



**Digital Commons@**

Loyola Marymount University  
LMU Loyola Law School

Loyola of Los Angeles Law Review

---

Volume 19  
Number 2 *Financing the Right to Counsel in  
California*

Article 2

---

12-1-1985

## Financing the Right to Counsel in California: A Conference of Legislators, County Supervisors and Bar Leaders

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

*Financing the Right to Counsel in California: A Conference of Legislators, County Supervisors and Bar Leaders*, 19 Loy. L.A. L. Rev. 325 (1985).

Available at: <https://digitalcommons.lmu.edu/llr/vol19/iss2/2>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# FINANCING THE RIGHT TO COUNSEL IN CALIFORNIA

A Conference of Legislators, County Supervisors and Bar Leaders\*

State Capitol Building  
Sacramento, California  
January 23, 1985

*In 1984, approximately \$175 million was spent for the defense of indigents in legal proceedings in California. Despite this expenditure by state, county and private agencies, disputes over the source and level of funding have presented the California Courts with grave constitutional issues: Can a County Auditor be jailed for refusal to pay court-ordered fees for the defense of one accused of murder? Can lawyers be compelled to accept uncompensated appointments to represent indigent prisoners in civil litigation? Can a county assign the legal defense of indigents to "low-bid" private contractors on a "piece-rate" basis? Ultimately, these cases present issues which must be addressed by well informed Legislators and County Supervisors. The Conference on Financing the Right to Counsel in California brought these officials together with leaders of the organized bar to learn the legal and practical dimensions of the problem, compare the experience of other states and discuss alternative solutions.*

*The Board of Editors of the Loyola of Los Angeles Law Review asked each of the Conference speakers to review the Conference transcript and annotate their comments as appropriate. We are pleased to reprint the transcript of the Conference on Financing the Right to Counsel in California in its entirety.*

## Conference Sponsors

California Attorneys for Criminal Justice  
American Bar Association  
The State Bar of California  
Los Angeles County Bar Association  
Bar Association of San Francisco  
Sacramento County Bar Association

---

\* Reprints of the annotated conference transcript printed in this issue, including the preceding article by Gerald F. Uelmen, are available at a cost of \$1.50 from the *Loyola of Los Angeles Law Review*, 1441 West Olympic Boulevard, California 90015.

## FINANCING THE RIGHT TO COUNSEL IN CALIFORNIA

### *Conference Program*

INTRODUCTION AND WELCOME	
<i>Gerald F. Uelmen</i>	
<i>Burke M. Critchfield</i> .....	327
THE RIGHT TO COUNSEL: CONSTITUTIONAL IMPERATIVES IN CRIMINAL CASES	
<i>Honorable John K. Van de Kamp</i> .....	329
THE RIGHT TO COUNSEL IN CIVIL CASES: AN INTERNATIONAL PERSPECTIVE	
<i>Honorable Earl Johnson, Jr.</i> .....	341
FINANCING THE RIGHT TO COUNSEL: A VIEW FROM A LOCAL PUBLIC DEFENDER	
<i>Sheldon Portman</i> .....	363
FINANCING THE RIGHT TO COUNSEL: A VIEW FROM THE STATE PUBLIC DEFENDER	
<i>Frank O. Bell, Jr.</i> .....	369
FINANCING THE RIGHT TO COUNSEL: A VIEW FROM THE PRIVATE BAR	
<i>Patricia D. Phillips</i> .....	375
FINANCING THE RIGHT TO COUNSEL IN CAPITAL CASES	
<i>Michael G. Millman</i> .....	383
FINANCING THE RIGHT TO COUNSEL: A NATIONAL PERSPECTIVE	
<i>Norman Lefstein</i> .....	391
FINANCING THE RIGHT TO COUNSEL: THE OREGON EXPERIENCE	
<i>R. William Linden, Jr.</i> .....	399
FINANCING THE RIGHT TO COUNSEL: REPORTS FROM DISCUSSION GROUPS	
<i>Ephraim Margolin, Clyde M. Blackmon, Gerald Blank, Alex Landon, David Heilbron, Wilbur Littlefield</i> .....	405
MEETING THE CHALLENGE: A PANEL DISCUSSION OF POLITICAL LEADERS	
<i>Robert D. Raven, Moderator, Honorable Edmund D. Edelman, Honorable David S. Roberti, Honorable Willie L. Brown, Jr.</i> .....	417

## INTRODUCTION AND WELCOME

*Gerald F. Uelmen, Conference Director\**

On behalf of the California Attorneys for Criminal Justice, the American Bar Association, California Bar Association and the Bar Associations of Los Angeles County, San Francisco and Sacramento County, I would like to welcome you to the Conference on Financing the Right to Counsel in California.

Of course, we are here to discuss a very profound issue; not just an issue of interest to scholars and lawyers and judges, but an issue which wars have been fought over and people have died for. That issue, of course, is money.

We are hoping to learn in today's conference what we are getting for the amount we are paying for the right to counsel in California. In announcing the conference, we informed you that last year we spent \$175 million. That is not all of it.

Certainly the donated services were a substantial part of what we are spending in California. We are going to learn whether we are getting enough to meet the standard we want to set for ourselves, how we can maximize the return on your investment and whether we need to spend more.

My name is Jerry Uelmen. I am the Conference Director. And at this time I would like to call on Burke Critchfield, who is the President of the State Bar of California, to say a few words as well.

*Burke M. Critchfield\*\**

Thank you, Jerry. And good morning to all of you. I am delighted to welcome you to today's Conference on Financing the Right to Counsel in California. This is an issue that clearly demands our vigorous atten-

---

\* Professor of Law, Loyola Law School, Los Angeles, California. Former Assistant United States Attorney for the Central District of California and past President of California Attorneys for Criminal Justice, Professor Uelmen is currently a trustee of the Los Angeles County Bar Association. Professor Uelmen served as amicus counsel in *Yarbrough v. Superior Court*, and his Article on the *Yarbrough* decision is printed in this issue. See Uelmen, Simmering on the "Backburner": The Challenge of *Yarbrough*, 19 LOY. L.A.L. REV. 285 (1985).

\*\* President, State Bar of California (1984-85). Prior to his election to the Board of Governors of the State Bar, Mr. Critchfield was a member of the State Bar Conference of Delegates for fourteen years. He has served as President of the Alameda County Bar Association, the Livermore-Alameda Valley Bar Association, the Alameda County Law Library Board of Trustees and the Livermore Chamber of Commerce.

tion. Unless we act, individual lawyers may continue to be asked to resolve a question of who pays on an ad hoc case-by-case basis.

Lawyers should not be put in this position, and neither should the indigent defendant who has a constitutional guarantee to competent legal services.

I have spoken out on numerous occasions on the inappropriateness, in my view, of requiring individual attorneys to assume financial responsibility for providing capable defense to indigent defendants in civil cases.

The State Bar has made it one of its legislative priorities to remedy the *Yarbrough* decision. It is simply inconsistent to suggest that indigent defendants are entitled to legal representation in certain civil matters, but fail to provide the funding necessary to insure that representation is adequate.

I believe it is unfair to ask the legal profession to shoulder the burden alone. I am equally concerned about the apparent trend towards underfinancing criminal defense services for indigent defendants.

If the State Bar sits back and permits the erosion of the accused's constitutional right to counsel, we will have serious damage done to our system of justice.

Today's conference brings together judges, bar leaders, practitioners and scholars to discuss the constitutional imperatives, the California response and national perspectives and ideas for the challenge ahead. This meeting is timely and of critical importance. I am honored to be here and I look forward to the day's discussion.

Thank you all for coming.

## THE RIGHT TO COUNSEL: CONSTITUTIONAL IMPERATIVES IN CRIMINAL CASES

*Honorable John K. Van de Kamp\**

I am here this morning as a prosecutor with two principal interests in the subject matter at hand. First, given the serious consequences—jail or prison—as well as serious collateral consequences, a defendant deserves to have decent counsel who can devote the time, energy, experience and requisite skill to his client's cause. It is only fair. The Constitution demands it. Second, from the standpoint of the prosecutor, it is generally preferable to have quality opposition than to have a bumbler. Quality opposition means that we can worry about *our* case—and not so much about whether all the issues have been raised by the defense.

I have been asked this morning to talk about the question of competency of counsel. It is an ephemeral subject given the rather murky tests provided to date by our courts. But it ties in with this conference's theme.

No longer can you assign a lawyer—*any* lawyer—to a defendant's cause and figure that you have carried out the constitutional requirements. Today our standards provide for competent counsel, whatever that means. And we are going to have to make the effort to meet those standards and whatever new standards are developed in the months and years ahead.

There are policy implications from that, that tie into the conference today. Public defender offices, as well as private defense counsel, will have to monitor caseloads and workload and develop scheduling and reporting techniques to make sure adequate time can be spent on preparation. And when there's too much, they are going to have to turn cases away. Care will have to be taken by courts in appointing lawyers. Experience will have to be measured against the subject matter at hand, and the particular needs of each case. Because, rest assured there will be someone looking over the lawyer's shoulder somewhere down the line, whether it be juries or judges.

---

\* Attorney General, State of California. As California's Attorney General, Mr. Van de Kamp is responsible for the work of more than 500 staff attorneys who provide advice and representation to state agencies and representation on behalf of the state in nearly all criminal and United States appellate courts. A 23-year veteran of the criminal justice system, Mr. Van de Kamp served as the Los Angeles County District Attorney, the first Federal Public Defender for Los Angeles, Deputy Director and Director of the Executive Office for United States Attorneys, and United States Attorney in Los Angeles.

The right to competent counsel is developing flesh and bones right now. We read about it every couple of days, whether it is in the advance sheets or in the newspaper. But it is not without growing pains; growing pains that I know affect some of you who have been trial counsel, who find your name being bandied about in the appellate courts as incompetent or who may be referred at some point to the State Bar, rightfully or wrongfully. And indeed, it is not without growing pains as it pertains to the Attorney General's office because we have to deal with these issues on appeal.

There is an old maxim that is familiar to many of us as trial lawyers. It is also, I think, relevant to the evolution of the criminal appeal. If the defendant loses the case, it goes to the appellate court. He first puts the trial court judge on trial, challenging the substance and wisdom of the court's rulings. If that does not work out, as the old adage goes, he puts the prosecutor on trial, blaming prosecutorial misconduct. And if all that fails, he puts his own counsel on trial, by claiming he was subject to incompetency.

The problem is that right now, it seems that the very first claim made by many criminal defendants is that they did not get competent counsel. We see it with increasing frequency.

Trial strategists are on trial. Second-guessing becomes the norm. After all, unless you allege incompetence, appellate defense counsel may be charged with incompetence. Something of a vicious circle has developed. And we see these challenges not only on direct appeal, but in habeas corpus proceedings down the line as well.

This litigation leads to some irony. The trial occurs, ostensibly, to determine the guilt or innocence of the accused, while the later proceedings often times focus on the competence or incompetence of the trial counsel.

Prosecutors find themselves in the anomalous position of praising strategies employed by defense attorneys because other defense counsel handling that appeal are assailing the same particular tactics. What prosecutors should pray for today are adequately trained and adequately funded defenders, as well as standards of competency that are clear and unmistakable.

## I. EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The concept of "effective" assistance of counsel, going back to *Powell v. Alabama*<sup>1</sup> in 1932—which established the fundamental right to ap-

---

1. 287 U.S. 45 (1932).

pointed counsel as a critical part of the right to a fair hearing—had little significance for counsel in criminal cases and their clients until recent decisions of the California and United States Supreme Courts.

In the landmark case, *People v. Pope*,<sup>2</sup> our California Supreme Court set out a two-step test for determining the adequacy of counsel: A criminal defendant “must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition [the defendant] *must establish* that counsel’s acts or omissions resulted *in the withdrawal* of a *potentially meritorious defense*.”<sup>3</sup>

In *Pope* the trial lawyer had failed to present evidence of, or even raise the issue of, the defendant’s borderline mental state. The defendant had, in fact, suffered from mental retardation, and evidence presented along those lines might have helped in dealing with some of the incriminating statements that the defendant had made to law enforcement. Counsel, however, tried to put on an aggressive “my client didn’t do it” defense.<sup>4</sup>

Nonetheless the court, after establishing the two-prong test, ruled against the defendant’s claim of attorney incompetency. While suggesting the case was “hastily prepared under intense time pressure,” the court observed that while the “defense preparation was less than exemplary,” under the facts on the record, there was not a failure of counsel to the degree that could be characterized as incompetence.<sup>5</sup> But at least California had a new test.

More recently, in *People v. Fosselman*,<sup>6</sup> this test was broadened further. A defendant may prove ineffectiveness based on acts or omissions not amounting to withdrawal of a defense “if he establishes that his counsel failed to perform with reasonable competence *and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel’s failings*.”<sup>7</sup> So we are dealing with words, typical lawyer’s words. The words “reasonably” and “probable” are words which inevitably require determination on a case-by-case basis.

Fosselman was convicted of assault with a deadly weapon, false imprisonment and battery on a young woman. The prosecutor ended up characterizing the defendant as an “animal . . . out to get somebody that

---

2. 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979).

3. *Id.* at 425, 590 P.2d at 866, 152 Cal. Rptr. at 739 (emphasis added).

4. *Id.* at 418-20, 590 P.2d at 861-63, 152 Cal. Rptr. at 734-36.

5. *Id.* at 429, 590 P.2d at 869, 152 Cal. Rptr. at 742.

6. 33 Cal. 3d 572, 659 P.2d 1144, 189 Cal. Rptr. 855 (1983).

7. *Id.* at 584, 659 P.2d at 1151, 189 Cal. Rptr. at 862 (emphasis added).



morning" and made reference to prior alleged criminal acts of the defendant in a manner that the court held to constitute misconduct.<sup>8</sup> The defense counsel had not raised any objection at all to those particular characterizations.

Using the test laid out in *Pope*, the court held that the record in the case did not entitle the defendant to a reversal based on denial of effective counsel. However the court *did* find that the trial court's refusal to consider a motion for new trial on the ground of ineffective counsel was erroneous, explaining that it was the trial judge's responsibility to see "that the trial is conducted with solicitude for the essential rights of the accused."<sup>9</sup> The practical result is that the old "farce or sham" test—articulated as the yardstick for so many years as the litmus test for competent counsel—has gone out of style along with pet rocks and hoola hoops.

May 14, 1984 was a big day in the United States Supreme Court. They decided *United States v. Cronin*<sup>10</sup> and *Strickland v. Washington*.<sup>11</sup> *Strickland* is the premier United States Supreme Court decision in the area of the right to competent counsel because it was the first time the Court addressed a claim of counsel's actual ineffectiveness. The Court held that a defendant must show that, considering all the circumstances, his attorney's performance fell below an objective standard of reasonableness and so prejudiced him as to result in denial of a fair trial.<sup>12</sup>

The Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."<sup>13</sup> Justice O'Connor, writing for the majority, commented that

[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.<sup>14</sup>

. . . .

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.<sup>15</sup>

---

8. *Id.* at 580-81, 659 P.2d at 1148-49, 189 Cal. Rptr. at 859-60.

9. *Id.* at 582-83, 659 P.2d at 1150, 189 Cal. Rptr. at 861 (quoting *Glasser v. United States*, 315 U.S. 60 (1942)).

10. 104 S. Ct. 2039 (1984).

11. 104 S. Ct. 2052 (1984).

12. *Id.* at 2064-65.

13. *Id.* at 2068.

14. *Id.* at 2064.

15. *Id.* at 2067.

Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance. Justice O'Connor further stated that "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . and in the test for materiality of testimony made unavailable to the defense by government deportation of a witness."<sup>16</sup>

Applying these principles to the case, Justice O'Connor outlined a number of practical considerations that must come into play. She cautioned against mechanical application of the principles, stressing that "the ultimate focus of inquiry must be on the *fundamental fairness* of the proceeding whose result is being challenged."<sup>17</sup> Additionally, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant."<sup>18</sup> Justice O'Connor advised that if "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."<sup>19</sup> In addressing claims of ineffectiveness, appellate courts must determine whether counsel's conduct so undermined the proper functioning of the trial process that the trial court result cannot be relied upon as just.

Justice O'Connor also concluded that the same principles should apply to a capital sentencing procedure. "For purposes of describing counsel's duties, [*a*] *capital sentencing proceeding* need not be distinguished from an ordinary trial."<sup>20</sup>

In California, however, the state supreme court already had applied the effective assistance of counsel standard in capital trials as set forth by *Pope* in 1979.<sup>21</sup> Thus, since *Strickland*, an effective assistance of counsel standard is now applied in all criminal cases. As a practical proposition, however, appellate courts undoubtedly will scrutinize competency claims in capital cases more carefully. The stakes are simply higher. Furthermore, both the United States and California Supreme Courts have concluded that *retained* counsel in criminal cases must be judged by the

---

16. *Id.* at 2068 (citations omitted).

17. *Id.* at 2069 (emphasis added).

18. *Id.* at 2069-70.

19. *Id.* at 2070.

20. *Id.* at 2064 (emphasis added).

21. See *supra* notes 2-5 and accompanying text. See, e.g., *People v. Jackson*, 28 Cal. 3d 264, 288-89, 618 P.2d 149, 158-59, 168 Cal. Rptr. 603, 612-13 (1980), *cert. denied*, *Jackson v. California*, 450 U.S. 1035 (1981); *People v. Frierson*, 25 Cal. 3d 142, 163, 599 P.2d 587, 598, 158 Cal. Rptr. 281, 291-92 (1979).

same standards applicable to appointed counsel.<sup>22</sup>

Finally, the United States Supreme Court in *Strickland* concluded that the minor differences in the lower courts' precise formulations of the actual ineffectiveness standard are insignificant. The different formulations are mere variations of the "reasonable competence" standard.<sup>23</sup> Taking Justice Stewart's approach to the law of obscenity,<sup>24</sup> criminal trial lawyers might best serve themselves and their clients by recognizing that attorney "effectiveness," or lack thereof, has not been something courts have been able to define articulately. Rather it's something "you know when you see," and like beauty or ugliness, is oftentimes only in the eye of the beholder.

Counsel undertaking the defense of a criminal case should bear in mind, from the initial client interview, that the client's right to later challenge counsel's effectiveness greatly increases the odds that counsel may be called to the witness stand at a later date to testify on matters as far ranging as what happened to the fee or to why counsel did not interview a certain witness. Recent California decisions indicate that tactical acts or omissions which seriously prejudice a defendant's case may constitute the withdrawal of a potentially meritorious defense, such as failure to object to impeachment evidence,<sup>25</sup> or failure to move to suppress evidence.<sup>26</sup>

A recitation of cases which have found ineffective counsel would be meaningless because they turn on their own unique facts and circumstances. A review of the cases does, however, tell us much of what we already know. Effectiveness of counsel is the diligent use of available skills and knowledge, including:

- (1) Prompt and thorough fact investigation involving exploration of factual avenues related to innocence, or, if the defendant is guilty, the degree of penalty.
- (2) Use of discovery procedure in the interests of the client.
- (3) Knowledge and application of the law through motions and during trial.
- (4) Maintenance of a good attorney-client relationship.
- (5) Use of scientific evidence and expert testimony in the interest of the defense.

---

22. *Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980); *People v. Frierson*, 25 Cal. 3d 142, 162, 599 P.2d 587, 598, 158 Cal. Rptr. 281, 291-92 (1979).

23. *Strickland*, 104 S. Ct. at 2069.

24. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

25. *People v. Zimmerman*, 102 Cal. App. 3d 647, 658, 161 Cal. Rptr. 669, 674-76 (1980).

26. *People v. Ellers*, 108 Cal. App. 3d 943, 952, 166 Cal. Rptr. 888, 893 (1980).

(6) The honest exercise of professional judgment based upon an adequate foundation of fact and law.

In California we have found that the effective criminal practitioner's file will serve as a defense if and when the practitioner's conduct is brought into question. For those who are poor recordkeepers, it is clear that the luxury of the naked file is gone forever. Since the trial lawyer has an immunity for the honest exercise of professional judgment based on an adequate foundation of fact and law, do not spare the pen. Keep track of where you have been, where you believe you are going, and what you have decided. Who can go back in a thousand-hour murder case and explain satisfactorily two years later what happened along the way by reference only to a cardboard box full of pleadings and transcripts? Records will establish the attorney's effectiveness.

## II. CONFLICT OF INTERESTS BETWEEN CO-DEFENDANTS

A related but separate problem that has plagued defense counsel is the multiple representation of criminal defendants. In the absence of a knowing, intelligent waiver, both the United States and California Supreme Courts have frequently found a denial of effective assistance of counsel because of conflicts of interest between co-defendants.<sup>27</sup>

In *People v. Mroczko*<sup>28</sup> the California Supreme Court observed that "[i]n every case of multiple representation, there exists a likelihood, if not a certainty, that the strategic maneuvers of the criminal defense attorney will adversely affect the interests of at least one defendant at some point in the trial process."<sup>29</sup> The court further commented that "[w]hile the most obvious conflicts arise when defendants have inconsistent defenses or . . . have been offered inconsistent plea bargains," almost any difference in co-defendants' criminal records, credibility, appearance or culpability "can trigger a conflict at trial."<sup>30</sup> "[I]nnumerable intangible factors' . . . may always lurk in the wings when there is a disparity of involvement between codefendants."<sup>31</sup>

Because the potential for conflict of interest in representing multiple defendants is so grave, the California Supreme Court's standard of re-

---

27. See, e.g., *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978); *People v. Chacon*, 69 Cal. 2d 765, 773, 447 P.2d 106, 113, 73 Cal. Rptr. 10, 17 (1968).

28. 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983).

29. *Id.* at 103, 672 P.2d at 844, 197 Cal. Rptr. at 62 (quoting Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 136 (1978)).

30. *Id.* at 103-04, 672 P.2d at 844-45, 197 Cal. Rptr. at 62.

31. *People v. Gallardo*, 269 Cal. App. 2d 86, 90, 74 Cal. Rptr. 572, 575 (1969) (quoting *People v. Kerfoot*, 184 Cal. App. 2d 622, 637, 7 Cal. Rptr. 674, 684 (1960)).

view is extremely rigorous. Regardless of whether there was an objection, even a potential conflict may require reversal if the record supports "an informed speculation" that an appellant's right to effective representation was prejudicially affected.<sup>32</sup> Proof of an "actual conflict" is not required.<sup>33</sup>

While the right to conflict-free representation generally may be waived,

the trial court must assure itself that (1) the defendant has discussed the potential drawbacks of joint representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of joint representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.<sup>34</sup>

There are special problems presented in determining whether there has been a knowing waiver of a conflict of interest. The defense lawyer who is torn between representing the best interest of each client is going to have a difficult job explaining that dilemma to each client. The trial court is at a different disadvantage because it cannot possibly know as much about the case as defense counsel. Quite correctly, our courts are now making it tough to represent more than one client.

In *Mroczko*, the California Supreme Court also adopted the following judicially declared rule of criminal procedure:

[W]hen the court undertakes to appoint counsel, it must initially select separate and independent counsel for each defendant "with an instruction that if counsel conclude, after fully investigating the case and consulting with their clients, that the interests of justice and of the clients will best be served by joint representation, this conclusion with supporting reasons shall be communicated to the court for such on-the-record disposition as the court deems appropriate in the circumstances."<sup>35</sup>

By shifting the burden to defense counsel, the court has provided much greater certainty in this area, and for that we should be grateful.

---

32. *People v. Chacon*, 69 Cal. 2d 765, 776 n.3, 447 P.2d 106, 113 n.3 73 Cal. Rptr. 10, 17 n.3 (1968) (quoting *Lollar v. United States*, 376 F.2d 243, 247 (D.C. Cir. 1967)).

33. *Maxwell v. Superior Court*, 30 Cal. 3d 606, 612-13, 639 P.2d 248, 251, 180 Cal. Rptr. 177, 180 (1982).

34. *Mroczko*, 35 Cal. 3d at 110, 672 P.2d at 850, 197 Cal. Rptr. at 67 (citations omitted).

35. *Id.* at 115, 672 P.2d at 853, 197 Cal. Rptr. at 71 (quoting *Ford v. United States*, 379 F.2d 123, 126 (D.C. Cir. 1967)).

## III. COMPETENCE OF APPELLATE COUNSEL

It is not just the competency of trial counsel we are concerned about. Unsuccessful appellants have increasingly challenged the effectiveness of appellate counsel. The fourteenth amendment to the United States Constitution requires that an accused indigent be afforded the assistance of competent counsel on appeal.<sup>36</sup> The California Supreme Court, in *In re Smith*,<sup>37</sup> set forth the duties which an appellant's appointed counsel must fulfill to meet his or her obligations as a competent advocate. These include:

prepar[ing] a brief to assist the court in understanding the facts and the legal issues in the case. The brief must set forth a statement of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authority, and *argue all issues that are arguable*.<sup>38</sup>

Thus, in *Smith*, our state supreme court held that the inexcusable failure of defendant's appellate counsel to raise crucial assignments of error, which originally might have resulted in a reversal, deprived the petitioner of the effective assistance of appellate counsel.

There have been inconsistent interpretations as to the meaning of an "arguable issue on appeal" which must be argued pursuant to the *Smith* case. The court of appeal in *People v. Scobie*<sup>39</sup> held that *Smith* developed a new concept: the "arguable-but-unmeritorious" issue which had to be argued as a requirement of due process on appeal.<sup>40</sup> Some have suggested this interpretation would reduce the process of appellate review to some kind of a W.P.A. project for the continued employment of judges and lawyers. Most courts have rejected this concept and held that an arguable issue on appeal consists of two elements: First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment.<sup>41</sup>

---

36. *Ross v. Moffitt*, 417 U.S. 600 (1974); *Douglas v. California*, 372 U.S. 353 (1963); *People v. Barton*, 21 Cal. 3d 513, 579 P.2d 1043, 146 Cal. Rptr. 727 (1978).

37. 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970).

38. *Id.* at 197, 474 P.2d at 971-72, 90 Cal. Rptr. at 4 (emphasis added).

39. 36 Cal. App. 3d 97, 111 Cal. Rptr. 600 (1973).

40. *Id.* at 99, 111 Cal. Rptr. at 601.

41. *People v. Johnson*, 123 Cal. App. 3d 106, 109, 176 Cal. Rptr. 390, 391 (1981), *cert. denied*, *Johnson v. California*, 457 U.S. 1108 (1982).

Under this standard, the California courts have held that appellate counsel were incompetent for neglecting to raise the issue of the trial court's failure to state a reason for imposing consecutive terms,<sup>42</sup> for neglecting to cite a recent line of cases that would have resulted in reduction of the charge<sup>43</sup> and for failing to present an adequate record to enable the court of appeal to reach the merits of defendant's search and seizure contention.<sup>44</sup>

#### IV. NEW CASES

We have seen a couple of cases that have come down, on the state and federal level, in just the last few weeks that bear directly on the right-to-counsel issue. On December 27, 1984 the state supreme court reversed a conviction in a Merced County case, *People v. Bigelow*.<sup>45</sup> There, the trial judge first allowed the defendant to discharge his lawyer and represent himself, but then refused to appoint advisory counsel. The court unanimously held that the failure of the trial court to appoint an advisory counsel to *in propria persona* defendants is reversible error per se.<sup>46</sup>

And just recently, a strong majority of the United States Supreme Court in *Evitts v. Lucey*<sup>47</sup> held, for the first time, that criminal defendants have the same right to effective counsel at the appellate stage as during trial. The Court overturned a Kentucky man's conviction on drug charges when the defendant's lawyer neglected to file a required statement on appeal with the appellate brief, leading to dismissal of the appeal.<sup>48</sup> With Justices Burger and Rehnquist dissenting, Justice Brennan wrote for the majority that the right to an effective lawyer is one of the procedural protections a state must afford if it allows a defendant to appeal his conviction.<sup>49</sup> This is a first for the United States Supreme Court. By so doing, it is only about ten years behind us in California.

#### V. CONCLUSION

Regardless of skill, reputation or past performance, an attorney must realize that the de facto immunity of post-conviction inquiry into

---

42. *In re Spears*, 157 Cal. App. 3d 1203, 204 Cal. Rptr. 333 (1984).

43. *In re Greenfield*, 11 Cal. App. 3d 536, 89 Cal. Rptr. 847 (1970).

44. *People v. Barton*, 21 Cal. 3d 513, 579 P.2d 1043, 146 Cal. Rptr. 727 (1978).

45. 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984), *modified*, 38 Cal. 3d 344a (1985).

46. *Id.* at 744, 691 P.2d at 1001, 209 Cal. Rptr. at 335.

47. 105 S. Ct. 830 (1985).

48. *Id.* at 832.

49. *Id.* at 834-36.

his or her effectiveness is gone. The stakes are high in the criminal courts. No one wants to be called to the witness stand under a charge of ineffectiveness. The best way to prepare for claims of ineffectiveness is to avoid them. Never handle a case where you are not prepared. When you take a case, be effective and document your effectiveness. A good file which documents not only your time, but the major tactical and strategic tacks you took during the course of the trial, may save you a lot of grief. If it sounds like the practice of defensive law—so be it. But if it leads to greater care and discipline and better representation, then we can all take some pride in giving greater substance to the sixth amendment.



