

QUESTION PRESENTED ON TRANSFER

Whether Indiana should adopt the procedure set forth by the Supreme Court forty years ago in Anders v. California allowing a public defender to withdraw from an appeal after drafting a brief explaining the possible issues and why counsel believes the appeal is frivolous.

TABLE OF CONTENTS

Question Presented on Transfer i

Table of Contents ii

Background and Prior Treatment of the Issues 1

Argument 3

 I. This court should grant transfer to clarify that the procedure in Anders v. California does not apply in Indiana 3

 II. Anders is unconstitutional, unnecessary and unworkable 7

Conclusion 13

Verification of Word Count 14

Certificate of Service 14

PETITION TO TRANSFER

The Indiana Supreme Court should grant transfer and issue an opinion that non-merit briefs authorized by the Supreme Court in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), violate the Indiana Constitution and should not be filed in Indiana. Anders sacrifices the client's right to advocacy throughout the appeal for an attorney's ethical obligation to not pursue frivolous claims. But, unlike the U.S. Constitution, Indiana's Constitution provides an absolute right to an appeal. Moreover, Indiana has expanded the Article I, Section 13, right to counsel beyond the Sixth Amendment. An appellate brief without an advocate is inconsistent with these rights guaranteed in the Indiana Constitution.

In lieu of Anders, this Court should adopt the approach outlined in the American Bar Association (ABA) Standards suggesting that counsel not withdraw from a frivolous appeal and rather remain an advocate, so long as his advocacy does not involve deception or misleading of the court. The Indiana Rules of Professional Conduct recognize that an attorney's ethical obligation not to pursue a frivolous claim must yield to a criminal defendant's rights. It is much easier to acknowledge that a public defender is not abusing the legal system by advocating for reversal on all the appeals to which he is appointed, even the seemingly hopeless ones, than to institute Anders. The forty years since Anders has shown that it is a managerial quagmire that misuses judicial resources and creates even more inequality in our appellate system.

BACKGROUND AND PRIOR TREATMENT OF THE ISSUES

On November 14, 2007, the State charged Mosley with Resisting Law Enforcement as a Class A misdemeanor and Criminal Trespass as a Class B

misdemeanor. App., 11, 12. After a bench trial on January 29, 2008, Mosley was found guilty of resisting law enforcement and not guilty of trespassing. T.R. 28. During a bench trial, Officer Flude testified that when he and Officer Stern attempted to place Mosley in handcuffs while arresting him for criminal trespass, Mosely started “flailing up with his left hand.” T.R. 12. Officer Flude thought Mosley was trying to punch Officer Stern. T.R. 12. So, he took Mosley to the ground where Mosley was “kicking quite a bit.” T.R. 12-13. Mosley claimed that the police officers immediately took him to the ground and arrested him when he left the bar. T.R. 18-19. The trial court found Mosley guilty of resisting law enforcement, but not guilty of trespassing. T.R. 28.

The Marion County Public Defender was appointed to perfect Mosley’s appeal. App., 17-18. On appeal, the public defender raised one issue, “[d]id the State’s evidence prove beyond a reasonable doubt that Mr. Mosley was guilty of resisting arrest?” Appellant’s Br., p. 1. Citing Ajabu v. State, 704 N.E.2d 494 (Ind.Ct.App. 1998) and Spangler v. State, 607 N.E.2d 720 (Ind. 1993), Mosley argued that some resistance does not constitute resisting law enforcement and that violent action beyond merely standing one’s ground is required. Appellant’s Br., p. 3. The State cited several Court of Appeals cases that did not require violence in order to support a finding of resistance and argued that Mosley’s act fell well within the bounds of forcibly resisting. Appellee’s Br., p. 4-7.

On September 19, 2008, the Court of Appeals, in a memorandum opinion, affirmed Mosley’s convictions and noted that:

There is no question that Mosley’s actions, while they seem to have stopped short of outright, dangerous violence against the police, went beyond merely ‘standing his ground.’

We understand that a criminal defendant has a right to an appeal of his conviction. But that does not mean that an appeal should be filed in every case. When it is clear that the trial court did not commit reversible

error, it is a waste of the resources of this court and the attorney general's office and, most of all, public defender funds, for an appeal to nonetheless be filed. Trying to create issues where there are none leads to the sort of perfunctory, baseless brief we have before us today. When there are not meritorious arguments to be made, the better approach is to file a brief in accordance with our decision in Packer v. State, 777 N.E.2d 733 (Ind.Ct.App. 2002), which outlines the proper procedure for such a situation. Memorandum Op., p. 5-6.

On October 3, 2008, the undersigned counsel entered their appearances as co-counsel with the consent of Mosley and the Marion County Public Defender.

ARGUMENT

I. This Court should grant transfer to clarify that the procedure in Anders v. California does not apply in Indiana

Indiana should grant transfer and issue an opinion prohibiting no-merit briefs authorized by Anders v. California, disapprove of the language in Court of Appeals' opinions sanctioning Anders briefs, and adopt the ABA Standards approach of requiring counsel to present the case so long his advocacy does not involve deception or misleading the court. State courts may reject the Anders approach as long as the State assures minimum constitutional protections. Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746, 759, 145 L.Ed.2d 756 (2000); cf Penson v. Ohio, 109 S.Ct. at 350.

The U.S. Supreme Court in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), sought to relieve the tension between an attorney's ethical obligation not to raise frivolous claims and the defendant's right to effective representation and equal protection by allowing a public defender to file a motion to withdraw from an appeal along with a brief explaining that the potential issues were "wholly frivolous." Id. at 1400. The public defender must provide the brief to the client in a timely manner so that the client can include the issues he wants to raise, and the appellate court must conduct a "full

examination of all proceedings” to determine whether the appeal is, in fact, “wholly frivolous.” Id. If the court finds a non-frivolous issue, it must order briefing on the merits. Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1989).

The Court of Appeals’ comments in this case concerning Anders, although dicta, encourages the use of the Anders procedure when counsel can not find meritorious issues to raise on appeal. Two other panels of the Indiana Court of Appeals have also encouraged public defenders to file Anders briefs when faced with this ethical dilemma. Packer v. State, 777 N.E.2d 733, 736-37 (Ind.Ct.App. 2002); Seals v. State, 846 N.E.2d 1070 (Ind.Ct.App. 2006). However, for thirty years prior to Packer, the Court of Appeals followed the position adopted in Dixon v. State, 152 Ind.App. 430, 284 N.E.2d 102, 104 (1972), overruled in part by Music v. State, 489 N.E.2d 949 (Ind. 1986), rejecting the filing of Anders briefs. Thus, there is a conflict in the Court of Appeals which must be resolved. Ind. Appellate Rule 57(H)(1).

In Dixon, the court held that an attorney could not withdraw in accordance with Anders from an appeal of the denial of a petition for post-conviction relief. Dixon, 284 N.E.2d at 104. Although Dixon was based on Indiana Post-Conviction Rule 1, § 9, the court joined other jurisdictions in rejecting the Anders approach and adopting the approach recommended in the *ABA Standards for Criminal Justice: Providing Defense Services*, § 5.3 (Approved Draft, 1968), which provided that: “Counsel should not seek to withdraw from a case because of his determination that the appeal lacks merit.” Id. at 106.

The Dixon court also observed:

if this court were to allow withdrawal by the Public Defender in accordance with Anders, supra, several practical problems would arise,

namely; appointment of new counsel should this court find merit to the appeal; representation of the petitioner should he desire to file a petition to transfer, challenging this court's determination of his appeal; and the additional cost of new counsel to the taxpayers. Id. at 106-07.

In Packer, the court criticized an appellate attorney for filing a brief in which he claimed the raised issues were frivolous rather than following the Anders procedure. Packer v. State, 777 N.E.2d 733, 736-37 (Ind.Ct.App. 2002). Following Packer, the court in Seals v. State, 846 N.E.2d 1070 (Ind.Ct.App. 2006), ordered a public defender to file an Anders Brief along with his motion to withdraw. However, after reviewing the record, the court determined that the Anders brief “demonstrate[ed] a lack of commitment and dedication to [the] client,” and it failed to address the “facially obvious issue” of the appropriateness of Seals’ maximum sentence under the plea agreement. Id. at 1073. Thus, the appellate court remanded with instructions to appoint replacement counsel.

Neither Seals nor Packer mentioned Dixon.

This Court has never expressly adopted or rejected the Anders approach.¹ In 1986, the court overruled Dixon only “to the extent” that it could be read to require a public defender, in a petition for post-conviction relief, to raise every issue his client would like him to raise. Music v. State, 489 N.E.2d 949, 950 (Ind. 1986). The court did not overrule Dixon’s rejection of Anders or Dixon’s endorsement of the ABA Standards, which now provides, in part:

¹ In State ex rel White v. Hilgermann, 218 Ind. 572, 34 N.E.2d 129, 131 (1941), the court noted that “if competent counsel finds no substantial error to assign upon appeal, and so advises the defendant and the trial court, the constitutional requirement is satisfied and the defendant may not demand the trial court find and appoint other counsel who will advise an appeal.” However, White was implicitly overruled by Anders, which prohibits the mere withdrawal of counsel.

- (a) Appellate counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit.
- (b) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, would consider all issues that might affect the validity of the judgment of convictions and sentence, including any that might require initial presentation in a post conviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.
- (c) If the client chooses to proceed with an appeal against advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw. . .

ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 4-8.3 (3rd ed. 1993).

The same year Music was decided, this court amended Post-Conviction Rule 1, § 9, from requiring representation by the public defender in “all” proceedings to providing a procedure for the public defender to withdraw if no meritorious issues are discovered after investigation and research.² The appellate rules were not amended in the same manner.

At least ten states do not allow attorneys to file motions to withdraw from appeals. Martha C. Warner, Anders in the Fifty States: Some Appellants’ Equal Protection is More Than Others, 23 Fla. St. U.L. Rev. 625, 642-43 (1996). In the states that have adopted Anders, the procedures for implementing and the frequency of Anders briefs vary widely. Id. A few states use alternatives, such as review by trial courts, commissioners or summary disposition. Id. at 656-61.

² The Anders requirement does not apply to state post conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

II. Anders is unconstitutional, unnecessary and unworkable.

The Anders approach is inconsistent with the absolute right to appeal and the greater right to counsel afforded by the Indiana Constitution. Article 7, Section 6 of the Indiana Constitution guarantees “in all cases an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases.” See also Rowe v. State, 704 N.E.2d 1104 (Ind. 1999). There is no corresponding right under the Federal Constitution. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 590, 189, 100 L.Ed. 891 (1956). Anders, based on due process and equal protection, only requires that “an indigent’s appeal will be resolved in a way that is related to the merit of that appeal,” and does not require advocacy throughout the appeal. Smith, 120 S.Ct. at 759; McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988).

Given the fact that criminal appeals in Indiana are a matter of right, Anders should not be adopted in Indiana. See State v. Lewis, 291 N.W.2d 735 (N.D. 1980). In Lewis, the North Dakota Supreme Court held that “the defendant has a right to appeal as a matter of law and counsel is appointed upon request for the appeal.” Id. at 738. The court declined to adopt Anders because to hold otherwise would violate Section 90 of the North Dakota Constitution³ and corresponding statutory provisions that provide indigent defendants greater protection. In light of Article 7, Section 6 of the Indiana Constitution, this Court should likewise reject the Anders procedure. At least with respect to appellate review of sentences, the right to appeal is even more expansive in Indiana. Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005) (discussing Ind. Appellate Rule 7(B)).

³ Section 90 of the North Dakota Constitution provides: “Appeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law.”

When the convicted person is indigent, Indiana requires the appointment of counsel to represent that person on appeal. State ex rel. Grecco v. Allen Circuit Court, 238 Ind. 571, 153 N.E.2d 914 (1958). Indiana’s right to counsel under Article 1, § 13 has a history of being interpreted more broadly than the Sixth Amendment. See, e.g., Malinski v. State, 794 N.E.2d 1071, 1078-9 (Ind. 2003) (citing several cases that “have often interpreted the section 13 right [to counsel] expansively”); Caraway v. State, 891 N.E.2d 122 (Ind.Ct.App. 2008), reh’g denied.

Implicit in the right to appeal and effective assistance of counsel is the right to a fair appeal with an advocate throughout. Just as a fair trial requires an advocate, so does a fair appeal. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” United States v. Cronin, 466 U.S. 648, 655, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984) (quoting Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975)). The need for advocacy is equally as important on appeal. Appellate counsel performs an important function in bringing to the court all the facts and applicable law, even in “hopeless” cases. See Johnson v. United States, 360 F.2d 844, 846 (D.C. Cir. 1966) (Burger, J., concurring). An Anders brief puts the court on notice that even the defendant’s advocate believes the case has no merit. If defense counsel were to make such a concession at trial, the defendant’s right to effective assistance of counsel could be violated. See, e.g., Christian v. State, 712 N.E.2d 4 (Ind.Ct.App. 1999).⁴

⁴ In Christian, a rape prosecution, defense counsel’s concession to the element of penetration in closing argument after the defendant had testified that penetration did not

Appellate review is a crucial part of the criminal justice system and requires advocacy by the defendant. An Anders brief is not a substitute for advocacy. McCoy, 108 S.Ct. at 1902, n. 3. An appeal without an advocate is neither a fair appeal nor effective representation.

Even if the Anders procedure were constitutional under the Indiana Constitution, it is unnecessary in Indiana because our Rules of Professional Conduct recognize and resolve the tension between a criminal defense attorney's ethical obligations and the client's rights in favor of the client's rights. "The lawyer's obligations [to not bring frivolous claims] under Rule 3.1 are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule." Comment, Indiana Rule of Professional Conduct 3.1. The purpose of Rule 3.1 is to impose a duty on the advocate "not to abuse legal procedure." Comment, Ind.R. Prof. Conduct 3.1.

Reading Rule 3.1 in conjunction with the Comment, it is not unethical for a public defender to represent a client with frivolous issues. A public defender perfecting an appeal that he believes to be frivolous is not abusing the legal procedure, but doing the best he can to assure the defendant's constitutional right to an appeal and effective assistance of counsel are fulfilled. Rule 3.1 is subordinate to the right to an appeal and counsel guaranteed under the Indiana Constitution.

Further, a public defender arguing an issue he believes to be frivolous must uphold the duty of candor toward the court by citing any adverse authority. See

occur was "a breakdown in the adversarial process that rendered the resulting convictions fundamentally unfair and unreliable." 712 N.E.2d. at 6-7.

Ind.R.Prof. Conduct 3.3(a)(2). Thus, an attorney, even when presenting a frivolous appeal, should never find himself in a position of misleading or deceiving the court.

If this court found it necessary, it could rewrite Rule of Professional Conduct 3.1 to explicitly exempt criminal defense attorneys from bringing frivolous claims on appeal. This court has adopted this exception at the trial level. See Ind.R.Prof. Conduct 3.1 (“A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”) In fact, in rejecting the Anders approach and instituting the ABA approach, the New Hampshire Supreme Court created an exception to its Rule of Professional Conduct 3.1. In re Richard A., 771 A.2d 572, 576 (N.H. 2001).

Further, the requirement in Anders that the court review the entire record misplaces judicial resources. Anders switches the task of record review and issue spotting from public defenders to the courts. Based on a survey sent to jurisdictions which have instituted Anders, one author concluded that “Anders appeals continue to be an analytical and managerial problem for state appellate courts.” Warner, *supra*, at 643.

The State courts that have rejected Anders often reason that it is a misuse of judicial resources. Id. at 644-47 (citing State v. McKenney, 98 Idaho 551, 568 P.2d 1213, 1214 (1977) (“if a criminal case on appeal is wholly frivolous, undoubtedly, less of counsel and the judiciary’s time and energy will be expended in directly considering the merits of the case in its regular and due course”), Commonwealth v. Moffett, 383 Mass. 201, 418 N.E.2d 585, 590 (1981) (Anders “not only runs the risk of alienating and frustrating [the] client, who can scarcely be blamed for feeling abandoned and betrayed,

but also complicates the court’s review unnecessarily”), and Huguley v. State, 324 S.E.2d 729, 731 (Ga. 1985) (appellate counsel is in a far better position than the court to search the record for error)).

Lastly, Anders’ subjective, unworkable standard of what constitutes a “wholly frivolous” appeal creates the potential for abuse and unfair application. Mosley’s appeal is a perfect example of the subjective nature of the Anders standard. Although the public defender’s argument that “some force” is not resisting may not prevail, the law concerning what amount of force is required to support a resisting law enforcement conviction is unclear. See Spangler v. State, 607 N.E.2d 720 (Ind. 1993) (holding that “one ‘forcibly resists’ law enforcement when strong, powerful, violent means are used to evade” law enforcement); cf. Johnson v. State, 833 N.E.2d 516 (Ind.Ct.App. 2005) (forcible resistance does not require violence). In fact, this Court recently vacated the Court of Appeals’ opinion in Graham v. State, 889 N.E.2d 1283 (Ind.Ct.App. 2008), and accepted transfer on this very issue.

Here, the evidence of any violent resistance by Mosley was directed at Officer Stern, who was not named in the charging information as the victim. T.R. 12. The characterization of this argument as frivolous is highly debatable and illustrates that the line between an argument likely to fail and a frivolous argument is gray and thin.

Because of this inherent subjectivity, Anders, a case reasoned in equal protection, ironically creates inequality. The results of Warner’s survey of states using Anders suggested an alarming disparity in the application of Anders.

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, whereas, in the Fifth District Court of Appeal, *Anders* briefs made up thirty-four percent of the total criminal filings. These differences also appear in other states. 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. Generally, in looking at the survey results, appellate courts in urban areas have a higher incidence of *Anders* briefs.

Warner, supra, at 654.

Suggested safeguards to protect against the unfair application of Anders are extensive, consuming valuable resources and time. See National Legal Aid and Defender Association, Standards and Evaluation Design for Appellate Defender Offices, Standard O, Procedure for Anders Cases.⁵ Forty years of Anders has illustrated that

⁵Each office shall have a procedure for determining how the office shall handle cases which fall under the criteria of *Anders v. California*, 386 U.S. 738 (1967), and how such decision should be communicated to the courts and the clients.

1. An office may determine that *Anders* briefs shall never be filed, but such decision should be made only after consideration of the ramifications of such decision, and consultation with representatives of the appellate court, and with representatives of the prosecution. Appellate defenders should consider that filing merit briefs in every case may undermine the credibility of the appellate defender with the appellate courts. On the other hand, appellate defenders should consider that the filing of *Anders* briefs may compromise the office's reputation within the client community.
2. The appellate defender shall adopt an extremely strict standard in determining what cases have "no arguable merit." Such cases should be genuinely frivolous, and not simply cases which the appellate defender believes will not prevail on appeal.
3. *Anders* briefs shall not be filed in cases in which the death penalty or life imprisonment has been imposed.
4. The office shall adopt an internal procedure for review of all cases in which it has been decided by the attorney handling the case that an *Anders* brief will be filed. Such internal review shall include, at the minimum, a plenary review of the case by another member of the legal staff. In offices of more than five attorneys, supervisory staff shall be designated for this purpose.
5. In each case in which a determination has been made that an *Anders* brief shall be filed, the attorney shall communicate that decision to the client prior to the filing of such brief, and shall give the client the opportunity to withdraw his

providing a defendant an advocate throughout the entire appellate process is the most efficient and least complicated method of assuring the defendant his constitutional rights.

CONCLUSION

WHEREFORE, the Appellant respectfully requests this court to grant transfer, vacate the conviction, and issue an opinion clarifying that Anders briefs are not to be filed in Indiana.

Respectfully submitted,

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request for the appointment of counsel or to withdraw the appeal. Such option should be given in a non-coercive manner, with the attorney making clear that an *Anders* brief will be filed as an alternative.

6. The attorney shall send a copy of the *Anders* brief to the defendant with instructions for responding thereto, and may assist the defendant in responding to the *Anders* brief or in contacting another agency or lawyer for such assistance.
7. In any case in which the appellate court has rejected an *Anders* brief, the chief appellate attorney shall review the handling of the case, the merits of the case, and discuss the matter with the attorney handling the case to determine whether the office procedures for screening the case were adequate, and whether it is appropriate for that attorney or the office to continue representation.
8. Each appellate defender office should adopt clearly-articulated procedures for dealing with clients who desire to raise individual issues in cases which the attorney believes to be without arguable merit. Such procedures should be sufficient to ensure that the issue desired by the client is presented to the appellate court in an appropriate manner so as to receive the serious attention of the court. It is preferable to have counsel include the issue in the brief submitted, if at all possible.

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VERIFICATION OF WORD COUNT

I verify that this brief contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

I hereby certify that two true copies of the forgoing has been served, by personal service, upon the Indiana Attorney General, 219 State House, Indianapolis, Indiana 46204, this ____ day of _____, 2008.

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