

WINNING STRATEGIES SEMINAR



**Anders Briefs &
Other Issues for Appeal**

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Anders Briefs & Related Issues on Appeal

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A. Anders and What It Requires

- Counsel is **required** to file a notice of appeal whenever requested to do so by the client. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).
- This is true even if counsel believes such an appeal would be frivolous.
- Moreover this is true even if the client has signed an appeal waiver giving up his right to appeal. *United States v. Gomez-Perez*, 215 F.3d. 315 (2nd Cir. 2000); *Helassage v. United States*, 2002 WL 31202714 (S.D.N.Y. 2002).
- However, what is the lawyer’s obligation to the client and the court if, after filing a notice of appeal, he concludes there are no meritorious issues and the appeal is “wholly frivolous?”
- This is the question answered by the Supreme Court in *Anders v. California*, 386 U.S. 738 (1967).
- *Anders* recognizes and attempts to resolve the tension between a lawyer’s duty to be a zealous advocate for his client and his duty, as an officer of the court, not to present frivolous arguments.
- The solution crafted by the *Anders* court requires that when counsel concludes an appeal is frivolous, counsel must nonetheless submit a brief to the court and to the defendant, requesting withdrawal but “referring to anything in the record that might arguably support the appeal.” *Anders*, 386 U.S. at 744.
- Next “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.” *Id.*
- The Third Circuit has defined counsel’s duty under *Anders* as follows: “When an attorney submits an *Anders* brief, his duties are (1) to demonstrate to the Court that he has thoroughly examined the record for appealable issues; and (2) to demonstrate that the issues are frivolous. In

carrying out his duties, “[c]ounsel need not raise and reject every possible claim.” Counsel needs only to satisfy the “conscientious examination” standard set forth in *Anders. United States v. Sanchez*, 2005 WL 419464 (3rd Cir. 2005)(quoting *United States v. Youla*, 241 F.3d 296, 300 (3d Cir.2001)).

B. When Should You File an *Anders* Brief?

- An *Anders* brief should, of course, only be filed after a thorough review of the record.
- It is a last resort, never a first resort.
- You should never file an *Anders* brief simply because you can not find any issues you think might win.
- Avoiding *Anders* does not require winning issues only arguable ones.
- Many, many non-*Anders* briefs are filed which the lawyer knows have no chance of winning.
- An *Anders* brief is required only where the lawyer can not find any issue that is not “wholly frivolous.”

C. Where and How to Look for Non-Frivolous Issues

- The Fifth Circuit has prepared a very helpful checklist of potential issues to look for in reviewing a district court record in preparation for appeal.
- This checklist covers both plea cases and trial cases.
- It can be found at www.ca5.uscourts.gov/clerk/AndersChecklist.pdf.
- It is also attached at the back of this paper.
- Only after reviewing each item on this checklist for potential issues should counsel conclude that there are no non-frivolous issues and that an *Anders* brief is appropriate.

D. What Makes an Issue Frivolous?

- *Anders* defines the term in the negative stating that a contention is not frivolous if “any of the legal points [are] arguable on their merits.” *Id.* at 744
- This not the most helpful standard and, not surprisingly, courts, lawyers and defendants often disagree as to whether a particular issue is “arguable.”
- Is an issue frivolous if there is direct circuit precedent against it?

- What if there is a circuit split?
 - What if there is contrary district court opinion?
- Is an issue frivolous if, potentially meritorious, but not preserved?
 - What if specifically waived by defendant?
 - What if waived by appeal waiver provision?
- Is an issue frivolous if, potentially meritorious, but harmless or moot?
- Is an issue meritorious if there is contrary Supreme Court precedent?
 - What if that precedent has been questioned but not over-ruled by a later S.Ct. case?
 - What if that precedent has been questioned by a circuit court opinion?
- Line between frivolous and prescient not always easy to perceive.
- Before *Bailey v. United States*, 516 U.S. 137 (1995), circuit courts had unanimously rejected the definition of “use of firearm” ultimately adopted by Supreme Court.
- Before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), every circuit court had rejected the argument that the quantity-based penalties found in the federal drug laws were not merely sentence enhancements but were, in effect, separate offenses which needed to be pled and proved to a jury.
- *Crawford v. Washington*, 541 U.S. 36 (2004) upset years of settled precedent regarding meaning of confrontation clause.
- Demise of the mandatory guidelines has only complicated this issue.
- When the Guidelines were mandatory, they created certain bright-line appellate rules: a refusal to downwardly depart was not appealable in most circumstances nor could the defendant appeal the point within the range he was sentenced.
- Now sentences are reviewed for reasonableness. May a defendant argue it was “unreasonable” for a court to sentence him at the high end rather than the low end of his uncontested guideline range?
- While such an appeal is unlikely to succeed, given the inherent breadth and fuzziness of the “reasonableness” standard, it is difficult to say that such an appeal would be frivolous. The Seventh Circuit, however, has suggested otherwise.
- In *United States v. Gammicchia*, 498 F.3d 467 (7th Cir. 2007), Judge Posner suggested that any attempt to challenge a district court’s refusal to go below the applicable range as “unreasonable” was likely frivolous and should be filed as an *Anders* brief.

– Worse, in *United States v. Bullion*, 466 F.3d 574 (7th Cir. 2006), Judge Posner wrote that a defendant’s challenge to the reasonableness of his 264-month sentence (which represented a substantial **upward variance** from the applicable guideline range) was “frivolous and the appeal a compelling candidate for an *Anders* brief.”

– On the other hand, the Second Circuit appears to take a different view. In *United States v. Whitley*, 503 F.3d 74 (2d Cir. 2007), the court *rejected* an *Anders* brief because it did not reflect that the lawyer had reviewed the substantive and procedural reasonableness of the sentence. This clearly suggests that the Second Circuit believes there are cases where there will be meritorious reasonableness challenges even to within-guideline sentences.

– Frivolity, it appears, is truly in the eye of the beholder.

– This makes it very difficult for the lawyer to make the *Anders* determination. Should he use his estimation of what is frivolous? The courts? The clients?

– In the end, the call is the lawyer’s to make but that judgment should be informed and influenced by his knowledge of the court in which the appeal will be filed and the desires of his client.

C. If an Issue is Frivolous Today, Is It Necessarily Frivolous Tomorrow?

– The frivolousness calculation is further complicated by the Supreme Court’s decision in *Bousley v. United States*, 523 U.S. 614 (1998) which held that in order to take advantage of a favorable change in the law in a collateral proceeding, a defendant must have raised the issue on direct appeal even if it would have been hopeless to do so at that time.

– This *Bousley* problem arose in the aftermath of the *Bailey* decision: say you have an argument that has been soundly rejected by all courts that have considered it— for example, that “use of a firearm” within the meaning of § 924(c) requires that the defendant actively employ the gun during the commission of the predicate. You therefore do not raise it on appeal because it would be utterly futile for you to do so. However, miraculously, after your appeal is decided, the Supreme Court issues a decision rejecting this unbroken line of precedent and rules that guns must, in fact, be “actively employed” to support a § 924(c) conviction. You try to take advantage of this new case by filing a habeas corpus petition. The government claims you procedurally defaulted on this claim by not raising it on direct appeal. You argue that, at the time of your appeal, such an argument would have been frivolous because of the uniform precedent against it. According to the Supreme Court in *Bousley*, you lose!

– According to *Bousley*, in order to preserve the claim for future litigation, in the event of a change in the law, a defendant must raise the issue on direct appeal even if it would be futile to do so.

– *Bousley* seems difficult to justify on several levels. No lawyer wants his client to miss out on the next *Bailey*, *Apprendi* or *Crawford*. However, because lawyers are not fortune-tellers, there is no real way for them to know *which* law might be the next to change. Therefore, *Bousley* encourages defendants to load up their briefs with a bunch of CYA arguments which are currently losers but may become winners if there is a change in the law. This, in turn, requires the court to wade through a bunch of arguments which, at the time they are filed, have little or no merit.

– Practically speaking, *Bousley* puts the defendant between a rock and a hard place. Should he raise his best arguments given the law as it currently stands or should he attempt to cover his bets by preserving as many issues as possible at the risk of diluting his stronger arguments? There is no easy answer, especially given the number of wholly unanticipated “sea-change” opinions the Supreme Court has issued in the last ten years.

– What are the ethical implications of *Bousley*? As noted above, a lawyer may not raise a frivolous issue but are *any* arguments frivolous after *Bousley*? After *Bailey*, *Apprendi*, *Booker*, *Crawford*, etc, can we say that *any* law is truly settled now and forever? If *Bousley* requires defendants to raise hopeless arguments in order to be able to obtain relief if they prevail sometime in the future, can a court blame a defendant from doing so?

– Well, apparently the Fifth Circuit can. One issue that many defendants routinely raise involves the prior conviction exception to the *Apprendi* rule created by *United States v. Almendarez-Torres*, 523 U.S. 224 (1998). In *Almendarez-Torres*, the court held that unlike all other penalty provisions which raise a defendant’s statutory maximum punishment, recidivist-based enhancements do not need to be plead and proved to a jury.

– As many have realized, the holding in *Almendarez-Torres* is incompatible with the logic of *Apprendi* and its progeny. Moreover, a majority of Supreme Court have expressed the view that *Almendarez-Torres* was wrongly decided.

– For that reason, defendants have repeatedly attacked the *Almendarez-Torres* exception as unconstitutional. This seems to be nothing more than smart lawyering given the volatility of the law in this area and the reality of *Bousley*.

– However, over a strong dissent, a panel of the Fifth Circuit disagreed and held that attacks on *Almendarez-Torres* were frivolous, little more respectable than tax protester arguments against the IRS, and stopped just short of threatening to sanction lawyers who continued to raise these arguments. *United States v. Pineda-Arrellano*, No. 06-41156 (5th Cir. July 17, 2007).

– The *Pineda-Arrellano* opinion is scary. It essentially threatens to sanction lawyers who take the lesson of *Bousley* seriously. However, it appears to be an outlier. No other court has expanded the boundaries of what constitutes a “frivolous appeal” quite so far.

D. *Anders* is Not (Necessarily) a Dirty Word

- Some lawyers take it as a point of pride that they would never file an *Anders* brief, implying that only a bad lawyer would.
- While you should avoid filing an *Anders* when you have issues, there are some situations where it actually serves the client’s interest if you do. (And others where the *Anders* is harder than an actual brief).
- One reason not to file an *Anders*: to preserve your “credibility” with the court.
- Most circuit judges understand the tensions faced by a appellate lawyers and don’t begrudge a lawyer’s good faith attempt to make a silk purse out of what is obviously a sow’s ear. They know we face cases with losing issues or no issues and that we sometimes have to file a “no-hoper,” and don’t hold it against us as long as we didn’t overlook a real issue.
- Sometimes, a client will get more satisfaction from an *Anders* than from a regular brief.
- An *Anders* brief is appropriate when the client and lawyer disagree about the relative merit of various issues in the appeal. If there are issues that the client feels strongly about but the lawyer can’t find a factual or legal basis for, or can’t raise in good faith, the best outcome may be an *Anders* brief.
- If the lawyer finds other non-frivolous issues to be raised, the most appropriate course of action is to file the brief and raise the issues the lawyer believes gives the client the best chance to win, and omitting some of the client’s pet issues. The client can always move to file her own pro se supplementary brief raising those issues.
- In filing an *Anders* brief, the lawyer can identify the issues the client wants to raise to the court and then the client has an opportunity to file a pro se brief, raising any issues, no matter how outlandish, inappropriate, or reliant on extra-record material.
- In addition, you can inform the client that the court itself is required by *Anders* to conduct an independent review of the entire record to discover any issues you, as his lawyer, may have overlooked.
- The client will, of course, not win. But, having had an opportunity to air their claims and granted the extra assurance that the court has reviewed the entire record, many will derive greater satisfaction from the appellate process than those defendants whose lawyers filed regular briefs that were *Anders* in everything but name and who, therefore, did not get a chance to raise the arguments they felt most strongly about.

– As long as there are no real issues in the case and the pros and cons of the *Anders* procedure are clearly explained, *Anders*, for some clients, can provide a greater sense of agency and control than a regular brief.

E. Cert Petitions

– *Anders* does not deal with petitions for certiorari and therefore offers no guidance in cases where the defendant asks counsel to file a meritless petition.

– There is no comparable *Anders* requirement that a lawyer file a cert. petition that he believes to be frivolous because certiorari involves discretionary review. *Austin v. United States*, 513 U.S. 5 (1994).

– Thus, circuit court must allow attorney to withdraw before filing with the Supreme Court if the cert. petition would present only frivolous claims. *Id.*

F. “Almost *Anders*” Briefs

– What do you do if you have meritorious claims but your client wishes you to include frivolous claims?

– This is a difficult question of client management. Ultimately, the decision is the lawyers but it does not promote good client relations to simply ignore his desires. Steamrolling the client when it is in his best interests is sometimes unavoidable but is never the preferred option.

– First, counsel must talk to client and try to convince him of the strategic wisdom of focusing on good issues and leaving out the bad. Often the client can be brought around.

– However, if client is insistent, the lawyer should consider strength of the “good” arguments in the case. If they are potentially winnable, counsel should not do anything to jeopardize the chances of success.

– However, if the “best” issue is non-frivolous but ultimately a loser, counsel should proceed with flexibility and consider including client’s preferred arguments since they are unlikely to affect ultimate outcome. Especially consider this approach if the client’s arguments can be presented in way which, at least, passes the laugh test. Obviously, utterly frivolous arguments with no basis in fact or law can not be raised.

– Working to ensure that client comes out of the process feeling respected and satisfied is a worthy goal which is often overlooked. If raising marginal issues can advance that goal at little cost, it is probably worth it.

G. Beyond *Anders*: The Meaning of *Smith v. Robbins*

- Is the *Anders* brief procedure constitutionally required?
- *Smith v. Robbins*, 120 S.Ct. 746 (2000) says the answer is no.
- In *Anders*, the Supreme Court held that an assigned lawyer’s conclusory letter stating that there was “no merit” to his indigent client’s appeal was, standing alone, constitutionally insufficient to support a deprivation of counsel on appeal. In a final section of the opinion, widely interpreted as part of the holding of the case, the Court stated that an assigned attorney’s request to withdraw from an appeal thought to be frivolous “must . . . be accompanied by a brief referring to anything in the record that might arguably support the appeal” (386 U.S. at 744).
- In *Smith v. Robbins*, the Court held (5-4) that this language was dicta, and that *Anders* did not establish minimum procedural requirements for state courts to follow in the evaluation of purportedly frivolous criminal appeals. Rather, the Court held that the conventionally understood “*Anders* brief” is merely “one method” of satisfying constitutional requirements, and that states are free to adopt alternative ones so long as those methods provide reasonable assurance “that an indigent’s appeal will be resolved in a way that is related to the merit of the appeal” (120 S.Ct. at 759-760).
- In *Smith*, the Court did not retreat from the fundamental constitutional rule, rooted in the Due Process and Equal Protection Clauses, that an indigent criminal appellant is entitled to the effective assistance of counsel on appeal. *See* 120 S.Ct. at 760 (fn. 10); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387 (1985).
- The Court’s opinion was concerned solely with the permissible means by which courts can determine whether an assigned attorney has fulfilled her constitutional duty to conscientiously review the record for appealable issues before concluding that none exist and abandoning further partisan effort on the client’s behalf. The Court apparently reaffirmed the narrow holding of *Anders*, i.e., that courts may not rely solely on counsel’s unsupported assertion that the record discloses no non-frivolous grounds to support a conventional appeal. But, in all other respects, the Court held that states are “free to adopt different procedures” than those set forth in *Anders*, so long as they “adequately safeguard a defendant’s right to appellate counsel.”

ANDERS CASE GUIDELINES

At Section I below is a checklist and outline for Anders briefs in guilty plea cases.

At Section II, page 5 below, is a checklist for jury trial/bench trial Anders briefs

The court requests attorneys to use this guidance in preparing Anders briefs.

SECTION I

Checklist and Outline for Anders Briefs in Guilty Plea Cases

If you plan to file an Anders motion and supporting brief in a guilty plea case, please take note of the following information and checklist. In order to assure and demonstrate compliance with the holdings of Anders v. California, 386 U.S. 738 (1967) and United States v. Johnson, 527 F.2d 1328 (5th Cir. 1976), it is strongly recommended that the Anders brief in support of a motion to withdraw in a guilty plea case contain, at a minimum, a discussion of the below listed items. You are encouraged to include this outline in your brief, which will assist the court in conducting its examination of the record. It is anticipated that references to the record volume and page number, or other pertinent record document such as a presentence report, would be listed in the column on the left side of the outline next to each line item. As with any brief, compliance with Fed. R. App. P. & 5th Cir. R. 28 is required. See the briefing checklist on this website at “www.ca5.uscourts.gov/clerk/docs/brchecklist.pdf” for a complete list of requirements. This outline is not intended to replace but rather to supplement the requirements of Fed. R. App. P. & 5th Cir. R. 28.

ANDERS OUTLINE FOR GUILTY PLEA

GUILTY PLEA - FED. R. CRIM. P. 11 requirements

- I. Advising and Questioning the Defendant - Rule 11(b)(1)
 - any statement given under oath may be used by Government in prosecution for perjury
 - right to plead not guilty or to persist in not-guilty plea

- right to jury trial
- right to be represented by counsel, appointed by court if necessary, at trial and at every other stage
- right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses
- defendant waives these rights if court accepts plea
- nature of each charge to which defendant is pleading
- maximum possible penalty, including imprisonment, fine, and term of supervised release
- any mandatory minimum penalty
- any applicable forfeiture
- court's authority to order restitution
- court's obligation to impose special assessment
- court's obligation to consider advisory Sentencing Guidelines, and court's discretion to depart or sentence outside guidelines range (Rule 11(b)(1)(M) as modified by United States v. Booker, 543 U.S. 220 (2005))
- terms of any plea-agreement provision waiving right to appeal or collaterally attack sentence

II. Ensuring That Plea is Voluntary - Rule 11(b)(2)

- determine plea is voluntary, not result of force, threats, or promises apart from plea agreement

III. Determining the Factual Basis for Plea - Rule 11(b)(3)

- determine that there is a factual basis for plea

IV. Judicial Consideration of Plea Agreement - Rule 11(c)(3)(B)

- if Government agrees to recommend or not to oppose request for particular sentence, advise that defendant has no right to withdraw plea if recommendation or request is rejected

V. Accepting Plea Agreement - Rule 11(c)(4)

- if Government agrees to not bring or to dismiss other charges, or Government agrees to a particular sentence, and court accepts agreement, advise that the agreed disposition will be in the judgment

APPEAL WAIVER

- Validity of any waiver of right to appeal conviction or sentence (valid waiver may obviate some portions of the checklist, but “it is defense counsel’s obligation to ascertain and certify that the Government would rely on the defendant’s appellate waiver before moving to withdraw.” United States v. Acquaye, 452 F.3d 380, 382 (5th Cir. 2006))

PSR & SENTENCING

- District court applied (enter date of version of Manual used) _____ Sentencing Guidelines Manual

I. Disclosing the PSR - FED. R. CRIM. P. 32(e)(2)

- timing of receipt of PSR - PSR must be furnished to the defendant, defense counsel, and Government not less than 35 days before sentencing

II. Sentencing - Rule 32(i)(1)

- verify that defendant and counsel have read and discussed PSR and any addenda thereto
- allow counsel to comment on PSR and sentencing matters

III. Sentencing - Rule 32(i)(3)

- make findings on disputed matters

IV. Sentencing - Rule 32(i)(4)

- allow counsel and defendant an opportunity to speak

V. Right to appeal - Rule 32(j)(1)

- advise defendant of any right to appeal and any right to appeal in forma pauperis

VI. Calculation of sentence

- base offense level
- offense-level adjustments
- calculation of criminal history
- PSR accurately reports the statutory minimum/maximum, as applicable
- PSR accurately reports applicable term of supervised release
- PSR accurately reports fine range, if fine was imposed
- findings on fine and on defendant's ability to pay
- Government's compliance with plea agreement

SECTION II

Checklist for Jury Trial/Bench Trial Anders Briefs

If you plan to file an Anders motion and supporting brief in either a jury trial or bench trial case, please take note of the following information and checklist. In order to assure and demonstrate compliance with the holdings of Anders v. California, 386 U.S. 738 (1967), and United States v. Johnson, 527 F.2d 1328 (5th Cir. 1976), it is strongly recommended that the Anders brief in support of a motion to withdraw in a jury/bench trial case contain, at a minimum, a discussion of the below listed items. You are encouraged to include these items in the Table of Contents which will assist the court in conducting its examination of the record. As with any brief, compliance with Fed. R. App. P. & 5th Cir. R. 28 is required. See the briefing checklist on this website at “www.ca5.uscourts.gov/clerk/docs/brchecklist.pdf” for a complete list of requirements. If there are any issues unique to the case not covered by the items listed below, those should be discussed as well. This outline is not intended to replace but rather to supplement the requirements of Fed. R. App. P. & 5th Cir. R. 28.

The items to be included, at a minimum, are:

- 1) sufficiency of the indictment;
- 2) any adverse pretrial rulings affecting the course of the trial (e.g. motions to suppress, motions in limine, motions to quash, speedy trial motion);
- 3) any adverse rulings during trial on objections or motions (e.g. objections regarding the admission or exclusion of evidence, objections premised on prosecutorial or judicial misconduct, mistrial motions);
- 4) any adverse rulings on post-trial motions(e.g. motion for a new trial or post-judgment verdict of acquittal);
- 5) jury selection [N/A in bench trial];
- 6) jury instructions [N/A in bench trial];
- 7) sufficiency of the evidence, which would include a recitation of the elements of the offense(s), and facts and evidence adduced at trial relevant to the offense(s) of conviction;

8) any errors for which there were no objections but which may rise to the level of plain error; and

9) calculation of the advisory guideline sentence and the reasonableness of the sentence imposed. With regard to the discussion of the sentence imposed, counsel is encouraged to attach a checklist, in addition to any discussion, which covers all the aspects of the current Fed. R. Crim. P. 32 requirements, found in the Anders checklist for guilty plea cases, (see Section I above).