IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Christopher Gardner, as Public Defender for the County of San Bernardino, Petitioner, v. Superior Court of the State of California, County of San Bernardino, People of the State of California, Real Parties in Interest.	Docket No. S246214

Fourth District, Division Two, No. E066330
Super. Ct. Nos. CIVDS1610302 and ACRAS1600028

BRIEF OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND LAW OFFICES OF THE PUBLIC DEFENDER FOR THE COUNTY OF RIVERSIDE AS *AMICI CURIAE* ON BEHALF OF PETITIONER

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Your amici, the California Public Defenders Association ("CPDA") and the Law Offices of the Public Defender for the County of Riverside ("LOPD") respectfully submit the following brief, on behalf of Petitioner, the Public Defender for the County of San Bernardino.

ISSUE PRESENTED

Is the Appellate Division of the Superior Court required to appoint counsel for an indigent defendant charged with a misdemeanor offense on an appeal by the prosecution?

ANSWER

Yes. While no California statute or rule requires the Appellate Division of the Superior Court to appoint counsel for an indigent criminal defendant who is named as a respondent (or real party in interest) in an appellate proceeding

initiated by the prosecution in the Appellate Division of the Superior Court, for the reasons stated herein, your *amici* urge this court to hold that the Sixth Amendment to the United States Constitution and article 1, section 15 of the California Constitution mandate that counsel be furnished by the State to an indigent respondent, when he or she finds himself having to defend against an appeal initiated by the public prosecutor.

SUMMARY OF ARGUMENT[1]

Dear Client:

I'm writing to let you know that I'm breaking up with you.

I know, I know. Yes, it's true that you were hauled into court by the Government and required to defend yourself against criminal charges. And, yes, I *know* that you asked for an attorney and were found to be financially eligible for appointed counsel. And I get that filing that motion to suppress wasn't exactly your idea and that you had no input in the District Attorney's decision to appeal. But the rules and statutes don't say that you can have a free lawyer in this situation. So, for now it's over. You're on your own.

Don't worry. You'll be fine. Appellate practice isn't that hard. It's not like it's a specialized field in which the State Bar offers certification or anything. Oh, wait. It is. Okay, so it's hard. But you'll be fine.

Just keep in mind that the standard of review on appeal in a case like this, with mixed questions of law and fact, is sort of complicated and, well, ultimately, de novo. (Don't worry about what that means. I'm sure the prosecutor will explain it in her opening brief.) And be sure to check the rules of court and local rules about things like "the record on appeal," and the proper "format" for your "brief", and the applicable "filing and service" requirements, because, if you do it wrong, the clerk probably won't let you file it.

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[1] An informal writing style is used here, because the following hypothetical letter from an appointed attorney to his or her indigent-criminal-defendant-now-respondent client clearly and concisely makes the point.

I know, I know, it seems unfair. I'm sure it *feels* like you've been dragged into an appellate proceeding by the District Attorney (like how you were hauled into criminal court in the first place) and required to defend yourself. And you're probably concerned, because, after all, the appeal is geared toward getting that dismissal order vacated, getting the order suppressing the evidence against you reversed, and getting you back into jail and, likely, convicted and punished. But, I'm sorry. Since the Government Code only imposes a duty to handle these appeals on the prosecuting attorney, without imposing any duty on the Public Defender to defend against them, and because the applicable Rule of Court doesn't expressly require that the court appoint counsel for you, it doesn't matter how much you may want me, need me or be constitutionally entitled to me. You don't get me. If you want an attorney, hire one. If you can't afford it, then you're going to have to get to the law library (assuming you can scrape up bus fare) and get cracking!

Don't worry, though. If the District Attorney prevails in the appellate proceeding, resulting in your re-arrest, and the criminal proceedings once again going forward, I'll be there for you. It's just that I can't be there for you right now, because the statutes and rules don't say that I must. So, I'll just be sitting over here with my fingers crossed, silently cheering you on. Good luck!

Best wishes,

Your Appointed Lawyer

ARGUMENT

I.

THE SIXTH AMENDMENT REQUIRES THAT COUNSEL BE FURNISHED TO AN INDIGENT CRIMINAL DEFENDANT WHO IS "HALED INTO COURT" BY THE GOVERNMENT TO DEFEND HERSELF IN AN APPELLATE COURT PROCEEDING STEMMING FROM AN ORDER MADE IN A CRIMINAL CASE WHICH IS NOT YET FINAL

The Sixth Amendment guarantees an accused the right to have "the Assistance of Counsel for his defence." (U.S. Const., Amend. VI.) "The Sixth

Amendment withholds from ... courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 463.) The right to counsel in criminal proceedings was deemed necessary, by the Framers of the Constitution, "to insure fundamental human rights of life and liberty" and to serve "as essential barriers against arbitrary or unjust deprivation of human rights." (*Johnson v. Zerbst, supra*, 304 U.S. at p. 462.) Without the safeguards of the Sixth Amendment, justice cannot be done. (*Ibid.*)

> It 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. That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to "* * * the humane policy of the modern criminal law * * *' which now provides that a defendant '* * * if he be poor, * * * may have counsel furnished him by the state, * * * not infrequently * * * more able than the attorney for the state."

(*Johnson v. Zerbst, supra,* 304 U.S. at pp. 462-463, quoting *Powell v. State of Alabama* (1932) 287 U.S. 45, 66 ("*Powell*".)

The Sixth Amendment also safeguards the fundamental right to be heard, integral to the right to due process and a fair trial. (*Powell, supra*, at p. 66; *Grosjean v. American Press Co.* (1936) 297 U.S. 233, 243-244.)

> "The * * * right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in

> the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

(*Johnson v. Zerbst, supra*, at p. 463, quoting *Powell, supra*, at pp. 68-69.)

And, if a defendant in a criminal proceeding is unable to obtain counsel, counsel must be furnished at the State's expense. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) As the Supreme Court reasoned in *Gideon*, "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." (*Ibid.*)

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide—spread belief that lawyers in criminal courts are necessities, not luxuries.

(*Ibid.*)

In this case, the Court of Appeal was dismissive of Petitioner's Sixth Amendment claim, having failed to recognize that the case on which it primarily relied, *Martinez v. Court of Appeal* (2000) 528 U.S. 152, 161 ("*Martinez*"), was inapplicable. The Court of Appeal cited *Martinez* for the broad proposition that,

"the Sixth Amendment does not apply to appellate proceedings." (*Morris v. Superior Court* (2017) 17 Cal.App.5th 636, 645.) In the opinion, that quote, which is actually a segment of a sentence in *Martinez*, appears without context and is misleadingly broad.

The question in *Martinez* was whether the United States Constitution guarantees a convicted defendant the right to represent himself in a postconviction appeal. The *Martinez* court held that, since the Sixth Amendment does not include the right to appeal from a conviction, it does not provide a basis for finding that a convicted defendant has a right to self-representation in his or her postconviction appeal. (*Martinez, supra,* 528 U.S. at p. 160.) The sentence fragment quoted by the *Morris* court appears in the following transitional sentence in the *Martinez* opinion: "In light of our 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,* at p. 161.) The *Martinez* Court concluded that no such right was required by the Due Process Clause, finding that, even in the worst scenario, "counsel's performance [will be] more effective than what the unskilled appellant could have provided for himself" and that postconviction appellate proceedings "are simply not a case of "hal[ing] a person into its criminal courts." (*Ibid.*)

However, the issue presented here does not arise in the context of a postconviction appeal initiated by a criminal defendant. It arises in the context of

an appeal from an interim order in an ongoing criminal proceeding (Pen. Code[2], § 1538.5, subd. (j)) and that of an appeal following the nonfinal dismissal of a criminal case (Pen. Code, §1238, subd. (a), subp. (7)[3]. These appeals, like the underlying criminal proceeding, involve "hal[ing] a person" into court to defend herself in a proceeding which, while not a "criminal proceeding," is inexorably connected to the underlying criminal case. Because of this, *Martinez* and other cases dealing with appeals initiated by convicted defendants are inapplicable.

In 1967, the Legislature, by enacting section 1538.5 and amending section 1238, created an unusual procedural device – an appeal, by the prosecutor, from a particular type of interim order made in a criminal proceeding. If the order is made in a proceeding in which only misdemeanor offenses are charged, and the People want appellate review, they can either announce that they are unable to proceed, invite the court to dismiss the case under section 1385, and appeal pursuant to section 1238, subdivision (a), subparagraph (7), or they can appeal directly from the interim order under section 1538.5, subdivision (j), and request that the criminal proceedings be stayed pending the outcome of the appellate court proceedings. Regardless of the procedural route taken, if the People prevail in the

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[2] Subsequent statutory references are to the Penal Code, unless otherwise indicated.

[3] Penal Code section 1238, subdivision (1), subparagraph (7), states: "An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting the defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code."

appellate court proceeding, the criminal proceeding will resume or, in the case of an appeal following a dismissal, the criminal case will be resurrected.

Constitutionally speaking, the duty of defendant's counsel in such a proceeding is virtually indistinguishable from the duty the defendant's counsel in the underlying criminal proceeding, because the prosecuting attorney's purpose, in both proceedings, is the same – to prosecute the defendant. Because of this, both proceedings are adversarial. Additionally, in both proceedings, the defendant, relabeled "Defendant and Respondent," is guaranteed the right to due process, fairness, and the right to be heard. And, even more than in trial court proceedings, in appellate court proceedings, "skill in the science of law" is critical, and the defendant requires "the guiding hand of counsel at every step in the proceedings against him." (*Johnson v. Zerbst, supra*, at p. 463, quoting *Powell, supra*, at pp. 68-69.) Because the appellate court proceedings and criminal proceeding are inexorably connected, under the circumstances discussed above, the appellate court proceeding should be considered a "critical stage," triggering the Sixth Amendment right to counsel and requiring the State to furnish counsel to an indigent defendant upon request.

II.

ARTICLE 1, SECTION 15 OF THE CALIFORNIA CONSTITUTION REQUIRES THAT, UPON REQUEST, COUNSEL BE APPOINTED TO DEFEND AN INDIGENT CRIMINAL DEFENDANT IN ANY APPELLATE COURT PROCEEDING STEMMING FROM A CRIMINAL CASE

The State of California has created a statutory right for either party to appeal from orders made in motion hearings under section 1538.5. When such a right is created, the right to due process is triggered. (*Griffin v. Illinois* (1956) 351 U.S. 12.)

The Court of Appeal rejected Petitioner's due process claim, because the United States Supreme Court, in *Scott v. Illinois* (1979) 440 U.S. 367, held that the Sixth and Fourteenth Amendments do not require that counsel be provided to a misdemeanor defendant who has not yet been convicted is not actually imprisoned.[4] "In sum, then, the rule we deduce is that the due process clause allows a legislative body to limit the right to appointment of counsel to only those defendants who have been sentenced to actual imprisonment." (*Morris v. Superior Court*, *supra*, 17 Cal.App.5th at p. 649.)

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[4] The Court also cited the more recent case of *Alabama v. Shelton* (2002) 535 U.S. 654 in support of its statement "that the United States Supreme Court has repeatedly held that the risk of actual imprisonment marks the line at which counsel must be appointed for purposes of the Sixth Amendment" (*Morris, supra,* at p. 646); however, the Court neglected to note the holding of *Alabama v. Shelton*, that a person receiving a suspended sentence, without actually being imprisoned, is entitled to the right to counsel under the Sixth Amendment. (*Alabama v. Shelton*, *supra*, 535 U.S. at p. 662.)

But the *Morris* Court failed to recognize that the California Constitution affords its own guarantee of the right to counsel in criminal proceedings, and that right clearly encompasses defendants charged only with misdemeanor offenses only and who are not actually imprisoned. Article 1, section 15 of the California Constitution, guarantees the defendant in a criminal case "the assistance of counsel for the defendant's defense" and the right "to be personally present with counsel"[5] and provides that no person shall "be deprived of life, liberty, or property without due process of law." (Art. 1, § 15.) Under the California Constitution, the right to counsel is not triggered only when a defendant is actually imprisoned: it applies to all defendants in all criminal proceedings.

> It is settled beyond cavil in this state that under the California Constitution ... an indigent defendant in a criminal prosecution for a misdemeanor, of whatever degree or type, is entitled to representation by counsel.

(*Rodriguez v. Municipal Court* (1972) 25 Cal.App.3d 521, 527.) This right actually pre-dates the adoption of the California Constitution. As far back as 1978, this Court recognized that, under California law, even where there is no possibility of imprisonment, "[a] person charged with a misdemeanor is entitled to

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[5] These constitutional guarantees are also codified in section 686, paragraph (2), which entitles a defendant in *any* criminal proceeding the right "to appear and defend in person and with counsel". (§ 686 (2); see also § 987.2, subd. (i) ["Counsel shall be appointed to represent, in a misdemeanor case, a person who desires but is unable to employ counsel, when it appears that the appointment is necessary to provide an adequate and effective defense for the defendant."].)

the assistance of court-appointed counsel." (*Tracy v. Municipal Court* (1978) 22 Cal.3d 760.)

There is no indication in the California Constitution or in this court's jurisprudence limiting these rights to individuals who are actually imprisoned, and they must be found to extend to indigent defendants charged only with a misdemeanor. It follows, then, that these rights would extend to those misdemeanor defendants whose cases have been dismissed pursuant to section 1385 after a favorable ruling in a suppression motion hearing, and who are the named respondents in appellate proceeding initiated by the prosecuting attorney under section 1238, subdivision (a), subparagraph (7), as well as those misdemeanor defendants whose cases remain pending in the criminal court while the People, pursuant to section 1538.5, subdivision (j), pursue review of the superior court's interim order in the Appellate Division of the Superior Court.

Although the federal due process clause does not require states to afford review of criminal judgments, if a state does provide for appellate review, its appellate procedures must comport with due process guarantees, and review must be "adequate and effective". (*Griffin, supra,* 351 U.S. at p. 20; *Evitts v. Lucey* (1985) 469 U.S. 387, 393.) Having a general policy of allowing such appeals, the State "cannot make lack of means an effective bar to the exercise of this opportunity." (*Id.*, at p. 24, conc. opn. of J. Frankfurter.)

The State of California has given the People, the right to appeal from orders entered pursuant to section 1538.5. The State has also insured that the People are

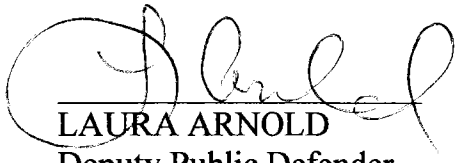
represented by an attorney, the public prosecutor, in these appeals. (Govt. Code, § 26500.) In so doing, it has created a vehicle by which a misdemeanor defendant may be "haled into court" by the Government and forced to defend himself in an appellate proceeding which is inexorably connected to the underlying criminal proceeding. Under such circumstances, it would be unthinkable for the Government to refuse to furnish counsel to an indigent defendant, upon request.

CONCLUSION

As explained herein, both the Sixth Amendment to the United States Constitution and article 1, section 15 of the California Constitution require that, upon request, counsel by furnished by the State to represent an indigent defendant who is the subject of an appellate court proceeding brought by the People.

Dated: 6/17/18

Respectfully submitted,



LAURA ARNOLD
Deputy Public Defender

On behalf of Amici,
CPDA and LOPD

CERTIFICATE OF WORD COUNT

I, LAURA ARNOLD, do hereby certify that, according to the word processing program used to prepare the foregoing brief of amici curiae, the brief, including headings and footnotes, is 3364 words in length.

I declare the foregoing to be true and correct, under penalty of perjury.

Executed this 17th of June, 2018, at Temecula, California.

Dated: 6/17/18

LAURA ARNOLD

PROOF OF SERVICE

Gardner v. Superior Court
Docket Number: S246214

I am a citizen of the United States and a resident of the county of Riverside, State of California. I am over the age of 18 years and not a party to the within action. I am employed by the Law Offices of the Public Defender and am familiar with the business practice at the Office for collection and processing of correspondence for mailing with the Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Law Offices of the Public Defender is deposited with the United States Postal Service, with postage fully paid, that same day in the ordinary course of business.

On June 18, 2018, I served a copy of the foregoing *Brief Of California Public Defenders Association And Law Offices Of The Public Defender For The County Of Riverside As Amici Curiae On Behalf Of Petitioner* by placing a copy in a sealed envelope, in the internal mail collection system at the Law Offices of the Public Defender, 30755-D Auld Rd., Ste. 2233, addressed to:

Superior Court for the County of San Bernardino, 8303 Haven Ave., Rancho Cucamonga, CA, 91730

In addition, I served a copy of the foregoing brief electronically, to the following parties and/or their attorneys:

Stephan Willms, Attorney for Petitioner, by email at swillms@pd.sbcounty.gov

California Attorney General, Attorney for Real Party, at sdag.docketing@doj.ca.gov

Fourth District Court of Appeal, Division Two, through Truefiling, Case E066330

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 18, 2018, at Murrieta, California.

LAURA ARNOLD