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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. GUADALUPE TORRES, Defendant and Appellant.	C048309 (Super. Ct. No. 8910978)

APPEAL from a judgment of the Superior Court of Yolo County, Michael Sweet, J. Dismissed as abandoned.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Charles A. French, Supervising Deputy Attorney General, Jeffrey D. Firestone, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Guadalupe Torres appeals his recommitment as a sexually violent predator (SVP). (Welf. & Inst. Code, § 6604.)[1]

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[1] Undesignated section references are to the Welfare and Institutions Code.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

We requested supplemental briefing on whether the procedures under *Anders v. California* (1967) 386 U.S. 738 [18 L.Ed.2d 493] (*Anders*) and *Wende, supra,* 25 Cal.3d 436 apply here. Defendant responds affirmatively; the Attorney General responds just the opposite. We conclude the *Anders/Wende* procedures are not applicable and will dismiss the appeal as abandoned.

PROCEDURAL HISTORY

The Yolo County District Attorney filed a petition to extend defendant's commitment as a SVP pursuant to section 6604. In his declaration, the prosecutor stated that defendant qualified as a SVP because he had previously been convicted of sexually violent offenses which involved two or more victims with whom he had a predatory relationship, that he had a current mental disorder and that by reason of the mental disorder, he was likely to reoffend in the future by committing another sexually violent offense.

Defendant waived his right to a jury trial (§ 6603, subd. (a)). After a court trial, the court found beyond a reasonable doubt that defendant was a SVP and recommitted defendant to Atascadero State Hospital for a term of two years, commencing on December 8, 2003. His recommitment expires on December 7, 2005.

DISCUSSION

The parties do not cite to, and we are unaware of, a published California case which considers whether the *Anders/Wende* procedure applies requiring the court to make a review of the entire record to an appeal by a SVP from an order of commitment or recommitment.

Anders* and *Wende

Anders determined that an indigent criminal defendant's appointed counsel who finds the case wholly frivolous could not simply file a no-merits letter with an appellate court but must instead file a brief "referring to anything in the record that might arguably support the appeal" and request permission to withdraw. The appellate court then examines the case to determine whether the appeal is wholly frivolous and if so, may grant the request to withdraw and dismiss the appeal or decide it on the merits if required by state law. When arguable issues are found by the appellate court, defense appellate counsel must be given the opportunity to argue. (*Anders, supra,* 386 U.S. at pp. 739-742, 744 [18 L.Ed.2d at pp. 495-498].) The *Anders* procedures are "not the result of an '"independent constitutional"' requirement but rather a '"prophylactic

framework"' for vindicating the right to counsel established in *Douglas v. California* [(1963)] 372 U.S. [353] at pages 357-358 [9 L.Ed.2d 811]" and "is relevant only when there is a constitutional right to counsel on appeal." (*In re Kevin S.* (2003) 113 Cal.App.4th 97, 103 (*Kevin S.*), citing *Smith v. Robbins* (2000) 528 U.S. 259, 273 [145 L.Ed.2d 756, 772] (*Smith*); *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555 [95 L.Ed.2d 539, 545] and *In re Sade C.* (1996) 13 Cal.4th 952, 972 (*Sade C.*).)

Wende determined that on an indigent criminal defendant's first appeal as of right, the appellate court was required under *Anders* and *People v. Feggans* (1967) 67 Cal.2d 444 (*Feggans*) "to make a review of the entire record before determining that the appeal was frivolous." (*Wende, supra,* 25 Cal.3d at pp. 440-441.) *Wende* also determined that appointed counsel is not required to seek permission to withdraw if he or she finds no arguable issues. (*Id.* at p. 442.) California's *Wende* procedure was upheld as constitutional. (*Smith, supra,* 528 U.S. at pp. 264-265 [145 L.Ed.2d at pp. 766-767].)

The *Anders/Wende* procedures have generally been applied in criminal appeals, not civil appeals, but there have been exceptions including paternity appeals, termination of parental rights, conservatorship appeals, and juvenile delinquency

appeals.[2] (*Sade C., supra,* 13 Cal.4th at p. 962, fn. 2, and cases cited therein.)

Sade C.

In *Sade C., supra,* 13 Cal.4th 952, the California Supreme Court concluded that the *Anders* procedures are inapplicable and should not be extended in an appeal involving an adverse decision affecting an indigent parent's custody of a child or his or her status as the child's parent. *Sade C.* determined that such review was neither compelled directly by *Anders* nor required by fundamental fairness, equal protection or policy. (*Id.* at pp. 959, 981-982, 984-993.)

Sade C. conducted a thorough review of the case law prior to, including, and subsequent to *Anders* (*Sade C., supra,* 13 Cal.4th at pp. 965-977) before summarizing its conclusions drawn therefrom:

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[2] Recently, in *Conservatorship of Ben C.* (2004) 119 Cal.App.4th 710 (*Ben C.*), Division One of the Fourth Appellate District of the Court of Appeal, concluded that the *Anders/Wende* procedures were inapplicable in conservatorship proceedings conducted pursuant to Welfare and Institutions Code sections 5350 et seq. (Lanterman-Petris-Short (LPS) Act). (*Ben C., supra,* at pp. 712, 716-718.) The California Supreme Court granted review in *Ben C.* and the case is currently pending (review granted September 15, 2004, S126664). On March 23, 2005, in *People v. Smith* (2005) 127 Cal.App.4th 896, Division Five of the Second Appellate District of the Court of Appeal, decided that the *Anders/Wende* procedures were inapplicable in proceedings conducted pursuant to Welfare and Institutions Code sections 2962 et seq. (Mentally Disordered Offenders (MDO)). (*Id*. at pp. 900-901, 908-912.) The California Supreme Court granted review on July 13, 2005, S133593, and the case is currently pending disposition of *Conservatorship of Ben C*.

"First, *Anders* establishes certain procedures for state appellate courts that are 'prophylactic' in nature. [Citations.] It does not, however, 'set down' any 'independent . . . command' derived from the United States Constitution itself. [Citations.] If, after conscientious examination, appointed appellate counsel, in an indigent criminal defendant's first appeal as of right, moves the appellate court for leave to withdraw on the ground that the appeal is 'wholly frivolous,' 'without merit,' or generally 'lack[ing] any basis in law or fact' [citation], these steps must be taken: Counsel must submit an *Anders* brief--which, although a peculiar kind of brief, is a brief nonetheless--'referring to anything in the record that might arguably support the appeal.' [Citation.] The defendant must next be 'furnished' a copy and 'allowed . . . [time] to raise any points that he chooses . . . .' [Citation.] The court must then conduct an *Anders* review, which is a 'full examination of all the proceedings . . . to decide whether the case is wholly frivolous.' [Citation.] If it does not find any point to be 'arguable on [its] merits,' it may grant counsel's motion to withdraw and proceed to dismiss the appeal, so far as federal constitutional principles are concerned, or decide it on the merits, if state law requires, on the basis that 'the case is wholly frivolous.' [Citation.] By contrast, if it does so find, it must 'afford the [defendant] the assistance of counsel to argue the appeal' [citation]--apparently, either by denying

counsel's motion to withdraw or by granting his request and appointing new counsel in his place.

"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. [Citations.] They do not extend to an appeal, even on direct review, that is discretionary. [Citation.] A fortiori, they do not reach collateral postconviction proceedings. [Citation.] Proceedings of this sort are considered civil in nature and not criminal. [Citation.] As such, they are far removed from the object of the *Anders* court's concern, which was the first appeal as of right *in a criminal action*.

"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. [Citations.] By operation of the due process guaranty, the right extends beyond nominal assistance to effective assistance. [Citations.] The same is true under the equal protection entitlement. [Citations.]

"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. [Citations.] In a word, *Anders* seeks to ensure that 'counsel acts in the role of an active advocate in behalf of his client . . . .' [Citation.] In aid thereof, it requires an *Anders* brief from counsel, to compel him to play, and to show that he has played, the part that is proper to him as an attorney and the one for which he is suited. It also requires *Anders* review from the court, to compel it to assure itself, on an adequate basis, that counsel has done so and need do no more. Counsel's withdrawal, of course, deprives the defendant of his continued assistance, effective or otherwise. [Citation.] It may be allowed only if any further assistance would be inutile--that is to say, only if the 'appeal lacks any basis in law or fact' [citation]." (*Sade C., supra,* 13 Cal.4th at pp. 977-979, fn. omitted.)

Sade C. discussed *Feggans* and *Wende*, noting that *Wende* "reaches somewhat beyond *Anders*" in stating 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. 979-981, orig. italics.)

In determining that the *Anders* procedures are not directly compelled by the facts before it, *Sade C.* pointed out that an indigent parent is not a criminal defendant; the proceedings were civil not criminal; and the *Anders* procedures are "dependent" upon and "designed solely to protect" the indigent criminal defendant's right under the Fourteenth Amendment to the assistance of appellate counsel, only in his first appeal as of

right, a right which does not exist for the indigent parent. (13 Cal.4th at pp. 981-983.)[3]

In determining that the *Anders* procedures were not required by the due process clause of the Fourteenth Amendment and its requirement of fundamental fairness, *Sade C.* reviewed the elements test of *Lassiter v. Department of Social Services* (1981) 452 U.S. 18 [68 L.Ed.2d 640] (*Lassiter*): "(1) the private interests at stake; (2) the state's interests involved; and (3) the risk that the absence of the procedures in question will lead to an erroneous resolution of the appeal." (*Sade C., supra,* 13 Cal.4th at pp. 986-987.) That analysis is as follows:

"The private interests at stake are those of the indigent parent and his child. They are not reflected in the United States Constitution itself, which is 'verbally silent on the specific subject' of children as well as parents. [Citation.] Rather, they have been found to be implicit in the 'liberty' protected by the Fourteenth Amendment's due process clause. [Citations.]

"The indigent parent has a 'liberty interest . . . in the care, custody, and management of' his child. [Citations.] This concern has been characterized as 'fundamental.' [Citations.] The parent has a derivative 'liberty interest' [citation] in the

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[3] *Sade C.* twice disapproved "any decision of ours or of the Courts of Appeal" which "states or implies that the applicability of *Anders* goes beyond what is described in the text. . . ." (13 Cal.4th at pp. 983, 993, fns. 13 & 21.)

‘accuracy and justice’ [citations] of the resolution of his appeal. This concern has been described as ‘extremely important’ in general [citation] and in fact ‘commanding’ when parental status is involved and not merely child custody [citations]. As a theoretical matter, these interests call for *Anders’*s ‘prophylactic’ PROCEDURES: they would arguably receive added, and appropriate, protection if steps were taken to ensure that ‘counsel acts in the role of an active advocate in behalf of his client’ [citation]. It must be noted, however, that the appealed-from decision, which is adverse to the parent and is predicated on detriment he caused or allowed his child to suffer, is presumptively accurate and just. [Citation.]

“The child has a ‘liberty interest[]’ [citation] in a ‘normal family home’ [citation], with his parents if possible [citation], or at least in a home that is ‘stable’ [citation]. This concern has been characterized as ‘important’ [citation] and even ‘compelling’ [citation]. ‘It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or [other caretakers]. There is little that can be as detrimental to a child’s sound development as uncertainty over whether he is to remain in his current “home,” . . . especially when such uncertainty is prolonged.’ [Citation.] The child has a derivative ‘liberty interest[]’ [citation] in an accurate and just resolution of his parent’s appeal [citation]. This concern too might be called ‘important’ [citation] and even ‘compelling’ [citation]. As a

theoretical matter, these interests may either call for, or counsel against, *Anders*'s 'prophylactic' procedures. What the parent wants or needs is not necessarily what the child wants or needs. [Citation.] If consistent, any added protection arguably given to the parent might benefit the child as well. If inconsistent, however, such protection might effectively cause the child harm by helping the parent. The presumption, evidently, is that the wants and needs of parent and child are *inconsistent*. As stated, the appealed-from decision, which is predicated on detriment the parent caused or allowed his child to suffer, is presumptively accurate and just. [Citation.]

"The second element embraces the state's interests. The state has a '*parens patriae* interest in preserving and promoting the welfare of the child . . . .' [Citations.] This concern has been characterized as 'urgent' [citations] and even 'compelling' [citation]. The state also has an interest in an accurate and just resolution of the parent's appeal. [Citations.] This concern might be called 'important' [citation] and even 'compelling' [citation]. Finally, the state has a 'fiscal and administrative interest in reducing the cost and burden of [the] proceedings.' [Citations.] This concern has been deemed merely 'legitimate.' [Citation.] To be sure, money counts little. '[I]t is hardly significant enough to overcome private interests as important as those' of the indigent parent and his child. [Citation.] But time counts more. Proceedings such as these 'must be concluded as rapidly

as is consistent with fairness . . . .' [Citation.] A 'period of time' that 'may not seem . . . long . . . to an adult . . . can be a lifetime to a young child.' [Citation.] 'Childhood does not wait for the parent to become adequate.' [Citation.] As a theoretical matter, these interests may either call for, or counsel against, *Anders'*s 'prophylactic' procedures. They are in opposition to the extent that an economical and expeditious resolution is hindered. They are in support, by contrast, to the extent that an accurate and just resolution is facilitated. But to repeat: The appealed-from decision, which is adverse to the parent and is predicated on detriment he has caused or allowed his child to suffer, is presumptively accurate and just. It presumptively establishes that the child's welfare lies with someone *other than* his parent.

"The third and final element concerns the risk that the absence of *Anders'*s 'prophylactic' procedures will lead to an erroneous resolution of the indigent parent's appeal. As a practical matter, we believe that the chance of error is negligible. We do not ignore the fact that such error may be irremediable. [Citation.] Nevertheless, our consideration of the many cases that have come before us on petition for review reveals that appointed appellate counsel faithfully conduct themselves as active advocates in behalf of indigent parents. This causes no surprise: the attorneys are enabled, and indeed encouraged, to effectively represent their clients by the procedural protections accorded them in the Court of Appeal,

including the right to precedence over all other causes [citation], which parallel those accorded them in the juvenile court [citation]. In accord is the experience of Division One of the Fourth Appellate District of the Court of Appeal, as it recently recounted in *In re Angelica V*. Having applied the procedures in question for more than a decade under its holdings in *Brian B*. and *Joyleaf W*., the court declared that 'we have discovered, to the best of our present recollection, *no* unbriefed issues warranting further attention.' [Citation.] As a result, it judged the procedures 'unproductive' [citation], and overruled *Brian B*. and *Joyleaf W*." (*Sade C., supra,* 13 Cal.4th at pp. 987-990, fns. omitted, orig. italics.)

Having considered the elements of *Lassiter, Sade C.* concluded that fundamental fairness did not compel imposition of the *Anders* procedures. (*Sade C., supra,* 13 Cal.4th at pp. 990-991.)

Sade C. also considered but rejected a due process argument based on the additional element required by the state's due process clause, "'the dignitary interest in informing individuals of the nature, grounds and consequences of the [governmental] action [in question] and in enabling them to present their side of the story before a responsible governmental official . . . .' [Citations.]" (13 Cal.4th at p. 991.) *Sade C.* concluded that the dignitary interest "could not command" the *Anders* procedures "which do not serve the

underlying values of notice and participation" and were nearly "'unproductive.'" (*Ibid.*)

As far as equal protection as a ground to extend the *Anders* procedures to an indigent parent's appeal, *Sade C.* rejected such claim. "Criminal defendants and parents are not similarly situated. By definition, criminal defendants face punishment. Parents do not. [Citation.] Criminal defendants, as such, are expressly given protections in the United States Constitution itself. [Citations.] Parents are not. Moreover, at trial, criminal defendants have a general right under the Fourteenth Amendment's due process clause to the assistance of appointed trial counsel if indigent [citation], are entitled to fully confront and cross-examine witnesses under the Sixth Amendment as made applicable to the states through the Fourteenth Amendment's due process clause [citation], and are favored by the imposition on the state of the burden of proof beyond a reasonable doubt, also through the Fourteenth Amendment's due process clause [citation]; and, in their first appeal as of right, they have a general right to appointed appellate counsel under both the due process and equal protection clauses of the Fourteenth Amendment [citation]. Parents are not so benefited. In analogous proceedings at the trial level, they do not have a general due process right to appointed trial counsel [citation], are not entitled to full confrontation and cross-examination [citation], and are not favored through the standard of proof beyond a reasonable doubt [citation]; on appeal, they do not

have a general federal constitutional right to appointed appellate counsel, at least not by operation of the due process clause." (*Sade C., supra,* 13 Cal.4th at pp. 991-992, fn. & italics omitted.) *Sade C.* also rejected an argument based on the state's equal protection clause. (*Id.* at p. 992, fn. 19.)

Finally, *Sade C.* rejected an argument that the *Anders* procedures should be extended as a matter of policy, finding that "[w]hatever the benefits in ensuring that appointed appellate counsel conduct themselves as active advocates--they appear to be relatively small--the costs [which include time, money, and delay in finality] are greater." (13 Cal.4th at pp. 992-993.)

Subsequent Case Law

In *Conservatorship of Margaret L.* (2001) 89 Cal.App.4th 675 (*Margaret L.*), the court concluded, over a strong dissent, that *Wende* review continued to be required in conservatorships of the person appeals, finding that *Sade C.* did not directly disapprove of *Conservatorship of Besoyan* (1986) 181 Cal.App.3d 34 at page 38 which held, "*Wende* review is applicable where appointed appellate counsel has filed a brief on behalf of an LPS [Lanterman-Petris-Short] conservatee which raises no specific issues or describes the appeal as frivolous." (*Margaret L., supra,* at pp. 679-680, 682.) *Margaret L.* noted that while *Besoyan's* rationale which relied upon one line of authority (finding *Wende* applicable in civil proceedings involving the parent/child relationship) had been rejected by *Sade C.*, the

other line of authority upon which *Besoyan* relied remained "intact," that is, *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (*Roulet*). (*Margaret L., supra,* 89 Cal.App.4th at pp. 679-680.) Although "*Roulet* predated *Wende* and involved a different issue, whether civil or criminal procedures should be applied in the trial of conservatorships[,]" *Margaret L.* determined that a "reasonable reading" of *Roulet* led to the conclusion that a conservatorship proceeding which involved the person was, in essence, a criminal case since the person's involuntary civil commitment to a mental hospital is a deprivation of liberty. (*Margaret L., supra,* 89 Cal.App.4th at pp. 679-681.)

Citing *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005 (*Susan T.*), the dissent in *Margaret L.* concluded that the California Supreme Court had already rejected any notion that "conservatorship proceedings resulting in an involuntary commitment . . . should be treated as if they are criminal cases." (89 Cal.App.4th at pp. 685-686.)

Susan T. rejected a claim that an LPS conservatee had the right to seek to exclude evidence seized in violation of the Fourth Amendment, noting that prior decisions applying the exclusionary rule and involving noncriminal proceedings identified with criminal law enforcement (forfeiture proceedings). (8 Cal.4th at pp. 1014-1015.) *Susan T.* concluded: "We find no similarity between the aims and objectives of the [LPS] act and those of the criminal law. What we have said of commitment proceedings for the mentally retarded

(§§ 6500-6513) is equally true of conservatorship proceedings under the act: 'The commitment is not initiated in response, or necessarily related, to any criminal acts; it is of limited duration, expiring at the end of one year and any new petition is subject to the same procedures as an original commitment [citation]; the petitioner need not be a public prosecutor. . . . The sole state interest, legislatively expressed, is the custodial care, diagnosis, treatment, and protection of persons who are unable to take care of themselves and who for their own well being and the safety of others cannot be left adrift in the community. The commitment may not reasonably be deemed punishment either in its design or purpose. It is not analogous to criminal proceedings.' [Citations.]" (*Id.* at p. 1015.)

Although a conservatee has the rights to counsel, to a jury trial, to a unanimous jury verdict, to a free transcript on appeal and the prosecutor's burden of proof is beyond a reasonable doubt, the dissent in *Margaret L.* found too many differences to equate conservatorship proceedings with criminal cases: "[A] conservatee's commitment is different in purpose and duration from a criminal defendant's incarceration, differences exist that afford a conservatee rights not granted to a criminal defendant. For example, conservatorships under section 5350 last for only one year. [Citation.] During that time, a conservatee can petition for immediate release or for a modification of the conservatorship's terms. [Citations.]

Also, as happened in this case, conservatees who display improvement can receive day passes to temporarily leave the facility where they are committed. [¶] To extend the commitment beyond one year, the petitioning party must again prove beyond a reasonable doubt the conservatee is, at that time, gravely disabled. [Citations.] And, if requested, the conservatee is entitled to have the new proceeding tried before a jury. [Citations.] [¶] Conversely, other rights granted to criminal defendants do not apply to proposed conservatees. As noted, the exclusionary rule employed to remedy Fourth Amendment violations is inapplicable in conservatorship proceedings. [Citation.] Unless an answer would be inculpatory, neither does the privilege against self-incrimination. [Citations.] Nor does the double jeopardy doctrine preclude the state from seeking to establish a conservatorship subsequent to a prior adverse decision. [Citation.]" (89 Cal.App.4th at pp. 686-687.)[4]

In *Kevin S., supra,* 113 Cal.App.4th 97, the Second Appellate District, Division Five, concluded that the *Anders/Wende* procedures are applicable in a juvenile delinquency proceeding despite being labeled a "civil" proceeding. (*Id.* at pp. 99, 107, 109, 119.) "As the United States Supreme Court has

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[4] As previously stated, *Ben C.* concluded that the *Anders/Wende* procedures were inapplicable in LPS conservatorship proceedings (119 Cal.App.4th at pp. 712, 716-718) and the California Supreme Court granted review (S126664).

recognized, the interests at stake in a juvenile delinquency proceeding parallel those at risk in a criminal prosecution. [Citations.] In a juvenile delinquency proceeding, a minor is accused of criminal conduct. [Citation.] The delinquency proceeding carries with it the prospect of curtailed physical freedom for an extended period of time. . . . [T]he 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.] . . . [T]he 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. . . . [T]he United States Supreme Court emphasized that, contrary to historical notions, minors adjudicated delinquents *are* stigmatized by that finding. [Citations.] [¶] [S]ome juvenile 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. [Citations.] This amplifies the justification for including delinquency appeals within the *Fourteenth Amendment* list of rights available to both adults and minors." (*Id.* at p. 118, orig. italics.)

Anders/Wende **in an Indigent SVP Appeal**

"Despite the ominous name, the SVP [Act] operates in a familiar manner when considered in light of other involuntary commitment procedures in this state and across the nation." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1142 (*Hubbart*).) "The SVPA is narrowly focused on a select group of violent criminal offenders who commit particular forms of predatory sex acts against both adults and children, and who are incarcerated at the time commitment proceedings begin. Commitment as an SVP cannot occur unless it is proven, beyond a reasonable doubt, that the person currently suffers from a clinically diagnosed mental disorder, is dangerous and likely to continue committing such crimes if released into the community, and has been found to have sexually victimized at least two people in prior criminal proceedings. The problem targeted by the Act is acute, and the state interests--protection of the public and mental health treatment--are compelling. [Citations.]" (*Id.* at p. 1153, fn. 20.)

"The Act is based on the premise that SVP's suffer from clinically diagnosable mental disorders which require psychiatric care and treatment, and which are not a proper basis for commitment under other mental health schemes. (See §§ 6600, subds. (a) & (c), 6604, 6606.) The Legislature also evidently determined that because SVP's have committed sexually violent offenses in the past and are dangerous at the time of commitment, they should receive treatment in a secure

psychiatric facility suited to addressing the special risks they present. (See §§ 6600, subds. (a) & (b), 6600.05, 6604.) [¶] Moreover, the Act is accompanied by a declaration of the Legislature's intent to establish a nonpunitive, civil commitment scheme covering persons who are to be viewed, 'not as criminals, but as sick persons.' (§ 6250; see Stats. 1995, ch. 763, § 1.) Commitment and treatment are proper under the Act only for so long as the person is both mentally disordered and dangerous." (*Hubbart, supra*, 19 Cal.4th at p. 1166.)

Defendant's commitment as a SVP is considered a civil matter or a special proceeding of a civil nature with "many of the trappings of a criminal proceeding" (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1192 (*Hurtado*); see *Hubbart, supra*, 19 Cal.4th at p. 1166; see *People v. Superior Court* (*Cheek*) (2001) 94 Cal.App.4th 980, 988; see *Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 680) including: the right to a probable cause hearing at which the SVP is entitled to the assistance of counsel (§ 6602); the right to a jury trial at which the SVP is entitled to the assistance of counsel, defense experts and access to all records (§ 6603); the right to a unanimous verdict in any jury trial (§ 6603, subd. (f)); and proof beyond a reasonable doubt (§ 6604); *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 246). That the proceeding is labeled civil or criminal is not determinative of whether certain standards or procedures apply. (*Allen v. Illinois* (1986) 478 U.S. 364, 370-374 [92 L.Ed.2d 296, 305-308] [Illinois Sexually Dangerous

Persons Act] (*Allen*); *In re Winship* (1970) 397 U.S. 358, 365-366 [25 L.Ed.2d 368, 376] [juvenile dependency proceedings]; *In re Gault* (1967) 387 U.S. 1, 49-50 [18 L.Ed.2d 527, 558] [juvenile delinquency proceedings].) SVP proceedings violate neither the federal or state ex post facto clause nor the prohibition against double jeopardy. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 360-370 [138 L.Ed.2d 501, 514-520] (*Hendricks*); *Hubbart, supra,* at p. 1175.) Defendant has a testimonial privilege but not the absolute right to remain silent. (*Allen, supra,* at pp. 369-370 [92 L.Ed.2d at pp. 304-305]; *People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1443 [MDO proceeding under section 2972].) Defendant cannot seek to suppress evidence as unconstitutionally obtained. (See *Susan T., supra*, 8 Cal.4th at pp. 1015-1016 [LPS conservatorship proceedings].)

The *Anders/Wende* procedures are compelled in an indigent criminal defendant's first appeal as a matter of right. Here, defendant has been civilly committed based on his mental disorder, dangerousness and prior predatory history. Defendant is not a criminal defendant in a SVP proceeding. The *Anders/Wende* procedures are not directly compelled. (*Sade C.*, *supra*, 13 Cal.4th at pp. 981-983.)

A closer question is whether the *Anders/Wende* procedures are required as a matter of fundamental fairness. Applying the elements test of *Lassiter*, we first consider the private interests at stake. Defendant's liberty interest and reputation are at stake. (*Hurtado, supra,* 28 Cal.4th at p. 1194.) In

fact, where a SVP's mental disorder is unamenable to treatment, he may be recommitted every two years, indefinitely, resulting in lifetime confinement. (*Ibid.*) This factor weighs in favor of review.

The state's interest is greater. "[C]onsistent with 'substantive' due process requirements, the state may involuntarily commit persons who, as the result of mental impairment, are unable to care for themselves or are dangerous to others. Under these circumstances, the state's interest in providing treatment and protecting the public prevails over the individual's interest in being free from compulsory confinement. [Citations.]" (*Hubbart, supra,* 19 Cal.4th at p. 1151.)

The final interest under *Lassiter,* the risk that the absence of the *Anders* procedures will lead to an erroneous resolution of an indigent SVP's appeal, weighs against review. Competent counsel is appointed for an indigent SVP who challenges his or her commitment or recommitment on appeal. Other procedures built in the SVP Act also suggest that errors will be negligible. "Various provisions seek to ensure that any commitment ordered under section 6604 does not continue in the event the SVP's condition materially improves." (*Hubbart, supra,* 19 Cal.4th at p. 1147.) A SVP's mental health is evaluated every year. (§ 6605.) A SVP may petition for release every year whether or not the Director of Mental Health does so. (§ 6608.) Further, during the commitment period, a SVP may be conditionally released. (§§ 6607, 6608.) The commitment lasts

two years and recommitment requires a new jury trial and proof beyond a reasonable doubt. (§ 6604.) Here, as we decide this case, defendant's recommitment is about to expire and possibly new recommitment proceedings have already been initiated assuming defendant continues to suffer a mental disorder. Unlike a criminal defendant whose imprisonment is set, a SVP's confinement may be adjusted depending on what occurs during the commitment period.

We conclude that the fundamental fairness requirement of the due process clause of the Fourteenth Amendment does not compel the *Anders* procedures in an appeal by an indigent SVP from a recommitment order. We likewise reject any state due process claim, concluding as *Sade C.* did, that the dignitary interest "could not command" the *Anders* procedures "which do not serve the underlying values of notice and participation" and were nearly "'unproductive.'" (13 Cal.4th at p. 991.)

Equal protection does not require that the *Anders* procedures be extended here, since defendant, as a SVP who faces commitment for treatment of his mental disorder, is not similarly situated to a criminal defendant who faces punishment. (See *Cooley, supra,* 29 Cal.4th at p. 253; *Sade C., supra,* 13 Cal.4th at pp. 991-992.)

CONCLUSION

"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. [Citation.] Hence, the appellant must make a challenge. In so doing, he must raise claims of reversible error or other defect [citation], and 'present argument and authority on each point made' [citations]. If he does not, he may, in the court's discretion, be deemed to have abandoned his appeal. [Citation.] In that event, it may order dismissal. [Citation.] Such a result is appropriate here. With no error or other defect claimed against the orders appealed from, the Court of Appeal was presented with no reason to proceed to the merits of any unraised 'points'--and, a fortiori, no reason to reverse or even modify the orders in question. [Citation.]" (*Sade C., supra,* 13 Cal.4th at p. 994, fn. omitted.)

DISPOSITION

The appeal is dismissed as abandoned.

CANTIL-SAKAUYE, J.

We concur:

MORRISON, Acting P.J.

BUTZ, J.