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## Resolving the Anders Dilemmas: How & Why Texas Should Abandon the Anders Procedure

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# ARTICLE

*Michael J. Ritter*

## Resolving the *Anders* Dilemmas: How & Why Texas Should Abandon the *Anders* Procedure

**Abstract.** When an indigent defendant has a right to counsel for an appeal, and counsel believes the appeal is wholly frivolous, Texas has adopted the *Anders v. California* procedure that permits counsel to withdraw from representation and argue to the appellate court why their client's appeal is wholly frivolous. This Article argues that, either by a change to the disciplinary rules or by judicial decision, Texas should abandon the *Anders* procedure as other states have. Doing so will promote the integrity of the right to counsel, avoid numerous conflicts and dilemmas created by the *Anders* procedure, and advance judicial efficiency and public confidence in Texas's criminal justice system.

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## I. INTRODUCTION

A criminal conviction permits governments to impose the most serious deprivations of individual rights. These deprivations can take the form of seizure of property, decades-long incarceration, and even the death penalty.<sup>1</sup> Because criminal convictions authorize the severest forms of punishment, a criminal conviction in the United States and Texas requires the highest level of certainty—a jury’s certainty beyond a reasonable doubt—that a defendant has committed a criminal offense.<sup>2</sup> The United States and Texas have pursued obtaining this level of certainty by subjecting those accused of criminal offenses to an adversarial justice system structured to advance truth-seeking.<sup>3</sup> Advancing truth-seeking requires protecting the legitimacy of core constitutional rights: (1) the right against self-incrimination; (2) the

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1. *See, e.g.*, TEX. PENAL CODE ANN. §§ 12.01–12.51 (providing a range of punishments for Texas criminal cases).

2. *Id.* § 2.01; *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958).

3. *Coronado v. State*, 351 S.W.3d 315, 320 (Tex. Crim. App. 2011) (stating, in a Confrontation Clause case, the adversarial nature of criminal proceedings promotes truth-seeking).

right to a trial by jury; (3) the right to confront accusers; (4) and the right to counsel.<sup>4</sup> But the legitimacy of these rights and procedural protections are often questioned from utilitarian and public policy perspectives when they interfere with effective law enforcement or are costly to taxpayers.<sup>5</sup>

One such costly right is the right of indigent criminal defendants to appointed counsel. The crime–poverty cycle, institutional racism, and other societal forces cause the mass criminal prosecution of indigent individuals who are unable to afford counsel.<sup>6</sup> The truth-seeking benefits of basic constitutional rights are essential in such prosecutions, just as they are in the prosecution of nonindigent defendants. But because nonindigent defendants can afford to pay the private counsel of their choice and counsel appointed to represent indigent defendants are paid by taxpayers, indigent criminal defendants’ right to appointed counsel is subject to more public criticism and questioning than the right to counsel for nonindigent defendants.<sup>7</sup> Thus, the legitimacy of indigent defendants’ right to counsel is often questioned from utilitarian and public policy perspectives, especially when it reasonably appears a defendant lacks a non-frivolous basis for denying criminal liability.

Appointing counsel to frivolously defend a criminal defendant at trial also presents ethical concerns because Texas lawyers are generally prohibited from frivolously defending a proceeding or asserting frivolous issues therein.<sup>8</sup> But like most other jurisdictions, Texas prioritizes an indigent defendant’s right to appointed counsel at trial over defense counsel’s

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4. See *id.* (discussing the right of confrontation and having a jury as the trier of fact); see also Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956) (explaining the right to counsel is necessary to safeguard all other rights).

5. See generally Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323 (2009) (discussing many jurisdictions’ attempts to displace costs back onto indigent defendants through recoupment and contribution programs).

6. See V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1471 (2019) (discussing implications of prosecuting indigent defendants); Jonathan Simon, *Is Mass Incarceration History?*, 95 TEX. L. REV. 1077, 1079 (2017) (reviewing ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016)) (acknowledging mass prosecution and incarceration in America).

7. See Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After ‘Gideon’*, THE ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433> [https://perma.cc/8HKS-FBH7] (“No one wants to pay for more public defenders.”).

8. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008).

conflicting obligation not to frivolously defend against a proceeding. So, even when the defendant freely confesses or when faced with what appears to be irrefutable and conclusive evidence of the defendant's guilt, appointed trial counsel's zealous representation may include frivolously arguing the jury should find the defendant not guilty.<sup>9</sup> An appointed criminal defense attorney may not thereafter be disciplined by the State Bar of Texas for asserting frivolous defenses to the elements of the state's case. But once a criminal defendant is found guilty, the general ethical prohibition against lawyers asserting frivolous issues remains applicable to appointed appellate counsel, who may be disciplined for asserting a frivolous issue on appeal.<sup>10</sup>

When a criminal appellant's right to appointed appellate counsel conflicts with appointed counsel's ethical obligation not to assert frivolous issues, Texas and most other jurisdictions take a reverse approach: counsel's ethical obligation not to assert frivolous issues is prioritized over the appellant's right to appointed counsel.<sup>11</sup> When appointed appellate counsel determines the appeal is wholly frivolous, Texas courts require counsel to file a motion to withdraw, expressing frivolity as the basis for the motion.<sup>12</sup> The motion to withdraw must be supported by a full appellate brief that refers the court of appeals to all potential issues that could be raised and explains why those issues are frivolous.<sup>13</sup> If counsel is correct, the appellate court must grant counsel's motion to withdraw and affirm the conviction.<sup>14</sup> This procedure, approved by the Supreme Court of the United States in *Anders v. California*,<sup>15</sup> raises numerous ethical, practical, and intellectual quagmires that are sometimes referred to as "*Anders* dilemmas."<sup>16</sup>

This Article posits that Texas should join the minority of jurisdictions that have abandoned the *Anders* procedure, and thereby prioritize indigent criminal appellants' right to counsel over the conflicting concern about appointed appellate counsel presenting a frivolous issue on appeal. Abandoning the *Anders* procedure would not only promote the integrity of

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9. *Id.*; see TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01 cmt. 3, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (discussing the nuances of frivolity).

10. *See id.* (providing a trial attorney may defend against a suit to require the state to meet its burden of proof, but not containing a similar exception for appellate counsel).

11. *In re Schulman*, 252 S.W.3d at 406–407; *see infra* Part V (noting most other jurisdictions follow the *Anders* procedure).

12. *In re Schulman*, 252 S.W.3d at 407.

13. *Id.*

14. *Id.* at 409.

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

16. *Id.* at 744–45; *see infra* Part V (discussing various *Anders* dilemmas).

the right to counsel on appeal but also be more beneficial from utilitarian, economic, and public policy perspectives. This Article proposes that Texas abandon the *Anders* procedure by narrowly extending the existing exception for criminal trial counsel in Texas Disciplinary Rules of Professional Conduct rule 3.01 to include any appeal in which an indigent appellant has the right to appointed appellate counsel.<sup>17</sup> Courts should also abandon the *Anders* procedure; just as appointed trial counsel may not withdraw on the grounds that they believe a client's defense is frivolous, appointed appellate counsel should not be permitted to withdraw merely because they believe the client's appeal is frivolous. Instead, just as appointed trial counsel may argue the state has not satisfied its burden, even if the argument is frivolous, appointed appellate counsel should be permitted to argue a similar issue on appeal, even if the issue is ultimately frivolous. Part II of this Article addresses societal forces generating mass criminal prosecutions of indigent persons. Part III discusses indigent defendants' right to appointed counsel. Part IV addresses appointed counsel's ethical obligations. Part V explains the *Anders* procedure and variants adopted by other jurisdictions. Finally, Part VI explains how and why Texas should abandon the *Anders* procedure.

## II. THE MASS PROSECUTION & RIGHTS OF INDIGENT DEFENDANTS

The vast majority of criminal prosecutions in the United States and in Texas are of indigent defendants. An estimated 60%–90% of criminal defendants are indigent.<sup>18</sup> Since the 1970s, the United States has witnessed mass incarceration of indigent people.<sup>19</sup> The increasing number of Americans living in poverty has only contributed to this mass incarceration; poverty and systemic racism perpetuate cycles of crime, including violence, drugs, and the breakdown of families.<sup>20</sup>

Yet our indigent-defense system has remained in a state of crisis for decades.<sup>21</sup> “[T]he sad reality is that in America today, economic status can determine the type of justice you receive[,]” and indigent defendants are therefore less likely to have their constitutional rights secured through a

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17. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R 3.01 cmt. 3, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (providing a trial attorney may defend against a suit to require the state to meet its burden of proof, but not containing a similar exception for appellate counsel).

18. Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 372, 375 (2012).

19. Simon, *supra* note 6, at 1078, 1083–84.

20. Gimbel & Muhammad, *supra* note 6, at 1471.

21. Piatt, *supra* note 18, at 375.

rigorous defense.<sup>22</sup> The lack of public funding for indigent defense overlimits the number of public defenders, causing public defender offices to become overwhelmed.<sup>23</sup> This situation is no less true in Texas. “For decades, Texans who can’t afford a lawyer have gotten caught in a criminal justice system that’s crippled by inadequate funding and overloaded attorneys.”<sup>24</sup>

Systemic disparate treatment of indigent defendants contributes to the cycle of poverty and crime. Criminal prosecutions and convictions frequently result in criminal fines.<sup>25</sup> Criminal fines “perpetuate poverty, aggravate racial disparities because they disproportionately affect communities of color, and erode trust in the legal system.”<sup>26</sup> Additionally, mass incarceration of indigent people makes it more difficult for individuals exiting the criminal justice system to escape poverty and increases the risk of recidivism. Furthermore, most death row inmates are also indigent.<sup>27</sup>

Criminal prosecutions and convictions for certain types of offenses (such as drug possession, child abuse or neglect, and sexual assault) can also carry civil implications, such as subjecting the indigent defendant to civil proceedings to terminate their parental rights to their children and, in some cases involving certain sex offenses, to civilly commit a defendant. These related civil proceedings further contribute to the cycle of poverty by subjecting more and more children to foster care, further breaking down the family, and increasing the rate of juvenile delinquency for those living in poverty.<sup>28</sup>

Due to the severity of criminal penalties and the potential loss of liberty in juvenile and parental termination proceedings, defendants in such proceedings are afforded a wide variety of constitutional and statutory rights. The criminal rights, such as the Fifth and Sixth Amendment rights—

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22. Hilarie Bass, *Poverty Is Not a Crime*, 104 ABA J. 8, 8 (2018).

23. *Id.*

24. Neena Satija, *How Judicial Conflicts of Interest are Denying Poor Texans Their Right to an Effective Lawyer*, TEX. TRIB. 1 (Aug. 19, 2019), [www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense](http://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense) [https://perma.cc/6UY7-MGFC].

25. Bass, *supra* note 22, at 8.

26. *Id.*

27. See Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 917 (1996) (“Since most death row inmates are indigent, the taxpayers of California bear this cost and the high court in California reviews about thirty new death penalty cases per year.”).

28. See Gimbel & Muhammad, *supra* note 6, at 1478–79 (“When a parent is incarcerated, the child that is left behind becomes collateral damage . . .”).



including the rights against self-incrimination, double jeopardy, rights to a speedy and public trial, an impartial jury, notice of charges, confrontation of witnesses, and the assistance of counsel—are structured to protect innocent individuals from wrongful convictions and to advance the truth-seeking function of the justice system.<sup>29</sup> But “[o]f all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”<sup>30</sup> Consequently, the truth-seeking benefits of these rights cannot be fully realized without the rigorous protection and enforcement of an accused’s right to counsel.

### III. THE RIGHT TO COUNSEL IN TEXAS

In Texas, individuals charged with criminal offenses generally have a state and federal constitutional right to counsel. The Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>31</sup> The federal right applies to state court proceedings in Texas through the Due Process and Equal Protection Clauses.<sup>32</sup> The Texas Constitution provides an analogous right to counsel, “In all criminal prosecutions[,] the accused . . . shall have the right of being heard by himself or counsel . . . .”<sup>33</sup> The Texas Court of Criminal Appeals has held the state constitutional right of counsel is coterminous with, and provides no greater protections than, the Sixth Amendment right to counsel.<sup>34</sup>

Thus, under both federal and state constitutions, a criminal defendant in Texas has the right to effective assistance of counsel at trial and, when a direct appeal is permitted, on direct appeal.<sup>35</sup> “[O]nce the [s]tate chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty.”<sup>36</sup> However, this right to counsel in a criminal appeal does not include the right

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29. U.S. CONST. amend. V & VI; accord Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 698 (1996) (referring to “the entire innocence-protecting and truth-seeking structure of the Sixth Amendment”).

30. Schaefer, *supra* note 4, at 8.

31. U.S. CONST. amend. VI.

32. *Ex parte Graves*, 70 S.W.3d 103, 122–23 (Tex. Crim. App. 2002) (citing *Gideon v. Wainwright*, 372 U.S. 335, 339–41 (1963); *Douglas v. California*, 372 U.S. 353, 357–58 (1963)).

33. TEX. CONST. art. I, § 10.

34. *Jacobs v. State*, 560 S.W.3d 205, 214 (Tex. Crim. App. 2018).

35. *Ex parte Graves*, 70 S.W.3d at 122.

36. *Burns v. Ohio*, 360 U.S. 252, 257 (1959).

to choice of appointed counsel or extend to the assistance of counsel in seeking discretionary review from a higher court.<sup>37</sup>

The Texas Legislature has also provided a statutory right of counsel for indigent defendants in criminal proceedings and in some civil proceedings, implicating a defendant's fundamental liberty interests. The Texas Code of Criminal Procedure provides, "[a] defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding."<sup>38</sup> This "includes the right to consult in private with counsel sufficiently in advance of a proceeding to allow adequate preparation for the proceeding."<sup>39</sup> "An indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement and in any other criminal proceeding if the court concludes that the interests of justice require representation."<sup>40</sup> In a criminal proceeding:

An eligible indigent defendant is entitled to have the trial court appoint an attorney to represent him in the following appellate and postconviction habeas corpus matters: (1) an appeal to a court of appeals; (2) an appeal to the Court of Criminal Appeals if the appeal is made directly from the trial court or if a petition for discretionary review has been granted; (3) a habeas corpus proceeding if the court concludes that the interests of justice require representation; and (4) any other appellate proceeding if the court concludes that the interests of justice require representation.<sup>41</sup>

The Texas Legislature has further provided for the right to counsel in civil commitment proceedings and government-initiated proceedings to terminate a parent-child relationship.<sup>42</sup> In the latter civil proceedings, the right to appellate counsel extends through the exhaustion of all appeals, which—unlike criminal appeals—includes the right to counsel for discretionary review by a higher court.<sup>43</sup> When an indigent defendant has a right to counsel, the court generally must appoint counsel, which creates

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37. *Ex parte Graves*, 70 S.W.3d at 122.

38. TEX. CODE CRIM. PROC. ANN. art. 1.051(a).

39. *Id.*

40. *Id.* art. 1.051(c).

41. *Id.* art. 1.051(d).

42. TEX. FAM. CODE ANN. § 107.016.

43. *In re P.M.*, 520 S.W.3d 24, 26 (Tex. 2016) (per curiam) (citing TEX. FAM. CODE § 107.016(2)).

an attorney–client relationship between appointed counsel and the indigent party.

#### IV. APPOINTED COUNSEL’S ETHICS OBLIGATIONS IN TEXAS

The commencement of an attorney–client relationship between appointed counsel and an indigent defendant creates a fiduciary relationship and obligates the attorney to comply with all applicable professional ethics rules contained in the Texas Disciplinary Rules of Professional Conduct (TDRPC) in the scope of the attorney’s representation. Generally, the duties of a fiduciary, such as an attorney, include the duty of care, a duty of good faith, and a duty of loyalty.<sup>44</sup> The duty of loyalty requires an attorney not to act to the client’s detriment.

Furthermore, rule 1.01, the very first rule that appears in the TDRPC, requires zealousness in representation.<sup>45</sup> A comment to rule 1.01 explain the duty of diligence, “a lawyer should act . . . with zeal in advocacy upon the client’s behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer.”<sup>46</sup> Other TDRPC rules govern the attorney–client relationship, require the lawyer to keep the client reasonably informed about the status of the case, and to sufficiently advise the client to allow them to make reasonably informed decisions about their legal rights.<sup>47</sup>

But appointed counsel’s ethical duties to a client are circumscribed by limits on counsel’s role as an advocate. For instance, although it might advance a client’s interest to delay litigation and increase the costs to and burdens on the state, rule 3.02 provides, “[i]n the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.”<sup>48</sup> Counsel must also be candid with the court about certain matters; rule 3.03 prohibits a lawyer from knowingly making material misrepresentations to the court and “fail[ing] to disclose to the tribunal

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44. See *D’Andrea v. Epstein, Becker, Green, Wickliff & Hall, P.C.*, 418 S.W.3d 791, 796 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (stating such duties include “a duty of reasonable prudence and fiduciary duties of loyalty and good faith”).

45. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.01, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A.

46. *Id.* at R. 1.01 cmt. 6.

47. *Id.* at R. 1.03.

48. *Id.* at R. 3.02.

authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .”<sup>49</sup>

Rule 3.01, the rule against frivolity, provides another limit on counsel’s role as an advocate: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.”<sup>50</sup> An assertion is “frivolous” if a “lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law.”<sup>51</sup> Comment 3 to rule 3.01 contains an important caveat: “[A] lawyer for a defendant in any criminal proceeding or for the respondent in a proceeding that could result in commitment may so defend the proceeding as to require that every element of the case be established.”<sup>52</sup>

Read in context of comment 3, rule 3.01 has three parts: (1) a lawyer shall not bring or defend a frivolous proceeding; (2) a lawyer shall not assert a frivolous issue in a proceeding; and (3) a lawyer may defend a criminal defendant or respondent in a commitment proceeding, so as to require the prosecution to prove every element of each charge.<sup>53</sup> So, to the general prohibition against asserting frivolous issues, the third part of the rule against frivolity exempts certain defense lawyers at trial—specifically, lawyers defending a client against a criminal prosecution or in a civil proceeding in which a respondent could be committed.<sup>54</sup>

#### V. THE *ANDERS* PROCEDURE: ITS DILEMMAS, VARIANTS, CRITICISMS & DEFENSES

An indigent defendant’s right to counsel, and rule 3.01’s prohibition against frivolity, can sometimes conflict.<sup>55</sup> When appointed trial counsel determines an indigent client’s defense is wholly frivolous, rule 3.01 permits trial counsel to frivolously defend against the proceeding.<sup>56</sup> But if the

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49. *Id.* at R. 3.03.

50. *Id.* at R. 3.01.

51. *Id.* at R. 3.01 cmt. 2.

52. *Id.* at R. 3.01 cmt. 3.

53. *Id.*

54. *Id.*

55. *See In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) (explaining an indigent’s right to counsel); TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.01.

56. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.01 cmts. 2–3.

defendant is convicted, and decides to exercise their right to appeal, and the corresponding right to obtain the assistance of counsel for a direct appeal, appointed appellate counsel is held to a different standard than trial counsel.<sup>57</sup> In Texas, when appointed appellate counsel determines the client's appeal is wholly frivolous, rule 3.01 prohibits appellate counsel from filing a brief in support of the appeal if doing so requires asserting a frivolous issue.<sup>58</sup> Instead, appointed appellate counsel in Texas must follow what is known as the *Anders* procedure.<sup>59</sup>

#### A. *The Anders Procedure*

In Texas, when appointed appellate counsel concludes a client's criminal appeal is wholly frivolous, counsel must file a motion to withdraw, supported by a brief that fully explains counsel's conclusion that the appeal is wholly frivolous.<sup>60</sup> This procedure is known as "the *Anders* procedure," named after the decision of the Supreme Court of the United States in *Anders v. California*.<sup>61</sup> In *Anders*, the Supreme Court held that allowing appointed counsel to withdraw under these circumstances does not violate an indigent defendant's constitutional right to counsel on direct appeal, subject to some important limitations.<sup>62</sup> The Court in *Anders* explained counsel may be allowed to withdraw only if: (1) the client is provided an explanation of why the appeal is frivolous; and (2) the appellate court independently reviews the entire record to determine whether counsel properly concluded the appeal is wholly frivolous.<sup>63</sup> When appointed counsel files an *Anders* brief in support of a motion to withdraw, the appellant may file a pro se response, objecting to the motion by identifying potentially non-frivolous issues for the court to consider.<sup>64</sup> If the reviewing court agrees the appeal is wholly frivolous, then the court must grant the motion to withdraw and affirm the conviction and sentence.<sup>65</sup> If the reviewing court disagrees, then the court must nevertheless grant counsel's motion to withdraw but must identify any non-frivolous issues the court

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57. See *In re Schulman*, 252 S.W.3d at 406 (requiring appointed appellate counsel to file a motion to withdraw).

58. *Id.*

59. *Id.*

60. *Id.*

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

62. *Id.* at 744–45.

63. *Id.*

64. *Id.*

65. *Id.*

discovered and appoint new appellate counsel to brief the identified issue or issues.<sup>66</sup>

Like courts in the vast majority of jurisdictions, the Texas Court of Criminal Appeals has adopted the *Anders* procedure, doing so in 1974 in *Currie v. State*.<sup>67</sup> But after *Currie*, the Supreme Court of the United States clarified that the *Anders* procedure is simply one method of allowing states to accommodate their interests in not permitting lawyers to raise frivolous issues, while providing adequate safeguards to the defendant's right to counsel.<sup>68</sup> Despite this clarification, the Texas Court of Criminal Appeals has continued to require appointed counsel to follow the *Anders* procedure when concluding an appeal is wholly frivolous.<sup>69</sup> The Supreme Court of Texas and Texas's intermediate appellate courts have followed suit for resolving analogous conflicts between an appellant's right to counsel and the rule against frivolity in civil appeals from juvenile delinquency proceedings, civil commitment proceedings, and government-initiated proceedings to terminate a parent-child relationship or to deprive a parent of custody.<sup>70</sup> However, the *Anders* procedure varies slightly in parental termination appeals; counsel is not permitted to withdraw in the intermediate court solely on the ground of frivolity because the appellant has the right to counsel through the filing of a petition for review.<sup>71</sup>

#### B. *The Anders Dilemmas*

The *Anders* procedure was adopted to mediate the conflict between the client's right to counsel and counsel's obligation not to assert frivolous issues, resolving the conflict in favor of attorneys protecting themselves and courts rather than advancing their clients' interests.<sup>72</sup> The procedure's

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66. *Id.*

67. *Currie v. State*, 516 S.W.2d 684, 684 (Tex. Crim. App. 1974).

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

69. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) ("The attorney's duty to withdraw is based upon his professional and ethical responsibilities as an officer of the court not to burden the judicial system with false claims, frivolous pleadings, or burdensome time demands.").

70. See *In re P.M.*, 520 S.W.3d 24, 26 (Tex. 2016) (per curiam) (describing parental termination appeals); *In re D.A.S.*, 973 S.W.2d 296, 299 (Tex. 1998) (outlining the rules for juvenile appeals); *In re State ex rel. Best Interest & Prot. of L.E.H.*, 228 S.W.3d 219, 220 (Tex. App.—San Antonio 2007, no pet.) (concluding the *Anders* procedure is appropriate when appealing involuntary civil commitment).

71. See *In re P.M.*, 520 S.W.3d at 26 (holding a motion to withdraw may not be granted in the court of appeals because a parent's right to counsel extends to filing a petition for review in the Supreme Court of Texas).

72. *In re Schulman*, 252 S.W.3d at 407–08.

unusual features result in several quagmires that courts, judges, and commentators refer to as “dilemmas” or “*Anders* dilemmas.”<sup>73</sup> These dilemmas typically involve conflicting ethical and public policy considerations, and most result from the realignment of nearly every person and entity involved in an appeal. Appointed counsel abandons the client and aligns himself with the state’s interest. The court abandons its role as a neutral arbiter to temporarily align itself with the appellant’s interest, and then shifts back into its neutral role. And the state’s role is eliminated almost entirely.

### 1. The “Arguable” Dilemma

The first *Anders* dilemma identified was in Justice Stewart’s dissent in *Anders*.<sup>74</sup> The *Anders* majority stated counsel should identify for the court any “arguable” issues, and then explain in a brief why those arguable issues are frivolous.<sup>75</sup> Justice Stewart contended that this requirement places counsel in a dilemma because if the issue is “arguable,” then the issue is not frivolous.<sup>76</sup> The *Anders* majority’s use of the word “arguable” was unfortunate because its vagueness continues to cause misunderstanding among members of the bench, the bar, and academia.<sup>77</sup> The *Anders* majority most likely intended “arguable” to mean potential issues that could be asserted on appeal based on issues that were preserved or that did not need to be preserved. Thus, the first *Anders* dilemma identified is not truly an ethical dilemma, but a matter of semantics. Nevertheless, this matter of

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73. See *id.* at 406 n.8 (quoting both Texas and Supreme Court decisions referring to the *Anders* “dilemma”); *In re D.A.S.*, 973 S.W.2d at 299 (referring to appointed counsel’s dilemma in an *Anders* case); *In re N.F.M.*, 582 S.W.3d 539, 546 (Tex. App.—San Antonio 2018, no pet.) (en banc) (Marion, C.J., dissenting) (“When an attorney is appointed to represent an indigent parent in an appeal of an order terminating parental rights, and the attorney believes the appeal is frivolous, however, the attorney faces an ethical dilemma.”); WAYNE LEFAVE ET AL., 3 CRIMINAL PROCEDURE § 11.2(c) (4th ed. 2019) (discussing the *Anders* rules and jurisdictions’ responses to the *Anders* dilemma).

74. See *Anders v. California*, 386 U.S. 738, 746 (1967) (Stewart, J., dissenting) (“[I]f 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.”).

75. *Id.*

76. *Id.*

77. See, e.g., *Zuniga v. State*, No. 04-17-00058-CR, 2018 WL 3551189, at \*2 (Tex. App.—San Antonio July 25, 2018, no pet.) (mem. op., not designated for publication) (Marion, C.J., dissenting) (“[T]he case law regarding what constitutes an ‘arguable’ ground for appeal is less than clear.”).

semantics, what is “arguable,” is one continuing source of criticism of the *Anders* procedure.<sup>78</sup>

## 2. Attorney vs. Client

Courts and commentators have identified another *Anders* dilemma; one that pits the attorney against the client.<sup>79</sup> Typically, an attorney must align themselves with their client's goals. The attorney acts as the client's agent in advancing those goals. The *Anders* procedure, by contrast, not only misaligns attorney and client, but also resituates the attorney as the client's opposition. Thus, the *Anders* procedure creates an unavoidable dilemma that requires an attorney—a fiduciary of the client—to act contrary to the client's interests.<sup>80</sup>

## 3. Attorney vs. Self

Another dilemma created by the *Anders* procedure is the internal ethical conflict of appointed appellate counsel. An attorney must diligently or zealously represent the client, comply with the fiduciary duty of loyalty to the client, and provide reasonably effective assistance of counsel.<sup>81</sup> The attorney's ethical obligation not to assert a frivolous issue or advance a frivolous appeal creates an internal conflict with these other legal and ethical duties.<sup>82</sup>

Some attorneys might personally prefer to withdraw from representation than face the discomforts of briefing a frivolous issue with a court and risk their credibility. But other attorneys might prefer to raise a frivolous issue than to face the discomfort of abandoning and advocating against their client and might err on the side of presenting frivolous issues. If the attorney misjudges the case, arguing the appeal is wholly frivolous; but the

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78. See *infra* Part V (discussing the criticisms of *Anders*); see also Andrew S. Pollis, *Fixing the Broken System of Assessing Criminal Appeals for Frivolousness*, 53 AKRON L. REV. 481, 483 (2019) (arguing the *Anders* procedure is “fraught with difficulties”).

79. Pollis, *supra* note 78, at 506; Cynthia Yee, Comment, *The Anders Brief and the Idabo Rule: It Is Time for Idabo to Reevaluate Criminal Appeals After Rejecting the Anders Procedure*, 39 IDAHO L. REV. 143, 153 (2002).

80. See Pollis, *supra* note 78, at 506 (“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.”); Yee, *supra* note 79, at 153.

81. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01 cmt. 6, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A.

82. Compare TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01 cmt. 6 (requiring diligent zealous representation); *with id.* at R. 3.01 (forbidding frivolous issues).



court disagrees, the attorney may have violated other ethical and legal duties.<sup>83</sup>

#### 4. The Appellate Court vs. Itself

Yet another dilemma created by the *Anders* procedure is the appellate court's internal conflict of whether to follow *Anders* properly in identifying non-frivolous issues, or to only identify meritorious issues. Under *Anders*, Texas law recognizes a distinction between meritorious issues that would result in a reversal, and non-meritorious issues that would not result in a reversal.<sup>84</sup> But not all non-meritorious issues are frivolous. Thus, non-meritorious issues may be frivolous or non-frivolous.<sup>85</sup> To be frivolous, an issue must satisfy the definition provided in comment 2 of rule 3.01.<sup>86</sup> And not all non-meritorious issues necessarily lack a good-faith basis.<sup>87</sup>

This distinction gives rise to an internal conflict for the appellate court in conducting an independent review of the record under *Anders*. When reviewing the record for non-frivolous issues, the court often considers the merits of the identified issue to determine whether the argument could be advanced in good faith. A dilemma arises when the court concludes an issue is non-frivolous but would not be meritorious. If the court strictly follows *Anders*, the court must engage in a clear waste of judicial resources by: (1) issuing an opinion or order identifying the issue; (2) ordering the substitution of a replacement attorney, requiring the county to pay two lawyers instead of just one; (3) having the replacement attorney file a merits brief; and (4) rejecting the issue identified by the court for replacement counsel to brief in another written opinion.<sup>88</sup> Because Texas's intermediate courts perceive themselves as "exceptionally busy,"<sup>89</sup> the *Anders* procedure creates a dilemma that encourages appellate courts to not truly follow *Anders* by reviewing the record only for meritorious issues.

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83. See Matthew D. Fazekas, Note, *An Open Letter to the Ohio Supreme Court: Setting A Uniform Standard on Anders Briefs*, 68 CLEV. ST. L. REV. 581, 602 (2020) (noting counsel's conflict of interest between his or her duties as a lawyer and duties to the client).

84. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01 cmt. 3 (defining, in a specific manner, a frivolous issue as requiring more than an issue that lacks merit).

85. *Id.*

86. *Id.* at R. 3.01 cmt. 2.

87. *Id.*

88. See Randall L. Hodgkinson, *No-Merit Briefs Undermine the Adversary Process in Criminal Appeals*, 3 J. APP. PRAC. & PROCESS 55, 56–57 (2001) ("When reviewing a no-merit brief, an appellate court or staff attorney has little motivation to find possible error.").

89. Michael J. Ritter, *En Banc Review in Texas Courts of Appeals*, REV. LITIG. 377, 437 (2020).

The court's internal dilemma also raises a concern about the disparate treatment of appellants whose counsel files an *Anders* brief and appellants whose counsel does not. When appointed or retained appellate counsel files a brief in support of their client's appeal, the appellate court typically does not review the record for any unassigned errors.<sup>90</sup> Consequently, an appellant whose counsel files an *Anders* brief tends to get preferential treatment by the court of appeals, which reviews the record for potentially meritorious issues, when other appellants usually do not get the benefit of the appellate court independently reviewing the whole record for arguable issues.<sup>91</sup>

##### 5. The Appellate Court vs. the State

In some cases, the *Anders* procedure also creates a conflict between the appellate court and the state. After appointed appellate counsel files an *Anders* brief and motion to withdraw, the appellate court must not only review counsel's analysis of the points identified in the *Anders* brief but also conduct an independent review of the record to determine: (1) whether appellate counsel failed to identify any potential issue; and (2) if so, whether the unidentified issue by counsel is non-frivolous. In this second step, the appellate court must temporarily shift into the role of advocate to assess potential issues appellant might raise.

If the court identifies any non-frivolous issues, the court must then order replacement counsel to brief the identified issue. Because the court has already identified the issue as non-frivolous, the court may be biased toward sustaining the issue it identified. If the court does not sustain the issue on re-briefing, the court would appear inconsistent and waste judicial resources. Consequently, the *Anders* procedure compromises the court's neutrality and, in some cases, places the court in opposition to the state.<sup>92</sup>

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90. The Texas Court of Criminal Appeals has held appellate courts have jurisdiction to review unassigned error but has also cast doubt on the propriety of doing so. *Hammock v. State*, 211 S.W.3d 874, 878 (Tex. App.—Texarkana 2006, no pet.).

91. See Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More than Others'*, 23 FLA. ST. U.L. REV. 625, 662 (1996) (“[N]either the indigent defendant whose attorney does not file an *Anders* brief nor the nonindigent defendant gets this kind of review from the court.”).

92. 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, 216–17 (2012) (arguing the *Anders* procedure produces role confusion for reviewing courts); Yee, *supra* note 79, at 153 (quoting *State v. Gicig*, 639 A.2d 251, 252 (N.H. 1994)) (stating the *Anders* procedure places “appellate court in the inappropriate role of defense counsel” and “the appellate court may appear to have lost its impartiality, displaying a potential bias in favor of any arguments it recommends”).

### C. Variants of the Anders Procedure

The various *Anders* dilemmas, and the public policy implications thereof, have caused some states to adopt modifications or variations of the procedure that aim to mediate the conflict between the right to counsel and the rule against frivolity. A small minority of jurisdictions have abandoned the *Anders* procedure altogether.<sup>93</sup> Immediately after the Supreme Court's decision in *Anders*, the American Bar Association criticized the procedure and discouraged counsel from withdrawing based on the rule against frivolity.<sup>94</sup> Three states have modified their professional ethics rules for attorneys to expand the exception in the rule against frivolity to include appointed appellate counsel in criminal appeals. In such circumstances, counsel must file a brief and raise an issue counsel believes is frivolous. Other states' courts have abandoned the *Anders* procedure without clarifying their respective ethical rules against frivolity.<sup>95</sup>

Other jurisdictions have adopted some version of the *Anders* procedure to resolve certain dilemmas. To avoid the dilemmas created by the court's independent review, some jurisdictions have modified the *Anders* procedure to require courts to independently review only those parts of the record necessary to address the issues appointed counsel identifies in the *Anders* brief. This "partial independent review" modification somewhat resolves the conflicts created by the court in reviewing the entire record for any potentially meritorious issue.<sup>96</sup> To avoid counsel's conflict with the client, California has adopted a *Wende*<sup>97</sup> brief procedure in which counsel files a brief reciting the facts and procedural history, and asks the court to conduct an independent review of the record.<sup>98</sup> A similar procedure, known as a *Balfour*<sup>99</sup> brief, was adopted by Oregon.<sup>100</sup> For a *Balfour* brief, counsel

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93. See Yee, *supra* note 79, at 155 n.82 (noting Nevada, New Hampshire, and Georgia have rejected *Anders* and amended ethical rules for lawyers).

94. Pollis, *supra* note 78, at 483–84.

95. See 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, 67 (2001) (discussing the Idaho rule, which is advocated by the American Bar Association and adopted by a handful of states); see also Warner, *supra* note 91, at 642 ("Ten states have rejected the *Anders* procedure.").

96. Fazekas, *supra* note 83, at 590 n.67 (explaining the Ohio court's independent review of the record is limited to the issues identified in counsel's *Anders* brief, and arguing in support of such a limited independent review).

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

98. *Id.* at 1074.

99. *State v. Balfour*, 814 P.2d 1069 (Or. 1991) (en banc).

100. OR. R. APP. P. 5.90.

drafts a brief with the facts, procedural history, and potential points of error, and the pro se appellant drafts the argument portion of the brief so that counsel is relieved from arguing a frivolous issue.<sup>101</sup>

Scholars and commentators have recommended other variations of the *Anders* procedure. One scholar has recommended, for federal cases, that in lieu of a court's independent review of the record, the court implement a three-tiered appointment system. If the first appointed lawyer believes the appeal is frivolous, a second lawyer would review the case. If the second lawyer reaches the same conclusion, then the court would appoint a third lawyer. If all three lawyers conclude the appeal is frivolous, then the appellant may proceed pro se.<sup>102</sup> Another recommendation is to limit *Anders* briefs to cases that preclude most legal issues, such as appeals from revocation of probation and from resentencing after limited remand when res judicata bars most issues.<sup>103</sup>

#### D. *Criticisms & Defenses of the Anders Procedure*

Evaluating criticisms and defenses of the *Anders* procedure requires weighing the extent to which different public policy considerations are implicated when considering, on one hand, protection of the appellant's right to counsel and, on the other, avoiding frivolous issues and appeals. The public policy considerations discussed by critics and defenders of the *Anders* procedure include the effects of the procedure on the adversarial process, judicial efficiency, and public confidence in the criminal justice system.

##### 1. Effects on the Adversarial Process

Critics and defenders of the *Anders* procedure have considered the effects of the procedure on the adversarial nature of the criminal justice system.<sup>104</sup> The federal and Texas state governments have established an adversarial justice system to promote truth-seeking. Because the *Anders* procedure realigns the appellant, the appellant's counsel, the court, and the state, the procedure breaks down the adversarial process. Critics and defenders of the

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101. *Id.*

102. *See generally* Pollis, *supra* note 78, at 485 (arguing for the adoption of a three-tier appointment system).

103. *See* Yee, *supra* note 79, at 166 (identifying specific situations warranting an *Anders* brief).

104. *See* Hodgkinson, *supra* note 88, at 56 ("A no-merit brief system allows a real breakdown of the adversary system.")

procedure disagree about the extent to which this breakdown occurs and the impacts of this breakdown.

One way the *Anders* procedure can impair the adversarial system is by depriving an indigent appellant of the assistance of counsel and repositioning appointed counsel in conflict with the appellant's interests.<sup>105</sup> Critics argue that the filing of an *Anders* brief creates opposition between the attorney and client, when the attorney owes a fiduciary duty of loyalty to the client.<sup>106</sup> As a result of the *Anders* procedure, the appellant's only recourse is to file a pro se response; but unlike counsel, pro se appellants are typically not legally educated, licensed, or trained. Thus, critics contend that having counsel oppose an appellant's interests and the pro se appellant's subsequent lack of counsel in responding to an *Anders* brief, undermines the efficacy of the truth-seeking benefits of the adversarial process.

Defenders of the *Anders* procedure argue that the appellant continues to have the assistance of counsel because appointed counsel must fully explain to the appellant, in the *Anders* brief, why the appeal is wholly frivolous. Consequently, like an appellant who can afford counsel, an indigent appellant receives the same type of legal advice when an appeal is wholly frivolous. Defenders also note the *Anders* procedure requires a second-level review by the court, after appointed counsel files an *Anders* brief, and the court can double check counsel's work to ensure counsel truly cannot ethically advocate on the appellant's behalf in the particular appeal.<sup>107</sup>

The *Anders* procedure can also impair the adversarial system by increasing the risk of undue prejudice to the appellant. The *Anders* procedure increases the risk of undue prejudice by having the appellant's lawyer affirmatively represent to the appellate court that the appeal has no merit. Critics view such representations by counsel as extreme because the mere filing of an *Anders* brief communicates to the court that a legally educated, licensed, and trained criminal appellate lawyer has fully reviewed the record and determined the appeal is wholly frivolous and the appellant's conviction

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105. See Yee, *supra* note 79, at 153 ("Another common criticism of the *Anders* procedure is that it leaves the indigent appellant to fend for himself on appeal and undermines advocacy in the judicial process. Advocacy is said to be lost due to the forced adverse roles between the court and appellate attorney."); see also Hodgkinson, *supra* note 88, at 56 ("When an accused's lawyer stands up to the court and says, 'My client should lose,' no apparent advocacy on behalf of the client takes place.").

106. Schmidt, *supra* note 92, at 207.

107. See Yee, *supra* note 79, at 153 (arguing the *Anders* procedure has checks—appointed counsel's review and the court's independent review—on the effect of counsel's abandonment to ensure the appellant is not prejudiced).

should be affirmed.<sup>108</sup> Even variants of the *Anders* procedure, such as a *Wende* brief, implicitly communicate this message to the court. “Courts of appeals, including judges and staff—like most people—generally consider themselves exceptionally busy.”<sup>109</sup> Courts generally (and correctly) focus more time deciding and resolving cases that have merit.<sup>110</sup> So, when counsel flags a case as lacking merit, the mere act of doing so could cause the court to give less attention to the case.<sup>111</sup>

The initial breakdown of the adversarial system—the appellant being deprived of counsel to respond to a motion to withdraw—can compound this prejudice when a pro se appellant fails to respond to counsel’s motion to withdraw, because they are unfamiliar with legal research and writing or do not believe they will be treated fairly by the justice system.<sup>112</sup> Defenders of the *Anders* procedure respond that trust should be placed in court staff and judges to act fairly when acting in both roles and that statistics do not show courts give only a perfunctory review of *Anders* cases.<sup>113</sup>

The *Anders* procedure can also prejudice the state when the court temporarily shifts into the shoes of the appellant’s advocate to identify any non-frivolous issues and researches whether certain issues might be meritorious.<sup>114</sup> Once the appellate court identifies a non-frivolous issue

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108. See Fazekas, *supra* note 83, at 603 (stating other procedures will still put the court “on notice that counsel believes the appeal is wholly frivolous”); *Mosley v. State*, 908 N.E.2d 599, 608 (Ind. 2009) (“An *Anders* withdrawal prejudices an appellant and compromises his appeal by flagging the case as without merit, which invites perfunctory review by the court.”).

109. Ritter, *supra* note 89, at 437.

110. See Warner, *supra* note 91, at 662 (“[C]ourts with rising caseloads need to spend their collective time determining cases that have merit.”).

111. See *id.* (“If the ultimate fairness of the proceeding is determined by the effectiveness of counsel in representing the defendant, then the goal should be to compel full representation through appeal and not to allow ways for that representation to be avoided.”).

112. See Pollis, *supra* note 78, at 517 (quoting *United States v. Tabb*, 125 F.3d 583, 584 (7th Cir. 1997) (per curiam)) (“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.’”); Hodgkinson, *supra* note 88, at 64 (“Regardless of one’s feelings about persons accused of crimes, most participants in the criminal justice system would agree that any layperson attempting to wind through the maze-like appellate process alone would have little chance of ever being fairly heard on the merits.”).

113. Compare Andrew L. Teel, *You Have the Right to an Attorney: Frivolous Appeals, Anders & Potential Reforms in Indiana*, 63 RES GESTAE 9, 11–12 (2019) (arguing courts’ disposition statistics do not confirm that *Anders* cases invite a perfunctory review), with Hodgkinson, *supra* note 88, at 57–58 (“[T]he vast majority of no-merit appeals are dealt with quite cursorily and do not receive the attention and review generated by counsel who know that they will file briefs in the matters.”).

114. See Duggan & Moeller, *supra* note 95, at 104 (“But the judge who is reading the record is not trained to think about precedent that way and may have purposely worked to de-program himself

and orders re-briefing by substitute counsel, confirmation bias and a desire to appear consistent and not to waste the court's resources can undermine the court's ability to be fair to the state when substitute counsel presents the issue—which the court identified—back to the court for resolution on the merits.<sup>115</sup> Defenders of the *Anders* procedure argue this concern is real, but insignificant, because appellate courts rarely find such issues.<sup>116</sup>

## 2. Implications for Judicial Efficiency

Critics and defenders of the *Anders* procedure also disagree about the procedure's efficiency. Critics argue the procedure is less efficient than always requiring counsel to file a merits brief because in an ordinary appeal, “the court has no obligation to scrutinize” the record “in search of unraised issues.”<sup>117</sup> Consequently, disposing of an *Anders* case can take longer for a court than disposing of a case with a merits brief raising a singular frivolous issue.<sup>118</sup> For appointed counsel, drafting an *Anders* brief can often take roughly the same amount of time, if not more time, than filing a single-issue merits brief.<sup>119</sup> The appellant is typically given time to file a pro se response, but the state typically files a letter waiving its right to file a brief, saving the court the time of waiting for the state's brief. However, when a pro se appellant files a response to counsel's motion to withdraw, the state may file a responsive brief. Because the court must appoint new counsel, critics contend the *Anders* procedure is incredibly inefficient because it effectively requires a delay equal to the time from when the first appointed

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of this method of thinking when he moved from the bar to the bench.”); Duggan & Moeller, *supra* note 95, at 105 (“Moreover, the judge who must review the record and cull out meritorious issues must later decide the issues. The same court must then switch back to its neutral role and declare whether the issue which it found to be meritorious merits reversal.”).

115. Duggan & Moeller, *supra* note 95, at 104–05.

116. See Fazekas, *supra* note 83, at 602 (arguing courts do not always find a non-frivolous issue when counsel files an *Anders* brief).

117. Pollis, *supra* note 78, at 507; Hodgkinson, *supra* note 88, at 59–60.

118. See Ramos v. State, 944 P.2d 856, 857 (Nev. 1997) (“[T]he *Anders* procedure often entails the expenditure of more court resources than would be expended upon a meritorious appeal.”); see also Yee, *supra* note 79, at 151–52 (“The procedure has been characterized as administratively difficult because it allegedly takes more time, work, and resources than an appeal briefed on the merits in the ordinary course.”).

119. Mosley v. State, 908 N.E.2d 599, 607 (Ind. 2009); see Joseph Frueh, *The Anders Brief in Appeals from Civil Commitment*, 118 YALE L.J. 272, 313 (2008) (noting “the added time and expense to compile a scrupulous *Anders* brief”).

counsel starts drafting the *Anders* brief to the time that substitute counsel starts drafting a brief on the merits.<sup>120</sup>

Defenders respond that *Anders* is more efficient than filing a frivolous merits brief because, with a merits brief: (1) the state must spend its time responding to the merits; (2) the court must grant or consider granting oral argument; and (3) the court must review the entire record.<sup>121</sup> Other commentators have noted that in response to a survey, judges and court staff reported that *Anders* cases take the same amount of time, or less, than cases briefed on the merits.<sup>122</sup>

### 3. Confidence in the Criminal Justice System

Finally, critics and defenders of the *Anders* procedure disagree as to whether the procedure promotes or hinders confidence in the criminal justice system.<sup>123</sup> Critics argue the *Anders* procedure fosters a disrespect for the criminal justice system and constitutional rights.<sup>124</sup> Initially, the procedure results in the abandonment of an indigent appellant as “a direct function of the [appellant’s] poverty.”<sup>125</sup> Because the *Anders* procedure is not employed when an appellant can afford to retain counsel, the public nature of appointed counsel’s abandonment of an appellant is caused by the appellant’s indigence. “A system where a lawyer remains as the defendant’s

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120. *Mosley*, 908 N.E.2d at 607.

121. *See* Fazekas, *supra* note 83, at 599–600 (arguing *Anders* is more efficient than requiring a merits brief because oral argument is mandatory in Ohio; the state must file a responsive brief; sufficiency issues require the court and the state’s attorney to read the entire record, sometimes in lengthy trials; and both sides must file and the court must read lengthy briefs because the state would not want to lose its conviction); Yee, *supra* note 79, at 154 (noting frivolous issues waste “both the judiciary’s time and the taxpayer’s money”).

122. Teel, *supra* note 113, at 12 (arguing survey results show *Anders* cases take the same amount of time or less than a case briefed on the merits); Yee, *supra* note 79, at 165–66 (“There is significant disagreement among appellate attorneys as to whether the *Anders* procedure requires more time, energy, work and resources for the judiciary and appellate attorneys who adjudicate and prepare *Anders* briefs.”); 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, 187 (1988) (“*Anders* provides a just and efficient process for protecting the indigents’ right to appellate representation.”).

123. *See* Hodgkinson, *supra* note 88, at 64 (“If I file a no-merit brief, I think all that the client and society see is an attorney who gave up on his client.”).

124. *E.g., id.* at 55 (arguing the fracturing of the attorney/defendant relationship due to no-merit briefs).

125. *See* Pollis, *supra* note 78, at 516 (“[W]e should be very concerned about the troubling repercussions of the *Anders* apparatus from the perspective of the client.”); *see also id.* at 517 (“It is beyond dispute that the abandonment is a direct function of the defendant’s poverty.”).



advocate will undoubtedly result in less dissatisfaction,<sup>126</sup> which can be beneficial for rehabilitation.<sup>127</sup> Conversely, the *Anders* procedure requires client-abandonment and therefore “does not bode well for the reputation of the criminal justice system.”<sup>128</sup>

Conversely, defenders of the *Anders* procedure contend the procedure promotes respect for the criminal justice system by eliminating counsel’s role in advancing frivolous appeals. Counsel appointed to represent indigent appellants are paid by taxpayers. Consequently, when appointed counsel files a merits brief raising a frivolous issue, taxpayer dollars are being used to advance frivolous appeals. Frivolous proceedings, generally, waste public resources by requiring courts to spend time on proceedings that should not exist. Thus, defenders of the *Anders* procedure contend *Anders* is a necessary public stance against abuse of the criminal justice system.

#### 4. Conclusion

The *Anders* procedure, and its variants, critics, and defenders, all have some merit, but this debate suffers from a lack of context-specific data. There are many different types of procedural postures presented in criminal appeals in Texas, including appeals following: (1) an open plea of guilty; (2) a probation revocation; (3) a plea bargain with and without issues preserved by a written motion; (4) a bench trial; (5) a jury trial; and (6) resentencing. The legal issues in each can differ dramatically, making it difficult to categorically treat all criminal appeals the same when considering the advantages and disadvantages of the *Anders* procedure.

Weighing the advantages and disadvantages of the *Anders* procedure is further complicated by the different variations and permutations in how criminal appeals may proceed. An appeal may be, in actuality, meritorious; non-meritorious, but non-frivolous; or wholly frivolous. In each of these categories of cases, counsel might file a merits brief or (correctly or incorrectly) an *Anders* brief and motion to withdraw. A pro se appellant

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126. See Duggan & Moeller, *supra* note 95, at 101 (“To the individual defendant, the mere fact that his lawyer does not withdraw midway through the appeal may improve the quality of the representation.”).

127. See Frueh, *supra* note 119, at 308–09 (noting under the “therapeutic justice” school of thought, negative perceptions of judicial procedures “can potentially hinder their progress under traditional mental-health therapies and treatment”).

128. See Pollis, *supra* note 78, at 517 (“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.”).

might file a pro se response to counsel's motion, or the appellant might not. Depending upon the court's assessment of the *Anders* brief, the court might grant the motion to withdraw and affirm the conviction, or the court might identify an issue and order merits briefing by substitute counsel. Weighing the advantages and disadvantages of the *Anders* procedure is challenging without more precise data, but experience can inform determinations about which situations occur more often than others.

Additionally, weighing the advantages and disadvantages of the *Anders* procedure, especially on the issue of judicial efficiency, is even further complicated by the national variations in state court practices and procedures. Such variations in procedure include whether oral argument is mandatory in each case briefed on the merits; whether an appellate court must issue a full opinion or may dispose of appeals summarily; how courts handle deficient *Anders* briefs; status of courts' training on the *Anders* procedure; whether authoring justices rely on staff attorneys' reviews of records or personally review the record; and whether non-authoring panel justices rely on staff attorneys' or the authoring justice's review of the record.<sup>129</sup> The remainder of this Article considers the defenses, criticisms, and variants of *Anders* in light of the specific procedures in Texas appellate courts.

## VI. HOW & WHY TEXAS SHOULD ABANDON THE *ANDERS* PROCEDURE

Texas should abandon the *Anders* procedure. The *Anders* procedure is necessitated by rule 3.01's prohibition against asserting frivolous issues on appeal.<sup>130</sup> The exception to rule 3.01—which permits criminal defense lawyers at trial to frivolously defend a client, so long as the defense is limited

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129. See Fazekas, *supra* note 83, at 599 (explaining Ohio's mandatory rule for oral argument in every case briefed on the merits makes the *Anders* procedure more inefficient); Joel M. Schumm, Mosley *Works for Courts, Public Defenders and Criminal Defendants*, 63 RES GESTAE 17, 17 (2019) (noting courts "can assess a well-briefed, straightforward appeal in a matter of minutes"); Pollis, *supra* note 78, at 507 (quoting Warner, *supra* note 91, at 656) (noting the "lack of uniformity in internal court methods for handling *Anders* briefs" and the "lack of guidance and uniformity on how to respond to a deficient *Anders* brief"); Duggan & Moeller, *supra* note 95, at 104 (stating, "[w]hether the ABA approach . . . is more efficient may depend on local practice[,] and identifying factors such as the "availability of personnel to read the record[,] and whether the court must issue "an opinion in every case or" summarily dispose of an appeal). Another possible variation is how courts handle merits briefs that challenge the imposition of fees, but do not challenge the conviction or sentence. See, e.g., Allison v. State, 609 S.W.3d 614, 626 (Tex. App.—Waco 2020, no pet.) (requiring the filing of an *Anders* brief when counsel filed a merits brief challenging the imposition of fees).

130. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A; *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008).

to requiring the prosecution to establish all elements of the case beyond a reasonable doubt—should be narrowly expanded to allow appointed appellate counsel to assert an issue in support of an indigent client’s appeal.<sup>131</sup> In the interests of safeguarding other fundamental constitutional rights, the exception to rule 3.01 should also be narrowly expanded to apply to any appellate proceeding in which an indigent defendant has the right to appointed counsel (e.g., juvenile delinquency, civil commitment, termination of parental rights), regardless of whether that right is provided for by constitution or statute. By narrowly expanding the exception to rule 3.01, appointed counsel would no longer have a basis to withdraw from representation on the ground that continued representation would require counsel to breach their ethical duty not to assert a frivolous issue.<sup>132</sup> Narrowly expanding the existing exception in rule 3.01 would entirely obviate the need for the *Anders* procedure in any appeal in which counsel is appointed. Considering Texas appellate courts’ practices and procedures, abandoning the *Anders* procedure would be more advantageous than disadvantageous in terms of maintaining the truth-seeking function of the adversarial system; reducing judicial inefficiencies; protecting indigent appellants’ right to counsel; and promoting confidence in the criminal justice system.<sup>133</sup>

A. *The Relatively Unexamined Basis for the Anders Procedure in Texas*

The Texas Court of Criminal Appeals first applied *Anders* in a cursory opinion in *Currie v. State*<sup>134</sup> in 1974. Without any apparent consideration that the *Anders* procedure might be optional, the Court of Criminal Appeals noted “*Anders* should not be interpreted as requiring appointed counsel to make arguments he would not consider worthy of inclusion in a brief for a paying client or to urge reversal if in fact he can find no merit in the appeal.”<sup>135</sup> The Court of Criminal Appeals continued to require

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131. TEX. DISCIPLINARY RULES PROF’L CONDUCT R 3.01 cmt. 3.

132. For civil appeals with the right to appointed counsel, amendments to the Texas Rules of Appellate Procedure may be required to ensure an indigent appellant or appointed counsel is exempt from damages caused by a frivolous appeal. *See, e.g.*, TEX. R. APP. P. 45, 62 (providing damages for frivolous civil appeals).

133. Hodgkinson, *supra* note 88, at 64 (arguing “the justification for a no-merit brief system simply does not nearly outweigh the associated costs”).

134. *Currie v. State*, 516 S.W.2d 684 (Tex. Crim. App. 1974).

135. *Id.* at 684.

compliance with the *Anders* procedure without much discussion until its decision in *In re Schulman*.<sup>136</sup>

In *In re Schulman*, the Court of Criminal Appeals rejected alternatives to the *Anders* procedure when appointed counsel filed an *Anders* brief without a motion to withdraw.<sup>137</sup> The court noted appointed counsel's argument that the Texas courts of appeals were inconsistent in applying the *Anders* procedure, including requesting the court below that the court should "abandon its 'policy' of requiring an attorney who files an *Anders* brief to simultaneously file a motion to withdraw as counsel."<sup>138</sup> Appointed counsel argued the motion to withdraw contradicted counsel's moral and ethical duties to the client, and that the procedure articulated in *Anders* was merely dicta.<sup>139</sup>

The Court of Criminal Appeals rejected appointed counsel's argument that the *Anders* procedure was merely dicta:

We are unable to find any authority from any jurisdiction for the proposition that the Supreme Court's discussion of the requirement that counsel file a motion to withdraw is mere *obiter dicta*. Instead, in *Smith v. Robbins*, the Supreme Court drew back from the proposition that the *Anders* brief procedure was a constitutional requirement. It concluded that [t]he procedure we sketched in *Anders* is a prophylactic one; the [s]tates are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel.<sup>140</sup>

The court stated the *Anders* procedure, "though not required by the federal [C]onstitution, seems to work relatively well in Texas. We see no reason to change it at this time."<sup>141</sup> The court's analysis of this issue was relatively cursory, and addressed neither the scholarships discussing the *Anders* dilemmas nor the criticisms or defenses of the *Anders* procedure.<sup>142</sup> The court then punted the decision to adopt a different procedure to the Texas

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136. *In re Schulman*, 252 S.W.3d 403 (Tex. Crim. App. 2008).

137. *Id.* at 404.

138. *Id.* at 405.

139. *Id.* at 410.

140. *Id.* (internal quotation marks omitted) (quoting *Smith v. Robbins*, 528 U.S. 259, 280–84 (2000)).

141. *Id.* (footnote omitted).

142. *Id.*

Legislature and concluded that “in the meantime, we will continue to adhere to the original rationale and procedural guidelines set out in *Anders*.”<sup>143</sup>

The rationale in *In re Schulman* for maintaining the *Anders* procedure primarily focused on counsel’s professional and ethical duty to not assert frivolous issues.<sup>144</sup> The court explained an “attorney’s duty to withdraw is based upon his professional and ethical responsibilities as an officer of the court not to burden the judicial system with false claims, frivolous pleadings, or burdensome time demands.”<sup>145</sup> The court also reasoned that an *Anders* brief assures “the appellate court that the attorney has indeed made a thorough and conscientious examination of the record, has provided the appellate court with the appropriate facts of the case and its procedural history, and has pointed out any potentially plausible points of error.”<sup>146</sup> The court noted the *Anders* procedure “has an additional use for the defendant: it provides him with appropriate citations to the record if he wishes to exercise his right to file a pro se brief.”<sup>147</sup> And, the court noted the procedure “has an additional use for the appointed attorney: it protects him from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled.”<sup>148</sup>

Although the Texas Court of Criminal Appeals identified the benefits of the *Anders* procedures and the purposes of the procedure’s features in *In re Schulman*, the court did not expressly consider any of the drawbacks of the various *Anders* dilemmas or whether other alternatives might be preferable.<sup>149</sup> The court punted the public policy considerations to the legislature, despite having the purview under *Smith v. Robbins*<sup>150</sup> to adopt an alternative, as other states’ courts had done.<sup>151</sup> The court has not revisited the propriety of the *Anders* procedure since *In re Schulman*. However, the Supreme Court of Texas and Texas’s intermediate courts of appeals, without considering any alternatives, have required appointed counsel to follow the *Anders* procedure in any appeal in which the appellant has the right to

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143. *Id.*

144. *Id.*

145. *Id.* at 407.

146. *Id.* at 406.

147. *Id.* at 407–08.

148. *Id.* at 408 (quoting *Anders v. California*, 386 U.S. 738, 745 (1967)).

149. *Id.* at 410.

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

151. *In re Schulman*, 252 S.W.3d at 410; Warner, *supra* note 91, at 657.

counsel when counsel concludes the appeal is wholly frivolous.<sup>152</sup> So, in most, if not all, civil appeals in which counsel is appointed to a client with the right to appeal (including juvenile, parental termination, and civil commitment appeals), counsel is expected to follow the *Anders* procedure.<sup>153</sup>

#### B. *Practices & Procedures in Texas Appellate Courts*

The weighing of the advantages and disadvantages of the *Anders* procedure in Texas first requires identifying state court practices and procedures affecting such an analysis. In Texas, appellate counsel is typically appointed from among criminal defense lawyers in private practice and public defenders' offices, and larger counties that generate more appeals typically have appellate divisions in their district attorneys' offices to file responsive briefs in criminal appeals.<sup>154</sup> A criminal appeal begins by the defendant filing a notice of appeal.<sup>155</sup> When the defendant is indigent, the trial court must appoint appellate counsel and the trial court clerk and court reporter must prepare the appellate record, all at a cost to taxpayers.<sup>156</sup>

In disposing of appeals, Texas appellate courts must issue an opinion; a court may issue a shorter memorandum opinion, but a memorandum opinion must nevertheless provide the basic reasons for the court's decision.<sup>157</sup> In regular appeals, appointed counsel will file a merits brief, and the state will file a response brief.<sup>158</sup> Infrequently, appointed counsel will file a reply brief.<sup>159</sup> The appellate court typically sets the case for submission on briefs but has discretion to decide whether to hear an oral argument.<sup>160</sup> In the vast majority of criminal appeals briefed on the merits, appellate courts decide the case without oral argument, even when one or both parties request an oral argument.

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152. *In re Schulman*, 252 S.W.3d at 410.

153. *Id.*

154. See TEX. CODE CRIM. PROC. ANN. art. 26.04 (providing procedures for appointing counsel); see also *Appellate Division*, BEXAR CNTY., <https://www.bexar.org/1745/Appellate-Division> [<https://perma.cc/UVL6-R4RH>] (last visited Aug. 28, 2021) (describing the appellate division of the Bexar County District Attorney's Office).

155. TEX. R. APP. P. 25.2.

156. *Id.* at R. 20.1, 20.2, 26.04.

157. *Id.* at R. 47.1, 47.4.

158. See *id.* at R. 38.1, 38.2 (outlining the requirements of what should be included in an appellant and appellee's brief).

159. *Id.* at R. 38.3.

160. *Id.* at R. 39.1.

Generally, in *Anders* appeals, appointed counsel files a motion to withdraw supported by an *Anders* brief.<sup>161</sup> Some courts of appeals have a checklist and guidelines for counsel to use when filing an *Anders* brief, but most do not.<sup>162</sup> The state typically files a brief waiver letter, declining to file a response to the motion to withdraw. The court will then give the pro se appellant an opportunity to respond to the *Anders* brief. Pro se appellants can file responses, but they do not in a large percentage of cases. When pro se appellants file a response to counsel's motion to withdraw, the state will often file a brief responding to the pro se response.<sup>163</sup> Typically, a staff attorney will conduct an independent review of the record.<sup>164</sup> If properly trained, the reviewing staff attorney will review the entire record, not merely the parts of the record cited by appointed counsel in the *Anders* brief.<sup>165</sup>

Very few intermediate appellate court justices and staff attorneys have an extensive background or significant experience with criminal appeals. Currently, three of approximately two hundred staff attorneys at intermediate appellate courts are board certified in criminal appellate law; zero of over eighty justices are board certified in criminal appellate law; zero staff attorneys are board certified in criminal law; and two justices are board certified in criminal law. Some appellate courts do not offer formal training for staff attorneys or judges to handle *Anders* cases and independently review records in criminal appeals. Oftentimes, neither the authoring justice nor the other panel justices independently review the record because they rely on the review conducted by the staff attorney. Also notable is that Texas's appellate court justices are elected, unless appointed to temporarily fill an unexpired term.<sup>166</sup>

### C. *Amending TDRPC Rule 3.01*

Considering Texas's practices and procedures in criminal appeals, Texas should follow the jurisdictions that have amended their disciplinary rules to

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161. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008).

162. E.g., *Practice Before the Court: Anders Guidelines & Forms*, TEX. JUD. BRANCH, [www.txcourts.gov/1stcoa/practice-before-the-court/anders-guidelines-forms](http://www.txcourts.gov/1stcoa/practice-before-the-court/anders-guidelines-forms) [https://perma.cc/K8QZ-ZMDT] (containing links to *Anders* guidelines and forms).

163. E.g., *Zuniga v. State*, No. 04-17-00058-CR, 2018 WL 3551189, at \*1 (Tex. App.—San Antonio July 25, 2018, no pet.) (mem. op., not designated for publication) (summarizing the state's response to a pro se brief).

164. *Id.*

165. See *In re Schulman*, 252 S.W.3d at 407 (requiring an independent court review of the entire record).

166. TEX. CONST. art. V, §§ 6, 11.

permit appellate counsel to assert a frivolous issue. Texas could abandon the *Anders* procedures by amending TDRPC 3.01's rule against frivolity and narrowly expanding the existing exception for criminal defense counsel to all cases in which counsel represents a person who has the right to appointed counsel.<sup>167</sup> Specifically, the text of the rule itself, or comment 3, could be modified to specify that counsel representing a party with the right to counsel on appeal may not withdraw on the grounds that the appeal is frivolous.<sup>168</sup> Stated differently, the constitutional or statutory right to appellate counsel would take precedence over counsel's rule-based duty not to assert frivolous issues, and the right to counsel would always prohibit withdrawal based solely on the rule against frivolity.<sup>169</sup> Although the Texas Court of Criminal Appeals punted the decision of whether to change *Anders* to the Texas Legislature, Texas courts have the prerogative to abandon *Anders* without legislative direction. And, if the Texas Legislature disapproved, the legislature could either require the *Anders* procedure or limit the statutory rights to appeal, and thereby limit the corresponding right to assistance of counsel on appeal.

Such an amendment to rule 3.01 would still leave intact counsel's candor obligations under rule 3.03.<sup>170</sup> Specifically, if appointed appellate counsel raised a frivolous issue that was clearly foreclosed by precedent, counsel would remain obliged to disclose the precedent to the court.<sup>171</sup> As explained more fully below, rule 3.03 would therefore function to assist courts in quickly and efficiently disposing of the frivolous issue on appeal by directing the court to the sole authority it needs to draft an opinion briefly disposing of the appeal. Although disclosing contrary authority might also suggest to the court that counsel believes the appeal is wholly frivolous, appellate counsel occasionally discloses such authority under

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167. See Pollis, *supra* note 78, at 506 ("One appellate judge advocates amending the rules of professional conduct to clarify that a merits brief in a criminal appeal is never frivolous."). In fairness, this exception would apply to attorneys retained by non-indigent clients.

168. *But see* Schumm, *supra* note 129, at 17 (arguing rule 3.1's exception "surely extends to appellate counsel bringing a sufficiency-of-evidence challenge"); *In re Schulman*, 252 S.W.3d at 407 (showing the court of criminal appeals appeared to believe counsel may not ethically file a merits brief asserting an issue counsel believes is frivolous).

169. See Junkin, *supra* note 122, at 192 ("Others suggest that the Court should interpret the constitutional right to the assistance of appellate counsel as absolutely prohibiting withdrawal.").

170. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A; Schumm, *supra* note 129, at 17 ("Filing a compliant brief that discloses adverse authority ensures counsel will face no discipline for a lack of candor to the tribunal.").

171. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03.



rule 3.03 when they file briefs on the merits, which is not necessarily an admission that counsel believes the appeal is frivolous.<sup>172</sup>

#### D. *Advantages of Texas Abandoning the Anders Procedure*

Abandoning the *Anders* procedure by amending TDRPC rule 3.01 would have several benefits. Abandoning the *Anders* procedure would allow Texas to promote the integrity of indigent defendants' right to counsel on appeal.<sup>173</sup> Abandoning the *Anders* procedure would also reduce judicial inefficiencies, conserve public resources, and promote other important public policy goals.<sup>174</sup>

##### 1. Protecting the Integrity of the Right to Counsel

Abandoning the *Anders* procedure in Texas would protect the integrity of the right to counsel in several ways. Most obviously, abandoning the *Anders* procedure would ensure that the indigent appellant is not deprived of counsel mid-appeal. One of the dilemmas created by the *Anders* procedure is that appointed appellate counsel must argue against the merits of a client's case before counsel is permitted to withdraw. This dilemma undermines the integrity of the right to counsel. First, when an indigent appellant's appointed counsel files an *Anders* brief arguing to an appellate court why the appellant should lose on appeal, counsel's conduct is not "assistance"; it is antithesis of assistance, it is opposition. The *Anders* procedure "sets up a system in which an accused, with little recourse, does not even get an adequate review of his or her conviction."<sup>175</sup> Second, this *Anders* dilemma requires the indigent appellant to argue—without the assistance of counsel—why a legally educated, Texas-licensed, and presumptively-competent criminal appellate lawyer is incorrect not only about the merits of the appeal, but also about counsel's self-assessment of their professional—ethical obligations.<sup>176</sup> And third, the *Anders* procedure undermines the

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172. *But see* Pollis, *supra* note 78, at 506 (arguing the candor rule requiring disclosure of contrary authority "would not resolve the holistic problem" because disclosing contrary authority "to the court may be just as problematic as characterizing the appeal as frivolous").

173. Warner, *supra* note 91, at 665.

174. *Id.* ("A change in the rules of professional conduct as well as the adoption of the ABA Standards for Criminal Appeals would facilitate both the protection of the Sixth Amendment right to counsel and the smooth functioning of the appellate court.").

175. *See* Hodgkinson, *supra* note 88, at 60 (explaining the problem with a no-merit brief procedure).

176. *Id.* at 56 ("But the appellate court is called upon to make this determination without the assistance of counsel.").

attorney–client relationship by forcing appointed counsel to publicly disclose mental impressions and work product produced on behalf of the client. “This rule stands in stark contrast to protection we normally afford to a lawyer’s sacrosanct mental impressions.”<sup>177</sup>

Moreover, narrowly expanding the existing exception in rule 3.01 would eliminate rule 3.01’s glaring double standard for criminal cases that go to trial. When an indigent client’s right to appointed counsel conflicts with counsel’s ethical duty not to assert frivolous issues, rule 3.01 requires a different resolution depending upon whether counsel was appointed for trial, or for an appeal.<sup>178</sup> Appointed trial counsel may frivolously argue the state failed to satisfy its burden to establish all elements of the charged offense beyond a reasonable doubt without fear of disciplinary action; appointed appellate counsel may not argue this same point, even for the same client in the same case on the same evidentiary record.<sup>179</sup> Either the integrity of the right to appointed counsel is more important than having counsel assert a frivolous issue regarding the sufficiency the evidence, or it is not. Texas and other jurisdictions have recognized that, for trial proceedings, the integrity of the right to appointed counsel is sufficiently important to require counsel, in some cases, to frivolously argue the state failed to meet its burden.<sup>180</sup> The same standard should apply to appointed appellate counsel.

There are certainly differences between trial counsel arguing the insufficiency of evidence to a factfinder as matter of establishing the facts, and arguing the insufficiency of the evidence to a court as a matter of law.<sup>181</sup> At trial, a factfinder is able to observe the demeanor, tone, and nonverbal cues of witnesses, whereas an appellate court cannot do the same on a cold record; and, objective legal standards govern whether the evidence admitted at trial is sufficient to support the judgment, whereas there are no similar objective standards for a factfinder in criminal cases.<sup>182</sup> But such considerations in evaluating the sufficiency of the evidence are legally constructed fictions in Texas criminal cases, necessitated by constitutional

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177. Pollis, *supra* note 78, at 507.

178. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.01, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A.

179. Hodgkinson, *supra* note 88, at 61.

180. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.01.

181. *See* McCoy v. Ct. of Appeals of Wis., 486 U.S. 429, 435–36 (1988) (explaining a criminal appellant has lost the presumption of innocence).

182. Threadgill v. State, 146 S.W.3d 654, 663, 667 (Tex. Crim. App. 2004).

rights specific to criminal prosecutions. These fictions do not exist in Texas civil cases when undisputed facts and evidence establish the existence or absence of civil liability as a matter of law.<sup>183</sup> In other words, when appointed counsel frivolously argues that a jury—or the court in a bench trial—should find the defendant not guilty, even when no rational factfinder would find the defendant not guilty, counsel is not merely arguing the factfinder should ignore the evidence, counsel is implicitly encouraging the factfinder to nullify the law applicable to the undisputed facts of the case.<sup>184</sup> Thus, when appointed trial counsel argues the prosecution failed to meet its burden without a good-faith factual basis for doing so, the argument is sufficiently analogous to a frivolous legal argument.<sup>185</sup> Thus, rule 3.01's existing exception for appointed trial counsel countenances some frivolous legal arguments that encourage jurors to disregard the law.<sup>186</sup>

Because the harm caused by a frivolous appellate argument is not significantly greater than a frivolous trial argument, a double standard for the different treatment of the right to appointed counsel at trial and on appeal would be justified only if the right to appointed appellate counsel is less valuable than the right to appointed trial counsel.<sup>187</sup> Certainly, from the defendant's perspective, having counsel appointed to obtain a favorable jury verdict—which definitively ends the prospect of any future prosecution by the same prosecutorial entity for the same offense—is more important than obtaining a reversal on appeal, which may result in a new trial or in an appellate judgment of acquittal that is later reversed by a higher court. But in the exceedingly rare case that appointed trial counsel is unable to make a

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183. See generally *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005) (establishing the legal sufficiency standard for civil cases in which testimony provided by interested witness may conclusively establish the underlying facts of a case, and legal sufficiency may be raised by either the plaintiff or defense in an appeal).

184. See *Madden v. State*, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007) (“If there is no disputed factual issue, the legality of the conduct is determined by the trial judge alone, as a question of law.”) Arguing that a jury should disregard undisputed facts and how the law applies to those facts is, in effect, seeking jury nullification.

185. See *Hodgkinson*, *supra* note 88, at 62 (“But this view of trial counsel’s role is simply not consistent with the idea of zealous representation or the model rule.”)

186. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.01, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A.

187. Compare *McCoy v. Ct. of Appeals of Wis.*, 486 U.S. 429, 435–36 (1988) (noting on appeal, the appellant no longer has the presumption of innocence) with *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (stating the right to appeal gives rise to the right to appointed counsel for the appeal and indicating the right to counsel on appeal is necessary to ensure the presumption of innocence was actually rebutted by legally sufficient evidence).

good-faith argument that the state has not satisfied its burden of proof, and no rational jury would find the defendant not guilty based on the undisputed facts and evidence, then the right to appointed trial counsel could aid in producing an injustice. More broadly, the right to appointed trial counsel and the right to appointed appellate counsel are of comparable importance because excluding arguments to a jury at trial or to a court at a pretrial hearing about the existence or absence of certain facts, trial counsel's defenses and issues in the trial court are—like the arguments of appellate counsel—legal arguments.

Abandoning *Anders* would better protect indigent appellants' right to counsel on appeal because both appointed counsel and appellate courts sometimes err in determining whether an appeal is wholly frivolous.<sup>188</sup> In theory, under the *Anders* procedure, counsel will identify all possible issues and explain why they lack merit.<sup>189</sup> But in practice, in far too many cases, appointed appellate counsel will file an *Anders* briefs that does not identify all potential issues in the record or incorrectly argues an identified issue is wholly frivolous. As a failsafe, the *Anders* procedure requires the appellate court to independently review the record.<sup>190</sup> In theory, the appellate court has or will acquire an in-depth, comprehensive working knowledge of substantive and procedural criminal trial and appellate law. But in Texas courts, that is simply not the case. In Texas, appellate court justices, and their staff attorneys, often draw upon the strengths of their varied backgrounds; but many have never practiced criminal law or handled a criminal appeal. Very few appellate court justices and staff attorneys in Texas courts of appeals are board certified in criminal law or criminal appellate law. Many appellate courts do not have guidelines for counsel, or their staff, to use in conducting an independent review of the record. And sometimes, staff attorneys are not trained in how to conduct an independent review of the record in criminal cases and, as in other cases, simply rely on the parties' briefs to be fully comprehensive. Thus, the *Anders* procedure in Texas incorrectly assumes Texas's appellate judiciary and staff are universally experts in independently evaluating a record in a criminal appeal for non-frivolous issues.

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188. See, e.g., *Harber v. State*, 594 S.W.3d 438, 438 n.2 (Tex. App.—San Antonio 2019, pet. re'd) (reversing manslaughter conviction and rendering an acquittal after appointed counsel, who was later elected a district court judge, filed an *Anders* brief).

189. *Anders v. California*, 386 U.S. 738, 743 (1967).

190. *Id.*

Furthermore, the *Anders* procedure diminishes the truth-seeking benefits of the right to counsel and of Texas's adversarial criminal justice system.<sup>191</sup> When an indigent appellant's lawyer files an *Anders* brief arguing the appeal is frivolous, an *Anders* brief impresses upon the appellate court that even the appellant's zealous advocate believes the appellant's conviction should be affirmed. In the vast majority of the cases, the state files a form letter waiving its opportunity to respond. The appellate court must then rely on a pro se appellant, who usually lacks the education, licensing, training, and experience of a lawyer, to explain why their educated, licensed, trained, and experienced lawyer is incorrect. In many cases, the pro se appellant does not file a brief, and the sole analysis of the potential issues in the appeal is one-sided, and presented by the appellant's advocate, against the appellant. Given a general lack of criminal defense and criminal appellate experience by justices and court staff, Texas's appellate courts are accustomed to relying on the competence and expertise of counsel to educate the court on the legal issues and on the adversarial process to identify defects in briefed arguments. The adversarial system is premised upon each side advancing the best arguments in opposition to the other side; the right to counsel on appeal is intended to ensure the efficacy of this adversarial process in reducing wrongful convictions. The *Anders* procedure breaks down the adversarial system in Texas and thereby undermines the truth-seeking benefits of the right to counsel.<sup>192</sup>

## 2. Conserving Public Resources

Abandoning the *Anders* procedure would allow Texas courts to better conserve public resources. First, abandoning the *Anders* procedure would, when the first appointed appellate counsel is incorrect about the appeal being wholly frivolous, avoid taxpayers having to pay for two different appointed attorneys to separately review the merits of the same appeal.<sup>193</sup> When an indigent appellant has appointed counsel, taxpayers of the county pay for the appointment of counsel. And when a court disagrees with counsel's *Anders* brief and remands the case for appointment of new counsel to brief the issue identified by the court, taxpayers pay twice.

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191. See generally Hodgkinson, *supra* note 88, at 55 (explaining how the *Anders* procedure breaks down the adversarial system).

192. *Id.*

193. See, e.g., Harber v. State, No. 04-17-00595-CR, 2018 WL 5268859, at \*1 (Tex. App.—San Antonio Oct. 24, 2018, no pet.) (mem. op., not designated for publication) (identifying an arguable issue and ordering substitute counsel to re-brief the case).

Second, abandoning the *Anders* procedure would allow Texas appellate courts and appointed counsel to quickly and efficiently dispose of frivolous appeals. As far as appellate procedures go, the *Anders* procedure is relatively complex; the procedure contains multiple steps not required in an appeal in which a merits brief is filed.<sup>194</sup> Counsel ordinarily must file a motion to withdraw.<sup>195</sup> The *Anders* brief must contain a professional evaluation of the whole record, with cites to the record and relevant legal authorities, that rebuffs every single potential issue that could be raised on appeal.<sup>196</sup> Counsel must also notify the appellant of the filing of the motion to withdraw and supporting *Anders* brief, explain the process to the appellant, and advise the appellant of the right to obtain and review a copy of the record and to file a pro se brief in response to the motion.<sup>197</sup> When an *Anders* brief is filed, the appellate court must ensure counsel has properly followed these procedures.<sup>198</sup> Occasionally, when counsel fails to follow these procedures, the appellate court must delay the final disposition of the case by ordering counsel to remedy counsel's noncompliance.<sup>199</sup>

After appointed counsel properly follows the *Anders* procedure, and the state and pro se appellant file a response (if any), the burden shifts to the appellate court.<sup>200</sup> In reviewing counsel's *Anders* brief, the appellate court must determine whether counsel correctly determined that the arguable issues identified by counsel are truly frivolous.<sup>201</sup> Even when the court determines counsel is correct in determining the identified arguable issues are frivolous, the court must then review the entire record for any arguable issues counsel did not identify in the *Anders* brief.<sup>202</sup> If the court finds such an arguable issue, the court must decide whether to delay the case by ordering counsel to file a supplemental *Anders* brief.<sup>203</sup> Alternatively, the court must conduct its own research and analysis to determine whether the arguable issue, if raised, would be frivolous.<sup>204</sup> When conducted properly and thoroughly, the court's independent review of the record can be

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194. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008).

195. *Id.* at 406–07.

196. *Id.* at 407.

197. *Id.* at 407–08.

198. *Id.* at 409; *Kelly v. State*, 436 S.W.3d 313, 318–21 (Tex. Crim. App. 2014).

199. *In re Schulman*, 252 S.W.3d at 407; *Kelly*, 436 S.W.3d at 318–21.

200. *In re Schulman*, 252 S.W.3d at 409.

201. *Id.*

202. *Id.*

203. *Id.* at 411.

204. *Id.* at 409.

incredibly time-consuming in many cases. While some staff attorneys believe that writing a form *Anders* opinion takes the same amount of time, if not less time, than an opinion addressing a single frivolous issue, it is also possible—given the lack of clarity in and reasonable disagreements about the *Anders* procedures—that the staff attorneys are not properly following the *Anders* procedure or are overlooking arguable issues.<sup>205</sup> If the court disagrees with counsel’s *Anders* brief, the court must further delay the final disposition of the appeal by abating the appeal and remanding the case to the trial court for appointment of new appellate counsel who must then restart the entire record-review and briefing processes.<sup>206</sup> For an appellate procedure in Texas, this process is long, detailed, and inefficient.

Moreover, the appellate court’s determination as to whether an *Anders* brief correctly concludes the appeal is wholly frivolous is often encumbered by one of the *Anders* dilemmas: whether the arguable issues identified by counsel must merely lack merit or whether the arguable issues—even if meritless—are frivolous. When a court reviews an *Anders* brief, the court’s determination is not whether the judgment of conviction should be affirmed or reversed. The *Anders* procedure requires the court to determine both that the potential issues are both meritless and that counsel could also be disciplined by the state bar for violating rule 3.01 by asserting an issue that is wholly frivolous, due to counsel lacking a good-faith basis for asserting the issues or arguing for a modification, extension, or reversal of existing law.<sup>207</sup> There are cases in which a judge or staff attorney will identify a non-frivolous issue, but it appears the issue would appear to lack merit if decided by the court. In such cases, the court knows that abating the appeal and remanding for appointment of new counsel is costly in terms of time and money and will not change the ultimate result for the appellant. This conflict has created disagreements among Texas appellate court justices about whether to strictly apply *Anders* or to avoid a clear waste of judicial resources by not following *Anders*. Thus, the conflict between following the letter of the law and commitment to the right of counsel, even when

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205. Teel, *supra* note 113, at 12 (arguing survey results show *Anders* cases take the same or less amount of time than a case briefed on the merits).

206. *E.g.*, *Zuniga v. State*, No. 04-17-00058-CR, 2018 WL 3551189, at \*1 (Tex. App.—San Antonio July 25, 2018, no pet.) (mem. op., not designated for publication).

207. *See* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.01, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.”).

inefficient, and a more efficient administration of justice, when the outcome will ultimately be the same for the appellant, is very real.<sup>208</sup> The disagreements among Texas appellate court justices can further add to the time required to dispose of *Anders* appeals and result in inconsistent results for appellants.

Allowing appointed appellate counsel to argue a single frivolous issue, in lieu of filing an *Anders* brief, would require the use of public resources, but would likely require using fewer resources than the *Anders* procedure. Initially, appointed counsel's brief would not need to contain a full professional evaluation of the record to address all potential issues. A merits brief raising a single frivolous issue could be much more streamlined. Although abandoning the *Anders* procedure would require the state to use public resources to conduct a more thorough review the appellate record and draft and file a responsive brief on the merits, responding to a singular frivolous issue would not require the state to invest a significant amount of time. Moreover, when the pro se appellant files a response to counsel's motion to withdraw, the state typically writes a responsive brief, which can make the state's expenditure of time on a frivolous appeal inevitable. And, because frivolous issues are typically easily identifiable by an appellate court, and because counsel would remain obligated under rule 3.03 to disclose binding contrary authority in certain circumstances, the state always has the option of waiving its right to file a full responsive brief (as it typically does in *Anders* appeals), and simply filing a letter brief referring the court to the law and the record cites in lieu of a brief.<sup>209</sup> In reviewing a singular issue, Texas appellate courts would not need to research each potential issue identified by counsel and confirm the issue is frivolous, or spend time combing through the record and researching any other potential issues not expressly addressed in the *Anders* brief. While drafting an *Anders* opinion is typically less time-intensive than drafting an opinion on the merits, drafting a short memorandum opinion rejecting a singular frivolous issue would take the same amount of time, or only slightly more time, than issuing a form opinion in an *Anders* case, assuming the court exercises good drafting practices. Overall, abandoning the *Anders* procedure would reduce costs to taxpayers, and promote judicial efficiency.

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208. *E.g., Zuniga*, 2018 WL 3551189, at \*1–2 (discussing the conflict in both the majority and dissenting opinions).

209. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01.



### 3. Other Benefits from Abandoning the *Anders* Procedure

In addition to protecting the right to appointed counsel and reducing unnecessary expenditures of public resources, abandoning the *Anders* procedure by amending rule 3.01 would advance other public policy goals by eliminating the multitude of *Anders* dilemmas. First, abandoning the *Anders* procedure would avoid requiring Texas appellate courts to compromise their judicial neutrality. The neutrality of courts is required by constitutional due process guarantees and is fundamental to the justice system.<sup>210</sup> By requiring Texas's appellate courts to independently review the record and then identify issues to be briefed on appeal, the appellate court must temporarily wear the hat of appellant's advocate.<sup>211</sup> The court must then, oftentimes with only the benefit of the *Anders* brief, determine whether the appeal is, in fact, wholly frivolous.<sup>212</sup> Requiring a court to engage in this type of role switching undermines Texas appellate courts' neutrality.<sup>213</sup>

Second, abandoning the *Anders* procedure would also have jurisprudential benefits. When a court of appeals issues an opinion in an *Anders* case, Texas appellate courts typically do not address any substantive issues or apply the law to the facts of the case.<sup>214</sup> Instead, the court typically issues a form opinion reciting that the requirements of the *Anders* procedure have been met and affirming the judgment.<sup>215</sup> An opinion disposing the merits of a

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210. See *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)) (“Due process requires a neutral and detached hearing body or officer.”).

211. See *In re Schulman*, 252 S.W.3d 403, 409 (Tex. Crim. App. 2008) (discussing the *Anders* procedure).

212. *Id.* at 409.

213. See Hodgkinson, *supra* note 88, at 56–58 (“Judicial functions and adversarial functions are quite different . . . . The adversarial process is not neutral, however, and an advocate is not neutral. . . . There is a psychology that accompanies knowing you will file a brief that encourages advocacy, while reviewing a case knowing that you will probably not file a brief discourages that same advocacy.”).

214. TEX. R. APP. P. 47.4.

215. See *id.* (“If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court’s decision and the basic reasons for it.”) It is questionable whether courts of appeals should issue a form opinion without any analysis under the *Anders* procedure. One of the benefits of the *Anders* brief is that it requires counsel to show its work and to think out legal issues through writing. See *In re N.F.M. and S.R.M.*, 582 S.W.3d 539, 542 (Tex. App.—San Antonio 2018, no pet.) (en banc) (discussing uniform *Anders* briefing requirements). If the appellate court’s independent review is intended to be a secondary safeguard, then arguably the appellate court’s opinion should at least provide the basic legal analysis for why the potential issues are, in fact, frivolous. TEX. R. APP. P. 47.4.

single frivolous sufficiency issue would at least have the benefit of providing additional guidance for future cases.<sup>216</sup>

Third, the *Anders* procedure allows indigent appellants to receive radically different treatment by appointed counsel and the court based solely on the particular preferences of appellate counsel. The decision of whether to file an *Anders* brief or a merits brief is entirely discretionary for appointed counsel. After concluding an appeal is wholly frivolous, appointed counsel can always choose to file a merits brief and risk disciplinary action. And there is no precedent for a Texas court forcing counsel who has filed a frivolous merits brief challenging a conviction or sentence to, instead, file a motion to withdraw and an *Anders* brief.<sup>217</sup> Unless the appeal is intended to harass or otherwise abuses the judicial process, the appellate court's only remedy is to refer appointed counsel to the State Bar of Texas. However, judges serving on Texas appellate courts are incredibly reluctant—even in the face of clear ethical violations—to refer counsel to the state bar for potential disciplinary action. And the State Bar of Texas is incredibly hesitant to discipline a court-appointed attorney for lacking good faith in asserting a frivolous issue because the standard is so high. Generally speaking, the appellate bar in Texas is well aware of these reluctances, which gives rise to a wide discrepancy in whether, and under what circumstances, different appointed appellate lawyers will file an *Anders* brief. Many appointed lawyers prioritize the client's right of counsel and never file an *Anders* brief, even if an appeal is wholly frivolous, because the risk of discipline is extraordinarily low. Many do not. As a result, indigent appellants may be subjected to the *Anders* process, or not, solely based on counsel's subjective preferences.

#### E. *Potential Disadvantages of Texas Abandoning the Anders Procedure*

There are at least two arguable concerns with abandoning the *Anders* procedure by slightly narrowing the scope of rule 3.01: (1) frivolous issues harm the integrity of the judicial system; and (2) allowing counsel to argue frivolous issues creates a moral hazard of encouraging appointed appellate counsel to consider and raise only the same issues in every appeal, frivolous

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216. Schumm, *supra* note 129, at 17–18 (noting an opinion on a frivolous issue can nevertheless “educat[e] counsel and judges for future cases” and can require “judges to reason through a case in writing”).

217. *Cf.* Allison v. State, 609 S.W.3d 624, 628 (Tex. App.—Waco 2020, no pet.) (requiring the filing of an *Anders* brief when counsel filed a merits brief challenging only the imposition fees, but not the conviction or the sentence).

or not, and to routinely ignore other types of issues that are potentially not frivolous and could result in a favorable outcome for a client.<sup>218</sup>

### 1. Promoting Frivolous Appeals & Issues

Although frivolous issues are generally unethical and should be avoided, the reasons why frivolous issues are unethical should be considered to determine whether the *Anders* procedure significantly protects and advances those interests. Frivolous issues are unethical because they abuse legal procedure, are factually false, are intended to harass or maliciously injure another, or are not made in good faith based on existing law or arguable changes to the law.<sup>219</sup> Frivolous issues also unnecessarily waste public resources. But when counsel is appointed to represent an indigent appellant, appointed counsel rarely, if ever, asserts frivolous issues to harass, maliciously injure the state, or to abuse the legal process.<sup>220</sup> And on appeal, the relevant facts are already contained in a record and new factual assertions are rarely, if ever, properly asserted on appeal. Thus, generally speaking, the only risk of real harm in appointed counsel asserting a frivolous issue on appeal is the possibility of wasted public resources and counsel's lack of a good-faith basis for presenting the issue.

Abandoning the *Anders* procedure would not encourage more frivolous appeals or more frivolous issues. In Texas, the decision of whether to appeal is typically made by the client, not by appointed appellate counsel.<sup>221</sup> In criminal cases in Texas, notices of appeal are often filed by the appellant pro se or by trial counsel. Once the notice of appeal is filed, and the appellant's indigence is established, the trial court will then appoint appellate counsel. Appointed appellate counsel typically does not make the decision of whether the appeal is filed. And generally speaking, appellate counsel will be unaware of whether an appeal is wholly frivolous until after public

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218. See, e.g., Yee, *supra* note 79, at 170 (“Carving out exceptions allowing only appellate or defense counsel to pursue frivolous appeals not only creates a lesser standard for such counsel, but also refuses to hold all attorneys, appointed or retained, to the same level of competency and professionalism.”).

219. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008).

220. See Duggan & Moeller, *supra* note 95, at 101 (“The opposition—the state or federal government—incurs additional expense by being required to respond to a frivolous argument, but this hardly rises to the level of the harassment the ethical rule targets. In addition, the court’s resources are not being abused because, one way or another, the court will have to review the issues.”).

221. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.02(a)(1), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (requiring the client to make decisions about objectives and general methods of representation).

resources and funds are used to prepare the appellate record.<sup>222</sup> By the time appointed appellate counsel reviews the record for arguable issues, the appeal has already been on file with the court of appeals, usually for months; the trial court clerk has already spent public resources preparing the record; and the court reporter has already prepared a transcript at a cost to the taxpayers.<sup>223</sup> If the appeal is frivolous, the waste of resources occurs regardless of whether counsel files an *Anders* brief or a frivolous merits brief.

Out of all the evils rule 3.01 intends to safeguard against—abuse, harassment, wasting resources unnecessarily, and preventing arguments that lack a good-faith basis—the lack of appointed appellate counsel’s good-faith basis for asserting a singular frivolous issue is the least harmful. The comparatively small harm resulting from appointed appellate counsel asserting a single frivolous issue is evidenced by the lack of bar grievances against appointed appellate counsel for asserting frivolous issues, appellate courts’ general unwillingness to refer appellate counsel to the state bar for asserting frivolous issues, and the state bar’s general aversion to attempting to overcome the evidentiary burden required to show a lawyer had no good-faith basis for asserting an issue.

Moreover, when counsel is appointed to represent an appellant with the right to counsel, it is also arguable that there is no such thing as a frivolous issue in the *Anders* context. Initially, appointed counsel always has the option to think creatively and raise non-traditional issues.<sup>224</sup> Furthermore, for an action to be frivolous, counsel must reasonably believe it is not supported by a good-faith argument in existing law, or a good-faith argument for the extension, modification, or reversal of existing law.<sup>225</sup> Appointed counsel likely has a good-faith basis for taking the action of filing a merits brief asserting a clearly non-meritorious issue if counsel believes in good faith that the client’s right to counsel and counsel’s fiduciary and other ethical obligations should prohibit withdrawal. Counsel’s action of asserting a clearly non-meritorious issue also might be supported by a good-faith basis if counsel believes in good-faith that Texas should abandon the *Anders* procedure, as other jurisdictions have done. In these circumstances,

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222. See TEX. R. APP. P. 20.2 (authorizing a free appellate record for an indigent appellant).

223. See Duggan & Moeller, *supra* note 95, at 99–100 (“In every case, counsel must determine the overall strength of the appeal and the various issues presented.”).

224. See Jani Maselli Wood, *The Dreaded Anders Brief: Just Say No!*, in 1 HANDLING YOUR FIRST (OR NEXT) CRIMINAL APPEALS CASE 8 (2020) (imploping appointed appellate lawyers to think outside of the box instead of filing an *Anders* brief).

225. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.01 cmt. 2.

appointed counsel's good faith is not entirely lacking and thus filing a brief with a single, clearly non-meritorious issue is arguably never frivolous under rule 3.01.<sup>226</sup> Nevertheless, because this position appears contrary to decisions by the Texas Court of Criminal Appeals,<sup>227</sup> and because rule 3.01's existing exception is unclear, rule 3.01 should be clarified.

The *Anders* procedure does not ensure frivolous issues will not be asserted and invites the assertion of frivolous issues. The *Anders* procedure merely attempts to ensure that appointed appellate counsel is not the individual asserting those issues. In many cases, the pro se appellant will file a response to counsel's *Anders* brief. In the vast majority of those cases, the appellate court disagrees with the pro se appellant. When the appellate court disagrees with the pro se appellant's response, then the issues raised in the pro se appellant's response are presumptively frivolous. In that respect, the *Anders* procedure actually invites frivolous issues, not from attorneys, but from pro se appellants. Although those frivolous issues are not presented by appointed counsel, the issues are nevertheless presented to the appellate court. In those cases, the *Anders* procedure does not avoid the harm to the justice system caused by the mere presentation of a frivolous issue. In other words, the *Anders* procedure invites the assertion of frivolous issues just as much as it discourages the assertion of frivolous issues.

## 2. The Moral Hazard

A more concerning, potential disadvantage of not allowing appellate counsel to file an *Anders* brief is that it creates a moral hazard. Specifically, appointed appellate counsel may develop tunnel-vision and only consider one type of issue in every case while not thoroughly considering others. If appointed appellate counsel knows that, after reviewing the whole record and determining all issues to be frivolous, counsel must, at a minimum, file a merits brief with a singular point, then concerns for efficiency—in light of the relatively low fees for taking court appointments—might tempt some lawyers to choose the issue at the outset of the case and not fully consider other potential issues, as is required by the *Anders* procedure.

Although it is arguable whether this moral hazard exists at all, there are three factors that mitigate or could mitigate the moral hazard, assuming it does exist. First, the above-described moral hazard already exists under the *Anders* procedure. As explained previously, in an appeal, whether to file an

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226. *Id.*

227. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008).

*Anders* brief is a decision solely within counsel's discretion and drafting an *Anders* brief is often more time-consuming for appointed appellate counsel than drafting a rote brief raising a single sufficiency issue.<sup>228</sup> Because the *Anders* procedure gives counsel the sole discretion as to whether to follow the *Anders* procedure, the moral hazard exists with or without the *Anders* procedure. Second, if the *Anders* procedure is predicated on the presumption that counsel will typically abide by their ethical obligation not to raise frivolous issues, then a proposal to abandon the *Anders* procedure could also be predicated on the presumption that counsel will typically abide by their ethical obligation to zealously advocate for their client if the *Anders* procedure were abandoned.<sup>229</sup> And third, in criminal appeals, the availability of writs of habeas corpus asserting ineffectiveness of appellate counsel is a viable and credible deterrent to appointed appellate counsel habitually disregarding certain parts of the record for potential issues.<sup>230</sup> The availability of habeas proceedings protects the rights of an indigent criminal defendant who receives such ineffective assistance of appellate counsel. Unfortunately, not all civil appeals in which an indigent appellant has a right to appointed appellate counsel—such as appeals in which indigent individuals could be wrongfully deprived of their children—have a similarly effective check on any existing moral hazard.<sup>231</sup>

### 3. Other Criticisms of Abandoning the *Anders* Procedure

One commentator has noted that in the Supreme Court's decision in *Anders*, none of the justices suggested counsel should be forced to file a brief that lacks merit.<sup>232</sup> There are reasonable explanations for this. Initially, the Supreme Court in *Anders* was concerned with defining minimal protections for the constitutional right to counsel, not about different possible state-level, practice-of-law solutions to the problems posed by frivolous

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228. See *supra* Part V.D (elaborating on counsel discretion in drafting and filing an *Anders* brief).

229. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01 cmt. 6.

230. See *Ex parte* Flores, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012) (explaining the habeas claim of ineffective assistance of appellate counsel).

231. See *In re* I.L., 580 S.W.3d 227, 242 (Tex. App.—San Antonio 2019, pet. dism'd) (quoting *In re* K.K., 180 S.W.3d 681, 686 (Tex. App.—Waco 2005, no pet.)) (“Unlike ineffective-assistance claims in criminal cases, which have the writ of habeas corpus as a safety net to develop a record for such claims, parental-rights termination cases have no similar mechanism available.”).

232. Teel, *supra* note 113, at 10 (“[N]either the majority’s decision nor the sharp dissent from Justice Stewart suggest that *Anders*’ original counsel should have been compelled to proceed with a frivolous appeal.”) (footnote omitted).

appeals.<sup>233</sup> Instead, the regulation of the practice of law historically was and still is primarily the responsibility of the states.<sup>234</sup> And, after *Anders*, the Supreme Court clarified the *Anders* procedure was just one of many options for protecting the right to counsel.<sup>235</sup> Prioritizing the right to counsel over the competing interest of lawyers not furthering frivolous appeals is one of the most protective options for protecting an indigent appellant's constitutional right of counsel, with which *Anders* was principally concerned. Perhaps counterintuitively, abandoning the *Anders* procedure would provide the most protection for the right the Supreme Court sought to protect in *Anders*.

Others have suggested that a court's independent review of the record in *Anders* cases allows for reversals of wrongful convictions.<sup>236</sup> But this argument assumes courts with staff and justices qualified, trained, or experienced in criminal law and criminal appeals will rigorously review the record in every single *Anders* case. Unfortunately, this assumption is not correct in many Texas appellate courts. Instead, the *Anders* procedure may have an adverse effect on attempts to overturn wrongful convictions in habeas proceedings, especially in the case of ineffective assistance of appellate counsel, because the court of appeals has already issued an opinion affirming that appointed appellate counsel did not miss any non-frivolous issues.<sup>237</sup> Abandoning *Anders* would subject appeals that counsel has deemed frivolous to the same procedures as all other appeals; potentially meritorious issues overlooked by appellate counsel could then be raised in a subsequent habeas proceeding through an ineffective assistance of counsel claim without a concern that the court of appeals has already approved of appointed appellate counsel's evaluation of unraised issues.<sup>238</sup> In sum, while the *Anders* procedure may result in the reversal of some wrongful

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233. *Anders v. California*, 386 U.S. 738, 755–45 (1967).

234. *See Singh v. Duane Morris LLP*, 538 F.3d 334, 339 (5th Cir. 2008) (“[F]ederal law rarely interferes with the power of state authorities to regulate the practice of law.”).

235. *Smith v. Robbins*, 528 U.S. 259, 276 (2000).

236. *See Duggan & Moeller, supra* note 95, at 102 (“If counsel fails to identify a meritorious issue, there is no appellate court waiting in the wings to uncover it.”).

237. *See Hodgkinson, supra* note 88, at 64 (“[T]he direct appeal from conviction is the last significant chance for substantial review of that person’s conviction; without a lawyer to guide the person through the maze, the client will not even get that review and, in fact, will likely have other avenues of review closed off by procedural default.”).

238. *Warner, supra* note 91, at 666 (“If counsel, by failing to raise issues that could lead to reversal, does not provide effective assistance in the brief, the indigent defendant would still have the same right as other criminal defendants to secure relief pursuant to a postconviction claim for ineffectiveness of counsel.”).

convictions on direct appeal, the *Anders* procedure may also present barriers to reversing wrongful convictions in a habeas proceeding.

F. *For Texas, Abandoning Anders is Better than Alternative Solutions*

Abandoning the *Anders* procedure altogether is a better option for Texas than adopting variations of the procedure. The disadvantages associated with the appellate court's compromised neutrality are not wholly addressed by limiting the court's independent review to only the issues identified in appointed counsel's *Anders* brief. Even a limited independent review requires the court to compromise its neutrality.<sup>239</sup> A three-tiered appointment system, which would eliminate judicial review altogether, might be feasible in federal courts for which Congress is the primary source of funds,<sup>240</sup> but it is not likely a feasible uniform approach for Texas. In Texas, the legislature funds the courts of appeals, and the state's 254 counties generally pay the bill for appointment of appellate counsel. Abandoning the *Anders* procedure altogether eliminates the dilemmas caused by the appellate court's role-shifting without any additional costs to counties, the legislature, or the courts in nearly all frivolous appeals.

Other variants of *Anders*, such as the alternative briefing procedure by which appointed counsel prepares a brief for the appellant but does not assert any arguments on behalf of the client, do not undermine the right to counsel as much as the *Anders* procedure.<sup>241</sup> But these alternatives nevertheless undermine the right to counsel by forcing pro se appellants who are generally not educated, licensed, or trained in criminal defense and appellate law to be their own advocates. These alternatives also deprive indigent appellants of the benefit of a fresh appellate perspective in framing issues and facts to support the issues a pro se appellant might argue.<sup>242</sup> And, while eliminating the *Anders* procedure except in certain types of cases (such as probation revocation and resentencing) comes the closest to resolving many of the disadvantages of the *Anders* procedure, this variant

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239. See Fazekas, *supra* note 83, at 597 (arguing for a court's limited independent review of the record).

240. See generally Pollis, *supra* note 78, at 485 (arguing for the adoption of a three-tier appointment system).

241. See *People v. Wende*, 600 P.2d 1071, 1072 (Cal. 1979) (describing alternate briefing procedure); see also OR. R. APP. P. 5.90 (outlining Oregon's appellate briefing procedure).

242. See Schumm, *supra* note 129, at 18 (arguing this approach would "deny[] litigants the fresh perspective of appellate lawyers with specialized expertise in finding, researching, framing and arguing appellate issues").



nevertheless remains subject to the *Anders* dilemmas that currently exist for those categories of cases. Thus, the best solution for Texas is to simply abandon the *Anders* procedure altogether.

## VII. CONCLUSION

Texas should abandon the *Anders* procedure by narrowly expanding the existing exception to rule 3.01 and allowing appointed appellate counsel to file a merits brief in any appeal in which the appellant has the right to counsel, even if doing so would require counsel to assert what would otherwise be considered a frivolous issue. Abandoning *Anders* would resolve numerous dilemmas for appointed counsel, indigent appellants, courts, and the state, and would be more judicially efficient. Most importantly, abandoning the *Anders* procedure would rightly prioritize rigorously protecting indigent appellants' right to counsel over the marginal harm created by appointed counsel asserting a singular frivolous issue in the zealous representation of clients on appeal.<sup>243</sup> Rigorously protecting the right to counsel is essential because effective assistance of counsel is the lynchpin for safeguarding all other rights in criminal prosecutions.

Although abandoning the *Anders* procedure would not be a panacea for Texas's indigent-defense system, affording more protections for indigent defendants' right to counsel would help improve the integrity of the judicial process by better advancing the criminal justice system's truth-seeking functions. Increasing protections for the right to counsel would provide at least one way to reduce the disparate treatment of indigent individuals, who are being prosecuted and incarcerated en masse, disproportionately affected by systemic racism, and subjected to a cycle of poverty and the severest penalties imposed by the State of Texas.

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243. See Warner, *supra* note 91, at 667 ("Moreover, in the hierarchy of rights and obligations under our Constitution, the preservation of the right to counsel must have a higher priority than the nonconstitutionally based ethical dilemma that may arise occasionally for the attorney who finds no arguable error in an appeal.").