Judicial Staff Attorney at the California Supreme Court of California for 11 years, but the views expressed are solely those of the author. This article does not purport to reflect the views of the California Supreme Court as a whole or any of its justices, and is based entirely on information available to the public. David has taught California Constitutional law at Hastings College of the Law and is a contributor to the SCOCA (Supreme Court of California) blog (<http://scocablog.com/>).

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### MOSKOVITZ ON APPEALS

Last March, in *In re Vicente Benavides Figueroa on Habeas Corpus*, 4 Cal. 5th 576 (2018), the California Supreme Court vacated the conviction and sentence of a death row inmate. This rarely happens. And, it arose not on appeal, but from a habeas corpus petition.

This case is distinctive in other ways too. It features a horrific crime and a series of unlikely procedural twists worthy of a "Perry Mason" novel. The case reflects both the best and the worst of how habeas corpus petitions have been used in death penalty cases.

#### The Facts of the Crime

Benavides was the boyfriend of a woman who had a 21-month-old daughter named Consuelo. In November of 1991, Benavides and the mother brought Consuelo to an emergency room. She was limp and unresponsive. Medical examination showed massive internal injuries. Her bowel and lower internal organs

were cracked in half. There was also evidence of older injuries suggesting previous physical abuse. She died in the hospital about a week later without ever regaining consciousness.

Benavides told investigators that he was babysitting Consuelo while her mother was out, but that Consuelo had slipped out of the house while he was cooking. He said he discovered her lying unconscious and injured near the carport of the house. His story was never verified by anyone else, and he was ultimately charged with her murder. Because the medical testing revealed swelling around her anus, one of the doctors who had examined her opined that she had been, in effect, sodomized to death.

The doctor testified to this at Benavides' trial, which resulted in Benavides conviction for first degree murder -- and a sentence of death. Benavides' conviction and death sentence were affirmed on appeal by the California Supreme Court in 2005. *People v. Benavides*, 35 Cal. 4th 69 (2005).

#### The Habeas Petition

In 2002, a petition for writ of habeas corpus was filed on his behalf in the California Supreme Court.

Like an appeal, a habeas corpus petition seeks to overturn a criminal conviction. But, while an appeal is based entirely on the trial record, a habeas corpus claim presents facts outside the record -- new facts that were never considered at trial.

The habeas petition claimed that the prosecution had presented false evidence at Benavides' trial, in the form of the doctor's expert opinion testimony about the cause of Consuelo's death.

The habeas corpus petition presented the declarations of the doctors who had treated Consuelo. This evidence tended to support the theory of the petition -- that the external trauma to Consuelo's genital/anal area was caused by a catheter the doctors inserted during her initial treatment at the emergency room, not by an earlier assault. Furthermore, many of the medical professionals who testified at trial subsequently retracted their testimony. Finally, other medical experts submitted declarations opining the physical impossibility of the prosecution's expert witness testimony that the massive damage to Consuelo's internal organs was caused by a forceful anal rape.

#### The "Life History"

While Benavides' 2002 petition contained this ultimately meritorious claim, the petition (like all modern capital habeas corpus petitions) contained a plethora of other claims, too.

Capital habeas corpus petitions often present the petitioner's life history. This arises in the context of a claim for ineffective assistance of trial counsel in the presentation of mitigating evidence at the penalty phase of the capital trial. The contention is that trial counsel did not present enough background information about the petitioner's life to the jury and that, if trial counsel had presented all the details that the habeas corpus petition now sets forth, the jury would not have given the petitioner a death sentence.

Ineffective assistance of trial counsel claims based on failure to present an adequate life history have rarely been successful with the California Supreme Court. They have found more success with the 9th U.S. Circuit Court of Appeals, although the U.S. Supreme Court has, in turn, reversed the 9th Circuit's reversals in several cases. *See, e.g., Cullen v. Pinholster*, 563 U.S. 170 (2011).

In Benavides' case, the life history part of his habeas corpus petition ended up being more than just superfluous to his eventual meritorious false evidence claim. Several years after Benavides' petition was filed, it was discovered that several of the declarations supporting the life history section, which purported to be signed by friends and family members of Benavides, were actually forged -- fabrications created by one of the habeas corpus investigators working on the case. The irony is that while there was a meritorious false evidence claim in the Benavides petition, the investigator sought to pump up the life history section with fabricated declarations designed to make Benavides appear more sympathetic. (For background, see Louis Sahagun, "Death Penalty Foe Gets Five Years in Prison; A Former Defense Investigator Faked Documents to Try to Delay Four Executions," L.A. Times, Aug. 17, 2007, at B1.)

The lawyers representing Benavides had to withdraw the 2002 petition and sanitize it of all of the fabrications. It took another two years for a corrected amended petition to be filed in 2008.

But Benavides was still not completely out of the woods. A 2012 California Supreme Court decision, *In re Richards*, 55 Cal. 4th 948, 963 had narrowly construed how a false evidence claim based on expert witness testimony could be made, holding that, "one does not establish false evidence merely by presenting evidence that an expert witness has recanted the opinion testimony given at trial." However, in 2014, the legislature amended Penal Code Section 1473, the statute governing false evidence claims in habeas corpus petitions, and added a new subdivision, (e), stating: "For the purposes of this section, 'false evidence' shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances." Penal Code Section 1473(e)(1).

In his Return to the Order to Show Cause, the Attorney General conceded that false evidence had been presented at Benavides' trial. Consequently, there was no need to hold an evidentiary hearing to take evidence on disputed facts concerning the habeas claim, which is the usual next step when an order to show cause has been granted for a habeas petition. While the Attorney General conceded that false evidence had been presented and that the death sentence and the first-degree murder conviction should be vacated, he argued that the California Supreme Court should "reform" the sentence to second-degree murder. While the Court had the power to reform the sentence, the Court concluded that since the rape felony-murder theory was the central prosecution theory at trial, it would be pure speculation to conclude that the jurors would have nonetheless returned a second-degree murder conviction had the case been tried without the rape felony-murder theory. Consequently, the Court vacated the conviction and death sentence in its entirety.

#### The Aftermath

It was then up to the Kern County District Attorney's Office to decide whether to re-try Benavides, which it decided not to do. Benavides was released from jail.

But legally this was not an exoneration. There has been no finding that Benavides is factually innocent. A prosecutor can decline to retry a case for many reasons, including the long passage of time, which would make retrial difficult because of lost evidence and fading memories. Twenty-seven years have passed since the death of Consuelo. There remain many unanswered questions in this troubling case.

#### The Larger Picture

Are there any general lessons we can take from this otherwise singular case?

In the end, the system worked. A major error in a trial was uncovered and a death sentence was vacated. Unlike many capital habeas corpus petitions, Benavides had a strong claim -- the presentation of false evidence -- the type of claim for which the writ of habeas corpus had originally been developed. Would this claim have been recognized and acted-upon sooner if it had not been bundled up in a typical massive, multi-claim capital habeas corpus petition? Perhaps.

Habeas attorneys for capital inmates are in a difficult position. They feel obligated to raise all issues in a massive petition, because it is hard to predict what claims, if any, will get traction on the merits, because the issues need to be preserved for federal habeas, and because delay typically benefits the petitioner. Perhaps, in an ideal system, we could have a process whereby a capital habeas petitioner could get a question certified for fast-track review, without waiving the right to raise other issues in a subsequent petition. But this would require a radical change in the whole capital habeas process.

It so happens that Proposition 66, narrowly passed by the voters in 2016, did attempt a radical change in the process by instituting a mandatory five-year deadline for state courts to complete the review of both the direct appeal and the habeas corpus petition in capital cases. However, the California Supreme Court held that part of Proposition 66 to be an unconstitutional violation of the separation of powers. The remaining provisions of Proposition 66 do constitute change capital habeas procedure by requiring that petitions be initially filed in the superior court and that denials be appealed to the Court of Appeal. But it remains to be seen whether these changes will result in a swifter adjudication of meritorious claims. (For further discussion, see David A. Kaiser, "Opinion Analysis: *Briggs v. Brown* (2017) Part 1.")

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