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Standards to Guarantee Effective Assistance to Counsel

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STANDARDS TO GUARANTEE EFFECTIVE ASSISTANCE OF COUNSEL

INTRODUCTION

The Constitution of the United States guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[1] *Gideon v. Wainwright*[2] held that the sixth amendment requirement of assistance of counsel was obligatory upon the states through the fourteenth amendment.[3]

The sixth amendment requirement of assistance of counsel is one of substance and not form. It cannot be satisfied by a pro forma or token appearance.[4] A defendant is entitled to "effective aid in the preparation and trial of the case."[5]

"Effective assistance of counsel" is as vague a concept as is "due process." What it means, and the standards by which it can be guaranteed have not been adequately defined by most courts. The purpose of this comment will be to compare the California cases, with some reference to federal cases where appropriate, to determine if the standards have been defined in a meaningful manner in California.

The approach will be to attempt to define "effective assistance of counsel" in terms of: (1) the standard set forth by the California Supreme Court in *People v. Ibarra;*[6] (2) inadequate time to prepare; (3) negligent use of preparation time; (4) lack of individual counsel; (5) denial of a motion to change counsel; (6) poor judgment and tactical error; and (7) the duties required of counsel on appeal.

IS AN EXACT DEFINITION POSSIBLE?

Obviously, effective assistance does not mean successful assistance,[7] for if it did every person convicted of crime could be said to

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[1] U.S. CONST. amend. VI.

[2] 372 U.S. 335 (1963).

[3] U.S. CONST. amend. XIV.

[4] Avery v. Alabama, 308 U.S. 444, 446 (1940); Holly v. Smyth, 280 F.2d 536, 542 (4th Cir. 1960).

[5] Powell v. Alabama, 287 U.S. 45, 71 (1932); *see* Reece v. Georgia, 350 U.S. 85, 90 (1955); Hawk v. Olsen, 326 U.S. 271, 274 (1945); Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962).

[6] 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

[7] *See* Mitchell v. United States, 259 F.2d 787, 789 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); People v. Nicolaus, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967).

have been denied his constitutional right to assistance of counsel. Nor, does it mean "errorless counsel." In *People v. Thompson*[8] the California court rejected defendant's contention that a denial of the effective assistance of counsel should be held to exist when it can be said that without the errors, omissions, or other adverse tactics of counsel, it is reasonably possible that a more advantageous result would have been obtained.

The problem is to define standards that are broad enough to cover many situations yet narrow enough to be meaningful. Because of the many complexities which face counsel in the conduct of any defense, it is evident that such standards must be pliant. Further, even when rules have been explicitly declared by the courts there has been a considerable amount of confusion in their application.

THE STANDARD OF *People v. Ibarra*

The leading California case is *People v. Ibarra*.[9] In *Ibarra* the defendant was charged with possession of narcotics, and he claimed that the heroin involved was not in his possession. He asserted that his constitutional right to the effective aid of counsel in the preparation and trial of his case was denied, since it appeared his counsel was unaware of the rule allowing a defendant to challenge the legality of a search and seizure even though defendant denies possession of the seized article and asserts no proprietary interest in the premises which are entered. As a result, counsel failed to object to the introduction into evidence of the heroin alleged to have been in the possession of the defendant. In defining "effective assistance of counsel" and what constitutes a denial of "effective assistance" the California Supreme Court said:

> To justify relief on this ground, "an extreme case must be disclosed." . . . It must appear that counsel's lack of diligence or competence reduced the trial to a "farce or a sham." . . . It is counsel's duty to investigate carefully all defenses of fact and of law that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled.[10]

The court held that counsel's failure to research the applicable law prevented him from exercising his judgment and clearly deprived the defendant of a determination of what was the better of the two defenses available to him; his trial was thereby reduced to a farce and a sham.

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[8] 252 A.C.A. 76, 60 Cal. Rptr. 203 (1967).
[9] 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).
[10] *Id.* at 464, 386 P.2d at 490, 34 Cal. Rptr. at 866.

The following sections will explore the application of the "farce or sham" test of *Ibarra*, and related cases, in an attempt to determine the elements of effective assistance of counsel.

INADEQUATE TIME TO PREPARE

Implicit in the concept of adequate representation is the principle that counsel must have adequate time to prepare his case for trial. California has long held that adequate time to prepare a proper defense is essential.[11] In *People v. Avilez*,[12] counsel was criticized for failure to devote more time to the protection of his client's interests even though the defendant wanted to plead guilty. In that case the taking of pleas commenced immediately after the appointment of counsel. The court said that it is counsel's duty to investigate carefully all defenses which may be available to the defendant and confer with him about them before he allows the defendant to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty.[13]

The question arises as to how much time is *adequate time*. It is impossible to set an arbitrary figure as to the amount of time necessary to prepare a defense, since in any given fact situation the amount of time needed may vary. Most of the cases in which the problem has arisen involve situations in which there was very little time to prepare by any standard. For example, in *In re Van Brunt*[14] about one minute elapsed between the appointment of counsel and the defendant's guilty plea. However, since it appeared from the facts that counsel had conferred with the defendant four days prior to the arraignment, the court held that the mere fact that the plea came immediately after the appointment was irrelevant. Even though the defendant's interviews with counsel were brief, the facts of guilt were obvious, and the court decided the defendant's plea was the result of a deliberate and preconceived decision.

A contrary result was reached in *Fields v. Peyton*.[15] There, the defendant Fields escaped from custody while serving a sentence. He was apprehended within an hour and taken to the county jail, where he remained for thirteen days, until the day of his trial. He was indicted for the escape and for statutory burglary, allegedly committed while he was at large. When Fields came into court, an

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11 People v. Manchetti, 29 Cal. 2d 452, 175 P.2d 533 (1946); People v. McGarvy, 61 Cal. App. 2d 557, 142 P.2d 92 (1943).

12 86 Cal. App. 2d 289, 194 P.2d 829 (1948).

13 *Id.* at 296, 194 P.2d at 834.

14 242 Cal. App. 2d 96, 51 Cal. Rptr. 136 (1966).

15 375 F.2d 624 (4th Cir. 1967).

attorney was appointed to represent him. Fields conferred with the appointed counsel for a few minutes in the rear of the courtroom while court was in session and then entered a general plea of guilty. Sentence was passed no more than fifteen to thirty minutes after appointment of counsel. The only mention of the burglary in the record was a reference to defendant's burglary of a "cabin," without any mention of the necessary elements of statutory burglary in that state. There was nothing in the record to indicate that counsel questioned the defendant about the facts surrounding the burglary.

The Court of Appeals for the Fourth Circuit held that the lack of due process implicit in sentencing within such a short time after appointment of counsel required invalidation of the sentence and a granting of habeas corpus.[16]

The reasoning of the court was based upon language in *Twiford v. Peyton*[17] to the effect that: (a) the appointment of counsel in a felony case so close to trial that the lawyer does not have a reasonable opportunity to investigate and prepare is inherently prejudicial; (b) a mere showing of such a late appointment establishes a prima facie case of denial of effective assistance of counsel; and (c) the burden of proving lack of prejudice is shifted to the state.[18]

In California, if counsel feels that he has not had sufficient time to prepare his case he may request a continuance. A continuance may not be denied if to do so would deprive defense counsel of a reasonably adequate time to prepare.[19]

Thus it is apparent that a definite amount of time cannot be stated as the amount needed to insure adequate preparation. Although the holding of *In re Van Brunt*[20] does not preclude a ruling similar to the holding of *Fields* and *Twiford*, the general rule in California is that the defendant has the burden of demonstrating ineffective assistance of counsel.[21] It is suggested that the holding of *Fields* and *Twiford* is a better rule, and that if the proper case arises the California courts should adopt it.

Negligent Use of Preparation Time

A closely related problem arises when there is obviously sufficient time to prepare and counsel fails to use it. A case frequently

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16 *Id.* at 628-29.

17 372 F.2d 670 (4th Cir. 1967).

18 *Id.* at 673.

19 Cal. Penal Code § 1009 (West 1956); *see* People v. Murphy, 59 Cal. 2d 818, 825, 382 P.2d 346, 351, 31 Cal. Rptr. 306, 311 (1963); People v. Sarozzawski, 27 Cal. 2d 7, 17, 161 P.2d 934, 939 (1945).

20 242 Cal. App. 2d 96, 51 Cal. Rptr. 136 (1966).

21 *See* People v. Reeves, 64 Cal. 2d 766, 774, 415 P.2d 35, 39, 51 Cal. Rptr. 691, 695 (1955).

cited by the courts is *Brubaker v. Dickson*[22] in which there were three months to prepare. The defendant was charged with first-degree murder in a California state court and was initially advised to plead guilty. During the three months between arraignment and trial, the defendant's counsel conferred with him on only three occasions for a total of about one hour. Two of the conferences were devoted largely to matters other than the client's defense.

The defendant contended that through lack of investigation and preparation his appointed counsel failed to discover and present the defense of lack of specific intent; that counsel inexcusably failed to discover and present evidence in mitigation of the sentence, although substantial evidence existed.

It appeared that trial counsel was aware of the defendant's history of head injury and extended unconsciousness. He was also aware of the heavy drinking that took place on the night of the homicide. Notwithstanding this knowledge, he made no effort to extract his client's personal history and made no inquiries of his family, friends or employers, even though defendant furnished him the names. Further, he did not arrange a private examination of defendant by an independent psychiatrist,[23] because he thought such communications would not be privileged.[24] Defendant had made several requests for an attorney and was refused until after he confessed; his counsel was aware of this but did not pursue the matter.

Defendant's trial counsel had assumed from the beginning that a first-degree conviction would result, but made no preparation for the penalty hearing.[25] Even though the state offered evidence in aggravation of the penalty, the defense offered none in mitigation because, as counsel for defendant stated, he was unaware that any was available.[26]

The court said: "The defense actually tendered was so insubstantial in relation to those not offered as to cast doubt upon the hypothesis that trial counsel made a deliberate and informed choice."[27] The court held that the omissions alleged by defendant

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[22] 310 F.2d 30 (9th Cir. 1962).

[23] Funds were available for that purpose. *Id.* at 35.

[24] *Id. In re Ochse*, 38 Cal. 2d 230, 238 P.2d 561 (1951), was cited as establishing that under California law such communications are within the attorney-client privilege and as such are privileged.

[25] CAL. PENAL CODE § 190.1 (West Supp. 1966) provides that: "Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty."

[26] 310 F.2d 30, 36 (9th Cir. 1962).

[27] *Id.* at 38.

did not amount to mistakes or errors by counsel in the conduct of the trial, but, if correct, they constituted a complete failure to present the cause of the defendant in any fundamental respect, and did not amount to the fair trial contemplated by the due process clause.[28]

Brubaker is an outstanding example of a complete lack of preparation notwithstanding adequate time to prepare. The law does not, however, require such an extreme situation before relief will be granted.[29]

It is thus apparent that if the defendant can demonstrate that his counsel had adequate time to prepare his case but failed to do so, relief will be granted on the basis of a denial of the constitutional right to effective assistance of counsel. A principle limitation, however, seems to be that the defendant is not in a position to complain where he, in bad faith, was responsible for the situation which hampered his attorney.[30] This is a valid limitation; if the rule were otherwise, it would merely encourage such tactics on the part of defendants who knew they had little chance of acquittal.

Right of Co-defendants to Separate Counsel

One of the continuing problems in this area involves the situation where two defendants are represented by the same appointed counsel during the trial. The problem is whether one attorney can adequately and effectively defend both defendants.

The right to separate counsel is not available in every case where only one attorney is appointed to represent more than one defendant.[31] However, if failure to provide separate counsel will prejudice a defendant's position, the appointment of separate counsel is constitutionally compelled.[32] Generally, the cases require that there be a conflict of interest between the defendants before a second counsel will be appointed. These conflicts of interest can arise when, to aid one defendant, the credibility of another must be attacked;[33] when one defendant does not have a record of prior

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[28] *Id.* at 39; *see* Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945).

[29] *See* People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

[30] People v. Adamson, 34 Cal. 2d 320, 332, 210 P.2d 13, 19 (1949); People v. Shaw, 46 Cal. App. 2d 768, 117 P.2d 34 (1941).

[31] United States v. Bentvena, 319 F.2d 916, 937 (2d Cir. 1963); People v. Ingle, 53 Cal. 2d 407, 348 P.2d 577, 2 Cal. Rptr. 14 (1960); People v. Odom, 236 Cal. App. 2d 876, 46 Cal. Rptr. 453 (1965); People v. Byrd, 228 Cal. App. 2d 646, 39 Cal. Rptr. 644 (1964).

[32] People v. Douglas, 61 Cal. 2d 430, 392 P.2d 964, 38 Cal. Rptr. 884 (1964).

[33] People v. Kerfoot, 184 Cal. App. 2d 622, 7 Cal. Rptr. 674 (1960).

felony convictions and the other does[34] or when appointed counsel feels a conflict may exist.[35]

Another awkward situation can arise when it appears that the case against one of the defendants is very strong and the case against the other defendant is weak. There are two possible tacks which counsel may follow—both of which are inadequate. One course of action is to refrain from making certain arguments in favor of the defendant in the better position for fear of harming the defendant in the weaker position. If this approach is followed, the result is a denial of the effective assistance of counsel for the defendant in the stronger position.[36] Another approach, followed in *People v. Keesee*,[37] is for counsel to compare the weakness of the case against the one defendant with the strength of the case against the other.[38] The result may shatter any possibility of an acquittal for one of the defendants.[39] The result may very well be the same if separate attorneys are appointed, since counsel representing one defendant would not be able to prevent the counsel representing the other from comparing the relative strengths and weaknesses of the case. At least the appointment of separate counsel eliminates the problem of forcing an attorney to point out these facts for the benefit of one client, at the expense of the other.

Moreover, the question of effectiveness of counsel is one that, by its nature, must be answered in retrospect. Procedural rules requiring such an issue to be raised at the trial level in order to be heard on appeal[40] are unrealistic.[41] First, they tend to ignore the fact that, at the trial level, the defense is within the control of the very counsel whose ineffectiveness gives rise to the appeal.[42] Second, they impute a knowledge of law to the defendant which common sense and experience show is not warranted[43] since such a defendant usually does not know whether his attorney is adequately conducting

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[34] People v. Douglas, 61 Cal. 2d 430, 392 P.2d 964, 38 Cal. Rptr. 884 (1964).

[35] *Id.*

[36] People v. Donohoe, 200 Cal. App. 2d 17, 19 Cal. Rptr. 454 (1962).

[37] 250 A.C.A. 901, 58 Cal. Rptr. 780 (1967).

[38] *Id.* at 903, 58 Cal. Rptr. at 781; ". . . *The case that is made out, if any is made out, is to Keesee,* not as to McLeod. . . ."

[39] "To hear Keesee's own counsel—now speaking for McLeod—comparing the weakness of the case against McLeod with the strength of the evidence against Keesee shattered any prospect of an acquittal." *Id.* at 904, 58 Cal. Rptr. at 782.

[40] People v. Monk, 56 Cal. 2d 288, 299, 363 P.2d 865, 870, 14 Cal. Rptr. 633, 638 (1961); People v. Prado, 190 Cal. App. 2d 374, 12 Cal. Rptr. 141 (1961); People v. Comstock, 147 Cal. App. 2d 287, 299, 305 P.2d 228, 236 (1956); People v. Hood, 141 Cal. App. 2d 585, 589-90, 297 P.2d 52, 55 (1956).

[41] People v. Keesee, 250 A.C.A. 901, 905, 58 Cal. Rptr. 780, 783 (1967).

[42] *See In re* Atchley, 48 Cal. 2d 408, 310 P.2d 15 (1957); People v. Logan, 137 Cal. App. 2d 331, 290 P.2d 11 (1955).

[43] 250 A.C.A. at 906, 58 Cal. Rptr. at 783.

the defense. Finally, since the question of prejudice must await the verdict, there is no certain way to assess the degree of conflict of interest until the appeal.

Since the real problem is predicting whether separate counsel are needed to prevent prejudice,[44] it would seem to be sound practice to appoint separate attorneys in all cases where a defendant has made a proper and timely request.[45] It has been recognized that "[a] refusal . . . becomes a time bomb ticking away in every case which may explode long after the verdict has become history."[46] Failure to appoint separate counsel upon timely request is to risk deprivation of the basic constitutional guarantees of the sixth amendment. As the United States Supreme Court stated in *Glasser v. United States*:[47]

> Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness. . . . The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.[48]

This language is limited to a great extent by the fact that in *Glasser* there was a showing of a conflict, and subsequent cases have interpreted the holding of the case as being limited to situations in which a conflict does exist or may possibly exist.[49] It is submitted that the language of the Supreme Court may have greater import when applied to conditions which exist today than it did when applied to the circumstances which existed twenty-five years ago. No valid reason appears which would justify risking the denial of a constitutional right for the sake of the convenience of having one counsel represent two defendants. The situation probably does not occur often enough to deny separate counsel on the ground that it would greatly overburden the judicial machinery. Since an increase in the burden did not prevent the United States Supreme Court from holding that indigents must be provided with counsel,[50] it would not seem to be controlling here.

The right to the "effective assistance of counsel" is as basic as the "right to counsel"; the terms are equivalent. In view of the ex-

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44 People v. Odom, 236 Cal. App. 2d 876, 879-80, 46 Cal. Rptr. 453, 455 (1965).

45 *Id.*

46 *Id.* at 880, 46 Cal. Rptr. at 455. Yet, in this case it was found that appointment of separate counsel was not necessary since the usual prejudices were not present.

47 315 U.S. 60 (1942).

48 *Id.* at 75-76.

49 United States v. Bentvena, 319 F.2d 916, 937 (2d Cir. 1963).

50 Gideon v. Wainwright, 372 U.S. 335 (1963).

panding protection given defendants in the continuing process of refinement of the elements vital to a fair trial, it is submitted that a better approach to the problem would be for the judge to appoint separate counsel whenever he deemed it desirable and to require appointment whenever a request was made by the defendant. The latter suggestion would insure equal protection of the laws by allowing the indigent defendant the same right to separate counsel as a wealthy one, even without cause.[51]

Denial Of a Motion To Change Counsel

An indigent defendant does not have a right to the appointment of a particular attorney.[52] During trial, a defendant may be granted a continuance if he has either retained private counsel or asserted an intention to retain private counsel.[53] However, he is neither entitled to the appointment of private counsel nor entitled to appointment of another public counsel without showing some reason why the aid given by his present appointed counsel is ineffective.[54]

However, it is not incumbent upon the attorney to conduct the trial according to the whims of the defendant.[55] It has been unsuccessfully argued that if the defendant were rich and the attorney refused to follow his instructions, he could discharge the attorney and retain another.[56] In that case the court pointed out that the ability of a wealthy defendant to change attorneys "like shirts" if they refuse to follow instructions, is not necessarily an advantage, and until the contrary is shown, the court will continue to believe that a member of the legal profession is better able to conduct a defense than his lay client.[57]

When a legitimate difference of opinion develops between appointed counsel and his client as to a basic trial tactic, the client has a right to the appointment of another counsel.[58] In *People v. Moss*[59] the public defender refused to call an individual the defendant considered to be a key alibi witness. The court held that in this situa-

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[51] *Cf.* Douglas v. California, 372 U.S. 353 (1963).

[52] People v. Massie, 66 A.C. 937, 948, 428 P.2d 869, 877, 59 Cal. Rptr. 733, 741 (1967).

[53] People v. Byoune, 65 Cal. 2d 345, 420 P.2d 221, 54 Cal. Rptr. 749 (1966); People v. Crovedi, 65 Cal. 2d 199, 417 P.2d 868, 53 Cal. Rptr. 284 (1966).

[54] People v. Massie, 66 A.C. at 948, 428 P.2d at 877, 59 Cal. Rptr. at 741.

[55] People v. Mattson, 51 Cal. 2d 777, 793, 336 P.2d 937, 949 (1959); *In re* Atchley, 48 Cal. 2d 408, 418-19, 310 P.2d 15, 22 (1957).

[56] People v. Nailor, 240 Cal. App. 2d 489, 494, 49 Cal. Rptr. 616, 620 (1966).

[57] *Id.*

[58] People v. Moss, 253 A.C.A. 294, 297, 61 Cal. Rptr. 107, 110 (1967).

[59] *Id.*

tion the defendant was entitled to a reasonable continuance in order to change attorneys and obtain the representation he is guaranteed under the Constitution.[60]

The rationale of these cases is sound. If an attorney was forced to follow the whims of the defendant the trial could be reduced to a "farce or a sham" just as easily as if he failed to present a legitimate defense. Yet, if there is disagreement over a basic point it is possible that the defendant could be correct. By allowing him to change attorneys and follow the course which he desires, at least he would have the opportunity of presenting his views to the trier of fact.

Poor Judgment and Tactical Error

It is in the area of trial tactics and mistakes in judgment that it is particularly difficult to establish definite standards as to what amounts to effective assistance of counsel. The basic rule is that if counsel is aware of the law but makes a mistake in judgment there is no basis for a reversal.[61]

In *People v. Pineda*[62] the court held that the failure of defendant's counsel to question proceedings leading to the issuance and execution of a search warrant and his failure to object to the introduction of evidence obtained as a result of the search, because of his belief that the state law on search warrants as of the date of the trial afforded no defense, constituted merely a mistake of judgment and did not deprive the defendant of effective assistance of counsel. The court said that there was a distinction between requiring general knowledge of the established principles of law and requiring particular knowledge of each relevant case in which those principles have been applied.[63] It was held that it was a matter of judgment as to the factual sufficiency of the allegations in the affidavit for the search warrant.[64]

The holding of the California Supreme Court in *Ibarra* was not that failure of counsel to object to the introduction of evidence is in itself an indication that counsel lacks the skill and diligence that

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60 *Id.* at 297-300, 61 Cal. Rptr. at 110-11.

61 *In re* Rose, 62 Cal. 2d 384, 398 P.2d 428, 42 Cal. Rptr. 236 (1965); People v. Linden, 52 Cal. 2d 1, 338 P.2d 397 (1959); People v. Tillman, 238 Cal. App. 2d 134, 47 Cal. Rptr. 614 (1965).

62 253 A.C.A. 515, 62 Cal. Rptr. 144 (1967).

63 *Id.* at 544, 62 Cal. Rptr. at 163.

64 *Id.* at 543, 62 Cal. Rptr. at 162-63. Although this case had the indicia of a lack of preparation case, the court indicated that the facts did not support a conclusion that there was a lack of preparation.

are required for the proper exercise of his obligations to his client.[65] It is only when it can be shown that the failure to object was due to lack of knowledge that it will be indicative of a lack of skill and diligence. Subsequent decisions have adhered to the standard that an attorney's failure to object, or his consent to informality in the introduction of evidence does not mean that he is incompetent.[66]

Unless the trial is reduced to a farce or sham, counsel may waive his client's rights as to matters of trial tactics, and usually he does not have to inform his client that he is waiving a particular right for him.[67] In *People v. Reeves*[68] it was not improper for counsel to waive advising of defendant's rights under the insanity plea, since defendant had just stated in open court that they had been fully explained to him and he had understood them. It was also proper to offer to stipulate that the insanity issue would be submitted on the basis of medical reports, and since there was undisputed evidence that the killing occurred in the perpetration of a robbery, to stipulate that the murder was of the first degree as a matter of law.[69]

Even if the defendant's counsel does not present a particular defense, this will not amount to reversible error where counsel discusses the tactical decision with his client and the client accepts it.[70] This position is not sound because the defendant may not always be able to determine whether a defense is substantial and therefore, cannot intelligently agree to drop it.

It is also proper for counsel to recommend that the defendant plead guilty if the case against him is very strong. In such a case it is not unreasonable for the defendant and his counsel to choose to admit the facts and throw the defendant upon the mercy of the court; the fact that such strategy was unsuccessful on a particular occasion is no ground for concluding that the attorney who suggested it is incompetent.[71] This is not inconsistent with the position of the preceding paragraph because if the facts of guilt are obvious, the

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[65] 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 683 (1963); People v. Garrison, 246 Cal. App. 2d 343, 356, 54 Cal. Rptr. 731, 739 (1966).

[66] People v. Reeves, 64 Cal. 2d 766, 415 P.2d 35, 51 Cal. Rptr. 691 (1966); People v. Robinson, 62 Cal. 2d 889, 402 P.2d 834, 44 Cal. Rptr. 762 (1965).

[67] People v. Hill, 67 A.C. 100, 110, 429 P.2d 586, 592-93, 60 Cal. Rptr. 234, 240-41 (1967).

[68] 64 Cal. 2d at 773, 415 P.2d at 39, 51 Cal. Rptr. at 695.

[69] *Id.*

[70] People v. Trombino, 253 A.C.A. 727, 732, 61 Cal. Rptr. 634, 638 (1967) (dictum).

[71] People v. Reeves, 64 Cal. 2d 766, 773, 415 P.2d 35, 39, 51 Cal. Rptr. 691, 695 (1966); People v. Robillard, 55 Cal. 2d 88, 96, 358 P.2d 295, 299, 10 Cal. Rptr. 167, 171 (1960); *see* People v. Massie, 66 A.C. 937, 428 P.2d 869, 59 Cal. Rptr. 733 (1967).

defendant is in a position to know his guilt and the consequences of a guilty plea.

The rationale behind the decisions in the cases discussed above is accurately summarized in *People v. Brooks*:[72]

> In the heat of a trial, defendant's counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. Except in rare cases an appellate court should not attempt to second-guess trial counsel.[73]

The California Supreme Court said in *People v. Reeves*: "Defendant has the burden, moreover, of establishing his allegation of inadequate representation 'not as a matter of speculation but as a demonstrable reality.' "[74]

This is a sound philosophy since if it were otherwise the appellate courts would be flooded with unfounded claims of tactical errors. The defendant would have every reason to misrepresent his dealings and relations with his counsel because he would have nothing to lose. *People v. Ibarra* could become a catch-all defense, unchallengeable by the prosecution, so long as the defendant is willing to make such misrepresentations.[75]

This position is not inconsistent with the suggested requirement of having the prosecution prove that late appointment of counsel was not prejudicial.[76] Late appointment of counsel should raise a rebuttable presumption of ineffective assistance of counsel. Once the presumption arises, the burden of proof should shift to the prosecution. However, where a defendant demonstrates an error in tactics, a presumption should not arise, and the burden of proof should remain with the defendant.

The Duties Required Of Counsel On Appeal

Recently, there have been substantial and important changes in the standards applied to insure effective assistance of counsel to indigents upon appeal. In *Anders v. California*,[77] decided in May 1967, the United States Supreme Court defined the extent of an appointed appellate counsel's duty to prosecute a first appeal from a criminal conviction after he has conscientiously determined that there is no merit to the appeal.

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72 64 Cal. 2d 130, 410 P.2d 383, 48 Cal. Rptr. 879 (1966).
73 *Id.* at 140, 410 P.2d at 389-90, 48 Cal. Rptr. at 885-86.
74 64 Cal. 2d at 774, 415 P.2d at 39, 51 Cal. Rptr. at 695.
75 People v. Cuevas, 250 A.C.A. 1046, 1052-53, 59 Cal. Rptr. 6, 11 (1967).
76 See note 20, *supra*, and accompanying text.
77 386 U.S. 738 (1967).

The California Supreme Court had held in *In re Nash*[78] that the requirements of *Douglas v. California*[79] were met when: (a) appointed counsel studied the record; (b) he consulted with his client and his trial counsel and conscientiously decided, and so advised the appellate court by letter, that there were no valid grounds of appeal; and (c) the appellate court was satisfied from its review of the record, in light of any points personally raised by the defendant, that the counsel's conclusion was correct. The appeal could then proceed without the appointment of another attorney, and a decision was then reached without argument.

In *Anders*, the United States Supreme Court held unconstitutional the no-merit letter procedure which had been set forth in *In re Nash*. The Court concluded that the no-merit letter procedure unconstitutionally conditioned an indigent's right of appeal. The Court said that beginning with *Griffin v. Illinois*[80] through *Douglas v. California* it had consistently voided those procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . is forced to shift for himself."[81]

According to *Anders*, the role of counsel must be that of an advocate rather than as amicus curiae.[82] The no-merit letter and subsequent procedure resulting from submission of the letter to the court did not meet the constitutional requirement of substantial equality and fair process which can be obtained only when counsel is an active advocate in behalf of his client.[83]

The validity of the reasoning of the Court is vividly demonstrated in *Anders*. In his *pro se* brief, filed in 1959, Anders failed to raise the issue that both the judge and the prosecutor had commented to the jury regarding his failure to take the stand—a procedure which the United States Supreme Court invalidated in *Griffin v. California*.[84]

In *People v. Feggans*[85] the California Supreme Court, in response to *Anders*, set forth the following procedures which an ap-

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[78] 61 Cal. 2d 491, 393 P.2d 405, 39 Cal. Rptr. 205 (1964).

[79] *Douglas v. California*, 372 U.S. 353 (1963), held that when an indigent defendant has a right to appeal, counsel must be appointed to represent him.

[80] 351 U.S. 12 (1956).

[81] 386 U.S. 738, 741 (1967).

[82] *Id.*

[83] *Id.* at 744.

[84] 380 U.S. 609 (1965).

[85] 67 A.C. 447, ——— P.2d ———, ——— Cal. Rptr. ——— (1967).

pointed counsel must follow when representing an indigent upon appeal:

1. Counsel must prepare a brief to assist the court in understanding the facts and the legal issues in the case.
2. The brief must set forth a statement of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authority, and argue all issues that are arguable.
3. Counsel serves both the court and his client by advocating changes in the law if argument can be made supporting the change.
4. If counsel concludes that there are no arguable issues and the appeal is frivolous, he may limit his brief to a statement of the facts and applicable law and may ask to withdraw from the case, but he must not argue the case against his client.
5. Counsel is not allowed to withdraw from the case until the court is satisfied that he has discharged his duty to the court and his client to set forth adequately the facts and issues involved.
6. If counsel is allowed to withdraw, defendant must be given an opportunity to present a brief, and thereafter the court must decide for itself whether the appeal is frivolous.
7. If any contention raised is reasonably arguable, no matter how the court feels it will probably be resolved, the court must appoint another counsel to argue the case.[86]

It should be noted that the brief should argue *all* issues that are arguable. This would seem to require counsel to include those issues which he feels are of little value as well as those he considers substantial. The opportunity of counsel to exercise judgment is correspondingly reduced.

One possible criticism of the ruling in *Anders* and of the rules set forth above, which was raised in the dissent in *Anders*, is that if there were any possible arguable issues present in the record, counsel would not have filed a no-merit letter in the first place.[87] However, the idea that every attorney is capable of recognizing the issues which the appellate courts may consider important is disputable.

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[86] *Id.* at 450, ——— P.2d at ———, ——— Cal. Rptr. at ———.

[87] 386 U.S. 738, 746 (1967).

Anders and *Feggans* represent one more step in the attempt to establish the indigent's right to fully enjoy the guarantees of the United States Constitution.

Conclusion

In the area of adequate time to prepare, when it is shown that counsel was appointed shortly before trial, the courts should require the prosecution to show that the defendant was not prejudiced. If the state fails to show lack of prejudice, the conviction should be reversed notwithstanding the failure of the defendant to show that he was prejudiced by the late appointment.

If the defendant's position is prejudiced by his attorney's negligent use of adequate preparation time, relief will be granted. The burden of demonstrating prejudice is upon the defendant. This position is sound because it should be presumed that the attorney used the time properly.

Further, since the trend of the law is to establish stringent standards in order to guarantee the right to effective assistance of counsel, in any case where there are multiple defendants being tried, the court should, on its own motion, appoint separate counsel for every defendant if it considers such action advisable. Also, the court should be required to appoint separate counsel whenever a request is made by the defendant. Such a procedure will help insure the defendant's right to "effective assistance of counsel" without necessitating an inquiry into the possiblity of prejudice prior to trial.

In the area of tactics and judgment by trial counsel, the courts permit a great degree of latitude before they hold that assistance was in fact ineffective. It does not seem practical to even attempt to construct a definite standard beyond that set forth in *People v. Ibarra*. Almost every case presents a different problem, in a different setting and, consequently, must be decided upon its own facts.

The standards prescribed in *Feggans* appear to solve most of the problems of inadequate representation of indigents on appeal. However, it is difficult to determine whether these new standards will eliminate the problem.

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