CASE #: S246214

IN THE SUPREME COURT

OF THE STATE OF CALIORNIA

PHYLLIS K. MORRIS, as Public Defender for the County of San Bernardino, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent,	Case No. _____ Court of Appeal Case no. E066330 Appellate Division Case nos.: CIVDS1610302 ACRAS1600028 Superior Court of California County of San Bernardino 8303 Haven Avenue Rancho Cucamonga, 91730 (909) 521-3566
THE PEOPLE Real Parties in Interest.	

PETITION FOR REVIEW

From a Denial of a Petition for a Writ of Mandate by the Court of Appeal, Fourth Appellate District, Division Two

STAY REQUESTED

Ruth Zapata Lopez is an indigent respondent in an appeal proceeding pending in the appellate division of respondent court and respondent court refuses to appoint counsel to represent Ms. Lopez

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Rules of Court

INTRODUCTION

California Rules of Court, rule 8.851(a), only authorizes an appellate division of a superior court to appoint counsel for a criminal defendant who has been convicted of a misdemeanor. Ruth Zapata Lopez was charged with misdemeanor driving under the influence of alcohol in respondent court and represented by petitioner. Respondent granted a motion to suppress filed by petitioner on behalf of Ms. Lopez. (Pen. Code, § 1538.5.) The case was dismissed. The People appealed to the appellate division. Petitioner requested respondent appoint counsel to represent Ms. Lopez. Respondent refused the request. Respondent stated Ms. Lopez was not entitled to appointed counsel in the appellate division because she had not been convicted of any criminal offense. When she insisted, petitioner was told by respondent she remained appointed to represent Ms. Lopez in the appellate division. Petitioner stated she had already elected to not represent Ms. Lopez in the appellate division, and again requested counsel be appointed. Respondent again refused; again claiming Ms. Lopez was not entitled to appointed counsel. Respondent then told petitioner Ms. Lopez would not be represented by counsel if petitioner refused to provide representation. Ms. Lopez remains unrepresented in the appellate division.

ISSUES PRESENTED FOR REVIEW

1. Does an indigent respondent in an appellate division court have a right to appointed counsel under the Sixth and Fourteenth Amendments to the federal Constitution?

2. Does a superior court have jurisdiction to order the public defender to represent an indigent respondent in an appellate division proceeding?

REQUEST FOR STAY

As is the case with any indigent defendant, Ms. Lopez is ill-equipped to represent herself in an appellate court. (*Halbert v. Michigan* (2005) 545 U.S. 605, 617.) In Ms. Lopez' case, the situation is exacerbated because not only does she not have any legal education, she does not speak English; and other than being able to perform simple tasks such as dating documents and printing her name, she does not read or write in that language. If a stay is not granted, Ms. Lopez will have no choice but to sit back and hope that the government's opening brief will not be persuasive enough to convince the appellate division to reverse the lower court's judgment. Without assistance of counsel Ms. Lopez is unable to protect her vital interests. (*Evitts v. Lucey* (1985) 469 U.S. 387, 396.) At this stage of the proceedings only a barren record will speak for Ms. Lopez, "and unless the printed pages show that an injustice has been committed, [she] is forced to go without a champion on appeal." (*Douglas v. California* (1963) 372 U.S. 353, 356.) Proceedings in this matter should be stayed so that this court can evaluate whether such an injustice should be allowed to occur.

STATEMENT OF THE CASE

On June 9, 2015, a criminal complaint was filed in respondent court charging Ruth Zapata Lopez with misdemeanor driving under the influence of alcohol. The complaint further alleged Ms. Lopez had a prior conviction. On March 11, 2016, Ms. Lopez' motion to suppress was granted. The case was dismissed on March 14, 2016.

On May 6, 2016, Ms. Lopez' trial counsel, Deputy Public Defender (DPD) Joy Hlavenka, contacted the appellate division of respondent court and requested counsel be appointed to represent Ms. Lopez in the appellate division proceeding. An appellate division clerk stated Ms. Lopez was not

entitled to appointed counsel because she was not required to file a reply to the District Attorney's opening brief, and "because it's a misdemeanor and under $500.00."

On May 11, 2016, DPD Willms went to the office of the clerk of the appellate division and filed a written request for appointment of appellate counsel for Ms. Lopez. The clerk at the window was familiar with the case and told Mr. Willms Ms. Lopez was not entitled to appointed counsel. After further discussion the clerk contacted a supervisor who came to the service window and reiterated the appellate division's position was Ms. Lopez was not entitled to appointed counsel. The supervisor agreed to file Ms. Lopez' request for appointment of counsel but stamped it "FILED ON DEMAND."

On May 24, 2016, Mr. Willms called the appellate division clerk to see if a decision had been made regarding Ms. Lopez' request for appointed counsel. The clerk advised Mr. Willms that the appellate division legal research staff concluded Ms. Lopez was not entitled to appointed counsel in the appellate division, and the appellate division would not issue any orders denying her request for appointed counsel, or provide any written responses to the requests. The clerk then advised petitioner she remained appointed to represent Ms. Lopez, and that it was her duty to represent Ms. Lopez in the appellate division. Mr. Willms responded that *Mowrer v. Appellate Dep't.* (1990) 226 Cal.App.3d 264, specifically states a public defender cannot be compelled to represent a former client on appeal. After further discussions with their research unit, the clerk advised Mr. Willms the appellate division remained firm in their position that petitioner remained appointed, but then stated petitioner could represent Ms. Lopez if she chose to, or could petition the Court of Appeal for a writ. The clerk then reiterated respondent would not appoint counsel to represent Ms. Lopez, and would not respond to any requests for appointed counsel for Ms. Lopez. That is how the conversation ended.

On June 14, 2016, petitioner filed a petition for a writ of mandate in the Court of Appeal. It was summarily denied on June 28, 2016, "without prejudice to petitioner's ability to petition the appellate division." (Ex. 1.)

On June 29, 2016, petitioner filed a petition for a writ of mandate in the appellate division. It was summarily denied on July 5, 2016. (Ex. 2.)

On July 7, 2016, petitioner refiled the petition for a writ of mandate in the Court of Appeal. It was summarily denied on July 13, 2016. (Ex. 3.)

On July 22, 2016, petitioner filed a petition for review with a request for a stay in this court. On that same day this court stayed proceedings and invited respondent to file an answer to the petition. The answer was filed on August 12, 2016. Petitioner filed a reply to the answer on August 22, 2016.

On September 14, 2016, the petition for review was granted and the matter was remanded back to the Court of Appeal with directions to vacate the order summarily denying the petition for a writ of mandate, and to issue an order to show cause.

On November 21, 2017, the Court of Appeal denied the petition in a published opinion. (Ex. 4.) The court held that rule 8.851 does not violate an indigent respondent's right to counsel under the Sixth Amendment to the federal Constitution or her Fourteenth Amendment right to equal protection and due process of the law. Having found there was no right to counsel, the court did not address who is responsible for providing representation to an indigent respondent in an appellate division proceeding.

REASONS TO GRANT REVIEW

1. **Issue 1: Indigent respondents' right to appointed counsel**

    a. **Do indigent respondents in appellate proceedings have a Sixth Amendment right to appointed counsel?**

The first issue presents a novel and important question of law, and is an issue of first impression in California. Two federal circuit courts, *United*

States ex rel. Thomas v. O'Leary (7th Cir. 1988) 856 F.2d 1011 and *Claudio v. Scully* (2nd Cir. 1992) 982 F.2d 798, have held that a government pretrial appeal to the granting of a defendant's suppression motion is a critical stage of a criminal proceeding at which a defendant has a Sixth Amendment right to counsel. The Supreme Judicial Court of Massachusetts reached the same conclusion in *Commonwealth v. Goewey* (2008) 452 Mass. 399. The Court of Appeal in this matter reached the opposite conclusion, holding a criminal defendant has neither a Sixth nor Fourteenth Amendment right to appointed counsel in these types of proceedings in appellate division courts. This will have a resounding effect on a large class of criminal defendants regarding a fundamental constitutional right that is undoubtedly among the most sacred. Review should be granted to determine whether the conclusions reached by the Court of Appeal are legally sound and should remain the law in the state of California, or whether the analysis/conclusions reached by *United States ex rel. Thomas, Claudio,* and *Goewey,* should be adopted as California law.

b. Do indigent respondents in appeal proceedings have a Fourteenth Amendment right to appointed counsel?

Review on the first issue should also be granted to ascertain whether rule 8.851 violates an indigent defendant's Fourteenth Amendment right to equal protection of the law and due process of law. Any appellate procedure that discriminates against the poor violates both the equal protection clause and due process clause of the federal Constitution. *Griffin v. Illinois* (1956) 351 U.S. 12, 18. The United States Supreme Court 'has long been sensitive to the treatment of indigents in our criminal justice system ... [and] *Griffin's* principle of "equal justice" ... has been applied in numerous other contexts.' (*Bearden v. Ga.* (1983) 461 U.S. 660, 664, internal quotations original.)

Every indigent defendant charged with a misdemeanor in respondent court is entitled to be represented by counsel. If the defendant cannot afford

an attorney, one is appointed by the court. If the defendant is convicted of a misdemeanor, she is entitled to have an attorney appointed to represent her in the appellate division. However, if a superior court judgment is rendered in favor of an indigent defendant, and the People appeal the judgment to the appellate division, that defendant is *not* entitled to appointed counsel in the appellate division even though she maintains her presumption of innocence. Respondent will not appoint appellate counsel in the latter situation because rule 8.851 does not state that they must. If petitioner elects to not represent Ms. Lopez, she must hire counsel. If she cannot afford counsel, she must sit back and hope that the briefs and arguments presented by the prosecution's experienced lawyers will not enough to sway the appellate division judges. Review should be granted to determine whether rule 8.851 creates a system of appellate review resulting in an invidious discrimination against the poor that violates both the equal protection and due process clauses of the federal Constitution.

2. **Issue 2: Do superior courts have jurisdiction to order a public defender to represent indigents in the appellate division?**

The Court of Appeal declined to address this second issue, which also presents a novel and important question of law. The appellate division of a superior court is a distinct and separate division of the superior court that functions strictly as an appellate court. California Government Code section 27706, the statute which sets forth the law regarding the appointment of the public defender, does not authorize an appellate court to appoint the public defender to represent indigent defendants in appellate proceedings. But that is what respondent has done in this matter. Review in this matter should be granted to determine whether respondent's order is lawful. A ruling on this issue will provide guidance to appellate courts and public defender offices statewide regarding whether superior courts may appoint a public defender

to represent a former indigent client in the appellate division of the superior court (contrary to the express language of Government Code section 27706, subdivision (a)).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Indigent respondents in appellate proceedings have a Sixth Amendment and Fourteenth Amendment right to counsel

a. Sixth Amendment

"The Sixth Amendment [right to counsel] guarantees an accused the assistance of counsel not just at trial, but whenever it is necessary to assure a meaningful defense." (*United States ex rel. Thomas, supra,* 856 F.2d at p. 1014 citing *United States v. Wade* (1967) 388 U.S. 218, 225.) Criminal defendants maintain their Sixth Amendment right to counsel at all "critical stages" of the proceedings. (*United States ex rel. Thomas, supra,* 856 F.2d at p. 1014 citing and quoting *Wade, supra,* 383 U.S. at pp. 224-226, and Coleman *v. Alabama* (1970) 399 U.S. 1, 7; *Claudio, supra,* 982 F.2d at pp. 802-03.) Critical stages are those "where potential substantial prejudice to [a criminal] defendant's rights inheres in the particular confrontation and where counsel's abilities can help avoid [the] prejudice." (*United States ex rel. Thomas, supra,* 856 F.2d at p. 1014 citing *Coleman, supra,* at p. 9.) A pretrial proceeding that "might well settle the accused's fate and reduce the trial itself to a mere formality" is a critical stage at which the defendant has a Sixth Amendment right to counsel. (*United States ex rel. Thomas, supra,* at p. 1014, citing and quoting *Wade, supra,* at p. 224, and *Coleman, supra,* at p. 7.) A pretrial appeal to the granting of a suppression motion is clearly a critical stage of a criminal proceeding at which the defendant has a Sixth Amendment right to counsel. (*United States ex rel. Thomas, supra,* at pp.

1014-1015; *Claudio, supra,* 982 F.2d at p. 802; *Goewey, supra,* 452 Mass. at p. 402.)

United States ex rel Thomas, supra, 856 F.2d 1011, *Claudio, supra,* 982 F.2d 798, and *Goewey, supra,* 452 Mass. 399, are squarely on point. In each case the court addressed the exact issue presented in this case;[1] and in each case the court held that the government pretrial appeal to the granting of the suppression motion was a critical stage of the criminal proceeding at which a defendant has a Sixth Amendment right to counsel. (*United States ex rel. Thomas, supra,* 856 F.2d at pp. 1014-015; *Claudio, supra,* 982 F.2d at p. 802; *Goewey, supra,* 452 Mass. at pp. 402-03.)

The reasoning behind the *United States ex rel Thomas*, *Claudio,* and *Goewey* decisions provide a detailed explanation as to why the prosecution pretrial appeal in this case is a critical stage of the proceedings at which Ms. Lopez has a Sixth Amendment right to counsel. There is no doubt that Ms. Lopez' suppression hearing before the trial court was a critical stage of the proceedings at which she was entitled to receive, and did receive, effective assistance of counsel. (*United States ex rel. Thomas, supra,* 856 F.2d at p. 1014.) The prosecution dismissed Ms. Lopez' case after her motion to suppress was granted. Obviously, the outcome was crucial to the prosecution's case. "The State's appeal from the trial court's suppression hearing ruling [is] equally as critical." (*Ibid.*) Surely, the result will be no less crucial than

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[1] The issue came before all three courts differently than it has come before this court. In *United States ex rel Thomas*, *Claudio,* and *Goewey,* there was a prosecution pretrial appeal to a granting of a suppression motion, but the defendant in each case was represented by counsel at the appeal hearings involving the granting of the suppression motions. One issue raised in each case, however, was whether each defendant's counsel provided ineffective assistance of counsel (IAC) at the appeal hearings. Therefore, in each case the court had to determine whether the defendant had a Sixth Amendment right to counsel at that type of pretrial appeal hearing before determining whether the defendant received IAC.

the trial court's ruling on the suppression motion. (*Ibid.*) The prosecution's appeal confronts Ms. Lopez with a new type of adversarial proceeding that requires counsel skilled in persuading a panel of appellate judges by means of a brief and perhaps oral argument. (*Ibid.*) Following the dismissal of her case, Ms. Lopez now "must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake." (*Ibid* quoting *Evitts, supra,* 469 U.S.at p. 396.) Therefore, the prosecution's appeal in this matter is a critical stage of the proceedings at which Ms. Lopez maintains her right to counsel under the Sixth Amendment to the federal Constitution. (*United States ex rel. Thomas, supra,* 856 F.2d at pp. 1014-15; *Claudio, supra,* 982 F.2d at p. 802; *Goewey, supra,* 452 Mass. at pp. 402-03.)

Ross v. Moffitt (1974) 417 U.S. 600, provides additional support for a determination that Ms. Lopez has a Sixth Amendment right to counsel in the appellate division proceedings. (*Claudio, supra,* 982 F.2d at p. 802.) In *Ross* the Supreme Court decided not to extend the right to counsel to post-conviction discretionary appeals. (*Ibid.*) In *Ross*, the Court wrote that:

> 'it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court"[2] by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.' (*Ibid* quoting *Ross, supra,* 417 U.S. at pp. 610-611, internal quotation marks original.)

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[2] "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless [he is provided counsel]." (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344.)

Here, Ms. Lopez needs assistance of counsel during the appellate division proceedings as a shield, not a sword, because "the prosecution initiated the appellate process at a time when [her] presumption of innocence remained intact." (*Claudio, supra,* 982 F.2d at p. 803.) Therefore, the prosecution's pretrial appeal is "unquestionably a critical stage" of the proceedings. (*Id.* at p. 802.)

If the prosecution pretrial appeal is allowed to go forward at present it will be devoid of any advocacy on behalf of Ms. Lopez. (*Goewey, supra,* 452 Mass. at p. 405.) The proceedings will not, as they should, involve any adversarial process. (*Ibid.*) The appellate division's unilateral review of the suppression hearing transcript, combined with the prosecution's briefs and oral argument in support of their position, without any advocacy on behalf of Ms. Lopez, is not an adequate substitute for her Sixth Amendment right to counsel. (*Ibid* citing *Penson v. Ohio* (1988) 488 U.S. 75, 83-85; See also *Douglas, supra,* 372 U.S. at pp. 355-56.) The proper procedure here is for the appellate division to decide the People's appeal only after hearing from Ms. Lopez' counsel. (*Goewey, supra,* 452 Mass. at p. 405.)

b. Fourteenth Amendment

'Both equal protection and due process emphasize the central theme of our entire judicial system – all people charged with crime must… "stand on an equality before the bar of justice in every American court."' (*Griffin v. Ill., supra,* 351 U.S. at p. 17, quoting *Chambers v. Fla.* (1940) 309 U.S. 227, 241.) A state that grants a right of appellate review may not do so in a way that discriminates against individuals who are poor. (*Griffin,* at p. 18.) This would be "a misfit in a country dedicated to affording equal justice to all." (*Id.* at p. 19.) Indigent defendants must be afforded the same adequate appellate review that is provided to defendants who have money to pay for representation. (*Ibid*; *Douglas, supra,* 372 U.S. at p. 355.) There is lacking

that equality demanded by the Fourteenth Amendment where the rich man enjoys the benefits of counsel "while the indigent man is forced to shift for himself." (*Id.* at p. 358.) The United States Supreme Court has for decades now made it abundantly clear that "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the [federal] Constitution." (*Roberts v. La Vallee* (1967) 389 U.S. 40, 42.) There is no distinction between a rule that denies an indigent the right to defend themselves in the trial court, and one denying them the right to defend themselves in an appellate court. (*Griffin, supra,* 351 U.S. at p. 18.)

Ms. Lopez needed to have counsel appointed in the superior court to protect herself from the risk of actual imprisonment; and she was appointed counsel, as required by the Sixth Amendment. After her suppression motion was granted, Ms. Lopez no longer had a right to appointed counsel because there was no longer a risk of imprisonment. But when the prosecution filed their appeal challenging the granting of the suppression motion, Ms. Lopez was again haled into court, and again faced a risk of actual imprisonment if the prosecution prevailed on its appeal. One would think it obvious that Ms. Lopez would have a right to counsel in the appellate division; because if the prosecution prevails, she will again face risk of imprisonment if convicted. However, it is at this point that California's procedures take a rather strange turn. As it turns out, under California procedure, Ms. Lopez does not have a right to have counsel appointed to represent her during the People's pretrial appeal proceedings, notwithstanding the fact that if the prosecution prevails she will again face imprisonment if convicted. (Rule 8.851(a).) A system of appellate review that functions in this manner violates indigent defendants' right to equal protection and due process of law. (*Griffin, supra,* 351 U.S. at p. 18; *Douglas, supra,* 372 U.S. at pp. 357-358.)

The rule 8.851(a) equal protection violation is rather blatant because it creates an appeals process that clearly discriminates between the wealthy and the poor. A defendant, affluent or indigent, has a right to counsel in any superior court proceeding. The wealthy defendant may retain counsel, while an indigent has a Sixth Amendment right to have counsel appointed. That is beyond question. The right to counsel is particularly important in a superior court suppression hearing because the outcome of the proceeding will often determine whether or not the prosecution can proceed.[3] Cases are often dismissed after a suppression motion is granted. That is exactly what happened in Ms. Lopez' case (and but for the guiding hand of counsel, that would not have happened).

If the prosecution appeals the granting of a suppression motion to the appellate division, the defendant is then haled back into court to defend the lower court judgment rendered in her favor. However, in those proceedings, pursuant to rule 8.851(a), indigent defendants have no right to have counsel appointed to assist them in attempting to defend their judgment. Although it is true that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel,"[4] there is no diminution in the liberty interest at risk in an appellate division proceeding wherein the prosecution challenges the granting of a suppression motion in the superior court, as opposed to the liberty interest that was at stake in the superior court suppression hearing. If the suppression motion is denied in the superior court, the liberty interest at stake is whatever the maximum punishment is for the charged offense. If an appeal is filed after the granting of a suppression motion and the granting of the motion is reversed on appeal, the liberty interest at stake is whatever the

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[3] *United States ex rel. Thomas, supra,* 856 F.2d at p. 1014; *Claudio, supra,* 982 F.2d at p. 802.

[4] *Lassiter v. Dept. of Social Services* (1981) 452 U.S. 18, 24.

maximum punishment is for the charged offense. The liberty interest at risk is the same whether the defendant loses a motion to suppress in the superior court or has the granting of his suppression motion reversed in the appellate division.

Rule 8.851(a) creates the type of appeal process that was specifically condemned in *Griffin* and *Douglas*: A procedure that discriminates between the wealthy and the poor. After a pretrial appeal challenging the granting of a suppression motion has been filed the situation facing a defendant that is wealthy or indigent is identical: If the prosecution's appeal is successful the defendant's case in the superior court will be resurrected and proceed in the manner it would have had the suppression motion not been granted. This is what will happen regardless of whether the defendant is wealthy or poor. In the superior court these two classes of defendants who situations are clearly indistinguishable are treated the same, but in the appellate division they are not. In the superior court the indigent defendant is appointed counsel so she can defend herself just as effectively as the wealthy defendant who can pay for counsel. In the appellate division, an indigent defendant does not have the right to have counsel appointed even though her situation in that court is indistinguishable from that of a wealthy defendant who can afford to retain her own attorney. In other words, the kind of review a defendant gets in the appellate division appeal proceedings "depends on the amount of money he has." (*Griffin, supra,* 351 U.S. at p. 19.) The resultant discrimination here is "between cases where a rich man can require the court to listen to argument of counsel before deciding [the case] on the merits, but a poor man cannot." (*Douglas, supra,* 372 U.S. at p. 357.) The indigent defendant is left to hope that the appellate judges' independent review of the suppression record will reveal enough to overcome the briefing and arguments presented by learned counsel representing the prosecution. "The indigent, where the record is unclear or [] errors are hidden, has only the right to a meaningless ritual, while

the rich man has a meaningful appeal." (*Id.* at p. 358.) "The state is not free to produce such a squalid discrimination." (*Griffin, supra*, 351 U.S. at p 24, conc. opn. of Frankfurter, J.) For all the reasons stated above, Rule 8.851(a) violates an indigent defendant's right to equal protection and due process of law guaranteed under the Fourteenth Amendment. (*Griffin, supra*, 351 U.S. at p. 18; *Douglas, supra,* 372 U.S. at pp. 356-357.)

II. The public defender cannot be compelled to represent indigent defendants in appellate division proceedings

The first sentence of Government Code section 27706, subdivision (a), states:

> "Upon request of the defendant or upon order of the court, a public defender shall defend, without expense to the defendant, except as provided by Section 987.8 of the Penal Code,[5] any person who is not financially able to employ counsel and who is charged with the commission of any contempt or offense triable in the superior courts at all stages of the proceedings."

If that were the only language in subdivision (a) there would be not be any question regarding whether a public defender is authorized to represent an indigent respondent in a prosecution pretrial appeal to an appellate division court because that pretrial appeal is a "stage[] of the proceedings." In fact, as discussed ante, at pages 12-15, it is a "critical stage" of the proceedings. However, it is still an appeal, and regarding appeal proceedings the second sentence of Government Code section 27706, subdivision (a), states:

> "The public defender shall, upon request, give counsel and advice to such person about any charge against the person upon which the public defender is conducting the defense, and shall prosecute all appeals to a higher

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[5] Penal Code Section 987.8 addresses the procedures for determining and ordering payment for costs of appointed counsel. The statute does not have any application to the issues presented in this case.

> court or courts of any person who has been convicted, where, in the opinion of the public defender, the appeal will or might reasonably be expected to result in the reversal or modification of a judgment of conviction."

The first sentence of section 27706, subdivision (a) authorizes "trial courts" to order appointment of the public defender at the "trial phase" of a case. (*Mowrer, supra,* 226 Cal.App.3d at p. 267.) Although it is a division of the superior court, an appellate division of a superior court is not a "trial court." (*People v. Allenthorp* (1966) 64 Cal.2d 679, 682 ["The Legislature established an *appellate* department to exercise *appellate* powers." (Italics original.); *In re Ramirez* (2001) 89 Cal.App.4th 1312, 1319.) The appellate division is 'a distinct and separate department of a superior court (a species of entity) with jurisdiction and powers defined by statute[6] pursuant to express constitutional sanction[7], limited to the consideration of "appeals" from [a superior] court ...' (*Thomasian v. Superior Court of San Francisco* (1953) 122 Cal.App.2d 322, 331, internal quotation marks original; accord, *Allenthorp, supra,* 64 Cal.2d at p. 682.)

When a case is dismissed after the granting of a motion to suppress in the trial court, a prosecution appeal of the granting of the motion is not a "trial phase" of the case because there is no longer any case pending in the trial court. At that point the case is purely an appellate case, and the second sentence of section 27706, subdivision (a), controls. The "second sentence, in which appeals are discussed, makes no mention of any judicial power to appoint." (*Mowrer, supra,* 226 Cal.App.3d at pp. 267.) Section 27706, subdivision (a), is intended to grant the public defender with full discretion to decide which former clients they will represent on appeal, and "to ward off the blows of those seeking to improperly interfere with the exercise of

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[6] Cal. Code Civ. Proc., § 77.

[7] Cal. Const., art. VI, § 4.

that discretion." (*Ibid.*) There is no statutory authorization for the appellate division "to order the appointment of the public defender in misdemeanor appeals." (*Id.* at p. 268.) Section 27706 "vests the office of public defender with the broad discretion to choose which clients it wishes to represent on appeal." (*Ibid; Erwin v. Appellate Dep't* (1983) 146 Cal.App.3d 715, 718-719.)

In this matter, respondent's initial position was that Ms. Lopez was not entitled to appointed counsel in the appellate division. Respondent then advised petitioner she remained appointed to represent Ms. Lopez in the appellate division, and that it was her duty to represent Ms. Lopez in those proceedings. Respondent's last position was that petitioner could represent Ms. Lopez if she chose; but if she refused, Ms. Lopez would simply not be represented by counsel in the appellate division.[8] Because petitioner cannot in good conscience sit back and allow Ms. Lopez to not be represented by counsel in the appellate division, Respondent's "represent Ms. Lopez or she will not be represented at all" ultimatum constitutes an ipso facto order directing petitioner to represent Ms. Lopez. Respondent has no jurisdiction to issue such an order. At minimum, respondent's approach impermissibly interferes with petitioner's right to freely choose who she will represent the appellate division and should not be permitted. For these reasons a writ of

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[8] It is impossible to know precisely which position respondent is asserting because they did not deny, or respond in any way, to any of the allegations in the return. The legal principle that all allegations not denied in the return are deemed to be admitted (*People v. Duvall* (1995) 9 Cal.4th 464, 480) is not helpful because under that legal principle respondent has admitted each of the three allegations, each of which is inconsistent with the other. It is assumed here that the last position taken, *i.e.* that petitioner can represent Ms. Lopez if she chooses, but if she chooses not to, Ms. Lopez will simply not be represented by counsel in the appellate division, is the position now being taken by respondent.

mandate should issue directing respondent to appoint an appellate attorney, but not petitioner, to represent Ms. Lopez in the appellate division.[9]

III. The Court of Appeal opinion

Relying on *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 161, the Court of Appeal held Ms. Lopez does not have a Sixth Amendment right to counsel in the appellate division because the Sixth Amendment does not apply to appellate court proceedings. (*Morris v. Superior Court* (2017) 17 Cal.App.4th 636, 645.) The immediate problem here is that *Martinez* has nothing to do with the Sixth Amendment issues in this case. In *Martinez* the defendant was convicted and requested to be allowed to represent himself on appeal. (*Martinez, supra,* 528 U.S. at p. 155.) The Supreme Court affirmed the denial of the defendant's request holding "The Sixth Amendment does not include any right to appeal." (*Id.* at pp. 159-160.) *Martinez* has no bearing on the issue presented in this case because this case does not involve an appeal by a convicted defendant. The appellant in this case is the prosecution, not Ms. Lopez. Ms. Lopez was not convicted of anything, and did not file an appeal. The issue in this matter is whether a government pretrial appeal is a critical stage of the proceedings,

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[9] Looming large in the background here is the fact that Government Code section 27706, as written, does not authorize public defenders to represent indigent respondents in appellate proceedings. Section 27706, subdivision (a), authorizes public defenders to represent indigent defendants who were "convicted." Neither subdivision (a), nor any of the other subdivisions that follow, authorizes public defenders to represent any person in an appellate proceeding who has not been "convicted." Because an indigent respondent such as Ms. Lopez has not been convicted of anything, a public defender is not authorized to represent them in any appellate proceeding. This does not have any bearing on this case because even if subdivision (a) is interpreted to permit a public defender to provide representation to respondents, it still clearly does not authorize the appointment of a public defender in any type of appellate proceeding.

an issue *Martinez* did not address. As discussed ante, at pp. 12-15, *United States ex rel Thomas, supra,* 856 F.2d 1011, *Claudio, supra,* 982 F.2d 798, and *Goewey, supra,* 452 Mass. 399, are squarely on-point, and hold that a prosecution pre-trial appeal to a trial court granting a motion to suppress is a critical stage of a proceeding wherein the respondent maintains her Sixth Amendment right to counsel.

The Court of Appeal's attempts at distinguishing *Thomas, Claudio*, and *Goewey,* are feeble and easily dismissed. The Court states that *Thomas* and *Claudio* "are [] easily distinguishable, as they involve murder charges rather than misdemeanor charges. ..." (*Morris, supra,* 17 Cal.App.5th at p. 653.) The distinction is wholly irrelevant. As the court itself pointed out in the opinion, "the United States Supreme Court has repeatedly held that risk of actual imprisonment marks the line at which counsel must be appointed for purposes of the Sixth Amendment." (*Id.* at p. 646.) In fact, immediately following this statement the Court cites *Argersinger v. Hamlin* (1971) 407 U.S. 25. In *Argersinger* the petitioner was charged with a misdemeanor that exposed him to a six-month sentence. (*Id.* at 26.) He was tried before a judge without counsel, convicted, and sentenced to ninety days. (*Ibid.*) The Supreme Court reversed the defendant's conviction and held that "absent a knowing and intelligent waiver [of counsel], no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or a felony, unless he was represented by counsel at trial." (*Id.* at p. 37.)[10] Therefore, the outcome of *Thomas* and *Claudio* would have been the same regardless of whether they were charged with murder or any misdemeanor offense that

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[10] It is noteworthy that in reaching this decision the Supreme Court adopted the views of the Oregon Supreme Court. (*Argersinger, supra,* 407 U.S. at p. 37.) In this matter, petitioner is asking this court to adopt the views of the Supreme Judicial Court of Massachusetts in *Goewey, supra,* 452 Mass. 399, as well as that of the Seventh Circuit in *Thomas*, and the Second Circuit in *Claudio*.

subjected them to actual imprisonment, and remain squarely on-point with the facts of this case.

The Court of Appeal also states that *Thomas* and *Claudio* are easily distinguished because both defendants were "actually sentenced" to prison. (*Morris, supra,* 17 Cal.App.5th at p. 653.) The Court explains the meaning behind this statement earlier in the opinion where they state that Supreme Court precedent requires "actual imprisonment as a direct consequence of losing [the] action before the right to counsel must attach." (*Id.* at p. 647) What the Court of Appeal has held is that a defendant cannot challenge the trial court's refusal to appoint counsel until he has been convicted and then imprisoned. If the trial court refuses to appoint counsel at the arraignment, preliminary hearing, pretrial motions, or even at trial, the defendant cannot petition for a writ directing the court to appoint counsel because his right to counsel has not yet attached. In other words, a defendant's claim that he was denied his Sixth Amendment right to counsel does not become ripe for adjudication until he has been convicted and imprisoned. It is well-settled that a trial court's order concerning the designation of appointed counsel is subject to review by a writ of mandate. (*Drumgo v. Superior Court* (1973) 8 Cal.3d 890, 933-34, citing *Smith v. Superior Court* (1968) 68 Cal.2d 547, 558.) Unless this court elects to overrule *Drumgo* and *Smith*, the holding of the Court of Appeal on this issue should be easily rejected.

None of the United States Supreme Court cases cited by the Court of Appeal require this court to reconsider *Drumgo* and *Smith*. All the cases cited by the Court of Appeal do is repeatedly reaffirm longstanding United States Supreme Court precedent which has repeatedly held that it is a *risk of actual imprisonment*, and not the ultimate result of actual imprisonment, which marks the line at which the Sixth Amendment requires appointment of counsel. (*Morris, supra,* 17 Cal.App.5th at pp. 646-47 citing *Alabama v. Shelton* (2002) 535 U.S. 654, 662-63, *Scott v. Illinois* (1978) 440 U.S. 367,

373-374, and *Argersinger, supra,* 407 U.S. 25.) A defendant faces the risk of actual imprisonment as soon as he is charged with any offense in which imprisonment is a potential punishment; and his Sixth Amendment right to counsel attaches at that time. This is why a defendant has a right to counsel at his arraignment, preliminary hearing, pretrial motions, trial, and all other critical stages of the proceedings. (*Wade, supra,* 388 U.S. at pp. 224-25.) If the Court of Appeal's holding that the right to counsel does not attach until a defendant has been convicted and then imprisoned, *Wade* is no longer the law in California and courts in this state are free to force defendants to forgo counsel throughout the entire prosecution of their case, including a trial. If the defendant is convicted, and the court wants to impose imprisonment as punishment, counsel can then be appointed, and the defendant and State will simply have to go through the entire prosecution process again. There is nothing in any of the Supreme Court cases cited by the Court of Appeal that supports such a farcical proposition.

The Supreme Court cases cited by the Court of Appeal do establish there is a scenario where an indigent defendant is not entitled to appointed counsel when charged with an offense in which imprisonment is a possible punishment. If a trial court handling a case knows prior to commencement of trial that a prison sentence will not be imposed, even though authorized by statute, the defendant is not entitled to appointed counsel. (*Argersinger, supra,* 407 U.S. at p. 40.)[11] A court making that preliminary decision must

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[11] This is what likely occurred in *Scott, supra,* 440 U.S. 367. The defendant in *Scott* was charged with shoplifting merchandise valued at less than $150. (*Id.* at p. 368.) He was tried before a judge without counsel, convicted, and fined $50. (*Ibid.*) It is likely the judge knew before the bench trial that he was not going to sentence the defendant to any time in custody. Regardless, the conviction was affirmed because no custody time was imposed. (*Id* at p. 374.) The exact opposite is what occurred in *Argersperger, supra,*407 U.S. 25. In that case the defendant was tried on a misdemeanor without counsel, convicted, and sentenced to ninety days in jail. (*Id.* at p. 26.) The conviction

also bear in mind that if the defendant is placed on probation, jail time cannot be imposed for probation violations if the defendant was unrepresented at the trial of the underlying offense. (*Shelton, supra,* 535 U.S. at p. 658.)

The Court of Appeal also concludes that Ms. Lopez does not have a right to counsel during the People's pretrial appeal because she will not be imprisoned after the appellate proceedings if the People prevail.[12] (*Morris, supra,* 17 Cal.App.4th at p. 647.) That conclusion is based on the Court of Appeal's misreading of *Lassiter, supra,* 452 U.S. at pp. 26-27, wherein the Supreme Court states counsel need only be appointed for a litigant "when, if he loses, he *may* be deprived of his physical liberty." (Italics added.) The Court of Appeal has read this to mean that an indigent defendant is only entitled to appointed counsel when he "is" deprived of his physical liberty, not when he "may" be deprived of it. The *if*, and *may,* in Lassiter means an indigent defendant is entitled to appointed counsel as soon as there is a risk that he *may* be imprisoned if convicted. That occurs as soon as the criminal complaint is filed. This is wholly consistent with the High Court's holding in *Wade, supra,* 388 U.S. 218, wherein the Court holds "the period from arraignment to trial [is] perhaps the most critical period of the proceedings during which [an] accused requires the guiding hand of counsel." (*Id.* at p. 225 quoting in part *Powell v. Alabama* (1932) 287 U.S. 45, 57, 69, internal quotation marks and citations omitted.) To affirm the opinion of the Court of Appeal in this matter would be to affirm the abrogation of *Wade* in this

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was reversed because the defendant was sentenced to time in jail after being unrepresented at his trial. (*Id.* at p. 27.)

[12] It is possible Ms. Lopez could be incarcerated if the People prevail. If the People prevail the case will be remanded back to the trial court where the People could request an O.R./Bail hearing. If the trial court hears evidence adduced at the pretrial appeal proceedings of which it was not previously aware it could remand Ms. Lopez into custody. The same could happen after any pretrial hearing or motion, including a motion to suppress.

state, which is of course prohibited under the well-established principles of stare decisis. (*People v. Bradley* (1969) 1 Cal.3d 80, 86 [State courts are bound by the decisions of the United States Supreme Court interpreting the federal Constitution.].)

In *Goewey, supra,* 452 Mass. 399, the State did not even dispute the defendant was entitled to be represented by counsel during the hearings in the appellate court addressing the People's challenge to the granting of the motion to suppress in the trial court. (*Id.* at p. 402.) The State claimed that the appellate court's review of the record was sufficient because the record established their appeal would have been granted regardless of whether the defendant was represented by counsel. (*Ibid.*) After a detailed analysis that relied in part on the decision in *Thomas, supra,* 856 F.2d 1011, the court in *Goewey* concluded that "[t]he Appe[llate] Court's unilateral review of the transcript of the suppression hearing, perhaps influenced by the Commonwealth's presentation but obviously unaided by advocacy for the defense, was not an adequate substitute" for the defendant's right to counsel. (*Id.* at p. 405 citing *Penson, supra,* 488 U.S. 75, 83-85.) In this matter, the Court of Appeal held that an appellate court's independent review of the record in these types of situations is an adequate substitute for a defendant's right to counsel. (*Morris, supra,* 17 Cal.App.4th at p. 651.) However, instead of addressing *Goewey's* detailed analysis, and United States Supreme Court authority upon which it is based, the Court of Appeal dismissed *Goewey* as being "superficial." (*Morris, supra,* 17 Cal.App.4th at p. 653.)

Lastly, the Court of Appeal cites a few selectively picked sentences from *Ross, supra,* 417 U.S. 600, to support its holding that the procedure at issue here does violate due process. (*Id.* at p. 648.) The sentences in *Ross* cited by the Court of Appeal strictly address the limits of the due process right to counsel for appellants. There is language in *Ross* that differentiates the interests between appellants and respondents, but the Court of Appeal

skips over it. This is the differentiating language that *Claudio, supra,* 982 F.2d 798, relied on in concluding that a state pretrial appeal to the granting of a suppression motion in the trial court is a critical stage of a proceeding, and one in which the respondent has a right to counsel:

> 'it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The 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.' (*Claudio v. Scully, supra,* 982 F.2d at pp. 802-803 quoting *Ross, supra,* 417 U.S. at pp. 610-611, internal quotation marks original.

The court in *Goewey*, without citing *Ross*, relied on the same reasoning in also concluding that a state pretrial appeal to the granting of a suppression motion in the trial court is a critical stage of a criminal proceeding, and one in which the respondent has a right to counsel: "This case does not involve a direct appeal by the defendant; rather, it concerns [his] participation as an appellee in [a prosecution] appeal from an interlocutory order suppressing evidence." (*Goewey, supra,* 452 Mass. at p. 402.) Rather than address the analysis and conclusion reached by either *Claudio* or *Goewey*, the Court of Appeal instead chose to ignore them.

United States ex rel. Thomas, supra, 856 F.2d 1011, *Claudio, supra,* 982 F.2d 798, and *Goewey, supra,* 452 Mass. 399, are all based on sound legal reasoning, and supported by United States Supreme Court precedent. In *Argersinger, supra*, 407 U.S. 25, the Supreme Court adopted a decision of the Oregon Supreme Court as the law of this nation, because that court's right to counsel jurisprudence was based on sound legal reasoning. For the same reasons *United States ex rel. Thomas*, *Claudio* and *Goewey* should be adopted as the law of this state.

CONCLUSION

For the reasons stated herein review should be granted.

Dated: January 1, 2018

Respectfully submitted,

PHYLLIS K. MORRIS
Public defender

STEPHAN J. WILLMS
Deputy Public defender

CERTIFICATION UNDER RULE 8.204(c)(1)

I, Stephan J. Willms, declare that I am an attorney duly licensed and admitted to practice law before all courts in the State of California and am a Deputy Public defender for the County of San Bernardino.

According to the word count on the program utilized to prepare this petition, Microsoft Word, the word count is 7,746.

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

Dated: January 1, 2018

Stephan J. Willms
Deputy Public defender

DECLARATION OF SERVICE BY U.S. MAIL

Case: *Morris v. The Superior Court; The People*

Case no.: E066330

Stephan J. Willms declares as follows:

I am a resident of the State of California and over the age of eighteen years; I am not a party to this action; my business address is 9411 Haven Avenue, Rancho Cucamonga, CA 91730; and my mailing address is 8303 Haven Avenue, Third Floor, Rancho Cucamonga, CA 91730. I am familiar with the business practice of the San Bernardino County Public Defender for collection and processing of correspondence for mailing in the United States Postal System. In accordance with this practice, all correspondence placed in the internal mail collection system at the San Bernardino County Public Defender's Office is deposited with the United States Postal System that same day, or the following day, in the ordinary course of business.

On January 1, 2018, I served copies of the

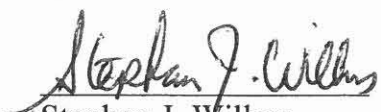
PETITION FOR REVIEW WITH REQUEST FOR STAY

by placing a copy in a sealed envelope, in the internal mail collection system at the San Bernardino County Public Defender's Office located at 9411 Haven Avenue, Rancho Cucamonga, CA 91730, and addressed to:

State of California
Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

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

Dated: January 1, 2018



Stephan J. Willms
Deputy Public Defender

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by placing a copy in a sealed envelope, in the internal mail collection system at the San Bernardino County Public Defender's Office located at 9411 Haven Avenue, Rancho Cucamonga, CA 91730, and addressed to:

State of California
Department of Justice
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101-3702

Ruth Zapata Lopez
Real Party in Interest
1797 West Via Verde
Rialto, CA 92376

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

Dated: January 1, 2018

Stephan J. Willms
Deputy Public Defender

DECLARATION OF SERVICE BY U.S. MAIL

Case: *Morris v. The Superior Court; The People*

Case no.: E066330

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by placing a copy in a sealed envelope, in the internal mail collection system at the San Bernardino County Public Defender's Office located at 9411 Haven Avenue, Rancho Cucamonga, CA 91730, and addressed to:

County of San Bernardino
Superior Court
Appeals Division
8303 Haven Avenue
Rancho Cucamonga, CA 91730

County of San Bernardino
District Attorney
Appellate Services Unit
303 W. Third St., 5th Floor
San Bernardino, CA 92415-0511

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

Dated: January 1, 2018

Stephan J. Willms
Deputy Public Defender

TABLE OF EXHIBITS

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

PHYLLIS K. MORRIS, as Public Defender for the County of San Bernardino, Petitioner, v. SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest	E066181 (Super.Ct.Nos. ACRAS1600028 & TWV1502001) The County of San Bernardino

THE COURT

The petition for writ of mandate and request for immediate stay are DENIED without prejudice to petitioner's ability to petition the appellate division for the relief she seeks.

RAMIREZ
Presiding Justice

Panel: Ramirez
Slough
Hollenhorst

cc: See attached list

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
APPELLATE DIVISION

8303 N. Haven Avenue, First Floor
Rancho Cucamonga, CA 91730
(909) 384-1888

CASE NO.: CIVDS1610302 / TWV1502001 (Rancho Cucamonga) **DATE:** July 5, 2016

PHYLLIS K. MORRIS, AS PUBLIC DEFENDER FOR THE COUNTY OF SAN BERNARDINO, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO, Respondent, RUTH ZAPATA LOPEZ, Real Party in Interest.	**ORDER**

The petition for writ of mandate is DENIED.

The Hon. Annemarie G. Pace and the Hon. Carlos M. Cabrera concur.

MICHAEL A. KNISH, Presiding Judge

cc: Judge James J. Hosking, Rancho Cucamonga Courthouse

I certify that copies of the above Order were mailed to counsel of record as indicated on _____.

Court Clerk

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

PHYLLIS K. MORRIS, as Public Defender for the County of San Bernardino, Petitioner, v. SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest	E066330 (Super.Ct.Nos. ACRAS1600028 & CIVDS1610302) The County of San Bernardino

THE COURT

The petition for writ of mandate and request for immediate stay are DENIED.

HOLLENHORST
Acting P. J.

Panel: Hollenhorst
Codrington
Ramirez

cc: See attached list

Morris v. Superior Court

Court of Appeal of California, Fourth Appellate District, Division Two

November 21, 2017, Opinion Filed

E066330

Reporter

17 Cal. App. 5th 636 *; 2017 Cal. App. LEXIS 1032 **; 2017 WL 5587661

PHYLLIS K. MORRIS, as Public Defender for the County of San Bernardino, Petitioner, v. APPELLATE DIVISION OF THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

Prior History: [**1] ORIGINAL PROCEEDINGS; petition for writ of mandate. Superior Court No. CIVDS1610302, No. ACRAS1600028, Michael A. Knish, Annemarie G. Pace and Carlos M. Cabrera, Judges.

Morris v. Superior Court, 2016 Cal. LEXIS 7773 (Cal., Sept. 14, 2016)

Disposition: Petition denied.

Core Terms

appellate division, misdemeanor, appointing counsel, convicted, cases, appointed counsel, indigent, superior court, imprisonment, right to appointed counsel, appointed, indigent defendant, public defender, trial court, sentenced, requires, courts, suppression motion, right to appeal, due process, rulemaking, materials, traverse, appeals, italics, actual imprisonment, authorities, provides, appears, fails

Case Summary

Overview

HOLDINGS: [1]-A county public defender failed to show why appointment of counsel for all indigent defendants in the appellate division of the superior court was constitutionally mandated; [2]-Under Cal. Rules of Court, rule 8.851, only misdemeanor defendants who have actually been convicted are entitled to appointed counsel in the appellate division; [3]-The appellate court rejected the public defender's challenge to rule 8.851 under the Sixth and Fourteenth Amendments; [4]-While a defendant acting as respondent in the appellate division would likely fare better with an attorney than without one, showing that something might be procedurally better is not the same as showing that the state is obligated to provide it; [5]-The record did not support the contention that the appellate division was forcing the public

defender to represent a particular defendant on appeal.

Outcome

Petition for writ of mandate denied.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Misdemeanors

Criminal Law & Procedure > Counsel > Assignment of Counsel

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN1 **Criminal Law & Procedure, Appeals**

Cal. Rules of Court, rule 8.851(a), which applies in the appellate division of a superior court, only authorizes appointment of counsel on appeal for defendants who have been convicted of a misdemeanor. Consequently, it does not require the appellate division to appoint counsel for a defendant who is acting as the respondent on an appeal by the People from an order suppressing evidence under Pen. Code, § 1538.5.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

HN2 **Fundamental Rights, Criminal Process**

Showing that something might be procedurally better is not the same as showing that the state is obligated to provide it.

Governments > Legislation > Interpretation

Governments > Courts > Rule Application & Interpretation

HN3 **Legislation, Interpretation**

The usual rules of statutory construction are applicable to the interpretation of the California Rules of Court. This means the court's primary object is to determine the drafters' intent. The words of the statute are the starting point. Words used in a statute should be given the meaning they bear in ordinary use. If the language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of the intent of the legislature.

Criminal Law & Procedure > Counsel > Assignment of Counsel

Governments > Courts > Rule Application & Interpretation

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Misdemeanors

HN4 [↓] **Counsel, Assignment of Counsel**

Cal. Rules of Court, rule 8.851, is expressed in plain, simple language. There is therefore no need to look to sources extrinsic to the rule itself to determine that the rule's drafters intended to provide appointed counsel only to misdemeanor defendants who have been convicted of a misdemeanor, and not to those who have not.

Criminal Law & Procedure > Appeals

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Misdemeanors

Criminal Law & Procedure > Counsel > Assignment of Counsel

HN5 [↓] **Criminal Law & Procedure, Appeals**

Cal. Rules of Court, rule 8.851, is interpreted to mean exactly what it says, which is that only misdemeanor defendants who have actually been convicted are entitled to appointed counsel in the appellate division of the superior court.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Constitutional Right

Criminal Law & Procedure > Counsel > Right to Counsel

Criminal Law & Procedure > Counsel > Waiver

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN6 [↓] **Criminal Process, Assistance of Counsel**

The Sixth Amendment to the United States Constitution withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his or her life or liberty unless the accused has or waives the assistance of counsel. The rule that has developed under the Sixth Amendment is that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for the person.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN7 [↓] **Fundamental Rights, Criminal Process**

Even though the Sixth Amendment does not require the right to appeal at all, a state that provides the right to appeal must, to remain consistent with the Fourteenth Amendment guarantees of due process and equal protection, make that right equally available to the rich and the poor. In this context, due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated. Equal protection, on the other hand, emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Assignment of Counsel

HN8 [↓] **Criminal Process, Assistance of Counsel**

As a litigant's interest in personal liberty diminishes, so does his or her right to appointed counsel.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Assignment of Counsel

Governments > Courts > Judicial Precedent

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN9 [↓] **Criminal Process, Assistance of Counsel**

The United States Supreme Court has repeatedly held that the risk of actual imprisonment marks the line at which counsel must be appointed for purposes of the Sixth Amendment. In sum, the Supreme Court's precedents speak with one voice about what fundamental fairness has meant when the Court has considered the right to appointed counsel, and California courts thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if the indigent litigant loses, he or she may be deprived of his or her

physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Assignment of Counsel

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN10 **Criminal Process, Assistance of Counsel**

What the Sixth and Fourteenth Amendments guarantee is not so much counsel, but the right to be free from uncounseled imprisonment.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Assignment of Counsel

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN11 **Criminal Process, Assistance of Counsel**

The due process clause of the Fourteenth Amendment allows a legislative body to limit the right to appointment of counsel to only those defendants who have been sentenced to actual imprisonment.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Criminal Law & Procedure > Appeals

HN12 **Equal Protection, Nature & Scope of Protection**

The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system. The State cannot adopt procedures which leave an indigent defendant entirely cut off from any appeal at all, by virtue of the defendant's indigency, or extend to such indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal. The question is not one of absolutes, but one of degrees.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

HN13 **Standards of Review, De Novo Review**

A judgment or order of a lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. Although an appellate court independently reviews whether the trial court properly applied the law regarding search and seizure under the Fourth Amendment, it still defers to any factual findings that are supported by substantial evidence. The appellate court assumes its colleagues in the appellate division of the superior court perform their official duty in accordance with these rules of law. Evid. Code, § 664.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN14 **Procedural Matters, Briefs**

Cal. Rules of Court, rule 8.254(a), only allows a party to bring to the appellate court's attention significant new authority, including new legislation, that was not available in time to be included in the last brief that the party filed or could have filed.

Governments > Courts > Judicial Precedent

HN15 **Courts, Judicial Precedent**

Lower federal court decisions on federal questions are persuasive authority, but they are not binding on a California state appellate court.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

HN16 **Appellate Jurisdiction, Extraordinary Writs**

Ordinarily, mandate would not lie in a situation in which an appellate court is asked to direct the trial court to perform an act which, on the record, the trial court has never refused to perform.

Headnotes/Syllabus

Summary

[*636] CALIFORNIA OFFICIAL REPORTS SUMMARY

The People filed a notice of appeal from the granting of an

indigent defendant's motion to suppress. A deputy public defender filed a request with the appellate division of the superior court to appoint counsel for the defendant on appeal. Court clerks informed counsel that the defendant was not eligible for appointment of counsel on appeal. The reason provided was that the defendant was the respondent, and the respondent on a misdemeanor appeal is not entitled to appointed counsel. The public defender filed a petition for writ of mandate in the appellate division challenging this policy. The appellate division summarily denied the petition. A petition for writ of mandate to the Court of Appeal followed. (Superior Court of San Bernardino, Nos. CIVDS1610302 and ACRAS1600028, Michael A. Knish, Annemarie G. Pace and Carlos M. Cabrera, Judges.)

The Court of Appeal denied the public defender's petition for writ of mandate. The court concluded that the public defender failed to show why appointment of counsel for all indigent defendants in the appellate division was constitutionally mandated. Under Cal. Rules of Court, rule 8.851, only misdemeanor defendants who have actually been convicted are entitled to appointed counsel in the appellate division. The court rejected the public defender's challenge to rule 8.851 under U.S. Const., 6th & 14th Amends. While a defendant acting as respondent in the appellate division would likely fare better with an attorney than without one, showing that something might be procedurally better is not the same as showing that the state is obligated to provide it. The record did not support the contention that the appellate division was forcing the public defender to represent the defendant on appeal. (Opinion by Ramirez, P. J., with McKinster and Codrington, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA (1) [⬇] **(1)**

Criminal Law § 85—Rights of Accused—Appointment of Counsel—Appellate Division.

Showing that something might be procedurally better is not the same as showing that the state is obligated to provide it. Thus, a county public defender failed to show why appointment of counsel for all indigent criminal defendants in the appellate division, as much as it might conceivably benefit those defendants, was constitutionally mandated, and the public defender's petition for writ of mandate was denied.

[Erwin et al., Cal. Criminal Defense Practice (2017) ch. 1, § 1.20.]

CA (2) [⬇] **(2)**

Statutes § 29—Construction—Language—Legislative Intent—Rules of Court.

The usual rules of statutory construction are applicable to the interpretation of the California Rules of Court. This means the court's primary object is to determine the drafters' intent. The words of the statute are the starting point. Words used in a statute should be given the meaning they bear in ordinary use. If the language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature.

CA (3) [⬇] **(3)**

Criminal Law § 85—Rights of Accused—Appointment of Counsel—Appellate Division—Misdemeanor Conviction.

Cal. Rules of Court, rule 8.851, is expressed in plain, simple language. There is therefore no need to look to sources extrinsic to the rule itself to determine that the rule's drafters intended to provide appointed counsel only to misdemeanor defendants who have been convicted of a misdemeanor, and not to those who have not.

CA (4) [⬇] **(4)**

Criminal Law § 85—Rights of Accused—Appointment of Counsel—Appellate Division—Misdemeanor Conviction.

Cal. Rules of Court, rule 8.851, is interpreted to mean exactly what it says, which is that only misdemeanor defendants who have actually been convicted are entitled to appointed counsel in the appellate division of the superior court.

CA (5) [⬇] **(5)**

Criminal Law § 85—Rights of Accused—Appointment of Counsel—Indigency.

U.S. Const., 6th Amend., withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his or her life or liberty unless the accused has or waives the assistance of counsel. The rule that has developed under U.S. Const., 6th Amend., is that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for the person.

CA (6) [⬇] **(6)**

Criminal Law § 42—Rights of Accused—Due Process—Equal Protection.

Even though U.S. Const., 6th Amend., does not require the right to appeal at all, a state that provides the right to appeal must, to remain consistent with U.S. Const., 14th Amend., guarantees of due process and equal protection, make that right equally available to the rich and the poor. In this context, due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other

individuals in the same situation may be treated. Equal protection, on the other hand, emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable.

CA (7) [⬇] **(7)**

Criminal Law § 85—Rights of Accused—Appointment of Counsel—Personal Liberty.

As a litigant's interest in personal liberty diminishes, so does his or her right to appointed counsel.

CA (8) [⬇] **(8)**

Criminal Law § 85—Rights of Accused—Appointment of Counsel—Imprisonment.

The United States Supreme Court has repeatedly held that the risk of actual imprisonment marks the line at which counsel must be appointed for purposes of U.S. Const., 6th Amend. In sum, the Supreme Court's precedents speak with one voice about what fundamental fairness has meant when the court has considered the right to appointed counsel, and California courts thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if the indigent litigant loses, he or she may be deprived of his or her physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

CA (9) [⬇] **(9)**

Criminal Law § 86—Rights of Accused—Appointment of Counsel—Imprisonment.

What U.S. Const., 6th & 14th Amends., guarantee is not so much counsel, but the right to be free from uncounseled imprisonment.

CA (10) [⬇] **(10)**

Criminal Law § 86—Rights of Accused—Appointment of Counsel—Imprisonment.

The due process clause of U.S. Const., 14th Amend., allows a legislative body to limit the right to appointment of counsel to only those defendants who have been sentenced to actual imprisonment.

CA (11) [⬇] **(11)**

Constitutional Law § 80—Equal Protection—Legal Proceedings—Appeals.

U.S. Const., 14th Amend., does not require absolute equality or precisely equal advantages, nor does it require the state to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system. The state cannot adopt procedures which leave an indigent defendant entirely cut off from any appeal at all, by virtue of

the defendant's [*639] indigency, or extend to such indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal. The question is not one of absolutes, but one of degrees.

CA(12) [↓] **(12)**

Criminal Law § 608—Appellate Review—Scope—Presumption of Correctness—Search and Seizure.

A judgment or order of a lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. Although an appellate court independently reviews whether the trial court properly applied the law regarding search and seizure under U.S. Const., 14th Amend., it still defers to any factual findings that are supported by substantial evidence. The appellate court assumes its colleagues in the appellate division of the superior court perform their official duty in accordance with these rules of law (Evid. Code, § 664).

CA(13) [↓] **(13)**

Criminal Law § 586—Appellate Review—Briefs—New Authority.

Cal. Rules of Court, rule 8.254(a), only allows a party to bring to the appellate court's attention significant new authority, including new legislation, that was not available in time to be included in the last brief that the party filed or could have filed.

CA(14) [↓] **(14)**

Courts § 40—Judicial Precedent—Opinions of Lower Federal Courts.

Lower federal court decisions on federal questions are persuasive authority, but they are not binding on a California state appellate court.

CA(15) [↓] **(15)**

Mandamus § 27—To Courts and Court Officers—Direction To Perform Act—Refusal To Perform.

Ordinarily, mandate would not lie in a situation in which an appellate court is asked to direct the trial court to perform an act which, on the record, the trial court has never refused to perform.

Counsel: Phyllis K. Morris, Public Defender, and Stephan J. Willms, Deputy Public Defender, for Petitioner.

Robert L. Driessen for Respondent.

No appearance for Real Party in Interest.

Judges: Opinion by Ramirez, P. J., with McKinster and Codrington, JJ., concurring.

Opinion by: Ramirez, P. J.

Opinion

[*640]

RAMIREZ, P. J.—*HN1*[↑] California Rules of Court, rule 8.851(a) (rule 8.851), which applies in the appellate division of a superior court, only authorizes appointment of counsel on appeal for defendants who have been "convicted of a misdemeanor." Consequently, it does not require the appellate division to appoint counsel for a defendant who is acting as the respondent on an appeal by the People from an order suppressing evidence under Penal Code section 1538.5.

CA(1)[↑] **(1)** In this petition, Phyllis K. Morris, in her capacity as the Public Defender for the County of San Bernardino, argues the United States Constitution obligates respondent, the Superior Court of San Bernardino County, to appoint counsel for all indigent defendants in the appellate division. While we agree that a defendant acting as respondent in the appellate division would likely [**2] [1] fare better with an attorney than without one, we stress that *HN2*[↑] showing that something might be procedurally better is not the same as showing that the state is obligated to provide it. (See, e.g., *Ross v. Moffitt* (1974) 417 U.S. 600, 616 [41 L. Ed. 2d 341, 94 S. Ct. 2437] (*Ross*) ["[T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required."].) Petitioner has failed to show why appointment of counsel for respondents in the appellate division, as much as it might conceivably benefit those respondents, is constitutionally mandated. Consequently, we deny the petition.[2]

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner's office represented Ruth Zapata Lopez, a nonparty to this petition, in a case alleging she committed two misdemeanors by driving while under the influence

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[1] Though the absence of counsel is not always fatal to a claim on appeal; we note the litigant in the landmark case who caused the United States Supreme Court to hold that all indigent criminal defendants have the right to appointed counsel, was himself without counsel for the majority of that proceeding. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 338 [9 L. Ed. 2d 799, 83 S. Ct. 792] (*Gideon*).)

[2] The petition was first filed in this court on July 7, 2016. On July 13, 2016, we summarily denied that filing. The California Supreme Court stayed the action to facilitate review of a petition for certiorari and then, on September 14, 2016, granted the petition for review, transferred the matter to this court, and directed us to issue an order to show cause why the relief sought in the petition should not be granted. "The Supreme Court's direction that we issue the alternative writ, after our denial, is an expression on the part of the Supreme Court that we examine the contentions raised by petitioner and write an opinion evaluating those contentions." (*Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 861 [156 Cal. Rptr. 107].) It is not an expression of an opinion that the petition should be granted. (*Ibid.*; see *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 500 [165 Cal. Rptr. 748]; *Krueger v. Superior Court* (1979) 89 Cal.App.3d 934, 939 [152 Cal. Rptr. 870].)

of alcohol and/or drugs. (Veh. Code, § 23152, subds. (a), [*641] (b).) Acting on Lopez's behalf, petitioner's office successfully moved to suppress evidence supporting the People's case. (Pen. Code, § 1538.5.) On March 14, 2016, both counts were dismissed in the interest of justice. The People filed a notice of appeal from the granting of the suppression motion on the same day.

On May 11, 2016, a deputy public defender filed a request with the Appellate Division of the Superior [**3] Court of San Bernardino County (appellate division) to appoint counsel for Lopez on appeal. Court clerks informed counsel that Lopez was not eligible for appointment of counsel on appeal. According to the deputy public defender, the reason provided was that Lopez "was the respondent, and the respondent on a misdemeanor appeal is not entitled to appointed counsel." In an e-mail attached to the petition, the same deputy public defender asserts a court clerk told him the appellate division's position was that petitioner's office still represented Lopez.

Petitioner filed an earlier petition (*San Bernardino County Public Defender v. Superior Court* (June 28, 2016, No. E066181), petn. den.) challenging this policy. On June 28, 2016, we summarily denied that petition "without prejudice to petitioner's ability to petition the appellate division for the relief she seeks." The following day, petitioner filed, in the appellate division, a petition for writ of mandate raising the same issue presented here. The appellate division summarily denied the petition on July 5, 2016. The instant petition to this court followed.

DISCUSSION

In this court, petitioner primarily asserts that the Sixth and Fourteenth Amendments to the United States Constitution require the appellate division to "appoint counsel for all indigent appellees in all misdemeanor [**4] criminal appeals, including [Lopez]." Then, turning instead to California statutory authority, petitioner contends the trial court lacks statutory authority to compel her office, specifically, to represent Lopez as a respondent in the appellate division. (Gov. Code, § 27706, subd. (a).) We disagree with her first assertion and, finding no evidence the second has occurred, decline to weigh in on whether a public defender's office may be compelled to represent a respondent in the appellate division.

Before explaining our reasons for drawing these conclusions, we comment on what is and what is not at issue on this petition. The petition purports to challenge "[t]he system in place in San Bernardino County, at least as suggested by Appellate Division staff," as if this "system" derived from a policy created by

the appellate division in San Bernardino County. As the return notes, however, the rule the appellate division appears to be enforcing [*642] in this case is simply rule 8.851, which we mentioned at the outset. What we consider in this opinion, then, is petitioner's assertion that rule 8.851 is facially invalid.[3] We find that it is not, at least under the authorities petitioner has cited.

Rule 8.851(a)(1) provides that an appellate division "must appoint appellate [**5] counsel for a defendant *convicted of a misdemeanor* who" is both: (1) subject to incarceration, a fine of more than $500, or "significant adverse collateral consequences as a result of the conviction"; and (2) indigent (which will be assumed if the defendant was "represented by appointed counsel in the trial court"). (Italics added.) Rule 8.851 further provides that "the appellate division may appoint counsel for any other indigent defendant *convicted of a misdemeanor.*" (Rule 8.851(a)(2), italics added.) The parties agree that Lopez does not qualify for appointment of counsel under rule 8.851 because she has not been "convicted of a misdemeanor."

As we construe the petition and traverse, petitioner suggests we could order that Lopez receive appointed counsel despite rule 8.851 in one of two ways: We could interpret rule 8.851 to require appointment of counsel for respondents who have not been convicted of a misdemeanor by finding an inadvertent omission by the rulemaking body, or we could find rule 8.851 constitutionally infirm as written and remake the rule to require appointment of counsel for even those respondents in the appellate division who have not been convicted of a misdemeanor. For the reasons to which we now turn, neither position has merit. [**6]

A. *We may not interpret rule 8.851 to require appointment of counsel for any criminal defendant who has not been convicted of a misdemeanor*

HN3[↑] ***CA(2)***[↑] **(2)** "'The usual rules of statutory construction are applicable to the interpretation of the California Rules of Court.' [Citation.] This means our primary object is to determine the drafters' intent. 'The words of the statute are the starting point. "Words used in a statute … should be given the meaning they bear in ordinary use. [Citations.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature … ."'" (*Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1122-1123 [135 Cal. Rptr. 2d 790].)

CA(3)[↑] **(3)** We agree with the return that ***HN4***[↑] rule 8.851 "is expressed in plain, simple

[3] Petitioner first made this assertion in the traverse, as the petition neither cited nor mentioned rule 8.851.

language." There is therefore no need to look to sources extrinsic to the rule [*643] itself to determine that the rule's drafters intended to provide appointed counsel only to misdemeanor defendants who have been convicted of a misdemeanor, and not to those who, like Lopez, have not. At bottom, then, petitioner's request that we look to the history of rule 8.851 fails, because we have no reason to consult these materials to interpret the text of the rule.

Still, even if we could properly consider petitioner's arguments [**7] regarding the history and purpose of rule 8.851 on the merits,[4] the inferences we draw from the materials presented are different from the ones petitioner draws. According to petitioner, the proposed rule on which the Judicial Council sought comment originally gave an appellate division discretion to appoint counsel, not just for "any other indigent misdemeanor defendant convicted of a misdemeanor" as under the version of rule 8.851(a)(2) that became operative, but for "any other indigent misdemeanor defendant." The traverse continues: "If this version of Rule 8.851(a)(2) remained as written, this matter would not be before this court, because this language would have included indigent respondents. But for reasons unexplained, the … language noted above did not remain, and Rule 8.851(a)(2) now reads '[o]n application, the Appellate Division may appoint counsel for any other indigent defendant *convicted of a misdemeanor.*' (Italics added.) The addition of this italicized language, *i.e.* '*convicted of a misdemeanor,*' took indigent respondents out of the realm of

[4] Even if we disregard the rule that we do not examine extrinsic sources if the legislation is unambiguous and consider petitioner's contentions regarding the history of rule 8.851, we have to take the traverse at face value and trust that petitioner correctly represents the contents of the February 6, 2008 advisory committee report on which she relies. This is because petitioner has not provided us with the legislative history materials she cites; there is no request for judicial notice, and the 2008 report on which petitioner relies has in no way been made part of the record in this court. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26 [34 Cal. Rptr. 3d 520] [explaining importance of proper motions for judicial notice of legislative history materials].) Also, "It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party." (*People v. Tully* (2012) 54 Cal.4th 952, 1075 [145 Cal. Rptr. 3d 146, 282 P.3d 173]; see, e.g., *People v. Peevy* (1998) 17 Cal.4th 1184, 1206 [73 Cal. Rptr. 2d 865, 953 P.2d 1212] ["Normally, a contention may not be raised for the first time in a reply brief."].) Here, we find ourselves in the unexpected position of assessing a main premise (i.e., that rule 8.851(a) is unconstitutional) that was not raised until the traverse because the petition did not cite rule 8.851 and, therefore, did not analyze its legislative history, purpose, or intent. Although the return made some arguments regarding these issues, respondent has had no ability to answer petitioner's specific points, which, though potentially important to her position, were not made known until the traverse. However, since we eventually find petitioner's legislative history materials do not help her case, we see no actual prejudice to respondent in our treating those materials as we have.

those entitled to appointed counsel in any Appellate Division proceeding."

CA(4) [↑] **(4)** As petitioner sees it, the omission of respondents on appeal must have been inadvertent, because California Rules of Court, rule 8.850, states that [**8] [*644] rules in the chapter containing it and rule 8.851 apply to both preconviction and postconviction appeals. However, the conclusion that an inadvertent omission occurred assumes that appointment of counsel for defendants who have not been convicted of a misdemeanor is somehow required, either because the rulemaking body intended to include such a benefit or because some extrinsic authority requires appointment of counsel even for misdemeanor pretrial respondents. It therefore begs the question. We do not have a record from which we could conclude that the rulemaking body intended to offer appointment of counsel to respondents on appeal such as Lopez, who have not been convicted; what petitioner has shown us is that the rulemaking body considered but rejected an option that would have given counsel to Lopez and others like her. ***HN5*** [↑] We therefore interpret rule 8.851 to mean exactly what it says, which is that only misdemeanor defendants who have actually been convicted are entitled to appointed counsel in the appellate division.

Moreover, we explain in the next section why we find, at least under the authorities petitioner has cited, that the United States Constitution does not require appointment of counsel for [**9] all misdemeanor defendants on appeal. Petitioner gives us no reason to find that the rulemaking body must necessarily have intended to offer more than is constitutionally necessary, and we have already intimated that the law is otherwise, because not all services that are "of benefit" to a litigant must be provided at government expense. (*Ross, supra*, 417 U.S. at p. 616.) Petitioner's legislative intent argument fails. There is no indication in the record that the rulemaking body decided to offer appointed counsel only to those criminal defendants in the appellate division who have been convicted of a misdemeanor because of an omission instead of because the body concluded, as we do, that no more is required under the Constitution.

B. *Rule 8.851 does not violate the Sixth or Fourteenth Amendments to the United States Constitution as alleged by the petitioner*

CA(5) [↑] **(5)** The United States Supreme Court has recognized "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463 [82 L.Ed. 1461, 58 S. Ct. 1019].) In that court's view,

this is why ***HN6***[⬆] the Sixth Amendment to the United States Constitution "withholds from federal courts,[5] in all criminal proceedings, the power and authority to deprive [**10] an accused of his life or liberty unless he has or waives the assistance of counsel." (*Johnson v. Zerbst*, at [*645] p. 463, fn. omitted.) The rule that has developed under the Sixth Amendment is that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." (*Gideon, supra*, 372 U.S. at p. 344.) This is the rule on which the petition chiefly relies for its Sixth Amendment claim.

However, "the Sixth Amendment does not apply to appellate proceedings." (*Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 161 [145 L. Ed. 2d 597, 120 S. Ct. 684] (*Martinez*).) Therefore, petitioner's challenge to rule 8.851 as violating the Sixth Amendment to the United States Constitution fails.

Petitioner cites to both *Gideon*'s statement that the Sixth Amendment requires appointment of counsel whenever a person is "haled into" criminal court (as purportedly happened to Lopez when the People appealed (*Gideon, supra*, 372 U.S. at p. 344)), and to *Anders v. California* (1967) 386 U.S. 738, 742 [18 L. Ed. 2d 493, 87 S. Ct. 1396], for the same proposition, presumably because *Anders* quoted the above referenced rule from *Gideon* in a case examining the role of counsel on appeal from a conviction. Nonetheless, *Anders* does not support a conclusion that the Sixth Amendment applies on appeal, because *Anders* resolved these questions not based on the Sixth Amendment, but instead on "[t]he constitutional requirement of substantial equality and fair process." (*Anders*, at p. 744.) As *Martinez* instructs, the Sixth Amendment is not an applicable source of authority [**11] when it comes to appointment of counsel on appeal. (*Martinez, supra*, 528 U.S. at p. 161.)

CA(6)[⬆] **(6)** Because the Sixth Amendment does not apply, courts have looked to the Fourteenth Amendment when analyzing claims regarding entitlement to counsel on appeal. (See, e.g., *Ross, supra*, 417 U.S. at pp. 608-609.) ***HN7***[⬆] Even though the Sixth Amendment does not require the right to appeal at all, a state that provides the right to appeal must, to remain consistent with the Fourteenth Amendment guarantees of due process and equal protection, make that right equally available to the rich and the poor. (*Griffin v. Illinois* (1956) 351 U.S. 12 [100 L.Ed. 891, 76 S. Ct. 585] [requiring states to furnish transcripts at no cost

[5] The same holds true of state courts, since the Sixth Amendment's right to counsel clause is "made obligatory upon the States by the Fourteenth Amendment." (*Gideon, supra*, 372 U.S. at p. 342.)

to indigent defendants on appeal].) In this context, "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." (*Ross*, at p. 609.)

We look, then, to see whether the due process and/or equal protection clauses of the Fourteenth Amendment require the appointment of counsel when the People appeal the granting of a Penal Code section 1538.5 motion [*646] to the appellate division in a misdemeanor case. In order to evaluate the petition on the merits, as directed by the Supreme Court, we look largely to United States Supreme Court [**12] jurisprudence regarding the right to appointed counsel as a freestanding due process right. We find these authorities quite helpful in explaining why we think the state acted constitutionally when it drew the line for who gets appointed counsel in the appellate division at misdemeanor defendants who have been convicted of a misdemeanor. (*Lassiter v. Dep't of Social Services* (1981) 452 U.S. 18, 24 [68 L.Ed.2d 640, 101 S.Ct. 2153] (*Lassiter*) ["Applying the Due Process Clause is … an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation."].)

CA(7) [↑] **(7)** We begin by noting that, if petitioner's core premise that the usefulness of counsel is sufficient to create a due process right to counsel, it is difficult to see any case in which appointment of counsel is not required. And yet that is resoundingly not the law. Rather, ***HN8*** [↑] "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." (*Lassiter, supra*, 452 U.S. at p. 26.) For example, in *Scott v. Illinois* (1979) 440 U.S. 367 [59 L. Ed. 2d 383, 99 S. Ct. 1158] (*Scott*), the court affirmed the misdemeanor theft conviction of a defendant who was subject to imprisonment but only sentenced to a $50 fine even though the defendant had requested and been refused counsel in the trial court. The court has also rejected an argument that each state "is under a constitutional duty to [**13] provide counsel for indigents in all probation or parole revocation cases" in favor of a system allowing the government entities charged with administering probation and parole to decide entitlement to counsel on a case-by-case basis. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 787 [36 L. Ed. 2d 656, 93 S. Ct. 1756].) Similarly, in *Lassiter*, the court held that parents in proceedings to terminate parental rights would only be entitled to appointed counsel on a case-by-case basis. (*Lassiter*, at p. 32.)

CA(8) [↑] **(8)** Although the Sixth Amendment does not guarantee the right to counsel on appeal from a conviction, cases that construe the rights guaranteed therein are instructive on the issue of what due process under the Fourteenth Amendment requires since "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L. Ed. 2d 674, 104 S. Ct. 2052]; see *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146 [165 L. Ed. 2d 409, 126 S. Ct. 2557] [same].) Having independently researched the issue, we emphasize that ***HN9*** [↑] the United States Supreme Court has repeatedly held that the risk of actual imprisonment marks the line at which counsel must be appointed for purposes of the Sixth Amendment. (See, e.g., *Alabama v. Shelton* (2002) 535 U.S. 654, 662 [152 L. Ed. 2d 888, 122 S. Ct. 1764]; *Scott, supra*, 440 U.S. at pp. 373-374; [*647] *Argersinger v. Hamlin* (1972) 407 U.S. 25 [32 L. Ed. 2d 530, 92 S. Ct. 2006].) "In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, [**14] and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured." (*Lassiter, supra*, 452 U.S. at pp. 26-27.)

Since the petition does not mention this presumption, petitioner has not rebutted it. Rather, she argues the appeal forces Lopez to face imprisonment because the People's prosecution of Lopez will resume if the appeal is successful, and Lopez faces imprisonment if convicted. We reject this contention. To begin with, it is inconsistent with *Lassiter*'s command that counsel need only be appointed for a litigant "when, if he loses, he may be deprived of his physical liberty." (*Lassiter, supra*, 452 U.S. at pp. 26-27.) While we realize Lopez may be more likely to become imprisoned if the People prevail on appeal, the cases discussed *ante* require more than mere likelihood. In fact, and as we have explained, they require actual imprisonment as a direct consequence of losing the action before the right to appointed counsel must attach. (*Scott, supra*, 440 U.S. at pp. 373-374 ["We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment [**15] unless the State has afforded him the right to assistance of appointed counsel in his defense."].)

CA(9) [↑] **(9)** Phrased differently,

HN10[↑] what the Sixth and Fourteenth Amendments guarantee is not so much counsel, but the right to be free from uncounseled imprisonment. (*Lassiter, supra*, 452 U.S. at p. 26 ["'the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.'"].) The petition has given us no reason to set the line in a different place for a respondent in the appellate division. If the right Lopez has is the right to be free from uncounseled imprisonment, she faces no diminution of that right on appeal, since she will be represented at trial even if the People prevail in the appellate division.

Again, we take no issue with the idea that Lopez's respondent's brief, and perhaps her chances of an affirmance on appeal, might well be better if she had counsel than if she did not. (See, e.g., *Johnson v. Zerbst, supra*, 304 U.S. at p. 463 ["The '... right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'"].) Where we part ways with petitioner is in what we make of the fact that Lopez would fare [*648] better on appeal with [**16] counsel. She appears to assume it means she has a federal due process right to counsel. As we have explained, she does not.

The petition in this case does not address the framework of cases cited *ante* and instead cites broad rules from *Griffin* and *Douglas v. California* (1963) 372 U.S. 353 [9 L. Ed. 2d 811, 83 S. Ct. 814] (*Douglas*) without analyzing why they require appointment of counsel in the appellate division in California. In her challenge based upon the Fourteenth Amendment, petitioner relies heavily on *Douglas*. There, the court invalidated "a California rule of criminal procedure which provides that state appellate courts, upon the request of an indigent for counsel, may make 'an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed. ... After such investigation, appellate courts should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court.'" (*Douglas*, at p. 355.) The *Douglas* court opined: "When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair [**17] procedure." (*Id.* at p. 357.)

Petitioner does not explain whether she cites *Douglas* on due process or on equal protection grounds, but the *Ross* court noted the *Douglas* court relied on both principles. (*Ross, supra*, 417 U.S.

at p. 610.) It then explained that with respect to due process, "there are significant differences between the trial and appellate stages of a criminal proceeding," since the purpose of the trial court portion of the action is to give the state a forum in which to attempt to overcome the presumption of innocence, while an appeal is usually initiated by a convicted defendant who needs counsel not to protect against being haled into court but to overturn a determination of guilt. (*Ibid.*) The court concluded: "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 not provide any appeal at all. *McKane* v. *Durston*, 153 U.S. 684 [38 L.Ed. 867, 14 S. Ct. 913] (1894). The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas* v. *California*, *supra*. Unfairness results only if indigents are singled out by the State and denied meaningful [**18] access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis." (*Ross*, *supra*, at p. 611.)

We also find *Douglas* distinguishable. Because the California rule the *Douglas* court invalidated asked a Court of Appeal to conduct "an ex parte [*649] examination of the record" and decide whether appointment of counsel would be helpful, it required a "preliminary showing of merit" before the appellant could know whether he or she would have a more effective appeal with counsel or a less effective one without. (*Douglas*, *supra*, 372 U.S. at pp. 356-357.) In other words, the California procedure affected "the right to appeal" itself. (*Ibid.*) Here, the right to appeal has not been affected, and there can be no prejudging of the merits of the appeal at an early stage by the court that is to assess the validity of the trial court's act. In addition, Lopez's interest in retaining the dismissal she obtained after the trial court granted her suppression motion is undoubtedly less weighty than that of a defendant who has been "convicted of a misdemeanor" (rule 8.851(a)(1), (2)) and is trying to overturn the sentence.

CA(10)[↑] **(10)** In sum, then, the rule we deduce is that ***HN11***[↑] the due process clause allows a legislative body to limit the right to appointment [**19] of counsel to only those defendants who have been sentenced to actual imprisonment. As discussed *ante*, petitioner herself admits the legislative body that drafted rule 8.851 deliberately chose to limit the right to appointed counsel in the appellate division to those defendants who had been convicted of a misdemeanor. We now turn to whether that decision violates the equal protection clause.

As previously described, petitioner challenges rule 8.851 on its face and asks us to find that the appellate division may not refuse to appoint counsel for an indigent defendant acting as respondent on appeal because otherwise "all [such a defendant] can do is hope the appeals court will find anything in the record to justify affirming her judgment while the rich man has the opportunity to have counsel fully and effectively defend his judgment." In other words, on the equal protection issue petitioner primarily points to an alleged "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." (*Ross, supra*, 417 U.S. at p. 609.)

As we discussed at oral argument, the paucity of equal protection analysis petitioner provided in her briefs greatly complicates this court's task. At times, she appears to complain about disparate [**20] treatment between appellants and respondents, and at other times she argues an equal protection violation has occurred because indigent litigants are being treated less favorably than wealthy ones. Petitioner does not discuss to what extent either of these pairs of classes is similarly situated, and she does not explain whether we should look for a rational basis or for something weightier when deciding whether rule 8.851's differentiation between misdemeanor defendants who have been convicted and those who have not passes constitutional muster. [*650]

CA(11) [↑] **(11)** We find the following passage from *Ross* particularly instructive: "Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. ***HN12*** [↑] The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' [citation], nor does it require the State to 'equalize economic conditions.' [Citation.] It does require that the state appellate system be 'free of unreasoned distinctions,' [citation], and that indigents have an adequate opportunity to present their claims [**21] fairly within the adversary system. [Citations.] The State cannot adopt procedures which leave an indigent defendant 'entirely cut off from any appeal at all,' by virtue of his indigency, [citation], or extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.' [Citation.] The question is not one of absolutes, but one of degrees." (*Ross, supra*, 417 U.S. at pp. 611-612, fn. omitted.)

In this case, limiting the right to appointed counsel in the appellate division to only those defendants who have been convicted

of a misdemeanor is not an "'unreasoned distinction[].'" (*Ross, supra*, 417 U.S. at p. 612.) As the previous discussion explains, appointed counsel does not become matter of right until a defendant faces uncounseled imprisonment.

We again emphasize that deciding whether to offer more than the Constitution requires with respect to the right to appointed counsel is a legislative act. (*Ross, supra*, 417 U.S. at p. 618 ["We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review."].) To our knowledge, the only way a litigant in the appellate division can be subjected to actual [**22] imprisonment is if he or she has been convicted of a misdemeanor. (See Pen. Code, §§ 19.6 [no imprisonment in infraction cases], 1466 [appellate division hears appeals in misdemeanor and infraction cases].) Limiting the right to appointed counsel on appeal in the appellate division to only those misdemeanor defendants who have suffered a conviction provides counsel to those with the best likelihood of having a clearly established right to it under the due process clause, while denying it to those who possess no such right. These two classes are therefore not "arguably indistinguishable." (*Ross*, at p. 609.)

This limitation also recognizes that the interest a convicted defendant seeks to protect on appeal is weightier than the interest of a party like Lopez, who faces no uncounseled imprisonment even if the appeal results in a reversal and the People resume prosecution. Rule 8.851 does not deprive Lopez of the right to appeal, and we have explained why the petition fails to show that the appeal in her case would be a "'meaningless ritual'" unless she is appointed [*651] counsel. (*Ross, supra*, 417 U.S. at p. 612.) It therefore appears to pass muster under the rules discussed herein.

In choosing to mount only a facial attack on rule 8.851, petitioner has not asked us to find that counsel is appropriate [**23] for Lopez, in particular, because of the unique facts of her case. While we note the petition mentions in passing that Lopez is not fluent in English, our information on this topic is scant. It is, in fact, limited to a statement in the petition that Lopez does "not have any legal training," "does not speak English," and, "other than being able to perform rudimentary tasks such as dating documents and printing her name, she does not read or write English." From this, petitioner asks us to conclude that, "If a stay is not granted [Lopez] will have no choice but to sit back and hope that the government's opening brief, which will be prepared by experienced government lawyers, will not be enough to persuade this court that

the lower court judgment should be reversed."

CA(12) [↑] **(12)** The record does not show that Lopez's appeal will be a "meaningless ritual" (*Douglas, supra*, 372 U.S. at p. 358) because of her difficulties with the English language. First, in a California appeal, unlike in the trial court, Lopez will reap the benefit of standards of review and other procedural tools that are designed to protect the ruling the trial court has already made.[6] For example, ***HN13*** [↑] "[a] judgment or order of a lower court is presumed correct. All intendments [**24] and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Hernandez v. Superior Court* (1992) 9 Cal.App.4th 1183, 1190 [12 Cal. Rptr. 2d 55].) Although an appellate court independently reviews whether the trial court properly applied the law regarding search and seizure under the Fourth Amendment, it still defers to any factual findings that are supported by [*652] substantial evidence. (*People v. Ayala* (2000) 24 Cal.4th 243, 279 [99 Cal. Rptr. 2d 532, 6 P.3d 193].) We assume our colleagues in the appellate division perform their official duty in accordance with these rules of law. (Evid. Code, § 664.) Petitioner has not addressed why safeguards such as these do not protect, or at least affect, the extent of her Fourteenth Amendment rights. (Cf. *Ross, supra*, 417 U.S. at p. 616 [noting "the nature of discretionary review in the Supreme Court of North Carolina" helped decrease the burden to an appellant seeking such review without counsel].)

Second, the record fails to support the suggestion that Lopez will be unable to file a brief at all, such that the appellate division will decide the People's appeal "based on its review of the

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[6] The petition cites what purport to be statistics showing that the reversal rate is unusually high when the People appeal from the granting of a suppression motion. Rather than statistics from which we can draw conclusions, however, what petitioner has provided is a list of cases and this statement in the unverified memorandum supporting the petition: "Since January 2010, the government has filed at least twenty-five appeals (including writ petitions) challenging the granting of a suppression motion." We do not know how many times the People have sought appellate review (if it was in fact more than 25), in what courts, and how and by whom these data were compiled. Because we have no statistics from which we can draw the comparative inferences petitioner suggests, we assign no evidentiary value to the figures on which the first few pages of the petition's supporting memorandum rely. In addition, even were the petition correct that reviewing courts often or even typically appoint counsel for respondents when the People appeal the granting of a suppression motion, we would find this fact irrelevant to the petition. (See *Ross, supra*, 417 U.S. at pp. 618-619 [encouraging states to offer more in the way of counsel than the federal Constitution requires and entrusting that decision to state legislative bodies].) In fact, rule 8.851 itself offers more than we conclude is required, since it requires appointment of counsel for defendants who have been convicted of misdemeanors but received sentences consisting of nothing but fines or serious collateral consequences instead of only offering appointed counsel to those misdemeanor defendants who have been sentenced to actual imprisonment. (Rule 8.851(a)(1)(A).)

Superior Court record … alone." "In contemporary urban society, the non-English speaking individual has access to a variety of sources for language assistance. Members of his family, friends or neighbors—born or schooled here—may [**25] provide aid. Private organizations also exist to aid immigrants." (*Jara v. Municipal Court* (1978) 21 Cal.3d 181, 184 [145 Cal. Rptr. 847, 578 P.2d 94].) Since the record contains so little detail about Lopez's language difficulties, the record does not support any claim that counsel must be appointed for Lopez, individually, because her status as a non-English speaker means the Fourteenth Amendment somehow requires that relief.

CA(13) [↑] **(13)** At oral argument, petitioner's counsel referred to three cases that had not been briefed. Despite counsel's announcing his intention to discuss these cases in two letters filed on May 15 and May 23, 2017, we are aware of no authority allowing a party to delay mention of cases that were in existence when the briefs were prepared. Even if it applies to a writ petition arising from a misdemeanor case,[7] ***HN14*** [↑] California Rules of Court, rule 8.254 only allows a party to bring to our attention "significant new authority, including new legislation, *that was not available in time to be included in the last brief that the party filed or could have filed.*" (Cal. Rules of Court, rule 8.254(a), italics added.) The three unbriefed cases on which petitioner wants to rely were published in 1992, 1998, and 2008. We are therefore not obligated to consider them.

CA(14) [↑] **(14)** Even if we do consider petitioner's three cases, which are *Claudio v. Scully* (2d Cir. 1992) 982 F.2d 798 (*Claudio*), *U.S. ex rel. Thomas v. O'Leary* (7th Cir. 1988) 856 F.2d 1011 (*O'Leary*), and *Commonwealth v. Goewey* (2008) 452 Mass. 399 [894 N.E.2d 1128] (*Goewey*), we find them unavailing. [**26] First, and as counsel acknowledged at oral argument, ***HN15*** [↑] "lower federal court decisions on federal questions are persuasive authority, but they are not [*653] binding on this court." (*Credit Managers Assn. of California v. Countrywide Home Loans, Inc.* (2006) 144 Cal.App.4th 590, 598 [50 Cal. Rptr. 3d 259].) We therefore need not follow *Claudio* or *O'Leary*. The same is true of *Goewey*, which is an out-of-state case. (See, e.g., *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 786 [11 Cal. Rptr. 3d 522] [out-of-state cases can be persuasive authority].)

Second, we find *Claudio*, *O'Leary*, and *Goewey* unpersuasive. *Claudio* and *O'Leary* are both easily distinguishable, as they involve

[7] California Rules of Court, rule 8.254 allows a party to submit a letter citing new authorities, but that rule appears to only apply to appeals. We see no analogous provision for writ petitions.

murder charges rather than misdemeanor charges, and as both defendants in those cases were actually sentenced to prison. (*Claudio, supra*, 982 F.2d at p. 800; *O'Leary, supra*, 856 F.2d at p. 1013.) *Goewey*, which involved an appeal from the pretrial granting of a suppression motion, is potentially more apt. However, the most the *Goewey* court offers us to explain why counsel must be afforded to pretrial respondents on appeal if counsel is afforded to pretrial appellants on appeal is that "the same general principles apply" to appellants and respondents on appeal. (*Goewey, supra*, 894 N.E.2d at p. 1132.) As we have now explained, the matter is much more complicated. *Goewey*'s superficial analysis does not affect our holding.

For the foregoing reasons, we reject petitioner's challenge to rule 8.851 under the Sixth and Fourteenth Amendments to the United States Constitution. While we agree that Lopez [**27] might fare better as the respondent on appeal to the appellate division if she had counsel, the petition has failed to show that appointment of counsel for Lopez or any other respondent on appeal is mandated by the Sixth or Fourteenth Amendments.

C. *The record does not support the contention that the appellate division is requiring petitioner to represent Lopez on appeal*

Petitioner's final contention is that the appellate division is forcing her to represent Lopez on appeal even though Government Code section 27706, which establishes a public defender's duties, allows for no such representation. The petition's prayer asks us to: "Issue a judgment declaring the San Bernardino County Superior Court may not appoint the Public Defender to represent indigent appellees in misdemeanor criminal appeals, or declare the Public Defender to remain appointed in cases where the Public Defender previously represented an indigent appellee in the Superior Court."

We decline to pass on this issue, as we see no proof that the appellate division is doing either of these things. First, we noted *ante* that the allegation that the appellate division still considers petitioner to represent Lopez came to us in the form of an e-mail from the deputy public defender [**28] who tried to arrange for appointment of counsel (other than petitioner) for Lopez. We are [*654] unclear how much evidentiary weight, if any, to assign to this e-mail, the contents of which are neither independently verified nor repeated in any other portion of the record. We note, however, that the e-mail itself is internally inconsistent, as it says both that "the Appellate Department's position is that [petitioner] is still counsel," and that petitioner "can represent M[s]. Lopez if they so choose, or petition the Fourth District for a writ." Even if we find evidentiary worth in this portion of the

record, we see in it no proof that the appellate division is denying petitioner the right to decide whether or not to represent Lopez on the People's appeal.

CA(15) [↑] **(15)** More fundamentally, the relief petitioner requests sounds more like a declaratory judgment than a writ of mandate. In fact, the cover page indicates petitioner's intent that we consider a "petition for writ of mandate *and declaratory relief*" (italics added), and, as noted *ante*, the prayer asks us to enter "*judgment*" declaring certain things (italics added). We may not do this on a mandamus petition asking us to review the propriety of a judicial [**29] order. Here, petitioner presents no evidence that the appellate division has exposed it to sanctions for failing to represent Lopez, refused to accept a brief from Lopez that was not prepared by petitioner's office, or otherwise given effect to the alleged statement by a court clerk that petitioner's office is still counsel of record. ***HN16*** [↑] "[W]e are asked to direct the trial court to perform an act which, on the record, it has never refused to perform. Ordinarily, mandate would not lie in such a situation." (*Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 98 [146 Cal. Rptr. 171].)[8]

DISPOSITION

The petition is denied.

McKinster, J., and Codrington, J., concurred.

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[8] While the appellate division denied a petition making the same argument petitioner makes here, it did so summarily, and may have done so because it has not, in fact, compelled petitioner to represent Lopez.