

ANDERS IN THE FIFTY STATES: SOME APPELLANTS' EQUAL PROTECTION IS MORE EQUAL THAN OTHERS'

MARTHA C. WARNER*

I.	INTRODUCTION.....	625
II.	THE PATH TO <i>ANDERS</i>	626
II.	<i>ANDERS V. CALIFORNIA</i> AND BEYOND.....	630
	A. <i>An Advocate for Indigent Defendants</i>	630
	B. <i>Insufficient Guidance</i>	632
	C. <i>The Evolution of Anders</i>	633
	1. <i>Early Formulations of the Reviewing Court's Function</i>	633
	2. <i>Evitts v. Lucey: Reliance on Due Process and Equal Protection</i>	635
	3. <i>McCoy v. Wisconsin: Clarifying the Attorney's Role and the Court's Independent Review Function</i>	636
	4. <i>Penson v. Ohio: Returning to Sixth Amendment Analysis</i>	639
	5. <i>Abandonment of Equal Protection?</i>	640
IV.	STATE COURT RESPONSES TO <i>ANDERS</i>	642
	A. <i>States Avoiding the Anders Procedure</i>	642
	B. <i>States Following Anders</i>	652
V.	ALTERNATIVE SOLUTIONS.....	656
VI.	CONCLUSIONS AND RECOMMENDATIONS.....	662

I. INTRODUCTION

A continuing source of frustration for the appellate judge is the review of appeals by indigent defendants whose appointed counsel can find no meritorious issues and files what is referred to as an *Anders* brief, required by the U.S. Supreme Court's holding in *Anders v. California*.¹ These appeals raise several problems for the appellate court. They require the devotion of court resources and time to appeals already deemed by counsel to have no merit; they require the court to review the record much more meticulously than in appeals raising meritorious issues; and they demand that the court raise, *sua sponte*, any issues that it deems arguably meritorious, even when counsel has not briefed those issues. In this respect, the appellate court treats this class of appeals in a significantly different way from other appeals. Because of these and other difficulties, several state appellate courts have adopted alternative procedures to avoid the *Anders* dilemma, while others have struggled with its application. The purpose of this Article is to examine what *Anders* and its progeny have required of state appellate courts, to determine how *Anders* has been applied in those

* Judge, Florida Fourth District Court of Appeal. B.A. magna cum laude, 1971, The Colorado College; J.D. with high honors, 1974, University of Florida; LL.M., 1995, University of Virginia. This Article is adapted from a thesis submitted by the author in partial fulfillment of the requirements for the degree of Master of Laws in the Judicial Process at the University of Virginia.

1. 386 U.S. 738, *reh'g denied*, 388 U.S. 924 (1967).

courts,² and to suggest some solutions to the problems *Anders* raises for the courts.

II. THE PATH TO *ANDERS*

The constitutional underpinnings of *Anders* and its progeny rely alternatively on both the Sixth and Fourteenth Amendments to the U.S. Constitution. These underpinnings resulted from a steady extension by the U.S. Supreme Court of rights to indigent criminal defendants. The attempt to satisfy both constitutional concerns in *Anders* forms the basis of the conflicting demands placed upon reviewing courts.

The U.S. Supreme Court first addressed the application of the Sixth Amendment right to counsel in 1932, when a poor, black defendant was sentenced to death without the assistance of counsel. In *Powell v. Alabama*,³ the Court held that the Sixth Amendment requires the appointment of trial counsel for indigent defendants in criminal cases.⁴ It declared that the right of an accused to be represented by counsel is a fundamental right under the Sixth Amendment.⁵ Later, in *Gideon v. Wainwright*,⁶ the Court held that the Sixth Amendment right to counsel applies to the states through the Equal Protection Clause of the Fourteenth Amendment.⁷ This decision thus reinforced the Court's assertion that fairness in criminal trials requires counsel to represent defendants in court proceedings. It noted not only that the government spends substantial sums of money securing attorneys to prosecute defendants, but also that a lay defendant is essentially no match for a trained lawyer representing the State.⁸

The issue of a defendant's rights in the appellate process was first addressed in the context of an indigent defendant's right to a transcript of the proceedings, which was deemed essential to prosecuting an appeal from a conviction.⁹ In *Griffin v. Illinois*,¹⁰ the Court, while acknowledging that the federal Constitution did not require the State to provide appellate review of criminal convictions, held that where such review was provided, it must be done in a manner that did not discriminate against indigent defendants.¹¹ Refusing to provide a transcript to an indigent defendant in a situation in which a wealthy defendant could secure one discriminated against the

2. To gather information for this Article, a questionnaire was sent to the chief judges of state intermediate appellate and supreme courts. Responses were received from most courts. The results of the survey are contained in the appendix to this Article.

3. 287 U.S. 45 (1932).

4. *Id.*

5. *See id.* at 68.

6. 372 U.S. 335 (1963).

7. *Id.*

8. *Id.* at 344-45.

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

10. *Id.*

11. *Id.* at 18.

indigent defendant and thus violated the Equal Protection Clause.¹² Although the *Griffin* decision stressed equal protection, it rested on the assumption that the appellant had meritorious points to raise and was unable to pursue those points solely because of the absence of a transcript, thus implicating due process concerns. The Court found that “[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with [a] crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’”¹³ *Griffin* is grounded on the belief that due process has been denied when error has occurred in a conviction and that error cannot be remedied on appeal in the absence of the transcript. By requiring the submission of a transcript without providing the means to obtain it, the State violated the defendant’s due process rights. However, the Court’s strongest statement in its opinion relied on equal protection: “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”¹⁴ In *Eskridge v. Washington State Board*,¹⁵ the Court reaffirmed a defendant’s right to a free transcript and disapproved a state procedure that allowed a trial court to deny an indigent defendant’s motion for transcription of his trial solely on the trial court’s conclusion that no reversible error occurred in the trial.¹⁶ The Court relied on the equal protection concerns expressed in *Griffin*.¹⁷

The Court, in *Lane v. Brown*,¹⁸ reiterated its assessment that the Equal Protection Clause requires that an indigent defendant be provided a transcript for the purpose of mounting an appeal of a conviction.¹⁹ In that case, an Indiana defendant sentenced to death wanted to appeal the denial of a writ of *coram nobis*, but the public defender assigned to represent him determined that no meritorious error could be asserted on appeal.²⁰ The Indiana courts had interpreted the statute governing public defenders as allowing only a public defender to request a transcript for an indigent defendant.²¹ The indigent defendant could not secure the transcript himself.²² After the public defender refused to appeal, the defendant requested both a transcript and the appointment of new counsel to represent him in appealing the denial of the writ.²³ Although the Indiana courts

12. *Id.* at 19.

13. *Id.* at 17 (citing *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

14. *Id.* at 19.

15. 357 U.S. 214 (1958).

16. *Id.*

17. *Id.* at 216.

18. 372 U.S. 477 (1963).

19. *Id.*

20. *Id.* at 481-82.

21. *Id.* at 481.

22. *Id.*

23. *Id.* at 482.

refused to grant relief, the federal appellate courts determined that denial of the transcript was a violation of equal protection of the law where the State had established a right to appeal but denied the indigent defendant that right solely because he could not afford the transcript.²⁴ The Supreme Court agreed and, in what appears to be a precursor to *Anders* itself, stated, "The provision before us confers upon a state officer [i.e., public defender] outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards."²⁵ Thus, after *Eskridge* and *Lane*, neither the trial court's determination that no reversible error had occurred nor the appointed counsel's determination that the appeal lacked merit could prevent a defendant from obtaining a transcript of the proceedings if one were essential to the effective presentation of the issues to the appellate court. In summarizing the foregoing line of cases, Justice Rehnquist noted in *Ross v. Moffitt*,²⁶ "The decisions discussed above stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."²⁷

The immediate predecessor to *Anders* was decided in the same term as *Lane*. In *Douglas v. California*,²⁸ the Court held that an indigent defendant was entitled to have counsel appointed to represent him on appeal of his conviction and sentence.²⁹ The defendants in *Douglas* had filed an appeal as of right to a California district court.³⁰ A California rule of criminal procedure provided that the appellate court could make an independent review of the record to determine whether it would be an advantage to the defendant or helpful to the appellate court to have counsel represent the defendant.³¹ Relying on that rule, the district court determined that "no good whatever could be served by appointment of counsel."³²

In reversing the decision, the Supreme Court concluded that refusing the appellant counsel to represent him on appeal amounted to a denial of equal protection.³³ If an appellant could afford counsel, then the appellate court would determine the merits of the case based upon a record with full written briefs pointing out errors.³⁴ But if the appellant were indigent, only manifest errors appearing on the face of the record—errors that might be noted by the appellate court—would result in a reversal of his conviction.³⁵ Matters of

24. *Lane v. Brown*, 372 U.S. 477, 483 (1963).

25. *Id.* at 485.

26. 417 U.S. 600 (1974).

27. *Id.* at 607.

28. 372 U.S. 353 (1963).

29. *Id.*

30. *Id.* at 354.

31. *Id.* at 355.

32. *Id.*

33. *Id.* at 357-58.

34. *Id.* at 356.

35. *Id.* at 355-56.

“hidden merit” would not be presented for review.³⁶ The Court therefore held that the independent review by the appellate court was not sufficient because a rich appellant could require a court to give attention to the written brief and the arguments presented, whereas the indigent defendant would have no such ability.³⁷

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.³⁸

Notably, the Court did not determine that the appellant was entitled to counsel under a Sixth Amendment claim but, rather, premised its decision on the same equal protection analysis used in the prior line of transcript cases.³⁹

In a strong dissent, Justice Clark noted that *Griffin* did not compel the result of requiring the appointment of counsel.⁴⁰ Even in *Griffin*, the Court acknowledged that a State could provide substitutes for a full transcript on appeal.⁴¹ Here, according to Justice Clark, California had provided a substitute for appointment of counsel by having the district court complete an independent review of the record to determine whether it would be to the defendant’s advantage to have appointed counsel.⁴² Because Justice Clark did not view the appellate court’s duty as a meaningless ritual, he contended that neither the Equal Protection Clause nor the Due Process Clause could require more than the independent review provided by the California rules.⁴³

Justice Harlan also dissented, explaining that the California procedure did not create a distinction between rich and poor appellants, but a distinction between appeals having merit and those deemed frivolous.⁴⁴ In short, Justice

36. *Id.*

37. *Id.* at 357-58.

38. *Id.*

39. *Id.* at 356.

40. *Id.* at 358 (Clark, J., dissenting).

41. 351 U.S. 12 (1956).

42. *Douglas*, 372 U.S. at 359 (Clark, J., dissenting).

43. *Id.* (Clark, J., dissenting).

44. *Id.* at 362 (Harlan, J., dissenting). Contending that the only constitutional basis on which California’s procedure could be evaluated was whether it comported with due process, *id.* at 363, Justice Harlan noted that appellate review was not in itself required by the Fourteenth Amendment. *Id.* at 365. Thus, Justice Harlan distilled the issue as one of whether the State’s rules regarding the appointment of counsel on appeal were arbitrary and unreasonable. *Id.* As the procedure was like that of the Court’s itself in reviewing petitions for discretionary writs, Justice Harlan suggested that the Court did not see itself as being anything other than completely conscientious when reviewing the thousand pro se petitions filed with it each year; he thus rebutted the majority’s argument that the California court review was no substitute for appointment of counsel. *Id.* at 365-66.

Harlan saw no constitutional impediment to California's procedure because it saved the State from the needless expense of providing attorneys to indigent defendants in frivolous cases⁴⁵—a distinction that would not violate either due process or equal protection considerations.

Noting that the majority of the Court used both due process and equal protection rationales to reach the results in the *Griffin/Douglas* line of cases, in *Ross v. Moffitt*,⁴⁶ the Court explained the different factors involved in each:

“Due Process” emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. “Equal protection,” on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.⁴⁷

II. *ANDERS V. CALIFORNIA* AND BEYOND

A. *An Advocate for Indigent Defendants*

Given the result in *Douglas* in 1963, the step to *Anders* four years later was a short one. The Court in *Douglas* had determined that without the appointment of counsel, California's independent review by the appellate court was insufficient to guarantee equal protection to the indigent defendant.⁴⁸ How, then, could the appointment of counsel alone be sufficient unless counsel filed a brief arguing the merits of the case?

Charles Anders was convicted in the 1950s of felony possession of marijuana.⁴⁹ He appealed, but his appointed counsel sent to the court a letter concluding that there was no merit to the appeal.⁵⁰ Anders then filed a pro se brief.⁵¹ The court affirmed his conviction.⁵² Six years later, Anders filed a petition for writ of habeas corpus seeking to reopen his case by virtue of a claim that he had been deprived of counsel on appeal.⁵³ After his petition was denied all the way to the California Supreme Court, the U.S. Supreme Court in granting review, noted that the appellant had raised as an issue in his petition that both the judge and prosecutor had commented

While the majority distinguished the procedure in *Douglas* from the Supreme Court's procedure on the basis that the California procedure was an appeal as of right, Justice Harlan considered that a meaningless distinction and pointed to *Lane v. Brown*, 372 U.S. 477 (1963), which required the presentation of a transcript on a postconviction proceeding. *Id.* at 366.

45. *Id.*

46. 417 U.S. 600 (1974).

47. *Id.* at 609.

48. *Douglas*, 372 U.S. at 357-58.

49. *Anders v. California*, 386 U.S. 738, 739, *reh'g denied*, 388 U.S. 924 (1967).

50. *Id.*

51. *Id.* at 740.

52. *Id.*

53. *Id.*

on his failure to testify, a comment that the Court had recently held to be constitutional error.⁵⁴

The Court's analysis was principally premised on its determination to eliminate discrimination against indigent defendants in the presentation of their first appeals. Although the Court mentioned *Gideon's* Sixth Amendment right to counsel, the reference was in the context of its application to the states through the Fourteenth Amendment.⁵⁵

The appointed counsel in *Anders* had reviewed the record and written the appellate court a letter stating: "I am of the opinion that there is *no merit* to the appeal."⁵⁶ Significantly, the Court distinguished between appeals with no merit and appeals that are entirely "frivolous" but failed to explain the distinction.⁵⁷ The Court was concerned that California's procedures completely failed to provide the indigent defendant with counsel who appeared in the role of advocate.⁵⁸ In formulating the procedure to be followed by counsel and courts in appeals by indigent defendants, it stated:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. 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.

This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready

54. *Id.* Having lost the battle in *Douglas*, Justice Clark wrote the majority opinion in *Anders*.

55. *See id.* at 742.

56. *Id.* (emphasis added).

57. *Id.* at 744.

58. *Id.* at 743.

references not only to the record, but also to the legal authorities as furnished it by counsel.⁵⁹

The Court's requirements present a logical inconsistency, noted by Justice Stewart in his dissent. If the appointed attorney can raise "anything that might arguably support an appeal," then, while it may be without "merit," it would not be entirely frivolous.⁶⁰ Nevertheless, the Court required the appellate court to make its own review of the record and to decide whether the appeal was wholly frivolous. Ironically, the very reason that the Court considered counsel necessary in *Douglas* was to bring forth matters of "hidden merit."⁶¹ Yet, under *Anders*, those matters may also escape review based only on an examination of the record proper.

B. *Insufficient Guidance*

The *Anders* opinion raises concerns about the appellate court's method of reviewing *Anders*-type cases. First, *Anders* draws a distinction between meritless and wholly frivolous cases, as noted by some early critics of the case: "[*Anders*] is seen as having established a rarefied distinction between appeals which are merely meritless and those which are wholly frivolous. Under *Anders*, so interpreted, the constitutional guarantee of effective assistance of counsel assures representation to criminal appellants for meritless, but not for frivolous, appeals."⁶² Other commentators viewed *Anders* as addressing solely the manner in which counsel communicates to the court the conclusion that the appeal was meritless, not the conclusion itself.⁶³ Certainly, the primary concern of appellate counsel has been not in how to communicate the conclusion that an appeal is meritless, but in the very suggestion that a client's case lacks any substance, for that has been seen as contrary to ethical standards requiring zealous representation of the client.⁶⁴ In practice, however, issues presented for review in *Anders* briefs frequently raise questions that cannot be deemed frivolous, even though they will not support a reversal because, for example, a lack of a timely

59. *Id.* at 744-45.

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

61. *Douglas v. California*, 372 U.S. 353, 356 (1963).

62. Robert Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 705 (1972).

63. See, e.g., Note, *The Right to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 TEX. L. REV. 181, 188 (1988) [hereinafter *Reevaluation*].

64. See, e.g., Hermann, *supra* note 62, at 705. If counsel is constitutionally required to pursue meritless claims but not frivolous claims, there exists an ethical conflict with the prohibition against pursuing such claims under the Code of Professional Responsibility. See, e.g., Charles Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed To Pursue a Frivolous Criminal Appeal*, 9 CRIM. JUST. J. 45, 51 (1986). A different view is taken in *Reevaluation*, *supra*, note 63, at 190-91. The author argues that counsel should not speculate on the likely success of an appeal but must evaluate the record more as an advocate, acknowledging the very low threshold for the determination that an appeal is meritorious under the *Anders* meaning. *Id.*

objection fails to preserve the issue for review. This, in and of itself, presents a dilemma for the appellate court. If, for instance, there were a clear error in admitting evidence to which there was no objection, should counsel file an *Anders* brief noting that the issue is one of arguable merit but is procedurally barred? Or should counsel file a standard brief and compel the State to raise the issue of lack of preservation in the answer brief? In the author's experience, such issues have been presented both ways. Some counsel file an *Anders* brief that acknowledges lack of preservation and triggers the court's independent review of the entire record. Other counsel file a brief arguing the error but without acknowledging its lack of preservation—a brief that prompts an answer brief from the State raising preservation but does not trigger the appellate court's independent duty to review the record for issues of arguable error. *Anders* thus leads to inconsistency in the presentation of issues to the appellate court, and this results in inconsistency in the method of review by the court.

Another related issue not fully addressed in the *Anders* opinion is whether the appellate court's review is limited to the arguable points raised or whether *Anders* requires the court to raise any issues it finds from the record. The court must decide whether the case is frivolous, but if it finds any legal point arguable on merit, it must require further briefing. If the appellate court's review is limited to the points raised in the appointed counsel's brief, then the appellate court performs its review similarly to that of any other criminal appeal. Certainly, if the court must determine whether the appeal is frivolous, it cannot ignore those issues that would not be frivolous if properly raised by the appellant. But if it considers issues not raised by counsel, then it is performing for the indigent appellant a function that it does not provide for any other class of appellee.

C. *The Evolution of Anders*

1. *Early Formulations of the Reviewing Court's Function*

The analysis used by the Court in *Ross v. Moffitt*,⁶⁵ decided almost eight years after *Anders*, supports a conclusion that the appellate court would not be required to perform an issue-searching function. Under the due process analysis, a State need not provide an appeal at all.⁶⁶ Therefore, the attorney for the indigent defendant acts as a "sword" rather than a "shield" against the State.⁶⁷ Unfairness of process results "only if indigents are singled out

65. 417 U.S. 600 (1974).

66. *Id.* at 611 (citing *McKane v. Durston*, 153 U.S. 684 (1984)).

67. *See id.* at 610-11.

The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the

by the State and denied meaningful access to the appellate system because of their poverty," an aspect that should be considered under an equal protection analysis.⁶⁸ But in making that analysis, the Fourteenth Amendment requires only that the state appellate system be "free of unreasoned distinctions . . . and that indigents have an adequate opportunity to present their claims fairly within the adversary system."⁶⁹

When counsel files an *Anders* brief for an indigent defendant whose appeal presents no meritorious points on review, he has as adequate an opportunity as any other litigant to present his arguments.⁷⁰ Requiring the appellate court to go further and itself search the record for points of arguable merit, however, would give the indigent *Anders* appellant an additional right not granted to other litigants. Nevertheless, this precise point was not made in *Ross*, and subsequent decisions indicate that the Court has not considered the issue.

Despite *Anders*' apparent requirement that the appellate court itself search the record for potentially meritorious issues, the Supreme Court subsequently held in *Jones v. Barnes*⁷¹ that an attorney is not required to raise every nonfrivolous issue requested by the client.⁷² "Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."⁷³ Noting that *Anders* required counsel to make a conscientious examination of the record, the Court observed that compelling counsel to raise every nonfrivolous issue that the client directs "seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation."⁷⁴ Therefore, counsel is told that if at least one issue of arguable merit is raised, counsel may exercise independent professional judgment and does not have to raise any other issues should counsel deem other issues too weak to present a good chance for reversal. But, given *Anders*, if counsel deems all of the issues nonmeritorious, counsel must file a brief raising *all* issues of arguable merit.⁷⁵ Under *Jones v. Barnes*, if counsel raises one meritorious issue, the appellate court has no independent duty to search the

trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.

Id.

68. *Id.*

69. *Id.* at 612 (citations omitted).

70. Under the *Ross* analysis, the preparation of an *Anders* brief by counsel would fulfill the Equal Protection Clause. *Cf. id.*

71. 463 U.S. 745 (1980).

72. *Id.* at 751.

73. *Id.*

74. *Id.*

75. *Anders v. California*, 386 U.S. 738, 744, *reh'g denied*, 388 U.S. 924 (1967).

record for other nonfrivolous issues.⁷⁶ It is only when *no* issues of arguable merit are raised that the appellate court searches and raises issues of arguable merit for the indigent appellant.

2. *Evitts v. Lucey: Reliance on Due Process and Equal Protection*

The Supreme Court returned to a due process analysis of the *Anders* issue in *Evitts v. Lucey*.⁷⁷ Interpreting *Anders* as establishing a due process right to effective assistance of counsel on an indigent's first appeal as of right, the Court held that counsel's failure to follow procedural rules, resulting in dismissal of the indigent defendant's first appeal as of right, denied the appellant due process.⁷⁸ The Court reviewed its analysis of the two constitutional principles involved in the *Griffin/Douglas/Anders* line of cases and concluded that the results in those cases relied on *both* equal protection and due process principles.⁷⁹ While acknowledging the equal protection claim, the Court observed that *Griffin* also stood on due process grounds. It held that allowing a case to be decided on appeal by reason of the presence or absence of a transcript "also violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved."⁸⁰ Moreover, the *Evitts* majority read in a strong due process justification for the *Anders* result and noted that *Anders* and *Jones v. Barnes* "rest on the premise that a State must supply indigent criminal appellants with attorneys who can provide specified types of assistance—that is, that such appellants have a right to effective assistance of counsel."⁸¹ Summarizing its reliance on both the due process and equal protection claims in that line of cases, the Court stated:

In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal. Both of these concerns were implicated in the *Griffin* and *Douglas* cases and both Clauses supported the decisions reached by this Court.⁸²

Thus, after *Evitts v. Lucey*, the *Anders* procedure must meet and address both the Due Process and Equal Protection clauses of the Constitution.

76. 463 U.S. 745 (1980).

77. 469 U.S. 387 (1985).

78. *Id.* at 394, 404.

79. *Id.* at 405.

80. *Id.* at 404.

81. *Id.* However, the Court specifically noted that the case did not require it to "decide the appropriate standards for judging claims of ineffective assistance of appellate counsel." *Id.* at 392.

82. *Id.* at 405.

3. *McCoy v. Wisconsin: Clarifying the Attorney's Role and the Court's Independent Review Function*

Less than three years later, the Court again addressed *Anders* in *McCoy v. Court of Appeals of Wisconsin District 1*.⁸³ The Wisconsin Supreme Court had adopted a rule of criminal procedure that required the appointed attorney for an indigent to include in the *Anders* brief "anything in the record that might arguably support the appeal *and a discussion of why the issue lacks merit*."⁸⁴ Counsel in *McCoy* filed a brief raising four arguments for reversal but concluded that further proceedings would be frivolous and without arguable merit.⁸⁵ Declining to inform the court, in accordance with the rule, as to why the points on appeal were without merit, counsel contended that to do so would be unethical and contrary to the effective advocacy requirement of *Anders*.⁸⁶ The Wisconsin Supreme Court disagreed with counsel's characterization of the conflict presented and held that the rule only required counsel to fulfill the dual duties to the client and the court.⁸⁷ It stated that informing the reviewing court of authorities against the arguments made is a duty that all attorneys have to the court to assist it in making a correct decision.⁸⁸

After reviewing the requirements of *Anders*, the United States Supreme Court concurred with the Wisconsin Supreme Court that the rule in question did not violate appellant's due process or equal protection rights.⁸⁹ First, the Court noted the ethical duty of all attorneys, whether paid or appointed, to refuse to prosecute a frivolous appeal.⁹⁰ When paid counsel comes to the conclusion that the appeal is frivolous, a duty to withdraw arises.⁹¹ Although the same duty to withdraw arises when appointed counsel comes to the conclusion that the appeal is frivolous, appointed counsel must secure approval of the court to withdraw. Such approval would entail informing the court of counsel's opinion about the frivolousness of the appeal.⁹² Although informing the court of counsel's opinion would seem to conflict with counsel's duty as an advocate, the Court stated, "It is well settled, however, that this dilemma must be resolved by informing the court of counsel's conclusion. . . . We reaffirmed this basic proposition in

83. 486 U.S. 429 (1988).

84. WISC. R. APP. P. 809.32(1) (emphasis added).

85. *McCoy*, 486 U.S. at 432.

86. *Id.*

87. *Id.* at 434 n.6.

88. *Id.* at 433.

89. *Id.*

90. *Id.* at 436.

91. *Id.* at 437.

92. *Id.* The Court appears to be working under a misapprehension regarding withdrawal of paid counsel. For instance, in Florida, no counsel, paid or appointed, may withdraw without permission of the court. Moreover, paid counsel would also have to recite some reason for withdrawal. See FLA. R. ADMIN. P. 2.060(i).

Anders.”⁹³ Further explaining *Anders*, the Court determined that the responsibility of counsel was the same, whether appointed or retained:

Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court. The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client’s interest to the best of his or her ability. Only after such an evaluation has led counsel to the conclusion that the appeal is “wholly frivolous” is counsel justified in making a motion to withdraw.⁹⁴

In a footnote to the phrase “wholly frivolous,” the Court made its first attempt to define what it meant by the term:

The terms “wholly frivolous” and “without merit” are often used interchangeably in the *Anders*-brief context. Whatever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact.⁹⁵

Returning to its original equal protection analysis, the Court noted that *Anders* gave to the indigent what the wealthy defendant could afford: a full examination of the record and identification of arguable issues for appeal.⁹⁶ The Court specified, however, that an *Anders* brief was not to be a substitute for a merits brief:

It is essential to keep in mind that the so-called “*Anders* brief” is not expected to serve as a substitute for an advocate’s brief on the merits, for it would be a strange advocate’s brief that would contain a preface advising the court that the author of the brief is convinced that his or her arguments are frivolous and wholly without merit. Rather, the function of the brief is to enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court.⁹⁷

Addressing the Wisconsin rule itself, the Court found it constitutionally unobjectionable, given its interpretation by the Wisconsin courts of requiring no lengthy argument that the appeal is meritless, but merely a listing of cases, statutes, and facts in the record supporting that

93. *McCoy*, 486 U.S. at 437 (citation omitted).

94. *Id.* at 438-39.

95. *Id.* at 438-39 n.10. This comment appears to be in response to criticisms that the *Anders* opinion attempted to draw an impossible distinction between simply “meritless” and “frivolous” cases. *See., e.g.*, Pengilly, *supra* note 64; Hermann, *supra* note 62.

96. *McCoy*, 486 U.S. at 439.

97. *Id.* at 439-40 n.13.

conclusion.⁹⁸ The Court also commented on the role of appellate courts in evaluating the briefs:

Unlike the typical advocate's brief in a criminal appeal, which has as its sole purpose the persuasion of the court to grant relief to the defendant, the *Anders* brief is designed to assure the court that the indigent defendant's constitutional rights have not been violated. To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it 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. . . . Just like the references to favorable aspects of the record required by *Anders*, the discussion requirement [of reasons why the appeal is frivolous] may forestall some motions to withdraw and will assist the court in passing on the soundness of the lawyer's conclusion that the appeal is frivolous.⁹⁹

Concluding, and giving perhaps the most specific direction to the appellate courts as to their function, the Court stated:

The *Anders* brief is not a substitute for an advocate's brief on the merits. As explained above, it is a device for assuring that the constitutional rights of indigent defendants are scrupulously honored. The Wisconsin Rule does no injury to that purpose, nor does it diminish any right a defendant may have under state law to an appeal on the merits. Once the court is satisfied both that counsel has been diligent in examining the record for meritorious issues and that the appeal is frivolous, federal concerns are satisfied and the case may be disposed of in accordance with state law. Of course, if the court concludes that there are nonfrivolous issues to be raised, it must appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief before deciding the merits.¹⁰⁰

Thus, *McCoy* finally makes clear that the appellate court's determination that counsel should be allowed to withdraw carries with it an independent duty for that court to review the record to determine whether there is any basis in fact or law to support the appeal. Inferable from that is the appellate court's duty to point out issues that might support an appeal when they have been overlooked by counsel.¹⁰¹

98. *Id.* at 440.

99. *Id.* at 442.

100. *Id.* at 444.

101. In *State v. Causey*, 503 So. 2d 321 (Fla. 1987), decided the year before *McCoy*, the Florida Supreme Court expressly informed appellate courts that their duty under *Anders* was to review the record for unraised error. The court specifically rejected the State's contention that the appellate court's only obligation was to assess the merit of the points raised in appointed counsel's *Anders* brief.

4. *Penson v. Ohio: Returning to Sixth Amendment Analysis*

In *Penson v. Ohio*,¹⁰² the Court most recently reaffirmed the *Anders* briefing procedure and criticized the Ohio Court of Appeals for failing to follow its dictates.¹⁰³ Appointed counsel on appeal had filed a “Certification of Meritless Appeal and Motion.”¹⁰⁴ In the certification, counsel informed the court that he had found no errors requiring reversal and that the appeal was meritless. He did not advance any issues of arguable merit. Despite his failure to file a brief in conformance with *Anders*, the court of appeals granted the motion to withdraw. The court gave appellant additional time to file a pro se brief, after which the appellate court planned to review the record independently to determine whether any error existed requiring reversal.¹⁰⁵ Although no *Anders* brief and no pro se brief were filed in the case, the court made its independent review of the record. It found several arguable claims and decided that plain error had been committed in one count.¹⁰⁶ In reversing appellant’s conviction on that count but affirming the remaining counts, the court concluded that appellant had “suffered no prejudice” as a result of his counsel’s failure to address these issues as the court had thoroughly reviewed the record.¹⁰⁷

The Supreme Court granted certiorari to hear the case. In reversing the decision, it found that the Ohio Court of Appeals’ failure to follow *Anders* was error that could not be considered harmless.¹⁰⁸ First, the appellate court erred in not requiring appointed counsel to file a brief in accordance with *Anders*.¹⁰⁹ The “Certification of Meritless Appeal” was no better than the no-merit letter sent in *Anders* and did not assist the court in determining whether counsel in fact had conducted the extensive examination of the record constitutionally required of counsel. Moreover, the certification did not provide the appellate court with any assistance in reviewing the “cold record” and thus left appellant without an advocate.¹¹⁰ The Court held that the appellate court also had erred in granting the motion to withdraw before it had made its own independent review of the record; it noted that, “[o]bviously, a court cannot determine whether counsel is in fact correct in concluding that an appeal is frivolous without itself examining the record for arguable appellate issues.”¹¹¹

More serious, however, was the appellate court’s determination of issues that it found arguable without appointing counsel to brief those issues.

102. 488 U.S. 75 (1988).

103. *Id.*

104. *Id.* at 77.

105. *Id.* at 78.

106. *Id.* at 79.

107. *Id.*

108. *Id.* at 81.

109. *Id.*

110. *Id.* at 82.

111. *Id.* at 83 n.10.

Noting that *Anders* was a limited exception to the constitutional requirement of representation on appeal, the Court stated that once an appellate court finds arguable error, there is no basis for the exception and, as provided in *Douglas*, the criminal appellant is entitled to representation.¹¹² The Court of Appeals' determination that arguable issues were presented by the record, therefore, created a constitutional imperative that counsel be appointed.¹¹³

The Court concluded that failure to appoint counsel to brief issues of arguable merit could not be found to be harmless or lacking *Strickland* prejudice¹¹⁴ because the appellate court would be reviewing the record without the assistance of an advocate for the appellant. To hold that this was harmless error would undercut the very basis of *Douglas* and *Anders* and render their constitutional guarantees meaningless.¹¹⁵ The right to counsel is fundamental and constitutionally based, and the appellate court's determination of the issues without appointment of counsel effectively denied the appellant that right. Because of this, the Supreme Court reversed and remanded the case to the Ohio courts for further proceedings.¹¹⁶ Thus, in *Penson*, the Court returned to the Sixth Amendment as the underpinning of the *Anders* procedure.

In dissent, Chief Justice Rehnquist, conceding the enlargement of the Sixth Amendment to include the right to effective counsel on appeal, posited that ineffectiveness claims could be handled as in any other case—as postconviction matters under the standard of *Strickland v. Washington*.¹¹⁷ He suggested that *Anders* was a “safe-harbor” method for counsel to use to protect against ineffectiveness claims but that it was *Strickland*, not *Anders*, that created the basic constitutional standard for effective representation.¹¹⁸ Chief Justice Rehnquist's analysis provides an alternative view of the appellate court's review function. An *Anders* brief may be evaluated as any other brief in judging the effectiveness of appellate counsel. The appellate court would not be required to perform an independent review of the record for other arguable errors. Instead, any deficiencies in counsel's review of the record and preparation of the brief would be remediable in collateral proceedings.¹¹⁹

5. *Abandonment of Equal Protection?*

While the Court's concerns have shifted among equal protection, due process, and right of counsel concerns, all three must be satisfied under *Anders* and its progeny. First, state review procedures must not be arbitrary

112. *Id.* at 84.

113. *Id.*

114. *Id.* at 85 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

115. *Id.* at 86.

116. *See id.* at 89.

117. *Id.* at 91 (Rehnquist, J., dissenting).

118. *Id.* at 89 (Rehnquist, J., dissenting).

119. *Id.* at 91.

with respect to the appeal itself. An indigent defendant must have a fair opportunity to present appellate claims within the adversary system. Second, the indigent defendant must not be at a disadvantage when compared to the nonindigent defendant. Thus, the indigent defendant must be given what the nonindigent defendant can procure. Third, the indigent defendant must be represented on an appeal as of right by counsel who performs effectively as an advocate.

Although premised on the Fourteenth Amendment, *Anders*, in the final analysis, is grounded more on ensuring the right to counsel than on either the equal protection or due process claims. *Anders* established a procedure to be followed when counsel desired to withdraw, thus leaving the indigent defendant with *no* representation on appeal. The establishment of a right to counsel on appeal in *Douglas* would be rendered meaningless if counsel could withdraw without performing as an advocate. To ascertain that counsel has indeed given professional representation assuring the indigent defendant the constitutional right to counsel, the court cannot simply rely on counsel's bare conclusion that an appeal is without merit. Thus, the Court has returned to its starting point in *Powell v. Alabama*¹²⁰ in concluding that fundamental fairness of the criminal prosecution both at trial and on appeal requires that the defendant have effective assistance of counsel. To ensure that counsel has been effective, the appellate court must perform an independent review of the record and look for any points of arguable error before allowing withdrawal of counsel because the appeal is frivolous.¹²¹ This is a function the appellate court performs for no other class of appellants.

While the Court is vindicating the right to counsel, the procedure it establishes suffers from serious equal protection implications. If a court reviews each record and raises arguable error only for an indigent appellant whose counsel moves to withdraw, then the nonindigent is disadvantaged as compared to the indigent—a denial of equal protection of the law. Moreover, it is not only the nonindigent defendant who is disadvantaged. In addition, the indigent defendant whose counsel raises some meritorious points also is not entitled to the court's independent review to raise other arguable points that counsel may have overlooked. It is a common experience of appellate judges to discover arguable points that were not raised in the briefs. Indeed, counsel is consistently encouraged by judges and appellate practice manuals to limit the points on appeal to those most likely to succeed.

In fact, the Supreme Court has approved as a valid state procedure the refusal of an appellate court to consider issues not raised in the brief.¹²² In *Smith v. Murray*,¹²³ the Supreme Court had to determine whether the failure to raise an issue on appeal, which under state procedural rules precluded the

120. 287 U.S. 45 (1932).

121. *See id.*

122. *See Smith v. Murray*, 477 U.S. 527 (1986).

123. *Id.*

appellate court from addressing the issue, barred the federal court's attention to the error in collateral proceedings.¹²⁴ In that case, the defendant had been examined prior to trial by a psychiatrist.¹²⁵ During the trial, the State was able to elicit, over the defendant's objection, statements made to the psychiatrist by the defendant.¹²⁶ On appeal, counsel did not raise the point regarding the psychiatrist's testimony,¹²⁷ and the state supreme court noted in a footnote that it addressed only those points raised by the defendant.¹²⁸ Throughout several collateral proceedings, the defendant attempted to raise the issue, but each time the courts held that he was barred by the state procedural rule providing that failure to raise a claim on direct appeal barred its consideration.¹²⁹ The Supreme Court, in approving the result, found that the state courts had an interest in enforcing a legitimate rule of state procedure.¹³⁰ If that is a legitimate rule of appellate procedure and, under *Jones v. Barnes*, counsel is not compelled to raise all nonfrivolous issues, then *Anders* has resulted in a state procedure that provides disparate treatment to appellants "whose situations are arguably indistinguishable."¹³¹

IV. STATE COURT RESPONSES TO *ANDERS*

How state courts have addressed the *Anders* issue varies widely.¹³² Ten states have rejected the *Anders* procedure. In some states, the public defenders refuse to file such briefs. A survey of the courts of appeal following the *Anders* procedure reveals that the percentage of the criminal caseload comprised of *Anders* appeals varies widely—from less than one percent, to a high of thirty-nine percent, of the total filings. The internal process each court uses in reviewing an *Anders* brief also differs markedly. The survey results show that handling *Anders* appeals continues to be an analytical and managerial problem for state appellate courts.

A. *States Avoiding the Anders Procedure*

Early court decisions that chose not to follow the *Anders* procedure primarily addressed the conflict in which appointed counsel is placed in representing indigent defendants. In 1971, the Missouri Supreme Court considered the application of *Anders* to its appellate process in *State v. Gates*.¹³³ It focused on the ethical and professional dilemma of the appellate

124. *Id.*

125. *Id.* at 529-30.

126. *Id.* at 530.

127. *Id.* at 530-31.

128. *Id.* at 531.

129. *Id.* at 531-32.

130. *Id.* at 534.

131. *Ross v. Moffitt*, 417 U.S. 600 (1974).

132. See generally state court survey responses summarized in appendix.

133. 466 S.W.2d 681 (Mo. 1971).

lawyer representing the indigent defendant in what appeared to be conflicting duties to the court and to the client. Quoting from the 1970 tentative draft of *ABA Standards: The Prosecution Function and the Defense Function*, the court agreed that counsel does not necessarily violate ethical standards by briefing issues lacking merit:

On the premise that the lawyer is of greater aid to the court by remaining with a weak or groundless appeal than by withdrawing, the preferable position is for him to remain even at some cost to the concept of professional independence of the lawyer. The lawyer cannot properly engage in advocacy calculated to mislead or deceive the court . . . [b]ut, in this situation, appearance of counsel is not an implicit representation to the court that he believes in the legal substantiality of the contentions advanced. . . . [T]he procedures in force in many jurisdictions put defense counsel in the awkward position of arguing against his client and the reviewing court in the unsatisfactory situation of having to review the record itself (thus, in effect, considering the merits) in order to determine whether counsel should be relieved. To avoid such a conflict of interest and duplication of effort, the Committee recommended 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. Counsel thus serves his function by appearing on behalf of his client and presenting the client's arguments. He is not, of course, required to distort the state of the law in so doing; indeed, he is obligated to reveal to the court any decisions directly adverse to his client's contentions, if they have not already been presented to the court by the government

This procedure satisfies the principles of *Anders* and avoids placing defense counsel in a position in which he may be tempted to take too narrow a view of the arguments that may be made in his client's behalf. At the same time, the lawyer remains consistent to his professional obligation to be candid with the court in the presentation of the appeal.¹³⁴

Notably, the problems identified by the ABA Advisory Committee include the difficult position in which appellate courts are placed in reviewing *Anders* briefs. The Missouri Supreme Court adopted the reasoning of the committee in holding that counsel's motion to withdraw because the appeal was frivolous would be denied.¹³⁵ The Missouri Supreme Court required counsel to file a brief consistent with the position advanced by the Committee.¹³⁶ Colorado¹³⁷ and Indiana,¹³⁸ agreeing with *Gates*, also adopted the ABA standards for reviewing appeals by indigent defendants.

134. *Id.* at 683-84 (citations omitted).

135. *Id.* at 684.

136. *Id.*

137. *McClendon v. People*, 481 P.2d 715, 718 (Co. 1971) (en banc). In the opinion, the court set forth the ABA standards that it adopted for pursuing appeals:

The Special Committee of the American Bar Association, in formulating the Standards of Criminal Justice relating to Criminal Appeals and to The Prosecution

Idaho abandoned the *Anders* procedure in *State v. McKenney*,¹³⁹ in holding that once counsel is appointed on appeal to represent an indigent defendant, counsel will not be permitted to withdraw on the ground that the appeal is frivolous or lacks merit.¹⁴⁰ Concerned with the prejudice to the client by the very filing of an *Anders* motion to withdraw, the court also observed that in no instance had it allowed withdrawal based on *Anders* since that case was decided.¹⁴¹ Thus, because the court did not allow an *Anders* withdrawal, counsel who filed a motion to withdraw stating that there was no merit to the appeal ended up in the untenable situation of then having to brief the case on the merits.¹⁴² Additionally, the court determined that judicial economy directed that a case with little merit be handled by the same procedure as any other appeal because the consideration of the *Anders* motion merely added a wasted layer of work for both counsel and the judiciary.¹⁴³ Finding that *Anders* set minimal constitutional standards, the court decided that refusing withdrawal of counsel provided indigent

Function and The Defense Function, gave full recognition to the points raised in *Anders v. California*, *Supra*, and at the same time defined the obligations of defense counsel in representing a defendant on appeal when the case is without merit. The Criminal Appeals Standards provide as follows:

3.2 Counsel on appeal

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

(i) Counsel should give his client his best professional estimate of the quality of the case and should endeavor to persuade the client to abandon a wholly frivolous appeal, or to eliminate particular contentions that are lacking in any substance.

(ii) If the client wishes to proceed, it is better for counsel to present the case, so long as his advocacy does not involve deception or misleading of the court. After preparing and filing a brief, on behalf of the client, counsel may appropriately suggest that the case be submitted on briefs.

(c) Unexplained, general requests by appellants for dismissal of their assigned counsel should be viewed with disfavor.

Id. (citing ABA STANDARDS, CRIMINAL APPEALS 73-74).

The Standards also provide:

8.3 Counsel on appeal[]

(a) Trial counsel, whether retained or appointed by the court, should conduct the appeal if the defendant elects to avail himself of that right unless new counsel is substituted by the defendant or the appropriate court.

(b) Appellate counsel should not seek to withdraw from a case solely on the basis of his own determination that the appeal lacks merit.

Id. (citing ABA STANDARDS: THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 293).

138. *Dixon v. State*, 284 N.E.2d 102 (Ind. Ct. App. 1972), *overruled on other grounds*, *Music v. State*, 489 N.E.2d 949 (Ind. 1986); *Hendrixson v. State*, 316 N.E.2d 451 (Ind. Ct. App. 1974).

139. 568 P.2d 1213 (Idaho 1977).

140. *Id.* at 1214.

141. *Id.*

142. *Id.*

143. *Id.*

defendants with greater constitutional protection than *Anders*.¹⁴⁴ Consistent with its determination to treat all indigent appellants alike, insofar as the procedure for handling appeals is concerned, the court does not search the record for errors.¹⁴⁵ Further, in accord with the general rule across the country, the Idaho court will not review or raise as error a lower court's action which has not been specifically assigned as error in the brief.¹⁴⁶

In *State v. Lewis*,¹⁴⁷ the North Dakota Supreme Court determined that under state law an indigent defendant was entitled to representation throughout the proceedings, including appeals, as a matter of right, and it refused to permit counsel to use the *Anders* procedure.¹⁴⁸ In *Lewis*, appellate counsel filed an *Anders* brief raising several issues. In each instance, however, counsel questioned the merit of the issues and ultimately concluded that the appeal was frivolous.¹⁴⁹ The State responded, not with a brief on the merits, but by arguing that the appellate court itself was required to examine the record to determine whether the defendant's appeal was frivolous.¹⁵⁰ The State contended that it was not required to respond unless the appellate court found arguable issues.¹⁵¹ The supreme court held that because the defendant's appeal was a matter of right, the *Anders* procedure would be contrary to North Dakota constitutional and statutory law, as *Anders* required the court to examine the proceedings for arguable merit and to appoint counsel to brief the appeal on the merits only if it found arguable merit.¹⁵² Under North Dakota law, the indigent defendant was entitled to an advocate throughout the appellate proceedings.¹⁵³ Instead of the *Anders* procedure, the court ordered that when the initially appointed counsel makes a determination that the appeal is frivolous, the court will then appoint another attorney to continue appellate representation of the indigent defendant.¹⁵⁴ The court explained that

the appointment of another attorney will provide the indigent defendant with legal counsel at all stages of his appeal and will eliminate the double burden of first convincing this court that the appeal has some degree of merit warranting an attorney's counsel and later coming back to this court to convince us that the degree of merit which warranted an attorney's counsel also supports a reversal of his conviction.¹⁵⁵

144. *Id.* at 1215.

145. *See State v. Hoisington*, 657 P.2d 17 (Idaho 1983); IDAHO R. APP. P. 35.

146. *See Hoisington*, 657 P.2d at 17; IDAHO R. APP. P. 35.

147. 291 N.W.2d 735 (N.D. 1980).

148. *Id.* at 737.

149. *Id.* at 736.

150. *Id.*

151. *Id.*

152. *Id.* at 737.

153. *Id.*

154. *Id.* at 738.

155. *Id.*

Conceding the possibility of a case in which an attorney could be compelled to represent an indigent defendant despite the attorney's opinion that the appeal lacked merit, the court maintained that its procedure was superior to *Anders* because it saved substantial court time by eliminating the initial screening of the brief for frivolousness.¹⁵⁶ Somewhat inconsistently, and doubtlessly of concern to appellate lawyers, the court concluded that it could nevertheless impose sanctions for prosecuting a frivolous appeal.¹⁵⁷

In 1981, the Massachusetts Supreme Judicial Court found that the *Anders* procedure not only caused conflicts between appellate counsel and the client but that it also made the court's review process more complex.¹⁵⁸ In deciding not to allow motions to withdraw on the ground that the appeal was frivolous, the court reasoned that this would avoid practical administrative problems.¹⁵⁹ It identified such considerations as follows:

If appointed counsel may move to withdraw on grounds of frivolousness, the court must determine whether the appeal is frivolous in order to rule on counsel's motion, and the determination necessarily entails consideration of the merits of the appeal. As long as counsel must research and prepare an advocate's brief, he or she may as well submit it for the purposes of an ordinary appeal. Even if the appeal is frivolous, less time and energy will be spent directly reviewing the case on the merits. . . . If the appeal is not frivolous, but rather arguable on the merits, refusing to permit withdrawal would also obviate any need to substitute counsel to argue the appeal.¹⁶⁰

The court also agreed with Judge Burger in *Johnson v. United States*¹⁶¹ that court-appointed counsel performs an important function in bringing to the court all facts and applicable law, even in a hopeless case.¹⁶² Where counsel finds it "absolutely necessary" on the grounds of professional ethics to disassociate from purportedly frivolous points raised in the brief, the court would allow counsel to indicate so in a preface to the brief and would require that the brief be served on the defendant.¹⁶³

Expressing the frustration that is experienced by many appellate judges when confronted with having to review an *Anders* brief and the entire record, the Georgia Supreme Court also has refused to allow attorneys to withdraw on the grounds of frivolousness by filing an *Anders* brief.¹⁶⁴ In *Huguley v. State*,¹⁶⁵ the court noted that the *Anders* motion forced the court

156. *Id.*

157. *Id.* at 739.

158. *Commonwealth v. Moffett*, 418 N.E.2d 585 (Mass. 1981).

159. *Id.* at 590.

160. *Id.* at 590-91.

161. 360 F.2d 844 (D.C. Cir. 1966).

162. *Moffett*, 418 N.E.2d at 591 (quoting *Johnson*, 360 F.2d at 846) (Burger, J., concurring).

163. *Id.* at 591-92.

164. *See Huguley v. State*, 324 S.E.2d 729 (Ga. 1985).

165. *Id.* The Georgia Court of Appeals adopted *Huguley* in *Fields v. State*, 376 S.E.2d 912 (Ga. Ct. App. 1988).

to act as counsel for the indigent in searching the record for arguable error—something that it believed appellate counsel is in a far better position to do.¹⁶⁶

The Mississippi Supreme Court's concern that the *Anders* motion left appointed counsel as essentially amicus curiae led that court to abandon *Anders*.¹⁶⁷ It found that *Anders* did not satisfy Mississippi's constitutional right to effective assistance of counsel because of the conflicting demands placed upon counsel.¹⁶⁸ Therefore, basing its opinion on the Sixth Amendment right to effective assistance of counsel, the court determined that a conscientious opinion of counsel that an appeal was without merit was not good cause to withdraw under the Mississippi rules of court.¹⁶⁹ Nevertheless, the court did permit counsel, in a most exceptional case, to State counsel's belief that the appeal had no merit.¹⁷⁰ If counsel made such a statement, the court required a copy of that representation to be sent to the indigent defendant together with a notice that the defendant could file a brief raising additional points.¹⁷¹ While the Mississippi Supreme Court's decision was grounded on constitutional rights, it also expressed a concern for finality of decisions. The court concluded that it would receive more collateral attacks on decisions for ineffective assistance of appellate counsel if counsel were allowed to withdraw because of a representation of an appeal as frivolous.¹⁷²

The Oregon courts have made the most thorough examination of *Anders* and its progeny in developing a different process of handling no-merit appeals.¹⁷³ In *State v. Horine*,¹⁷⁴ the Oregon Court of Appeals considered the *Anders* procedures. Finding them wanting, it called them "a disservice to appellate counsel, appellate courts and criminal appellants."¹⁷⁵ After addressing the ethical dilemma of an attorney faced with a nonmeritorious appeal, an issue that has been treated by most courts, the court focused its attention on the difficulties *Anders* posed for the courts in their review.¹⁷⁶ First, it required the appellate court to review the entire record to determine whether the appeal was, in fact, frivolous.¹⁷⁷ Second, it created an anomaly:

[A]n appellate court must search the record for error when counsel has found *none*, although it need not do so when counsel finds and argues

166. *Huguley*, 324 S.E.2d at 731.

167. *Killingsworth v. State*, 490 So. 2d 849 (Miss. 1986) (en banc).

168. *Id.* at 851.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 851-52.

173. *See State v. Horine*, 669 P.2d 797 (Or. App. 1983).

174. *Id.* at 801.

175. *Id.*

176. *Id.* at 802-03.

177. *Id.* at 803.

one claim of error. As noted by the court in *People v. Wende*], 600 P. 2d 1071 (Cal. 1979)], “. . . under this rule counsel may ultimately be able to secure a more complete review for his client when he cannot find any arguable issues than when he raises specific issues, for a review of the entire record is not necessarily required in the latter situation”¹⁷⁸

Arguing that *Anders* failed to justify the added steps required of the appellate court, the Oregon court observed that the possibility of counsel’s failing to raise a nonfrivolous issue exists equally where counsel raises meritorious claims for reversal and where counsel raises none.¹⁷⁹ If reversible claims are not raised in a non-*Anders* brief, then the court will not, “and cannot, search the record in every criminal case to discover them.”¹⁸⁰ If counsel performs ineffectively and fails to raise a point that may lead to reversal, relief may be obtained through postconviction ineffectiveness motions.¹⁸¹

What the Oregon court found most troublesome about *Anders* was that the procedure it imposed on appellate courts was not constitutionally required and was possibly constitutionally infirm. Relying substantially on *Ross v. Moffitt*,¹⁸² the court reasoned that since the State was under no obligation to provide the criminal defendant with an appeal as of right, the due process concerns on appeal were not nearly so compelling as those involved in the initial determination of guilt.¹⁸³ Because the Fourteenth Amendment does not require absolute equality but assures only that indigent defendants have adequate opportunity to present claims fairly in the state’s appellate process, *Anders* could not, and should not, compel a more comprehensive review process for the indigent defendant than for the nonindigent defendant.¹⁸⁴ Thus, by providing the indigent defendant with a free transcript and competent counsel, the State had provided all that was required, because that was all that a wealthy defendant could command.¹⁸⁵ With that background, the court determined that when counsel filed an *Anders* brief and notified the client, who was thereby given the opportunity to raise whatever issues he or she chose, the court would consider the issues raised by both counsel and the appellant.¹⁸⁶ The court determined that it would not search the record itself for arguable issues.¹⁸⁷

Although *Horine*’s limitation on the appellate court function under *Anders* was never addressed directly by the U.S. Supreme Court, in *State v.*

178. *Id.* (emphasis added).

179. *Id.* at 803-04.

180. *Id.* at 804.

181. *Id.*

182. 417 U.S. 600 (1974).

183. *Horine*, 669 P.2d at 804.

184. *Id.*

185. *Id.* at 805.

186. *Id.* at 806.

187. *Id.*

*Balfour*¹⁸⁸ the Oregon Supreme Court concluded that *Horine's* procedure was constitutionally infirm after both *McCoy v. Court of Appeals of Wisconsin*¹⁸⁹ and *Penson v. Ohio*.¹⁹⁰ The *Balfour* court detected a shift from the Fourteenth Amendment concerns set forth in *Anders* to a Sixth Amendment concern in *McCoy* and *Penson*, and it noted that in *Penson* the requirements of *Anders* were not guidelines but "a stringent benchmark against which to gauge the state procedures."¹⁹¹ Nevertheless, the Oregon Supreme Court maintained that it, and not the U.S. Supreme Court, was the final arbiter of determinations of ethical practice for attorneys in the state, except where ethical practices implicated federal constitutional rights.¹⁹² It therefore rejected *Anders* as the only constitutional solution to the problem of frivolous appeals by indigent defendants.¹⁹³

Because the court found that the rules of professional responsibility precluded an attorney from *personally* advancing a frivolous claim, it fashioned a procedure under which counsel could advance only those claims he or she conscientiously believed were meritorious while still supporting the client in bringing other arguable issues before the court.¹⁹⁴ It reasoned that an *Anders* brief was required only when counsel was seeking to withdraw from representation.¹⁹⁵ Therefore, if counsel could not withdraw, there was no constitutional mandate for the *Anders* procedure.¹⁹⁶ In essence, counsel would no longer be required to argue issues of questionable merit.¹⁹⁷ Instead, counsel would file a statement as to the facts and jurisdiction of the court.¹⁹⁸ If the client wished to raise issues, counsel would assist in preparation of, but would not be required to sign, that portion of the brief and would thus avoid the violation of the ethical prohibition against advancing issues of no merit.¹⁹⁹ By following this procedure, the court concluded that the attorney would not be ethically compelled to withdraw from a frivolous case and the client would be afforded the assistance of counsel for the appeal.²⁰⁰ Moreover, the court

188. 814 P.2d 1069 (Or. 1991).

189. 486 U.S. 429 (1988).

190. 488 U.S. 75 (1988).

191. *Balfour*, 814 P.2d at 1076.

192. *Id.* at 1079.

193. *Id.*

194. *Id.* at 1080.

195. *Id.*

196. *Id.*

197. *Id.* at 1081.

198. *Id.*

199. *Id.*

200. *Id.* at 1079-80. The holdings of *State v. Balfour* were incorporated into Rule 5.90, *Oregon Rules of Appellate Procedure*:

(1) If counsel appointed by the court to represent an indigent defendant in a criminal case on direct appeal has thoroughly reviewed the record and discussed the case with trial counsel and the client, and has determined that there are no meritorious issues on appeal, counsel shall file a brief with two sections:

determined that under these procedures, review of the entire record by the appellate court in the direct appeal would not be required.²⁰¹ To date, *Balfour* has not been challenged in federal court.²⁰²

New Hampshire was the most recent state to discard the *Anders* procedure in favor of the Idaho rule.²⁰³ The New Hampshire Supreme Court expressed concern for the role of the court under *Anders* review because the procedure puts the court in the role of an advocate for the appellant by forcing it to devise and raise legal arguments and thereby possibly leads to claims of potential bias on the part of the court. For these reasons, as well as the more frequently expressed attorney ethical conflict issues, the court adopted the rule that counsel could not withdraw because of the frivolousness of the appeal.²⁰⁴ However, to accommodate counsel, the court created an exception to its rules of professional conduct for the rare occasion in which counsel may be required to assert a frivolous issue on behalf of an indigent criminal client.²⁰⁵

While having no stated rule or opinion rejecting *Anders*, courts in several states do not accept *Anders* briefs. Hawaii has maintained a policy for years of not accepting *Anders* briefs and instead urges counsel to raise even extremely weak points of error in the opening brief.²⁰⁶ Similarly, Kansas has an

(a) Section A of the brief shall contain a statement of the case, including a statement of facts, sufficient to apprise the court of the jurisdictional basis for the appeal and shall be signed by counsel.

(b) Section B of the brief shall contain any claim of error requested by the client and shall be signed by the client. Section B shall attempt to state the claim [and any argument in support of the claim] as nearly as practicable in the manner that the client seeks, in proper appellate brief form.

(2) A case in which appellant's brief is prepared and filed under this rule shall be submitted without oral argument, unless otherwise ordered by the court.

OR. R. APP. P. 5.90.

201. *Balfour*, 814 P.2d at 1081.

202. Chief Judge William L. Richardson, Oregon Court of Appeals, notes: "The reality is that nearly all of the *Balfour* briefs disclose a lack of any meritorious issues. The briefs, even the supplemental part filed by the defendant individually, follow a format that is almost a rote presentation." Letter from William L. Richardson, Chief Judge, Oregon Court of Appeal, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (Jan. 19, 1995) (on file with author). Nevertheless, based on conferences he has had with various public defender groups, Judge Richardson expresses confidence in their diligence in performing their responsibilities under *Balfour*. *Id.* He further reports that of 2,654 total criminal filings in 1994, 504, or 18.9%, were *Balfour* briefs. *Id.*

203. *State v. Cigic*, 639 A.2d 251 (N.H. 1994). In responding to the survey conducted in connection with this Article, the Clerk of the New Hampshire Supreme Court stated that for years the public defender of New Hampshire had a policy of not filing *Anders* briefs. It was only in 1993 that the appellate defender asked the court whether it would follow *Anders* or the "Idaho rule." Letter from Howard J. Zibel, Clerk of Court, New Hampshire Supreme Court, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 7, 1994) (on file with author).

204. *Cigic*, 639 A.2d at 254.

205. *Id.*

206. HAWAII APPELLATE HANDBOOK § 8-6 (1988).

unwritten policy of not accepting *Anders* briefs.²⁰⁷ In Maryland, when the *Anders* dilemma first appeared, the Court of Appeals of Maryland, acting in concert with the public defender's office, urged the criminal defense bar not to file *Anders* briefs.²⁰⁸ In New Jersey, no *Anders* briefs are received because the public defender's office simply does not file them.²⁰⁹ Similarly, Alaska reports that the public defender's office does not file *Anders* briefs.²¹⁰ Concluding "that it was better for everyone concerned to simply fully brief the case and submit it to the court for a decision on the merits," the Nebraska Supreme Court abolished its rule allowing counsel to withdraw from frivolous appeals.²¹¹ Moreover, some states report having no, or only sporadic, *Anders* briefs filed over the years.²¹²

207. 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) (on file with author).

208. 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) (on file with author).

209. 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) (on file with author).

210. Survey response from Clerk of the Alaska Court of Appeals to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (Jan. 24, 1995) (on file with author).

211. 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) (on file with author). Chief Judge Richard D. Sievers of the Nebraska Court of Appeals reports that in the two years since the inception of that court, he recalls only two *Anders* briefs being filed. He attributes this in part to the attorneys' knowledge that Nebraska applies the plain error doctrine. Thus, attorneys can make arguments and count on the court to address what they miss. Survey response from Richard D. Sievers, Chief Judge, Nebraska Court of Appeals, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 3, 1994) (on file with author).

212. Survey response from Jan Hansen, Clerk, Alaska Court of Appeals, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (Jan. 24, 1995); Survey response from Daniel Wathen, Judge, Maine Supreme Judicial Court, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 9, 1994); Survey response from Tennessee Court of Criminal Appeals to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 20, 1994) (recalling the filing of only one in the last 15 years); Survey response from Ohio Eleventh District Court of Appeal to Martha C. Warner, Judge, Florida Fourth District Court of Appeal; Survey response from Vermont Supreme Court to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 17, 1994); Survey response from Margaret L. Workman, Justice, West Virginia Supreme Court of Appeals, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 9, 1994); Survey response from Wyoming Supreme Court to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 14, 1994); 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) (Judge Anderson indicated that Minnesota does not have *Anders* briefs because of its centralized public defender system: "[A]ll convicted felons are provided counsel for appeal, without involvement of the court in the process of evaluating the merits.") (all foregoing survey responses and letters on file with author).

B. States Following Anders

California reexamined its procedure for addressing no-merit appeals in *People v. Wende*.²¹³ Summarizing the holding of *Anders* regarding what procedures were essential to satisfy federal constitutional standards, the California Supreme Court emphasized that counsel for an indigent defendant must act in the role of an advocate by filing a brief referring to anything in the record that would support an appeal.²¹⁴ After a copy of the brief is furnished to the client, the court, not counsel, must examine all of the proceedings to determine whether the appeal is wholly frivolous.²¹⁵ *Wende* addressed whether the appellate court is required, under *Anders*, to make a review of the entire record before determining that the appeal is frivolous.²¹⁶ It concluded that such a thorough review is essential:

The thrust of *Anders* was to increase the protection afforded indigent appellants. Even the *Nash* [*In re Nash*, 393 P.2d 405 (1964)] no-merit letter procedure, which was found inadequate, provided for a review of the record by the court. This review was deemed insufficient because it was done without the aid of a brief by counsel and because the court itself did not make an express finding that the appeal was frivolous. It is the latter defect which the court appears to have been attempting to remedy by providing that “the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.” It is no longer sufficient for a court to review the record to determine the correctness of counsel’s assessment of the case. . . . The court itself must expressly determine whether the appeal is wholly frivolous. Since the court’s concern was with not merely accepting counsel’s assessment of the case, it follows that the determination and concomitant review of the entire record must be made regardless of whether the defendant has availed himself of the opportunity to submit a brief.²¹⁷

The court acknowledged that, under the *Anders* rule, counsel could secure a more complete review when no arguable issues could be found than when counsel raised specific issues; however, the court expressed confidence that attorneys would not shirk professional responsibility obligations by failing to review a record conscientiously when they know that the court will undertake such a review.²¹⁸ Additionally, the court refused to permit counsel to state on the record that the client’s case was indeed frivolous. Such an admission would not give the client the services of an advocate but would

213. 600 P.2d 1071 (Cal. 1979) (en banc).

214. *Id.* at 1074.

215. *Id.*

216. *Id.* at 1074-75.

217. *Id.* at 1074.

218. *Id.* at 1075.

necessitate counsel's withdrawal.²¹⁹ On the other hand, if counsel argued the points without making such assertions, the court would not need to appoint new counsel upon finding meritorious issues to address.²²⁰ In dissent, Justice Clark took issue with the majority's conclusion that *Anders* required the appellate court to review the record for errors not raised by counsel. *Anders*, he said, "simply commands the appellate court to ascertain whether appellate counsel and the courts have performed in the manner required by law. . . . Thus the appellate court shall respond only to issues raised to it, not to issues raised by it."²²¹ California has continued to abide by *Wende* and conducts a full record review of each *Anders* brief.²²²

Several states have adopted rules of court or court orders to formalize the *Anders* procedure. Some, such as Arkansas, detail the requirements of the brief.²²³ Each state with a rule establishes a procedure for counsel to file an *Anders* brief, for the indigent defendant to receive a copy and have time to respond, and for the court to review the brief.²²⁴ Some courts have local rules or rules of internal operating procedure governing the processing of *Anders* motions.²²⁵

219. *Id.*

220. *Id.* at 1077 (Clark, J., dissenting).

221. *Id.* (Clark, J., dissenting). *Wende* was decided ten years before *Penson v. Ohio*, 488 U.S. 75 (1988), which clearly requires the court to raise issues revealed in its review of the record.

222. See survey results summarized in appendix.

223. Rule 4-3(j), *Rules of the Arkansas Supreme Court and Court of Appeals*, requires that a brief accompanying a request to withdraw on the grounds that the appeal is without merit shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the trial court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The abstract section of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the trial court.

ARK. R. APP. P. 4-3(j). This type of detail, not required in routine briefs, probably deters the filing of *Anders* briefs.

224. DEL. SUP. CT. R. 26(c); IOWA R. APP. P. 104; MICH. Ct. R. 7.211(C)(5); R. OKLA. CT. CRIM. APP. 3.6(B); *State v. Benjamin*, 573 So. 2d 528 (La. Ct. App. 1990), *approved in State v. Robinson*, 590 So. 2d 1185 (La. 1992) (per curiam); *State v. Williams*, 406 S.E.2d 357 (S.C. 1991) (order setting forth procedure for processing *Anders* briefs under the South Carolina appellate court rules); WISC. R. APP. P. 809.32.

225. In Ohio, the first, second, fourth, sixth, and seventh districts all report having local procedures to govern the handling of *Anders* briefs. See appendix. The rest of the districts responding do not indicate that any formalized procedure has been instituted. The Alabama Court of Criminal Appeals adopted an internal procedure for handling *Anders* briefs in April 1992. Several Texas appellate courts have internal rules. See, e.g., Order of the Ninth District of Texas at Beaumont (Oct. 28, 1993). Other Texas districts have incorporated procedures in written opinions. See *Johnson v. State*, 885 S.W.2d 641 (Tex. Ct. App. 1994). The Texas courts that have set forth briefing requirements generally insist that the briefs include an analysis of every pretrial motion and every objection made by the defense and overruled by the court, as well as every objection made by the State and sustained by the court. See, e.g., Order of the Ninth District of Texas, *supra*. At least one court noted that defense counsel argue that because of the detail required in the brief, it is more expeditious to prepare and file a regular

Of those state courts that receive and review *Anders* briefs, the incidence of no-merit briefs varies widely even within a state's appellate divisions. For instance, in Florida, the Fourth District Court of Appeal reports that *Anders* briefs constitute approximately five percent of its total criminal filings,²²⁶ whereas in the Fifth District Court of Appeal, *Anders* briefs make up thirty-four percent of the total criminal filings.²²⁷ These differences also appear in other states.²²⁸ The South Carolina Supreme Court reports that *Anders* briefs make up thirty-nine percent of its filings, which is the largest percentage reported of the courts responding to the survey.²²⁹ Generally, in looking at the survey results, appellate courts in urban areas have a higher incidence of *Anders* briefs. Thus, it would appear that *Anders* poses a greater administrative problem in some states and areas than in others.

Each court follows its own procedures for handling *Anders* appeals. When appointed counsel files an *Anders* brief in the author's court, the indigent appellant is first given a chance to file a brief. The case is then assigned to the central staff, comprised of the most experienced staff attorneys on the court, to review the record. Next, a memo is prepared giving a detailed factual statement and an analysis of the points raised by appointed counsel and by the indigent defendant, if a pro se brief is filed. The staff memo also discusses any other points that the staff attorney thinks may raise arguable errors. The assigned judge of a three-judge panel then reviews the brief, the memo, and as much of the record as the judge deems necessary to determine whether any arguable issues are present.²³⁰ In many cases in which *Anders* briefs have been filed, the defendant has pled to the charge or has been convicted in a relatively short trial and, in an abundance of caution, the trial attorney has filed a notice of appeal. The issues in such cases involve either the voluntariness of the plea or the sentence. Typically,

brief. Survey response from Charles Reynold, Chief Justice, Court of Appeals for the Seventh District of Texas, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (Jan. 11, 1995) (on file with author). The local rules of Texas are based on the brief requirements set forth in *High v. State*, 573 S.W.2d 807, 813 (Tex. Ct. App. 1978).

226. Letter from Marilyn Beuttenmuller, Clerk, Florida Fourth District Court of Appeal, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 10, 1994) (on file with author).

227. Survey response from Florida Fifth District Court of Appeal to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 7, 1994) (on file with author).

228. In Texas, the second, seventh, tenth, eleventh, and fourteenth districts report *Anders* briefs in 5% or fewer of their criminal cases; the first, eighth, ninth, and thirteenth, between 5-10%; and the sixth and fifth, between 10-15%. On the other hand, Ohio's twelve districts are more closely grouped; they report generally from less than 1% to 5% in *Anders* filings. Only the second district in Texas reports as great a number as 16% in *Anders* appeals. Similarly disproportionate, the First Appellate District of Illinois reports that 31% of the filings are *Anders* cases, while the rest of the Illinois appellate courts report that less than 11% are *Anders* cases. See appendix.

229. Survey response from South Carolina Supreme Court to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June, 6, 1994) (on file with author).

230. The "assigned" judge in the author's court means the first judge to review the case and write the opinion, if the judges agree to issue one.

the record is very limited. Judicial review of the record is not time-consuming in these types of cases and, because there is no requirement in Florida that every appellate opinion be written, cases are generally affirmed without written opinion. In the author's experience, only in the rarest of cases is an *Anders* brief filed after a long trial. Thus, the trial transcripts and records that the judge is required to read seldom take more than a few hours. Often the records on sentencing appeals are fewer than thirty pages and require only a few minutes to read. It is up to the individual judge, however, to determine how much of the record to read personally and how much reliance to place on the staff attorney's review.

After the assigned judge reviews and acts on the appeal, the entire file is transmitted for similar review by the second and third judges on the panel. If arguable issues are discovered by either the staff attorney or the judges, appointed counsel is ordered to brief those issues. Thus, in the author's court, review of the case is a combined effort of both staff and judges. Frequently, staff will find arguable errors not addressed by the public defender and, sometimes, judges will discern an arguable error not noticed by either staff or public defender. It is often difficult to resist the temptation to which the Ohio appellate court succumbed in *Penson*: to determine, *sua sponte*, the arguable issues discovered by the court without further briefing. In most cases, the court is already of the opinion that the arguable errors noted probably will not result in a reversal. While the author has never reviewed a case involving an *Anders* brief that, after independent review, resulted in a reversal of a conviction,²³¹ there is such precedent.²³²

The survey of appellate courts reveals a lack of uniformity in internal court methods for handling *Anders* briefs.²³³ Within the courts answering the survey, most often a staff attorney or research director reviews *Anders* briefs. Many courts rely on their most experienced staff attorneys to review the records and briefs, while in other courts, the judges' law clerks review the cases. Seventy-four percent of the courts surveyed require that their staff attorneys prepare memoranda for the judges' review, but within the appellate divisions of each state, this practice is not consistently followed.²³⁴

Not all courts receiving *Anders* briefs review the record for unraised points of arguable merit. Fourteen courts, or twenty-one percent of those responding, indicated that they do not comb the record to point out arguable

231. Minor sentencing errors have been raised and corrected by the court pursuant to *Anders*.

232. See, e.g., *Causey v. State*, 484 So. 2d 1263 (Fla. 1st DCA 1986), wherein the court reversed the conviction of a defendant after its independent review of the record in conformance with *Anders* revealed that the trial court had refused to allow Causey's counsel to impeach the State's main witness on cross-examination. The court certified a question to the supreme court, which then quashed the opinion because the district court had reversed without giving either party an opportunity to brief the issue.

233. See generally appendix.

234. See, e.g., appendix (survey responses from the Texas and Ohio courts of appeal).

appellate issues. Others reported that they point out only issues constituting clear error, not merely issues of arguable merit.²³⁵ When unaddressed issues are found, the majority of courts simply order rebriefing by appointed counsel. However, a substantial number of courts order the appointment of new counsel to file new briefs on this occasion. And, in what appears to be a practice contrary to the holding of *Penson v. Ohio*, some courts address the issues sua sponte without any rebriefing. When issues of arguable merit are found by the court in its review, whether to appoint new counsel or to allow rebriefing by withdrawing counsel also varies among the districts within some states.²³⁶

Because *Anders* involves additional steps of review for the appellate court, some opinions emphasize that the procedure is too time-consuming for the court. The survey responses do not indicate that following the dictates of *Anders* is generally more time-consuming than the average criminal appeal. Forty-nine percent of the courts reported that *Anders* review takes less time than the average criminal appeal, while forty-four percent indicated that *Anders* cases take about the same time to review as the average criminal case. Only seven percent indicated that their *Anders* review takes more time than the average appeal.

V. ALTERNATIVE SOLUTIONS

Some states have incorporated *Anders* within their appellate review scheme in unique ways. Connecticut employs its trial court to make the required *Anders* review when counsel files an *Anders* motion to withdraw.²³⁷ The motion must be accompanied by a brief addressing anything in the record arguably supporting an appeal, and an opportunity must be given for the defendant to file a pro se brief in support of the appeal.²³⁸ However, the presiding trial court judge alone makes the independent review of the record to determine whether the appeal is wholly frivolous.²³⁹ If the judge finds the appeal frivolous and decides not to appoint new counsel, then the judge must file a memorandum setting forth the basis for determination.²⁴⁰ The Connecticut Supreme Court may review the finding of the trial judge upon written motion, but if review is denied, the appeal is dismissed.²⁴¹

235. See, e.g., appendix (survey responses from Louisiana Fourth District Court of Appeal, Nebraska Court of Appeals, North Carolina Court of Appeals, Virginia Court of Appeals).

236. See, e.g., appendix (survey responses from Ohio and Texas courts of appeal).

237. PRACTICE BOOK §§ 952-956 (Conn. 1994).

238. *Id.*

239. *Id.* If the presiding judge is the judge who heard the case, then another judge is appointed to review the record. *Id.*

240. *Id.*

241. *Id.* § 4053.

While, at first glance, the Connecticut procedure may appear contrary to *Esckridge v. Washington State Board*,²⁴² it, in fact, contains the safeguards required by *Anders*—that is, a brief setting forth any arguable issues and the independent review by a judge for frivolousness. The Connecticut rule simply delegates to one judge the work that in most appellate courts is handled by a panel of judges. The rule has not been challenged, and there is nothing in *Anders* that compels a full panel of judges to review the brief. The judicial review required by *Anders* amounts to a check on the effectiveness of appellate counsel. There is no constitutional basis for concluding that the review must be done by more than one judge.

The State of Washington uses commissioners to determine *Anders* motions.²⁴³ Counsel files a motion to withdraw, which must “identify the issues that could be argued if they had merit and, without argument, include references to the record and citations of authority relevant to the issues.”²⁴⁴ The State is required to respond by filing either a responsive brief or a “motion on the merits” arguing to affirm the conviction.²⁴⁵ The issue for determination by a commissioner may be referred to the motion docket in one of two ways: 1) pursuant to the State’s motion on the merits, or 2) where the State has not filed such a motion, on the court’s own motion.²⁴⁶ Next, the court commissioner examines the motion and conducts the independent review of the record as required by *Anders*. If the commissioner finds arguable error or a failure to comply with the rules or procedure, then the motion will be denied and briefing will be required by either the same counsel or new counsel, depending upon the circumstances.²⁴⁷ On the other hand, if the commissioner finds that the appeal is frivolous, then an order will be issued granting the motion to withdraw and affirming the judgment.²⁴⁸

New Mexico has developed perhaps the most novel system for handling meritless appeals through the use of a summary disposition docket. In 1975, the procedure was initiated for all criminal cases, and it has since been

242. 357 U.S. 214 (1958).

243. Commissioners are lawyers hired by the court to decide motions, screen appeals, and oversee the training of judicial law clerks. WASH. R. APP. CT. ADMIN. § 16.

244. *Id.* § 18.3(a)(2).

245. *Id.* § 18.14(a).

246. *Id.* § 18.14(d).

247. “If the arguable points are fairly established in the record, then new counsel is appointed. If the arguable points arise following the filing of the *Anders* brief, for example [such as from the absence of a transcript of a portion of the proceedings], then counsel is asked to re-brief the matter.” Letter from Philip J. Thompson, Chief Judge, State of Washington Court of Appeals, Division III, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (Jan. 11, 1995) (on file with author).

248. WASH. R. APP. CT. ADMIN. § 18.14(h).

extended to other types of appeals.²⁴⁹ In 1987, all cases filed in the appellate court were subjected to the summary disposition procedure, which resulted in sixty to sixty-five percent's being disposed of summarily.²⁵⁰

Trial counsel must file an appellant's docketing statement soon after the notice of appeal.²⁵¹ It contains: 1) a statement of the case with all relevant facts, 2) a statement of the issues on appeal and how they were preserved, and 3) a list of authorities relied upon, together with a parenthetical description of the proposition for which those authorities are cited.²⁵² The court then reviews the docketing statement and the record, which includes a copy of the trial court file.²⁵³ Based on that review, it issues a calendar notice, which is, in essence, the proposed disposition of the case.²⁵⁴ The parties have ten days in which to file written memoranda as to why the proposed disposition should, or should not, be made.²⁵⁵ If no memoranda are filed, then an opinion disposing of the case is filed.²⁵⁶ However, if an opposition memorandum is filed and found persuasive, the court can either assign the case to a regular appellate calendar or issue a second opinion with a different result.²⁵⁷ In that event, both parties have the opportunity to show cause why the new result should, or should not, prevail.²⁵⁸

With respect to *Anders* cases, New Mexico's summary disposition procedure eliminates the burdensome review of the record because no transcript is available on summary dispositions in any type of appeal, with some exceptions.²⁵⁹ Constitutional challenges to the summary disposition

249. Lynn Pickard, *New Mexico Summary Disposition Procedure*, PARASCOPE, Spring 1987, at 1.

250. *Id.*

251. *Id.*

252. N.M. R. APP. P. 12-208. The docketing statement has similarities to the English notice of appeal.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Pickard, *supra* note 249, at 1. Under this system, although three judges constitute a quorum for an opinion, one judge is assigned to all calendaring decisions. *Id.* at 2. This position rotates every three months. Along with staff attorneys, this judge makes all initial decisions on the summary calendar. *Id.* Each case is reviewed by a staff attorney, who makes a recommendation as to whether the case should be placed on a nonsummary calendar or be treated under summary disposition procedure. *Id.* If summary disposition is recommended, the staff attorney will draft the opinion (calendar notice) for the judge. *Id.* After memoranda in opposition are filed, the staff attorney again reviews the opinion and suggests changes. *Id.* If the staff attorney recommends no changes and the calendaring judge agrees, then two other judges are assigned to the case to review and sign the final opinion. *Id.* at 3. Pickard reports that the summary disposition procedure requires from 10 to 40 hours of judge and staff time to complete per case, as opposed to 100 to 140 hours for nonsummary dispositions. *Id.*

259. See, e.g., *State v. Ibarra*, 864 P.2d 302, 303-304 (N.M. Ct. App. 1993), *cert. denied*, 115 S. Ct. 1116 (1995).

[J]udicial notice of the records of this Court will also show that indigents are allowed access to the transcripts during the summary calendar process in many situations.

procedure have been rejected by the New Mexico Court of Appeals. Because the court frequently denies nonindigent defendants the time necessary to produce a full transcript of proceedings, the court has rejected equal protection challenges on the basis that nonindigent and indigent defendants are treated equally under the procedure.²⁶⁰ The court also has found no due process violations and has noted that transcripts are not essential to the disposition of routine cases on appeal.²⁶¹

Under the unique feature of the summary calendar, the counsel who tried the case is required to prepare the docketing statement, and each side is given an opportunity to advance its version of the facts.²⁶² Moreover, if parties disagree as to the facts so that the court cannot come to a conclusion without a full transcript, the case is moved to a nonsummary calendar. Thus, within the context of the state appellate procedures, no criminal defendant is denied any procedure essential to a fair presentation of the claim for reversal.²⁶³ Finally, in *State v. Ibarra*, the court made short shrift of the claim that the New Mexico procedure denied the indigent criminal appellant effective assistance of counsel by retorting, "Defendant has not cited one case standing for the proposition that a denial of the constitutional right to effective assistance of counsel occurs when state court procedures deny both indigent and nonindigent defendants an absolute right to pick through a transcript searching for unidentified error."²⁶⁴

A similar solution for the handling of *Anders* meritless appeals would require the limited filing of statements of points on appeal.²⁶⁵ However, this solution would require the filing of the transcript to enable the staff of the appellate court to make an independent review of the record.²⁶⁶ Professors Carrington, Meador, and Rosenberg contend that the problem is not only the assertion of frivolous issues on appeal but the excessive briefing that

This happens in judicial districts which routinely duplicate the audio tapes or produce computer-assisted transcripts in sufficient time to allow their use at this stage. When necessary, this Court has requested the tape monitor or court reporter to specifically make such records available during the calendaring process. Such express allowance by this Court usually turns on an allegation of a good-faith inability to recall some matter related to the issues raised on appeal. As a general rule, the only time the Court does not allow access to the transcript is when significant extra time is requested and the sole allegation is that it is necessary to sort through the transcript for unidentified error.

Id. See also *State v. Sheldon*, 791 P.2d 479, 480 (N.M. Ct. App.), *cert. denied*, 498 U.S. 969 (1990) ("It has long been recognized by this court that the appellate rules do not allow appellate counsel to pick through the record for possible error.").

260. *See, e.g., Ibarra*, 864 P.2d at 303.

261. *Id.*

262. *Id.* at 305.

263. *Id.*

264. *Id.* at 306.

265. CARRINGTON ET AL., JUSTICE ON APPEAL 85 (1976).

266. *Id.*

taxes the time and effort of the court and its staff.²⁶⁷ The professors assert that this time could be more profitably spent on meritorious cases.²⁶⁸ They, therefore, propose limits on the extensiveness of argumentation on nonmeritorious issues. Their system would require counsel to file a statement of issues when the appeal is filed, or shortly thereafter; the statement would include a capsulized argument of each issue with two or three citations of authority.²⁶⁹ No more than two or three pages would be allowed. The State would file a similarly constructed brief response.²⁷⁰ Taking these statements and the transcript, the staff attorney at the appellate court would review the transcript and the issues raised and make a recommendation with regard to any issues that required further briefing.²⁷¹ The recommendation would be furnished to counsel, who then would brief only those issues.²⁷² This procedure would reduce the briefing process for all criminal appeals, as well as the time spent by counsel and the court on issues not requiring full briefing.²⁷³

Under both the New Mexico procedure and the similar Carrington/Meador/Rosenberg solution, all criminal appeals, not merely *Anders* motion cases, would first pass through the summary procedure. In this way, appeals of nonindigent and indigent defendants would be treated equally and the procedure would thereby satisfy the major concern expressed by the U.S. Supreme Court in *Anders*. However, if the *Anders* standard is to be followed, in order to satisfy equal protection concerns, court staff attorneys would be required to raise any points of arguable merit noted in non-*Anders* cases, as well as in *Anders* meritless cases. This would tend to increase the burden on the appellate courts, which do not address unraised errors in typical criminal appeals.

The U.S. Army Court of Criminal Appeals, which serves as the appellate court in military court martial cases, uses another method to avoid the *Anders* dilemma.²⁷⁴ Under this procedure, every conviction by a military court is automatically reviewed by the appellate court. The court must review the entire record for errors of law and fact, whether or not assigned as error and argued on appeal.²⁷⁵ Moreover, counsel on appeal must invite the court's attention to any issues that the appellant wants raised, regardless of whether counsel considers them frivolous. However, counsel is not required to brief frivolous issues. Nevertheless, the court must consider those issues and must acknowledge in its opinion that they have been

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 89.

273. *Id.* at 90.

274. 10 U.S.C. § 866(c) (1988).

275. *Id.*; United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

considered.²⁷⁶ The court reports that approximately 1,200 cases were filed there last year. Of those, approximately sixty percent were *Anders*-type appeals.²⁷⁷

Such a system of reviewing all criminal convictions and sentences would be entirely impractical in states where trial courts handle a large number of criminal cases. For instance, in Florida's Broward County (which encompasses Fort Lauderdale), 14,598 criminal cases were disposed of in 1993,²⁷⁸ although only 2,009 appeals were filed from those dispositions.²⁷⁹ For the Fourth District Court of Appeal to review another 8,000 to 10,000 cases would nearly triple the size of the court's caseload. That would not include the corresponding increases from the five other counties over which it has appellate jurisdiction. The automatic review of convictions would greatly increase the workload of the appellate court and, therefore, its funding requirements. However, most state legislatures historically underfund appellate courts and, thus, that solution appears impractical.²⁸⁰

276. *Grosteffon*, 12 M.J. at 435.

Appellate defense counsel has the obligation to assign all arguable issues, but he is not required to raise issues that, in his professional opinion, are frivolous. But he is, after all, an advocate, and if he errs, it should be on the side of raising the issues. There can be little harm in this practice since the Court of Military Review has the mandatory responsibility to read the entire record and independently arrive at a decision that the findings and sentence are correct in law and fact. Hence raising an issue that counsel does not think is meritorious would, at worst, signal the Court of Military Review to consider the record in light of that issue. If the accused urges an issue which appellate counsel believes would be counter effective to the accused's case, they should so inform the accused and seek to have him withdraw it. If he refuses, they may still ethically list the issue for consideration of the appellate court without further briefing.

Id. (citation omitted).

277. Survey response from William S. Fulton, Jr., Judicial Advisor, U.S. Army Court of Criminal Appeals (formerly named Army Court of Military Review), Court of Military Review, Falls Church, Virginia, to Martha C. Warner, Judge, Florida Fourth District Court of Appeal (June 14, 1994) (on file with author).

278. Circuit Court Criminal Dispositions, Office of the State Courts Administrator (Jan. 12, 1995). This figure comprises all types of dispositions, including dismissals. Therefore, the number of dispositions that might generate a right to appeal would be smaller than the number reported.

279. REPORT ON FILINGS FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA (on file with author).

280. In *Justice on Appeal*, Professors Carrington, Meador, and Rosenberg present a variation on the Court of Military Criminal Appeals procedure. They propose the creation of a nonjudicial Criminal Review Office, which would undertake routine administrative review of all criminal convictions in which no appeal is taken. See CARRINGTON ET AL., *supra* note 265, at 94-96. It would have the authority to identify errors of substance that should be addressed by the appellate court and would have the authority to certify those issues to the court even though an appeal has not been taken. *Id.* In order to encourage indigent appellants to refrain from appealing where their appeals lack substantial merit, the authors argue that indigent appellants should be required to undertake the same cost/benefit analysis that the nonindigent appellant makes. *Id.* That is, the indigent should be required to weigh the likelihood of success on appeal against the expenditure of funds on a transcript and a lawyer to pursue the appeal. Under this system, the indigent would be paid a certain amount of money if the appeal were foregone. However, if he took the money, then no

VI. CONCLUSIONS AND RECOMMENDATIONS

The vexatiousness of *Anders* meritless appeals reflects the conflicting pressures on the state appellate courts. On one hand, courts with rising caseloads need to spend their collective time determining cases that have merit. On the other hand, the appellate process must be fair to each individual defendant. If the ultimate fairness of the proceeding is determined by the effectiveness of counsel in representing the defendant, then the goal should be to compel full representation through appeal and not to allow ways for that representation to be avoided. 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.

Moreover, what is particularly disturbing to most judges who have reviewed *Anders* appeals is the inconsistency of the appellate system created by *Anders*. An indigent defendant whose appointed counsel states that there are no arguable issues to raise is entitled to the full and independent review of the court to discern whether the attorney has missed points of arguable error. However, neither the indigent defendant whose attorney does not file an *Anders* brief nor the nonindigent defendant gets this kind of review from the court.

Illustratively, the author was presented with two appeals recently. In one, the indigent defendant had been convicted of murder. The record consisted of a lengthy transcript, but in the brief on appeal, the only issue raised by the public defender was whether the trial court had erred in ordering restitution to the victim's family. However, the public defender did not file an *Anders* brief, and thus the duty to review the record independently was not triggered. Contending that his appointed counsel failed to represent him adequately, the indigent defendant filed a motion to represent himself on appeal. In the other case, the indigent defendant had been convicted after a lengthy trial and sentenced as a habitual offender. The full transcript was sent as part of the record, but the only issue raised by the appointed appellate counsel involved whether the trial court had erred in imposing the habitual offender sentence. No issues were raised as

appeal or collateral matter could be pursued at public expense, although the authors would allow the indigent defendant to pursue either the appeal or collateral matters at his own expense. *Id.* Furthermore, the indigent would know that his case would be reviewed by the Criminal Review Office, which could certify issues to the appellate court if it found that a substantial error had been committed. *Id.*

It is hard to justify what would be a substantial expense to the government not only to provide what the authors acknowledge would be politically unpopular payments to indigent defendants but also to set up an office of criminal review. In addition, when this suggestion was made in 1976, pro se litigation by criminal defendants was uncommon, whereas today pro se litigants are numerous and persistent. Indeed, they pose, in this author's view, a more significant depletion of appellate court time on issues involving no merit than do *Anders* litigants.

to the conviction. Again, no duty of the appellate court to make an independent review of the record was activated because the attorney did not rely on *Anders*.²⁸¹

Of course, the appellate court could always strike the briefs in cases such as these and order the attorneys to file *Anders* briefs as to the convictions. However, this would be at the discretion of the panel reviewing the case. More than the burden placed on the appellate court to review the full record, the real problem with *Anders* is that it creates two distinct classes of appellate review for criminal defendants and results in a failure of equal protection.

One continual source of *Anders* withdrawal motions is in appeals from sentences after pleas of guilty or nolo contendere. Even though the defendant may have entered into a plea agreement, an appeal is filed and a full brief is required. Neither *Anders* nor any of the other Supreme Court cases discussing *Anders* involved an appeal solely from a sentence or a plea. Thus, the procedure developed does not seem to be the best way to cope with these types of appeals. A better solution would be to make review of pleas and sentences discretionary through the use of the petition for writ of certiorari; procedures similar to those used in New Mexico could be employed. Trial counsel would be responsible for filing the petition setting forth the charges, the plea, the sentence, and the issues entitling the petitioner to review, together with citations of authority. A copy of the transcript of the plea colloquy and a sentencing scoresheet, if used in the state, would accompany the petition. The court would review the petition and determine whether it stated a case for relief to which the State should respond. If it did not, the petition would be dismissed, ending sentencing review. Review in this manner would be less time-consuming for both counsel and the court, without sacrificing the individualized consideration of each defendant's case. It also would apply to both nonindigent and indigent defendants and thus avoid equal protection problems.

In most cases, it is not ethically necessary for counsel to withdraw since the issues, while not supporting reversal, are not frivolous. Busy appellate public defenders often do not fully appreciate what an entirely frivolous appeal is. *McCoy* attempted to define it as an appeal that lacks any basis in fact or in law. That does not satisfactorily explain to appellate counsel that appeals which they conclude are not "winners" still may not be frivolous. Both appointed counsel and court staff sometimes refer to the absence of

281. The Florida Supreme Court has determined that where only minor sentencing issues are raised, the *Anders* review process still applies. *In re Appellate Court Response to Anders Briefs*, 581 So. 2d 149 (Fla. 1987). Failure to follow the habitual offender statute would most likely not be considered a minor issue, except that in the above case, our court had already decided the identical issue against the position of the appellant. In the brief on appeal, the appointed attorney merely asked for our court to certify the question to the supreme court for review. As to the former case, whether restitution was proper may be a minor issue when the appellant has been sentenced to life in prison.

reversible error, rather than to the absence of arguable error. Indeed, many issues raised in an *Anders* brief are arguable even though they will not support reversal.

Definitions of a frivolous appeal vary from state to state. For instance, the Washington courts define a frivolous appeal as one that presents “no debatable issues upon which reasonable minds might differ . . . and . . . so totally devoid of merit that there [is] no reasonable possibility of reversal.”²⁸² In Florida, a frivolous appeal is comprehensively defined as follows:

A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. . . . It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it, i.e., against appellant or plaintiff in error.²⁸³

If proceedings are viewed with this definition in mind, few appeals will be so devoid of any arguable matter that an *Anders* brief would be justified. Adherence to a high standard of frivolousness would significantly reduce *Anders* filings.

What American courts refer to as frivolous appeals are termed “hopeless” appeals in England.²⁸⁴ Under the English system, a single judge reviews an application for leave to appeal.²⁸⁵ Leave is granted where arguable points of substance appear. To deter applications for appeal in frivolous cases, the reviewing judge who denies leave to appeal on the grounds that the appeal is hopeless can order that time already spent in custody will not be credited toward the appellant’s sentence. Thus, in England, the appellant has something to lose by pursuing a hopeless appeal.²⁸⁶ A comparable penalty in state jurisdictions would be a statutory authorization for the denial of prison “gain time”²⁸⁷ in a case involving an

282. *State v. Rolax*, 702 P.2d 1185, 1189 (Wash. 1985) (quoting *Millers Cas. Ins. Co. v. Briggs*, 665 P.2d 887, 891 (Wash. 1983)). Similarly, Massachusetts has defined a frivolous appeal as one that “not merely lack[s] merit, but would not have a prayer of a chance.” *Pires v. Commonwealth*, 370 N.E.2d 1365, 1371 (Mass. 1977).

283. *Treat v. State ex rel. Mitton*, 163 So. 883, 883-84 (Fla. 1935).

284. See MEADOR ET AL., *APPELLATE COURTS: STRUCTURE, FUNCTION, PROCESSES & PERSONNEL* 791 (1994).

285. *Id.*

286. *Id.*

287. “Gain time” is a deduction from a sentence to reward appropriate behavior on the part of the prisoner. See, e.g., FLA. STAT. § 944.275 (1995).

appeal deemed frivolous by the court. The penalty would apply both to indigent and nonindigent appellants.

A change in the rules of professional conduct as well as the adoption of the ABA Standards for Criminal Appeals would facilitate both the protection of the Sixth Amendment right to counsel and the smooth functioning of the appellate court. The standards provide that if a client in a frivolous case demands to proceed with an appeal, "it is better for counsel to present the case, so long as his advocacy does not involve deception or misleading of the court."²⁸⁸ It should be made clear in the rules of conduct that counsel appointed to represent an indigent defendant in a criminal appeal will not violate the code of professional conduct by filing a brief, despite its lack of merit, so long as counsel does not misrepresent facts or law. The appellate court is better served when it receives a full brief in the case rather than an *Anders* brief requiring the judge to conduct an independent review of the record for points of arguable merit. Under the current *Anders* procedure, there is no penalty to the appointed counsel for a less-than-full examination of the record. More *Anders* briefs are filed when caseloads of public defenders increase, and, invariably at these times, the court's review reveals issues of arguable error not pointed out by counsel. If nothing else, under current *Anders* procedure, the failure to raise issues of arguable error should involve as great of a penalty to counsel as the filing of a frivolous brief. In the long run, both tax the resources of the court.

If counsel is precluded from withdrawing when an appeal is frivolous, in those instances in which a complete review of the record reveals nothing that counsel can raise, counsel can still fulfill the duty of advocacy for the client without compelling the appellate court to search the record for arguable error. Stricter adherence to the rules of appellate procedure in the preparation of the brief would assist the court.²⁸⁹ First, counsel's brief should set forth everything that is required in the appellate rules of most states, namely, statements of the nature of the case, the course of proceedings, and the facts with appropriate references to the record. Second, the issues or argument section should contain whatever the attorney can present to the court without deception or misstatement of law. Thus, counsel could argue points and leave to the appellate court the question of whether or not the error is harmless. Third, the State would be required to respond to the brief, as it would in any other appeal. These procedures would apply to all criminal appeals, not just to appeals by indigent defendants. Consequently, all criminal appeals would be treated alike and equal protection problems would be avoided.

Appellate court review would proceed as with any other appeal. The court, however, would more liberally exercise its authority to strike a brief

288. See *McClendon v. People*, 481 P.2d 715 (Co. 1971) (en banc).

289. See, e.g., *FLA. R. APP. P. 9.210(b)(3)*.

that does not adhere to the rules of appellate procedure. This is especially relevant to presentation of a complete statement of the case and facts. By insisting on a full presentation of the facts and procedure, the court can assure that each appellant has had the opportunity of representation by counsel who has reviewed the record on appeal. Whether or not counsel's representation is effective in presenting meritorious points for review is governed by *Strickland v. Washington*,²⁹⁰ as Justice Rehnquist explained in his dissent in *Penson v. Ohio*.²⁹¹ If counsel, by failing to raise issues that could lead to reversal, does not provide effective assistance in the brief, the indigent defendant would still have the same right as other criminal defendants to secure relief pursuant to a postconviction claim for ineffectiveness of counsel.

In addition to counsel's ethical obligation to represent the client to the fullest extent of the law, the threat of an ineffectiveness of counsel claim can be expected to spur appellate counsel to review the record thoroughly and to raise meritorious issues. No attorney wants to be upbraided by a court for failing to raise a claim that could have resulted in the reversal of a defendant's conviction. Moreover, with their access to prison law libraries and trained paralegals to assist in the preparation of legal briefs, many convicted defendants are more than ready to review their own records and point out their counsel's ineffectiveness. Postconviction relief ineffectiveness claims, available to all defendants, assure that defendants receive their Sixth Amendment right of effective assistance of counsel. Importantly, these claims do so without affording the indigent defendant appellate review unavailable to the nonindigent defendant.

By refusing to allow counsel to withdraw, appellate courts are better served because they will receive a brief on the merits, regardless of the issues. The review process will be the same for all similarly situated defendants, and all defendants will thus receive the full extent of the Sixth Amendment guarantee of right to counsel. Moreover, in the hierarchy of rights and obligations under our Constitution, the preservation of the right to counsel must have a higher priority than the nonconstitutionally based ethical dilemma that may arise occasionally for the attorney who finds no arguable error in an appeal.

The prohibition of withdrawal of counsel and the modification of appellate procedures and disciplinary rules cannot be established by the U.S. Supreme Court. The individual states have control over the practice of law within their borders. Any change in the right to appeal, the rules of appellate procedure, or the ethical rules of the bar must come from the states, not the Supreme Court. Of those states that have modified or rejected the *Anders* procedure, none have been overturned by the federal courts.

290. 466 U.S. 668 (1984).

291. 488 U.S. 75, 89 (1988) (Rehnquist, J., dissenting).

Thus, it appears that providing for the right of counsel to indigent defendants without denying equal protection to other defendants can occur without burdening the courts with the cumbersome *Anders* procedure. It would be a great benefit to the institution of the appellate courts of the states to undertake that endeavor.

APPENDIX: SURVEY OF COURT PROCEDURES FOR HANDLING *ANDERS*
NO-MERIT CRIMINAL APPEALS

Preface

The appendix consists of a table summarizing the responses to a questionnaire requesting information on state appellate court procedures for handling *Anders* cases; the questionnaire was sent to all state appellate courts. Not all of the questions asked in the survey are included in the table. The answers to these questions are either contained in the Article itself or did not produce useful information.

Most of the courts provided 1993 data, although some courts that answered a second request provided 1994 data. The statistics presented in the table regarding the number of criminal cases filed and the number of *Anders* briefs filed are, in most instances, estimates. The asterisk (*) indicates that the survey response provided an estimate. The precision of the numbers was not so important to the author as the overall trend. Therefore, the figures provide only a general guide.

Many times a court provided additional clarifying comments. The footnotes appended to the table provide the reader this additional information.

Some courts did not answer all questions. In other cases, the author had to make decisions as to how to interpret the data and conform the answers to the chart choices. For instance, many courts noted that the court itself did not appoint new counsel when arguable points were discovered. Instead, the court remanded the case to the trial court to make the appointment. The author elected to treat such answers as appointing new counsel. The mechanics of the appointment were not of concern for the purposes of this survey.

STATE	AL	AK	AZ	AZ	AR	AR
Court	Ct. Crim. App.	App. Ct.	App./ Div. I	App./ Div. II	S. Ct.	App. Ct.
No. of Judges on Court	5	3	15	6	7	6
NO. OF CRIMINAL CASES PER YEAR	2260	4-500	1900	800	265	300
No. of Anders appeals	63	0	*350	*150	14	40
Anders cases as a % of total	2.79	0	15.7	18.75	5.28	13.33
STAFF USED TO REVIEW CASE						
1) Judge's personal law clerks	yes		yes			yes
2) Most experienced staff atty				yes	yes	
3) Least experienced staff atty						
4) Other						
WHO REVIEWS TRANSCRIPT						
1) Law clerk or staff atty			always	yes		
2) Judge			generall y			
3) Both	generally				yes	yes
4) Other						
IS STAFF MEMO PREPARED	usually		no	yes	yes	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes		no	yes ²⁹²	yes	
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT						
1) Order new brief	yes		yes	yes	yes	yes
2) Appoint new counsel					sometimes	
3) Determine issues sua sponte						
IN ANDERS CASE, DOES COURT						
1) Conference case				yes	yes	yes
2) Circulate w/o conference	yes		yes			
IS A WRITTEN OPINION REQUIRED	no		yes	yes	no	no
IS TIME DEVOTED TO ANDERS CASE						
1) More than the average case					xxx	
2) About the same as average				xxx		xxx
3) Less than average	xxx		xxx			

292. Arizona Court of Appeal, Second Division. By statute, the court must review the record for fundamental error in all criminal appeals. See *State v. Styers*, 865 P.2d 765, 774 (Ariz. 1993) (citing ARIZ. REV. STAT. ANN. § 13-4035 (1993)). *But see* 1995 Ariz. Sess. Laws ch. 198, § 1 (repealing § 13-4035 after the survey responses were returned).

STATE	CA	CA	CA	CA	CA	CA
Court	App. Dist. I	App. Dist. II	App. Dist. III	App. Dist. IV	App. Dist. V	App. Dist. VI
No. of Judges on Court	19	26	10	18	9	6
NO. OF CRIMINAL CASES PER YEAR	1486	2310	1050	1400	830	534
No. of Anders appeals	258	508	*120	180	*125	76
Anders cases as a % of total	17.6	21.99	11.42	12.85	15	14.28
STAFF USED TO REVIEW CASE						
1) Judge's personal law clerks						yes ²⁹³
2) Most experienced staff atty					yes	
3) Least experienced staff atty						
4) Other	varies ²⁹⁴	varies ²⁹⁵	cent. staff ²⁹⁶	varies ²⁹⁷		
WHO REVIEWS TRANSCRIPT						
1) Law clerk or staff atty	yes				yes	yes
2) Judge					sometimes	yes
3) Both			yes	yes		
4) Other		varies ²⁹⁸				
IS STAFF MEMO PREPARED	yes	yes	no	yes	sometimes	sometimes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes	yes	yes	yes	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT						
1) Order new brief	yes	yes	yes	yes	yes	yes
2) Appoint new counsel					rarely	
3) Determine issues sua sponte						
IN ANDERS CASE, DOES COURT						
1) Conference case			yes			
2) Circulate w/o conference	yes	yes ²⁹⁹		yes	yes	yes
IS A WRITTEN OPINION REQUIRED	yes	yes	yes	yes	yes	yes
IS TIME DEVOTED TO ANDERS CASE						
1) More than the average case						
2) About the same as average						
3) Less than average	xxx	xxx	xxx	xxx	xxx	xxx

293. California Sixth Appellate District. Either the law clerk or the judge reviews the case and reads the transcript.

294. California, First Appellate District. Personnel review the case; the type of personnel used varies with each division of the court.

295. California, Second Appellate District. Personnel review the case; the type of personnel varies with each division of the court.

296. California Third Appellate District. The court's central staff, which includes attorneys of all levels of experience, review the case.

297. California Fourth Appellate District. Within some divisions, the most experienced staff review the case, while in others staff of average experience review the case.

298. California Second Appellate District. Several divisions of the court report that both judge and clerk review the transcript and record. One division reports that the staff attorney reviews the record.

299. California Second Appellate District. One division reports that it conferences the case. The remaining divisions that responded report that they circulate the case.

STATE	CO	CT	DE	DC	FL	FL	FL
Court	App. Ct.	App. Ct.	S. Ct.	Ct. of App.	1st DCA	2d DCA	3d DCA
No. of Judges on Court	16	9	5	9	15	14	11
NO. OF CRIMINAL CASES PER YEAR	*700	214	200-250	575	1100	2500	1200
No. of <i>Anders</i> appeals	1 ³⁰⁰	note ³⁰¹	*20-30	*20-30	184	*2-300	*300
<i>Anders</i> cases as a % of total			*10	*4.3	16.72	12 ³⁰²	25
STAFF USED TO REVIEW CASE							
1) Judge's personal law clerks						yes	
2) Most experienced staff atty			yes	yes	yes ³⁰³		
3) Least experienced staff atty							
4) Other							judge
WHO REVIEWS TRANSCRIPT							
1) Law clerk or staff atty				yes	yes		
2) Judge							judge
3) Both			yes			yes	
4) Other							
IS STAFF MEMO PREPARED			generally	yes	yes	yes	no
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF			yes	yes	yes	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT							
1) Order new brief					yes	yes	yes
2) Appoint new counsel			yes	yes			
3) Determine issues sua sponte							
IN <i>ANDERS</i> CASE, DOES COURT							
1) Conference case					varies	yes	
2) Circulate w/o conference			yes	yes			yes
IS A WRITTEN OPINION REQUIRED			no ³⁰⁴		no	no	no
IS TIME DEVOTED TO <i>ANDERS</i> CASE							

300. Colorado adopted the ABA standards for reviewing indigent appeals in 1971; however, it still reviews one or two a year. The unified appellate division of the State Public Defender's Office believes that *Anders* briefs require more work and slow the appellate process.

301. Connecticut Appellate Court. The trial court determines whether the case is frivolous and whether compliance with *Anders* has occurred. Thus, the appellate court keeps no statistics on such cases.

302. Florida Second District Court of Appeal. The court reported that *Anders* briefs were filed in several hundred cases. The author assigned 200-300 as a number to come to a rough percentage for the court.

303. Florida First District Court of Appeal. The senior career staff attorney screens the *Anders* brief to determine whether it complies with the *Anders* requirements, e.g., whether there is an adequate discussion of the facts and any potential issues. If it does comply and the senior attorney believes the appeal has no merit, the case is flagged for a summary affirmance. An order is then issued allowing the appellant to file a pro se brief. When the brief is filed, or time for responding expires, the file is sent to another staff attorney. If the case is not flagged for summary affirmance, it is treated and reviewed as any other case, while taking into account the requirements of *Anders*.

304. Delaware Supreme Court. Cases are decided by opinion or order. *Anders* cases are normally decided by order.

1) More than the average case				xxx			
2) About the same as average			xxx			xxx	
3) Less than average				xxx			xxx

STATE	FL	FL	GA	GA	HI	HI	ID
Court	4th DCA	5th DCA	S. Ct.	App. Ct.	S. Ct.	App. Ct.	S. Ct.
No. of Judges on Court	12	9	7	9	5	4	
NO. OF CRIMINAL CASES PER YEAR	1300	1237	does not	does not	340	200	does not
No. of Anders appeals	87	423	allow	allow	0	0	allow
Anders cases as a % of total	6.6	34.19	withdrawal	withdrawal			withdrawal
STAFF USED TO REVIEW CASE							
1) Judge's personal law clerks							
2) Most experienced staff atty	yes	yes					
3) Least experienced staff atty							
4) Other							
WHO REVIEWS TRANSCRIPT							
1) Law clerk or staff atty							
2) Judge							
3) Both	yes ³⁰⁵	yes					
4) Other							
IS STAFF MEMO PREPARED	yes	yes					
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes	yes					
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT							
1) Order new brief	yes	yes					
2) Appoint new counsel							
3) Determine issues sua sponte							
IN ANDERS CASE, DOES COURT							
1) Conference case							
2) Circulate w/o conference	yes	yes					
IS A WRITTEN OPINION REQUIRED	no	no					
IS TIME DEVOTED TO ANDERS CASE							
1) More than the average case							
2) About the same as average	xxx	xxx					
3) Less than average							

305. Florida Fourth District Court of Appeal. The staff reviews the record. Review by the judge is within each judge's discretion.

STATE	IL	IL	IL	IL	IL
Court	App. Dist. I	App. Dist. II	App. Dist. III	App. Dist. IV	App. Dist. V
No. of Judges on Court	24	9	6	6	7
NO. OF CRIMINAL CASES PER YEAR	2257	595	500	502	315
No. of Anders appeals	700	31	*55	23	11 ³⁰⁶
Anders cases as a % of total	31	5.2	11	4.58	3.4
STAFF USED TO REVIEW CASE					
1) Judge's personal law clerks				yes	
2) Most experienced staff atty		yes	yes		
3) Least experienced staff atty		yes	yes		
4) Other	research dir.				research dir.
WHO REVIEWS TRANSCRIPT					
1) Law clerk or staff atty	yes		yes		
2) Judge					
3) Both		yes		yes	yes
4) Other					
IS STAFF MEMO PREPARED	no	yes	no	not always	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes	yes	no	no	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT					
1) Order new brief	yes	yes	yes	yes	sometimes
2) Appoint new counsel					occasionally
3) Determine issues sua sponte					sometimes
IN ANDERS CASE, DOES COURT					
1) Conference case					
2) Circulate w/o conference	yes	yes	yes	yes	yes
IS A WRITTEN OPINION REQUIRED	no	no ³⁰⁷	no	yes	yes
IS TIME DEVOTED TO ANDERS CASE					
1) More than the average case					
2) About the same as average				xxx	
3) Less than average	xxx	xxx	xxx		xxx

306. Illinois Fifth Appellate District. The information supplied by the staff indicates a wide fluctuation in *Anders* briefs from year to year. For instance, in 1990, 13 *Anders* briefs were filed, while in 1991 and 1992, 29 and 28 were filed respectively. The figures in the chart are from 1993. The court reports that in 1994, 361 criminal appeals were filed, 32 of which were *Anders* cases, or almost 9%.

307. Illinois Second Appellate District. A written opinion, concise order, or summary order is required in each case. Even summary orders require a limited discussion of the facts and the contentions raised. This explains the discrepancy among the answers from the various courts of Illinois. The question on the survey asked only whether the court was required by law to write *opinions* in each case. While not all cases require opinions, a written decision is mandated.

STATE	IN	IN	IA	IA	KS	KS
Court	S. Ct.	App. Ct.	S. Ct.	App. Ct.	S. Ct.	App. Ct.
No. of Judges on Court		15	9	6		10
NO. OF CRIMINAL CASES PER YEAR	does not	does not	610			650
No. of <i>Anders</i> appeals	allow	allow	*110	n/a ³⁰⁸	0 ³⁰⁹	0
<i>Anders</i> cases as a % of total	withdrawal	withdrawal	18			
STAFF USED TO REVIEW CASE						
1) Judge's personal law clerks						
2) Most experienced staff atty			staff with	screening		
3) Least experienced staff atty			varying	committee		
4) Other			experience	staff		
WHO REVIEWS TRANSCRIPT						
1) Law clerk or staff atty				yes		
2) Judge						
3) Both			yes			
4) Other						
IS STAFF MEMO PREPARED			yes	yes		
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF			yes	yes		
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT						
1) Order new brief			yes	yes		
2) Appoint new counsel			yes			
3) Determine issues sua sponte						
IN <i>ANDERS</i> CASE, DOES COURT						
1) Conference case			sometimes			
2) Circulate w/o conference			yes	yes		
IS A WRITTEN OPINION REQUIRED			no	no		
IS TIME DEVOTED TO <i>ANDERS</i> CASE						
1) More than the average case						
2) About the same as average						
3) Less than average			xxx	xxx		

308. Iowa Appellate Court. Iowa applies a defunctive procedure whereby all appeals are filed in the supreme court, which then decides to transfer certain cases to the intermediate appellate court based on established screening criteria. The supreme court disposes of *Anders* cases before the transfer decisions are made. Consequently, the intermediate court does not review no-merit appeals.

309. Kansas Supreme Court. The Chief Justice reported that in his seventeen years of service on the court, he had not seen more than two or three *Anders*-type cases come before the court.

STATE	KY	LA	LA	LA	LA	LA	LA
Court	App. Ct.	S. Ct.	1st Cir.	2d Cir.	3d Cir.	4th Cir.	5th Cir.
No. of Judges on Court	14		13	9	12	12	8
NO. OF CRIMINAL CASES PER YEAR	*700	discret.	250	234	187	289	127
No. of Anders appeals	*18	juris.	3	2	*25	75	*21
Anders cases as a % of total	2.58		1.2	0.85	13.4	25.9	16.5
STAFF USED TO REVIEW CASE							
1) Judge's personal law clerks	yes					yes	yes
2) Most experienced staff atty	yes		yes	staff attys			yes
3) Least experienced staff atty					crim. staff dir.	staff dir.	
4) Other							
WHO REVIEWS TRANSCRIPT							
1) Law clerk or staff atty							
2) Judge							
3) Both	yes		yes	yes	yes	yes	yes
4) Other					staff dir.		
IS STAFF MEMO PREPARED	no		yes	yes	yes	yes	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	no		yes	yes	yes	no ³¹⁰	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT							
1) Order new brief	yes		yes	yes	yes	yes	varies
2) Appoint new counsel							varies
3) Determine issues sua sponte					sometimes		varies
IN ANDERS CASE, DOES COURT							
1) Conference case			yes	yes	generally		yes
2) Circulate w/o conference	yes					yes	
IS A WRITTEN OPINION REQUIRED	yes		no	yes	yes	yes	yes
IS TIME DEVOTED TO ANDERS CASE							
1) More than the average case					xxx		
2) About the same as average	xxx		xxx	xxx			xxx
3) Less than average						xxx	

310. Louisiana Fourth Circuit Court of Appeal. While the court reviews the record for arguable appellate issues that may not have been raised by appointed counsel, Judge Patrick Schott indicated that he would not use the word "comb" to describe the review process.

STATE	ME	MD	MD	MA	MA
Court	Sup. Jud. Ct.	Ct. of App.	Spec. App.	Sup. Jud. Ct.	App. Ct.
No. of Judges on Court	7		13	7	14
NO. OF CRIMINAL CASES PER YEAR	200	cert.	1000	80-90	700
No. of <i>Anders</i> appeals	no info.	juris.		*6	*2-3
<i>Anders</i> cases as a % of total		only	0	7	0.4
STAFF USED TO REVIEW CASE					
1) Judge's personal law clerks	yes				
2) Most experienced staff atty					
3) Least experienced staff atty					
4) Other					crim. staff
WHO REVIEWS TRANSCRIPT					
1) Law clerk or staff atty					staff
2) Judge					
3) Both	yes				
4) Other				varies	
IS STAFF MEMO PREPARED	yes			yes	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	no			usually no	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT					
1) Order new brief	no			depends	
2) Appoint new counsel	no			on	
3) Determine issues sua sponte				circumstances	
IN <i>ANDERS</i> CASE, DOES COURT					
1) Conference case	yes			yes	yes
2) Circulate w/o conference					
IS A WRITTEN OPINION REQUIRED	no			yes	yes
IS TIME DEVOTED TO <i>ANDERS</i> CASE					
1) More than the average case					
2) About the same as average	xxx			xxx	xxx
3) Less than average					

STATE	MI	MI	MN	MN	MO	MT	NE
Court	S. Ct.	App. Ct.	S. Ct.	App. Ct.	S. Ct.	S. Ct.	S. Ct.
No. of Judges on Court		28	7	16		7	
NO. OF CRIMINAL CASES PER YEAR	cert.	7000		434	does not	200	does not
No. of Anders appeals	juris.	100			allow	*6	allow
Anders cases as a % of total		1.4	0 ³¹¹	0	withdrawal	3	withdrawal
STAFF USED TO REVIEW CASE							
1) Judge's personal law clerks							
2) Most experienced staff atty		yes					
3) Least experienced staff atty							
4) Other						staff atty	
WHO REVIEWS TRANSCRIPT							
1) Law clerk or staff atty		yes				yes	
2) Judge							
3) Both							
4) Other							
IS STAFF MEMO PREPARED		yes				yes	
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF		yes				yes	
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT							
1) Order new brief		yes					
2) Appoint new counsel						yes ³¹²	
3) Determine issues sua sponte							
IN ANDERS CASE, DOES COURT							
1) Conference case							
2) Circulate w/o conference		yes					
IS A WRITTEN OPINION REQUIRED		no				no	
IS TIME DEVOTED TO ANDERS CASE							
1) More than the average case							
2) About the same as average		xxx					
3) Less than average						xxx	

311. Minnesota Supreme and Appellate Court. Both the supreme court and the court of appeals report that their centralized state public defender system provides all convicted felons with counsel for appeal without involvement of the court in the process of evaluating the merits.

312. Montana Supreme Court. The case is reviewed by the only staff attorney on the court. On the one occasion in which arguable merit was found in an unraised point, the case was remanded for appointment of new counsel.

STATE	NE	NV	NH	NJ	NJ	NM
Court	App. Ct.	S. Ct.	S. Ct.	S. Ct.	App. Div.	App. Ct.
No. of Judges on Court	6	5		7	32	5
NO. OF CRIMINAL CASES PER YEAR	600-700	600+	does not	discret.	pub. def.	
No. of <i>Anders</i> appeals		very few	allow	juris.	doesn't	
<i>Anders</i> cases as a % of total	0 ³¹³		withdrawal		file <i>Anders</i>	
STAFF USED TO REVIEW CASE						see
1) Judge's personal law clerks						description
2) Most experienced staff atty		yes				of NM
3) Least experienced staff atty		yes				procedure
4) Other						in Article
WHO REVIEWS TRANSCRIPT						
1) Law clerk or staff atty		yes				
2) Judge						
3) Both		rarely				
4) Other						
IS STAFF MEMO PREPARED		yes				
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF		yes				
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT						
1) Order new brief		yes				
2) Appoint new counsel						
3) Determine issues sua sponte						
IN <i>ANDERS</i> CASE, DOES COURT						
1) Conference case		yes				
2) Circulate w/o conference						
IS A WRITTEN OPINION REQUIRED		no				
IS TIME DEVOTED TO <i>ANDERS</i> CASE						
1) More than the average case						
2) About the same as average		xxx				
3) Less than average						

313. Nebraska Court of Appeals. The Chief Judge reports that he could recall the filing of only one *Anders* brief within the last two years.

STATE	NM	NY	NY	NY	NY	NY
Court	S. Ct.	Ct. of App.	App. Div. I	App. Div. II	App. Div. III	App. Div. IV
No. of Judges on Court			13	20	9	11
NO. OF CRIMINAL CASES PER YEAR	discret.	discret.	1400	2300	468	800
No. of Anders appeals	juris.	juris.	140	*261	18	100
Anders cases as a % of total			10	11.3	3.8	12
STAFF USED TO REVIEW CASE						
1) Judge's personal law clerks			yes	yes ³¹⁴	yes	yes
2) Most experienced staff atty			yes		yes	
3) Least experienced staff atty			yes			
4) Other						
WHO REVIEWS TRANSCRIPT						
1) Law clerk or staff atty						yes
2) Judge						
3) Both			yes	yes	yes	
4) Other						
IS STAFF MEMO PREPARED			yes	yes	yes	sometimes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF			yes	yes	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT						
1) Order new brief						
2) Appoint new counsel			yes	yes	yes	yes
3) Determine issues sua sponte						
IN ANDERS CASE, DOES COURT						
1) Conference case			yes	yes	yes	yes
2) Circulate w/o conference						
IS A WRITTEN OPINION REQUIRED			no	no	yes ³¹⁵	no
IS TIME DEVOTED TO ANDERS CASE						
1) More than the average case						
2) About the same as average						
3) Less than average			xxx	xxx ³¹⁶	xxx	xxx

314. New York Supreme Court, Appellate Division, Second Judicial Department. Court attorneys and judges' law clerks are assigned *Anders* cases based on length and nature of the case.

315. New York Supreme Court, Appellate Division, Third Judicial Department. Internal court policy requires written opinions.

316. New York Supreme Court, Appellate Division, Second Judicial Department. Most *Anders* cases thus far have involved plea proceedings.

STATE	NC	NC	ND	OH	OH	OH	OH
Court	S. Ct.	App. Ct.	S. Ct.	1st DCA	2d DCA	3d DCA	4th DCA
No. of Judges on Court	7	12		6	5	4	4
NO. OF CRIMINAL CASES PER YEAR	125	450	does not	475	372	200	200
No. of Anders appeals	*3	*20	allow	*10	*60	*5 to 10	*3
Anders cases as a % of total	2.4	4.4	withdrawal	2.1	16	5	1.5
STAFF USED TO REVIEW CASE							
1) Judge's personal law clerks	yes				yes		yes
2) Most experienced staff atty					yes		
3) Least experienced staff atty							
4) Other		staff atty		staff atty		admin. counsel	
WHO REVIEWS TRANSCRIPT							
1) Law clerk or staff atty							
2) Judge							
3) Both	yes	yes		yes	yes		yes
4) Other						admin. counsel	
IS STAFF MEMO PREPARED	yes	yes		no	no	no	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes	only for clear error		yes	yes	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT							
1) Order new brief	*317	no		varies		yes	
2) Appoint new counsel		no			yes		
3) Determine issues sua sponte							yes
IN ANDERS CASE, DOES COURT							
1) Conference case	yes	yes		yes	yes		
2) Circulate w/o conference						yes	yes
IS A WRITTEN OPINION REQUIRED	no	yes		yes	yes	no	yes
IS TIME DEVOTED TO ANDERS CASE							
1) More than the average case							xxx
2) About the same as average				xxx	xxx		
3) Less than average	xxx	xxx				xxx	

317. North Carolina Supreme Court. Within the court's recollection, no arguable points other than those mentioned in the brief have ever been found.

STATE	OH	OH	OH	OH	OH	OH	OH
Court	5th DCA	6th DCA	7th DCA	8th DCA	9th DCA	10th DCA	11th DCA
No. of Judges on Court	5	5	3	12	5	8	4
NO. OF CRIMINAL CASES PER YEAR	364	252	170	509		280	*200
No. of Anders appeals	*3	*20	*10	*4	1 ³¹⁸	*2	0
Anders cases as a % of total	0.8	7.9	5.9	0.8		0.7	
STAFF USED TO REVIEW CASE							
1) Judge's personal law clerks		yes	yes		yes	Yes	yes
2) Most experienced staff atty				yes			
3) Least experienced staff atty							
4) Other	judges						
WHO REVIEWS TRANSCRIPT							
1) Law clerk or staff atty				yes	yes		yes
2) Judge				yes			
3) Both	yes	yes	yes	yes		yes	
4) Other							
IS STAFF MEMO PREPARED							
	no	no	yes	no		yes	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF							
	yes	yes	yes	yes		yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT							
1) Order new brief							
2) Appoint new counsel		yes	yes	yes		no	
3) Determine issues sua sponte	yes						
IN ANDERS CASE, DOES COURT							
1) Conference case	yes	yes		yes		yes	yes
2) Circulate w/o conference			yes				
IS A WRITTEN OPINION REQUIRED							
	yes	yes	yes	yes		yes	yes
IS TIME DEVOTED TO ANDERS CASE							
1) More than the average case							
2) About the same as average	xxx	xxx	xxx	xxx		xxx	
3) Less than average							

318. Ohio Ninth District Court of Appeals. The court reports the filing of only one *Anders* brief in the last four years. The responding staff attorney attributed this to a belief by attorneys that the court did not like to receive *Anders* briefs.

STATE	OH	OK	OR	OR	PA	SC
Court	12th DCA	Ct. Crim. App.	S. Ct.	App. Ct.	Superior Ct.	S. Ct.
No. of Judges on Court	4	5	7	10	15	5
NO. OF CRIMINAL CASES PER YEAR	209	1560	discret.	2654	3222	352
No. of <i>Anders</i> appeals	9	*1	juris.	504 ³¹⁹	*50	137
<i>Anders</i> cases as a % of total	4.3	0.06		19	1.5	39
STAFF USED TO REVIEW CASE						
1) Judge's personal law clerks		yes			yes	
2) Most experienced staff atty	yes				cent. staff	
3) Least experienced staff atty						
4) Other				chief judge	*320	staff ³²¹
WHO REVIEWS TRANSCRIPT						
1) Law clerk or staff atty	yes				yes	
2) Judge				judge		
3) Both		yes				yes
4) Other						
IS STAFF MEMO PREPARED	no	yes		no	yes	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes ³²²	yes		no	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT						
1) Order new brief	yes	*323		n/a	varies	yes
2) Appoint new counsel						
3) Determine issues sua sponte						
IN <i>ANDERS</i> CASE, DOES COURT						
1) Conference case		yes				
2) Circulate w/o conference	yes	yes		yes		yes
IS A WRITTEN OPINION REQUIRED	yes	yes		no	no	no
IS TIME DEVOTED TO <i>ANDERS</i> CASE						
1) More than the average case						
2) About the same as average	xxx	xxx			xxx	xxx
3) Less than average	xxx			xxx		

319. Oregon Court of Appeals. While the court does not permit withdrawal of attorneys and requires them to file a brief in conformance with *State v. Balfour*, 814 P.2d 1069 (1991), the court answered the questionnaire by providing its method of handling these *Balfour* briefs.

320. Pennsylvania Superior Court. The court's central legal staff initially reviews an *Anders* brief for compliance with procedural requirements and prepares a short memo. The case is then treated as any other criminal case, and the judge's law clerks address the merits.

321. South Carolina Supreme Court. Staff attorneys with at least six months' experience are assigned to *Anders* cases.

322. Ohio Twelfth District Court of Appeals. The survey response states, "We 'review' the record. 'Comb' might be too strong a term."

323. Oklahoma Court of Criminal Appeals. Thus far, the court has not addressed the issue of what occurs when the court finds points of arguable error not addressed in the *Anders* brief.

STATE	SD	TN	TX	TX	TX	TX	TX
Court	S. Ct.	Ct. Crim. App.	Ct. Crim. App.	1st DCA	2d DCA	3d DCA	4th DCA
No. of Judges on Court	5	9	9	9	7	6	7
NO. OF CRIMINAL CASES PER YEAR	87	1000	discret.	1300	560	350	
No. of Anders appeals		0 ³²⁴	juris.	*100	*10	*25	*40
Anders cases as a % of total				7.7	1.8	7.1	
STAFF USED TO REVIEW CASE							
1) Judge's personal law clerks	yes	yes		yes			
2) Most experienced staff atty					yes	yes	both
3) Least experienced staff atty							both
4) Other	staff						
WHO REVIEWS TRANSCRIPT							
1) Law clerk or staff atty					yes	yes	yes
2) Judge							
3) Both	yes	yes		yes			
4) Other							
IS STAFF MEMO PREPARED	yes	yes		yes	yes	no ³²⁵	no
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	no	no		yes	yes	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT							
1) Order new brief				yes			
2) Appoint new counsel					yes	yes	yes
3) Determine issues sua sponte		yes					
IN ANDERS CASE, DOES COURT							
1) Conference case	yes			yes			
2) Circulate w/o conference		yes			yes	yes	yes
IS A WRITTEN OPINION REQUIRED	no	no		yes	yes	yes	yes
IS TIME DEVOTED TO ANDERS CASE							
1) More than the average case					xxx		
2) About the same as average	xxx	xxx		xxx			
3) Less than average						xxx	xxx

324. Tennessee Court of Criminal Appeals. The survey response noted the filing of only one Anders brief in the last fifteen years.

325. Texas Third Court of Appeals. The staff attorney prepares a draft opinion in lieu of a memo.

STATE	TX	TX	TX	TX	TX	TX
Court	5th DCA	6th DCA	7th DCA	8th DCA	9th DCA	10th DCA
No. of Judges on Court	13	3	4	4	3	3
NO. OF CRIMINAL CASES PER YEAR	*2000	175	240	200	175	150
No. of Anders appeals	*250	*25	*6	*12-24	15	*5
Anders cases as a % of total	12.5	14.3	2.5	*6-12	8.5	3.3
STAFF USED TO REVIEW CASE						
1) Judge's personal law clerks			yes	yes		
2) Most experienced staff atty		yes		yes		
3) Least experienced staff atty		yes				
4) Other	*326				staff atty	designated atty
WHO REVIEWS TRANSCRIPT						
1) Law clerk or staff atty	always	yes		yes		
2) Judge	occasionally					
3) Both			yes		yes	
4) Other						designated atty
IS STAFF MEMO PREPARED	yes	yes	yes	no	yes	no
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes	no	yes	yes	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT						
1) Order new brief						
2) Appoint new counsel		yes	yes	yes	yes	yes
3) Determine issues sua sponte	yes					
IN ANDERS CASE, DOES COURT						
1) Conference case						
2) Circulate w/o conference	yes	yes	yes	yes	yes	yes
IS A WRITTEN OPINION REQUIRED	yes	yes	yes	yes	yes	yes
IS TIME DEVOTED TO ANDERS CASE						
1) More than the average case						
2) About the same as average	xxx				xxx	
3) Less than average	xxx	xxx	xxx	xxx		xxx

326. Texas Fifth District Court of Appeals. The court has noticed a great fluctuation in Anders briefs over the last three years. Originally, the court would refer all Anders cases to their most senior staff attorneys, who would prepare draft opinions and circulate them to the assigned panel without a conference. This procedure became unsatisfactory for cases involving meritorious points. The court's current procedure distinguishes between "pure" Anders cases without arguable points of error and those with arguable points. The former is assigned to a midlevel staff attorney for preparation of a draft opinion; the latter is handled as any other criminal appeal.

STATE	TX	TX	TX	TX	UT	VT
Court	11th DCA	12th DCA	13th DCA	14th DCA	App. Ct.	S. Ct.
No. of Judges on Court	3	3	6	9	7	5
NO. OF CRIMINAL CASES PER YEAR	200	115	350	800		130
No. of Anders appeals	*10	*5-10	*25	21	15	*0 ³²⁷
Anders cases as a % of total	5	4 to 8	7.1	2.6		
STAFF USED TO REVIEW CASE						
1) Judge's personal law clerks						yes
2) Most experienced staff atty	yes	yes	yes	yes		yes
3) Least experienced staff atty					yes	
4) Other						
WHO REVIEWS TRANSCRIPT						
1) Law clerk or staff atty		yes		yes	yes	
2) Judge		sometimes				
3) Both	yes		yes			yes
4) Other						
IS STAFF MEMO PREPARED	yes	draft op.	yes	no	yes	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes	yes	yes	no	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT						
1) Order new brief		yes			yes	
2) Appoint new counsel			yes			
3) Determine issues sua sponte		sometimes				
IN ANDERS CASE, DOES COURT	treated as					
1) Conference case	any other					
2) Circulate w/o conference	case	yes	yes	yes	yes	
IS A WRITTEN OPINION REQUIRED	yes	yes	yes	yes	no	no
IS TIME DEVOTED TO ANDERS CASE						
1) More than the average case						
2) About the same as average	xxx					xxx
3) Less than average		xxx	xxx	xxx	xxx	

327. Vermont Supreme Court. The court reports that no *Anders* cases have been filed, but that it anticipates the filing of some in the future.

STATE	VA	VA	WA	WA	WA
Court	S. Ct.	App. Ct.	App. Div. I	App. Div. II	App. Div. III
No. of Judges on Court	7	10	9	6	4
NO. OF CRIMINAL CASES PER YEAR	639	1800	839	750	299
No. of <i>Anders</i> appeals	*20	*180	73	51	*60-70
<i>Anders</i> cases as a % of total	3.1	10	8.7	6.8	23.4
STAFF USED TO REVIEW CASE					
1) Judge's personal law clerks	yes				
2) Most experienced staff atty	yes	yes	yes		
3) Least experienced staff atty		yes			
4) Other				comm'r	comm'r
WHO REVIEWS TRANSCRIPT					
1) Law clerk or staff atty	yes		yes		
2) Judge	available				
3) Both		yes			
4) Other				comm'r	comm'r
IS STAFF MEMO PREPARED	yes	usually not	yes	yes	no
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes	yes ³²⁸	yes	yes	yes
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT					
1) Order new brief	n/a	yes	sometimes	yes	yes
2) Appoint new counsel			sometimes		sometimes
3) Determine issues sua sponte			most often		
IN <i>ANDERS</i> CASE, DOES COURT					
1) Conference case	yes			yes ³²⁹	
2) Circulate w/o conference		yes	yes		
IS A WRITTEN OPINION REQUIRED	no	no	yes	yes	yes
IS TIME DEVOTED TO <i>ANDERS</i> CASE					
1) More than the average case				xxx	
2) About the same as average	xxx				
3) Less than average		xxx	xxx		xxx

328. Virginia Court of Appeals. The court reviews the record for only issues that were preserved and appear to have merit. With respect to whether the court appoints counsel or orders additional briefing when arguable points are found, the survey response states that it is up to the judge to whom the case is assigned. "Since we have a petition for appeal process, most likely the court would grant an appeal on that issue(s) and deny counsel's request to withdraw, forcing the same counsel to brief the issues on appeal."

329. Washington Court of Appeals, Second Division. "A panel of judges will look at the case if the commissioner who first reviews it determines that there are issues that are not clearly without merit, or if the appellant seeks modification of the commissioner's decision."

STATE	WV	WI	WI	WY
Court	S. Ct.	S. Ct.	App. Ct.	S. Ct.
No. of Judges on Court	5		16	5
NO. OF CRIMINAL CASES PER YEAR	175	discret.	1264	115
No. of <i>Anders</i> appeals	0 ³³⁰	juris.	201	0
<i>Anders</i> cases as a % of total			15.9	
STAFF USED TO REVIEW CASE				
1) Judge's personal law clerks	yes			
2) Most experienced staff atty				yes
3) Least experienced staff atty				
4) Other	staff atty		staff atty	
WHO REVIEWS TRANSCRIPT				
1) Law clerk or staff atty	yes		yes	
2) Judge			available	
3) Both				yes
4) Other				
IS STAFF MEMO PREPARED	yes		*331	yes
DOES COURT COMB RECORD AND RAISE ARGUABLE POINTS ITSELF	yes		yes	no
IF IT FINDS UNRAISED ARGUABLE POINTS, DOES COURT				
1) Order new brief				yes
2) Appoint new counsel			up to P.D.	
3) Determine issues sua sponte				
IN <i>ANDERS</i> CASE, DOES COURT				
1) Conference case	yes			yes
2) Circulate w/o conference			yes	
IS A WRITTEN OPINION REQUIRED	yes		yes	yes
IS TIME DEVOTED TO <i>ANDERS</i> CASE				
1) More than the average case				n/a
2) About the same as average	xxx			
3) Less than average			xxx	

330. West Virginia Supreme Court of Appeals. The survey response indicated that only one *Anders* petition had been filed in the court. It was treated as any other criminal appeal.

331. Wisconsin Court of Appeals. The staff attorney prepares a draft opinion or order affirming the judgment if no arguable merit is discovered. If the attorney discovers an issue with potential merit, he or she submits a recommendation to the assigned panel.