ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GEORGE SMITH, WARDEN, Petitioner v. LEE ROBBINS

CASE NO: 98-1037 c.1

PLACE: Washington, D.C.

DATE: Tuesday, October 5, 1999

PAGES: 1-51

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

OCT 1 5 1999

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1999 OCT 15 P 3: 2[illegible]

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 GEORGE SMITH, WARDEN, :

4 Petitioner :

5 v. : No. 98-1037

6 LEE ROBBINS :

7 -X

8 Washington, D.C.

9 Tuesday, October 5, 1999

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:06 a.m.

13 APPEARANCES:

14 CAROL F. JORSTAD, ESQ., Deputy Attorney General, Los

15 Angeles, California; on behalf of the Petitioner.

16 RONALD J. NESSIM, ESQ., Los Angeles, California; on behalf

17 of the Respondent.

18

19

20

21

22

23

24

25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 CAROL F. JORSTAD, ESQ.

4 On behalf of the Petitioner 3

5 ORAL ARGUMENT OF

6 RONALD J. NESSIM, ESQ.

7 On behalf of the Respondent 23

8 REBUTTAL ARGUMENT OF

9 CAROL F. JORSTAD, ESQ.

10 On behalf of the Petitioner 48

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in Smith v. Robbins.

5 ORAL ARGUMENT OF CAROL F. JORSTAD

6 ON BEHALF OF THE PETITIONER

7 MS. JORSTAD: Mr. Chief Justice, and may it

8 please the Court:

9 This case concerns one of the hardy perennials

10 of American law, what to do with a meritless criminal

11 appeal when that appeal is brought by an appointed lawyer

12 on behalf of an indigent client, and what the standard of

13 reversal in such cases should be.

14 This Court addressed the problem in Anders v.

15 California, holding that the indigent appellant in that

16 case had his equal protection and due process rights to

17 counsel on appeal violated by California's conclusory no-

18 merit letter.

19 Anders has two component parts. The first is

20 the identification of the constitutional rights at stake,

21 and the second is the setting forth of a procedure by

22 which those rights can be vindicated. The Ninth Circuit

23 thinks that the Anders framework, the second part, is

24 compulsory. We think not. In fact, we believe that the

25 Ninth Circuit's insistence on rigid, programmatic

1 adherence to that procedure has undermined California's
2 legitimate efforts to provide effective assistance to
3 indigent appellants.
4 The second issue is whether the Strickland test
5 for ineffective assistance should apply to meritless
6 indigent appeals. Federal habeas is intended to guard
7 against extreme malfunctions in the State procedure.
8 Ordinarily, Federal courts presume the regularity of State
9 court judgments, but not in no-merit cases. In those
10 cases, prejudice is presumed. This is presents problems,
11 because it is altogether too one-sided, and because it
12 turns the presumption of regularity on its head.
13 A presumption of prejudice should be reserved
14 for cases where the error is so systemic that it's
15 impossible to judge what the harm is, and the examples
16 given generally are those of judicial bias and actual
17 denial of counsel.
18 We urge that Strickland be adopted to bring this
19 one anomalous situation into conformity with other cases
20 where deficient performance by counsel is urged.
21 QUESTION: Ms. Jorstad, the problem that I have
22 with that is not a theoretical problem, but kind of a
23 practical one, and that is this, that if we require a
24 demonstration of Strickland prejudice at the habeas stage,
25 once there's been found to be an Anders violation, if we

1 require the demonstration of Strickland prejudice at that
2 stage, as a practical matter, what we are going to do is
3 require the argument of the appeal in the first instance
4 in a Federal court.
5 And number 1, that's going to take some serious
6 time, and the oddity -- when you get to standing on head
7 argument, the oddity is that you're going to have your
8 appeal argued in the first instance in a Federal court,
9 whereas in the first instance it shouldn't be, so for
10 pragmatic reasons it seems to me that there's an argument
11 that it makes a lot of sense to say that once you have
12 shown the Anders violation, and let's say, to go -- I'd go
13 this far for the sake of argument.
14 Once you've shown that there's a possibility
15 that there could be a difference, that there might be some
16 merit, that's as much as you should require, or in effect
17 you're going to turn Federal courts in habeas cases on
18 Anders into State appellate courts.
19 MS. JORSTAD: Justice Souter, I believe that
20 that's not an overall concern. I think if we look at this
21 in the context of merits briefs, where counsel raises one
22 or two or three issues, but fails to raise one or two or
23 three others, the Federal courts are in much the same
24 position.
25 They're going to have to look -- in a Strickland

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 context, there is no presumption of prejudice, but in a
2 Strickland context they're going to have to look at these
3 other issues that will be asserted on Federal habeas, and
4 of course, they should have been exhausted in State court
5 as well, so it won't be the first time.
6 QUESTION: Ms. Jorstad, doesn't the strength of
7 your second argument on the prejudice and so forth from
8 Strickland depend to a certain extent on whether we agree
9 with you that the constitutional rights for the appellants
10 discussed in Anders do not require that the particular
11 Anders remedy be etched in stone, that other remedies
12 would be equally effective? Isn't that going to influence
13 somewhat the outcome of the Strickland analysis in the
14 second prong?
15 MS. JORSTAD: Yes, it is, Mr. Chief Justice.
16 Our position on this matter is that the first component of
17 Anders, that is, the rights to be vindicated, is strictly
18 constitutional. It goes to effective or ineffective
19 assistance, and can always be raised in Federal court.
20 The second part of Anders, this prophylactic
21 framework, is not constitutional. This is a matter of
22 pragmatic suggestion by the court in Anders, and we
23 believe that these rights can be vindicated. After all,
24 what we're talking about is effective assistance of
25 counsel, we're talking about equal protection, and to a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 lesser extent, due process, and the laboratory of the
2 States should be allowed to develop these procedures in
3 ways that make sense in those States, as long as they
4 vindicate the underlying rights.
5 QUESTION: Do you believe as a general
6 proposition that, if this Court identifies a
7 constitutional violation, and says the way this violation
8 is to be avoided in the future is to follow steps A, B,
9 and C, that any court, State or Federal for that matter,
10 is free to say, well, we really don't like A, B, and C,
11 we'll try C, D, and F?
12 Do you believe that the lower courts are free,
13 when we have come up with a pragmatic constitutional
14 solution and says, this is the way it is to be avoided,
15 are they free to ignore that?
16 MS. JORSTAD: I certainly don't think that any
17 court is free to ignore this Court, but I would say that
18 lower Federal courts certainly seem to me to be obliged,
19 because of this Court's supervisory powers in addition to
20 its constitutional jurisdiction, to follow whatever
21 procedure this Court sets forth, but it has been the
22 custom over many, many years for State courts to have some
23 flexibility in interpreting this Court's procedural
24 suggestions --
25 QUESTION: Do you think this Court is free to

1 interpret its own opinions to decide that perhaps a
2 suggestion in the opinion, or a formula, was not mandatory
3 but could be replaced by an equally acceptable one?
4 MS. JORSTAD: I do, Mr. Chief Justice. I do.
5 QUESTION: But if it is mandatory, what's your
6 answer then?
7 MS. JORSTAD: But if it is mandatory? If it is
8 mandatory, if, in fact, this Court said what it meant and
9 meant what it said in Anders, and if this court holds that
10 as a matter of constitutional law that procedure were
11 required, then California is not in compliance.
12 QUESTION: I thought we -- we don't mandate
13 anything. We're not like a legislature. We don't issue
14 prescriptions. I suppose the only real holding in Anders,
15 the only holding in the actual case was that what occurred
16 there did not comply with the Constitution.
17 MS. JORSTAD: I would agree with that.
18 QUESTION: And the further statement that in
19 order to comply with the Constitution you have to do this,
20 this, this, and this can be regarded as dictum, which you
21 would be well-advised, if you're a lower court, to follow,
22 but I'm not sure that a legislature has the obligation to
23 follow that prescription as though we were laying down a
24 prescription.
25 We decided in Anders that what occurred there

1 did not provide effective assistance of counsel.

2 MS. JORSTAD: Yes, Your Honor. In fact, what

3 was decided in Anders was that it didn't provide counsel

4 at all and, of course, Anders antedated Strickland by 17

5 years, so there was no real test for prejudice in that

6 case.

7 California took Anders very seriously, and so --

8 and People v. Feggans followed it very, very closely, but

9 over time, things changed, and what has happened in the

10 last 32 years and even less, really, is that California's

11 system for providing representation to indigents has

12 become more and more sophisticated, has become more

13 established.

14 This is not a situation any longer. There is no

15 indigent in the State of California who will be

16 represented by some solo lawyer who crawls out of the

17 woodwork. Everybody is responsible to the Appellate

18 Projects. The Appellate Projects actually seek out

19 lawyers, they train them, they match lawyers --

20 QUESTION: Well, but I guess -- why don't you

21 help us understand what the California procedure is. A

22 lawyer there representing an indigent defendant can

23 find -- can conclude that he finds no valid grounds for

24 overturning the appeal, and just write something to the

25 court saying that, but not asking to withdraw, and not

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 pointing out any arguable issues.

2 MS. JORSTAD: Let me --

3 QUESTION: Is that right? I mean, that's

4 acceptable. That's what happened here.

5 MS. JORSTAD: No, it is not, Your Honor. I

6 think that's --

7 QUESTION: I thought what happened here was that

8 the lawyer found no grounds that he thought justified

9 going further, and so advised the California courts, and

10 did not ask to withdraw, and did not point out any so-

11 called arguable issues.

12 MS. JORSTAD: If I may recap, that's I guess

13 correct as far as it goes, but there are other aspects to

14 it.

15 When the lawyer has decided that there's no

16 merit to the brief, and when his appellate supervisor, his

17 Appellate Project supervisor, who's an expert, concurs, he

18 may file a brief under California procedure in which he

19 sets forth a detailed statement of the case and statement

20 of the facts with citations to the record which help the

21 court to know that the record has been read and

22 considered.

23 In the record, in the brief filed in this

24 particular case, counsel mentioned in his statement of the

25 case that there had been a Faretta motion, that the

1 appellant's competency had been tested, and that there had
2 been two so-called Marsden motions. In California they're
3 for replacement of counsel. So those issues were kind of
4 identified in the statement of the case.
5 In addition, you're correct in saying, Justice
6 O'Connor, that he does not withdraw, and he asks the
7 court -- he also does not, pursuant to the Wende case,
8 argue against his client. What he does is to ask the
9 court to make an independent review.
10 This allows the court to look at the record
11 without having a list of issues that counsel has read,
12 researched, and rejected. The idea here is to have the
13 court take a fresh look, and that is in fact the holding
14 of Wende, is that an independent review by the court is
15 required.
16 QUESTION: Now, does the appellate -- does the
17 counsel for the Appellate Project continue to participate
18 at that point, or does he stand aside, just as the
19 attorney stood aside?
20 In other words, the retained attorney consults
21 the lawyer for the California Appellate Project, and that
22 lawyer concurs with the judgment that there should be a
23 Wende brief. Is that Appellate Project lawyer now out of
24 the process, or does he continue to assist the court?
25 MS. JORSTAD: No, he would not assist the court,

1 Your Honor. I think the main thing to be aware of in the
2 California system is that the effort is to have the
3 advocacy come at the front end. There's something like
4 the Emperor's new clothes about saying vigorous advocacy
5 in the context of a brief that's decided -- that they
6 decide has no merit.
7 QUESTION: Yes, but the thing I wonder -- I
8 think California has a pretty good system, frankly, and if
9 I were designing one, maybe it would be California's, but
10 the problem that I see is that we have an adversary
11 system, basically, in the country and Anders says, you
12 have a right to a lawyer, criminal defendant, and you have
13 a right, as part of that, to have the lawyer think through
14 on appeal what are his best arguments.
15 Now, we want him to go through that process,
16 write down what his best arguments are, and if he thinks
17 they're still no good, tell us why. That's part of what
18 it is to be an advocate, and that's part of what it is to
19 be a lawyer, and that's part of a right to a lawyer that
20 you have. Now, given our adversarial system, why not?
21 MS. JORSTAD: Your Honor, first of all I would
22 say that I certainly agree that the -- that any appellant
23 has a right to a conscientious and diligent lawyer who
24 looks for issues.
25 The question really, and the point of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 controversy really is, what is that lawyer to do when he
2 can't find any, there's nothing there, and there are cases
3 like that. There simply is nothing to raise that would
4 not be violative of --
5 QUESTION: Well, here the Federal courts
6 apparently concluded that there were some issues that
7 ought to be raised and litigated.
8 MS. JORSTAD: Nobody -- well, first of all, I
9 would have to say that there have been two issues raised
10 in this context, and I think both of them are, frankly,
11 the definition of frivolousness. The first was, there was
12 a complaint -- well, no, there was not a complaint. The
13 district court itself essentially raised the issue of the
14 law library and its adequacy.
15 The -- I had said all along that the law library
16 only came up in the context of the judge's Faretta
17 warnings to Mr. Robbins telling him all of the parade of
18 horribles that he would face if he went pro per.
19 QUESTION: But wasn't the issue -- not the
20 original Faretta, but later in the proceeding it is
21 argued, I don't know if the record supports it, that the
22 defendant made known a desire to have assistance of
23 counsel later on --
24 MS. JORSTAD: That's absolutely --
25 QUESTION: -- and that is not mentioned at all

1 in the, what would pass as an Anders brief by the lawyer.
2 What is mentioned is the original threat of going.
3 MS. JORSTAD: Yes. Well, let me --
4 QUESTION: And also --
5 MS. JORSTAD: I'm sorry.
6 QUESTION: -- I don't see that his statement did
7 mention that another lawyer in the public defender's
8 office reviewed what he'd done.
9 MS. JORSTAD: It did not.
10 QUESTION: It didn't.
11 MS. JORSTAD: Actually I don't think that's
12 true. I --
13 QUESTION: So we don't know from the record
14 whether that was actually done, do we?
15 MS. JORSTAD: Yes, Your Honor, we do, because
16 there was a declaration by counsel, and I believe it's in
17 the joint appendix -- yes, at page 43. This was filed in
18 the district court, and he said prior to the filing of
19 briefs I consulted with the California Appellate Project
20 and received their permission to file a Wende brief.
21 QUESTION: But we don't know what the
22 appellate -- he asked permission to file, and he got
23 permission.
24 MS. JORSTAD: Yes. Yes.
25 QUESTION: But it doesn't show that the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 Appellate Project read through the record again.
2 MS. JORSTAD: It does not. We do have the
3 rules, and we do have the very excellent brief of the
4 California Academy.
5 QUESTION: What are the rules, Ms. Jorstad.
6 MS. JORSTAD: I don't know the rules verbatim,
7 but they provide for supervision, review, and concurrence
8 on no-merit briefs. I would like to add that --
9 QUESTION: Can you tell us -- take us through,
10 because I want to get to Justice Breyer's question again,
11 after the Wende brief is filed, then I take it that the
12 district court of appeals has a staff that looks at this
13 brief and talks with the court about it, is that right?
14 MS. JORSTAD: Either somebody on the attorney's
15 staff or a justice reviews the entire record from scratch.
16 QUESTION: Now -- now, as Justice Breyer
17 indicated, that's an interesting system. It's not really
18 the adversary system.
19 MS. JORSTAD: I think, again, to return to an
20 earlier theme, that it only really makes sense to talk
21 about an adversary system if there is some basis for
22 adversarial representation. If there is no merit, a
23 lawyer in California and in most other jurisdictions
24 cannot raise a frivolous issue.
25 QUESTION: Ms. Jorstad, one thing that is

1 bothering me about this argument is, it's a kind of a
2 trust-me argument. There is something disciplined to
3 writing out reasons why I have concluded that although
4 these issues I could identify, they are not worthy of the
5 court's attention.
6 The discipline of saying why, explaining why,
7 it's just like for a court. A court has to give reasons
8 for what it does, and sometimes, in writing out those
9 reasons, one discovers that something isn't right, that it
10 won't write, so the discipline that a lawyer has to go
11 through in saying, this is my thought process, this is how
12 I arrived at the conclusion, then none of that appears.
13 None of that appears on the record. We haven't got a
14 clue.
15 And something else, too, frankly, that bothers
16 me is, the notion that there is a judge who's going to
17 read through this whole record in these no-merits cases
18 doesn't comport with reality. Isn't the reality that
19 there's going to be some staff counsel, not even a law
20 clerk to the judge, who is going to read this and present
21 it to a panel and say, no merit?
22 MS. JORSTAD: Let me take those two questions
23 seriatim. As far as the discipline of writing down why
24 the issue is no good, I think if we try to step back a
25 little and look at what's the basis for requiring that

1 might be, we're talking here about the right to counsel,
2 and we're talking about mostly equal protection.
3 If you analyze this as a matter of equal
4 protection, it would simply never be true. I can say
5 categorically that retained counsel would have to explain
6 to the court why he failed to raise the issues he doesn't
7 raise, nor would appointed counsel, who raises -- you
8 know, even if counsel in a merits brief raises a single
9 extremely marginal issue, that counsel would never have to
10 say to the court, here are the other issues I considered,
11 and here are the cases that say why they're no good. It
12 just doesn't happen.
13 What I'm suggesting is that we do have --
14 Justice Ginsburg, you said, trust me, and I think we
15 should afford similar trust to lawyers who write no-merit
16 briefs that we give to lawyers who write merits briefs,
17 and specifically I would point out that under the current
18 system it takes a lot of courage to write a no-merit
19 brief.
20 Now, first of all, I would also add that it's not as
21 if the lawyer who presents a no-merit brief can just kind
22 of write it off and hand it in and go away with his money.
23 He has to justify himself to the Appellate Project. The
24 Appellate Project is going to give it and him an
25 advocate's review. They're going to give very close

1 scrutiny, and they are going to know things that no court
2 will ever be able to know, because they may be told in
3 confidence by the client --
4 QUESTION: I think you could have said the same
5 thing about the certificate in Penson v. Ohio. Maybe they
6 didn't have a second one look at it. Why don't we
7 trust -- why wouldn't we trust that lawyer?
8 MS. JORSTAD: Well, I mean, I certainly -- I
9 guess that's possible. I would say that Penson v. Ohio,
10 the --
11 QUESTION: The only difference between the --
12 his certificate and the certificate in this case is,
13 you've also got a statement of facts here.
14 MS. JORSTAD: Your Honor, this is -- no, Your
15 Honor, that's -- there are other differences. First of
16 all, in Penson the attorney did write just a certificate.
17 I would suggest to the Court that what California does is
18 far more than that. The statement of a case, the
19 statement of the facts is a guarantee that somebody's been
20 through that record and knows what's in it, and isn't just
21 filing a letter out of laziness. That's one thing.
22 A second thing is that in Penson the lawyer was
23 really, really wrong. That is to say, he was -- he said
24 there were no issues at all. The court, after having
25 dismissed him, found a number of issues and, more

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 importantly, found a single issue which resulted in the
2 reversal of a count, a big mistake.
3 Now, Penson I think would have come out the same
4 way if there had been a Strickland test as a presumption
5 of prejudice, but it's very, very different, because in
6 Penson the, really the largest fault was the court's, and
7 that is in failing to appoint counsel once they knew that
8 the first counsel had missed big, arguable issues. That
9 would never happen in California. In California -- and it
10 was in Penson the State reviewing board itself which found
11 the errors and failed to appoint counsel.
12 In California, if a State -- if the State court
13 finds that there are issues that should have been raised,
14 even counsel who has not yet been dismissed, or a new
15 counsel in some cases will be appointed and has to brief
16 those issues.
17 QUESTION: Has that ever actually happened in
18 California?
19 MS. JORSTAD: Yes, Your Honor. Yes, it has, and
20 I would like to say, Justice Ginsburg, that unlikely as it
21 may seem, I have pretty good reason to believe that judges
22 and/or their research attorneys do, in fact, go through
23 these records. It's a terrible burden, and the way --
24 QUESTION: Some or uniformly?
25 MS. JORSTAD: I'm sorry?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 QUESTION: Some, or uniformly?

2 MS. JORSTAD: Well, I can't speak for the entire

3 bench in California, but I do know that we have reported

4 decisions, published decisions in which judges complain

5 bitterly about the amount of time -- I mean, they're not

6 happy, all of them, to be doing this work.

7 QUESTION: Ms. Jorstad, wouldn't it be helpful

8 to the court to have an explanation of arguable issues and

9 why they were rejected? I mean, if I were assigned the

10 task of going over these records, I would think that would

11 be a good starting point for me. I'm just surprised that

12 California is resisting having such a system.

13 MS. JORSTAD: Well, Your Honor, it's

14 interesting, because both sides of the -- not both sides

15 of the bench, but both sides of the bar, both the people

16 and the defense, feel the same way about this.

17 I think that when you talk about having reasons

18 stated to the Court for issues that have been rejected,

19 again we need to look at what constitutional interest

20 would be satisfied by that.

21 If we're talking about the Sixth Amendment, or

22 about equal protection, I don't think that that answers

23 those things at all, because in fact a client --

24 QUESTION: Does this record have any statistics

25 or figures on how often these no -- these Wende briefs are

1 filed in California, percentage wise?

2 MS. JORSTAD: As of a few years ago it was in

3 roughly 20 percent to, maybe, in some districts as much as

4 25.

5 QUESTION: And do the statistics also tell us

6 how often under a Wende procedure the courts would

7 actually find arguable issues on their review and send it

8 back?

9 MS. JORSTAD: They do not, Your Honor. It does

10 happen. I've seen it happen.

11 I started to say a little bit earlier, I think

12 in answer to Justice Ginsburg's question, that it takes a

13 lot of courage under the current system to file a Wende

14 brief. These --

15 QUESTION: Well, it takes a lot of courage, but

16 one countervailing consideration, I take it as a general

17 matter, the enormous workloads that the assigned counsel

18 are laboring under, and that seems to me one of the

19 distinctions that goes to the analogy you tried to draw

20 between the situation of normally retained paid counsel

21 and the counsel who are subject to Anders. I mean, am I

22 missing your point?

23 MS. JORSTAD: I believe you are.

24 QUESTION: Tell me, then. Your expression tells

25 me I am --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 (Laughter.)

2 QUESTION: -- but I'm not sure where I have done

3 it.

4 MS. JORSTAD: The counsel who are appointed by

5 the court -- or, excuse me, appointed by the Appellate

6 Projects, and that duty is delegated by the courts, don't

7 have enormous case loads, at least from the Appellate

8 Project, because the work is divided up and I think a

9 reasonable workload is assumed and, of course, whatever

10 the workload is for these people who file no-merit briefs,

11 the same could be said for people who are filing merits

12 briefs. We don't monitor them. We shouldn't monitor

13 these folks.

14 QUESTION: Well, yes, but except that if they're

15 normally retained counsel, number 1 they don't have an

16 inducement to give short shrift to issues which they could

17 litigate and be paid for litigating, and number 2, I had

18 supposed that as a group they were more likely to be able

19 to control their own work loads and not take more than

20 they could handle.

21 MS. JORSTAD: I think, Your Honor, that these

22 attorneys are equally as well able to control their work

23 load. They are not, as is true in the Attorney General's

24 office, a member of an office where the work load is what

25 it is and comes at you the way it comes at you. They --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 QUESTION: May I ask if you disagree with the
2 representations made in the amicus brief filed by the
3 retired California judges, who say the system isn't
4 working very well?
5 QUESTION: I was going to ask the same question.
6 These are very distinguished judges.
7 MS. JORSTAD: Yes, they are.
8 QUESTION: Do they just disagree as a matter of
9 policy, or are they making a constitutional argument?
10 MS. JORSTAD: Thank you for asking, Justice
11 Kennedy, because that is the point of this brief. They
12 don't like the procedure very much, these particular
13 judges, and the thing they don't like about it is, they
14 say it's inefficient, they say it makes the court work too
15 hard, they say it's a waste of resources, but in fact, if
16 you look at that brief, there is no claim that there's any
17 constitutional deficiency in California's procedure.
18 If I may, I'd like to reserve the rest of my
19 time.
20 QUESTION: Very well, Ms. Jorstad.
21 MS. JORSTAD: Thank you.
22 QUESTION: Mr. Nessim, we'll hear from you.
23 ORAL ARGUMENT OF RONALD J. NESSIM
24 ON BEHALF OF THE RESPONDENT
25 MR. NESSIM: Mr. Chief Justice, and may it

1 please the Court:

2 I would like to begin by making three points.

3 First, both the district court and the Ninth Circuit

4 correctly found that there were arguable issues in this

5 case. therefore, like the defendant in Penson, Robbins

6 had a right under Douglas v. California to an advocate's

7 brief on the merits.

8 Second, Robbins' State appellate attorney did

9 not file a proper Anders brief in this case. This was not

10 a mere technical violation of Anders. There was no

11 advocacy. A nonlawyer could have written the brief or

12 document which was filed here. As the Warden concedes, it

13 does not refer to a single legal issue.

14 QUESTION: Well, Mr. Nessim, supposing that

15 under a State which follows the Anders rules, an Anders

16 brief is filed, but -- and the State -- the Federal court

17 finds that there was some issue that should have been

18 raised, what does the Federal court -- can the Federal

19 court examine that on habeas, and if it does find an issue

20 should have been raised, what is the remedy?

21 MR. NESSIM: I believe the remedy should be

22 prejudice per se, Your Honor, because the Federal court

23 will not be guided by the advocacy process, would not be

24 able -- does not have the information, would have to

25 speculate, as this Court has repeatedly found, to make

1 that determination without an advocate's presentation, if
2 there's a finding of an arguable issue that a merits brief
3 is required.
4 If there's no finding -- if -- the Federal court
5 may not be in a position to decide if there's an arguable
6 issue with an inadequate merits brief or an Anders brief.
7 If there's no adequate brief that refers to the issues,
8 the court only has the cold record, and this Court has
9 repeatedly found that that is insufficient for the court
10 to make its determination.
11 QUESTION: Well, talk about consuming time,
12 though. I mean, here the lawyer in the State court on
13 appeal filed a no-merits brief under Anders, and you say
14 the Federal district court, it doesn't have to decide that
15 there actually was any error in the State court
16 proceedings, but only that there was an arguable issue,
17 and then what, it goes back to the State court to have
18 another argument on an arguable issue, without ever
19 finding any constitutional infirmity in the trial. That
20 does seem going around Robin Hood's barn.
21 MR. NESSIM: Well, I think Anders is an
22 efficient procedure. It requires the lawyer to act as an
23 advocate. The Federal habeas court is unable to make the
24 determination whether the appeal is wholly frivolous,
25 which is constitutionally required, without the assistance

1 of an advocate and, as I think a question was asked during
2 the Warden's presentation, it's efficient to have the
3 State court make the determination in the first instance.
4 The Federal court's determination was, was there
5 a denial to right to counsel, and this Court has
6 repeatedly found a right to counsel on the first appeal as
7 of right. In fact, Pennsylvania v. Findley assumes that
8 while Anders may not be mandatory in the case of post
9 conviction or discretionary appeals, it is mandatory where
10 there is such a underlying constitutional right.
11 QUESTION: That's a different question. I'd be
12 awfully worried about -- I agree with the Chief Justice
13 that, suppose -- what you're saying is, if lawyer A, who's
14 a good lawyer, perfectly good, it's not inadequate
15 assistance, brings an appeal and leaves out issue 1 in the
16 State court and argues the rest of it. Issue 1 is gone.
17 It's waived, unless it was inadequate assistance of
18 counsel, which I assume it wasn't.
19 You're saying lawyer A did exactly the same
20 thing, but not having found any other issues, he files an
21 Anders brief, which in every other respect is fine, and
22 under those circumstances we have two more procedures, 1)
23 the procedure in habeas court where the habeas judge says,
24 I guess it's arguable, you should have raised it, and then
25 back we go to State court, and this time it wasn't waived.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 Now, trying to reconcile that's impossible in my
2 mind.
3 MR. NESSIM: In answer to your question, Anders
4 requires that there be an advocate on appeal. In most
5 cases it will be a merits brief, but if the lawyer is
6 unable to do that because of ethical reasons, it requires
7 an Anders brief, and in Penson this Court distinguished
8 the situation between where a lawyer acts as an advocate
9 but acts ineffectively, in which case there's not a
10 presumed prejudice standard, and the situation where there
11 is no advocate at all, and we would submit there was no
12 advocate at all here, because a proper Anders brief was
13 filed. In fact, of the nine issues that we refer to in
14 our brief, not one of those are even hinted at.
15 QUESTION: That's the other question which I
16 have, a more important question, on which I'm quite
17 undecided. California seems to me to have a pretty good
18 system, frankly. I mean, if I were a criminal defense
19 lawyer, I might say they had a better system, because a
20 lawyer who wants to file an Anders brief is not going to
21 be an enthusiast, while the staff attorneys are paid to
22 find those issues.
23 So to decide for you might require me to decide
24 for a system that's actually going to give the criminal
25 defendant a less-good shot at the appeal, and that's

1 worrying me, so I want to know your response to that.

2 MR. NESSIM: Your Honor, the aspect of Anders

3 which was criticized in California is the aspect of the

4 independent judicial review, which is independently

5 required by California law. The Wende case that's in fact

6 one of the two issues they face, they interpret Anders as

7 requiring that.

8 We would submit to you that the California

9 system, while certain aspects of it are good, and there's

10 no reason that they can't stay under what we promote, they

11 can still have this appellate project system.

12 I would add that most of the facts concerning

13 that system are not in the record of this case, which was

14 pointed out in one of the amicus files, but more

15 importantly -- and I think this is crystal clear -- while

16 this case should be decided under Federal constitutional

17 law, the Warden has mischaracterized the California

18 system, and I would refer you to In re Sade C, an opinion

19 of the California supreme court, which does not purport to

20 break any new ground.

21 It just refers the precedents which were in

22 effect, and it says that Wende -- and I'm referring to

23 page 787 of actually the 55 Cal. Rptr. 2d version, but

24 Wende made clear that in such a situation all the steps

25 specified by Anders had to be taken, other than those

1 dependent on filing a motion to withdraw.

2 The implicit rationale is that for present

3 purposes substantial withdrawal is equivalent to formal

4 withdrawal, and in the footnote there it says that the

5 Oregon court erred in finding that an Anders brief which

6 referred to issues was not required.

7 So our position is, first of all Federal

8 constitutional law controls, but there is no contrary

9 California system. If this Court looks at footnote 8 and

10 footnote 22 of Sade C, which does not purport to break new

11 ground, it just refers to California law. Footnote 22

12 says very clearly that the brief that was filed in that

13 case, if Anders was to apply -- the court concluded that

14 Anders did not apply in that case. It deals with a

15 custody situation.

16 But they said that we note that under Anders

17 none of the briefs submitted by appointed appellant

18 counsel would have been sufficient. Anders brief must

19 contain law as well as facts, although each of the briefs

20 here, and I'm paraphrasing, has facts, none has law.

21 QUESTION: Well now, let's get down to what you

22 really are complaining about so that I can get this in

23 perspective. What you say should have happened here is

24 that the lawyer, who found no good issue, should

25 nonetheless have spelled out what arguable issues there

1 might be, even though he didn't think they were
2 sustainable for a legitimate on appeal, right? You want
3 to see that, you want to see this spelled out. Is that
4 correct?
5 MR. NESSIM: Yes, but I think from an --
6 QUESTION: Okay, and also you want, as I
7 understand it, to require that the lawyer, having filed
8 that, then withdraw. Is that the other component of what
9 you want?
10 MR. NESSIM: No, Your Honor.
11 QUESTION: No.
12 MR. NESSIM: First of all I think terminology is
13 important. If the lawyer found arguable issues, then a
14 merits brief is required. If the lawyer found no arguable
15 issues, and the State had -- has an epic system that did
16 not allow the filing of a merits brief in that situation,
17 an Anders brief, which does not argue issues -- and Anders
18 does not require the argument of Federal issues. It
19 requires the reference of those issues, so -- and the
20 reason why that's important --
21 QUESTION: Well, so that's what we're quibbling
22 about, some description of issues that aren't even
23 arguable.
24 MR. NESSIM: The points served by that, Your
25 Honor, are two, and the Anders court said this. The Court

1 said it in McCoy and Penson first. The court is unable to
2 make its determination whether the appeal is wholly
3 frivolous without the assistance of the reference of legal
4 issues. The cold record is insufficient.
5 Second, a mere conclusory statement, whether
6 it's a one-sentence or one paragraph in Anders, or the
7 type of brief here, which does not refer to a single legal
8 issue, does not give the court information to make the
9 second determination of whether the attorney was
10 effective, or by --
11 QUESTION: What is going to be the reaction of a
12 typical court when it gets the kind of brief you say ought
13 to be filed? There are six issues here, but they're all
14 frivolous.
15 MR. NESSIM: The purpose of an Anders brief is
16 not to decide the case on the merits.
17 QUESTION: Well, answer my question, if you
18 will --
19 MR. NESSIM: Yes.
20 QUESTION: -- not just go into some recitation.
21 MR. NESSIM: If the court receives such a brief,
22 the court will be able to look at those issues and maybe
23 the court will have a different opinion on whether those
24 issues are arguable or not. Maybe the court will see that
25 this -- the court will have some evidence that the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 attorney was effective.

2 QUESTION: If the issues are arguable, he has to

3 file a merits brief, doesn't he?

4 MR. NESSIM: That's correct, but --

5 QUESTION: Is that so? Let me -- excuse me.

6 Could I just make this one point?

7 QUESTION: Yes, sure.

8 QUESTION: I think McCoy holds to the contrary

9 on that, because McCoy approved the Wisconsin procedure in

10 which, after identifying arguable issues, if the lawyer

11 went ahead and explained why he thought they did not

12 justify a merits brief, that satisfied Anders.

13 MR. NESSIM: That's correct. McCoy validated

14 what could be called Anders plus. Anders requires a

15 reference to issues.

16 QUESTION: Right.

17 MR. NESSIM: Anders requires, in fact --

18 requires not only a reference of the relevance facts

19 pertaining to those issues, but a reference to the

20 relevant law which pertains to those issues.

21 QUESTION: But I thought the purpose of Anders

22 in part, which you haven't referred to, so I might be

23 wrong, was to say to the lawyer, lawyer, do the following:

24 read the transcript. Now, when you read the transcript,

25 think what is the best argument I could make.

1 Now, write it down, and then if you want give
2 the reasons why it isn't that great, but it forces the
3 lawyer to go through that advocacy process, and in the
4 course of doing so, he may find some issues. That, I
5 thought, was the major purpose of Anders, but you didn't
6 refer to that, so maybe I was wrong.
7 MR. NESSIM: You are correct, Your Honor. In
8 fact, Penson, explicitly after discussing the two purposes
9 I discussed, said that a third purpose said that it
10 provides an independent inducement to counsel to do what
11 Douglas requires, which is to diligently review the
12 record, research the law, and by putting pen to paper,
13 with that discipline you're much more likely to find an
14 arguable issue than you would if you didn't engage in that
15 process, so it does provide an independent inducement.
16 QUESTION: But the lawyer in Anders, in the
17 Anders procedure, need not follow the final step outlined
18 by Justice Breyer, which is to say why these arguments are
19 frivolous.
20 MR. NESSIM: That is correct.
21 QUESTION: He can say, I hereby certify that the
22 following issues should be examined pursuant to Anders,
23 and then list these things.
24 QUESTION: Which means that he thinks they're
25 frivolous, doesn't it?

1 MR. NESSIM: That is correct, and the purpose is
2 not to decide them on the merits, but you're right. I
3 think it's more than a listing. It's a reference of the
4 relevant facts and the relevant law. I think the Seventh
5 Circuit in many ways has given the most attention of the
6 circuit courts as to what an adequate Anders brief, then
7 Judge Stevens' opinion --
8 QUESTION: It's strange, I suppose there are
9 innumerable frivolous issues that could be found in any
10 case. I mean, you know, the failure of California to
11 provide a thirteenth juror is a frivolous issue.
12 How does counsel go -- well, yes, he has to
13 identify issues that he thinks do not justify an appeal,
14 correct, but if they justify an appeal, that is, I guess
15 if they're arguable, he has to conduct the appeal, so what
16 he has to list are frivolous issues. There are
17 innumerable frivolous issues in any case. I really
18 don't -- I don't know what I would do with this if I had
19 to comply with it.
20 MR. NESSIM: In response to that, first of all
21 we're talking about not -- we're talking about issues
22 which appear to be frivolous. There's been no
23 determination that they are frivolous. But I don't think
24 Anders requires any conceivable frivolous issues such as a
25 thirteenth juror. I think that the types of issues which

1 should be identified are those which a trained advocate,
2 and this comes from Nichols, would identify and consider,
3 that a trained advocate would identify and consider in the
4 evaluation of the appeal.
5 QUESTION: So he would say, this is as close as
6 I can get to a nonfrivolous issue. Isn't that what he's
7 doing? It's a kind of modified issue-spotting. This is
8 as close as the record gets to a nonfrivolous issue.
9 That's what he's supposed to list, right?
10 MR. NESSIM: I think that's correct. If you
11 take the most simplest of proceedings, a guilty plea, with
12 a very standard sentencing, what does an attorney do? I
13 think that an attorney in that case should at least refer
14 to the issues such as voluntariness of a plea, whether the
15 defendant was advised of rights, whether the sentencing
16 was in the range.
17 If the attorney does that, the appellate court
18 will have the information to decide, 1) whether the appeal
19 is wholly frivolous, 2) whether the attorney provided
20 effective assistance, and whether he did his duties under
21 Douglas v. California. I think it's a very workable
22 system.
23 QUESTION: And it will get the court there
24 faster than the court will get if it has to do it all by
25 itself.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 MR. NESSIM: That's right. Anders is not only
2 constitutionally required, it's an efficient system.
3 What's being complained about by some practitioners or
4 judges in California is the failure to file an Anders
5 brief, because the court then is just left with a cold
6 record, and is forced to do the whole thing itself.
7 QUESTION: What about the appellate process?
8 QUESTION: On that point, Justice Stevens and I
9 were both interested in the brief filed by the retired
10 justices. Do you interpret this brief as saying that
11 there is a constitutional deficiency in the California
12 procedure, or that they just prefer the old procedure as a
13 policy matter? How do you interpret the brief?
14 MR. NESSIM: Yes. Your Honor, I interpret the
15 brief as the judges' commenting on policy, not
16 constitutionality. I disagree with the Warden's statement
17 that their statement is to, in a sense, agree with the
18 Warden that the California system, which is practiced at
19 least in some parts of California, is the correct system.
20 I think they're talking about the policy.
21 And with respect to the CAP system, as we
22 pointed out in our brief, most of -- the only thing about
23 cap, which is in the record, came out the first time at
24 the Federal habeas level, when Mr. Goodwin, the appellate
25 attorney, filed a declaration where he said he consulted

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 with an appellate attorney.

2 That doesn't indicate that they independently

3 reviewed the record, and even if they did, that was the

4 situation in Ellis back in, I think it was in '58 or '63,

5 where the Court said it doesn't matter how many attorneys

6 looked at something behind closed doors, the court needs

7 the assistance of an advocate. Somebody has to act as an

8 advocate.

9 QUESTION: You suggested, I think, in your brief

10 that these appellate projects where not uniform in their

11 approach, and that some of them do require an

12 identification of issues that the lawyer considered. I

13 think there's some disagreement about that. Can you tell

14 us a little bit more about -- it's rather foggy what these

15 appellate projects are.

16 Ms. Jorstad said that they are run by experts,

17 that the staff of experts in these matters -- but I'm a

18 little unclear on exactly what these animals are.

19 MR. NESSIM: Your Honor, we said very little in

20 our brief on the merits about the CAP system. It is

21 addressed in great length in one of the amicus briefs that

22 was filed on our behalf, the one on behalf of Delgado.

23 Our position on the CAP system is, first of all

24 it's not in the record and shouldn't be considered, but if

25 the Court does consider it, as the Daskian brief points

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 out, there are five different appellate projects in
2 California, and one of them in 1990, after the Ninth
3 Circuit decision in Griffy, where the courts basically
4 said, the Ninth Circuit in that case, if the California
5 system is as they claim, meaning not requiring an Anders
6 brief, it's unconstitutional.
7 According to this brief, one of the appellate
8 projects at that time switched to the Anders system and
9 according to this brief two others have, but I would
10 caution the Court, none of this is in the record.
11 Our position is that even if -- 1) it's not in
12 the record, and 2), even if there was a second attorney
13 who reviewed it, this Court has repeatedly held that is
14 not the substitute of an advocate's brief, and an Anders
15 brief, while a very strange form of advocacy, is still an
16 advocate's brief, and the court needs that.
17 I would point out also that there is a
18 fundamental difference between the Warden's position and
19 our position as to what an arguable issue is. The Warden
20 I think would ask counsel to speculate as to, in a sense
21 act as amicus per aes, which was criticized before as to
22 the likely success of an issue.
23 I think in McCoy this Court very clearly said
24 that an arguable issue is any issue that has any basis in
25 fact or law, and I think the nine issues that we set

1 forth, and we only need one -- and the lower courts didn't
2 say that there were not more than two. They said there
3 were at least two.
4 I think that if this Court -- and this is not
5 only a case of equal protection. Due process concerns,
6 Ebbitts made that very clear, as well as Sixth Amendment
7 concerns are present, too. If one applies the balancing
8 test, which in MLB was discussed again last term, there is
9 a fundamental interest at stake here, the right to counsel
10 on the first appeal as of right, and if you look at the
11 State interest, Anders is efficient.
12 All it requires the attorney to do is to put pen
13 to paper, to put -- he had to go -- he or she has to go
14 through that process anyway. It doesn't involve greater
15 expenditures.
16 QUESTION: Well, I suppose --
17 MR. NESSIM: It's efficient for judges.
18 QUESTION: I suppose in the Anders opinion
19 itself there's some indication that we wouldn't preclude
20 other systems that were equally as effective, right?
21 MR. NESSIM: The --
22 QUESTION: I mean, Anders isn't necessarily the
23 only way that the right to counsel can be satisfied.
24 MR. NESSIM: This Court has repeatedly held that
25 advocacy is necessary to reliably decide a case, and we

1 would submit that the lawyer has -- Anders is a limited
2 exception. A merits brief is much preferred. Anders is
3 just a recognition that there are certain State ethical
4 rules that sometimes prohibit that.
5 So I think any system would require a form of
6 advocacy to give the Court the information it needs,
7 because a cold record is insufficient, and I should add --
8 QUESTION: So --
9 MR. NESSIM: I should add that Anders, McCoy,
10 and --
11 QUESTION: But it's so odd when the court itself
12 says, we don't want it and need it. We have a different
13 system that we think works as well.
14 MR. NESSIM: First of all, that's what the
15 Warden --
16 QUESTION: I mean, if it's -- this was for the
17 benefit of the court presumably, and the court says, I
18 don't need it, thank you.
19 MR. NESSIM: First of all, Your Honor, the
20 California courts have not said that. In fact, they've
21 said the exact opposite of what the Warden says, and in
22 terms of a policy matter, that's what the retired judges
23 are saying.
24 QUESTION: Well, but --
25 MR. NESSIM: They need that brief.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 QUESTION: -- I thought in Wende the supreme
2 court of California had approved this system.
3 MR. NESSIM: Not at all, Your Honor. If this
4 court reads the Wende opinion, there were two questions
5 raised in Wende, 1) whether the appellate court had to
6 make an independent review of the whole record, and the
7 second question Wende considered was whether counsel had
8 to formally withdraw. Now --
9 QUESTION: Well, here the court of appeals in
10 this case said they were satisfied the respondent's
11 attorney had fully complied with the responsibilities in
12 Wende. I mean, that suggests that the California courts
13 do recognize this system. I mean, it would really be a
14 very strange world if the California courts don't
15 recognize it, and yet this case comes here in this
16 posture.
17 MR. NESSIM: I would submit, Your Honor, that
18 the -- many California courts --
19 QUESTION: Well, but --
20 MR. NESSIM: -- have misinterpreted their own
21 law, and --
22 QUESTION: Well, that's not a question for us,
23 whether California courts misinterpret their own law.
24 That's up to them.
25 MR. NESSIM: Well, I agree with that, Your

1 Honor. The answer for the ultimate question for this
2 Court is whether the system meets constitutional
3 standards, but California's argument that their system is
4 consistent with California law independent informs this
5 Court's analysis on each of the three questions. It's
6 part of the Bierdenberg v. Georgia balancing of interests.
7 If the States -- if -- you have to look --
8 obviously, the high court of California is the ultimate
9 authority on California law, not the intermediate
10 appellate court, not the Warden, and if they've said an
11 Anders brief is required, that affects the balancing of
12 interests. It also, when the California supreme court
13 states that though an attorney -- and this goes back to
14 Justice O'Connor's question that I didn't have a chance to
15 answer about --
16 QUESTION: Well, I -- before you go back to any
17 other question, I wish you'd answer mine, and here the
18 California court of appeals said it examined the record,
19 found no other arguable issues, and the response attorney
20 fully complied with his responsibilities, citing Wende,
21 and then the California supreme court denies review. Are
22 you saying that this is the California court of appeals'
23 position is contrary to California precedent?
24 MR. NESSIM: Yes, Your Honor, and I refer you to
25 Wende, and I agree that Wende is not the clearest --

1 QUESTION: Okay. We've got the California court
2 of appeals saying this did comply with Wende. We've got
3 you saying it didn't. That's a rather easy choice.
4 (Laughter.)
5 MR. NESSIM: Well, Your Honor, if that was the
6 choice, I would agree with you. I'm referring you to what
7 the California supreme court said in Wende, and what it
8 made crystal clear, not seeking to break any new ground in
9 Sade C. It said, in California an Anders brief must refer
10 to law as well as facts, and --
11 QUESTION: If we reject your view of what those
12 two cases stand for, and we accept that the California
13 procedure is, you do not have to identify issues that you
14 considered along the way, let's assume that that is the
15 California law, does that affect whether you should win or
16 lose?
17 MR. NESSIM: No, it should not affect. We
18 should still win, Your Honor, because if one goes back and
19 reads the State's briefs in Anders v. California, they are
20 an exact replay of their arguments here. They argued
21 there there was a multi-tiered review of several
22 attorneys. They argued there that there was an
23 independent judicial review of the whole record, and this
24 Court found that insufficient.
25 Why, and again I go back to the purposes,

1 because the Court -- the cold record is not enough for the
2 court to make the determination of whether the appeal is
3 wholly frivolous, nor was it enough to determine whether
4 counsel provided effective assistance.
5 The brief here only -- a high school student
6 could have written this brief. It first of all misses
7 most of the important pretrial proceedings, and even its
8 summary of the facts, it's a nonlawyer's discussion. It's
9 a summary of a witness-by-witness basis. There's no
10 advocate's basis.
11 I should add here that the failure of advocacy
12 goes beyond, in this case, the mere file -- the failure to
13 file an advocate's brief, whether merits or Anders.
14 The Chief Justice in his dissent in Penson
15 discussed that there's no reason to doubt that the
16 attorney conscientiously reviewed the record in that case.
17 There's plenty of reason to doubt that in this case. Many
18 of the important pretrial proceedings weren't even
19 transcribed at the time, so the attorney didn't have the
20 benefit of that, the appellate court didn't have the
21 benefit of that.
22 In fact -- and then Penson discusses that one of
23 the important responsibilities of an advocate is to ensure
24 that the appellate court has a full record. The appellate
25 attorney here failed in that obligation.

1 Robbins actually made several motions to augment
2 the record before the State court of appeal. The attorney
3 did not support those efforts. In fact, many key
4 portions, the -- one of the arguable issues we raise is
5 the denial of the motion to -- for destruction of
6 evidence.
7 The Warden points out in their reply brief that
8 Robbins said at one point, this motion has already been
9 heard, and the judge says, well, we're not going to hear
10 it again.
11 In fact, if you look at the record, there's
12 nothing in the record to suggest that it actually was
13 heard. Robbins was probably confused. The hearings,
14 which -- between the filing of that motion and that
15 colloquy, if you look at the minute order, that's all we
16 have.
17 None of them indicate that the motion was
18 actually heard, and so Robbins actually pointed to each of
19 these key motions and hearings in his motions to augment,
20 and the appellate court denied that, and I think that was
21 probably in contravention of California law to look at the
22 whole record.
23 And Goodwin, the attorney didn't support it.
24 QUESTION: Would you explain to me a little bit
25 more about California's rules on getting the whole record

1 typed up and provided. Did he have a right to have
2 everything typed up, or did he have to make some kind of a
3 showing that there might be something in the parts that
4 hadn't been typed up?
5 MR. NESSIM: The relevant rule is California
6 Rule of Court 33, and it's been amended, I don't think
7 substantively, from back when this appeal was decided on
8 today.
9 It does not -- it requires all motions which
10 were denied to be part of the appellate record, and in
11 fact all motions which were denied were not part of the
12 record on appeal in this case. It does not to my
13 knowledge -- it does not require all pretrial proceedings,
14 but there is a mechanism, if those are relevant to
15 deciding an issue of appeal, to request them.
16 QUESTION: How did they get typed up in this
17 case? Did you have to order that, or did -- how did it --
18 you said that they weren't typed up in time for the
19 California appellate court to have read them. Is that
20 shown by the record?
21 MR. NESSIM: Yes, Your Honor. The transcripts
22 were prepared during the State habeas proceedings before I
23 was appointed as counsel. Robbins did that on his own.
24 QUESTION: I see.
25 MR. NESSIM: He caused a reporter to prepare

1 those. Those transcripts were attached to the State
2 habeas and, of course, to the Federal habeas petition.
3 QUESTION: Did he do that at his own expense, or
4 State expense?
5 MR. NESSIM: His own expense.
6 QUESTION: I see.
7 MR. NESSIM: Now, I would -- to stress, in terms
8 of the prejudice per se standard, you know, there is a
9 difference between -- and Penson expressly recognizes
10 this, between providing some advocacy that's ineffective
11 and no advocacy at all.
12 In fact, in both -- Ebbitts refers to Anders and
13 Entsminger, cases where the attorneys did not formally
14 withdraw, and notes that they were represented by counsel
15 in name only and, in fact, they had no counsel at all.
16 Like those defendants, Robbins in this case had to shift
17 entirely for himself, and Penson refers to both Cronic and
18 Saterwaite v. Texas as cases which obviously involve trial
19 error.
20 But that -- Penson expressly extends them to the
21 appellate area and says, when an attorney fails to act as
22 an advocate in a proceeding, the error pervades the entire
23 proceeding and can never be harmless, and the reason for
24 that is because the court would have to speculate without
25 the assistance of an advocate, and we've also discussed

1 the additional reasons of comity and judicial efficiency.

2 I would add that we believe that even if the

3 Strickland standard was applied in this case, that we

4 would prevail. We have raised substantive issues.

5 there's a reasonable probability sufficient to undermine

6 the confidence.

7 If there are no other questions, I will conclude

8 my argument.

9 QUESTION: Thank you, Mr. Nessim.

10 Ms. Jorstad, you have 3 minutes remaining.

11 REBUTTAL ARGUMENT OF CAROL F. JORSTAD

12 ON BEHALF OF THE PETITIONER

13 MS. JORSTAD: Thank you very much, Your Honor.

14 I think we should be very clear about what

15 advocacy means in the context of an Anders brief, or a no-

16 merit brief generally. Up front, it means, giving the

17 client the benefit of professional judgment, of

18 professional skill, professional analysis. In California,

19 there's also even more professional review, and a whole

20 system built around that.

21 But once there's been a no-merit determination

22 made by counsel, when you talk about advocacy, what you're

23 really talking about is advocating for the other side.

24 Telling the court what issues it can readily

25 reject cannot help having some, at least subliminal, if

1 not more, effect on the mind set of the judges who are
2 reading that brief.
3 Far better for the client if also --
4 QUESTION: Yes, but we rejected that point in
5 the Wisconsin case, McCoy, didn't we? We said it's
6 perfectly okay if he spells out the reasons why he thinks
7 there's no merit.
8 MS. JORSTAD: And I think, Justice Stevens, that
9 what we can say about McCoy is that this Court approved
10 that procedure, which was in fact a deviation from Anders,
11 but it didn't require it. California, I believe, has much
12 more concern for the client.
13 QUESTION: Well, we didn't hold it was a
14 deviation from Anders. We held it was perfectly
15 consistent with Anders.
16 MS. JORSTAD: I under --
17 QUESTION: It performed the function of having a
18 lawyer identify for the court in a way that would be
19 helpful to the court when it looks through the record what
20 arguable issues are there, and this -- it required that
21 there be some discussion of legal issues, and that's
22 what's missing here. You don't have any discussion of
23 legal issues.
24 MS. JORSTAD: That's correct, Your Honor, just
25 as, as a matter of equal protection, no client with

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 retained counsel would ever put before the court a
2 discussion of the legal issues he rejected. It just
3 wouldn't happen.
4 I'm suggesting to the Court that there is no
5 reason to be unduly suspicious of lawyers who write no-
6 merit briefs. It's a hard thing to do. It requires much
7 more in the way of approval from the appellate project in
8 California. The sanctions against the lawyer are
9 potentially far greater. He's subject to a presumed
10 prejudice standard rather than a Strickland standard.
11 The much easier course would be to raise
12 something like the reasonable doubt instruction which most
13 everybody --
14 QUESTION: Well, of course, the difference in
15 the prejudice is, in Strickland the fellow gets a new
16 trial. Here, the only thing that's at stake is whether
17 there has to be a merits brief filed.
18 MS. JORSTAD: Well, in Strickland -- but on
19 appeal Strickland --
20 QUESTION: But he's not going to get out of jail
21 if there's a violation of Anders.
22 MS. JORSTAD: Absolutely not, Your Honor, but
23 Strickland also applies on appeal in merits situations,
24 and that's when a new appeal is given.
25 It would be wrong to force the State to give

1 appeals willy nilly in situations like this one, quite
2 specifically. Here, the two issues that have been
3 suggested as the most meritorious by the two courts --
4 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
5 Jorstad. Your time has expired.
6 MS. JORSTAD: Thank you, Your Honor.
7 CHIEF JUSTICE REHNQUIST: The case is submitted.
8 (Whereupon, at 11:33 a.m., the case in the
9 above-entitled matter was submitted.)
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

GEORGE SMITH, WARDEN, Petitioner v. LEE ROBBINS
CASE NO: 98-1037

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

By Richard Smelson