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When Appealing is Unappealing: A Look at the Constitutionality of Anders Structures

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When Appealing Is Unappealing: A Look At The Constitutionality of Anders *Structures*

By Daniel Blinka

Ellis T. McCoy
v.
Wisconsin Court of Appeals, District I
(Docket No. 87-5002)

Argued January 20, 1988

A controversial decision of the Warren Court may be overturned or drastically rewritten by the Rehnquist Court, but its demise will be mourned by few, if any. The case is *Anders v. California* (386 U.S. 739 (1967)) which set forth a procedure governing when an appointed attorney can withdraw from representing an indigent defendant on an appeal so lacking in merit that it is labeled frivolous.

Anders represents the egalitarian ideal of providing the same level of legal representation for indigents as is available for convicted defendants able to hire their own lawyer to appeal their convictions. But the procedures it mandated have proven unworkable.

ISSUE

McCoy presents the narrow, specialized question of whether Wisconsin's version of the *Anders* procedure violates a defendant's constitutional right to counsel and due process of law. Specifically, Wisconsin's statutory "discussion rule" compels the defendant's attorney to not only identify the appeal as frivolous, but to explain why any error that might support an appeal is also frivolous.

McCoy, however, also presents the Supreme Court with the opportunity to reconsider the entire *Anders* procedure, which has been roundly and justly criticized by courts, commentators and public defenders for the last twenty years.

FACTS

Ellis T. McCoy was convicted in Milwaukee County, Wisconsin, for sexually assaulting and abducting a twelve year-old girl. Louis Butler, an Assistant Wisconsin Public Defender, was appointed to represent McCoy on appeal at public expense. Butler reviewed the record of McCoy's trial and concluded that any appeal would be frivolous; that is, Butler found no legal errors that even arguably held merit.

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Butler presented McCoy with three options. First, McCoy could voluntarily dismiss his appeal and serve his twelve years in prison. This would effectively preclude any further appeals. Second, McCoy could fire Butler and act as his own lawyer, filing his own brief attacking his conviction but without the assistance of a lawyer. Third, he could request that Butler file a "no merit report."

Under Wisconsin, law a no merit report is prepared by the lawyer. It must state anything in the record that might even arguably support an appeal, but must also include a discussion by the lawyer explaining why the issue is frivolous and not worthy of being pressed in a brief attacking the conviction. This requirement is called the discussion rule; in effect it compels a defendant's own lawyer to explain why the only identifiable errors are frivolous. If the appellate court agrees that the identified errors are frivolous, the conviction is affirmed. McCoy opted for the no merit procedure, but apparently agreed with Butler's decision to attack the legality of the discussion rule.

After a series of legal maneuvers the constitutionality of the rule was brought before the Wisconsin Supreme Court. In a 4-to-3 decision, the court upheld the legality of the rule (137 Wis. 2d 90 (1987)).

The majority recognized that the starting point for any analysis was *Anders*—the Warren Court decision which originated the no merit brief procedure. The Wisconsin Supreme Court concluded that the discussion rule was neither explicitly recognized in *Anders* nor precluded by it. It justified the discussion rule as serving to assist clogged courts in expeditiously sorting through frivolous matters as well as ensuring that defense counsel actually thought through the appeal and was effectively representing a defendant in a futile cause. The court interpreted the discussion rule as calling for only a brief summary of law and facts which support the lawyer's conclusion—not a "protracted argument" in favor of it.

The dissenters contended that the discussion rule turns the lawyer against his or her own client. They also remarked on the drumbeat of criticism directed at *Anders* over the last twenty years, observing that "practitioners find the *Anders* procedure either unworkable or distasteful or both."

BACKGROUND AND SIGNIFICANCE

In *Anders*, the Supreme Court recognized the special problem posed by an appointed lawyer seeking to withdraw from the representation of an indigent defendant on the ground that any appeal would be frivolous. *Anders* is limited

to indigent defendants who are attacking their convictions in an initial appeal. Since the indigent defendant lacks the economic resources to shop for another lawyer to bring the appeal, certain procedures were throught necessary to ensure that any appeal was indeed frivolous. Counsel seeking to withdraw must file a brief which refers to anything in the record that might arguably support an appeal. The defendant must be given a copy of the brief and the opportunity to respond with any additional contentions. Finally, the appellate court must examine the briefs and the trial record and independently conclude that the contentions are so utterly without merit that they are frivolous. If the only identifiable errors are frivolous, then the lawyer may withdraw and the judgment of conviction is affirmed. If the errors are not frivolous, they must be addressed on the merits.

The *Anders* procedure was intended to juggle the competing and conflicting interests of the courts, the lawyer and the indigent defendant. The defendant has a constitutional right to effective assistance of counsel at trial and in litigating a first appellate assault against the conviction (*Pennsylvania v. Finley*, 107 S.Ct. 1990 (1987); *Preview*, 1986-87 term, pp. 269-70). The lawyer, however, has an ethical responsibility which precludes offering a frivolous argument to any court. And the already congested appellate courts do not have the resources to review full briefs and hear argument on issues that are utterly without merit.

In addition to these considerations, *Anders* also represents the egalitarian ideal of the Warren Court. The case appears to rest on the jaded assumption that there is a difference in the representation provided by appointed counsel, who represent the poor, and retained counsel, who represent the economically advantaged. A convicted defendant who is able to hire a lawyer has the financial means, so the argument goes, to find some lawyer somewhere who will brief his or her appeal regardless of the merits. But the indigent is not free to shop for lawyers. If the indigent's appointed lawyer says any appeal is frivolous, the indigent defendant is not able to pick up the retainer check and see another lawyer who may have a lower threshold of "frivolity." If the indigent's lawyer refuses to press a frivolous appeal, the alternatives are to withdraw the appeal (and serve the sentence) or press the appeal without the assistance of any lawyer. The *Anders* procedure was intended to provide a third alternative, one which vainly attempted to redress the conflicting interests of the lawyer who is obligated to zealously represent the client but also owes a fealty to the legal system which forbids wafting just any argument before an appellate court.

However laudable the motives underlying *Anders*, the decision has few supporters and many fierce critics. Its procedures have been called workable and distasteful by courts and commentators. One seasoned public defender wrote that it "is easier to simply file a frivolous brief at the outset than to go through the frustrating and degrading *Anders* procedure." *Anders* has spawned diverse procedures as state courts struggle to implement its protean resolution of the irresolvable. The Wisconsin discussion rule is only one such mutation, and it seems unlikely in light of this firestorm of criticism that the Supreme Court is concerned simply with this rule. Rather, it is this twenty year-old widespread dissatisfaction with *Anders* itself that makes the decision ripe for rethinking.

In particular, *Anders* raises a number of related problems. First, what is a "frivolous" issue? How can a frivolous issue be distinguished from an otherwise meritless or "loser" issue—a distinction compelled but not explained by *Anders*? Second, if counsel conscientiously concludes that any errors at trial are not simply meritless but frivolous as well, then *Anders* requires counsel to brief the unbriefable. That is, the attorney must prepare a brief which refers to anything in the record "that might arguably support an appeal." But if counsel can execute this ratiocination, then why is the issue frivolous? Third, how can labeling an appeal as frivolous be reconciled with a lawyer's obligations toward his or her client? Finally, if counsel decides to brief a frivolous issue out of responsibility toward the client, has the lawyer violated the ethical norms of the legal profession?

Wisconsin's discussion rule further complicates matters by compelling defendant's counsel, who has already branded the appeal "frivolous," to explain why it is "utterly without merit." McCoy argues that this rule deprives him of legal assistance and sets his own lawyer at odds with his, McCoy's, interests. The state of Wisconsin contends that counsel's adversary obligation ended after he conscientiously concluded that any appeal would be frivolous. In short, any attempt to reconcile the discussion rule with *Anders* will founder because the decision itself unsuccessfully attempts to reconcile conflicting interests.

ARGUMENTS

For Ellis T. McCoy *(Counsel of Record, Louis B. Butler, Jr., 819 N. Sixth Street, Room 821, Milwaukee, WI 53203; telephone (414) 227-4891)*

1. Wisconsin Rule 809.32(1) deprives McCoy of his rights to appeal, to due process on appeal and to effective assistance of counsel on appeal as it requires appellate counsel to provide the court with reasons why a "no merit" appeal lacks merit.

For the Wisconsin Court of Appeals, District I *(Counsel of Record, Donald J. Hanaway, P. O. Box 7857, Madison, WI 53707-7857; telephone (608) 266-8908)*

1. Wisconsin Rule 809.32(1) is consistent with requirements set forth in *Anders* and it does not deprive McCoy of his rights to appeal, to due process on appeal or to effective assistance of counsel on appeal as it requires appellate counsel to provide the court with reasons why a "no merit" appeal lacks merit.

AMICUS BRIEFS

In Support of Ellis T. McCoy

The National Legal Aid and Defender Association, the American Civil Liberties Union Foundation and the ACLU of Wisconsin filed a joint brief