IN THE SUPREME COURT
OF THE STATE OF CALIORNIA

PHYLLIS K. MORRIS, as Public Defender for the County of San Bernardino, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent,	Case No. S246214 Court of Appeal Case no. E066330 Superior Court Case nos.: CIVDS1610302 ACRAS1600028
THE PEOPLE, Real Parties in Interest.	

PETITIONER'S REPLY BRIEF

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1. Respondent's Sixth Amendment arguments have no basis in law

a. Respondents right to counsel on direct appeal arguments are irrelevant

Respondent claims Ms. Lopez does not have a Sixth Amendment right to appointed counsel because there is no Sixth Amendment right to appointed counsel for a convicted defendant who files a direct appeal. (Answer at p. 4.) This argument, and the numerous cases cited in support of it, have no bearing on the issue presented in this case. Ms. Lopez' case was dismissed in the trial court. The appellant in this case is the government, not Ms. Lopez. Ms. Lopez did not file any appeal. The issue here is whether a prosecution pretrial appeal is a critical stage of a criminal proceeding, an issue that none of the decisional authority cited by respondent even remotely address.

b. The claim that the right to counsel does not attach until a defendant has been "actually imprisoned" is meritless

Respondent's concession that *Argersinger v. Hamlin* (1972) 407 U.S. 25, held a risk of actual imprisonment triggers the Sixth Amendment right to counsel is correct. (Answer at pp. 2.) Their claim the Supreme Court clarified *Argersinger* in *Scott v. Illinois* (1979) 440 U.S. 367, by holding the right to counsel does not attach until '"actual imprisonment" actually occurs,' is not. *Scott* does not address when the Sixth Amendment right to counsel attaches. *Scott* is a harmless error-type case that holds there is no violation of the Sixth Amendment right to counsel if an unrepresented defendant was convicted but not sentenced to any term of imprisonment, even if a term of imprisonment could have been imposed. Such was the case with the defendant in *Scott*; but the Supreme Court never held the *Scott* defendant's Sixth Amendment right to counsel had not attached at any of his pretrial proceedings, or his trial. All the Court held was that was that there was no viable Sixth Amendment claim because no term of imprisonment had been imposed. The result was just the opposite in *Argersinger* because in that case a term of imprisonment had been

imposed. Respondent's claims regarding *Alabama v. Shelton* (2002) 535 U.S. 654, are also incorrect. *Shelton* is another harmless error-type case wherein the Supreme Court held a suspended sentence could not be imposed because the defendant was denied his right to counsel at trial. (*Id.* at p. 658.) But nowhere in *Shelton* does it state that a defendant's Sixth Amendment right to counsel does not attach until the defendant has been imprisoned. If anything, *Shelton* reinforces the *Argersinger* holding conceded by respondent, which is the risk of actual imprisonment is what triggers the Sixth Amendment right to counsel.

Adopting the rule proposed by respondent, *i.e.* the Sixth Amendment right to counsel does not attach until actual imprisonment actually occurs, is one that would lead to absurd results. There are a multitude of Supreme Court decisions that hold a defendant's Sixth Amendment right to counsel attaches at all critical stages of the proceedings, including many proceedings that take place long before the defendant is even brought to trial. Many of these cases postdate *Scott, supra*, 440 U.S. 367. If respondent's interpretation of *Scott* is adopted, then the following is just a short list of the Sixth Amendment cases that *Scott* overruled: *Lee v. United States* (2017) 137 S. Ct. 1958, 1964 (Right to counsel at the time of entry of guilty plea.); *Missouri v. Frye* (2012) 566 U.S. 134, 140 (Right to counsel at arraignment, postindictment interrogations and lineups, entry of guilty plea.); *Lafler v. Cooper* (2012) 566 U.S. 156, 165 (Right to counsel at all pretrial critical stages.); *Coleman v. Alabama* (1970) 399 U.S. 1 (Right to counsel at a preliminary hearing.); *U.S. v. Wade* (1967) 388 U.S. 218, 225 (Right to counsel at arraignment to trial.); *Mempa v. Rhay* (1967) 389 U.S. 128, 134 (Right to counsel at sentencing.); *Powell v. Ala.* (1932) 287 U.S. 45, 57, 69 (Right to counsel at arraignment to trial.). *Scott* could not have overruled *Coleman*, *Wade*, *Mempa*, and *Powell*, because even though those cases predate *Scott*, the Supreme Court continues to cite them

to this very day as legal authority regarding when the Sixth Amendment right to counsel attaches.[1] *Scott* obviously could not have overruled *Lee*, *Frye*, and *Cooper* because those cases were all decided thirty-plus years after *Scott*. The law on this subject is well settled, and that is as soon as a defendant is charged with a criminal offense for which she can be imprisoned, she then has a Sixth Amendment right to counsel at all critical pretrial stages of the proceedings. Respondent's claim that *Scott* establishes there is no Sixth Amendment right to counsel until actual imprisonment actually occurs is obviously wrong.

The rule respondent proposes would mean that trial courts are free to deny a defendant's request for counsel at any critical stage of the proceeding, including trial. But if the defendant is convicted and the judge imposes a term of imprisonment, the entire process, including the trial, will have to be done over if the defendant asserts his right to counsel after he is sentenced to that term of imprisonment. That argument is nonsensical, if not just silly, and is certainly not supported by any legal authority.

c. Respondent's critical stage arguments are meritless

(1) Respondent's reliminary arguments

Respondent claims the prosecution appeal in this case is not a critical stage of these proceedings because Ms. Lopez would not be prejudiced by an unfavorable outcome. (Answer at p. 5.) Of course an unfavorable outcome would be prejudicial to Ms. Lopez. Ms. Lopez is not only being dragged into these appellate division proceedings with her presumption of innocence, she is not even charged with a criminal offense. Her case was dismissed after her suppression motion was granted in the trial court. If the prosecution prevails

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[1] *Betterman v. Montana* (2016) 136 S. Ct. 1609, 1615, fn.4 (citing *Mempa v. Rhay*); *Martinez v. Ryan* (2012) 566 U.S. 1, 12 (quoting *Powell v. Alabama*); *Frye, supra,* 566 U.S. at p. 140 (citing *U.S. v. Wade*); *Rothgery v. Gillespie County* (2008) 554 U.S. 191, 202-203 (citing *Coleman v. Alabama*).

on their appeal her case will be resurrected in the trial court, and if convicted she will once again face a risk of actual imprisonment in addition to a number of serious collateral consequences that flow from DUI convictions. As far as unfavorable outcomes go, this is about as worse as it gets for misdemeanants. The overwhelming amount of prejudice Ms. Lopez will suffer if the loses in the appellate division is exactly why the appellate division proceedings are a critical stage of the proceedings at which Ms. Lopez has a Sixth Amendment right to appointed counsel.

Respondent next claims the prosecution pretrial appeal in this case is not a critical stage of these proceedings because "the direct outcome cannot lead to any immediate incarceration." (Answer at p. 5.) Respondent provides no case authority to support this "immediate incarceration" standard, and that is because there is none. Nevertheless, further discussion on the subject is not necessary as that exact claim has already been rejected by the Supreme Court. (*Shelton*, *supra*, 535 U.S. at pp. 663-664.)

Respondent then claims the prosecution pretrial appeal is not a critical stage of the proceedings because if Ms. Lopez loses in the appellate division, she will be in the same position she was in before the trial court ruled on her suppression motion. Yes. That is the problem. For Ms. Lopez to be in the exact same position she was in before the lower court ruled on her suppression motion is really bad. She wants to be in the position she was in *after* the lower court ruled on the suppression motion, which is the position she is in going into the appellate division proceedings. Going into the appellate division, her case is dismissed. If she loses, the prosecution is resurrected in the trial court and she again faces conviction, imprisonment, and all of the other collateral consequences that flow from a DUI conviction. Whether or not that happens will be determined in the appellate division, which is why those proceedings are such a critical stage of these proceedings.

Respondents last argument is that the appellate division pretrial appeal at issue here is not a critical stage because there has been no showing that the appellate division's refusal to appoint counsel at this time has prejudiced Ms. Lopez. The argument appears to be that Ms. Lopez will only be prejudiced if she loses in the appellate division, and because that has not yet happened her Sixth Amendment right to counsel has not attached. Noteworthy first is that respondent now appears to concede that Ms. Lopez will be prejudiced if she loses in the appellate division. But that aside, this argument is identical to the "actual imprisonment, actually imposed" argument in that the argument here is that Ms. Lopez will only have a Sixth Amendment right to counsel if she loses in the appellate division. Until that happens, the appellate division does not have to appoint counsel. But if they choose to rule against her, they must then appoint counsel and go through the entire appeal process again. Again, that is a nonsensical procedure that is not supported by any legal authority.

(2) *O'Leary*,[2] *Claudio*,[3] and *Goewey*[4]

Respondent claims that *O'Leary*, *Claudio*, and *Goewey*, are irrelevant to the issue raised in this case because the final determination in each of those cases was whether the defendant in each case received ineffective assistance of counsel; and because ineffective assistance of counsel is not an issue here, those cases do not apply. (Answer at pp. 14-16.) Respondent acknowledges the procedural backdrop in *O'Leary*, *Claudio*, and *Goewey*, is a prosecution pretrial appeal challenging the granting of a suppression motion in the lower courts. What respondent has chosen to ignore, and that which was discussed at great length in the petition for review and petitioner's opening brief on the merits, was the threshold finding in *O'Leary*, *Claudio*, and *Goewey*, that each

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[2] *United States ex. Rel. Thomas v. O'Leary* (7th Cir. 1988) 856 F.2d 1022.

[3] *Claudio v. Scully* (2nd Cir 1992) 982 F.2d 798.

[4] *Commonwealth v. Goewey* (2008) 452 Mass. 399.

defendant had a Sixth Amendment right to counsel during the pretrial appeal proceedings. As expected, in each case the court first determined whether the defendant had a right to counsel at a prosecution initiated pretrial appeal before determining whether the representation he received was constitutionally deficient. In each case the courts provided a detailed analysis before holding a prosecution pretrial appeal challenging the granting of a motion to suppress in a trial court is a critical stage of a criminal proceeding at which a defendant maintains his Sixth Amendment right to counsel. (*O'Leary*, *supra*, 856 F.2d at pp. 1014-1015 [The suppression motion in the trial court and the pretrial appeal challenging the granting of that motion were both equally critical and the defendant had a Sixth Amendment right to counsel at both proceedings.]; *Claudio*, *supra*, 982 F.2d at p. 802 [The prosecution's "pretrial appeal to the Court of Appeals was unquestionably a critical stage."]; *Goewey*, *supra*, 452 Mass. at p. 403 ["The defendant was absolutely entitled to be heard in the Commonwealth's appeal [and] the Commonwealth does not dispute this."].) Respondent's failure to address the analysis and the holdings in these cases on those issues, especially in light of how thoroughly they were discussed in the petition for review and opening brief, can only be realistically viewed as respondent conceding the validity of the analysis and holding in each case on that subject.

2. Respondent's Fourteenth Amendment arguments have no basis in law

a. The equal protection arguments are easily refuted

Citing *San Antonio Indep. Sch. Dist. v. Rodriguez* (1973) 411 U.S. 1 (*San Antonio*), and *Griffin v. Illinois* (1956) 351 U.S. 12, respondent submits a state has no duty to assure wealthy and indigent respondents are represented by counsel during the type of pretrial appeal proceeding at issue here. Neither case supports that proposition. In fact, *Griffin* flat-out refutes it.

In *San Antonio* the alleged equal protection violation was that children in districts having relatively low assessable property values were receiving a poorer quality of education than that available to children living in wealthier districts. The Supreme Court's immediate response to this was "[a]part from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to [this] argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." The last nine words are what respondent quotes. Of course, cases relied upon to support or refute a claim rarely have facts identical to the issue at hand, but there is usually some nexus between the case(s) cited and the disputed issues. But here, there is none. There is simply no correlation between *San Antonio* and what is at issue here. *Griffin*, on the other hand, is a different story.

The issue in *Griffin* involved an Illinois law that stated "Writs of error in all criminal cases are writs of right and shall be issued of course." (*Griffin*, *supra*, 351 U.S. at p. 13, internal quotation marks original.) The question before the Court in *Griffin* was "whether Illinois may, consistent with the Due Process and Equal Protection Clauses [], administer this statute so as to deny adequate appellate review to the poor while granting such review to others." (*Ibid.*) The salient facts from *Griffin* are that after being convicted of robbery he filed a motion in the trial court claiming he was an indigent and needed a copy of his trial transcript to prosecute an appeal. (*Ibid.*) Under Illinois law only indigents sentenced to death were entitled to a free transcript. (*Id.* at p. 14.) All others had to buy their own transcript. (*Ibid.*) The disparity at issue in *Griffin* was the ability of the wealthy defendant to purchase a transcript to prosecute an appeal while the indigent defendant could not. Even though the facts and issues in *Griffin* and this case are not identical, the general concepts are strikingly similar, and it is abundantly clear the outcome of *Griffin* should be highly determinative of what the outcome should be here.

In holding the Illinois statute violated both the Due Process and Equal Protection Clauses, the Supreme Court cited many constitutional principles. But since there is a word limit here, petitioner will cite the one she feels most squarely addresses the issue presented in this matter: "There is no meaningful distinction between a rule which would deny the poor a right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." (*Id.* at p. 18.) In this case, the fact Ms. Lopez is the respondent and not the appellant does not mean she is any less entitled to "adequate appellate review." In fact, because she is being haled into the appellate division appeal proceedings after her case has been dismissed and while still maintaining her presumption of innocence, her need for adequate appellate review of the trial judgment rendered in her favor is significant in light of the dire consequences she faces if she loses. The only difference between this case and *Griffin* is in *Griffin* the defendant could not obtain adequate appellate review because the trial court refused to provide him with a transcript, and in this case Ms. Lopez cannot obtain adequate appellate review because the appellate court refuses to provide her an attorney. If there is an equal protection violation because a trial court refuses to provide an indigent with a trial transcript when a wealthy defendant can afford one, then there certainly an equal protection violation if an indigent defendant is denied counsel when a wealthy defendant can afford one.

Even closer to being directly on-point is another case cited throughout respondent's answer, *Douglas v. California* (1963) 372 U.S. 353. In *Douglas* the Supreme Court held that a system of appellate procedure that denies the appointment of counsel to convicted indigent defendants on their first appeal is the type of invidious discrimination prohibited by the equal protection and due process clause of the Fourteenth Amendment to the federal Constitution. (*Id.* at pp. 355-357.) "Where the merits of the *one and only appeal* an indigent

has as of right without the benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (*Id.* at p. 357, italics original.) As discussed above, there is no meaningful distinction between the fact Ms. Lopez is the respondent in the proceedings at issue here and not the appellant. Like appellants challenging a conviction, Ms. Lopez undoubtedly has a right to defend herself in the appellate division proceedings, and those proceedings will be her *one and only* opportunity to defend the trial judgment rendered in her favor. In fact, Ms. Lopez' need for counsel is much more compelling than that of an appellant, because unlike convicted appellants who use counsel as a "sword to upset a prior determination of guilt" (*Ross v. Moffitt* (1974) 417 U.S. 600, 611) she needs the assistance of counsel 'as a shield to protect her against being "haled into court" by the State and stripped of her presumption of innocence' (*id.* at pp. 610-611, internal quotation marks original; *Claudio*, *supra*, 982 F.2d at pp. 802-803.) In the type of pretrial appeal proceedings at issue here, wealthy respondents are able to obtain adequate appellate review of lower court judgments rendered in their favor, while the indigents are not.[5] Under *Griffin* and *Douglas*, a system of appellate procedure that functions in this manner violates both the equal protection and due process clauses of the Fourteenth Amendment to the federal Constitution.

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[5] The sixth amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.' (*Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463.)

Respondent's claim that providing Ms. Lopez a copy of the trial record will nullify her need for the assistance of counsel should be easily rejected in light of the fact that the exact claim was rejected by the Supreme Court in *Douglas*, *supra*, 372 U.S. at pp. 357-358.

b. Strict Scrutiny is the appropriate standard of review

Citing *In re Evans* (1996) 49 Cal.App.4th 1263, respondent says that rational basis is the standard of review here because "[t]he classification of misdemeanants does not involve a typically suspect classification such as race or sex." (Answer at pp. 11-12 quoting *Evans*, *supra*, 49 Cal.App.4th at p. 1270.) In *Evans*, the petitioner claimed Penal Code section 12021(c)(1), violated the equal protection clause.[6] *Evans* correctly states the standard for analyzing equal protection claims: "Legislation which discriminates on the basis of [any] suspect class or touches on a fundamental right is subject to judicial examination under the strict scrutiny test." (*Ibid*, internal quotation marks omitted.) All others are analyzed under the rational basis test. (*Ibid.*) In *Evans*, the court applied the rational basis test because "classification of misdemeanants does not involve a typically suspect classification," *and* because 'the private right to bear arms was not a fundamental right under the Second Amendment to the [federal] Constitution.' (*Ibid*, internal quotation marks omitted.)

Like the petitioner in *Evans*, Ms. Lopez is not a member of a suspect class. However, unlike the petitioner in *Evans*, the Legislative act in question, Rule 8.851, which only permits an appellate division court to appoint counsel for convicted defendants but not indigent respondents, clearly touches on the Sixth Amendment right to counsel. The Sixth Amendment right to counsel is unquestionably a fundamental right. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 343.) Equal protection claims reviewed under the rational basis standard are "clothed in a presumption of constitutionality." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "However, once it is determined the classification scheme affects a fundamental [] right the burden shifts; thereafter the state must first

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[6] At the time, section 12021(c)(1) provided any person convicted of specified misdemeanors who, within 10 years of the conviction, had any firearm in his or her possession or under his or her control, was guilty of a public offense.

establish it has a compelling interest which justifies the law and demonstrate that the distinctions drawn by it are necessary to further that purpose." (*Ibid.*) Respondent has come nowhere close to meeting this standard. They have not explained why the state has any interest in refusing to appoint counsel for an indigent misdemeanor respondent at a critical stage of the proceedings, much less a compelling interest. Respondent only offers two conclusory statements to support the need for Rule 8.851 as it is currently written. Respondent first states "[a]s there is a rational basis for the rule to only require [state] appellate divisions to appoint counsel after a defendant has been convicted, Rule 8.851 is constitutional." (Answer at pp. 11-12.) Prior to this quote is page after page of case citations, but no explanation as to why the state even has a legitimate interest in refusing to appoint counsel for an indigent respondent at a critical stage of a misdemeanor criminal proceeding when it is specifically required under the Sixth Amendment. Respondent closes the discussion on the subject with "eliminating an appellate court's ability to exercise its own discretion would excessively and unnecessarily burden the budget of the [appellate division] court." (Answer at p. 13.) First, as explained post, at page 17, Rule 8.851 does not give an appellate division court discretion to appoint counsel for an indigent respondent. Second, respondent offers no data or any offer of proof to support the claim that requiring appellate division courts to appoint counsel would excessively and unnecessarily burden the budget of appellate division courts. This broad, conclusory claim, devoid of evidentiary support, should be summarily rejected.

California does not have a legitimate interest, much less a compelling one, in refusing to appoint counsel for indigent misdemeanants in a criminal proceeding in which they have a guaranteed right to counsel under the Sixth Amendment. As was the case with the statute in *Evans*, *supra*, 49 Cal.App.4th

1263, Rule 8.851 does not survive scrutiny under the rational basis standard, much less strict scrutiny.

3. Rule 8.851 does not give appellate division courts discretion to appoint counsel for indigent respondents

Respondent states that although Rule 8.851 does not require counsel be appointed for indigent respondents, the rule does give appellate division courts the discretion to do so, and that this court should not strip an appellate division court of that discretion. (Answer at p. 12.) Ironically, six pages later respondent strenuously argues the plain language of Rule 8.851 clearly states that appellate division courts may only appoint counsel for defendants who have been convicted of a misdemeanor.[7] Respondent's latter argument is the correct argument. Rule 8.851(a)(1)(A) and (B) mandate counsel be appointed for convicted misdemeanants sentenced to the punishments listed in each of those provisions. Rule 8.851(a)(2) gives appellate division courts discretion to "appoint counsel for any other indigent defendant [whose been] *convicted* of a misdemeanor." (Italics added.) Nowhere in Rule 8.851 does the Judicial Council even remotely suggest that appellate division courts have discretion to appoint counsel for a misdemeanor defendant who has not been convicted of a criminal offense.

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[7] "[T]he 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 [indigent] 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. [Citation.] Rule 8.851 reflects a clear legislative intention to only allow for appointed counsel after a defendant has been convicted of a misdemeanor." (Answer at p. 18.)

Respondent's reliance on *People v. Vigil* (1961) 189 Cal.App.2d 478, is easily dismissed because it was overruled two years later by the Supreme Court in *Douglas*, *surpa*, 372 U.S. 353. In *Vigil* a California appellate court held appellate courts had discretion to appoint counsel for defendants on their first appeal to their conviction, and that there would be no abuse of discretion in refusing to appoint counsel if an appeals court determined the defendant's appeal was meritless. (*Id.* at pp. 480-82.) In *Douglas* the Supreme Court held that an indigent defendant's right to appointed counsel on his first appeal was guaranteed under the Fourteenth Amendment, and that a independent review of the record by an appellate court was not a sufficient substitute for the right to counsel. (*Douglas*, *supra*, 372 U.S. at pp. 355-58.) Because *Douglas* overruled *Vigil*, respondent's reliance on *Vigil* should be easily dismissed.

Respondent's reliance on *Lassiter v. Dep't of Social Services* (1981) 452 U.S. 18, and *Iraheta v. Superior Court* (1999) 70 Cal.App.4th 1500, can also be easily dismissed because both cases addressed a request for appointed counsel in a civil proceeding wherein each party requesting the appointment of counsel did not face a deprivation of physical liberty if they did not prevail. The balancing test used in *Lassiter* and *Iraheto* (*Mathews v. Eldridge* (1976) 424 U.S. 319), is only applied in civil cases where there is no risk of an actual deprivation of liberty. This case involves a criminal prosecution wherein the defendant, Ms. Lopez, faces a risk of actual imprisonment if she is convicted. Neither *Lassiter* nor *Iraheto* have any application to the right to counsel issue presented in this case.

4. This Court need not wait for the Judicial Council to cure Rule 8.851 of its constitutional defect

Respondent claims that because the Judicial Council has "spoken on the subject" it should be left for them to determine whether the Constitution requires counsel be appointed to represent indigent respondents in appellate division proceedings. (Answer at p. 19.) There are two problems here. First,

as explained ante, at page 17, the Judicial Council has never spoken on this subject (assuming the subject to which respondent refers is whether counsel should be appointed to represent indigent respondents in appellate division proceedings). More significant, though, is that this statement is based on the misconceived notion that whenever a statute conflicts with a constitutional provision, the statute prevails, and it is up to the rule making body to remedy constitutional defects, assuming it deems any exist. That is not how it works. In fact, just the opposite is well settled law. "Wherever statutes conflict with constitutional provisions, the latter must prevail." (*People v. Navarro* (1972) 7 Cal.3d 248, 260; *Molar v. Gates* (1979) 99 Cal.App.3d 1, 24 ["Legislative mandates cannot take precedence over constitutional provisions."].) When a court is confronted with a statute that violates a constitutional right, it need not "wait upon the convenience of the Legislature" to cure the defect. (*Ibid.*)

Although it is well settled that it is a duty of a court to strike down an unconstitutional statute (*In re Anderson* (1980) 69 Cal.2d 613, 634) that is not at play here because there is nothing written in Rule 8.851 that expressly violates either the state or federal Constriction. The problem with Rule 8.851 is not in what it says, but what it does not say. The problem with Rule 8.851 is that it is underinclusive. One or two sentences stating an appellate division court must appoint counsel for indigent respondents in the type of appellate proceeding at issue here is all that is needed to remedy the one constitutional defect. Respondent's appeal is currently stayed, and has been pending since March, 2016. If this court were to pass on this issue to see when, or if, the Judicial Council modifies Rule 8.851, this appeal could be prolonged for another year, or two, or more. At this point the quickest and most efficient way to cure the constitutional defect would be for this court to judicially reform Rule 8.851.

There are number of cases wherein this Court judicially reformed an underinclusive statute to avoid a patent equal protection violation.[8] (*Hayes v. Superior Ct.* (1971) 6 Cal.3d 216; *Sykes v. Superior Ct.* (1973) 9 Cal.3d 83; *In re Kapperman* (1974) 11 Cal.3d 542, 550; *Del Monte v. Wilson* (1992) 1 Cal.4th 1009.[9]) These decisions all contain several underlying themes: (1) In each case the exclusion of a statutory benefit to one class of individuals that was available to another was not reasonably related to any legitimate public purpose; (2) Each case holds that a statutory classification which arbitrarily excludes some but not all similarly situated in relation to the legitimate purpose of the statute does not necessarily invalidate the entire statute; and (3) Each case held that in light of the purpose and history of a particular statute or an overall statutory scheme a reviewing court may correct discriminatory classifications by invalidating the invidious exemption and extend statutory benefits to those whom the Legislature unconstitutionally excluded. (*Hayes, supra*, 6 Cal.3d at pp. 223-224; *Sykes, supra*, 9 Cal.3d at p. 92; *Kapperman, supra*, 11 Cal.3d at p. 544-545, 550; *Del Monte, supra*, 1 Cal.4th at p. 1026; *Kopp, supra*, 11 Cal.4th p. 660-661 ['[A] court may reform -- *i.e.*, "rewrite" --a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by

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[8] Judicial reformation can also be used to reform an underinclusive statute to avoid a Sixth Amendment violation. (*People v. Sandoval* (2007) 41 Cal.4th 825, 844.)

[9] The statute in *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607 was not judicially reformed but the decision provides excellent discussions regarding judicial reformation of statutes that are underinclusive under the Equal Protection Clause. (*Id.* at pp. 632-641, 649-661.) *Fenske v. Board of Admin.* (1980) 103 Cal.App.3d 590, is a court of appeal case involving the judicial reformation of an underinclusive statute.