No. 98-1037

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE SMITH, WARDEN,
Petitioner

v.

LEE ROBBINS,
Respondent

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Filed April 21, 1999

QUESTION PRESENTED

Should *Anders* v. *California* be modified or overruled?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule of Court

Treatises

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE SMITH, Warden,

Petitioner,

vs.

LEE ROBBINS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

The considerable difficulties the courts and counsel have with frivolous indigent appeals, as demonstrated by the decision below, are contrary to the interests of society that CJLF was formed to protect.

---

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

SUMMARY OF FACTS AND CASE

On December 31, 1988, defendant shot and killed his former roommate. Pet. for Cert. 2. He served as his own counsel at his trial in Los Angeles County Superior Court, *id.*, at 3, and was convicted of second-degree murder and grand theft auto. *Robbins* v. *Smith*, 152 F. 3d 1062, 1064 (CA9 1998).

Defendant was appointed counsel for his appeal. *Ibid.* Appellate counsel found that there were no nonfrivolous issues to appeal. Pet. for Cert. 3. Following the procedures established in *People* v. *Wende*, 25 Cal. 3d 436, 600 P. 2d 1071 (1979), appellate counsel filed a nonmerit brief with the Court of Appeal. Pet. for Cert. 3. It contained the procedural history of the case, a statement of facts, and a request that the Court of Appeal independently review the record for appealable issues. In an attached declaration, appellate counsel averred that he had reviewed the entire record, discussed the case with trial counsel, and told defendant of his right to request counsel's removal and file his own brief in propria persona. *Ibid.* Defendant filed a brief on his own behalf. *Ibid.* The appellate court, after independent review of the record, found that appellate counsel satisfied his duties, that the issues raised by defendant were unsupported by the record, and that there were no arguable issues to appeal. *Ibid.*

After exhausting his state remedies, defendant filed a federal habeas action on February 24, 1994. *Robbins*, *supra*, 152 F. 3d, at 1064. He claimed that state appellate counsel's withdrawal violated *Anders* v. *California*, 386 U. S. 738 (1967). On October 24, 1995, the District Court granted the habeas petition, effectively requiring the California Court of Appeal to hear defendant's direct appeal. *Id.*, at 1065. The Ninth Circuit affirmed, finding that the California procedure violated *Anders* because counsel's *Wende* brief had failed to "identify any grounds that arguably supported an appeal." *Id.*, at 1067. It also upheld the District Court's conclusion that there were two nonfrivolous issues: 1) the denial of defendant's attempt to withdraw the waiver of his right to counsel; and 2) the inadequacy of the county jail's library depriving him of his right to self-representation. *Ibid.*

SUMMARY OF ARGUMENT

This Court has good reason to concern itself with wasting resources, as the judiciary is particularly vulnerable to resource limitations. Judicial decisionmaking is relatively expensive, and likely to get more expensive over time. The physical constraints upon the judiciary are particularly severe at the appellate level.

Frivolous appeals are thus a particularly important problem to attack. No legitimate interest is served by frivolous appeals. Because indigent criminal defendants have no incentive to forego frivolous appeals, this class of litigants is a singularly large source of frivolous appeals. Therefore, limiting frivolous defense appeals is a particularly fertile ground for saving scarce judicial resources.

Anders v. *California* exacerbates this problem by requiring appointed counsel confronted with a frivolous appeal to write an "impossible brief" that overburdens the courts and treats other defendants unfairly. The decision implicitly mistrusts the reliability of appointed counsel and presumes that retained counsel is willing to file anything for money, no matter how frivolous the appeal. Few attorneys are so unethical or incompetent.

The *Anders* brief imposes an impossible ethical dilemma between counsel's duty not to file frivolous claims, and the duty to act as advocate on behalf of the client. *Anders* also assumes that frivolous can be defined more precisely than reality allows. An issue either is or is not frivolous, if it might "arguably support the appeal" then it is no longer frivolous.

Anders also places too great a burden on the intermediate appellate courts by requiring them to search the record for appealable issues. Having courts act on behalf of indigent frivolous defendants in this manner creates equal protection problems, since nonindigent defendants and indigent defendants who file briefs on the merits do not get the same level of judicial scrutiny as *Anders* litigants.

Stare decisis is a rule of policy that should not prevent this Court from overruling or modifying *Anders*. There is no reliance interest in *Anders*, and it has caused considerable confusion. Given its high cost in wasted resources and the ethical dilemmas it causes, *Anders* should be abandoned.

ARGUMENT

I. Appointed appellate counsel's duties to defendant should be defined in light of the limited resources available to the criminal justice system.

Rights exist in a world governed by limited resources.

> "Scarcity is a central fact of the human condition and the starting point for economic analysis. Legal services, like other goods, are affected by scarcity. The time of lawyers, judges, and court personnel is not unlimited, and society must determine how to allocate this good." Pritchard, Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel, 34 Am. Crim. L. Rev. 1161, 1161 (1997).

This Court's decisions reflect the importance of accommodating rights to limited resources. The body of habeas corpus jurisprudence contains many references to prevent the waste of "scarce judicial resources" by limiting unnecessary litigation on habeas. See, *e.g.*, *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 7 (1992); *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991).

Habeas is not the only field in which this Court seeks to conserve scarce resources. It has strengthened the government's ability to enter and enforce plea bargains in part because these agreements allow "[j]udges and prosecutors to conserve vital and scarce resources." *Blackledge* v. *Allison*, 431 U. S. 63, 71 (1977). This Court takes a similarly practical approach to interlocutory appeals. It will not allow such appeals for the sole reason of correcting erroneous decisions, as doing so "would constitute an unjustified waste of scarce judicial resources." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 378 (1981). Another example of the need to conserve judicial resources is found in a prisoner rights case, *Sandin* v. *Conner*, 515 U. S. 472 (1995). Among the reasons the *Sandin* Court chose to abandon the broad definition of state-created liberty interests announced in *Hewitt* v. *Helms*, 459 U. S. 460 (1983), was the fact that "the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." 515 U. S., at 482.

This Court has good reason to concern itself with wasting resources. While no institution is free of the constraints posed by a world of necessarily limited resources, the judiciary is particularly vulnerable. As an institution, the judiciary comes by its decisions very expensively. The rules and formalities that give courts their evenhandedness also make them very expensive when compared to other institutions, such as the market or the political process. See N. Komesar, Imperfect Alternatives 125 (1994). Inevitably, some decisions are kept from the courts because they are too costly to litigate. *Id.*, at 125-128.

The problem of cost is likely to worsen over time. Although precise estimates of the cost of judicial services are difficult, it is likely that the judiciary suffers from "cost disease." See Peacock, Cost of Judicial Services, in The New Palsgrave Dictionary of Economics and the Law 530, 531 (P. Newman ed. 1998).

> "A well-known hypothesis . . . suggests that in the case of government provision of law and order, health and education, personal services are an integral part of output and this will limit the substitution of capital for labour. It seems inconceivable that judges trying cases or lawyers representing clients could be replaced by interacting computers which could produce justice, and in any event the quality of the service is perceived to be uniquely correlated with personal service. At the same time, the price of the labour services used in the provision of justice will depend on the value of these services in the economy as a whole. Judges and legal staff receive emoluments and status comparable with those which they would otherwise obtain as professional or corporate lawyers or in other professions where their skills and experience could be employed. It follows that as an economy grows and real wages increase, increases in costs per unit in, say, manufacturing output, will be offset by increases in productivity per head resulting from process innovations, whereas costs to secure judicial output are bound to rise, even if no extra inputs are required. If the growth in the economy is accompanied as already indicated, by an increase in the demand for the resolution of disputes and the growth in recorded crime and associated demand for

> criminal proceedings, then expenditure on judicial services, in common with other forms of government expenditure embodying personal services, must have a tendency to rise at a faster rate of growth than national expenditure." *Ibid.* (citation omitted).

In practical terms, this means that the problem of overcrowded courts is not going away. Although demand for judicial services may consistently outstrip legal productivity, society will not devote an ever larger share of the economy to the law. In the end, some disputes will not make it to the courthouse. Any effort to make the legal system less wasteful can thus reap considerable rewards both economically and as a matter of justice.

Appellate courts are a particularly critical bottleneck. The hierarchical structure of appellate courts limits their physical capacity to resolve disputes. The apex, of each jurisdiction's system, this Court and the highest court of each state, has a fixed capacity to decide cases.

> "The most obvious reform, increasing the number of judges on these high courts, does not easily or even necessarily increase the output of this court. While an increase in judges would decrease the per judge load of opinion writing, it would not decrease the time and effort necessary to reach a collective decision by this body. In fact, increasing the numbers would probably make such collective decisions more difficult and time consuming." Komesar, *supra*, at 144-145.

Increasing the size of the intermediate appellate courts is little better, as larger courts will inevitably create more conflicts that must be resolved by the Supreme Court. See *id.*, at 145. Thus "the main bottleneck [to the capacity of the judiciary]—is the appellate court system." *Id.*, at 144.

Checking frivolous appeals is one of the most efficient, least costly means for the judiciary to deal with its limited resources. A litigant who loses a frivolous claim loses nothing. See *Lewis* v. *Casey*, 518 U. S. 343, 353, n. 3 (1996). Nor does counsel have either the duty or the right to present frivolous claims. *United States* v. *Edwards*, 777 F. 2d 364, 365 (CA7 1985) (*per curiam*). Courts also have no interest in dealing with claims that never

should have been made. For every frivolous claim that is disposed of efficiently, attorney and judicial resources can be freed to deal with more worthy disputes. Discouraging frivolous appeals thus "furthers the State's interest in conserving judicial resources." See *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 81-82 (1988).

Unfortunately, the decisions providing representation for indigent defendants for their first appeal makes frivolous appeals much more likely in these cases. The constitutionally necessary subsidy of *Douglas* v. *California*, 372 U. S. 353 (1963) and the other indigent appeal cases remove any incentive for an indigent defendant to forego a frivolous appeal, making the demand to pursue even the most unworthy appeal a rational choice for the indigent defendant. See Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1167; Pengilly, Never Cry *Anders*: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 Crim. Just. J. 45, 46 (1986); C. Wolfram, Modern Legal Ethics 817 (1986). A similar problem afflicts this Court's *pro se* petitions.

> "But paupers filing *pro se* petitions are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote the end." *In re McDonald*, 489 U. S. 180, 184 (1989) (*per curiam*).

The fact that Congress and the states are effectively compelled to provide resources for defendant's first appeal does not avoid the high costs of frivolous indigent appeals. "[J]udicial fiat cannot cure scarcity; it merely disguises the symptoms of the disease." Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1162. Justice is not immune from economic realities.

> "In ethical and legal discussion, 'justice' in adjudication is sometimes spoken of as though it were an impalpable or an absolute. In operational terms, which is to say eco-

> nomic terms, it is surely not. In the doing of justice, as elsewhere, what can be obtained is limited by what can be funded. And if it is true that no amount of money can buy perfect juridical insight, it is clear enough that approximations of perfection in an organized social structure are possible only with substantial expenditure. Hence, all decisions about the measure of justice that should be accorded in the system are also decisions about public expenditure." Hazard, Rationing Justice, 8 J. L. & Econ. 1, 4 (1965).

Resources spent on indigent appeals must come from somewhere.

> "[D]ecisions about the desired level of service in the public welfare program of administered justice are economically competitive with decisions to engage in other types of programs .... Hence, administered justice is a commodity for which differential preference has to be established by comparison with other possibilities." *Ibid.*

Because each extra indigent appeal will come at the expense of some other public good such as education, health, or defense, it is unrealistic to expect states or Congress to provide indigent criminal appellants with a level of funding that will give them some "perfect justice."

The resource limits on indigent appeals places most of the burden of frivolous appeals on indigent defendants with potentially valid appeals. If counsel for indigent defendants spend too much time on frivolous appeals "the people who will suffer the most are the indigent prisoners who have been *unjustly* convicted; they will languish in prison while lawyers devote time and energy to hopeless causes on a first come-first served basis." Doherty, Wolf! Wolf!—The Ramification of Frivolous Appeals, 59 J. Crim. L., Criminology & Police Sci. 1, 2 (1968) (emphasis in original).

Frivolous appeals harm those with valid claims even after briefs are filed. Every frivolous appeal reviewed by an appellate court further delays vindication for the improperly convicted defendant. Furthermore, these unnecessary cases harm other defendants in a more insidious way. There is an unavoidable cost

to crying wolf; if counsel for indigent defendants are forced to press frivolous appeals, then counsel's credibility before the intermediate appellate courts will diminish, harming those indigent defendants with potentially meritorious claims. See *ibid*; Hermann, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev. 701, 703 (1972).

Justice Jackson noted the problem of the many bad claims driving out the few good ones in the context of habeas corpus:

> "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (opinion concurring in result).

Improperly convicted defendants are not the only victims of frivolous appeals. Some prosecutorial resources will be wasted in dealing with frivolous claims. More importantly, judicial resources spent on frivolous cases will be diverted from all appeals, including civil and nonindigent criminal cases, delaying justice for every litigant and contributing to the ever-increasing strain on the judiciary's resources.

Unfortunately, the problem with frivolous indigent criminal appeals is significant.

> "A significant amount of appellate judges' time is spent in reading two or more briefs, exchanging memoranda and perhaps writing an opinion in criminal cases which plainly lack any basis for reversal. Especially with regard to the federal appellate bench, it may fairly be said that most judges find the task at best bothersome and at worst infuriating."

Hermann, *supra*, 47 N. Y. U. L. Rev., at 702 (footnotes omitted); see also Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1168-1169 (*Anders* has "driven the courts to judicial triage" leading fully briefed appeals to get less than complete attention); Warner, *Anders* in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others', 23 Fla. St. U. L. Rev. 625, 625 (1996) (finding dealing with *Anders* briefs "[a] continuing source of frustration for the appellate judge").

The problem of frivolous appeals can be addressed by checking the indigent defendant's unconstrained interest in prosecuting all possible appeals without regard to their merit. Appointed counsel is the most logical choice to act as a gatekeeper. Unlike the client, counsel has an ethical duty to keep frivolous appeals out of the courts. See, *e.g.*, ABA Model Rules of Professional Conduct, Rule 3.1 (1992); ABA Model Code of Professional Responsibility, DR 7-102(A)(2), EC 7-4 (1983); *Anders* v. *California*, 386 U. S. 738, 744 (1967). Separating the potentially meritorious wheat from the frivolous chaff is appellate counsel's job. See *Huguley* v. *State*, 324 S. E. 2d 729, 731 (Ga. 1985).

Anders too often prevents defense counsel from fulfilling this necessary role. As *amicus* will demonstrate, this decision places unreasonable ethical burdens on counsel, needlessly deterring them from acting as the gatekeeper against frivolous claims.

II. *Anders* requires appointed counsel confronted with a frivolous appeal to write an "impossible brief," that overburdens the courts and treats other defendants unfairly.

A. The Improper Premise.

Anders v. *California*, 386 U. S. 738 (1967) seems to operate from a premise of mistrust. The holding that a letter informing the court that the appeal is frivolous is ineffective advocacy, and must be supplemented by a brief allowing the court to examine the correctness of counsel's assertion, see *id.*, at 744, "can be explained, . . . only upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted." *Id.*, at 746 (Stewart, J., dissenting). This premise is the foundation for *Anders*' unworkable solution to the problem of frivolous appeals. It creates an impossible ethical dilemma for appointed counsel, creating unnecessary work and encouraging frivolous appeals.

Although the *Anders* majority does not state this assumption explicitly, the dissent's accusation is well-founded. Under the *Anders* procedure, the Court of Appeals duplicates counsel's role

of examining the entire record for issues to appeal. See *id.*, at 744. The Janus-faced *Anders* brief filed by counsel is often either perfunctory or a brief against the client. See R. Hermann, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev. 701, 711-712 (1972). At best, the "brief referring to anything in the record that might arguably support the appeal," *Anders*, 386 U. S., at 744, requires counsel to point out potential flaws in his or her analysis to the court, which shows little confidence in appointed counsel's abilities.

Anders also betrays a low opinion of retained counsel. The decision is based on giving indigent and nonindigent defendants essentially equal access to the courts. See *id.*, at 745; *McCoy* v. *Court of Appeals of Wisconsin*, 486 U. S. 429, 438 (1988). Thus, "[i]n imposing this burden only upon attorneys representing 'penniless defendants' the court assumes, first, that anyone 'able to afford the retention of private counsel' has the right and opportunity to present any appeal, no matter how meritless it may be." Pengilly, Never Cry *Anders*: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 Crim. Just. J. 45, 49 (1986). From this follows *Anders*' belief that "private lawyers will undertake the appeal of any criminal conviction, even a frivolous one so long as they are compensated." Doherty, Wolf! Wolf!—The Ramifications of Frivolous Appeals, 59 J. Crim. L., Criminology & Police Sci. 1, 3 (1968). *Anders* thus defines the standard of practice for retained counsel at this lowest, most mercenary common denominator:

> "Since, speaking realistically, a criminal defendant who has money will always be able to persuade some lawyer to prosecute an appeal for him, parity—or, again speaking realistically, an approximation to parity—between criminal defendants who do and those who do not have monetary means requires that the appointed counsel who wants to withdraw not leave his client wholly in the lurch, which is the practical consequence of the 'no merit' letter. Instead he must file a brief that will advise the court of what points he might have raised and why he thinks they would have been frivolous." *United States* v. *Edwards*, 777 F. 2d 364, 365 (CA7 1985) (*per curiam*).

This characterization of counsel that is the heart of *Anders* is corrosive and unfair. While some lawyers may file anything for money, *ethical* lawyers will not file a frivolous appeal regardless of the monetary consequences. See, *e.g.*, ABA Model Rules of Professional Conduct, Rule 3.1 (1992); Doherty, *supra*, at 3. The overwhelming majority of lawyers do not abandon their profession responsibilities. See *United States* v. *MacCollom*, 426 U. S. 317, 326 (1976) (plurality).

Allowing constitutional standards to be defined by such unethical conduct is corrosive to the legal profession. Society and

> "the legal profession has . . . been well served by a code of ethics which imposes certain standards beyond those prevailing in the market place and by a duty to place professional responsibility above pecuniary gain." *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 677 (1985) (O'Connor, J., concurring and dissenting).

By virtue of its position at the apex of the federal judiciary, this Court is a leader of the legal profession. *Anders* is a poor use of this authority. Attorneys "occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts." *In re Griffiths*, 413 U. S. 717, 729 (1973). They are "leaders in government throughout the history of our country." *Ibid.*

> "Despite the almost continuous criticism leveled at the legal profession, he, too, is an influence in legislation, in the community, and in the role-model figure that the professional person enjoys." *Ambach* v. *Norwick*, 441 U. S. 68, 89 (1979) (Blackmun, J., dissenting).

This Court should both presume and expect a higher standard than found in *Anders*.

In *McCoy*, *supra*, this Court devised a more nuanced view of *Anders*, finding that private counsel might give an *Anders*-type brief to the client. See 486 U. S., at 439, n. 12. Although more benign than the original spirit of *Anders*, it still paints an inaccurate picture of counsel's role. *McCoy* repeats *Anders* original mistake, basing constitutional protections on what counsel *could* do as opposed to what an ethical attorney *should* do. The constitution does not mandate absolute equality, but rather freedom from unreasoned distinctions. See *Ross* v. *Moffitt*, 417 U. S. 600, 612 (1974). While retained counsel may give a client with a frivolous appeal an *Anders* brief, it is, at best, a rarity. A proper *Anders* brief can involve tremendous work. By one estimate it requires as much work as ten briefs on the merits. See Pengilly, *supra*, 9 Crim. Just. J., at 62-63. The paying client will rarely be as capable of appreciating it as the appellate judge under the *Anders* procedure. In almost any circumstance, giving an *Anders* brief to a paying client would be a waste of the client's money.

> "Nor does the Constitution require that an indigent be furnished with every possible legal tool, no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind." *MacCollom*, *supra*, 426 U. S., at 317 (Blackmun, J., concurring in the judgment).

Unfortunately, *Anders*' harm does not stop with the reputation of counsel. *Anders*' basic mistrust places burdens on counsel and courts that are the greatest cost of this decision.

B. The Impossible Dilemma.

Anders' central difficulty stems from the type of brief it requires counsel to write before withdrawing: "a brief referring to anything in the record that might arguably support an appeal." *Anders*, *supra*, 386 U. S., at 744. The problem with this seemingly innocuous requirement is that it is effectively impossible for an ethical attorney to write.

A brief is "[a] written statement prepared by counsel arguing a case in court. It contains a summary of the facts of the case, the pertinent laws and an argument of how the law applies to the facts *supporting counsel's position.*" Black's Law Dictionary 192 (6th ed. 1990) (emphasis added). Black's definition nicely raises the first problem with the "*Anders*" brief: what is appointed counsel's position in the brief when he or she refers to items that "may arguably support an appeal"?

If counsel believes that the highlighted issues are not frivolous then the motion to withdraw is deceptive and thus unethical. See

ABA Model Rules of Professional Conduct, Rule 3.3 (1992) ("MRPC") (candor to tribunal). The only other realistic reading of an *Anders* brief is that counsel is asserting that these issues do not have merit, an interpretation supported by counsel's claim that the appeal is frivolous. Although *Anders* looks for issues "that might arguably support the appeal," the fact that counsel seeks to withdraw because there are no nonfrivolous issues cannot hide his or her opinion of the client's claims.

Identifying specific issues as insufficient to support an appeal typically is considered improper behavior of a professional charged to act as "an active advocate in behalf of his client as opposed to that of *amicus curiae*." *Anders*, *supra*, 386 U. S., at 744.

> "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required *to vindicate a client's cause or endeavor*." MRPC, Rule 1.3, comment (1) (emphasis added).

"[A] defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the *undivided* interests of his client.' " *Polk County* v. *Dodson*, 454 U. S. 312, 318-319 (1981) (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)).

McCoy v. *Court of Appeals of Wisconsin*, 486 U. S. 429 (1988) illustrates the type of representation *Anders* encourages. A Wisconsin rule required an *Anders* brief "also to include 'a discussion of why the issue lacks merit.' " *Id.*, at 430. Appointed counsel who sought to withdraw naturally refused to argue against his client. See *id.*, at 432, and n. 2. This Court upheld the rule under *Anders*. See *id.*, at 441-442. The *McCoy* Court was sympathetic to counsel's predicament.

> "Appointed counsel, however, is presented with a dilemma because withdrawal is not possible without leave of court, and advising the court of counsel's opinion that the appeal is frivolous would appear to conflict with the advocate's duty to the client." *Id.*, at 437.

McCoy concluded that the *Anders* requirement that the court be informed of counsel's conclusion resolved the dilemma. See *ibid.*

Practitioners, commentators, and judges have found the *Anders* resolution wanting. As one former public defender noted:

> "In short, *Anders* first requires counsel to make an impossible distinction between the 'meritless' and the 'wholly frivolous.' Having done so, counsel is then required to perform one or the other of two tasks, both of which are impossible and unethical: either argue the merits of claims which are meritless, or explain to the court why those claims are meritless without taking a position adverse to the client's interest." Pengilly, *supra*, 9 Crim. Just. J., at 52 (footnote omitted).

Anders places an ethical counsel confronted with a frivolous appeal between the Scylla of the duty not to present frivolous claims and the Charybdis of counsel's duty to act as an advocate on behalf of the client's interest.

> "I think it is clear, however, that an attorney confronted with the *Anders* situation has to do something that the Code of Professional Responsibility describes as unethical; the only choice is as to which canon he or she prefers to violate." *Id.*, at 64.

Other practitioners share this experience. A New York Legal Aid attorney described how many counsel dealt with the dilemma:

> "Some have written cursory and conclusory briefs which at least cannot be said to be advocacy against one's client, even though they are of little aid to the client or the court in reviewing arguable errors. Others have written briefs detailing at length both the facts and the legal issues and authorities. This, although most helpful to the court, usually is in effect a brief against the client." Hermann, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev. 701, 711-712 (1972) (footnote omitted).

As the author noted, "[h]owever highminded may have been the Court's intentions [in *Anders*] . . . , in practice they cannot be fulfilled." *Id.*, at 711. A career public defender observed, "Any client is entitled to the very best that a lawyer has to offer; his skill, his knowledge, his experience, and his diligence. But no one

has the right to make an intellectual prostitute out of a lawyer." Doherty, Wolf! Wolf!—The Ramifications of Frivolous Appeals, 59 J. Crim. L., Criminology & Police Sci. 1, 3 (1968).

Anders' ethical dilemma has not escaped the attention of commentators. One commentator noted that while the procedure approved in *McCoy* "does reduce the risk that incompetent or lazy counsel will file a pro forma *Anders* brief, it intensifies the *Anders* anomaly when counsel is conscientious." 1 G. Hazard & W. Hodes, The Law of Lawyering §3.1:304, p. 568 (2d ed. 1996 Supp.). As another authority on professional responsibility pointed out, "While the court was well-meaning in developing the *Anders* procedure, it has proved to promote what amounts to an inherent conflict between the attorney and client . . . ." J. Hall, Professional Responsibility of the Criminal Lawyer 681-682 (2d ed. 1996); see also C. Wolfram, Modern Legal Ethics 817 (1986) ("The *Anders* directives are confusing, if not contradictory.").

Anders' ethical problem has caused a reaction in some state courts.

> "The major difficulty with the *Anders* procedure is its requirement that an attorney assume contradictory roles if he wishes to withdraw on the grounds that the appeal lacks merit. . . . This Janus-faced approach . . . runs the risk of alienating and frustrating his client, who can scarcely be blamed for feeling abandoned and betrayed . . . ." *Commonwealth* v. *Moffett*, 418 N. E. 2d 585, 590 (Mass. 1981) (footnote omitted).

The sense of betrayal fostered by *Anders* will make for a very strained counsel-client relationship where the court refuses to grant the *Anders* motion. "In any case where counsel has unsuccessfully sought to withdraw on the basis that the appeal is frivolous and without merit he can find himself in a completely intolerable situation if required to thereafter pursue an appeal." *State* v. *McKenney*, 568 P. 2d 1213, 1214 (Idaho 1977) (*per curiam*).

The *Anders* Court wants appointed counsel to act like advocates as opposed to *amicus curiae* when attempting to withdraw from an appeal. See *Anders*, *supra*, 386 U. S., at 744. "This is a nonsequitor, however, for if it is assumed that the appeal

was in fact without merit, then no lawyer would have a license to press it forward, as *amicus* or otherwise." 1 Hazard & Hodes, *supra*, The Law of Lawyering, at 567. If anything, a conscientious *Anders* counsel acts more as *amicus* than advocate. The brief in *McCoy* that spelled out the weakness of the client's position is the nonpartisan advocacy one could expect from *amicus*. In any situation outside of *Anders*, however, such a brief from an advocate for a client would be malpractice and would subject counsel to discipline.

Just as this Court cannot use judicial fiat to avoid the economic realities, see Part I, *supra*, *Anders* cannot avoid its ethical problem. Fairness to the countless diligent and ethical appointed appellate counsel and their clients requires this Court to address the ethical dilemma posed by *Anders*.

C. The Impossible Distinction.

Anders' problems do not end with its ethical dilemma. It also requires appointed counsel to split a hair too fine for even skilled, conscientious attorneys. The *Anders* Court, in its effort to protect indigent defendants from incompetent counsel, presumes that "frivolous" is capable of being defined much more precisely than reality allows.

Anders requires the brief accompanying the motion to withdraw to mention "anything in the record that might arguably support the appeal." 386 U. S., at 744. This cannot mean every conceivable issue; the universe of frivolous issues is vast and may be unlimited. This interpretation is supported by *Anders*' qualifying phrase "might arguably." These issues must thus come from a special subset of the set of all frivolous appeals; they are frivolous, but sufficiently less frivolous than other issues to warrant bringing to the attention of the Court. This is an unfair and impossibly impractical distinction.

> "In effect, then, the Court must assume three categories of issues: (1) issues that are wholly frivolous and that do not have to be considered further by either counsel or court; (2) issues that are not substantial enough to warrant concluding that the appeal is anything but wholly frivolous but that nonetheless for, presumably, some other reason warrant discussion in an *Anders* brief accompany-

ing a motion to withdraw; and (3) issues that arguably support a nonfrivolous appeal and whose presence in the record triggers an obligation on the part of the appellate court to appoint new counsel to argue those points fully.

"Such hair-splitting among possible arguments hardly describes an operable test." Wolfram, *supra*, Modern Legal Ethics, at 817-818.

"Frivolous" cannot be defined with great precision. "Frivolousness, like madness and obscenity, is more readily recognized than cogently defined." Hermann, *supra*, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev., at 705 (footnote omitted). This Court has never given any precise definition of "frivolous." *Anders* tosses around concepts such as "wholly frivolous," "arguably support the appeal," and "arguable on the merits" without giving any further definition to these open-ended terms. See *Anders*, 386 U. S., at 744. The closest this Court has come to fleshing out "frivolous" came in *McCoy* v. *Court of Appeals of Wisconsin*, 486 U. S. 426 (1988).

"The terms 'wholly frivolous' and 'without merit' are often used interchangeably in the *Anders*-brief context. Whatever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact." *Id.*, at 438-439, n. 10.

This is hardly encouraging to an appointed counsel attempting to split *Anders*' hairs. The reality is that every conclusion that an appeal is frivolous must be taken from the context of that particular case. "Thus the 'wholly frivolous' concept is not defined by abstract standards, but rather in terms of counsel's determination after a conscientious consideration of the record." *Nickols* v. *Gagnon*, 454 F. 2d 467, 471 (CA7 1971) (Stevens, J.). Without the guidance of bright-lines or clear definitions, counsel's task is unduly burdensome, if not impossible.

Anders' imprecision will also place undue burdens on the counsel who feels that there are not even any potentially arguable issues. Briefing an unquestionably frivolous issue would facially comply with *Anders* at the risk of concealing "a substantial

problem in a record . . . ." *Id.*, at 472. Yet a brief containing no arguable issues runs a substantial risk of being labeled as not complying with *Anders*.

Anders' unguided distinction between the merely frivolous and the frivolous, but potentially arguable, reinforces the two-faced nature of this brief.

"As a practical matter, however, the brief required in order to withdraw will be nearly impossible to write. Counsel must explain why her client's appeal is frivolous, while simultaneously pointing to all errors in the record mandating reversal of her client's conviction." Pritchard, Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel, 34 Am. Crim. L. Rev. 1161, 1166 (1997).

There is a further problem with *Anders*' requirement that counsel point out some potentially arguable issues.

"As the [*Anders*] dissenters rightly pointed out (and as frustrated appellate counsel have learned over the years) if there is an argument of that quality revealed in the record then the appeal is by definition not frivolous. *Anders* briefs therefore necessarily entail legal submissions that counsel regards as frivolous." 1 Hazard & Hodes, *supra*, The Law of Lawyering §3.1:304, at 567 (2d ed. 1996 Supp.).

Confronted with an impossible distinction, and the unpleasant task of satisfying the *Anders* "ceremony," see Wolfram, *supra*, at 817, many lawyers will simply refuse to file such briefs and instead file frivolous appeals. See Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1166-1167; Hermann, *supra*, 47 N. Y. U. L. Rev., at 715-716. In this context, a decision to file a frivolous appeal is an unfortunately rational decision to avoid *Anders*.

D. The Unfair Burden.

Anders' distrust of appointed counsel leads it to transfer the responsibility of winnowing frivolous appeals from counsel to the appellate courts. Placing this decision in the hands of the courts

burdens already overburdened institutions, and unfairly advances the interests of the least deserving litigants.

Under *Anders*, before an appellate court may grant appointed counsel's motion to withdraw, it must "decide whether the case is wholly frivolous" only "after a full examination of all the proceedings." *Anders*, 386 U. S., at 744. Few duties, if any, can be less appealing to the intermediate appellate courts than searching the entire record to find the rare nonfrivolous needle in a haystack of frivolous claims. Cf. *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring). Just as the conscientious *Anders* brief can require the work of ten merit briefs, see Pengilly, *supra*, 9 Crim. Just. J., at 62-63, the detailed review of the entire record required by *Anders* places a disproportionate share of the court's scarce resources on presumptively frivolous appeals.

It is not the standard practice of the appellate courts to comb the record for all possible issues and raise unmentioned issues for argument on the merits. An issue defendant failed to raise on the first appeal in state court may be procedurally barred under federal habeas corpus. See *Murray* v. *Carrier*, 477 U. S. 478, 490-491 (1986). It is not typical for courts to address unraised errors in criminal appeals, and any attempt to do so would further burden them. See Warner, *supra*, 23 Fla. St. U. L. Rev., at 661.

This presents an equal protection problem that some consider to be the greatest difficulty posed by *Anders*. The detailed court review and the *sua sponte* raising of arguable issues gives *Anders* defendants greater privileges than either nonindigent defendants or the indigent defendants whose counsel submit a brief on the merits. See *id.*, at 641-642. As *Anders* is substantially based on treating the indigent fairly in comparison to the nonindigent defendant, see, *e.g.*, *Anders*, *supra*, 386 U. S., at 457; *McCoy*, *supra*, 486 U. S., at 438, this failure of *Anders* is particularly disturbing. See Warner, *supra*, 23 Fla. St. U. L. Rev., at 662.

The injustice of this inequality is compounded by the uniquely undeserving recipients of *Anders*' largesse. *Anders* protects a class of litigants who are overwhelmingly validly convicted of crimes. Reversals after a court rejects an *Anders* motion occur "[e]xceedingly rarely . . . ." Wolfram, *supra*, at 817, n. 35. Instead of minimizing resources on this undeserving many, *Anders* wastes judicial and attorney time on them at the expense of the

deserving few. Indeed, some state courts have found hearing frivolous appeals on the merits to be a more efficient use of their resources than utilizing the cumbersome *Anders* procedure. See, *e.g.*, *State* v. *McKenney*, 568 P. 2d 1213, 1214 (Idaho 1977) (*per curiam*); *Commonwealth* v. *Moffett*, 418 N. E. 2d 585, 590-591 (Mass. 1981).

Under *Anders* the only party who does not bear the cost of frivolous appeals is the indigent defendant who wishes to press the frivolous claims. This creates an economic "tragedy of the commons" where the frivolous indigent defendants consume more resources than their cause warrants. See Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1167-1168. Disposing of frivolous claims is important; unfortunately *Anders* transferred responsibility to the wrong actor. It is the attorney's role to act as gatekeeper against frivolous litigation; responsibility for identifying and disposing of such claims should be left to counsel, who are better equipped to fulfill this function than the courts. *Huguley* v. *State*, 324 S. E. 2d 729, 731 (Ga. 1985).

III. *Anders* should be overruled or substantially modified.

When a decision is as heavily criticized and as harmful as *Anders* v. *California*, 386 U. S. 738 (1967) a discussion of its continued validity under the doctrine of *stare decisis* is necessary. Although *Anders* has had a substantial impact upon criminal procedure, and has existed relatively undisturbed for over 20 years, it should not be allowed to stand. The decision generates no reliance interest, it confuses the courts, and it causes considerable harm to society and the indigent defendants it is meant to protect. Any protections for indigent defendants with potentially frivolous claims deserve a sounder, less expensive foundation.

While *stare decisis* is an important doctrine serving a useful social policy, it does not have the same force as a statute or the Constitution. The judiciary's role in our society is as an interpreter of laws. See The Federalist No. 78, at 467 (A. Hamilton) (Rossiter ed. 1961). Therefore, *stare decisis*, while respected, cannot deter this or any other court from its ultimate duty of interpreting the law. *Stare decisis* is the law's servant, not its master.

This Court has recognized that the doctrine does not have the force of a rule of law and may be overridden when appropriate. "Whether it [*stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court . . . ." *Hertz* v. *Woodman*, 218 U. S. 205, 212 (1910). While it will be followed in most cases, this is simply "a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' " *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). Therefore, this Court has "treated *stare decisis* as a 'principle of policy,' *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), and not as an 'inexorable command.' " *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 63 (1996) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991)).

Perhaps the most important factor in limiting *stare decisis* is the ability of other bodies to overturn this Court's decisions. This Court is particularly reluctant to overturn its own statutory interpretations, because Congress "remains free to alter what [this Court has] done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989).

Constitutional cases are another matter. Because " 'correction through legislative action is practically impossible,' " constitutional cases are more prone to re-examination than statutory cases, *Payne* v. *Tennessee*, *supra*, 501 U. S., at 828 (quoting *Burnet*, *supra*, 285 U. S., at 407 (Brandeis, J., dissenting)). Given the necessary tension between our democratic ideals and judicial review under the Constitution, see Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 695-696 (1976), this Court must be ready to reexamine its constitutional decisions in order to maintain the democratic nature of our society.

Refusing to reexamine an incorrect opinion that the public cannot overturn is corrosive to this Court's public respect. Thus the decision to uphold the incorrectly decided line of cases under *Lochner* v. *New York*, 198 U. S. 45 (1905) until 1937 helped to damage this Court as a public institution. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 861-862 (1992). "Of course, it is embarrassing to confess a blunder; it may

prove even more embarrassing to adhere to it." *United States* v. *Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

This Court is also more willing to reexamine decisions that have developed contradictions over time. Thus, this Court will not allow *stare decisis* to preserve inconsistent or difficult to administer decisions. See *Patterson*, *supra*, 491 U. S., at 173. Similarly, if the conditions that motivated a decision change, then there is good reason to overrule the prior decision. See *Casey*, 505 U. S., at 855, 862.

The fact that *stare decisis* is not a " 'mechanical rule' " is demonstrated by the hierarchy within the doctrine. While some decisions are virtually etched in stone, others warrant more flexibility. For those cases less worthy of *stare decisis*, " 'the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' " *United States* v. *Scott*, 437 U. S. 82, 101 (1978) (quoting *Burnet*, *supra*, 285 U. S., at 408 (Brandeis, J., dissenting)).

The most important consideration when examining the *stare decisis* value of a decision is the public's reliance interest in that precedent. *Stare decisis* benefits society and legal institutions "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of judicial process." *Payne*, *supra*, 501 U. S., at 827. Where these interests are greater, *stare decisis* considerations are correspondingly more important. Thus, "*stare decisis* concerns are at their acme in cases involving property and contract rights." *State Oil Co.* v. *Kahn*, 522 U. S. 3, 20 (1997); *Payne*, *supra*, 501 U. S., at 828.

There is no reliance interest in *Anders*. Reliance is at its weakest in cases involving "procedural and evidentiary rules." *Payne*, *supra*, 501 U. S., at 828. *Anders*' particular lack of reliance interest can be seen by examining the analogous field of retroactive application of statutes.

The retroactive application of statutes is generally disfavored. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 268 (1994). However, when the statutory change effects a rule of procedure, then the change generally may be applied to a pending case

because "they regulate secondary rather than primary conduct." *Id.*, at 275. "Primary conduct" is the conduct of people in their ordinary course of life. In *Landgraf*, this was "the discriminatory conduct of respondent's agent . . . ." *Id.*, at 283. In the present case, this would be Robbins' car theft and the killing of his former roommate.

The "secondary conduct" is the adjudication, in this case the defendant's trial. Decisions regarding trial procedures, such as evidence to be heard at sentencing, thus do not invoke the reliance interest warranting *stare decisis* protection. See *Payne*, *supra*, 501 U. S., at 828. The *Anders* procedure is even further removed from defendant's conduct. It is a "prophylactic framework," see *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987), that regulates appellate procedure, which is so far removed from defendant's initial conduct it could be deemed "tertiary conduct." No one regulates their affairs in reliance on *Anders*' rule of appellate procedure.

Another important consideration in deciding whether to uphold a decision is how well the precedent guides those who must apply it. A precedent that proves to be confusing and difficult to apply deserves much less *stare decisis* protection. See *United States* v. *Dixon*, 509 U. S. 688, 712 (1993). "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' " *Payne*, *supra*, 501 U. S., at 827 (quoting *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944)).

Anders' intrinsic ethical conflict and the considerable difficulty with finding possibly arguable, but still frivolous issues, makes a brief comporting with the literal rule and spirit of *Anders* practically impossible to write for conscientious, ethical attorney. See *supra*, at 13-19; see Pengilly, Never Cry *Anders*: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Appeal, 9 Crim. Just. J. 45, 52 (1986); Pritchard, Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Counsel, 34 Am. Crim. L. Rev. 1161, 1166 (1997). *Anders* left key terms such as "wholly frivolous" and "arguably support the appeal" undefined, a failing this Court has never remedied. See *supra*, at 18. It is unfortunately too easy to sympathize with the complaint of one attorney that "[a]fter reading [*Anders*] carefully, however, I

still had no idea what was expected of me or any other appointed attorney in a similar position." Pengilly, *supra*, 9 Crim. Just. J., at 47. As one treatise somewhat undiplomatically put it: "such a document, known as an *Anders* brief, is an anomaly, and demonstrates the Court's isolation from the realities of practice." 1 G. Hazard & W. Hodes, The Law of Lawyering §3:1:304, p. 567 (2d ed. 1996 Supp.)

Anders is no easier on the courts that must administer it. A Florida appellate judge, in her survey of the courts implementation of *Anders*, noted that dealing with *Anders* is "[a] continuing source of frustration for the appellate judge . . . ." Warner, *Anders* in the Fifty States: Some Appellants' Equal Protection is More Equal than Others', 23 Fla. St. U. L. Rev. 625, 625 (1996). *Anders*' lack of clarity is reflected in the many different approaches courts take to implementing the decision.

"Ten states have rejected the *Anders* procedure." *Id.*, at 642. The judicial abandonments of *Anders* have invoked various reasons and applied different means to avoid this decision. The Idaho Supreme Court simply refused to allow counsel to withdraw from frivolous appeals, finding that such appeals can be disposed of more fairly and efficiently through the traditional briefing process than under *Anders*. See *State* v. *McKenney*, 568 P. 2d 1213, 1214 (1977) (*per curiam*). The North Dakota Supreme Court found *Anders* violated state constitutional law depriving defendant of his state right to appeal. See *State* v. *Lewis*, 291 N. W. 2d 735, 738 (1980). Its solution was to appoint new counsel whenever original counsel claimed the appeal was frivolous. *Ibid.* Even though this might force some counsel to file briefs that they believed frivolous, this consequence was acceptable due to the substantial court time saved by abandoning *Anders*. See *ibid.* Unfortunately, the Court also concluded that it would still impose sanctions for prosecuting a frivolous appeal. *Id.*, at 738-739.

The Massachusetts Supreme Court effectively abandoned *Anders* in *Commonwealth* v. *Moffett*, 418 N. E. 2d 585 (1981). The Court's decision was based on both the "Janus-faced approach" of *Anders* briefs, and the administrative problems of dealing with *Anders*. See *id.*, at 590. If counsel finds it "absolutely necessary" to be disassociated from frivolous arguments in

the brief, the court allowed counsel to indicate this in a preface to the brief, while requiring this brief to be served on the client. *Id.*, at 591-592.

Perhaps the most thorough examination of *Anders* came from another court that withdrew from the decision, the Oregon Supreme Court. In *State* v. *Balfour*, 814 P. 2d 1069 (1991), the Oregon high court reasoned that after *Penson* v. *Ohio*, 488 U. S. 75 (1988), *Anders* was not a mere set of guidelines, but instead "a stringent benchmark against which to gauge state procedures." *Balfour*, 814 P. 2d, at 1076. The *Balfour* Court nonetheless reaffirmed its preeminence as the arbiter of legal ethics within the state except when such practices implicated federal constitutional rights. *Id.*, at 1078. Therefore, it rejected *Anders* as the only permissible solution to the problem of frivolous appeals by indigent defendants. *Ibid.* By preventing counsel from withdrawing, the constitutional mandate for *Anders* was gone; *Anders* only applied to motions to withdraw. *Id.*, at 1079. This allowed counsel to avoid the unethical requirement of having to argue frivolous issues. Counsel would simply file a statement of the facts and jurisdiction of the court. *Id.*, at 1080. If the defendant desired to raise issues, counsel would assist in preparing them, but would not have to sign that part of the brief, avoiding any ethical problem with advancing frivolous issues. *Ibid.* This convoluted brief would thus resolve *Anders*' conflict between advocacy and the prohibition against frivolous appeals. See *id.*, at 1081.

Georgia, Mississippi, and New Hampshire have also abandoned *Anders* in decisions. See *Huguley* v. *State*, 324 S. E. 2d 729, 731 (Ga. 1985); *Killingsworth* v. *State*, 490 So. 2d 849, 851 (Miss. 1986) (en banc); *State* v. *Cigic*, 639 A. 2d 251, 254 (N.H. 1994). Other courts have abandoned *Anders* informally. These states include: Hawaii, Kansas, Maryland, New Jersey, Alaska, and Nebraska. See *Warner*, *supra*, 23 Fla. St. U. L. Rev., at 651.

There is little consistency among the jurisdictions that attempt to apply *Anders*. California's interpretation, *People* v. *Wende*, 25 Cal. 3d 436, 600 P. 2d 1071 (1979), is perhaps the closest to literal compliance with *Anders*. See Pengilly, *supra*, 9 Crim. Just. J., at 57-58. The California Supreme Court noted that under this procedure, counsel could obtain greater review for the client than when counsel raised specific issues in a brief on the merits. See

Wende, 25 Cal. 3d, at 1078, 600 P. 2d, at 1075. The Court felt confident that attorneys would not shirk their professional responsibility by filing false *Anders* briefs, *ibid.*, showing more respect for the profession than the *Anders* majority.

Following this Court's example in *Anders*, the California Supreme Court provides little detail as to what the withdrawal brief should contain, other than "a statement of the facts and the applicable law . . . ." See *People* v. *Feggans*, 67 Cal. 2d 444, 447, 432 P. 2d 21, 23 (1967); *Wende*, *supra*, 25 Cal. 3d, at 440, 600 P. 2d, at 1073. Other states, however, are more willing to inform counsel what the brief should obtain. Arkansas provides particularly detailed guidance, requiring that 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 a meritorious ground for reversal. The abstract section of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the trial court." Rules of Arkansas Supreme Court and Court of Appeals, Rule 4-3(j)(1).

This level of detail is not required of briefs on the merits, and probably deters the filing of *Anders* briefs. See Warner, *supra*, 23 Fla. St. U. L. Rev., at 653, n. 223. A somewhat less detailed, but still explicit regulation was upheld by this Court in *McCoy* v. *Court of Appeals of Wisconsin*, 486 U. S. 429, 430 (1988). Other states are much less focused, allowing *Anders* to be governed by local rules of court, see Warner, *supra*, 23 Fla. St. U. L. Rev., at 654, n. 225.

One consequence of the confusion surrounding *Anders* is a considerable variation in how courts review *Anders* motions. The Warner survey of *Anders* found that:

> "Fourteen courts, or twenty-one percent of those responding, indicated that they do not comb the record to point out arguable appellate issues. Others reported that they point out only issues constituting clear error, not merely issues of arguable merit. When unaddressed issues are found, the majority of courts simply order rebriefing by

> appointed counsel. However, a substantial number of courts order the appointment of new counsel to file new briefs on this occasion. And, in what appears to be a practice contrary to the holding of *Penson* v. *Ohio*, some courts address the issues sua sponte without any rebriefing. When issues of arguable merit are found by the court in its review, whether to appoint new counsel or to allow rebriefing by withdrawing counsel also varies among the districts within some states." *Id.*, at 656.

Anders is a mess. The socially useful experimentation of federalism is one thing; the widespread repudiation and inconsistent application of *Anders*' vague and inconsistent mandates is another. Something must be done about *Anders*, and *stare decisis* should not stand in the way.

Ideally, *Anders* should simply be overruled. It wastes scarce judicial resources on behalf of the least deserving litigants at the expense of indigent defendants with valid claims. It is premised upon a degrading appraisal of the appointed bar and a cynical appraisal of retained counsel. By virtue of its unsolvable ethical dilemma and logically untenable distinctions, *Anders* requires a brief from counsel that is as impossible to write as it is degrading. All of these problems limit judicial efforts to free up its scarcest resources, the appellate courts.

Overruling *Anders* will not leave indigent defendants without recourse if appointed counsel improperly withdraws. A claim for ineffective assistance of appellate counsel would still be available to appellants who are actually prejudiced. See *Evitts* v. *Lucey*, 469 U. S. 387, 397-398 (1985). "The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremediated manifest injustice." *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). While such relief may not be easy to obtain, appeals believed frivolous very rarely contain reversible issues. See *supra*, at 21. Allowing counsel to act as gatekeeper would free resources to allow other defendants with briefable issues to receive justice.

Overruling *Anders* does not abandon the indigent defendant whose counsel seeks to withdraw. Some procedure should guide the court's discretion to allow counsel to withdraw, but it should

be less cumbersome, divisive, and suspicious than *Anders*. Counsel should not be required to submit the impossible *Anders* brief, but may instead write a letter like the one accepted by the California Court of Appeal in *Anders*. The letter should state that there is no merit to the appeal, that counsel came to this conclusion after studying the record, and that counsel informed defendant of this conclusion. See *Anders* v. *California*, 386 U. S. 738, 739-740 (1960). Defendant should receive a copy of this letter, and should have the option of filing a *pro se* brief, or making a request to the court to find substitute counsel. The request may include any potentially appealable issues defendant wishes to bring to the court's attention. The court may, but does not have to, grant defendant's request for new counsel. Courts would be free to develop more stringent policies, or even to forbid counsel from withdrawing from frivolous appeals.

This procedure would be efficient, by avoiding *Anders*' wasteful duplication of resources. It would also be easier for counsel than writing the impossible *Anders* brief, while still protecting defendant. Although the protection is less than that found in *Anders*, the interests *Anders* purports to protect deserve less effort than that decision requires. Attorneys can be trusted to act professionally when withdrawing from cases. An erroneous withdrawal that results in the undeserved affirmance of a conviction is exceedingly rare. See *supra*, at 21. The harm to society and defendants from *Anders*' wasteful procedure is greater and more certain. In the end, everyone benefits by abandoning *Anders*, for a more trusting, less cumbersome procedure.

If this Court refuses to overrule or modify *Anders*, it should nonetheless "decline to go beyond it, by even a fraction of an inch." *Silverman* v. *United States*, 365 U. S. 505, 512 (1961). The Ninth Circuit's decision to void California's *Wende* procedure is such an improper extension of *Anders*. A wrong rule is necessarily a "new rule," not dictated by precedent. Cf. *Conn* v. *Gabbert*, 526 U. S. ___ (No. 97-1802, April 5, 1999) (slip op., at 7) (holding the nonexistence of a right "pretermit[s] the question of whether such a right was 'clearly established' as of a given day"). The Ninth Circuit's decision was thus at least barred under *Teague* v. *Lane*, 489 U. S. 288 (1989).

"Justice, like other goods, is scarce." Pritchard, *supra*, 34 Am. Crim. L. Rev., at 1191. *Anders* has created an unworkable standard in pursuit of an unnecessary goal, "squandering judicial resources with little offsetting benefit to anyone." *Sandin* v. *Conner*, 515 U. S. 472, 482 (1995). This Court should trust courts and counsel to find the best way of maximizing justice with their necessarily limited resources.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

April, 1999

Respectfully submitted,

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record