Development of Standards for Determining Effectiveness of Appellate Counsel in California

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DEVELOPMENT OF STANDARDS FOR DETERMINING EFFECTIVENESS OF APPELLATE COUNSEL IN CALIFORNIA

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... [T]he... layman has small and sometimes no skill in the science of law.... He requires the guiding hand of counsel at every step of the proceedings against him.1

... hat duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid [of counsel] in the preparation and trial of the case.2

The suggestion of Justice Sutherland in Powell v. Alabama that the “effective aid” of counsel is essential to a complete criminal defense is widely recognized as the earliest judicial pronouncement on competent counsel.3 Since that decision, many states have sought to ensure the competency of counsel at every stage of criminal prosecution—including appeal.4

The leading California case on the right to the effective aid of counsel at trial is People v. Ibarra,5 decided by the supreme court in 1963. Although the standards laid down in Ibarra were not specific, subsequent decisions6 have expanded these standards and have delineated with greater precision the guidelines to be employed by the courts in determining whether the criminal defendant has been denied his constitutional right to effective aid of counsel at the trial stage of the proceedings.

Recently, in the decisions of In re Smith,7 In re Greenfield,8 and

2. Id. at 71 (emphasis added).
3. For examples of more recent pronouncements see Maye v. Pescor, 162 F.2d 641 (8th Cir. 1947); People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).
6. See text accompanying notes 7-49 infra.
7. 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970).
In re Banks,9 the California courts have attempted to establish qualitative standards for determining whether an indigent defendant has received effective assistance of counsel on appeal as well. In these cases, the courts have taken an unprecedented step in asserting supervisory control over counsel.

This note will analyze these decisions in terms of the court imposed standards for effective counsel both at trial and on appeal and will consider how these standards have been applied by the courts, and may be applied in the future. It should be noted at the outset that the courts, in judging effectiveness of counsel on appeal, have stated that they will apply the judicially imposed standards for determining effectiveness of counsel at the trial.10 Therefore, this note will begin with an analysis of the standards for trial counsel developed by the courts thus far.

Development of Standards for Determining Effectiveness of Trial Counsel

In the leading California case, People v. Ibarra,11 the defendant was charged with possession of narcotics. The defendant claimed that he did not have the narcotics in his possession at the time of his arrest; nevertheless, he was convicted. On appeal, the defendant asserted that his constitutional right to the effective aid of counsel had been denied because counsel had failed to object to the introduction into evidence of the narcotics alleged to have been in defendant's possession. The California Supreme Court found that the evidence had been obtained through an illegal search and seizure, and that counsel's express statement in the trial record12 that objection could not be made to the search and seizure procedures clearly indicated that the defendant had been denied effective counsel at the trial. The court concluded that counsel was apparently unaware of the rule allowing a defendant to challenge the legality of a search and seizure even though such defendant also denies possession of the seized article and asserts

9. 4 Cal. 3d 337, 482 P.2d 215, 93 Cal. Rptr. 591 (1971).
10. See text accompanying notes 65-88 infra.
12. "Following the testimony on the search and seizure, the trial court asked defense counsel if he wished to object to the admission of the heroin. Defense counsel replied, 'Well, your honor, in view of the testimony from the defendant that the object in People's Exhibit WK-1 [the heroin] was not in his possession and was not taken from him, under such circumstances I could not make a motion to object to its introduction. So far as I know I would have no grounds since defendant has denied this was in his possession or taken from him.' The court again inquired, 'I take it therefore that there is no objection offered?" Counsel replied in the negative and the court admitted the heroin into evidence. Id. at 463-64, 386 P.2d at 490, 34 Cal. Rptr. at 866.
The court explained that counsel's apparent lack of knowledge regarding constitutional requirements for a valid search and seizure resulted in the defendant's loss of a "crucial" defense. The court was apparently influenced by the fact that the defendant had only one real defense at trial—the illegal search and seizure of the heroin—and this defense had been lost due to counsel's incompetence. The court held that since this was a "crucial" defense, the defendant had been denied his right to effective counsel.

The concept of ineffectiveness of counsel has been a troublesome one for the courts, since the very term "effectiveness" has made the formulation of black letter rules difficult. The court in *Ibarra*, however, enunciated the following requirements in an attempt to delineate when the aid of counsel could be deemed ineffective. First, it must appear from the case as a whole that counsel's lack of diligence or competence reduced the trial to a "farce or sham."14 Second, "an extreme case" must be shown.15 Third, it must be shown that counsel had failed in his duty to investigate all defenses of law and of fact that may have been available to the defendant, and as a result a "crucial defense" had been denied the defendant.16 Fourth, it must be shown that counsel's failure to raise a crucial defense was not due to trial strategy, but represented instead a "default of knowledge" which reasonable inquiry would have produced.17 Finally, it must appear that there had not been a mere mistake in judgment by counsel in his failure to raise a crucial defense. Of course, these requirements—employing such terminology as "crucial defense," "faulty judgment," "reasonable inquiry," "extreme case," and "farce or sham"—are obviously no more subject to precise definition than is "effective assistance" of counsel. Thus, though *Ibarra* may have solidified the basic elements to be utilized in determining effectiveness of counsel at trial, the impreciseness of the court's terminology perpetuates the very evil which they sought to eliminate—the nebulous nature of the determination in any given factual situation.

Although the very nature of the subject makes hard-and-fast factual delineations of standards for trial counsel impractical, certain recurring factual situations appear in the cases which question the effectiveness of counsel. For purposes of discussion, cases falling within

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14. 60 Cal. 2d at 464, 386 P.2d at 490, 34 Cal. Rptr. at 866.
15. *Id.*
16. *Id.*
17. *Id.* at 465, 386 P.2d at 490, 34 Cal. Rptr. at 866.
four general categories will be analyzed in terms of actions or omissions by trial counsel. This analysis will attempt to isolate the underlying reasoning utilized by the courts in interpreting and applying the *Ibarra* standards for determining the effectiveness of counsel in the trial proceeding. These four general categories involve counsel's (1) faulty advice on pleas; (2) failure to object to illegal searches and seizures; (3) failure to raise the defenses of insanity and diminished capacity; and (4) improper or faulty calling and questioning of witnesses.

**Faulty Advice on Pleas**

A defendant in a criminal prosecution has a right to assistance of counsel throughout the preliminary hearings as well as the trial proceedings. Thus, effectiveness of counsel may be brought into question not only during the actual trial, but also during the pleading stages of the proceedings. For a convicted defendant to obtain reversal on the basis of ineffective assistance during the pleading stage, he must allege and prove that counsel lacked specific knowledge of the law and/or facts in the case. This must be proved either by a clear indication in the trial record or a specific finding of fact by a court-appointed referee. The burden of the defendant in meeting this requirement is well illustrated by a brief comparison of the cases of *In re Hawley* and *In re Williams*.

In *Hawley*, counsel had extensive evidence of the defendant's insanity but advised the defendant to plead guilty without raising the insanity issue. Although acknowledging the substantial amount of evidence tending to show that defendant was insane, and the high possibility of success counsel might have had in so proving, the appellate court nevertheless refused to find counsel ineffective. The reason given by the court was that the defendant had failed to allege and prove that counsel lacked knowledge of the law regarding the defense of insanity, and the court thus considered counsel's failure to raise the insanity defense a matter of trial tactics. Generally, in cases where the courts find that counsel did not lack knowledge either of law or fact, counsel's

20. See text accompanying notes 26-34 infra.
22. 67 Cal. 2d 824, 433 P.2d 919, 63 Cal. Rptr. 831 (1967).
actions, however erroneous, have been attributed to "trial tactics" or "mistakes of judgment."\footnote{25}

In Williams, on the other hand, the appellate court had appointed a referee to take evidence and make findings of fact as to trial counsel's actions. The referee determined as a matter of fact that in a plea bargain in which two other charges were to be dismissed, counsel had erroneously advised the defendant to plead guilty to a charge of which he could not otherwise have been convicted in a trial on the merits. The essential finding by the referee relied upon by the court was that counsel, without making any investigation of the facts or law of the case, had advised the defendant to plead guilty. The court concluded, therefore, that counsel lacked knowledge of the law and facts relevant to the case and was thus ineffective. The significant aspect of this case is the acceptance by the court of the referee's finding of fact as conclusive evidence that the defendant had been denied the effective aid of counsel. However, even though the defendant has proved counsel's lack of knowledge as to the law and/or facts, he still must show that counsel's actions were "crucial" in the case. Of course, since most of the cases which are appealed on the basis of counsel's advice to plead guilty admittedly involve a "crucial" action, ipso facto, this additional requirement has been of relatively little significance in this type of case and the courts only infrequently discuss it. The sole distinction between Williams and Hawley, therefore, appears to have been the referee's finding, as a matter of fact, that counsel lacked knowledge of the law of the case.

Failure to Object to Illegal Search and Seizure

Another category of cases which appear to be treated in a manner similar to the plea advisement cases by the court are cases involving search and seizure issues. The defendant attempting to prove inefficaciousness of counsel in cases involving counsel's failure to object to the introduction of evidence obtained through an illegal search and seizure also must allege and prove that counsel lacked knowledge of law or facts.\footnote{26} So far, this burden has been sustained in search and seizure

\footnote{25} See text accompanying notes 52-61 infra. Courts have similarly treated cases involving motions for mistrial and plea advice cases. While there are several important cases, none have involved express findings of fact by a referee, and none have involved clearcut statements by counsel indicating failure to investigate relevant facts or law. None of these cases have, therefore, resulted in a determination that defendant has been deprived of his right to effective counsel. E.g., People v. Savala, 2 Cal. App. 3d 415, 82 Cal. Rptr. 647 (1969); People v. Scott, 270 Cal. App. 2d 773, 76 Cal. Rptr. 117 (1969); People v. Crowder, 257 Cal. App. 2d 564, 64 Cal. Rptr. 913 (1967).

\footnote{26} People v. Gallegos, 4 Cal. 3d 242, 481 P.2d 237, 93 Cal. Rptr. 229 (1971); In re Teran, 65 Cal. 2d 523, 421 P.2d 107, 55 Cal. Rptr. 259 (1966), cert. denied,
cases only when counsel's statement in the trial record showed conclusively that he lacked certain knowledge as, for example, in *Ibarra*. As previously noted, in that case counsel's failure to object to the introduction of illegally seized evidence was explained by counsel in a statement for the record to support his action and clearly showed counsel's erroneous reliance on a case which was not even in point.27

In a similar case, *People v. Coffman,*28 counsel had failed to object to evidence obtained in a search conducted by, and on the authority of, a parole agent whose primary function was parole administration and not law enforcement. Counsel specifically stated to the judge that he could not object because the search was sanctioned by a prior California case.29 The appellate court noted that this clearly indicated counsel had misread the case and concluded on the basis of the trial record that defendant had not received effective aid of counsel due to counsel's failure to "investigate carefully all defenses of fact and of law" involved in the case.30

In another case, however, *People v. Pineda*,31 the court indicated that a distinction must be drawn between general knowledge of established principles and specific knowledge of particular case precedents. In *Pineda* counsel filed an affidavit with the court stating that he had examined the search warrant, and that based on his knowledge of the law of California at the time, he was of the opinion that the warrant and affidavit were legally sufficient and that no ground existed on which to challenge its validity. The warrant, however, was subsequently determined to be invalid.32 The appellate court indicated that the crucial question in the case was whether counsel's affidavit indicated a "lack of preparation and general competence." The court held that there is a distinction between requiring general knowledge of established principles and requiring particular knowledge of each prece-
dent in which those general principles have been applied to a given factual situation. The court further stated that in order for the defendant to prove the incompetency of counsel at trial, the defendant had to prove that his attorney was unaware of the constitutional prohibitions on searches and seizures [the court cited the Fourth Amendment and corresponding sections of the California Constitution] and the general provisions of laws governing the issuance of search warrants [the court specifically cited California Penal Code sections 1523-29].

Since the defendant was unable to show that counsel was unaware of these general provisions, the court determined that the defense counsel's action was merely a "mistake in judgment," and denied relief. The test formulated by the court in Pineda—proof that the attorney is unaware of the applicable provisions of the state and federal constitutions and a few general statutes—if applied literally, would of course result in few cases finding "ineffective" counsel. The court in Pineda, however, had apparently attempted to utilize some type of "reasonable attorney" standard in determining lack of knowledge by counsel; this, in turn, then becomes a question of whether, in the opinion of the judge, an attorney should have recognized a legal problem in a given fact situation. Of course, a "reasonable" attorney standard is no more subject to precise definition than "effective" attorney standards.

As in the plea advisement cases, the defendant must not only prove lack of knowledge by counsel, he must also show that this resulted in the loss of a "crucial" defense, a particularly difficult burden in search and seizure cases. Courts have repeatedly held that if the evidence would have been admissible on some other basis, failure to object to its introduction does not indicate that counsel is ineffective. Frequently, evidence is obtained under circumstances involving an invalid search warrant; however, the admissibility of such evidence is unaffected because outside factors would have authorized the search without a warrant. Beyond a set of circumstances where such outside

33. 253 Cal. App. 2d at 471, 62 Cal. Rptr. at 163.
34. Id. at 469, 62 Cal. Rptr. at 161.
factors are absent, it is difficult to determine what would be deemed to constitute a "crucial" defense.

In People v. Coffman\(^3\) the court attempted to set out a test for determining "crucialness" in cases admitting illegally obtained evidence. The court stated that the failure to object to illegally seized evidence became crucial if, in view of the other evidence in the case, it converted a "reasonable possibility" of receiving a verdict of guilty to a "virtual certainty." Of course, the criteria utilized by a court to decide when a "reasonable possibility" is converted into a "virtual certainty" would appear as difficult and vague as the definition of "crucial" itself. The test enunciated in Coffman does, however, follow the underlying theme voiced in Ibarra—to be a "crucial defense," the issue need not be one that will necessarily result in reversal. Probably the only ascertainable standard to be derived from this test is that harmless error, as defined by prior decisional law, will not be sufficient to deem counsel ineffective.

**Failure to Raise the Defenses of Insanity and Diminished Capacity**

In the cases involving failure to introduce evidence of insanity or diminished capacity, the defendant's burden of proof for convincing the court that counsel was ineffective appears to have been slightly relaxed. In People v. Welborn,\(^3\) a prosecution for first degree murder, counsel argued the issue of insanity at the special sanity hearing but failed to present extensive evidence\(^4\) available to him to establish defendant's diminished capacity at the guilt phase of the trial. While there was no specific statement in the transcript to indicate counsel's lack of knowledge as to the law regarding diminished capacity, the court found that the combined effect of counsel's waiver of argument on defendant's mental state, his stipulation that the case be submitted on the transcript of the preliminary hearing—which did not contain any information regarding several psychiatric reports—and counsel's failure to object to denial of the motion for new trial all indicated a basic lack of knowledge on the part of counsel which warranted a determination that counsel was ineffective.\(^4\) The court made its determination of "ineffec-

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40. The available evidence included psychiatric reports of three doctors indicating conclusively defendant's lack of capacity to understand the nature of his actions. See id. at 517 n.1, 65 Cal. Rptr. at 11 n.1.
41. "[D]efense counsel's failure to raise the defense of diminished capacity was the result of ignorance of the law, not trial tactics. Even without defense evidence, the prosecution's case concerning defendant's mental state at the time of the shooting was open to argument. Defense counsel waived argument. The psychiatric reports available to counsel before the trial began pointed to the strong possibility of an abnormal
tiveness" in this case without requiring the production of conclusive proof as to counsel's lack of knowledge required in the other cases discussed above. Also, the court appeared to require less proof on the issue of crucialness, since the sole basis of the court's determination that the defense was crucial was that the prosecution's proof of premeditation, deliberateness, and malice aforethought was weak.

In another case, People v. McDowell, which also involved counsel's failure to raise the insanity defense at trial, the lack of knowledge issue was satisfied by the apparent belief by counsel that since the introduction of evidence regarding the defendant's diminished capacity had been admitted at the sanity hearing, such evidence could not be introduced at the defendant's subsequent trial. The court apparently reached its conclusion that the defendant had been denied a crucial defense on the same basis as the court in Welborn—that the prosecution's proof of the elements of the murder charge was weak.

Welborn and McDowell appear to be the only two California cases in which the court determined that counsel had been ineffective because of his failure to raise issues of insanity. Since both cases involved prosecutions for first degree murder, the underlying reason for the court's determination regarding crucialness and lack of knowledge may have been the severity of the result to the defendant of any laxity on the part of counsel and thus the degree of proof required of the defendant to establish such laxity, both on the issues of knowledge and crucialness, was substantially relaxed. It may be question-
able whether the gravity of the penalties involved in particular criminal cases should affect the degree of proof required to establish ineffectiveness of counsel; however, at least in these two cases this may have been an important determinant for the court.

There have been a number of insanity cases in which counsel's effectiveness was unsuccessfully challenged by defendant. Most of these decisions rest on the defendant's failure to prove lack of knowledge on the part of counsel, or the strong possibility that counsel's omission was simply a matter of trial strategy. For example, in two cases, In re Hawley and People v. Saidi-Tabatabai, counsel had advised the defendants to plead guilty in exchange for a recommendation of life imprisonment, even though in both cases there was strong evidence of the defendants' insanity. In both decisions the court held that trial strategy was involved. In these decisions, the court apparently utilized the same strict standards as in the plea advice decisions discussed above—defendant must specifically prove that counsel lacked knowledge of the law and/or facts.

Other sanity cases have involved failure of counsel to introduce specific evidence on the issue of insanity; however, none of these decisions, to date, have held counsel ineffective. The defendants in these cases were unable to prove counsel's lack of knowledge—clearly a difficult task in an area so closely interrelated with considerations of trial strategy. Other cases in which lack of knowledge of counsel has been shown, usually through specific statements by counsel in the record, have been held not to have involved "crucial" defenses.

**Failure to Call and Question Witnesses**

Cases involving counsel's effectiveness in eliciting and using testimony of witnesses have arisen quite frequently. This is an area in which "trial strategy" has traditionally been an almost total bar to a claim of ineffective aid of counsel. To date, there has been only one case in which witness evidence has led to a finding of ineffectiveness. In People v. Wheeler, which involved a prosecution for assault with a...
deadly weapon, counsel agreed to a stipulation that the case was to be submitted on the record of the preliminary hearing, subject to the right to call additional witnesses. At trial, however, counsel called no witnesses, failed to cross examine prosecution witnesses, and, over the defendant's vigorous protests, failed to allow the defendant to testify. The appellate court, relying on defendant's statements after pronouncement of the verdict, determined that there was a complete failure of communication between the defendant and counsel. The court explained that counsel's failure to offer any of the several available defenses, and the failure to call any witnesses at all, indicated counsel's basic lack of knowledge due to a failure to investigate the facts or the law involved in the case. The additional issue of whether the defendant had been denied a crucial defense was not discussed by the court, apparently on the theory that failure to raise any defense at all, without agreement or discussion with the client, was itself omission of a "crucial defense." The very extreme facts in Wheeler indicate the difficulties in proving counsel's ineffectiveness insofar as the witness' testimony is concerned. Many cases have arisen due to counsel's failure to call or question witnesses, but no other case has held counsel "ineffective." The failure to call specific witnesses has been the most frequently litigated issue, but in no such case has the defendant been able to overcome the court's determination that "trial strategy" was involved. Also, the failure to call subpoenaed witnesses, and to locate possible witnesses have been litigated, but with similar results.

53. The trial court pronounced the verdict, finding defendant guilty of assault with a deadly weapon. The appellate court included in its opinion a record of the ensuing interchange: "THE DEFENDANT: You mean I have been tried? THE COURT: Certainly. You just got tried and were found guilty. . . . THE DEFENDANT: Wait a minute. I haven't said a word. THE COURT: Take him out of here. THE DEFENDANT: What is this? THE COURT: Wait a minute. Come here. This case was submitted on the transcript by your counsel. At the last hearing it was submitted on the transcript of the testimony taken at the preliminary hearing and I have read the transcript, and on the basis of the testimony there I found you guilty, so you have had a trial. What are you complaining about? THE DEFENDANT: I haven't said a word. THE COURT: You don't have to say a word. Your counsel didn't put you on. You don't have to say anything. THE DEFENDANT: What did I pay him for? THE COURT: I don't know. Take him out." Id. at 525-26, 67 Cal. Rptr. at 248-49.


In the case of *People v. Durham*, counsel's failure to call any witnesses at the penalty phase of the criminal proceeding was not deemed "ineffective" without a further showing by the defendant that specific witnesses would have been "crucial." The same result was reached in *People v. Hill*, in which the court said that in a criminal case, to sustain a claim of inadequate representation based on counsel's failure to call witnesses, there must be a showing that the testimony of the omitted witness was "material, necessary and admissible." Until subsequent decisions further explain the determination of a witness's testimony as "material and necessary," more concrete definitions of effectiveness of counsel regarding this issue cannot be made.

In the related area of counsel's failure to raise objections to the testimony of witnesses, similar difficulties exist. A general statement was made by the court in *People v. Davis* to the effect that counsel's choice of making objections is inherently a matter of trial tactics, not ordinarily reviewable on appeal, and a failure to object does not necessarily indicate incompetence of counsel.

**Summary of Trial Standards**

The evidence necessary to prove to the court that counsel lacked knowledge of the law and/or facts, and that such lack of knowledge resulted in the loss of a crucial defense to the defendant at his trial, clearly varies with the factual situation in each particular case. In the plea advice cases, proof of counsel's lack of knowledge of the facts and/or law requires a showing in the record of what amounts to a direct statement by counsel of his ignorance. Whether such ignorance, if proven, resulted in the loss of a crucial defense to the defendant is seldom disputed since the defendant has generally plead guilty in these cases.

Proof of counsel's lack of knowledge is somewhat more difficult in the cases dealing with illegal searches and seizures. Not only must an express statement of counsel be contained in the record, but under the *Pineda* rule such statement must conclusively indicate a lack of knowledge by counsel of general constitutional and statutory provisions, and

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59. *Id.* at 690, 452 P.2d at 335, 76 Cal. Rptr. at 231.
ignorance of specific applications of these provisions is not necessarily enough to deem counsel ineffective. In addition, even if counsel's lack of knowledge be proven, proof of crucialness is extremely difficult due to the strong possibility that trial tactics were involved in counsel's actions.

When the omitted defense is insanity or diminished capacity, and the case involves a capital offense, the burden to be borne by defendant seems to have been considerably relaxed by the court, apparently due to the severity of the punishment involved. However, in most cases involving this defense the court appears to find counsel's omission a matter of trial tactics.

When witness evidence is involved, current decisions indicate an almost insurmountable burden to be overcome by defendant in proving ineffectiveness. And while this is the most frequently litigated area, there was only one case—no witnesses were called and no other defenses were raised—in which the court found counsel ineffective.

Policy Considerations Underlying the Court's Reasoning

The strict requirements of proof which have been imposed by the court and a pronounced willingness to utilize broad discretion in determining crucialness, both of which have been clearly displayed in decisions thus far, indicate a limited likelihood of success for defendant's contention that his counsel has been ineffective. The underlying reasons for the strict requirements imposed by the courts in proving ineffective assistance of counsel are basic. It would appear that the appellate courts fear the familiar "floodgate" problem. Perhaps less strenuous requirements for proving ineffectiveness would result in the appellate courts being flooded with unfounded claims of tactical errors. The convicted defendant would have every reason to misrepresent his dealings and relations with counsel because he would have nothing to lose. *Ibarra* would become a catch-all defense, not subject to challenge by the prosecution, and difficult to refute if defendant should be willing to misrepresent his dealings with counsel.

This fear by the court may not be completely unfounded. There is a high incidence of indigency among those accused of crime re-

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62. It should be noted that in the ninety-seven cases analyzed during preparation of this article, only eight were successful in their allegation that defendant had been denied his right to the effective assistance of counsel.

63. Professor Kamisar has brought together several sources which indicate that, depending on the jurisdiction involved, from 30% to 60% of those charged with crime are financially unable to retain counsel. Kamisar, *The Right to Counsel and The Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CH. L. REV. 1, 5 n.21 (1962), citing E. BROWNEll, LEGAL AID IN THE UNITED STATES 83 (1951); SPECIAL COMM. TO STUDY DEFENDER SYSTEMS, BAR ASS'N OF THE CITY OF NEW YORK, EQUAL JUSTICE FOR THE ACCUSED 80, 134-35 (1959); Kennedy,
quiring large numbers of court appointed counsel, whose competency may be more easily challenged by the defendant who "had no choice." This, combined with the prevalence of jailhouse lawyers, makes the use of lenient standards impractical. A potential flood of claims is clearly one to be avoided, and the court appears to work within the premise that less strict standards would result in larger numbers of conviction reversals on appeal on the basis of ineffective counsel. This could of course result in a serious undermining of the public confidence in attorneys practicing before the bar. On the other hand, the nebulous quality of the current "standards" may in many ways be the most practical approach by the courts to an admittedly difficult problem. The court may apply such standards to the facts of a particular case when it is readily apparent that there has been a miscarriage of justice by an important denial of constitutional protections, and at the same time the court may also dispose of meritless claims without having to distinguish among a more detailed set of rules. The fact that the standards have heretofore become operative only where the inadequacy of representation approaches extremes may discourage claims where representation has been essentially adequate. Conversely, the present vague standards may actually spur attorneys representing indigents to greater efforts, resulting in more effective representation.

**Effectiveness of Appointed Appellate Counsel**

Once the rights of indigents to counsel was established and general standards for such counsel at trial set out, it was inevitable that the California courts would turn to the establishment of practicable standards for determining the effectiveness of appointive appellate counsel as well. Three recent California decisions which have attempted to develop these appellate standards will be discussed below.

**In re Smith**

*In re Smith* was the first expression of California's nascent standards for appointive appellate counsel. The defendant was convicted of the rape of victim A, the attempted kidnapping of victim B, and the kid-

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64. "It is well known that the drafting of petitions of habeas corpus has become a game in many penal institutions." Diggs v. Welch, 148 F.2d 667, 669-70 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).

napping of victim C. The attorney appointed to represent him on appeal filed an opening brief consisting of a twenty-page recitation of the facts and a one-page argument. The argument consisted solely of the claim that the defendant was entitled to reversal of his conviction because the state had failed to expressly prove that he was not married to victim A, the young lady he had been convicted of raping. Counsel raised no objections relative to the other two convictions. The court noted that in view of the fact that the defendant had testified at trial that he was single, that the victim had testified that she had never had sexual intercourse prior to the rape, and that both prosecution and defense counsel repeatedly referred to the victim as "Miss," counsel's argument regarding defendant's possible marriage to the victim was clearly frivolous.

The court went on to discuss several specific defenses that should have been raised by counsel at defendant's trial. The court especially noted that defense counsel had failed to object to the lineup identification procedure utilized in convicting defendant of kidnapping C. The court recounted that on the night of the alleged incident C was taken to the police station and the defendant was exhibited to her in a room occupied only by C and a police officer. C was asked if the defendant was the man who had attacked her, and she responded affirmatively. Immediately thereafter defendant was placed in a lineup and C again identified him as the assailant. The court noted that recent cases involving similar one-man show ups rendered this procedure an obvious ground of error, and concluded that although factual issues were involved in the determination of whether the "one-man show up" method was required by exigent circumstances and whether it affected the subsequent lineup identification, objection to this procedure should certainly have been raised by defendant's counsel. In addition, the court found that the evidence at trial was conflicting since C had told the police prior to the lineup that her assailant was a Negro approximately twenty or twenty-two years old, about five feet six inches tall, and weighing 150 pounds. In fact, the defendant was six feet tall and weighed 180 pounds, and the court concluded that counsel's failure to raise this conflict in C's identification was highly prejudicial to the defendant.

The court also found that the defendant's conviction for the attempted kidnapping of victim B was subject to plausible arguments of error. Defendant's alleged encounter with B took place after she had parked and locked her automobile. A man stopped B to ask directions, and then grabbed her arm, brandished a screwdriver and ordered her to unlock the door on the driver's side of her car. B in-

dicated that since she was too frightened to unlock the door, she had given her purse to the assailant. While the man searched for the keys another car pulled alongside and in the confusion B was able to escape. The court noted that it was at least arguable that defendant's alleged conduct in regard to B exhibited neither the intent nor the action (preparation v. perpetration) requisite to a conviction of attempted kidnapping. The only direct evidence of the assailant's intent was his statement, paraphrased by B as follows: [after ordering her to unlock the door on the driver's side] "that we were going in my car." The court reasoned that such a statement standing alone was not an unequivocal expression of an intent to abduct B, and that even though the victim had been forced to enter the car another explanation, as plausible as kidnapping, was the inference that defendant intended to rape his victim inside her car without driving it away, or that he intended to rob her or steal her car. Furthermore, defendant's actions to accomplish his criminal purpose arguably did not reach a stage of development beyond mere preparation. Counsel had raised none of these contentions at trial or on appeal.

Another possible ground of error noted by the court was the victim's in-court identification of the defendant, since B was unable or unwilling to positively identify the defendant in the lineup, but later did identify him at trial. B explained this by saying that she had been given a "refresher" prior to trial, and since the defendant was in court, he must have been the assailant. The explanations given by the victim for the positive in-court identification of defendant—a "refresher" and the fact that he was "here" on trial—were found very questionable by the court, and appellate counsel was found remiss in failing to discuss the credibility of the victim's identification of the defendant and the sufficiency of the evidence in general.

The court then reviewed the only aspect of the case to which appellate counsel gave any attention in his brief—the conviction of defendant for the kidnapping and rape of A. Unfortunately, the lone issue counsel chose to raise on appeal—the possibility that the defendant and victim were married—was so perceptibly weak that it probably would have been better overlooked according to the court.

The court noted several other assignments of error that arguably might have justified a reversal of the rape conviction. The rape victim had identified defendant at a lineup and again at the trial. The court cited two aspects of the lineup procedure which should have been discussed on appeal: first A had testified that immediately before the lineup she was shown a small number of photographs, one of which resembled defendant. She had not been able to identify...
any of the suspects pictured; however, she did state that none of the pictures resembled any of the other men in the lineup. The court concluded that counsel could have argued that the photographs were used to "prime" the victim to pick out the defendant in the subsequent lineup; a display of photographs to a witness immediately before a lineup was clearly improper because of the attendant danger of undue suggestion to the witness. The court also noted a second possible deficiency in the lineup procedure in that A testified on cross-examination that only the defendant, among the four persons in the police lineup, approximated her description of the assailant. The court cited the case of People v. Douglas,68 decided a few months prior to the trial, which had held that this type of lineup procedure was a violation of due process requirements under the Constitution.

On the basis of its review of the record of the case, the California Supreme Court found assignments of error that might arguably have justified a reversal, and with the defendant's allegations set forth in the writ of habeas corpus, counsel had failed to render the thoughtful assistance to which the defendant was entitled.69 Of significance was the fact that the defendant was not required to show that he was entitled to reversal on the merits in order to show the prejudicial effect of ineffective counsel. The court briefly reviewed Anders v. California70 and People v. Feggans71 and then proceeded to apply the standards enunciated in People v. Ibarra,72 explaining that:

[In Ibarra] we did not indicate that the "crucial defense" withdrawn by defendant's incompetent trial counsel would have resulted in a verdict for defendant or even in suppression of the evidence seized by the police. Rather, we held that "[c]ounsel's failure to object precluded resolution of the crucial factual issues supporting defendant's primary defense." [Citation omitted.] The defense was crucial because it arguably might have produced a verdict for defendant, not because it would have inevitably achieved a favorable result.73

The court specifically limited its decision in Smith to the inexcusable failure of defendant's appellate counsel to raise crucial assignments of error that arguably might have resulted in a reversal, and stated:

We do not suggest that failure of appellate counsel in a future case to raise . . . specific potential assignments of error . . . will establish that the appellant was denied effective assistance of counsel. Future cases must be decided on their own facts, and the determination of each will depend on whether the appellant's

69. 3 Cal. 3d at 202, 474 P.2d at 975, 90 Cal. Rptr. at 7.
70. 386 U.S. 738 (1967).
71. 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967).
72. See text accompanying notes 11-17 supra.
73. 3 Cal. 3d at 202, 474 P.2d at 975, 90 Cal. Rptr. at 7.
counsel failed to raise assignments of error which were crucial in the context of the particular circumstances at hand. Nor do we decide in the instant case whether failure to raise any one of the several assignments of error overlooked by appellate counsel would have indicated ineffective assistance; we hold only that failure to raise all of them constituted such indicium.\(^{74}\)

Of primary significance is the court's adoption of the *Ibarra* trial standards\(^{75}\) for determining competency of counsel on appeal.

**In re Greenfield**

Following the *Smith* ruling by the California Supreme Court, the court of appeal decided *In re Greenfield*,\(^{76}\) which again raised the question of competence of appellate counsel. The facts of this case are briefly set out below.

In December 1966 defendant was convicted of second degree burglary\(^{77}\) and receiving stolen goods.\(^{78}\) The conviction was affirmed by the court of appeal;\(^{79}\) a rehearing was denied, and the supreme court denied a petition for hearing. In September 1970, while defendant was an inmate at Folsom State Prison, the court of appeal held a hearing on a writ of habeas corpus filed by the defendant in which were alleged certain constitutional infirmities in the defendant's conviction attributed to ineffective representation of counsel.

In the trial proceedings, defendant's trial counsel, a deputy public defender, moved that the superior court set aside the third count, a credit card violation, on the ground that defendant had not actually succeeded in obtaining the merchandise, and "that there was no corpus [delicti] established." The deputy district attorney conceded the merits of the motion. Asked by the trial court whether an order setting aside the third count would be proper, the district attorney responded in the affirmative, and the order was then made.

At the hearing on defendant's writ of habeas corpus, the court of appeal noted that both attorneys, as well as the superior court, were apparently unaware that Penal Code section 484a(b)(6) proscribed attempts to secure merchandise as well as completed acts, and that the third count should have been amended, not set aside. By setting aside the third count, the trial court had inadvertently removed from the case the only charge whose validity was beyond question. The court of appeal noted that petitioner's trial counsel thus had an excellent chance of establishing invalidity of the charge of receiving stolen

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74. *Id.* at 203, 474 P.2d at 975, 90 Cal. Rptr. at 7.
75. See text accompanying notes 11-61 supra.
78. *Id.* § 496.
credit cards and at least an arguable case for nullifying the burglary count as well. Yet, at no time during the trial court proceedings had defendant's counsel attacked the validity of those charges, and the defendant had been found guilty on both counts. The court of appeals further noted that in the initial appeal of the case, another attorney had been appointed to represent the defendant, and even though two supreme court cases had arisen between trial and the initial appeal which lent support to the invalidity of defendant's conviction on the remaining charges, the appellate counsel had failed to raise this ground of error. The court of appeals thus concluded that defendant had been denied the effective assistance of counsel—both at trial and on appeal. The reversal of the conviction on the basis of performance of trial counsel is so nearly identical to the case of *In re Williams*,\(^8^0\) discussed above,\(^8^1\) that further analysis would not be worthwhile. The court's comments regarding appellate counsel do, however, warrant some consideration.

The basic thrust of *Greenfield* was that counsel must serve as an advocate and raise all issues before the court that are "crucial" under the circumstances. The court noted that in criminal cases the California courts have long recognized that when, through ignorance or omission, defense counsel causes the loss of a crucial defense in the trial court, there has been a denial of the constitutional right to counsel which infects the conviction with fundamental unfairness and requires its reversal.\(^8^2\) Therefore, the court reasoned, when incompetent or inadequate representation by appointed counsel causes the loss of a crucial defense *on appeal*, a similar result must follow since the state is constitutionally obliged to furnish counsel whose advocacy will permit full consideration and resolution of the crucial issues.\(^8^3\)

**In re Banks**

A third case involving competency of appellate counsel was recently decided by the California Supreme Court, *In re Banks*.\(^8^4\) In that case defendant was convicted on two counts of robbery and one count of attempted robbery. The defendant conducted his own defense at trial but after he was convicted requested that counsel be ap-

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80. 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969).
81. See text accompanying notes 25-26 supra.
84. 4 Cal. 3d 337, 482 P.2d 215, 93 Cal. Rptr. 591 (1971). The defendant had a long history of appeals to the United States Supreme Court, but as the prior appearances are only of marginal interest they are omitted from this discussion.
pointed to represent him on appeal. Counsel was appointed but through numerous extensions delayed filing a brief for fifteen months. Even then counsel filed a short (twenty-one page) brief with only one page devoted to argument. The conviction was affirmed by the court of appeals. The defendant, through his own efforts, brought the case before the California Supreme Court and obtained a reversal of the decision against him; the case was remanded for retrial and the same counsel was appointed by the court to represent the defendant at his second trial. The defendant requested that the court appoint different counsel, and the court refused. The defendant's counsel failed to submit any brief, make any motion, or appear to argue the case, nor did he make any explanation for these omissions. On retrial, the defendant was again convicted. Through his own efforts, the defendant sought further relief and again the case was remanded for retrial. The defendant again requested appointment of other counsel for the retrial, and was again refused. Defendant's appointed counsel again failed to aid defendant in his case in any way, and the conviction was affirmed a second time. The defendant then filed a writ of habeas corpus with the California Supreme Court and alleged, among other errors, that he had been denied effective assistance of counsel on appeal. This writ was granted, the conviction reversed, and the case remanded to the superior court for trial.

The supreme court's opinion of the brief filed on the first appeal is made clear by the following comments:

The brief mentions only two cases. One point raised demonstrated complete ignorance of when the information was filed and when the trial commenced. The strongest ground for claiming error in the trial record, given the state of the law in early 1964, related to denial of counsel at trial. Yet \textit{Gideon v. Wainwright} . . . is nowhere mentioned in counsel's brief. Although making a number of additional claims of error, counsel nowhere marshalled the evidence to show that such claimed errors would be prejudicial in view of the record as a whole. The most obvious conclusion to be drawn from reading the brief is that counsel gave it no thought whatsoever, but instead retyped suggestions submitted to him by petitioner, a layman.\textsuperscript{86}

The court, in addition, noted counsel's total inaction in the two ensuing appeals.

In granting the writ, the court acknowledged that although a defendant's right to appointed counsel does not include the right to require the court to appoint any specific counsel; a defendant is entitled to relief where the record clearly shows that the first counsel appointed

\textsuperscript{85} The other alleged errors were denial of counsel at trial, improper lineup procedure, and use of defendant's silence as an adoptive admission.

\textsuperscript{86} 4 Cal. 3d at 340-41, 482 P.2d at 217, 93 Cal. Rptr. at 593.
to him is not adequately representing him. The court felt that the failure of defendant's attorney to argue at any time any of the specific issues on the two remands made it clear that the defendant lacked effective assistance of counsel. The court explained:

Here, as in In re Smith . . . "petitioner would have fared better had his attorney withdrawn in favor of a pro se brief from petitioner, . . ." In effect, petitioner was not represented by counsel and was thus clearly denied his right to assistance of counsel.

**Conclusion**

The three recent cases involving appointive appellate counsel were clearly extreme situations. The court in each case purported to adopt the Ibarra trial standards for determining whether the defendant had been denied the right to effective assistance of counsel. The only apparent modification of the trial standards indicated by the court were those due to the nature of appellate review, such as the change in terminology from "crucial defense" to "crucial assignments of error, which arguably might have resulted in a reversal." In Smith and Banks the court emphasized that for there to be an arguable ground of error, it was not essential that the issue result in reversals; this, of course, is the same standard utilized in determining the effect of the omission of a "crucial" defense at trial.

The unanswered question is whether the courts will continue to apply standards similar to those used at trial to determine effectiveness of counsel on appeal. The three decisions on effectiveness of appellate counsel discussed above—the only three cases thus far which have attempted to deal with the issue—have involved such extreme circumstances as to represent almost a complete denial of counsel and can really not be said to have established any standard. The court in each of the cases alluded to the extreme factual situation presented and noted that the defendant was, in effect, not represented by counsel at all.

88. 4 Cal. 3d at 343, 482 P.2d at 219, 93 Cal. Rptr. at 595.
89. See In re Smith, 3 Cal. 3d 192, 202-03, 474 P.2d 969, 975, 90 Cal. Rptr. 1, 7 (1970).
90. See the discussion on trial standards in text accompanying notes 11-61 supra.
The extreme factual situations in the three cases precludes any accurate formulation of standards for effectiveness of counsel on appeal, and also limits any analogy with trial situations to determine whether the California courts are attempting to apply trial standards to the appellate area. If the extreme factual situations in *Banks*, *Greenfield*, and *Smith* truly represent what will be deemed necessary to prove ineffectiveness of appointive appellate counsel, it is doubtful that very much incompetency of counsel will be established with any frequency in the immediate future.

It is more likely, however, that future litigation in the area will allow formulation of more definitive standards similar to those in the trial area discussed above. Quite possibly appellate standards will be made more rigorous by the court for the same reasons that trial standards, as noted above, are strictly applied—a balancing of the rights of indigents to effective representation, with the fear of a flood of litigation and the undermining of confidence in the California judicial system. At present, however, any formulation of standards for appointive appellate counsel, or conclusions as to whether trial standards have, in fact, been applied to the appellate level is not warranted. The severity of the facts in the three cases decided to date, combined with the less strict standards indicated by the purported adoption of trial standards, indicates that further litigation will be necessary to clarify any court imposed standards for appellate counsel. Clearly this will occur, for the very nature of the judicial system is to weigh and balance problems of the present so that the law may be changed, expanded, and, hopefully, improved as warranted.

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