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To: Kevin Stinson, Assistant Clerk Administrator
Court of Appeal, Fourth Appellate District, Division Three

From: Elaine A. Alexander, Executive Director
Appellate Defenders, Inc.
State Bar number 043193

Date: August 26, 2014

People v. Hernandez, G049024: Request for modification of opinion or withdrawal of publication order

Appellate Defenders, Inc. (ADI), as amicus curiae, asks leave of court to file this letter under California Rules of Court, rule 8.200(c), requesting the court modify its opinion in this case or withdraw its order for publication, because it is based on a mistaken reading of appellant's brief and a mistaken interpretation of what appointed attorneys call "*Anders* issues."[1] The opinion is causing confusion among appointed counsel as to what is expected or permitted in a *Wende* brief.[2]

This letter is necessarily brief because of the very short time left for the court to exercise jurisdiction, which expires August 28, 2014. (Cal. Rules of Court, rule 8.366(b).) Nevertheless, because of ADI's relationship with the court for more than 30 years, ADI wishes to give the court the courtesy of its analysis before seeking any order for depublication under rule 8.1125.

STATEMENT OF INTEREST

ADI is the appointed counsel administrator for the Fourth Appellate District and so has responsibility for giving guidance to counsel in all cases, including those determined to lack arguable issues within the meaning of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738. In no-issue cases, ADI has long encouraged (though not required) counsel to enumerate issues considered but not raised, as a way of assisting the court in its review of the record and ensuring the issues are not overlooked. This court's opinion can be read as disapproving that practice. At the same time the

[1] *Anders v. California* (1967) 386 U.S. 738.

[2] *People v. Wende* (1979) 25 Cal.3d 436.

opinion inaccurately characterizes the very practice it disapproves. As a result, counsel face confusing and contradictory expectations.

DISCUSSION

Counsel did not present the issues as "arguable" ones that must be decided

The court states it published the case "to reaffirm the decision of another panel in our district which, over 30 years ago, rejected *Anders/Wende* briefs presenting, '"arguable-but-unmeritorious" issue[s]."' (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)" The *Hernandez* opinion says counsel asks the court to "consider" the listed issues, and it declines to do so. (Slip opn., p. 2, as modified by order of Aug. 6, 2014.)

This position rejects a straw man, because counsel did not present his issues as "arguable-but-unmeritorious"at all. To the contrary, fulfilling his duty of candor to the court, counsel forthrightly stated:

> After a thorough review of the record in this case, appellant's appointed counsel on this appeal finds <u>no</u> arguable issue for review.

(*Wende* brief, p. 8, emphasis added.) Counsel further informed the court the reason for listing these issues was "to assist this court's independent review of the record." (*Wende* brief, p. 8.)

Counsel's brief in no way implies appellant was raising the issues as substantive grounds for relief, nor does it suggest the court has an obligation to address them in its opinion. Many *Wende* opinions do mention *Anders* issues as a discretionary matter, to make a record of the court's decisional process,[3] but these courts do not suggest they *must* address non-contentions. The court has plenary discretion to disregard counsel's issues without mention if it finds them unhelpful.

An *Anders* issue listed by counsel is to be contrasted with an issue raised by a *client* in a pro per brief filed after counsel has filed a no-merit brief. In the latter case the issues are indeed urged as grounds for relief. Since the client has a right to file the brief when counsel has failed to identify any issues, a written decision is required. (*People v. Kelly*, *supra*, 40 Cal.4th 106; see Cal. Const., art. VI, § 14.)

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[3]See *People v. Kelly* (2006) 40 Cal.4th 106, 120-121, laying out reasons for a written opinion in a *Wende* situation.

The concept of an "arguable but not meritorious" issue is extremely narrow, confined to one that is constitutionally mandated, though unsuccessful

The concept of an "arguable but not meritorious" issue applies *outside* the *Wende* context and only in the very narrow situation where counsel omits a constitutionally required issue, even if counsel has raised other issues. In *People v. Scobie* (1973) 36 Cal.App.3d 97 the defendant claimed counsel had rendered ineffective assistance by failing to raise all arguable issues. The court found it necessary, in responding, to identify arguable but unmeritorious contentions that appellate counsel *must* argue.[4] (*Id.* at p. 99.) In *People v. Johnson* (1981) 123 Cal.App.3d 106, the defendant argued that the court had a duty to review the record under *Wende*, even though counsel had already raised a substantive issue. The court rejected *Scobie*'s arguable but unmeritorious concept and said an arguable issue is one that (1) has a reasonable chance for success and (2) if successful, will result in reversal or modification of the judgment. (*Id*. at p. 109.) Neither of these situations even faintly resembles the hundreds of no-merit cases, including *Hernandez*, adjudicated annually in California.

An *Anders* issue is not an "arguable but unmeritorious" one. Most obviously, it is not presented as "arguable" at all; if it were, the brief would not be a *Wende*. Also, counsel is hardly suggesting it is constitutionally necessary to argue it; if it were necessary, counsel would have argued it instead of just describing it as something that may assist the court in reviewing the record of the proceedings.

The practice of listing issues has a valid legal and practical basis and should not be limited by court order

Counsel's brief was consistent with ADI's long-standing advice and the practice of most appointed counsel in this district. ADI's Appellate Practice Manual[5] states, at § 4.79:

> ADI for the most part encourages listing of issues. It is a way of stimulating and organizing counsel's thoughts, suggesting issues to the Court of Appeal it might not otherwise consider, and demonstrating counsel's efforts to both the court and the client.

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[4]The proposition that appellate counsel must raise *all* arguable issues was rejected in *Jones v. Barnes* (1983) 463 U.S. 745, 751-754.

[5]The Manual is accessible on ADI's website: http://www.adi-sandiego.com/panel/manual.asp

> Such a listing, however, must be done properly. Counsel must not argue the merit or lack of merit of any issue listed, but must neutrally describe the issues considered and any relevant authority, without urging any conclusions. (If the brief urges *relief* because of the issue, it is contradicting the characterization of the case as a no-merit one. If it affirmatively argues the issue should be *rejected*, counsel is impermissibly arguing against the client.)

The issues listed by definition are not "arguable"; rather, they are those sufficiently substantial that reasonably experienced counsel would consider and investigate them before determining they do not meet the standard of arguability.[6]

ADI's guidance is based on experiences from the late 1990s, when the Ninth Circuit began invalidating the bare *Wende* briefs favored by the State Public Defender, which stated facts but no "law" other than *Wende*. The Ninth Circuit found the absence of listed issues violated *Anders* and resulted in a complete denial of appellate counsel, thus was prejudicial per se. (E.g., *Robbins v. Smith* (9th Cir. 1997) 125 F.3d 831, reversed in *Smith v. Robbins* (2000) 528 U.S. 259; *Delgado v. Lewis* (9th Cir. 1999) 181 F.3d 1087, cert. granted and judgment vacated *Lewis v. Delgado* (2000) 528 U.S. 1133, refiled as modified in 223 F.3d 976.)

In the interests of judicial economy, fearing the need to redo no-merit appeals on a massive scale, ADI counseled its attorneys to include in *Wende* briefs issues considered but judged not arguable. It developed approaches to describing unbriefed issues that would address both the State Public Defender's concerns about not "arguing against the client" and the federal court's objections to the bare *Wende* brief.

The United States Supreme Court resolved the immediate crisis in *Smith v. Robbins*, *supra*, 528 U.S. 259, which upheld California's *Wende* procedures. By that time, however, ADI and many of its attorneys had determined that they actually preferred briefs with listed *Anders* issues. Putting the issues on paper helped them organize their own thoughts more carefully, facilitated ADI's *Wende* review, documented counsel's efforts in the case, helped many clients understand better the processes the attorney had gone through, and ensured the court would have an opportunity to render a "second opinion" on

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[6]The Appellate Indigent Defense Oversight Advisory Committee of the Judicial Council has long recognized and compensated for time spent by counsel on such issues, which are classified as "unbriefed."

the issues counsel had rejected, if it so chose. This court's opinion does not mention these considerations or suggest they are unreasonable.

Counsel's listing of issues conforms to directions given by the both the United States and California Supreme Courts. *Anders* called for no-merit briefs to include "legal points" and "legal authorities" as an aid to courts that otherwise must review "the cold record . . . without the help of an advocate." (*Anders v. California*, *supra*, 386 U.S. 738, 744-745.) *People v. Feggans* (1967) 67 Cal.2d 444, 447-448, directed counsel to note "the applicable law." (See also *In re Sade C.* (1996) 13 Cal.4th 952, 994-995, fn. 22 [finding the no-merit briefs in that case inadequate because "*Anders* brief must contain law as well as facts"].) Although *Smith v. Robbins*, *supra*, 528 U.S. 259 determined other safeguards may substitute for those requirements, it decidedly did not disapprove of listing legal issues. ADI suggests it is a matter of counsel's sound judgment and should not be the subject of judicial decree.

CONCLUSION

The concerns about the listed issues articulated in the *Hernandez* opinion are based on a misconception of what counsel was representing to the court and a mistaken belief that counsel's no-merit brief was similar to those filed in *Scobie* and *Johnson*. Counsel listed the issues as a record of what counsel had considered and as assistance to the court in its own review of the record. He did not argue them as grounds for relief, nor did he suggest the court had an obligation to address them in its opinion.

The published opinion will foreseeably cause confusion among appointed counsel. The opinion appears to disapprove a practice other than the one followed in the case before it. It undermines ADI's published guidance to attorneys, without pointing out any deficiencies in it. Revision of the opinion, or at least withdrawal of its publication status, is needed to prevent uncertainty and misunderstanding.

ADI thanks the court for its courtesy in considering these points.

Very sincerely yours,

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