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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TOM SMITH, Defendant and Appellant.	B175297 (Los Angeles County Super. Ct. No. ZM005810)

APPEAL from a judgment of the Superior Court of Los Angeles County. David S. Wesley, Judge. Dismissed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

The issue in this case is whether the procedures constitutionally required in an appeal by a indigent criminal defendant under *Anders v. California* (1967) 386 U.S. 738 (*Anders*) and *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) also apply to the appeal from an order of commitment under the Mentally Disordered Offender statute ("MDO") pursuant to Penal Code section 2962 et seq.[1] Based upon relevant authority from the United States Supreme Court and the California Supreme Court, we conclude *Anders* and *Wende* do not apply to an appeal under the MDO statutes.

PROCEDURAL HISTORY

The District Attorney of Los Angeles County filed a petition to extend the involuntary commitment of appellant Tom Smith ("appellant") pursuant to section 2970. The petition alleged that appellant was previously committed pursuant to section 2962 as severely mentally disordered after having been found guilty of assault with intent to commit rape in violation of section 220. The petition further alleged that appellant has a severe mental disorder, that the severe mental disorder is not in remission, or cannot be kept in remission if appellant's treatment is not continued and that by reason of appellant's severe mental disorder, appellant represents a substantial danger of physical harm to others.

A jury found the allegations of the petition to be true. The trial court ordered appellant recommitted to Patton State Hospital for a period of one year beyond the previous commitment order. Patton State Hospital was ordered to provide appropriate treatment and confinement.

Following the filing of a timely notice of appeal, we appointed counsel to represent appellant before this court. Counsel filed an opening brief setting forth an accurate statement of the case and statement of facts, followed by an argument pursuant to *Wende*, requesting this court to independently review the entire record on appeal.

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[1] All statutory references are to the Penal Code, unless indicated otherwise.

Counsel indicated he had reviewed the entire record and remained available to brief any additional issues upon the court's request. Counsel advised appellant of his right to file a supplemental brief. The opening brief included a declaration from counsel consistent with the requirements of *Wende*.

In response to appellant's *Wende* brief, this court issued an order observing that an appeal from an MDO commitment constituted a postjudgment civil proceeding. Noting that the California Supreme Court in *In re Sade C.* (1996) 13 Cal.4th 952, 978-983 (*Sade C.*) held that the *Anders* and *Wende* procedures are not applicable to a civil appeal, we directed counsel for appellant to file a supplemental opening brief on the applicability of *Wende* to the initial appeal of an MDO commitment. After counsel for appellant filed a supplemental opening brief addressing the *Wende* issue, the Attorney General filed a respondent's brief, to which appellant has filed a reply brief.

DISCUSSION

The Opinion in *Sade C.*

In *Sade C.*, the California Supreme Court granted review "to address the question whether *Anders* . . . , which has been considered in decisions including . . . *Wende* . . . , applies, or must or should be extended, to an indigent parent's appeal from a judgment or order, obtained by the state, adversely affecting his custody of a child or his status as the child's parent. As will appear, our answer is no." (*Sade C.*, *supra*, 13 Cal.4th at p. 959.)

In defining the constitutional role of an appointed attorney for an indigent defendant, *Anders* held that the "constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if 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 to 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." (*Anders*, *supra*, 386 U.S. at p. 744, fn. omitted.)

California expanded on the demands of *Anders* in *Wende*. "*Wende* reaches somewhat beyond *Anders*. It does so in its statement that appointed appellate counsel is not *required* to move to withdraw if he believes the appeal to lack any basis in law or fact." (*Sade C.*, *supra*, 13 Cal.4th at pp. 980-981.) The United States Supreme Court upheld the constitutionality of the *Wende* procedure in *Smith v. Robbins* (2000) 528 U.S. 259.

The court in *Sade C.*, an opinion by Justice Stanley Mosk, undertook an exhaustive analysis of *Anders* and other relevant United States Supreme Court authority before concluding that *Anders* and *Wende* do not apply to civil appeals, such as termination of a parent's rights to custody of a child. The court noted that, in general, *Wende* had been limited to criminal appeals, although there was some inconsistency:

"Generally, the Courts of Appeal have confined *Anders* and *Wende* to criminal appeals. (See, e.g., *In re Olsen* (1986) 176 Cal.App.3d 386, 389-392 [holding that *Anders* and *Wende* are applicable to criminal appeals of misdemeanors as well as felonies].) They have generally declined to reach into civil appeals. (See, e.g., *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1117, fn. 2 [distinguishing *Wende* in the area of civil appeals]; *Grillo v. Smith* (1983) 144 Cal.App.3d 868, 873, fn. 3 [same]; see also *Adoption of Chad T.* (1995) 39 Cal.App.4th 1107, 1108-1109 [declining to extend *Wende* to appeals from a termination of parental rights under the Family Code, which is obtained

by a private party and not the state]; cf. *Ronald S.* v. *Superior Court* (1995) 34 Cal.App.4th 1467, 1468-1469 [declining to extend *Wende* to proceedings on a petition for 'extraordinary relief' challenging a (presumably) adverse order under the juvenile court law].) Exceptions, however, are apparent. (See *County of Madera v. Jacobson* (1987) 194 Cal.App.3d 569, 570-573 (*per curiam*) [purporting to extend *Wende* to paternity appeals]; *Conservatorship of Besoyan* (1986) 181 Cal.App.3d 34, 36-38 (*per curiam*) [same as to conservatorship appeals]; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1023 (conc. and dis. opn. of Mosk, J.) [following *Besoyan*]; see also *In re Adrian O.* (1984) 155 Cal.App.3d 631, 635 [appearing to assume that *Wende* is applicable to appeals from a termination of parental rights under the juvenile court law]; *In re Edward S.* (1982) 133 Cal.App.3d 154, 157-158 [same as to appeals from an adjudication of juvenile delinquency under the juvenile court law]; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1498, fn. 1 [same]; *In re Deon D.* (1989) 208 Cal.App.3d 953, 955-956 [same].)" (*Sade C.*, *supra*, 13 Cal.4th at p. 962, fn. 2.)

The opinion in *Sade C.* first looked to determine whether *Anders* applied to an indigent parent's appeal of an order adversely affecting custody rights of a child or status as a parent. (*Sade C.*, *supra*, 13 Cal.4th at p. 965.) The court distilled four conclusions from its review of *Anders* and its progeny. "First, *Anders* establishes certain procedures for state appellate courts that are 'prophylactic' in nature. (*Pennsylvania v. Finley* [(1987) 481 U.S. 551,] 555; see *Penson v. Ohio* [(1988) 488 U.S. 75,] 80 [speaking of *Anders*'s 'safeguards'].) It does not, however, 'set down' any 'independent . . . command' derived from the United States Constitution itself. (*Pennsylvania v. Finley*, *supra*, 481 U.S. at p. 555; see *Penson v. Ohio*, *supra*, 488 U.S. at p. 80.)" (*Sade C.*, *supra*, 13 Cal.4th at p. 977.) "Second, *Anders*'s 'prophylactic' procedures are limited in their applicability to appointed appellate counsel's representation of an indigent criminal defendant in his first appeal as of right. (*Pennsylvania v. Finley*, *supra*, 481 U.S. at pp. 554-559; see *Anders . . . , supra*, 386 U.S. at pp. 739, 741-742, 744-745; see also *Austin v. U.S.*, [(1994)] 513 U.S. 5, ___.) They do not extend to an appeal, even on direct review, that is discretionary. (See *Austin v. U.S.*, *supra*, 513 U.S. at p.___.) A fortiori,

they do not reach collateral postconviction proceedings. (*Pennsylvania v. Finley*, *supra*, 481 U.S. at pp. 554-559.) Proceedings of this sort are considered civil in nature and not criminal. (*Id*. at p. 557.)" (*Sade C.*, *supra*, 13 Cal.4th at p. 978.) "Third, *Anders*'s 'prophylactic' procedures are dependent for their applicability on the existence of an indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the assistance of appellate counsel appointed by the state in his first appeal as of right. (*Pennsylvania v. Finley*, *supra*, 481 U.S. at p. 555; see *Anders . . . , supra*, 386 U.S. at pp. 739, 741-742, 744-745.) By operation of the due process guaranty, the right extends beyond nominal assistance to effective assistance. (*Evitts v. Lucey*, [(1985) 469 U.S. 387,] 391-400; see *Anders . . . , supra*, 386 U.S. at p. 744; *McCoy v. Court of Appeals of Wisconsin*, [(1988) 486 U.S. 429,] 435-439; *Penson v. Ohio*, *supra*, 488 U.S. at pp. 79-85.) The same is true under the equal protection entitlement. (See *Anders . . . , supra*, 386 U.S. at p. 744; *McCoy v. Court of Appeals of Wisconsin*, *supra*, 486 U.S. at pp. 435-439.)" (*Sade C.*, *supra*, 13 Cal.4th at p. 978.) "Fourth, *Anders*'s 'prophylactic' procedures are designed solely to protect an indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the assistance of appellate counsel appointed by the state in his first appeal as of right. (*Pennsylvania v. Finley*, *supra*, 481 U.S. at p. 557; *Anders . . . , supra*, 386 U.S. at pp. 739, 741-742, 744-745; *Jones v. Barnes*, [(1983) 463 U.S. 745,] 750-754; *Evitts v. Lucey*, *supra*, 469 U.S. at pp. 396-397; *McCoy v. Court of Appeals of Wisconsin*, *supra*, 486 U.S. at pp. 435-444; *Penson v. Ohio*, *supra*, 488 U.S. at pp. 79-85.)" (*Sade C.*, *supra*, 13 Cal.4th at pp. 978-979.)

The court in *Sade C.* concluded that *Anders* did not apply to an indigent's appeal of an order affecting custody of a child or status as a parent. "By it's very terms, *Anders*'s 'prophylactic' procedures are limited to their applicability to appointed appellate counsel's representation of an indigent *criminal defendant*—and there only in his first appeal as of right." (*Sade C.*, *supra*, 13 Cal.4th at p. 982; see *Pennsylvania v. Finley*, *supra*, 481 U.S. at pp. 554-555.) "An indigent parent adversely affected by a

state-obtained decision on child custody or parental status is simply not a criminal defendant." (*Sade C.*, *supra*, 13 Cal.4th at p. 982.)

In reaching the conclusion that *Anders* was not applicable outside of the sphere of criminal cases, *Sade C.* addressed the holdings in earlier decisions that *Anders*'s prophylactic procedures applied to the assistance of appellate counsel appointed by the state to any indigent in his or her first appeal as a matter of right, where a fundamental right is involved. (See *In re Andrew B.* (1995) 40 Cal.App.4th 825, 853 [holding that *Anders*/*Wende* review is constitutionally mandated where counsel is appointed at state expense on an appeal affecting a litigant's fundamental liberty interest.].) In four successive footnotes, the court in *Sade C.* repeated that "*Andrew B.* is in error" (*Sade C.*, *supra*, 13 Cal.4th at pp. 982-985, fns. 11-14), and further, "[t]o the extent that any decision of ours or of the Courts of Appeal states or implies the applicability of *Anders* goes beyond what is described in the text, it is disapproved." (*Id*. at pp. 983-984, fn. 13.)

Having determined that *Anders* did not apply outside of the context of an indigent criminal defendant's first appeal, the court in *Sade C.* then turned to the question of whether *Anders* should be extended to an indigent parent's appeal from a judgment obtained by the state adversely affecting custody of a child or parental status. "Here too, as will appear, the answer is no." (*Sade C.*, *supra*, 13 Cal.4th at p. 984.)

In so concluding, the court rejected the notion that *Anders*'s prophylactic procedures were invoked because the state provided counsel to an indigent parent challenging an order affecting child custody or status as a parent. Citing *Pennsylvania v. Finley*, *supra*, 481 U.S. at page 556, the court held that just because the state provided counsel on appeal, it did not follow that *Anders* applied "outside the sphere of criminal law." (*Sade C.*, *supra*, 13 Cal.4th at p. 985.)

The final issue addressed in *Sade C.* was whether *Anders*'s prophylactic procedures were required by the Fourteenth Amendment's due process clause in a case affecting an indigent litigant's status as a parent or child custody. For guidance, the court turned to the decision in *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 26-27. In *Lassiter*, the court addressed the question of whether an indigent was entitled

to appointed counsel in a state initiated trial proceeding on parental status. The court stated there was a presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. (*Lassiter v. Department of Social Services*, *supra*, 452 U.S. at pp. 26-27.) Three interests were identified to decide what due process requires, specifically "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." (*Id.* at p. 27.)

The private interests at stake in *Sade C.* were those of parent and child. Although not mentioned in the Constitution, the parent/child relationship has been deemed to be implicit in the liberty concept protected by the due process clause of the Fourteenth Amendment. (*Sade C.*, *supra*, 13 Cal.4th at pp. 987-988; see *Santosky v. Kramer* (1982) 455 U.S. 745, 753.) However, once a child is removed from parental custody or parental rights are terminated, "'the court may assume . . . that the interests of the child and natural parents . . . diverge.'" (*Sade C.*, *supra*, 13 Cal.4th at pp. 989.)

The second element in the due process analysis is the state's interests. The state has a *parens patriae* interest in preserving and promoting the welfare of the child, a concern which is described as both "'urgent'" and "'compelling.'" (*Sade C.*, *supra*, 13 Cal.4th at p. 989.) "The state also has an interest in an accurate and just resolution of the parent's appeal" as well as a "'fiscal and administrative interest in reducing the cost and burden of [the] proceedings' [citation]," and although the latter interest is "'legitimate,'" it "counts little." (*Id.* at pp. 989-990.)

The third and final element of the due process analysis in *Sade C.* was the risk that absence of the *Anders*'s protections will lead to an erroneous determination of the indigent parent's appeal. The chance of error was deemed "negligible" because experience teaches that "appointed appellate counsel faithfully conduct themselves as active advocates in behalf of indigent parents." (*Sade C.*, *supra*, 13 Cal.4th at p. 990.)

The court resolved the issue by concluding *Anders* should not be extended to appeals by an indigent parent from a state-obtained order regarding child custody or parental status. "After evaluating and balancing all three elements, we believe that the

requirement of fundamental fairness contained in the Fourteenth Amendment's due process clause does not compel imposition of *Anders*'s 'prophylactic' procedures. Procedures that are practically 'unproductive,' like those in question, need not be put into place, no matter how many and how weighty the interests that theoretically support their uses. To be sure, these procedures may have 'symbolic value' of some kind. [Citation.] Such value, however, is too slight to compel their invocation." (*Sade C., supra,* 13 Cal.4th at pp. 990-991.) Criminal defendants and indigent parents are not similarly situated, because parents do not face punishment and criminal defendants have a wide range of expressly recognized constitutional rights. (*Id*. at pp. 991-992.) The court also rejected the idea that *Anders*'s procedures ought to be extended as a matter of policy under the California Supreme Court's inherent power to declare rules of appellate procedure. (*Id*. at pp. 992-993.) "Whatever the benefits in ensuring that appointed appellate counsel conduct themselves as active advocates—they appear to be relatively small—the costs are greater. These obviously include time and money and delay in finality. It is true the state's interest in its financial resources is no stronger here than elsewhere. But its interest in expeditiousness is strong indeed." (*Id.* at p. 993.)

***In re Kevin S.* (2003) 113 Cal.App.4th 97 (*Kevin S.*)**

As *Sade C.* repeatedly makes clear, *Anders* applies only to a criminal defendant's first appeal as a matter of right. After *Sade C.* was decided, this court addressed the issue of whether the *Wende* applied to a juvenile delinquency appeal, an action traditionally labeled as "civil." (*Kevin S., supra,* 113 Cal.App.4th at p. 99.) This court noted that *Sade C.* had not addressed the issue of the application of *Anders* and *Wende* to appeals in juvenile delinquency matters. "*Sade C.* cannot be read as holding that *Wende* is inapplicable to juvenile delinquency appeals. The issue before the California Supreme Court in *Sade C.* was whether *Anders* applied to an indigent parent's appeal from a judgment or order adversely affecting custody of a child or parental status. (*Sade C., supra,* 13 Cal.4th at p. 965.) The question whether *Anders* and therefore *Wende* applies

to an appeal from a juvenile delinquency proceeding was not before the California Supreme Court in *Sade C.* The California Supreme Court has stated numerous times that an opinion is not authority for a proposition not therein considered. (E.g., *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) Therefore, *Sade C.* is not authority for the following propositions: an indigent juvenile has no Fourteenth Amendment due process or equal protection right to appointed counsel on a first appeal as of right from a delinquency adjudication; a delinquent minor has no constitutional right to effective representation by counsel on appeal; and that *Anders*, and therefore *Wende*, is inapplicable to juvenile appeals." (*Kevin S.*, *supra*, 113 Cal.App.4th at p. 106.) Juvenile court matters are civil by label, so *Sade C.* arguably precluded *Wende* review. (*Ibid*.)

After reviewing the United States Supreme Court opinions in the area of rights in juvenile delinquency matters, the *Kevin S.* court concluded that *Anders* and *Wende* applied to juvenile delinquency appeals, notwithstanding the "civil" label attached to juvenile matters. "The very real risks of lost physical liberty and stigmatization have compelled the United States Supreme Court to extend the Fourteenth Amendment protections under many circumstances to criminal defendants and juveniles alike. The Fourteenth Amendment requires that the minor's one and only appeal as of right be full and effective. To safeguard the appeal right and ensure that juvenile delinquency adjudications are premised on accurate factfinding, the Fourteenth Amendment mandates that an indigent minor be appointed counsel on appeal. We are in accord with the courts that have directly decided the applicability of *Anders* to juvenile delinquency appeals. Given the Fourteenth Amendment right to counsel on appeal, the prophylactic rules in *Anders* and therefore *Wende* apply to delinquency appeals. (*Smith v. Robbins, supra,* 528 U.S. at p. 273; *Pennsylvania v. Finley, supra,* 481 U.S. at pp. 554-555.)" (*Kevin S.*, *supra,* 113 Cal.App.4th at p. 119.)

"As the United States Supreme Court has recognized, the interests at stake in a juvenile delinquency proceeding parallel those at risk in a criminal prosecution. (*Breed v.* Jones [(1975)] 421 U.S. [519,] 529; *McKeiver v. Pennsylvania* [(1971)] 403 U.S.

[528,] 540; *In re Gault* [(1967)] 387 U.S. [1,] 17-25, 36.) In a juvenile delinquency proceeding, a minor is accused of criminal conduct. ([Welf. & Inst. Code,] § 602, subd. (a).) The delinquency proceeding carries with it the prospect of curtailed physical freedom for an extended period of time. In [*In re*] *Winship* [(1970) 397 U.S. 358, 365-366] and [*In re*] *Gault*[, *supra,* 387 U.S. at page 36], the United States Supreme Court observed that a proceeding subjecting a child to a loss of liberty for years is comparable in seriousness to a felony prosecution. [Citations.] In *Schall* [*v. Martin* (1984) 467 U.S. 253, 265], the court held that a juvenile's interest 'in freedom from institutional restraints' was 'undoubtedly substantial.' [Citation.] Further, the delinquency finding carries with it a stigma that may follow the minor throughout his or her life. In *Gault,* the United States Supreme Court emphasized that, contrary to historical notions, minors adjudicated delinquents *are* stigmatized by that finding. (*In re Gault, supra,* 387 U.S. at pp. 17-25; see *Addington v. Texas* [(1979)] 441 U.S. [418,] 427.)" (*Kevin S., supra,* 113 Cal.App.4th at p. 118.)

Some juvenile delinquency cases involve potentially serious collateral consequences in the adult criminal judicial system. "If a minor is adjudicated to have committed a violent or serious felony, depending on the circumstances, the ensuing disposition can be used to enhance an adult sentence including a potential life sentence. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12; § 707, subd. (b); *People v. Garcia* (1999) 21 Cal.4th 1, 13-15.) This amplifies the justification for including delinquency appeals within the Fourteenth Amendment list of rights available to both adults and minors." (*Kevin s., supra,* 113 Cal.App.4th at pp. 117-118.)

<u>*Anders*/*Wende* in the Context of a MDO Indigent Appeal</u>

We turn now to the issue of whether *Anders* applies to an indigent appeal from a civil commitment order under MDO. We conclude *Anders* does not apply in this context, because as was repeatedly stated in *Sade C.*, *Anders* applies only to an indigent criminal

first appeal as a matter of right. MDO proceedings are civil, as defined by statute, and that characterization has been consistently recognized by California courts.

"The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.'" (*Kansas v. Hendricks* (1997) 521 U.S. 346, 361.) The California Legislature has declared: "The hearing shall be a civil hearing, however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable." (§ 2972, subd. (a).) "Although a section 2970 hearing, like a competency hearing, is something of a hybrid, a civil hearing with criminal procedural protections, it is nonetheless, as the statute clearly states and California courts have consistently agreed, a civil hearing." (*People v. Montoya* (2001) 86 Cal.App.4th 825, 830, fn. omitted; see also *People v. Superior Court (Myers*) (1996) 50 Cal.App.4th 826, 834.) " 'The purpose of the MDO statutory scheme is to provide *mental health treatment* for those offenders who are suffering from *presently severe mental illness*, not to punish them for their past offenses.' " (*People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1271.) "The courts that have analyzed the issue are unanimous in concluding that MDO commitment proceedings are civil in nature and therefore defendants presented with possible commitment do not enjoy the constitutional rights accorded criminal defendants." (*People v. Williams* (2003) 110 Cal.App4th 1577, 1590.)

Constitutional components of criminal trials are not afforded in MDO proceedings. "As we shall explain, however, the MDO provisions are neither punitive in purpose nor effect and their procedural safeguards do not require us to transform the hearing into a criminal trial." (*People v. Superior Court (Myers)*, *supra*, 50 Cal.App.4th at p. 834.) For example, an attorney in an action filed under section 2970 may waive a jury trial on behalf of the client, unlike in a criminal trial, where the defendant must personally waive the right to a jury. (*People v. Montoya* , *supra*, 86 Cal.App.4th at p. 830.) The right to a jury trial and the right to counsel in MDO proceedings are statutory rights, which are not constitutionally based. (§ 2972, subd. (a); *People v. Williams* (2003) 110 Cal.App.4th 1577, 1588-1591; *People v. Cosgrove* , *supra*, 100 Cal.App.4th at pp. 1273-1274 ["If the person is indigent, the county public defender shall

be appointed."].) A party named in a section 2970 petition has no absolute right not to be called as a witness by the state under the Fifth Amendment to the United States Constitution, although the privilege against self-incrimination applies to the extent it exists in other civil actions. (*People v. Merfield* (1997) 57 Cal.App.4th 1440, 1446; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1082.) The right to counsel on appeal from an MDO commitment also has a statutory basis. (§ 1240.1, subd. (a) ["In any noncapital criminal, juvenile court, or civil commitment case wherein the defendant would be entitled to the appointment of counsel on appeal if indigent"].)

Appellant argues that he suffers confinement as the result of the civil commitment, which in his view makes a MDO proceeding the functional equivalent of a criminal action, requiring *Anders*/*Wende* review on an indigent's first appeal. Whatever superficial appeal this contention offers, the United States Supreme Court has explained that civil restraint does not equate with punishment and does not convert a civil commitment into a criminal action.

There has been a marked contrast in the approach of the United States Supreme Court to juvenile delinquency actions and civil commitments for mentally disordered offenders and habitual sexual offenders. In the juvenile delinquency cases, as discussed at length in *Kevin S.*, the Supreme Court has typically afforded constitutional rights, other than the right to a jury trial, consistent with the rights in an adult criminal trial. On the other hand, the Supreme Court has been equally consistent in denying rights typically afforded in criminal trials to civil commitment proceedings, despite the fact the civil commitment results in restraint. "Although the civil commitment scheme at issue here does involve an affirmative restraint, 'the mere fact that a person is detained does not inexorably lead to the conclusion the government has imposed punishment.' [Citation.] The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate non-punitive governmental objective and has been historically so regarded. . . . If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to

be considered punishment. But we have never so held." (*Kansas v. Hendricks*, *supra*, 521 U.S. at p. 363.)

In a series of cases, the United States Supreme Court has held that constitutional principles traditionally found in criminal actions are not constitutionally required in civil commitments. In *Seling v. Young* (2001) 531 U.S. 250, 263, Washington State's Community Protection Act of 1990, authorizing the civil commitment of sexually violent predators was held to be non-punitive, thus taking it outside the reach of the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution. *Kansas v. Hendricks*, *supra*, 521 U.S. at pages 361-362 held that civil commitment under the Kansas Sexually Violent Predator Act, did not "implicate either of the two primary objectives of criminal punishment: retribution or deterrence." "Although the civil commitment scheme at issue here does involve an affirmative restraint, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." (*Id*. at p. 363.) According to the decision in *Hendricks*, the State's use of procedural safeguards traditionally found in criminal trials does not make the commitment proceedings criminal rather than civil. "The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution." (*Id*. at pp. 364-365.) In *Allen v. Illinois* (1986) 478 U.S. 364, 370-371, 374-375, the court held that commitment proceedings under an Illinois statute providing for civil commitment of a "sexually dangerous person" was civil, not criminal, and the privilege against self-incrimination did not apply under either the Fifth Amendment or as a matter of due process. The United States Supreme Court has also held that proof by clear and convincing evidence, rather than the beyond a reasonable doubt standard required in criminal actions, was sufficient for a civil commitment on the grounds of mental illness under Texas law. (*Addington v. Texas*, *supra*, 441 U.S. at pp. 427-432.)

Given this consistent line of authority from the United States Supreme Court, it is evident that an appeal of a civil commitment under California's MDO statutes does not equate with either an indigent criminal appeal or an indigent juvenile delinquency appeal. Accordingly, *Anders* has no application to the appeal in this case.

Finally, we conduct the three-part test set forth in *Lassiter* and applied in *Sade C.* to determine if denial of *Anders/Wende* review on an indigent's appeal of a MDO commitment violates the due process clause of the Fourteenth Amendment. As will be seen, these factors do not compel expansion of *Anders* and *Wende* on the basis of Fourteenth Amendment due process.

The first *Lassiter* element, that of appellant's private interest at stake, is not entirely one-sided. To be sure, appellant has a strong interest in being free from civil commitment under MDO to the extent it prevents his release from confinement. On the other hand, the civil commitment results from a finding, made beyond a reasonable doubt, that appellant has a severe mental disorder, which is not in remission, or cannot be kept in remission without treatment, and that by reason of the severe mental disorder, appellant represents a substantial danger to harm others. Appellant has a strong interest in obtaining treatment of the severe mental disorder, as a means of avoiding harm to others which is likely to result in lengthy incarceration in state prison.

Second, the state has a compelling interest in protecting its citizenry from future victimization by those with severe mental disorders. (See Cal. Const., art. 1, § 28 [creating a "bill of rights for victims of crime"].) "We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." (*Kansas v. Hendricks*, *supra*, 521 U.S. at p. 357.) Statutes providing for limited "involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control" (*id*. at p. 358) have historically survived constitutional scrutiny. (*Id*. at p. 363.)

Third, we do not believe that the absence of review under *Anders* and *Wende* is likely to lead to an erroneous result in the appeal of an indigent MDO. While it is always possible that the absence of *Anders/Wende* review may lead to an erroneous result, "As a

practical matter, we believe the chance of such error is negligible." (*Sade C.*, *supra*, 13 Cal.4th at p. 990.) As in *Sade C.*, we have no reason to doubt that appointed counsel in appeals in MDO commitment cases conduct themselves as active and professional advocates for their clients.

It is also questionable whether effective *Wende* review can be completed in most cases before the one year extension under section 2970 expires. The commitment under section 2970 is for one year from the date of the conclusion of a previous commitment. This case demonstrates the problem. Appellant's prior commitment expired on January 22, 2004, meaning the current commitment ended on January 21, 2005. Even with an expeditious handling of this appeal, following briefing of the issue of *Wende* review, our opinion is being filed well after the expiration of the one year extension currently under review. There is negligible benefit, if any, in applying *Wende* to an indigent appeal of an MDO commitment, when to do so will mean that no appellate resolution is likely to be reached before the order under review has expired. Application of *Wende* to indigent appeals of MDO commitments would therefore be the type of "unproductive" procedure that "theoretically" has "symbolic" value, but which value "is too slight to compel" invocation. (*Sade C.*, *supra*, 13 Cal. 4th at pp. 990-991.)

It is important to emphasize that our decision does not mean an indigent committed as an MDO will go without appellate representation. Representation will be provided, free of charge as required by statute. All that will be lacking is an independent review of the record by the appellate court, a practice not deemed sufficient in *Sade C.* to extend to a civil appeal.

As in *Sade C.*, we conclude that application of the three-part *Lassiter* test leads to the conclusion that the due process clause of the Fourteenth Amendment does not compel *Anders*'s "prophylactic" procedures to indigent appeals of MDO commitments.[2]

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[2] The issue of whether the *Wende* procedures apply to conservatorship appeals is currently pending before the California Supreme Court in *Conservatorship of Ben C.* (2004) 119 Cal.App.4th 710, review granted September 15, 2004, S126664. An earlier decision had held, over a strong dissent, that *Wende* continued to apply to

CONCLUSION

The appropriate remedy in this appeal is that adopted by the court in *Sade C.* "A 'reviewing court has inherent power, on motion or its own motion, to dismiss an appeal which it cannot or should not hear and determine.' [Citation.] An appealed-from judgment or order is presumed correct. (E.g., *Denham v. Superior Court* (1970) 2 Cal. 3d 557, 564.) Hence, the appellant must make a challenge. In so doing, he must raise claims of reversible error or other defect (see *ibid*.), and 'present argument and authority on each point made' (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591; accord, *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278). If he does not, he may, in the court's discretion, be deemed to have abandoned his appeal. (*Berger v. Godden, supra,* 163 Cal.App.3d at p. 1119.) In that event, it may order dismissal. (*Ibid*.) Such a result is appropriate here." (*Sade C., supra,* 13 Cal.4th at p. 994.)

The appeal is dismissed.

CERTIFIED FOR PUBLICATION.

KRIEGLER, J.*

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.

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conservatorship appeals after *Sade C.* (*Conservatorship of Margaret L.* (2001) 89 Cal.App.4th 675, 677.) There was no petition for review filed in *Margaret L.*, and the conflict in decisions will be decided by the court in *Ben C.*

* Judge of the Superior Court for the Los Angeles Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.