Appellate Advocacy College 2000

Lecture

Effective Petitions for Rehearing, Review and Certiorari

Jonathan B. Steiner

The Petition for Review
By Jonathan Steiner

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In California today, the Courts of Appeal are the courts of last resort for over 95% of appellate litigants. The Supreme Court grants review in roughly 4% of the petitions for review filed. (An analysis of the reasons for this paucity of the Court's granting petitions for review would require, at least, another article.)

However, it would constitute malpractice for a lawyer handling an appellate matter to ignore the petition for review as a significant and potent means of achieving a better result for his or her client. This is particularly true since if you are or should be considering a petition for review, your client has lost in the Court of Appeal.

This article, then, will delineate and exemplify the key aspects of writing persuasive petitions for review for the Supreme Court.

Several critical points need to be touched before getting into the writing of the petition. First, consider whether you need to file a petition for rehearing in the Court of Appeal. The Supreme Court will base its decision on whether to grant review of the facts as stated in that court's opinion. It will not normally consider

> *any issue or any material fact that was omitted from or misstated in* [that]. . . opinion ... unless the omission or misstatement was called to the attention of the Court of Appeal
>
> in a petition for rehearing. (Cal. Rule of Court, Rule 29(b)(2).)

It is unlikely that your petition for review would be denied solely because of a rigid application of this rule, but if the missing fact or issue is significant enough, it is safer to petition for rehearing.

Next, the petition has to be filed within ten days of the date on which the opinion of the Court of Appeal becomes final. As that opinion is final on the 30th day after it has been filed, the petition must be filed between the 31st and 40th day after the filing of the Court of Appeal opinion.

The most important single point to remember is to make your petition as concise and as interesting as possible. The granting of petitions for review is completely discretionary, and you are competing with numerous other briefs and petitions for the attention and affection of the justices and their research attorneys, not necessarily in that order. Your petition has to reach out and grab them.

Each petition should start with an introductory section entitled "Petition for Review." This is a short, factual statement in which you tell the court that you are petitioning for review after the decision of the specific Court of Appeal involved and that the opinion is attached as an exhibit. If the opinion has been certified for publication, note that fact as well because experience indicates it may play a role in the Supreme Court's decision to grant or deny a petition.

Next, in California Rule of Court 28(e)(2), you are told to state:

> *(A)t the beginning of the body of the petition ... the issues presented for review ..without unnecessary detail.* The statement should be short and concise ...

Rule 28(e)(3) states that

> (T)he petition shall be as concise as possible, *and shall address, in particular, why the cause is appropriate for review under the criteria stated in Rule 29.*

The use of the word "concise" in two consecutive subsections of Rule 28 should carry the message clearly.

It is always much harder and time consuming to write a short petition of real quality as opposed to one which is adequate and long. But that is what has to be done. In writing these petitions, counsel needs to restrain the desire to wax on in eloquent prose. Your basic job is to hit the points that will advance the goal of convincing the Supreme Court to grant your petition for review.

Note that the statement of issues mentioned by Rule 28(e)(2) does not require counsel to stick to a simple, one sentence articulation of the issue or issues. Nor does it imply that the court wants one virtually incomprehensible sentence per issue with numerous dangling clauses.

The Court wants to be told why it is necessary for it to take up its time on your specific case. What brings it within Rule 29?

The first section of your petition might be entitled "Statement of Issues" or "Necessity for Review," but the latter sounds a bit more compelling.

Then, "... expressed in the terms and circumstances of the case but without unnecessary detail . . . " (Rule 28(e)(2)), you must spell out clearly the specific issue or issues on which you are basing your petition and state succinctly why this petition should be granted "to secure uniformity of decision or the settlement of important questions of law." Rule 29(a).

Your statement " should not be argumentative or repetitious…", (Rule28 (e)(2)), but it needs to be carefully written along the lines discussed above.

There is little doubt that if the statement of issues does not interest the research attorney or justice who reads it, the chances are high that your reader will go no further. Then, all the compelling arguments you have put into your brief in support of your petition will go the way of the "Denied" stamp.

What if you have three or four issues in your case which you want to place before the court? Then you need to place them all in your petition for review because "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Rule 28(e)(2).

Yet, strategically, you may have to make some tough choices. A petition with too many issues is likely to give the court the impression that none of them are very compelling. It is rarely helpful to raise more than two issues, three at the outside, even if your case is just overflowing with fascinating issues. Again, it is better to keep the petition as short and direct as possible.

One other strategic consideration in a criminal case is that if there is any thought of seeking federal habeas

corpus relief, you need to have exhausted state remedies on the particular issue involved. Such an issue must be included in the petition for review. If this is done and the petition for review is denied, you have done all you can in the California courts and are free to seek what relief is possible in the federal courts.

It is in this first section also that you want to tell the Court whether the question in your petition has divided the Courts of Appeal (citing the conflicting opinions), whether and why it is an important question of law (perhaps discussing how this issue negatively affects the trial courts every day) or whether, alone or in addition to being one or both types mentioned above, it is also a matter of first impression. If there are other cases before the court at that time raising the same issue (and you should make it your business to know), this is the time to mention it.

It is worthwhile to note that certain justices have mind sets to want to review certain issues. It's a "Have opinion, need case" type of situation. It is difficult to plug into this potential, but one possible way is reading carefully the opinions of the concurring and dissenting justices in the Court's opinions to learn what is on their minds.

Rule 28(e)(5) also requires that, following your Issues section, a brief in support of the petition be included. Remember, and this is critical, that this brief is in support of the petition, that is, in support of the document which you are hoping will get your case on the Supreme Court's docket.

Should the Court grant the petition, you will get the opportunity to brief fully the merits of the case, either relying on the brief filed in the Court of Appeal or filing a new brief.

Thus, the brief in support of the petition for review should be directed to establishing in greater detail with whatever additional authorities you can find or arguments you can make for the existence of one of the grounds stated in Rule 29(a). While you should make the correctness of your legal position clear, you should avoid overly concentrating on proving how absolutely, positively right you are on the merits. Both in denying petitions which it seems certain should be granted and by depublishing decisions, the Supreme Court has said repeatedly that it does not see itself as a "court of last resort" (although this is factually the case).

The Court has always seen itself as one of policy. This means that it will not necessarily step in to right a wrong perpetrated against one of the parties by a plainly incorrect decision by the Court of Appeal.

The Supreme Court's mandate is to shape the law of the state and to give it direction or momentum. (If you have been noticing a surprisingly large number of criminal appeals using the phrase "harmless error" in the last paragraph or two, you have seen the concept of momentum in action.) The Supreme Court has that power when it interprets statutes, carries forward (or backward) decisional trends or plainly overrules case law laid down by a previous court with which it disagrees. It does not even have to give reasons for denying your petition for review.

Thus, if you want to get your case before that court, you have to convince four of its seven members that they want to decide it. Not necessarily even in your favor. You have lost in the Court of Appeal; that is why you are in the position of having to consider how best to write a petition for review.

Your goal is to get the court to grant the petition for review that you will be placing before them. You can worry about convincing them that your client should win later. The game is about to be over and you're losing. That is why it is essential that your brief in support of the petition address itself to the issues stated in Rule 29.

Attaining such a goal is no easy job as, today, over 95% of petitions for review are denied. Having a petition

denied is nothing to be ashamed of. It happens to everyone who is in an appellate practice. But if you keep in mind while writing your Petition for Review what has been discussed here, you will be maximizing your chances to become that one in 20 who gets a Petition for Review granted.

Remember, too, that there is a group of attorneys who specialize strictly in appellate practice. If you do not have time or desire to become sufficiently expert to represent your client properly in an appellate proceeding, it is often a very good idea to retain such a lawyer to handle the job for you or, at least, for consultation purposes.

Otherwise, all you can do is avoid being intimidated, become as skilled as possible and do the best job you can. Put another wav, as a coach once commented to Wayne Gretskv, you're going to miss 100% of the shots you don't take.

JULYIAUGUST 1989

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICARDO T. VELEZ, Defendant and Appellant.	)	No. B094387 (Sup.Ct.No. KA008776)

APPEAL FROM THE JUDGMENT OF

THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE ROBERT C. GUSTAVESON, JUDGE

PETITION FOR REHEARING

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICARDO T. VELEZ, Defendant and Appellant.	)	No. B094387 (Sup.Ct.No. KA008776)

PETITION FOR REHEARING

TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT, DIVISION FOUR:

Appellant Ricardo T. Velez respectfully petitions this Court for a rehearing in the above-entitled matter after decision of this court filed October 16, 1996, affirming the judgment. The reasons why a rehearing should be granted are set forth below.

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ARGUMENT

I

THE OPINION'S INITIAL STATEMENT THAT NO REPLY BRIEF WAS FILED, ITS ADOPTION OF ARGUMENTS THAT WERE REFUTED IN THE REPLY BRIEF, ITS FAILURE TO ADDRESS ANY CONTENT OF THE 19-PAGE REPLY BRIEF, AND ITS SUBSEQUENT MODIFICATION DELETING THE STATEMENT THAT NO REPLY BRIEF WAS FILED, CREATE AN APPEARANCE OF INJUSTICE THAT CAN BE REMEDIED ONLY BY REHEARING AND ISSUANCE OF AN OPINION THAT DEMONSTRATES APPELLANT'S REPLY BRIEF WAS READ AND CONSIDERED

> "Appellant, having filed no reply brief, makes no response to [respondent's] assertion." (Slip opinion, page 7, last sentence of first full paragraph.)
>
> "The opinion filed herein on October 16, 1996, is modified as follows: [¶] "On page 7, the last sentence of the first full paragraph which reads: 'Appellant, having filed no reply brief, makes no response to this assertion' is deleted. [¶] This modification does not affect a change in the judgment. " (Order modifying opinion, in full.)

As this case now stands, it creates the appearance that this court issued its opinion without having read appellant's reply brief. Since the reply brief was unusually comprehensive and since it refuted several of respondent's contentions that the opinion adopted without comment in order to affirm the judgment, that appearance of impropriety can be remedied only by issuance of a new opinion that considers, and then either accepts or rejects, the reply brief's arguments. Furthermore, for the reasons stated in the reply brief, the judgment of the trial court should be reversed.

The facts are as follows:

Appellant filed an opening brief consisting of a multifaceted argument for a sentencing remand, plus a brief argument for correction of the Abstract of Judgment. Respondent then filed its brief, contesting the argument for remand, agreeing that the Abstract should be corrected, and raising its own argument that appellant was awarded significantly more presentence custody credits than he earned. Appellant timely filed his Reply Brief, which consisted of a comprehensive 16-page refutation of respondent's comments on the remand issue, a brief observation that respondent had conceded necessity to correct the Abstract, and an explanation of why respondent was wrong about the presentence credits.

Next, just after appellant waived oral argument, which he did largely on the strength of the Reply Brief, the court issued its opinion. On the remand issue, the opinion restated the contentions made in appellant's opening brief, restated the answers to those contentions made in Respondent's Brief, and then adopted respondent's answers; there was no acknowledgement of the Reply Brief or of any of its contents. In the section of the opinion dealing with respondent's claim that appellant had been awarded excess presentence custody credits, the opinion stated, "Appellant, having filed no reply brief, makes no response to this assertion."

Upon reading the opinion, appellate counsel phoned the Court of Appeal and informed a clerk of Division Four that she had indeed filed a Reply Brief. Two days later, the court

modified its opinion, making no change other than to delete the statement that no Reply Brief had been filed.

This sequence of events leaves the undeniable impression that the opinion, as it originally stated, was rendered by a court which had not read appellant's Reply Brief. The modification does nothing to erase that impression; on the contrary, by simply deleting the statement that the court was unaware of the Reply Brief without denying the truth of that statement or explaining how it came to be made, the modification compounds the appearance of impropriety. The result is to remind one of Orwell's Ministry of Information, where facts become converted into nonfacts by the simple process of deletion.

For whatever reason this case has come to its present posture, the following is undeniable: Appellant is entitled to an opinion by a tribunal which has considered, and then either accepted or rejected his arguments; and the content of the opinion and modification raise a serious question whether this tribunal has done so. The problem is not merely one of appearances, for appellant believes that this court would change its judgment and afford him relief were it to address the points made in his Reply Brief. For example, the opinion's characterization of what the sentencing court was aware of is refuted at pages 7 and 14 of the brief; the opinion's reference to available alternative aggravating factors is refuted at, *inter alia*, pages 4-5 and 12; prejudicial error is demonstrated on the grounds stated at pages 7-8 in themselves.

Rather than repeat the arguments made in the Reply Brief, appellant attaches it here as an Appendix. Rehearing should be granted, and a new opinion issued which addresses, at the least, those portions of the brief which refute respondent's contentions adopted by the present opinion.

II

THIS COURT FAILED TO ADDRESS APPELLANT'S SHOWING THAT EVEN IF THE ERRORS WERE OTHERWISE HARMLESS, THEY PREJUDICIALLY AFFECTED THE DECISION TO SENTENCE CONSECUTIVELY RATHER THAN CONCURRENTLY; UNDER ALL APPLICABLE CASELAW, REMAND IS REQUIRED ON THAT BASIS ALONE

As an independent ground for rehearing, the opinion fails to address appellant's contention that remand is required on the falsely-premised consecutization alone, a contention overwhelmingly supported by caselaw in point, none of which is cited or distinguished in the opinion.

It has been conceded that the trial court relied on a single factor in its decision to impose consecutive, rather than concurrent, sentences, and that that factor was erroneous. Further, as pointed out in the Reply Brief, every single criterion listed in the California Rules of Court as relevant to that decision supported ***concurrent*** terms. The crimes and their objectives were not predominantly independent of each other, there were no separate acts of violence or threats of violence, the crimes occurred in the space of a half-hour so as to indicate a single period of aberrant behavior, and neither of the crimes sentenced upon were aggravated in ways that had not already been relied upon, or would necessarily have been relied upon in lieu

of erroneous factors, to justify imposition of the upper term. (Cal. Rules of Court, Rules (a)(1), (a)(2), (a)(3) and (b)).

Under these circumstances, the Courts of Appeal have unanimously held that remand is required for reconsideration of the decision whether to impose consecutive or concurrent terms. (See, ***People*** v. ***Robinson*** (1992) 11 Cal.App.4th 609 [where some counts involved single victim on single occasion, failure to state reasons for consecutive terms prejudicial, requiring remand, since case didn't necessarily cry out for consecutive terms]; ***People*** v. ***Kozel*** (1982) 133 Cal.App.3d 507, 540 [consecutization based on single factor also used to support upper term prejudicial, requiring remand]; ***People*** v. ***Lawson*** (1980) 107 Cal.App.3d 748 [where court used several good factors to impose upper term but same ones again to sentence consecutively, remand required since impossible to tell which factors might have been determinative]; ***People*** v. ***Burke*** (1980) 102 Cal.App.3d 932 [remand required for failure to state reasons for imposing consecutive terms where not all Rule 425 factors favored consecutization]).

Rehearing should be granted so that the court may address this contention and explain, if it disagrees with it, why ***Robinson***, ***Kozel***, ***Lawson*** and ***Burke*** do not control.

CONCLUSION

For the foregoing reasons, appellant respectfully urges the court to grant rehearing in this case.

Dated: October 31, 1996

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SHONTA D. TAYLOR, Defendant and Appellant.	)	2d Crim. B095766 (Sup.Ct.No. NA023748)

PETITION FOR REVIEW

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NOT REFLECT THAT THE TRIAL COURT WOULD, UNDER NO CIRCUMSTANCES, HAVE EXERCISED ITS DISCRETION TO STRIKE THE PRIOR FELONY CONVICTION PURSUANT TO SECTION 1385 AND AS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SHONTA D. TAYLOR, Defendant and Appellant.	2d Crim. B095766 (Sup.Ct.No. NA023748)

PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES, CALIFORNIA SUPREME COURT:

Appellant, SHONTA DEVON TAYLOR, hereby requests that this Court grant his petition for review from the unpublished decision of the California Court of Appeal, Second Appellate District, Division Three, filed December 11, 1996, affirming his conviction on appeal. (A copy of the opinion of the Court of Appeal is attached hereto as Exhibit A.) Appellant's petition for rehearing was denied on January 9, 1997.[1] (See Exhibit B.)

[1] The arguments made in support of this petition for review were made to the Court of Appeal in the petition for rehearing filed on appellant's behalf. See Arguments III and IV of the petition for rehearing.

NECESSITY FOR REVIEW

This Court denied appellant's petition for review in People v. Askey (1996) 49 Cal.App.4th 381, 388 (Supreme Court No. S056727); three justices voted to grant the petition. (See the Order of this Court dated December 23, 1996.)

Division Three of the California Court of Appeal, Second Appellate District, decided Askey; that division also decided this case. (See Exhibit A, p. 1)

Further, in its one paragraph rejection of appellant's argument that the case must be remanded for resentencing pursuant to People v. Superior Court (Romero) (1996) 13 Cal.4th 497, the opinion of the Court of Appeal in this case cited and relied on People v. Askey, supra, for the key interpretations of this Court's decision in Romero. The Court of Appeal stated:

> "...Taylor contends the case must be remanded for resentencing pursuant to People v. Superior Court (Romero) (1996) 13 Cal.4th 497. This claim is meritless. Because Taylor did not ask the trial court to exercise its discretion to strike his qualifying prior conviction, any error has been waived. (See People v. Askey (1996) 49 Cal.App.4th 381, 388.) Moreover, the record indicates that the trial court would not have exercised its discretion to strike the prior. [fn. 4] (Id., at p. 389.)
>
> _____
>
> 4. During sentencing argument, defense counsel--in arguing for the mitigated substantive term--commented, "I know the court's going to use that prior to double the base term. So he's getting a whammy there." The trial court replied: "Don't you think the people of the State of California have indicated somewhat that they're fed up with people not getting double whammies? Isn't that what the legislation was all about?" (Slip opinion, pp. 12-13)

The decision in People v. Askey, supra, is flawed and contrary to the decisions of other Court of Appeal in People v. Sotomayor (1996) 47 Cal.App.4th 382, 390-391 and People v. Smith (1996) 50 Cal.App.4th 1194, 1200. This case is but one example of the fact that Askey has sown and will continue to sow significant confusion and inconsistent decisions in the trial courts and courts of appeal of this state (particularly in unpublished decisions like this one) if it is not soon disavowed by this Court.

Thus, this Court now has before it a case which presents for resolution the types of questions which will permit the Court not only (1) to secure uniformity of decision and (2) to settle the important questions of law at issue (see California Rules of Court, rule 29 (a)(1)), but also (3) to do justice and reach the equitable result.

ARGUMENT

I

THE HOLDING IN ASKEY THAT APPELLANT WAIVED THE ROMERO ARGUMENT ON APPEAL BECAUSE HE DID NOT SO MOVE IN THE TRIAL COURT IS (1) NOT A CORRECT INTERPRETATION OF ROMERO, (2) CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND (3) IS CONTRARY TO POLICIES OF SOUND JUDICIAL ADMINISTRATION

A. Askey Incorrectly Interpreted Penal Code section 1385 As Well As This Court's Opinion in Romero

In rejecting appellant's argument that this matter should be returned to the trial court for resentencing, the Court of Appeal cited its own decision in People v. Askey, supra, for the proposition that he waived his right to have a trial court exercise its discretion under Penal code section 1385 if he did not specifically ask the trial court to do so in the original sentencing hearing. (See Exhibit A, p. 13.)

Yet, section 1385 reads, in relevant part, as follows:

> The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.

Thus, the statute specifically gives only the judge or the prosecutor the standing to make a motion for relief under its terms. Specifically excluded is the defendant.[2]

[2] In People v. Superior Court (Flores) (1989) 214 Cal.App.3d 127, 136-137, the court adopted this position and stated that Penal Code section 1385

In People v. Sotomayor, supra, the Court of Appeal remanded the matter for resentencing in light of Romero, saying,

> "Notably the Supreme Court did not say a defendant seeking reconsideration of sentence must show that he or she had brought a motion to strike the allegations in the trial court. ...we conclude a motion to strike is not a prerequisite to obtaining reconsideration." (Id., 47 Cal.App.4th at 390-391; emphasis added)

Neither the opinion in Askey nor the opinion in the case at bar provides any analysis which explains away these

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> "...does not authorize the defendant to make a motion to dismiss in furtherance of justice. (People v. Ritchie (1971) 17 Cal.App.3d 1098, 1104.) To recognize such motion and order would judicially enlarge the scope of section 1385...The Legislature limited the right to initiate the use of section 1385 to the People and to the Court....[emphasis in original]
>
> While a defendant can informally suggest a court consider the dismissal of charges against him, section 1385 does not provide for a formal defense motion to accomplish the same result. (People v. Smith (1975) 53 Cal.App.3d 655, 657-658.)" (emphasis added)

problems of statutory and decisional interpretation. Therefore, as the enabling statute plainly excludes appellant from making the section 1385 motion in the trial court and as it was a motion on which he had no possibility of prevailing at the time anyway, it was simply wrong for the Court of Appeal in Askey and in the case at bar to hold that appellant waived the right to raise the section 1385 issue before the Court of Appeal.

People v. Smith, supra, a decision of the Court of Appeal for the Fourth Appellate District, Division One, also lends considerable support to this position. There, the prosecution appealed the trial court's exercise of discretion to strike two "strikes" for sentencing purposes; the Court of Appeal reversed because the trial court did not state its reasons for striking the prior pursuant to section 1385.

As one of the points raised in defense of the trial court's actions, Smith contended that the appellate court could not reach the issue on which it reversed because "the prosecutor failed to raise the issue at trial. (People v. Scott (1994) 9 Cal.4th 331.)" (Id., 50 Cal.App.4th at 1200)

In rejecting this contention, the Smith court accepted the explanation for the prosecution's failure to object which applies equally, if not with greater strength, to this case:

> "Finally, the law was clearly in flux during that period. Considerable debate raged on the question of whether or not trial courts even had such power, let alone the manner of its exercise. It was not until the court in People v. Superior Court (Romero), supra, 123 Cal.4th 497 resolved the issue that we could

> fully understand and apply the trial court's discretion to striking priors such as those in this case. Thus, we cannot apply waiver to the facts in this record. Certainly. in cases after Romero the prosecutor is subject to the waiver provisions of Scott if timely objections on specific grounds is not made. (Id.; emphasis added)

If both Askey and Smith are allowed to stand, it will correctly appear that, as far as the doctrine of waiver is applied in this area of the law, what is good for the goose (the prosecution) is not good for the gander (the defense); in other words, the law will not be applied equally to both prosecution and defense. From both the point of view of both justice and the administration of justice, this is not an acceptable result. Thus, this is the very type of case which this Court needs to hear and decide in order to resolve plain inconsistencies in decisions of the appellate courts.

Auto Equity Sales v. Superior Court (1962) 57 Cal.2d 450 holds that the Court of Appeal was bound by this Court's decision in Romero. Appellant further submits that (1) the Sotomayor and Smith decisions correctly construe this Court's Romero decision and that (2) the Court of Appeal's decision in Askey and in the instant case are incorrect on this point.

B. Askey Requires The Making Of Futile Future Motions And Runs Contrary To Important Policy Considerations

Further, given the pre-Romero interpretation of Penal Code section 667 (b-i) which was being followed by the Courts of Appeal at the time of the trial in this case, the making of such a motion would have been futile. For just two of the many Court of Appeal opinions on this point, see, e. g., People v. Glaster

(1995) 36 Cal.App.4th 785, petition for review granted, Supreme Court No. S048283; People v. Petty (1995) 37 Cal.App.4th 730, petition for review granted, Supreme Court No. S048702.

On a policy level, if Askey is followed, trial courts will have their valuable time taken up by motions which have no chance of being granted but which counsel or a defendant believes must be made in order to anticipate some hoped-for (but perhaps extremely unlikely) change in the law.

People v. Scott, supra, relied on by this court in Askey, does not support its conclusion. In Scott, this Court only required that a defendant make objections or motions based on settled legal principles in existence at the time of the trial -- not such law as may come into being in the future. (Id., at 352, 353)

Further, the Court made its ruling in Scott prospective only for the same reason: counsel cannot be and is not required by law to anticipate future Supreme Court opinions under pain of waiving his or her client's rights. (Id., at 356-358)

Based on the facts of this case, the result reached here and in Askey is contrary to considerations of judicial economy. It is simply not equitable to preclude the trial court from hearing the sentencing question presented by appellant under the law as it has evolved simply because counsel did not make what he appropriately thought to be a frivolous motion under the law at the time.

C. Askey Faults Trial Counsel For Failing To Make A Futile Motion And Creates A Situation In Which Appellate Counsel In This Matter And In Future Matters Is Ethically Required To Argue, However Reluctantly, That Trial Counsel Was

Ineffective When That Is Simply Not The Truth; This Is Another Policy Reason Why The Askey Opinion Is Wrong

Finally, if it is ultimately trial counsel's failure to make a motion under section 1385 which disables appellant from obtaining a new sentencing hearing, appellate counsel is ethically constrained in this case and all others in which the issue arises to take the position, albeit reluctantly, that trial counsel's performance was ineffective.

Further, as sentencing is a critical stage of the trial proceedings (People v. Cropper (1979) 89 Cal.App.3d 716, 719-720) and as the result of counsel's failure to make the section 1385 motion is to completely preclude appellant from obtaining the relief sought, i. e., a new sentencing hearing with the possibility of a significantly lesser sentence, it would have to be held prejudicial under any standard. Strickland v. Washington (1984) 466 U.S. 668, 684-685. See. See also People v. Cotton (1991) 230 Cal.App.3d 1072, 1085-1087.

This Court, the appellate courts and commentators have criticized appellate counsel for appearing too willing to raise the "ineffectiveness of trial counsel" issue. Yet, under Askey, appellate counsel would be ethically required to argue that trial counsel was ineffective in order to overcome the waiver doctrine even though it would be clear that such an argument is no more than a fiction and that trial counsel was not ineffective at all.

D. Askey Cannot Be Allowed To Stand as Precedent

Thus, for several reasons of law and of sound judicial administration, Askey cannot be allowed to stand as precedent.

Further, because of the opinions in Sotomayor and Smith, on the one hand, and Askey, on the other, reach opposite conclusions, it is now impossible for trial courts or courts of appeal to know what the law requires of them. Thus, this Court should grant review in this case and resolve this very real conflict.

II

RELYING ON ITS DECISION IN ASKEY AND STRETCHING TO AVOID THE SENTENCING REMAND REQUIRED BY ROMERO, THE COURT OF APPEAL HERE MISCONSTRUED BOTH THE HOLDING OF THIS COURT IN ROMERO AND THE IMPORT OF THE TRIAL COURT'S COMMENTS AT THE SENTENCING HEARING; THEREFORE, AS THE RECORD IN THIS CASE DOES NOT REFLECT THAT THE TRIAL COURT WOULD, UNDER NO CIRCUMSTANCES, HAVE EXERCISED ITS DISCRETION TO STRIKE THE PRIOR FELONY CONVICTION PURSUANT TO SECTION 1385 AND AS APPELLANT WOULD HAVE HAD THE RIGHT TO PUT ON EVIDENCE OF HIS DEMEANOR IN STATE PRISON IN SUPPORT OF HIS REQUEST FOR A REDUCED SENTENCE IN THE TRIAL COURT, THE COURT OF APPEAL WAS REQUIRED BY AUTO EQUITY TO REMAND THE CASE TO THE TRIAL COURT FOR A NEW SENTENCING HEARING, AND ASKEY SHOULD BE OVERRULED

A. The Court of Appeal's Holding That The Trial Court Would Not Have Exercised Its Discretion To Strike The Prior Felony Conviction Here Does Not Comply with Romero.

People v. Superior Court (Romero), supra, 13 Cal.4th at 530, fn. 13, modified at 13 Cal.4th at 1016a, required that, before a court could deny a request for relief under Romero, the record shows that the trial court knew it had sentencing discretion and did not to exercise it[3] or

[3] See People v. Robles (filed 12/11/96) 96 Daily Journal D.A.R. 14836, 14839, in which the Court of Appeal stated:

"...when the record indicates that the trial court would not have granted such a dismissal if it believed it had the discretion to do so, then an appellate court may appropriately

deny remand."

> "if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. (People v. Belmontes [(1983) 34 Cal.3d [335] at p. 348, fn. 8.)" (emphasis added)

The Court of Appeal relied on the second alternative, stating, "Moreover, the record indicates that the trial court would not have exercised its discretion to strike the prior." (Slip opinion, p. 13; emphasis added)

Two points are immediately apparent. First, the Court of Appeal took it upon itself to edit the adverb "clearly" out of the standard articulated in this Court's decision in Romero in an attempt to weaken that standard and make the result it reached here and in Askey appear more in line with Romero.

Second, and proceeding to utilize that purported weakening of the Romero standard, it is plain that the statement of the trial court on which the Court of Appeal relied to show that the trial court would not have exercised its discretion does not "clearly indicate that [the trial court] would not, in any event, have exercise its discretion to strike the allegations." (Id.; Slip opinion, p. 13, fn. 4.) Thus, the Court of Appeal's refusal to remand this matter for resentencing flies in the face of Romero and Auto Equity Sales.

In addition, it should be noted that Askey had such a horrendous record (13 prior felony convictions including at least four attempted murder convictions) that the Court of Appeal

described him as a "budding 'Night Stalker.'" (People v. Askey, supra, 49 Cal.App.4th at 385, 389)

Appellant's record of one prior felony plainly comes nowhere near Askey's. Appellant suffered only one prior felony and injured no one in this or the prior conviction. Although he was charged with the possession and use of a gun in this case, the jury specifically determined the gun use allegation under section 12022.5 to be "not true."

While it might have been correct for the Askey court to conclude that it would have been an abuse of discretion to grant Askey relief under Romero on the basis of his record alone, the same cannot be said about appellant. This is a perfect example of the kind of serious systemic problems which the Askey opinion can cause.

Thus, the Court of Appeal's interpretation in this case of its own decision in Askey and the apparent breadth attributed to that precedent has led to a huge injustice for appellant and denied him a chance to be fairly resentenced according to the law as stated in Romero.

B. The Court of Appeal Also Misconstrued The Statement Of The Trial Court On Which The Court of Appeal Relied To Hold That The Trial Court Would Never, Under Any Circumstances, Exercise Its Discretion Under Penal Code Section 1385.

Next, the Court of Appeal misinterpreted the statement of the trial court which it cited to support its holding. (Slip opinion, p. 13, fn. 4.)

In response to defense counsel's argument that the trial court should not use the one prior involved in this case both to double the base term of five years under section 667, subdivisions (b) through (i) as well as adding an additional five years under section 667a (the dual use of the prior, "double whammy" argument that has been rejected by every court that has considered it), the trial court stated:

> "Don't you think the people of the State of California have indicated somewhat that they're fed up with people not getting double whammies? Isn't that what the legislation was all about?" (Slip opinion, p. 13, fn. 4)

(See the trial court's statement to this effect in the process of plea discussions before the trial began. RT 4)

The trial court here was simply stating its understanding that the electorate had intended that the trial court double the base term imposed based on a prior under section 667, subdivisions (b)-(i) and then impose an five year sentence enhancement under section 667(a) for that same prior when the voters enacted the Three Strikes statutes. This was nothing special as it was exactly what the California appellate courts had said up to that point.

In other words, the trial court only stated that it was going to impose the sentence that it thought was required by law.

The trial court was not stating and did not ever state that it would never, if it understood that it had the discretion, strike the prior in this case for purposes of imposing a sentence less than 15 years. This is the type of statement on the record which the Romero Court required to justify a refusal to remand a case for resentencing where the trial court imposed a sentence based on a pre-Romero understanding of the "strikes" law.

C. The Court of Appeal's Decision Deprives Appellant Of The Right Which He Would Have Had In The Trial

Court To Present Evidence Of His Behavior And Other Record In State Prison to Support His Request That The Trial Court Exercise Its Discretion Under Section 1385

A critical point that has not been mentioned in any published opinion is that, if returned to the trial court for resentencing under Romero, appellant would have the right to submit evidence as to his behavior in prison to prove that he was entitled to the exercise of the trial court's discretion. People v. Warren (1986) 179 Cal.App.3d 676, 687, 692; People v. Cooper (1984) 153 Cal.App.3d 480, 482-483, Thus, the law would require the trial court to consider his prison record after the date of sentencing in this case.

In Warren, the appellate court remanded the matter to the Superior Court and ordered it to hear again a post-appeal motion to strike special circumstances under section 1385 because, in its previous ruling, it had refused to consider the post-conviction prison behavior record of the appellant in determining whether to exercise its discretion.

The Court of Appeal's resolution of the Romero argument in this case deprives appellant of this important right as the result of which he could present sufficient evidence to establish his right to the relief he would seek.

CONCLUSION

Appellant has set out a number of reasons for this Court to grant this petition.

1. The Court of Appeal's decision in People v. Askey, supra, incorrectly interpreted Penal Code section 1385 as well as this Court's opinion in People v. Superior Court (Romero), supra. (See Argument IA, pp. 4-7.)

2. If permitted to hold sway, Askey would require the making of futile motions to avoid the doctrine of waiver and runs contrary to the sound administration of justice. (See Argument IB, pp. 7-8.)

3. Askey will ethically require future appellate counsel to argue, however reluctantly, that trial counsel was ineffective for failing to make futile motions when that was simply not the case; thus, it is not a sound result from a policy perspective. (See Argument IC, pp. 8-9.)

4. The Court of Appeal's holding that the trial court's comments at sentencing establish clearly that the trial court would not have exercised its discretion to strike the prior felony for sentencing purposes here does not comply with the plain language of Romero. (See Argument IIA, pp. 10-12.)

5. The Court of Appeal misconstrued the statement of the trial court on which the it relied to hold that the trial court would never, under any circumstances, exercise its

discretion under Penal Code section 1385. (See Argument IIB, pp. 12-13.)

6. The Court of Appeal's decision deprives appellant of the right which he would have had in the trial court to present evidence of his behavior and other record in state prison to support his request that the trial court exercise its discretion under section 1385. (See Argument IIC, p. 14.)

For each of the above reasons, appellant prays that this Supreme Court grant his petition for review.

Dated: _____

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

_____
JONATHAN B. STEINER
Executive Director

Attorneys for Appellant

QUESTION PRESENTED

Does the defendant in a criminal case have the right to represent him- or herself in the appeal from the judgment of conviction?

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents,

v.

WESLEY E. SCOTT, Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

WESLEY E. SCOTT respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Three.

LIST OF PARTIES

The parties are as they appear in the caption.

OPINION BELOW

The opinion of the Court of Appeals of the State of California (App., *infra*, 1a-29a) is reported at 64 Cal.App.4th 550.

JURISDICTION

The Court of Appeal entered its judgment on June 5, 1998. (App., *infra, 1a.)* The Supreme Court of California denied discretionary review on September 30, 1998. (App., *infra, 30a.)* The jurisdiction of this Court is invoked under 28 U.S.C. section 2101 (c) and Rule 13.1 of the Rules of the United States Supreme Court.

STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

Scott, who was represented at trial by appointed counsel, was convicted by a jury of assault with a firearm (California Penal Code section 245, subd. (a)(2)) and possession of a firearm by a felon (California Penal Code section 12021, subd. (a)(1). He was sentenced to a total term of 25 years and 4 months in state prison.

On May 7, 1997, Scott filed a notice of appeal from the judgment of conviction. Scott stated in the notice that he "wishes to represent himself on this appeal, and does not require the court to appoint an attorney on appeal." Scott again informed the California Court of Appeal that he wished to represent himself in a letter filed on June 17, 1997.

By an order filed on June 23, 1997, the Court of Appeal denied Scott's request, ruling that "[a]ppellant has no right to proceed in propria persona on appeal. (*In re Walker* (1976) 56 Cal.App.3d 225, 228.) This matter is referred to the California Appellate Project for appointment of counsel." Gideon Margolis, Esq. was appointed by the Court of Appeal on July 10, 1997 to represent Scott in the appeal.

Scott filed a petition for a writ of habeas corpus in the Court of Appeal on July 28, 1997 in which he stated that he had been deprived of his right to represent himself on appeal.

On September 24, 1997, the Court of Appeal issued an order deeming the habeas petition to be a motion for reconsideration of the Court of Appeal's order of June 23, 1997 denying Scott's request to represent himself in the appeal, as well as a motion for the

reconsideration of the Court of Appeal's order appointed Mr. Margolis as Scott's counsel on appeal.

On September 9, 1997 the Court of Appeal appointed Thomas Kallay, Esq. to represent Scott in Scott's petition to be permitted to represent himself in the appeal. Simultaneously, the Court of Appeal sent the California Attorney General, Scott and attorney Kallay a letter in which the Court of Appeal raised a number of questions having to do with the merits of Scott's request to represent himself in the appeal.

On November 24, 1997 Scott filed a brief prepared by attorney Kallay in which he contended that the right of self-representation in a trial as well as on appeal is a fundamental right guaranteed by the Sixth Amendment independently of the right to counsel; that this Sixth Amendment right is "…incorporated *as such* into the due process clause of the Fourteenth Amendment, and [is] not an indeterminate 'due process' right which awaits judicial definition" and that "[t]here is no doubt that the right which the United States Supreme Court in *Faretta* applied to the states through the due process clause was the right of self-representation *as expressed and defined by the Sixth Amendment.* " (Emphasis in original)

After additional briefing and oral argument, the California Court of Appeal rendered its decision on June 5, 1998 and denied a petition for rehearing. The California Supreme Court denied Scott's petition for review on September 30, 1998.

REASONS FOR GRANTING THE WRIT

The writ should be granted because: (1) The Sixth Amendment of the Constitution of the United States guarantees Scott the right to represent himself in the appeal from the judgment of conviction. It is also a denial of the equal protection of the laws to deprive Scott, who is appealing his conviction, of the right to represent himself which is a right accorded to all defendants on trial. (2) Five federal Circuit Courts Appeal have expressly recognized that a defendant in an appeal from a criminal conviction has the right under the Sixth Amendment to represent him- or herself. Two federal Circuit Court of Appeal have held to the contrary. Thus, there is a split of authority on the important question whether a defendant has the right to self-representation in an appeal from a judgment of conviction. (3) Review should also be granted because the California Court of Appeal, instead of following *Faretta v. California* (1975) 422 U.S. 806, 45 L Ed 2d 562, 95 S. Ct. 2525 which held that the right of self-representation is protected by the Sixth Amendment, erroneously chose to apply the due process clause of the Fourteenth Amendment and concluded that there is no right of self-representation under the due process clause. The California Court of Appeal's decision to ignore the unambiguous constitutional mandate that the right to self-representation is guaranteed by the Sixth Amendment and its further decision to apply the due process clause sets a dangerous precedent that should be corrected before it is emulated by other state courts. The approach followed by the California Court of Appeal can lead to an erosion of the federal protection of fundamental rights.

I

THE RIGHT TO SELF-REPRESENTATION IS A FUNDAMENTAL VALUE GUARANTEED BY THE SIXTH

AMENDMENT OF THE U.S. CONSTITUTION WITHOUT REGARD TO THE FORUM IN WHICH THE RIGHT IS ASSERTED

The right to represent oneself in a criminal proceeding is a fundamental right protected by the Sixth Amendment. This is the right the petitioner is asserting in his appeal from his judgment of conviction. This is the right the California Court of Appeal has denied him. The reason given by the California Court of Appeal was that there is no such right in appellate criminal proceedings.

Neither history nor logic nor policy supports the rule that the California Court of Appeal has announced. History, logic and policy and this Court's exposition of all three in *Faretta v. California* (1975) 422 U.S. 806, 45 L Ed 2d 562, 95 S. Ct. 2525 give this petitioner the right to defend himself in his appeal if he so chooses.

The right to defend is personal to this defendant, as it is personal to every defendant. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused the right to make his defense." (*Faretta v. California, supra,* 422 U.S. 806, 819, 45 L Ed 2d 562, 572, 95 S. Ct. 2525.) The right is given "directly to the accused" (*Faretta v. California, supra,* 422 U.S. 806, 820, 45 L Ed 2d 562, 573, 95 S. Ct. 2525) and not to the State or a lawyer, particularly a state-appointed lawyer.

The Sixth Amendment speaks of the "'...assistance' of counsel, and an assistant, *however expert*, is still an *assistant*." (Emphasis added) (Ibid.) "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant - not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; [ftn. omitted] and the right to make a defense is stripped of the personal character upon which the Amendment insists." (*Faretta v. California, supra,* 422 U.S. 806, 820, 45 L Ed 2d 562, 573, 95 S. Ct. 2525.) "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." (Emphasis in original) (*Faretta v. California, supra,* 422 U.S. 806, 821, 45 L Ed 2d 562, 573-574, 95 S. Ct. 2525.) No exception is made here for *appellate* counsel, as two Circuit Courts of Appeals have expressly recognized when addressing the right of self-representation on appeal. (*Myers v. Collins* (5th Cir. 1993) 8 F.3d 249, 252 ["Whether at trial or appeal, a defendant is not required to accept unwanted counsel."]; *Chamberlain v. Ericksen* (8th Cir, 1984) 744 F.2d 628, 630 ["We have no doubt that a defendant is not required to have counsel forced upon him or her."]; *see* Argument IV, *infra*.)

It is the act of "thrust[ing] counsel upon the accused, against his considered wish" which "violates the logic of the [Sixth] Amendment." Appellate counsel, thrust upon the defendant, is no more or less a violation of the Sixth Amendment than trial counsel imposed against a defendant's wishes. The statutus of a lawyer *as an assistant* is not transformed by the court in which the lawyer performs his or her duties. If it is wrong to foist trial defense counsel on an unwilling defendant because such a lawyer is "an organ of the State interposed between an unwilling defendant and his right to defend himself personally" (*Faretta v. California, supra,* 422 U.S. 806, 821, 45 L Ed 2d 562, 573-574, 95 S. Ct. 2525), it is also wrong to impose appellate counsel on an unwilling defendant. To paraphrase *Faretta*,

unwanted appellate counsel, no different from unwanted trial counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." (*Faretta v. California, supra,* 422 U.S. 806, 821, 45 L Ed 2d 562, 573-574, 95 S. Ct. 2525.) Unwanted appellate counsel "is not the defense guaranteed him [the defendant] by the Constitution, for, in a very real sense, it is not *his* defense." (*Faretta v. California, supra,* 422 U.S. 806, 821, 45 L Ed 2d 562, 573-574, 95 S. Ct. 2525.)

The right to self-representation is *independently* found in the structure and history of the Sixth Amendment. "Our concern is with an *independent* right of self-representation...the right must be independently found in the structure and history of the constitutional text." (Emphasis in original) (*Faretta v. California, supra,* 422 U.S. 806, 819, ftn. 15, 45 L Ed 2d 562, 572, 95 S. Ct. 2525.) The right to self-representation arises *independently* and not as a correlative right from the defendant's power to waive the right to the assistance of counsel. *Faretta v. California, supra,* specifically rejected the application of the principle of *Singer v. United States* (1965) 380 U.S. 24, 13 L Ed 2d 630, 85 S.Ct. 783, where the Court had held that an accused has no right to a bench trial, despite his capacity to waive his right to a jury trial. (*Faretta v. California, supra,* 422 U.S. 806, 819, ftn. 15, 45 L Ed 2d 562, 572, 95 S. Ct. 2525 [no indication that colonists considered the ability to waive a jury trial to be of equal importance to the right to demand one].) The historical record proves that the right to self-representation is not only of equal dignity to other rights guaranteed by the Sixth Amendment, it is the genesis of those rights.

In the England of the later common law, i.e. the seventeenth century, "...it was not representation by counsel but self-representation that was the practice of prosecutions for serious crimes." (*Faretta v. California, supra,* 422 U.S. 806, 823, 45 L Ed 2d 562, 575, 95 S. Ct. 2525.) Only slowly did the accused gain the additional right to representation by counsel and, when Parliament finally provided for the appointment of counsel in serious criminal cases, the appointment was only made on the accused's request. (Ibid.) "At no point in this process of reform in England was counsel ever forced upon the defendant. The common law rule, succinctly stated in *R. v. Woodward* [1944] KB 118, 119, [1944] 1 All ER 159, 160, has evidently always been that 'no person charged with a criminal offense can have counsel forced upon him against his will.' [ftn. omitted] [citations]" (*Faretta v. California, supra,* 422 U.S. 806, 825-826, 45 L Ed 2d 562, 575, 95 S. Ct. 2525.)

In the history of the English common law, there was only one tribunal that adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. (*Faretta v. California, supra,* 422 U.S. 806, 821, 45 L Ed 2d 562, 574, 95 S. Ct. 2525.) That was the Star Chamber which "...for centuries symbolized disregard of basic individual rights." [ftn. omitted] (Ibid.) In the Star Chamber, the defendant's answer to an indictment was not accepted unless it was signed by counsel; if counsel would not sign, the defendant was deemed to have confessed. (*Faretta v. California, supra,* 422 U.S. 806, 821-822, 45 L Ed 2d 562, 574, 95 S. Ct. 2525.) Counsel, however, were careful in what they signed for if they "'put their hand to a frivolous plea'" or otherwise misbehaved, they could be rebuked, suspended, fined or imprisoned. (*Faretta v. California, supra,* 422 U.S. 806, 822, ftn. 18, 45 L Ed 2d 562, 574, 95 S. Ct. 2525, citing 5 W. Holdsworth, *A History of English Law* 178-179 (1927).)

The pernicious practice of forcing counsel upon a defendant in the Star Chamber is not without its lessons for this very case. If a defendant today insists on raising a point ***on appeal*** that his counsel deems frivolous, the collision of interests in the Star Chamber is

replicated. The defendant has a right guaranteed by the Constitution to make his defense as he or she sees fit but counsel may not wish to submit a brief which he fears will bring censure down upon him for propounding a meritless or even frivolous argument. In the case of a lawyer who does court-appointed work, the sanction which the lawyer may wish to avoid is suspension from further appointments. In either event, the lawyer is moved to look out for him- or herself and not the defendant. We cannot ignore such a conflict. By recognizing the right to self-representation in trial *and* appellate courts, we show our readiness to eliminate this conflict.

"The notion of *obligatory* counsel disappeared with it [the Star Chamber]." (Emphasis added) (*Faretta v. California, supra,* 422 U.S. 806, 823, 45 L Ed 2d 562, 575, 95 S. Ct. 2525.) It has been resurrected by the California Court of Appeal in this case and in the minority of jurisdictions which subscribe to the rule of this case. The rule is in disharmony with our legal tradition.

The right of self-representation is a fundamental American legal tradition. "In the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England." (*Faretta v. California, supra,* 422 U.S. 806, 826, 45 L Ed 2d 562, 577, 95 S. Ct. 2525.) "We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation." (*Faretta v. California, supra,* 422 U.S. 806, 828, 45 L Ed 2d 562, 577, 95 S. Ct. 2525.)

Not only was the right to self-representation recognized "in many colonial charters and declaration of rights," significantly (for the purposes of the Sixth Amendment), the "right to counsel" meant the right to chose between pleading through a lawyer and representing oneself. (*Faretta v. California, supra,* 422 U.S. 806, 828, 45 L Ed 2d 562, 577, 95 S. Ct. 2525.) After the Declaration of Independence, the right to self-representation entered the "new state constitutions in a wholesale fashion" (*Faretta v. California, supra,* 422 U.S. 806, 829, 45 L Ed 2d 562, 578, 95 S. Ct. 2525)[1] and the right to counsel was only thought to supplement the primary right of the accused to defend himself. (Ibid.)

"The Founders believed that self-representation was a basic right of a free people." (*Faretta v. California, supra,* 422 U.S. 806, 830, ftn. 39, 45 L Ed 2d 562, 578, 95 S. Ct. 2525.) Tom Paine thought that a party had a "natural right to plead his own cause." (Ibid.) Thus, even apart from the uniform historical practice, the right to self-representation was thought to be a part of natural law, a matter that influenced the Founders strongly. Given all this, and the strong support of the right to self-representation in the positive law of the age,

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[1] The opinion of the *Faretta* Court lists the constitutions of Pennsylvania, Vermont, Georgia, Massachusetts, New Hampshire, and Delaware as guaranteeing this right with Maryland, New Jersey and New York implying the existence of the right to self-representation. (*Faretta v. California, supra,* 422 U.S. 806, 829, ftn. 38, 45 L Ed 2d 562, 578, 95 S. Ct. 2525.)

i.e. the state constitutions, it comes as no surprise that "[n]o state or colony ever forced counsel upon an accused; no spokesman had ever suggested that such practice would be tolerable, much less advisable. If anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue. But there was none." (*Faretta v. California, supra,* 422 U.S. 806, 832, 45 L Ed 2d 562, 579, 95 S. Ct. 2525.) "In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history." (*Faretta v. California, supra,* 422 U.S. 806, 832, 45 L Ed 2d 562, 580, 95 S. Ct. 2525.)

Logic and policy vindicate the historical record. It is as true today as it was true 200 and more years ago that the core value which the right to self-representation protects is that *every accused has the right to make his or her own defense*. Neither directly nor indirectly should the State or anyone else arrogate to itself or himself the right to defend.

Depriving the defendant of the ultimate power to defend as he or she deems fit has two negative consequences. First, it strips the defendant of the dignity of being the master of his or her fate. Second, it insinuates the State into the conduct of the defense even as the State is prosecuting the defendant.

As to the first, we have traditionally viewed self-representation as the basic right of a free people. (*Faretta v. California, supra,* 422 U.S. 806, 830, ftn. 39, 45 L Ed 2d 562, 578, 95 S. Ct. 2525.) Why should we retreat from this tradition? We should embrace the tradition and not abandon or weaken it.

As to the second reason, when, as in California, the State is already greatly involved in the selection and compensation of a significant number of appellate criminal defense counsel (*see People v. Scott, supra*, 64 Cal.App.4th 550, 564), making it impossible for the appellant to reject that counsel confirms, from the viewpoint of the defendant, that the State and his appellate defense counsel are allied against him. After all, the State, which is prosecuting him, selects and pays for his lawyer and does not permit him to discharge that lawyer. In the trial courts, *Farretta* obviates this problem. If the rule announced by the

California Court of Appeal in *People v. Scott* becomes the law of the land, the rule will enshrine the problem as the solution.

The core value, i.e. that the right to defend is *personal to the defendant*, deserves as much protection on appeal as it does in the trial court. Given that the State selects and pays counsel in most criminal appeals, at least in California, if not everywhere in the United States, it is important to allow the defendant on appeal the freedom to assert the right to conduct his own defense.

The contrary opens the door to speculation and innuendo that lawyers are in league with the State to betray their clients. The integrity of the system conceived and designed out of the best of motives is undermined by the State's insistence that the defense be made by a lawyer the defendant cannot discharge. It requires extraordinary naivete not to become suspicious when one's lawyer is paid by one's principal adversary and where that lawyer may derive a significant part of his earnings from that adversary's coffers. And the lawyer appears to be playing a seamy double game by doing the State's bidding while pretending to represent a client who does not want him or her.

The best and most effective way to put an end to such ruminations is to allow the defendant on appeal the right which every American has, i.e. to fire his lawyer and to proceed on his own.

Because the core of the right of self-representation is that counsel cannot be imposed on an unwilling defendant, there is no difference between trials and appeals when it comes to the assertion of this right. There is nothing in *Faretta* which carves out appellate lawyers as a species of lawyer who can be imposed on an unwilling defendant.

Observations like those offered by the Nevada Supreme Court that "'[b]ecause the Sixth Amendment only applies to trials, it does not support the existence of a right to self-representation on appeal'" (*People v. Scott*, *supra*, 64 Cal.App.4th at 557 citing *Blandino v. State* (1966) 112 Nev. 352 [914 P.2d 624, 626]), offered without citation to authority or reason, absolutely misses that the core value in the right to self-representation is that the State cannot impose a lawyer on a defendant who will not have him. And it is also true that the right to self-representation is rather obviously different from the right *to counsel* since it prevents the State from *imposing counsel.* Thus, it is irrelevant that the "right *to counsel* on appeal does not rest on the Sixth Amendment." (Emphasis added) (*People v. Scott, supra*, 64 Cal.App.4th at 557 [offering this as a reason why self-representation is not a right protected by the Sixth Amendment].) Nor does it matter what the basis of the right *to counsel* on appeal is since the right to self-representation simply does not rest on the right *to counsel* but rather on the defendant's right to be *free of counsel.* (See *People v. Scott, supra*, 64 Cal.App.4th at 560 citing *Lumbert v. Finley* (7th Cir. 1984) 735 F.2d 239, 246 for its holding that it "conceptually difficult" to find a "correlative right of self-representation" in the "equal protection" right to counsel.) The policies served by the right to be free of counsel are quite different from those served by the right to counsel. The policies served by the former have been briefly enumerated in the text above.

History, logic and policy all point in the same direction. Defendants on appeal should have the right to represent themselves. In reaching the wrong conclusion, the California Court of Appeal completely ignored the core principle that a lawyer cannot be forced on a defendant who does not want one. It did not mention that principle even once in its opinion. However,

as appears in the next argument, the California Court of Appeal also erred in pronouncing upon federal constitutional law. That error must also be rectified before it is repeated.

II

THE CALIFORNIA COURT OF APPEAL ERRED IN CONCLUDING THAT, AS A MATTER OF FEDERAL CONSTUTIONAL LAW, THE RIGHT *NOT* TO BE REPRESENTED BY COUNSEL IN A STATE CRIMINAL PROCEEDING IS FOUNDED ON THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The California Court of Appeal rejected the petitioner's contention that his right to represent himself on his appeal is based on the Sixth Amendment. *(People v. Scott, supra,* 64 Cal.App.4th 550, 560-561.)

The Sixth Amendment protects the right of self-representation and there can be no question that the Sixth Amendment, together with the right of self-representation, has been incorporated into the due process clause of the Fourteenth Amendment. "The Sixth Amendment includes a compact statement of the rights necessary to a full defense...Because these rights are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States...the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. [citation]" (*Faretta v. California, supra,* 422 U.S. 806, 818, 45 L Ed 2d 562, 572, 95 S. Ct. 2525.) Nothing can be clearer than that the right of self-representation is a "right in an adversary criminal trial to make a defense as we know it." Once a guaranty of the Bill of Rights has been made applicable against the states under the

Fourteenth Amendment, those guaranties are to be enforced against the states according to the same standards that protect those personal rights against the federal government. (*Malloy v. Hogan* (1964) 378 U.S. 1, 10, 12 L.Ed.2d 653, 661, 84 S.Ct. 1489.) The commentators have made the import of this principle very clear. "When a guarantee is found to be fundamental, due process, in effect, 'incorporates' that guarantee, and carries over to the states precisely the same prohibitions as apply to the federal government under that guarantee. Under selective incorporation, a ruling that a particular guarantee is within the ordered liberty concept makes applicable to the states all of the standards previously developed in applying that guarantee to federal criminal prosecutions." (LaFave and Israel, *Criminal Procedure* (2d ed. West) section 2.5, p. 61.)[2]

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[2] "Some justices have believed that, even if the Bill of Rights were applicable to the states, here was no need to hold state laws to the same standards under those amendments. [ftn. omitted] However, a majority of the justices have rejected this concept and held that when a provision of the Bill of Rights is made applicable to the states, it applies to state and local acts in the same manner as it does to federal actions. [citing *Malloy v. Hogan, supra,* 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489, *Duncan v. Louisiana, supra,* 391 U.S. 145, 20 L Ed 2d 491, 495, 88 S.Ct. 1444, *Baldwin v. New York* (1970) 399 U.S. 66, 26 L.Ed.2d 437, 90 S.Ct. 1886] *** [Para.] This concept is sometimes known as the 'bag and baggage' theory for it holds that when a provision of the Bill of Rights is made applicable to the states it is applied with all of its previous federal interpretation - it comes to the states, complete with its 'bag

and baggage.' This doctrine squares with the philosophy of selective incorporation. When the Supreme Court holds a provision of the Bill of Rights applicable to the states, it does so because the justices are of the opinion that it is a right which can be deemed 'fundamental' to the American system of government. Accordingly, the justices will not tolerate either federal or state activities which impair the right. [ftn. omitted]" (Rotunda and Nowak, *Treatise on Constitutional Law: Substance and Procedure, 2nd*, section 15.6, pp. 426-427.)

Instead of following the foregoing principles upon which the petitioner relied, the California Court of Appeal concluded that "the right of *self-representation in the general sense* is not an element of due process." (Emphasis added) (*People v. Scott, supra*, 64 Cal.App.4th at 561.) However, Scott had expressly argued before the California Court of Appeal, as he argues in this petition, that it is the right of self-representation *as found in the Sixth Amendment* that has been incorporated in the due process clause of the Fourteenth Amendment. Scott had carefully pointed out to the Court of Appeal that the right of self-representation was not based on the due process clause. To make the point clear, Scott had compared in his brief the present period where the right of self-representation, just as the right to counsel, is protected by the Sixth Amendment to the period between the time *Powell v. Alabama* (1932) 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, and *Gideon v. Wainwright* (1963) 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 were decided. During the period 1932-1963, the right to counsel was based on the due process clause of the Fourteenth Amendment. Scott had contended in the Court of Appeal that, unlike during 1932-1963 with respect to the right to counsel, the right to self-representation is defined and grounded in the Sixth Amendment. Yet the California Court of Appeal ignored this and instead shifted its analysis to the question that Scott had specifically *declined* to raise, i.e. whether the due process clause in the general sense protects the right of self-representation. Scott had declined to claim that the right to self-representation is based "generally" on the due process clause since the correct view is that it is based on the Sixth Amendment. Unsurprisingly, the California Court of Appeal found no right of self-representation in the due process clause "generally" and so stripped the petitioner of his right of self-representation that is ***guaranteed by the Sixth Amendment.***

It follows that the California Court of Appeal's exposition why the denial of self-representation does not violate the due process clause is beside the point. (*People v. Scott, supra*, 64 Cal.App.4th 550, 562-566.)[3] Scott contends that he has been denied of a right protected by the Sixth Amendment. What is not irrelevant, however, is that the California Court of Appeal elevates the interest in "fair," effective" and "adequate" appellate review over and above the right of a defendant to represent himself. There is nothing in *Faretta v. California, supra,* 422 U.S. 806, 45 L Ed 2d 562, 95 S. Ct. 2525 which suggests that the objective of a "fair," effective" and "adequate" *trial* overrides the defendant's right to represent him- or herself. If the contrary were true, it is very doubtful that *Faretta* would have turned out as it did for most will admit that the chances of a "fair," effective" and "adequate" trial are enhanced when a lawyer represents the defendant in a criminal trial.

The California Court of Appeal's decision to reject the constitutional mandate that the right to self-representation is protected by the Sixth Amendment must be corrected by this Court. If the California Court of Appeal's decision is allowed to stand, the states have found a ready means to escape the reach of the federal Constitution.

[3] It is also true the Court of Appeal's exposition of the point that state appellate review must comport with due process and equal protection guarantees is unobjectionable as a general matter. (*People v. Scott, supra*, 64 Cal.App.4th 550, 558-560.) However, as noted in Argument III, *infra*, Scott contended in the California Court of Appeal, as he does here, that he is denied the equal protection of the laws in that defendants at trial can claim the right to self-representation while he cannot claim that right on appeal.

The plain and simple constitutional principle is that a lawyer cannot be forced on a defendant who has made an intelligent choice that he or she does not want a lawyer. Scott respectfully requests that this principle be recognized in his case.

III

THE DENIAL OF THE RIGHT OF SELF-REPRESENTATION ON APPEAL VIOLATES THE EQUAL PROTECTION CLAUSE

Scott argued to the California Court of Appeal that the right to self-representation, as found in the Sixth Amendment, was a fundamental right and that the distinction between defendants in the trial court and on appeal, giving the former the right to self-representation and withholding it from the latter, had to be strictly scrutinized in order to determine whether this classification served a compelling state interest. Scott contended in the California Court of Appeal not only that there were no compelling state interests but that there were no colorably sound reasons for this distinction. In fact, Scott pointed out that self-representation was relatively more feasible on appeal than during a trial since an appeal does not require ready and instant knowledge of the rules of evidence and procedure as is required in the conduct of a trial.

The California Court of Appeal dealt with this in two ways, each of which violates the Constitution. First, the Court of Appeal held that *Faretta* "did not create a fundamental right to self-representation on appeal." (*People v. Scott, supra,* 64 Cal.App.4th 550, 567.) Second, the Court of Appeal applied the "rational basis" standard to determine whether the

distinction between defendants on trial and defendants on appeal comported with the requirements of the due process clause. (*People v. Scott, supra,* 64 Cal.App.4th at 567.)

The holding that "*Faretta* did not create a fundamental right to self-representation *on appeal*" (emphasis added) (*People v. Scott, supra,* 64 Cal.App.4th at 567) is as evasive as it is incorrect. The California Court of Appeal did not quarrel with the fact that the right to self-representation is a fundamental right. (See Argument I, *supra*.) If there is a right of self-representation on appeal, it can be no less fundamental than when that right is asserted in the trial courts for fundamental rights hardly change their nature depending on the forum in which they are asserted. The question therefore remains whether there is a right of self-representation on appeal and not whether such a right is a fundamental right -- which it concededly is. And it is axiomatic that when fundamental rights are at stake, the classification must be subjected to strict scrutiny. (*Plyler v. Doe* (1982) 457 U.S. 202, 217, 72 L.Ed.2d 786, 799, 102 S. Ct. 2382.) The Court of Appeal's venture to rewrite constitutional law on this score cannot be said to be a success.

The Court of Appeal's effort to find such a distinctions between trial and appeals as would warrant the limitation of the right to self-representation to trial is not any more successful. Citing *Ross v. Moffit* (1974) 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 [counsel need not be appointed to represent defendant in discretionary appellate review], the Court of Appeal finds "profound" differences between trial and appeal. (*People v. Scott, supra*, 64 Cal.App.4th 550, 567-568.) While there are clearly differences between the function *counsel* serves at trial and *counsel* serves in a discretionary appeal, the issue at bar is not whether Scott is entitled to counsel but whether he has the right to be *free of counsel*. *Obligatory counsel* is no less invasive of the fundamental right to defend at trial than on

appeal. *All defendants, whether at trial or on appeal, have the personal right to defend*. Not only is there nothing to the contrary in *Faretta,* the contrary offends the letter and spirit of that decision.

It remains that to deny Scott the right to represent himself, i.e. to impose counsel on him against his wishes, violates the equal protection clause of the Fourteenth Amendment.

IV

THE MAJORITY OF FEDERAL CIRCUITS WHICH HAVE CONSIDERED THE QUESTION HAVE HELD THAT BY VIRTUE OF THE SIXTH AMENDMENT DEFENDANTS HAVE THE RIGHT TO REPRESENT THEMSELVES ON APPEAL

The First,[4] Fifth,[5], Eighth,[6] Ninth [7] and Tenth[8] Circuit Courts of Appeals have concluded that there is a right of self-representation on appeal and there is an indication that the Eleventh Circuit Court of Appeals has reached the same conclusion.[9] U.S. District Courts

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[4] *United States v. O'Clair* (1st Cir. 1971) 451 F.2d 485, 486 [if defendant feels qualified to conduct his own appeal, he may choose to represent himself].

[5] *Myers v. Johnson* (5th Cir. 1996) 76 F.3d 1330, 1333-1334 [distinguishing oral argument under *Price v. Johnston, supra,* 334 U.S. 266, 285, 92 L.Ed 1356, 1369, 68 S.Ct. 1049 as not an essential ingredient of due process from the right to file briefs]; *Myers v. Collins* (5th Cir. 1993) 8 F.3d 249, 251-252 [same; and whether at trial or appeal, a defendant is "not required to accept unwanted counsel"]; *Gomez v. Collins* (5th Cir. 1993) 993 F.2d 96, 98.

[6] *Chamberlain v. Erickson* (8th Cir. 1984) 744 F.2d 628, 630 [no doubt that defendant is not required to have counsel forced upon him or her, whether on trial or appeal, but no right to make oral argument; defendant has right to file brief in pro per]; *U.S. v. Logan* (8th Cir. 1994) 49 F.3d 352, 361, ftn. 5.

[7] *Hendricks v. Zenon* (9th Cir. 1993) 993 F.2d 664, 669; *Campbell v. Blodgett* (9th Cir. 1991) 940 F.2d 549.

[8] *Garrison v. Lacey* (10th Cir. 1966) 362 F.2d 798, 799.

[9] In *United States v. Moore* (D.C.S.D. Ga. 1995) 903 F.Supp. 44, affirmed 106 F.3d 415 the District Court, acting per the mandate of the Circuit Court of Appeals, held a hearing on the voluntariness of the defendant's waiver of counsel on appeal. Obviously, there would

in the Third[10] and Eleventh Circuits[11] have also upheld this right. The Fourth[12] and Seventh Circuits[13] have concluded that there is no right to self-representation on appeal.

The approach of those federal courts that have favorably addressed the issue of the right of self-representation on appeal has been largely the same. The premise with which these Courts begin is that a lawyer cannot be imposed on a defendant who does not want one. Decisions of the Fifth and Eighth Circuit Courts of Appeal have recognized this very clearly. (*Myers v. Collins* (5th Cir. 1993) 8 F.3d 249, 252 ["Whether at trial or appeal, a defendant is not required to accept unwanted counsel."]; *Chamberlain v. Ericksen* (8th Cir, 1984) 744 F.2d 628, 630 ["We have no doubt that a defendant is not required to have counsel forced

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have been no such mandate if the Court of Appeals thought that the defendant did not have the right to waive counsel on appeal.

[10] *United States v. Rundle* (D.C.E.D. Penn. 1969) 295 F.Supp. 613, 615 [right inferentially recognized]; *United States v. Mazurkiewicz* (D.C.E.D. Penn. 1969) 307 F.Supp. 333, 336 [right inferentially recognized]

[11] *United States v. Moore, supra,* 903 F.Supp. 44, 45 affirmed 106 F.3d 415.

[12] *United States v. Gillis* (4th Cir. 1985) 773 F.2d 549.

[13] *Lumbert v. Finley* (7th Cir. 1984) 735 F.2d 239.

upon him or her."].) The California Court of Appeal in *People v. Scott, supra,* avoided this principle completely, even though Scott stressed it greatly in his briefs filed in that Court.

The next hallmark of federal cases that have dealt favorably with this issue is to distinguish between the right to make oral argument and the right to file briefs. This Court held in *Price v. Johnston* (1948) 334 U.S. 266, 285, 92 L.Ed. 1356,68 S.Ct. 1049 that a "prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." Applying *Price, supra*, the Eighth Circuit in *Chamberlain v. Ericksen, supra,* 744 F.2d 628, 630 held that "[a] defendant's right to file a pro se brief or motions is distinguishable from a defendant's right to make oral argument before the court. *See generally Price v. Johnston* 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948); Annot. 24 A.L.R. 4th 266 (1983) *See Price,* 334 U.S. at 280, 68 S.Ct. at 1067…Recognition of this principle lends itself to the recognition that all defendants have a basic right to address the court with a pro se brief." Federal courts have followed the lead which *Chamberlain v. Ericksen, supra,* has given on this issue. . (*Myers v. Collins* (5th Cir. 1993) 8 F.3d 249, 252 [*Chamberlain* persuasive that *Price* does not foreclose a defendant's right to file a pro se brief]; *Myers v. Johnson* (5th Cir. 1996) 76 F.3d 1330 [same].)

Scott has made it clear that he does not seek the right to make oral argument in this case.

The opinions of the federal courts which have concluded that there is no right of self-representation on appeal are not persuasive.

In *United States v. Gillis* (4th Cir. 1985) 773 F.2d 549, 560, the Court of Appeal held that although a convicted defendant has a right to counsel on appeal, "...his implicit Sixth Amendment right to represent himself at trial does not carry over to the appeal." In support,

the Court cited *Price v. Johnston, supra,* 334 U.S. 266, 285, 92 L.Ed 1356, 1369, 68 S.Ct. 1049 for the proposition that "a prisoner has not absolute right to argue his own appeal or even be present in the appellate court." (*United States v. Gillis, supra,* 773 F.2d 549, 560.) As *Chamberlain v. Ericksen, supra,* 744 F.2d 628, 630 held [“a defendant’s right to file a pro se brief or motions is distinguishable from a defendant’s right to make oral argument before the court”], oral argument is not to be confused with filing briefs and motions and *Price v. Johnston, supra, did* recognize the principle that counsel cannot be forced on an unwilling defendant. (*Price v. Johnston, supra*, 334 U.S. 266, 280, 92 L.Ed. 1366, 68 S.Ct. 1049 [ordinarily the court cannot “designate counsel for the prisoner without his consent”].) *Gillis* rests on a misreading of *Price.*

The Seventh Circuit Court of Appeal in *Lumbert v. Finley* (7th Cir. 1984) 735 F.2d 239, 245-246 has delivered what is perhaps the most passable rationale in support of the argument that there is no right of self-representation on appeal. Yet that rationale does not pass muster.

The Court in *Lumbert v. Finley, supra,* first noted that there "significant differences between the trial and appellate stages of a criminal proceeding." (735 F.2d 239, 245.) To support this point, the Court cited from *Ross v. Moffitt* (1974) 417 U.S. 600, 610, 41 L.Ed.2d 341, 351, 94 S.Ct. 2437 which had observed that a defendant needs an "...attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need no provide any appeal at all." (*Ross v. Moffitt, supra,* 417 U.S. 600, 610, 41 L.Ed.2d

341, 351, 94 S.Ct. 2437, cited in *Lumbert v. Finley, supra,* 735 F.2d at 245.) This being so, it is "difficult to perceive any basis in the history or structure of the Sixth Amendment for a right of self-representation on appeal." (Ibid.)[14]

The right to self-representation is *independently* found in the structure and history of the Sixth Amendment. (*Faretta v. California, supra,* 422 U.S. 806, 819, ftn. 15, 45 L Ed 2d 562, 572, 95 S. Ct. 2525 ["Our concern is with an *independent* right of self-representation...the right must be independently found in the structure and history of the constitutional text." (Emphasis in original].) It is therefore erroneous to seek in the right to counsel the basis for the right to self-representation. While the two rights are part of the same course of historical development and obviously stand in close relation to each other, one is not based on the other; they each have an independent base in the Constitution. Thus, the initial step taken by the Court in *Lumbert v. Finley, supra,* i.e. to equate the right to self-representation with the right to counsel, was a step in the wrong direction.

Lumbert's analysis does not improve after this false start. The Court goes on to note that the right to counsel in the first appeal as of right is based on the equal protection clause and, to a lesser extent, on the due process clause; the equal protection rationale is "prominent." (*Lumbert v. Finley, supra,* 735 F.2d at 245-246, citing *Douglas v. California* (1963) 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814.) The Court concludes:

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[14] The California Court of Appeal in *Scott* appears to have drawn on *Lumbert v. Finley, supra,* by also citing *Ross v. Moffitt* for the proposition that trial and appeal are different. (*Scott, supra,* 64 Cal.App.4th at 567-568.) Yet, as noted, it is not the difference between the two proceedings which is important but the fact that the role of the lawyer in both is to represent the client and that in both proceedings the client should agree to that representation.

> "We find it conceptually difficult to imply in the 'equal protection right' to counsel on direct appeal a correlative right of self-representation on direct appeal. And, although the due process principle of fundamental fairness requires that an indigent be provided with counsel on direct appeal, it provides no basis for finding a correlative right of self-representation on direct appeal." (*Lumbert v. Finley, supra,* 735 F.2d at 246.)

The right of self-representation guaranteed by the Sixth Amendment is based not only on the principle of free choice but also on the unbroken tradition of Anglo-American law that counsel cannot be imposed on a defendant -- unbroken, that is, with one infamous exception, the Court of the Star Chamber.[15] It is therefore mistaken to seek to imply in the equal protection right to counsel the right to self-representation; no such conceptual sleight of hand is required. The right of self-representation stands on its own footing in the Sixth Amendment.

The *Lumbert v. Finley* Court also missed the point that when one of the fundamental rights guaranteed by the Bill of Rights is incorporated into the due process clause, that right is "...to be enforced against the States under the Fourteenth Amendment according to the *same standards* that protect those personal rights against federal encroachment." (Emphasis added) (*Malloy v. Hogan, supra,* 378 U.S. 1, 10, 12 L.Ed.2d 653, 661, 84 S.Ct. 1489.) As pointed out in Argument I, the right of self-representation is to be applied, through the due

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[15] "The [English] common law rule ... has evidently always been that 'no person charged with a criminal offense can have counsel forced upon him against his will'" (*Faretta v. California, supra,* 422 U.S. 806, 825, 45 L Ed 2d 562, 576, 95 S. Ct. 2525) and "[n]o state [of the United States] or colony ever forced counsel upon an accused; no spokesman had ever suggested that such practice would be tolerable, much less advisable." (*Faretta v. California, supra,* 422 U.S. 806, 832, 45 L Ed 2d 562, 579, 95 S. Ct. 2525.)

process clause, according to the same terms and standards as contained in the Sixth Amendment. There is therefore no need to rely on the "equal protection rationale" to justify the right of self-representation on appeal. This Sixth Amendment right has been applied to the states through the due process clause of the Fourteenth Amendment. That is the alpha and omega of this story.

The state of federal law on this subject moved the California Court of Appeal to observe in a footnote: “In view of the substantial and continuing split among the federal courts as to whether the Sixth Amendment confers a right of self-representation on appeal, it may be appropriate for the United States Supreme Court to resolve this issue.” (*People v. Scott*, *supra*, 64 Cal.App.4th 550, 578, ftn. 15.) Scott agrees, with the addition that the weight of federal authority supports the right to which he lays claim in this proceeding.

V

THE MAJORITY OF THE STATES HAVE CONCLUDED THAT A DEFENDANT HAS THE RIGHT TO REPRESENT HIM- OR HERSELF ON APPEAL

Alabama,[16] Arizona,[17] Arkansas,[18] Delaware,[19] Georgia,[20]Indiana,[21] Louisiana,[22]

Michigan,[23] Minnesota,[24] Mississippi,[25]Nebraska,[26] New Mexico,[27] New York,[28] Ohio[29], Oklahoma,[30] Oregon,[31] Pennsylvania,[32] Rhode Island,[33] South Carolina,[34] Texas[35] and Washington[36] have recognized that the appellant in a criminal appeal has the right to represent him- or herself. As noted by the Court of Appeal in *Scott, supra,* at 64 Cal.App.4th at 573-574, five states, i.e. Nevada, Tennessee, Maryland, Florida and California follow the contrary rule.

The Court of Appeal in *Scott* gave California's *In re Walker* (1976) 56 Cal.App.3d 225 a vote of confidence. (64 Cal.App.4th at 554.) *Walker,* however, suffers from all the flaws which adhere to decisions that deny defendants the right of self-representation on appeal.

First, *In re Walker* relies on *Price v. Johnston, supra,* 334 U.S. 266, 92 L.Ed. 1356, 68 S.Ct. 1049 for the proposition that there is no right of self-representation on appeal. (*In re Walker, supra*, 56 Cal.App.3d 225, 292.) This is in error; *Price v. Johnston, supra*, is limited to oral argument and actually recognizes the foundational principle that counsel cannot be imposed on a criminal defendant.

Second, *In re Walker, supra*, completely fails to note that the right of self-representation is a fundamental right guaranteed by the Sixth Amendment. That is, the opinion of the Court in *In re Walker, supra*, completely misses *Faretta's* extended discussion of the history and the development, not to mention the universal acceptance, of the principle of free choice and that there is no such thing as an obligatory counsel in Anglo-American law.

Third, *In re Walker, supra*, 56 Cal.App.3d 225, 292, relied, out of context, on a comment in *People v. Ashley* (1963) 59 Cal.2d 339, 361, to hold that "counsel may be appointed on appeal over the defendant's objection." This was an incorrect citation of *Ashley's* holding and is, in any event, not good law.

In *People v. Ashley, supra,* the appellant had objected to the appointment of counsel. The Court held: "It was proper to appoint such counsel, whether defendant desired him or not, as long as defendant's constitutional right to appear in propria persona was not violated." (*People v. Ashley, supra,* 59 Cal.2d 339, 361.) At the time *Ashley, supra,* was decided, the California Constitution provided that an accused had the right to "appear and defend, in person and with counsel." (Cal. Const., former Art. I, section 13.)[37] Whatever validity the aside had that it was proper to appoint counsel "whether defendant desired him or not,"[38] it is clear that *Ashley* assumed that the appellant had the constitutional right to represent himself. In any event, after *Faretta*, the proposition of *In re Walker, supra*, 56 Cal.App.3d 225, 292, that "counsel may be appointed on appeal over the defendant's objection" is hardly valid in light of *Faretta's* specific condemnation of such a rule.

Given these rather massive flaws in *In re Walker, supra*, it comes as no surprise that the writer authoring 24 ALR4th 431, 433 *Appeal - Self-Representation*, summed up *In re Walker* as a "modicum of possible questionable authority apparently to the effect that there is no fundamental at all on the part of a criminal defendant to conduct an appeal in person, in state courts, even short of actually presenting oral argument."

CONCLUSION

People v. Scott is not simply the instance of an erroneous state court decision. In *People v. Scott*, the California Court of Appeal has made a significant pronouncement on federal constitutional law. Minimally, it has interpreted the Sixth Amendment differently from five or possibly six Circuit Courts of Appeal. Perhaps more significantly, it has declined to follow this Court's holding in *Faretta* that the right of self-representation is one found in the Sixth Amendment. But the ultimate significance of the California Court of Appeal's decision is that, contrary to our traditions, counsel is to be imposed on a defendant who does not want a lawyer. The damage and mischief that this will cause to the values for which the Sixth Amendment speaks should cause this Court to review the *Scott* decision and to reverse it.

Respectfully submitted,

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