SUPREME COURT
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Jorge Navarrete Clerk

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The Supreme Court of the State of California

PHYLLIS K. MORRIS, as Public Defender
for the County of San Bernardino,
Petitioner,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Parties in Interest

Court of Appeal, Fourth Appellate District, Division Two, Case No. E066330

Appellate Division, Case Nos. ACRAS1600028 & CIVDS1610302

San Bernardino County Superior Court, Case No. TWV1502001

Respondent's Answer

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I. AN APPELLATE DIVISION OF THE SUPERIOR COURT IS NOT REQUIRED TO APPOINT COUNSEL FOR AN INDIGENT DEFENDANT CHARGED WITH A MISDEMEANOR OFFENSE ON AN APPEAL BY THE PROSECUTION

At issue is whether an appellate division is required to appoint counsel to an indigent defendant when the prosecution is the appellant. There is no dispute that appellate divisions are only required to appoint counsel pursuant to the California Rules of Court, rule 8.851(a)(1), which sets the standards for appointment on a misdemeanor appeal. Pursuant to rule 8.851(a)(1), an appellate division is only required to appoint counsel when a defendant has **been convicted** of a misdemeanor and is: (1) subject to incarceration, or (2) a fine of more than $500, or (3) is likely to suffer significant adverse collateral consequences as a result of the conviction **and** the defendant was represented by appointed counsel in the trial court. In all other cases, an appellate division has discretion when to appoint counsel for indigent defendants. There are no statutes, case law, or other legal authority which require an appellate division to appoint counsel on an appeal when a defendant has not been convicted.

Petitioner does not contend the appellate division improperly applied the rule but rather California Rules of Court, rule 8.851(a)(1), is unconstitutional.

a. Rule 8.851(a)(1) Does not Violate the Sixth Amendment

"It is well settled that a defendant charged with any misdemeanor is entitled to counsel, at his own expense, on an appeal from a judgment of conviction. It is equally well settled that, in

California, an indigent defendant charged with either a felony or a misdemeanor is entitled to counsel at public expense at his trial." (*People v. Wong* (1979) 93 Cal.App.3d 151, 153-54.) Further, the Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. (*Lafler v. Cooper* (2012) 566 U.S. 156, 165.)

However, a criminal defendant's rights regarding legal representation are more limited on appeal than at trial. The Sixth Amendment does not include any right to appeal. As the Supreme Court of the United States has held, "[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of statute." (*Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 160.) As the Sixth Amendment does not include any right to appeal, so it implicates no basis for a right to representation by professional counsel on appeal. (*In re Barnett* (2003) 31 Cal.4th 466, 472.) A criminal defendant's right to counsel through the first appeal as a right derives not from the Sixth Amendment but "'from the due process and equal protection clauses of the Fourteenth Amendment.' [Citation.]" (*Martinez, supra*, 528 U.S. at p. 155.) Indeed, none of the Supreme Court of the United States many cases safeguarding the rights of an indigent appellant has placed any reliance on the Sixth Amendment. (See, e.g., *Douglas v. People of State of Cal.* (1963) 372 U.S. 353, 356-358; *Griffin v. Illinois* (1956) 351 U.S. 12, 26; *Martinez, supra*, 528 U.S. at p. 160.)

In *Argersinger v. Hamlin* (1972) 407 U.S. 25, 35-40, the United States Supreme Court appeared to hold that prospective

imprisonment for a misdemeanor offense guarantees indigents a right to appointed counsel, but the Court clarified in *Scott v. Illinois* (1979) 440 U.S. 367, 373-74, that under the Sixth Amendment, this right is limited to cases in which the defendant is actually imprisoned for the charged offense. Although states are free to provide greater rights to indigent defendants, no state is required to do so. Therefore, *Argersinger* and *Scott* hold that the Sixth Amendment right to counsel in misdemeanor cases is limited to cases where the defendant is actually imprisoned. Thus, until modified by the United States Supreme Court, *Scott* stands for the proposition that under the Sixth Amendment to the United States Constitution, a poor misdemeanant defendant does not have a right to counsel unless "actual imprisonment" actually occurs regardless of the collateral consequences or the fairness of the underlying proceeding. (*Scott, supra*, 440 U.S. at p. 369.) The United States Supreme Court again addressed the issue in *Alabama v. Shelton* (2002) 535 U.S. 654, and reaffirmed the right to counsel under the Sixth Amendment is only required when there is either actual imprisonment or a "a suspended sentence that may end up in the actual deprivation of a person's liberty." (*Id.* at p. 658.) (internal quotes omitted)

The only cases that find criminal defendants have a right to effective assistance of counsel in direct appeals via the Sixth Amendment (even though the Constitution does not require States to provide a system of appellate review at all) are those cases, when a State opts to act in a field where it is not required to do so. (See *Lafler, supra,* 566 U.S. at p. 168.) California has not provided any greater protections under the Sixth Amendment than those provided

by the United States Constitution. *People v. Wong* (1979) 93 Cal.App.3d 151, held, "[i]t is well settled that a defendant charged with any misdemeanor is entitled to counsel, at his own expense, on an appeal from a judgment of conviction. It is equally well settled that, in California, an indigent defendant charged with either a felony or a misdemeanor is entitled to counsel at public expense at his trial. It is also the law that the same right to counsel exists in the case of an appeal in a felony case and of an appeal in a misdemeanor case where a sentence of imprisonment has been imposed. We are cited to no cases, and we know of none, that have held that a criminal defendant is entitled to counsel at public expense in situations other than those above listed." (*Id.* at p. 153-154.) (internal quotes omitted)

Therefore, as California has not expanded any greater protections under the Sixth Amendment than those provided under the United States Constitution, there is no Sixth Amendment right to counsel on an appeal.

Even if the Court was to adopt there is a Sixth Amendment right on appeal, the denial of a right to have counsel present on appeal when a defendant is a respondent would not violate the Sixth Amendment. When a defendant is a respondent to a prosecutor's appeal after the granting of a motion to suppress, would not be a critical stage of the case as there is minimal risk that counsel's absence at such a stage might derogate the right to a fair trial. As this is not a critical stage, there is no Sixth Amendment violation. (See *Kirby v. Illinois* (1972) 406 U.S. 682, 695.) "The determination whether the hearing is a 'critical stage' requiring the provision of

counsel depends ... upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the [particular] confrontation and the ability of counsel to help avoid that prejudice.' [Citations.]" (*People v. Ebert* (1988) 199 Cal.App.3d 40, 44.) "'[T]he essence of a "critical stage" is ... the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel.' [Citation.]" (*People v. Rouse* (2016) 245 Cal.App.4th 292, 297.) An appeal on a motion to suppress is not a critical stage as even an unfavorable outcome to respondent would not prejudice them.

As Ruth Lopez is a respondent, the direct outcome of the appeal cannot lead to any immediate incarceration. Even if one was to assume the Appellate Division was to find in favor of the prosecution, the case would be sent back to the trial court where Ruth Lopez would again be represented by appointed counsel. Therefore, Ruth Lopez would be in exactly the same status as before the trial court made a determination on the motion to suppress. Additionally, there is no showing that the Appellate Division's actions prejudiced Ruth Lopez. At this point, it is just mere speculation and there is no mandatory right to appointed counsel when a defendant is the respondent on appeal.

b. Rule 8.851(a)(1) Does Not Violate the Fourteenth Amendment

The Fourteenth Amendment and its due process and equal protection guarantees, prohibit discrimination against convicted indigent inmates; consequently, an indigent inmate has a constitutional right to counsel appointed at the state's expense

where the state confers a criminal appeal as of right. (*Barnett, supra*, 31 Cal.4th at p. 472.) "[S]tates may exercise broad discretion when considering what representation to allow and may require an indigent inmate 'to accept against his will a state-appointed attorney' for representation on a direct appeal without violating the federal Constitution." (*Id.* at p. 473.)

The United States Supreme Court has established the right to appointed counsel extends to the first appeal of right, and no further. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555.) In light of the United States Supreme Court's conclusion that the Sixth Amendment does not apply to appellate proceedings, "any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause." (*Martinez, supra*, 528 U.S. at p. 161.) However, the right to counsel on appeal based on equal protection does not require the appointment of an attorney for an indigent appellant just because an affluent defendant may retain one. (*Pennsylvania, supra*, 481 U.S. at p. 556.) The state is not required to provide protection against every minor mishap that may follow from indigency. (*Wong, supra*, 93 Cal.App.3d at p. 155.) Convicted criminal defendants are provided counsel "[b]ecause of the undesirability of fruitlessly adding to the burdens of this court the time-consuming task of reading pro se documents which are not properly before us, and, if they be read, of consequently enlarging [the] opinion by a recountal and discussion of the contentions made in propria persona." (*People v. Mattson* (1959) 51 Cal.2d 777, 798.)

"The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant

in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." (*Id.* at p. 616.) "The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty." (*Ross v. Moffitt* (1974) 417 U.S. 600, 611.) In *Ross*, the United States Supreme Court concluded that the defendant's access to the trial record, the appellate briefs, and opinions provided sufficient tools for the pro se litigant to gain meaningful access to courts that possess a discretionary power of review. (*Ross, supra*, 417 U.S., at 614-615.)

The Fourteenth Amendment "does not require absolute equality or precisely equal advantages" (*San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 24), nor does it require the State to "equalize economic conditions." (*Griffin v. Illinois* (1956) 351 U.S. 12, 23.) It does require that the state appellate system be "free of unreasoned distinctions" (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 310) and that indigents have an adequate opportunity to present their claims fairly within the adversary system. (*Draper v. State of Wash.* (1963) 372 U.S. 487, 496.) The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, (*Lane v. Brown* (1963) 372 U.S. 477, 480), or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." (*Douglas v. California, supra*, 372 U.S.

at 358.) The question is not one of absolutes, but one of degrees. (*Ross, supra*, 417 U.S. at p. 612.)

Douglas established the indigent appellant's federal constitutional right to counsel on appeal, based not on a Sixth Amendment right to counsel, but on the Fourteenth Amendment's guarantees of due process and equal protection. *Douglas* held these guarantees are violated when an indigent litigant for whom counsel was appointed in the trial court is denied access to the appellate court on substantially the same terms as a nonindigent litigant in "the first appeal, granted as a matter of right to rich and poor alike, based on a statute." (*Douglas v. California, supra*, 372 U.S. at 356.)

Appointment of counsel for indigents charged with misdemeanors on appeal in California on is governed by Rule 8.851(a)(1). These provisions, although perhaps on their face broad enough to cover appointments such as those Petitioner sought here, have generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Thus, California has followed the mandate of *Douglas v. California*, and authorized appointment of counsel for a convicted defendant appealing to the appellate division of a Superior Court, but has not gone beyond *Douglas* to provide for appointment of counsel for a defendant who seeks appointment when they have not been convicted

Therefore, as the United States Supreme Court held, "[w]e do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not

appoint counsel to aid him in seeking review in that court." (*Ross, supra*, 417 U.S. at p. 615.) As in *Ross*, an indigent respondent would have at the very least, a transcript or other record of trial proceedings, a motion on his behalf that was filed at the trial court level setting forth his claims, and in many cases an opinion by the trial court as to why it rendered its decision. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide an appellate division of a Superior Court with an adequate basis for its decision in reviewing the appeal.

An indigent respondent although maybe somewhat handicapped in comparison with a wealthy respondent who has counsel assisting him in every conceivable manner at every stage in the proceeding. Nonetheless both an indigent respondent and a wealthy respondent would have had the opportunity to have counsel prepare a motion to suppress at the trial court. "The fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." (*Ross, supra*, 417 U.S. at p. 616.)

Rule 8.851, does not deprive Lopez of the right to appeal. First, in an appeal, unlike in the trial court, Lopez will reap the benefit of standards of review and other procedural tools that are designed to protect the ruling the trial court has already made. (*Morris v. Superior Court* (2017) 17 Cal.App.5th 636, 651.) In the absence of

statutory authorization, appellate departments are not required to provide representation on to indigents on misdemeanors when they are a respondent on appeal.

While it is true that Article I, section 13 of the California Constitution guarantees a right of counsel to any person charged with a criminal offense and this guarantee extends to persons charged with misdemeanors. (*Blake v. Municipal Court, Oakland-Piedmont Judicial Dist.* (1966) 242 Cal.App.2d 731, 733.) However, this guarantee does not extend to appeals where they are not the appellant. Regarding the appointment of counsel argument, we need to acknowledge all states, under the Fourteenth Amendment, are obligated to provide a defendant the right to counsel when one's liberty is at issue. (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1504.) "If the right Lopez has is the right to be free from uncounseled imprisonment, she faces no diminution of that right on appeal, since she will be represented at trial even if the People prevail in the appellate division." (*Morris, supra,* 17 Cal.App.5th at p. 647.) Generally speaking, the right to counsel has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation. (*Iraheta v. Superior Court* (1999) 70 Cal.App.4th 1500, 1508.)

"The crux of the constitutional promise of equal protection is that persons similarly situated shall be treated equally by the laws. [Citation.] However, neither clause [of the United States or California Constitutions] prohibits legislative bodies from making classifications; they simply require that laws or other governmental regulations be justified by sufficient reasons. The necessary

quantum of such reasons varies, depending on the nature of the classification." (*In re Evans* (1996) 49 Cal.App.4th 1263, 1270.) "In considering whether state legislation violates the Equal Protection Clause ..., we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. [Citations.] Classifications based on race or national origin, [citation] and classifications affecting fundamental rights [citation], are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." (*Clark v. Jeter* (1988) 486 U.S. 456, 461.) "[M]ost legislation challenged under the equal protection clause is evaluated merely for the existence of a 'rational basis' supporting its enactment. [Citations.] Under the latter analysis, the question is whether the classification bears a fair relationship to a legitimate public purpose." (*Evans, supra*, 49 Cal.App.4th at p. 1270; see similarly *People v. McKee* (2010) 47 Cal.4th 1172, 1211, fn. 14.) In the absence of a suspect class or a fundamental right, defendant's equal protection challenge to rule 8.851 would be evaluated under the rational basis test. (*Delacy, supra,* 192 Cal.App.4th at p. 1494.)

In holding the classification should be analyzed under the rational basis test, the *Evans* court explained strict scrutiny is inapplicable because "[t]he classification of misdemeanants does not involve a typically suspect classification such as race or sex" (*Evans, supra*, 49 Cal.App.4th at p. 1270.) As there is a rational basis for the

rule to only require appellate divisions to appoint counsel after a defendant has been convicted, rule 8.851 is constitutional.

The equal protection clauses are found in the Fourteenth Amendment to the United States Constitution and section 7(a) of article I of the California Constitution. The scope and effect of the two clauses is the same. (*Evans, supra*, 49 Cal.App.4th at p. 1270.)

c. Appellate Divisions Should Retain Their Discretion of When to Appoint Counsel

Although a defendant respondent is not entitled to appointed counsel as a matter of right, appellate courts retain the authority to appoint counsel for an indigent respondent within their discretion, there is no reason for this Court to take away such discretion. "Unlike the constitutional right of indigents to be represented by court appointed counsel in the trial court, representation on appeal is regarded as discretionary with all reviewing courts, except in rare cases in which appointment of counsel is required by statute." (*People v. Vigil* (1961) 189 Cal.App.2d 478, 480.) In the case at hand, there is no statute requiring mandatory appointment of counsel; therefore, any appointment rests in the sound discretion of the court. Judicial discretion is that power of decision exercised to the necessary end of awarding justice based upon reason and law but for which decision there is no special governing statute or rule. Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice. (*Harris v. Superior Court* (1977) 19 Cal.3d 786, 796.)

The Sixth and Fourteenth Amendments guarantee is not so much counsel, but the right to be free from uncounseled imprisonment. (*Lassiter v. Department of Social Services of Durham County, N. C.* (1981) 452 U.S. 18, 26.) The Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense. The *Lassiter* court incorporated this presumption into its due process balancing test. The *Lassiter* court impliedly recognized that applying this "general rule" will not always preclude appointment of counsel where a defendant's physical liberty is not at stake. However, the general rule clearly establishes a benchmark against which all due process interests must be measured. "Significantly, as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." (*Lassiter, supra*, 452 U.S. at p. 26.) Thus, where there is little or no possibility that a defendant will be deprived of his physical liberty, he must demonstrate an extremely important interest which is sufficiently compelling to overcome the presumption that appointment of counsel is not required unless a litigant may be deprived of his physical liberty. (*Iraheta, supra*, 70 Cal.App.4th at p. 1505.) The court that is in the best position to conduct such a balancing test as to whether a respondent should be appointed counsel would be the appellate division. Additionally, eliminating an appellate court's ability to exercise its own discretion would excessively and unnecessarily burden the budget of the court.

d. The Decisions in ***O'Leary, Claudio,*** and ***Goewey*** Are Unpersuasive to the Issue at Hand

In *Thomas v. O'Leary* (7th Cir. 1988) 856 F.2d 1011, 1014, court held that Thomas's attorneys' failure to file a brief on his behalf on the State's appeal from the state trial court's suppression order constituted ineffective assistance of counsel in violation of the Sixth Amendment. *Thomas* is inapplicable to the current case at hand as Thomas was still represented at the time while Lopez is no longer represented by counsel. In *Thomas* the court held the failure of Thomas's counsel to file an opposition brief was found to be ineffective assistance of counsel, thus the basis of the constitutional protection. As Lopez is no longer represented, there cannot be a violation of ineffective assistance of counsel. *Thomas* does not support the holding that a respondent who is not currently represented has a Sixth Amendment right to counsel, rather as Thomas was still represented at the time, the failure of his counsel to file an opposition was ineffective assistance of counsel. This own court held "[a] criminal defendant's rights regarding legal representation are more limited on appeal than at trial. The Sixth Amendment does not include any right to appeal, so it implicates no basis for a right to representation by professional counsel on appeal." (*Barnett, supra,* 31 Cal.4th at p. 472.) As Lopez is no longer represented, the holding in *Thomas* is inapplicable.

As in *Claudio v. Scully* (2d Cir. 1992) 982 F.2d 798, the court did not find the failure to appoint counsel caused a violation but rather the defendant was deprived of effective assistance by the failure of an assigned appellate counsel to rely on New York constitutional law

during a pretrial appeal. Once again, just as in *Thomas*, the court found the violation was based on ineffective assistance of counsel. Specifically, in *Claudio* the court found the quality of counsel's representation was lacking, not that counsel need to be appointed. Once again *Claudio* was still represented during the state's pretrial appeal and therefore the holding does little to add to the current issue. It also should be noted that "[t]he New York Court of Appeals has consistently interpreted the right to counsel under the New York Constitution more broadly than the Supreme Court has interpreted the federal right to counsel." (*Claudio, supra*, 982 F.2d at p. 803.) Therefore, any right found in *Claudio* is based under the New York Constitution. As Petitioner has failed to identify any California authority holding the California Constitution provides greater protections, the holding in *Claudio* is unpersuasive to the issue at hand.

As with the other two persuasive authorities Petitioner heavily relies upon, *Com. v. Goewey* (2008) 452 Mass. 399, is also unavailing. In *Goewey*, the defendant, through his counsel, filed a timely motion to extend the time for filing his brief on a pretrial appeal. The Appeals Court granted the extension, however well after the extension was granted defendant's counsel still failed to file an opposition. Approximately three and one-half months after the extended due date for the brief, the court scheduled the case for oral argument. Approximately one month after that, the court heard argument from the Commonwealth's side only, and in due course decided the appeal. (*Id.* at p. 400-401.) "In a footnote at the conclusion of its opinion, the Appeals Court stated: 'The defendant

did not file a brief in this case. We have reviewed the entire record before the motion judge and conclude that there is no ground to support the suppression order. The defendant was, therefore, not deprived of any ground of defense at this stage." (*Id.* at p. 401.) The Supreme Judicial Court of Massachusetts determined Goewey's counsel's failure to file an opposition brief while he was still attorney of record was ineffective assistance of counsel. Once again, the important distinction in *Goewey* is that "[d]espite not having filed a brief for the defendant, the attorney remained his counsel of record. At no time during the appeal did the attorney seek to withdraw his representation of the defendant." (*Id.* at p. 408, fn. 1.) In our case at hand, the issue is not whether Lopez's former attorney provided ineffective assistance of counsel by refusing to represent her in the current appeal but rather is an appellate division required to appoint new counsel on her appeal.

Clearly, *O'Leary*, *Claudio*, and *Goewey* all support the proposition that if a defendant has counsel of record, that counsel is required to represent them in all appeals including pretrial appeals. However, none of these cases support a position that when a defendant is no longer represented by an attorney, a court is required to appoint an attorney for a pretrial appeal.

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II. THE JUDICIAL COUNCIL SHOULD DECIDE WHETHER TO ALLOW THE APPOINTMENT OF COUNSEL FOR DEFENDANTS WHO ARE RESPONDENTS IN MISDEMEANOR APPEALS AND DO SO THROUGH THE RULE-MAKING PROCESS

The Judicial Council drafted the California Rules of Court and the Judicial Council's intent is plain: an appellate division must only appoint appellate counsel for a defendant who has been convicted of a misdemeanor. Interpretation of the California Rules of Court is an issue of law. The usual rules of statutory construction apply to the interpretation of California Rules of Court. (*Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1122.) Under those rules, the court's primary objective is to determine the drafters' intent. (*Id.* at p.1123.) The first step in this analysis is to look to the enactment's words and give them their usual and ordinary meaning. The enactment's plain meaning controls the court's interpretation, unless the enactment's words are ambiguous. If the plain language is unambiguous, the court should not go beyond that pure expression of the drafters' intent. (*Kobzoff v. Los Angles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 860-861.) A court's primary objective is to determine the drafters' intent. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 125.)

If the language permits more than one reasonable interpretation, a court looks to a variety of extrinsic aids, including: the legislative history; public policy; contemporaneous administrative construction; and the scheme of which the enactment is a part. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.) After considering

these extrinsic aids, a court must select the construction that comports most closely with the apparent intent of the drafter, with a view to promoting rather than defeating the general purpose of the enactment and avoid an interpretation that would lead to absurd consequences. (*Id.* at pp. 977-978.) If two interpretations are possible, a court must adopt the interpretation that leads to the more reasonable result. (*Id.* at p. 979.)

Thus, the plain language of the rules governing when an appellate division must appoint counsel on an appeal for an indigent defendant applies only after a conviction. Here, there is no evidence that the Judicial Council meant to apply the appointment of counsel to defendants that have not been convicted of a misdemeanor, but simply forgot to do so. Such an oversight might be conceivable in a statutory scheme comprising hundreds or thousands of prolix statutes. However, rule 8.851 contains only three subdivisions and comprises only twelve sentences and is expressed in plain, simple language. In construing statutes, a court is required to interpret them in a manner calculated to give effect to the intent of the Legislature. (*People v. Ruster* (1976) 16 Cal.3d 690, 696.) Rule 8.851 reflects a clear legislative intention to only allow for appointed counsel after a defendant has been convicted of a misdemeanor. This legislative intent must be respected and, for that reason, Petitioner's contention must be rejected. (*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12.)

Finally, the Rules of Court are presumed constitutional; the invalidity of a rule must be clear before it can be declared unconstitutional. (*Johnson v. Superior Court In and For Los Angeles*

County (1958) 50 Cal.2d 693, 696 [discussing statutes].) No California case has followed Petitioner's suggestion - the idea that an appellate division is required to appoint counsel for a defendant who has not been convicted of a misdemeanor. Petitioner does not even point to any secondary sources or commentators who have opined that the doctrine should apply. Petitioner thus relies on a hypothetical extension of state and federal law, unsupported by any authorities.

Assuming, arguendo, there is an equitable reason for changing the rule, the decision should be made via the rule-making process. As the Judicial Council has spoken on the subject, the Judicial Council should be the body to determine whether the doctrine extends to defendants who have not been convicted of a misdemeanor. This Court should only craft such new procedural rules when the Judicial Council has not spoken on the subject. (*Ferguson v. Keays* (1971) 4 Cal.3d 649, 656.) Additionally, the Judicial Council is in the best position to decide whether to extend the reasons for appointment of counsel on a misdemeanor appeal; and do so through its rule-making process. Article VI, section 6 of the California Constitution charges the Council with the responsibility to adopt rules for court administration and to improve the administration of justice. Title Six, Division I, rule 10.20(c), of the California Rules of Court charges the Council with the duty to "establish uniform statewide practices and procedures where appropriate to achieve equal access to justice throughout California." The rule-making process consists of proposed rules being (1) reviewed by the Office of the General Counsel and, if applicable, an