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## Fixing the Broken System of Assessing Criminal Appeals for Frivolousness

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## FIXING THE BROKEN SYSTEM OF ASSESSING CRIMINAL APPEALS FOR FRIVOLOUSNESS

Andrew S. Pollis\*

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\* Professor, Case Western Reserve University School of Law. Thanks to my colleagues for this colloquium issue; I wish we could have convened in person. Thanks also to the students in my inaugural Appellate Litigation Clinic in the spring of 2020; their outstanding work on their criminal appeals pushed my thinking about the issues in this article.

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## I. INTRODUCTION

Imagine you’re a criminal-defense lawyer, maybe not many years out of school. Much of your income is from court appointments. One of those appointments involved an open-and-shut case of drug activity. You do your best to defend, but your client is convicted. He now wants you to appeal, but you’re confident there’s nothing in the record or the law that would warrant a reversal.

Imagine you’re an appellate judge. Appointed defense counsel files a motion to withdraw, claiming she can think of no good-faith basis for appeal. Do you grant the motion? And, if so, do you appoint someone else to pursue the appeal, or do you accept her representation and dispose of the case accordingly? What standards do you use in selecting between these options?

Now imagine you’re the client. You’re young and poor, probably male,<sup>1</sup> maybe a minority.<sup>2</sup> You have distrusted the legal system your whole life, even before they locked you up. You think you were set up for

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1. See Roya Butler et al., *Correctional Facilities*, 20 GEO. J. GENDER & L. 357, 359 (2019) (“number of women in prison remains far less than the number of male inmates, at approximately 7% of the total prison population”).

2. See, e.g., Leah Sakala, *Breaking down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL’Y INITIATIVE (May 28, 2014), <https://tinyurl.com/y3kfabg6> [<https://perma.cc/APJ4-6TAW>].

this drug crime. And now your lawyer is telling you—and the court—that you have no case for appeal. It figures.

Welcome to the confusing world of *Anders* briefing, so called for the seminal 1967 Supreme Court case that purported to articulate a nationwide standard for protecting the appellate rights of low-income defendants in these types of difficult cases.<sup>3</sup> *Anders* identified a procedure for counsel and the courts to follow if counsel can identify no nonfrivolous issues for appellate review.<sup>4</sup> The Supreme Court recognizes that counsel rely on *Anders* briefs “[n]ot infrequently.”<sup>5</sup>

But the *Anders* procedure presents an inherent challenge: how to balance the three triangulated interests—that of the client, the lawyer, and the court—in a fashion that meets constitutional demands without imposing excessive burdens or compromising a defendant’s constitutional rights. The *Anders* procedure is thus fraught with difficulties, precisely because of the tensions it creates among these interested parties. How can counsel ethically advise a court that her client has no nonfrivolous issue for appellate review? How can a court, without the benefit of full advocacy, endorse such a position? And what is a client without money or legal training supposed to do when his court-appointed lawyer is convinced he has no case?

As the Court has recognized, *Anders* has been the subject of “consistent and severe criticism.”<sup>6</sup> Courts have thus struggled for over fifty years to articulate helpful standards for applying *Anders*; the Court has itself decided at least five cases since 1967 attempting to stem the confusion.<sup>7</sup> Surprisingly, however, only a handful of scholars has focused on the *Anders* procedure, most arguing to abolish it and require counsel to

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

4. *Id.* at 744.

5. *Smith v. Robbins*, 528 U.S. 259, 264 (2000).

6. “We recognize that, since the day it was decided, *Anders* has been subjected to ‘consistent and severe criticism.’” *In re Sade C.*, 920 P.2d 716, 731 (Cal. 1996) (quoting Frederick D. Junkin, Note, *The Right to Counsel in “Frivolous” Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 TEX. L. REV. 181, 212 (1988)), quoted in *Smith*, 528 U.S. at 281.

7. See *Smith*, 528 U.S. 259 (approving state procedure that requires counsel only to summarize the trial-court proceedings and leaves determination of frivolousness entirely to appellate court); *McCoy v. Ct. of App. of Wisc.*, 486 U.S. 429 (1988) (Constitution does not foreclose state rule requiring counsel invoking *Anders* to explain why client’s appeal is frivolous); *Penson v. Ohio*, 488 U.S. 75 (1988) (reversing state-court decision rejecting appeal where counsel filed inadequate *Anders* brief and where court disposed of case without appointing new appellate counsel); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (*Anders* does not require counsel to file frivolous petition for certiorari to U.S. Supreme Court); *Jones v. Barnes*, 463 U.S. 745 (1983) (*Anders* does not require counsel to raise on appeal every issue identified by the client).

brief the merits of the appeal<sup>8</sup> (as the American Bar Association recommends<sup>9</sup> and as ten states have done<sup>10</sup>). Issues with *Anders* have also garnered occasional attention from law students.<sup>11</sup> And one scholar, herself a state-court appellate judge, demonstrated the lack of uniformity in the way state courts apply *Anders*.<sup>12</sup>

*Anders* is rooted in nearly a century of Supreme Court decisions recognizing a state-court defendant's right to counsel under the Federal Constitution,<sup>13</sup> including on appeal.<sup>14</sup> While the seminal cases originated in state-court prosecutions, the teachings of *Anders* apply with equal force in federal court. With the growing "federalization of criminal law,"<sup>15</sup> crimes associated with poverty are prosecuted in federal court with regularity.<sup>16</sup> In recognition of their obligation to provide an *Anders*

8. See generally Eric B. Schmidt, *A Call to Abandon the Anders Procedure that Allows Appointed Appellate Criminal Counsel to Withdraw on Grounds of Frivolity*, 47 GONZ. L. REV. 199 (2011); Randall L. Hodgkinson, *No-Merit Briefs Undermine the Adversarial Process in Criminal Appeals*, 3 J. APP. PRAC. & PROCESS 55 (2001); James E. Duggan & Andrew W. Moeller, *Make Way for the ABA: Smith v. Robbins Clears a Path for Anders Alternatives*, 3 J. APP. PRAC. & PROCESS 65 (2001). See also Brent E. Newton, *Alemendarez-Torres and the Anders Ethical Dilemma*, 45 HOUSTON L. REV. 747, 748–52 (2008) (reflecting on dilemma counsel can face when advancing an argument that runs counter to Supreme Court precedent and when the good-faith basis for reversing that precedent is questionable).

9. Duggan & Moeller, *supra* note 8, at 93–94 (quoting ABA STANDARDS, PROVIDING DEFENSE SERVICES § 5.3 (tentative draft 1967)).

10. 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, 642 (1996) ("Ten states have rejected the *Anders* procedure.").

11. See, e.g., Matthew D. Fazekas, Note, *An Open Letter to the Ohio Supreme Court: Setting a Uniform Standard on Anders Briefs*, 68 CLEVE. ST. L. REV. 581 (2020) (arguing that Ohio should adopt uniform *Anders* standards); Joseph Frueh, Note, *The Anders Brief in Appeals from Civil Commitment*, 118 YALE L.J. 272 (2008) (arguing that *Anders* procedure should apply in civil-commitment appeals); Cynthia Yee, Comment, *The Anders Brief and the Idaho Rule: It Is Time for Idaho to Reevaluate Criminal Appeals After Rejecting the Anders Procedure*, 39 IDAHO L. REV. 143 (2002) (arguing for application of *Anders* procedure in Idaho state courts); Junkin, *supra* note 6 (defending *Anders* and suggesting guidelines for determining adequacy of an *Anders* brief).

12. See generally Warner, *supra* note 10.

13. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

14. *Douglas v. California*, 372 U.S. 353 (1963).

15. See, e.g., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7–9 (1998); see also *Gamble v. United States*, 139 S. Ct. 1960, 2008 (2019) (Gorsuch, J., dissenting) (quoting Edwin E. Meese, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEXAS L. REV. L. & POL'Y 1, 22 (1997) ("Some suggest that 'the federal government has [now] duplicated virtually every major state crime.'")).

16. The vast majority of criminal defendants in the federal system meet the financial criteria for appointed counsel. See, e.g., Press Release, Office of Justice Programs, Bureau of Justice Statistics, Federal Immigration Arrests Increased Along U.S.-Mexico Border Between 2005 and 2009, <https://www.bjs.gov/content/pub/press/fjs09pr.cfm> [<https://perma.cc/ZHQ7-DQ46>] ("Of the 95,000 federal cases concluded in 2009, 40 percent were represented by a public defender . . . , 36 percent by a panel-appointed attorney . . . and 21 percent by a private attorney . . .").

framework, nine federal circuits have adopted local rules governing *Anders* briefing,<sup>17</sup> and another three have published guidelines for counsel seeking to withdraw under *Anders*.<sup>18</sup> The Sixth and Seventh Circuits have both published similar guidelines.<sup>19</sup> But no scholar has examined *Anders* in the federal appellate system. I fill that gap here.

This paper suggests a framework for resolving the confusion in federal appellate courts. That framework removes the court from the process entirely, leaving it to three tiers of counsel, each with greater financial incentive than her predecessor, to scour the record and root out good-faith bases for appellate review.<sup>20</sup> If, after three reviews, no lawyer has identified a nonfrivolous basis for appeal, then the court may safely assume there is none. At that point, it may discharge counsel and dismiss the appeal unless the defendant wishes to pursue it pro se or through a lawyer not at public expense.

The paper proceeds in six parts, of which this introduction is Part I. Part II provides an overview of *Anders*, including its history and subsequent Supreme Court clarification. Part III focuses specifically on the federal circuits' approaches to *Anders* submissions. Part IV then delves into the competing interests of counsel, the court, and the client, explaining the quandaries *Anders* has created for each. Part V explains the solution I propose; that solution is imperfect, but it would be a vast improvement over existing practice. Part VI concludes.

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17. See 1ST CIR. R. 46.6(c)(4); 2D CIR. R. 4.1(b); 3D CIR. R. 109.2; 6TH CIR. R. 12(c)(4)(C); 7TH CIR. R. 51(b); 8TH CIR. R. 27B(b); 9TH CIR. R. 4-1(C); 10TH CIR. R. 46.4(B)(1)–(3); 11TH CIR. 27-1(A)(8).

18. See UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, *CJA Representation*, <https://tinyurl.com/y36u6oks> [<https://perma.cc/HE54-YBN4>] [hereinafter *4th Cir. CJA Representation*]; *Anders Guidelines*, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, <https://tinyurl.com/ydhhbzmgw> [<https://perma.cc/8D6E-V9KN>] [hereinafter *5th Cir. Anders Guidelines*]; UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES § VI(D)(2) at 26 (Dec. 2018), <https://tinyurl.com/y77f8h64> [<https://perma.cc/S38N-JMGW>] [hereinafter D.C. CIR. HANDBOOK].

19. See 6TH CIR. R. 12(c)(4)(C); UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, *Notes on Anders Cases*, <https://tinyurl.com/yyqe7a6l> [<https://perma.cc/W3Y5-VHDV>] [hereinafter *6th Circuit Notes*]; 7TH CIR. R. 51(b); PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, §§ XIV(B) & XVII(C), at 102, 116–18 (2019), <https://tinyurl.com/yytgch28> [<https://perma.cc/NE4L-X7XH>] [hereinafter *7TH CIR. PRACTITIONER'S HANDBOOK*].

20. I completed the first draft of this article in November 2019. The next month—but before this article was published—an Ohio appellate judge independently proposed the same idea. See *State v. Sims*, 8th Dist. Cuyahoga No. 107724, 2019–Ohio–4975, ¶ 35 (Sheehan, J., concurring).

## II. THE RIGHT TO APPELLATE COUNSEL: THE ORIGINS OF *ANDERS* AND ITS PROGENY

### A. *The Historical Legal Framework that Led to the Anders Decision*

*Anders* sprang from a state-court conviction in California<sup>21</sup> and has its roots in the Supreme Court's incremental recognition that certain federal constitutional principles apply to defendants in state-court criminal proceedings. "The constitutional underpinnings of *Anders* and its progeny rely alternatively on both the Sixth and Fourteenth Amendments to the U.S. Constitution,"<sup>22</sup> often "shift[ing] among equal protection, due process, and right of counsel concerns."<sup>23</sup> Those concerns will lie at the heart of any solution crafted to address an *Anders*-style conundrum, so it is important to understand the history leading to the *Anders* decision and the ways in which the Court has revisited that decision in subsequent cases.

#### 1. The Right to Trial Counsel: *Powell v. Alabama*, *Betts v. Brady*, and *Gideon v. Wainwright*

Perhaps owing to a popular book and a television movie,<sup>24</sup> *Gideon v. Wainwright*<sup>25</sup> is often widely recognized as the source of the right to trial counsel in criminal state-court proceedings, and deservedly so. But *Gideon* came three decades after *Powell v. Alabama*,<sup>26</sup> a case that deserves its own recognition, both for its holding and for the insidious story behind it.<sup>27</sup>

In 1931 Alabama, nine African-American teenagers, one only thirteen years old, were arrested for raping two white women in a railroad

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21. See *Anders v. California*, 386 U.S. 738, 739 (1967).

22. Warner, *supra* note 10, at 626; see also U.S. CONST. amend. VI; U.S. CONST. amend. XIV.

23. Warner, *supra* note 10, at 641.

24. ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964); *GIDEON'S TRUMPET* (Worldvision Enters. 1980).

25. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

26. *Powell v. Alabama*, 287 U.S. 45 (1932).

27. Though the story behind *Powell* is less well known, it also been the subject of many historical and creative works, including several books, *e.g.*, DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969), a television drama, *JUDGE HORTON AND THE SCOTTSBORO BOYS* (Tomorrow Entertainment 1976), an Oscar-nominated documentary film, *SCOTTSBORO: AN AMERICAN TRAGEDY* (PBS 2001), and a Tony Award-nominated Broadway musical, DAVID THOMPSON, JOHN KANDER, & FRED EBB, *THE SCOTTSBORO BOYS* (2010). The case inspired several other legal decisions of note, including *Norris v. Alabama*, 294 U.S. 587 (1935) (overturning convictions based on removal of African-American citizens from jury venire), and *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981) (affirming judgment for television network sued for defamation by one of the alleged victims based on her depiction in television drama).

boxcar in which all of them, and several white men, were stowing a ride from Chattanooga, Tennessee.<sup>28</sup> They were removed from the train in Paint Rock, Alabama, near the city of Scottsboro.<sup>29</sup> The defendants came to be known as the Scottsboro boys,<sup>30</sup> and they were convicted in a trial that took place “six days after indictment”<sup>31</sup> under an aura of “great hostility.”<sup>32</sup> As one commentator has noted, “[i]n such cases, guilt or innocence usually mattered little.”<sup>33</sup>

The case reached the Supreme Court on the question of right to counsel, because the defendants essentially had none. “[U]ntil the very morning of the trial no lawyer had been named or definitely designated to represent the defendants.”<sup>34</sup> Even then, the record was unclear whether anyone actually represented them at trial.<sup>35</sup> The Court thus recognized that “defendants were not accorded the right of counsel in any substantial sense.”<sup>36</sup>

Until *Powell*, however, the Court had not recognized that the right to counsel in criminal cases, enshrined in federal court under the Sixth Amendment,<sup>37</sup> applied to state-court prosecutions. To the contrary, the Court had rejected, on textual grounds, the principle that the Fourteenth Amendment<sup>38</sup> extended the entirety of federal criminal-law protections to state-court proceedings.<sup>39</sup> *Powell*, then—in holding that “[i]t was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial”<sup>40</sup>—marked a pivot in the Court’s view of the reach of the Fourteenth Amendment. In recognizing a criminal defendant’s right to “the guiding hand of counsel at every step in the proceedings against him,”<sup>41</sup> the Court shifted its constitutional philosophy in a fashion perhaps more abrupt than it would later do in *Gideon*<sup>42</sup> and certainly decades earlier.

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28. Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 379–80 (2009).

29. *Id.* at 380.

30. *Id.* at 379.

31. *Powell v. Alabama*, 287 U.S. 45, 52 (1932).

32. *Id.* at 51 (“It is perfectly apparent that the proceedings from beginning to end, took place in an atmosphere of tense, hostile, and excited public sentiment.”).

33. Klarman, *supra* note 28, at 382.

34. *Powell*, 287 U.S. at 56.

35. *Id.* (recounting “casual fashion” in which court addressed question of defendants’ representation, leaving much ambiguity on who, if anyone, represented them).

36. *Id.* at 58.

37. U.S. CONST. amend. VI.

38. U.S. CONST. amend. XIV.

39. *Powell*, 287 U.S. at 63 (discussing *Hurtado v. California*, 110 U.S. 516 (1884)).

40. *Id.* at 52.

41. *Id.* at 69.

42. *Gideon v. Wainwright*, 372 U.S. 335 (1963).



But *Gideon* is important, because the Court's right-to-counsel decisions following *Powell* were more equivocal. In *Betts v. Brady*, for example, the Court surveyed state constitutions for guidance on the universality of the right to counsel.<sup>43</sup> Finding lack of unanimity among them, the Court was "unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case."<sup>44</sup> Instead, the Court left it to each state court itself, "it deems proper, to appoint counsel where that course seems to be required in the interest of fairness."<sup>45</sup> Although the Court offered no clear distinction of its prior holding in *Powell*, it portrayed *Powell* as a case involving unique circumstances of unfairness—both because the trial court in *Powell* failed to follow an applicable Alabama statute and because it was a capital case.<sup>46</sup> The dissent was unwilling to indulge such distinctions, urging instead that under *Powell*, "[t]he right to counsel in a criminal proceeding is 'fundamental.'"<sup>47</sup>

In light of *Betts*, then, *Gideon* was in fact seminal. The *Gideon* Court held that the Sixth Amendment's guarantee of criminal-defense counsel in federal cases is "one of the[] fundamental rights" that flow to state-court defendants through the Fourteenth Amendment's Due Process Clause.<sup>48</sup> Despite the wavering holdings on the subject before *Gideon*, the issue for trial purposes has been settled since then.

## 2. The Right to Appellate Counsel: *Griffin v. Illinois* and *Douglas v. California*

The next step toward *Anders* came in a pair of decisions that focused on a state-court defendant's rights on appeal from a criminal conviction.

First, in *Griffin v. Illinois*,<sup>49</sup> the Court recognized that low-income defendants enjoy a federal right of access to a state-court trial transcript in order to prosecute an appeal. In doing so, the Court expanded its analysis to include not only due process, but also equal protection;<sup>50</sup> it recognized that "a State is not required by the Federal Constitution to

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43. *Betts v. Brady*, 316 U.S. 455, 467–71 (1942).

44. *Id.* at 471.

45. *Id.* at 471–72.

46. *Id.* at 463.

47. *Id.* at 475 (Black, J., dissenting) (quoting *Powell v. Alabama*, 287 U.S. 45, 70 (1932)).

48. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

49. *Griffin v. Illinois*, 351 U.S. 12 (1956).

50. *See id.* at 17 ("[O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.").

provide appellate courts or a right to appellate review at all,”<sup>51</sup> but it cautioned that “a State that does grant appellate review” cannot “do so in a way that discriminates against some convicted defendants on account of their poverty.”<sup>52</sup> The pursuit of “equal justice,” the Court held, falters “where the kind of trial a man gets depends on the amount of money he has.”<sup>53</sup>

It was a short leap, then—both temporally and doctrinally—to a nationally recognized right to appellate *counsel* in state-court appeals. The Court recognized that right for the first time nine years after *Griffin*, in *Douglas v. California*.<sup>54</sup> There, the Court reviewed California’s system of having a trial judge review the trial record to determine “whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed.”<sup>55</sup> Again, equal protection was the theme: “where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”<sup>56</sup> But due process played an important role; having a court screen to determine whether appellate review was warranted deprived the defendant of “[a]ny real chance” of uncovering “hidden merit.”<sup>57</sup> “Hidden merit” is an important concept here; the difficulties with *Anders* arise primarily when the basis for reversal on appeal is not patent.

### B. *The Seminal Decision in Anders*

Four years after first recognizing in *Douglas* a constitutional right to appellate counsel in appeals of right, another California case spawned the Court’s decision in *Anders*.<sup>58</sup> The Court in *Anders* struggled to capture, in concrete terms, what the right to counsel actually means. The decision is

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51. *Id.* at 18; *see also* *Smith v. Robbins*, 528 U.S. 259, 292 (2000) (Souter, J., dissenting) (“When a State elects to provide appellate review, . . . the terms on which It does so are subject to constitutional notice.”). The universal right of appeal is beyond the scope of this article, but my colleague Cassandra Burke Robertson has addressed it. *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219 (2013) (advocating for recognition of fundamental right to appeal); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE § 21-1.1(a) (2d ed. 1980) (“The possibility of appellate review of trial court judgments should exist for every criminal conviction. It is undesirable to have any class of case in which such trial court determinations are unreviewable.”).

52. *Griffin*, 351 U.S. at 18.

53. *Id.* at 19.

54. *Douglas v. California*, 372 U.S. 353 (1963).

55. *Id.* at 355 (quoting *California v. Hyde*, 331 P.2d 42, 43 (Cal. 1958)).

56. *Id.* at 357 (emphasis added).

57. *Id.* at 356.

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

confusing and internally inconsistent. And it ushered in an era of confusion that continues to this day.

Charles Anders was stopped for an ordinary traffic violation. After seeing a “package fly out of the car,” the police officer searched the car and discovered marijuana.<sup>59</sup> He was eventually convicted of felony possession of marijuana in a California state court.<sup>60</sup>

On appeal, Anders’ lawyer wrote a letter to the California appellate court representing “that there was no merit to the appeal.”<sup>61</sup> Anders then “requested the appointment of another attorney,” which the appellate court denied.<sup>62</sup> Left with no other option, he pursued his appeal pro se,<sup>63</sup> and the appellate court affirmed his conviction.<sup>64</sup> That opinion addressed his counsel’s withdrawal in a single sentence, highlighting counsel’s conclusion that the appeal had no merit.<sup>65</sup> There was no mention of Anders’ request for replacement counsel. And there was no discussion of the constitutional significance of his counsel’s withdrawal or of the public disparagement of the merits of his client’s appeal.

The Supreme Court reversed. Having recognized in *Douglas* the right to appellate counsel in a state-court criminal appeal,<sup>66</sup> the Court’s decision turns heavily on what that right actually means: “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*.”<sup>67</sup> So holding, the Court had no trouble concluding that “California’s procedure did not furnish petitioner with counsel acting in the role of an advocate[,] nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity.”<sup>68</sup>

So what does it mean to be an advocate? The Court explained that an advocate must “support his client’s appeal to the best of his ability.”<sup>69</sup> Fair

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59. *People v. Anders*, 333 P.2d 854, 855–56 (Cal. Dist. Ct. App. 1959), *rev’d*, 386 U.S. 738.

60. *Anders*, 386 U.S. at 739.

61. *Id.* at 740.

62. *Id.*

63. *Id.*

64. *Anders*, 333 P.2d at 856.

65. *Id.* at 855 (“The attorney who was appointed by this court to assist him on appeal has informed the court and the defendant that he finds no merit therein.”).

66. *Douglas v. California*, 372 U.S. 353 (1963).

67. *Anders*, 386 U.S. at 744 (emphasis added); *see also* *Smith v. Robbins*, 528 U.S. 259, 276–77 (2000) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)) (equal-protection and due-process concerns “largely converge to require that a State’s procedure ‘afford[] *adequate and effective* appellate review to indigent defendants.”) (emphasis added)).

68. *Anders*, 386 U.S. at 743.

69. *Id.* at 744.

enough, but what if counsel has no such ability? What if the facts and procedural history of the case support no appellate argument? That was apparently the conclusion Anders' counsel had reached in informing the California court that the appeal had "no merit."<sup>70</sup>

To accommodate those circumstances, the Court left counsel an option for cases that counsel believes are "wholly frivolous."<sup>71</sup> Counsel must first perform "a conscientious examination" of the record before making that determination.<sup>72</sup> Then, if counsel so concludes, "he should so advise the court and request permission to withdraw."<sup>73</sup> But there was a catch in the original *Anders* formulation: the request to withdraw had to be "accompanied by a brief referring to anything in the record that *might arguably support the appeal*,"<sup>74</sup> including "references not only to the record, but also to [apposite] legal authorities."<sup>75</sup> The Court defended this requirement as a means of providing the client with "that advocacy which a nonindigent defendant is able to obtain."<sup>76</sup>

Of course, it is difficult to fathom how there can be anything in the record that might arguably support an appeal that is wholly frivolous. Justice Stewart's dissent pointed out that "if the record did present any such 'arguable' issues, the appeal would not be frivolous[,] and counsel would not have filed a 'no-merit' letter in the first place."<sup>77</sup> He characterized this as a "quixotic requirement" premised on the "cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted."<sup>78</sup>

The Court built into the *Anders* briefing process two additional provisions designed to protect the client. First, "[a] copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses."<sup>79</sup> Second, the appellate court "then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous."<sup>80</sup> If the court, having conducted its review, agrees with counsel, it may grant the motion to withdraw and dispose of the case as state law requires.<sup>81</sup> But if it disagrees with counsel's assessment, the

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70. *People v. Anders*, 333 P.2d 854, 855 (Cal. Dist. Ct. App. 1959).

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

72. *Id.*

73. *Id.*

74. *Id.* (emphasis added).

75. *Id.* at 745.

76. *Id.*

77. *Id.* at 746 (Stewart, J., dissenting).

78. *Id.*

79. *Id.* at 744 (majority opinion).

80. *Id.*

81. *Id.*

court “must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.”<sup>82</sup>

C. *Post-Anders Clarification from the Supreme Court on the Right to Appellate Counsel in the Context of Arguably Frivolous Appeals*

In the fifty-three years since *Anders*, the Court has decided at least five cases that hinge on the *Anders* holding. This subsection chronicles the evolution of the *Anders* holding through the lenses of these evolving cases.<sup>83</sup>

1. *Jones v. Barnes*

It was not until 1983, some fifteen years after deciding *Anders*, that the Court had occasion to revisit the *Anders* holding. And the decision, *Jones v. Barnes*,<sup>84</sup> did not involve a lawyer’s request to withdraw. Instead, the defendant in *Jones* challenged his appellate counsel’s refusal to raise specified issues on appeal.<sup>85</sup> Jones thus had appellate counsel, but he argued that his counsel was ineffective for not arguing the case according to his direction.<sup>86</sup> The Second Circuit, on review of a federal habeas petition, agreed with Jones and held that “since *Anders* bars counsel from abandoning a nonfrivolous appeal, it also bars counsel from abandoning a nonfrivolous issue on appeal.”<sup>87</sup>

The Court reversed, clarifying that counsel is not required to raise particular issues on appeal if in her professional judgment there is no value in doing so—even when the client demands otherwise, and even when the issues are not themselves frivolous.<sup>88</sup> “Neither *Anders* nor any 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.”<sup>89</sup> Such a requirement would “seriously

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82. *Id.*

83. In addition to the cases that address *Anders* directly, the Court has also decided a civil case that rejected a claim against a state-employed public defender who, by not abiding by the *Anders* procedure, allegedly deprived a defendant of his constitutional rights. See *Polk Cty. v. Dodson*, 454 U.S. 312 (1981).

84. *Jones v. Barnes*, 463 U.S. 745 (1983).

85. *Id.* at 749.

86. *Id.* at 749–50.

87. *Id.* at 750.

88. *Id.* at 751.

89. *Id.*

undermine[] the ability of counsel to present the client's case in accord with counsel's professional evaluation."<sup>90</sup>

The *Jones* decision rests on notions of effective appellate advocacy and power allocation as between lawyer and client. Effective appellate advocacy, the Court held, is not measured purely by the ability to articulate issues, but also by the judgment to select among them. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."<sup>91</sup>

But implicit in the majority decision is the allocation of power to the lawyer to make the ultimate selection. And Justice Brennan found fault with that premise: "The import of words like 'assistance' and 'counsel' seems inconsistent with a regime under which counsel appointed by the State to represent a criminal defendant can refuse to raise issues with arguable merit on appeal when his client, after hearing his assessment of the case and his advice, has directed him to raise them."<sup>92</sup> He further explained that "[t]he right to counsel . . . is not an all-or-nothing right, under which a defendant must choose between forgoing the assistance of counsel altogether or relinquishing control over every aspect of his case beyond its most basic structure . . . ."<sup>93</sup>

## 2. *Pennsylvania v. Finley*

The Court's second *Anders* clarification came in 1987 and requires little attention here. In *Pennsylvania v. Finley*,<sup>94</sup> the Court refused to apply the *Anders* rule to an appeal from an unsuccessful collateral attack on a conviction. The Court explained that it had "never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."<sup>95</sup> The case, then, offers no guidance on proper application of the *Anders* procedure; it merely limits the circumstances in which the Constitution requires such a procedure, which under *Finley* applies only to direct appeals.

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90. *Id.*

91. *Id.* at 751–52 (1983) (citing Justice Robert Jackson, *Advocacy Before the Supreme Court*, 25 TEMPLE L.Q. 115, 119 (1951)); see also *Fifth Third Mortg. Co. v. Chic. Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012) ("When a party comes to us with nine grounds for reversing the district court, that usually means there are none.")

92. *Jones*, 463 U.S. at 755–56 (Brennan, J., dissenting).

93. *Id.* at 759; see also *id.* at 764 ("I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime.")

94. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

95. *Id.* at 555.

### 3. *McCoy v. Court of Appeals of Wisconsin*

*McCoy v. Court of Appeals of Wisconsin*,<sup>96</sup> decided in 1988, was the third case clarifying *Anders* and the first to take up a state-court deviation from the process the Court had established for assessing a motion to withdraw. The Wisconsin rule at issue in *McCoy* required an attorney seeking to withdraw to file an *Anders* brief with an additional requirement not found in *Anders*; Wisconsin required counsel to identify not only the arguable issues, but also ““a discussion of *why*”” they ““lack[ed] merit.””<sup>97</sup> The Wisconsin Public Defender refused to comply with the latter requirement of the rule, arguing that it would be “unethical and contrary to *Anders*” to have to argue against his own client.<sup>98</sup>

The Supreme Court upheld the Wisconsin rule. In doing so, it recognized that an *Anders* brief is not a “typical advocate’s brief,” which normally has “as its sole purpose the persuasion of the court to grant relief to the defendant.”<sup>99</sup> An *Anders* brief is instead designed to assure the court that the indigent defendant’s constitutional rights have not been violated.<sup>100</sup> It therefore has a different purpose and places on the appellate court “two interrelated tasks.”<sup>101</sup> First, the court “must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client’s appeal.”<sup>102</sup> Second, the court “must determine whether counsel has correctly concluded that the appeal is frivolous.”<sup>103</sup>

With these tasks in mind, the Court upheld Wisconsin’s “why” requirement because it “merely requires that the attorney go one step further” than the procedure described in *Anders* itself.<sup>104</sup> “Instead of relying on an unexplained assumption that the attorney has discovered law or facts that completely refute the arguments identified in the brief, the Wisconsin court requires additional evidence of counsel’s diligence.”<sup>105</sup> The Court construed this requirement as an “*additional safeguard* against mistaken conclusions by counsel that the strongest arguments he or she

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96. *McCoy v. Ct. of App. of Wisc.*, 486 U.S. 429 (1988).

97. *Id.* at 430 (quoting Wis. R. APP. P. 809.32) (emphasis added); *see also id.* at 429 (requiring counsel “to discuss *why* each issue raised lack[s] merit” is a “depart[ure] from *Anders*.”).

98. *Id.* at 432.

99. *Id.* at 442.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Anders v. California*, 386 U.S. 738, 744–45 (1967).

105. *McCoy*, 486 U.S. at 442.

can find are frivolous.”<sup>106</sup> Astonishingly, the Court held that this process amounted to “precisely the services that an affluent defendant could obtain from paid counsel—a thorough review of the record and a discussion of the strongest arguments revealed by that review.”<sup>107</sup>

Apparently, the Court was not bothered by the reality that counsel for affluent clients do not normally advise the court and the prosecution that she thinks the appeal is frivolous, much less the reasons for that view. Justice Brennan took up that torch: “The Court today,” he wrote in dissent, “reneges on . . . longstanding assurances [to criminal defendants] by permitting a State to force its appointed defender of the indigent to advocate against his client upon unilaterally concluding that the client’s appeal lacks merit.”<sup>108</sup> The “why” requirement, he explained, turns the lawyer into “a friend of the court whose advocacy is so damning that the prosecutor never responds,”<sup>109</sup> effectively amounting to client abandonment.<sup>110</sup>

Eventually, in its 2000 decision in *Smith v. Robbins*, the Court acknowledged that the Wisconsin rule “probably made a court more likely to rule against the indigent than if the court had simply received an *Anders* brief.”<sup>111</sup> Even with that recognition, however, the *Smith* Court reaffirmed the *McCoy* holding.<sup>112</sup>

#### 4. *Penson v. Ohio*

*Penson v. Ohio*,<sup>113</sup> decided one term after *McCoy*, was the fourth Supreme Court case clarifying the *Anders* holding. But *Penson* tread no new ground; the case was “remarkably similar” to *Anders* and therefore required of the Court “a similar answer.”<sup>114</sup>

The lawyer in *Penson* filed a motion to withdraw, along with a conclusory “certification” that he had “carefully reviewed” the record, that he had “found no errors requiring reversal,” and that he would not file

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106. *Id.* (emphasis added); *see also id.* at 443 (“If an attorney can advise the court of his or her conclusion that an appeal is frivolous without impairment of the client’s fundamental rights, it must follow that no constitutional deprivation occurs when the attorney explains the basis for that conclusion.”).

107. *Id.* at 444.

108. *Id.* at 445 (Brennan, J., dissenting).

109. *Id.* at 455.

110. *Id.*

111. *Smith v. Robbins*, 528 U.S. 259, 272–73 (2000).

112. *See id.* at 284 (reaffirming that Wisconsin requirement “affords adequate and effective appellate review for criminal indigents”).

113. *Penson v. Ohio*, 488 U.S. 75 (1988).

114. *See id.* at 77.



a “meritless appeal.”<sup>115</sup> The Ohio appellate court granted that motion without first reviewing the record.<sup>116</sup> It then conducted an independent review and concluded that there was, in fact, error—not only arguable error, but an instance of plain error that warranted a partial reversal.<sup>117</sup> Instead of appointing new appellate counsel to argue all of the issues it identified on its independent review, the Ohio court decided those issues, mostly against the defendant, based only on its own review with no advocate for the defendant.<sup>118</sup>

The Supreme Court held that the Ohio court had not followed the *Anders* procedures in several respects. First, the Ohio court erred “when it granted appellate counsel’s motion to withdraw” because counsel’s certification did not comply with the *Anders* briefing requirement;<sup>119</sup> indeed, it was no better than the letter counsel had sent to the Court in *Anders*. The Ohio court also erred in granting the motion before conducting its own independent review of the record; “the Court of Appeals should not have acted on the motion to withdraw before it made its own examination of the record to determine whether counsel’s evaluation of the case was sound.”<sup>120</sup> And, “[m]ost significantly,” it erred after determining that there were nonfrivolous issues for appeal by deciding those issues without appointing new counsel.<sup>121</sup>

##### 5. *Smith v. Robbins*

The Court’s most recent guidance on how to apply *Anders* came in 2000. In *Smith v. Robbins*,<sup>122</sup> the Court, in a five-to-four decision, endorsed a California procedure that differed from *Anders* in significant ways. That procedure, first announced by the California Supreme Court in *People v. Wende*,<sup>123</sup> did not require counsel to state that an appeal was frivolous or to seek leave to withdraw. Instead, the California procedure instructed counsel to provide a summary of the case but to remain “silent on the merits.”<sup>124</sup> Counsel was also required to explain the position to the

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115. *Id.* at 78.

116. *Id.*

117. *Id.* at 79.

118. *Id.* at 81.

119. *Id.*

120. *Id.* at 82–83.

121. *Id.* at 83.

122. *Smith v. Robbins*, 528 U.S. 259 (2000). Between its decisions in *Penson* and *Smith*, the Court also held that *Anders* does not require a party to petition to the U.S. Supreme Court following an adverse appellate decision. *See Austin v. United States*, 513 U.S. 5 (1994).

123. *People v. Wende*, 600 P.2d 1071 (Cal. 1979).

124. *Smith*, 528 U.S. at 265.

client, advise the client of the right to file a supplemental brief pro se, and “express[] his availability to brief any issues on which the court might desire briefing.”<sup>125</sup> The California appellate court would then review the entire record and either affirm or, if it identified an issue of possible merit, call for further briefing.<sup>126</sup>

One of the major questions in *Smith* was whether state courts were required to follow the *Anders* procedure precisely or whether they were free to fashion alternative methods of addressing arguably frivolous appeals. The Court took the latter route, reaffirming its “established practice of permitting the States within the broad bounds of the Constitution to experiment with solutions to difficult questions of policy” rather than confining the states in a “straitjacket.”<sup>127</sup> The Court placed its trust in the “laboratory of the States in the first instance” to craft appropriate procedures, rather than imposing a national mandatory one.<sup>128</sup> I will come back, in a discussion below, to the significance this aspect of the *Smith* holding may have on the flexibility available to federal appellate courts applying *Anders*.<sup>129</sup>

Having endorsed California’s right to forge its own method of meeting the *Anders* objectives, the Court then examined whether California’s procedure did so. But it first offered an evolved description of what those objectives are—“to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*, and also to enable the State to ‘protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.’”<sup>130</sup> The focus on the misuse of public money had never before appeared in a Court opinion in the line of cases leading to *Anders* or later construing it. With the *Anders* objective now tempered by monetary costs, the Court emphasized that the right to appellate counsel “does not include the right

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125. *Id.*

126. *Id.*; see also *id.* at 265 (quoting *Wende*, 600 P.2d at 1074–75) (“The appellate court, upon receiving a ‘*Wende* brief,’ must ‘conduct a review of the entire record,’ regardless of whether the defendant has filed a pro se brief. The California Supreme Court in *Wende* required such a thorough review notwithstanding a dissenting Justice’s argument that it was unnecessary and exceeded the review that a court performs under *Anders*.”).

127. *Id.* at 272–73.

128. *Id.* at 275 (quoting *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring)). One law student has nevertheless suggested that non-uniform standards for applying *Anders* raise equal-protection concerns. See Fazekas, *supra* note 11, at 594–96.

129. See *infra* § V.

130. *Smith*, 528 U.S. at 277–78 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)).

to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal.”<sup>131</sup>

The Court then endorsed the California procedure, explaining that it was preferable to *Anders* in two respects. First, the procedure reflected a good-faith effort to “mitigate” the ethical problem for counsel by not requiring counsel “to raise legal issues and by not requiring counsel to explicitly describe the case as frivolous.”<sup>132</sup> Second, the Court acknowledged the oxymoronic nature of “suggesting that an appeal could be both ‘wholly frivolous’ and at the same time contain arguable issues,”<sup>133</sup> which implied that there were “gradations of frivolity” and that there were “two different meanings for the phrase ‘arguable issue.’”<sup>134</sup> The California procedure, the Court held, “attempts to resolve this problem . . . by drawing the line at frivolity and by defining arguable issues as those that are not frivolous.”<sup>135</sup>

Justice Souter, writing for the four dissenters, would have rejected the California procedure because the required brief made no attempt to advocate on behalf of the client. He explained that the appellate court’s independent review of the record “could never compensate for the lawyer’s failure of advocacy.”<sup>136</sup> He candidly acknowledged that “there is no perfect place to draw the line between” a lawyer’s conflicting obligations of duty to the client and candor to the court.<sup>137</sup> But depriving the client of any advocacy at all, he warned, ran the risk of a lawyer’s “relax[ing] his partisan instinct.”<sup>138</sup> The majority opinion suggested that on balance it was better to have no argument from counsel than argument that suggested the appeal was frivolous and can thereby “subtly undermine the independence and thoroughness” of the court’s independent review of the record.”<sup>139</sup>

### III. APPLICATION OF *ANDERS* IN THE FEDERAL APPELLATE COURTS

The history chronicled above demonstrates that *Anders*, its precursors, and its Supreme Court progeny all involved the constitutional right to competent counsel in state-court proceedings. The requirement of

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131. *Id.* at 278.

132. *Id.* at 282.

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

134. *Id.*

135. *Id.*

136. *Id.* at 294 (Souter, J., dissenting).

137. *Id.* at 292.

138. *Id.* at 294.

139. *Id.* at 284.

competent counsel in federal prosecutions has never been in doubt; it was enshrined from the outset in the Sixth Amendment.<sup>140</sup> And the Supreme Court itself has never addressed the applicability of *Anders* in the context of federal appeals. But there was, even before *Anders*, a skeletal understanding that appointed counsel could not simply withdraw from appellate representation without assuring the court that doing so would not compromise the defendant's rights.

The federal history has its roots in the federal statute that authorizes a criminal defendant who cannot afford litigation expenses to pursue an appeal *in forma pauperis*.<sup>141</sup> A defendant who qualifies is entitled not only to relief from filing fees and transcript costs, but also to appointment of appellate counsel.<sup>142</sup> Appellate counsel's fee in such circumstances "shall not exceed \$5,000."<sup>143</sup> But by statute a trial court may deny a defendant the right to proceed *in forma pauperis* "if the trial court certifies in writing that it is not taken in good faith."<sup>144</sup> So the same trial court that issued the judgment of conviction has the statutory power to deprive the convicted defendant of access to the appellate process. The statute also provides that an appellate court "shall dismiss the case" if it determines that the appeal is "frivolous."<sup>145</sup>

In 1957, the Court held that the statutory language does not permit a court to deprive a defendant of the right of appeal without "the aid of counsel," even where the trial court has certified that the appeal lacks the requisite good faith.<sup>146</sup> The following year, the Court held that "[t]he good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit."<sup>147</sup> It explained that counsel must act as an advocate for the client; it rejected the work of counsel who, in confirming the absence of a good-faith basis for appeal, "performed essentially the role of amici curiae."<sup>148</sup> Foreshadowing its eventual holding in *Anders*, the Court allowed for the possibility of withdrawal

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140. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.").

141. See 28 U.S.C. § 1915 (2018) (originally enacted as Act of June 25, 1948, ch. 646, § 1915, 62 Stat. 869, 954–55).

142. See *id.* § 1915(e)(1). The statute has been amended several times, but its pertinent provisions are the same today as they were at the time of the Supreme Court decisions herein cited.

143. 18 U.S.C. § 3006A(d)(2) (2018).

144. 28 U.S.C. § 1915(a)(3).

145. *Id.* § 1915(e)(2)(B)(i).

146. *Johnson v. United States*, 352 U.S. 565, 566 (1957); see also *Douglas v. California*, 372 U.S. 353, 357 (1963) ("In the federal courts, . . . an indigent must be afforded counsel on appeal whenever he challenges a certification that the appeal is not taken in good faith.").

147. *Ellis v. United States*, 356 U.S. 674, 675 (1958).

148. *Id.* at 675.

only after the court first ensures that permitting withdrawal would not compromise the client's rights:

If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.<sup>149</sup>

The Court reaffirmed these holdings in *Anders*.<sup>150</sup> These holdings also align with the American Bar Association's 1980 criminal-justice standards.<sup>151</sup>

With that backdrop, the federal circuit courts began applying *Anders* in assessing requests to withdraw—some almost immediately after the *Anders* decision.<sup>152</sup> Six months after *Anders*, for example, the District of Columbia Circuit rejected a “brief filed by counsel appointed by this court to represent appellant” that “was in fact a brief *against* appellant.”<sup>153</sup> In that case, appellate counsel presented a brief listing eight questions identified by his client followed by “a discussion whose manifest thrust is to show there is no substance in the contention.”<sup>154</sup> The circuit procedure, adopted before *Anders* and obliquely criticized in the *Anders* opinion,<sup>155</sup> called for an “amicus memorandum” to be provided “only to the court,” not to the Government,<sup>156</sup> although counsel in that case had “transmitted” it to the Government, and the Government had “adopted” it.<sup>157</sup> Invoking *Anders*, the D.C. Circuit held that a “brief like that filed by counsel in this

149. *Id.*; see also *Hardy v. United States*, 375 U.S. 277, 282 (1964) (holding that appellate counsel who did not participate in trial must order and review transcript before determining whether appeal can proceed in good faith).

150. *Anders v. California*, 386 U.S. 738, 741 (1967) (“Indeed, in the federal courts, the advice of counsel has long been required whenever a defendant challenges a certification that an appeal is not taken in good faith, and such representation must be in the role of an advocate, rather than as amicus curiae.” (citations omitted)).

151. ABA STANDARDS, *supra* note 51, at § 21–2.4(a) (“Requirement of a trial court’s certificate as a condition of appellate review is inconsistent with the principle of the right to appeal. If the decisions to refuse a certificate are not final but can be reviewed by the appellate courts, transition of cases to the appellate courts is made unnecessarily complex and the burden on the appellate courts is increased.”).

152. See, e.g., *United States v. Fisher*, 442 F.2d 1018 (2d Cir. 1971); *Suggs v. United States*, 391 F.2d 971 (D.C. Cir. 1968).

153. *Suggs*, 391 F.2d at 972 (emphasis added).

154. *Id.*

155. See *id.* at 973 (quoting *Anders*, 386 U.S. at 744 n.3).

156. *Id.* at 974. The D.C. Circuit practice still requires counsel to file the memorandum and serve it on his client “but not on government counsel.” D.C. CIR. HANDBOOK, *supra* note 18, § VI(D)(2), at 26.

157. *Id.*

case is not constitutionally adequate, even though the court purports to review the record independently. Counsel may not ‘brief his case against his client.’”<sup>158</sup> Other circuits have found similar fault with counsel’s submissions when they found themselves unable to craft a merit brief advocating for reversal.<sup>159</sup>

By 2019, the federal appellate courts were regularly invoking the *Anders* standards in decisions posted to Westlaw around 600 times a year, sometimes more.<sup>160</sup> And the nature of *Anders*-based dispositions suggests that many of them are not captured in reported decisions that find their ways to searchable databases. When the Supreme Court observed in 2000 that counsel rely on *Anders* briefs “[n]ot infrequently,”<sup>161</sup> it presumably meant in state-court cases, where the *Anders* line of cases originated. But the same can be said of the application of *Anders* in the federal system. Indeed, federal appellate courts have developed a robust set of rules, guidelines, and precedential decisions governing *Anders* briefing in their respective circuits.<sup>162</sup> And the federalization of criminal conduct often associated with poverty<sup>163</sup> helps explain why federal circuit courts are seeing large numbers of cases involving appointed counsel, many of whom eventually seek to withdraw.

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158. *Id.* at 973; *see also id.* at 974 (“It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quote another for him to feel sandbagged when the counsel appointed by one arm of the Government seems to be helping another to seal his doom.”). The effect of counsel’s improper submission permeated the eventual merits decision, which invoked the prior filings by the defendant’s former counsel, to hold that most of the assigned errors “do not merit any comment.” *Suggs v. United States*, 407 F.2d 1272, 1275, 1278 n.3 (D.C. Cir. 1969).

159. *See, e.g., United States v. Griffy*, 895 F.2d 561, 562 (9th Cir. 1990) (rejecting “a brief that summarized the proceedings in the district court, recited the facts of the case, and stated that counsel had reviewed the record and ‘located no specific issues’ for appeal” without “say[ing] the appeals were frivolous and [moving] to withdraw.”); *United States v. Edwards*, 777 F.2d 364, 365 (7th Cir. 1985) (“Since, speaking realistically, a criminal defendant who has money will always be able to persuade some lawyer to prosecute an appeal for him, parity—or, again speaking realistically, an approximation to parity—between criminal defendants who do and those who do not have monetary means requires that the appointed counsel who wants to withdraw not leave his client wholly in the lurch, which is the practical consequence of the ‘no merit’ letter.”).

160. A Westlaw search in the database of all federal circuit courts in 2019 using the search phrase “anders /p (frivolous nonfrivolous non-frivolous) /p withdraw! % habeas” returned 555 cases. The same search returned 607 cases for 2018, 593 cases for 2017, 726 cases for 2016, and 652 cases for 2015.

161. *Smith v. Robbins*, 528 U.S. 259, 264 (2000).

162. *See* 1ST CIR. R. 46.6(c)(4); 2D CIR. R. 4.1(b); 3D CIR. R. 109.2; 6TH CIR. R. 12(c)(4)(C); 7TH CIR. R. 51(b); 8TH CIR. R. 27B(b); 9TH CIR. R. 4-1(C); 10TH CIR. R. 46.4(B)(1)-(3); 11TH CIR. R. 27-1(A)(8); 4th Cir. *CJA Representation*, *supra* note 18; 5th Cir. *Anders Guidelines*, *supra* note 18; D.C. CIR. HANDBOOK, *supra* note 18; SEVENTH CIR. PRACTITIONER’S HANDBOOK, *supra* note 19; *United States v. Wagner*, 103 F.3d 551 (7th Cir. 1996); *United States v. Griffy*, 895 F.2d 561, 562 (9th Cir. 1990); *Suggs v. United States*, 392 F.2d 971 (D.C. Cir. 1968).

163. *See supra* notes 15–16 and accompanying text.

IV. THE PROBLEMS THAT *ANDERS* CREATED

In his dissenting opinion in *Smith*, Justice Souter explained that *Anders* “contemplates two reviews of the record, each of a markedly different character.”<sup>164</sup> The first review comes from “the advocate,” whose “job is to identify the best issues the partisan eye can spot.”<sup>165</sup> The second review is “judicial review from a disinterested judge, who asks two questions: whether the lawyer really did function as a committed advocate, and whether he misjudged the legitimate appealability of any issue.”<sup>166</sup>

The concept is perhaps simple enough to articulate in that fashion. But it presents significant problems at both stages—for the lawyer, for the court, and for the defendant. This section explains those problems.

A. *Problems for Appellate Counsel*

Under *Anders*, the first review of the appellate record comes from the counsel appointed to represent the defendant on appeal. The result of this review—the lawyer’s report to the court about it—is a pivotal moment in the decision whether the lawyer will function as an advocate for the client or an advisor to the court. Judge Richard Posner, writing for the Seventh Circuit, noted that “[m]ost of the case law” under *Anders* “concerns the adequacy of the brief that the lawyer is required to file in support of the motion, identifying the grounds that he might have raised in an appeal brief and explaining why they are frivolous.”<sup>167</sup> The adequacy or inadequacy is a direct function of the bind that a lawyer can find herself in when tasked to represent a client on appeal if she is unable to identify a good-faith argument for reversal.

The Third Circuit has explained that the “dual duties of counsel in the *Anders* situation” are: “(1) to satisfy the court that he or she has thoroughly scoured the record in search of appealable issues; and (2) to explain why the issues are frivolous.”<sup>168</sup> The Seventh Circuit has embodied these concepts in a practitioner’s handbook.<sup>169</sup> But this task presents several significant challenges for counsel.

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164. *Smith*, 528 U.S. at 295 (Souter, J., dissenting).

165. *Id.*

166. *Id.*

167. *United States v. Wagner*, 103 F.3d 551, 551 (7th Cir. 1996).

168. *United States v. Marvin*, 211 F.3d 778, 780 (3d Cir. 2000).

169. 7TH CIR. PRACTITIONER’S HANDBOOK, *supra* note 19, § XVII(C), at 117 (citing *United States v. Edwards*, 777 F.2d 364, 366 (7th Cir. 1985)). Note that the Third and Seventh Circuits’ articulation of the standard, similar to the standard addressed by the Supreme Court in *McCoy*, includes the “why” component. See *supra* notes 97–112 and accompanying text (discussing *McCoy*).

### 1. Distinguishing Between “Frivolous” and Merely “Meritless”

The Supreme Court understands that the *Anders* procedure has been criticized as “incoherent and thus impossible to follow.”<sup>170</sup> How can an appeal “be both ‘wholly frivolous’ and at the same time contain arguable issues”?<sup>171</sup> An arguable issue is, by definition, “‘not frivolous.’”<sup>172</sup> In that sense, “the *Anders* procedure appears to adopt gradations of frivolity and to use two different meanings for the phrase ‘arguable issue.’”<sup>173</sup> The peril for lawyers is that an argument that rises to the level of “frivolous” would constitute an ethical violation,<sup>174</sup> although the ethical rules are somewhat relaxed in the criminal context.<sup>175</sup>

Lawyers are trained to make the best arguments they can from the facts provided and the applicable law. Litigation by definition involves winners and losers; on the front end, lawyers are expected to understand the strengths and weaknesses of their case and explain their assessments to their clients. Most cases lie between the end points of the strong-to-weak continuum; just as no lawyer can ever assure a client that victory is certain (for example, in seeking to overturn a conviction), so too is it rare to be certain that victory is so unlikely as to rise to the level of frivolity, particularly after a lengthy trial.<sup>176</sup>

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v. Ct. App. of Wisc., 486 U.S. 429, 430 (1988)). That component is not found in *Anders* itself. See generally *Anders v. California*, 386 U.S. 738 (1967).

170. *Smith v. Robbins*, 528 U.S. 259, 282 (2000).

171. *Id.*

172. *Id.* (quoting *Anders*, 386 U.S. at 744).

173. *Id.* (quoting *Anders*, 386 U.S. at 744); see also Robert Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 705 (1972) (“[*Anders*] is seen as having established a rarefied distinction between appeals [that] are merely meritless and those [that] are wholly frivolous. Under *Anders*, so interpreted, the constitutional guarantee of effective assistance of counsel assures representation to criminal appellants for meritless, but not for frivolous, appeals.”).

174. See, e.g., MODEL RULES OF PROF’L COND. r. 3.1; see also *infra* notes 189–195 and accompanying text.

175. “The lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.” *Id.* cmt. 3; see also *State v. Sims*, 8th Dist. Cuyahoga No. 107724, 2019–Ohio–4975, ¶ 65–69 (Boyle, J., dissenting) (arguing that counsel’s risk of ethical problem is low).

176. See, e.g., *United States v. Palmer*, 600 F.3d 897, 898 (7th Cir. 2010) (quoting *United States v. Edwards*, 777 F.2d 364, 366 (7th Cir. 1985) (“[I]t seems improbable that in those [transcript] pages or elsewhere in the pretrial proceedings there is nothing at all that ‘a court or another lawyer might conceivably think worth citing to the appellate court as a possible ground of error.’”)); see also 7TH CIR. PRACTITIONER’S HANDBOOK, *supra* note 19, at 102 (“Attorneys who file an *Anders* motion in a case that was tried . . . should pay particular attention to the court’s discussion in [*Palmer*], reminding counsel that the court must have confidence that counsel thoroughly evaluated the record before the court will let the lawyer guide the court’s review of the appeal.”).



Reasonable lawyers can certainly disagree on the strength of an appeal. It follows, then, that reasonable lawyers (and judges) can (and do) disagree on whether an appeal is frivolous.<sup>177</sup> Requiring an appointed lawyer to make that determination, particularly on a question that lends itself to such subjectivity, is perilous for any lawyer who cares about her clients and who does not wish to be the subject of a published opinion criticizing her judgment.<sup>178</sup> On the other hand, some lawyers would be inclined to pursue even frivolous appeals to avoid the risk of ineffective representation—and then pass the buck to the court, through an *Anders* submission, to avoid having to make the ultimate judgment call themselves.

## 2. Having to Advocate Against the Client

“In the relationship with a client, the lawyer is required above all to demonstrate loyalty.”<sup>179</sup> But the *Anders* procedure can require a lawyer to abandon her client’s interest as the price for extricating herself from a case she feels uncomfortable briefing. *Anders* requires the lawyer to affirmatively represent that an appeal is frivolous; she must “advise the court” that she has drawn that very conclusion.<sup>180</sup> As Justice Brennan explained, a lawyer seeking to withdraw “must announce to the court that will rule on a client’s appeal that he or she believes the client has no case.”<sup>181</sup> The Seventh and Third Circuits have specifically rejected *Anders* briefs that did not include that representation.<sup>182</sup>

To be sure, there are variations of *Anders* that lessen the requirement that a lawyer turn against her client. Under the California procedure at issue in *Smith*, counsel does not “explicitly state[] that his review has led

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177. See, e.g., *Penson v. Ohio*, 488 U.S. 75, 91 (1988) (Rehnquist, C.J., dissenting) (“As it turned out, [counsel’s] determination [that an appeal was frivolous] was incorrect, but this fact does not mean that counsel did not employ his legal talents in the service of his client.”); see also *6th Cir. Notes*, *supra* note 19, at 3 (“[A]n attorney’s sense that the defendant/appellant will ultimately not prevail does not necessarily mean that the appeal is wholly frivolous.”).

178. See, e.g., *United States v. Fernandez*, 174 F.3d 900, 902 (7th Cir. 1999) (chastising counsel for “repeated failures to comply with proper *Anders* procedures”); *United States v. Burnett*, 989 F.2d 100, 104 (2d Cir. 1993) (describing inadequate *Anders* submission as a “dereliction of duty”).

179. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 21 (1987).

180. *Anders v. California*, 386 U.S. 738, 744 (1967).

181. *McCoy v. Ct. of App. of Wisc.*, 486 U.S. 429, 447 (1988) (Brennan, J., dissenting).

182. *United States v. Tabb*, 125 F.3d 583, 585 (7th Cir. 1997) (“The problem with the *Anders* brief in this case is not what it says, but what it does not say . . . [I]t gives no indication that counsel has determined, following a proper examination of the record, that there is no nonfrivolous basis for the appeal.”); see also *United States v. Marvin*, 211 F.3d 778, 780–81 (3d Cir. 2000) (adopting *Tabb* holding).

him to conclude that an appeal would be frivolous,” but the courts understand that the frivolousness conclusion is “implicit.”<sup>183</sup> Similarly, the Eighth Circuit has criticized an *Anders* brief that is not “done as an advocate.”<sup>184</sup> But that Eighth Circuit decision seemed to suggest that counsel was required to file a full merits appeal; it offered no alternative to the *Anders* procedure that would have permitted counsel to withdraw.

More typical is the Seventh Circuit’s approach, which is to reject an *Anders* brief that reads “as though [the issues] had merit,” even if counsel advances those arguments “only because his client requested that he do so.”<sup>185</sup> The Seventh Circuit instead insists on an “*Anders* brief explaining why any potential arguments have no merit.”<sup>186</sup>

Justice Brennan wanted a clear rule: “When counsel has nothing further to say in the client’s defense, he or she should say no more.”<sup>187</sup> But *Anders* does not allow for that clear approach. It does not allow for silence. The *Anders* process requires counsel, explicitly or implicitly, to represent that he has no faith in the merits of the client’s case. It is hard to fathom how, in that context, counsel provides the client with the adequate representation on appeal that the Constitution demands. In the words of one Ohio appellate judge, “[w]hen appellate counsel files an *Anders* brief saying, ‘My client should lose,’ appellate counsel undoubtedly prejudices his or her client.”<sup>188</sup>

### 3. Honoring the Duty of Candor to the Court

Competing directly with the duty of loyalty to the client is counsel’s duty of candor to the court.<sup>189</sup> But “when a lawyer’s corresponding obligations are at odds with each other, there is no perfect place to draw the line between them.”<sup>190</sup> On appeal, “counsel must do his partisan best, short of calling black white, to flag the points that come closest to being

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183. *Smith v. Robbins*, 528 U.S. 259, 265 (2000).

184. *Robinson v. Black*, 812 F.2d 1084, 1086–87 (8th Cir. 1987) (“Robinson had a right to expect counsel to brief and argue his case to the best of counsel’s ability, showing the most favorable side of the defendant’s arguments. Counsel changed the adversarial process into an inquisitorial one by joining the forces of the state and working against his client.”).

185. *United States v. Tabb*, 125 F.3d 583, 586 (7th Cir. 1997).

186. *Id.*

187. *McCoy v. Ct. of App. of Wisc.*, 486 U.S. 429, 449 (1988) (Brennan, J., dissenting).

188. *State v. Sims*, 8th Dist. Cuyahoga No. 107724, 2019–Ohio–4975, ¶ 60 (Boyle, J., dissenting).

189. See MODEL RULES OF PROF’L CONDUCT r. 3.1 (duty not to advance position “unless there is a basis in law and fact for doing so that is not frivolous”); *id.* r. 3.3(a)(1) (duty not to make a “false statement of fact” to tribunal); *id.* r. 3.3(a)(2) (duty to disclose controlling authority).

190. *Smith v. Robbins*, 528 U.S. 259, 292 (2000) (Souter, J., dissenting).

appealable.”<sup>191</sup> A lawyer who can unearth no nonfrivolous argument for appeal is thus faced with two untenable options: abandoning the loyalty she owes the client or risking professional misconduct.

The argument is complicated once again by the challenge in defining what constitutes “frivolous.”<sup>192</sup> We can all agree that failing to disclose controlling authority, misrepresenting facts, or misstating the law are improper under all circumstances.<sup>193</sup> But arguments that lack sufficient factual or legal support are also potentially frivolous, even if those arguments do not involve outright misrepresentation; they may still violate “the rule against trifling with the court.”<sup>194</sup>

One appellate judge advocates amending the rules of professional conduct to clarify that a merits brief in a criminal appeal is never frivolous “so long as counsel does not misrepresent facts or law.”<sup>195</sup> The concept is sound, and it may resolve the concerns about candor to the tribunal, but it would not resolve the holistic problem. If contrary authority runs against the defendant, disclosing it to the court may be just as problematic for the client as characterizing the appeal as frivolous. And it still would require to brief an appeal she does not believe in.

#### 4. Exposing Counsel’s Mental Impressions

Related but distinct from the other problematic features of an adequate *Anders* brief is the requirement that counsel provide a window into her mental impressions as a predicate for obtaining leave to withdraw. Comparing the *Anders* procedure to the usual appellate brief exposes the problem.

In a normal scenario, in either a civil or a criminal appeal, the appellant’s counsel identifies the various candidates for reversal and makes strategic choices about which issues to raise. Typically, these are choices informed by an assessment of the relative strength of the arguments—but not always. Sometimes counsel will abandon an argument with a substantial possibility for reversal if there are competing considerations—such as creating an inconsistency with another argument or for reasons extrinsic to the appeal itself.<sup>196</sup> For example, an argument based on ineffective assistance of trial counsel can run counter to other

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191. *Id.* at 295.

192. *See supra* notes 170–174 and accompanying text.

193. *See supra* note 189.

194. *Smith*, 528 U.S. at 295.

195. Warner, *supra* note 10, at 665.

196. *See United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002) (“Lawyers should not blindly assume that their clients will benefit from every legal contention, no matter the hazard . . .”).

arguments that depend on the portrayal of trial counsel as diligent and effective. A tenuous argument to reverse a conviction may not integrate well with another, stronger argument focusing on the length of the sentence. An argument that a defendant's remorse justified a lower sentence may not be acceptable to a client who insists on his innocence. And so on.

In the face of these considered choices by counsel in an ordinary appeal, the court has no obligation to scrutinize them or to review the record in search of unraised issues.<sup>197</sup> Indeed, under *Jones*, courts afford great deference to counsel's selection of issues, so long as counsel pursues at least one on the merits.<sup>198</sup> But under *Anders*, counsel who believes the appeal is frivolous in its entirety is nevertheless required to articulate *all* of the available arguments<sup>199</sup> and, depending on the court, also to explain why they are frivolous.<sup>200</sup>

This rule stands in stark contrast to protection we normally afford to a lawyer's sacrosanct mental impressions. For over eighty years, we have accepted as canonic that "even the most liberal of discovery theories" does not "justify unwarranted inquiries into the files and the mental impressions of an attorney."<sup>201</sup> And yet we require appointed counsel seeking to withdraw to do just that. We do so under the guise of protecting the defendant's constitutional rights, but of course the client in this circumstance usually has no desire to see his counsel expose the client's hand in that fashion.

### B. *Problems for the Appellate Court*

Evaluating appointed counsel's request to withdraw—that is, determining whether a particular submission complies with the *Anders* safeguards—has been a "continuing source of frustration for the appellate judge."<sup>202</sup> Part of the frustration stems from "a lack of uniformity in internal court methods for handling *Anders* briefs"<sup>203</sup> These problems are both procedural and substantive. They are procedural because the courts

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197. Warner, *supra* note 10, at 635 ("[I]f at least one issue of arguable merit is raised, counsel may exercise independent professional judgment and does not have to raise any other issues should counsel deem other issues too weak to present a good chance for reversal.>").

198. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see generally supra* notes 84–93 and accompanying text.

199. *Id.*; *see Warner, supra* note 10, at 634 ("[G]iven *Anders*, if counsel deems all of the issues nonmeritorious, counsel must file a brief raising all issues of arguable merit.>").

200. *See supra* notes 97–107, 167–169 and accompanying text.

201. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

202. Warner, *supra* note 10, at 625.

203. *Id.* at 656.

cannot agree on the right level of review of counsel's submission and of the record. They are substantive because that review, at whatever level, implicates important constitutional protections that a cautious appellate judge does not wish to compromise for the sake of expediency. The challenges are so onerous that several states "have refused to adopt the *Anders* [p]rocedure."<sup>204</sup>

A "disinterested judge" evaluating an *Anders* brief "asks two questions: whether the lawyer really did function as a committed advocate, and whether he misjudged the legitimate appealability of any issue."<sup>205</sup> Articulating these questions is easy enough; answering them presents several challenges.<sup>206</sup> First, how is the appellate court supposed to determine whether counsel acted as a sufficient advocate? Second, what degree of review of the record should the appellate court conduct to test the reliability of counsel's conclusion that the appeal is frivolous? And third, what should the court do if it disagrees with counsel's assessment? I treat each of these questions in turn.

### 1. Evaluating Counsel's Competency in Submitting an *Anders* Brief

The first problematic task an appellate court confronts in determining whether to grant a request to withdraw under *Anders* is whether counsel's submission demonstrates an adequate assessment of the case. Some commentators take the view that *Anders* speaks "solely [to] the manner in which counsel communicates to the court the conclusion that the appeal was meritless, not the conclusion itself."<sup>207</sup> Ensuring an adequate brief is critical; "there needs to be some reasonable assurance that the lawyer has not relaxed his partisan instinct."<sup>208</sup>

So what is adequate? The circuits have attempted to define the term in their apposite rules and guidelines, and the standard certainly demands a brief that reflects a thorough review of the transcripts, which "is necessary for the court to satisfy itself that counsel has been diligent in examining the record for meritorious issues and that the appeal is indeed

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204. Schmidt, *supra* note 8, at 207; *see also* Warner, *supra* note 10, at 642. In Ohio, which is divided into appellate districts, three districts no longer allow *Anders* submissions, while the other nine continue to accept them. *See generally* MARK P. PAINTER & ANDREW S. POLLIS, OHIO APPELLATE PRACTICE § 5:27, at 277–78 (2019–20 ed.).

205. Smith v. Robbins, 528 U.S. 259, 295 (2000) (Souter, J., dissenting).

206. Warner, *supra* note 10, at 633 ("*Anders* . . . leads to inconsistency in the presentation of issues to the appellate court, and this results in inconsistency in the method of review by the court.>").

207. Warner, *supra* note 10, at 632 (citing Junkin, *supra* note 6, at 188 (1988)).

208. Smith, 528 U.S. at 294 (Souter, J., dissenting).

frivolous.”<sup>209</sup> But transcript review aside, determining the adequacy of counsel’s assessment, based only on the brief filed by the lawyer who seeks to withdraw, requires the court to place a high level of confidence in the lawyer’s competency. An obviously insufficient brief in some ways is easier to assess than one that appears facially adequate.<sup>210</sup> That begs the question: what does “facially adequate” mean?

The Seventh Circuit suggests that “facially adequate” means “that the brief appears to be a competent effort to determine whether the defendant has any grounds for appealing.”<sup>211</sup> It “explains the nature of the case[,] addresses the issues that a case of this kind might be expected to involve” and contains an analysis that “appears to be thorough.”<sup>212</sup> The Second Circuit appears to look for key objections and motions made at trial and decided against the defendant.<sup>213</sup> The Fifth Circuit offers a more-detailed checklist of lower-court proceedings on which counsel should focus in conducting a review of the record and even distinguishes between guilty-plea cases and cases tried to a verdict.<sup>214</sup> Justice Souter explained there must be “some affirmative and express indicator that an advocate has been at work, in the form of a product that an appellate court can specifically review.”<sup>215</sup>

This know-it-when-you-see-it standard<sup>216</sup> is a troubling foundation on which to assess the constitutional rights of a defendant who has already been convicted and is presumably incarcerated. It invites a high level of deference, whether or not warranted, to the lawyer looking for relief from an assignment. It rewards lawyers who write well at the expense of their

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209. 7TH CIR. PRACTITIONER’S HANDBOOK, *supra* note 19, § XIV(B), at 117; *see also id.* at 102 (“Counsel should be mindful that the transcripts are essential in the preparation of a motion to withdraw based on *Anders*.”); 1ST CIR. R. 46.6(C)(4) (requiring counsel to have “ordered and read all relevant transcripts”); 4th Cir. *CJA Representation*, *supra* note 18 (requiring counsel to “order the complete record transcribed”); *see also* 7TH CIR. PRACTITIONER’S HANDBOOK, *supra* note 19, § XIV(B), at 102 (“Counsel should be mindful that the transcripts are essential in the preparation of a motion to withdraw based on *Anders*”); *supra* note 149. *But see* 11TH CIR. R. 27-1(a)(8) (requiring counsel to ensure that the record contains transcripts of “relevant” proceedings).

210. *See United States v. Tabb*, 125 F.3d 583, 584 (7th Cir. 1997) (“Our starting point is the *Anders* brief itself, which we review to see if it is adequate on its face.”).

211. *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

212. *Id.*

213. *See United States v. Burnett*, 989 F.2d 100, 104 (2d Cir. 1993) (rejecting *Anders* brief “consisting solely of one and a half pages of argument [that] does not explain why neither the objection to [an aspect of the trial evidence] nor the insufficiency of the evidence claims are now frivolous grounds for an appeal.”).

214. 5th Cir. *Anders Guidelines*, *supra* note 18.

215. *Smith v. Robbins*, 528 U.S. 259, 298 (2000) (Souter, J., dissenting).

216. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring) (concluding that motion picture did not meet the definition of pornography).

clients; good writing can sometimes mask weak substance. And its inherent subjectivity lends itself to different conclusions on the part of different judges, depending on several factors, including their prior familiarity with the lawyer's work or reputation, their general willingness to scrutinize the issues independently, and their philosophical predisposition to find in favor or against a criminal defendant.<sup>217</sup>

In some circumstances, of course, inadequacy is apparent on the face of a submission. And courts that have rejected *Anders* submissions offer some clues about what can constitute a deficiency. Among federal courts that have weighed in on this topic, the Seventh Circuit has been particularly prolific. That court insists on "sufficient indicia in the brief that counsel has made a sound judgment."<sup>218</sup> It has noted its suspicions of unexpectedly short submissions<sup>219</sup> and has rejected briefs where the "discussion" section "did not demonstrate that [counsel] looked at the record and made an informed decision that no issues merited appeal."<sup>220</sup> It also frowns on *Anders* briefs that raise only the sentencing decision as an arguable issue for appeal after a lengthy trial: "So much can happen during a [lengthy trial], and when presented with an *Anders* motion, we are not free to assume that counsel combed the entire record but found nothing else worth discussing."<sup>221</sup> Finally, the court admonishes counsel not only to summarize the evidence, but to "provide[] *context*" for it, without which the "brief does not reflect the close scrutiny that we expect from a lawyer who represents that her client's appeal is frivolous."<sup>222</sup>

To be sure, the Seventh Circuit acknowledges the "broad discretion" conferred on attorneys "to decide what matters to discuss in an *Anders* brief."<sup>223</sup> It also "emphasize[s] that counsel need not discuss every possible issue."<sup>224</sup> But the brief must leave the court satisfied that counsel

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217. See, e.g., Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 312–13 (2013).

218. *United States v. Tabb*, 125 F.3d 583, 585 (7th Cir. 1997).

219. *United States v. Fernandez*, 174 F.3d 900, 901 (7th Cir. 1999) ("The argument section of this brief is a mere three pages, which, rather than identifying potential issues for appeal, surveys the proceedings from guilty plea to sentencing, and states bare conclusions that no error existed at any stage of the proceedings."); see also *United States v. Burnett*, 989 F.2d 100, 105 (2d Cir. 1993) (submission "consisting solely of one and a half pages of argument is inadequate").

220. *Tabb*, 125 F.3d at 585.

221. *United States v. Palmer*, 600 F.3d 897, 899 (7th Cir. 2010) ("It will be the unusual case when a lawyer representing a defendant convicted at trial cannot identify anything but sentencing issues to include in an *Anders* submission.>").

222. *Id.*; see also *Tabb*, 125 F.3d at 585 (rejecting conclusory statement of no prejudice to defendant from events at trial that was unaccompanied by a "review of the events at trial").

223. *Tabb*, 125 F.3d at 585.

224. *Id.*

has “made a reasoned decision not to raise the issues he has omitted.”<sup>225</sup> Indeed, selection of the issues is crucial, because, in Justice Stevens’ words, “bad judgment by the attorney in selecting the issues to raise might divert the court’s attention from more meritorious, unmentioned issues.”<sup>226</sup>

Ironically, the better the brief, the higher the risk of adverse consequences for the client; what benefits counsel and the court may not benefit the party who presumably would prefer to have an advocate argue forcefully for reversal. Perhaps to temper the inherent conflict, the Seventh Circuit wants counsel to “sketch[] an argument *for* reversal,” in order to spare the appellate court the task of “comb[ing] the entire record looking for possible arguments that counsel missed.”<sup>227</sup> It even goes so far as to suggest that counsel who provides such a sketch thereby satisfies “the duty to be ‘an active advocate on behalf of his client.’”<sup>228</sup> But the reality is that sketching out an argument, and then telling the court it is frivolous—and, worse yet, explaining *why* it is frivolous<sup>229</sup>—runs directly counter to the client’s interest. In the end, then, courts like the Seventh Circuit do more disservice to the defendant’s constitutional rights than they do to uphold them.

## 2. Scope of Review when Presented with *Anders* Brief

The second major problem for an appellate court evaluating an *Anders* submission is to determine how much of the record it must independently review and how closely it must review it. “Just what is ‘enough’” court review in these circumstances “is not clear.”<sup>230</sup> Should the appellate court review the entire record, regardless of the issues counsel raises? The Seventh Circuit has acknowledged that “[l]anguage in some opinions of the Supreme Court could . . . be taken to impose upon us this task of fine tooth combing the record.”<sup>231</sup> But some courts,

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225. *Id.*

226. *Smith v. Robbins*, 528 U.S. 259, 284 (2000) (Stevens, J., dissenting). Justice Stevens also admonishes that “the task of writing out the reasons that support an initial opinion on a question of law” can “lead[] to a conclusion that was not previously apparent.” *Id.* at 290.

227. *United States v. Fernandez*, 174 F.3d 900, 901 (7th Cir. 1999) (emphasis added).

228. *See id.* at 901 (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)).

229. *See McCoy v. Ct. of App. of Wisc.*, 486 U.S. 429, 430 (1988); *United States v. Wagner*, 103 F.3d 551, 551 (7th Cir. 1996).

230. *People v. Wende*, 600 P.2d 1071, 1076 (1979) (Clark, J., concurring in part and dissenting in part) (quoting *Anders*, 386 U.S. at 742); *see also Wagner*, 103 F.3d at 552 (“Less explored, and the focus of this opinion, is how deeply we appellate judges must explore the record in the district court in order to determine whether to grant the motion.”).

231. *Wagner*, 103 F.3d at 552.



including the Seventh Circuit, find it sufficient to review only those portions of the record that are germane to the arguable issues of merit identified in the submission. It is not the court's job, the Seventh Circuit has held, "to comb the record even where the *Anders* brief appeared to be perfectly adequate, searching for possible nonfrivolous issues that both the lawyer and his client may have overlooked."<sup>232</sup>

One could logically posit that the degree of review should be a function of the quality of the lawyer's submission.<sup>233</sup> The better the lawyer's brief, the more reasonable it would be for a court to accept the representation that there are no nonfrivolous arguments. But that argument suffers from a fallacy that the court can reasonably infer adequate scrutiny of the record from a brief that appears facially sound. Perhaps that inference is warranted sometimes, or even often, but not consistently enough to be a reliable bellwether of constitutional safeguards for the client.

There is, then, no uniform answer to this question; federal circuits have reached different conclusions.<sup>234</sup> While the Seventh Circuit confines its review to the portions identified by counsel, the Fourth Circuit, for example, "review[s] the entire record,"<sup>235</sup> regardless of the quality of the submission. Neither approach is adequate.

Reviewing the entire record "adds substantially to the burden on the judicial shoulders."<sup>236</sup> More fundamentally, it requires judges to review the record "much more meticulously than in appeals raising meritorious issues."<sup>237</sup> It thereby creates an inconsistency that is "particularly disturbing to most judges."<sup>238</sup> After all, "neither the indigent defendant whose attorney does not file an *Anders* brief nor the nonindigent

232. *Id.*

233. *See id.* at 553 (degree of record review is "guided . . . by the *Anders* brief itself, provided that the brief is adequate on its face").

234. State courts are also divided. Fourteen state courts "do not comb the record to point out arguable appellate issues." Warner, *supra* note 10, at 656. Some state courts "point out only issues constituting clear error, not merely issues of arguable merit." *Id.*

235. *See, e.g.,* United States v. Garvin, No. 19-4415, 2019 WL 5448589, at \*2 (4th Cir. Oct. 24, 2019). Note that the Fourth Circuit approach mirrors the California approach endorsed by the Supreme Court. *See* Smith v. Robbins, 528 U.S. 259, 265 (2000) (quoting *People v. Wende*, 600 P.2d 1071, 1072 (1979) ("[The appellate court] . . . must 'conduct a review of the entire record' . . .")); *see also* *Wende*, 600 P.2d at 1074-75 ("We conclude that *Anders* requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous.").

236. *Smith v. Robbins*, 528 U.S. 259, 298 (2000) (Souter, J., dissenting).

237. Warner, *supra* note 10, at 625.

238. *Id.* at 662; *see also id.* at 633 (if a court "considers issues not raised by counsel, then it is performing for the indigent appellant a function that it does not provide for any other class of appellee").

defendant gets this kind of review from the court”;<sup>239</sup> to the contrary, if counsel pursues an appeal on the merits, courts defer to counsel’s selection of issues to press.<sup>240</sup> Some have observed that offering a comprehensive record review to a defendant whose counsel found no nonfrivolous issue for appeal “require[s] an appellate court to abandon its traditional role as an adjudicatory body and to enter the appellate arena as an advocate.”<sup>241</sup>

The Seventh Circuit first announced its middle-of-the-road approach in *United States v. Wagner*.<sup>242</sup> Judge Posner, writing for the court, explained that reviewing the entire record, rather than only those portions of the record identified by counsel, “makes this court the defendant’s lawyer.”<sup>243</sup> The upshot, he argued, is to afford the defendant more advocacy than the Constitution requires or warrants:

The defendant ends up in effect with not one appellate counsel but (if he is lucky) six—his original lawyer, who filed the *Anders* brief; our law clerk or staff attorney who scours the record for issues that the lawyer may have overlooked; a panel of this court that on the advice of the law clerk or staff attorney denies the *Anders* motion and appoints another lawyer for the appellant; the new lawyer.<sup>244</sup>

He characterized this multitude of reviewers as “overkill,” as “it gives the indigent defendant more than he could expect had counsel (whether retained or appointed) decided to press the appeal, since counsel’s decision on which issues to raise on appeal would normally be conclusive.”<sup>245</sup> So the Seventh Circuit does not “scour the record”;<sup>246</sup> its

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239. *Id.*

240. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see generally supra* notes 84–93 and accompanying text.

241. *People v. Wende*, 600 P.2d 1071, 1076 (1979) (Clark, J., concurring in part and dissenting in part).

242. *United States v. Wagner*, 103 F.3d 551 (7th Cir. 1996).

243. *Id.* at 552.

244. *Id.*; *see also* *United States v. Fernandez*, 174 F.3d 900, 901 (7th Cir. 1999) (reviewing the entire record “unfairly gives the defendant the benefit of a committee of counsel looking for error”).

245. *Wagner*, 103 F.3d at 552.; *see also Fernandez*, 174 F.3d at 900 (quoting *Wagner*, 103 F.3d at 552 (“[W]hen counsel files an *Anders* brief, we will not ‘scour the record’ looking for issues counsel missed.”)); *United States v. Pippen*, 115 F.3d 422, 426 (7th Cir. 1997) (“[W]e have noted before that this court would not scour the record in search of an appealable issue if counsel has fallen down on the job . . . .”); *United States v. Tabb*, 125 F.3d 583, 584 (7th Cir. 1997) (“If [the brief] explains the nature of the case and intelligently discusses the issues that a case of the sort might be expected to involve, we will not conduct an independent review of the record to determine whether a more ingenious lawyer might have found additional issues that may not be frivolous.”); *see generally* Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251 (2004) (discussing an appellate court’s role in rooting out error not identified by the appellant).

246. *Wagner*, 103 F.3d at 552.

practitioner guide declaratively warns that the court “will not conduct an independent top-to-bottom review of the record in search of additional issues that may not be frivolous.”<sup>247</sup> Instead, it confines its review of the record to the specific materials identified by counsel, coupled with a review of *Anders* submission and “the district court’s decision.”<sup>248</sup> That narrow review, the court believes, serves as “a sufficient basis for confidence in the lawyer’s competence to forego scrutiny of the rest of the record.”<sup>249</sup>

Judge Posner cautioned that this “intermediate position” is appropriate only if the *Anders* submission is “adequate on its face.”<sup>250</sup> Of course, that reasoning walks us back to the original problems that beset both the court and counsel—how the court should determine if an *Anders* submission is facially adequate without reviewing the record<sup>251</sup> and how counsel should go about crafting such a submission without throwing her client under the bus.<sup>252</sup>

At the core of Judge Posner’s intermediate position is that “[t]he resources of the courts of appeals are limited and the time of staff attorneys and law clerks that is devoted to searching haystacks for needles is unavailable for more promising research.”<sup>253</sup> While it is no doubt a drain on judicial resources to review the entire record of every criminal appeal in which counsel seeks to withdraw, the allocation of resources hardly seems an adequate basis for depriving the defendant of effective appellate counsel. At the same time, it makes no sense to afford one incarcerated defendant more judicial scrutiny than it offers his similarly situated cellmate, all because the cellmate’s appellate lawyer is willing to press even one appellate issue for a merit decision. In that sense, as the Supreme Court observed, a lawyer who presses one weak issue on appeal thereby “divert[s] the court’s attention from more meritorious, unmentioned issues.”<sup>254</sup>

### 3. What to Do in Face of an Inadequate *Anders* Brief

The third problem appellate courts encounter under the *Anders* regime is what to do if they find something inadequate in counsel’s

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247. 7TH CIR. PRACTITIONER’S HANDBOOK, *supra* note 19, § XVII(C), at 117.

248. *Tabb*, 125 F.3d at 584.

249. *Id.*

250. *Id.* at 553.

251. *See supra* § IV(B)(1).

252. *See supra* § IV(A).

253. *United States v. Wagner*, 103 F.3d 551, 553 (7th Cir. 1996).

254. *See Smith v. Robbins*, 528 U.S. 259, 284 (2000).

submission. A court can reach that conclusion in two ways. First, it can conclude that the submission does not meet the *Anders* briefing standard. That conclusion can itself take any of three forms: (1) that the brief betrays an insufficient review of the record; (2) that the brief does not adequately explain the issues that have arguable merit; and (3) depending on the court rule, that the brief does not explain why the appeal is frivolous.<sup>255</sup> Second, a court can disagree with counsel's assessment of the identified issues as frivolous.

The appropriate response to any of these inadequacies seems fairly obvious: discharge the appointed counsel and appoint a successor. It would appear appropriate to appoint a successor whether the submission is defective or whether the court believes there to be an arguably meritorious argument. Having already found a flaw in counsel's representation, it is hardly fair to require the client to suffer through the merits process with counsel who has no confidence in the case.

Surprisingly, however, this is not the uniform approach. For example, where the deficiency was with the *Anders* submission itself, the Third and Seventh Circuits have directed the same counsel to file an *Anders*-compliant brief,<sup>256</sup> deviating from that practice only after concluding that the lawyer in question was a serial offender<sup>257</sup> or had failed to provide a record to the court.<sup>258</sup> The rationale for permitting the same lawyer to submit a successive *Anders* brief appears to include the notion that "going through the exercise required by *Anders* "will cause the lawyer to "change his mind and decide that his client has a meritorious, or at least nonfrivolous, appeal after all."<sup>259</sup> The better approach would be to have another lawyer assess the case, as I explain below.

When the brief is not facially deficient, but the court nevertheless disagrees with counsel's conclusion that there are no nonfrivolous issues for briefing, there is no uniformity. The Third Circuit stands alone in addressing this subject by local rule, which requires the court to appoint a new lawyer.<sup>260</sup> But appointing successor counsel is not the majority

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255. See *supra* notes 97–107, 167–169 and accompanying text.

256. *United States v. Marvin*, 211 F.3d 778, 782 (3d Cir. 2000); *United States v. Edwards*, 777 F.2d 364, 366 (7th Cir. 1985); see also *United States v. Palmer*, 600 F.3d 897, 898 (7th Cir. 2010); *United States v. Fernandez*, 174 F.3d 900, 901 (7th Cir. 1999).

257. *Fernandez*, 174 F.3d at 902.

258. *United States v. Pippen*, 115 F.3d 422, 426 (7th Cir. 1997).

259. *Edwards*, 777 F.2d at 366; see also *Smith*, 528 U.S. at 290 (Stevens, J., dissenting) ("On a good many occasions I have found that the task of writing out the reasons that support an initial opinion on a question of law—whether for the purpose of giving advice to my client or for the purpose of explaining my vote as an appellate judge—leads to a conclusion that was not previously apparent.").

260. 3D CIR. R. 109.2(a); see also *Marvin*, 211 F.3d at 782 n.4.

approach, at least among state appellate courts.<sup>261</sup> Again, it is disquieting that a criminal defendant, presumably incarcerated, must ever rely on the services of a lawyer who has already told the court his case is frivolous.

The one option that is not available to an appellate court if it disagrees with counsel's *Anders* submission is to decide whatever meritorious issues it identifies without demanding merits briefing. That approach was squarely rejected by the Supreme Court in *Penson*.<sup>262</sup> Nevertheless, the Seventh Circuit has granted a motion to withdraw, even after noting its disagreement with counsel's assessment of an issue, by concluding that the error it identified in a plea colloquy was harmless and not in the defendant's interest to pursue.<sup>263</sup> On that basis, the court granted counsel's motion to withdraw and dismissed the appeal as frivolous even though counsel had not identified the error in the *Anders* brief.<sup>264</sup> The dissent, by contrast, critiqued the majority's decision to determine whether the issue was frivolous without the aid of a proper *Anders* brief.<sup>265</sup>

The lack of guidance and uniformity on how to respond to a deficient *Anders* brief or a brief that incorrectly characterizes an issue as frivolous is worrisome. If a criminal defendant has a constitutional right to competent counsel on appeal, the remedy for a court submission that casts any doubts on counsel's competency should be a new lawyer. That should be the consistent rule, and it should not vary from one court to another.

### C. *Problems for the Criminal Defendant*

The focus of the entire *Anders* process, of course, is the client. That focus hearkens back to the roots of the *Anders* procedure, found in right-to-counsel cases as far back as *Powell v. Alabama*.<sup>266</sup> With that focus in mind, we should be very concerned about the troubling repercussions of the *Anders* apparatus from the perspective of the client.

A defendant whose lawyer makes an *Anders* submission has effectively told the world—certainly the appellate court and the prosecution—that he has no case. A “lawyer submitting an *Anders* brief is, in essence, offering an expert opinion that the appeal is devoid of

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261. See Warner, *supra* note 10, at 656 (most state courts “simply order rebriefing by appointed counsel”).

262. *Penson v. Ohio*, 488 U.S. 75, 83 (1988).

263. *United States v. Knox*, 287 F.3d 667, 670–71 (7th Cir. 2002).

264. *Id.* at 671–72.

265. *Id.* at 672–73 (Ripple, J., dissenting) (“[W]e ought to proceed at a measured pace in adjudicating this case. We ought not to take definitive action on this appeal until we can be confident that counsel has evaluated thoroughly the case and made with his client a careful determination as to whether to raise the adequacy of the [plea colloquy].”).

266. 287 U.S. 45, 53 (1932); see also *supra* notes 26–41 and accompanying text.

merit.”<sup>267</sup> This betrayal is nothing short of abandonment. The ABA itself uses the word “abandon” in describing its recommendation that appointed counsel “endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.”<sup>268</sup>

It is beyond dispute that the abandonment is a direct function of the defendant’s poverty. “[T]he wealthy can always seek a second opinion and might well find a lawyer who in good conscience believes it to have arguable merit.”<sup>269</sup> Even if a private lawyer is unable to identify a basis for appeal, “[i]n no event . . . will [that] lawyer file in the wealthy client’s name a brief that undercuts his or her position.”<sup>270</sup> But the impoverished client whose lawyer refuses to proceed on the merits is left, quite literally, to fend for himself. This hardly seems consistent with equal-protection principles.<sup>271</sup>

Of course, the defendant has the right to submit a response to the *Anders* brief and to pursue any issues he thinks have merit.<sup>272</sup> Indeed, some circuits focus on the requirement that counsel serve the client with a copy of the *Anders* submission, suggesting that notifying the client overcomes some of the problems.<sup>273</sup> Of course, the client “will ordinarily not be learned in the law” and may be unable “to spot possible flaws in his lawyer’s legal arguments.”<sup>274</sup> But courts nevertheless are sometimes “influenced” by a defendant’s failure to respond, which courts construe as “an acknowledgment that the appeal should be abandoned as hopeless.”<sup>275</sup>

This paradigm does not bode well for the reputation of the criminal justice system. The premise of the *Anders* procedure is to protect a criminal defendant’s constitutional rights, but defendants are unlikely to view it that way when it results in abandonment. “It is no secret that indigent clients often mistrust the lawyers appointed to represent them.”<sup>276</sup> The mistrust stems in part from the reality that “the very State that is

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267. *United States v. Tabb*, 125 F.3d 583, 584 (7th Cir. 1997).

268. ABA STANDARDS, *supra* note 51, at § 21-3.2(b)(i) (2d ed. 1980).

269. *McCoy v. Ct. of App. of Wisc.*, 486 U.S. 429, 452 (1988) (Brennan, J., dissenting).

270. *Id.*

271. *See supra* notes 50–53 and accompanying text (discussing equal-protection principles underlying right to counsel).

272. *See Anders v. California*, 386 U.S. 738, 744 (1967) (court must permit defendant, after being served with counsel’s submission, “to raise any points that he chooses”).

273. *See* 6TH CIR. R. 12(c)(4)(C); 5th Cir. *Anders Guidelines*, *supra* note 18, at 1; D.C. CIR. HANDBOOK, *supra* note 18, § VI(D)(2), at 26; *see also* *United States v. Cervantes*, 795 F.3d 1189, 1189–90 (10th Cir. 2015) (focusing on need to provide client substance of submission “in a language he understands”).

274. *United States v. Wagner*, 103 F.3d 551, 552 (7th Cir. 1996).

275. *United States v. Tabb*, 125 F.3d 583, 584 (7th Cir. 1997).

276. *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting).

resolved to deprive appellant of liberty pays his defense counsel.”<sup>277</sup> History can bear out the mistrust when, for example, a lawyer for a defendant recounts arguments against him “[f]or nearly seven pages” and “openly support[s] the trial court’s various rulings with case citations and counsel’s own opinions.”<sup>278</sup>

We can and must do better. I offer in the next section a proposal for doing just that.

## V. A NEW PATH FORWARD

Given all the problems, many commentators have suggested discarding the *Anders* procedure altogether and simply requiring assigned counsel, in some fashion, to argue the case on the merits.<sup>279</sup> Many state courts have taken precisely that step.<sup>280</sup> In Ohio alone, three appellate districts have announced they will no longer accept *Anders* briefs, while the other nine still accept them.<sup>281</sup>

The inconsistency itself, while in keeping with the Court’s invitation for experimentation,<sup>282</sup> is troubling. It shows that a major premise of *Anders*—that in substantial numbers of cases, an appeal is frivolous, so we need to give lawyers a way out—is flawed. It is absurd to suggest that appeals are sometimes frivolous in one Ohio county but never frivolous in the next county over.

It is also absurd to condition withdrawal of counsel on the court’s finding that an appeal is frivolous. It forces the lawyer to cast aspersions on her client’s matter when in fact it may be the lawyer’s own lack of expertise that leads to her desire to step away. Her lack of expertise should be enough of a reason on its own.

At the same time, permitting a lawyer to withdraw necessitates the appointment of another. And potentially another. If multiple lawyers are unable to proceed in good faith, how many times must the court appoint new counsel before it concludes that it can find none willing to pursue the merits? And how do we resolve the tension among the parties in a way that permits withdrawal, protects the client’s rights, and relieves the court of its ambiguous duty to review the record?

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277. *McCoy v. Ct. of App. of Wisc.*, 486 U.S. 429, 445 (1988) (Brennan, J., dissenting).

278. *See, e.g., Robinson v. Black*, 812 F.2d 1084, 1085 (8th Cir. 1987).

279. *See supra* notes 8–10 and accompanying text.

280. *See supra* note 10 and accompanying text.

281. *PAINTER & POLLIS, supra* note 204, § 5:27, at 277–78; *see also State v. Sims*, 8th Dist. Cuyahoga No. 107724, 2019–Ohio–4975, ¶ 60 (Boyle, J., dissenting) (advocating elimination of *Anders* briefs in the appellate district that includes Cleveland).

282. *See supra* note 128 and accompanying text; *infra* note 290 and accompanying text.

I have a proposal.

A. *The Proposal: Three Tiers of Counsel*

I propose that when a court appoints counsel to handle a criminal appeal, it should appoint two backup lawyers. The initially appointed appellate lawyer then reviews the case and handles the appeal as she normally would, unless she believes it is frivolous. At that point, she hands the case off to the first backup lawyer, who proceeds in the same fashion. If the first backup lawyer hands the case off to the second backup lawyer, and the second backup lawyer in turn believes the case is frivolous, they present their joint written conclusions to the client (not the court), in a form that might approximate a thorough *Anders* brief.<sup>283</sup> They then exercise an automatic right to withdraw, and the client's right to appointed counsel terminates. The court would have no role in reviewing the case at this juncture. The defendant would always retain the right to proceed pro se or through another lawyer if he can find one willing to represent him after the right to appointed counsel has ended.

I further propose a fee structure that maximizes the incentives to pursue the merits. For example, the second lawyer could be eligible for twice the normal fee if she is willing to pursue the case on the merits. And perhaps the third lawyer would be eligible for even more. The precise differences could also be a function of the lawyer's level of expertise. The idea is to reward lawyers for the acumen to identify and pursue nonfrivolous issues. There is some indirect precedent for a financial incentive system.<sup>284</sup> It would most logically be in the form of a congressional amendment to the statute governing fees for appointed appellate counsel.<sup>285</sup>

The appointment process would also require some scrutiny. At least one of the three lawyers should have a strong history of expertise,

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283. My proposal would require some careful thought in determining the level of detail the initially appointed lawyer provides to the first backup lawyer, and likewise, the detail that the first backup lawyer provides to the second. Efficiency concerns would justify full candor at every stage, but backup lawyers may more readily uncover meritorious bases for appeal if not influenced by the specific analyses of her predecessor(s). Relatedly, the format of the presentation to the client—whether it involves three separate reviews appended to each other or a cumulative review prepared by the second backup lawyer—would require thorough consideration. These decisions might also influence the compensation system, because they may bear on the amount of work each successive lawyer would be required to perform.

284. See *United States v. Burnett*, 989 F.2d 100, 105 (2d Cir. 1993) (denying fees to counsel whose *Anders* submission was “for all practical purposes worthless”).

285. 18 U.S.C. § 3006A(d)(2) (2018).



measured by resume, case history, and peer reputation.<sup>286</sup> Where the most-experienced lawyer enters the picture is worth debating; one could argue that appointing the most-experienced lawyer to serve as the first lawyer would foster efficiency, in that she would be less likely to invoke the need for the second and third lawyers. On the other hand, a hierarchy that places the most-experienced lawyer in the position of last review would enable the junior lawyers to gain valuable experience while providing a safety net (in the form of the third lawyer) for erroneous determinations that might otherwise prejudice the client.

In any event, the appointment process should permit no lawyer to serve as appointed counsel if she has invoked the withdrawal process with unacceptable frequency. It is beyond my cavil to determine whether that level of unacceptable frequency should be two times or ten, and perhaps it should a maximum percentage of the number of appointed cases that lawyer has handled. It also would be useful to consider, in assessing whether to render a lawyer ineligible for ongoing appointments based on a history of withdrawals, whether a backup lawyer in those prior cases ultimately succeeded in briefing the merits; if so, that fact would militate against future appointments.

#### *B. Measuring My Proposal Against the Legal Standards*

The primary goal of the *Anders* procedure is twofold: (1) to ensure that low-income defendants “whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*”;<sup>287</sup> and (2) “to enable the State to ‘protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.’”<sup>288</sup> My proposal achieves these goals. The Supreme Court tells us that “the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant’s right to appellate counsel.”<sup>289</sup> Presumably the same holds true of federal appellate courts, which may collectively adopt a procedure that does not follow precisely the procedures approved in *Anders*, *McCoy*, or *Smith* but nevertheless comports with constitutional demands.<sup>290</sup>

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286. One could reasonably require expertise from all three lawyers. That requirement would perhaps deprive less-experienced lawyers of the opportunity to gain meaningful experience as appointed counsel. The precise expertise balance is beyond the scope of my proposal, but it warrants careful scrutiny in implementation.

287. *Smith v. Robbins*, 528 U.S. 259, 277 (2000).

288. *Id.* at 277–78 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)).

289. *Id.* at 265.

290. Of course, federal courts need not collectively adopt a uniform approach; they are free to experiment among themselves with different procedures to address meritless criminal appeals, just as

The proposal protects the rights of defendants with nonfrivolous appeals more robustly than the usual *Anders* scenario. The client receives the benefit of not just one appellate lawyer, but three—each of whom is charged with reviewing the entire record and considering all available bases for appealing. This would meet Justice Brennan’s concern that the client on the receiving end of an *Anders* submission “has no recourse to a second opinion.”<sup>291</sup> Indeed, at the end of the process the client has one of two things: (1) a full representation on the merits of a nonfrivolous appeal by one of the three lawyers; or (2) a written explanation from all of them, similar to an *Anders* brief, explaining why they are unwilling to proceed on the merits. If the result is the latter, the document can serve as a basis for pursuing the case *pro se*, securing another lawyer to appear *pro bono*, or—in an extreme scenario—a later argument of ineffective assistance of appellate counsel.<sup>292</sup>

Under my proposal, the court plays no review role in the process at the withdrawal stage; each lawyer who has participated appropriately in the review process would have an unfettered right to withdraw without explanation. That aspect of the proposal resolves all of the concerns about the required extent of the court’s scrutiny of the brief and the record, as well as how the court should respond if it finds any inadequacies. More importantly, it would excise from the process one of the most troubling and offensive features of *Anders*—the delivery to the court (and the prosecution) of a roadmap for affirming a conviction.<sup>293</sup>

And there is no need for court review given the three tiers of counsel, particularly with standards in place to ensure quality. Lawyers, unlike judges, are directly accountable to clients for their legal malpractice and can be disciplined for failing to meet duties of competence to their

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states are. *See id.* at 272–73. Bryan Lammon has endorsed experimentation as a solution that “often produces at least some evidence about the effects of an approach to a particular legal problem.” Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 437 (2013). I agree with Professor Lammon and would welcome the opportunity to assess the efficacy of my solution in a subset of federal circuit courts.

291. *McCoy v. Ct. of App. of Wisc.*, 486 U.S. 429, 452 (1988) (Brennan, J., dissenting).

292. *See, e.g., Evans v. Clarke*, 868 F.2d 267, 268 (8th Cir. 1989) (recognizing habeas petition as proper vehicle for pursuing ineffective assistance of appellate counsel for improper *Anders* brief); *see also Grubbs v. Singletary*, 120 F.3d 1174, 1176–77 (11th Cir. 1997). One court has suggested that ineffective assistance of appellate counsel is not an available basis for an *Anders*-based collateral attack on the conviction, because the appellate court’s acquiescence in the attorney’s claim that there were no nonfrivolous issues for appeal is *res judicata*. *See United States v. McIntire*, No. 3:08-cr-38, 2009 WL 3401265, at \*1 (S.D. Ohio Oct. 21, 2009). That problem would not plague defendants under my proposal, precisely because the appellate court would have no involvement in assessing the issue.

293. *See Smith v. Robbins*, 528 U.S. 259, 278 (2000) (“The obvious goal of *Anders* was to prevent this limitation on the right to appellate counsel from swallowing the right itself.”).

clients.<sup>294</sup> Judges, by contrast, have no such accountability. The Supreme Court seems most concerned with ensuring more than “one tier of review,”<sup>295</sup> but there is no reason further review should involve judges whose interests are not aligned with the defendant’s.

The monetary costs of my proposal are also not likely to exceed the costs of the current system, which include the cost of the withdrawing lawyer’s preparation of an adequate *Anders* brief,<sup>296</sup> the cost involved of the various court personnel (at least three judges and as many law clerks) involved in reviewing the brief and the record, and the cost of addressing any shortcomings in the submission or the possible need to appoint a successor in the event the court finds issues of arguable merit.<sup>297</sup> Of course, the monetary costs are inherently difficult to quantify and compare meaningfully, particularly as they involve the time of court personnel that for which records are probably not maintained, at least not at the level of a case-by-case accounting that would be required. But monetary costs should not drive the equation. The constitutional and ethical concerns are paramount here. As the Sixth Circuit has recognized, “*Anders* should never be invoked as a labor-saving process.”<sup>298</sup>

Nor does my proposal do violence to any suggestion in *Powell*<sup>299</sup> or its progeny that the right to counsel includes representation in a court. Until *Griffin*,<sup>300</sup> the right-to-counsel cases revolved around the right to counsel *at trial* and to resist the prosecution’s effort to prove adverse facts that lead to criminal liability. But on appeal, the facts are no longer subject to debate. The issues are legal, and the burden is on the defendant to prove that something at trial went wrong. Representation, in that context, may be adequate if it consists only of solid advice, rather than advocacy. The Supreme Court tells us that the right in question is not “to have an advocate make [the client’s] case to the appellate court,” but rather the right “to have an attorney, zealous for the indigent’s interests, evaluate his

294. MODEL RULES OF PROF’L COND. r. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

295. *Smith*, 528 U.S. at 281.

296. *6th Cir. Notes*, *supra* note 19, at 3 (“A properly prepared *Anders* brief can be, in some cases, more labor intensive than a merits brief.”).

297. *But see* *Penson v. Ohio*, 488 U.S. 75, 90 (1988) (Rehnquist, C.J., dissenting) (“There are doubtless lawyers . . . who, for a substantial retainer, would have filed a brief on behalf of . . . urging, with a straight face, all of the claims which petitioner’s appointed attorney decided were frivolous. But nothing in the Constitution or in any rational concept of public policy should lead us to require public financing for that sort of an effort.”).

298. *6th Cir. Notes*, *supra* note 19, at 3.

299. *Powell v. Alabama*, 287 U.S. 45 (1932).

300. *Griffin v. Illinois*, 351 U.S. 12 (1956).

case and attempt to discern nonfrivolous arguments.”<sup>301</sup> If there are no nonfrivolous arguments to discern for appeal, the lawyer’s job is to say so. If three lawyers say so rather than one, and if they explain their rationale in writing to the client, we should assume the client has had the requisite access to and assistance of counsel for purposes of due process and equal protection.

## VI. CONCLUSION

For over sixty years, courts have struggled with how to implement *Anders* in a fashion that provides adequate protection without imposing unreasonable burdens on courts or appointed counsel. I contend that these struggles have been harder than necessary. Remove the court from the assessment, replace it with more robust representation for the client, and the problems go away. Counsel would no longer have to submit briefs against their own clients. Courts would never have to act as advocates for the defendant. And clients would receive input from three lawyers, not just one—and would never have to swim upstream against an *Anders* submission that represents to the court and the government that their appeal is baseless.

*Anders* has plagued us for decades with its ambiguity. “Vague standards are manipulable,” and they are particularly suspect when left to judges “to safeguard the rights of the people.”<sup>302</sup> The subjectivity inherent in the current *Anders* briefing process, as demonstrated in the numerous problems it poses for lawyers, judges, and defendants, demonstrates that “categorical constitutional guarantees” are not well served by “open-ended balancing tests.”<sup>303</sup> It is time we replaced the amorphousness with a system that eliminates its pitfalls.

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301. See *Smith v. Robbins*, 528 U.S. 259, 278 n.10 (2000).

302. *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

303. *Id.* at 68–69.