

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 98–1037

GEORGE SMITH, WARDEN, PETITIONER v.
LEE ROBBINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 19, 2000]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins,
dissenting.

While I join JUSTICE SOUTER’s cogent dissent without qualification, I write separately to emphasize two points that are obscured by the Court’s somewhat meandering explanation of its sharp departure from settled law.

First, despite its failure to say so directly, the Court has effectively overruled both *Anders v. California*, 386 U. S. 738 (1967), and *Penson v. Ohio*, 488 U. S. 75 (1988). Second, its unexplained rejection of the reasoning underlying our decision in *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U. S. 429 (1988), see *ante*, at 9–10, illustrates the extent of today’s majority’s disregard for accepted precedent.

To make my first point it is only necessary to quote the Court’s new standard for determining whether a State’s appellate procedure affords adequate review for indigent defendants:

“A State’s procedure provides such review so long as it reasonably ensures that an indigent’s appeal will be resolved in a way that is related to the merit of that appeal.” *Ante*, at 14.

The California procedure reviewed in *Anders* and the Ohio procedure reviewed in *Penson*— both found inadequate by

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this Court— would easily have satisfied that standard. Yet the Court today accepts California’s current procedure because it “requires both counsel and the court to find the appeal to be lacking in arguable issues.” *Ante*, at 17. But in defense of its position in *Anders*, California relied heavily on those very same requirements, *i.e.*, “the additional feature of the [State’s] system where the court also reads the full record.” Brief for Respondent in *Anders v. California*, O. T. 1966, No. 98, pp. 30–31; see also *id.*, at 12–13, 19, 23, 28–29. Our *Anders* decision held, however, that this “additional feature” was insufficient to safeguard the indigent appellant’s rights.

To make my second point I shall draw on my own experience as a practicing lawyer and as a judge. On a good many occasions I have found that the task of writing out the reasons that support an initial opinion on a question of law— whether for the purpose of giving advice to my client or for the purpose of explaining my vote as an appellate judge— leads to a conclusion that was not previously apparent. Colleagues who shared that view of the importance of giving reasons, as opposed to merely announcing conclusions, joined the opinions that I authored in *McCoy*, *Penson*, and *Nickols v. Gagnon*, 454 F. 2d 467 (CA7 1971).¹ In its casual rejection of the reasoning in *McCoy*, the Court simply ignores this portion of the opinion:

¹“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,’ the temptation to discharge an obligation in summary fashion is avoided, and the reviewing court is provided with meaningful assistance.” *Nickols*, 454 F. 2d, at 470 (citation and footnotes omitted) (quoting *Anders v. California*, 386 U. S. 738, 744 (1967)).

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“Wisconsin’s Rule merely requires that the attorney go one step further. Instead of relying on an unexplained assumption that the attorney has discovered law or facts that completely refute the arguments identified in the brief, the Wisconsin court requires additional evidence of counsel’s diligence. This requirement furthers the same interests that are served by the minimum requirements of *Anders*. Because counsel may discover previously unrecognized aspects of the law in the process of preparing a written explanation for his or her conclusion, the discussion requirement provides an additional safeguard against mistaken conclusions by counsel that the strongest arguments he or she can find are frivolous. Just like the references to favorable aspects of the record required by *Anders*, the discussion requirement may forestall some motions to withdraw and will assist the court in passing on the soundness of the lawyer’s conclusion that the appeal is frivolous.” *McCoy*, 486 U. S., at 442; see also *Penson*, 488 U. S., at 81–82.

In short, “simply putting pen to paper can often shed new light on what may at first appear to be an open-and-shut issue.” *Id.*, at 82, n. 4. For this reason, the Court is quite wrong to say that requiring counsel to articulate reasons for its conclusion results in “less effective advocacy.” *Ante*, at 10.²

²The *Wende* procedure at issue in this case requires a “summary of the proceedings and facts,” but does not require counsel to raise any legal issues. *People v. Wende*, 25 Cal. 3d 436, 438, 600 P. 2d 1071, 1072 (1979); see also *ante*, at 2. This procedure plainly does not serve the above purpose, since it does not force counsel to “put pen to paper” regarding those things most relevant to an appeal— legal issues. Accordingly, and contrary to the Court’s assertion, *ante*, at 18–19, this summary does not improve upon the procedure rejected in *Anders*— a “bare conclusion” by the attorney that an appeal is without merit. 386 U. S., at 742.

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An appellate court that employed a law clerk to review the trial transcripts in all indigent appeals in search of arguable error could be reasonably sure that it had resolved all of those appeals “in a way that is related” to their merits. It would not, however, provide the indigent appellant with anything approaching representation by a paid attorney. Like California’s so-called *Wende* procedure, it would violate the “principle of substantial equality” that was described in *Anders* and *McCoy* and has been a part of our law for decades. *McCoy*, 486 U. S., at 438; *Anders*, 386 U. S., at 744.