

11/29/2018

Robert Laurens Driessen  
Superior Court of San Bernardino, Appellate Division  
8303 Haven Avenue  
Rancho Cucamonga, CA 91730

SUPREME COURT  
**FILED**

DEC 05 2018

Jorge Navarrete Clerk

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Deputy

The Honorable Chief Justice Cantil-Sakauye  
The Honorable Associate Justices  
Supreme Court of California  
Earl Warren Building  
350 McAllister Street  
San Francisco, CA 94102

**Re: Case No.: S246214 Gardner v. S.C. (People), Fourth Appellate District,  
Division Two Case No. E066330**

Dear Chief Justice Cantil-Sakauye and Associate Justices,

Respondent, The Superior Court of San Bernardino County submits the following supplemental letter brief, as invited by the Court:

**SUPPLEMENTAL LETTER BRIEF**

The Court asked the following question:

What is the relevance, if any, of article 1, section 15 of the California Constitution to the issues in this case, including whether a defendant facing misdemeanor charges is entitled to the assistance of appointed counsel at critical stages of the criminal case, without regard to whether the defendant will ultimately be sentenced to a term of imprisonment?

**DISCUSSION**

Article 1, section 15 states:

The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the

defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.

Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.

**i. What Are The Guarantees Under Article 1, Section 15**

There is no question a criminal defendant has a right to a public trial that is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by article 1, section 15 of the California Constitution. (*People v. Prince* (2007) 40 Cal.4th 1179, 1276.) Additionally, a convicted defendant has the right to effective assistance of counsel on appeal. (*People v. Freeman* (2013) 220 Cal.App.4th 607.) The issue is who is responsible for providing counsel to a criminal defendant who has not been convicted and is a respondent on an appeal related to the granting of a motion to suppress. Respondent does not dispute the fact that a criminal defendant who has not been convicted has the right to counsel; rather, the issue is Respondent does not have the duty or ability to appoint counsel on an appeal when a criminal defendant has not been convicted. The responsibility should remain with the Office of the Public Defender.

**ii. What Is The Duty Of The Appellate Division To Appoint Counsel On Appeal**

"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.) 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, so it implicates no basis for a right to representation by professional counsel on appeal. (*In re Barnett* (2003) 31 Cal.4th 466, 472.) The Fourteenth Amendment and its due process and equal protection guarantees, however, 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. (*Ibid.*) “[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.)

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 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.)

California Rules of Court, rule 8.851(a)(1), sets the standards for appointment on a misdemeanor appeal. “On application, the appellate division must appoint appellate counsel for a defendant convicted of a misdemeanor who:(A) Is subject to incarceration or a fine of more than \$500 (including penalty and other assessments), or who is likely to suffer significant adverse collateral consequences as a result of the conviction; and

(B) Was represented by appointed counsel in the trial court or establishes indigency.”

(Cal. Rule Court, rule 8.851(a)(1).)

Additionally, California Rules of Court, rule 8.851(a)(2) allows “on application, the appellate division may appoint counsel for any other indigent defendant convicted of a misdemeanor.” (Cal. Rule Court, rule 8.851(a)(2); see also, 6 Witkin, Cal. Crim. Law 4th Crim Appeal § 51 (2012).) (emphasis added)

Therefore, 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 to appoint indigent defendants who have been convicted of a misdemeanor.

### **iii. What Is The Public Defender’s Duty To Handle An Appeal**

The offices of the various county public defenders are authorized to provide representation only in those classes of cases as set forth in Government Code section 27706. (*Erwin v. Appellate Department* (1983) 146 Cal.App.3d 715, 718.) Government Code section 27706, subdivision (a), provides in pertinent part that: “Upon request of the defendant or upon order of the court, the public defender shall defend ... **any person who is not financially able to employ counsel** and who is charged with the commission of any ... offense triable in the superior, municipal or justice courts **at all stages of the proceedings**.... The public defender shall, upon request, ... **prosecute all appeals** to a higher court or courts of any person who has been convicted, where, in the opinion of the public defender, the appeal will or might reasonably be expected to

result in the reversal or modification of the judgment of conviction.” (Gov. Code, § 27706, subd. (a).)(bold added)

A defendant charged with a misdemeanor is entitled to assistance of counsel at all stages of the proceedings, and to make right to counsel meaningful, defendant must be made aware that he has right to counsel and that court will appoint counsel if he is unable to afford counsel. (*In re Peterson* (1970) 4 Cal.App.3d 979, 981.) The public defender who has been appointed to represent a misdemeanor defendant at trial has the authority to represent the defendant on appeal as long as the public defender believes the appeal has merit. (*Hernandez v. Superior Court* (1992) 9 Cal.App.4th 1183, 1191.) However, “[i]n the absence of statutory authorization, respondent appellate department had no jurisdiction to compel the public defender to provide representation on appeal to indigents convicted of misdemeanors.” (*Mowrer v. Appellate Department* (1990) 226 Cal.App.3d 264, 267.) Additionally, “the right of an indigent defendant to appointed counsel on appeal was restricted solely to those instances in which the reviewing court was of the view that appointment of counsel ‘would be of advantage to the defendant or helpful to the appellate court....’ [citation.]” (*Id.* at p. 268.) With respect to discretionary appointments, Government Code section 27706, subdivision (a), gives county public defenders discretion in deciding whether to represent indigent defendants on appeal. (*Erwin, supra*, 146 Cal.App.3d at p. 718.) Therefore, the appellate department does not have the statutory authority to order the appointment of the public defender in misdemeanor appeals. (*Mowrer, supra*, 226 Cal.App.3d at p. 268; 5 Witkin, Cal. Crim. Law 4th Crim Trial § 195 (2012).)

The issue is an appellate division is not statutorily authorized to order the appointment of the public defender in a misdemeanor appeal. (See *Mowrer, supra*, 226 Cal.App.3d at p. 268.) Nor is an appellate division statutorily authorized to appoint appellate counsel to a criminal defendant who has not been convicted. (Cal. Rule Court, rule 8.851(a)(2).) Thus, Respondent respectfully requests this Court overturn *Mowrer v. Appellate Department* (1990) 226 Cal.App.3d 264, and permit an appellate division to appoint the public defender to handle a pre-conviction appeal.

**iv. Issue of Dual Representation**

The other issue appellate divisions face with appointing appellate counsel to individuals who have not been convicted is the problem of dual representation. In almost all instances, including the underlying criminal matter in this instance, the public defender represented their client and now has elected to no longer represent them, but fails to be properly relieved of counsel. In *People v. Smith* (1993) 6 Cal.4th 684, this Court dealt with a similar issue and determined as the original attorney was apparently not relieved of further representation of the defendant, a court could not appoint additional counsel to represent the defendant. Thus, until the public defender is relieved, Respondent cannot appoint additional counsel.

Respectfully,



Robert Laurens Driessen

## Declaration of Service by U.S. Mail

Case: GARDNER v. S.C. (PEOPLE)

Case No.: S246214

I, Cheryl D. Franzen, declare as follows:

I am a resident of the State of California and over the age of eighteen years; I am not a party to this action; my business address is 8303 Haven Avenue, Rancho Cucamonga, CA 91730. I am familiar with the business practices of the Superior Court of San Bernardino County for collection and processing of correspondence for mailing in the United States Postal System. In accordance with this practice, all correspondence placed in the internal mail collection system at the Superior Court of San Bernardino County is deposited with the United States Postal System that same day, or the following day, in the ordinary course of business.

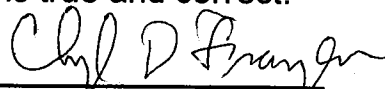
On November 30, 2018, I served copies of the Supplemental Letter Brief on behalf of Respondent

By placing a copy in a sealed envelope, in the internal mail collection system at the Superior Court of San Bernardino County located at 8303 Haven Avenue, Rancho Cucamonga, CA 91730, and addressed to:

Attorney General - San Diego Office P.O. Box 85266 San Diego, CA 92186-5266	County of San Bernardino Office of the Public Defender Attn: Stephan Joseph Willms 8303 Haven Avenue, Third Floor Rancho Cucamonga, CA 91730
County of San Bernardino District Attorney Appellate Services Unit Attn: Brent Schultze 303 W. Third St., 5 <sup>th</sup> Floor San Bernardino, CA 92415-0511	Court of Appeal Fourth District, Division Two 3389 Twelfth Street Riverside, CA 92101
Brett Johnston Williamson O'Melveny & Myers LLP 610 Newport Center Drive, #1700 Newport Beach, CA 92660-6429	County of Riverside Office of the Public Defender Attn: Laura Beth Arnold 4200 Orange Street Riverside, CA 92501

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

Dated: November 30, 2018



Cheryl D. Franzen  
Cheryl D. Franzen  
Legal Processing Assistant II