A Call to Abandon the *Anders* Procedure that Allows Appointed Appellate Criminal Counsel to Withdraw on Grounds of Frivolity

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Imagine you have been wrongly convicted of a crime. The State's evidence against you is strong. You do not have any affirmative defenses. You simply deny having committed the crime. After trial, your appointed counsel meets with you. She informs you that she can find no good faith basis for bringing an appeal. Accordingly, she informs you that if you wish to pursue an appeal, she will withdraw as your appointed counsel. Further, she will inform both the appellate court and the State of the strategies that she considered before concluding that there is no good faith basis for arguing your conviction should be overturned. If the appellate court examines the evidence and confirms your appointed counsel's conclusion, it will not

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appoint another attorney for you once your appointed counsel withdraws. You will be left to defend yourself pro se.

Such a process seems shocking, yet this is precisely the possibility that indigent criminal appellants face in Washington State.[1] The Washington Rules of Appellate Procedure (RAP) provide as follows:

> If counsel appointed to represent an indigent defendant can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent. The motion shall identify the issues that could be argued if they had merit and, without argument, include references to the record and citations of authority relevant to the issues. The adverse party shall file an answer to the motion within 30 days after the motion is served on the adverse party. If requested by the court, an amended answer shall be submitted including argument as to why the identified issues are without merit. The motion and answer will be reproduced by the clerk and served on the adverse party and the person represented by counsel seeking to withdraw.[2]

This procedure, which I shall refer to as the *Anders* Procedure, was adopted by the Washington State Supreme Court following the United States Supreme Court's decision in *Anders v. California*.[3] In this article, I argue that the Washington State Supreme Court should abandon the *Anders* Procedure and repeal RAP 18.3(a)(2) for three reasons. First, the *Anders* Procedure infringes on an indigent criminal appellant's right of appeal under the Washington State Constitution.[4] Second, no ethical rule in Washington prevents an appointed appellate counsel from prosecuting an appeal that counsel believes, in his or her subjective opinion, lacks merit.[5] Third, and most importantly, the *Anders* Procedure creates role conflicts by requiring the appellant's appointed counsel to assist the State and by requiring the appellate court to assist the appellant.[6] Thus, abandoning the *Anders* Procedure will protect the

1. The *Anders* Procedure is used with considerable frequency in Washington. From 2008 to 2010, it was used in sixty-five criminal appeals. E-mail from Syl Field, Div. II, Wash. State Court of Appeals, to Eric B. Schmidt, Comm'r, Div. II, Wash. State Court of Appeals (June 22, 2011, 10:24 AM) (on file with *Gonzaga Law Review*); E-mail from Monica Wasson, Comm'r, Div. III, Wash. State Court of Appeals, to Eric B. Schmidt, Comm'r, Div. II, Wash. State Court of Appeals (June 23, 2011, 9:16 AM) (on file with *Gonzaga Law Review*). Additional figures are available in a Westlaw search of September 15, 2011 on file with *Gonzaga Law Review*. For recent examples of the procedure's use, see State v. Darrington, No. 64249-9-I, 2011 WL 6509, at *1 (Wash. Ct. App., Jan. 3, 2011), and State v. Haggard, No. 37673-3-II, 2009 WL 924895, at *1 (Wash. Ct. App., Apr. 7, 2009).

2. WASH. R. APP. P. 18.3(a)(2).

3. 386 U.S. 738 (1967).

4. *See* discussion *infra* Part V.

5. *See* discussion *infra* Part VI.

6. *See* discussion *infra* Part VII.

indigent criminal appellant's right of appeal and allow appointed counsel, prosecutors and appellate courts to return to their proper roles.

I. THE BIRTH OF THE *ANDERS* PROCEDURE

Following conviction of felony possession of marijuana in California, Charles Anders appealed.[7] The California District Court of Appeal appointed counsel for him.[8] After studying the record, however, Anders's appointed counsel concluded the appeal had no merit.[9] The counselor informed the appellate court by letter of his conclusion: "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him . . . ."[10]

Anders's counsel also informed the court of his client's desire to file a brief on his own behalf.[11] Anders moved for the court to appoint new counsel, but the court denied his motion.[12] Anders filed a pro se brief, to which the State responded.[13] The appellate court affirmed Anders's conviction in a unanimous ruling.[14]

Six years later, Anders applied for a writ of habeas corpus in the California District Court of Appeal, arguing that the court's handling of his original appeal denied him his constitutional right to counsel.[15] The court denied his application, stating that it followed the procedure required under *In re Nash*[16] by reviewing the record and concluding that Anders's appeal was without merit.[17] The Supreme Court of California also denied Anders's petition for a writ of habeas corpus.[18] The United States Supreme Court granted certiorari.[19]

Anders was merely the latest in a series of opinions in which the Supreme Court addressed the rights of indigent criminal appellants. In *Griffin v. Illinois*,[20] indigent appellants petitioned for transcripts of their trials without cost to them.[21] Illinois courts denied their petitions on the grounds that, except for appellants sentenced to death or appellants raising constitutional questions, Illinois law did not require

7. *Anders*, 386 U.S. at 739.
8. *Id.*
9. *Id.*
10. *Id.* at 742 (omission in original).
11. *Id.* at 739-40.
12. *Id.* at 740.
13. *Id.*
14. *Id.*
15. *Id.*
16. 393 P.2d 405 (Cal. 1964) *abrogated by Anders*, 386 U.S. at 745-46.
17. *Anders*, 386 U.S. at 740.
18. *Id.* at 740-41.
19. Anders v. California, 383 U.S. 966 (1966) (mem.).
20. 351 U.S. 12 (1956).
21. *Id.* at 13.

providing free transcripts to indigent appellants.[22] The Supreme Court vacated the decision and remanded the case, holding that a denial of transcripts to appellants where necessary to prosecute an appeal was a violation of due process and equal protection.[23] Instead, "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[24]

Similarly, in *Eskridge v. Washington State Board of Prison Terms & Paroles*,[25] an indigent appellant requested a no-cost transcript of his trial.[26] At the time, Washington law provided that an indigent appellant could be provided with a transcript produced at public expense only if, in the trial judge's opinion, "'justice will thereby be promoted.'"[27] The trial judge denied Eskridge's request, finding that "'justice would not be promoted'" because the defendant had already "'been accorded a fair and impartial trial . . . .'"[28] Twenty-one years later, Eskridge filed a petition for a writ of habeas corpus in the Washington State Supreme Court, contending that the failure to provide him with a free transcript violated due process and equal protection.[29] The Washington State Supreme Court denied the petition without opinion.[30]

The United States Supreme Court granted certiorari[31] and, relying on *Griffin*, held that the Washington courts had denied Eskridge's rights to due process and equal protection.[32] The Court remarked that "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript."[33]

The United States Supreme Court soon extended its holding in *Griffin* by granting indigent appellants the right to appointed counsel on first appeal. In *Douglas v. California*,[34] indigent appellants requested appointed counsel on appeal.[35] The California District Court of Appeal denied their requests, stating that "it had 'gone through' the record and had come to the conclusion that 'no good whatever could be

22. *Id.* at 14-15.
23. *Id.* at 18, 20.
24. *Id.* at 19.
25. 357 U.S. 214 (1958).
26. *Id.* at 215.
27. *Id.* (quoting REM. REV. STAT. § 42-5 (1932) (recodified as amended at WASH. REV. CODE § 2.32.240 (2010))).
28. *Id.*
29. *Id.* at 215.
30. *Id.*
31. Eskridge v. Schneckloth, 353 U.S. 922 (1957) (mem.).
32. *Eskridge*, 357 U.S. at 216.
33. *Id.*
34. 372 U.S. 353 (1963).
35. *Id.* at 354.

served by appointment of counsel.'"[36] California law at the time provided that "upon the request of an indigent for counsel, [the appellate court] may make 'an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed.'"[37] After granting certiorari, the United States Supreme Court held that the California procedure for appointing counsel to indigent appellants discriminated against indigent appellants in the same way that denying them free transcripts did in *Griffin*.[38] The Court concluded as follows:

> In California . . . once the court has "gone through" the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own, as best he can, no matter how meritorious his case may turn out to be. The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[39]

Finally, in *Anders*,[40] the Court concluded that the California procedure, of having appointed counsel file a "no-merit" letter and then having the appellate court review the record for error, was similar to the process forbidden in *Eskridge*.[41] It was therefore insufficient to satisfy an indigent appellant's rights to due process and equal protection.[42] Instead, the Court set out the following standards for appointed counsel:

> 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.

36. *Id.* at 354-55 (quoting People v. Douglas, 10 Cal. Rptr. 188, 195 (Dist. Ct. App. 1960)).

37. *Id.* at 355 (quoting People v. Hyde, 331 P.2d 42, 43 (Cal. 1958) (internal quotation marks omitted)).

38. *Id.* at 355-56.

39. *Id.* at 357-58.

40. Anders v. California, 386 U.S. 738 (1967).

41. *Id.* at 742-43.

42. *See id.* at 744.

> 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. The request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.[43]

Thus, the *Anders* Procedure was born.

If appointed counsel concluded that the appeal for which she was appointed was wholly frivolous, she could file an *Anders* Brief, in which she must "refer[] to anything in the record that might arguably support the appeal."[44] The indigent appellant must have an opportunity to raise any points that he or she chooses to address.[45] Then, the appellate court must examine all of the record and decide if the appeal is "wholly frivolous."[46] Upon a finding of frivolity, appointed counsel may take leave to withdraw as counsel for the indigent appellant.[47] If, however, the appellate court concludes that the appeal is not "wholly frivolous," then it must require counsel to file a brief arguing the appeal.[48]

II. WASHINGTON'S ADOPTION OF THE *ANDERS* PROCEDURE

Three years later, in *State v. Theobald*,[49] Washington adopted, without discussion, the *Anders* Procedure, allowing for motions to withdraw by appointed counsel when he or she concludes that an appeal would be wholly frivolous.[50] In

43. *Id.* (footnote omitted).

44. *Id.*

45. *Id.*

46. *Id.*; *see* WASH. CONST. art. IV, § 2 (requiring the Washington State Supreme Court to state the grounds for each decision it reaches); WASH. REV. CODE § 2.06.040 (2010) (requiring the Washington State Court of Appeals to state the grounds for each decision it reaches).

47. *Anders*, 386 U.S. at 744.

48. *Id.* For an example of such an appeal, see State v. Lagervall, No. 37647-4-II, 2010 WL 928436, at *1 n.2 (Wash. Ct. App. Mar. 10, 2010), in which the reviewing court found the appeal was not frivolous and directed the attorney to file an advocate's brief.

49. 470 P.2d 188 (Wash. 1970).

50. *Id.* at 189.

adopting its Rules of Appellate Procedure in 1976,[51] the Washington State Supreme Court implemented RAP 15.2(h) pertaining to appointed counsel representing indigent defendants. That rule provided as follows:

> If counsel can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent. The motion should be supported by a brief. The motion and brief will be reproduced by the clerk and served on the opposing party and the person represented by counsel seeking to withdraw.[52]

The Washington State Supreme Court also adopted RAP 18.3, which applied to both retained counsel representing non-indigent appellants and appointed counsel representing indigent appellants.[53] That rule provided, in pertinent part:

> Except for indigent appointments and withdrawals as provided in [RAP] 15.2([h]), counsel for a defendant in a criminal case may withdraw only with the permission of the appellate court on a showing of good cause. The appellate court will not ordinarily grant permission to counsel to withdraw after the opening brief has been filed. A motion to withdraw must be served on all parties and on the defendant personally.[54]

While the Washington State Supreme Court did not publish any drafters' comments about RAP 15.2(h), it was understood to refer to the brief defined in *Anders*, as adopted in *Theobald.* However, in *State v. Pollard*,[55] the State argued that a brief filed under RAP 15.2(h) requires appointed counsel to not only "refer[] to anything in the record that might arguably support the appeal," but to analyze why those potential arguments are frivolous.[56] Pollard responded that requiring his counsel to analyze why he concluded the potential arguments were frivolous would "'force appointed counsel to brief his case against his client,'" in violation of *Anders*.[57] The Court of Appeals agreed with Pollard and held that an *Anders* Brief need not contain analysis of why the appointed counsel believed the potential arguments were frivolous.[58]

51. WASH. R. APP. P. 1.1-18.24, 86 Wash. 2d 1138, 1138-1310 (1976).

52. WASH. R. APP. P. 15.2(h), 86 Wash. 2d 1233, 1233 (1976) (recodified as amended at WASH. R. APP. P. 15.2(i)).

53. WASH. R. APP. P. 18.3, 86 Wash. 2d 1266, 1266 (1976) (recodified as amended at WASH. R. APP. P. 18.3(a)(1)).

54. *Id.*

55. 834 P.2d 51 (Wash. Ct. App. 1992), *cert. denied*, 844 P.2d 436 (Wash. 1992).

56. *Id.* at 55-56.

57. *Id.* at 56 (emphasis omitted) (quoting Anders v. California, 386 U.S. 738, 745 (1967)).

58. *Id.* at 57.

In order to resolve this and other issues about the necessary content of an *Anders* brief in Washington,[59] in 1994 the Washington State Supreme Court adopted RAP 18.3(a)(2), which provides in pertinent part as follows:

> If counsel appointed to represent an indigent defendant can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent. The motion shall identify the issues that could be argued if they had merit and, without argument, include references to the record and citations of authority relevant to the issues.[60]

RAP 18.3(a)(2) has not been further amended and so defines the current requirements for an *Anders* Brief in Washington.[61]

In 1997, the Washington State Supreme Court rejected an attempt by the Washington State Court of Appeals to reduce its role when appointed counsel files an *Anders* Brief.[62] Adopting an opinion by Judge Posner of the United States Court of Appeals for the Seventh Circuit,[63] the Washington State Court of Appeals had concluded that "when the *Anders* brief makes it apparent that counsel has taken his or her duty [to ascertain that there is no merit to the appeal] seriously, we will rely on counsel's competence as we do in all other instances" and would not conduct an

59. *See, e.g.*, State v. Robinson, 794 P.2d 1293, 1296 (Wash. Ct. App. 1990) (concluding that a brief filed under RAP 15.2(h) did not comply with the *Anders* requirements because it "did not contain citations to the record or legal authority supporting any arguable issues on appeal"), *cert. denied*, 803 P.2d 1311 (Wash. 1991).

60. WASH. R. APP. P. 18.3(a)(2), 124 Wash. 2d 1140, 1140 (1994). By 1993, the Washington State Supreme Court had renumbered former RAP 18.3 as RAP 18.3(a)(1) and removed the cross-reference to RAP 15.2(h). *See id.* 18.3(a)(1), 121 Wash. 2d 1117, 1117 (1993). In 1994, the court amended RAP 15.2(h) to provide that "[i]f counsel can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent as provided in rule 18.3(a)." WASH. R. APP. P. 15.2(h), 124 Wash. 2d 1135, 1135 (1994).

61. The Washington State Supreme Court amended RAP 18.3(a)(1) in 1998, replacing the requirement of personally serving the motion to withdraw as appointed counsel on the appellant with a requirement of mailing the motion to the appellant's last known address. *See* WASH. R. APP. P. 18.3(a)(1), 135 Wash. 2d 1140, 1140-41 (1998). RAP 18.3(a)(2), however, has not been amended.

62. State v. Hairston, 946 P.2d 397, 398, 400 (Wash. 1997).

63. United States v. Wagner, 103 F.3d 551, 553 (7th Cir. 1996). In *Wagner*, Judge Posner stated as follows:

> If the [*Anders*] brief explains the nature of the case and fully and intelligently discusses the issues that the type of case might be expected to involve, we shall not conduct an independent top-to-bottom review of the record in the [trial] court to determine whether a more resourceful or ingenious lawyer might have found additional issues that may not be frivolous. We shall confine our scrutiny of the record to the portions of it that relate to the issues discussed in the brief.

Id.

independent review of the record to determine whether the appeal is frivolous.[64] The Washington State Supreme Court rejected this reduction of the appellate court's role when considering an *Anders* Brief.[65] The court noted that it had "faithfully followed *Anders* without exception," and that *Anders* requires the appellate court to perform "'a full examination of all the proceedings'" before concluding the appeal is wholly frivolous.[66]

Thus, since the United States Supreme Court decided *Anders*, the Washington courts have followed it and have codified it in its Rules of Appellate Procedure. But, as the next section discusses, Washington could have followed another course, and it still can.

III. STATES THAT DID NOT ADOPT *ANDERS*

As discussed above, the Washington State Supreme Court adopted the *Anders* Procedure without discussion. A number of other states, however, have refused to adopt the *Anders* Procedure.[67] An American Bar Association (ABA) Advisory Committee noted that, in *Anders*, the Court first "wanted to prevent withdrawing counsel from filing a brief against the appellant's position in order to demonstrate frivolity," and second, "believed that the brief of withdrawing counsel for the appellant could be quite useful to the appellate court . . . ."[68] But the Advisory Committee opined that "[n]either of these laudable purposes solves the dilemma posed for counsel who is required to brief the unbriefable."[69]

In an attempt to solve the dilemma created by *Anders*, the Advisory Committee recommended alternatives for lawyers representing indigent defendants. The committee noted that lawyers are of more interest to the public through the prosecution of "weak or groundless appeal[s] than by withdrawing" entirely as counsel.[70] Indeed, the legal profession's commitment to client loyalty is threatened by a rule permitting appointed counsel to withdraw upon a subjective finding of frivolity.[71] The committee clarified that the duty of client loyalty is not a mandate for lawyers to "mislead or deceive the court, and no lawyer should do so."[72] A lawyer

64. State v. Hairston, 931 P.2d 217, 218 (Wash. Ct. App. 1997), *rev'd*, 946 P.2d 397 (Wash.).

65. *Hairston*, 946 P.2d at 400.

66. *Id.* (quoting Anders v. California, 386 U.S. 738, 744 (1967)).

67. For a comprehensive review of states' adoption of, or refusal to adopt, the *Anders* Procedure, see Martha C. Warner, Anders *in the Fifty States: Some Appellants' Equal Protection is More Equal than Others'*, 23 FLA. ST. U. L. REV. 625 (1996).

68. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 8.3 cmt. b (Approved Draft 1971) (emphasis omitted).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

can, however, "communicate to the court the issues and whatever can be said in support of them without . . . advising the court that he is aware of the weakness of [his client's] position."[73]

The Committee suggested that a lawyer, who files a brief with the court to the best of his ability, should not be forced to undergo oral argument and "conceal the deficiencies of the brief."[74] Instead, the lawyer may suggest to the court that the appellant is willing to have the appeal decided on the briefs alone.[75] If oral argument is required, the lawyer need not address the frivolous arguments unless instructed to do so by the court. The Advisory Committee concluded:

> This procedure satisfies the principles of *Anders* and avoids placing defense counsel in a position in which he may be tempted to take too narrow a view of the arguments that may be made in his client's behalf. At the same time, the lawyer remains consistent to his professional obligation to be candid with the court in the presentation of the appeal.[76]

A. *Missouri*

A number of states adopted the Advisory Committee's approach to the dilemma created by *Anders*. In *State v. Gates*,[77] the Supreme Court of Missouri held that "the position of the Advisory Committee should be followed, at least until the Supreme Court of the United States has spoken definitively on the question."[78] It therefore refused to allow appointed counsel in criminal appeals to withdraw under the *Anders* Procedure.[79]

B. *Colorado*

Similarly, in *McClendon v. People*,[80] the Supreme Court of Colorado adopted the following guidelines from the ABA Standards for Criminal Appeals, which were formulated in response to *Anders*:

> 3.2 Counsel on appeal.
> . . . .
> (b) Counsel should not seek to withdraw from a case because of his determination that the appeal lacks merit.

73. *Id*.
74. *Id*.
75. *Id.*
76. *Id.*
77. 466 S.W.2d 681 (Mo. 1971).
78. *Id.* at 684.
79. *See id.*
80. 481 P.2d 715, 718 (Colo. 1971).

> (i) Counsel should give his client his best professional estimate of the quality of the case and should endeavor to persuade the client to abandon a wholly frivolous appeal, or to eliminate particular contentions that are lacking in any substance.
>
> (ii) If the client wishes to proceed, it is better for counsel to present the case, so long as his advocacy does not involve deception or misleading of the court. After preparing and filing a brief, on behalf of the client, counsel may appropriately suggest that the case be submitted on briefs.
>
> (c) Unexplained, general requests by appellants for dismissal of their assigned counsel should be viewed with disfavor.[81]

C. *Idaho*

Idaho was more forceful in its rejection of the *Anders* Procedure. In *State v. McKenney*,[82] appointed counsel for appellants filed *Anders* Briefs, outlining possible arguments that could be raised in their clients' favor and then pointing out why those arguments would be frivolous.[83]

The Idaho Supreme Court, following the requirement of the *Anders* Procedure, reviewed the record and found arguable grounds for appeal.[84] Accordingly, it appointed new counsel to carry out the appeals.[85] But the court went on to hold as follows:

> These two cases and motions and circumstances therein demonstrate the inability of this Court to follow the impractical and illogical procedure outlined in the *Anders* dictum. We therefore hold today that once counsel is appointed to represent an indigent client during appeal on a criminal case, no withdrawal will thereafter be permitted on the basis that the appeal is frivolous or lacks merit.
>
> . . . .
>
> [The court then quoted the *Anders* Procedure, calling it dictum.]
>
> We do not gainsay the adequacy of the above outlined procedure in protecting an indigent defendant in a criminal case on appeal. Nevertheless, we deem it clear that the mere submission of such a motion by appellate counsel cannot but result in prejudice. . . . We further determine that if a criminal case on appeal is wholly frivolous, undoubtedly, less of counsel and the judiciary's time and energy will be expended in directly considering the merits of the case in its regular and due course as contrasted with a fragmented consideration of various

81. STANDARDS RELATING TO CRIMINAL APPEALS § 3.2(b)-(c) (Approved Draft 1970).

82. 568 P.2d 1213 (Idaho 1977).

83. *Id.* at 1213.

84. *Id.* at 1215.

85. *Id.*

> motions, the consideration of which necessarily involves a determination of the merits. . . .
>
> We find that *Anders* presents no obstacle to the procedure adopted herein since *Anders*, by way of dictum, presents what are *minimal* constitutional safeguards . . . upon appeal. Our announced procedure of today extends the protections of *Anders*.[86]

Thus, rather than treating *Anders* as a procedure that courts must follow in the case of appointed counsel on appeal, the Idaho Supreme Court treated *Anders* as a minimal constitutional safeguard for appellants.[87] Because *Anders* was merely a safeguard, the court reasoned, it could impose greater constitutional protection for appellants by refusing to allow appointed counsel to withdraw on grounds of frivolity.[88]

D. *North Dakota*

In *State v. Lewis*,[89] the Supreme Court of North Dakota rejected the idea of adopting the *Anders* Procedure because it would violate the North Dakota Constitution and its implementing statutes.[90] Specifically, the North Dakota Constitution provides that "[a]ppeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law."[91] Further, North Dakota's statutes provide that appeals from verdicts of guilty and final judgments of conviction "are [a] matter of right."[92] Accordingly, the North Dakota Supreme Court concluded:

> [T]he proper procedure to be followed by the courts of this State in cases such as the one before us in which the court-appointed defense counsel believes that the indigent defendant's appeal is without merit is to appoint another attorney to represent the defendant on appeal as soon after the initially appointed attorney makes his opinion as to frivolity known to the court as is practical. The appointment of another attorney will provide the indigent defendant with legal counsel at all stages of his appeal and will eliminate the double burden of first convincing this court that the appeal has some degree of merit warranting an attorney's counsel and later coming back to this court to convince us that the degree of merit which warranted an attorney's counsel also supports a reversal of his conviction. Conceivably, the situation may arise where the trial court will

86. *Id.* at 1214-15 (quoting Anders v. California, 386 U.S. 738, 744 (1967)).
87. *See id.*
88. *Id.*
89. 291 N.W.2d 735 (N.D. 1980).
90. *Id.* at 738.
91. N.D. CONST. art. VI, § 6.
92. N.D. CENT. CODE §§ 29-28-03, -06 (2006).

> have to designate an attorney to represent the defendant to the best of his ability notwithstanding the fact that the attorney does not believe the appeal has merit.
>
> The North Dakota procedure excels the procedure in *Anders* and satisfies all the principles of law expounded by the United States Supreme Court in *Anders*. We believe our procedure offers the indigent defendant greater constitutional protection. We also are aware of the substantial saving of appellate court time due to the elimination of the initial supreme court determination of whether or not the appeal is frivolous.[93]

E. *Massachusetts*

In its rejection of the *Anders* Procedure in *Commonwealth v. Moffett*,[94] the Supreme Judicial Court of Massachusetts focused on the role confusion the procedure creates for appointed counsel:

> The major difficulty with the *Anders* procedure is its requirement that an attorney assume contradictory roles if he wishes to withdraw on the grounds that the appeal lacks merit. He must "fil[e] a schizophrenic motion to withdraw (accompanied by a formal brief opposing the motion)." This Janus-faced approach not only runs the risk of alienating and frustrating his client, who can scarcely be blamed for feeling abandoned and betrayed, but also complicates the court's review unnecessarily.[95]

The Court then concluded that "appointed counsel should not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit."[96] Instead, the Court directed as follows:

> If there is nothing to support a contention which the defendant, despite counsel's attempts to dissuade him, insists on pursuing, we think it preferable that counsel present the contention succinctly in the brief in a way that will do the least harm to the defendant's cause. If appointed counsel, on grounds of professional ethics deems it absolutely necessary to dissociate himself or herself from purportedly frivolous points, counsel may so state in a preface to the brief. If such a preface is included, counsel must send a copy of the brief to the defendant, direct his attention to the preface, and inform him that he may present additional arguments to the appellate court within thirty days.[97]

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93. *Lewis*, 291 N.W.2d at 738.

94. 418 N.E.2d 585 (Mass. 1981).

95. *Id.* at 590 (alteration in original) (citation omitted) (quoting James J. Doherty, *Wolf! Wolf!—The Ramifications of Frivolous Appeals*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 2 (1968)).

96. *Id.* at 591.

97. *Id.* at 591-92 (citations omitted).

F. *Georgia*

In *Huguley v. State*,[98] the Supreme Court of Georgia announced it would no longer entertain *Anders* motions and criticized the unique result of requiring an appellate court to take on the function of the appellant's attorney:

> We conclude that the Anders motion is unduly burdensome in that it tends to force the court to assume the role of counsel for the appellant. *Anders v. California* . . . provides a mechanism for withdrawal of appointed counsel at the appellate level in the event that the appeal would be frivolous, but it does not require such withdrawal. Further, the opinion of the United States Supreme Court does not intimate that an attorney should be subjected to discipline or even disapproval for filing a frivolous appeal in a criminal case. Ever since *Griffin v. Illinois*, a continuing line of cases has developed protection for the indigent appellant on his first appeal. Therefore, a defendant is entitled to review of any claim which might afford him relief.[99]

G. *New Hampshire*

Finally, New Hampshire initially allowed appointed appellate counsel to use the *Anders* Procedure when they believed a criminal appeal had no merit.[100] But twenty-three years later, in *State v. Cigic*,[101] the Supreme Court of New Hampshire reexamined the use of the *Anders* Procedure and concluded that, while "*Anders* presents the minimum level of protection to which a criminal defendant is constitutionally entitled on appeal," it did not "create[] a constitutional mandate not subject to any modification."[102] The court then concluded that the "Idaho rule" announced in *State v. McKenney*[103] "preserves the integrity of the attorney-client relationship better than a strict adherence to *Anders* does."[104] It rejected the State's concern that following the Idaho rule, under which an appointed counsel could not withdraw on grounds believing the appeal had no merit, "would lead appellate advocates to compromise their ethical duty 'not [to] bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not

98. 324 S.E.2d 729 (Ga. 1985).
99. *Id.* at 731 (citation omitted).
100. *See* State v. Fleury, 282 A.2d 873, 874 (N.H. 1971).
101. 639 A.2d 251 (N.H. 1994).
102. *Id.* at 252-53.
103. 568 P.2d 1213, 1214 (Idaho 1977); *see also* discussion *supra* Part III.C.
104. *Cigic*, 639 A.2d at 253.

frivolous.'"[105] The court concluded that such frivolous appeals "would be extremely rare,"[106] noting as follows:

> Provided that appellate counsel has a good faith basis for doing so, it would also not be frivolous, for example, to challenge the sufficiency of the evidence used to convict the defendant.[107]

Accordingly, the court adopted a procedure, drawn largely from the ABA Standards, in which, if an appointed counsel believes the appeal lacks merit, she must "seek to persuade the defendant to abandon the appeal."[108] If that effort fails, counsel must file "a brief that argues the defendant's case as well as possible," and counsel "cannot concede that the appeal is frivolous."[109]

H. *Summary*

In summary, while Washington adopted the *Anders* Procedure for those instances where appointed counsel on appeal believes the appeal lacks merit, some states rejected the *Anders* Procedure from the beginning. Additionally, Georgia and New Hampshire, having initially followed the *Anders* Procedure, later overruled themselves. The states did so for a collection of reasons, most notably the skewing of the roles of the appointed appellate counsel and the appellate court. In the following section, this article examines how those reasons support rejecting the *Anders* Procedure in Washington, despite its adoption many years ago.

IV. THE *ANDERS* PROCEDURE IS A FLOOR, NOT A CEILING

In adopting the *Anders* Procedure, Washington, like most states, appeared to treat the procedure as mandatory. It likely did so because *Anders* and the decision that reaffirmed it, *McCoy v. Court of Appeals*,[110] both state that appointed appellate counsel have an ethical obligation not to prosecute what they believe to be a frivolous appeal. In *Anders*, the Court stated, "[o]f 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."[111] *McCoy* goes further, stating, "[a]n attorney, whether appointed or paid, is . . . under an ethical obligation to refuse to

105. *Id*. at 253 (quoting N.H. R. PROF'L CONDUCT 3.1).
106. *Id*.
107. *Id*. (citing Gale v. United States, 429 A.2d 177, 178-81 (D.C. 1981) (Ferren, J., dissenting).
108. *Id.* at 254.
109. *Id*.
110. 486 U.S. 429 (1988).
111. Anders v. California, 386 U.S. 738, 744, (1967).

prosecute a frivolous appeal."[112] *McCoy* includes the following quotation from *United States v. Edwards*:[113]

> "A lawyer, after all, has no duty, indeed no right, to pester a court with frivolous arguments, which is to say arguments that cannot conceivably persuade the court, so if he believes in good faith that there are no other arguments that he can make on his client's behalf he is honor-bound to so advise the court and seek leave to withdraw as counsel."[114]

But why must a lawyer "of course" seek to withdraw rather than file an appeal the lawyer believes lacks merit? And why is a lawyer "honor-bound" to do so when it will deprive her client of counsel on appeal? This view of a lawyer's duty, when confronted with prosecuting what may be deemed a frivolous appeal, could arise from the fact that an indigent defendant has no federal constitutional right to appeal.

In *Jones v. Barnes*,[115] the Supreme Court noted that "[t]here is, of course, no constitutional right to appeal . . . ."[116] It therefore concluded that "[n]either *Anders* nor any other decision of this Court suggests . . . that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."[117]

Similarly, in federal courts, "an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."[118] So, in the absence of a constitutional right to appeal, the Court has concluded that appointed counsel's ethical obligation not to prosecute a frivolous appeal is greater than the defendant's interest in appealing and gives rise to an obligation to withdraw from representing the defendant.

If a state agrees that an indigent defendant has no constitutional right to appeal and agrees that appointed counsel has a duty to withdraw, rather than to prosecute a frivolous appeal, then the safeguards contained in the *Anders* Procedure are mandatory. But, as the next section discusses, there may be a state constitutional right to appeal, such that appointed counsel may not have an ethical duty to withdraw rather than prosecute a frivolous appeal. In those states, the *Anders* Procedure serves

112. *McCoy*, 486 U.S. at 436 (citing STANDARDS FOR CRIMINAL JUSTICE § 4-3.9 cmt. (1980); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 955 (1975)).

113. 777 F.2d 364 (7th Cir. 1985).

114. *McCoy*, 486 U.S. at 436 (quoting *Edwards*, 777 F.2d at 365).

115. 463 U.S. 745 (1983).

116. *Id.* at 751.

117. *Id.*

118. 28 U.S.C. § 1915(a)(3) (2006); *see also* FED. R. APP. P. 24; BLACK'S LAW DICTIONARY 849 (9th ed. 2009) (defining in forma pauperis as proceeding "in the manner of an indigent who is permitted to disregard filing fees and court costs").

as a constitutional "floor" protecting the indigent appellant rather than a "ceiling" defining a mandatory procedure.

V. THE *ANDERS* PROCEDURE INFRINGES ON THE APPELLANT'S RIGHT TO APPEAL UNDER THE WASHINGTON STATE CONSTITUTION

Article I, section 22 of the Washington State Constitution confers upon persons convicted of a crime "the right to appeal in all cases . . . ."[119] That right also includes the right to appointment of effective counsel.[120] In *State v. Hairston*,[121] the Washington State Supreme Court held that compliance with the *Anders* Procedure is required to protect these constitutional rights.[122] But while the *Anders* Procedure is one way to protect these constitutional rights, it is not the only way of doing so. In the process of protecting the right to appeal, I suggest that the *Anders* Procedure infringes on that right by placing the appointed counsel in the position of acting to benefit the State, rather than his client. Thus, although the Washington State Supreme Court cannot allow appointed counsel to withdraw without following the *Anders* Procedure, it need not allow appointed counsel to withdraw on grounds that the appeal would be frivolous. As is discussed below, appointed counsel would not be violating their ethical duties in Washington by prosecuting what they subjectively believe to be a frivolous appeal.

VI. WASHINGTON LEGAL ETHICS DO NOT PROHIBIT APPOINTED COUNSEL FROM PROSECUTING WHAT APPEAR TO BE FRIVOLOUS APPEALS

Much of the discussion in *Anders v. California*,[123] and especially *McCoy v. Court of Appeals*,[124] involves the Court's concern that requiring an appointed attorney to prosecute an appeal that she believed to be frivolous would require her to violate her ethical obligations.[125] Because there is no federal constitutional right to appeal, those ethical obligations led the Court to create and reaffirm the *Anders* Procedure.[126] The Washington State Supreme Court has recognized through its rulemaking that situations sometimes require appointed counsel in a criminal case to present what might appear to be a frivolous defense.[127] Accordingly, it has exempted such actions

119. WASH. CONST. art I, § 22.
120. *See* State v. Rolax, 702 P.2d 1185, 1188 (Wash. 1985).
121. 946 P.2d 397 (Wash. 1997).
122. *Id.* at 400.
123. 386 U.S. 738 (1967).
124. 486 U.S. 429 (1988).
125. *See, e.g., id.* at 435-36 (discussing the ethical obligation of an appointed or paid attorney to "refuse to prosecute a frivolous appeal").
126. *See id.*
127. *See* WASH. R. PROF'L CONDUCT 3.1 & cmt. 3.

as grounds for discipline.[128] Indeed, even the Oath of Attorney taken by Washington lawyers contains such an exception:

> I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense except as I believe to be honestly debatable under the law, *unless it is in defense of a person charged with a public offense*.[129]

Similarly, the Washington Rules of Professional Conduct for attorneys provide as follows:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. *A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established*.[130]

Thus, as the courts in Georgia[131] and New Hampshire[132] recognized, requiring appointed appellate counsel to pursue what may appear to be a frivolous appeal would not require the attorney to violate her ethical obligation to maintain no frivolous action. When combined with the existence of a constitutional right to appointed counsel on appeal, these exceptions support the abandonment of the *Anders* Procedure in favor of requiring appointed counsel to prosecute appeals in all cases.

VII. THE *ANDERS* PROCEDURE CREATES INAPPROPRIATE ROLE CONFUSION FOR COUNSEL AND THE APPELLATE COURT

Finally, and most importantly, the *Anders* Procedure creates inappropriate role confusion for the defendant's appointed counsel, the state's attorney, and the appellate court. If appointed counsel for the defendant is allowed to file an *Anders* Brief and move to withdraw under the *Anders* Procedure, she is, to some extent, compromising her duty of loyalty to her client. The *Anders* Procedure requires her to "identify the issues that could be argued if they had merit . . . ."[133] While she is not required to explain her reasoning as to those issues,[134] the mere fact that she lists issues and then

128. *See id.*
129. WASH. ADMISSION TO PRAC. R. 5(e) (emphasis added).
130. WASH. R. PROF'L CONDUCT 3.1 (emphasis added).
131. *See* discussion *supra* Part III.F.
132. *See* discussion *supra* Part III.G.
133. WASH. R. APP. P. 18.3(a)(2).
134. *See* State v. Pollard, 834 P.2d 51, 56 (Wash. Ct. App. 1992).

moves to withdraw on grounds of frivolity sends a tacit message that she considers those issues meritless. Further, as the Massachusetts court noted, the act of an appointed counsel filing a brief and motion that appear contrary to his client's interest "runs the risk of alienating and frustrating his client, who can scarcely be blamed for feeling abandoned and betrayed . . . ."[135]

Further, the *Anders* Procedure creates role confusion for state counsel. It relieves the state from the duty to defend the trial court's judgment, and in its place, calls upon counsel for the state to concur with appointed counsel for the appellant. Such agreement needlessly encourages the beliefs of some appellants that appointed counsel are not as desirable as privately retained counsel because they may be cooperating with the State.

Finally, the *Anders* Procedure creates role confusion for the appellate court. Rather than assuming its customary role of considering the arguments of counsel and examining the record in light of those arguments, the *Anders* Procedure requires the appellate court to serve as backup counsel for the appellant; the court must review the entire trial record to confirm appointed counsel's determination that the appeal is "wholly frivolous."[136] This is a role to which appellate courts are not well suited. Perversely, if the appellate court fulfills the role well, the appellant will have received more assistance on appeal than would an appellant whose appointed counsel did not file an *Anders* Brief because both appointed counsel and the court will have reviewed the entire record. Finally, as the Idaho court noted, abandoning the *Anders* Procedure would allow the courts and defense counsel to more efficiently consider "the merits of the case in its regular and due course as contrasted with a fragmented consideration of various motions, the consideration of which necessarily involves a determination of merits."[137]

Ultimately, the *Anders* Procedure creates inappropriate and unnecessary role confusion for appointed counsel, prosecutors, and appellate courts. This role confusion can be eliminated by abandoning the *Anders* Procedure.

VIII. CONCLUSION

The *Anders* Procedure creates a minimum protection for criminal appellants in that it requires the appellate court to confirm the appointed counsel's determination that the appeal lacks merit. Nevertheless, it is neither mandatory nor an appropriate means of protecting criminal appellants' constitutional rights to appeal. The most

135. Commonwealth v. Moffett, 418 N.E.2d 585, 590 (Mass. 1981); *see also* discussion *supra* Part III.E.

136. Anders v. California, 386 U.S. 738, 744 (1967); *see also* Huguley v. State, 324 S.E.2d 729, 731 (Ga. 1985).

137. State v. McKenney, 568 P.2d 1213, 1214-15 (Idaho 1977); *see also* State v. Lewis, 291 N.W.2d 735, 738 (N.D. 1980); discussion *supra* Part III.C.

appropriate means for appointed counselors to maintain client fidelity is to prohibit them from moving to withdraw on grounds of frivolity.

So what, one may ask, is appointed counsel supposed to do if she reviews the trial record, consults with her client, and cannot identify any arguably meritorious appellate issues? Like her colleagues in the trial court, she can still challenge the sufficiency of the State's evidence underlying the conviction.[138] In so doing, she violates neither her Washington Oath of Attorney nor the Washington Rules for Professional Conduct for Attorneys.[139]

For the above reasons, the Washington court should abandon the *Anders* Procedure in favor of the "Idaho rule" in which appointed counsel are not allowed to withdraw on grounds of frivolity. By so doing, appointed counsel could return to their role of zealously representing the interests of appellants, prosecutors could return to their role of defending the verdict, and appellate courts could return to their role of reviewing the arguments of parties against the record.

138. *See* State v. Cigic, 639 A.2d 251, 253 (N.H. 1994) (citing Gale v. United States, 429 A.2d 177, 178-81 (D.C. 1981) (Ferren, J., dissenting)).

139. *See* discussion *supra* Part VII.