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Smith v. Robbins 120 S. Ct. 746 (2000)

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I. Facts

Although *Smith v. Robbins*[1] was not a capital case, it does have important implications for effective assistance of counsel in the capital context. The Court's decision in *Robbins* affects virtually every facet of both the state and federal judicial system in two ways: (1) by holding the requirements of *Anders v. California*[2] to be prophylactic and thereby opening the gate for states to amend and potentially lessen the requirements of appellate counsel; and (2) by deciding the case on federalism grounds and thereby setting the stage for abandoning *Miranda v. Arizona*[3] in favor of a return to the voluntariness standard.

II. Implications for Effective Assistance of Counsel in Capital Context

A. Smith v. Robbins

In 1990, a California jury convicted Lee Robbins ("Robbins") of second-degree murder for the fatal shooting of his former roommate. Although Robbins represented himself at his jury trial, he received the assistance of court-appointed counsel for purposes of appeal. Because Robbins's appointed counsel concluded that an appeal would be frivolous, he filed a brief with the California Court of Appeal complying with the *Wende* system, California's post-*Anders* procedure for withdrawal by appellate counsel.[4] Robbins also filed a pro se supplemental brief, permitted by

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1. 120 S. Ct. 746 (2000).

2. 386 U.S. 738, 744 (1967) (holding that when appointed appellate counsel wants to withdraw (1) counsel must submit a brief to the client and the court outlining all arguable appellate issues, (2) the defendant must have an opportunity to raise additional issues, and (3) the court must find that all appellate issues would be frivolous were they to be raised on appeal).

3. 384 U.S. 436, 444 (1966) (holding that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of attorney, either retained or appointed").

4. Smith v. Robbins, 120 S. Ct. 746, 754 (2000). After concluding that an appeal would be frivolous, counsel is required by the *Wende* system to: (1) file a brief summarizing the procedural and factual history of the case; (2) indicate that he has reviewed the record; (3) explain his review of the case to his client; (4) provide the client with a copy of his brief; and (5) inform the client of his right to file a pro se supplemental brief. It is then the court's responsibility to determine if there are any arguable issues to raise on appeal. *Id.* at 753.

the *Wende* system, in which he claimed that there was insufficient evidence to support his conviction and that the prosecutor failed to disclose exculpatory evidence in violation of *Brady v. Maryland*.[5] The California Court of Appeal affirmed Robbins's conviction and concluded that an appeal would be frivolous.[6]

After exhausting state habeas proceedings, Robbins petitioned the United States District Court for the Central District of California for habeas corpus relief. Among the claims raised by Robbins in his federal habeas petition was a claim that he was denied effective assistance of appellate counsel because the *Wende* brief filed by his appointed counsel failed to comply with *Anders v. California*. The district court found merit in Robbins's claim and concluded that Robbins's appellate counsel had deviated from the procedure set forth in *Anders* by failing to include at least two arguable issues in his brief.[7] Deciding that counsel's deviation from *Anders* resulted in deficient performance by counsel, the district court found a presumption of prejudice and ordered that Robbins be granted a new direct appeal. The United States Court of Appeals for the Ninth Circuit agreed that the brief filed by Robbins's appellate counsel was deficient because it did not comply with the *Anders* procedure. However, rather than granting a new direct appeal, the Ninth Circuit ordered the district court to consider Robbins's eleven claims of trial error.[8] The United States Supreme Court granted certiorari to consider whether the procedure adopted by California in *People v. Wende*[9] violated the procedure outlined by the Court in *Anders*.[10] The Court split five-four on the issue. Justice Thomas, writing for the majority, reversed the Ninth Circuit's decision, concluding that the procedure outlined by the Court in *Anders* was merely "a prophylactic one."[11]

B. The Anders *System*

In *Anders v. California* the Court reviewed an earlier California pre-withdrawal procedure for appointed appellate counsel. Under the old California system, appointed appellate counsel could withdraw from a case

5. 373 U.S. 83, 87 (1963) (holding that failure by prosecution to disclose evidence favorable to accused upon request violates due process when the evidence is material to guilt or punishment).

6. *Robbins*, 120 S. Ct. at 754.

7. *Id.* The district court found that Robbins's appellate counsel erred in failing to brief (1) whether the prison law library was adequate for the preparation of Robbins's pro se defense at trial; and (2) whether the trial court erred in its refusal to allow Robbins to withdraw his waiver of trial counsel. *Id.*

8. *Id.* at 755.

9. 600 P.2d 1071, 1074-75 (Cal. 1979).

10. *Robbins*, 120 S. Ct. at 753.

11. *Id.* at 753.

without filing an appeal after filing a letter stating that the appeal had "no merit."[12] The Court concluded that this California procedure denied defendants access to process and equality as guaranteed by the Fourteenth Amendment.[13] Because a conclusory letter stating that the appeal had "no merit" was not equivalent to a finding that the appeal was "frivolous," the Court determined that the California system was inadequate.[14] The Court then set forth the acceptable procedure for handling the withdrawal of appellate counsel:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court–not counsel–then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds[,] it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it 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.[15]

In *Robbins*, the Ninth Circuit considered the *Anders* procedure to be mandatory;[16] in subsequent decisions the court concluded that, because the *Wende* system deviated from *Anders*, it was unconstitutional.[17] However, the United States Supreme Court disagreed.[18]

C. *The* Wende *System*

In *People v. Wende*, California adopted a new procedure for allowing appellate counsel to withdraw.[19] Under the *Wende* system, "counsel, upon concluding that an appeal would be frivolous, files a brief with the appellate court that summarizes the procedural and factual history of the case, with citations of the record."[20] Additionally, counsel must indicate that he has reviewed the record, explained his view of the case to his client, furnished

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12. Anders v. California, 386 U.S. 738, 739 (1967).
13. *Id.* at 741.
14. *Id.* at 743.
15. *Id.* at 744.
16. *Robbins*, 120 S. Ct. at 756.
17. *Id.* at 755 n.4 (citing Delgado v. Lewis, 181 F.3d 1087, 1090, 1093 (9th Cir. 1999); Davis v. Kramer, 167 F.3d 494, 496, 497-98 (9th Cir. 1999)).
18. *Id.* at 756.
19. *Id.* at 753.
20. *Id.*

the client with a copy of his brief, and advised the client of his right to file a pro se supplemental brief.[21] The court, rather than counsel, then searches the record for arguable issues.[22] If, after reviewing the entire record, the appellate court determines that an appeal would be frivolous, it may affirm; "[i]f, however, it finds an arguable (i.e., nonfrivolous) issue, it orders briefing on that issue."[23] The *Wende* system differs from *Anders* in that counsel filing a brief under *Wende* does not explicitly request permission to withdraw or comment on the merits or frivolity of an appeal.[24]

The *Robbins* Court claimed that, "[i]n addition to this double review and double determination of frivolity, [the *Wende* procedure] affords a third layer of review, through the California Appellate Projects."[25] However, the Court's claim that *Wende* provides a "double determination of frivolity" is in conflict with its claim that "counsel following *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous . . . nor requests leave to withdraw."[26] The Court based its conclusion that the *Wende* system provides double review of frivolity on an assumption that counsel following *Wende* make an implicit determination that an appeal would be frivolous.[27] That assumption, however, goes against the Court's assertion that counsel following *Wende* are "silent on the merits of the case."[28]

The California Appellate Projects employs attorneys who are under contract with the court to review the records and to assist appointed appellate counsel.[29] When appointed appellate counsel wish to file a *Wende* brief, "an appellate project staff attorney reviews the record again to determine whether a *Wende* brief is appropriate."[30] Thus, although the review procedure may not be as strict as implied by the Supreme Court, the California Appellate Projects does provide supplemental review to the *Wende* system.

III. Problems with Implementing Wende *System in Virginia*

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 753 n.1.
26. *Id.* at 753 & n.1.
27. *Id.* at 753.
28. *Id.*
29. *Id.* at 753 n.1 (quoting People v. Hackett, 43 Cal. Rptr. 2d 219, 228 (Cal. Ct. App. 1995) (internal quotation marks omitted)).
30. *Id.* (quoting *Hackett*, 43 Cal. Rptr. 2d at 228).

In *Brown v. Warden of the Virginia State Penitentiary*,[31] the Supreme Court of Virginia established the procedure for appointed appellate counsel in Virginia to follow when counsel considers an appeal to be frivolous.[32] Adopting the procedures set forth in *Anders*, the Supreme Court of Virginia held:

> when an indigent's counsel conscientiously determines that an appeal to this [c]ourt would be wholly frivolous, he must so advise this [c]ourt and request permission to withdraw. Simultaneously with such request and within the time allotted for perfecting an appeal, counsel shall file a petition for appeal identifying anything in the record that arguably might support the appeal. Counsel shall furnish his client with a copy of the withdrawal request and of the petition for appeal.[33]

Even if, as the Court in *Wende* concludes, the procedure established in *Anders* is merely "a prophylactic one,"[34] Virginia courts should continue to follow the *Anders* system. Because there is no statewide public defender system in Virginia, court appointed lawyers must do appellate work without state-funded assistance. There is also no system in Virginia comparable to the California Appellate Projects. At best, the California Appellate Projects provides a third layer of review under the *Wende* system; at worst, it provides a second layer of review under *Wende*. Regardless, there is nothing in Virginia that is remotely comparable to that review system. It would, therefore, be impossible to implement the *Wende* system as it has been approved by the Supreme Court in *Robbins* because the current conditions in Virginia are not comparable to those in California. Because there is no public defender system in Virginia analogous to the system in California, the Commonwealth cannot implement the *Wende* system without making substantial changes to its existing public defense system. Modifying the existing Virginia system to comply with the conditions required by the *Wende* system would pose significant financial and administrative burdens.

It is clearly in the best interests of both the courts and defendants to retain the *Anders* system in Virginia. Implementing *Wende* in Virginia would require the Virginia Court of Appeals to engage in a complete review of the entire record without the assistance of a brief by counsel that it currently enjoys under *Anders*. Indisputably, complete review of the entire record by the Virginia Court of Appeals would add significant time and financial burdens to the court.[35] Furthermore, the role of judges in our

31. 385 S.E.2d 587 (Va. 1989).

32. Brown v. Warden of the Virginia State Penitentiary, 385 S.E.2d 587, 588 (Va. 1989).

33. *Id.* at 589-90.

34. *Robbins*, 120 S. Ct. at 753.

35. Thirteen retired Justices of the Supreme Court of California and the Courts of Appeal of California filed an amicus brief in *Robbins* in which they pointed out the "risk that the review of the cold record [under the *Wende* scheme] will be more perfunctory without the issue-spotting guidance, and associated record citations, of counsel." *Robbins*, 120 S. Ct.

criminal justice system is not an adversarial one. The appropriate role of a judge is that of a neutral, detached magistrate. Defense counsel are thus better equipped than the courts to review the record in search of arguable issues to bring on appeal. Shifting that burden to the Virginia Court of Appeals increases the burden on the court; retaining the *Anders* system in Virginia lessens that burden and avoids placing the judiciary in an adversarial role. Because there is no obvious non-*Anders* or non-*Wende* system that would work in Virginia, and because *Wende* is unworkable in Virginia, the Commonwealth should continue to adhere to its version of the *Anders* system.

IV. Forecast for Dickerson *and the Future of* Miranda

A. Background

On January 27, 1997, Charles T. Dickerson ("Dickerson") confessed to robbing a number of banks in Virginia and Maryland. Dickerson was indicted by a federal grand jury on one count of conspiracy to commit bank robbery, three counts of bank robbery, and three counts of using a firearm in the commission of a crime of violence.[36] Shortly after his indictment, Dickerson moved to suppress his confession because it was obtained in violation of *Miranda*.[37] The district court found that Dickerson's confession was voluntary under the Fifth Amendment but suppressed the confession on the grounds that it was in technical violation of *Miranda*.[38] In ruling that the confession should be suppressed, the district court did not consider Section 3501 of the of the Omnibus Crime Control Act of 1968 ("Section 3501"), which provides that "a confession . . . shall be admissible in evidence if it is voluntarily given."[39] In *United States v. Dickerson*,[40] the United States Court of Appeals for the Fourth Circuit confronted whether Section 3501, rather than *Miranda v. Arizona*,[41] governs the admissibility of confessions in federal courts.[42] The Fourth Circuit concluded that, "[b]ased upon the statutory language, it is evident that Congress enacted [Section] 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court."[43] If

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at 771 (Souter, J., dissenting) (alteration in original) (internal quotation marks and citation omitted).

36. United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999).
37. *Id.*
38. *Id.*
39. 18 U.S.C. § 3501(a) (1985).
40. 166 F.3d 667 (4th Cir. 1999).
41. 384 U.S. 436 (1966).
42. *Id.* at 672.
43. *Id.* at 671.

Congress had the authority to enact Section 3501, Dickerson's confession would be admissible because it was given voluntarily.[44]

The question of congressional authority, the Fourth Circuit reasoned, turned on whether the rule set forth in *Miranda* by the Supreme Court was required by the federal constitution.[45] In *Miranda*, the Court explained that the warnings were not protected constitutional rights and warned that its decision "in no way create[d] a constitutional straightjacket which [would] handicap sound efforts at reform."[46] The Court instead described the warnings as being "procedural safeguards"[47] and encouraged both the states and Congress to create their own safeguards.[48] In subsequent decisions, the Court has indicated that the *Miranda* warnings are "prophylactic" in nature and are therefore not required by the Constitution.[49] After reviewing the *Miranda* decision itself and the cases that followed it, the Fourth Circuit in *Dickerson* concluded that because failure to deliver *Miranda* warnings does not rise to the level of a constitutional violation, "the irrebuttable presumption created by the Court in *Miranda*–that a confession obtained without the warnings is presumed involuntary–is *a fortiori* not required by the Constitution."[50] According to the Fourth Circuit, Congress had the authority to overrule *Miranda* and exercised that authority when it approved the voluntariness standard embodied in Section 3501.[51] The warnings approved by the Court in *Miranda* are thus reduced to factors within Section 3501 to be used by the court in determining voluntariness.[52]

B. Implications of Robbins *for* Dickerson

In *Robbins*, the Court concluded that "any view of the procedure we described in the last section of *Anders* that converted it from a suggestion into a straightjacket would contravene our established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy."[53] The Court's decision in *Robbins* was clearly based on federalism. It is likely that the Court will rely on federalism again–this time in the *Miranda* context when it decides

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44. *Id.*
45. *Id.* at 687.
46. Miranda v. Arizona, 384 U.S. 436, 467 (1966).
47. *Id.* at 444.
48. *Id.* at 467.
49. *Dickerson*, 166 F.3d at 689 (quoting New York v. Quarles, 467 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974)).
50. *Id.* at 690.
51. *Id.* at 691.
52. *Id.* at 692.
53. *Robbins*, 120 S. Ct. at 757.

Dickerson.[54] A decision by the Court striking down *Miranda* as prophylactic would mean a return to voluntariness as the standard for determining the admissibility of confessions.

A return to an emphasis on voluntariness could, however, be a positive change. Under the current *Miranda* system, the warnings and waiver of rights are controlling. As long as the warnings are given and the wavier of rights is signed by the defendant, voluntariness is presumed. If *Miranda* is discarded, then courts will be forced to evaluate the actual circumstances surrounding a confession and involuntary confessions will no longer be cloaked behind a mechanical warning and waiver of rights. However, rather than merely abandoning *Miranda*, the Court will need to explain that a return to the voluntariness test does not lower the standard or lessen the protection afforded defendants against self-incrimination. A return to voluntariness should instead mean a return to the basic right of protection against self-incrimination, rather than a mechanical application of that right. Until *Dickerson* is decided, counsel must take care to avoid procedural default. All motions to suppress confessions should be grounded both on *Miranda* grounds and involuntariness grounds. Then, if *Miranda* is overruled, the voluntariness issue will not have been defaulted.

V. Conclusion

The Court's decision in *Robbins* has important implications for our entire criminal justice system. By refusing to recognize the requirements of *Anders v. California* as mandatory, the decision explicitly grants the discretion to alter the process for withdrawal of appellate counsel to the states. Further, by deciding the case on federalism grounds, the stage is set for the abandonment of *Miranda* and a return to the voluntariness standard in the confession context.

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54. Dickerson v. United States, 120 S. Ct. 578 (1999) (granting certiorari).

CASE NOTES:

United States Court of Appeals, Fourth Circuit

Decision on the Merits