

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ARTICLES

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MAKE WAY FOR THE ABA: *SMITH v. ROBBINS*  
CLEARS A PATH FOR *ANDERS* ALTERNATIVES

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There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

—Justice Douglas in *Douglas v. California*<sup>1</sup>

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1. 372 U.S. 353, 357-58 (1963).

## INTRODUCTION

In *Douglas*, the United States Supreme Court held that under the Fourteenth Amendment, indigents appealing their criminal convictions are entitled to court-appointed counsel.<sup>2</sup> Whether this holding was based on the Due Process or Equal Protection Clause has never been clarified.<sup>3</sup> It is clear, however, that the Court's underlying concern in *Douglas* was that the appeal would be a "meaningless ritual" for an indigent who is forced to be his own advocate. By contrast, "[a] rich man . . . [would] enjoy [ ] the benefits of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf."<sup>4</sup>

Left open by *Douglas* was the difficult issue concerning the level of representation required and the proper scope of counsel's role when an indigent defendant's appeal is devoid of any arguable issues. In *Anders v. California*,<sup>5</sup> the Court held that the Fourteenth Amendment requires states to erect safeguards to protect an indigent's right to effective counsel on appeal even if the appeal is frivolous. The Court went on to prescribe a seemingly solitary procedure intended to protect an indigent's constitutional rights.<sup>6</sup> Implementation of *Anders* was subsequently explained in *McCoy v. Court of Appeals of Wisconsin*<sup>7</sup> and *Penson v. Ohio*.<sup>8</sup> However, the question of whether states are obligated to follow *Anders* as the exclusive procedure for withdrawal of appellate counsel has never been clearly resolved.<sup>9</sup> Most recently, in *Smith v. Robbins*,<sup>10</sup> the Court

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2. *Id.* at 357.

3. See *Ross v. Moffitt*, 417 U.S. 600, 608-09 (1974).

4. *Douglas*, 372 U.S. at 358.

5. 386 U.S. 738 (1967).

6. *Id.* at 744.

7. 486 U.S. 429 (1988).

8. 488 U.S. 75 (1988).

9. The authors would like to note the articles produced by other commentators who have previously grappled with this and other issues raised by the Court's decision in *Anders*. See e.g. Jack M. Bains, Student Author, *Termination of the Attorney-Client Relationship: How Far Must Anders Compliance Go?* 16 J. Legal Prof. 229 (1991); James J. Doherty, *Wolf! Wolf! The Ramifications of Frivolous Appeals*, 59 J. Crim. L. Criminology & Police Sci. 1 (1968); Robert Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. Rev. 701 (1972); Frederick D. Junkin, *The Right to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 Tex. L.

changed its tack by substantially modifying *Anders* to allow states considerable leeway in devising procedural schemes for frivolous appeals.<sup>11</sup> In none of these cases has the Court considered a different approach to this issue—like the approach first suggested by the American Bar Association (“ABA”) Standards for Criminal Justice in 1967 and later referred to as the “Idaho Rule.”<sup>12</sup> This approach has been formally adopted or followed de facto by a significant number of states.<sup>13</sup>

This article is written in three parts. Part I sets forth summaries of the Court’s decisions in *Anders*, *McCoy*, *Penson*, and *Smith* in an effort to provide the reader with a foundation for the forthcoming discussion. Part II analyzes these cases and argues that the Court’s most recent decision in *Smith* is a significant departure from *Anders*, *McCoy*, and *Penson*, in that it permits states to abandon the *Anders* procedure in favor of other equal safeguards. Part III describes the historical development of the procedure suggested by the ABA Standards (the Idaho Rule), evaluates that procedure, and argues that it overcomes many of the deficiencies of *Anders*.

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Rev. 181 (1988); Arthur Mendelson, *Frivolous Criminal Appeals: The Anders Brief or the Idaho Rule?* 19 *Crim. L. Bull.* 22 (Jan.-Feb. 1983); Charles Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 *Crim. Just. J.* 45 (1986); Deborah Pines, *Second Circuit Court Defines Standards for “Anders” Briefs*, 208 *N.Y. L.J.* 1 (Dec. 10, 1992); Deborah Pines, *Circuit Sees Rise in Volume of Anders Briefs*, 208 *N.Y. L.J.* 1 (Oct. 8, 1992); A.C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 *Am. Crim. L. Rev.* 1161, 1168 (1997); Peter C. Ray, Student Author, *Frivolous Appeals and the Minimum Standards Project: Solution or Surrender?* 24 *U. Miami L. Rev.* 95 (1969); Martha C. Warner, *Anders in the Fifty States: Some Appellants’ Equal Protection is More Equal than Others’*, 23 *Fla. St. U. L. Rev.* 625 (1996).

10. 528 U.S. 259 (2000).

11. *Id.* at 272.

12. This approach was named the Idaho Rule in reference to the Idaho Supreme Court’s decision in *State v. McKenney*, 568 P.2d 1213 (Idaho 1977).

13. *See infra* n. 211.

## I. OVERVIEW

## A. Anders v. California

*1. Background*

Charlie Anders was convicted of felony possession of marijuana and sought appellate review and appointment of counsel from the California District Court of Appeal.<sup>14</sup> The court granted Anders's requests and assigned counsel to represent him.<sup>15</sup> However, upon review of the record, court-appointed counsel concluded that Anders's appeal lacked merit and advised the court<sup>16</sup> as such.<sup>17</sup> Anders, for his part, wished to pursue his appeal despite the loss of counsel. He again requested that the court provide him with an attorney, but his request was denied.<sup>18</sup> Undaunted, Anders continued pro se, filing his appellate brief and a reply brief without the assistance of counsel.<sup>19</sup> Thereafter, the court unanimously affirmed Anders's conviction.<sup>20</sup>

Nearly six years later, Anders sought to reopen his original case with the California District Court of Appeal by way of a writ of habeas corpus. In his writ, Anders argued that he was deprived of his right to counsel on his initial appeal after the court refused to appoint him an attorney.<sup>21</sup> The court denied Anders's writ, stating that it had again reviewed Anders's case

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14. *People v. Anders*, 333 P.2d 854, 855 (Cal. Dist. App. 1959). The California District Court of Appeal is now the California Court of Appeal.

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

16. The Court's decision contains the following excerpt from Anders's counsel's letter to the California court:

I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him . . . [H]e wishes to file a brief in this matter on his own behalf.

*Id.* at 742.

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

18. *Anders*, 386 U.S. at 740.

19. *Id.*

20. *Id.*

21. *See id.* at 740.

and found it to be without merit.<sup>22</sup> Likewise, the Supreme Court of California, without opinion, denied Anders's second petition for a writ of habeas corpus.<sup>23</sup> In doing so, it did not address Anders's contention that both the trial judge and the prosecutor inappropriately commented on his failure to testify at trial in violation of *Griffin v. California*.<sup>24</sup>

The United States Supreme Court granted Anders's petition for certiorari,<sup>25</sup> but did not take up Anders's claim that inappropriate comments had been made concerning his failure to testify at trial. Rather, the Court limited its review to "the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal."<sup>26</sup>

## 2. *The Court's Decision*

Justice Clark, who dissented in *Douglas*, delivered the opinion of the Court. In Part I of the decision, the Court briefly retraced its past jurisprudence pertaining to an indigent appellant's rights on appeal.<sup>27</sup> Citing *Griffin v. Illinois*,<sup>28</sup> *Douglas v. California*,<sup>29</sup> *Johnson v. United States*,<sup>30</sup> and *Ellis v. United*

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22. *See id.*

23. *Id.* at 740-41.

24. *See Anders*, 386 U.S. at 741 (citing *Griffin v. California*, 380 U.S. 609 (1965) (holding that comment on a defendant's failure to testify violates the self-incrimination clause of the Fifth Amendment)).

25. The question presented by Anders's certiorari petition read as follows:

May a State appellate court refuse to provide counsel to brief and argue an indigent criminal defendant's first appeal as of right on the basis of a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief?

*McCoy v. Wis. Ct. App.*, 486 U.S. 429, 439 n. 11 (1988).

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

27. *Id.* at 741-42.

28. 351 U.S. 12 (1956) (requiring that indigent appellants be provided free transcripts on appeal).

29. 372 U.S. 353, 357-58 (1963).

30. 352 U.S. 565 (1957) (per curiam) (requiring appointment of counsel when a defendant challenges a federal district court's determination that his appeal is not being taken in good faith).

*States*,<sup>31</sup> the Court reaffirmed its previous pronouncements that procedures correlating the nature and scope of appellate review with the appellant's wealth are constitutionally infirm.<sup>32</sup> That is, distinctions based on wealth which operate to decrease or restrict the effectiveness of an indigent's right to counsel on appeal are impermissible. With the stage set, the Court moved to Part II of its opinion to examine the constitutionality of California's procedure as applied to Anders.

The Court found that Anders's court-appointed counsel's bare conclusion that his appeal lacked merit was insufficient to satisfy Anders's right to counsel on appeal.<sup>33</sup> Presumably this is because the Court felt Anders was, at most, only afforded the limited benefit of *amicus curiae* rather than the constitutionally required full-blown assistance of a zealous advocate prescribed in *Ellis*.<sup>34</sup> The Court equated the treatment Anders received to that received by the defendant in *Eskridge v. Washington State Board*,<sup>35</sup> who was refused a trial transcript after the trial judge unilaterally determined that he had received an impartial trial free from prejudicial error.<sup>36</sup> This procedure was condemned by the Court.<sup>37</sup>

Notably, the *Anders* Court focused on the fact that none of the California courts reviewing Anders's appeal ever made a frivolity finding.<sup>38</sup> The California District Court of Appeal stated that Anders's case was "without merit," and the Supreme Court of California failed to comment at all on the frivolity, or not, of Anders's appeal. The Court found that Anders's appeal was never deemed frivolous, yet he still was denied representation beyond that of an *amici*.<sup>39</sup> As such, the Court concluded that

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31. 356 U.S. 674 (1958) (per curiam) (requiring that counsel appointed to an indigent appellant serve as an advocate, as opposed to an *amicus curiae*).

32. *Anders*, 386 U.S. at 741-42.

33. *See id.* at 742; *see also Douglas v. California*, 372 U.S. 353 (1963) (requiring appointment of counsel for indigent appellants on their first appeal as of right).

34. *See Anders*, 386 U.S. at 743.

35. 357 U.S. 214, 215 (1957) (per curiam) (holding Washington's procedure authorizing a trial judge to furnish an indigent defendant with a trial transcript at public expense "if in his opinion justice will thereby be promoted" to be a violation of *Griffin v. Illinois*, which requires that indigent appellants be provided free transcripts for appeal).

36. *See Anders*, 386 U.S. at 742.

37. *See Eskridge*, 357 U.S. at 216.

38. *See Anders*, 386 U.S. at 743.

39. *See id.*

“California’s procedure did not furnish [Anders] with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity.”<sup>40</sup>

In the final section of the Court’s decision, Justice Clark crafted a new procedure to satisfy the Court’s principle that “[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of *amicus curiae*.”<sup>41</sup> The Court described the procedure as follows:

Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client’s appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.<sup>42</sup>

And thus, the “*Anders* brief” was born. The Court stated that its new procedure would “afford [the indigent defendant] that advocacy which a nonindigent defendant is able to obtain” and would “induce the court to pursue all the more vigorously its own review because of the ready references not only to the

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40. *Id.* The Court went on to note that at least one of Anders’s grounds for appeal may well have been meritorious, had a motivated advocate assisted him in raising it on appeal. In *Griffin*, the Court held California’s rule permitting comment on a defendant’s failure to testify unconstitutional, an argument Anders failed to raise in his initial appeal, but cited in his petition for certiorari filed after *Griffin* was decided. See *Anders*, 386 U.S. at 741-43.

41. *Id.* at 744.

42. *Id.*

record, but also to the legal authorities as furnished it by counsel.”<sup>43</sup> The Court’s final proclamation, however, best illustrates the underlying principle that *Anders* attempted to reinforce: “This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.”<sup>44</sup>

### 3. *The Dissent*

Justice Stewart penned the dissenting opinion, which Justices Black and Harlan joined. The short dissent expressed the dissenters’ puzzlement over the majority’s seemingly oxymoronic mandate that appellate counsel file a brief detailing conceivable appeal issues, while at the same time requesting to withdraw after deeming the appeal to be wholly frivolous.<sup>45</sup> As the dissenters pointed out, “if the record did present any such ‘arguable’ issues, the appeal would not be frivolous and counsel would not have filed a ‘no-merit’ letter in the first place.”<sup>46</sup> This logic is difficult to deny, but it did not carry the day in *Anders*, nor did it prevent the Court’s holding in *McCoy*, which allowed states to put defense counsel in an even more self-contradictory posture.

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

### 1. *Background*

Sixteen years after *Anders* was decided, a Wisconsin trial judge found Ellis T. McCoy guilty of abduction and sexual assault and sentenced him to twelve years in prison for his misdeeds.<sup>47</sup> From that conviction, McCoy filed an appeal, and

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43. *Id.* at 745 (citation omitted).

44. *Id.*

45. *See id.* at 746 (Stewart, J., dissenting).

46. *Id.* (Stewart, J., dissenting) (quotations in original).

47. *See McCoy v. Wis. Ct. App.*, 486 U.S. 429, 431 (1988) (*McCoy II*). McCoy was convicted in Milwaukee County Circuit Court on December 2, 1983. *McCoy v. Wis. Ct. App.*, 403 N.W.2d 449, 450 (Wis. App. 1987) (*McCoy I*), *aff’d*, 486 U.S. 429 (1988).



the court appointed counsel to represent him.<sup>48</sup> After his attorney informed him that pursuing an appeal would be futile, McCoy elected to have his attorney file a brief presenting his strongest arguments, yet at the same time advising the court that counsel deemed the appeal frivolous—in essence, an *Anders* brief.<sup>49</sup> McCoy's attorney filed the brief, which the Court characterized as “schizophrenic,”<sup>50</sup> but refused to include a discussion of the reasons why he found no merit in McCoy's appeal, as required by the Wisconsin Rules of Appellate Procedure.<sup>51</sup> McCoy's attorney explained to the court that he regarded compliance with the discussion requirement of the appellate rule to be unethical and a violation of the United States Supreme Court's decision in *Anders*.<sup>52</sup> The court, unpersuaded, directed McCoy's attorney to

48. See *McCoy II*, 486 U.S. at 431.

49. See *id.* at 431-32; see also *McCoy I*, 403 N.W.2d at 450-51.

50. *McCoy II*, 486 U.S. at 432. The Court stated:

In his role as an advocate for appellant, counsel stated the facts, advanced four arguments for reversal, and prayed that the conviction be set aside. In his role as an officer of the court, counsel stated that further appellate proceedings on behalf of his client “would be frivolous and without any arguable merit,” and prayed that he be permitted to withdraw. Thus, in the same document, the lawyer purported to maintain that there were arguments warranting a reversal and also that those arguments were wholly without merit.

*Id.*

51. See *McCoy II*, 486 U.S. at 432; see also *McCoy I*, 403 N.W.2d at 450-51. At the time of the decision, Rule 809.32 of the Wisconsin Rules of Appellate Procedure read:

Rule (No merit reports) (1). If an attorney appointed under section 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California*, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant and shall file a statement in the court of appeals that service has been made upon the defendant. The defendant may file a response to the brief within 30 days of service.

*McCoy II*, 486 U.S. at 430-31.

52. The Court's decision in *McCoy* contains the following excerpt from McCoy's counsel's brief:

Counsel would no longer be an advocate, as required by *Anders*, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be contrary to the mandate of *Anders* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant and this attorney submit that a discussion of why any issue lacks merit would violate the sixth amendment.

*Id.* at 432 n. 2 (citations omitted).

file a conforming brief, which he refused to do.<sup>53</sup> McCoy's counsel instead sought a ruling on the constitutionality of the appellate rule from first the intermediary appellate court, and then by way of original action for a declaratory judgment in the Wisconsin Supreme Court.<sup>54</sup> The Wisconsin Supreme Court found the appellate rule to be constitutional, stating, "While *Anders* does not sanction the use of the discussion requirement, it does not proscribe it, either."<sup>55</sup> McCoy then brought his constitutional challenge to the United States Supreme Court.

## 2. *The Court's Decision*

Relying on both the Wisconsin Supreme Court's interpretation of the requirements of the appellate rule<sup>56</sup> and the ethical standards attorneys are charged with obeying,<sup>57</sup> the Court, through Justice Stevens, found that Wisconsin's rule bred no denial of the effective assistance of counsel. This, however, was not the thrust of McCoy's argument. As the Court noted,

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53. *Id.* at 432.

54. *Id.* at 432-33; *see also McCoy I*, 403 N.W.2d at 450-51.

55. *McCoy I*, 403 N.W.2d at 452.

56. *See McCoy II*, 486 U.S. at 440. The Court relied on the following excerpt from the Wisconsin Supreme Court's decision:

We interpret the discussion rule to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching the same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with "notice" that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit.

*McCoy I*, 403 N.W.2d at 454.

57. *See McCoy II*, 486 U.S. at 440-41. The Court cited Rule 3.3(a) of the ABA Model Rules of Professional Conduct (1984), which provided in part:

A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal 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; or
- (4) offer evidence that the lawyer knows to be false.

*Id.* at 441 n. 14.

The aspect of the Rule that has provoked the concern of counsel for petitioner and other members of the defense bar is that which calls for the attorney to reveal the basis for his or her judgment [that the appeal lacks merit].<sup>58</sup>

McCoy argued that requiring appellate counsel to go beyond simply informing the court that counsel deems the appellant's appeal meritless and actually provide the reasons for, and a discussion of, the basis for counsel's finding violated an appellant's Sixth and Fourteenth Amendment rights and was contrary to *Anders*.<sup>59</sup> The Court, however, found nothing objectionable about Wisconsin's rule.

Recognizing that its ruling in *Anders* created minimum requirements for safeguarding an appellant's rights, the Court found that Wisconsin's appellate rule simply furthered the objectives of *Anders* by requiring appellate counsel to take an extra step and provide additional written evidence of his review of the appellant's case.<sup>60</sup> As the Court explained:

Instead of relying on an unexplained assumption that the attorney has discovered law or facts that completely refute the arguments identified in the brief, the Wisconsin court requires additional evidence of counsel's diligence.<sup>61</sup>

The Court rationalized that requiring a written analysis from appellate counsel may jar previously undiscovered arguments and prevent counsel from drawing "mistaken conclusions . . . that the strongest arguments he or she can find are frivolous."<sup>62</sup> In this regard, the Court found Wisconsin's appellate rule in keeping with the purpose of the *Anders* brief,<sup>63</sup> which is to assure

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58. *Id.* at 441.

59. *See id.*

60. *See id.* at 442.

61. *Id.*

62. *Id.*

63. The Court stated that the *Anders* brief is intended to assist an appellate court as it adjudicates a motion to withdraw. According to the Court,

First, [the appellate court] must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous. Because the mere statement of such a conclusion by counsel in *Anders* was insufficient to allow the court to make the required determination, we held that the attorney was required

the court that the appellant's constitutional rights have not been violated.<sup>64</sup>

The Court rejected McCoy's argument that Wisconsin's rule places appellate counsel in the position of *amicus curiae*,<sup>65</sup> and it was unpersuaded that the rule infringed upon an indigent defendant's right to effective representation and due process on appeal.<sup>66</sup> The Court succinctly stated, "A supported conclusion that the appeal is frivolous does not implicate Sixth or Fourteenth Amendment concerns to any greater extent than does a bald conclusion."<sup>67</sup> And with that, the Court affirmed the Wisconsin Supreme Court and upheld the Wisconsin appellate rule.<sup>68</sup>

### 3. *The Dissent*

Led by Justice Brennan, the dissenters<sup>69</sup> voiced their opinion that the Wisconsin rule impinged upon McCoy's right to counsel and passively encouraged inequity between rich and poor.<sup>70</sup> In the dissenters' view, the Wisconsin rule did not preserve appellate counsel's singular role as an advocate. Instead, the appellate rule impermissibly thrust appellate counsel into a dual role as advocate and *amicus curiae*.<sup>71</sup> Drawing a parallel between the discussion requirement of Wisconsin's rule and the no-merit brief the Court struck down in *Ellis*, the

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to submit for the court's consideration references to anything in the record that might arguably support the appeal.

*Id.*

64. *See id.*

65. *See id.* at 443.

66. *See id.*

67. *Id.*

68. *See id.*

69. Justices Marshall and Blackmun joined in Justice Brennan's dissent. Justice Kennedy took no part in the decision. *See id.*

70. *See id.* at 451 (Brennan, J., dissenting).

71. The dissenters characterized their position by explaining,

Our disagreement boils down to whether defense counsel who details for a court why she believes her client's appeal is frivolous befriends the client or the court. The Court looks at Wisconsin's regime and sees a friend of the client who "assur[es] that the constitutional rights of indigent defendants are scrupulously honored." I look at the same regime and see a friend of the court whose advocacy is so damning that the prosecutor never responds.

*Id.* at 455 (Brennan, J., dissenting) (citation omitted).

dissenters stated, “No less than the no-merit briefs we disapproved in *Ellis*, the no-merit discussion undermines the ‘very premise of our adversary system of criminal justice.’”<sup>72</sup>

The dissenters were also troubled by what they perceived to be inequity between rich and poor resulting from compliance with Wisconsin’s rule. They pointed out that legal minds can and do differ on the validity of legal issues.<sup>73</sup> As such, when a wealthy appellant’s retained counsel informs him that his appeal is frivolous, the wealthy appellant can seek a second opinion and retain different counsel, who may recognize the validity of his cause.<sup>74</sup> Not so with the indigent appellant who, after accepting the State’s offer of counsel, runs the risk that he will not only have to combat opposing counsel, but also his own counsel if she deems his appeal meritless.<sup>75</sup>

Like the majority, the dissenters recognized that the Wisconsin rule required appellate counsel to take an extra step. The dissenters, however, viewed that step as impermissible under the Constitution:

Merely because counsel constitutionally may take slight deviations from the role of advancing the client’s undivided interests does not mean that counsel constitutionally may entirely abandon that role, nor even that counsel may depart from that role any more than is absolutely necessary to satisfy the ethical obligation.<sup>76</sup>

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72. *Id.* at 450 (Brennan, J., dissenting) (citations omitted). The Court went on to conclude that “the Wisconsin Rule falls squarely within our flat prohibition against casting defense counsel in the role of amici.” *Id.* (Brennan, J., dissenting).

73. “Legal issues do not come prepackaged with the labels ‘frivolous’ or ‘arguably meritorious.’ . . . It by no means impugns the legal profession’s integrity to acknowledge that reasonable attorneys can differ as to whether a particular issue is arguably meritorious.” *Id.* at 451 (Brennan, J., dissenting).

74. *See id.* at 452 (Brennan, J., dissenting).

75. *See id.* (Brennan, J., dissenting).

76. *Id.* at 453 (Brennan, J., dissenting).

## C. Penson v. Ohio

*I. Background*

On December 7, 1984, an Ohio jury found Steven Anthony Penson guilty of, among other things, fourteen counts of rape, two counts of aggravated robbery, and two counts of felonious assault.<sup>77</sup> The court sentenced him to serve eighteen to twenty-eight years at the Chillicothe Correctional Institute.<sup>78</sup> After sentencing, the court appointed appellate counsel to assist Penson in his appeal.<sup>79</sup>

On June 2, 1986, Penson's attorney filed a "Certificate of Meritless Appeal and Motion" with the Ohio Court of Appeals.<sup>80</sup> A week later the court permitted Penson's appellate counsel to withdraw and granted Penson additional time to file his brief pro se.<sup>81</sup> The court granted Penson numerous extensions of time to file his brief, but refused to grant his request to have new appellate counsel appointed.<sup>82</sup> In the end, Penson never filed an appellate brief.<sup>83</sup>

The Ohio Court of Appeals, after having previously excused Penson's appellate counsel, reviewed the record and

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77. See *Ohio v. Penson*, 1987 WL 12222 at \*1 (Ohio App. June 5, 1987) (per curiam).

78. See *id.*

79. See *Penson v. Ohio*, 488 U.S. 75, 77 (1988).

80. See *id.* at 77-78. The Court included the following text of the "Certification of Meritless Appeal and Motion" in its decision:

Appellant's attorney respectfully certifies to the Court that he has carefully reviewed the within record on appeal, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1056, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.

MOTION

Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion.

*Id.* at 78.

81. See *Penson*, 1987 WL 12222 at \*2; see also *Penson*, 488 U.S. at 78.

82. See *Penson*, 1987 WL 12222 at \*2; see also *Penson*, 488 U.S. at 78.

83. See *Penson*, 1987 WL 12222 at \*2; see also *Penson*, 488 U.S. at 78.

found “several arguable claims,” and eventually found plain error in a portion of the jury instructions related to one count of felonious assault.<sup>84</sup> Despite expressing its disagreement with counsel’s filing of a no-merit brief,<sup>85</sup> the court held that Penson suffered no prejudice as a result of his attorney’s cursory examination of the record because the court had previously reviewed and dismissed similar arguments raised by Penson’s co-defendants in their separate appeals.<sup>86</sup> Penson sought review from the Ohio Supreme Court, which summarily dismissed his appeal.<sup>87</sup>

## 2. *The Court’s Decision*

Preliminarily, the United States Supreme Court reiterated the *Anders* procedure for properly permitting counsel to withdraw from representing an indigent appellant.<sup>88</sup> Without hesitation or apparent difficulty, the Court found that the Ohio Court of Appeals failed to follow the safeguard procedure developed in *Anders*. Worse, the Court also found that the Ohio procedure denied Penson “constitutionally adequate representation”<sup>89</sup> when it refused to appoint him counsel after concluding that he indeed had several arguably meritorious grounds for reversal and modification of his sentence.<sup>90</sup> Specifically examining the handling of counsel’s motion to withdraw, the Court found that the Ohio Court of Appeals erred in two ways: first, by granting counsel’s motion despite the fact that counsel did not draw attention to any arguable appeals

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84. *Penson*, 1987 WL 12222 at \*2.

85. The Ohio Court of Appeals stated, “Initially, this court is troubled by the filing of an *Anders* brief in the present action. We find counsel’s claim that the record does not reveal any assignment of error which could arguably support the appeal to be highly questionable.” *Id.*

86. *See id.* (“Because we have thoroughly examined the record and already considered the assignments of error raised in the other defendants’ appeals, we find appellant has suffered no prejudice in his counsel’s failure to give a more conscientious examination of the record.”).

87. *See Penson*, 488 U.S. at 79.

88. *See id.* at 80.

89. *Id.* at 81.

90. *See id.*

grounds;<sup>91</sup> and second, by impermissibly deciding counsel's motion to withdraw without first conducting its own investigation into the merits of Penson's appeal.<sup>92</sup>

The Court found more significant error, however, in the Ohio court's failure to appoint new counsel after its own investigation revealed that Penson had viable arguments on appeal.<sup>93</sup> As the Court noted, *Anders* unambiguously required that a court appoint counsel prior to rendering a decision if it concludes that the appellant may have arguable claims on appeal.<sup>94</sup> In its discussion, the Court clarified the interplay between *Anders* and *Douglas*—identifying *Anders* as a limited exception to the rule in *Douglas* that indigent defendants have a right to effective representation on their first appeal as of right.<sup>95</sup>

The exception is predicated on the fact that the Fourteenth Amendment—although demanding active and vigorous appellate representation of indigent criminal defendants—does not demand that States require appointed counsel to press upon their appellate courts wholly frivolous arguments. However, once a court determines that the trial record supports arguable claims, there is no basis for the exception and, as provided in *Douglas*, the criminal appellant is entitled to representation.<sup>96</sup>

As such, the Court concluded that the court of appeals' determination that arguable issues existed in the record created a constitutional imperative that counsel be provided.<sup>97</sup>

In the last portion of the majority's decision, the Court rejected Ohio's argument that the prejudice requirement in *Strickland v. Washington*<sup>98</sup> and the harmless-error analysis in *Chapman v. California*<sup>99</sup> are applicable in cases—like

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91. *See id.* (citing *Anders*, 386 U.S. at 744 (stating that counsel must identify "anything in the record that might arguably support the appeal"))).

92. *See id.* at 82-83.

93. *See id.* at 83.

94. *See id.*

95. *See id.*

96. *Id.* at 84.

97. *See id.*

98. 466 U.S. 668 (1984) (requiring a defendant pursuing a Sixth Amendment ineffective assistance of counsel claim to show that counsel's performance was deficient and that he suffered actual prejudice as a result thereof).

99. 386 U.S. 18 (1967) (requiring findings of harmless error to be made beyond a reasonable doubt where a federal constitutional violation has occurred).



Penson's—where seemingly egregious violations of the *Anders* procedure occur.<sup>100</sup> To hold otherwise, hypothesized the Court, would render the protections of *Anders* and *Douglas* meaningless because, whether the reviewing court finds a basis for reversal or not, the indigent appellant would not be harmed. Thus he would have no reason to complain.<sup>101</sup>

Nor was the Court persuaded by the State's argument that the Ohio Court of Appeals' review of the briefs filed on behalf of Penson's co-defendants satisfied Penson's right to representation on appeal. "One party's right to representation on appeal is not satisfied by simply relying on representation provided to another party."<sup>102</sup> In its final rejection of the State's contention that either *Strickland* prejudice analysis or *Chapman* harmless-error analysis was applicable, the Court stated,

Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, the presumption of prejudice must extend as well to the denial of counsel on appeal.<sup>103</sup>

The Court reversed the judgment of the Ohio Court of Appeals and remanded the case for further proceedings.<sup>104</sup>

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100. *Penson*, 488 U.S. at 88-89.

101. The Court stated:

Finding harmless error or a lack of *Strickland* prejudice in cases such as this, however, would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protection afforded by *Douglas* and *Anders*.

*Id.* at 86.

102. *Id.* The Court further stated, "A criminal appellant is entitled to a single-minded advocacy for which the mere possibility of a coincidence of interest with a represented codefendant is an inadequate proxy." *Id.* at 87.

103. *Id.* at 88 (citation omitted).

104. *See id.* at 89.

### 3. *The Dissent*<sup>105</sup>

In the opinion of Chief Justice Rehnquist, the lone dissenter, the majority's view impermissibly stretched the protections afforded by the Sixth Amendment.<sup>106</sup> Quoting the Court's decision in *Ross v. Moffitt*,<sup>107</sup> Justice Rehnquist recognized the equal protection component present in the Sixth Amendment right to counsel on appeal. However, he took issue with what he perceived to be the majority's attempt to permit the state's coffers to be used to fund representation equal to that which could be obtained by privately retained counsel.<sup>108</sup> Concluding that such equality is not required, Justice Rehnquist characterized the majority's opinion as a "futile monument to the Court's effort to guarantee to the indigent appellant what no court can guarantee him: exactly the same sort of legal services that would be provided by suitably retained private counsel."<sup>109</sup> Justice Rehnquist also concluded that alleged violations of *Anders* should be judged under the effective-assistance-of-counsel guarantee using the *Strickland* analysis and that appellants should not be afforded alternative constitutional relief if such violations do not render counsel's representation ineffective.<sup>110</sup>

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105. It should be noted for the sake of completeness that Justice O'Connor filed a one paragraph concurring opinion. She wrote separately to express her view that "nothing in the Court's opinion forecloses the possibility that a mere technical violation of [*Anders*] might be excusable." *Id.* (O'Connor, J., concurring).

106. *See id.* at 90-91 (Rehnquist, C.J., dissenting).

107. 417 U.S. 600, 616 (1974) ("The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.").

108. *See Penson*, 488 U.S. at 90 (Rehnquist, C.J., dissenting); *see also Ross*, 417 U.S. at 616.

109. *Penson*, 488 U.S. at 90 (Rehnquist, C.J., dissenting).

110. *See id.* at 91 (Rehnquist, C.J., dissenting).

## D. Smith v. Robbins

### I. Background

In 1990, a California jury convicted Lee Robbins of second degree murder and grand theft auto, for which the trial court sentenced him to serve seventeen years to life in prison.<sup>111</sup> Robbins's appointed counsel concluded that filing an appeal would be frivolous and therefore submitted a brief complying with the requirements of California's "*Wende* procedure" to the California Court of Appeal.<sup>112</sup> The court excused Robbins's attorney. So, like Charlie Anders, Robbins took up his own case and filed a pro se brief with the court alleging that there was insufficient evidence to support his conviction.<sup>113</sup> Finding no support in the record for Robbins's arguments, the California Court of Appeal denied his appeal.<sup>114</sup> The California Supreme Court thereafter refused his petition for review.<sup>115</sup> After exhausting his state remedies, Robbins sought relief in the federal courts by way of a habeas corpus petition.<sup>116</sup>

Along with a number of alleged trial errors, Robbins argued to the federal district court that he was denied effective assistance of counsel because his appointed state appellate

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111. See *Smith*, 528 U.S. at 266; see also *Robbins v. Smith*, 152 F.3d 1062, 1064 (9th Cir. 1997) (opinion amended Aug. 13, 1998).

112. The Court summarized the *Wende* procedure as follows:

[C]ounsel, upon concluding that an appeal would be frivolous, files a brief with the appellate court that summarizes the procedural and factual history of the case, with citations of the record. He also attests that he has reviewed the record, explained his evaluation of the case to his client, provided the client with a copy of the brief, and informed the client of his right to file a pro se supplemental brief. He further requests that the court independently examine the record for arguable issues. Unlike under the *Anders* procedure, counsel following *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous (although that is considered implicit) nor requests leave to withdraw. Instead he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing.

*Smith*, 528 U.S. at 265 (internal citations omitted); see also *People v. Wende*, 600 P.2d 1071 (Cal. 1979) (en banc).

113. See *Smith*, 528 U.S. at 267.

114. See *id.*

115. See *id.*

116. See *id.*

counsel failed to present his claims in accordance with *Anders*.<sup>117</sup> Finding an *Anders* violation, the district court ordered California to grant Robbins a new appeal or release him from custody.<sup>118</sup> The United States Court of Appeals for the Ninth Circuit affirmed the district court on the *Anders* issue, stating that *Anders* “set forth the exclusive procedure through which appointed counsel’s performance can pass constitutional muster.”<sup>119</sup> It remanded the case, however, for the district court to consider Robbins’s claims of trial error.<sup>120</sup> The Supreme Court then granted certiorari.<sup>121</sup>

## 2. *The Court’s Decision*

After examining the development of the *Anders* procedure, Justice Thomas devoted a full section of the Court’s decision to quieting the Ninth Circuit’s and legal commentators’ speculation that the *Anders* procedure was obligatory upon the states.<sup>122</sup> While acknowledging that cases subsequent to *Anders* may have included language that could be misinterpreted,<sup>123</sup> the Court minimized *Anders*’s perceived mandatory effect, and, relying on principles of federalism, stated,

[A]ny view of the procedure we described in . . . *Anders* that converted it from a suggestion into a straitjacket would contravene our established practice . . . of allowing the

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117. See *id.* Robbins argued that the following errors occurred at trial: (1) The prosecutor violated his duty to disclose exculpatory evidence; (2) the court erred by failing to allow Robbins to withdraw the waiver of his right to counsel; (3) the court failed to provide him with either the money or the means to prepare a case in his own defense; and (4) the court deprived him of his right to a fair trial by failing to secure the presence of the witnesses he had subpoenaed. See *Smith*, 152 F.3d at 1064-65.

118. See *Smith*, 528 U.S. at 268; see also *Smith*, 152 F.3d at 1065. The district court identified two issues that should have been raised on appeal: first, whether the prison law library was adequate to support Robbins’s efforts as a pro se defendant; and second, whether the trial court erred by refusing to allow him to withdraw his waiver of counsel. See *Smith*, 528 U.S. at 268.

119. *Smith*, 152 F.3d at 1066.

120. See *Smith*, 528 U.S. at 269; see also *Smith*, 152 F.3d at 1069.

121. 526 U.S. 1003 (1999).

122. See *Smith*, 528 U.S. at 270-76.

123. See *id.* at 272 (“We did, in *McCoy*, describe the procedure at issue as going ‘one step further’ than *Anders*, thus suggesting that *Anders* might set a mandatory minimum . . .”) (internal citation omitted); *id.* (“It is true that in *Penson* we used some language suggesting that *Anders* is mandatory upon the States . . .”).

States wide discretion . . . to experiment with solutions to difficult problems of policy.<sup>124</sup>

In concluding that portion of the opinion, the Court expressly held that “the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals.”<sup>125</sup>

Having determined that non-compliance with *Anders* was not fatal to California’s *Wende* procedure, the Court moved to an examination of the procedure on its own merits.<sup>126</sup> After examining the *Wende* procedure against the backdrop of its prior line of relevant cases, the Court found it to be constitutionally satisfactory.<sup>127</sup> First, the Court was swayed by the fact that the *Wende* procedure, unlike prior cases found to be inadequate under *Anders*, required both counsel and the court to make a frivolity determination before withdrawal.<sup>128</sup> Second, the *Wende* procedure was free from the *Douglas* violation problem encountered in *Penson* of an appellate court permitting counsel to withdraw before undertaking its own review of the record and thereafter deciding the case without appointing new counsel.<sup>129</sup> Finally, the Court found that the *Wende* procedure’s two tiers of review provided sufficient procedural protections, unlike the singular review procedures reviewed in prior cases.<sup>130</sup> The Court ultimately held that the *Wende* procedure, “like the *Anders* and *McCoy* procedures, and unlike the ones in *Ellis*, *Eskridge*, *Lane*, *Douglas*, and *Penson*, affords adequate and effective appellate review for criminal indigents.”<sup>131</sup>

The Court remanded the case for clarification and adjudication of the non-frivolous appellate issues. For Robbins’s contention that he received ineffective assistance of counsel, the

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124. *Id.*

125. *Id.* at 276. The Court went on to say, “States may—and, we are confident, will—craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*. The Constitution erects no barrier to their doing so.” *Id.*

126. *See id.*

127. *See id.* at 278-79.

128. *See id.* at 279-80.

129. *See id.* at 280 (“Under *Wende*, . . . *Douglas* violations do not occur, both because counsel does not move to withdraw and because the court orders briefing if it finds arguable issues.”).

130. *See id.* at 279-81.

131. *Smith*, 528 U.S. at 284 (referring to *Lane v. Brown*, 372 U.S. 477 (1963)).

Court directed that the *Strickland* standard be used to evaluate his claim.<sup>132</sup> The Court decided that the *Strickland* analysis was appropriate because the *Wende* procedure was constitutional, thus eliminating the issue of whether Robbins was afforded his right to counsel on appeal.<sup>133</sup> The only issue was therefore whether Robbins could prove that he was actually prejudiced by counsel's performance. Because the Court found that Robbins was afforded his right to counsel on appeal, it "presume[d] that the result of the proceedings on appeal [was] reliable, and . . . require[d] Robbins to prove the presumption incorrect in his particular case."<sup>134</sup>

### 3. *The Dissents*

Justice Stevens authored the first dissent, which Justice Ginsburg joined. Justice Stevens wrote separately to highlight two points concerning the majority's decision: first, that the majority had effectively overruled *Anders* and *Penson*;<sup>135</sup> and second, that in his view, the majority had inexplicably disregarded the Court's precedent set in *McCoy*.<sup>136</sup> Justice Stevens drew heavily on his prior experience as a practicing attorney and appellate judge in concluding that requiring counsel to "put pen to paper" may yield formerly reclusive viable legal issues on appeal.<sup>137</sup>

Justice Souter's lengthier dissent garnered the support of Justices Stevens, Ginsburg, and Breyer. In the first portion of his dissent, Justice Souter set forth to make the case for *Anders* and distinguish its staunch protection of the adversarial system from the overly-permissive guideline prescribed to the states by the majority.<sup>138</sup> Second, while stating that the Court has not held

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132. *See id.* at 285-86.

133. *Cf. Penson*, 488 U.S. at 88-89 (establishing a presumption of prejudice where there is an altogether denial of counsel on appeal as of right).

134. *Smith*, 528 U.S. at 287.

135. *See id.* at 289 (Stevens, J., dissenting).

136. *See id.* (Stevens, J., dissenting).

137. *Id.* at 291 (Stevens, J., dissenting).

138. Justice Souter wrote:

It is owing to the importance of assuring that an adversarial, not an inquisitorial, system is at work that I disagree with the Court's statement today that our cases approve of any state procedure that "reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." A

*Anders* to contain an exclusive procedure, Justice Souter characterized it as a “benchmark” and concluded that the *Wende* procedure “fail[ed] to measure up” because it did not require counsel to raise arguable issues in a no-merit brief, which in turn made more difficult the court’s search of the record for arguable issues.<sup>139</sup> Finally, because he viewed the invocation of the *Wende* procedure as tantamount to a denial of counsel on appeal, Justice Souter concluded that prejudice should be presumed, thereby eliminating the need for *Strickland* analysis.<sup>140</sup>

## II. DISCUSSION

The *Smith* Court gave short shrift to the notion that the procedure detailed in *Anders* was binding on the states. But an appreciation of the historical context of *Anders* and a review of the text of the *Anders* opinion lend considerable support to the conclusion that the procedure was in fact mandatory.<sup>141</sup> *Smith* therefore constitutes a radical change in the Court’s approach.

As for the historical context of *Anders*, around the time *Anders* was announced, the United States Supreme Court was routinely imposing new rules of criminal procedure on the

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purely inquisitorial system could satisfy that criterion, and so could one that appoints counsel only if the appellate court deems it useful. But we have rejected the former and have explicitly held the latter unconstitutional, the reason in each case being that the Constitution looks to the means as well as to the ends.

*Id.* at 296 (Souter, J., dissenting) (citations omitted).

139. *Id.* at 298 (Souter, J., dissenting) (“*Wende* . . . requires no indication of conceivable issues and hence nothing specifically reviewable by a court bound to preserve the system’s adversary character. *Wende* does no more to protect the indigent’s right to advocacy than the no merit letter condemned in *Anders*, or the conclusory statement disapproved in *Penson*.”).

140. *See id.* at 300-01 (Souter, J., dissenting).

141. This was the Ninth Circuit’s view. *Smith*, 152 F.3d at 1066 (“*Anders* and *Douglas* thus set forth the exclusive procedure . . .”). This perception was also reflected recently in *State v. Mouton*, 653 S.2d 1176 (La. 1995) (per curiam). A Louisiana lower appellate court had held that Louisiana had a “higher standard of constitutional protection than that offered by the *Anders* brief.” *State v. Mouton*, 653 S.2d 1360, 1361 (La. App. 1995). The court said that *Anders* “effectively wipes out defendant’s right to counsel on appeal and forces the judiciary to become his advocate.” *Id.* at 1362. In reversing, the Louisiana Supreme Court noted that the United States Court of Appeals for the Fifth Circuit, in a case arising in Louisiana, had previously held that strict adherence to *Anders* is constitutionally required and concluded that Louisiana’s appellate courts could not deviate from *Anders*. *See Mouton*, 653 S.2d at 1176-77 (citing *State v. Benjamin*, 573 S.2d 528 (La. App. 1990), which relied on *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990)).

states. The new rules included broad mandates that certain provisions in the Bill of Rights be enforced in state criminal cases, e.g., the privilege against self-incrimination,<sup>142</sup> the right to a speedy trial,<sup>143</sup> the right to confront witnesses,<sup>144</sup> and the right to compulsory process.<sup>145</sup> There were also cases that spelled out specific rules that states had to follow as a matter of federal constitutional law, e.g., the content of the harmless error rule,<sup>146</sup> specific procedural requirements in juvenile cases,<sup>147</sup> and a specific rule extending the right to counsel to a defendant facing a lineup.<sup>148</sup> Given this context, *Anders* could easily be read as yet another mandated procedure.

In addition, the text of *Anders* is not in the form of a suggested procedure. In other cases where the Court has merely suggested a new procedure, it has expressly stated that other alternatives would be constitutionally acceptable.<sup>149</sup> *Anders*, in contrast, stated that a motion to withdraw “*must . . . be accompanied by a brief.*”<sup>150</sup> The Court also stated that if the appellate court finds the appeal to be frivolous, the court can allow counsel to withdraw “and dismiss the appeal insofar as *federal requirements* are concerned,”<sup>151</sup> and that if the court finds any arguable issues the court “*must, prior to a decision, afford the indigent the assistance of counsel to argue the appeal.*”<sup>152</sup> *Anders* then went on to describe the procedure outlined as a “requirement” designed to “assure penniless defendants the same rights and opportunities on appeal . . . as are

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142. See *Malloy v. Hogan*, 378 U.S. 1 (1963).

143. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

144. See *Pointer v. Texas*, 380 U.S. 400 (1965).

145. See *Washington v. Texas*, 388 U.S. 14 (1967).

146. See *Chapman*, 386 U.S. at 22-24.

147. See *In re Gault*, 387 U.S. 1 (1967).

148. See *U.S. v. Wade*, 388 U.S. 218 (1967).

149. See e.g. *id.* at 239. There, the Court held that counsel is required at a lineup because a lineup is a “critical stage.” See *id.* The Court, however, said that other procedures that “eliminate the risks” of suggestive identification proceedings may render the lineup less “critical.” *Id.* Citing *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court said, “What we hold today in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.” *Wade*, 388 U.S. at 239.

150. *Anders v. California*, 386 U.S. 738, 744 (1967) (emphasis added).

151. *Id.* (emphasis added).

152. *Id.* (emphasis added).



enjoyed by those . . . able to afford the retention of private counsel.”<sup>153</sup>

Justice Stewart’s dissent also understood the procedure to be mandatory. He initially referred to the *Anders* brief as a “requirement” and then as a “quixotic requirement imposed by the Court.”<sup>154</sup> More fundamentally, he wondered how “the procedure that the Court commands” was better than California’s then-current procedure.<sup>155</sup> Finally, he disagreed with the “implicit assertion that there can be a single inflexible answer” to the issue, which further indicates that he understood the Court’s procedure to be mandatory.<sup>156</sup>

The Court reinforced the notion that *Anders* was mandatory in *McCoy*. There, the Court recognized the dilemma of appointed counsel who, unlike retained counsel, cannot withdraw from a frivolous appeal, but neither can she ethically brief a frivolous issue.<sup>157</sup> The Court resolved the dilemma by directing counsel to err on the side of informing the court of the frivolity of her client’s appeal.<sup>158</sup> *McCoy* went on to refer to the *Anders* brief as a requirement<sup>159</sup> and the Wisconsin rule as simply going “one step further” than “the minimum requirements of *Anders*.”<sup>160</sup>

*McCoy* thus not only stood for the proposition that *Anders* is constitutionally mandated, it also acknowledged that there is only one acceptable solution to the ethical dilemma—that counsel must inform the appellate court of her conclusion that the appeal is frivolous.<sup>161</sup> This holding goes beyond *Anders* and beyond what is constitutionally required. Whether appellate counsel is required to inform the court that her client’s appeal is

153. *Id.* at 745.

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

155. *Id.* at 747 (Stewart, J., dissenting).

156. *Id.* (Stewart, J., dissenting).

157. *McCoy II*, 486 U.S. at 437.

158. *Id.* (citing *Ellis v. U.S.*, 356 U.S. 674, 675 (1958)) (“It is well settled . . . that this dilemma must be resolved by informing the court of counsel’s conclusion.”).

159. *See id.* at 439 (“That requirement was designed . . .”); (“The *Anders* requirement assures . . .”); *see also id.* at 442 (“[*Anders*] held that the attorney was required to submit . . .”).

160. *Id.* at 442.

161. Both the majority and the dissent in *McCoy II* stated that counsel must advise the court of her determination that her client’s appeal is frivolous. *See id.* at 447 (Brennan, J., dissenting).

frivolous is a matter of state law, not federal constitutional law.<sup>162</sup> Nonetheless, *McCoy* purports to dictate how appellate defense counsel in all fifty states must handle this ethical dilemma.

The seven-member majority in *Penson* was equally firm concerning *Anders*. The majority said that *Anders* permitted withdrawal “provided that certain safeguards are observed” and went on to repeat, in detail, the *Anders* procedure.<sup>163</sup> The Court then carefully went through the procedure used by the Ohio courts, compared it jot for jot with *Anders*, and found that it did not comply with the *Anders* requirements. The clear import of this analysis was that any deviation from *Anders* would not be tolerated.

The majority’s rigid approach was underscored by the concurring and dissenting opinions. Justice O’Connor agreed with the result on these facts, but would not grant relief for “a mere technical violation of *Anders*.”<sup>164</sup> In dissent, Chief Justice Rehnquist said that the majority had “engraft[ed] onto . . . *Anders* . . . a presumption of prejudice when the appellate attorney for an indigent does not exactly follow the procedure laid down in that case.”<sup>165</sup> Thus, after *Penson*, it appeared that the entire Court regarded *Anders* as the template against which the Court would measure the states’ handling of frivolous appeals in indigent criminal cases.

*Smith*, decided twelve years after *Penson* and *McCoy*, is thus a major change in the Court’s approach. The majority in *Smith*, however, did not view it that way. Instead, the majority stated that while *McCoy* “suggest[ed] that *Anders* might set a mandatory minimum,” this characterization had to be viewed in the context of the Wisconsin procedure under review and, as such, was “questionable.”<sup>166</sup> As for *Penson*, the majority admitted that there was “some language suggesting that *Anders*

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162. See *State v. Balfour*, 814 P.2d 1069, 1078 (Or. 1991) (en banc) (“[T]he [United States] Supreme Court is not the arbiter of ordinary questions of ethical practices for attorneys in state court, except where those ethical practices implicate federal constitutional concerns.”); *State v. Clark*, 2 P.3d 89, 96 (Ariz. App. 1999) (“[I]t is up to the states to determine the proper ethical rules for attorneys practicing within their jurisdiction.”).

163. *Penson*, 488 U.S. at 80.

164. *Id.* at 89 (O’Connor, J., concurring).

165. *Id.* at 90 (Rehnquist, C.J., dissenting) (citations omitted).

166. *Smith*, 528 U.S. at 272.

is mandatory upon the States, . . . but that language was not necessary to the decision.”<sup>167</sup> The dissenters in *Smith* agreed that the Court had never held “the details of *Anders* to be exclusive but . . . as exemplifying what substantial equality requires.”<sup>168</sup> The dissent simply viewed *Anders* as a “benchmark.”<sup>169</sup> Thus, in *Smith*, the Court categorically denied that it ever held *Anders* to be mandatory on the states, seemingly disregarding its prior language and leaning in *Anders*, *McCoy*, and *Penson*.

The overriding theme of *Smith* is that states now have exceptionally wide latitude in regulating the performance of appellate counsel in frivolous cases. Any lingering ambiguity from *Anders* has been resolved. States may follow *Anders* or *Wende*, or any other procedure “so long as it reasonably ensures that an indigent’s appeal will be resolved in a way that is related to the merit of that appeal.”<sup>170</sup> At a minimum, this requires a lawyer, a transcript and, if a state chooses to set up a system that screens out frivolous criminal appeals, certain substantive and procedural safeguards within the system.<sup>171</sup>

First, the screening system must use a criterion of frivolousness. In other words, it cannot screen out cases that are arguable but unlikely to succeed on appeal. To use a standard that demands more than frivolousness would discriminate

167. *Id.*

168. *Id.* at 297 (Souter, J., dissenting).

169. *Id.* (Souter, J., dissenting).

170. *Id.* at 276-77 (citations omitted).

171. For an example of how *Smith* is being applied, see *Hughes v. Booker*, 220 F.3d 346, 352 (5th Cir. 2000), where the Fifth Circuit held that Mississippi’s “*Killingsworth* procedure” failed to provide adequate and effective review to indigent defendants. Mississippi’s withdrawal procedure provided that:

[i]f counsel truly believes an appeal without merit, he may with honor state such to the Court—although we caution that this be done only in the clearest cases. Where counsel regards the appeal without merit and deems it his obligation to so state to the Court, the full protection of the rights of the accused require that he receive a copy of the representation counsel has made to the Court and be furnished a reasonable opportunity to file his own comments and raise any additional points that he chooses.

*Killingsworth v. State*, 490 S.2d 849, 851 (Miss. 1986). In concluding that the “*Killingsworth* procedure” did not comport with *Smith*, the court found the fact that counsel is not required to explain the basis for his “no merit” conclusion and is not required to brief arguably meritorious issues to be fatal. *Hughes*, 220 F.3d at 351. Further, it found that the “*Killingsworth* procedure” failed to provide for state appellate court review, and did not contain any alternative safeguards to make up for the shortcomings identified above. *Id.* at 351-52.

against the indigent.<sup>172</sup> Second, the screening mechanisms cannot allow counsel to withdraw until the court determines that the appeal is frivolous.<sup>173</sup> And, if the court finds non-frivolous issues, the court must insist that counsel brief them.<sup>174</sup> It cannot simply decide the merits of the appeal without the assistance of counsel.<sup>175</sup> Third, the determination as to whether an appeal is frivolous cannot be left solely to counsel or solely to the court. Having one, but not both, review frivolousness is insufficient to guarantee advocacy by an effective lawyer.<sup>176</sup>

Provided these safeguards are in place, a State may establish its own mechanism for pre-screening indigent criminal appeals. But, just as the Constitution does not require a State to have a system of appellate review, a State does not have to establish a system for screening out frivolous criminal appeals. A State may choose to treat all criminal appeals in the same manner by insisting that counsel act as an advocate for the defendant whatever the merits of the appeal. By providing an indigent with a transcript and a lawyer to brief the issues, the State guarantees that the indigent will receive the same representation as an appellant represented by retained counsel. Counsel will file a brief that addresses the merits and advocates on the appellant's behalf. Ultimately, this means that the indigent's case, just like all other cases, will be resolved based on the merits, which is sufficient to meet the federal constitutional minimum. This is the approach first suggested by the ABA and subsequently followed in a number of States.

### III. THE AMERICAN BAR ASSOCIATION APPROACH<sup>177</sup>

The ABA approach eliminates the two most controversial steps that *Anders* added to the appellate process. Appellate counsel is not required to inform the court that in her opinion the

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172. *Smith*, 528 U.S. at 279.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.* at 281.

177. The authors wish to express their gratitude and appreciation to Ms. Susan Hillenbrand and the American Bar Association for their cooperation and assistance in providing us with the ABA Standards referred to in this article.

appeal is frivolous, and the court is not required to undertake an independent review of the record.

This section will review the history of this approach, discuss its effects on the role of counsel and the court, and argue that this approach better serves the appellate process.

### *A. History of the American Bar Association Approach*

The Court decided *Anders* in 1967, three years after the ABA had launched the formidable effort to write the *Standards for Criminal Justice*.<sup>178</sup> The actual *Standards* came out as tentative drafts and later as approved drafts accompanied by comments from the various Advisory Committees.

The first *Standard* to specifically deal with the *Anders* issue was promulgated in July of 1967 in tentative draft form by the Advisory Committee on the Prosecution and Defense Functions as part of the *Standards Relating to Providing Defense Services*. *Standard 5.3 on Withdrawal of Counsel* stated in part:

Counsel should not seek to withdraw because he believes that the contentions of his client lack merit, but should present for consideration such points as the client desires to be raised provided he can do so without compromising professional standards.<sup>179</sup>

The Commentary to this standard cited *Anders* only in passing,<sup>180</sup> but nonetheless criticized the withdrawal procedure as “cumbersome.”<sup>181</sup> The Commentary elaborated on its practical concern stating that permitting withdrawal by defense counsel “has . . . added to the net burden of judicial and lawyer time.”<sup>182</sup> The better procedure, said the Commentary, is for counsel to

present the claim to the court whatever it may be, rather than file a memorandum in support of a motion to withdraw . . . . [T]he presentation of the contentions of his client, even if lacking in support by authority, when done in the manner consistent with his professional obligations

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178. See Ray, *supra* n. 9, at 95.

179. ABA Standards, *Providing Defense Services* § 5.3 (tentative draft 1967).

180. The only citation to *Anders* indicated that it was in “accord” with *Ellis*.

181. *Providing Defense Services*, *supra* n. 179, at 51.

182. *Id.* at 52; see also Doherty, *supra* n. 9, at 2 (arguing, among other things, that *Anders* “will compound the evil of delay in reviewing meritorious appeals”).

fulfills his duty to his client without stultifying his role as lawyer.<sup>183</sup>

In March of 1969, a different committee, the Advisory Committee on Sentencing and Review, issued a draft of *Standards Relating to Criminal Appeals*.<sup>184</sup> In the introduction to these *Standards*, the Advisory Committee discussed at length the perceived problem of frivolous appeals. The Committee expressed doubts about the efficacy of any mechanism designed to screen out frivolous appeals, flatly stated that “the lawyers’ tactic of requesting permission to withdraw should be abandoned”<sup>185</sup> and concluded that “[g]reat improvement is possible if appointed counsel would undertake to serve their clients in the fullest sense, as if retained for a substantial fee.”<sup>186</sup> The text of section 3.2 reflected this view.<sup>187</sup>

In its Commentary, the Advisory Committee made two observations: first, that *Anders* required counsel to “brief the unbrieffable”;<sup>188</sup> and second, that “the lawyer [should not] attempt to undermine his relationship with and duty towards his client by subtle or open personal disclaimers of any given argument.”<sup>189</sup>

Then, in March of 1970, the Advisory Committee on Prosecution and Defense Functions revisited the issue. The Committee modified the text of the *Standard* to read simply that “[a]ppellate counsel should not seek to withdraw from a case

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183. *Providing Defense Services*, *supra* n. 179, at 52 (citations omitted).

184. ABA Standards, *Criminal Appeals*, Introduction at 2 (approved draft 1970).

185. *Id.*

186. *Id.* at 3.

187. *Criminal Appeals*, *supra* n. 184, at 73-74.

188. *Id.* at 78.

189. *See id.* Interestingly, section 3.2 was amended prior to approval by the ABA House of Delegates in October of 1970. The change in fact allowed counsel to withdraw after filing a brief for her client. *See Criminal Appeals*, *supra* n. 184, at 5 (Supp. 1970). The Commentary stated that while the “Tentative Draft is consistent with *Anders*, . . . the Special Committee views it as significant to state that, in some cases, counsel may appropriately request leave to withdraw rather than file a suggestion to forego oral argument.” *Id.* at 6. This “change . . . is intended to make the standard conform to the requirements of *Anders*.” *Id.* This amendment, however, went unnoticed by the *Standards Relating to the Prosecution Function and The Defense Function* as approved in 1971. The most recent *Standard* restates the position that counsel should not withdraw from a frivolous appeal and adds that counsel may only withdraw when her only other option is to mislead the court. *See ABA Standards, The Defense Function*, Standard 4-8.3, *Counsel on Appeal* (approved 1990).

solely on the basis of his own determination that the appeal lacks merit.”<sup>190</sup> The Commentary repeated the views of the prior committees and concluded that the better approach is for the appellate lawyer to present the issues even though they may be frivolous and not to indicate in any explicit manner that counsel personally believes the issues are frivolous.

In 1971, the ABA approach was adopted by the highest courts in two states, Missouri and Colorado.<sup>191</sup> In Missouri, the court cited with approval the recommendation that “counsel present to the court whatever there is to present, recognizing that in many instances this will amount to a presentation of contentions that are not well founded in any established case law.”<sup>192</sup> In practical terms, this means that in Missouri, any attempt by appellate counsel to withdraw because the appeal is frivolous will be denied.<sup>193</sup> As applied to this particular case, where appellate counsel’s brief amounted to little more than a listing of the points previously raised in a motion for a new trial without any argument, counsel was required to file a new brief that argued the appeal as well as possible.<sup>194</sup> The Missouri Supreme Court concluded that “the positions of the Advisory Committee should be followed, at least until the Supreme Court of the United States has spoken definitively on the question.”<sup>195</sup>

In the Colorado case, the defendant was convicted of burglary on testimony by two witnesses who saw him leaving the scene, one of whom apprehended him. His only claim on appeal was that the evidence was insufficient and that one witness was “inherently incredible.”<sup>196</sup> After recognizing that this issue was devoid of any merit, the court considered “the questions of when the Public Defender is required to prosecute an appeal and the duties which he has on appeal.”<sup>197</sup> The court

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190. ABA Standards, *The Prosecution Function and the Defense Function* (tentative draft 1970 & approved draft 1971).

191. See *State v. Gates*, 466 S.W.2d 681 (Mo. 1971); *McClendon v. People*, 481 P.2d 715 (Colo. 1971) (en banc).

192. *Gates*, 466 S.W.2d at 684.

193. See *id.* (“[A]pplications of counsel to withdraw because the appeal is considered frivolous will be denied.”).

194. See *id.*

195. *Id.*

196. *McClendon*, 481 P.2d at 716.

197. *Id.* at 717.

then interpreted *Anders* to say that “counsel for an accused must be an advocate and cannot . . . cast aside the points urged by the defendant as being without merit.”<sup>198</sup> The court found support for this interpretation in the *ABA Standards*, which “gave full recognition to the points raised in *Anders*,” but defined the obligations of counsel differently.<sup>199</sup> Applying the *Standards* to this case, the court found that the Public Defender “carried out the highest standards of the advocate” by preparing a brief that raised the issues that the defendant wanted raised.<sup>200</sup> Thus, even though the issue on appeal was frivolous, counsel’s decision to brief that issue without filing a motion to withdraw satisfied the defendant’s right to effective counsel on appeal.

The next major decision rejecting *Anders* came in 1977 from the Idaho Supreme Court.<sup>201</sup> The court did not rely on the *ABA Standards* or the opinions from Colorado or Missouri. Instead, the court relied on its own experience in trying to implement *Anders*. The court pointed out that in the *McKenney* case itself, appellate counsel had filed an *Anders* brief along with a motion to withdraw, that the court had denied the motion to withdraw because there were “arguable grounds for appeal,” and that the defendant had personally filed a motion asking that a new attorney be appointed to represent him.<sup>202</sup> The court conceded that this procedure was consistent with *Anders*, but saw two problems with it. First, the court stated that the “mere submission” of a motion to withdraw “result[s] in prejudice.”<sup>203</sup> Second, the court lamented the “fragmented consideration of various motions” based on the “impractical and illogical procedure outlined in *Anders dictum*.”<sup>204</sup> The court concluded that if in fact an appeal is frivolous, “less of counsel and the

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198. *Id.* at 717-18.

199. *Id.* at 718.

200. *Id.* at 719.

201. See *State v. McKenney*, 568 P.2d 1213, 1213 (Idaho 1977). Two other courts rejected *Anders* shortly after Colorado and Missouri. In *State v. Cheelester*, 488 P.2d 1045 (Utah 1971), the court stated without elaboration its disagreement with *Anders*. In *Dixon v. State*, 284 N.E.2d 102 (Ind. App. 1972), *overruled on other grounds*, *Music v. State*, 489 N.E.2d 949 (Ind. 1986), the court discussed *McClendon* and *Gates* at length and adopted the position of the ABA Advisory Committee. See also *Hendrixson v. State*, 316 N.E.2d 451 (Ind. App. 1974) (expressing agreement with *Dixon*).

202. *McKenney*, 568 P.2d at 1213-14.

203. *Id.* at 1214.

204. *Id.*



judiciary's time and energy will be expended in directly considering the merit of the case in due course."<sup>205</sup>

Since this decision, a number of states and commentators have labeled this approach the "Idaho Rule."<sup>206</sup> Three states have gone even further by expressly creating an exception to the rules of professional conduct and allowing counsel to raise frivolous claims.<sup>207</sup> Two states have held that counsel will not be permitted to withdraw on the ground that the appeal is frivolous, but may in the brief expressly disassociate herself from frivolous issues.<sup>208</sup> One state has rejected *Anders* but cautioned lawyers pursuing frivolous appeals that they might be subject to sanctions.<sup>209</sup> And, one state, while eliminating the motion to

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205. *Id.*

206. See e.g. Mendelson, *supra* n. 9; see also Junkin, *supra* n. 9.

207. *Ramos v. State*, 944 P.2d 856 (Nev. 1997) (per curiam); *State v. Cigic*, 639 A.2d 251 (N.H. 1994); *Huguley v. State*, 324 S.E.2d 729 (Ga. 1985). It should be noted that the author, James E. Duggan, served as appellate counsel in the *Cigic* case.

208. In *Commonwealth v. Moffett*, 418 N.E.2d 585 (Mass. 1981), the court held that "counsel should not be permitted to withdraw solely on the ground that the appeal is frivolous," but stated that "[i]f appointed counsel, on grounds of professional ethics deems it absolutely necessary to dissociate . . . herself from purportedly frivolous points, counsel may so state in a preface to the brief." *Id.* at 591. Similarly, in *Killingsworth v. State*, 490 S.2d 849 (Miss. 1986) (en banc), the court denied counsel's motion to withdraw under *Anders* but added, "If counsel truly believes an appeal without merit, he may with honor state such to the court—although we caution that this be done only in the clearest of cases." *Id.* at 851; see *supra* n. 171 (discussing the Fifth Circuit's rejection of the *Killingsworth* procedure).

The situation both courts may have in mind is when the client insists on raising an issue that is not simply frivolous but irrational—for example that the government cannot pass laws prohibiting homicide. The issue here is whether counsel *must* raise such issues because of the defendant's wishes. The answer under *Anders* is to allow the defendant to submit his own pro se supplement to the *Anders* brief. The answer under the *ABA Standards* is that the defendant is represented by counsel who has the final say in issue selection. Although a case like *McClendon* indicates that counsel acted appropriately by raising the frivolous issue that the defendant wanted raised, after *Jones v. Barnes*, 463 U.S. 745 (1983), the selection of which issues to raise in an appeal where all the issues are frivolous would ultimately lie with counsel.

209. See *State v. Lewis*, 291 N.W.2d 735 (N.D. 1980). In *Lewis*, counsel filed an *Anders* brief. In response the court said that *Anders* did not apply in North Dakota because there is a constitutional right to appeal. See *id.* at 737-38 (quoting N.D. Const. § 90). This means that the North Dakota Supreme Court has a duty to hear a defendant's appeal without a preliminary determination of frivolousness. However, if trial counsel concludes the appeal is frivolous and so informs the court, then the court should appoint another attorney to handle the appeal "to the best of his ability." *Id.* at 738. This procedure provides "greater constitutional protection" than *Anders*. *Id.* The court then went on to warn counsel that sanctions including costs and attorneys' fees are available if an appeal is frivolous. *Id.* at 738-39.

withdraw and independent judicial review, requires its own unique format in frivolous appeals.<sup>210</sup> In several states, the ABA approach has been followed de facto, either as a matter of local rule or practice.<sup>211</sup>

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210. *State v. Balfour*, 814 P.2d 1069, 1080 (Or. 1991) (en banc). *Balfour* held that if an appeal is frivolous and the client insists on going forward, counsel should file a two-part brief. Part A shall contain a statement of the case and the facts but no legal argument. Part B shall contain the issues the client wants to raise. Appellate counsel may sign part A but not part B. This way counsel is not “personally” raising frivolous issues. The case is submitted without oral argument. The court then decides the case as it would any other appeal. There is no independent review of the record by the court. *Balfour* holds that this procedure provides the defendant with “an advocate on the appellant’s behalf active to the permissible ethical limit.” *Id.* at 1081.

211. For a comprehensive and well-documented survey of how the *Anders* issue is handled in all jurisdictions, see Warner, *supra* n. 9. As for states that in practice do not follow *Anders*, the article lists:

- Alaska, where the public defender office does not file *Anders* briefs. *Id.* at 651 n. 210 (citing survey response from Clerk of the Alaska Court of Appeals to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (Jan. 24, 1995)).
- Hawaii, where the courts do not accept *Anders* briefs. *Id.* at 651 n. 206 (citing *Hawaii Appellate Handbook* § 8-6 (1988)).
- Kansas, where there is “an unwritten policy of not accepting *Anders* briefs.” *Id.* at 651 n. 207 (citing letter from Mary Beck Briscoe, Chief Judge, Kansas Court of Appeals, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 1, 1994)).
- Maryland, where the Court of Appeals and public defender office took steps that have resulted in lawyers not filing *Anders* briefs. *Id.* at 651 n. 208 (citing letter from Robert C. Murphy, Chief Judge, Maryland Court of Appeals, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 9, 1994)).
- New Jersey, where the public defender office does not file *Anders* briefs. *Id.* at 651 n. 209 (citing letter from Judge Herman D. Michels, Presiding Judge for Administration, Superior Court of New Jersey, Appellate Division, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 8, 1994)).
- Nebraska, where the Nebraska Supreme Court “abolished its rule allowing counsel to withdraw from frivolous appeals.” *Id.* at 651 n. 211 (citing letter from William C. Hastings, Chief Justice, Supreme Court of Nebraska, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 3, 1994)).
- Maine, where “no, or only sporadic, *Anders* briefs [have been] filed over the years.” *Id.* at 651 n. 212 (citing letter from Daniel Wathen, Judge, Maine Supreme Judicial Court, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 9, 1994)).
- Minnesota, where no *Anders* briefs are filed “because of its centralized public defender system.” *Id.* (citing letter from Chief Judge Paul H. Anderson, Minnesota Court of Appeals, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 15, 1994)).
- Tennessee, where only one *Anders* brief has been filed in the last 15 years. *Id.* (citing survey response from Tennessee Court of Criminal Appeals to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 20, 1994)).

By rejecting *Anders* soon after it was decided, the *ABA Standards* gave legitimacy to those critical of the *Anders* procedure. The *Standards* provided an alternative that purported to satisfy the goals of *Anders* without its cumbersome mechanism. The existence of the *Standards* has allowed a significant number of states to adopt a process that they believe provides effective representation and is more suited to the traditional roles of appellate counsel and the appellate courts.

### *B. Effects of the American Bar Association Approach*

#### *1. Defense Counsel*

While the ABA's recommended approach relieves defense counsel of her obligation to notify the court that she deems her client's case frivolous, counsel does not have carte blanche to ignore her ethical responsibilities. Counsel's conduct remains governed by the usual ethical and professional constraints and duties.

In every case, counsel must determine the overall strength of the appeal and the various issues presented. She must give the defendant her professional judgment as to the benefits and likelihood of success on appeal. There are many instances where appellate counsel might advise the defendant not to pursue an appeal: for example, where the sentence imposed is more lenient than expected and counsel fears a harsher sentence if the appeal is successful,<sup>212</sup> or where the cost and complexity of protracted appellate proceedings outweighs the likelihood of success.

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- Vermont, where “no, or only sporadic, *Anders* briefs [have been] filed over the years.” *Id.* at 651 n. 212 (citing survey response from Vermont Supreme Court to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 17, 1994)).
  - West Virginia, where “no, or only sporadic, *Anders* briefs [have been] filed over the years.” *Id.* (citing survey response from Margaret C. Workman, Justice, West Virginia Supreme Court of Appeals, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 9, 1994)).
  - Wyoming, where “no, or only sporadic, *Anders* briefs [have been] filed over the years.” *Id.* (citing survey response from Wyoming Supreme Court to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 14, 1994)).

212. See *North Carolina v. Pearce*, 395 U.S. 711 (1969) (permitting a harsher sentence to be imposed in some circumstances after a defendant has successfully attacked his conviction on appeal). See also *Wasman v. U.S.*, 468 U.S. 559 (1984) (upholding such a

So, too, with the frivolous appeal. Counsel must evaluate the chances of success and advise the defendant accordingly. If counsel determines that the appeal is wholly frivolous, ethically she must advise the defendant to withdraw the appeal.

The reality is that it is often difficult to persuade a client in a criminal case to withdraw an appeal, especially in indigent criminal appeals.<sup>213</sup> From the client's perspective, there is little or nothing to be gained by abandoning the appeal, even when counsel has advised him that there is only a one-in-a-million chance of success. For a person serving a lengthy prison sentence, that is a chance worth taking.

Given this reality, there is the risk that without a duty to report to the court that an appeal is frivolous, appellate counsel will fail to make the frivolousness determination. Instead of confronting the defendant with the bad news, counsel may simply go ahead and brief the case. Some lawyers may take that approach. On the other hand, as a practical matter, there is often an incentive for counsel to genuinely try to persuade her client to withdraw a frivolous appeal. Counsel will then not have to write a brief and otherwise prepare the case for appeal. At least for lawyers who specialize in indigent criminal appeals, and who often carry heavy caseloads, not having to write a brief frees them to devote more time to other more meritorious cases.<sup>214</sup>

Nonetheless, if the defendant decides not to withdraw the appeal, the ABA procedure allows counsel to continue in her traditional role. Counsel's conclusion that the appeal is frivolous thus has less drastic consequences on her relationship with her

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sentence); *Texas v. McCullough*, 475 U.S. 134 (1986) (same).

213. While *Anders* has been applied to appellate counsel who is retained, see e.g. *Cannon v. Berry*, 727 F.2d 1020, 1021 (11th Cir. 1984), in practice retained counsel is unlikely to file a motion to withdraw. As Justice Souter pointed out in *Smith*, "Paying clients generally can fire a lawyer expressing unsatisfying conclusions and will often find a replacement with a keener eye for arguable issues or a duller nose for frivolous ones." *Smith*, 528 U.S. at 294 n. 2 (Souter, J., dissenting); see also *McCoy II*, 486 U.S. at 451 (Brennan, J., dissenting) ("[T]he indigent client has no recourse to a second opinion.").

214. See Pritchard, *supra* n. 9, at 1168 (arguing that the "onslaught of frivolous appeals unleashed by *Anders*" has overburdened appellate lawyers and "ensures that indigent criminal defendants will receive mediocre appellate representation"). A different view is that by briefing obviously frivolous issues and waiving oral argument, appellate counsel "may lull the client—who is often not sent a copy of the government's brief and rarely is able to come to oral argument—into believing that he is getting a meaningful appeal." Hermann, *supra* n. 9, at 716. This point is well taken, provided counsel is not candid with her client about the merits of the appeal.

client. Counsel is not required to formally resign as her client's advocate. She can continue to serve her client in the traditional attorney-client model.

Of course, this means that defense counsel is permitted to act unethically. Three courts have frankly acknowledged this by creating an exception to the ethical prohibition on raising frivolous issues for counsel handling criminal appeals.<sup>215</sup> States are, of course, free to define their own ethical boundaries. The question then is whether states have sacrificed the values underlying the Rules of Professional Conduct by creating this exception.

The ban on raising frivolous claims is designed to prevent counsel from harassing the opposition and wasting the resources of the judicial system. Neither of those goals is undermined by an exception in indigent criminal appeals. The opposition—the state or federal government—incur 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. In sum, the underlying goals of the ethical rules are not significantly compromised by creating an exception for criminal appeals.

## *2. Better Representation*

An analysis of whether the ABA approach provides better quality representation for the defendant must begin with an understanding of what constitutes quality representation. To the individual defendant, the mere fact that his lawyer does not withdraw midway through the appeal may improve the quality of the representation. A system where the lawyer remains as the defendant's advocate will undoubtedly result in less dissatisfaction among clients.

Quality representation, however, is more than simply the defendant's subjective feeling about the services provided by his lawyer. The measure of quality includes whether the lawyer is able to effectively assist the defendant in attaining his goal of overturning his conviction or securing some other form of relief

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215. See *supra* n. 207.

on appeal. In this respect, the ABA approach may have an important effect on counsel's performance. Requiring counsel to brief what appears to be unbriefable will sometimes result in an unexpectedly persuasive argument. As the Supreme Court stated in *Penson*, "Simply putting pen to paper can often shed new light on what may at first appear to be an open-and-closed issue."<sup>216</sup> The process of writing a brief on a frivolous issue may unearth creative arguments. It may force counsel to take a closer look at the facts or to undertake additional investigation into the client's allegations. In this regard, the ABA approach may operate to actually improve the quality of representation provided.

On the other hand, under the ABA approach there is no check on counsel's performance because there is no independent judicial review of the record. If counsel fails to identify a meritorious issue, there is no appellate court waiting in the wings to uncover it. Under *Anders*, independent judicial review is the safeguard against counsel's failure to find meritorious issues. No comparable safeguard exists in the ABA approach.

Some courts and commentators, however, question the value of independent judicial review. One court has said that the motion to withdraw "prejudices" the court against finding meritorious issues.<sup>217</sup> One commentator has stated that "counsel's request for withdrawal amounts in practical effect to a motion for dismissal or affirmance."<sup>218</sup> And, with that starting point, the court's independent review is limited to the record on appeal. The appellate court cannot consult with trial counsel or the defendant.

There are cases where such review resulted in finding error that counsel either did not find or considered frivolous.<sup>219</sup> But such review is hardly the equal of the trained advocate. Indeed, the very presence of independent judicial review may encourage

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216. *Penson v. Ohio*, 488 U.S. 75, 81 n. 4 (1988). Also, in *Smith*, Justice Stevens noted:

On a good many occasions I have found that the task of writing out the reasons that support an initial opinion on a question of law—whether for the purpose of giving advice to my client or for the purpose of explaining my vote as an appellate judge—leads to a conclusion that was not previously apparent.

*Smith*, 528 U.S. at 290 (Stevens, J., dissenting).

217. *State v. McKenney*, 568 P.2d 1213, 1214 (Idaho 1977).

218. *Ray*, *supra* n. 9, at 110.

219. *See e.g. Penson*, 488 U.S. at 79.

counsel not to scrutinize the record as closely as counsel who knows that she has to write a brief. At the same time, if the court assumes that counsel has scrutinized the record with the utmost of care and has found nothing to argue, there is at least a risk that the defendant will not receive the full benefit of either's expertise.

In most cases, requiring appellate counsel to brief what counsel considers to be a frivolous issue will have the same result as the *Anders* procedure. But, balanced against the value of independent judicial review, counsel's efforts are more likely to uncover potentially meritorious claims.

### 3. Appellate Courts

One of the reasons for the *Anders* decision was purportedly to save courts from expending their full resources in resolving frivolous appeals.<sup>220</sup> At least one California appellate court, in describing its procedure under *Wende*, would agree that the goal has been met.<sup>221</sup> The court said that the *Wende* process is "a streamlined and swift affair."<sup>222</sup> When appointed counsel files a *Wende* brief, the other side either files no brief or files a pro forma brief. There is no oral argument. The court reviews the record, finds no issues, and issues a "written opinion . . . consist[ing] of only several boilerplate paragraphs."<sup>223</sup> The "opinion is produced on a word processor with a minimum number of keystrokes."<sup>224</sup> The result is "an opinion that is filed and final much sooner than one in an appeal that proceeds in the more conventional manner."<sup>225</sup>

But other courts that have rejected *Anders* have said that doing so saves a substantial amount of appellate court time.<sup>226</sup>

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220. See Junkin, *supra* n. 9, at 187. ("[T]he [*Anders*] procedure promotes efficiency by providing a means for appellate courts to dispose of frivolous appeals with minimal expenditure of judicial resources.").

221. *In re Andrew B.*, 40 Cal. App. 4th 825 (1995).

222. *Id.* at 829.

223. *Id.*

224. *Id.* n. 3.

225. *Id.* at 830.

226. In *Lewis*, the court stated, "We also are aware of the substantial saving of appellate court time due to the elimination of the initial supreme court determination of whether or not the appeal is frivolous. The elimination of the double procedure will also conserve county funds." 291 N.W.2d at 783.

Another court stated that sorting through the issues in the *Anders* brief, reading the record looking for additional issues, deciding whether those issues are frivolous or arguable, and then having counsel brief the new issues is time-consuming and complicated.<sup>227</sup>

Whether the ABA approach or the *Anders* process is more efficient may depend on local practice. One factor may be the availability of personnel to read the record. Another may be whether the court is required to write an opinion in every case or whether it can summarily dispose of obviously frivolous appeals.<sup>228</sup>

Putting the resources issue aside, the issue remains as to the appropriateness of an appellate court reviewing the record on the defendant's behalf. Requiring a court to take on the mantle of the defendant's advocate is at odds with the neutrality of the court. It requires the court to read the record in a new and different way. The court is not looking simply for error, but rather, is looking for ways that a creative criminal defense lawyer can argue that reversible error exists. This involves thinking about precedent with one eye towards extending it in favor of a defendant's rights. 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 of this method of thinking when he moved from the bar to the bench. In fact, the arguments that an experienced criminal defense attorney may consider plausible, a judge may regard as at odds with the direction he thinks the law should take. Thus, for a court to

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227. See *McKenney*, 568 P.2d at 1214.

228. One commentator has questioned the efficiency of the ABA approach.

Adoption of the Idaho Rule and prohibiting all withdrawals would sacrifice the efficiency achieved by *Anders*. The Idaho Rule does not account for cases so obviously frivolous that it would be useless for counsel to argue for reversal and inefficient for a court to expend the resources needed to formally address the issues in any extended manner.

Junkin, *supra* n. 9, at 195. This, of course, is accurate if the appellate court is required to write an opinion in every case. Otherwise, the ABA approach allows the court to identify obviously frivolous cases based on the briefs and summarily affirm without oral argument. Cf. *Gale v. United States*, 429 A.2d 177, 183 n. 12 (D.C. 1981) (per curiam) (Ferren, J., dissenting) (arguing that abandoning *Anders* in favor of the Idaho Rule "would have little effect on the time of the court or counsel" but acknowledging there would be some impact on the local prosecutor's resources).



assume the role of defense counsel is undermined by its usual, natural role.<sup>229</sup>

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. While it is theoretically possible for a judge to do this, it puts the judge in the position of arguing against himself.<sup>230</sup>

Ultimately, the value of independent review must be measured against the goals of the appellate process. One goal is to identify those cases where reversible error has occurred. The traditional method for achieving that goal relies on the effective advocacy of appellate counsel. The *Anders* procedure allows counsel to abandon her advocacy without requiring counsel to attempt to write a merits brief. Counsel can simply decide an appeal is frivolous and assume the court will act as a safety net. The court of course assumes that defense counsel has thoroughly reviewed the record and found no issues. Neither defense counsel nor the court is acting as normally envisioned by the

229. As Judge Ferren explained in his dissent in *Gale*, “[T]he *Anders* dictum typically forces either the court to undertake the role of the lawyer, or the lawyer to undertake the role of the court. This role reversal does not well serve the administration of justice.” *See id.* at 178-83. Judge Ferren urged the adoption of the Idaho Rule, stating, “[I]f an appellant is entitled to the appointment of counsel, then that appellant is entitled to the full benefit of the adversary system; and, in any event, the *Anders* compromise does not work well because it forces lawyers and courts to undertake ill-fitting roles.” *Id.* at 182 n. 10. He concluded that

[t]he adversary system has served the administration of justice long and well. It is the best system we know for producing results that are reliable, credible and fair. Motions to withdraw under *Anders*, by contrast, are agonizing for the lawyer, awkward for the judge, and perceived as collusive by the appellant.

*Id.* at 183.

230. *Gale* is also an excellent example of the difficulty in being both an advocate for the defendant and a judge of the merits of the case. There, the majority granted counsel’s motion to withdraw under *Anders*. *See id.* at 177. Judge Ferren, however, found two non-frivolous issues. He reviewed the record and persuasively argued that there was insufficient evidence on the Burglary I charge because there was little or no evidence that a resident was present in the apartment at the time of the burglary as required by the Burglary I statute. He argued that similar arguments had prevailed in other cases and that in an “analogous context” of proof of value in larceny cases, the court had been persuaded to adopt a “rigid rule of proof.” *Id.* at 180. He then went on to argue that appellate review of the sufficiency claim may not be barred by trial counsel’s failure to raise this issue because there was “a serious question” of ineffectiveness presented. *Id.* Having taken great pains to construct an argument on the defendant’s behalf out of whole cloth, if review had been granted, Judge Ferren would then have had to objectively evaluate his own argument.

adversary system. This structure—far from ensuring effective assistance of counsel—may create a risk that counsel is less effective and that reversible error remains uncovered in the process.

As one judge who has extensively studied the *Anders* issue said,

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 for that representation to be avoided. Thus, those states that refuse to allow withdrawal of counsel on the ground that the appeal is frivolous more effectively provide the right than do those that allow counsel to withdraw.<sup>231</sup>

#### IV. CONCLUSION

It is clear that the United States Supreme Court's decision in *Smith* is a radical departure from its prior decisions in *Anders*, *McCoy*, and *Penson*. The departure allows states to deviate from Justice Clark's seemingly mandatory procedure for handling frivolous indigent criminal appeals.

The procedure suggested in the *ABA Standards* overcomes many of the deficiencies present in *Anders* and strikes the closest balance between counsel's duty to her client and ethical duties as an officer of the court. It is arguably more efficient because it eliminates independent judicial review, is certainly more consistent with the traditional roles of appellate counsel and appellate judges, and may improve the quality of representation afforded to indigent appellants.

The Court's decision in *Smith* liberates states that have followed *Anders* blindly under the misconception that they were required to do so and frees them to serve as laboratories for alternative procedures, such as the ABA approach endorsed by this article.

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231. Warner, *supra* n. 9, at 661-62.