

**A BILL TO AMEND CRIMINAL
APPELLATE PROCEDURE**

A BILL

To amend the current *Anders* brief procedure, to allow individuals convicted of federal crimes the right to fair and adequate representation on appeal.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as “The Right to Effective Appellate Counsel for Indigent Individuals Act.”

SEC. 2. FINDINGS.

Congress find the following:

- (1) An individual who is convicted of a crime has the right to a court-appointed lawyer.
- (2) There is a Constitutional right to effective assistance of counsel.
- (3) The court-appointed lawyer who believes that all potential arguments on appeal are frivolous may file an *Anders* brief, so-named after the Supreme Court case which established the procedure. *See Anders v. California* (1967) 386 U.S. 738.
- (4) An attorney who files an *Anders* brief seeks to withdraw as counsel for the individual who was convicted.
- (5) An *Anders* brief must state the potential arguments on appeal and why the attorney thinks that the potential arguments are meritless.

- (6) The Supreme Court has noted that the *Anders* standard may be “incoherent and thus impossible to follow,” because, by definition, a potential argument is not frivolous. *See Smith v. Robbins*, 528 U.S. 259 (2000).
- (7) Theoretically, an *Anders* brief should be infrequently filed because a skilled attorney should be able to identify potential arguments for appeal and make a compelling case in favor of those potential arguments.
- (8) Nonetheless, an estimated 1,150 *Anders* briefs were filed in federal courts of appeal in 2022.
- (9) After court-appointed counsel notifies the court that counsel was unable to find any meritorious issues for the appeal, the person appealing a conviction typically has a short time to file a pro per supplemental brief.
- (10) In the Sixth Circuit, counsel must serve a copy of the *Anders* brief and motion to withdraw on the person appealing a conviction; the person appealing a conviction then has 21 days to file a brief in the appellate court. In California state court, an appellant is given 30 days to file a supplemental brief in the appellate court.
- (11) Often, there is no requirement for court-appointed counsel to automatically send the court records/transcripts to the person appealing a conviction.
- (12) An indigent individual whose attorney files an *Anders* brief is not given sufficient time to thoroughly review the record and transcript and to submit a researched appellate brief.
- (13) The person convicted cannot request another court-appointed attorney.

- (14) The *Anders* procedure requires the judges to review the trial record and transcripts to determine if there are appealable issues, thereby turning the judges into advocates.
- (15) In *United States v. Perez*, 22 F. 4th 430 (4th Cir. 2022), for example, “After independently reviewing the record, we identified one issue for supplemental briefing...In response, the parties jointly moved to remand the case for resentencing.”
- (16) The *Anders* brief procedure places an additional burden on the federal courts, which have a heavy caseload and which must review the entirety of a record on appeal as part of the *Anders* brief process.
- (17) The current *Anders* brief procedure incentivizes attorneys to not conduct a full and adequate review of the case.
- (18) When an *Anders* brief is filed, an indigent appellant will be unable to hire private counsel and will be deprived of the appellant’s constitutional right to effective counsel on appeal.
- (19) In the jurisdictions which require an attorney to send a copy of the *Anders* brief to the appellant, the appellant cannot “spot possible flaws in his lawyer’s legal arguments,” since he does not have formal legal training. (*United States v. Wagner*, 103 F.3d 551, 552 (7th Cir. 1996)).
- (20) Though premised on a lawyer’s ethical obligation to avoid asserting frivolous arguments, the *Anders* brief undermines an indigent appellant’s right to representation on appeal and ignores that Model Rules of Professional

Conduct Rule 3.1, which relaxes the obligation to avoid frivolous arguments in criminal cases.

(21) The filing of an *Anders* brief changes the attorney-client relationship into one in which the attorney advocates *against* his or her client and signals to the courts and to the People that the appeal should be denied on the merits.

(22) Rule 44 of the Federal Rules of Criminal Procedure, titled “Right to Appointed Counsel,” states, “A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.”

(23) Congress has the power to enact rules of procedure for federal courts under the “Necessary and Proper” clause of Article I Section 8 of the Constitution and under Article III of the Constitution.

SEC. 3. Procedures for the Filing of an *Anders* Brief.

Title IX General Provisions of the Federal Rules of Criminal Procedure is amended by adding the following:

44.1 PROCEDURES FOR AN *ANDERS* BRIEF

(a) SECOND TIER REVIEW.

(1) An indigent person who is convicted of a crime will be appointed with two attorneys, one who is the attorney of record, and the other, who is the reviewing attorney.

(2) If the attorney of record cannot find a non-frivolous issue on appeal, the attorney of record must draft and submit an *Anders* brief to the reviewing attorney, together with the trial record.

(3) The attorney of record must simultaneously submit the *Anders* brief to the defendant.

(3) The attorney of record must simultaneously submit a copy of the trial record to the defendant.

(4) The reviewing attorney has 60 days to review the *Anders* brief and determine if there are appealable issues present. The reviewing attorney may request a 30-day extension, which will automatically be granted by the Court.

(5) If the reviewing attorney finds that there are appealable issues, the reviewing attorney will be compensated at a rate 20% higher than the original attorney of record to draft an appellate brief. The reviewing attorney then becomes the attorney of record.

(6) If the reviewing attorney agrees with the contents of the *Anders* brief that was submitted, the reviewing attorney must promptly notify the defendant.

(7) The defendant has 180 days to submit a pro per appellate brief to the Court.

(b) NOTICE TO THE COURT

(1) Upon submission of an *Anders* brief for second-tier review, the attorney of record will notify the Court that the case is in second-tier review. The attorney of record may not submit an *Anders* brief to the Court.

(2) The Court shall be flexible in extending deadlines in any situation where a second-tier review is conducted.

SEC. 3. Fee Structure.

Section 3006A(d) of title 18, United States Code, is amended by adding the following:

(7) An attorney who reviews an *Anders* brief as the second-tier attorney will be compensated at a rate of 20% higher than the rate listed in section (1) and will not be subject to the maximum in section (2).

SEC. 4. Private Database of Attorneys who File *Anders* Briefs.

Section 3006A(a) of title 18, United States Code, is amended by adding the following:

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan. *In regards to provisions for representation on appeal, the circuit shall create a private database, viewable by admitted attorneys, judges, court officials, and government officials, to keep track of how often Anders briefs are filed, and the frequency of a specific attorney filing an Anders brief. Preference will be given to attorneys who file Anders briefs less frequently.*

SEC. 5. ADOPTABILITY.

Although the preceding is intended for use in federal court cases, it is recommended that the procedures above be adopted by states for all felony and misdemeanor cases.

SEC. 6. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this Act, or

an amendment made by this Act, or the application of such provision to other persons or circumstances, shall not be affected.