No. 98-1037

In The

Supreme Court of the United States

October Term, 1998

GEORGE SMITH, WARDEN,

Petitioner,

vs.

LEE ROBBINS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE AMICI CURIAE STATES OF ARIZONA, ET AL. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), *amending* 125 F.3d 831 (9th Cir. 1997), the Ninth Circuit declared unconstitutional California's procedures governing the filing of no-merit appellate briefs by appointed counsel on behalf of indigent criminal defendants on the stated ground that they do not conform with *Anders v. California*, 386 U.S. 738 (1967). *Robbins* will severely affect the Amici states that have literally thousands of criminal defendants whose appeals mirrored the California procedure. If *Robbins* is allowed to stand, a flood of no-merit appeals will return to the state and federal courts despite the fact that appointed counsel and the state appellate courts have already determined that no arguable appellate issues exist. Other states have joined as Amici herein because *Robbins* severely undermines each state's right to determine its own procedures in compliance with *Anders*. The result dictated by *Robbins* offends the interests of the Amici Curiae in protecting the finality of criminal convictions, assuring equal treatment of all criminal defendants, indigent or affluent, and in preserving public resources.

SUMMARY OF ARGUMENT

Anders and its progeny protect an indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the effective assistance of state-appointed appellate counsel in the first appeal as of right. Those cases do not afford indigent criminal defendants more rights under the Constitution than those defendants represented by retained counsel,

they only guarantee that indigent defendants are treated with substantial equality.

In *Robbins*, the Ninth Circuit held that *Anders* requires appointed counsel to state arguable issues and federal courts to search for them on habeas review. The practical result of this holding is that federal courts will now be compelled, in *Anders* cases, to search the state court record for arguable issues, despite the fact that: (1) neither indigent criminal defendants whose appointed counsel file merit briefs nor criminal defendants whose retained counsel withdraw from representing them on appeal because they find no arguable issues are afforded this benefit; (2) indigent criminal defendants whose counsel file no-merit briefs are already afforded a more thorough review of their appeals than other criminal defendants, indigent or not, who file merit briefs; and (3) the indigent criminal defendants' appointed counsel, who file no-merit briefs, as well as the appellate court and its staff have already meticulously searched the state court record for arguable issues and found none to exist.

The Ninth Circuit's opinion in *Robbins* bestows upon indigent criminal defendants whose attorneys file no-merit briefs, the right to a comprehensive federal court habeas review of the state court record. This holding misconstrues *Anders*, and violates the state's right to finality of criminal convictions, undermines its ability to preserve public resources, and violates the principles of equal protection. It also creates a new rule of criminal procedure in a collateral proceeding in violation of *Teague v. Lane*, 489 U.S. 288 (1989).

ARGUMENT

AS A CONSEQUENCE OF *ROBBINS*, FEDERAL COURTS, ON HABEAS REVIEW, WILL SEARCH STATE COURT RECORDS FOR ARGUABLE ISSUES IN *ANDERS* CASES, THEREBY DILUTING THE EQUAL PROTECTION AND DUE PROCESS GOALS ARTICULATED IN *ANDERS*, AND OFFENDING THE STATES' INTERESTS IN ASSURING THE FINALITY OF CRIMINAL CONVICTIONS AND IN PRESERVING PUBLIC RESOURCES.

A. *Anders* and its Progeny: Equal Protection and Due Process Concerns.

In *Anders v. California*, 386 U.S. 738 (1967), this Court evaluated appointed counsel's duty to "prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." *Id.* at 739. There, appointed counsel followed California's established procedures; he wrote a letter advising the appellate court that he had concluded his client's appeal had no merit, and simultaneously advised the court that the defendant wished to file a brief on his own behalf. *Id.* After reviewing the defendant's brief and the record, the California appellate court affirmed the conviction. *Id.* The defendant then filed a habeas corpus petition in the California Supreme Court, and that court also affirmed his conviction. *Id.* at 740-41.

This Court reversed, finding that California's no-merit letter procedure did not comport with "fair procedure and lack[ed] the equality that is required by the Fourteenth Amendment." *Id.* at 741. This Court reasoned that it had "consistently held invalid those procedures 'where the rich man, who appeals as of right, enjoys the

benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.' " *Id.* (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). In *Douglas*, this Court held that absolute equality is not required in order to comport with the Fourteenth Amendment, so long as the differences between the rich and poor do not "amount to a denial of due process or an invidious discrimination." *Id.* at 356-57 (citations omitted). It held, in *Anders*, that the Constitution required "substantial equality and fair process," which can only be attained if counsel "acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Id.* at 744.

Against this backdrop of equal protection and due process concerns, the *Anders* court articulated a procedure for counsel to follow in cases where an indigent criminal defendant's appointed counsel determines that an appeal would be without merit. It stated that where counsel, after a conscientious examination of the record, finds his indigent client's criminal appeal to be wholly frivolous, counsel should advise the court of that fact and request to withdraw. *Id.* The request to withdraw must be accompanied by "a brief referring to anything in the record that might arguably support the appeal," and that brief must be supplied to the defendant, who then must be permitted to raise any points he chooses. *Id.* The appellate court must then conduct a "full examination of the proceedings" in order to determine whether counsel's determination that the case is wholly without merit is correct. *Id.* If the appellate court concludes that counsel's

no-merit representation is correct, it may grant counsel's request to withdraw and dismiss the appeal, unless state law requires it to proceed to a decision on the merits. If, on the other hand, it finds "any of the legal points arguable on their merits," the court must afford the indigent defendant counsel to argue the appeal before rendering its decision. *Id.*[1]

This Court reaffirmed *Anders'* equal protection rationale in *McCoy v. Wisconsin*, 486 U.S. 429 (1988). There, appointed counsel challenged a state supreme court rule requiring counsel seeking to withdraw to submit a brief to the court that included an explanation regarding why issues that " 'might arguably support the appeal' " lacked merit. *Id.* at 430 (citation omitted). This Court stated that "[t]he principle of substantial equality" requires appointed counsel to make the same "diligent and thorough evaluation of the case" as retained counsel before concluding that an appeal would be frivolous; "[e]very advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court." *Id.* at 438. This Court held that Wisconsin's rule requiring appointed counsel to explain why his client's appeal lacks merit

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[1] The *Anders* court was not unanimous. In dissent, Justice Stewart, joined by Justice Black and Justice Harlan, found the no-merit letter procedure free of constitutional error. *Id.* at 747. Justice Stewart characterized the requirement imposed by the majority as "quixotic" and observed that it was based on the "cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted." *Id.* at 746-47.

"furthers the same interests that are served by the minimum requirements of Anders," because it "provides an additional safeguard against mistaken conclusions by counsel that the strongest arguments he or she can find are frivolous." *Id.* at 442.

This Court acknowledged, in *McCoy*, that no-merit briefs are "seldom, if ever" filed by retained counsel. *Id.* at 438. Obviously, this is because "the wealthy client can always seek a second opinion and might well find a lawyer who in good conscience believes it to have arguable merit." *Id.* at 451 (Brennan, J., dissenting). Moreover, if retained counsel finds an appeal to be frivolous, he or she can simply inform the client of that fact and withdraw from the case. Unlike appointed counsel, retained counsel need not seek permission from the court to withdraw. Additionally, in the case of defendants who cannot afford to hire counsel, the court is the appointing authority, fulfilling the constitutional requirement of providing counsel on appeal. Where appointed counsel submits a brief raising no issues, it is incumbent on the appellate court to review the record; the same is not true for defendants with retained counsel. Thus, retained counsel need not comply with the dictates of *Anders* when withdrawing from representing a defendant in a frivolous appeal. *See People v. Placencia*, 11 Cal. Rptr. 2d 727 (1992) (retained counsel not required to follow *Anders* procedures); *Johnson v. State*, 885 S.W.2d 641, 645 (Tex. App. 1994) (the procedural safeguards of *Anders* do not apply to retained counsel). This conclusion is clearly accurate given the intent of *Anders* and its progeny to protect the indigent defendant.

B. *Robbins v. Smith.*

In *Robbins v. Smith*, the Ninth Circuit held that, to comply with *Anders*, appointed counsel must state arguable issues in a no-merit brief. 152 F.3d at 1067. The defendant's appointed counsel thoroughly reviewed the record and concluded that defendant's appeal was without merit, the defendant filed a brief on his own behalf, and the state court had reviewed this together with counsel's no-merit brief and the entire record and found that no arguable issues existed for appeal. The defendant filed a federal habeas corpus action alleging, among other claims, that his appointed counsel had not complied with the dictates of *Anders*.

Despite the fact that the viability of the defendant's appeal had been repeatedly and meticulously reviewed at the state level, the federal district court conducted its own thorough review of the state record and found two issues that it believed to be "arguable."[2] That court held that the case should be returned to state court for a new appeal.

The Ninth Circuit upheld the district court's determination that the defendant's appointed counsel had not complied with *Anders* and that two arguable issues existed for appeal. The court also held that the district court erred in failing to consider the defendant's exhausted claims of constitutional error contained in his petition. *Id.*

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[2] An "arguable" issue is defined, for purposes of California law, as one that has some potential for success, some possibility of a result requiring reversal or modification of the judgment. *See Robbins*, 152 F.3d at 1067 (citing *People v. Johnson*, 123 Cal. App. 3d 106, 109 (1981)).

at 1068-69. The court ruled that the defendant was entitled to a new appeal, based on the violation of *Anders* and the fact that two arguable issues existed, but that the case should be remanded to state court for that appeal only if none of his exhausted claims of constitutional error had merit. *Id.*

C. The Practical Effect of *Robbins*: A Far Cry From Simply Assuring Substantial Equality Among Criminal Defendants in Prosecuting Their Appeals.

Robbins in effect requires federal courts to review the entire state court record in search of arguable issues in *Anders* cases where none have been stated on appeal by appointed counsel or found to exist by the state appellate courts. This results in substantial *inequality* rather than *equality* among criminal defendants, and runs afoul of the very intent of *Anders* and its progeny.

Unlike indigent defendants whose counsel file no-merit briefs, indigent defendants whose appointed counsel file merit briefs are not entitled to a thorough review of their entire case in state court in search of arguable issues. In addition, federal courts do not comb the record for issues in cases where appointed counsel file merit briefs, because this Court has held that appointed counsel's decision regarding which issues to raise is normally conclusive. *See Jones v. Barnes*, 463 U.S. 745 (1983). If, after reviewing the state court record, appointed counsel decides there is a single arguable issue on appeal, regardless of its potential for success, the state court is not required to scour the case for additional arguable issues, nor is the defendant entitled to federal court review of

the record under *Robbins*. As a consequence of *Robbins*, indigent defendants would always be better served if their appointed counsel filed no-merit briefs rather than merit briefs, because a no-merit brief would entitle them to thorough review of the case not only in state court, but in federal court as well. Therefore, counsel would be doing his client a disservice by filing anything other than an *Anders* brief. Creating or compounding inequities between indigent defendants in this manner is clearly contrary to the intent of this Court as expressed in *Anders*.

Indigent defendants whose appointed counsel file *Anders* briefs are already entitled to a tier of state court review unavailable to indigent defendants whose counsel file merit briefs, and, obviously, to defendants whose retained counsel file briefs on the merits or no briefs at all. Entitling those indigent defendants whose counsel file *Anders* briefs to still *another* level of review of their cases in search of arguable issues does not ensure that they are treated equally, but instead bestows upon them more rights than other criminal defendants possess, which is clearly not the intent of *Anders*.

Moreover, if all indigent defendants filed *Anders* briefs to obtain better review of their cases at the state and federal level, state courts would be forced to review the entire record in search of arguable issues in the vast majority of criminal appeals. The Amici Curiae States simply cannot afford to devote their scarce judicial resources to such an exhaustive endeavor.

This Court has emphasized the importance of the state's right to assure the finality of its convictions,

stating, that " '[t]he states possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate both the states' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). *See also Coleman v. Thompson*, 501 U.S. 722, 748 (1991); *McCleskey v. Zant*, 499 U.S. 467, 487 (1991). This Court has also often recognized the collateral, and somewhat limited, nature of federal habeas corpus review of state court convictions, referring to direct appeal in state court as "the primary avenue for review of a conviction or sentence," to which a "presumption of finality and legality attaches." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). As such, this Court has stated that the role of federal habeas corpus proceedings is "secondary and limited," because "[f]ederal courts are not forums in which to relitigate state trials." *Id.*

With this in mind, principles of comity clearly require federal courts to defer to the determination of the state courts whether issues exist for appeal. The procedure sanctioned in *Robbins*, whereby the federal court reviews the entire state court record, in habeas corpus cases, in search of arguable issues, usurps the state court's power to enforce its criminal laws and to punish its offenders, and misconstrues the role of the federal courts in habeas corpus cases. This is particularly true in states where collateral review is available to litigate claims of ineffective assistance of counsel on appeal.[3] In

[3] *See, e.g., State v. Herrera*, 905 P.2d 1377 (Ariz. App. 1995) (allegation of ineffective assistance of appellate counsel is

those states, the performance of appointed counsel on appeal can be fully scrutinized, without the involvement of the federal courts.

D. Retroactive Application of *Robbins* Will Severely Debilitate the Federal Courts and the State Appellate Courts in Jurisdictions Where the *Anders* Procedures are Similar to California's.

Federal habeas corpus is a collateral remedy; it is not a substitute for direct review. This Court has never held that the purpose of federal habeas corpus is to address " 'a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.' " *Teague v. Lane*, 489 U.S. 288, 308 (1989) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986)). Rather, the purpose of federal habeas corpus review is to provide an incentive for all trial and appellate courts to "conduct their proceedings in a manner consistent with established constitutional standards." *Id.* at 306 (citations omitted). This "deterrence function" is only served by demanding that courts adhere to the constitutional standards in place at the time of the original proceedings. *Id.* Thus, new constitutional rules of criminal procedure cannot be retroactively applied upon federal habeas corpus review unless the new rule falls within one of two very narrow exceptions.[4] *Id.* at 310.

encompassed within ARIZ. R. CRIM. P. 32.1 as a claim that the conviction or sentence was in violation of the federal or state constitution).

[4] Specifically, a new rule should be applied retroactively on federal habeas corpus review if: (1) it places "certain kinds of

A case announces a new rule when it "breaks new ground or imposes a new obligation on the State or the Federal Government." *Id.* at 300. In other words, a case announces a new rule if the "result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (quoting *Teague*, 489 U.S. at 301) (emphasis in original). This principle ensures respect for the finality of state convictions and minimizes the costs to the states of having to continually relitigate convictions and sentences:

> "[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Teague, 489 U.S. at 308-10 (quoting *Engle v. Issac*, 456 U.S. at 128 n.33); *see also Lockhart v. Fretwell*, 506 U.S. 364, 372-73 (1993) (*Teague* "new rule" doctrine inapplicable to decisions favoring state because states' interests in comity and finality are not diminished by applying a favorable "new rule"); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("new rule" principle validates "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions").

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primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307 (citation omitted); or (2) if it requires the observance of "those procedures that . . . are implicit in the concept of ordered liberty." *Id.* (citations omitted.)

Because Respondent came to the federal courts on collateral habeas review, he may not obtain federal relief "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *see also Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997) (the issue is whether the unlawfulness of the prisoner's conviction was apparent to "all reasonable jurists"). Habeas relief is proper only if a state court considering the prisoner's claim at the time the conviction became final would have felt *compelled* by existing precedent to conclude that the rule sought was required by the Constitution. *Gray v. Netherland*, 518 U.S. 152, 166 (1996); (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

Under this analysis, it is clear that *Robbins* announced a new rule and therefore cannot be applied retroactively. California's procedure governing no-merit briefs, which *Robbins* rejected as unconstitutional, has been in place since 1979. *See People v. Wende*, 600 P.2d 1071 (Cal. 1979). Other states have, for many years, employed procedures similar to California's without successful constitutional challenge. Like California, those states do not require counsel to state frivolous issues in order to comply with *Anders*; they allow counsel to file a brief containing only the factual and procedural background of the case. *See, e.g., State v. Balfour*, 814 P.2d 1069, 1079-80 (Or. 1991); *State v. Clark*, 287 Ariz. Adv. Rep. 7, 8 n. 1 (Ariz. Ct. App. Jan. 19, 1999) (attached as Appendix A). In fact, in *State v. Clark*, the Arizona Court of Appeals recently reaffirmed the constitutionality of Arizona's no-merit procedure, specifically rejecting the *Robbins* court's determination

that the procedure is constitutionally inadequate. *Clark*, 287 Ariz. Adv. Rep. at 12.

It is clear that the rule articulated in *Robbins* was not dictated by precedent existing at the time that defendant's conviction became final. Nor can it be stated that state courts considering claims that no-merit procedures, such as California's, did not comply with *Anders* would have been compelled to agree. Thus, *Robbins* announced a new rule which cannot be applied retroactively.

Moreover, retroactive application of *Robbins* will result in an avalanche of federal habeas corpus petitions filed by inmates whose appointed counsel followed state procedures existing at the time of their convictions, and therefore did not state arguable issues in a no-merit brief. *Robbins* will require the federal courts to search state court records in each of those cases for any arguable appellate issue. This will cripple the federal courts whose jurisdictions include states following no-merit procedures similar to California's. Such review by the federal courts will undoubtedly result in a deluge of cases returning to state court for new appeals, years after convictions and first direct appeals, for the purpose of litigating frivolous, although arguable, appellate issues. In states such as Arizona, where more than 20 percent of the criminal appeals are *Anders* cases,[5] relitigation of those cases on

[5] The proportion of no-merit appeals to all criminal appeals is similarly significant in other states: Arkansas (13.33% in Ct. of App.); Florida (16.72% in 1st Dis. Ct. App., 34.19% in 5th Dis. Ct. App.); Illinois (31% in App. Dist. I); Iowa (18% in S. Ct.); Louisiana (13.4% in 3rd Cir., 25.9% in 4th Cir., 16.5% in 5th Cir.); New York (12% in App. Dis. IV); Ohio (16% in 2d Dis. Ct. App.);

appeal would cripple the state appellate court system, to the detriment of criminal defendants, indigent or not.[6]

Oregon (19% in Ct. App.); South Carolina (39% in S. Ct.); Texas (14.3% in 6th Dis. Ct. App.); Virginia (10% in Ct. App.); Washington (23.4% in App. Div. III); and Wisconsin (15.9% in Ct. App.). These figures are based on 1993-94 statistics, and were published in the following article: Martha Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others'*, 23 Fla. St. U. L. Rev. 625 (1996).

[6] The provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) did not apply in *Robbins* because that defendant's habeas corpus petition was filed before April 1, 1996. The Ninth Circuit has recently held, however, that *Robbins* is applicable to cases subject to the AEDPA, despite the more deferential standard of review afforded state court determinations of federal law by 28 U.S.C. § 2254(d)(1). *See Delgado v. Lewis*, 168 F.3d 1148, 1154 (9th Cir. 1999); *Davis v. Kramer*, 167 F.3d 494, 498 (9th Cir. 1999), *petition for certiorari filed* Mar. 8, 1999 (67 USLW 3570). In these cases, the Ninth Circuit held that a no-merit procedure that does not require appointed counsel to raise arguable issues "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." Thus, federal courts will also be compelled to search the record in post-AEDPA cases for arguable, although probably frivolous issues, and, if such issues are discovered, those cases will also return to state court for new appeals.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A