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APPELLATE INEFFECTIVE ASSISTANCE OF COUNSEL

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INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: Spotting It, Litigating It & Avoiding It Yourself

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I. THE RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A criminal defendant has a federal constitutional right to effective assistance of counsel on his first appeal as of right. *Evitt v. Lucey* (1985) 469 U.S. 387. Unlike effective assistance of trial counsel, which arises from the Sixth Amendment's express right to "counsel," the entitlement to effective assistance of appellate counsel derives from the due process clause of the Fourteenth Amendment (or, for federal criminal defendants, from the parallel clause of the Fifth Amendment). Due process and equal protection principles also entitle an indigent defendant to appointment of counsel on direct appeal (*Douglas v. California* (1963) 372 U.S. 353) and to free provision of whatever transcripts are necessary to appellate review (*Griffin v. Illinois* (1956) 351 U.S. 12).

Limitation to first appeal of right: The federal constitutional right of an indigent defendant to appointment of counsel on appeal and of any defendant to effective assistance of counsel on appeal (whether appointed or retained) is limited to the first direct appeal as of right in the state's system. "Our cases establish that the right to appointed counsel extends to the first appeal as of right, and no further." *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555. Thus, in California, that right attaches to proceedings on direct appeal in the Court of Appeal in non-capital cases or in the Supreme Court in capital cases. *But there is no federal constitutional right to counsel to pursue a petition for discretionary review to the state's highest court. Ross v. Moffitt* (1974) 417 U.S. 600. Consequently, it is not possible to base an ineffective assistance claim on counsel's refusal or failure to file a petition for review in the California Supreme Court or for deficient performance in the presentation of such a petition (e.g., the attorney's omission of a viable issue for review). That limitation, of course, sets up a potential Catch 22, because presentation of a defendant's federal constitutional claims to the state's highest court is a prerequisite for "exhaustion" of those claims for purposes of subsequent federal habeas review. *O'Sullivan v. Boerckel* (1999) 526 U.S. 838.

- Possible alternative state remedies for defaulted petitions for review. Although there is no federal constitutional right to effective assistance in filing a petition for review, it is still often possible to obtain a form of relief in the California courts where appellate counsel effectively abandons the client and frustrates the client's ability to seek review on his own – such as where counsel promises to petition for review but fails to do so, or where counsel neglects to inform the client of the appellate court's decision. In each of these scenarios, the attorney's error does not merely deprive the client of assistance of counsel in preparing a petition for review, but also effectively prevents the client from attempting to file a pro. per. petition for review. Although there is no published case law precisely on point, in our experience, appellate courts are willing to grant relief under these circumstances by *recalling the remittitur and refiling the appellate opinion.* The refiling of the opinion restarts the clock, and the defendant (either on his own or with the assistance of new counsel) is able to petition for review and thereby preserve and exhaust his claims.

Limitation to direct review; no right to counsel to pursue collateral remedies. The federal constitutional right to effective assistance of counsel is limited to the direct appeal. *There is no right to appointment of counsel and no right to effective assistance of counsel for purposes of state collateral proceedings* – i.e., state habeas corpus. *Pennsylvania v. Finley* (1987) 481 U.S. 551. Consequently, even if a state does provide appointed counsel for a post-conviction proceeding, that attorney's errors cannot provide a basis for a constitutional claim of ineffective assistance. *Coleman v. Thompson* (1991) 501 U.S. 722. dramatically illustrates that rule and its consequences for defendants. In *Coleman*, Virginia law provided a capital defendant with appointed counsel, who represented him in a state post-conviction hearing. But, following the state trial court's denial of the petition, the appointed attorney missed a crucial filing deadline in the Virginia Supreme Court, which dismissed the proceeding (apparently due to the late filing) without addressing the merits. That "procedural default" in the state courts also barred federal habeas review of the claims raised in the state post-conviction proceeding. Although attorney error amounting to a constitutional violation (i.e., ineffective assistance of counsel at trial or on direct appeal) would have provided "cause" for overcoming the procedural bar, the U.S. Supreme Court refused to extend that principle to the errors of habeas counsel. Because there was no federal constitutional right to assistance of counsel in the post-conviction proceeding in the first place, the habeas attorney's deficient performance could not provide the basis for an ineffective assistance claim.

- Possible grounds for relief in California. Notwithstanding *Finley* and *Coleman*, California law may provide some grounds for relief from gross errors by post-conviction counsel under some very limited circumstances. Although California does not recognize any broad right to appointment of habeas counsel in non-capital cases, the California Supreme Court has long held that "due process concerns" require appointment of counsel in those rare instances where a court finds a prima facie case and actually issues an Order to Show Cause (OSC) on a habeas petition. *In re Clark* (1993) 5 Cal.4th 750, 780; *People v. Shipman* (1965) 62 Cal.2d 226, 232-233. In light of those holdings, it is conceivable that a California court would grant relief from deficient attorney representation in post-OSC habeas proceedings – at least to the extent of relieving the client from any forfeiture of his claims attributable to attorney neglect.[1]

[1] The California Supreme Court has been willing to grant relief from habeas counsel's "abandonment" of the client in another context where state law provided for appointment of counsel. *In re Sanders* (1999) 21 Cal.4th 697. In *Sanders,* the Supreme Court appointed counsel to represent a capital defendant both for his direct appeal and for investigation and filing of a habeas petition. However, despite Supreme Court rules requiring a capital habeas petition to be filed within a specified period of completion of briefing in the appeal, appellate counsel failed to conduct a habeas investigation. Two years after the Court's affirmance of the conviction and sentence in the direct appeal, new counsel (who had been appointed in Sanders' federal habeas proceeding) filed a state habeas petition on his behalf. Despite the "substantial delay" in filing the petition, the California Supreme Court chose not to "procedurally default" the petition under its timeliness rules, but considered (and denied) the petition on the merits: "We conclude that when, as here, an attorney representing a capital defendant essentially abandons his client and fails, in the face of triggering facts, to conduct an investigation in order to determine whether there exist potentially meritorious claims, such abandonment constitutes good cause for substantial delay in the presentation of potentially meritorious claims by subsequent counsel. [Fn.]" *Sanders*, *supra*, at 701.

II. INEFFECTIVE ASSISTANCE IN PERFECTING THE APPEAL

The most egregious attorney errors in the appellate process are those which forfeit the defendant's appeal altogether (as opposed to those affecting only particular claims). This category includes both "front-end" errors in the initial noticing of an appeal and errors later in the appellate process, which result in default dismissal of an appeal without determination of the merits. Not surprisingly, these are also the areas in which it is easiest for a defendant to obtain relief in the form of reinstatement of his right to proceed with the appeal.

A. Noticing the Appeal.

The deadline for filing a notice of appeal (currently, 60 days from the judgment, Cal. Rules of Court, rule 8.308(a)) is often described as "jurisdictional." Nonetheless, the California Supreme Court has long recognized that a defendant is entitled to relief from that requirement and has ordered "constructive filing" of a late notice of appeal, when defense trial counsel ignored the client's express instructions to file an appeal: "'Of course, the trial attorney is under no obligation to represent the defendant on the appeal, but where the defendant clearly indicates, as he did here, that he desires to appeal, *the trial attorney is under a duty not to ignore that request*. The trial attorney is under a duty either to file the notice of appeal, or to instruct the defendant as to the proper procedure, or to see that the defendant has counsel to do these things for him.']" *People v. Diehl* (1964) 62 Cal.2d 114, 117-118; *In re Benoit* (1973) 10 Cal.3d 72, 87-88, emphasis in *Benoit*.

Subsequent U.S. Supreme Court decisions have confirmed that the federal constitution also dictates relief under these circumstances. "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable [citations]" and thereby deprives the defendant of his Sixth Amendment right to effective assistance of counsel.[2] *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477.

Roe v. Flores-Ortega also makes clear that, in some circumstances, a defendant will be entitled to relief even though, due to his ignorance of his appellate rights, he never

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[2] While the Supreme Court analyzes the right to representation in the appeal itself under the due process clause (*Evitt v. Lucey* (1985) 469 U.S. 387), it has treated the duty to file a notice of appeal upon a defendant's request as part of *trial counsel*'s obligations under the Sixth Amendment. Cf. *Roe v. Flores-Ortega*, *supra*, at 477.

specifically asked his attorney to appeal. The principal question is *Flores-Ortega* was, "Under what circumstances does counsel have an obligation to *consult* with the defendant about an appeal?" *Flores-Ortega*, *supra*, at 478, emphasis added.[3] Though the *Flores-Ortega* majority agreed that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal," it declined to impose a "bright line rule," mandating such consultations in every case. *Id.* at 479, 480.

> We instead hold that *counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing*. In making this determination, courts must take into account all the information counsel knew or should have known. [Citation.] Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal. *Roe v. Flores-Ortega,* 528 U.S. at 480, emphasis added.

As this formulation reflects, the duty to consult may arise either under an objective test (based on the likely interest of a hypothetical "rational defendant") or under a subjective one (focused on whether "this particular defendant" would likely want to appeal, if he knew of that right). The majority added, "We expect that courts evaluating the reasonableness of counsel's performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal." *Id*. at 481.

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[3] "We employ the term 'consult' to convey a specific meaning-advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Flores-Ortega*, *supra*, at 478.

B. Applicability to Certificate of Probable Cause Application.

In explaining the rationale for counsel's duty to honor a defendant's request to file an appeal, the Supreme Court commented,"This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477. A necessary corollary of the duty to file "the necessary notice" is compliance with any governing deadlines or other procedural or technical requirements. Indeed, in its leading case recognizing the constitutional entitlement to effective assistance of appellate counsel, the Supreme Court ordered reinstatement of the defendant's right to appeal where his appellate counsel's "deficient failure to comply with mechanistic local court rules" had resulted in a default dismissal of the appeal. *Evitt v. Lucey* (1985) 469 U.S. 387; see *Flores-Ortega*, *supra*, at 485 (summarizing holding of *Evitt*); see Part I-D, for further discussion of *Evitt*.

Taken together, the *Flores-Ortega* duty to file "the necessary notice" if requested and the *Evitt* obligation to comply with relevant state procedural requirements have obvious implications for California's technical rules governing appeals following guilty or no contest pleas. Under those rules, a simple notice stating that the defendant is appealing from the judgment (the ordinary form of a post-trial notice of appeal) will not suffice. In order to render an appeal "operative," a post-plea notice must either (1) state that it seeks review of denial of a Pen. Code § 1538.5 suppression motion (Cal. Rules of Court, rule 8.304(b)(4)), and/or (2) include an application for a certificate of probable cause" stating constitutional or jurisdictional grounds going to the validity of the proceedings (Pen. Code § 1237.5).[4]

Accordingly, where counsel has reason to know that the defendant wishes to raise "certificate grounds" in a post-plea appeal (including such common complaints as ineffective assistance of counsel in connection with the plea or other claims going to the validity of the plea), counsel has a duty to prepare a certificate of probable cause application, in conjunction with the notice itself, or, at a minimum, to advise the defendant on that procedure. Indeed, even before such U.S. Supreme Court decisions as *Evitt* and *Flores-Ortega*, the California Supreme Court recognized: "When a defendant makes a timely request of his trial attorney to file an appeal from a judgment upon a plea of guilty, the attorney must file the 1237.5 statement, instruct defendant how to file it, or secure other counsel for him. [Fn.]" *People v. Ribero* (1971) 4 Cal.3d

[4] Of course, section 1237.5 imposes the additional condition that the trial court must *grant* the certificate application, in order for an appeal on such grounds to proceed.

55, 65.

> The Legislature has conditioned the right to appeal from a plea of guilty upon the filing of the required statement. Advice or assistance of counsel in filing the notice of appeal is meaningless if counsel does not also advise or assist in preparation and filing of the required statement. It follows that counsel's obligation to assist in filing the notice of appeal necessarily encompasses assistance with the statement required by section 1237.5. *Ribero*, *supra*, at 66.

C. No Duty to Show Probable Merits of Appeal, Where Counsel Defaults Appeal.

The Supreme Court has recognized that ineffective assistance in failing to file a notice of appeal or other attorney neglect which results in dismissal of an appeal or otherwise forfeits appellate review poses a more grievous problem than the more traditional claimed deficiencies involving failure to raise particular discrete issues.

> Today's case is unusual in that counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. .... Assuming those allegations are true, counsel's deficient performance has deprived respondent of more than a *fair* judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether. *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 483, emphasis in original.

Consequently, in contrast to claims concerning failure to raise particular issues (see Part IV-D, *infra*), a defendant need not show any likelihood that he would have prevailed on appeal in order to obtain relief from his attorney's deficient failure to file a requested notice of appeal or to consult with the client about a possible appeal.[5] If the defendant expressly asked counsel to file an appeal, nothing further is required to demonstrate prejudice. "[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had

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[5] That is not to say that the probable merits of an appeal are entirely irrelevant to the ineffective assistance analysis. Where the alleged error consists of the attorney's failure to advise the client on the right to appeal (as opposed to an attorney's disregard of a specific request to file an appeal), the existence of "nonfrivolous grounds for appeal" is material to the "performance" inquiry as a factor bearing on whether " a rational defendant would want to appeal." Cf. *Flores-Ortega*, *supra*, 480 U.S. at 480.

merit" *Peguero v. United States* (1999) 526 U.S. 23, 28; *Flores-Ortega*, *supra*, 528 U.S. at 477. If counsel unreasonably failed to consult the defendant about a possible appeal, the prejudice inquiry turns simply upon whether the defendant would have taken an appeal if properly advised. "[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, *supra*, at 484.

D. Abandoned and Defaulted Appeals.

A close cousin of a trial attorney's breach of a promise to file a notice of appeal is an appellate attorney's failure to brief an appeal after undertaking to represent the client. In two cases, 30 years apart, the California Supreme Court addressed almost identical situations in which retained attorneys effectively abandoned appeals by allowing them to go into default. *In re Martin* (1962) 58 Cal.2d 133; *In re Serrano* (1995) 10 Cal.4th 447. In both *Martin* and *Serrano*, appellate counsel accepted a retainer, then neglected to file a brief, resulting in the appellate court's eventual dismissal of the appeal. Each attorney had failed to respond to the client's (or the client's family's) inquiries on the status of the appeal. In each case, the Supreme Court recalled the remittitur and ordered reinstatement of the defaulted appeal.

Finally, even where counsel (retained or appointed) does attempt to brief an appeal on the merits, the defendant is entitled to relief if the attorney then defaults the appeal by neglecting to comply with the jurisdiction's procedural requirements. In *Evitt v. Lucey* (1985) 469 U.S. 387, counsel filed a timely notice of appeal. But he subsequently neglected to comply with a Kentucky rule requiring filing of a separate document, a "statement of appeal," in conjunction with the merits brief. As a result of that procedural deficiency, the Kentucky appellate court refused to consider the merits of the appeal and dismissed it. The Supreme Court found that the attorney's dereliction deprived Lucey of effective assistance of counsel on appeal and that strict enforcement of the "statement of appeal" requirement under those circumstances violated due process by depriving Lucey of consideration of his appeal on the merits.

E. Failure to Abandon the Appeal as Ineffective Assistance?

Although it is clear that attorney errors which result in an appeal's dismissal may constitute ineffective assistance, one reported California case addressed, but did not definitively resolve, the converse question – whether "pursuing rather than abandoning an appeal" could ever support such an ineffective assistance claim. *People v. Harris* (1993) 19 Cal.App.4th 709, 714. *Harris* involved a classic "unauthorized

sentence"/"adverse consequences" problem. Appellate counsel's brief raised a credits issue concerning the 27-to-life murder sentence, but the respondent's brief identified a more consequential error – the trial court's failure to state reasons for striking a special circumstance. The appellate court remanded the matter, and the trial court ultimately reinstated the special circumstance and imposed an LWOP sentence. In his subsequent appeal and habeas petition, Harris unsuccessfully argued that his prior appellate counsel had rendered ineffective assistance by pursuing the appeal. The appellate court denied the claim because appellate counsel had warned Harris (at the time of her reply brief) of the risks of continuing the appeal, but Harris had not responded to her suggestion that he consider abandoning the appeal. "On this record, it was petitioner, not counsel, who decided to pursue rather than abandon the appeal." *Harris*, *supra*, at 715. Based on that conclusion, the appellate court had "no occasion to decide" the more fundamental question of whether a failure to abandon an appeal posing "adverse consequence" risks could ever support an ineffective assistance claim.

III. DUTY TO ENSURE PRESENTATION OF APPEAL ON ADEQUATE RECORD.

"The [U.S.] Supreme Court has identified at least two "'basic tools' [citation] that are constitutionally necessary for a "'complete and adequate' appeal by an indigent: (1) a competent attorney on appeal, acting as an advocate on behalf of the indigent [citations]; and (2) *an appellate record that will permit a meaningful, effective presentation of the indigent's claims* [citaitons]." *People v. Barton* (1978) 21 Cal.3d 513, 518, emphasis added.

Both the U.S. and California Supreme Courts have found deprivations of those rights where appellate counsel neglected to take the necessary steps to present the appeal on a complete record. In *Enstminger* v. *Iowa* (1967) 386 U.S. 748, 752 (a case heard and decided concurrently with *Anders v. California* (1967) 386 U.S. 738), counsel submitted the case to the appellate court for "plenary review" (a state procedure allowing submission of an appeal based on the briefs and arguments below). "However, counsel, apparently believing the appeal was without merit, failed to file the entire record of petitioner's trial although it had been prepared by the State" and instead submitted the appeal based solely on a Clerk's Transcript. *Enstminger*, *supra*, at 750. That transcript consisted of the accusatory pleading, the jury instructions, and "various orders and judgment entries of the court, but [did] not contain the transcript of evidence nor the briefs and argument of counsel." *Id.* at 749. The Supreme Court held that the Iowa reviewing court's allowance of that procedure "precluded [the defendant] from obtaining a complete and effective appellate review of his conviction." *Id*. at 752.

The California Supreme Court confronted a more discrete deprivation of a complete record in *People v. Barton* (1978) 21 Cal.3d 513. Appellate counsel briefed the denial of a Pen. Code § 1538.5 suppression motion. But he briefed and submitted the appeal based on a record which included only the second day of the two-day suppression hearing. In the absence of the transcript of the first day of the hearing, counsel based his appellate arguments on the testimony on the second day, on the prosecutor's "statement of expected testimony" in his memorandum in opposition to the suppression motion, and on the testimony at the subsequent trial. The appellate court affirmed, stating that it was "the duty of appellant to produce an adequate record." *Id*. at 517. The California Supreme Court granted the defendant's pro. per. petition for hearing. It agreed that appellate counsel had deprived Barton of effective assistance of counsel by "fail[ing] to present an adequate appellate record from which [the appellate] court could consider the merits of the search and seizure issue." *Id*. at 516. The Court elaborated on appellate counsel's duty to move for augmentation or to take any other necessary steps to remedy omission of relevant transcripts or other materials from the appellate record:

> Obviously, if counsel has a duty to cite to the appellate record in support of his contentions, then counsel has a duty to insure that there is an adequate record before the appellate court from which those contentions may be resolved on their merits. Where the appropriate record is missing or incomplete, counsel must see that the defect is remedied, by requesting augmentation or correction of the appellate record [citation] or by other appropriate means [citation]. Otherwise, counsel has not provided that advocacy which permits "full consideration and resolution" of the appeal, as required by the Constitution. [Citations.] *People v. Barton*, *supra*, 21 Cal.3d at 519-520.

IV. STANDARDS GOVERNING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

Most claims of ineffective assistance of appellate counsel concern the attorney's choice of issues to brief, rather than omissions which defaulted the appeal altogether. Thus, the typical claim focuses on additional claims which counsel assertedly should have raised – either instead of or in addition to those which he actually briefed.

A. Pre-*Strickland* California cases.

The California Supreme Court's most extensive treatments of ineffective assistance of appellate counsel came in a series of cases in the 1970's. *In re Smith* (1970) 3 Cal.3d

192; *In re Banks* (1971) 4 Cal.4th 337; *People v. Rhoden* (1972) 6 Cal.3d 519; *People v. Lang* (1974) 11 Cal.3d 134. In most of those cases, appellate counsel filed a woefully inadequate brief (in both substance and form) raising only weak or even frivolous issues and neglected to present other "arguable" or "crucial" claims.

For example, in *Smith* – a case the Supreme Court described as "bristling with arguable claims of error" – appellate counsel "filed an opening brief consisting of a 20-page recitation of the facts and a one-page argument. The purported argument consisted of the ludicrous proposition that petitioner was entitled to reversal on all counts because the People had failed to expressly prove that petitioner was not married to" the rape complainant. *Smith*, *supra*, 3 Cal.3d at 198.[6] In contrast to that argument – which was "so perceptibly weak that it probably would have been better overlooked," *id*. at 201 – appellate counsel failed to present several "arguable" and potentially successful" claims suggested by the record. These included the suggestiveness of both the line-up and in-court identification procedures and the sufficiency of the evidence to support an attempted kidnapping conviction.

Rhoden involved a similar combination of counsel's filing of a deficient brief, "devoid of any citation of authority, be it case, statute, or treatise," raising a single marginal argument, and the attorney's failure to raise several more substantial arguments. These included the delivery of instructions defining the charged offense in language "taken not from the current statute, but from section 209 *as it read in 1933*," when the statute allowed an aggravated kidnapping "in the absence of any asportation whatever," as well as related instructional and sufficiency-of-evidence issues concerning asportation and other elements. *Rhoden*, *supra*, 6 Cal.3d at 525, emphasis in original.

In *Lang*, however, appellate counsel had raised a *successful* issue, but one which concerned only the disposition (procedural irregularities in the MDSO commitment proceeding). But counsel had neglected to present multiple potentially meritorious challenges to the conviction itself, including sufficiency-of-evidence and ineffective assistance of trial counsel, among others. Also, counsel had actually argued against his client by stating in the brief "I am not in agreement" with the client's claims of

[6] Among other problems with that argument, the defendant himself "had testified at trial that he was single," and "all the evidence implicitly indicated that the petitioner and the victim were total strangers prior to the criminal episode." *Smith*, *supra*, at 198.

innocence. *Lang*, *supra*, 11 Cal.3d at 138.[7]

In each of these cases, the California Supreme Court found ineffective assistance, based on appellate counsel's failure "to raise crucial assignments of error, which arguably might have resulted in a reversal." *Smith*, *supra*, 3 Cal.3d at 202; *Rhoden*, *supra*, 6 Cal.3d at 529; *Lang*, *supra*, 11 Cal.3d at 142. The Supreme Court held that counsel's failure to present potentially meritorious grounds was sufficient, by itself, to entitle the defendant to relief. Significantly, in three of those cases, the Court ordered the appeals reinstated, but declined to resolve whether the omitted claims would necessarily require reversal.[8]

> We have catalogued the arguments which petitioner's counsel failed to offer on behalf of his client, not because we conclude that petitioner was likely to obtain a reversal on appeal, but only to demonstrate that his appellate counsel did not render the thoughtful assistance to which he was entitled. *Petitioner need not establish that he was entitled to reversal in order to show prejudice in the denial of counsel. In re Smith*, *supra*, 3 Cal.3d at 202, emphasis added; accord *Rhoden*, *supra*, 6 Cal.3d at 529; *Lang*, *supra*, 11 Cal.3d at 139.

Though *Smith* and its 1970's progeny remain the California Supreme Court's leading opinions on the general subject of ineffective assistance, they were decided a decade before the U.S. Supreme Court's landmark *Strickland* decision (*Strickland v. Washington* (1984) 466 U.S. 668) defining the standards for ineffective assistance of *trial* counsel.[9] As discussed in Part IV-B, subsequent opinions, of both the U.S. and

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[7] In the fourth case, *Banks*, the defendant filed two successful pro. per. petitions for certiorari; each time, the U.S. Supreme Court grant cert.and remanded the case to the California courts for reconsideration in light of then-recent opinions. Remarkably, even then, counsel failed to brief the specific points raised by the Supreme Court's remand orders. *In re Banks*, *supra*, 4 Cal.3d at 341-343.

[8] In *Banks*, the Court bypassed the remedy of recalling the remittitur. "[I]n view of the history of the case" (which had already twice been remanded from the U.S. Supreme Court) and in the interest of "conservation of scarce judicial resources," the Court elected to use the habeas petition to decide the ultimate merits of the previously-omitted issues and reversed the conviction. *Banks*, *supra*, 4 Cal.3d at 343; see Part V for further discussion.

[9] Also, in the years immediately after *Strickland*, a few California appellate decisions continued to employ the framework established in *Smith, Rhoden*, and *Lang*, without

California Supreme Courts, have made clear that the two-prong *Strickland* test (deficient performance and a reasonable probability of a different outcome) applies to appellate ineffective assistance claims, as well.

Smith, *Rhoden*, and *Lang*, have not been expressly overruled or disapproved, and the actual dispositions in those cases would likely be the same under current standards. Additionally, their discussions of the scope of appellate counsel's duties are generally consistent with current standards (though occasionally phrased somewhat differently). However, counsel litigating ineffective assistance claims should *not* rely on the *Smith* cases' formulation of the overall test for obtaining relief on a claim of ineffective assistance of counsel. In particular, as discussed further in Part IV-D, under current standards, it is not enough to show that the omitted claims were "arguable" or potentially meritorious. Instead, as with other claims under *Strickland*, the defendant must show a "reasonable probability" that the outcome of the appeal would have been different if counsel had raised the other claims.

B. *Strickland*'s Application to Appellate Ineffective Assistance.

In a very brief passage, buried in a lengthy 1988 capital opinion, the California Supreme Court indicated, almost in passing, that the two-prong *Strickland* standard applied to claims against both trial and appellate counsel. *People v. Hamilton* (1988) 45 Cal.3d 351, 377. It stated that point more explicitly in a subsequent capital opinion:

> A defendant claiming ineffective assistance of counsel under the federal or state Constitutions must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. [Citation.] *We apply that standard to representation on appeal.* [Citations.] *People v. Osband* (1996) 13 Cal.4th 622, 664, emphasis added; see also, e.g., *People v. Erwin* (1997) 55 Cal.App.4th 15, 20.

U.S. Supreme Court decisions have confirmed that the California Supreme Court's assumption was correct. See *Smith v. Robbins* (2000) 528 U.S. 259, 285-288. Indeed, the *Strickland* test applies both to claims concerning the omission of particular issues from a brief on the merits and to challenges to counsel's filing of a *Wende* or *Anders* brief raising no issues.

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discussing *Strickland*. E.g., *People v. Valenzuela* (1985) 175 Cal.App.3d 381.

C. Considerations in Evaluating Appellate Counsel's Choice of Issues.

Although the ineffective assistance test nominally consists of two discrete prongs, deficient performance and prejudice, the courts have recognized that (to a greater extent than with claims directed to trial counsel) "[t]hese two prongs partially overlap when evaluating the performance of appellate counsel." *Miller v. Keeney* (9th Cir. 1989) 882 F.2d 1428, 1434; accord, e.g., *United States v. Cook* (10th Cir. 1995) 45 F.3d 388, 394.

> In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. [Footnote; citations.] Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point-"just in case"-is likely to serve her client less effectively than one who concentrates solely on the strong arguments. [Fn.] Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason-because she declined to raise a weak issue. *Miller v. Keeney*, *supra*, 882 F.2d at 1434.

The role of counsel's professional judgment in selecting and weeding out potential issues. While some language in older California cases suggested that appellate counsel must "argue all issues that are arguable" (*People v. Feggans* (1967) 67 Cal.2d 444, 447; *In re Smith* (1970) 3 Cal.3d 192, 197), subsequent U.S. Supreme Court cases have explicitly repudiated any such sweeping rule. The Court has emphasized that, in the interests of effective advocacy, appellate counsel may – an indeed *should* – be much more discriminating in selecting the issues to be briefed.

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. *Jones v. Barnes* (1983) 463 U.S. 745, 751-752.
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> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most

> promising issues for review. .... A brief that raises every colorable issue runs the risk of burying good arguments-those that, in the words of the great advocate John W. Davis, "go for the jugular,"[citation] -in a verbal mound made up of strong and weak contentions. [Citation; fn.] *Jones v. Barnes*, *supra*, at 752-753.[10]

Counsel's professional judgment prevails over client's insistence on issues. Indeed, even when the omitted issue is "non-frivolous" *and* the client specifically demands that the attorney raise it, counsel may decline to do so, provided that decision is professionally reasonable in light of counsel's strategy in the overall appeal. "Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, *supra*, 463 U.S. at 751.

Relative strength of the omitted and briefed issues and other factors. Under *Jones v. Barnes* and other authorities, the "arguable" character of an omitted issue is not sufficient, by itself, to establish deficient performance, if appellate counsel did brief other issues.[11] "Notwithstanding *Barnes,* it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins* (2000) 528 U.S. 259, 288.

Some federal opinions have identified a number of factors relevant to assessment of the reasonableness of appellate counsel's choice of issues, even while cautioning that "the list is not "exhaustive" and these are ""merely... matters to be considered":

> Were the omitted issues "significant and obvious"? [¶]] (2) Was there arguably contrary authority on the omitted issues? [¶]] (3) Were the

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[10] As the Ninth Circuit has observed, "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court. [Citation.]" *Pollard v. White* (9th Cir. 1997) 119 F.3d 1430, 1435; accord, e.g., *Hayes v. Woodford* (9th Cir. 2002) 301 F.3d 1054, 1086.

[11] If counsel filed a *Wende* or equivalent *Anders* brief raising no issues, the failure to spot and include an arguable issue does constitute deficient performance (though, as discussed below (Part IV-D), the prejudice prong still requires the additional showing of a "reasonable probability" that the omitted claim would have succeeded). *Smith v. Robbins* (2000) 528 U.S. 259, 288.

> omitted issues clearly stronger than those presented? [¶]] (4) Were the omitted issues objected to at trial? [¶]] (5) Were the trial court's rulings subject to deference on appeal? [¶]] (6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable? [¶]] (7) What was appellate counsel's level of experience and expertise? [¶]] (8) Did the petitioner and appellate counsel meet and go over possible issues? [¶]] (9) Is there evidence that counsel reviewed all the facts? [¶]] (10) Were the omitted issues dealt with in other assignments of error? [¶]] (11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt? [Citations.] *Mapes* v. *Coyle* (6th Cir. 1999) 171 F.3d 408, 427-428 (*"Mapes I*"); *Mapes v. Tate* (6th Cir. 2004) 388 F.3d 187, 191.

Of the various considerations, the courts generally place greatest emphasis on a comparison between the strength of the issues omitted with that of the issues briefed. In *Smith v. Robbins*, the Supreme Court quoted, with apparent approval, the Seventh Circuit's observation: "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith v. Robbins, supra,* 528 U.S. at 288, quoting *Gray v. Greer* (7th Cir. 1986) 800 F.2d 644, 646.

Indeed, a common thread running through cases which have sustained ineffective assistance claims is that the omitted issues were far stronger than those briefed. For example, in *Jackson v. Leonardo* (2nd Cir. 1998) 162 F.3d 81, 85-86, counsel's selection of issues "could not reflect a plausible strategy to pursue more promising grounds," where her "cursory appellate brief ... raised a couple of highly dubious claims," but omitted a "sure winner" double jeopardy argument. However, the issues briefed need not be frivolous or marginal in order for counsel's omission of appreciably stronger claims to amount to ineffective assistance.

> [A]n appellate advocate may deliver deficient performance and prejudice a defendant by omitting a "dead-bang winner," even though counsel may have presented strong but unsuccessful claims on appeal. [Citation.] Although courts have not defined the term "dead-bang winner," we conclude it is an issue which was obvious from the trial record, [citation] *and* one which would have resulted in a reversal on appeal. *United States v. Cook* (10th Cir. 1995) 45 F.3d 388, 395, emphasis in original.

For example, in *Cook*, "counsel presented several strong but unsuccessful claims on

direct appeal [citation], [but] counsel omitted a 'dead-bang' winner"– a conflict-of-interest issue which should have "'leaped out upon even a casual reading of [the] transcript.'" *Cook*, *supra*, 45 F.3d at 395.

Importance of the issue to the overall disposition. In addition to the comparative strengths of the briefed and omitted issues, another relevant consideration should be the issues' importance to the overall disposition of the defendant's case – including which portions of the judgment the respective claims address. A number of cases have found ineffective assistance where counsel's arguments focused only on the conviction, but not the sentence, or vice versa.

At least one circuit has also cautioned against the risks of bypassing a relatively-straightforward issue in order to limit the appeal to a more ambitious, but difficult argument.

> [I]in some situations lawyers think-usually in error-that by omitting a good argument, they can thereby increase the chance of prevailing on a more doubtful argument directed to a more far-reaching result. However, in this instance, such a calculation would have been manifestly unreasonable under an objective standard, given the comparative strengths of the two different attacks, the opportunity to make both, and the stakes for the defendant. *Cirilo-Munoz v. United States* (1st Cir. 2005) 404 F.3d 527, 531.

Thus, in *Cirilo-Munoz*, counsel's briefing of evidentiary challenges directed to the validity of the conviction did not excuse his failure to challenge the sufficiency of the evidence to support a crucial sentencing enhancement. The omitted argument "would not have detracted from the evidentiary challenge to the conviction but would have built upon it," and" it represented the difference between a long jail sentence and a *life* sentence." *Cirilo-Munoz*, *supra*, at 531.

Anticipating or advocating changes in the law. As the California Supreme Court has observed, "counsel serves both the court and his client by advocating changes in the law if argument can be made supporting change." *People v. Feggan* (1967) 67 Cal.2d 444, 447; *In re Smith* (1970) 3 Cal.3d 192, 197. That said, however, it is extremely difficult to predicate a successful ineffective assistance claim about failure to brief an argument which, at the time of the appeal, appeared untenable under extant case law.

In *Smith v. Murray* (1986) 477 U.S. 527, 534, counsel raised an evidentiary claim at trial but then "consciously elected not to pursue the claim before the Supreme Court

of Virginia" because it appeared doomed under a recent decision of that court. "With the benefit of hindsight," the defendant challenged that omission in light of a later federal circuit opinion, which repudiated the state precedent which had deterred counsel from raising the issue. However, the U.S. Supreme Court held that counsel's decision "under the current state of the law" to forego that evidentiary issue in favor of other seemingly stronger claims "fell well within the wide range of professionally competent assistance": "It will often be the case that even the most informed appellate counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule." *Id*. at 535.

Notwithstanding *Smith v. Murray*, there are situations where competent appellate counsel reasonably *should* be able to anticipate that an adverse precedent may be overruled, such as where the U.S. Supreme Court or the California Supreme Court has granted review to re-examine that precedent or has otherwise signaled its willingness to do so.

Client relations and communications. Although the strength of the omitted issues remains the pre-eminent consideration, other aspects of the attorney's representation which suggest a lack of professionalism or an indifference to the client's interests may help contribute to a reviewing court's finding of deficient performance. The ultimate basis for habeas relief in a recent capital case was appellate counsel's failure to brief a meritorious juror bias issue But the habeas court made plain that it viewed the omission of that argument (which was one of many issues suggested by the client) as part of a pattern of neglect and lack of communications. Appellate counsel " never met with [the client] or even spoke with him over the telephone," did not even write to him until 11 months after her appointment, "ignored his suggestions, telling him they were frivolous," did not advise him of his right to file a pro. per. supplemental brief, and did not send him the opening brief until a month after it was filed. *Franklin v. Anderson* (6th Cir. 2006) 434 F.3d 412, 429-430.

D. Understanding *Strickland*'s Prejudice Prong in the Appellate Context

As noted earlier, the U.S. Supreme Court has applied the *Strickland* prejudice requirement to all claims involving failure to brief particular claim – regardless of whether appellate counsel filed a merits brief raising other issues or filed a *Wende* or *Anders* brief raising no claims. *Smith v. Robbins* (2000) 528 U.S. 259, 285-288. Even in the latter context, counsel's failure to identify and brief an "arguable" issue is only sufficient to establish the "deficient performance" prong, but does not excuse the

necessity of establishing prejudice:[12]

> Respondent must first show that his counsel was objectively unreasonable, [citing *Strickland*] in failing to find arguable issues to appeal-that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [the defendant] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal. [Citation; fn.] *Smith v. Robbins*, *supra*, 528 U.S. at 285-286.

In light of the U.S. Supreme Court's explicit application of *Strickland*'s prejudice prong to appellate ineffective assistance claims, some of the statements in older California cases can no longer be consider binding. As discussed in Part IV-A, in such cases as *Smith*, *Rhoden*, and *Lang*, the California Supreme Court essentially granted relief upon a finding of deficient performance alone (counsel's failure to brief "arguable" or "crucial" issues), without determining the ultimate merits of those issues. However, a *Strickland* prejudice analysis requires the reviewing court to come closer to determining the ultimate merits of the omitted issue, than suggested in the earlier California cases. While a defendant still does not need to establish that he necessarily

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[12] However, much as in the trial context, the Supreme Court has "distinguished denial of counsel altogether on appeal, which warrants a presumption of prejudice, from mere ineffective assistance of counsel on appeal, which does not. [Citation.]" *Smith*, *supra*, 528 U.S. at 286. Prejudice is presumed if an attorney's *Anders* brief or the reviewing court's procedure for considering such briefs is so deficient that it amounts to a constructive denial of counsel. *Penson v. Ohio* (1988) 488 U.S. 75, 88-89. In *Penson*, appellate counsel filed a short conclusory motion declaring that there were no meritorious issues and seeking leave to withdraw; the motion did not summarize the proceedings or facts of the case and did nothing to refer the reviewing court to anything in the record that might arguably support an appeal. On its own review of the record, the appellate court spotted several arguable issues, but it then compounded the deprivation of counsel by proceeding to decide those issues itself without ordering briefing or appointing new counsel. "The present case is unlike a case in which counsel fails to press a particular argument on appeal [citation], or fails to argue an issue as effectively as he or she might. Rather, at the time the Court of Appeals first considered the merits of petitioner's appeal, appellate counsel had already been granted leave to withdraw; petitioner was thus entirely without the assistance of counsel on appeal. .... It is therefore inappropriate to apply either the prejudice requirement of *Strickland* or the harmless-error analysis of *Chapman.* [Fn.]" *Penson*, *supra*, at 88-89.

would have prevailed, he must at least show a "reasonable probability" of a more favorable disposition of the appeal.

Note, however, that the "reasonable probability" analysis focuses on whether the defendant "would have prevailed *on appeal*." *Smith v. Robbins*, *supra,* 528 U.S. at 286, emphasis added. The many federal cases applying *Strickland* to appellate ineffective assistance claims consistently frame the inquiry in terms of the probability of success (i.e., a reversal or remand) in the specific "proceeding" which is the subject of the claim – the appeal. *Mason* v. *Hanks* (7th Cir. 1996) 97 F.3d 887, 893.

> [I]n order to determine prejudice, the court must first perform "a review of the merits of the [omitted or poorly presented] claim. [Citation] If the Court finds that the neglected claim would have *a reasonable probability of success on appeal*, then ... it is necessary to find "appellate counsel's performance prejudicial *because it affected the outcome of the appeal*." [Citation] *Heath* v. *Jones* (11th Cir. 1991) 941 F.2d 1126, 1132; emphasis added; see also, e.g., *Joiner* v. *United States* (11th Cir. 1997) 103 F.3d 961, 963;*United States* v. *Cook* (10th Cir. 1995) 45 F.3d 388, 395.)

The defendant must show a reasonable probability that he would have obtained a reversal or remand, if appellate counsel had raised the omitted issue(s). But, it is not necessary to demonstrate what would have happened on remand in the trial court *after the appeal.* That is, it is not necessary for the defendant to show that, following a reversal or remand, he would have obtained an acquittal or other more favorable result on retrial.

V. ALTERNATIVE REMEDIES AND PROCEDURES FOR RAISING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL – RECALLING THE REMITTITUR VS. HABEAS REVIEW OF THE UNDERLYING CLAIMS.

There are two alternative procedures for pursuing an appellate ineffective assistance claim in the California courts. The defendant (or his new counsel) may file a *motion to recall the remittitur* (e.g., *People v. Valenzuela* (1985) 175 Cal.App.3d 381) or raise the claim in a habeas corpus petition (either alone or in conjunction with other claims) (e.g., *In re Smith* (1970) 3 Cal.3d 192; *In re Banks* (1971) 4 Cal.4th 337) . The motion-to-recall procedure is specifically authorized by the appellate rules. Cal. Rules of Court, rule 8.272(c)(2) ("On a party's or its own motion or on stipulation, and for good cause, the court may stay a remittitur's issuance for a reasonable period or order

its recall"). The use of habeas for this purpose is equally well established. "The writ of habeas corpus may be used by a defendant lawfully in custody to seek relief from default in perfecting an appeal. [Citations.]" *In re Serrano* (1995) 10 Cal.4th 447, 454.

Even if the defendant employs the vehicle of a habeas petition, he may seek the remedy of recalling the remittitur, or the appellate court may elect that remedy. Thus, in *Smith*, upon determining that appellate counsel had unreasonably neglected to raise "crucial ... assignments of error," the Supreme Court "treat[ed] the petition for habeas corpus as an application to recall the remittitur" and transferred the matter to the appellate court "with directions to recall its remittitur, vacate its decision, reinstate the appeal, and appoint other counsel for appellant." *In re Smith* (1970) 3 Cal.3d 192, 203-204.

Recalling the remittitur appears to be the most commonly-adopted remedy among the published California cases finding ineffective assistance of appellate counsel. Alternatively, however, the reviewing court may bypass that procedure and use the habeas petition to determine the ultimate merits of the issues which previous appellate counsel had neglected to brief. As the California Supreme Court commented in *Banks*:

> Where the case comes before us solely on the issue of denial of counsel on appeal (particularly in a pro. per. petition), we ordinarily reinstate the appeal and remand to the Court of Appeal to reconsider its decision with the aid of effective advocacy by appellate counsel. [Citation.] However, competent counsel for both petitioner and respondent have now fully briefed and argued the merits of the appeal before this court, and, in view of the history of the case, conservation of scarce judicial resources warrants our passing upon the merits of the appeal.... *In re Banks* (1971) 4 Cal.3d 337, 343; see also, e.g., *In re Spears* (1984) 157 Cal.App.3d 1203, 1214.

Tactical considerations in choice of remedies. In light of these alternatives, counsel pursuing a claim of ineffective assistance of prior appellate counsel faces a tactical choice of either explicitly seeking the remedy of recalling the remittitur (either in a motion under rule 8.272(c)(2) or as the requested relief in a habeas petition) or asking the habeas court to use the petition itself to determine the merits of the omitted As reflected by the Supreme Court's comments in *Banks*, use of the habeas petition to decide the omitted claims may offer the prospect of a speedier favorable resolution for the client. Additionally, if counsel is presenting the ineffective assistance claim in state court primarily for the purpose of "exhausting" it because he or she believes it will receive a more favorable reception in federal court, counsel may prefer that the

state court *not* decide the merits, particularly in an opinion which could then be the subject of AEDPA deference (cf. 28 U.S.C. § 2254(d)(1)).

Nonetheless, in many cases, there will likely be a decided advantage in expressly asking the state court to recall the remittitur, *especially if the one-year AEDPA statute of limitations* (28 U.S.C. § 2244(d)) *has already run as of the time of filing of the motion or petition.* Even if it is not firmly convinced of the ultimate merits of the omitted claims, an appellate court may be inclined to give the defendant "his day in court" if it is clear that prior appellate counsel unreasonably failed to pursue potentially meritorious claims. Indeed, as *Strickland* itself instructs, the "reasonable probability" inquiry requires only "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington* (1984) 466 U.S. 668, 694. "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. at 693. Consequently, an appellate court applying that standard can and should recall a remittitur, even if, after full briefing on the claim on the reinstated appeal, it may ultimately affirm.

In the past, there may have been little practical difference between losing on the habeas petition raising the ineffective assistance claim or losing on the reinstated appeal. But, in view of the AEDPA statute of limitations, this distinction may have crucial implications for a defendant's ability to take his claims into federal court. While a "properly filed" state habeas petition "tolls" the AEDPA statute if it has not yet expired (28 U.S.C. § 2244(d)(2)), it cannot "restart the clock" if the statute has already run. In contrast, a successful motion to recall the remittitur will *reinstate the direct appeal* and restore the case to a pre-finality status. Consequently, even if the appellate court ultimately rejects the claim, the defendant will still have the opportunity to pursue his claims in federal court.

A second potential advantage of recalling the remittitur is that reinstatement of the appeal will also revive the defendant's right to *appointment of counsel.*