SEPARATING WHEAT (OR GRUEL) FROM CHAFF
or How to Tell an Arguable Issue From A Frivolous One
(And What to Do With Those Knotty Issues In-Between)

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Introduction

Where is the line between an arguable, but probably hopeless issue, and a frivolous issue that it would be improper to argue? The obvious answer, to paraphrase Justice Potter Stewart, is "I don't know, but I know it when I see it."[1] To a certain extent, that is true; the distinction is impossible to quantify and not so easy to assess qualitatively. In the end, making the call requires something of a gut reaction, discerning between a *reasonable* losing argument and an *unreasonable* losing argument.

And, before we try to better answer that question, here's another one: Why does it matter? Isn't the decision whether to raise such an issue, which has virtually no chance of success, one of tactics, rather than ethics? You raise it if it can help your client in some way, right? Somebody might think it's frivolous, and somebody else might think it's arguable, but probably hopeless, but if it has any measurable chance of success, and/or helps your client in a discernible way, e.g., sets up another argument, preserves a conceivable issue for a Cert. petition or a federal habeas claim, or tries to change the law, it's worth it.

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[1]Like "Play it again, Sam," a phrase much-remembered but never spoken in the film *Casablanca*, the actual line used in Justice Stewart's concurrence in *Jacobellis v. Ohio* (1964) 378 U.S. 184, is not what is remembered.

> I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area[, obscenity, are] constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

(*Id*., at p. 197, conc. opn. of Stewart, J, fns. omitted.)

Well, it turns out that this question is a bit thornier than you might imagine at first blush. And, as always, the line between ethics and tactics, and their interplay, is subtle and filled with opportunity for creative and zealous advocacy for our clients, which is really what we are all about after all.

I was surprised to learn that there's actually a fair amount of legal authority touching on the issue. There are ABA guidelines, which have shifted from an earlier ethical obligation to raise every "nonfrivolous claim" urged by the client, to a more balanced, judicially and constitutionally sanctioned approach which recognizes the wisdom and need for tactical weeding out of weaker issues in appeals. There was a flurry of California cases from the 70s and 80s discussing what constitutes ineffective assistance of counsel on direct appeal based on failure to raise arguable issues. (See, e.g., *In re Smith* (1970) 3 Cal.3d 192 and *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 389-391.) Lastly, a line of cases, largely, but not entirely, in the civil arena, delineates what constitutes a *frivolous* appellate issue for purposes of assessing whether sanctions should be imposed or moral opprobrium attached. (See e.g., *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 and *People v. Craig* (1991) 234 Cal.App.3d 1066.) While these three approaches give us some material to work with around the edges, and help us to set the "goal posts" as to what issues *must* be raised, and which issues *must not* be raised, they do not provide much in the way of specific guidance to the criminal appellate practitioner as to what to do with those tough decisions as to whether or not to raise a borderline issue in your opening brief.

The goal here is to sort out, in terms of both ethics and tactics, how to determine whether an issue is "weak-but-arguable", or "frivolous-unarguable", and how to deal with the tough-call issues in-between.

A. **How it Comes up in Our Work Between Staff and Panel**

To frame the discussion of the line between the frivolous and arguable issue, it helps to first describe the situations in which a determination whether an issue is arguable or frivolous becomes important and, sometimes, difficult in our work. Obviously, this type of issue comes up in the case work of every staff and panel attorney who handles

appeals, and sometimes can give rise to tough and agonizing calls in any given case. Rather than focus on how these problems arise in deciding which issues to raise in a brief, which I will discuss in Part C below, I want to spend a bit of time explaining how this type of issue sometimes gives rise to difficulties between staff and panel attorneys in our work together on behalf of our clients. There are two sets of circumstances where the problem arises, which I discuss below.

1. ***Wende* Reviews.**[2] One of the jobs of staff attorneys at SDAP is to review cases submitted to us by panel attorneys who have concluded there are no arguable issues. In the course of our *Wende* review, the SDAP staff attorney will many times find a *real* arguable issue, i.e., a fine that was improperly imposed, an IAC claim about sentencing, etc., that actually has some chance of success. In those cases, we tell counsel to brief the issue, which sometimes leads to a victory, mostly small, for the client. That's not my focus here.

More commonly, there is an issue, sometimes identified by counsel along with the *Wende* submission, which your SDAP buddy classifies as "arguable" and directs you to brief. About equally often, we will get a phone call, prior to a *Wende* submission (a good practice), where you, the panel lawyer, runs this issue before us. After discussing it, we come to the mutual conclusion that the issue really is arguable, even if the chances of it winning are small.

One recent example involved a case with a seemingly frivolous Fourth Amendment issue, where persons stopped in the middle of the night turned out to be in a car owned by Mr. D, the police learned that D was a parolee, then went to his residence to conduct a search based on evidence tying him to the drugs and the parole condition. Trial counsel had argued that the search was arbitrary and harassing, but did not focus on the middle-of-the-night hour of the search. So, I thought this was arguable as harassing or arbitrary conduct by the police, and directed counsel to brief the issue. It lost of course, and was even found forfeited because the precise point wasn't raised at trial. But,

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[2] *People v. Wende* (1979) 25 Cal.3d 436.

it was sort-of-raised at trial, and was arguable *and*, it allowed counsel to raise the then-brand new 4019 retroactivity argument on direct appeal, rather than by means of a motion in the trial court. This then, is a good example of a weak but arguable issue raised not only because of the *Wende* situation, but with a good tactical reason to support it.

Here's another creative example which I helped a panel attorney come up with in a recent *Wende* submission. D, who had appealed on various grounds, got relief based on some unlawful and unauthorized parts of his previous sentence. When he was resentenced, the new term was slightly longer, and he filed a sentencing appeal. But in a wonderfully written memo from counsel with the *Wende* submission on the second appeal, I learned that D was only entitled to the same sentence under double jeopardy protections if the court could reach the same sentence in an authorized manner; if there no way to reach it in an authorized manner, the court could impose any lawful sentence. (See *People v. Mustafaa* (2004) 22 Cal.App.4th 1305, 1311-1312.) This sounded horribly unfair, so I tried to be creative, suggesting that counsel make two wild and crazy arguments: first, that the trial court could have used its 1385 authority to reduce one of the completed charges to an attempt, and could have reached the identical sentence that way; and second, I suggested that the double jeopardy principle has to apply anyway, and the court is obligated *at least* to impose the closest possible sentence without exceeding the original sentence. Counsel did a fabulous job on each argument; but we'll never know how they might have fared because the client got religion and insisted that the appeal be abandoned.

Weird things can sometimes happen in *Wende* cases. I can think of two occasions where counsel and I had carefully explored a potential issue – in one case, an issue about failing to dismiss dependency proceedings involving a minor prior to commencing delinquency proceedings against him; and in another, a seemingly frivolous Fourth Amendment claim – and the Court of Appeal, after reviewing the record, directed counsel to brief the same issue. In both cases, this was found both amusing and challenging; and in both cases, to give counsel credit, the argument raised ended up sounding arguable,

maybe even with a shot at reversal. Of course, both issues were shot down.[3]

It is sometimes the case that the panel lawyer will disagree with his SDAP buddy's assessment of an issue as arguable, worried that it is frivolous because it is weak and probably hopeless. The key point here, as discussed below, is there is a well-recognized ethical obligation to raise *any* arguable issue rather than file a no-issue *Wende* brief.

2. **Communications (and Sometimes Disputations) Between Project and Panel Attorneys as to the Arguability of an Issue.**

Most of the time, relations between panel attorneys and staff attorneys are cordial, even amicable, as we work together for the common purpose of zealously representing our clients within the bounds of the law. However, differences of opinion, sometimes heated ones, can arise concerning the arguability of a particular issue. Sometimes this involves counsel advocating or raising a particular issue which his or her SDAP buddy finds to be frivolous; other times it's the converse, where the panel lawyer opposes, refuses, or fails to raise an issue which the staff attorney believes is arguable, helpful, or both.

This can be a touchy situation at times. One reason for this is that panel attorneys, particular ones accustomed to handling cases independently for many years, are not used to having project attorneys looking over their shoulders and second-guessing their issue judgment. Apparently, SDAP engages in this practice more commonly than other appellate projects. One reason for this is structural. Unlike any of the other projects, in Sixth District cases, SDAP is actually appointed on the case, then "associates" with you, the panel attorney; we are thus, in every sense, your cocounsel in the case, a role which

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[3]In fact, in the dependency/delinquency case, the court simply issued a *Wende* opinion, finding no arguable issues, and never addressed the issue which it had directed counsel to brief! We sought rehearing and review, arguing that the court had a duty under the California Constitution to issue an opinion as to any issue briefed on appeal, but both were denied. Fortunately, virtue has triumphed, and the Supreme Court's subsequent opinion in *People v. Kelly* (2006) 40 Cal.4th 106 requires courts of appeal to issue opinions discussing issues presented to the court during the *Wende* process.

we take very seriously in terms of our obligation to provide zealous and effective representation to the client. The other reason is because . . ., well, we really give a damn about our clients and raising every arguable issue, and about the ethical – and tactical – problem of raising a frivolous claim.

One example of an issue I urged counsel to brief involved the familiar bad-law/good-law problem as applied to a section 654 issue. We are all familiar with the bad case law which essentially eliminates section 654 arguments as to most sex crime charges from a single occasion, on the theory that every separate act of penetration or sexual contact has its own separate nefarious act and intent. (See *People v. Perez* (1979) 23 Cal.3d 545, 552-554 and *People v. Harrison* (1989) 48 Cal.3d 321, 335.) However, I reviewed an AOB not long ago in which it appeared that an act of digital penetration (§ 289) was committed simply to facilitate the ensuing act of rape. Trial counsel had argued that section 654 had applied, but appellate counsel, properly focused on the impediment of *Perez* and *Harrison*, had not briefed the issue. However, there is a separate, somewhat older line of cases which holds where one crime is merely incidental to a second crime, and was undertaken to facilitate the greater crime, 654 applies. (See, e.g., *People v. Bothuel* (1988) 205 Cal.App.3d 581, 589-592, and cases cited therein [prohibiting separate punishment for acts of kissing and touching the minor victim because the offense was incidental to commission of oral copulation].) Although the rationale of *Bothuel* has been since questioned by the Supreme Court (*People v. Scott* (1994) 9 Cal. 4th 331, 348), it has not been disapproved, and thus is still arguable, particularly in light of the fact that the Supreme Court has adhered to the rule that kidnapping committed to facilitate rape makes the two offenses subject to section 654. (See *People v. Latimer* (1993) 5 Cal.4th 1203.) So, counsel raised the point in a supplemental brief, making a splendid 654 argument.

An example of the other side of the coin, an issue that was briefed by a panel lawyer which I, as SDAP buddy, deemed to be frivolous, was a sufficiency claim in a 288(b) case, in which there was conflicting evidence galore, and much impeachment of the alleged victim, but where her account of the incident was that the molester school bus

driver, Mr. D, reached his hand under her skirt, and squeezed her buttocks four times, telling her, "That's a good girl. That's the way I like it." In my letter to the panel attorney, I wrote:

> There is no innocent explanation possible for this conduct, and the only defense presented was that it didn't take place. As Justice Mihara of the Sixth District wrote on only slightly more egregious facts in *People* v. *Guardado* (1995) 40 Cal.App.4th 757, 762, "This conduct is quintessentially lewd and lascivious and blatantly betrays defendant's intent to gratify his own sexual desires." On these facts, and without even considering the section 1101 and 1108 evidence adduced by the prosecution (which is, of course, a part of the quantum of evidence for sufficiency purposes, even if erroneously admitted), I believe that a sufficiency argument is without arguable merit, and should be withdrawn.

Other areas of conflict that arise between staff and panel attorney in the context of the weak-but-arguable issue concern the important theme of raising and preserving federal constitutional claims of error to allow a client access to federal habeas relief. Two obvious examples, often repeated, come to mind. First, there is the failure to federalize an arguable issue, often in the face of contrary state case law saying it's not federal constitutional error (e.g., where the issue involves failure to instruct on a lesser included offense). Second, there is the problem of failing to exhaust a weak but arguable issue by means of a review petition and, in certain circumstances, a cert petition.

In the course of these disputes, we, staff, are often put into an almost adversarial position with the panel attorney; and sometimes the ultimate direction ends up, when persuasion fails, being almost parental in nature: "do it or else." We do not like these situations, to put it mildly. We all do better working together on a collegial basis, having vigorous discussion and argument about the viability or framing of issues, but ultimately reaching consensus. And it makes it all the more difficult that sometimes, on either side, it is difficult to describe what it is that makes an issue weak-but-arguable versus frivolous-and-thus-unarguable.

So, after that lengthy introduction and preface, I will now do my best to try to

provide some guidance about how to separate the wheat from the chaff, how to know your HA's from your FU's.

B. Legal Authority from Related Parallel Universes

As indicated in the introduction, the source materials here are diverse, and I am not aware of any past effort to try to put them together. So, bear with me as I try to lay out, contrast, and cobble together the varied sources.

1. ABA Ethical Guidelines for Criminal Appellate Practice

ABA guidelines used to advise criminal appellate practitioners to raise every arguable claim advanced by a client. "[C]ounsel should argue on appeal all nonfrivolous claims on which the client insists." (American Bar Association, ABA Standards for Criminal Justice 21-3.2, Comment, p. 21.42 (2d ed. 1980).) However, even when these rules were in effect, it was recognized that there was no *constitutional* duty to raise every colorable argument. (See *Jones v. Barnes* (1983) 463 U.S. 745, 754.)

The current ABA rule is wonderfully vague in its formulation. It provides as follows:

> Counsel for a defendant-appellant should not seek to withdraw from a case because of counsel's determination that the appeal lacks merit.
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> (i) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.
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> (ii) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

(ABA Criminal Justice Section Standards, Standard 21-3.2, "Counsel on appeal.")[4]

Alas, this is not much of a start. We should look for issues which "might affect the validity of the judgment of conviction and sentence" – shouldn't that be "*or* sentence"?; and find and raise issues which are *not* "lacking in substance."

One thing everybody seems to agree on, is that when you *do* have arguments of substance that could effect the judgment or sentence, you don't have to raise every conceivable argument. "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*, *supra*, 463 U.S. at p. 751-752.)

But we all knew that. If you have meaty issues, don't throw scraps in with them; or, for our vegetarian colleagues, don't wreck a good salad by throwing in pieces of stale cracker. But this is not much help for our current purpose, which is try to figure out when you *have to* raise a weak (and maybe hopeless) but arguable issue, when you *might* want to raise it, and how to tell if an issue is frivolous and thus should never be raised.

2. **California Ineffective Assistance of Counsel on Appeal Cases**

Going back a few decades, there was a body of law which seemed to be very helpful to our purpose in laying out the concept that the constitutional obligation of counsel to a client in a criminal appeal required him or her to raise and present all "arguable" issues on appeal.[5] At first, these cases applied a fairly rigorous standard which seemed to require counsel to raise all *conceivably* arguable issues, even when they lacked "winnability." Gradually, though, the rule has shifted to a more balanced approach, finding counsel ineffective only where the forfeited issue had a meaningful

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[4]Found at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_crimappeals_blk.html

[5] A more thorough explanation of this subtopic can be found in Brad O'Connell's excellent article for the 2007 FDAP Training Seminar, "Appellate Ineffective Assistance of Counsel."
(http://www.fdap.org/downloads/seminar-p_and_e/AppellateIAC-2007.pdf.)

chance of success, as befitting the recognition that IAC claims required a showing of prejudice. This evolution is summarized by the court in *In re Spears* (1984) 157 Cal.App.3d 1203, which staked out a position more forgiving of the omission of borderline appellate issues.

> The Fourteenth Amendment to the federal Constitution requires that an indigent accused be afforded the assistance of competent counsel on appeal. [citations] The duties which appointed appellate counsel must fulfill to meet his or her obligations as a competent advocate include the duty to "argue all issues that are arguable." (*People v. Feggans* (1967) 67 Cal.2d 444, 447; see also *People v. Wende*, *supra*, 25 Cal.3d 436; *People v. Barton* [(1978) 21 Cal.3d 513,] 519; *In re Smith* [(1970) 3 Cal.3d 192,] 197.) A habeas petitioner need not establish that he was entitled to reversal in order to show prejudice in the denial of appellate counsel. (*People v. Rhoden* (1972) 6 Cal.3d 519, 524; *In re Smith*, *supra*, 3 Cal.3d at p. 202.) In the context of the facts of those cases, in *Smith* and *Rhoden*, *supra*, our Supreme Court held the inexcusable failure of defendant's appellate counsel to raise crucial assignments of error, which arguably might have resulted in a reversal, deprived the petitioner of the effective assistance of appellate counsel to which he was entitled under the Constitution. (*In re Smith*, *supra*, at pp. 202-203; *People v. Rhoden*, *supra*, at p. 529.) While these cases do not contain an exact definition of what is "crucial," *Smith* does refer to issues which are "potentially successful contentions on appeal." (*In re Smith*, *supra*, 3 Cal.3d at p. 203.)
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> The Courts of Appeal have given inconsistent interpretations to the meaning of an arguable issue on appeal which must be argued by competent counsel within the meaning of the *Smith* and *Rhoden* cases. The Court of Appeal in *People v. Scobie* (1973) 36 Cal.App.3d 97 held that *Smith* and *Rhoden* had developed a new concept: the "arguable-but-unmeritorious" issue which had to be argued as a requirement of due process. This concept was rejected by the Court of Appeal in *People v. Johnson* (1981) 123 Cal.App.3d 106, cert. den., 457 U.S. 1108, which held that an arguable issue on appeal consists of two elements. "First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a

> reversal or a modification of the judgment." (*Id*., at p. 109.) We find the *Johnson* interpretation more convincing and hold that for an issue to be an arguable issue on appeal it must be reasonably arguable that there is prejudicial error justifying reversal or modification of judgment. *Smith* made it clear that it is not the duty of appellate counsel to "contrive arguable issues." (*In re Smith*, *supra*, 3 Cal.3d at p. 198.)

(*In re Spears*, *supra*, 157 Cal.App.3d at pp. 1210-1211.)

A somewhat broader view was advanced by the court in *People v. Valenzuela* (1985) 175 Cal.App.3d 381, which came from the same appellate division that decided *Scobie*. After summarizing the above-discussed rulings in *Smith* and *Rhoden*, the *Valenzuela* court turned to *Scobie*, summarizing its holding as follows:

> In [*Scobie*] we concluded that the court in *Smith* "carefully pointed out that it was not holding that any of the arguable issues had merit as grounds of reversal." We further noted that "[the] holding of the *Smith* case is that due process required that these issues be argued whether or not the record contained ground for reversal" and that "[it] is thus clear that the Supreme Court has determined that there is a category of arguable-but-unmeritorious issues which must be argued as a requirement of due process on appeal. [para.] . . . To follow *Smith* and *Rhoden* we are required to judge not only the merits of the appeal but the performance of counsel. A defendant may have been fairly tried and justly convicted, and have no ground of reversal, yet be entitled to attack the judgment of the appellate court, under *Smith* and *Rhoden*, because of deficiency in the performance of his appellate attorney." (*Ibid*., fn. omitted.)

(*Valenzuela*, *supra*, at p. 389.) The court then noted the criticism of *Scobie* by the courts in *Johnson* and *Spears*, which it characterized as misplaced, and then set forth a fairly useful description of what makes an appellate issue "arguable."

> *Scobie* does not, as *Johnson* and *Spears* intimate, stand for the proposition that appellate counsel must raise frivolous issues in order to comply with the constitutional mandate of due process, nor does it require counsel to "present marginal, nay, hopeless issues . . . ." (*People v. Johnson*, *supra*, 123 Cal.App.3d at p. 110.) Cognizant that *Smith* expressly notes that appellate advocates are not required "to contrive arguable issues" (*In re Smith*, *supra*, 3 Cal.3d at p. 198) we

> expressly noted in *Scobie* that there was "no constitutional necessity" for appellate counsel to include a legally frivolous argument "as an 'arguable' contention in his brief." (*People v. Scobie*, *supra*, 36 Cal.App.3d at p. 101.) *Scobie* simply holds that in order to establish ineffective assistance of appellate counsel it is not necessary to show that an unargued "arguable" issue would result in the actual reversal of the judgment. This conclusion is clearly mandated by the *Smith* court's statement that "[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 p. 202.)
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> In differentiating between "an unmeritorious contention which appellate counsel must argue, and an unmeritorious contention which he need not argue" (*People v. Scobie*, *supra*, 36 Cal.App.3d at p. 99), a court must seek guidance from *Smith*'s teaching that due process is abridged when counsel on appeal inexcusably fails "to raise crucial assignments of error, which arguably might have resulted in a reversal, . . ." (*In re Smith*, *supra*, 3 Cal.3d at p. 202.) "Arguable" issues under *Smith*, then, are those which raise "potential assignments of error" – i.e., amount to "potentially successful contentions on appeal. . . ." (*In re Smith*, *supra*, 3 Cal.3d at p. 203.)
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> The question of ineffective assistance of appellate counsel must be decided on a case-by-case basis, "and the determination of each will depend on whether the appellant's counsel failed to raise assignments of error which were crucial in the context of the particular circumstances at hand." (*In re Smith*, *supra*, 3 Cal.3d at p. 203.)

(*Valenzuela, supra*, 175 Cal.App.3d at pp. 390-391.)

In my view, for purposes of a fair assessment of appellate IAC, the views expressed in *Scobie* and *Valenzuela* make far more sense than the more restricted view of *Johnson* and *Spears*. This is so for a reason not discussed in any of these cases, i.e., the nature of the prejudice test for ineffective assistance of counsel adopted in *Strickland v. Washington* (1984) 466 U.S. 668. In that case, the Supreme Court specifically rejected an "outcome-determinative" test advanced by the prosecution, borrowed from the standard for reversal based on newly discovered evidence, which requires a strong showing based on the finality of the proceedings, with the Court expressly holding that "a

defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." (*Strickland*, *supra*, at p. 693.)

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

(*Strickland*, *supra*, at p. 694.) After rejecting application of the "newly discovered evidence" standard, the Court in *Strickland* explained that the appropriate prejudice test for ineffective assistance of counsel claims under the Sixth Amendment "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . .", which the Court described as the now-familiar required showing by the defendant that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The court then further defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." (*Ibid*.) Thus, in the context of appellate IAC, it need only be shown that the failure to raise a particular claim or set of claims "arguably might have resulted in a reversal." (*In re Smith*, *supra*, 3 Cal.3d at p. 202.)

We now have some help. Effective counsel must raise any claim which might, in some arguable fashion, result in a meaningful benefit to the client. We now need only squeeze the box a little further to determine, for our own ethical-tactical purposes, where the frontier lies between the arguable-but-possibly-hopeless issue that you should raise, and the frivolous and/or worthless issue that you should not raise. But first, we need a brief side-trip into civil law, with a bit of criminal law gloss, concerning what amounts to a *frivolous* argument on appeal.

3. **The Frivolous Civil (and Criminal) Appeal**.

In civil appeals, there is a statute providing for sanctions for frivolous appeals. Code of Civil Procedure section 907 provides for an award of costs where the reviewing

court concludes that "the appeal is frivolous or taken solely for the purpose of delay. In interpreting a former court rule designed to carry out sanctions for frivolous appeals, the California Supreme Court in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 attempted to set out a standard as to what constitutes a "frivolous" appeal, a task which it explained had never really been addressed. Chief Justice Bird's rare near-unanimous opinion in *Flaherty* is careful in its analysis to "strik[e] a balance that will ensure both that indefensible conduct [by counsel] does not occur and that attorneys are not deterred from the vigorous assertion of client's rights." (*Flaherty*, *supra*, at p. 648).

The opinion rejected the contention that a proper definition would be hopelessly vague and would deter exercise of appellate rights, and put forth a definition of the "frivolous appeal" which combined both subjective and objective elements. "The subjective standard looks to the motives of the appellant and his or her counsel . . .", with the Court noting one case where a court found a claim to be nonfrivolous in part based on the earnestness of counsel and his graciousness in arguing the case, and pointed to other cases involving inquiries into the good faith of the litigant, with penalties only being imposed when the purpose of the appeal was delay. (*Flaherty*, *supra*, at p. 649.)

Of more interest for our purposes here is the description of the "objective standard," which "looks at the merits of the appeal from a reasonable person's perspective. The problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous. . . ." (*Ibid*., citations and internal quotations omitted.)

The *Flaherty* opinion then weaves the subjective and objective standards together to construct a working definition of a frivolous appeal.

> Both strands of this definition are relevant to the determination that an appeal is frivolous. An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome

> volume of work at the appellate courts. Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit. [citation]
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> However, any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals. Justice Kaus stated it well. In reviewing the dangers inherent in any attempt to define frivolous appeals, he said the courts cannot be "blind to the obvious: the borderline between a frivolous appeal and one which simply has no merit is vague indeed . . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used." (*People v. Sumner* [(1968) 262 Cal.App.2d 409,] 415.) The same may be said about the power to punish attorneys for prosecuting frivolous appeals: the punishment should be used most sparingly to deter only the most egregious conduct.

(*Flaherty*, *supra*, at pp. 650-651.)

Flaherty is helpful in figuring out when an appeal is "frivolous." For our purposes, the subjective element will rarely have any meaning, as, aside from capital cases, the prosecution of an appeal rarely can have any collateral benefits to the client on probation or serving a prison sentence.[6] The objective test, however, is helpful in laying out a very remote outside boundary for a "frivolous" issue. The requirement that "any reasonable attorney . . . agree that the appeal is totally and completely without merit . . ." (*ibid*.), allows enormous breadth of action based on tactical calculations. It recognizes that reasonable attorneys can and will differ as to whether a particular issue has or lacks arguable merit, and that it is acceptable to go with one reasonable attorney's take on an

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[6]But see Part B-2-3 below, which discusses situations where prosecution of an appeal can have some collateral favorable consequences.

issue and disregard another's; and the use of the hyperbolic phrase "totally and completely without merit" leaves room to raise issues which have only slight or minimal arguability. Most importantly for our purposes, this extreme definition of an objectively frivolous appellate issue gives room, as will be discussed below, to raise "borderline" issues with only very minor remedies, which have only a tiny chance of success, or which argue against existing precedent for favorable changes in existing legal doctrine.

Notably, I am aware of only one published appellate opinion which has applied a *Flaherty*-like test to find a *criminal* appellate issue to be frivolous. In *People v. Craig*, *supra*, 234 Cal.App.3d 1066, Justice Puglia's majority opinion strongly criticizes appointed counsel on appeal for raising a completely worthless appellate issue, i.e., appellant's entitlement to the benefits of an "implied plea bargain," a contention which the court properly classified as "rank speculation" since the supposed "implied promise" of no additional prison time had been communicated from a probation officer in one county to a probation officer in another county, with absolutely no evidence that the defendant had any knowledge of, let alone reliance on, such an implied promise. (*Id*., at pp. 1070-1071.)

> Defendant's contention is a nonstarter, a disturbing example of an all too prevalent tendency on the part of appointed appellate counsel to advance utterly baseless contentions on appeal. This practice is unacceptable. It adds substantially to the already staggering public cost of providing representation for indigent criminal appellants by requiring a response to each such claim by the Attorney General and the court, thus condemning scarce resources of the justice system to feckless exertions. If the problem persists, other measures, such as sanctions, may have to be considered.

(*Id*., at p. 1071.)

Earlier in the same opinion, the court gives us another working definition of a frivolous issue.

> Appointed counsel's obligations to their clients require that they raise in the appeal all arguable issues on their clients' behalf. What is and is not an arguable issue depends both on the facts established in the record on appeal and on the state

> of the law. It is frequently a matter of opinion and therefore necessarily left to the professional judgment of counsel. However, that is not to say all issues are incapable of definitive classification. In some cases there may be issues on one extreme of the continuum which are indisputably arguable. On the opposite extreme of the continuum may be issues which are manifestly and indisputably not arguable. For want of a better description, the latter are "nonissues." This appeal involves a nonissue. It is unarguably not arguable. It is not merely frivolous, it is utterly hopeless.

(*Id*., at p. 1068.)

Like *Flaherty*, which is neither discussed nor mentioned by the court, the opinion in *Craig* recognizes that the arguability of issues is inherently "a matter of opinion" most often left to the "professional judgment of counsel." However, *Craig* sounds a distressing alarm in its pointed reference to what it characterizes as an "all too prevalent tendency on the part of appointed appellate counsel to advance utterly baseless contentions on appeal." While no published cases has cited or followed *Craig* and found an appellate issue to be frivolous, a Sheppard's search reveals that it has been cited in unpublished opinions four times, three of which involved the court concluding that an issue raised was frivolous.

Craig provides a warning – albeit, a rather distant one in most cases – that insistence on issues with no merit at all – on claims which are "unarguably not arguable" – could have the consequence of undermining your reputation with the appellate tribunal and, possibly, of "other measures," such as sanctions.

C. So What Does This All Mean? Carving Out Our Own Rules for Setting the Bounds of the "Arguable" and "Frivolous" Appellate Issue.

The case law discussed above sets out, in less than crystal-clear terms, the outside bounds of our discussion. *Smith*, *Scobie*, and *Valenzuela* effectively delineate the location of the "near post," which requires effective counsel in a criminal appeal to "raise crucial assignments of error, which arguably might have resulted in a reversal. . . ." (*In re Smith*, *supra*, 3 Cal.3d at p. 202) *Flaherty* and *Craig* describe the "far post," which

precludes us from raising an issue which is "unarguably not arguable, which "indisputably has no merit . . .", i.e., where any reasonable attorney would agree that the appeal is totally and completely without merit."

Knowing the locations of these near and far posts should help us to consider the key issue for our practice, i.e., *what to do with all those issues that fall in between* these two posts, the arguable but (probably) hopeless issues that so often give rise to the agonizing decision, "to brief, or not to brief." Even the tough-worded opinion in *Craig* acknowledges that such matters are "frequently a matter of opinion and therefore necessarily left to the professional judgment of counsel." (*Craig*, at p. 1068.) *Flaherty* recognizes that our "clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal." (*Flaherty*, *supra*, at p. 650.)

For all those issues "inside the posts," which are not frivolous, and which can be argued but are not likely to result in any meaningful benefit for the client, we must chart our own course for figuring out when to raise them, and when to let them slide.

1. **The Art of Issue-Spotting, As Applied to the Weak but Arguable Issue**

A few years ago, I wrote an article called "Zen and the Art of Issue Spotting." I won't try to summarize it here. It's still on our website, and I think it is worth reading if you haven't already. In the article, I obtained input from many experienced panel members, and offered my own suggestions about how to approach the critical task of locating, and sometimes creating, appellate issues from the record. For the present purposes, it suffices to say that almost everyone's approach to issue spotting involved first identifying anything at all that might be arguable.

Of course, winnowing out weak and hopeless issues is a critical part of the process. One starts this by identifying every conceivable issue, based on those raised at trial, those which you identify while reviewing the record, and even (and maybe especially) situations where you think something is wrong but are not sure what it is. Once you have set forth all the possible issues, done your preliminary research, brain-storming, advice seeking, etc., you will sort the presumably "promising" and even "slightly hopeful" issues into one pile. And, into another pile, you will put the weak

and/or hopeless issues.

Obviously, you will first seek to identify the issues you are sure to argue, and those you will most likely argue. And, equally obvious, you will spend most of your time, thinking, and emotional energy on the "good" issues. But you should always go back and look at the remaining issues, which you've labeled "weak" or "hopeless." Your task now is to sift through the weak issues, identifying some as essentially frivolous, and thus unarguable, and then processing the remaining issues through a series of interrogations to ascertain whether there is some ethical or tactical reason for raising them on appeal.

2. **Queries for Borderline Issues**

I propose the following techniques, which I've developed over the years, mostly through trial and error, as providing a helpful framework for this sorting process. The general theme is, take a second look, even a third look, at issues which your gut tells you are "on the border" between being worth raising or not. Here's how I break it down.

a. **The Straight Face Test**.

Can you make the argument with a straight face, despite its weaknesses, or does its ridiculousness in the context of your case make you pause and blanch? Picture yourself at an imaginary oral argument, facing the appellate justice who lurks in your anxiety closet; then imagine how you would answer his or her difficult questions about this issue. If you *have no answer* to the tough questions, you will almost invariably not want to raise this issue. Mind you, these "close call" issues are ones you will almost never seek to orally argue, barring some sort of intervening miracle (a favorable appellate decision on the same or similar issue, etc. [it has happened]). But I have always found the "straight face" test to be a good one for filtering out weak or hopeless issues.

Another way of conducting this test is to run the issue by another experienced appellate attorney – your project buddy, colleague down the hall or across cyberspace. I have found this to be the most useful filter of all. Plus, as discussed in my issue-spotting essay, this can sometimes lead to reformulating the issue into one which at least has some

arguable chance of success.

a-i. **Prejudice, Prejudice, Prejudice**.

Nearly every issue involving trial court error requires an assessment of prejudice. You may have a great argument for legal error, for example, on a manslaughter defense, but where the defense strategy was to raise an alibi defense, and there are virtually no facts which support a "provocation on heat of passion" theory, the error is almost certainly harmless. Again, you must do the "straight face" test. Even where you know your chances of prevailing are small, if you can conscientiously make a prejudice argument, e.g., in the hypothetical, there are some, alternative facts presented, even in the prosecution's case, which suggest provocation, your issue is arguable and can be presented. When, as in the example, the stakes are a possible reduction of murder to manslaughter, this will probably be an issue you will want to raise on appeal. Which, neatly, brings us to the next point.

b. **Can It Help the Client?**

If your close-call issue is successful, will it provide some possible measurable benefit to your client? Eight months off a 45 year sentence would count in this calculus; but not 100 years off a 270 to life sentence (I did this once). Reduction of a restitution fine in an LWOP or virtual LWOP sentence would also count, since it affects your client's quality of life in prison (i.e. fewer deductions from meager earnings, family sent money). Sometimes the issue can be somewhat subtle. For example, your client may be doing 150 to life for an invasion robbery with strikes; but getting his single sex-crime conviction reversed could make a difference to him, as it could affect the client's classification in CDCR, his family visitation rights (sex criminals don't get such visits), etc.

While the "meaningful benefit" test will not typically be decisive, the presence of such a benefit vastly enhances the arguability of a weak issue. And, truth be told, it is sometimes only very small and slightly meaningful benefits which can be won for our clients in the most hopeless cases.

c. **Can the Issue Improve the Law and Maybe Help Others?**

Often with borderline issues, we are arguing for novel interpretations of the law, for applying a legal framework from one type of situation to a similar but not same situation, or for favorable changes in the law which follow (or buck) current trends. Experienced counsel can tell you that such arguments are almost always in vain. Again, picture the appellate justice in your anxiety closet asking you, "What's your authority for this proposition, counsel?" and you will have a small idea of why this is so. The overwhelming percentage of criminal appeals result in affirmances; and the overwhelming majority of victories on our side come on issues where the law is well settled in our favor.

That said, it is also part of our work to advocate for favorable changes and evolution of the law. You may have a *great* case in terms of showing error in a developing area of the law, but a very weak prejudice argument which almost certainly dooms the issue. Without losing your focus on the client's interest being paramount, I suggest that you carefully consider the potential benefit of a favorable interpretation of law in your case. I can recall at least one such case which I had, where I obtained a published opinion finding *Doyle* error (*Doyle* v. *Ohio* (1976) 426 U.S. 610) in a rather unique factual context, with the court finding the error harmless, a conclusion I argued against but which I found hard to get upset about. (See *People* v. *Evans* (1994) 25 Cal.App.4th 358.[7])

There are several types of situations where the chance, even small, of a legally favorable ruling can be a factor worth pursuing. So, ask yourself the following questions

i. **Where the Law Appears Settled Against You, Are There Cracks Suggesting**

[7]One measure of harmlessness in this assault with intent to commit rape case, where the client denied he was the perpetrator, involved the victim describing her escape as the assailant put a condom on his penis; fast forward to the jail, where my poor client has a condom pop out of the bottom of his pants leg. Oops!

Uncertainty, New Developments in Related Areas That Suggest an Inroad Such That an Issue Can Be Phrased in a New Way That Might Get You Around Bad Precedent?

The vast expansion of new theories of trial error, and relitigation of apparently settled points, occasioned by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Crawford v. Washington* (2004) 541 U.S. 36 provide an obvious example. As most of us recall, these cases led appellate advocates to scramble to articulate and argue, sometimes successfully, issues that would have previously been utterly hopeless, even frivolous.

An example of this from my own work involved the application of Evidence Code section 1108, the law allowing admission of prior sex crimes into evidence to show the defendant's propensity to commit sex crimes. I had a case where this law was applied retroactively to crimes committed before the effective date of section 1108. Although ex post facto arguments as to this new law had been summarily rejected (see *People v. Fitch* (1997) 55 Cal.App. 4th 172, 185-186), the expansive reinterpretations of the Ex Post Facto Clause by the United States Supreme Court a decade ago in *Carmell v. Texas* (2000) 529 U.S. 513 and *Stogner v. California* (2003) 539 U.S. 607 provided a powerful suggestion that such an argument might succeed, and provided a strong basis for rearguing a issue which had seemed hopeless. Mind you, my contentions went nowhere, but I still think we were correct on this point. (If you have any old sex crime cases committed before 1994 where 1108 evidence is admitted, let me know; I have the briefing.) And the point is, watch those trends from the high courts, and see if they can help raise up a seemingly weak issue.

ii. **Even Though Intermediate Appellate Court Rulings Are Against You, Is There an Uncertainty in the Controlling Highest Court on the Issue?**

On a state law issue, has the California Supreme Court not yet clearly weighed in and enunciated a position? An example of this would be the question of the application of California's "cruel or unusual punishment" prohibition in a close-case Three Strikes life sentence situation. While there have been many lower court rulings, all but one

unfavorable, the Supreme Court has not yet decided such a case. (One is pending now. See *In re Coley* 2010) 187 Cal. App. 4th 138, rev. gtd. 11/10/10, S185303, to consider "whether defendant's sentence of 25 years to life under the three strikes law for failing to update his sex offender registration within five days of his birthday constitute[s] cruel and unusual punishment. . .")[8]

On a federal constitutional issue, has the US Supreme Court stayed out of the fray on an issue, or sub-issue? This is significant even in those situations where an issue is no longer "hot," in light of unfavorable decisions from the California Supreme Court or other appellate courts, and even denials of certiorari from the High Court. Two examples in the *Apprendi* arena come to mind here. The California Supreme Court in *People v. McGee* (2006) 38 Cal.4th 682 and *People v. Nguyen* (2009) 46 Cal. 4th 1007 has essentially slammed the door on two of our favorite *Apprendi* issues, respectively, whether *Apprendi* applies to facts beyond the "fact of" a prior conviction (e.g., proof of whether the crime involved personal infliction of great bodily injury), and whether a juvenile prior can be used as a strike without violating due process the jury trial guarantee. While these issues will go absolutely nowhere in state court under stare decisis principles, and the chances of a cert grant are probably small, the unresolved nature of the issue in the U.S. Supreme Court means that it may be worth raising and preserving the claim.

On a less lofty plain, there are also issues which are doomed in state court, but which have a measurable chance of success on federal habeas review. One example, off the top of my head, is the former section 1108 propensity instruction, which had a split verdict in California cases, and was never addressed directly by the California Supreme Court, but was found violative of due process by the Ninth Circuit in *Gibson v. Ortiz*. (9th Cir. 2004) 387 F.3d 812. If you have a case involving the same or similar instruction on propensity, you may have next-to-zero chances of prevailing in state court, but your client may well win the day if he presents the issue on federal habeas review.

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[8]http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1951846&doc_no=S185303

iii. **Even where all precedent is against you, is there judicial/societal trend suggesting a change?**

For a long time, it seemed hopeless to challenge death sentences and LWOP punishments imposed against juveniles tried as adults. Then, in two landmark decisions, *Roper v. Simmons* (2005) 543 U.S. 551 and *Graham v. Florida* (2010) 560 U.S. ___ [176 L.Ed.2d 825, 130 S.Ct. 2011], the U.S. Supreme Court found it to be cruel and unusual punishment to impose a death sentence on any juvenile offender, and to impose an LWOP sentence as to a juvenile offender convicted of a non-homicide. Imagine, if you will, that you represent a minor sentenced to LWOP in a murder case. While these two cases obviously don't cover your client, it would be incumbent upon you, as a zealous advocate, to urge that the principles of *Roper* and *Graham* be extended to juvenile homicide cases. Likewise, the rule ought to apply to any "virtual LWOP" sentences (e.g., 150 years to life). Notably, review has recently been granted regarding a Court of Appeal decision holding otherwise. (*People v. Caballero* (2011) 191 Cal.App.4th 1248, rev. gtd. 4/13/11, S190647.)

d. **Can Your Weak Issue, Even If It's Probably Hopeless, Make Another Issue Work Better?**

For me, this is always a major consideration with an issue that looks to be hopeless. The classic is the weak sufficiency of evidence claim which you can articulate, based on weak proof of an element or the whole charge, but which you know you probably can't win because it all turns on credibility, or conflicts in evidence. If you can cobble together a sufficiency argument based, e.g., on the dubious nature of the complaining witness's testimony and all the inconsistencies, it may not win, but it could just make that next argument, on evidentiary or instructional error related to the same crucial evidence, all that much easier to argue and win in terms of prejudice.

Another example involves evidentiary error where counsel made some vaguely phrased related objection. It is probably hopeless to argue that the objection had sufficient specificity to preserve it under Evidence Code section 353. But it may be

helpful to raise the weak-but-arguable evidentiary error based on this objection in order to bootstrap this argument into your backup IAC claim, using the authority of that excellent case, *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366, to argue that defense counsel's unsuccessful objections on other grounds demonstrates that "there is no reason," other than his ignorance of the proper legal theory for excluding the evidence, that counsel would not have objected on meritorious grounds.

Again, as with my other suggestions, I am not telling you to raise *frivolous* issues in order to make another issue look good, just weak ones, if it serves this tactical purpose.

e. Is There Some Legitimate Tactical Reason to File an AOB Raising a Borderline Arguable Issue?

This factor arises in two situations. The first involves a case with a potential *Wende* submission. Of course, it is settled that in a situation where there are *no other* arguable issues, an appellate lawyer is ethically bound to raise *any* arguable issue on appeal, rather than file a no-issue *Wende* brief. (See, e.g., *Anders v. California* (1967) 386 U.S. 738, 739 [prerequisite to *Anders/Wende* submission is conscientious[] determin[ation] that there is no merit to the indigent's appeal"].) However, as this essay seeks to explain, there are "arguable" arguable issues, and there are "borderline" arguable issues, and often the decision whether to raise an issue that is "on the edge", i.e., which has virtually no chance of success or benefit to the client, will turn on tactical considerations.

As one example, if you are investigating an IAC habeas in the case, it appears based on experience that you may improve the client's chances of getting an order to show cause (OSC) issued in the Court of Appeal by raising a substantive issue up on appeal. This is so, at least in the Sixth District, because it appears to be the court's practice in cases involving *Wende* submissions, to often issue an order denying the petition "without prejudice to filing the petition in the superior court." Thus, it may to your client's advantage to put an weak-but-arguable ball into the air on direct appeal in order to give the habeas a better chance of proceeding in the Court of Appeal with the assistance of appointed counsel.

The same sort of calculus can apply to a case involving immigration consequences, where your client's removal from the country (formerly known as deportation), can be stayed pending the finality of an appeal. Thus, if, after consulting with your client's immigration counsel, or with someone with knowledge and experience in this field, you determine that this is the case, it will probably make sense to raise and present an arguable but weak (and likely hopeless) issue, rather than abandon or file a *Wende* submission.

Mind you, I am most certainly *not* suggesting that counsel ever brief a frivolous issues, i.e., a claim that is "unarguably not arguable" (*People v. Craig*, *supra*, 234 Cal.App.3d at p. 1068), for such a tactical reason. That would be unethical in terms of counsel's obligation to the court to raise only arguable issues. Nor am I suggesting that an appeal be used solely for the purpose of delay, which is also clearly unethical. Again, I am referring to that hard-to-pinpoint issue that is right on (or near) the line between weak-but-arguable and hopeless-but-not-arguable. My suggestion is simply that if there are doubts as to which side of the line your issue falls on, you can resolve these doubts by tactical considerations.

A second, related situation can arise in the context of an appeal with arguable issues and a habeas claim. In those cases, sometimes the issue presented on habeas can also be raised on direct appeal, albeit with a much smaller chance of success. I can recall at least one case where the best estimation of an IAC contention raised on direct appeal was that it would not succeed because of a deficient factual record, a deficiency corrected in the stronger habeas petition raising the same claim; yet the issue became a winner on direct appeal! The apparent reason, we suspect, is that the habeas effectively "filled in the gap" in the minds of the court, and allowed them to make a favorable ruling on the direct appeal issue. In other situations, raising the same issue on direct appeal may help to obtain an OSC in the habeas petition, in the same manner that a weak sufficiency claim can help a succeeding instructional error claim to be successful.

f. **Client, Family, or Trial Counsel's Pet Issue(s).**

Another factor to consider is whether the client, family members, trial counsel, or some other nonparty in the case is mildly (or extremely) insistent that a particular issue

be raised on appeal. If the issue is nonfrivolous but probably hopeless, you may consider raising it based on deference to the client or trial counsel, even though you are not ethically obligated to do so. Obviously, you should employ all the other calculi described above before deciding to raise the issue, i.e., can it help the other issues, or will it make you look like you're tossing in the kitchen sink. The point here is that amicable relations with the client, his family, and trial counsel are important for the appeal process and for effective representation. Raising the weak, and probably hopeless pet issue – particularly after you've explained to the interested personage that its chances of success are close to nil – can promote that ever-important "appearance of due process" and can leave you with a satisfied customer.

3. **Don't Make Your Brief Look Like a Death Penalty Brief**.

In capital cases, it seems that every conceivable issue is presented, including ones which have been raised and rejected countless times, and issues where the arguability of the claim is "slim or none." Our briefs should never look like this. While employing the above-described tests to your weak but arguable issues, bear in mind the wisdom of many generations of appellate practice which calls for a careful winnowing out of weaker issues. In a passage quoted by the Supreme Court in *Jones v. Barnes*, *supra*, 463 U.S. 745, 754, Justice Jackson made the following observation:

> "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [Experience] on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, Advocacy Before the United States Supreme Court, 25 Temple L. Q. 115, 119 (1951).

So, be "judicious" in your selection of issues, and only include"weak-but-arguable" issues where there is good reason for doing so.

CONCLUSION

The goal of this article was to set forth the inner and outer limits of arguability for an appellate issue, and to give you some help in working through the uncharted territory situated in-between "the arguable issue with a meaningful chance of success" and the "frivolous issue with no chance of success." Deciding whether to raise the "arguable-but- unmeritorious" issue (*In re Spears*, *supra*, 157 Cal.App.3d at pp. 1210-1211) – which I prefer to call the "weak-but-arguable" issue, with the understanding that the issue may have real, but unrecognized merit – is fundamentally a tactical choice for you, as counsel. The suggestion of this article is that you should make this difficult decision bearing in mind the constellation of considerations noted above, as well as other subjective factors in a particular case too numerous and/or individualized to describe here.

So, on with the work of issue-spotting and issue-sorting! And keep in mind the old adage, which I just made up, that today's seemingly hopeless issue may turn into tomorrow's published reversal.