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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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SMITH, WARDEN *v.* ROBBINS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–1037. Argued October 5, 1999– Decided January 19, 2000

An attorney appointed to represent an indigent defendant on appeal may conclude that an appeal would be frivolous and request that the appellate court allow him to withdraw or that the court dispose of the case without the filing of merits briefs. In *Anders* v. *California*, 386 U. S. 738, this Court found that, in order to protect a defendant's constitutional right to appellate counsel, courts must safeguard against the risk of granting such requests where an appeal is not actually frivolous; found California's procedure for evaluating such requests inadequate; and set forth an acceptable procedure. California adopted a new procedure in *People* v. *Wende*, 25 Cal. 3d 436, 600 P. 2d 1071. Unlike under the *Anders* procedure, counsel under *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous nor requests to withdraw; instead he is silent on the merits of the case and offers to brief issues at the court's direction. A California state-court jury convicted respondent Robbins of second-degree murder and grand theft. His appointed counsel on appeal concluded that appeal would be frivolous and filed with the State Court of Appeal a brief that complied with the *Wende* procedure. Agreeing with counsel's assessment, the Court of Appeal affirmed. The California Supreme Court denied review. After exhausting his state postconviction remedies, Robbins sought federal habeas relief, arguing, *inter alia*, that he had been denied effective assistance of appellate counsel because his counsel's *Wende* brief did not comply with the *Anders* requirement that the brief refer "to anything in the record that might arguably support the appeal," 386 U. S., at 744. The District Court agreed, concluding that there were at least two issues that might arguably have supported Robbins's appeal and finding that his counsel's failure to include them in

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his brief deviated from the *Anders* procedure and thus amounted to deficient performance by counsel. Rather than requiring Robbins to prove prejudice from this deficiency, the court applied a presumption of prejudice. The Ninth Circuit agreed, concluding that *Anders*, together with *Douglas* v. *California*, 372 U. S. 353– which held that States must provide appointed counsel to indigent criminal defendants on appeal– set forth the exclusive procedure by which appointed counsel's performance could be constitutional, and that counsel's brief failed to comply with that procedure. The court, however, remanded the case for the District Court to consider other trial errors raised by Robbins.

Held:

1. The *Anders* procedure is only one method of satisfying the Constitution's requirements for indigent criminal appeals; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel. Pp. 6–13.

(a) In finding that the California procedure at issue in *Anders*– which permitted appellate counsel to withdraw upon filing a conclusory letter stating that the appeal had "no merit" and permitted the appellate court to affirm the conviction upon reaching the same conclusion following a review of the record– did not comport with fair procedure and lacked the equality that the Fourteenth Amendment requires, this Court placed the case within a line of precedent beginning with *Griffin* v. *Illinois*, 351 U. S. 12, and continuing with *Douglas* v. *California*, 372 U. S. 353, that imposed constitutional constraints on those States choosing to create appellate review. Comparing the California procedure to other procedures that this Court had found invalid and to statutory requirements in the federal courts governing appeals by indigents with appointed counsel, the Court concluded that the finding that the appeal had "no merit" was inadequate because it did not mean that the appeal was so lacking in prospects as to be frivolous. The Court, in a final, separate section, set out what would be an acceptable procedure for treating frivolous appeals. Pp. 6–9.

(b) The Ninth Circuit erred in finding that *Anders*'s final section, though unnecessary to the holding in that case, was obligatory upon the States. This Court has never so held; its precedents suggest otherwise; and the Ninth Circuit's view runs contrary to this Court's established practice. In *McCoy* v. *Court of Appeals of Wis., Dist. 1*, 486 U. S. 429, this Court rejected a challenge to Wisconsin's variation on the *Anders* procedure, even though that variation, in at least one respect, provided less effective advocacy for an indigent. In *Pennsylvania* v. *Finley*, 481 U. S. 551, the Court explained that the *Anders* procedure is not an independent constitutional command, but rather a

prophylactic framework; it did not say that this was the only framework that could adequately vindicate the right to appellate counsel announced in *Douglas*. Similarly, in *Penson* v. *Ohio*, 488 U. S. 75, the Court described *Anders* as simply erecting safeguards. Finally, any view of the procedure described in *Anders*'s last section that converted it from a suggestion into a straitjacket would contravene this Court's established practice of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult policy problems. See *e.g.*, *Griffin*, *supra*. The Court, because of its status as a court– particularly a court in a federal system– avoids imposing a single solution on the States from the top down and instead evaluates state procedures one at a time, while leaving "the more challenging task of crafting appropriate procedures . . . to the laboratory of the States . . . in the first instance," *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261 (O'CONNOR, J., concurring). Pp. 9–13.

2. California's *Wende* procedure does not violate the Fourteenth Amendment. Pp. 13–22.

(a) The precise rationale for the *Griffin* and *Douglas* line of cases has never been explicitly stated, but this Court's case law reveals that the Equal Protection and Due Process Clauses of the Fourteenth Amendment largely converge to require that a State's procedure "afford adequate and effective appellate review to indigent defendants," *Griffin*, *supra*, at 20 (plurality opinion). A State's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal. In determining whether a particular procedure satisfies this standard, it is important to focus on the underlying goals that the procedure should serve– to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*, and also to enable the State to "protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent," *Griffin*, *supra*, at 24 (Frankfurter, J., concurring in judgment). For an indigent's right to counsel on direct appeal does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal. *Anders*'s obvious goal was to prevent this limitation on the right to appellate counsel from swallowing the right itself, and the Court does not retreat from that goal here. Pp. 14–16.

(b) The *Wende* procedure reasonably ensures that an indigent's appeal will be resolved in a way that is related to the appeal's merit. A comparison of that procedure to those evaluated in this Court's chief cases demonstrates that it affords indigents the adequate and effective appellate review required by the Fourteenth Amendment.

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The *Wende* procedure is undoubtedly far better than those procedures the Court has found inadequate. A significant fact in finding the old California procedure inadequate in *Anders*, and also in finding inadequate the procedures that the Court reviewed in *Eskridge* v. *Washington Bd. of Prison Terms and Paroles*, 357 U. S. 214, and *Lane* v. *Brown*, 372 U. S. 477, two of the precedents on which the *Anders* Court relied, was that those procedures required only a determination that the defendant was unlikely to prevail on appeal, not that the appeal was frivolous. *Wende*, by contrast, requires both counsel and the court to find the appeal to be lacking in arguable issues, *i.e.*, frivolous. An additional problem with the old California procedure was that it apparently permitted an appellate court to allow counsel to withdraw and then decide the appeal without appointing new counsel. Such a procedure was struck down in *Penson* v. *Ohio*, 488 U. S. 75, because it permitted a basic violation of the *Douglas* right to have counsel until a case is determined to be frivolous and to receive a merits brief for a nonfrivolous appeal. Under *Wende*, by contrast, *Douglas* violations do not occur, both because counsel does not move to withdraw and because the court orders briefing if it finds arguable issues. The procedure disapproved in *Anders* also only required counsel to file a one-paragraph "bare conclusion" that the appeal had no merit, while *Wende* requires that counsel provide a summary of the case's procedural and factual history, with citations of the record, in order to ensure that a trained legal eye has searched the record for arguable issues and to assist the reviewing court in its own evaluation. Finally, by providing at least two tiers of review, the *Wende* procedure avoids the additional flaw, found in the *Eskridge*, *Lane*, and *Douglas* procedures, of having only one such tier. Pp. 16–19.

(c) The *Wende* procedure is also at least comparable to those procedures the Court has approved. By neither requiring the *Wende* brief to raise legal issues nor requiring counsel to explicitly describe the case as frivolous, California has made a good-faith effort to mitigate one of the problems that critics have found with *Anders*, namely, the requirement that counsel violate his ethical duty as an officer of the court (by presenting frivolous arguments) as well as his duty to further his client's interests (by characterizing the client's claims as frivolous). *Wende* also attempts to resolve another *Anders* problem— that it apparently adopts gradations of frivolity and uses two different meanings for the phrase "arguable issue"— by drawing the line at frivolity and by defining arguable issues as those that are not frivolous. Finally, the *Wende* procedure appears to be, in some ways, better than the one approved in *McCoy*, and in other ways, worse. On balance, the Court cannot say that the latter, assuming *arguendo* that they outweigh the former, do so sufficiently to make the *Wende*

procedure unconstitutional, and the Court's purpose under the Constitution is not to resolve such arguments. The Court addresses not what is prudent or appropriate, but what is constitutionally compelled. *United States* v. *Cronic*, 466 U. S. 648, 665, n. 38. It is enough to say that the *Wende* procedure, like the *Anders* and *McCoy* procedures, and unlike the ones in, *e.g.*, *Douglas* and *Penson*, affords adequate and effective appellate review for criminal indigents. Pp. 19–22.

3. This case is remanded for the Ninth Circuit to evaluate Robbins's ineffective-assistance claim. It may be that his appeal was not frivolous and that he was thus entitled to a merits brief. Both the District Court and the Ninth Circuit found that there were two arguable issues on direct appeal, but it is unclear how they used the phrase "arguable issues." It is therefore necessary to clarify how strong those issues are. The proper standard for evaluating Robbins's claim on remand is that enunciated in *Strickland* v. *Washington*, 466 U. S. 668: He must first show that his counsel was objectively unreasonable, *id.*, at 687–691, in failing to find arguable issues to appeal, and, if Robbins succeeds in such a showing, he then has the burden of demonstrating prejudice, *id.*, at 694. He must satisfy both prongs of the *Strickland* test to prevail, for his claim does not warrant a presumption of prejudice. He has received appellate counsel who has complied with a valid state procedure for determining whether his appeal is frivolous, and the State has not left him without counsel on appeal. Thus, it is presumed that the result of the proceedings is reliable, and Robbins must prove the presumption incorrect. Further, his claim does not fall within any of the three categories of cases in which prejudice is presumed, for it does not involve the complete denial of counsel on appeal, state interference with counsel's assistance, or an actual conflict of interest on his counsel's part. *Id.*, at 692, 694. Pp. 22–27.

152 F. 3d 1062, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined.