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An Open Letter to the Ohio Supreme Court: Setting a Uniform Standard on *Anders* Briefs

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AN OPEN LETTER TO THE OHIO SUPREME COURT: SETTING A UNIFORM STANDARD ON *ANDERS* BRIEFS

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ABSTRACT

Attorneys are faced with an ethical dilemma when they represent indigent defendants who wish to appeal a criminal sentence, but that appeal would be frivolous. In 1967, the United States Supreme Court, in *Anders v. California*, introduced a procedure protecting the rights of indigent defendants that balanced the ethical concerns of an attorney forced to file a frivolous appeal. In 2000, the Court in *Smith v. Robbins*, held that the states can set their own procedure for the aforementioned ethical dilemma, so long as it protects the rights of indigent defendants in compliance with the Fourteenth Amendment. This has led many states to reject, follow, or modify the holding in *Anders v. California*. As of 2020, the Supreme Court of Ohio has yet to address whether it will follow *Anders*. Because of this, the twelve Ohio Appellate districts are left without adequate guidance, resulting in a district split where some districts follow *Anders* and others do not. Consequently, indigent defendants are receiving vastly different treatment on appeal throughout the state. The Ohio Supreme Court needs to address *Anders* to set a uniform procedure throughout the state. When it does, the Court should find that—with a few alterations—*Anders v. California* is a sufficient procedure to handle frivolous appeals raised by indigent defendants.

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I. INTRODUCTION

In Ohio, "a lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous."[1] A lawyer must also "act with commitment and dedication to the interest of the client."[2] Ohio law grants criminal defendants a statutory right to appeal their criminal convictions.[3] A conflict can arise when a lawyer is appointed to represent an indigent defendant on appeal and there is nothing of merit to appeal.[4] Thus, under the Ohio Rules of Professional Conduct, that lawyer has a duty to not only pursue the appeal because of the client's right to appeal, but also refrain from filing that appeal because it would be wholly frivolous.[5]

The United States Supreme Court in *Anders v. California* sought to resolve this dilemma by developing a procedure whereby the lawyer would fulfill his ethical duty to not only serve the client's right to appeal, but also refrain from filing a frivolous appeal.[6] Additionally, this procedure protects an indigent defendant's right to appeal because the defendant does not have an opportunity to hire a different lawyer if the defendant disagrees with the lawyer's determination that the appeal is frivolous.[7] Under this procedure, appellate courts now accept what is known as an "Anders" brief. In these briefs, lawyers have the opportunity to address potential assignments of error, and then provide law to show why this likely is not an error.[8] The appellate court then has an opportunity to review these potential errors and determine if the appeal has any merit.[9] Finally, under this procedure there is no oral argument and the government does not need to file a brief with the court.[10]

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[1] OHIO PROF. COND. R. 3.1. *See also* OHIO R. APP. P. 23 ("If a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs.").

[2] OHIO PROF. COND. R. 1.3(1).

[3] *See* OHIO REV. CODE ANN. § 2953.02 (1995) ("In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals."). *See also* OHIO R. CRIM. P. 32(B)(1) ("After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.").

[4] *See* OHIO R. CRIM. P. 32(B)(3)(b) ("[I]f the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost").

[5] This dilemma predominately applies to criminal proceedings. However, this same dilemma arises in a parental rights case. In Ohio, parents have the right to appeal the termination of parental rights. *See* OHIO REV. CODE ANN. § 2151.414(F) (2016).

[6] Anders v. California, 386 U.S. 739, 744 (1967).

[7] *See, e.g.*, State v. Ortiz-Santiago, 100 N.E.3d 1127, 1132 (Ohio Ct. App. 2017) (citing Thruston v. Maxwell, 209 N.E.2d 204, 205 (Ohio 1965)).

[8] *Anders*, 386 U.S. at 744.

[9] *Id.*

[10] *Id.*

In a subsequent decision, the United States Supreme Court determined that their decision in *Anders* was but one way to solve this issue.[11] In response, state courts have affirmed, reformed, and even rejected *Anders*.[12] However, the Ohio Supreme Court has not yet addressed this issue, resulting in confusion throughout the twelve Ohio appellate districts.[13] Recently, three districts have rejected *Anders* while the other nine districts continue to follow *Anders*.[14] Two of the nine districts that follow *Anders* have deviated from the original decision in *Anders v. California*.[15] As a result, indigent defendants do not have equal protection under the law within the state of Ohio, and as will be discussed *infra*, sometimes they do not have equal protection within their own district.[16] The Ohio Supreme Court needs to clear up the confusion surrounding *Anders* by setting a standard uniform procedure. When the justices on the Ohio Supreme Court set this standard, they should decide that *Anders* is appropriate to handle the ethical dilemma when an indigent defendant wishes to pursue an appeal that would be wholly frivolous.

This Note discusses the original rationale behind *Anders*, subsequent United States Supreme Court decisions on *Anders*, state courts' reactions to *Anders*, and, specifically, how *Anders* is applied in Ohio in Part II. Part III sets forth why the Ohio Supreme Court needs to set a uniform standard within the state of Ohio under the scope of the Fourteenth Amendment. Part IV discusses why *Anders* is an appropriate solution to the aforementioned ethical dilemma. Within Part IV, Subsection A addresses the "independent review" component of *Anders* and the approach that the court takes in *State v. Taylor*. Then, Subsection B addresses why *Anders* is the most judicially efficient solution to the ethical dilemma of when a lawyer is faced with filing a frivolous appeal for an indigent defendant. Subsection C addresses the criticism of *Anders* that counsel argues against their client in an *Anders* brief. Next, Subsection D shows why prohibiting *Anders* ignores a lawyer's ethical obligations, and Subsection E provides an illustration of why *Anders* is an appropriate procedural device to dispose of frivolous appeals. Finally, Part V discusses the proposed standard and concludes.

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[11] Smith v. Robbins, 528 U.S. 259, 276–77 (2000). *See also* discussion on *Smith infra* notes 44–52.

[12] Cynthia Yee, *The Anders Brief and the Idaho Rule: It is Time for Idaho to Reevaluate Criminal Appeals After Rejecting the Anders Procedure*, 39 IDAHO L. REV. 143, 150–57 (2002).

[13] The Ohio Supreme Court recently had the opportunity in two cases to address this issue but dismissed them for being "improvidently accepted." *See* State v. Bowshier, 154 Ohio St. 3d 39 (Ohio 2018) (Fisher, J., dissenting); State v. Upkins, 154 Ohio St. 3d 30 (Ohio 2018) (Fischer, J., dissenting).

[14] *See infra* notes 62, 64.

[15] *See infra* note 69.

[16] The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See also* OHIO CONST. art. 1, § 2 ("Government is instituted for their equal protection and benefit").

II. BACKGROUND

A. Anders v. California

In *Anders v. California*, the United States Supreme Court outlined counsel's role when an indigent defendant wishes to pursue a statutory right to appeal yet that appeal would be wholly frivolous.[17] In *Anders*, the defendant was convicted for felony possession of marijuana and wished to invoke his statutory right to appeal his conviction.[18] Counsel advised the court by letter, with a bare conclusion, that the appeal had no merit, and that the defendant wished to file his own brief *pro se*.[19] Counsel did not inform the court why he believed the appeal had no merit.[20] The defendant requested a new attorney, but that request was denied by the court.[21] The defendant filed his brief *pro se* and lost.[22] After losing the appeal, the defendant filed a writ of habeas corpus, which the California Court of Appeals and then the California Supreme Court denied.[23]

Upon granting certiorari, the United States Supreme Court concluded that "California's action does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment."[24] The Court cited a line of cases which invalidated procedures

> where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[25]

The Court laid out what is now known as the *Anders* procedure by looking to precedent, where it previously concluded that once counsel determines that the appeal is frivolous, he may file a motion to withdraw, and if the court agrees, the motion will be granted.[26]

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[17] Anders v. California, 386 U.S. 738, 744 (1967).

[18] *Id.* at 739–40.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 740.

[22] *Id.* at 740, 743. Interestingly enough the California Supreme Court actually found an error, that the defendant failed to raise. At trial the judge and prosecutor made a point to the jury that the defendant failed to testify. The court found this in violation of Art. I, Sec.13, of the California Constitution. Unfortunately, the defendant waived this appeal because he did not raise this error in his brief.

[23] *Id.* at 740–41.

[24] *Id.* at 740.

[25] *Id.* at 741 (quoting Douglas v. California, 372 U.S. 353, 358 (1963)) (internal quotation marks omitted).

[26] *Id.* at 741–42 (citing Ellis v. United States, 356 U.S. 674, 675 (1958)).

Specifically, the Court found that counsel's bare conclusion that the appeal was meritless was contrary to the Court's holding in *Eskridge v. Washington State Board*.[27] In *Eskridge*, the trial court deprived an indigent defendant of the trial transcript because the trial court determined that "'no grave or prejudicial errors'" existed.[28] The Court in *Eskridge* invalidated this procedure stating there "cannot be an adequate substitute for the right to full appellate review available to all defendants who may not be able to afford such an expense."[29] The Court found that in *Anders*, the situation was similar because the California courts deprived the defendant of a right to look at the record or have an attorney look through the record on the defendant's behalf.[30] The Court ultimately determined that "California's procedure did not furnish [the defendant] with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity."[31]

The Court in *Anders* based its decision on the Fourteenth Amendment of the Constitution.[32] The Court determined that when appointed counsel finds that an appeal would be wholly frivolous, counsel must (1) find the appeal wholly frivolous after a conscientious examination of the record, (2) advise the court with a motion to withdraw, (3) file a brief with the court referring to anything in the record that might arguably support the appeal, and (4) send a copy of the brief to the indigent defendant and give the defendant time to file a brief *pro se*.[33] If the court determines that the appeal is wholly frivolous "after a full examination of all the proceedings," the court should grant counsel's motion to withdraw and dismiss the appeal.[34] If, on the other hand, the court determines that there is an arguably meritorious appeal, then the court must afford the defendant the assistance of counsel to argue the appeal.[35] This procedure does not require the state (or city) to file a brief as the appellee and there is never an oral argument.[36]

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[27] *Id.* at 742 (citing Eskridge v. Wash. State Bd., 357 U.S. 214, 215 (1958)).

[28] *Eskridge*, 357 U.S. at 215.

[29] *Id.* at 216. *See also* Lane v. Brown, 372 U.S. 477, 485 (1963) (holding that depriving an indigent defendant access to a trial transcript violated constitutional standards).

[30] *Anders*, 386 U.S. at 743.

[31] *Id.*

[32] *Id.* at 744 ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client . . . .").

[33] *Id.*

[34] *Id.* Alternatively, the court may affirm the case depending on the law of the state. *Id.*

[35] *Id.* Justice Stewart, along with two other justices, are extremely skeptical of this procedure as well. "The fundamental error in the Court's opinion, it seems to me, is its implicit assertion that there can be but a single inflexible answer to the difficult problem of how to accord equal protection to indigent appellants in each of the 50 States." *Id.* at 747 (Stewart, J., dissenting). This ultimately turns out to be wrong as each state can decide what procedure they wish to follow. *See* discussion *infra* notes 46–53.

[36] *See* Penson v. Ohio, 488 U.S. 75, 81 (1988) ("The so-called '*Anders* brief' serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the

B. Subsequent Supreme Court Decisions

Three subsequent United States Supreme Court decisions developed the law surrounding *Anders*. First, in *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, the Court addressed the validity of a Wisconsin Supreme Court Rule.[37] The rule in question essentially restated the holding of *Anders* but added an additional requirement that counsel must provide "a discussion of why the issue lacks merit."[38] The defendant's counsel challenged the constitutionality of this additional requirement, which the Court labeled "the discussion requirement."[39] The Court held the discussion requirement was constitutional under the Fourteenth Amendment because it satisfied the same objectives as *Anders*, went beyond the minimum requirement of *Anders*, and added an additional safeguard against mistaken conclusions that an appeal is frivolous.[40] Thus, *McCoy* permitted states to go beyond the minimum requirements set forth by *Anders*.

Second, in *Penson v. Ohio*, the Court suggested, but did not outright hold, that state courts must follow the minimum procedures set forth in *Anders v. California*.[41] The Court reversed an Ohio Court of Appeals decision to allow counsel to withdraw from an appeal when counsel did not provide any support for why he determined the appeal was frivolous.[42] When counsel determined the appeal was frivolous, he filed a document captioned "Certification of Meritless Appeal and Motion," which simply provided that counsel carefully reviewed the record, found no error, would not file a meritless appeal, and requested to withdraw as counsel.[43] The Court determined that counsel did not comply with *Anders* by failing to provide the court of appeals with a brief pointing to the record to assist the court with determining if the appeal was frivolous.[44] Moreover, the Court determined that the Ohio Court of Appeals erred first by permitting counsel to withdraw without looking at the record, and second by not appointing new counsel to represent the defendants after finding "several arguable claims."[45]

Finally, in *Smith v. Robbins*, the Court changed its view on *Anders* by holding that *Anders* was but "one method of satisfying the requirements of the Constitution for

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required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation.").

[37] 486 U.S. 429, 430–31 (1988).

[38] *Id.* at 430.

[39] *Id.* at 430–32.

[40] *Id.* at 442.

[41] *See generally Penson*, 488 U.S. at 75.

[42] *Id.*

[43] *Id.* at 77–78.

[44] *Id.* at 79.

[45] *Id.* at 76.

indigent criminal appeals."[46] In this case, the Court looked at whether California's *Wende* procedure was constitutional.[47] California courts were not following the decision in *Anders v. California*.[48] Instead, if counsel suspected the appeal was frivolous, counsel would request the appellate court to review the record without submitting a brief pointing to the record.[49] If the appellate court found any arguable issue, counsel would be ordered to file briefs on the issue.[50] If the appellate court did not find anything of merit to appeal, the case would be dismissed.[51] The Court found "the Constitution 'has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure."[52] Furthermore, the Court stated that imposing a "single solution" went against its role as a court and should "evaluate state procedures one at a time, as they come before us."[53] With this in mind, the Court examined California's *Wende* procedure independently of *Anders* and determined *Wende* did not violate the constitution because it provided adequate safeguards to indigent defendants on appeal.[54]

C. State Courts' Reaction to Anders

California was not the only court to deviate from the requirements set forth by *Anders v. California*.[55] In 1977, the Idaho Supreme Court in *State v. McKenney*, expressly rejected *Anders* by holding that the court would no longer grant motions to withdraw on the grounds that the appeal lacks merit or is deemed wholly frivolous by counsel.[56] The court in *McKenney* held that by not permitting the motion to withdraw

[46] Smith v. Robbins, 528 U.S. 259, 276–77 (2000).

[47] *Id.* at 276. *See also* People v. Wende, 600 P.2d 1071, 1074–75 (Cal. 1979). *Wende* is discussed *infra* at notes 138–40.

[48] *Smith*, 528 U.S. at 265–66.

[49] *Id.* at 265.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 274 (citing Spencer v. Texas, 385 U.S. 554, 564 (1967)).

[53] *Smith*, 528 U.S. at 275 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) ("the more challenging task of crafting appropriate procedures . . . to the laboratory of the states in the first instance.").

[54] *Smith*, 528 U.S. at 278–79.

[55] *See* People v. Wende, 600 P.2d 1071, 1074–75 (Cal. 1979). *See also* State v. Balfour, 814 P.2d 1069, 1080 (Or. 1991) (adopting a standard similar to *Wende* that didn't comply with the requirements of *Anders v. California*).

[56] State v. McKenney, 568 P.2d 1213, 1214–15 (Idaho 1977). Idaho was the prominent court to reject *Anders*. For an in-depth analysis of why other jurisdictions prohibited *Anders*, see Cynthia Yee, *supra* note 12 at 151–57.

they were extending the protection of *Anders*.[57] Other jurisdictions, such as New Hampshire, Georgia, Massachusetts, and the District of Columbia followed suit and prohibited *Anders* briefs by following a similar rationale as the Idaho Supreme Court in *McKenney*.[58] With the holding in *Smith v. Robbins*, the states were permitted to prohibit *Anders* briefs so long as prohibiting *Anders* is consistent with the Fourteenth Amendment.[59] The United States Supreme Court has not addressed if prohibiting *Anders* is consistent with the Fourteenth Amendment. However, prohibiting *Anders* forces attorneys to always file an appeal, and it is unlikely the Court would hold that this is contrary to the Fourteenth Amendment because it always ensures that a defendant's right to appeal is preserved.[60]

D. The Current Landscape of Anders in Ohio

Ohio has yet to set a uniform standard on how the state should handle frivolous appeals stemming from an indigent defendant. In June 2018, the Ohio Supreme Court had the opportunity to set a uniform standard but decided not to accept a challenge to *Anders*.[61] Currently the Fourth, Sixth, and Seventh Ohio Appellate Districts have rejected *Anders*.[62] As of writing this Note, all three decisions have come within the last four years, with the Seventh District rejecting *Anders* in June 2018.[63] The rest of Ohio, for the most part, follows the original *Anders* procedure.[64] As recently as

[57] *McKenney*, 568 P.2d at 1214–25. The court determined that they were preventing the situation where a motion to withdraw is rejected and then counsel would have to file an appeal. The court also determined that they were saving the judiciary time by focusing their attention only on the appeal and not various other motions. Further, if counsel was wrong and the appeal had merit then they were in the precarious situation of a conflict of interest between his duties to the client.

[58] Gale v. United States, 429 A.2d 177, 182 (D.C. 1981); Huguley v. State, 324 S.E.2d 729, 730–31 (Ga. 1985); Commonwealth v. Moffett, 418 N.E.2d 585, 591 (Mass. 1981); State v. Cigic, 639 A.2d 251, 254 (N.H. 1994).

[59] *Smith*, 528 U.S. at 276–77.

[60] *See, e.g.*, *McKenney*, 568 P.2d at 1214. The court implies that counsel must always file an appeal for an indigent defendant by stating "if a criminal case on appeal is wholly frivolous, undoubtedly, less of counsel and the judiciary's time will be expended in directly considering the merits of the case." *Id.*

[61] *See supra* note 13.

[62] State v. Wenner, 114 N.E.3d 800 (Ohio Ct. App. 2018); State v. Cruz-Ramos, 125 N.E.3d 193, 197 (Ohio Ct. App. 2018); State v. Wilson, 83 N.E.3d 942, 955 (Ohio Ct. App. 2017).

[63] Interestingly, the Seventh District followed its own "*Anders*" procedure prior to the *Cruz-Ramos* decision. The so-called *Toney* brief was different in only one aspect: as summarized in the Syllabus, counsel had to have "long and extensive experience in criminal practice." State v. Toney, 262 N.E.2d 419, 419 (Ohio Ct. App. 1970), *overruled by Cruz-Ramos*, 125 N.E.3d at 197.

[64] State v. Fiore, No. 17AP-835, 2018 Ohio App. LEXIS 3374, at *3 (Ohio Ct. App. Aug. 7, 2018); *In re* M.B., No. 27956, 2018 Ohio App. LEXIS 3678, at *4–5 (Ohio Ct. App. Aug. 24, 2018); State v. Watters, No. 2016-G-0068, 2017 Ohio App. LEXIS 2681, at *2 (Ohio Ct. App. June 30, 2017); State v. Hammond, No. 27793, 2016 Ohio App. LEXIS 3890, at *2 (Ohio Ct. App. Sept. 28, 2016); State v. Whiting, No. 103765, 2016 Ohio App. LEXIS 2083, at *2 (Ohio

October 1, 2018, the Twelfth District reaffirmed its commitment to *Anders* but expressed concerns over the lack of uniformity within Ohio.[65] The court stated, "Ohio courts have applied *Anders* in a variety of ways and there is no defined procedure from the Ohio Supreme Court to give guidance to appeals courts."[66] The confusion between appellate districts does not end at the border of neighboring districts. The Eighth District has two ways to handle *Anders*. Some judges in the Eighth District subscribe to the "independent review" role of the courts, where it is the duty of the court to comb through the entire record looking for potential error.[67] Other judges believe that the court's role is to only look at the record, in-so-much as it relates to the potential assignment(s) of error raised by counsel in the no-merit brief.[68]

Currently, the trend is to reform or reject *Anders*. Five of the twelve Ohio appellate districts do not follow the standard set forth by *Anders v. California*. Three of those five districts have prohibited *Anders* briefs. With the split authority in the twelve Ohio appellate districts, indigent defendants are receiving vastly different treatment on appeal by their lawyers and by the courts. The Ohio Supreme Court needs to set a standard, like many other states have, so that every defendant in the state of Ohio has equal rights on appeal.[69] Otherwise, indigent defendants are deprived of equal protection under the law as mandated by the Fourteenth Amendment.

Ct. App. May 26, 2016); State v. Parrott, No. C-130476, 2014 Ohio App. LEXIS 1106, at *2 (Ohio Ct. App. Mar. 26, 2014); *In re* D.M.-S, Nos. CA2011-06-011, CA2011-07-014, 2012 Ohio App. LEXIS 1466, at *1–2 (Ohio Ct. App. Apr. 16, 2012); *In re* McBrayer, No. CT2008-0017, 2008 Ohio App. LEXIS 3736, at *1 (Ohio Ct. App. Aug. 28, 2008); State v. Meeks, Nos. 1-98-28, 1-98-29, 1999 Ohio App. LEXIS 933, at *1 (Ohio Ct. App. Feb. 18, 1999). The First District still allows *Anders* briefs for criminal matters but has rejected *Anders* for parental rights cases. *See In re* J.M., No. C-130643, 2013 Ohio App. LEXIS 6206 (Ohio Ct. App. Dec. 24, 2013).

[65] State v. Lawrence, 121 N.E.3d. 1, 4 (Ohio Ct. App. 2018).

[66] *Id*. at 4.

[67] *See, e.g.*, *Whiting*, 2016 Ohio App. LEXIS 2083, at *1–2. This conflict in the 8th District is reflective in a recent opinion in State v. Sims, No. 107724, 2019 WL 6606556, *1 (Ohio Ct. App. Dec. 5, 2019). In *Sims*, one judge wrote for the majority, one judge wrote a concurring opinion, and one judge wrote a dissenting opinion. The majority opinion affirmed the use of *Anders* briefs. *Id*. at *3. The dissenting Judge acknowledged the inter-district spilt on *Anders* by stating "a three-judge panel of this court subsequently held that the 'independent examination' be limited to those issue that appellate counsel raised in the *Anders* brief." *Id*. at *9 (Boyle, J., concurring). This was not the first time Judge Boyle expressed her frustration with spilt on *Anders* in the 8th District. *See* State v. Anderson, No. 103490, 2016 Ohio App. LEXIS 2194, at *7 (Ohio Ct. App. June 9, 2016) (Boyle, J., concurring).

[68] State v. Taylor, No. 101368, 2015 Ohio App. LEXIS 384, at *13–15 (Ohio Ct. App. Feb. 5, 2015). The concept of the "independent review" will be discussed *infra* at notes 96–103.

[69] For more on which states have set uniform standards see Martha Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others'*, 23 FLA. ST. U. L. REV. 625 (1996).

III. SETTING A UNIFORM STANDARD: THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT

Currently, depending on where indigent defendants are arrested in Ohio, their rights on appeal differ. For example, the line separating Lorain County and Erie County separates a district that follows *Anders* and a district that rejects it.[70] Let's say a defendant resides in Lorain County. This defendant goes to a bar in Erie County and drinks one too many alcoholic beverages. On his way home, he is pulled over and subsequently charged with a DUI. This defendant's rights on appeal change solely on whether he was pulled over in Lorain County or whether he was pulled over in Erie County. Because Erie County lies within the 6th District's jurisdiction, counsel would be unable to file an *Anders* brief, whereas in Lorain County, which resides in the 9th District, counsel could file an *Anders* brief.[71] A arbitrary difference of 500 feet is the difference between two completely different sets of rights on appeal for an indigent defendant.

This example shows how defendants in Ohio receive different treatment on appeal solely based on the location of the crime. The Equal Protection Clause of the Fourteenth Amendment requires the state to justify why its laws affect one group in a way that's different than another group.[72] While the laws that put the indigent defendants in jail are uniform throughout the State of Ohio, their rights on appeal are anything but uniform. The Ohio Supreme Court has failed to address this lack of uniformity and provide a reason why the laws affect one group of indigent defendants more than another. In two recent decisions, where the Ohio Supreme Court could have addressed *Anders*, the court dismissed both cases as being "improvidently accepted."[73] The court announced to the lower courts that it was up to the individual districts to handle *Anders*. Justice Fischer dissented in both cases and stated that "[a]t a minimum, this court must provide guidance to the lower courts as to how to apply *Anders* consistently and correctly."[74]

A. Overall Lack of Uniform Guidance

Without guidance from the Ohio Supreme Court, appellate districts are left to their own devices. Seven of the twelve districts still follow the original *Anders* decision from 1967.[75] In these opinions, the courts do not delve into the requirements of *Anders*

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[70] Lorain County resides in the Ninth District which follows *Anders*, and Erie County resides in the Sixth District which prohibits *Anders*.

[71] *See supra* note 70.

[72] William Eskridge, *Destabilizing Due Process and Evolutive Equal Protection,* 47 UCLA L. REV. 1183, 1188 (2000).

[73] State v. Bowshier, 154 Ohio St.3d 39 (Ohio 2018); State v. Upkins, 154 Ohio St.3d 30 (Ohio 2017).

[74] *Bowshier*, 154 Ohio St.3d at 40 (Fischer, J., dissenting).

[75] *See* State v. Troy, No. CA2018-01-008, 2018 Ohio App. LEXIS 3608, at *1 (Ohio Ct. App. Aug. 20, 2018) ("Counsel for appellant, Michael G. Troy, has filed a brief with this court pursuant to *Anders v. California*."); State v. Ojezua, No. 27768, 2018 Ohio App. LEXIS 4125, at *1 (Ohio Ct. App. Sept. 21, 2018) ("[a]ssigned counsel filed a brief under the authority of

or discuss the procedure in any detail. The courts simply provide a brief statement that "counsel has filed this brief pursuant to *Anders v. California*" and then dismiss the case for being frivolous. As a result, courts receive vastly different briefs when they are filed pursuant to *Anders v. California*. For example, in *State v. Wilson*, the Fourth District court stated that it has "accepted *Anders* briefs that identify and support potentially meritorious issues, briefs that argue the issues are frivolous, and split-personality briefs that argue both the merits and frivolity of the issues."[76] This is the unfortunate situation of *Anders* in Ohio where lawyers do not know what exactly to file because the courts provide little guidance, contrary to the role of the appellate court to provide guidance and clarity to lawyers through their opinions.[77] This overall lack of guidance only ensures that lawyers are protected because *Anders* shields lawyers from breaching their ethical duty. However, indigent defendants are not protected because of the vastly different treatment their lawyers and the courts give them.

Some courts have acknowledged this confusion and lack of guidance. For example, in *State v. Taylor*, the Eighth District Court of Appeals stated:

> Before addressing the merits of the motion to withdraw as counsel, we think it provident to address the duties of defense counsel when filing an *Anders* brief and those of the court of appeals when ruling on motions to withdraw as counsel on grounds that an appeal would be frivolous. The Ohio Supreme Court has not addressed either of these issues, and because there are differences in the manner in which appellate courts review motions to withdraw as counsel, we believe some discussion is warranted.[78]

The effects of this discussion are extremely beneficial to lawyers who file *Anders* briefs because they now know what the expectations are for an *Anders* brief filed in the Eighth District.[79]

Anders v. California."); State v. Green, No. 2017-T-0073, 2018 Ohio App. LEXIS 3837, at *1 (Ohio Ct. App. Sept. 4, 2018) ("[a]ppellate counsel has filed a brief and requested leave to withdraw, pursuant to *Anders v. California*.").

[76] State v. Wilson, 83 N.E.3d 942, 951 (Ohio Ct. App. 2017).

[77] Malia Reddick, *Evaluating the Written Opinions of Appellate Judges: Toward a Qualitative Measure of Judicial Productivity*, 48 NEW ENG. L. REV. 547, 547 (2014). Reddick argues,

> [t]he written opinion is an appellate judge's primary work product. How a case is decided determines the fate of the parties, but the explanation of that decision often establishes precedent, laying out guidelines for deciding future cases dealing with similar issues. The soundness of the legal reasoning and the clarity with which it is communicated determine the impact of the decision.

Id.

[78] State v. Taylor, No. 101368, 2015 Ohio App. LEXIS 384, at *2 (Ohio Ct. App. Feb. 5, 2015).

[79] A subsequent decision in the Eighth District confirms this assertion. For example, the court in *State v. Anderson* cites to *State v. Taylo*r by stating "[t]he no-merit brief considered four possible issues . . . [w]e examine those arguments in light of the record and legal precedent." State v. Anderson, No. 103490, 2016 Ohio App. LEXIS 2194, at *1 (Ohio Ct. App. June 9, 2016). The court in *State v. Spicer* did the same thing by citing to *State v. Taylor* when

Another example is the Twelfth District in *State v. Lawrence*.[80] In that case, the court detailed the state of *Anders* after determining that "there has been little uniformity in the manner in which states protect the rights of indigent defendants in *Anders*-type situations."[81] Within this opinion are numerous examples of what the Twelfth District now expects when counsel files an *Anders* brief.[82]

B. The Futility of Attempting to Provide Guidance

Both the Eighth and Twelfth District's attempts at providing guidance were futile. For example, some judges in the Eighth District do not follow the decision in *State v. Taylor*.[83] The court in *State v. Taylor* narrowly defined the court's role when deciding an *Anders* appeal.[84] Other judges in the Eighth District do not subscribe to how the court in *State v. Taylor* defined the court's role and refuse to follow it.[85] Judges disagreeing about how to handle *Anders* is not unique to the Eighth District.

The Fourth District did not unanimously agree to prohibit *Anders* briefs.[86] In a subsequent decision to *State v. Wilson*, Judge McFarland of the Fourth District wrote a dissenting opinion stating,

> I respectfully dissent and note I was not on the panel in *State v. Wilson*. While I recognize that the *Anders* process used in Ohio may not be perfect, I believe a better approach, if change is warranted, would have been to seek rule changes at the Ohio Supreme Court because of the constitutional and ethical harmonics at play. This approach allows any stakeholders involved

addressing the *Anders* standard. State v. Spicer, No. 104081, 2016 Ohio App. LEXIS 3279, *1–2 (Ohio Ct. App. Aug. 11, 2016).

[80] *See generally* State v. Lawrence, 121 N.E.3d. 1 (Ohio Ct. App. 2018).

[81] *Id.*

[82] *Id.* at *8 ("Therefore, we find that counsel must view an 'arguable issue' broadly and on finding an arguable issue, must file a merit brief even if counsel considers the arguments unlikely to prevail or anticipates a strong argument in reply from the prosecution."); *Id.* at *9 ("Finally, if an *Anders* brief is filed *with this court*, counsel must serve a copy of the brief on the defendant and inform the defendant that he may file a *pro se* brief if he so desires.") (emphasis added).

[83] *See infra* note 85.

[84] State v. Taylor, No. 101368, 2015 Ohio App. LEXIS 384, at *14–16 (Ohio Ct. App. Feb. 5, 2015).

[85] State v. Whiting, No. 103765, 2016 Ohio App. LEXIS 2083, at *2 (Ohio Ct. App. May 26, 2016). *See also* State v. Anderson, No. 103490, 2016 Ohio App. LEXIS 2194, at *7 (Ohio Ct. App. June 9, 2016) (Boyle, J., concurring) ("I write separately to express my view that *State v. Taylor*, 8th Dist. Cuyahoga No. 101368, 2015-Ohio-420, expressly contradicts our role as a reviewing court set forth in Loc. R. 16(C)."); State v. Hall, No. 103760, 2016 Ohio App. LEXIS 2745, at *10 (Ohio Ct. App. July 14, 2016) (Gallagher, J., concurring) ("In my view, *Taylor* expressly contradicts our role as a reviewing court set forth in Loc. R. 16(C), as well as reviewing courts' role under *Anders*.").

[86] State v. Wilson, 83 N.E.3d 942, 951 (Ohio Ct. App. 2017).

> to have input via the public comment period if they so desire and assists in the interests of judicial economy.[87]

Judge McFarland's opinion shows that in any appellate district there are going to be disagreements between judges and the best way to prevent such disagreements is by letting the Supreme Court handle a contested issue.[88]

While the courts in *State v. Taylor* and *State v. Lawrence* tried to clear up the confusion surrounding *Anders*, their efforts to provide clarity were fleeting because some judges may not apply those cases. Therefore, even in the districts that have tried to set guidance, lawyers will still be left to file an *Anders* brief pursuant to the 1967 decision in *Anders v. California*, except now there is even more confusion surrounding proper procedure because of inter-district disagreements and even intra-district disagreements between judges.

C. Why the Equal Protection Clause Requires the Ohio Supreme Court to Set a Uniform Standard.

The Equal Protection Clause of the Fourteenth Amendment provides that the state will not "deny to any person within its jurisdiction the equal protection of the laws."[89] The United States Supreme Court stated in *Smith v. Robbins*, the Fourteenth Amendment "require[s] that a State's procedure 'affor[d] adequate and effective appellate review to indigent defendants.'"[90] Currently, because of the lack of guidance on *Anders*, Ohio courts are not providing adequate and effective appellate review to indigent defendants and, therefore, are violating the Equal Protection Clause of the Fourteenth Amendment.

Moreover, within each individual district, indigent defendants are receiving unpredictable treatment from their lawyers and the court. For example, the Eighth District has an opinion that gives guidance to lawyers on *Anders* but is not followed by all the judges.[91] The Twelfth District has a leading opinion but there is no guarantee

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[87] State v. Gillian, No. 16CA11, 2017 Ohio App. LEXIS 3700, at *9–10 (Ohio Ct. App. Aug. 21, 2017) (McFarland, J., dissenting).

[88] The court in *State v. Cruz-Ramos* avoided this issue all together by sitting per curiam as opposed to a three-panel bench. State v. Cruz-Ramos, 125 N.E.3d 193, 194 (Ohio Ct. App. 2018). The Courts of Appeals also have the power to certify the conflict to the Ohio Supreme Court. *See* OHIO CONST. art. 4, § 4(B)(4) ("Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination").

[89] U.S. CONST. amend. XIV, § 1. The Ohio Constitution also has an Equal Protection Clause. OHIO CONST. art. 1, § 2 ("Government is instituted for their equal protection and benefit . . . ."). An analysis into the Ohio Constitution is not necessary because "[t]he limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States Constitutions are essentially identical." Daugherty v. Wallace, 621 N.E.2d 1374, 1382 (Ohio Ct. App. 1993). *See, e.g.*, Porter v. Oberlin, 1 Ohio St.2d 143, 205 N.E.2d 363, 367 (Ohio 1965).

[90] Smith v. Robbins, 528 U.S. 259, 276 (2000).

[91] *See* State v. Taylor, No. 101368, 2015 Ohio App. LEXIS 384, at *14–16 (Ohio Ct. App. Feb. 5, 2015). *See also* State v. Anderson, No. 103490, 2016 Ohio App. LEXIS 2194, at *7 (Ohio Ct. App. June 9, 2016) (Boyle, J., concurring) ("I write separately to express my view

that there will not be an intra-district split like the Eighth District.[92] The remaining appellate districts leave lawyers to their own devices without clear guidance other than the original decision in *Anders v. California*.

This has caused complete disarray in the state of *Anders* jurisprudence within Ohio. An indigent defendant will always have their appeal briefed on the merits in the Fourth District.[93] This also holds true for the Sixth and Seventh District.[94] Within the Eighth District, some judges may look at the entire record or just at the record as it pertains to what was raised by counsel in their brief.[95] The Twelfth District sets its own parameters for an *Anders* brief that do not appear in the original *Anders v. California* decision.[96] The Twelfth District requires "that counsel must view an 'arguable issue' broadly and, on finding an arguable issue, must file a merit brief even if counsel considers the arguments unlikely to prevail or anticipates a strong argument in reply from the prosecution."[97] Finally, in the rest of the remaining seven appellate districts there is zero guidance on *Anders* briefs and there is no way to tell how vastly different the treatment indigent defendants receive within these districts.

Therefore, an indigent defendant in the Second District does not have the same protection under the law as an indigent defendant in the Eighth District. That defendant in the Eighth District does not have equal protection under the law as an indigent defendant within the Fourth District. The attempts to provide guidance by the appellate courts have proved futile. Thus, indigent defendants are not consistently afforded "adequate and effective appellate review'" as required by the Fourteenth Amendment.[98]

The Ohio Supreme Court can easily solve this problem. By setting a uniform standard, all twelve appellate districts will be bound by one consistent procedure. Every indigent defendant in Ohio would receive the same treatment on appeal if the Ohio Supreme Court sets a standard. While appellate courts could possibly interpret that new decision in different ways, the disparity in interpretation of *Anders* would be

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that *State v. Taylor*, expressly contradicts our role as a reviewing court set forth in Loc. R. 16(C).").

[92] State v. Lawrence, 121 N.E.3d 1, 4 (Ohio Ct. App. 2018).

[93] State v. Wilson, 83 N.E.3d 942, 952 (Ohio Ct. App. 2017) ("If counsel believes the appeal to be frivolous, counsel should inform the defendant and try to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with the appeal nonetheless, counsel must file a merit brief and argue the defendant's appeal as persuasively as possible regardless of any personal beliefs that the appeal is frivolous.").

[94] State v. Wenner, 114 N.E.3d 800, 804 (Ohio Ct. App. 2018) ("A criminal defense attorney must proceed with a basis in law (procedural and substantive) and fact."); State v. Cruz-Ramos, 125 N.E.3d 193, 197 (Ohio Ct. App. 2018) ("If the defendant does not wish to dismiss the appeal after consulting with counsel, then counsel must file a merit brief.").

[95] *See generally Taylor*, 2015 Ohio App. LEXIS 384, at *14–16. *See also Anderson*, 2016 Ohio App. LEXIS 2194, at *7 (Boyle, J., concurring) ("I write separately to express my view that *State v. Taylor*, expressly contradicts our role as a reviewing court set forth in Loc. R. 16(C).").

[96] *Lawrence*, 121 N.E.3d at 4.

[97] *Id.* at 8.

[98] Smith v. Robbins, 528 U.S. 259, 276 (2000).

less problematic than if the lower courts are left to their own devices. The courts would be interpreting a detailed decision from 2020, or later, instead of one paragraph from a sixty-year-old opinion. The next question is which direction Ohio should take on handling an indigent defendant's right to appeal when that appeal would be wholly frivolous.

IV. THE STANDARD THE OHIO SUPREME COURT SHOULD ADOPT

The Ohio Supreme Court should adopt the overall procedure set forth in *Anders v. California* with two deviations.[99] First, counsel should draft the statement of facts and law of the case in the no-merit brief, but not conclude whether the appeal is frivolous. This will prevent counsel from arguing against his client and allow the court to avoid taking the role of an advocate. Second, the court should adopt the *State v. Taylor* approach to the "independent review." Under this approach, the court would only look through the record as it pertains to the points raised by counsel or by the defendant in a *pro se* brief.

Furthermore, an *Anders* procedure should be adopted because as will be shown in Subsection IV.B, it is a much more judicially efficient way to handle a frivolous appeal than forcing counsel to brief the case on the merits. Moreover, jurisdictions that prohibit *Anders* briefs ignore lawyers' ethical obligations, whereas *Anders* addresses those concerns. Finally, Ohio case law shows that *Anders* is an effective procedural device to dispose of frivolous appeals.

A. The Independent Review and the State v. Taylor Approach

1. The Independent Review: Unequal Protection of Appellants

The final requirement of an *Anders* appeal is that "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous."[100] Most courts have interpreted this to require the appellate court to look at the entire record to see if any error exists.[101] In Ohio, the Eighth District Court in *State v. Taylor* took a different approach, where the court is only to look at the record as it pertains to the points raised by counsel in the no-merit brief.[102] This approach is consistent with the Equal Protection Clause of the Fourteenth

[99] Counsel must (1) find the appeal wholly frivolous after a conscientious examination of the record, (2) advise the court with a motion to withdraw, (3) file a brief with the court referring to anything in the record that might arguably support the appeal, and (4) send a copy of the brief to the indigent defendant and give the defendant time to file a brief *pro se. See* Anders v. California, 386 U.S. 738, 744 (1967).

[100] *Id.*

[101] *See, e.g.*, State v. Weese, No. 2013-CA-61, 2014 Ohio App. LEXIS 3186, at *5 (Ohio Ct. App. July 25, 2014) ("We also have performed our duty under *Anders* to conduct an independent review of the record. We thoroughly have reviewed the various filings, the written transcript of the plea colloquy, and the sentencing disposition.").

[102] *See* State v. Taylor, No. 101368, 2015 Ohio App. LEXIS 384, *14–16 (Ohio Ct. App. Feb. 5, 2015).

Amendment.[103] Under the independent review formulation of the final requirement set forth by *Anders v. California*, an indigent defendant receives *greater* treatment by the appellate court than would a non-indigent defendant.[104] An illustration on how these two formulations work helps to conceptualize this point.

Consider two defendants, Defendant Dave and Defendant Adrian, who are both found guilty of the exact same crime. They both go to trial and the same exact evidence is presented at trial. Every objection and every argument made is exactly the same. They are both sentenced to ten years in prison for the exact same reasons. Both defendants wish to elect their right to appeal their ten-year sentence. There is one difference between the two defendants. Defendant Dave is declared indigent and Defendant Adrian is represented by counsel she paid for.

Defendant Dave's counsel determines that the trial court did not err and decides to file an *Anders* brief. Defendant Dave's counsel diligently looks through the record and raises one potential error: "the trial court erred in admitting the email from Defendant Dave to the victim." The court, under the independent review formulation would address the potential assignment of error and then conduct its own independent review of the record. While conducting its independent review, the court would look for any other error the trial court committed that was not raised by the Defendant Dave's counsel. For example, the court could conclude that the verdict rendered against Defendant Dave was potentially against the manifest weight of the evidence and appoint new counsel to argue the appeal.[105]

Now turning to Defendant Adrian, his counsel thinks it would be a long shot, but, after diligently looking through the record, determines there is some merit to an appeal and also cites one assignment of error: "the trial court erred in admitting the email from Defendant Adrian to the victim." The court would only look to the record as it pertains to the assignment of error raised. The court would not look for other error not raised by counsel. The court would spend less time on Defendant Adrian's appeal than Defendant Dave's. Thus, under this hypothetical scenario, the defendant who had a *frivolous* appeal received more attention from the court than a defendant who had a *meritorious* appeal. While technically both appeals would be "frivolous," because counsel for Defendant Dave believed the appeal had merit, the court will spend less time on his appeal.

What was described above does not just happen in the realm of hypotheticals. In *State v. Wright*, the court explicitly provided more protection to an indigent defendant filing an *Anders* brief than if an *Anders* brief was not filed.[106] The court stated,

> [n]ormally, due to the fact Appellant did not raise a constitutional argument . . . further analysis would be foreclosed. However, in the context of an

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[103] *See Anders*, 386 U.S. at 745 ("This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.").

[104] Ironically, this is contrary to the original holding in *Anders*, where the court wanted to ensure indigent defendants were receiving the same treatment as a non-indigent defendant on appeal. *See id.* at 744–45.

[105] *See id.* at 744.

[106] State v. Wright, Nos. 15CA3705, 15CA3706, 2016 Ohio App. LEXIS 4659, at *12 (Ohio Ct. App. Nov. 17, 2016).

> *Anders* review, where we fully examine the trial court proceedings, we have also analyzed Appellant's speedy trial claim within the constitutional realm. We also find no constitutional violation.[107]

If a meritorious appeal were filed in *Wright*, with the same assignments of error as the *Anders* brief in that case, the court would not have analyzed any constitutional claims because they were not raised in the brief. However, because of the independent review requirement, the court in *Wright* was able to address any feasible issue and decided to address constitutional concerns.[108] Under *State v. Taylor*, the court in *Wright* would only be able to address the errors raised in the brief, and would not be permitted to address any constitutional issues.

2. A Criticism of the *State v. Taylor* Approach

The Seventh District was critical of the approach in *Taylor* as an alternative to the traditional "independent review" approach.[109] The court determined that this approach was unrealistic as many common criminal appeals (such as a manifest weight challenge or an appeal on a plea) would still require a full review of the record.[110] The Seventh District's rationale is flawed, however, as it ignores the purpose of only looking at the potential assignment(s) of error. If the only point raised in an *Anders* brief was a manifest weight of the evidence challenge, the appellate court would only look at the evidence to determine whether the state proved the defendant's guilt beyond a reasonable doubt. The court would not be required to then analyze every objection made by counsel, every procedural motion made, whether the evidence was properly admitted, whether the trial judge abused its discretion by imposing a condition of probation, or whether any other feasible reversible error may have occurred.[111]

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[107] *Id.*

[108] For a further discussion into this issue see *Warner*, *supra* note 69, at 662.

[109] State v. Cruz-Ramos, 125 N.E.3d 193, 196 (Ohio Ct. App. 2018) ("[o]ften, the result of this procedure is that a case with no nonfrivolous issues receives a much more extensive review than a case in which specific assignments of error are raised by counsel.").

[110] *Id.*

[111] This is consistent with the requirement that counsel must conduct "a conscientious examination" of the record before counsel can determine that the appeal is wholly frivolous. *Anders*, 386 U.S. at 744. If the court had a duty to conduct its own independent review why would counsel need to make "a conscientious examination" of the record? This formulation would be in line with the pre-*Anders* decision in *Ellis v. United States*, where the court held that counsel's only requirement was to provide the court with a motion to withdraw stating the appeal was frivolous. Ellis v. United States, 356 U.S. 674, 675 (1958). *Anders* adds the requirement for counsel to assign potential assignment of error to help the court in its examination of potential error. If the independent review was the proper procedure the court in *Anders* would not have added this requirement. *Anders*, 386 U.S. at 745.

3. The *State v. Taylor* Approach Solves Many Common Criticisms of *Anders*.

A common criticism of *Anders* is the "independent review" and is used as a justification to prohibit *Anders* briefs because of the bizarre situation it causes where indigent defendants gain more protection than non-indigent defendants.[112] Under a *State v. Taylor* formulation, the court provides the same amount of time and care on an *Anders* brief as they would a "meritorious" appeal. This formulation puts indigent and non-indigent defendants on a level playing field on appeal.[113]

Another common criticism of the "independent review" is that it will waste judicial time and resources.[114] However, the *State v. Taylor* approach resolves this issue as well by making *Anders* a judicially efficient option. An independent review formulation requires the court to look beyond what was briefed by counsel.[115] The *State v. Taylor* approach only requires the court to look at the record as it pertains to the potential assignments of error raised by counsel.[116] By applying a *State v. Taylor* approach, the court only needs to spend the same amount of time as they would on a non-*Anders* appeal.[117] That begs the question, then why not just prohibit *Anders* and force counsel to brief on the merits, if the same amount of time is spent using a *State v. Taylor* formulation? The answer is quite simple: *Anders* cases do not require the state to file a brief or require an oral argument. Therefore, the *State v. Taylor* formulation reduces the amount of time spent on *Anders* appeals because less time will be spent reading through the record.

A final criticism that *State v. Taylor* resolves is that the courts take on the role of counsel when disposing of *Anders* briefs.[118] The situation where "the appellate judge feels obligated to act as lawyer and the appellate lawyer feels constrained to rule as a judge" does not exist under a *State v. Taylor* approach to the court's role.[119] Under that

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[112] *See Warner*, *supra* note 69, at 663. "[T]he real problem with *Anders* is that it creates two distinct classes of appellate review for criminal defendants and results in a failure of equal protection." *Id.* "[N]either the indigent defendant whose attorney does not file an *Anders* brief nor the nonindigent defendant gets this kind of review from the court." *Id.* at 663. Warner sets forth the common criticism but does not suggest a way to fix this equal protection issue. The court's role as set forth in *State v. Taylor* solves this issue.

[113] *See* State v. Taylor, No. 101368, 2015 Ohio App. LEXIS 384, *14–16 (Ohio Ct. App. Feb. 5, 2015).

[114] *See, e.g.*, Mosley v. State, 908 N.E.2d 599, 607–08 (Ind. 2009).

[115] *See, e.g.*, Weese, No. 2013-CA-61, 2014 Ohio App. LEXIS 3186, at *5 (Ohio Ct. App. July 25, 2014) ("We have also performed our duty under *Anders* to conduct an independent review of the record. We thoroughly have reviewed the various filings, the written transcript of the plea colloquy, and the sentencing disposition.").

[116] *Taylor*, 2015 Ohio App. LEXIS 384, at *14–16.

[117] *Id.*

[118] *See* State v. Cruz-Ramos, 125 N.E.3d 193, 196 (Ohio Ct. App. 2018) (citing Huguley v. State, 324 S.E.2d 729, 731 (Ga. 1985)) (*Anders* procedure "tends to force the court to assume the role of counsel for the appellant").

[119] *See Wilson*, 83 N.E.3d at 945 (citing Gale v. United States, 429 A.2d 177,182 (D.C. 1981) (Ferren, A.J., dissenting)). *See also Taylor*, 2015 Ohio App. LEXIS 384, at *10 (citing United

formulation, the court is not required to go beyond their role of a non-*Anders* appeal. If the court follows the "independent review" formulation, then the court would assume the role of counsel because the court could find issues to appeal that counsel did not. However, the burden to comb through the entire record under a *State v. Taylor* approach would only be on counsel and not on the courts. Therefore, this approach frees the judiciary from the extra burden of combing through the record even if it does not pertain to the potential errors raised by counsel.

B. Judicial Efficiency: Anders *Clears Up Frivolous Appeals from Appellate Dockets*

Another common criticism is that, overall, *Anders* is not judicially efficient. However, such a criticism overlooks that *Anders* is much more efficient than forcing lawyers to file meritorious briefs. For example, the courts in Ohio that prohibit *Anders* briefs require the defense attorney to file a meritorious brief, even if the appeal would be "frivolous."[120] This leads to more of the court's resources being devoted to appeals that could have been resolved through *Anders*. The standard procedure for an appeal is that the appellant files their notice of appeal and then a brief pointing to assignments of error.[121] The appellee then files a brief refuting the assignments of error.[122] Then, the court reviews both briefs and allocates time for an oral argument.[123] Three judges then must preside over the oral argument. However, while *Anders* still has three judges rule on the case, *Anders* only requires that defense counsel file a brief (and sometimes the defendant *pro se*), and there is no oral argument.

When the Sixth District prohibited *Anders*, the court determined that counsel must find something to appeal.[124] They point to examples like legal sufficiency and manifest weight of the evidence arguments for appealable issues.[125] These arguments require the appellate court to comb through the entire record.[126] In a non-*Anders* situation, the

States v. Wagner, 103 F.3d. 551, 552 (7th Cir. 1996)). The court in *Wagner* found "[the independent review] makes this court the defendant's lawyer to identify the issues that he should be appealing on." *Wagner*, 104 F.3d at 552. The court further noted "[t]he defendant ends up in effect with not one appellate counsel but (if he is lucky) six-his original lawyer, who filed the *Anders* brief; our law clerk or staff attorney . . . a panel of this court . . . ." *Id.*

[120] *See, e.g.*, *Wilson*, 83 N.E.3d at 952. "If the defendant chooses to proceed with the appeal nonetheless, counsel must file a merit brief and argue the defendant's appeal as persuasively as possible regardless of any personal belief that the appeal is frivolous."

[121] OHIO R. APP. P. 3, 16(A).

[122] OHIO R. APP. P. 16(B).

[123] OHIO R. APP. P. 21(A). This rule mandates oral arguments for every appeal unless a local rule states otherwise. In these jurisdictions, if a party requests an oral argument the court must schedule an oral argument.

[124] State v. Wenner, 114 N.E.3d 800, 804–05 (Ohio Ct. App. 2018).

[125] *Id.* at 804.

[126] *See* State v. Rawson, 62 N.E.3d 880, 890 (Ohio Ct. App. 2016) ("The relevant inquiry on review of the sufficiency of the evidence is whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential

state would also have to comb through the record. Lengthy trials often produce transcripts that are over 1,000 pages long. What if the argument made was frivolous? Ignoring the ethical concerns, by filing a meritorious appeal, the state must comb through the record and prepare for an oral argument. That brief would be extensive, as the state would not want to ruin their conviction. And if the appeal is "frivolous," there would be numerous pieces of evidence to sustain a conviction. Therefore, the court must read two extensive briefs and preside over an oral argument to hear a frivolous appeal.

Moreover, the overall time of appeals—*Anders* or non-*Anders*—to move through appellate dockets would increase if *Anders* was prohibited. The percentage of *Anders* cases compared to the overall criminal docket vary by jurisdiction, but range from 1% to 39%.[127] In Ohio, this would range from a total of 71 cases to 2,777 cases.[128] While this may not reflect the total amount of *Anders* dismissals, it is safe to say that "[f]or every one percent increase in oral argument rate, disposition time is increased by .03 months."[129] Assuming that every lawyer would have filed an *Anders* brief in a jurisdiction that prohibits *Anders*, then the total increase in appellate dispositional times could range from approximately one day to approximately one month. Even assuming that 7%[130] of the criminal caseload are *Anders* cases, the overall increase in dispositional times would be around six days.

While six days may seem like a short period of time, the 7% increase in cases requiring oral argument would add six days for every appeal on the docket, not just criminal appeals.[131] In the context of a civil case, "[i]t is only if the judiciary is accessible to potential plaintiffs that it can be seen *as a real protector of their formal rights*; and only if it is efficient will there not be huge delays in court decisions."[132] The effect of forcing *Anders* appeals to be heard on the merits would have a large

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elements of the crime beyond a reasonable doubt.'") (citing Jackson v. Virginia, 443 U.S. 307, 308 (1979)). *See also* State v. Hall, No. 103760, 2016 Ohio App. LEXIS 2745, at *3 (Ohio Ct. App. July 14, 2016) ("[A]ppellate courts are charged with reviewing the record, weighing the evidence and credibility of the witnesses, and ultimately determining whether the jury so 'clearly lost its way' and 'created such a manifest miscarriage of justice that [the] conviction[(s)] must be reversed and a new trial ordered.'").

[127] Warner, *supra* note 69, at 642–43.

[128] In 2017 there was a total of 7,120 Criminal appeals filed with Ohio Courts of Appeals. THE SUPREME COURT OF OHIO, 2017 OHIO COURTS STATISTICAL REPORT 10 (2017). However, the 1% estimate of 71 is likely far too low as urban districts like the First, Eighth, and Tenth have high rates of criminal cases. These three districts combined account for 2,634 of the total criminal appeals. *Id.*

[129] Robert K. Christensen & John Szmer, *Examining the Efficiency of the U.S. Courts of Appeals: Pathologies and Prescriptions*, 32 INT'L REV. L. & ECON. 30, 33 (2012).

[130] In 2017, 1,048 of the 7,120 criminal appeals were dismissed. 2017 OHIO COURTS STATISTICAL REPORT, *supra* note 128, at 10. Assuming half of these dismissals were *Anders* based, the total percentage would be 7%.

[131] *Id.*

[132] Giovanni B. Ramello & Stefan Voigt, *The Economics of Efficiency and the Judicial System*, 32 INT'L REV. L. & ECON. 1, 1 (2012) (emphasis added).

effect on all other cases that are meritorious.[133] The appellate courts would have to spend more time on frivolous cases forcing meritorious cases to be delayed.[134] Therefore, it would be an unwise decision to prohibit *Anders* briefs because *Anders* provides a judicially efficient way of handling frivolous appeals.

The Supreme Court of Indiana, in *Mosley v. State*, provides a counterargument by stating, "[r]equiring counsel to submit an ordinary appellate brief the first time—no matter how frivolous counsel regards the claims to be—is quicker, simpler, and places fewer demands on the appellate courts."[135] The court in that case prohibited *Anders* briefs and held that counsel must file a brief when appointed to represent an indigent defendant.[136] The court reasoned that if counsel filed an *Anders* brief with the court and counsel was incorrect, the court would have to look at the same appeal again and spend time finding new counsel to argue on the merits.[137] This is an accurate conclusion but overlooks the fact that not every *Anders* case requires the substitution of counsel. While the court may have to expend more time and resources on the rare occasion that requires the substitution of counsel, requiring every *Anders*-type appeal to be briefed on the merits, as previously discussed, would cause every *Anders*-type case to waste the judiciary's time and resources. Understandably, it may seem inefficient to have to replace counsel and then look at the same case twice. However, it is more judicially efficient to handle *Anders*-type situations than requiring counsel to brief the case on the merits.

C. Arguing Against the Client

Another criticism of *Anders* is when "there is arguable merit in the appeal" counsel is then in a conflict of interest between his duty as a lawyer and his duty to his client's best interest because the lawyer would be in effect arguing against his client.[138] California has its own version of *Anders* called the "*Wende* brief."[139] When filing a *Wende* brief, counsel does not raise any specific issues of law but simply requests the

[133] The appellate courts are already behind in their caseloads. For example, in 2017 every appellate district had less cases filed that year than total cases on their dockets. 2017 OHIO COURTS STATE REPORT, *supra* note 127, at 10–12. For example, the Fifth District had 263 criminal cases pending from 2016 and the Eighth District had 298 civil cases pending from 2016. *Id.*

[134] For example, a civil matter that goes to trial may take up to 5 years to resolve. *See* Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 814 (2000). Most civil matters take years to resolve. It would be unfair to those litigants to clog the courts with "frivolous" *Anders* cases that could be resolved without the need for oral argument.

[135] Mosley v. State, 908 N.E.2d 599, 608 (Ind. 2009).

[136] *Id.* at 601–02.

[137] *Id.* at 608.

[138] State v. McKenney, 568 P.2d 1213, 1214–15 (Idaho 1977).

[139] People v. Wende, 600 P.2d 1071, 1074–75 (Cal. 1979). *See also* discussion on *Smith v. Robbins*, *supra* notes 46–54.

court conduct an independent review of the record.[140] This alleviates a conflict of interest where counsel is arguing against the client.[141] The Oregon Supreme Court developed its own procedure based on *Wende* in *State v. Balfour*.[142] The court in *Balfour* determined that in Oregon, counsel will submit one half of the brief that contains the factual history of the case and then the defendant herself will submit the second half of the brief with issues of law.[143] Therefore, under *Balfour*, counsel does not actively conclude the appeal is frivolous and the defendant is not subject to the rules of professional conduct when she files a frivolous argument.

Like the procedures in *Wende* and *Balfour*, Ohio should adopt a procedure that avoids arguing against the client. When filing an *Anders* brief, counsel must provide a statement of facts, point to potential assignments of error, and provide the standard of review for the courts. Moreover, counsel should not flat-out refute the potential assignments of error. By requiring counsel to not refute the potential assignment of errors, counsel is not arguing against the client. By giving the court a statement of facts pointing to the record and by providing the standard of review, the court can take on its traditional role of ruling on error, as opposed to searching for error. The court would then have to determine whether the potential assignments of error have merit just as the court would in a non-*Anders* situation. While the court would still be on notice that counsel believes the appeal is wholly frivolous, this formulation would prevent counsel from directly arguing against the client in the no-merit brief. Finally, by not arguing against the client, that same attorney could then file a non-*Anders* appeal if there were meritorious issues or the court could simply appoint new counsel.[144]

Ohio should not directly adopt either the *Wende* or *Balfour* procedure. Under the *Wende* procedure, the court must conduct an independent review.[145] As previously discussed, independent review provides more protection then is required by the Fourteenth Amendment,[146] diverts too much time to frivolous appeals,[147] and causes the courts to take on the role of an advocate.[148] Under *Balfour*, too much is asked of the defendant by requiring her to provide the issues of law.[149] *Anders* "requires that the indigent receive substantially the same assistance as one who can afford to retain

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[140] *Wende*, 600 P.2d at 1074–75.

[141] *Id.*

[142] State v. Balfour, 814 P.2d 1069, 1080 (Or. 1991).

[143] *Id.*

[144] Ironically if the court did just appoint new counsel, then they would always be granting the motion to withdraw. In a sense, the motion to withdraw is just a formality that accompanies the brief.

[145] *Wende*, 600 P.2d at 1074–75.

[146] *See supra* text accompanying notes 100–01, 107–08.

[147] *See supra* text accompanying notes 109–12.

[148] *See supra* text accompanying notes 113–14.

[149] State v. Balfour, 814 P.2d 1069, 1080 (Or. 1991).

an attorney."[150] This places the burden of legal research (which has already been completed by counsel to determine that the appeal is frivolous) on the defendant. An indigent defendant would unlikely be well versed in legal research, and writing the second half of the brief would be more time consuming than if a lawyer drafted the brief. Considering that the appeal would lose given it is frivolous, this would waste the time and hope of the defendant. Therefore, while *Wende* and *Balfour* provide ways to avoid arguing against the client, both procedures are flawed and should not be adopted by Ohio.

D. Prohibiting Anders *Ignores the Ethical Obligations Required by a Lawyer*

Even without these criticisms, forcing a lawyer to always brief an appeal on the merits is problematic. When courts prohibit *Anders*, the lawyer must find something to appeal.[151] However, if an appeal could have been filed as an *Anders* brief, then when that same case is filed as a meritorious appeal, the lawyer breaches Rule 3.1 of the Ohio Rules of Professional Conduct because it is frivolous.[152] While *Anders* provides a safeguard to sanctions that would result from filing a frivolous appeal, prohibiting *Anders* does not provide any distinction for a court or appellee's lawyer, and thus, appointed lawyers could be faced with unnecessary fines or sanctions for doing their court-appointed job.

The court in *State v. Wenner*, points to comment 1 of Rule 3.1 to show that a lawyer would not be sanctioned if *Anders* is prohibited.[153] That comment provides "[t]he lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule."[154] This is not convincing as the comment is not a binding rule and it is not hard to imagine

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[150] Nickols v. Gagnon, 454 F.2d. 467, 471 (7th Cir. 1971).

[151] State v. Wenner, 114 N.E.3d 800, 804 (Ohio Ct. App. 2018) ("A criminal defense attorney must proceed with a basis in law (procedural and substantive) and fact."); State v. Cruz-Ramos, 125 N.E.3d 193, 197 (Ohio Ct. App. 2018) ("If the defendant does not wish to dismiss the appeal after consulting with counsel, then counsel must file a merit brief."); State v. Wilson, 83 N.E.3d 942, 952 (Ohio Ct. App. 2017) ("[I]f the defendant chooses to proceed with the appeal nonetheless, counsel must file a merit brief and argue the defendant's appeal as persuasively as possible regardless of any personal belief that the appeal is frivolous."). The court in *State v. McKenney* also implies that a defense attorney must file a merit brief. State v. McKenney, 568 P.2d 1213, 1214–15 (1977). "We further determine that if a criminal case on appeal is wholly frivolous, undoubtedly, less of counsel and the judiciary's time and energy will be expended in directly considering the merits of the case in its regular and due course as contrasted with a fragmented consideration of various motions." *Id.* at 1214. *See also* Mosley v. State, 908 N.E.2d 599, 607–08 (Ind. 2009); Commonwealth v. Moffett, 418 N.E.2d 585, 588 (Mass. 1981); Murrell v. People, 53 V.I. 534, 547–48 (V.I. 2010).

[152] "A lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." OHIO PROF. COND. R. 3.1 (2017).

[153] *Wenner*, 114 N.E.3d at 804. *See also Wilson*, 83 N.E.3d 942 at 953–54.

[154] OHIO PROF. COND. R. 3.1 cmt. 3 (2017).

a court ignoring this comment when sanctioning a lawyer for filing a frivolous brief.[155] Rule 3.1 forces lawyers to file only meritorious claims and provides a punishment if they breach this rule. The court could not set a standard stating "a lawyer will not be sanctioned for representing an indigent defendant on appeal" because that will allow lawyers to be lazy. As a result, a busy attorney may file a borderline frivolous claim solely based on that protection. Moreover, this would reduce the protection of indigent defendants, which would be contrary to the Equal Protection Clause. Therefore, it is impossible in a jurisdiction that prohibits *Anders* to safely allow lawyers to file frivolous appeals without the threat of sanctions.

E. Anders *is an Appropriate Procedural Device to Dispose of Frivolous Appeals*

A final concern courts have with *Anders* is that truly frivolous appeals are hard to come by.[156] One Ohio judge, particularly, found it impossible for a criminal appeal to be frivolous because a defendant in Ohio has a right to appeal a conviction or sentence.[157] A frivolous appeal is defined as "one which present no reasonable question for review"[158] and "lacks any basis in law or fact."[159] A look into Ohio case law shows that frivolous appeals in criminal cases do exist. This shows why *Anders* is an appropriate procedural device to dispose of frivolous appeals.

For example, a recent Eighth District case, *State v. Black*,[160] illustrates a frivolous criminal appeal. A brief recitation of the procedural history will illustrate why this case presented a frivolous appeal. The defendant was found guilty of various crimes and was sentenced to fourteen years in prison.[161] He then invoked his statutory right to appeal, and the appellate court found that the trial court improperly sentenced

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[155] The comments to the rules of professional conduct are not binding authority. See OHIO PROF. COND. R. Preamble (21) ("The comments are intended as guides to interpretation, but the text of each rule is authoritative.").

[156] *See, e.g.*, *Wilson*, 83 N.E.3d at 951–52.

[157] State v. Christian, No. 2013–T–0055, 2014 Ohio App. LEXIS 4749, at *9–10 (Ohio Ct. App. Nov. 3, 2014) (O'Toole, J., Dissenting) ("[i]t logically follows that if an appeal is a matter of right in criminal proceedings in Ohio, how can an appeal be frivolous?").

[158] Talbot v. Fountas, 475 N.E.2d 187, 188 (Ohio Ct. App. 1984); Garritano v. Pacella, No. L–09–1256, 2010 Ohio App. LEXIS 1411, at *4 (Ohio Ct. App. Apr. 16, 2010); Siemientkowski v. State Auto. Mut. Ins. Co., No. 87299, 2006 Ohio App. LEXIS 4072, at *¶12 (Ohio Ct. App. Aug. 10, 2016).

[159] McCoy v. Ct. of App. of Wis., Dist. 1, 486 U.S. 429, 438 n.10 (1988).

[160] *See generally* State v. Black, No. 106879, 2018 Ohio App. LEXIS 4110 (Ohio Ct. App. Sept. 20, 2018) [hereinafter *Black II*].

[161] State v. Black, No. 105197, 2017 Ohio App. LEXIS 4439, at *5, 21 (Ohio Ct. App. Oct. 5, 2017) [hereinafter *Black I*].

him.[162] The case was remanded to sentence the defendant to eleven years in prison.[163] Subsequently on remand, the trial court resentenced the defendant to eleven years in prison.[164] The trial court followed the appellate court's order and properly sentenced the defendant pursuant to Ohio's statutory guidelines.[165]

The defendant then invoked his statutory right to appeal when he was resentenced.[166] Given the procedural history of this case, the only available appeal for the defendant was whether the trial court properly resentenced him.[167] Any other potential assignment of error was waived during the first appeal. Therefore, so long as the trial court followed the appellate court's order, there was no error. Counsel for the defendant realized this and filed an *Anders* brief for the appeal on the resentencing.[168] Filing the appeal would be wholly frivolous because the trial court properly resentenced the defendant, so *Anders* was the appropriate method for filing this appeal.

This case illustrates two benefits that *Anders* provides. First, this provided one extra layer of protection for the defendant. The defendant was able to have three judges look at his case one more time to ensure that eleven years was the proper sentence.[169] Second, this protected the lawyer from filing a frivolous brief on this issue. The trial court properly resentenced the defendant[170] and the only available issue was resentencing. If the lawyer had to brief this case on the merits, like some jurisdictions in Ohio require, the lawyer would breach Rule 3.1 because the filing an appeal based on the resentencing would be frivolous. In conclusion, this case shows why *Anders* is an appropriate way to dispose of frivolous appeals.

V. CONCLUSION

The current state of appellate practice for indigent criminal defendants is non-uniform in Ohio. Appellate districts have provided little-to-no guidance on what the duties are for a lawyer when faced with an *Anders* situation. The Ohio Supreme Court has ignored this issue for over sixty years, raising Equal Protection concerns. It is time for the court to set a uniform standard on *Anders*. The court should adopt *Anders* but should make two changes. The first change would be to remove the "independent review" requirement as it creates the bizarre situation where the court spends more time on a frivolous appeal than it would on a meritorious appeal. The second change would be to require counsel to provide law accompanied with the potential

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[162] *Id.* at *21.

[163] *Black II*, 2018 Ohio App. LEXIS 4110, at *5.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.* at *7.

[168] *Id.* at *5.

[169] *See generally Black II*, 2018 Ohio App. LEXIS 4110.

[170] *Id.* at *9.

assignments of error, but not argue why they believe the appeal is frivolous. Moreover, the court should find that *Anders* provides the most judicially efficient manner of disposing of frivolous appeals. Finally, *Anders* provides the only solution that acknowledges the lawyers' ethical obligations, whereas prohibiting *Anders* ignores the ethical obligations. In conclusion, the Ohio Supreme Court needs to clear up the confusion and lack of guidance surrounding *Anders*. Adopting *Anders* with the removal of the "independent review" and prohibiting counsel from arguing against is the best way to do so.