No. 98-1037

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE SMITH, WARDEN,
Petitioner

v.

LEE ROBBINS,
Respondent

BRIEF AMICUS CURIAE OF JESUS GARCIA DELGADO IN SUPPORT OF RESPONDENT

Filed June 21, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

COURT RULES

OTHER AUTHORITIES

TABLE OF CITATIONS AND REFERENCES

"Panel attorney": Refers to a private attorney accepted onto a panel of attorneys which is maintained by an appellate project for court appointments in indigent appeals.

"Project attorney," "Staff attorney": Refers to an attorney who works on the staff of an appellate project.

STATUTES, RULES, AND STANDARDS

California Penal Code Section 1237.5 (as of January 1, 1999):

§ 1237.5. Appeal by defendant from judgment of conviction upon plea of guilty or nolo contendere or revocation of probation; certificate of probable cause; operative date

No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

This section shall become operative on January 1, 1992.

California Rule of Court 76.5 (as of January 15, 1999):

Rule 76.5. Appointment of counsel in criminal appeals

(a) [Procedures] Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.

(b) [Lists of qualified attorneys] On receiving each completed questionnaire, the court shall evaluate the attorney's

qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).

(c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

Standards of Judicial Administration Recommended by the Judicial Council, § 20 (as of January 15, 1999):

§ 20. Guidelines for appointment of counsel in criminal appeals

(a) [General] Each appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals as required by rule 76.5, should follow the guidelines in this section to match each appointed attorney's skills and experience with the demands of the case.

Before appointment of counsel in a case, the court should determine the demands of the case by reviewing the trial court file or by other appropriate means. In determining the demands of the case, the following factors should be considered: the length of the sentence; the novelty or complexity of the issues; the length of the trial and of the reporter's transcript; and any questions relating to the competency of trial counsel.

(b) [Courts of Appeal] Each Court of Appeal should maintain three lists of qualified attorneys. The lists should be based on the following minimum qualifications:

List I (For appointment to cases in which probation was granted, or the sentence is five years or less in state prison): (1) active membership in the State Bar; (2) attendance at one approved appellate training program; (3) participation in one trial or appellate brief; and (4) submission of one sample of the attorney's writing for review by the court or administrator.

List II (For appointment to cases in which the sentence is five years to fifteen years in state prison): (1) active practice of law for 18 months in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of two appellate cases; and (4)

submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

List III (For appointment to cases in which the sentence is fifteen years to life in state prison): (1) active practice of law for three years in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of five appellate cases; and (4) submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

(c) [Supreme Court] The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

INTEREST OF AMICUS CURIAE[1]

Jesus Garcia Delgado was the indigent defendant and appellee in *Delgado v. Lewis*, 168 F.3d 1148 (No. 97-56162, 9th Cir. 1999) (petn. for rehg. pending), in which the U.S. Ninth Circuit Court of Appeals affirmed the conditional grant of habeas corpus by the U.S. District Court for the Central District of California, based on appointed counsel's failure to file a brief that met the requirements of *Anders v. California*, 386 U.S. 738 (1967) and *Penson v. Ohio*, 488 U.S. 75 (1988). The Ninth Circuit's *Delgado* opinion adhered to its opinion in *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1997), which is now the case at bar after this Court's grant of certiorari. The Warden's brief in the case at bar refers to the Ninth Circuit's *Delgado* opinion. WB 14, 30, 34.

This case potentially has a direct effect on Mr. Delgado's case, as the primary issues in this case are also the issues on which Mr. Delgado prevailed in the Ninth Circuit. Mr. Delgado's efforts to obtain one appeal of right with the constitutional guarantee of advocacy of counsel have gone on for over 4 years, but thus far have not been successful. An adverse decision in this case could impair or eliminate Mr. Delgado's ability to obtain a single appeal with advocacy of counsel. For all of these reasons, Mr. Delgado has a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

Most of the Warden's brief, and the entire *amicus curiae* brief of the California Academy of Appellate Lawyers (CAAL), is premised on factual assertions regarding California indigent appeals which are stated for the first time in this Court, not supported by citation, and not based on anything in any record. *Amicus curiae*

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[1] Under Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or part, and no person or entity made a monetary contribution to its preparation or submission. Under Rule 37.3, *amicus curiae* states that all parties have given written consent to this brief being filed.

disagrees that a case should be litigated in this Court in that manner. But if those assertions are considered, *amicus curiae* is compelled to point out that they are significantly erroneous. The majority of California's appellate projects and appellate courts, including its Supreme Court, follow *Anders* in criminal appeals. There is no single "California appellate project system," and each appellate project handles no-merit briefs as it sees fit. It is also inaccurate to say that two qualified attorneys completely and comprehensively review the record in every no-merit appeal.

This Court's opinion in *Douglas v. California*, 372 U.S. 353 (1963), and *Anders*, *Penson*, and *McCoy v. Court of Appeals*, 486 U.S. 429 (1988) which followed it, required that indigent criminal appellants be given legal advocacy in one appeal of right when a state grants appeals to people of means. An *Anders* brief is advocacy. The no-merit no-advocacy form brief urged by the Warden and CAAL is not, so it fails constitutional requirements. The Warden's effort to distinguish *Penson*, on the ground that counsel there moved to withdraw while counsel in the case at bar didn't, is unavailing, as a non-withdrawing attorney who files a no-merit no-advocacy form brief still provides no advocacy.

Moreover, as *Anders* and *Penson* held, the court must determine whether an appeal lacks arguable issues. That cannot be delegated to counsel; the court is responsible for protecting the integrity of the judicial process, and safeguarding the right to counsel. A court cannot determine whether an appeal lacks legal issues, or anything else in our adversarial system, without advocacy. A "no-advocacy appeal" is no more permissible than a "no-advocacy trial."

While the Warden and CAAL argue that review by two attorneys can vitiate the above constitutional requirements, this Court rejected the same argument in *Anders*, and previously in *Ellis v. United States*, 356 U.S. 674 (1958) (per curiam). The Warden's effort to create a prejudice rule for denial of advocacy of counsel was also previously rejected by this Court in *Penson*.

ARGUMENT

Amicus curiae Jesus Garcia Delgado was totally denied any advocacy of counsel at his sentencing: His attorney was a no-show, and a "stand-in attorney"—who had a major conflict—merely submitted the matter. Mr. Delgado then was totally denied any advocacy of counsel in his appeal: His attorney missed strong and obvious issues and failed to obtain a proper record, instead filing a no-merit, no-advocacy form brief of the type praised by the Warden and CAAL. The result is that in more than four years, no court has considered any argument by an attorney for Mr. Delgado on the merits of his appeal, and that situation has no end in sight.

Mr. Delgado's "journey in the criminal justice system," *Delgado v. Lewis*, 168 F.3d at 1154, shows the wisdom of this Court's *Anders* opinion and its *Penson* opinion reiterating *Anders*, which implemented the guarantee of counsel in *Douglas v. California*, 372 U.S. 353. Mr. Delgado was entitled to one appeal with advocacy of counsel, and would have had one if his attorney had followed *Anders* and *Penson*. But it didn't happen.

In Mr. Delgado's case, like respondent Robbins', the Ninth Circuit relied on *Anders*, *Penson* and *Douglas* in holding that the no-merit, no-advocacy form brief urged by the Warden and CAAL doesn't meet minimum standards of advocacy. *Delgado v. Lewis*, 168 F.3d 1148. The Warden deems this "cynicism in full flower." WB 34. Respectfully, *amicus curiae* believes this Court's precedent in *Anders*, *Penson* and *Douglas* is the law, not "cynicism."

I. Background Of *Amicus Curiae*'s Case

Some of *amicus curiae*'s points are best made with reference to the facts of his own case. Those facts are well stated in Judge Thomas's opinion for the Ninth Circuit, *Delgado v. Lewis*, 168 F.3d at 1149-51, to which this Court may refer. In case it is of assistance, *amicus curiae* briefly recounts the facts which appear most pertinent here. (References generally are to the Ninth Circuit

excerpts of record ["DER"]; other references are to documents filed in the California state proceedings.)

As part of a six-defendant information, Mr. Delgado was charged with manufacture of methamphetamine and related offenses. DER 26, 188. After a motion to suppress evidence and other pretrial motions were heard and denied, *see* DER 97, 99, the six defendants all entered into plea agreements. DER 133-39. In return, the trial court agreed to impose sentences with specified maximums, and to consider any materials and argument presented in support of sentencing below the maximum. DER 128-32.

For sentencing, counsel for five of the six defendants presented documents and arguments for mitigation in briefs, at the sentencing hearing, or both. DER 147-50, 161-69, 171-74, 177-78, 181-85. Three of those five defendants received sentences well under the trial court's stated maximum. DER 175, 179, 181-86.

Alone among the six defendants, Mr. Delgado had no presentation in mitigation made on his behalf. No sentencing brief or other documents were filed, and no witnesses or argument were presented at sentencing. DER 157-59. In fact, Mr. Delgado's appointed trial counsel was a total no-show at the sentencing hearing. DER 140, 143, 357. He also had been a no-show at Mr. Delgado's preliminary hearing, and had relied on a co-defendant's attorney to explain the guilty plea form to Mr. Delgado. DER 357.

At sentencing, one of the co-defendant's attorneys purported to act as Mr. Delgado's "stand-in counsel." DER 143. This attorney had a major conflict, because she had obtained a court commitment of probation for her own client over the prosecutor's strong objection. DER 181-85, 357-58. When asked through an interpreter if "stand-in counsel" was OK, Mr. Delgado, who understood little English and had a grade school education in rural Mexico, said yes. DER 143, 188, 295. No effort was made to explain to Mr. Delgado that he had a right to his own attorney, or that he could continue the hearing for that purpose, or the existence

or nature of "stand-in counsel's" conflict. DER 143. "Stand-in counsel" merely submitted on Mr. Delgado's sentencing, before securing her own client's grant of probation. DER 158, 182, 185.

With no argument in mitigation on his behalf, Mr. Delgado received the maximum sentence permitted by the plea agreement, 15 years. DER 159.[2]

Subsequently, Mr. Delgado's appointed trial attorney obtained a certificate of probable cause, DER 113, California's procedural requirement for permission to appeal most types of issues after a guilty plea. Cal. Pen. Code § 1237.5. A notice of appeal was filed with the certificate. DER 112. Another attorney was appointed for the appeal, on an "independent" basis. DER 201.

Mr. Delgado's appellate attorney received a record that was missing the suppression motions and transcripts, some of the other preplea proceedings, and other relevant documents. *See* Application to Augment the Record on Appeal [post-grant of habeas], Cal. Ct. App. No. E016476, Oct. 14, 1997, at 2-9. The attorney did not request to augment the record to include these materials. *See ibid.* The attorney told Mr. Delgado his appeal was "simply worthless," and that he saw no issues. DER 256.

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[2] Despite the total absence of advocacy at sentencing, even this undeveloped record contains facts that would have given an advocate ample basis for argument in mitigation. Importantly, as the Ninth Circuit pointed out, Mr. Delgado, then 45, had no known criminal record. 168 F.3d at 1149-50; *see also* DER 231, 251. Beyond that, Mr. Delgado told the probation officer he and his wife were originally hired to do menial labor at the ranch where the meth lab was later set up, *i.e.*, maintenance and taking care of the animals. DER 194. Mr. Delgado fully admitted participation in the manufacturing operation, albeit a subsidiary role—he washed buckets of chemicals, and dumped buckets of methamphetamine liquid into strainer containers, doing what he was told (a role befitting someone who apparently shoveled animal manure). DER 193-94. Delgado's admission of responsibility, however, impressed the judge and persuaded him Delgado was telling the truth, at least to a substantial extent and more than any other defendant. DER 163-64.

The attorney then filed a no-merit brief, DER 201-13, with a short statement of procedural history and prosecution evidence from the preliminary hearing, which failed to set forth any legal points, issues or authority, or "anything [else] in the record that might arguable support the appeal." *Penson*, 488 U.S. at 80; *Anders*, 386 U.S. at 744. The no-merit brief requested that the court review the record, and included a declaration saying the attorney had read the record; gave Mr. Delgado an evaluation of the appeal; and was not moving to withdraw. DER 201-13. With the help of a "jailhouse lawyer," Mr. Delgado filed a *pro. per.* supplemental brief. DER 214-24. The Court of Appeal opinion recited a short procedural history, then concluded: "We have now concluded our independent review of the record and find no arguable issues. The judgment is affirmed." DER 226-28.

Now *pro. per.* and in prison, and without any transcripts (since his attorney hadn't sent them, *see* DER 358-59), Mr. Delgado filed a handwritten petition for review in the California Supreme Court. DER 230-31. It was denied without opinion. DER 235. Then, with the help of a "jailhouse lawyer," Mr. Delgado filed a petition for habeas corpus in the California Supreme Court. DER 236. That was also denied without opinion. DER 257.

Again aided by a "jailhouse lawyer," Mr. Delgado filed a petition for habeas corpus with the U.S. District Court for the Central District of California. DER 258. The District Court granted the writ conditionally, subject to the State accepting jurisdiction over Mr. Delgado's appeal and appointing new counsel. DER 367.

On September 2, 1997, the California Court of Appeal reinstated Mr. Delgado's appeal and appointed new counsel (the undersigned). Supp. DER 21. However, it later stayed the appeal in mid-briefing, over objection; that stay has continued for over a year. 2d Supp. DER 67-68, 75-93. On February 22, 1999, the Ninth Circuit affirmed the District Court's conditional grant of habeas corpus. *Delgado v. Lewis*, 168 F.3d 1148 (9th Cir. 1999). The State's petition for rehearing is pending as of this writing.

II. The Warden's And CAAL's Unsupported Factual Assertions On California Indigent Appeals

The Warden as petitioner and CAAL as *amicus curiae* have made arguments that fundamentally depend on their view of what they call (i) California's "procedure" for handling no-merit appeals, and (ii) California's "system" for appointing counsel in noncapital indigent criminal appeals. The Warden derives his factual assertions on these matters from CAAL *amicus curiae* brief, *see* WB 21, which in turn repeats essentially CAAL's assertions in its *amicus curiae* submission in support of the petition for certiorari.

It appears that none of the "facts" asserted by the Warden and CAAL with respect to their theories of a California "system" or "procedure" is in the record before this Court. Certainly, these "facts" were not asserted and were not the subject of any evidence in the Ninth Circuit, the District Court, or the state courts. It seems unusual that a party should be advancing legal arguments for the first time in this Court through unsworn factual arguments of counsel, which are supported by no citation to authority. *See, e.g., Chapman & Dewey Lumber Co. v. Board of Directors of St. Francis Levee District*, 234 U.S. 667, 668 (1914).

Amicus curiae does not believe that arguing "facts" not in the record, and not supported by citation, is an appropriate way to litigate legal issues before this Court. However, the Warden and CAAL have put their unsupported assertions before this Court as a major premise of their arguments. *Amicus curiae* does not believe he can allow significantly erroneous assertions to stand unrebutted.[3]

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[3] Counsel for *amicus curiae* is familiar with the area, as he has done indigent appeals in California for the past seven years, and works closely on an ongoing basis with appellate projects and their attorneys. He has been on the panel of each of the five projects at various times in those seven years. He is a certified appellate law specialist, certified by the State Bar of California, Board of Legal Specialization.

Amicus curiae must therefore, reluctantly, provide a more balanced perspective on those assertions. To do so, *amicus curiae* cites written documentation where possible, but for some points he has had to rely on unwritten discussions. Since "factual" assertions on California indigent appeals are not properly before the Court, *amicus curiae* would prefer it if this Court disregarded everyone's unsupported assertions on these topics—CAAL's, *passim*; the Warden's, WB 8-9, 20-21, 23, 34; and *amicus curiae*'s own, *infra*, pp. 8-15. But since *amicus curiae* cannot be sure this Court will agree with his view of what should be considered, he believes he is compelled to discuss the Warden's and CAAL's assertions.

A. Overview

The Warden's and CAAL's briefs create the impression that there is a single California "appellate project system"—also dubbed a "California procedure"—which rejects *Anders*. WB 7-9, 12-13, 18-21, 23-24, 28, 32, 45-48, 50; CAAL 2-3, 5-6, 9-10, 12-14. They contend that this so-called "California system" replaces *Anders* with a form no-merit brief that contains no legal authority, no issues and no advocacy, and that the California Supreme Court specified this approach in *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979). WB 3-4, 7-10, 13, 18-20, 22, 24, 29, 32, 34, 43, 45-46, 48-49; CAAL 2, 5-7, 9-12.

Neither contention is accurate. A majority of California's appellate projects and half of its intermediate appellate courts follow *Anders* for criminal appeals, with no adverse effect on the projects, the courts, or the indigent appeals they handle. What the Warden and CAAL deem the "California system" is not one; there *is* no single "California system."

Moreover, what the Warden and CAAL promote as "the *Wende* procedure" is not required by any California law, doesn't follow the jurisprudence of the California Supreme Court, and isn't required or even permitted by *People v. Wende*. To the contrary: On the issue of advocacy in criminal appeals which is a central

issue before this Court, the California Supreme Court follows *Anders*, as it recently reiterated. *In re Sade C.*, 13 Cal.4th 952, 977-81, 55 Cal.Rptr.2d 771, 920 P.2d 716 (1996) [cited in CAAL 11]. This subject has been discussed in respondent Robbins' brief, Parts III, III(A)(1) and III(A)(2).

In discussing how California appellate projects and courts handle indigent appeals, *amicus curiae* wishes to emphasize that he does not criticize the institution of indigent appellate projects in California. His counsel is probably among the strongest supporters of the appellate projects, and he has the utmost respect for their attorneys and Executive Directors. He agrees wholeheartedly that the projects have "greatly professionalized criminal appellate practice in California." CAAL 8.

Amicus curiae simply recognizes—as do the majority of California's appellate projects—that there is no incompatibility between the existence and functioning of the appellate projects, and this Court's opinions in *Anders* and *Penson*. If anything, the latter can strengthen the former. *See infra*, p. 12 n.6.

B. Discussion

To begin with, the Warden's and CAAL's briefs create the impression of a single "California appellate project system" functioning uniformly throughout California, much like a unified private State Public Defender system.

There is no such thing. The five private appellate projects in California are not unified; they operate very differently, particularly when it comes to "no-merit briefs." Three of the five appellate projects, which handle the work in 9 of the 18 intermediate appellate courts or divisions in California, do not utilize the type of no-merit, no-advocacy form brief espoused by the Warden and CAAL. They follow *Anders* and *Penson*. The Warden and CAAL repeatedly mention the five appellate projects in support of their efforts to avoid *Anders*, WB 8, 13, 20-22;

CAAL 1-2, 6, 7, but they don't mention the fact that a majority of those appellate projects follow *Anders*, quite willingly.

The five appellate projects that handle California Court of Appeal cases are independent, private nonprofit organizations. Their roles grew out of the downsizing of the State Public Defender's office in the mid-1980s.

As one would expect from that evolution, the projects are separate private enterprises, not a unified statewide entity. Each is run by a different Executive Director, supported by different staff attorneys. Each has its own internal policies and procedures. Each accepts attorneys to its panels, rates attorneys, and makes recommendations matching them to cases, independently of the others—sometimes with striking variations; for example, an attorney who represents murder defendants in one project may be given only more routine cases in another. The projects often have very different views of organization, administration, and occasionally even law. Each project director manages his or her own organization as (s)he sees fit, subject to any practices of their own Courts of Appeal, which can vary greatly from court to court.

There are virtually no formal requirements on how appellate projects are to be structured or run. To the knowledge of *amicus curiae*, the only provisions on administration of noncapital indigent appeals are California Rule of Court 76.5 and Section 20 of the Standards of Judicial Administration Recommended by the California Judicial Council [both cited in CAAL 7; text reprinted *supra*, pp. vii-x]. These provisions provide few specifics, and they don't tell project directors how to run their organizations.

No-merit briefs are an area in which the appellate projects have sharply differing views. Some follow *Anders*. Some do not.

Three of California's five appellate projects follow *Anders*. Appellate Defenders, Inc. (ADI) of San Diego, the administrator for the three-division Fourth District Court of Appeal, has followed

Anders for almost two years. *See Appellate Defenders Issues*, No. 37, April 1999, p. 1. The First District Appellate Project (FDAP) of San Francisco began following *Anders* in October 1998, and recently reported that the five-division First District Court of Appeal has had no problems with *Anders* briefs. *See* letter from FDAP to panel attorneys, March 9, 1999, at 1. And based on a telephone conversation with a senior attorney, *amicus curiae* understands the Sixth District Appellate Project (SDAP) of San Jose has followed *Anders* for nearly a decade, since the opinion in *United States v. Griffy*, 895 F.2d 561 (9th Cir. 1990), which followed *Anders* and *McCoy* in rejecting a no-merit, no-advocacy form brief purportedly conforming to *People v. Wende*.[4]

The other two appellate projects do not follow *Anders*. The California Appellate Project (CAP) of Los Angeles, the project which was involved in the *Robbins* case now before this Court, reports that the seven-division Second District Court of Appeal rejects *Anders* in favor of the approach urged by the Warden and CAAL, and CAP does so as well. *See* letter from CAP to panel attorneys, May 25, 1999, at 2-3. And from a telephone conversation with a senior attorney, *amicus curiae* understands the Central California Appellate Program (CCAP) in Sacramento follows its two courts; the Third District Court of Appeal in Sacramento rejects *Anders*,[5] while the Fifth District in Fresno tends to reject *Anders* but often accepts *Anders*-styled briefs.

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[4] The Ninth Circuit's 1990 *Griffy* opinion, 885 F.2d at 562-563, belies the Warden's disparaging claim of "[t]he Ninth Circuit's sudden revelation of *Wende*'s invalidity." WB 43; *see* WB 20, 45-46. (The Warden's claim also doesn't take into account his error on what *Wende* held. *See supra*, pp. 8-9.)

[5] However, as of this writing (Saturday, June 19), *amicus curiae* Delgado is informed that the former Presiding Justice of the Third District Court of Appeal, Hon. Robert K. Puglia—one of California's most highly regarded jurists, who recently retired after more than 25 years of distinguished service with the Court—will be one of the *amici curiae* on another brief supporting respondent Robbins in this case.

ADI, FDAP, SDAP, CAP and CCAP are staffed by attorneys with expertise and experience, and are superb resources for California appellate attorneys. Each runs in its own way with its own policies on numerous issues including no-merit briefs. Thus, what the Warden and CAAL call a "California system" on no-merit briefs is followed by fewer than half of its appellate projects, and is rejected by more than half of its appellate courts including the California Supreme Court. Nothing suggests that *Anders* and *Penson* have caused any problems for projects that follow them, or for those projects' staff and panel attorneys.

Nor does anything in the Warden's or CAAL's briefs provide any reason why they should. Nothing in *Anders* or *Penson* prohibits an attorney from sharing confidential information with appellate project staff but not the court, or from making decisions based on confidential information. *Compare* CAAL 13-14. Nor does anything in *Anders* or *Penson* prohibit an appellate project from reviewing proposed *Anders* briefs. *Compare* CAAL 13-14. Appellate projects that follow *Anders* treat those briefs as other projects treat the no-merit briefs urged by the Warden and CAAL.[6]

The Warden and CAAL also contend that the no-merit, no-advocacy form briefs they support are better than *Anders* briefs, because the no-merit, no-advocacy form brief is said to be scrutinized by two different attorneys before it goes to the Court of Appeal. WB 8, 21, 23, 34; CAAL 6, 9-10, 13-14. Of course,

[6] In fact, some project attorneys may be grateful for the increased guidance provided by an *Anders* submission. One senior appellate project attorney noted that his own task in reviewing no-merit briefs has become easier since his project began following *Anders*, for the same reason *Anders* is helpful to judges—it provides guidance to whoever is conducting the review, so (s)he doesn't have to "fly blind." *See infra*, p. 25. Some project attorneys may also be pleased with a system that helps ensure appointed counsel has done his or her job, and provides an extra incentive for appointed counsel not to be too hasty in concluding there are no arguable issues. *See infra*, p. 21 n.11.

two attorneys can just as easily scrutinize an *Anders* brief. *See supra*, p. 10. Moreover, the contention (i) is based on an unfounded or misleading premise, and (ii) fails to conform to this Court's *Anders* and *Penson* procedures, instituted to ensure protection of the indigent appellant and the integrity of the appellate process. *Amicus curiae* discusses (ii) in the next Part. He takes up (i) here.

The assertion that two attorneys fully review and assess the record on an indigent appellant's behalf is a substantial overstatement. That often doesn't happen; and there is certainly no state law requiring such duplicative work, let alone in every case.[7]

CAAL refers to two types of appointments, "assisted" and "independent" cases. CAAL 9. It cannot be assumed in either that two qualified attorneys do a complete and comprehensive review.

The very premise of an "assisted" case is that the attorney appointed for the appellant does not have the experience or expertise for the appellate project to assume that (s)he or can handle the case independently. *See* CAAL 8. In that situation, it may be literally true that two attorneys review the record on the defendant's behalf, as CAAL states. CAAL 10. However, only one of those attorneys is presumed qualified. CAAL states that about 40% of cases are assisted cases. CAAL 8.

The analysis is similar for independently appointed cases (the remaining 60%), only in reverse. The premise of an

[7] In only one of the five appellate projects, covering one of the six California Courts of Appeal (the Sixth District, not involved in either Robbins' case or Delgado's), is the appellate project actually an attorney of record for the indigent appellant at the time the panel attorney files a brief, and even that doesn't occur in every case. Everywhere else, the project is almost never counsel of record along with the panel attorney at the time any brief is filed. (In the Second District, the project generally starts as counsel of record, but is later relieved if a panel attorney is appointed.)

independent case is that the appointed attorney has demonstrated the experience and expertise necessary to handle the case independently. (S)he decides what if any appellate issues should be briefed, and how to brief them. Thus while it is true that an appellate project attorney will request the transcripts for review, that review is often quicker and less detailed than the independent attorney's review is expected to have been.[8]

That is only logical. Each of the five projects has hundreds of attorneys on its panel. Each processes between about 500 and 3,000 criminal appeals per year, *see, e.g.,* Judicial Council of California, Court Statistics Report 107 (1998), plus juvenile and other indigent appeals. More serious appeals often require more time and resources. The appellate projects have between about 6 and 20 attorneys, who must not only review no-merit briefs, but also supervise every assisted case; monitor every independent case at a level of intensity varying with the experience of the panel attorney and the nature of the case; review all briefs and opinions; review and make recommendations on all claims for compensation

[8] CAAL's brief doesn't seem entirely specific on this topic. CAAL does say the project attorney's review is "much more involved" for an assisted case than for an independent case, and the project attorney "will . . . normally conduct a complete review" in an assisted case. CAAL 9. In other words, project review in independent cases is often "much [less] involved" than an assisted case, and thus is less than a "complete review." That is *amicus curiae*'s point.

CAAL also states: "As a matter of standard practice, either the panel attorney will request that the project attorney review the entire record or selected portions of it or the project attorney will make that request." CAAL 9. CAAL doesn't say what this "standard practice" is supposed to be, or what its source is. Moreover, if it were truly "standard practice" in all independent cases for the project attorney to review the entire record, then why would the independent attorney ever need to ask the project attorney to "review the entire record," or "selected portions" thereof, if the project attorney was going to do it anyway? The somewhat hedged nature of the statement indicates the process is less than "standard." One would expect as much, as discussed in the text.

(a time-consuming and often sensitive task); provide support for and evaluations of panel attorneys; and usually, handle some of their own cases as well. And each project is on a limited budget.

Moreover, there is no statute, rule or regulation that requires any project to review transcripts with any particular degree of intensity for an independent no-merit brief. Practices vary from project to project, and will differ depending on the case and the attorneys involved. Appellate projects are certainly conscientious, and none would want to see a panel attorney miss issues. However, no one can know in advance which no-merit briefs will contain missed issues. And no appellate project could review every no-merit submission with the same thoroughness, intensity, and expenditure of time that one would expect from independent counsel. Nor would one expect them to. That would often be a waste of resources, since one presumably qualified attorney is already being paid to make that kind of review once.

Because the independent attorney is appointed as counsel of record, that is the attorney who is expected to do necessary legal research relevant to the facts of a case, and to request record augmentation for transcripts which are shown to be needed by careful review of the record. If the independent attorney hasn't done the work expected in one or both areas, the project attorney may simply be unable to figure that out. *See infra*, pp. 20-21.

Amicus curiae praises the role of the appellate projects in helping to decrease the number of erroneously filed no-merit briefs, since every one results in another appeal like Mr. Delgado's, where a person is entitled to advocacy and gets none. But their role should not be overstated, and it is incorrect to suggest that two qualified attorneys always—or even generally—do a full workup of every no-issue submission.

And even if two attorneys did review the record completely and comprehensively, review by a second attorney is still not a substitute for the constitutional requirements of advocacy and judicial review. *Amicus curiae* discusses that in the next Part.

Ironically, the Warden and CAAL rely on *People v. Hackett*, 36 Cal.App.4th 1297, 1311, 43 Cal.Rptr.2d 219 (1995). WB 20, 22; CAAL 11, 13. *Hackett* agreed strongly with respondent Robbins, and with *amicus curiae* here, in repeatedly emphasizing that a vital part of *Anders* and *Penson* is the requirement of advocacy by counsel filing a no-merit brief. *See Hackett*, 36 Cal.App.4th at 1301, 1307, 1309-10. That was the "[f]irst and foremost" reason why *Hackett* disagreed with the no-merit, no-advocacy form brief approach that it (erroneously) believed *Wende* called for. *Hackett*, 36 Cal.App.4th at 1309-10. Notably, *Hackett* was decided a year before the Supreme Court reiterated that it took the advocacy requirement of *Anders* seriously, and noted that it never said otherwise in *Wende*. *In re Sade C.*, 13 Cal.4th at 977-81; *see supra*, p. 9.

Having said all of that, this Part should be irrelevant. *Amicus curiae* recognizes that most of the facts in this Part were never briefed and are not in the record of his case or respondent Robbins' case. But because major portions of the Warden's and CAAL's arguments are premised on unsworn assertions of counsel made for the first time in this Court, *amicus curiae* must present a more balanced picture. That doesn't make any of it relevant.

Most importantly, whatever some or all of California's appellate projects might or might not do, the constitutional requirements of advocacy and judicial review are a vital part of an indigent person's guarantee of one meaningful appeal of right, established in *Douglas v. California*. This Court has made clear that these are necessities, not mere luxuries. *Penson*, 488 U.S. at 81-85. If there were any remaining doubt that this Court meant what it said in *Anders*, that doubt should have been dispelled by this Court's 8-1 opinion in *Penson* barely a decade ago.

III. Legal Advocacy; Judicial Review

This Court's opinion in *Douglas v. California* established that an indigent appellant is entitled to legal advocacy. 372 U.S. at 357-58. "Although the Constitution does not ensure that every defendant receives the benefit of superior advocacy—how could it, given that half of all lawyers are below average?—it does entitle every defendant to the benefits of an advocate." *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994.)

The no-merit no-advocacy form brief espoused by the Warden and CAAL is not legal advocacy. A legal advocate provides a judicial decision-maker with legal points that are intended to assist the client in seeking relief, to the extent permitted by law. *See, e.g.*, Black's Law Dictionary 55 (6th ed. 1991). A statement of facts, coupled with a boilerplate recitation that counsel doesn't see any issues, fails to qualify.

An *Anders* brief is legal advocacy. It may be a rather strange type of advocacy, *see McCoy v. Court of Appeals*, 486 U.S. at 439 n.13, since counsel sets forth issues and authorities, but doesn't argue them. *See* RB, Part II(A)(4). Certainly, if an attorney can make an actual legal argument, (s)he provides more and better advocacy to the client than (s)he would in an *Anders* brief. But an *Anders* brief is still advocacy. In an *Anders* brief, appointed counsel effectively tells the court: "I believe this appeal has no arguable issues. But I could be wrong, since everyone, myself included, can make mistakes. So I submit these points and authorities to guide this Court and maximize the chances that my client can get relief if (s)he is entitled to it." That last sentence is what *any* appellate advocate does, in a merits or a no-merit brief.

A proper no-merit brief would combine constitutionally required advocacy, with the ethical duty not to argue frivolous issues. That is the brief required by *Anders* and *Penson*.[9]

Looked at from a different perspective, if appointed counsel files a brief, then *Douglas v. California* requires that the brief must contain advocacy. And appointed counsel is clearly obligated to file some brief. Otherwise, an attorney would have the final say on whether the indigent person would obtain an adequate appeal, an approach this Court has repeatedly rejected. *Anders v. California,* 386 U.S. at 744; *Lane v. Brown*, 372 U.S. 477, 485 (1963); *Ellis v. United States*, 356 U.S. at 675.

The Warden seeks to distinguish *Penson* on the ground that in Robbins' case, appointed counsel filed a no-merit no-advocacy form brief but then didn't move to withdraw, whereas appointed counsel did move to withdraw in *Penson*. WB 29, 32, 46. That claimed distinction is the linchpin of the Warden's effort to apply *Strickland v. Washington*, 466 U.S. 668 (1984) to this case, since this Court has already rejected the claim that *Strickland* applies to no-merit no-advocacy briefs. *Penson*, 488 U.S. at 86, 88-89; *see id.*, Br. for Respondent, No. 87-6116, Part I [arguing applicability of *Strickland* to brief that did not meet requirements of *Anders*].)

If that is a distinction, it is one without a difference. An attorney who engages in no advocacy, whether or not (s)he moves to withdraw, provides the same amount of advocacy: None. Neither course satisfies any constitutional requirement. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland v. Washington*, 466 U.S. at 685. "The Constitution's guarantee of

[9] Some states waive ethical prohibitions against frivolous arguments in indigent criminal appeals. *See, e.g., Ramos v. State*, 113 Nev. 1081, 1084-85, 944 P.2d 856 (1997); *State v. Cigic*, 138 N.H. 313, 318, 639 A.2d 251 (1994). In those states, literal adherence to *Anders* may not be needed, as a frivolous issue can be argued to avoid a no-merit brief. California is not such a state.

assistance of counsel cannot be satisfied by mere formal appointment." *United States v. Cronic*, 466 U.S. 648, 654-55 (1984) [citation omitted].

The above should be dispositive. *Douglas v. California*, and *Anders*, *McCoy* and *Penson* which followed it, hold that as long as a state accords one appeal of right in a criminal case, then the Constitution requires advocacy on behalf of an indigent person in that one appeal. No-merit briefs are no exception.

Beyond that, the fact that counsel must file a brief, and cannot unilaterally withdraw an indigent client's appeal, further supports this Court's requirements in *Anders* and *Penson*. If an attorney must file a brief in a reviewing court, then the court has a live appeal and must perform its essential functions. A court in our adversarial system cannot perform its functions without partisan advocacy. *Herring v. New York*, 422 U.S. 853, 862 (1975).

Douglas v. California requires that appointed counsel must provide that partisan advocacy. 372 U.S. at 357-58. It would be constitutionally unacceptable under *Douglas*, based on a lack of partisan advocacy, for counsel to file a brief that merely said: "I reviewed the record, and I see nothing to this appeal. By the way, another attorney concurs." *See also supra,* p. 18. There is no difference between that brief, and a brief that says the same thing but also copies some facts and procedural history into the record.

Thus, respondent's approach is a logical and necessary outgrowth of *Douglas*. A court, not an attorney or an appellate project, is charged with adjudicating an appeal. The court must decide the appeal even if appointed counsel assures the court that the appeal is not worth deciding, or gets another attorney's concurrence. Moreover, no reviewing court is bound by concessions of counsel on questions of law, *see, e.g., Orloff v. Willoughby*, 345 U.S. 83, 87 (1953), which of course include concessions of counsel that there are no legal issues to decide.

Consequently, this Court held in *Anders* that after a no-merit brief is filed, "the court—not counsel—then proceeds, after a full examination of all of the proceedings, to decide whether the case is wholly frivolous." *Id.* at 744; *Penson*, 488 U.S at 80.

Consider Mr. Delgado's case. An "independent" panel attorney proposed to file a no-merit no-advocacy form brief. Unbeknownst to everyone, he had utterly failed in two vital duties. First, at least two superb appellate issues were available to be spotted—issues which were so good that when Delgado argued them in the Ninth Circuit in support of the grant of habeas relief, the Warden made no effort to rebut them in his reply.[10] (A reply would have been needed to prevent those issues from being alternative grounds for affirmance. *See United States v. American Railway Express Co.*, 265 U.S. 425, 435-36 (1924) [court reviews lower court's result, not its reasoning].) Second, proper record augmentation of motion proceedings was essential for intelligent evaluation of other possible issues suggested by the existing record.

[10] One of the issues was total denial of the advocacy of counsel at sentencing, which is a "critical stage" of the proceedings. *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967). Denial of counsel at a critical stage is reversible error *per se*. *United States v. Cronic*, 466 U.S. at 659; *Strickland v. Washington*, 466 U.S. at 692; *United States v. Gonzales*, 113 F.3d 1026, 1029 (9th Cir. 1997). The other was the major conflict on the part of Delgado's "stand-in counsel," who was in the process of getting her client an extraordinary result of probation over the prosecutor's strong objection. *See supra*, p. 4. "Stand-in counsel" had a strong incentive not to 'rock the boat' by getting a good result for a co-defendant, because that would increase the possibility the prosecutor would become fed up and pull out of the plea agreement, ruining her client's extraordinary result. That conflict, which should have been apparent to the trial court, *see Delgado v. Lewis*, 168 F.3d at 1154, was reversible error. *See Wood v. Georgia*, 450 U.S. 261, 271-74 (1981). Mr. Delgado's bare agreement to conflicted "stand-in counsel," without any advisement that he had a right to his own attorney or the existence or nature of the conflict, was not a waiver of the conflict. *See People v. Mroczko*, 35 Cal.3d 86, 110, 197 Cal.Rptr. 52, 672 P.2d 835 (1983); *Glasser v. United States*, 315 U.S. 60, 70-72 (1942).

However, the independent panel attorney, perhaps after an overly hasty review or a preconceived idea that nothing would turn up in a short guilty plea transcript, was grossly deficient in these essential and routine tasks. The appellate project staff attorney who reviewed the panel attorney's no-merit submission was one of the finest criminal appellate lawyers in California, but he had no way to know the independently appointed attorney had so thoroughly failed in his duties. Thus without any guidance from the appointed panel attorney; having only limited time and resources with which to conduct a review; and not being counsel of record with the primary responsibility of legal research and ordering missing transcripts, he didn't find the issues either.[11]

After the no-merit no-advocacy form brief was filed, Mr. Delgado filed a *pro. per.* brief with the help of a "jailhouse lawyer." *See supra*, p. 6. The matter then went to the Court of Appeal, which had no useful materials to guide it in evaluating the cold record before it. It is no wonder that the Court of Appeal could do no more than say, "We have now concluded our independent review of the record and find no arguable issues. The judgment is affirmed." DER 226-28. Appellate judges can't do their jobs if the parties' counsel don't do theirs.

Deciding appeals is not the only judicial function impaired by a no-merit no-advocacy form brief. A reviewing court is also ultimately responsible for safeguarding the integrity of the judicial process, as well as its essential nature, *i.e.*, its conformance with fundamental fairness and the law of the jurisdiction.

[11] An *Anders* brief would surely have been helpful to the project attorney in doing his job. At the same time, an *Anders* brief might also have prevented the entire problem by forcing appointed counsel to think carefully about the appeal, rather than hurrying through it on a superficial level, because he would have had to put his legal thoughts on paper in a publicly filed brief. *See Penson*, 488 U.S. at 81 n.4; RB, Part II(A)(3).

No court can delegate essential functions of an adversarial justice system. For example, an attorney cannot decide whether a defendant is competent to be tried, or what instructions to give a jury. Here, an attorney cannot usurp the judicial function of deciding whether an indigent person's constitutional guarantee of advocacy will be respected. That, however, is the end result when the attorney files a no-merit no-advocacy form brief, and thus gives the court no guidance in determining whether the appeal lacks arguable legal issues.[12]

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[12] Along with its role in safeguarding the integrity of the judicial process and an indigent appellant's right to counsel, the court's involvement in reviewing no-merit briefs compensates to an extent for the indigent person's complete inability to obtain one constitutional right that a person of means has—the right to "counsel *of his own choice*." *Powell v. Alabama*, 287 U.S. 45, 53 (1932) [italics added]; *see also Flanagan v. United States*, 465 U.S. 259, 267-68 (1984). That right is important to a person of means, as it enables him or her to utilize the free market to retain the attorney in whom (s)he reposes the greatest trust. *See, e.g., Heine v. Colton, Hartnick, Yamin & Sheresky*, 786 F.Supp. 360, 368 (S.D.N.Y. 1992). If that attorney concludes there are no arguable issues, the person of means can obtain from trusted counsel of choice a detailed opinion letter discussing possible issues with specific strengths and weaknesses. *See McCoy v. Court of Appeals*, 486 U.S. at 439 n.12.

By contrast, an indigent person has no constitutional right to counsel of choice. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989). While the indigent person has no right to choose an attorney in whom (s)he has particular trust, the court can compensate to an extent; it can choose an attorney in whom it at least has sufficient trust to warrant making an appointment. As a society, we repose trust in our judiciary to make such decisions impartially, since it is the branch of government most embodying neutrality in our system of justice. Thus, if appointed counsel concludes there is nothing to argue in an appeal, then instead of the indigent client obtaining an opinion letter from an attorney of choice in whom (s)he has particular trust (since the indigent client has no right to counsel of choice), the court must obtain something akin to an opinion letter from the attorney of its choice, in whom it has reposed trust. That "opinion letter" which counsel directs to the entity that hired him or her, the appointing court, is the *Anders* brief.

(continued...)

As respondent Robbins has shown, the State of California made the same claim in *Anders* that it does now, and this Court rejected it in *Anders*. RB, Part III(B)(2). The State claimed then as it does now that the presence of a second attorney vitiates the constitutional requirements of (i) an advocate's brief, and (ii) a judicial determination of whether an appeal has no arguable issues. In fact, the State asks this Court to decide this claim a third time, as this Court also rejected it nine years before *Anders*.

In *Anders* and *Penson*, this Court relied on its opinion in *Ellis v. United States*, 356 U.S. 674 ["*Ellis II*"]. *See Anders*, 386 U.S. at 741-42, 743; *Penson*, 488 U.S. at 82-83. In *Ellis II*, this Court reversed the opinion of the Court of Appeals, and rejected a "no-merit no-advocacy" submission:

> In this case, it appears that the two attorneys appointed by the Court of Appeals, performed essentially the role of amici curiae. But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed. . .

Ellis II, 356 U.S. at 675.

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[12](...continued)

Needless to say, no private client would be satisfied with an opinion letter from counsel of choice that recited facts and procedure, and concluded, "I'm not going to tell you anything about the law, but I stand ready to do whatever you want." Similarly with appointed counsel, the appointing court would not be satisfied with such an uninformative opinion letter from its counsel of choice. *Anders* makes clear the court is entitled to more.

This holding, like *Anders*, made clear that counsel must engage in advocacy to convince the court that counsel "has diligently investigated the possible grounds of appeal," and must present an "evaluation of the case" to the court. That was also the conclusion of the dissenting opinion in the Court of Appeals, later echoed by this Court in its unanimous reversal of the majority opinion. *Ellis v. United States*, 249 F.2d 478, 480 (D.C. Cir. 1957) (Washington, J., dissenting) ["*Ellis I*"], *rev'd*, 356 U.S. 674.

The no-merit no-advocacy procedure rejected by this Court in *Ellis II* involved the appointment of two lawyers—the same number which California now urges is enough, and one more than California courts actually appoint for indigent appellants. The appointed lawyers in *Ellis* were highly qualified; "one . . . was formerly employed on the staff of this court [the D.C. Circuit] and both . . . served as Assistant United States Attorneys in this jurisdiction." *Ellis I*, 249 F.2d at 479. Appointed counsel "[made] a thorough and detailed statement of the facts, based on interviews with the trial judge, appellant's trial counsel, the prosecuting attorney, the court reporter, one of the government witnesses, and the defendant." *Id.* at 478-79. They concluded in the no-merit brief that there was only one "possible" area of error, probable cause; but based on the facts, it wasn't an issue. *Id.* at 479.

That is a lot more representation than the "no-merit no-advocacy" form brief advocated by the Warden and CAAL, yet this Court held in *Ellis II* that it wasn't enough. The reason was the same one *amicus curiae* has argued: "[R]epresentation in the role of an advocate is required." *Ellis II*, 356 U.S. at 675.

In their effort to avoid *Anders* and *Penson*, CAAL also argues that a court is in a difficult position when it has to review a record, because a court is not an advocate for a defendant. CAAL 13. *Amicus curiae* agrees that a court is not an advocate, but that makes advocacy all the more essential. For in our adversarial system, a court first and foremost requires guidance from the litigants. This Court has recognized as much:

> "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted [and sentenced according to law] and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862....Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743 (1967).

United States v. Cronic, 466 U.S. at 655. A reviewing court is ultimately responsible for ruling on issues of law—and the issue of whether any legal issues exist is certainly one—but it can't do so in a vacuum. It requires advocacy to guide it. That is a central purpose and function of an *Anders* brief.

CAAL contends that its preferred no-merit no-advocacy form brief "mak[es] continuity of representation possible in case the appellate court does find arguable issues." CAAL 2, 5, 12. It isn't yet clear that "continuity of representation" is permissible after a no-merit brief. *Cf. Penson*, 488 U.S. at 83, 85 [appointed counsel who files a no-merit brief must ask to withdraw; if the court finds an issue, it appoints new counsel]. Assuming for this argument that "continuity of representation" is permissible, the contention overlooks a basic question that a court would always have to ask: Is "continuity of representation" warranted and desirable?

Neither a court nor an indigent person would want "continuity of representation" by an attorney who has already rendered professionally deficient representation. In Mr. Delgado's case, the appointed attorney had been grossly ineffective; he missed two easily recognizable issues, and failed to obtain a proper

record for evaluating other possible issues. If the Court of Appeal had been guided toward recognizing this with the assistance of an *Anders* brief, it would likely have discontinued the appointment of the attorney who had already provided professionally unreasonable representation. In the unlikely event the Court didn't do so on its own, Mr. Delgado would have had cause to make that request. Instead, the Court of Appeal had no way to figure this out, as it didn't have an *Anders* brief to help it spot issues and omissions.

A court's decision on whether to have appointed counsel continue on the case (again, assuming *arguendo* that is permissible) would be better informed with an *Anders* brief on file. From the presentation of the issues and the overall quality of the *Anders* brief, the court can make a reasoned determination of whether appointed counsel is likely to render effective assistance in filing a supplemental brief.

For example, if counsel spotted and discussed the issue that led the court to request further briefing, but merely misjudged the scope of appellate review (*e.g*, didn't recognize that *de novo* review might be used, and thought abuse of discretion was the standard), then the court might still conclude (s)he was conscientious, and would advance the indigent client's cause zealously in supplemental briefing on a specified issue. In Mr. Delgado's case, a hypothetical attorney using *Anders* might have flagged the issue of a Sixth Amendment denial at sentencing, but failed to argue it due to an erroneous belief that *Strickland v. Washington* (ineffective advocacy) rather than *United States v. Cronic* (total denial of advocacy) was the standard. A court spotting the *Cronic* issue might continue counsel's appointment nonetheless, if (s)he wrote a good *Anders* brief. If on the other hand, the *Anders* brief was of poor quality, then the court might decide that appointing another attorney was essential to ensure proper functioning of the adversarial process and protect the indigent appellant's right to counsel.

By contrast, if appointed counsel has filed only a no-merit no-advocacy form brief, the reviewing court has no guidance in this important decision. That is what happened to Mr. Delgado. He needed real representation by a zealous advocate, *i.e.*, new counsel, not continuity of a "warm body." Unfortunately, his Court of Appeal had no effective way to figure that out.

All of this underscores *amicus curiae*'s point. It is the court, not an attorney or appellate project, that must determine whether it is appropriate and desirable to have "continuity of representation." Forcing "continuity of representation" upon a court involuntarily, by not giving it adequate information for an informed choice, does not assist it in its vital and constitutionally required tasks of protecting the integrity of the judicial process and safeguarding the indigent person's right to counsel.[13]

The Warden argues that states should be able to adopt their own methods for handling "no-merit" briefs in indigent appeals. WB 14, 27-28. They can, but only subject to the constitutional guarantees of *Douglas v. California*, and *Anders*, *Penson* and *McCoy* which follow it. One could hardly argue that a state can permit appointed trial counsel to conduct no cross-examination and present no defense case or argument. *See State v. Lamoreaux*, 22 Ariz.App. 172, 525 P.2d 303 (1974) [reversing after "no-advocacy trial"]. Nor would that be permissible if someone on the local indigent defense panel concurred. A "no-advocacy appeal" is no more an option than a "no-advocacy trial," for it too lacks informed judicial decision-making and an adversarial process.

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[13] CAAL expresses concern that appointing new counsel after a no-merit brief in a case with "thousands of pages" of record would be expensive. CAAL 13. If original counsel's representation was seriously deficient, then a court would probably appoint new counsel anyway, regardless of record length. But in reality, relatively few no-merit briefs are filed in cases with huge records. Most are in cases with small records, often in appeals after guilty pleas.

Finally, the Warden's effort to urge a "prejudice" analysis, when an indigent person has been denied even a minimal level of advocacy, *see* WB 9-10, 30-34, 42, is a reprise of Ohio's effort to do the same 10 years ago in *Penson*. *See id.*, Br. for Respondent, No. 87-6116, Part II ["harmless error" argument]. This Court rejected the effort in *Penson*: "Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversary process." 488 U.S. at 87. (The Warden's claim under *Teague v. Lane*, 489 U.S. 288 (1989) is equally misplaced. Respondent Robbins seeks a straightforward application of *Penson* and *Anders*; since this Court decided those cases 10 and 32 years ago, obviously, neither is a "new rule.")

When an appellant's counsel fails to engage in any advocacy, the appellant has been denied the most fundamental role of an attorney in a court of law, as surely as if the attorney had wholly failed to take some other step required to perfect the client's appeal. A court doesn't engage in "prejudice" analysis after a total denial of the advocacy of counsel at the trial level; a defendant is not required to show what the result would have been if someone had given him an attorney-advocate. *United States v. Cronic*, 466 U.S. at 658-59 & n.25; *Strickland v. Washington*, 466 U.S. at 692. *Penson* logically follows in stating the same rule for appeals.

In such circumstances, the First Circuit's observations are *à propos*:

> We do not see how the right to appeal and to effective assistance of counsel in connection therewith can be adequately vindicated if, as a condition to any relief, petitioner must first establish—without the assistance of any counsel—that he has a non-frivolous or arguably meritorious issue to present on appeal. Requiring an initial demonstration of merit from an unrepresented defendant as a condition to remedying the involuntary loss of appellate rights would deprive the defendant of one of the very benefits of appellate counsel—review by counsel for the purpose of identifying potential appellate issues. See *Anders v. California*, 386 U.S. 738, 744-45....

United States v. Tajeddini, 945 F.2d 458, 467 (1st Cir. 1991) (per curiam; before Breyer, Campbell and Selya, JJ.). As *Penson* makes clear, no less is true in the context of no-merit briefs.

CONCLUSION

No legal system is perfect. Attorneys, like judges, do make legal errors. But Mr. Delgado's case, like that of respondent Robbins, involved the most fundamental type of error of all: An attorney's determination that an indigent client has no right to the assistance of counsel in his one appeal of right, the only right he has to assert legal error below. *See McCoy v. Court of Appeals*, 486 U.S. at 440 n.13. As this Court recognized in *Anders* and *Penson*, a court cannot accept that determination without making an effort to verify it. In turn, a court cannot effectively verify it without the guidance of counsel.

Contrary to *Anders* and *Penson*, the approach urged by the Warden and CAAL was used in Mr. Delgado's case. As a result, a fundamental breakdown in Mr. Delgado's sentencing couldn't be fixed on appeal, because the appellate system was rendered incapable of spotting *its own* fundamental breakdown. The Ninth Circuit eloquently described the result:

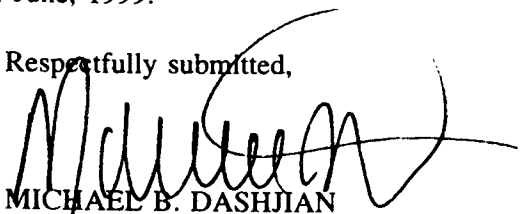
> The absence of any meaningful legal assistance in this case makes a mockery of the representation of indigent defendants contemplated by the Supreme Court in *Anders, Penson, Strickland*, and *Gideon v. Wainwright*, 372 U.S. 335 (1963). Clearly established constitutional law requires competent advocacy in criminal defense, not shadowboxing. To hold otherwise would, to paraphrase Eliot, render the clear sound of Gideon's trumpet quiet and meaningless as wind in dry grass.

Delgado v. Lewis, 168 F.3d at 1154-55.

Amicus curiae Delgado joins respondent Robbins in asking this Court to affirm the judgment of the Court of Appeals.

Dated this 21st day of June, 1999.

Respectfully submitted,



MICHAEL B. DASHJIAN
Law Offices of Michael B. Dashjian
1110 California St. Suite D
P.O. Box 512
San Luis Obispo, CA 93406-0512
Telephone: (805) 787-0300
Facsimile: (805) 686-0726
Counsel of Record for
Amicus Curiae