



## University of Arkansas at Little Rock Law Review

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Volume 24 | Issue 2

Article 3

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2002

### Supreme Court of Arkansas Rule 4-3(j): No-Merit Briefs in Arkansas and the Need to Amend the Rule

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#### Recommended Citation

Jeffrey A. Weber, *Supreme Court of Arkansas Rule 4-3(j): No-Merit Briefs in Arkansas and the Need to Amend the Rule*, 24 U. ARK. LITTLE ROCK L. REV. 313 (2002).

Available at: <https://lawrepository.ualr.edu/lawreview/vol24/iss2/3>

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# SUPREME COURT OF ARKANSAS RULE 4-3(J): NO-MERIT BRIEFS IN ARKANSAS AND THE NEED TO AMEND THE RULE

*Jeffrey A. Weber\**

## I. INTRODUCTION

In Arkansas, appellate counsel who wish to withdraw due to the lack of merit in an appeal must satisfy both the requirements set by the Supreme Court of the United States in *Anders v. California*<sup>1</sup> and Rule 4-3(j) of the Supreme Court of Arkansas.<sup>2</sup> The Court in *Anders* required that counsel, when faced with an appeal that he believed lacked merit, file a brief that would refer “to anything in the record that might arguably support the appeal.”<sup>3</sup> By requiring counsel to inform the appellate court of issues that might arguably support an appeal, the Court was attempting to ensure that counsel acted in the role of an advocate and adhered to the principle that “[t]he 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*.”<sup>4</sup> The Arkansas rule, however, requires that in addition to filing a brief identifying each potential issue as required by *Anders*, counsel must also list each adverse ruling, even if it does not arguably support an appeal, and state reasons why those issues do not support an appeal.<sup>5</sup> The requirement

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1. 386 U.S. 738 (1967).

2. ARK. SUP. CT. R. 4-3(j); see *Tucker v. State*, 47 Ark. App. 96, 885 S.W.2d 904 (1994); *Ofechebe v. State*, 40 Ark. App. 92, 844 S.W.2d 373 (1992).

3. *Anders*, 386 U.S. at 744. In his dissent, Justice Stewart criticized this requirement and made the obvious point that “if the record did present any such ‘arguable’ issues, the appeal would not be frivolous,” and that counsel would not have requested to withdraw. *Id.* at 746 (Stewart, J., dissenting).

4. *Id.* at 744.

5. The relevant portion of Rule 4-3(j) reads:

A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract. The brief 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

that counsel list each ruling adverse to the defendant avoids Justice Stewart's criticism in his *Anders* dissent<sup>6</sup> because it does not make a distinction between arguable and non-arguable issues. Indeed, under Rule 4-3(j), even if none of the adverse rulings are arguably meritorious, the lawyer must still list each of them. However, by requiring counsel to argue against his client, the rule, at best, causes him to act in the prohibited role of *amicus curiae*. At worst, it turns the lawyer into a second prosecutor, not advocating for his client, but against him. In either case, it deprives the client of his right to have counsel that acts as an advocate.

This article examines no-merit appeals in Arkansas. Part II provides a background of the development of no-merit appeals and rules regarding the right to appellate counsel. Part III discusses the constitutionality of Rule 4-3(j). Part IV surveys how the rule has affected appellate advocacy in Arkansas. Finally, Part V briefly addresses different alternatives to *Anders* that have been adopted by other states and suggests that in order to ensure the principles of "substantial equality and fair process" are met, Arkansas should adopt a rule similar to one in California that recently withstood constitutional challenge.

## II. THE DEVELOPMENT OF NO-MERIT APPEALS AND RULES REGARDING THE RIGHT TO APPELLATE COUNSEL

### A. The Right of Appellate Representation for Indigent Criminal Defendants

On March 18, 1963, the Supreme Court of the United States issued two historic opinions that have profoundly affected the American criminal justice system. First, in *Gideon v. Wainwright*,<sup>7</sup> the Supreme Court held that indigent criminal defendants were entitled to a lawyer appointed to represent them at trial.<sup>8</sup>

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a meritorious ground for reversal.

ARK. SUP. CT. R. 4-3(j).

6. See *Anders*, 386 U.S. at 746 (Stewart, J., dissenting).

7. 372 U.S. 335 (1963).

8. *Id.* at 344-45. Until *Gideon*, it was a common practice of states to provide a lawyer only in capital cases. See, e.g., *Beck v. Wainwright*, 147 So. 2d 515 (Fla. 1962); *State v. Lane*, 128 S.E.2d 389 (N.C. 1962); *Commonwealth ex rel. Weigner v. Russell*, 177 A.2d 148 (Pa. Super. Ct. 1962); *Pitt v. State*, 126 S.E.2d 579 (S.C. 1962).

The second case was *Douglas v. California*.<sup>9</sup> In *Douglas*, the Court held that those indigent defendants who were convicted were entitled to have counsel appointed to represent them during their first direct appeal.<sup>10</sup> After being convicted of thirteen felonies, the petitioners, due to indigency, sought, inter alia, appointed counsel from the California District Court of Appeals to represent them on direct appeal.<sup>11</sup> The appellate court, following California's rules of criminal procedure, reviewed the record and determined that appointed counsel would not have been helpful to either the court or the petitioners.<sup>12</sup> Therefore, it denied the request and affirmed the convictions.<sup>13</sup> The Supreme Court of California denied discretionary review.<sup>14</sup>

In vacating the California appellate court's decision, the United States Supreme Court reiterated that in federal court an appellant has the right to counsel on direct appeal from a conviction and that "representation in the role of an advocate is required."<sup>15</sup> The California rule, the Court explained, caused an intolerable situation where an affluent defendant enjoys an appeal "as of right," but the indigent defendant, "already burdened by a preliminary determination that his case is without merit, [was] forced to shift for himself."<sup>16</sup> The Court ruled that the Fourteenth Amendment prohibited such a situation whereby a "rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot."<sup>17</sup>

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9. 372 U.S. 353 (1963).

10. *Id.* at 357. While the Court noted that states are not required to provide for an appeal in criminal cases, see *McKane v. Durston*, 153 U.S. 684, 687 (1894), when such a provision is made, due process requires that counsel be appointed. *Douglas*, 372 U.S. at 357. The Supreme Court later declined to extend the right to appellate counsel to subsequent discretionary appeals. See *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

11. *People v. Douglas*, 10 Cal. Rptr. 188 (Dist. Ct. App. 1961).

12. The California appellate court did not discuss which rule it was following. *Id.* The Supreme Court, however, indicated that the lower court had relied on a specific rule, but did not identify it. *Douglas*, 372 U.S. at 354-55.

13. *Douglas*, 10 Cal. Rptr. at 195.

14. *Douglas*, 372 U.S. at 353.

15. *Id.* at 357 (quoting *Ellis v. United States*, 356 U.S. 674, 675 (1958)).

16. *Id.* at 358.

17. *Id.* at 357. Of course, this concern is not allayed by current law. Even under *Anders* and Rule 4-3(j), a rich man can fire an attorney who will not file an appeal in which he argues the merits and hire another who will. An indigent, on the other hand, will not be in such a position if his counsel follows the rules for withdrawing and the appellate court agrees with the assessment that no meritorious issues exist. Justice Souter states the problem eloquently in his dissent in *Smith v. Robbins*: "Paying clients generally can fire a lawyer expressing unsatisfying conclusions and will often find a replacement lawyer with a keener eye for arguable issues or a duller nose for frivolous ones." *Smith v. Robbins*, 528 U.S. 259, 294 n.2 (2000) (Souter, J., dissenting).

B. Resolving the Conflicting Duties of Appellate Criminal Defense Counsel: *Anders v. California*

The representation of a defendant by appointment at the trial level poses no ethical problems for lawyers because of the presumption of innocence. Regardless of the evidence the State has against a defendant, he may plead not guilty and require the State to prove each element of the charge beyond a reasonable doubt.<sup>18</sup> On appeal, however, the ethical situation is changed. While a lawyer must continue to represent his client diligently,<sup>19</sup> he must refrain from making meritless or frivolous claims to the appellate court.<sup>20</sup> A dilemma arises when an attorney determines that his client has no meritorious issues that can support an appeal.<sup>21</sup> In such a situation, how does the lawyer balance his client's right to appellate counsel, the duty

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18. *In re Winship*, 397 U.S. 358, 362 (1970); accord *Jackson v. Virginia*, 443 U.S. 307, 326 (1979) (holding a state inmate entitled to habeas corpus relief if no rational trier of fact could find proof of guilt beyond a reasonable doubt); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (finding that requiring defendant to prove lack of premeditation by a preponderance of the evidence violates due process); *Harkness v. State*, 267 Ark. 274, 276, 590 S.W.2d 277, 279 (1979) (holding that a jury instruction characterizing alibi as an affirmative defense, to be proved by the defendant by a preponderance of the evidence, was reversible error); *Peals v. State*, 266 Ark. 410, 416-17, 584 S.W.2d 1, 4-5 (1979) (holding that failure to instruct jury of prosecution's duty to prove each element of lesser included offenses beyond a reasonable doubt was reversible error); see also ARK. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2001) (providing that an attorney representing a criminal defendant may "defend the proceeding as to require that every element of the case be established.").

19. ARK. MODEL RULES OF PROF'L CONDUCT R. 1.3; see also *Clark v. Comm. on Prof'l Conduct*, 320 Ark. 597, 898 S.W.2d 446 (1995); *Colvin v. Comm. on Prof'l Conduct*, 309 Ark. 592, 832 S.W.2d 246 (1992).

20. ARK. MODEL RULES OF PROF'L CONDUCT R. 3.1; see also *Dodrill v. Comm. on Prof'l Conduct*, 308 Ark. 301, 824 S.W.2d 383 (1992).

21. For a good discussion on ethics for appellate lawyers, see Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 PACE L. REV. 323 (1999). Judge Miner suggests that too many attorneys resolve the dilemma in favor of unworthy appeals: "[F]ar too many frivolous appeals and far too many non-meritorious issues are presented to appellate tribunals." *Id.* at 324. Judge Miner notes that in 1997, eighty-two out of the 850 criminal appeals filed in the Second Circuit Court of Appeals were filed in conjunction with *Anders* briefs; in the "vast majority" of these cases, counsel was permitted to withdraw. *Id.* at 325. Given this number of non-meritorious appeals as a starting point, Judge Miner predicts that the total number of non-meritorious appeals must be very high considering the number of criminal and civil cases with paying clients. *Id.* Judge Miner further asserts that "pressing appeals that have no merit in these times of limited appellate court resources and burgeoning caseloads is especially irresponsible, for it delays the disposition of meritorious cases and issues." *Id.* at 325-26.

to act with diligence, and the duty not to make meritless arguments? The Supreme Court answered that question in *Anders v. California*.<sup>22</sup>

After being convicted in a California trial court, Anders appealed to the California District Court of Appeal and requested that an attorney be appointed to represent him. Although the appellate court granted the request, the attorney determined that the appeal lacked merit and informed the court of his opinion by letter.<sup>23</sup> Counsel also told Anders that he could file a pro se brief. Anders asked that another attorney be appointed to represent him, but that motion was denied and his conviction was affirmed.<sup>24</sup>

The Supreme Court of the United States held that the California procedure did not satisfy the requirements of the Fourteenth Amendment.<sup>25</sup> The Court found that simply writing a conclusory letter stating that an appeal had no merit did not satisfy “[t]he constitutional requirement of substantial equality and fair process that 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*.”<sup>26</sup>

In order to satisfy the requirement that counsel act in the role of an advocate, the Court said, a lawyer who wishes to withdraw due to the lack of merit in an appeal must file a brief that identifies any issue that would “arguably support the appeal.”<sup>27</sup> The Court held that a lawyer must provide the client with a copy of the brief so that he may raise any issue he believes to be meritorious.<sup>28</sup> The deciding court would then determine if counsel was correct and rule on the appeal, or, if it felt that meritorious issues existed, provide the appellant with assistance of counsel.<sup>29</sup> The Court reasoned that the requirements would help the client and the court and would shield the attorney from charges of being ineffective.<sup>30</sup> Importantly for our discussion, the Court also wrote

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22. 386 U.S. 738 (1967).

23. *Id.* at 739.

24. *Id.* The Supreme Court of California previously held that the right to appellate counsel is not abridged when counsel, after reviewing the record and consulting with the defendant and trial counsel, determines that there is no merit to an appeal, and after the appellate court makes an independent examination of the record, is allowed to withdraw without additional counsel being appointed. See *In re Nash*, 393 P.2d 405, 408 (Cal. 1964).

25. *Anders*, 386 U.S. at 741.

26. *Id.* at 744.

27. *Id.*

28. *Id.*

29. *Id.* Presumably, this would be done by either denying the motion to withdraw or by appointing new counsel.

30. *Id.* at 745.

that “[t]he requirement [of listing all arguably meritorious claims] would not force appointed counsel to *brief his case against his client* but would merely provide the [indigent defendant] that advocacy which a nonindigent defendant is able to obtain.”<sup>31</sup>

C. *Penson v. Ohio*: The Court Further Explains *Anders*

In the months that followed the *Anders* decision, the Court remanded several cases, and ordered compliance with the *Anders* standard.<sup>32</sup> *Anders* did not lay the issue to rest, however. More than twenty years later, the Court was (and is) still explaining what the Constitution requires when counsel seeks to withdraw from a so-called no-merit appeal.

In *Penson v. Ohio*,<sup>33</sup> the petitioner’s appellate lawyer filed a document in the state court of appeals that simply stated that he had reviewed the record and found no errors that required reversal.<sup>34</sup> He did not file any sort of brief.<sup>35</sup> Additionally, the state appellate court allowed the lawyer to withdraw before reviewing the record for itself. When it did review the record, the state appellate court expressed its opinion that the lawyer’s determination that there were no credible issues was “highly questionable.”<sup>36</sup> Despite the lack of a brief as required by *Anders*, and the determination of the state appellate court that credible issues existed, new counsel was not appointed.<sup>37</sup> The state appellate court concluded that the petitioner had not been prejudiced because the court would have ruled against him on any colorable claims.<sup>38</sup>

In reversing the judgment, the Supreme Court was direct:

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31. *Anders*, 386 U.S. at 745 (emphasis added).

32. See *Smith v. Arizona*, 389 U.S. 10 (1967); *Fox v. Oregon*, 388 U.S. 466 (1967); *Camodeo v. United States*, 387 U.S. 575 (1967); *Elliott v. Oregon*, 387 U.S. 571 (1967); *Barnett v. Nevada*, 387 U.S. 243 (1967); *Belcher v. Wisconsin*, 387 U.S. 241 (1967); *Walker v. Wainwright*, 387 U.S. 236 (1967).

33. 488 U.S. 75 (1988).

34. *Id.* at 77-78.

35. *Id.* at 78.

36. *Id.* at 79. The petitioner was charged, inter alia, with two counts of felonious assault. *Id.* at n.1. The court of appeals examined the record and found that that the trial court failed to instruct the jury one on of the elements of felonious assault, and applying the state’s plain error doctrine, reversed petitioner’s conviction on one of the two counts. *Id.*

37. *Id.* at 79.

38. *Id.*

It is apparent that the Ohio Court of Appeals did not follow the *Anders* procedures when it granted appellate counsel's motion to withdraw, and that it committed an even more serious error when it failed to appoint new counsel after finding that the record supported several arguably meritorious grounds for reversal of petitioner's conviction and modification of his sentence. As a result, petitioner was left without constitutionally adequate representation on appeal.<sup>39</sup>

The Court rejected the State's claim "that the Court of Appeals' consideration of the appellate briefs filed on behalf of petitioner's codefendants" was adequate representation for the petitioner himself.<sup>40</sup> It held that "[t]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client."<sup>41</sup> The Court was also unpersuaded by the argument that any errors were harmless. "[T]he right to counsel is 'so basic to a fair trial that its infraction can never be treated as harmless error.'"<sup>42</sup> This applies no less at the appellate level than it does at the trial level. Justice Stevens, writing for the majority, again stressed the need for the attorney to act as an advocate when he wrote, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage."<sup>43</sup>

Thus, in *Douglas, Anders, and Penson*, the Court insisted that a defendant who wishes to appeal his conviction is entitled to have an advocate representing him, not simply an attorney assigned to help make the process work more smoothly. The *Anders* Court also recognized that appellant defense counsel should not be required to advocate against his client and predicted that a rule requiring counsel to list all arguably meritorious issues would not violate that policy.<sup>44</sup> That prophecy, however, has proven false in Arkansas.<sup>45</sup>

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39. *Penson*, 488 U.S. at 81.

40. *Id.* at 86.

41. *Id.* at 86-87 (quoting *Glasser v. United States*, 315 U.S. 60, 70 (1942)).

42. *Id.* at 88 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

43. *Id.* at 85.

44. *Anders v. California*, 386 U.S. 738, 745 (1967).

45. See *infra* Part IV. For an overview of *Anders* and its promises, see Frederick D. Junkin, Note, *The Right to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 TEX. L. REV. 181 (1988).



### III. THE CONSTITUTIONALITY OF RULE 4-3(j): THE SUPREME COURT UPHOLDS A SIMILAR RULE

Although the Supreme Court of the United States has never specifically addressed the constitutionality of Arkansas Supreme Court Rule 4-3(j), in 1988, however, the Court did address a Wisconsin rule of appellate procedure that also requires counsel to list the reasons why an appeal is non-meritorious.<sup>46</sup> In *McCoy v. Wisconsin Court of Appeals*,<sup>47</sup> a five to three majority<sup>48</sup> ruled that the requirement of counsel to state the basis for his determination that his client's appeal is non-meritorious did not violate the client's Sixth Amendment right to counsel and was consistent with the requirements of *Anders*.<sup>49</sup> Not surprisingly, the three dissenters (Justices Brennan, Marshall, and Blackmun) disagreed on both issues.<sup>50</sup> Experience has shown that the dissenters were correct.

After being convicted of abduction and sexual assault, McCoy was given a court-appointed attorney to represent him on appeal.<sup>51</sup> The attorney reviewed the record and made the determination that there were no non-frivolous issues to be raised.<sup>52</sup> In his brief, however, he argued the strongest points he could, but included a statement that he believed the appeal was frivolous.<sup>53</sup> He did not include, as the Wisconsin rule required, any reasons for his conclusion.<sup>54</sup> Rather, he indicated

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46. The relevant portion of Wisconsin Rule of Appellate Procedure 809.32 provides:

If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California*, the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

WIS. R. APP. P. 809.32 (citation omitted).

47. 486 U.S. 429 (1988).

48. *Id.* at 430, 443-44. Justice Kennedy did not participate in the case. *Id.*

49. *Id.* at 443-44.

50. *Id.* at 448-49 (Brennan, J., dissenting).

51. *Id.* at 431.

52. *Id.* at 431-32. Counsel then gave his client three options: voluntarily dismiss the appeal, proceed pro se, or let his attorney file a brief presenting the strongest arguments possible but also advising the appellate court that, in his attorney's opinion, the appeal was frivolous. *Id.* McCoy chose the third option. *Id.* at 432.

53. *McCoy*, 486 U.S. at 432. The Court expressed disapproval of the brief, noting that counsel, "in the same document, . . . purported to maintain that there were arguments warranting a reversal and also that those arguments were wholly without merit." *Id.* The Court stated that the brief "[could] best be characterized as schizophrenic." *Id.*

54. *Id.*

that he believed “it would be both unethical and contrary to *Anders* to discuss the reasons why the appeal lacked merit.”<sup>55</sup> The court of appeals rejected the brief and ordered a new one filed that complied with the rule.<sup>56</sup> Counsel did not comply with that order.<sup>57</sup> Instead, he sought to have it overturned by the Supreme Court of Wisconsin.<sup>58</sup> A divided court upheld the decision of the court of appeals.<sup>59</sup> The Supreme Court of the United States granted certiorari.<sup>60</sup>

In upholding the constitutionality of the Wisconsin rule,<sup>61</sup> the majority simply made the conclusory statement that the rule did not place counsel in the role of *amicus curiae*,<sup>62</sup> and that an attorney’s obligation to be an advocate, as a result of the rule, is not diminished.<sup>63</sup> Justice Brennan dissented and expressed his opinion that the discussion requirement went beyond the constitutional and ethical limit prescribed by *Anders*.<sup>64</sup>

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55. *Id.* In his brief, counsel argued that the Wisconsin rule conflicted with *Anders*, noting that if he was forced to explain why he felt the appeal was nonmeritorious,

[c]ounsel would no longer be an advocate, as required by *Anders*, but would be in the awkward position of arguing why his client’s appeal lacks merit.

This would be contrary to the mandate of *Anders* that his attorney not brief the case against the client and that the attorney act as an advocate.

*Id.* at n.2.

56. *Id.* at 432.

57. *Id.*

58. *Id.* at 432-33.

59. *McCoy*, 486 U.S. at 431, *aff’g* Wisconsin *ex rel.* McCoy v. Wisconsin Court of Appeals, 403 N.W.2d 449 (1987).

60. Wisconsin *ex rel.* McCoy v. Wisconsin Court of Appeals, 484 U.S. 813 (1987).

61. *McCoy*, 486 U.S. at 440-44. The Court held that discussion requirement constitutional under the Sixth and Fourteenth Amendments. The Court reasoned that the purpose of the *Anders* brief was twofold: first, to assure that the appellate attorney reviewed the record diligently for arguable issues; and second, to assist the deciding court in determining if counsel’s conclusion was correct. *Id.* at 442. The Wisconsin rule, which “merely require[d] that the attorney go one step further,” served the same purposes. *Id.* The Court held that “[a] supported conclusion that the appeal is frivolous does not implicate Sixth or Fourteenth Amendment concerns to any greater extent than does a bald conclusion.” *Id.* at 443.

62. *Id.*

63. *Id.* at 444 (“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 according to state law.”).

64. *Id.* at 445-55 (Brennan, J., dissenting).

IV. *ANDERS* IN ARKANSAS: APPELLATE DEFENSE COUNSEL ARGUE  
AGAINST THEIR OWN CLIENTS

The dissenters in *McCoy* warned that a rule requiring appellate counsel to explain his reasons for believing an appeal to be frivolous would turn counsel from an advocate for his client's interest into "a friend of the court whose advocacy is so damning that the prosecutor never responds."<sup>65</sup> An examination of a sample of typical *Anders* briefs that have been filed in Arkansas illustrates the *McCoy* dissenters' point.

A. *Matthews v. State*: Defense Counsel Argues Substantial Evidence and Lack of Prejudice—Against His Own Client

In *Matthews v. State*,<sup>66</sup> the defendant pleaded guilty to burglary and theft of property.<sup>67</sup> Pursuant to Rule 36.4 of the Arkansas Rules of Criminal Procedure, he sought post-conviction relief arguing that his counsel should have requested a mental evaluation, and should have investigated possible character witnesses.<sup>68</sup> Relief was denied.<sup>69</sup> On appeal, his appellate lawyer's *Anders* brief stated:

[The defendant] did not state how the results of a mental evaluation and investigating possible character witnesses would have resulted in a plea of not guilty and in a trial with a more favorable outcome. . . . There was substantial evidence before the Court that [the defendant's] counsel was effective in his representation. Even if any errors occurred, no prejudice was shown.<sup>70</sup>

Appellate counsel followed Rule 4-3(j) exactly as he should have. Consequently, he was forced to argue against his client's interest. Surely, the *McCoy* majority could not think that it is in an appellant's interest for his lawyer to argue any perceived errors were non-prejudicial.

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65. *Id.* at 455 (Brennan, J., dissenting).

66. 332 Ark. 661, 966 S.W.2d 888 (1998) (per curiam).

67. *Id.* at 663, 966 S.W.2d at 889.

68. *Id.* at 665, 966 S.W.2d at 890.

69. *Id.* at 667, 966 S.W.2d at 891.

70. Brief of Appellant at 22, *Matthews* (No. CR 97-461).

B. *Adaway v. State*: The Defense Defends the Trial Judge's Rulings

Similarly, in *Adaway v. State*,<sup>71</sup> a jury convicted the defendant of two counts of second-degree battery and one count of fleeing.<sup>72</sup> On appeal, appellate counsel noted that two objections raised by the defense at trial were overruled.<sup>73</sup> He went on to note that the objections "were the only objections made during the course of the trial that were overruled by the court. The *defense contends* that these rulings were proper and that no error occurred."<sup>74</sup> When addressing an issue raised by the defendant, pro se, appellate counsel responded that the defendant

has not provided any proof as to the composition of the jury venire [sic] called in his case, let alone the entire jury pool or master list from which each venire [sic] is chosen. Without such proof [the defendant] has failed to make out a prima facie [sic] showing of racial discrimination in the jury selection process.<sup>75</sup>

Again, appellate counsel complied with Rule 4-3(j). But to say that in doing so he was acting as an advocate for his client and not arguing against him is absurd.

C. *Sweeney v. State*: Rule 4-3(j) Compliance, or the State's Brief?

Appellate counsel in *Sweeney v. State*,<sup>76</sup> arguing the issue of the sufficiency of the evidence, wrote:

Appellant was the only person at the scene of the crime which occurred in the early morning hours. The evidence at trial demonstrated that Appellant had a white substance on his boots and coat, which was consistent with sheetrock that had been kicked in at the entry site into the building in question. Sheriff's deputies also found gloves near appellant which had a similar white substance on them. Finally, Appellant was wearing a long, black trench coat and light colored boots when arrested, which the owner of the business identified as being worn by the perpetrator. Under the standards

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71. No. CACR 97-1022, 2000 WL 1349223 (Ark. App. Sept. 20, 2000).

72. *Id.* at \*1.

73. *Id.*

74. Brief of Appellant at 35, *Adaway* (No. CACR 97-01022).

75. *Id.* at 36.

76. No. CACR 99-206, 2000 WL 1751060 (Ark. App. Nov. 29, 2000).

governing sufficiency of evidence, the evidence at trial was sufficient to establish Appellant's guilt of commercial burglary.<sup>77</sup>

Although the above passage is from defense counsel's Rule 4-3(j) compliant brief, it could have easily been from the State's brief.

D. *Dewberry v. State*: No Facts Existed to Grant a Directed Verdict For My Client

Likewise, the defendant in *Dewberry v. State*<sup>78</sup> was convicted of five counts of aggravated robbery, five counts of theft of property, and one count of aggravated assault.<sup>79</sup> He had raised the defense of duress.<sup>80</sup> In addressing that issue, and the sufficiency of the evidence, appellate counsel told the Supreme Court of Arkansas:

This attorney, in his professional opinion, asserts that the Court's overruling of his motion for directed verdict on all 11 counts was a correct ruling and that no facts existed to grant a directed verdict on behalf of the Defendant. Further, that the Defendant has no sufficient evidence, in fact no evidence, to require a jury to find the affirmative defense of duress was valid and reach a verdict of not guilty.<sup>81</sup>

These are only four examples of the effect Rule 4-3(j) has had on appellate advocacy in Arkansas. However, they are typical of the briefs that have been filed in no-merit cases. Each of the appellate counsel in the above examples followed the requirements of Rule 4-3(j). Yet, the briefs read as though the State prepared them. They demonstrate that the dissenters in *McCoy* were correct that the rule "forces appointed counsel to do exactly what we denounced in *Ellis* and *Anders*,"<sup>82</sup> and that "[t]he Court today reneges on these longstanding assurances by permitting a State to force [appellate counsel] to advocate against his client upon unilaterally concluding that the client's appeal lacks merit."<sup>83</sup>

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77. Supplemental Brief for Appellant at 3-4, *Sweeney* (No. CACR 99-206).

78. No. CR 99-1079, 2000 WL 1801865 (Ark. Dec. 7, 2000) (per curiam).

79. *Id.* at \*1.

80. Brief for Appellant at 34, *Dewberry* (No. CACR-99-01079).

81. *Id.* at 35.

82. *McCoy v. Wisconsin Court of Appeals*, 486 U.S. 429, 449 (1988) (Brennan, J., dissenting).

83. *Id.* at 445 (Brennan, J., dissenting); see also Eduardo I. Sanchez, Note, *The Right to Counsel and Frivolous Appeals: Assistance to the Court or Advocacy for the Indigent Client—Which Is the Real McCoy?*, 43 U. MIAMI L. REV. 921 (1989).

The majority in *McCoy* attempted to reconcile the apparent conflicts with *Anders* by stating that the Wisconsin rule only required counsel to go one step further than what *Anders* required, and that in doing that, the rule caused counsel to fully review the record and ensured that no non-frivolous issues were missed.<sup>84</sup> Defense counsel in Arkansas, however, already review the entire record in search of any issue that is meritorious.<sup>85</sup> Filing a brief on the merits of any single issue is a much easier task than explaining why every adverse ruling against a client was not error.

In *Douglas*, the Court found that counsel at the appellate level, acting in the role of an advocate, were required to do so, otherwise, a defendant “already burdened by a preliminary determination that his case was without merit, [would be] forced to shift for himself.”<sup>86</sup> Under the logic of *McCoy* and the requirement of Rule 4-3(j); however, it is not only allowable that he shift for himself, but that he do so after his own counsel has argued against him. The *Anders* promise that counsel would not be required to argue against his client<sup>87</sup> has not been realized in Arkansas.

## V. SUGGESTIONS FOR REFORM

### A. *Anders* Alternatives Devised by Other States and the American Bar Association Proposal

The *Anders* formula has not been universally recognized as the best way to handle apparent no-merit appeals, and several states have adopted slightly different procedures.<sup>88</sup> These range from not allowing no-merit briefs at all<sup>89</sup> to having the trial court, as opposed to the appellate court, conduct a review of the record,<sup>90</sup> to having an independent commission review no-merit cases.<sup>91</sup> One state reviews no-

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84. *McCoy*, 486 U.S. at 442.

85. In addition, both the State and the Arkansas Supreme Court are required to comb the record for reversible error in cases involving life imprisonment or the death penalty. See ARK. CODE ANN. § 16-91-113(a) (Michie 1987); ARK. R. CRIM. P. 14; ARK. SUP. CT. R. 4-3(h).

86. *Douglas v. California*, 372 U.S. 353, 358 (1963).

87. *Anders v. California*, 386 U.S. 738, 745 (1967).

88. For a list of these states and a good discussion on the various alternatives, see Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More Equal than Others*, 23 FLA. ST. U. L. REV. 625, 643 (1996).

89. *Id.* at 653.

90. *Id.* at 656.

91. *Id.* at 657.

merit cases, along with all other criminal cases, via summary disposition wherein the appellate court reviews statements of fact and issues, a list of authorities, and the trial court file.<sup>92</sup> The court then issues a proposed ruling to which a party may object within ten days.<sup>93</sup>

There are significant problems with each of these procedures. With a summary disposition procedure, the reviewing court does not review the entire trial transcript. Therefore, it is not in a position to determine if counsel is correct in his determination of what issues are arguable on appeal. Consequently, there is no guarantee that the client's right to counsel is being protected.

An independent commission simply adds an unnecessary level of bureaucracy and does not prevent a rule, like 4-3(j), that results in a lawyer having to argue against his client. The problem is the same with having the trial court review the record instead of the appellate court. It still does nothing to allay the concerns addressed by this article.

Finally, the most disturbing alternative is to simply not allow no-merit briefs at all. Recently, two authors suggested that the best way to handle the criticisms and shortcomings of *Anders* was to adopt the American Bar Associations suggestion that

[c]ounsel should not seek to withdraw because he believes that the contentions of his client lack merit, but should present for consideration such points as the client desires to be raised provided he can do so without compromising professional standards.<sup>94</sup>

This is wholly unacceptable. Initially, counsel would not be able to do so without compromising professional standards. It would require, as the authors admit, that appellate counsel be permitted to act in an unethical manner by proffering frivolous claims.<sup>95</sup> Further, presenting arguments simply because the client wants them pursued causes a lawyer to abrogate his duty to use his professional judgment, and may lead to countless frivolous issues being sent to appellate courts.<sup>96</sup>

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92. *Id.* at 657-58.

93. *Id.* at 658.

94. James E. Duggan & Andrew W. Moeller, *Make Way for the ABA: Smith v. Robbins Clears a Path for Anders Alternatives*, 3 J. APP. PRAC. & PROC. 65, 93 (2001); see also Randall L. Hodgkinson, Essay, *No Merit Briefs Undermine the Adversary Process in Criminal Appeals*, 3 J. APP. PRAC. & PROC. 55, 64 (2001) (arguing that "the justification for a no-merit brief system simply does not nearly outweigh the associated costs").

95. Duggan & Moeller, *supra* note 94.

96. Moreover, forcing an appellate lawyer to advance frivolous arguments against his professional judgment goes against the holdings of the United States Supreme Court with respect to nonfrivolous issues. The Court in *Jones v. Barnes* recognizing that "[e]xperienced advocates since time beyond memory have emphasized the importance

Occasionally, there are simply no meritorious issues to be had on an appeal and the judicial system is not benefited by creating non-meritorious issues to inundate appellate courts.

## B. The *Wende* Procedure: A Viable Alternative

Perhaps the best balance of the appellate lawyer's duties to court and client was created by the Supreme Court of California in *People v. Wende*.<sup>97</sup> In *Wende*, the state court approved a procedure that departed significantly from *Anders*. A *Wende* brief does not contain a statement that counsel believes the appeal is frivolous, nor does counsel ask to withdraw.<sup>98</sup> Rather, he summarizes the procedural and factual history of the case, and makes citations to the record.<sup>99</sup> Counsel must also confirm that he reviewed the record, explained his opinions to his client and provided him with a copy of the brief, and explained to him that he was allowed to file a pro se brief.<sup>100</sup> Additionally, the Supreme Court of California approved the procedure by which counsel would ask the court to review the record for any arguable issues, and remain available to brief any such issues.<sup>101</sup> Unlike *Anders*, the *Wende* brief does not contain an argument on any issues.

The Supreme Court of the United States was called upon to decide if the *Wende* procedures were adequate. In *Smith v. Robbins*,<sup>102</sup> it found that they were adequate. The Court ruled that the requirements of *Anders* were prophylactic in nature,<sup>103</sup> and, therefore, "states are free to

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of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most a few key issues," held that appellate defense counsel has no constitutional duty to raise every nonfrivolous issue requested by the defendant. 463 U.S. 745, 751-52 (1983); cf. *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000) (holding that a criminal defendant enjoys no constitutional right to self-representation on appeal). When counsel is not obligated to raise all nonfrivolous issues at his client's insistence (and a defendant has no constitutional right to press such issues himself), it is difficult to see why appellate counsel should be forced to do so with regard to frivolous issues.

97. 600 P.2d 1071 (Cal. 1979).

98. *Id.* at 1075.

99. *Id.* at 1072.

100. *Id.*

101. *Id.*

102. 528 U.S. 259 (2000).

103. The Court previously stated, when ruling that *Anders* did not apply to post-conviction cases in which no right to counsel attached, that "*Anders* did not set down an independent constitutional command that all lawyers, in all proceedings, must follow these particular procedures. Rather, *Anders* established a prophylactic framework that is relevant only when, and only when, a litigant has a previously established constitutional right to counsel." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).



adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel."<sup>104</sup>

#### VI. CONCLUSION

The *Wende* procedures seem the best solution to the sometimes-conflicting duties appellate lawyers owe to the courts in which they practice and to the clients whom they represent. The *Wende* procedures add no more work for the appellate court because the court already reviews the record to determine if counsel's finding that the appeal is non-meritorious is correct. Most importantly, however, it allows the lawyer to avoid arguing against his client, and to simply argue those issues that the state appellate court finds appropriate, ensuring that the lawyer is always acting in the role of an advocate. As Justice Brennan stated, "[w]hen counsel has nothing further to say in the client's defense, he or she should say no more."<sup>105</sup>

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104. *Smith*, 528 U.S. at 265.

105. *Wisconsin ex rel. McCoy v. Wisconsin Court of Appeals*, 486 U.S. 429, 449 (1988) (Brennan, J., dissenting).