No. 98-1037

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE SMITH, WARDEN,
Petitioner

v.

LEE ROBBINS,
Respondent

BRIEF FOR THE RESPONDENT

Filed June 21, 1999

QUESTIONS PRESENTED

1. When a criminal defendant's direct appeal presents arguable issues, the defendant has a constitutional right, recognized since *Douglas v. California*, to a merits brief that argues one or more of those issues. Here, appointed counsel filed a conclusory no-merit brief that did not argue any issues. If Robbins' appeal presented arguable issues, did the no-merit brief violate his constitutional right to counsel on direct appeal?

2. Whether or not Robbins' appeal presented arguable issues, the question remains as it was in *Anders v. California* (where this Court identified no arguable issues) and in *Penson v. Ohio* (where arguable issues existed): "May a State appellate court refuse to provide counsel to brief and argue an indigent criminal defendant's first appeal as of right on the basis of a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief?" *Penson v. Ohio*, 488 U.S. 75, 77 (1988) (quoting Brief for Petitioner in *Anders v. California*, O.T. 1966, No. 98, p. 2).

3. If counsel in a criminal case files a brief on direct appeal that does not argue or even refer to any legal issues at all, should prejudice be presumed due to the constructive abandonment of counsel?

4. Does the *Teague v. Lane* anti-retroactivity doctrine bar the lower courts from applying *Douglas* and *Anders* to this case, where Robbins' conviction became final decades after *Douglas* and *Anders* were decided?

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STATUTORY PROVISIONS

California Rule of Court 228.1 states in pertinent part:

> (a) [The conference] Before jury selection begins in criminal cases, the court shall conduct a conference with counsel to determine:
>
> (1) a brief outline of the nature of the case, including a summary of the criminal charges;
>
> (2) the names of persons counsel intend to call as witnesses at trial;
>
> (3) the People's theory of culpability and the defendant's theories;
>
> (4) the procedures for deciding requests for excuse for hardship and challenges for cause; and
>
> (5) the areas of inquiry and specific questions to be asked by the court and, as permitted by the court, by counsel and any time limits on counsel's examination.

Cal. Rule of Court 228 (effective June 6, 1990).

California Penal Code Section 1260 states:

> The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

Cal. Penal Code § 1260 (West 1982).

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Lee Robbins was an indigent, incarcerated defendant charged with first-degree murder. His trial was flawed in ways almost too numerous to count. His public defender did

not want to file even a discovery motion on his behalf. When the trial court refused to appoint another attorney to represent him, Robbins saw no alternative but to defend himself. He was given only $500 to locate witnesses and investigate the crime. The trial court neither heard his motions nor served his trial subpoenas, although it had promised to do so. After he filed a written motion challenging the state of the jail law library, the court itself agreed that the law library was inadequate. But the court refused to allow Robbins to withdraw his waiver of counsel and refused to appoint advisory counsel to assist him, saying that it would never ask an attorney to "play second fiddle" to a client. Moments before jury selection began, the court denied Robbins crucial discovery that it had earlier ordered produced.

Prevented from meaningfully preparing for trial, Robbins was left untrained and unaided, indigent and incarcerated, facing a prison sentence of twenty-seven years to life. Once his trial began, he failed to excuse potential jurors who would probably favor the prosecution, ineffectively cross-examined witnesses, did not call a single witness in his own defense (because the court had not had his trial subpoenas served), and declined a manslaughter instruction. All in all, the adversarial process failed. Nevertheless, the jury rejected the prosecutor's call to convict Robbins of first-degree murder, convicting him instead of second-degree murder and grand theft of an automobile.

On appeal, Robbins' appointed lawyer filed a conclusory no-merit brief that neither argued nor referred to any legal issues at all. He also failed to obtain and provide the appellate court with the full trial court record, leaving the court (and himself) without access to transcripts and filings that supported viable appellate claims. When Robbins filed *pro se* requests to augment the record, appointed counsel did nothing to support him, and the requests were denied. Robbins' appeal was then denied on the merits by an appellate court that lacked the benefit both of the full record and of an advocate's brief.

On habeas review, the district court found that Robbins' appointed appellate counsel had failed to argue at least two arguable issues. It therefore found that Robbins had been denied his constitutional right to counsel on appeal. The Ninth Circuit affirmed.

II. FACTUAL BACKGROUND

A. Introduction.

On December 31, 1988, Douglas Spaulding died in a gun battle. SER 275, 319.[1] He had fired no fewer than five shots, and at least five shots had been fired at him. SER 264, 275. Robbins was charged with first degree murder with a gun use allegation, as well as with grand theft of an automobile. CT 106-07. He faced a mandatory sentence of twenty-five years to life on the murder charge alone. JA 222. There were no eyewitnesses to the shooting, and the prosecution's evidence was both conflicting and circumstantial. *See, e.g., infra* note 5.

B. State Court Pre-Trial Proceedings.

Robbins repeatedly sought to replace his public defender. During a series of hearings conducted pursuant to *People v. Marsden*, 2 Cal. 3d 118, 84 Cal. Rptr. 156 (1970) (setting forth procedure for replacing appointed counsel), Robbins told the trial court that his attorney refused to give him documents related to the case, refused to file a discovery motion on his behalf, repeatedly told him that he was "guilty until I prove myself innocent," and refused to act on his behalf because he believed that Robbins had no defense. JA 99-103, 169-70; SER 4. The trial court denied each of Robbins' requests for new counsel. JA 111, 197-98; SER 11. At the conclusion of the final *Marsden* hearing, Robbins told the court that, if it would not appoint substitute counsel, he

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[1] Each abbreviated citation to the record is explained in the Table of Record Citations, *supra* at xii.

had "no choice" but to represent himself. JA 190, 198. He waived his right to counsel two days later. *Faretta v. California*, 422 U.S. 806 (1975). JA 217-27.

A few weeks after his *Faretta* waiver, Robbins filed a written motion objecting to the state of the jail law library: "The law library was found to be inadequate back in 1975 and hasn't been updated since. . . . An accused who cannot research a charge against him cannot present his best defense because he has no way of discovering what possible defenses exist." App. 7, 9. The court agreed with Robbins about the state of the law library but refused to correct the problem:

> [I]f you are looking up law, you are not going to [be] able to find it because somebody has torn it out before you got there. And you are going to be asking me for time or books or something else, and I am not going to be inclined to grant it.

JA 255-57, 259-60.

Nor did Robbins' troubles end there. A central factual issue in the case was whether a particular gun was the murder weapon. SER 296-323. The court granted Robbins $500 for an investigator; in a written motion, Robbins asked for additional funds for an investigator and for a forensics expert, offering to provide the court with more detailed support *in camera* if necessary. JA 263; App. 30-31. The court summarily denied the motion without giving Robbins the opportunity to make a further showing. JA 284-85. Robbins was thus unable to challenge the prosecutor's characterization of the forensic evidence against him.

Preparing his defense from his jail cell and facing a possible life sentence, Robbins was without legal assistance, without a functioning law library, without a forensics expert, and without more than $500 to investigate the case. Throughout the pre-trial proceedings, his attempts to represent himself were a failure. Increasingly desperate for help, he several times sought the appointment of advisory counsel. JA 247-48;

App. 28-32.[2] The court denied all of his requests – even though it told Robbins in the course of one such denial that his pretrial motions were "garbage." JA 320-21; *see also* JA 255, 321-24 (denying requests). Although the court purported to exercise its discretion in denying Robbins' requests for advisory counsel, JA 324, its comments reveal its true policy: "I am not going to ask an experienced attorney who is trained in law school and who is a criminal lawyer to sit there and play second fiddle and have you call the shots. . . . " JA 321.

Some of Robbins' requests for substitute counsel did not clearly distinguish substitute from advisory counsel, but the court made no attempt to explore the requests. It simply denied them all. Indeed, it refused even to accept a habeas petition in which Robbins asked "that an attorney be appointed to represent me." JA 276-77, 286-87; App. 32. One week before trial, when Robbins again requested "assistance of counsel to help me present my defense" and indicated a new possible conflict with the public defender's office, the court failed to explore the nature of the new conflict and did not even try to clarify whether Robbins wanted advisory or substitute counsel. Instead, it denied the request. JA 320-24.

Without tools, training, advisory counsel or substitute counsel, Robbins tried to press ahead with his defense. But the adversarial system continued to fail him. The trial court never allowed him to argue his motion to dismiss, in which he contended that the state's forensic evidence contained numerous inconsistencies and that the state had lost, destroyed, or tampered with certain material evidence. CT 163-73.[3] The court refused even to accept a habeas petition in

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[2] The Warden characterizes Robbins as manipulative, but a more accurate reading of the record is that he was an unfailingly polite and non-manipulative defendant who found himself in an impossible situation.

[3] The minute orders from the hearings immediately following the filing of the motion (no transcripts were ever prepared) do not indicate that the motion was ever heard. CT 174-76. The court evidently (but

which Robbins asked for counsel. JA 272, 286-87. Moments before jury selection began, the court refused to order the prosecutor to produce a record of the decedent's arrests "for specific acts of aggression," SER 68, 124-25, even though the prosecutor had agreed earlier that Robbins was entitled to it (and to everything else in his discovery motion) and the court itself had declared the matter resolved in light of the prosecutor's promise to produce it. JA 126; App. 26-27.[4]

The system failed in other ways as well. The court agreed to have Robbins' trial subpoenas served, but it refused to attempt service on Deputy Barry Jones, one of the two principal investigating officers. JA 291, 294-95; SER 226. The court did not challenge the materiality of Jones' testimony or express doubt that he could provide evidence favorable to Robbins, but announced that Jones, who had been employed by the sheriff's department as recently as seven months earlier, CT 89, no longer worked there and could not be located. JA 294-95. The record does not show that the court made any effort to discover the whereabouts of the recently retired deputy.

The court also refused to subpoena the officer who had retrieved fingerprints at the crime scene, stating, "I was inquiring of the prosecutor as to the officers – there is duplication. . . . The print man is one of the people that the prosecutor is definitely bringing in. The one who handled the latents and prints is going to be here." JA 295-97. Evidently relying on the court's representation, Robbins did not attempt further to establish the materiality of the witness or attempt further to subpoena him. At trial, however, the prosecutor did not call "the print man."

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mistakenly) believed that another judge had decided the motion. JA 285-86.

[4] The record would likely have shown, at a minimum, that the decedent had been arrested a few months before his death for beating his wife. SER 136-37, 145-46. The decedent had also threatened to kill Robbins and had shot at Robbins' van on the freeway. CT 96-97.

Another aspect of the court's judicial function appears to have broken down. The court's admission that it "was inquiring of the prosecutor" about Robbins' trial subpoenas indicates a prior communication between the prosecutor and the court about the prosecutor's witnesses. JA 297. Because nothing in the record up to that point identified the prosecutor's witnesses, Robbins' federal habeas petition argued that the prosecutor and the court had had an improper *ex parte* contact. Hab. Pet. at 64-65. The Warden responded that a "fair interpretation" of the court's comments was that the prosecutor had made an unreported response during the hearing. Return at 46-47. But this explanation is implausible: The prosecutor was not present during this portion of the hearing. JA 294.

C. State Court Trial And Sentencing.

Robbins went to trial without meaningful investigation, without representation or advice of counsel, and without any of the witnesses he had subpoenaed. The results were predictable. Robbins declined to hold the prosecutor to an earlier agreement to sever a charge of grand theft of an automobile, SER 72, did not exercise any challenges during *voir dire* (possibly because the court failed to hold the pre-*voir dire* conference required by California Rule of Court 228.1), SER 85-116, did not make an opening statement, SER 130, and never raised any evidentiary objections. He incompetently cross-examined the state's witnesses, and he allowed hearsay and other non-responsive testimony to be admitted. *See, e.g.*, SER 144-45, 221-23.

Informed by the bailiff in a whisper that none of his own witnesses was available, Robbins did not call a single witness in his defense. SER 344, 440. His closing argument was repeatedly hamstrung by the prosecutor's objections, and he never argued the presumption of innocence or the prosecutor's high burden of proof. SER 359-65. He declined a manslaughter instruction, SER 336-37, and he did not object when the court twice gave a reasonable doubt instruction that used

"moral certainty" and "moral evidence" language. SER 80, 385-86.

As a result, Robbins was tried not only for murder but for fleeing the state afterwards in a stolen truck. SER 390-91. He was judged by a jury that included the father of a police officer who had often worked with the prosecutor, SER 85-89, a woman who had been robbed at gunpoint and three of whose family members had been victims of car theft, SER 98, 102, and a woman who had witnessed an armed robbery and whose son had been beaten so severely during another robbery that his skull was fractured, SER 99-101.

But despite the lack of adversarial testing of the state's evidence, the case was a close one. Although the evidence stage of the trial lasted less than five hours, SER 129, 178-79, 281-82, 333, 344, the jury deliberated over the course of two days, SER 396-97, 400-01, asked for a read-back of certain testimony, SER 397, and posed certain questions of the court, SER 398-400. It rejected the prosecutor's request for a verdict of first degree murder, convicting Robbins instead of second degree murder with a gun use allegation and grand theft of an automobile. SER 358-59, 401-04. Robbins was sentenced to prison for a term of seventeen years to life. SER 409.

D. State Court Direct Appeal.

Robbins filed a notice of appeal and requested that "all pre-trial and trial proceedings" be included in the record. CT 253-54. David Goodwin was appointed as his appellate counsel. App. 24-25. Before Goodwin filed his no-merit brief, Robbins twice asked the court to augment the appellate record with motions and transcripts of proceedings that were not included in the clerk's and reporter's transcripts or in Goodwin's own motion to augment the record. JA 326-31. His requests were denied. *See, e.g.*, JA 331.

Goodwin filed a no-merit brief on or about October 1, 1991. JA 26-37. The first section was a one and one-half page procedural history. It briefly mentioned the denial of two of

Robbins' four *Marsden* motions (erroneously giving March 1 as the date of one of the denials, JA 162-63), but it did not mention, let alone discuss, any of the other documents or pre-trial proceedings described on pages 3-8 above. Goodwin's only citations to the record were to minute orders and other similarly short documents. He did not cite the transcript of a single pre-trial hearing or any of Robbins' written motions. The second section of his brief, a six-page factual history, purported to be a summary of the trial proceedings. It omitted many material facts, and the facts that it included were largely presented in a way unfavorable to Robbins.[5] The third section, captioned "Argument," contained no argument. It did not so much as hint at a potential issue. The fourth section consisted of a one-page declaration in which Goodwin stated that he had (1) "reviewed the entire record on appeal," (2) "examined the superior court file," and (3) "discussed appellant's case with trial counsel." JA 36.[6]

But Goodwin had not reviewed the entire record. He never looked at the transcripts of many crucial pretrial proceedings. Because he did not cause them to be included in the record on appeal, the state court of appeal did not review

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[5] For example, Goodwin: (1) failed to describe the testimony of two prosecution witnesses who testified that Robbins remained with them on the night of the crime until after the hour at which the state contended the shooting had occurred, SER 133, 140-41, 290-92, 325; and (2) failed to recount the testimony of a prosecution witness who described Robbins as having worn clothing on the night of the crime that did not match the clothing described by a witness who the state contended had seen Robbins near the crime scene when the crime allegedly occurred. SER 158, 161, 293.

[6] The Warden's petition for writ of certiorari accurately reports that Goodwin's declaration stated that he "discussed the case with trial counsel." Cert. Pet. 3, 13. Perhaps realizing that this statement asserts an impossibility because Robbins represented himself at trial, the Warden now claims instead that Goodwin "averred that he had spoken to the attorney who had represented Robbins until Robbins waived counsel." WB 3, 24. The record does not support this assertion.

these proceedings either. These proceedings included (1) all proceedings held prior to November 28, 1989, including a *Marsden* hearing held on October 19, 1989, *see* JA 162, App. 2, SER 2; (2) a hearing held on April 16, 1990, at which Robbins' request for advisory counsel was denied, JA 244-50; (3) a hearing held on July 13, 1990, at which Robbins' request for advisory or other counsel was denied and the court refused to serve certain of Robbins' trial subpoenas, JA 283-99; App. 28-32; (4) a hearing held on August 9, 1990, at which the court stated that Robbins' motions were "garbage" but refused to appoint advisory or other counsel, JA 300-25; and (5) the prosecutor's opening statement, SER 130. Robbins attached some of these transcribed proceedings, which he later caused to be prepared, as exhibits to his federal habeas petition. Hab. Pet., Ex. E. Some of these proceedings still have not been transcribed. In addition, Goodwin did not review Robbins' habeas petition, which the trial court had refused to accept. JA 272-82, 286-87; App. 32-33. He also failed to cause important documents from the superior court file to be included in the record on appeal. *See* App. 5-23.

On October 28, 1991, the appellate court issued two orders. One allowed Robbins thirty days to supplement Goodwin's no-merit brief. JA 333-34; App. 33. The other denied Robbins' second motion to augment the record, stating that augmentation was Goodwin's responsibility. JA 331-32. Goodwin did nothing.

Robbins subsequently filed a *pro se* supplement to Goodwin's brief that raised none of the arguable issues identified at pages 18-23 below. Supp. Ret., Ex. 13. On December 12, 1991, the state court of appeal affirmed Robbins' conviction, noting – incorrectly, since it had twice denied Robbins' request to augment the record – that it had "examined the entire record." Hab. Pet. Ex. B-4.

E. Federal Habeas Proceedings.

After exhausting his state court remedies, Robbins filed a *pro se* federal habeas petition in which he claimed, among

other things, that Goodwin's no-merit brief violated this Court's decision in *Anders v. California,* 386 U.S. 738 (1967). Hab. Pet. 82-88.

During the proceedings before the district court, the Warden filed a declaration in which Goodwin stated (1) that he had "attempted to consider" not all, but only "most" of the issues that Robbins had raised with him; (2) that he had not filed an advocate's brief because he had not found the issues that he considered to be "meritorious;" and (3) that he had "consulted" with the California Appellate Project ("CAP") and received "their permission to file a *Wende* brief [*People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (1979)]." JA 43. Goodwin's declaration, filed at a time when the *Anders* issue was front and center, demonstrates that his standard for including an issue in an advocate's brief was not whether it was "arguable," but whether it was "meritorious." In addition, although Goodwin stated that he had consulted with CAP, nothing in the record suggests that any attorney at CAP reviewed even the partial record submitted to the court of appeal, let alone the entire record of the proceedings below.

SUMMARY OF ARGUMENT

This case and the lower courts' decisions are based on the right to counsel established in *Douglas v. California*, 372 U.S. 353 (1963). *Douglas* holds that the right to counsel on the first appeal of right requires counsel to file an advocate's argumentative brief (a "merits brief") in a non-frivolous criminal appeal. Because Robbins' state appeal presented several substantial appellate issues, the filing of a conclusory no-merit brief violated the right to counsel established in *Douglas*.

Anders v. California, 386 U.S. 738 (1967), reaffirms the right to a merits brief but also recognizes a narrow exception to that right. In apparently frivolous appeals, *Anders* permits counsel to file an "*Anders* brief," which identifies (but does not argue) legal issues that a reasonably competent lawyer would consider in assessing the merits of the appeal. *Anders*,

386 U.S. at 744-45; *Nickols v. Gagnon*, 454 F.2d 467, 471 (7th Cir. 1971) (Stevens, J.). In the absence of a merits brief, an *Anders* brief provides the reviewing appellate court with the minimum-required basis for ensuring that appointed counsel's failure to identify arguable issues is based on a diligent review of the record and applicable law, and that counsel's no-merit conclusion is correct. *McCoy v. Wisconsin*, 486 U.S. 429, 442 (1988). Thus, even if Robbins' appeal had presented no arguable issues, the filing of a conclusory no-merit brief would have been unconstitutional under *Anders*.

This Court need not address *Anders* here, because Robbins had the right to a merits brief, not just an *Anders* brief. Should the Court consider *Anders*, however, it is important to recognize that the *Anders* procedure works. Contrary to the Warden's and his *amici's* assertions, there is nothing "impossible" or unethical about filing an *Anders* brief. First, in writing an *Anders* brief, counsel does not "argue" frivolous issues. *Anders* requires only that counsel who believes that no non-frivolous issues exist identify (not argue) legal issues that competent counsel would consider in assessing the appeal. Second, *Anders* does not require counsel to argue against his or her client. It requires identification of legal issues presented by the appeal, not an explanation of counsel's reasons for concluding that the identified issues are not arguable. Finally, filing an *Anders* brief is no more or less difficult than filing a merits brief. Appointed counsel, who has a duty to examine the record and consider all potential claims, is well positioned to file an *Anders* brief that identifies the issues that counsel considered before concluding that the issues were not arguable.

The Warden argues that (1) California has a different procedure, which does not require an *Anders* brief, and (2) California's different procedure is constitutional. The Warden is wrong on both points. First, the California Supreme Court has made clear that its procedure does not deviate from *Douglas* or *Anders*. *In re Sade C.*, 13 Cal. 4th 952, 55 Cal. Rptr. 2d 771 (1996). A merits brief is required whenever the

appeal presents arguable issues, and an *Anders* brief identifying legal issues is required when there are no arguable issues. A conclusory no-merit brief – identifying no legal issues at all – is not authorized under California law. *Id.* at 977-81, 55 Cal. Rptr. 2d at 785-88.

Second, even if California had adopted a procedure permitting counsel not to file a merits or *Anders* brief, that procedure would be unconstitutional, just as it was in 1963 and 1967 when *Douglas* and *Anders* were decided. Indeed, the Warden's argument here is virtually identical to the state's argument in *Anders*. The Warden adds only one new feature: He argues that the *Anders* protections are not necessary because appointed counsel remains *formally* present at all times during the appeal, even though the formally present lawyer does nothing to assist the appellate court in its review of the cold record. What the Warden fails to recognize is that counsel in *Anders* also was formally present at all times and that counsel's formal presence made no difference – nor should it have, given the merely nominal nature of that continued representation. *Id.* at 980, 55 Cal. Rptr. 2d at 787.

The Warden effectively asks this Court to abandon *Douglas* and *Anders* by denying habeas relief absent a showing that the filing of a merits or *Anders* brief would have made a difference to the state appellate court ruling on issues of both state law and federal constitutional law. But this Court has previously recognized that, when counsel abandons the client by failing to file a merits brief in an appeal of arguable merit, prejudice must be presumed. *Penson v. Ohio*, 488 U.S. 75, 86-87 (1988).

The same rule of presumed prejudice should apply when counsel fails to file an *Anders* brief identifying the issues presented by the case. This bright-line rule not only defines the right to counsel on appeal, but is mandated by principles of efficiency, comity, and federalism. These principles would be offended if a federal court were compelled to intrude on state sovereignty by deciding the merits of state law and constitutional issues that the state appellate court had not

previously considered on direct review. Further, because there is no general right to counsel on habeas review, a failure to file either an *Anders* brief or a merits brief in the state proceeding will often leave the federal court without an adequate basis for assessing the merits of the appeal – just as the state appellate court was unable to assess the strength of the appeal without a constitutionally adequate merits or *Anders* brief.

Finally, the Warden argues that the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989), bars consideration of this violation of *Douglas* and *Anders*. The Warden contends that the long-established *Douglas-Anders* rules are "new" because this Court has not previously applied them to what the Warden argues is California's procedure. By that theory, virtually every application of an established rule of constitutional criminal procedure would be a new rule. In any case, applying *Douglas* and *Anders* does not conflict with the state court's interpretation of federal constitutional law. California's court-made procedure, as interpreted by its own Supreme Court, requires the filing of a merits or *Anders* brief under exactly the same conditions as *Douglas* and *Anders*. *Sade C.*, 13 Cal. 4th at 979-81; 55 Cal. Rptr. 2d at 786-88.

ARGUMENT

I. ROBBINS' RIGHT TO COUNSEL WAS VIOLATED BY COUNSEL'S FAILURE TO BRIEF ANY OF THE ARGUABLE ISSUES PRESENTED BY THE APPEAL.

The adversary process on Robbins' appeal broke down completely. These were no mere technical violations. Goodwin failed to review the entire record, failed to present critical portions of the record to the state appellate court, and, most significantly, failed to argue even one of the many legal issues that existed. In sum, Goodwin provided absolutely no assistance to the appellate court, which was forced to resolve the merits of Robbins' appeal based only on its own unguided review of the barren record. No matter how diligent it may be,

an appellate court forced to decide the merits of an appeal without any meaningful assistance from defense counsel is likely to miss potentially winning points – rendering the court's judgment highly dubious. That is what happened here.

A. The Right To Counsel Mandates The Filing Of A Merits Brief Whenever Arguable Issues Exist.

A defendant in a criminal case has a constitutional right to an advocate on appeal; the most basic responsibility of that lawyer is to file a brief on the merits ("merits brief") that argues non-frivolous issues. The right to such counsel was first recognized in *Douglas v. California*, 372 U.S. 353 (1963). This Court in *Douglas* rejected as constitutionally inadequate a state procedure that conditioned an indigent defendant's right to appointed counsel upon the appellate court's determination that counsel would be "helpful." *Id.* at 355.

Under that California procedure, the appellate court reviewed the "barren record" without the benefit of written briefs or oral argument by defense counsel. *Id.* at 356. By that process, indigent defendants were subject to a prejudging of the merits on appeal that (1) denied them the benefit of an advocate, and (2) forced appellate courts to review the cold record without the aid of a merits brief. Indigent defendants thereby faced the risk of losing on appeal in cases of hidden or undiscovered merit. *Id.* at 357-58. This Court recognized that, because counsel's assistance on appeal is essential to the adversary process, California's denial of such advocacy turned the indigent defendant's appeal into nothing more than a "meaningless ritual." *Id.* at 358.

This Court has consistently reaffirmed the right to counsel on the first appeal as of right. This is a substantive, not a prophylactic, right. It is mandated by both the principle of substantial equality of treatment for indigent and non-indigent defendants and the principle of due process of law. *Evitts v.*

Lucey, 469 U.S. 387, 394-95 (1985). Due process is implicated because our criminal procedure is founded upon the adversary system. *Id.* at 394.

The right to counsel on the first appeal as of right is "among the most fundamental of rights" because it is only "through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84-85 (1988). The defendant needs and is entitled to a forceful advocate on appeal; anything less fails to protect the integrity of the adversarial appellate process. *Id.* at 85. A criminal defendant on appeal who is forced to function without an advocate " ' – like an unrepresented defendant at trial – is unable to protect the vital interests at stake.' " *Id.* (quoting *Evitts*, 469 U.S. at 396).

To protect the defendant's interests on appeal, the general rule is that counsel must file an advocate's brief, the *sine qua non* of appellate representation. *Douglas*, 372 U.S. at 357-58. There can be no meaningful appellate representation without a constitutionally adequate brief. *Penson*, 488 U.S. at 81.

There are two different types of briefs. A "merits brief" is an argumentative brief, the type of adversarial brief required by *Douglas*. It is distinguished from an "*Anders* brief," which identifies issues but does not argue them. *Anders v. California*, 386 U.S. 738, 744 (1967). A merits brief is *required* in non-frivolous appeals, whereas an *Anders* brief is *permitted* in "frivolous" appeals – appeals that "lack[ ] any basis in law or fact." *McCoy v. Wisconsin*, 486 U.S. 429, 438 n.10 (1988).

This Court has recognized that the promise of *Douglas* would be empty if appointed counsel were excused from filing a merits brief in a non-frivolous appeal. *Penson*, 488 U.S. at 83. *Douglas, Anders, McCoy*, and *Penson* therefore require that the appellate court "appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief before deciding the merits" in all cases where arguable issues exist. *McCoy*, 486 U.S. at 444.

B. Robbins Was Entitled To A Merits Brief Because His Appeal Raised Several Arguable Issues.

Douglas and *Anders* hold that a merits brief is required whenever an appeal presents arguable issues. Robbins' state court appeal presented many such issues, but Goodwin raised none of them. That failure violated Robbins' right to counsel.

The Warden now contends that the two arguable issues identified by the district court and Ninth Circuit are not arguable. WB 35-42. Yet the Warden did not contest these findings in his petition; indeed, he advised this Court that, although he had contested the existence of arguable issues below, the matter is "not relevant to the questions presented." Reply to Opp. to Cert. Pet. at 5 n.3. This Court should therefore presume that arguable issues exist. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992) (holding that issues not raised in petition are not properly addressed on the merits).

Moreover, both the district court and the Ninth Circuit emphasized that they had not attempted to identify *all* of the arguable issues, because the existence of even one arguable issue required that Robbins be granted a new state appeal. JA 49, 89 n.3. Although the space limitations of this brief do not permit anything more than a summary analysis, and the relevant inquiry is only whether an issue is non-frivolous, the following issues – none of which Goodwin even mentioned in his brief – are at least arguable under California law, federal law, or both.[7]

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[7] The facts supporting these issues are summarized at pages 3-8 above. This section relies only on cases available to Goodwin at the time he filed his no-merit brief. Some of these issues are stronger than others; counsel was not required to pursue all of them in a merits brief. *Jones v. Barnes*, 463 U.S. 745 (1983). But even if counsel believed that none of these issues belonged in a merits brief, he should have referred to them in an *Anders* brief.

1. Pre-trial tools for a defense.

When Robbins concluded that his appointed trial counsel was not zealously representing his interests and that he would have to represent himself, he arguably had a right to a "meaningful opportunity to prepare his defense," including, "at a minimum, . . . some access to materials and witnesses." *Milton v. Morris*, 767 F.2d 1443, 1445-46 (9th Cir. 1985) (citing *Faretta v. California*, 422 U.S. 806 (1975)). But Robbins was consistently denied the tools he needed to prepare a defense. Under California law, the issues below must be considered both individually and cumulatively. *People v. Buffum*, 40 Cal. 2d 709, 726, 256 P.2d 317, 326 (1953).

a. Failure to provide funds for a forensic expert and an investigator.

Both state law and federal constitutional law gave Robbins the right to court-funded investigative and expert services. Although a defendant must make a showing of need for such services, the court must view a pre-trial motion for such assistance liberally. *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 319-20, 204 Cal. Rptr. 165, 171-72 (1984); *see also Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (recognizing that due process requires that indigent defendant be given "access to the raw materials integral to the building of an effective defense"). In some cases, the need for such services may be "readily apparent absent some explanation." *People v. Worthy*, 109 Cal. App. 3d 514, 522, 167 Cal. Rptr. 402, 407 (1980). This was such a case. Not only had Robbins filed a pre-trial motion alleging that the state had mishandled the forensic evidence, but a central issue in the case was whether a particular gun was the murder weapon. When the court denied Robbins' request for a "forensics expert" and funds for an investigator – without even attempting to explore the basis for Robbins' request or accepting Robbins' offer to make an additional showing *in camera* – it arguably deprived him of his right to necessary ancillary services.

b. Failure to provide an adequate jail law library.

Six years before Goodwin filed his brief, the Ninth Circuit recognized that the inadequacy of a jail law library could give rise to a *Faretta* violation. *Milton*, 767 F.2d at 1446; *see also Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989). The Warden is incorrect in asserting that Robbins failed to preserve this issue for appeal. WB 37. Robbins expressly complained about the inadequacy of the law library in a written motion that Goodwin inexplicably and improperly failed to include in the record on appeal. App. 7-9. Further, the trial judge's comments about the state of the law library were not merely "hyperbolical." WB 37. The court and Robbins agreed that the law library was inadequate.

The right of access to a law library is arguably implicit in the notion of self-representation. *Milton*, 767 F.2d at 1446; *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) ("defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard"). Robbins was therefore arguably not required to show prejudice from the denial of an adequate law library. *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986). Moreover, even if the state appellate court believed that a showing of prejudice was required and was not made, it had the option of remanding the case to the trial court for such a determination. Cal. Penal Code § 1260 (West 1982).

c. Failure to provide advisory counsel.

Under California law, the denial of advisory counsel may be an abuse of discretion, which is reversible *per se*. *People v. Bigelow*, 37 Cal. 3d 731, 742-46, 209 Cal. Rptr. 328, 334-36 (1984). The *Bigelow* court considered four factors in evaluating the defendant's request for advisory counsel: (1) the seriousness of the charges, (2) the factual and legal complexity of the case, (3) the level of the defendant's general education, and (4) the defendant's legal knowledge and experience. *Id.* The court must engage "in a reasoned exercise of

judgment based on an examination of the particular circumstances" of each case. *People v. Crandell*, 46 Cal. 3d 833, 862, 251 Cal. Rptr. 227, 240-41 (1988). Here, each of the four *Bigelow* factors arguably weighed in favor of appointment of advisory counsel. The charge of first degree murder was obviously "serious;" the forensic issues were complex; Robbins had minimal legal knowledge or experience; and, as the trial court told Robbins, his briefs were "garbage" and the law library was inadequate. The court's failure to consider the four factors – let alone its failure to appoint advisory counsel – arguably was an abuse of discretion.

d. Failure to permit Robbins to withdraw his *Faretta* waiver.

Under California law, a trial court must exercise "meaningful discretion" in considering a request to withdraw a *Faretta* waiver. *People v. Elliott*, 70 Cal. App. 3d 984, 993, 139 Cal. Rptr. 205, 211 (1977). The Warden argues that Robbins would have accepted the reappointment of the public defender had he truly wished to withdraw his *Faretta* waiver. WB 42. But this argument ignores the court's failure to explore the basis of the alleged new conflict. *Wood v. Georgia*, 450 U.S. 261, 272 (1981) (holding that "court has duty to inquire further" where "possibility of a conflict" is "sufficiently apparent") (footnote omitted); *Smith v. Lockhart*, 923 F.2d 1314, 1320-21 (8th Cir. 1991); *United States v. Hurt*, 543 F.2d 162, 166-68 (D.C. Cir. 1976). Furthermore, the court did not ask Robbins, in light of his ambiguous statements, whether he wished to continue to represent himself. Instead, the court simply reiterated that Robbins had chosen to represent himself and implied that, having made his choice, he was not permitted to rescind it.[8]

[8] The trial court also erred in refusing to accept – let alone to hear – the habeas petition that Robbins sought to file in the trial court, in which he asked for counsel. *Griggs v. Superior Court*, 16 Cal. 3d 341, 347, 128 Cal. Rptr. 223, 227 (1976) (holding that court in which habeas petition is presented must file petition, determine whether it states prima facie claim for relief, and, if it does, decide whether to hear petition on merits or transfer it to another court for hearing). Even if the document was inappropriately styled, the court should have accepted it for filing and considered it on the merits.

e. Failure to provide the decedent's arrest record.

When Robbins originally requested the decedent's arrest record, the prosecutor properly agreed that it was material evidence. Robbins specifically cited *Engstrom v. Superior Court*, 20 Cal. App. 3d 240, 245, 97 Cal. Rptr. 484, 487 (1971), in his discovery motion, thereby putting the state on notice of a possible defense of self-defense. The prosecution was thus required to disclose acts of aggression on the part of the decedent, so that Robbins could use the evidence to demonstrate self-defense or to show mitigating circumstances that might reduce the charge. The prosecutor's later failure to produce what he had promised arguably caused Robbins to "abandon lines of independent investigation, defenses, or trial strategies that [he] otherwise would have pursued." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Although the theory behind Robbins' cross-examinations and closing argument was that he had not shot the decedent, he did not present evidence inconsistent with self-defense: He presented no defense at all. The failure to provide the decedent's arrest record was error. *People v. Coyer*, 142 Cal. App. 3d 839, 191 Cal. Rptr. 376 (1983). Robbins was entitled to remand so that the trial court could examine the decedent's arrest record and order a new trial if warranted. Cal. Penal Code § 1260; *Coyer*, 142 Cal. App. 3d at 844, 191 Cal. Rptr. at 380.

f. Failure to serve Robbins' trial subpoenas.

Robbins had a right to compel witnesses in his defense. *Washington v. Texas*, 588 U.S. 14 (1967). The court never suggested that Deputy Jones or the fingerprint officer would

fail to provide material and favorable evidence, or questioned the reasonableness of Robbins' request to call these witnesses. The court's refusal to subpoena the officers therefore arguably violated Robbins' right to compel the presence of witnesses on his behalf. *Id.; United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). If the appellate court believed that the record contained insufficient evidence of the witnesses' materiality, it could have remanded the case to the trial court for such a determination. Cal. Penal Code § 1260; *People v. Harris*, 36 Cal. 3d 36, 72, 201 Cal. Rptr. 782, 804 (1984).

2. "Moral certainty" reasonable doubt jury instruction.

Not long before Goodwin filed his no-merit brief, this Court disapproved a reasonable doubt instruction that used "moral certainty" language that resembled the instruction given in this case. *Cage v. Louisiana*, 498 U.S. 39, 40 (1990). Although this Court decided four years later in *Victor v. Nebraska*, 511 U.S. 1 (1994), that the instruction given here comported with due process, its thorough analysis of the issue demonstrates that a contrary argument was not frivolous when Goodwin's no-merit brief was filed in 1991. *Id.* at 10-17. Robbins' failure to object to the instruction did not waive his right to raise the issue on appeal. *People v. Hannon*, 19 Cal. 3d 588, 600, 138 Cal. Rptr. 885, 892 (1977).

3. Failure to hear Robbins' motion to dismiss.

The trial court had an obligation to consider Robbins' motion to dismiss for failure to preserve evidence; under the circumstances, it also had an obligation to hold an evidentiary hearing on the motion. *People v. Mayorga*, 171 Cal. App. 3d 929, 936-38, 218 Cal. Rptr. 830, 834-35 (1985) (emphasizing importance of evidentiary hearing given court's need to make factual findings, apply law, and fashion remedies to ensure fair trial). Had Robbins' motion been decided in his favor, the

court could have imposed sanctions on the prosecution. *People v. Medina*, 51 Cal. 3d 870, 894, 274 Cal. Rptr. 849, 864 (1990). At the very least, because the trial court failed to make any findings about whether law enforcement officers had acted in good faith in failing to preserve the evidence in question, Robbins was entitled to a remand for an evidentiary hearing on the issue. *People v. Anderson*, 59 Cal. App. 3d 831, 843, 131 Cal. Rptr. 104, 111 (1976).

4. Improper *ex parte* contact.

Because Robbins acted as his own counsel, he had the right to be present during all conversations between the court and the prosecutor about the case. *Heavey v. State Bar*, 17 Cal. 3d 553, 131 Cal. Rptr. 40 (1976). Since the record suggests that an improper and undisclosed *ex parte* contact occurred, an appellate court could have concluded that Robbins was prejudiced. *Compare People v. Jennings*, 53 Cal. 3d 334, 382-85, 279 Cal. Rptr. 780, 810-12 (1991) (finding no showing of prejudice where court itself properly disclosed *ex parte* contact). Goodwin should at least have argued that the case be remanded for a determination of whether an *ex parte* contact occurred and whether it prejudiced Robbins. Cal. Penal Code § 1260. Even though Robbins did not preserve the issue with a contemporaneous objection, his failure should be excused: Neither the court nor the prosecutor revealed an *ex parte* contact to him.

C. *Douglas* Mandates Affirmance Of The Lower Courts' Decisions.

This Court need not decide any issues surrounding the right to an *Anders* brief. As the Ninth Circuit and district court concluded, and as the Warden did not challenge in his petition for a writ of certiorari, Robbins had a right to a merits brief that zealously argued the arguable issues raised by his appeal. JA 47, 87-88. Goodwin's conclusory no-merit brief was clearly inadequate under *Douglas*. *Douglas*, 372 U.S. at 356-57.

II. EVEN IF THE APPEAL HAD PRESENTED NO ARGUABLE ISSUES, ROBBINS' RIGHT TO COUNSEL WOULD HAVE BEEN VIOLATED BY COUNSEL'S FAILURE TO FILE AN *ANDERS* BRIEF.

Even if no arguable issues had been present, Robbins would have been entitled to an *Anders* brief, the minimum level of advocacy permitted by the Constitution. *McCoy*, 486 U.S. at 442. But Goodwin failed to file an *Anders* brief, filing instead a no-merit brief that identified no legal issues. Because his brief failed to meet *Anders*' minimum requirements, the Warden and his *amici* ask this Court effectively to overrule *Anders*. They stridently criticize *Anders*, but do so "based largely on misconceptions about *Anders*' requirements." Frederick D. Junkin, *The Right To Counsel In "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 Texas L. Rev. 181, 187 (1988). It is therefore important to place *Anders* in its proper perspective and thereby reveal both its necessity and the invalidity of the criticism.

A. A Non-Argumentative *Anders* Brief Provides The Minimum Level Of Representation Tolerated By The Constitution.

Anders essentially recognizes a "limited exception" to the requirement articulated in *Douglas* that indigent defendants are entitled to a merits brief in their first appeal as of right. *Penson*, 488 U.S. at 83. It limits *Douglas* by permitting appeals to be decided without the benefit of a merits brief in cases where no arguable issue exists. That narrow exception is based on and limited by the lawyer's state-law based ethical duty not to prosecute frivolous appeals. *McCoy*, 486 U.S. at 437-38. When an appeal presents no issues of arguable merit, the right to counsel on the first appeal as of right is met by the

filing of an *Anders* brief – which is the constitutional *minimum* level of advocacy required in such cases. *Id.* at 442 (describing "minimum requirements of *Anders*").[16]

1. The dilemma solved by *Anders*.

Anders resolved the dilemma presented by the apparently frivolous appeal. Counsel has a constitutional duty to argue on behalf of the client, but counsel often has a state-law based ethical obligation not to argue frivolous points. *Id.* at 437. This Court resolved that dilemma in *Anders* by holding that the client's right to zealous advocacy does not include the making of frivolous arguments. *Id.* at 437-48.

That holding raised two practical problems, which *Anders* also resolved. The first problem is that counsel's belief that an argument is frivolous may be incorrect. *Penson*, 488 U.S. at 81 n.4. Cases of apparent frivolousness might contain actual, though hidden, merit. This is not an uncommon phenomenon: "[V]ery often what may seem frivolous or unsupportable to counsel may seem otherwise in the eyes of the client or appellate court." *Freels v. Hills*, 843 F.2d 958, 963 (6th Cir. 1988). *Anders* solves that problem by requiring an *Anders* brief, which is designed to assist the court in verifying that the appeal is indeed so frivolous that a merits brief is not required. *McCoy*, 486 U.S. at 439, 441.

The second problem with the type of conclusory no-merit brief filed in *Anders* and here is one of fair process: Such a brief provides no meaningful representation. The *Anders* brief solves that problem too. The appellate lawyer functions as an advocate – without arguing issues – by filing an *Anders* brief that identifies the legal issues that competent counsel would at least have considered in assessing the appeal. *Nickols v. Gagnon*, 454 F.2d 467, 471 (7th Cir. 1971) (Stevens, J.).

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[16] The states may provide more than the minimum level of advocacy by requiring lawyers to file merits briefs even in frivolous appeals, and some do. *See, e.g., State v. McKenney*, 98 Idaho 551, 568 P.2d 1213 (1977).

2. The *Anders* brief provides the appellate court with the tools for deciding the appeal correctly.

The point of *Anders* is to ensure the correctness of the appellate court's determination on the merits. *McCoy*, 486 U.S. at 439. Because the court, not counsel, is responsible for assessing the merits of the appeal, the court cannot rely on appointed counsel's conclusion that the appeal lacks merit. *Anders*, 386 U.S. at 744; *Ellis v. United States*, 356 U.S. 674, 675 (1958); *cf. Lane v. Brown*, 372 U.S. 477, 485 (1963) (holding court, not public defender, responsible for assessing merits of appeal).

But in our adversary system, the appellate court cannot properly decide appeals without any assistance from defense counsel. To assess the merits – and to test appointed counsel's conclusion that the appeal raises no arguable issues – the court must, as a constitutional minimum, have the assistance of an *Anders* brief. *Anders*, 386 U.S. at 744. That assistance, in conjunction with the court's own examination of the record, gives the court a proper foundation for determining whether the appeal raises any arguable issues. *Id.*; *McCoy*, 486 U.S. at 439, 442; *Penson*, 488 U.S. at 81-82. And "if [the court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Anders*, 386 U.S. at 744; *see also Penson*, 488 U.S. at 83-84.

3. The *Anders* brief serves several constitutionally significant functions.

Those who criticize *Anders* fail to acknowledge the essential functions that the *Anders* brief serves. First, an *Anders* brief that properly references "all points which have sufficient significance that trained counsel would at least identify and consider them in his evaluation of an appeal" provides evidence of counsel's diligence in reviewing the record and the applicable law. *Nickols*, 454 F.2d at 471. Second, the *Anders* brief aids appellate courts in determining

whether the appeal is in fact so frivolous that there are no issues of even arguable merit. *McCoy*, 486 U.S. at 442; *Penson*, 488 U.S. at 82-84. Thus, the legal issues identified in an *Anders* brief assist the court in its review of the otherwise cold record. *McCoy*, 486 U.S. at 442.

The *Anders* brief thereby provides the minimum level of advocacy required by the Constitution and promotes the efficient disposition of appeals. It greatly reduces the burden on the appellate court by identifying the legal issues that competent counsel would at least consider. Without an *Anders* brief, the appellate court (1) is left "without an adequate basis for determining that [counsel] had performed his duty carefully to search the case for arguable error," and (2) is "deprived" of essential references to legal issues presented by the appeal, forcing the court to review a "cold record" on appeal. *Penson*, 488 U.S. at 82. The *Anders* brief therefore facilitates the court's efficient disposition of such appeals.

The *Anders* brief also serves a closely related third function. It "provides an independent inducement to counsel to perform a diligent review:"

> 'The danger that a busy or inexperienced lawyer might opt in favor of a one sentence letter instead of an effective brief in an individual marginal case is real, notwithstanding the dedication that typifies the profession. If, however, counsel's ultimate evaluation of the case must be supported by a written opinion "referring to anything in the record that might arguably support the appeal," *Anders*, 386 U.S. at 744 . . . , the temptation to discharge an obligation in summary fashion is avoided and the reviewing court is provided with meaningful assistance.'

Penson, 488 U.S. at 81 n.4 (quoting *Nickols*, 454 F.2d at 470). Without *Anders*, the number of conclusory no-merit briefs inevitably would skyrocket – as "busy or inexperienced lawyers" would no longer have any meaningful judicial check on their assessment of the case and no "independent inducement" to perform a diligent review of the record. *See also McCoy*,

486 U.S. at 442 (observing that counsel, in preparing an *Anders* brief, "may discover previously unrecognized aspects of the law" that result in filing a merits brief instead of an *Anders* brief).[17]

4. The *Anders* brief is not impossible or unethical to write.

Contrary to some misguided criticism, the *Anders* brief is not "impossible" to write. As Justice (then Judge) Stevens recognized in *Nickols*, the only difference between an *Anders* brief and a merits brief is that a merits brief contains argument, while the *Anders* brief highlights issues but does not argue them. *Nickols*, 454 F.2d at 470-71. Drafting it is not difficult. Having just examined the record and studied available claims in drawing his or her own conclusions, which *Douglas* itself requires, appointed counsel is in an excellent position to draft an *Anders* brief quickly and efficiently. If such a brief were not required, the lawyer's efforts would be wasted and both the client and the court would be left with only the cold record. Difficult as it may be for an appellate court to locate arguable issues with counsel's help, it is much more difficult for the court to identify such issues without the

[17] The fact that retained lawyers nearly always find arguable issues, whereas, according to one *amicus*, appointed lawyers in many states file no-merit briefs in twenty percent or more of their appeals, simply illustrates the maxim that necessity is the mother of invention. Ariz. Am. at 14-15 & n.5. When the incentive to find arguable issues is high for both lawyer and client – as it almost always is for non-indigents in criminal cases – that necessity inevitably bears fruit in the form of arguable issues raised in a merits brief. *Proceedings at the National Judicial Conference on Standards for the Administration of Criminal Justice*, 57 F.R.D. 229, 308-09 (1972) ("I can never remember a case where if the money was there the appeal was so frivolous that the lawyer couldn't make it;" maybe it has happened, "but maybe there are angels in the balcony, too.") (comments of Justice Day); *United States v. Edwards*, 777 F.2d 364, 365 (7th Cir. 1985) ("[S]peaking realistically, a criminal defendant who has money will always be able to persuade some lawyer to prosecute an appeal for him.").

assistance of the lawyer who knows the record best. Conversely, if counsel carelessly reviews the record or does an inadequate job of identifying legal issues, as some will, an inadequate *Anders* brief will give the appellate court a "basis for determining" that counsel has not performed his or her "duty carefully to search" for arguable error. *Penson*, 488 U.S. at 82.

Contrary to the Warden's suggestion, WB 32, *Anders* does not require counsel to "argue" frivolous claims. *Nickols*, 454 F.2d at 470-71. Rather, *Anders* requires counsel to refer to (not argue) issues that might be arguable but, as revealed by closer examination, in counsel's opinion are not. *Id.* at 470-71 & n.8; *see Anders*, 386 U.S. at 744 ("a brief *referring* to anything in the record that might arguably support the appeal") (emphasis added). The *Anders* brief, therefore, does not argue the defendant's contentions. (It is thus no substitute for an argumentative merits brief in cases where one is required. *Penson*, 488 U.S. at 84.) The *Anders* brief is a "professional exposition of all points which have sufficient significance that trained counsel would at least identify and consider them in his evaluation of an appeal." *Nickols*, 454 F.2d at 471. Thus, *Anders* does not require counsel to violate ethical norms by making frivolous arguments. *McCoy*, 486 U.S. at 436; *see* Junkin, 67 Texas L. Rev. at 187-92.

Nor does *Anders* "force appointed counsel to brief his case against his client," as the Warden suggests. WB 8-9, *see also* CJLF Am. 13-17 (same). *Anders*, 386 U.S. at 744. While *Anders* requires counsel to "identify" legal issues that competent counsel would consider, there is no constitutional requirement that counsel explain *why* counsel believes that the identified issues are frivolous. *Anders* requires only that the issues be identified.[18] Finally, although the states remain

[18] Although the filing of an *Anders* brief implies that counsel believes that the client's appeal is frivolous, the same is true when counsel, like Goodwin here, files a no-merit brief that refers to no issues. In the former

free to require counsel to explain the reasons supporting counsel's conclusion, and some have done so, this Court has never suggested that such an explanation is constitutionally mandated.[19]

III. THERE IS NO CONSTITUTIONAL CONFLICT BETWEEN *DOUGLAS-ANDERS* AND THE CALIFORNIA SUPREME COURT'S NO-MERIT PROCEDURE.

The Warden argues that (1) the California Supreme Court has adopted an alternative procedure, the so-called *Wende* procedure, which permits counsel to file a conclusory no-merit brief that does not identify any legal issues at all, and (2) the *Wende* procedure is constitutional. WB 13, 22-24 (citing *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (1979)). The Warden is wrong on both points.

First, the California Supreme Court does not permit counsel to file a conclusory no-merit brief that fails to identify any legal issues. *In re Sade C.*, 13 Cal. 4th 952, 980 n.8, 994 n.22, 55 Cal. Rptr. 2d 771, 787 n.8, 797 n.22 (1996). Although the California Court of Appeal failed to require Goodwin to file a merits or *Anders* brief in Robbins' case, that failure to comply with *Douglas* and *Anders* is not justified by any alternative procedure authorized by the California Supreme Court. Because there is no authorized California procedure conflicting with *Anders*, there is no basis for exempting California from the *Anders* rules.

Second, even if the California Supreme Court had authorized such a procedure, it would be unconstitutional. As a

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case, however, the several constitutionally significant functions of an *Anders* brief are served.

[19] The *Anders* brief required in *McCoy* included a description of counsel's reasons for believing the appeal to be frivolous because that discussion was required by Wisconsin law. It is not required by *Anders*, although the inclusion of such a discussion does not violate *Anders*. *McCoy*, 486 U.S. at 442.

constitutional minimum, *Anders* requires the filing of a brief referring to the legal issues presented by the appeal.

A. The Warden Mischaracterizes California Law.

1. The California Supreme Court's procedure for protecting the right to counsel on appeal.

In *Sade C.*, the California Supreme Court analyzed *Anders* and its progeny in light of the "two major" California Supreme Court cases that establish California's procedures for handling appeals when appointed counsel concludes that they are frivolous. *Sade C.*, 13 Cal. 4th at 979, 55 Cal. Rptr. 2d at 786; *see* CAAL Am. 5, 11 (citing *Sade C.*). The first case, *People v. Feggans*, 67 Cal. 2d 444, 62 Cal. Rptr. 419 (1967), expressly recognized that the *Anders* procedures are binding in California courts and set forth those requirements in a manner "comfortably within" the requirements stated in *Anders*. *Sade C.*, 13 Cal. 4th at 979, 55 Cal. Rptr. 2d at 786.

The second case is *People v. Wende*, *supra*. Contrary to the Warden's representation, the court in *Wende* did not "devise a method" or hold that counsel may file a brief that identifies no legal issues at all, a procedure that would conflict with *Anders*. WB 18. Indeed, the court in *Wende* described the *Anders* procedure in approving terms, including the requirement that, if counsel believes the appeal to be wholly frivolous, counsel must file " 'a brief referring to anything in the record that might arguably support the appeal.' " *Wende*, 25 Cal. 3d at 439, 158 Cal. Rptr. at 841 (quoting *Anders*, 368 U.S. at 744).[20]

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[20] The opinion in *Wende* observed, in passing, that appointed counsel in the case before it had filed a brief that "raised no specific issues." *Wende*, 25 Cal. 3d at 438, 158 Cal. Rptr. at 840. It is not clear whether the court meant that the brief raised no arguable issues or that counsel had failed even to identify any legal issues. What is clear, however, is that the court in *Wende* affirmatively recognized the constitutional requirement of filing an *Anders* brief, *id.* at 439, 158 Cal. Rptr. at 841, and quoted *Feggans*, which

As recognized in *Sade C.*, *Wende* reaches beyond *Anders* only in holding that, as a matter of state-law ethical rules, appointed counsel is not required to withdraw if counsel believes that the appeal is frivolous. *Sade C.*, 13 Cal. 4th at 980-81, 55 Cal. Rptr. 2d at 787 (citing *Wende*, 25 Cal. 3d at 441-42, 158 Cal. Rptr. at 842). The court in *Wende* held that counsel need not withdraw because "there may be practical benefits to the court and the client from counsel's remaining on the case" in "at least a formal capacity." *Sade C.*, 13 Cal. 4th at 980-81, 55 Cal. Rptr. 2d at 787. Appellate counsel's merely formal presence may be helpful if the court, after its review of the record, seeks the assistance of counsel on behalf of the defendant. *Id.*[21]

2. The California Supreme Court's procedure is identical to *Douglas* and *Anders* in requiring a merits or *Anders* brief.

The Warden's position is based on the contention that, under California's *Feggans-Wende* procedure, an *Anders* brief is not required as long as counsel does not formally seek to withdraw. A conclusory no-merit brief that recites only the procedural background and statement of facts – but is devoid of any reference to legal issues – is supposed to be made satisfactory by the merely formal presence of counsel. WB 8-9. The California Supreme Court has expressly rejected the Warden's characterization of California law.

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expressly stated that a brief identifying legal issues is required. *Id.* at 440, 158 Cal. Rptr. at 841 (quoting *Feggans*, 67 Cal.2d at 447-48, 62 Cal. Rptr. at 421). Most significantly, however, the question whether an *Anders* brief identifying legal issues is required was neither before nor considered by the *Wende* court.

[21] *Anders*' statement that counsel should move to withdraw upon concluding that the appeal is frivolous is based on the Court's assessment of counsel's state-law based ethical duties. *Polk County v. Dodson*, 454 U.S. 312, 324 (1981) (stating that duty not to argue frivolous points is general ethical limitation on counsel); *McCoy*, 486 U.S. at 440.

Although counsel need not "*formally* withdraw" under *Wende*, counsel's failure to file a merits brief amounts to "*substantial* withdrawal." *Sade C.*, 13 Cal. 4th at 980, 55 Cal. Rptr. 2d at 787 (emphasis in original). As a result, "all the steps specified by *Anders* [have] to be taken, other than those dependent on the filing of a motion to withdraw." *Id.* In so concluding, the state high court expressly *rejected* the notion that an *Anders* brief is not required. *Id.* at 980 n.8, 55 Cal. Rptr. 2d at 787 n.8.[22]

The court in *Sade C.* recognized that the court in *State v. Balfour*, 311 Or. 434, 450, 814 P.2d 1069 (1991), held that the "federal constitution requires an *Anders* brief only when counsel seeks *to withdraw*." *Sade C.*, 13 Cal. 4th at 980 n.8, 55 Cal. Rptr. 2d at 787 n.8 (emphasis in original). But the California high court concluded that the *Balfour* court "erred" in so holding. *Id.* That is because counsel's continued presence is merely formal. *Id.* at 980, 55 Cal. Rptr. 2d at 787. Counsel who refrains from moving to withdraw but fails to file a merits or *Anders* brief does nothing more than withdrawing counsel. Thus, "*substantial* withdrawal is equivalent to *formal* withdrawal." *Id.* (emphasis in original).

The *Balfour* court's reliance on counsel's merely formal presence elevates form over substance. This Court in *Anders* tied the constitutionally-based requirement to file an *Anders* brief to the state-law based filing of a motion to withdraw only because it presumed that these events would occur at the

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[22] Even if this analysis is dictum, it is "considered dictum" of the California Supreme Court, which is "highly persuasive" under California law. *Evans v. City of Bakersfield*, 22 Cal. App. 4th 321, 328, 27 Cal. Rptr. 2d 406, 409 (1994). Where, as here, a state high court interprets its own prior decisions, that interpretation should be dispositive. *Cf. Stringer v. Black*, 503 U.S. 222, 235 (1992) ("[I]t would be a strange rule of federalism that ignores the view of the highest court of the State as to the meaning of its own law."). To the extent that the Warden relies upon language in *Wende* that he claims is contrary to both *Anders* and *Sade C.*, that language is not "considered dictum." The court in *Wende* never considered whether an *Anders* brief is required.

same time. But even if a state's rules of ethics do not require counsel to withdraw (something not anticipated in *Anders*), there is still the same need for an *Anders* brief if no merits brief is filed. Counsel's merely formal presence does nothing to serve the multiple functions of an *Anders* brief.

Consequently, when appointed counsel in California fails to file a merits brief, that counsel must file an *Anders* brief that contains "law as well as facts." *Sade C.*, 13 Cal. 4th at 994 n.22, 55 Cal. Rptr. 2d at 797 n.22. The brief must have " 'ready references not only to the record, but also to . . . legal authorities. . . . ' " *Id.* (quoting *Anders*, 386 U.S. at 745). An *Anders* brief that fails to " 'discuss legal issues with citations to appropriate authority' " is therefore insufficient under California's *Feggans-Wende* procedure. *Id.* (quoting *Feggans*, 67 Cal. 2d at 447, 62 Cal. Rptr. at 421). The brief filed on Robbins' behalf, which plainly failed to refer to any legal issues, thus violated both *Anders* and California's own procedure.

3. The absence of a state-authorized procedure that is contrary to *Anders* defeats the Warden's argument.

The "precise rationale" for this Court's decisions concerning access to the judicial process has not been composed because these cases " 'cannot be resolved by resort to easy slogans or pigeonhole analysis.' " *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (quoting *Bearden v. Georgia*, 461 U.S. 660, 666 (1983)). The cases raise both equal protection and due process concerns. *Id.* But no matter how they are analyzed, one thing is clear: This Court's role is to "inspect the character and intensity of the individual interests at stake, on the one hand, and the state's justification for its exaction, on the other hand." *Id.* at 120-21 (citing *Bearden*, 461 U.S. at 666-67).

That inspection was made in *Anders*, where the Court must have found, not surprisingly, that the individual's fundamental interest in meaningful legal representation on the first

criminal appeal outweighed the state's justification for permitting counsel to file a conclusory no-merit brief. The economic burden on the state is quite small given appointed counsel's undisputed obligation under *Douglas* conscientiously to review the record and the law before concluding that the appeal lacks merit. Indeed, the job of state judges is made easier when they have an *Anders* brief, which identifies legal issues raised by the appeal, rather than only the cold record to review. The extra economic burden of compensating counsel for filing an *Anders* brief also is minimal – given the work that counsel must already have done in reviewing the record and applicable law.

Furthermore, the Warden's position today is *not* based on a state-authorized procedure, as it was in *Anders*. *See In re Nash*, 61 Cal. 2d 491, 39 Cal. Rptr. 205 (1964). The Warden's proposed no-merit procedure has never been authorized by the California legislature and is flatly inconsistent with the procedure mandated by the state's high court. Consequently, there is no "State justification" to weigh against the fundamental individual interest at stake. That alone defeats the Warden's attempt to change California law from without.

B. Even If The California Supreme Court Had Adopted The Warden's Procedure, That Procedure Would Be Unconstitutional.

The *Douglas* and *Anders* rules are clear: The defendant is entitled to a merits brief in all cases of arguable merit and to an *Anders* brief in appeals that raise no arguable issues. These are rules of general application – fitting all first appeals as of right. The procedure that the Warden incorrectly characterizes as California's *Wende* procedure would permit counsel to refrain from filing an *Anders* brief. That procedure clearly violates *Anders*. Contrary to the Warden's assertion, there is no basis for exempting California from the *Anders* requirements.

1. The state appellate court's unaided review of the record does not excuse counsel's failure to file an *Anders* brief.

The Warden argues that an *Anders* brief is unnecessary in California because appellate courts there review "the entire record." WB 22. (In fact, the state appellate court here did not have, and therefore did not review, the entire record.) The same argument was made and rejected in *Anders* because the appellate court's review of the cold record – without the aid of an *Anders* brief – creates too high a risk that arguable issues will be missed. By filing an *Anders* brief, counsel (1) helps to focus the court's attention on issues that a competent attorney would at least consider, and (2) minimizes the court's burden in such appeals.

The Warden may seek to distinguish *Anders* on the ground that Goodwin filed a no-merit brief containing a two-page statement of the case and "a detailed six-page statement of facts." WB 24. That "brief," however, even apart from its many other deficiencies, failed to identify any legal issues at all – a clear violation of *Anders*. It therefore left the court "without an adequate basis for determining that [counsel] had performed his duty carefully to search the case for arguable error and also deprived the court of the assistance of an advocate in its own review of the cold record on appeal." *Penson*, 488 U.S. at 82.

2. The addition of a CAP lawyer does not alter the constitutional balance.

The Warden injects into his brief considerable detail about the California Appellate Project ("CAP"), though much of it is not in the record and is belied by the facts of this case. His argument reduces to the following: The functions served by an *Anders* brief – to assist the court in its review of both the record and counsel's performance – are not required if a second attorney merely consents to the filing of a conclusory

no-merit brief. WB 8. The Warden misses the point of *Anders*, as made clear in *Penson* and *McCoy*.[23]

An *Anders* brief provides the appellate court with two things: evidence that appointed counsel has met his or her duty of providing the client with a diligent and thorough search of the record for any arguable claims that might support the appeal, and references to legal issues presented by the appeal that assist the court in its review of the record, so that it can determine whether any arguable issues exist. *McCoy*, 486 U.S. at 442. The CAP attorney's mere concurrence in the filing of a no-merit brief does not assist the court in either of these tasks.

Indeed, the state made precisely the same argument in *Anders*. It argued that the defendant there was not denied his right to counsel because California's no-merit brief procedure provided for a multi-layered review. Brief for Respondent in *Anders*, O.T. 1966, No. 98, p. 19. It emphasized that the defendant in *Anders* had *two* appointed lawyers – one on direct appeal and another on habeas review – neither of whom could identify any arguable issues. *Id.* The state also argued that appellate courts in California "read the full record" in assessing the merits of indigent defendant appeals, and that the appellate court had found no meritorious issues. *Id.* at 30-31. (Exactly the same argument is made by the Warden here – down to the number of state-appointed lawyers (two) who failed to discover merit to the appeal. WB 8, 13, 34.) The state relied on this multi-layered review to argue in *Anders* that counsel's filing of a conclusory no-merit brief raised no constitutional issues. This Court flatly rejected the state's argument. *Anders*, 386 U.S. at 744-45.

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[23] There is no evidence that a CAP attorney reviewed the entire record here, though the Warden repeatedly implies that this occurred. WB 8, 20-21. Goodwin stated only that he "consulted" with CAP and received its permission to file a no-merit brief. JA 43. Robbins therefore moves to strike all references to CAP that are not in the record or properly subject to judicial notice. *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970); *Johnson v. United States*, 426 F.2d 651, 656 n.8 (D.C. Cir. 1970).

This Court's reasoning is still sound. The court, not counsel, is responsible for determining whether arguable issues exist. *McCoy*, 486 U.S. at 439. Without an *Anders* brief, the accuracy of the appellate process is jeopardized because the court must assess the merits without counsel's assistance in identifying legal issues. *Anders*, 386 U.S. at 744; *Penson*, 488 U.S. at 82; *cf. Ellis*, 356 U.S. at 675 (holding that conclusion of *two* appointed lawyers that appeal was frivolous is not controlling; court itself must determine whether appeal is frivolous).

3. The merely formal presence of counsel does nothing to reduce the need for an *Anders* brief.

The Warden relies on *State v. Balfour*, *supra*, which holds that counsel may refrain from filing an *Anders* brief as long as counsel does not formally withdraw. *Id.* at 451, 814 P.2d at 1079. The *Balfour* court's analysis, however, defies logic. First, the court failed to recognize that appointed counsel in *Anders* was also formally present at all stages of the appellate process. *Anders*, 386 U.S. at 739-40. But counsel's merely formal "presence" in *Anders*, which is no different than occurs today under California's (or Oregon's) current practices, did not make counsel's conclusory no-merit brief constitutionally sufficient. The client in *Anders*, even with his counsel formally present, was still "forced to shift entirely for himself." *Id.* at 745.

Second, as the California Supreme Court has also concluded, the merely formal presence of counsel, which amounts to "substantial withdrawal," does *nothing* to assist the court either in its assessment of counsel's performance or in the court's own review of the record. *Sade C.*, 13 Cal. 4th at 980, 55 Cal. Rptr. 2d at 787. Counsel's merely formal

presence thus fails to advance the multiple functions served by an *Anders* brief. *See, e.g., Penson*, 488 U.S. at 82.[24]

IV. PREJUDICE SHOULD BE PRESUMED WHENEVER COUNSEL FILES A CONCLUSORY NO-MERIT BRIEF.

A. The Warden Waived The Prejudice Argument.

The Warden argues that the failure to file a constitutionally adequate no-merit brief should be measured under the prejudice standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), rather than that set forth in *Penson*, 488 U.S. at 78. But that argument was *not* made before the Ninth Circuit; and the Warden conceded before the district court that prejudice must be presumed, at least where, as here, the appeal presents arguable issues. JA 47; SER 450.[25] As a result, the Warden has waived the argument. *United States v.*

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[24] Several federal appellate courts have likewise concluded that counsel's merely formal presence is not constitutionally significant or sufficient. *See, e.g., United States v. Burnett*, 989 F.2d 100, 104 (2d Cir. 1993);. *United States v. Griffy*, 895 F.2d 561, 562-63 (9th Cir. 1990) (*per curiam*); *Lombard v. Lynaugh*, 868 F.2d 1475, 1481 (5th Cir. 1989); *Freels v. Hills*, 843 F.2d at 962-64; *Jenkins v. Coombe*, 821 F.2d 158, 161-62 (2d Cir. 1987).

[25] The following exchange occurred during oral argument in the district court:

> THE COURT: Do you then admit if the Court were to find under the appropriate standard, whatever that might be, that there were issues that were arguable and could have and should have been raised, but were not, do you then concede that prejudice is presumed?
>
> [Counsel for the Warden]: I believe it is.
>
> THE COURT: And then [Robbins] would be entitled to a new appeal?
>
> [Counsel for the Warden]: I believe so.

SER 450.

Alvarez-Sanchez, 511 U.S. 350, 360 n.5 (1994); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

B. Principles Of Federalism, Comity, And Efficiency Mandate A Rule Of Presumed Prejudice When Counsel Fails To Argue Or Refer To Any Legal Issues At All.

This Court held in a nearly unanimous decision in *Penson* that, when an indigent criminal appellant is actually or constructively denied appellate representation, prejudice must be presumed. *Penson*, 488 U.S. at 88; *see also United States v. Cronic*, 466 U.S. 648, 659-60 (1984) (stating that prejudice is presumed when counsel is unavailable at "critical stage" of trial); *Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

Counsel's complete failure to file a merits or *Anders* brief is a constructive denial of counsel because the filing of such a brief is the essence of appellate legal representation. When counsel fails to file a brief that argues or refers to any legal issues at all, as Goodwin did here, the client "must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate." *Anders*, 386 U.S. at 745.

1. Prejudice must be presumed if counsel fails to file a merits brief when arguable issues exist.

This Court already has held that prejudice must be presumed if counsel fails to file a merits brief when arguable issues exist. *Penson*, 488 U.S. at 86. The appointed lawyer in *Penson* filed a conclusory no-merit brief that failed to argue or even refer to any legal issues – just as in *Anders* and in this case. By that complete lack of advocacy, counsel abandoned his client at a critical stage of the appeal. Counsel's failure to file a merits brief also deprived the appellate court of the

minimum assistance of counsel needed for the court to assess the merits of the appeal. *Id.* at 82.

This Court rejected the state's contention that indigent defendants on habeas review must show prejudice when counsel fails to raise any arguable issues at all. *Id.* at 86. Any such prejudice inquiry would require the federal court on habeas review to speculate whether a merits brief would have made a difference *to the state appellate court* reviewing the record for reversible error under *state* law and federal constitutional law. *Id.* at 87. To permit such speculation "would render meaningless the protections afforded by *Douglas* and *Anders*." *Id.* at 86.

Moreover, as argued further below, the federal court's consideration of state law and federal constitutional issues *before* the state court has a meaningful opportunity to resolve such issues with the aid of a constitutionally adequate brief would offend principles of comity, federalism, and efficiency.

2. Prejudice must be presumed when counsel fails to file an *Anders* brief in appeals apparently lacking arguable issues.

Here, as in *Penson*, there are arguable issues that should be decided in the first instance by the state appellate court with the benefit of a merits brief. But even in appeals where there are *apparently* no issues of arguable merit, prejudice should still be presumed if counsel fails to file an *Anders* brief in state court. Just as counsel's failure to file a merits brief is an abandonment of counsel on appeal when issues of arguable merit exist, *id.*, so too is counsel's failure to file an *Anders* brief when no issues of arguable merit *appear* to exist. *Freels*, 843 F.2d at 963; *Castellanos v. United States*, 26 F.3d 717, 718-19 (7th Cir. 1994) (Easterbrook, J.) (recognizing that prejudice component of *Strickland* does not apply when counsel fails to file merits brief or comply with *Anders* requirements).

There are three important reasons why prejudice must be presumed. First, because there is generally no right to counsel

in federal habeas proceedings, federal courts are often forced on habeas review to engage in an unaided review of the cold record – a review that is just as inadequate as the state court's unaided review of the same record. When the state court denies an appeal on the merits without benefit of at least an *Anders* brief, the harm cannot be cured by a federal court's equally unguided assessment of the merits. To require petitioners – usually acting without counsel – to show prejudice under these circumstances would render *Anders* a dead letter. *See United States v. Tajeddini*, 945 F.2d 458, 467 (1st Cir. 1991) (*per curiam*) (requiring unrepresented habeas petitioner to show prejudice from denial of appellate counsel "would deprive the defendant of one of the very benefits of appellate counsel – review by counsel for the purpose of identifying potential appellate issues") (citing *Anders*, 386 U.S. at 744-45) (Breyer, Campbell, Selya, JJ.); *cf. Peguero v. United States*, ___ U.S. ___, ___, 119 S. Ct. 961, 965-66 (1999) (O'Connor, J., concurring) (noting that habeas petitioners, who are often without "a lawyer to identify and develop arguments on appeal," should not be required to show "meritorious grounds for appeal" when failure to file timely appeal is due to court's error).

Second, the state appellate court on direct appeal reviews the record for error under both state law and federal constitutional law. If this Court were to require federal courts to find actual prejudice (not presume it), state courts would be deprived of the opportunity to address state law and constitutional issues in the first instance – as principles of federalism and comity dictate. This Court noted in *Penson* that state courts, not federal courts, should rule on issues of state law with the benefit of a constitutionally adequate brief. *Penson*, 488 U.S. at 87 n.9.[26] The state court should also have the first

[26] *See also* transcript of oral argument before the Ninth Circuit at 11-12 (lodged) (argument of Warden's counsel). *Cf. Granberry v. Greer*, 481 U.S. 129, 134-35 (1987) (holding that, if habeas petition presents unresolved question of state law that may have bearing on petition, issue should be resolved in state court first); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'Connor, J., concurring) (noting that principles of comity and federalism may require federal courts to defer ruling on federal constitutional issues that are entwined with interpretation of state law).

opportunity to address constitutional issues with the benefit of a constitutionally sufficient brief. *Cf. O'Sullivan v. Boerckel*, ___ U.S. ___, ___, No. 97-2048, 1999 U.S. LEXIS 4003, at *13 (June 7, 1999) (stating that comity dictates that state court should have first opportunity to rule on issues of federal constitutional law).

If prejudice is not presumed, federal courts will be required to decide whether the appeal raises meritorious issues (not simply arguable issues) of state or constitutional law *before* the state court has the opportunity to do so with a constitutionally adequate brief. And because there is no general right to counsel in habeas proceedings, the federal court's merits analysis will often be without benefit of either a lawyer's brief filed in the habeas proceedings or the *Anders* brief that should have been filed in state court. The absence of any defense-side briefing will render the federal court's determination of whether there are arguable issues both intrusive of state sovereignty and highly dubious on the merits. *See Entsminger v. Iowa*, 386 U.S. 748, 752 (1967) ("Since petitioner admittedly has not received the benefit of a first appeal with a full printed abstract of the record, briefs, and oral argument, as was his right under Iowa law, we do not reach the merits of his conviction here.").

Third, efficiency is also furthered by a bright-line rule of presumed prejudice. When an *Anders* brief is filed in state court, the federal court's limited function on habeas review is to determine whether there are any arguable issues, a minimal threshold, without speculating as to how the state court would resolve those issues. If no *Anders* brief is filed at all, the federal court's task is even simpler. It must grant the petition

so that the state court can determine, with the benefit of an *Anders* brief, whether there are arguable issues.

The Warden argues that Robbins will receive an undeserved "windfall" if his habeas petition is granted. WB 33. But the only consequence of this Court's affirmance will be that Robbins' appeal will be decided by the court that should have decided it, with sufficient briefs, in the first instance – the state appellate court. Nor can a fresh state appeal properly be compared to a new trial, with all the attendant problems and taxing of judicial and other resources that a new trial entails. In most cases there will simply be (1) a new, constitutionally adequate brief that addresses issues raised by an already existing record, and (2) a decision on the merits by the state appellate court, made with the benefit of that constitutionally adequate brief.

3. Prejudice must be presumed here because counsel's abandonment went beyond the failure to file a brief.

The failure to file a merits or *Anders* brief is a *per se* abandonment of counsel sufficient *in itself* to trigger a presumption of prejudice. But the inadequacy of appellate representation here went far beyond the failure to file a merits or *Anders* brief. Goodwin abandoned Robbins on appeal not just by failing to file a merits or *Anders* brief, but also by failing to review the entire record, including important portions of the record that revealed arguable issues, and by failing to support Robbins' requests to augment the record, including portions of the record that established Robbins' arguable issues. *See supra* at 8-10; *Penson*, 488 U.S. at 82 n.5 (noting that counsel serves important function by making sure that record on appeal "accurately and unambiguously reflects all that occurred" below). These additional facts establish beyond cavil that Goodwin constructively abandoned Robbins on appeal.

V. *TEAGUE v. LANE* WAS NOT VIOLATED.

A. The Clear Rules Stated In *Douglas* And *Anders* Are Not New.

Douglas and *Anders* established two clear and simple rules: As the minimum level of advocacy permitted by the Constitution, a merits brief must be filed in non-frivolous appeals, and an issue-spotting *Anders* brief must be filed in frivolous appeals. *Douglas*, 372 U.S. at 358; *Anders*, 386 U.S. at 744-45. These rules are unambiguous. *Anders*, 386 U.S. at 744; *Penson*, 488 U.S. at 80-81, 83 (characterizing requirement of merits brief in appeals of arguable merit as "unambiguous"); *McCoy*, 486 U.S. at 439. The Warden conceded below that "federal law has remained consistent." Transcript of oral argument before the Ninth Circuit at 6 (lodged).

The Ninth Circuit's ruling – that the failure to file a merits brief in an appeal of arguable merit violated the constitutional rule established in *Douglas* and *Anders* – was dictated by long-established precedent. As a result, the *Teague* anti-retroactivity doctrine was not violated. *Teague v. Lane*, 489 U.S. 288, 301 (1989).[27]

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[27] Moreover, *Teague* does not bar federal courts from creating new rules of constitutional criminal procedure when state court procedures do not provide for a fair and full opportunity to litigate the matter at trial or on direct appeal. *See* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 25.6, at 1012, 1015-18 (3d ed. 1998). Such claims should be considered non-final for *Teague* purposes so that both petitioner and federal courts have a fair opportunity to address such issues of constitutional law. *Id.* The need to delay finality under these limited circumstances is particularly acute in the context of denial of counsel on appeal, where the state court does not have the opportunity meaningfully to address the constitutional issue because the only lawyer purporting to represent the defendant on direct appeal is the one guilty of the violation. That lawyer is in no position to raise the issue. The issue can meaningfully be raised only *after* the direct appeal process is completed. *Cf. Withrow v. Williams*, 507 U.S. 680, 688 (1993) (noting that violations of right to counsel "would often go unremedied" if left to review on direct

B. The Warden's *Teague* Argument Is Based On The Faulty Premise That California Law Violates *Douglas* and *Anders*.

The Warden's *Teague* argument is premised on the notion that California has adopted a procedure that deviates from the rules established in *Anders*. Because that premise is wrong, this Court need not consider the Warden's *Teague* argument. The state court of appeal simply failed to follow the *Anders* rules – a mistake that this Court should not treat as authorized under California law, given the California Supreme Court's contrary interpretation of its own court-made law. *Stringer v. Black*, 503 U.S. at 235. The Warden's *Teague* argument is therefore invalid due to his misinterpretation of California law.

C. The Warden's *Teague* Argument Would Be Wrong Even If California Had Adopted A Procedure Violating *Douglas* and *Anders*.

There would be no violation of *Teague* even if the Warden's characterization of California's *Feggans-Wende* procedure were accurate. The Warden argues that California should be exempt from the clear rules of *Douglas* and *Anders* because the state's high court in *Wende* adopted a different procedure that permits the filing of a conclusory no-merit brief that refers to no legal issues. The Warden argues that, because this Court has never before invalidated California's alleged *Wende* procedure, the Ninth Circuit's conclusion that there is no basis for such an exemption is, by definition, the application of an old rule to "novel" circumstances.[28] Thus,

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appeal). For that reason, the *Teague* doctrine should not apply to Robbins' claims.

[28] The Warden reads too much into the fact that no prior reported decisions challenge the practice of failing to file an *Anders* brief in California. WB 45. The issue cannot be raised on direct appeal because the offending counsel will not raise it. Nor will it likely be raised in collateral

the application of *Douglas* and *Anders* amounts to a "new rule." The Warden's bootstrap argument reduces to this: The application of an existing constitutional rule is a "new rule" whenever a state's attempt to evade the existing rule has not been expressly rejected by this Court before the petitioner's conviction became final.

1. The Warden's bootstrap argument would nullify existing rules of constitutional criminal procedure.

The Warden's argument betrays a misunderstanding of *Teague*. *Teague* simply requires federal courts on habeas review to apply the federal constitutional rules in place at the time the conviction became final. *Teague*, 489 U.S. at 310. It does not require that federal courts defer to a state-court interpretation of existing federal constitutional law that would permit an exemption from an existing constitutional rule. *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring). Thus, even if the California Supreme Court had concluded that *Douglas* and *Anders* should not apply where appointed appellate counsel does not move to withdraw, its interpretation of federal law would not be entitled to any deference under *Teague*. *Id.* at 308 (Kennedy, J., concurring). The standard for determining whether application of an existing rule to a particular fact pattern amounts to a new rule is objective; the existence of conflicting authority is therefore not dispositive. *Stringer*, 503 U.S. at 237.

It is true that the application of an existing rule to new and unforeseen circumstances may sometimes amount to a "new rule." *Id.* at 228. But *Douglas* and *Anders* articulate rules of general application that apply in *all* first criminal

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attack, where there is no right to appointed counsel. Further, the Warden ignores *United States v. Griffy*, 895 F.2d at 562, in which Judges Kozinski, Rymer, and Browning held that *if* California's *Feggans-Wende* procedure does not require the filing of an *Anders* brief, as counsel there argued, the procedure is unconstitutional.

appeals as of right. This case therefore does not involve a "novel" application of *Douglas* and *Anders* because those rules apply by design to all first appeals as of right. The mere fact that a state court believes that it should be exempt from an existing constitutional rule does not make the existing constitutional rule "new." Simply put, *Teague* was not meant to insulate from scrutiny state procedures designed to evade existing rules of constitutional criminal procedure.

Further, the Warden's bootstrap argument would undermine the deterrent function of habeas review: " 'The threat of habeas serves as a necessary incentive to trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles.' " *Teague*, 489 U.S. at 306 (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). Indeed, this Court has characterized deterrence as the "leading purpose of federal habeas review." *Graham v. Collins*, 506 U.S. 461, 467 (1993). That function would be thwarted if *Teague* were interpreted to insulate from habeas review state court decisions that purport to recognize *exemptions* from clear, pre-existing constitutional rules.

2. Counsel's mere formal presence is immaterial.

The *Douglas* and *Anders* rules are rules of "general application" that apply to all first appeals as of right. A rule of general application will *only infrequently* yield a result "so novel that it forges a new rule, one not dictated by precedent." *Wright*, 505 U.S. at 309 (Kennedy, J., concurring). Simply put, "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable." *Id.* at 304 (O'Connor, J., concurring); *cf. Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in part, dissenting in part) (stating that purpose of inquiry is "to determine whether a

particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

The proffered factual distinction here – counsel's merely formal presence on appeal – does not change the force of the precedent's clear underlying principle, which emerges from the entire *Douglas-Anders-McCoy-Penson* line of cases. *See Stringer*, 503 U.S. at 232 (describing "clear principle" as emerging from long line of authority). The principle is that the filing of a merits or *Anders* brief is the *minimum* level of legal assistance permitted by the Constitution. The merely formal presence of an attorney does not in any way serve the functions of a merits or *Anders* brief. When counsel fails to file a merits or *Anders* brief, but merely remains formally present, the court and client are in exactly the same position as if counsel had filed a motion to withdraw without an *Anders* brief. Indeed, in *Anders* itself, counsel remained formally present. The proposed distinction is therefore without constitutional difference.

VI. CONCLUSION

For these reasons, this Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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