Notes on *Anders* Cases

I. Overview – *Anders v. California*

Anders v. California, 386 U.S. 738 (1967), establishes the procedures that must be followed by appointed counsel who seeks to withdraw from a criminal appeal based on his or her assessment that the absence of arguable issues in the case would make any appeal frivolous. If appointed counsel, after conscientious review of the record, makes such an assessment, he or she should advise the Court, and move to withdraw. That motion must be accompanied by a brief "referring to anything in the record that might arguably support the appeal." *Id*. at 744. The motion and brief should be served on the client, and counsel should advise the client that he may raise any issues that he chooses in a pro se brief. In this Circuit, the client has 21 days from the date of service in which to file a brief. *See* 6 Cir. R. 12(c)(4)(C).

The Court will examine counsel's brief, in conjunction with its own independent examination of the record, and determine if counsel has complied with the *Anders* requirements and whether counsel's assessment of the relative merits of the appeal is correct. If counsel has filed an adequate *Anders* brief, and the Court's independent review of the record demonstrates that there are no issues of arguable merit which would support the appeal, the Court will grant counsel's motion to withdraw and affirm the judgment. Conversely, if the Court 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." *Anders*, 386 U.S. at 744.

The purpose of the *Anders* brief is twofold. It is intended first "to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients" appeal to the best of their ability, and, second, to assist the court in making "the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." *McCoy v. Court of Appeals of Wisconsin,* 486 U.S. 429, 439 (1988); *see also Penson v. Ohio*, 488 U.S. 75, 82 (1988).

If counsel has not filed an adequate *Anders* brief, the Court may order further briefing before it reaches either the merits of the appeal or counsel's motion to withdraw. If the Court's assessment of the merits reveals arguable issues, the court may deny counsel's motion to withdraw and order her to file a merits brief, or may allow counsel to withdraw but appoint new counsel to file a merits brief.

II. Preparing the motion to withdraw and supporting *Anders* brief.

1. These are the critical steps that an attorney who seeks to withdraw on *Anders* grounds must take:

    a. Before filing an *Anders* brief, counsel must conscientiously examine the entire record.

        i. An attorney preparing an *Anders* brief should review the entire trial record, including voir dire and jury instructions or, in the case of a guilty plea, the plea agreement and rearraignment proceeding, and sentencing. In

addition, all significant hearings, including suppression or competency hearings should be examined.

ii. Transcripts. Notwithstanding trial counsel's familiarity with the conduct of the proceedings below, the court must independently review the record, and counsel must order the production of transcripts of all proceedings. Correspondingly, counsel who is newly appointed for appeal must order and review the transcripts of all proceedings in order to represent to the court that he or she has reviewed the entire record. Counsel must order transcripts of all relevant proceedings, including plea and sentencing hearings, voir dire, jury instructions, and motion hearings.

b. Counsel must prepare an adequate *Anders* brief, which must include:

i. A recitation of substantive and procedural facts, with record citations.

ii. At least one issue of potentially arguable merit, supported by legal analysis and case citation.

– Please note that "whether there are no non-frivolous issues" is *not* an acceptable issue. That is the reason for filing the motion to withdraw. *Anders* requires that the attorney seeking to withdraw identify potentially arguable issues. A brief which simply questions their absence is no better than the "no merit letter" condemned in *Anders.* *See Anders*, 386 U.S. at 745.

c. Counsel must serve his client with motion and briefs, and must advise client of his right to respond

i. In addition to the service otherwise required, counsel shall serve a copy of the brief and motion on the defendant and advise the defendant that the defendant has 21 days from the date of service in which to file a brief in support of reversal of the conviction. Such a motion must be accompanied by proof of service on the defendant. *See* 6 Cir. R. 12(c)(4)(C). If the client needed an interpreter in the district court, counsel must have her motion and brief, including the 21-day notice, translated into the client's native language and sent to him.

III. Some practical considerations and advice.

a. *Anders* is to be invoked when counsel's thorough and conscientious review of the record convinces her that any appeal would be frivolous. The presence of issues of arguable merit does not mean that the defendant will prevail, but does mean that an appeal is not frivolous. Arguable merit is not a difficult standard to meet, and the appeal without any such issues is a rarity.

b. While the length and complexity of the proceedings leading to the judgment of conviction do not control, cases in which the defendant went to trial, particularly where the trial lasted for several days, are rarely without issues of arguable merit.

c. Guilty plea cases in which the plea agreement contains an appellate waiver are not automatically candidates for *Anders* withdrawal. Not all appellate waivers are created equal, and there can be, and often are, issues that are not pretermitted by the waiver provision, either explicitly or implicitly, present on the record.

d. A properly prepared *Anders* brief can be, in some cases, more labor intensive than a merits brief. *Anders* should never be invoked as a labor-saving process in a case in which the attorney is convinced that the appellant will not prevail. Again, an attorney's sense that the defendant/appellant will ultimately not prevail does not necessarily mean that the appeal is wholly frivolous.