[Cite as *State v. Wilson*, 2017-Ohio-5772.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	Case No. 16CA12
Plaintiff-Appellee,	:	
v.	:	DECISION AND ORDER
JUSTIN A. WILSON,	:	
		RELEASED: 6/23/2017
Defendant-Appellant.	:	

APPEARANCES:

J. Roger Smith, II, Huntington, West Virginia for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, Ironton, Ohio for appellee.

Harsha, J.

{¶1} A jury convicted Justin A. Wilson of aggravated murder with a firearm specification and tampering with evidence. Wilson appealed, but his counsel advises us that he has reviewed the record and can discern no meritorious claim for appeal. Counsel moved for leave to withdraw under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). After considering the ethical and constitutional requirements of appointed appellate counsel in a criminal appeal, we conclude that this Court will no longer accept motions to withdraw under *Anders.* Accordingly, we discharge current counsel, and by separate entry will appoint new counsel who should prepare an amended merit brief that complies with the procedure outlined in this decision.

I. FACTS

{¶2} A Lawrence County grand jury indicted Wilson on one count of aggravated murder with a firearm specification and one count of tampering with evidence. Wilson pleaded not guilty and waived his right to a speedy trial.

{¶3} At trial the state presented testimony that as part of a drug-related robbery in January 2015, Wilson entered a residence and beat and shot the victim Justin Adams in the face, killing him. Two of the state's witnesses testified that they were in the residence with Wilson and Adams during the altercation and they saw Wilson shoot Adams. Wilson's girlfriend, Angela Bailey, testified that when Wilson returned home, he told her that he had just shot a man in the face. After Wilson left her home, Bailey notified the authorities.

{¶4} The state presented evidence that after Wilson left Bailey's home, he fled to West Virginia. The cab driver who transported Bailey to West Virginia testified that Wilson was talking on his phone and told someone that he had "done something really, really bad but did not want to talk about it on the phone." Wilson was apprehended several weeks later and brought back to Ohio. While in custody Wilson made several conflicting statements to investigators. In statements that were presented to the jury, Wilson first admitted that he shot Adams after Adams pulled a knife on him. However, Wilson later recanted and gave several other conflicting versions of events.

{¶5} A jury convicted Wilson as charged and the trial court sentenced him to a term that included life without parole.

II. MOTION TO WITHDRAW AND *ANDERS* BRIEF

{¶6} Although Wilson appealed his conviction, his appellate counsel has filed a motion for leave to withdraw and an *Anders* brief. The Supreme Court of the United

States established what has come to be known as the *Anders* procedure in *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).[1] Under *Anders*, if counsel reviews the record and determines that the case is frivolous, counsel informs the court of that opinion and files a motion to withdraw as counsel, but also "submits a brief referring to anything in the record that might arguably support the appeal." The indigent criminal defendant receives a copy of counsel's brief and may raise additional issues. Then the court reviews the motion, the *Anders* brief and the entire record to determine if any arguably meritorious issues exist. If an issue exists, the court must discharge current counsel and appoint new counsel to prosecute the appeal. If the appeal is wholly frivolous, the court grants the request to withdraw and dismisses the appeal or proceeds with a decision in accordance with state law. *Anders* at 744. "Wholly frivolous" and "without merit" both mean "the appeal lacks any basis in law or fact." *McCoy v. Court of Appeals of Wisconsin, Dist. 1,* 486 U.S. 429, 438, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988), fn. 10 (the Court explained, "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.").

{¶7} Wilson's counsel complied with these requirements by filing a motion for leave to withdraw and furnishing Wilson with a copy of the brief. Wilson had an additional 30 days to file a pro se brief, but chose not to.

[1] The relevant language of *Anders* appears at p.744 of the Supreme Court's opinion and as an Appendix to our decision.

A. Reconsideration of *Anders* Approach

{¶8} This case provides us with an opportunity to reexamine the ethical and constitutional obligations appointed appellate counsel has to an indigent criminal defendant when counsel believes there are no meritorious grounds for an appeal, and the scope of our duty to independently examine the record looking for any issues containing arguable merit.

{¶9} It is now clear that the *Anders* procedure is an alternative, not a constitutional mandate:

> [T]he *Anders* procedure is not "an independent constitutional command," but rather is just "a prophylactic framework" that we established to vindicate the constitutional right to appellate counsel announced in *Douglas*. We did not say that our *Anders* procedure was the only prophylactic framework that could adequately vindicate this right; instead, by making clear that the Constitution itself does not compel the *Anders* procedure, we suggested otherwise. Similarly, in *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988), we described *Anders* as simply erecting "safeguards." (Citations omitted.)

Smith v. Robbins, 528 U.S. 259, 273, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

> Accordingly, we hold that the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may—and, we are confident, will—craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*. The Constitution erects no barrier to their doing so.

Robbins at 276.

B. Criticisms of *Anders*

1. Prejudice to client

{¶10} Many courts have identified problems with the *Anders* procedure. *Robbins* at 281 ("Turning first to the procedure we set out in the final section of *Anders*, we note that it has, from the beginning, faced 'consistent and severe criticism.' "). When counsel files a motion to withdraw because counsel believes the appeal is frivolous, it

may prejudice the client. "An *Anders* withdrawal prejudices an appellant and compromises his appeal by flagging the case as without merit, which invites perfunctory review by the court." *Mosley v. State*, 908 N.E.2d 599, 608 (Ind. 2009); *State v. Cigic*, 138 N.H. 313, 315, 639 A.2d 251, 252 (1994) ("a review may be prejudiced by the fact that appellate counsel has already determined after a 'conscientious examination' of the record, that the appeal is wholly frivolous"); *Commonwealth v. Moffett,* 383 Mass. 201, 206, 418 N.E.2d 585, 590 (1981) ("courts have recognized that the mere submission by appointed counsel of a request to withdraw on grounds of frivolousness may result in prejudice to the indigent defendant"); *State v. McKenney*, 98 Idaho 551, 552, 568 P.2d 1213, 1214 (1977) ("[W]e deem it clear that the mere submission of such a motion by appellate counsel cannot but result in prejudice."). Not only may counsel's pronouncement that the appeal is frivolous prejudice the client's direct appeal, but at least one judge has expressed concern that the *Anders* brief may prejudice the client's future collateral attacks. *See Gale v. United States,* 429 A.2d 177,182 (D.C. 1981), fn. 11 (Ferren, A.J., dissenting) ("The Anders approach leads to other unsettling questions. For example, if an attorney files an Anders brief on a direct appeal, has that attorney precluded collateral attack * * * on that record, on the ground that the court implicitly has reached and deemed frivolous all potential issues presented by that record?").

2. Counsel's Conflict

{¶11} The *Anders* procedure also creates tension between counsel's duty to the client and to the court. *Smith v. Robbins*, 528 U.S. at 281-282 ("One of the most consistent criticisms, * * * is in some tension both with counsel's ethical duty as an officer of the court (which requires him not to present frivolous arguments) and also with

his duty to further his client's interests (which might not permit counsel to characterize his client's claims as frivolous)"). "As one former public defender has explained, '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.'" (Citations omitted.) *Id.* at 282, fn. 11. This tension has been described as "contradictory," "schizophrenic," and "Janus-faced" because counsel files a motion to withdraw arguing the appeal is frivolous and an *Anders* brief essentially arguing that it may not be. *See Moffitt* at 205-206; *McKenney* at 552-553 ("counsel who has made a motion for withdrawal is also necessarily caught up in a conflict of interest between his duties toward his client and his duty toward the court of candor and truthfulness"); *Cigic* at 315 ("the *Anders* approach puts counsel at odds with the client, forcing counsel into the awkward position of arguing against the client before the reviewing court"); *State v. Korth*, 650 N.W.2d 528, 535 (S.D. 2002) (criticizing the *Anders* procedure for putting attorneys "on the ethical horns of a dilemma"); *Ramos v. State*, 113 Nev. 1081, 1083, 944 P.2d 856, 857 (1997) ("The *Anders* approach is schizophrenic in nature.") *Lindsey v. State*, 939 So.2d 743, 747 (Miss. 2005) (recognizing the "conundrum faced by appellate attorneys forced to make any assertions under *Anders* procedures about the frivolity of their client's argument").

{¶12} To relieve this tension some courts have modified the requirements of the *Anders* brief and do not permit counsel to withdraw. Instead of an *Anders* brief, California requires counsel to file what is known as a "*Wende* brief," which provides a procedural and factual history of the case with citations to the record, attests that counsel has reviewed the record, discussed it with and provided it to the client, and

informed the client of the right to file a pro se supplemental brief. Counsel asks the court to independently review the entire record for arguable issues, but unlike *Anders,* counsel does not expressly state that the appeal is frivolous or ask to withdraw. Instead, counsel is silent on the merits of the case and will brief any issues the court finds after its exhaustive review of the record. *People v. Wende,* 25 Cal.3d 436, 441-442, 600 P.2d 1071, 1074-1075 (1979). Although the *Wende* procedure alleviates the conflict of interest tension for counsel, it exacerbates “the court as co-counsel” and judicial economy concerns because the court must review the entire record without assistance from counsel to find potentially meritorious issues for the client. *See Smith v. Robbins,* 528 U.S. 259, 279-284, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (comparing the California *Wende* procedure to the Wisconsin procedure the Court reviewed in *McCoy, supra,* and finding, “the *Wende* procedure appears to be in some ways better than the one we approved in *McCoy* and, in other ways, worse.”). Oregon has a procedure like California’s but instead of permitting the client to submit a pro se brief with purportedly frivolous issues, counsel prepares a “Part A” section of the brief like a *Wende* brief and a “Part B” arguing the merits of the purportedly frivolous issues on behalf of the client. Counsel signs Part A and the client signs Part B. *See State v. Balfour,* 311 Or. 434, 814 P.2d 1069 (1991).

3. Role Reversal

{¶13} The *Anders* procedure has also been criticized for creating a role reversal between counsel and the court and removing the adversarial nature of the judicial system. Counsel determines the appeal is frivolous and the court scours the entire record looking for arguably meritorious issues on the client’s behalf. *Huguley v. State,*

253 Ga. 709, 324 S.E.2d 729 (1985) (Anders procedure “tends to force the court to assume the role of counsel for the appellant”).

> [T]he Anders procedure places the appellate court in the inappropriate role of defense counsel, forcing the court to devise and recommend viable legal arguments for subsequent appellate counsel. In making such recommendations, the appellate court may appear to have lost its impartiality, displaying a potential bias in favor of any arguments it recommends.

Cigic at 315; *Gale* at 182 (“the Anders dictum typically forces either the court to undertake the role of the lawyer, or the lawyer to undertake the role of the court. This role reversal does not well serve the administration of justice.”) (Ferren, A. J., dissenting).

> Even for appeals that turn out to be frivolous, adversary procedure is much to be preferred over a process in which the appellate judge feels obligated to act as lawyer and the appellate lawyer feels constrained to rule as a judge. At the very least, if the appeal is indeed frivolous, the adversary approach will reveal that truth far more effectively, with greater credibility * * * .

Id.; see also, Mosley, 908 N.E.2d at 608 (“[I]n a direct appeal a convicted defendant is entitled to a review by the judiciary, not by overworked and underpaid public defenders.”).

4. Burden on Judiciary

{¶14} And the *Anders* approach has been criticized for imposing unnecessarily heavy burdens on the judiciary. *See Murrell v. People of the Virgin Islands,* 53 V.I. 534, 543, 2010 WL 1779930 (2010) (deciding to no longer accept *Anders* motions and citing Idaho, Massachusetts, Georgia and Indiana Supreme Court decisions rejecting the *Anders* approach amid judicial economy concerns). In what is now referred to as “the Idaho rule,” the Supreme Court of Idaho rejected the *Anders* procedure on judicial economy grounds and held that “once counsel is appointed to represent an indigent

client during appeal on a criminal case, no withdrawal will thereafter be permitted on the basis that the appeal is frivolous or lacks merit." *McKenney*, 98 Idaho at 552, 568 P.2d at 1214 (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, the consideration of which necessarily involves a determination of merits. On the other hand, if there is arguable merit in the appeal (a determination of which by appellate counsel is usually extremely difficult) counsel who has made a motion for withdrawal is also necessarily caught up in a conflict of interest between his duties toward his client and his duty toward the court of candor and truthfulness.
>
> We find that Anders presents no obstacle to the procedure adopted herein since Anders, by way of dictum, presents what are minimal constitutional safeguards for a criminal defendant upon appeal. Our announced procedure of today extends the protections of Anders.

Id. at 552-553, 1214-1215; *see Cigic*, 138 N.H. at 316, 639 A.2d at 253 ("the *Anders* procedure entails serious drawbacks that warrant our review of alternative proposals, such as the so-called 'Idaho rule.' ")

{¶15} The Supreme Court of Indiana also identified concerns with judicial economy when rejecting the *Anders* approach:

> Overall *Anders* is cumbersome and inefficient. An attorney who withdraws pursuant to *Anders* must still review the record, complete at least some legal research, consult and advise the client, and draft a brief for submission to the Court of Appeals. 386 U.S. at 744, 87 S.Ct. 1396. If all this is done, the attorney "may as well submit it for the purposes of an ordinary appeal." *Commonwealth v. Moffett*, 383 Mass. 201, 418 N.E.2d 585, 590–91 (1981). Furthermore, the Court of Appeals must conduct a "full examination of all the proceedings" to determine if there are any meritorious issues. *Anders*, 386 U.S. at 744, 87 S.Ct. 1396. Any saving of time and effort by counsel in preparing an *Anders* brief is offset by increased demands on the judiciary, which is to some extent placed in the precarious role of advocate. *See Huguley v. State*, 253 Ga. 709, 324 S.E.2d 729, 731 (1985); *State v. Gates,* 466 S.W.2d 681, 684 (Mo.1971). And if the reviewing court finds any meritorious issues, even more time

> and money must be spent in substituting new counsel and starting the appeal all over again. *Dixon,* 152 Ind.App. at 438, 284 N.E.2d at 106–07. Requiring 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. *Cline*, 253 Ind. at 269–70, 252 N.E.2d at 796; *see also* Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others',* 23 Fla. St. U.L.Rev. 625, 643–51 (1996) (describing principal considerations of states rejecting *Anders*); LaFave, *supra*, § 11.2(c), at 634 (same).

Mosley, 908 N.E.2d at 607-608.

{¶16} Courts have also criticized *Anders* for the confusing and burdensome scope of record review involved in requiring the appellate court to conduct "a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744. Courts, including ours, have read this requirement as requiring appellate court to "flyspeck" the entire record.[2] Other courts have rejected this as overly burdensome and, to achieve greater judicial economy, have narrowed the scope of record review to those potentially meritorious issues identified in the *Anders* brief:

> The opposite extreme would be for us to comb the record even where the *Anders* brief appeared to be perfectly adequate, searching for possible nonfrivolous issues that both the lawyer and his client may have overlooked and, if we find them, appointing a new lawyer and flagging the issues we've found for him. We have done this on occasion, but have now concluded that it is not a sound practice. It makes this court the defendant's lawyer to identify the issues that he should be appealing on and to hire another member of the bar to argue the issues that we have identified. The 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 who scours the record for issues that the lawyer may have overlooked; a panel of this court that on the advice of the law clerk or staff attorney denies the *Anders* motion and appoints another lawyer for the appellant; the new lawyer. This is overkill, this six-lawyer representation of criminal defendants that we have described and today renounce; it gives the indigent defendant more than he could expect had counsel (whether retained or appointed) decided to press the appeal, since counsel's decision on which issues to raise on appeal would

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[2] It is with high regard that we borrow the term from the late Earl Stephenson, who guided this court (and author) for many years.

> normally be conclusive. If after reviewing all the potential issues counsel decided to brief and argue only one, we would not scour the record looking for the other issues-all the other issues would be deemed waived. The *Anders* procedure implements the Sixth Amendment right of counsel, 386 U.S. at 742, 87 S.Ct. at 1398-99, a right to have counsel of minimum professional competence-not to have a committee of counsel including judges of the court of appeals.
>
> * * *
>
> The resources of the courts of appeals are limited and the time of staff attorneys and law clerks that is devoted to searching haystacks for needles is unavailable for more promising research.

U.S. v. Wagner, 103 F.3d 551, 552-553 (7th Cir. 1996) (written by Posner, C.J.); *see also U.S. v. Youla*, 241 F.3d 296, 301 (3rd Cir. 2001) ("we extrapolate from *Wagner's* recommendation that we confine our scrutiny to those portions of the record identified by an adequate *Anders* brief"); *Wilson v. State*, 40 S.W.3d 192, 198 (Tex. App. 2001) (finding that in light of the United States Supreme Court decision in *Smith v. Robbins,* "the Seventh Circuit's reasoning in *Wagner* is persuasive").

{¶17} At least one jurisdiction has rejected the *Anders* approach as inconsistent with a criminal defendant's state right to a direct appeal. The Supreme Court of North Dakota announced that in a direct appeal of a criminal case it would not hear any proceedings designed only to determine whether an appeal is frivolous:

> While we may be in complete agreement with the principles of law recited in the Anders decision, we do not think that the procedures [sic] applies to this State because under our constitution and statutes an appeal is as a matter of right which eliminates the need for an Anders proceeding. Under the North Dakota procedure, the defendant is afforded all of the constitutional requirements set out in Anders.

State v. Lewis, 291 N.W.2d 735, 737 (N.D. 1980). The court recognized that this may mean that designated counsel may have to represent a defendant "to the best of his ability notwithstanding the fact that the attorney does not believe the appeal has merit."

Id. at 738. The court also recognized that their decision addresses judicial economy concerns, stating that "the elimination of the [*Anders*] double procedure will also conserve county funds." *Id.*

{¶18} Similarly, the Supreme Court of Indiana was invited by the Indiana Public Defender Council to reject the *Anders* procedure on state constitutional grounds but the Court declined to do so and instead rejected *Anders* on its own supervisory authority over matters of appellate procedure:

> Mosley urges us to reject *Anders* on state constitutional grounds as well. He urges that our decision to prohibit *Anders* withdrawals finds support in article 7, section 6 of the Indiana Constitution, which guarantees Hoosiers in all cases an absolute right to one appeal. However, we ground our opinion in this case on this Court's supervisory authority over matters of appellate procedure and professional responsibility, and do not reach the constitutional claim.
>
> In sum, we believe that disapproving *Anders* is simpler, more effective, fairer, and less taxing on counsel and the courts. Prohibiting *Anders* withdrawals may also force counsel to be more diligent and locate meritorious issues in a seemingly empty record. *Gale v. United States*, 429 A.2d 177, 182 (D.C.1981) (Ferren, A.J., dissenting). And in those few cases that offer no colorable argument of trial court error whatsoever, counsel may still be able to solicit a sentence revision or even a change in the law. *Cigic,* 639 A.2d at 253; Ind. Appellate Rule 7(B); see also Prof. Cond. R. 3.1 cmt. ("[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.").
>
> We conclude that in any criminal appeal as a matter of right, counsel may neither withdraw on the basis that the appeal is frivolous nor submit an *Anders* brief to the appellate court.

Mosley, 908 N.E.2d at 608-609.

{¶19} In Ohio defendants have a statutory right to a criminal appeal. R.C. 2953.02; R.C. 2953.08; *See State v. Trent*, 6th Dist. Erie No. E-07-039. 2009-Ohio-508, ¶ 16 ("In Ohio, the right to an appeal is a creature of statute. R.C. 2953.02."); *State v.*

Butts, 112 Ohio App.3d 683, 686, 679 N.E.2d 1170 (8th Dist. 1996); *see, generally* Katz, Martin, and Giannelli, *Baldwin's Oh. Prac. Crim. L.*, Section 80:2 (3d ed.), fn. 3. No Ohio court has yet rejected *Anders* on the basis that it violates a defendant's state right to a criminal appeal. *But see State v. Christian*, 11th Dist. Trumbull No. 2013-T-0055, 2014-Ohio-4882, ¶ 22-24 (O'Toole 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?") *and see State v. Talley*, 11th Dist. Trumbull No. 2014-T-0098, 2015-Ohio-2816, ¶ 24 (O'Toole dissenting) (contending that the *Anders* process "creates a conundrum" because either the court becomes biased through the process of finding meritorious issues on behalf of the defendant or, if the court finds no meritorious issues, grants counsel's motion to withdraw and dismisses the appeal, then the defendant "is denied his rights to counsel and to an appeal, as a matter of right.").

5. Lack of Uniformity

{¶20} Courts and commentators have also stated concerns with the lack of nationwide uniform guidelines among the courts that follow *Anders* procedure. *See State v. Korth*, 650 N.W.2d 528, 533-536 (S.D. 2002) (discussing the variety of federal and state *Anders* guidelines); *see also* Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others',* 23 Fla. St. U.L.Rev. 625 (1996). Ohio has no uniform statewide rules or procedures governing *Anders* briefs. In this vacuum, most courts—like this one—have blindly applied the method set forth in *Anders* without recognizing that this procedure is not required by the United States Supreme Court, as *Smith v. Robbins* now holds. *See, generally,* Painter and Pollis, *Baldwin's Ohio Appellate Practice*, Section 5:27 (2016). Several Ohio appellate courts

have adopted a local rule governing *Anders* briefs. *See* 1st Dist. Loc.App.R. 16.2; 6th Dist. Loc.App.R. 10(G); 8th Dist. Loc.App.R. 16(C). Our Court has not. Consequently, we have 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. Interestingly, *Anders* only characterizes the brief as "referring to anything…", not "arguing" the issue. *Anders* at 744.

{¶21} Likewise, Ohio appellate courts lack uniformity in the degree of scrutiny used in reviewing the record. Up until now our Court went beyond the issues identified in the *Anders* brief and scoured the entire record for any possible errors to locate any that may have been missed by counsel. *See State v. Wright*, 4th Dist. Scioto Nos. 15CA3705, 15CA3706, 2016-Ohio-7795, ¶ 18 (court reviewed the statutory speedy trial issue raised in the *Anders* brief, then sua sponte reviewed the record for potential constitutional speedy trial issues: "Normally, due to the fact Appellant did not raise a constitutional argument * * * further analysis would be foreclosed. However, in the context of *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."). *See also State v. Lester*, 4th Dist. Vinton No., 12CA684, 2013-Ohio-2485, ¶ 3, discussing the *Anders* requirements.

{¶22} In contrast, the Eighth Appellate District has recently adopted the *Wagner* scope of review and limits its review to the issues raised in the *Anders* brief. *See State v. Taylor*, 8th Dist. Cuyahoga No. 101368, 2015-Ohio-420, ¶ 15-20 (a completely independent examination of the entire record to determine if there are any colorable issues on appeal is "overkill" and makes the court the defendant's counsel), citing

United States v. Wagner, 103 F.3d 551, 552 (7th Cir. 1996). Like the Wisconsin courts in *McCoy, supra, Taylor* also requires the discussion of why potential assignments are wholly frivolous. *See Taylor* at ¶ 9.

III. THE NEW APPROACH

{¶23} With these considerations and criticisms in mind, we reverse the direction this Court takes in "*Anders* type" cases and adopt the Idaho rule: After counsel is appointed to represent an indigent client during appeal on a criminal matter, we will not permit counsel to withdraw solely on the basis that the appeal is frivolous. *See McKenney*, 98 Idaho at 552, 568 P.2d at 1214. Instead, counsel will file a brief on the merits.

{¶24} We believe that the Idaho rule clearly satisfies the constitutional requirement of substantial equality and fair process referred to in *Anders* at 744. It also preserves the integrity of the attorney-client relationship and betters serves the appellate court. The *Anders* procedure is inefficient, unduly burdensome on the court, and potentially prejudicial to the defendant. "An attorney who withdraws pursuant to Anders must still review the record, complete at least some legal research, consult and advise the client, and draft a brief for submission to the Court of Appeals. * * * If all this is done, the attorney may as well submit it for the purposes of an ordinary appeal." *Mosley* at 607, citing *Moffett*, 383 Mass. at 205-206, 418 N.E.2d at 590-591 (1981). "Requiring counsel to submit an ordinary brief the first time – no matter how frivolous counsel regards the claims to be – is quicker, simpler, and places fewer demands on the appellate court." *Mosley* at 608; *Murrell*, 53 V.I. at 543 (the *Anders* procedure is "significantly more onerous for both counsel and the appellate court than if the court

simply required court-appointed counsel to fully prosecute the appeal even if it is frivolous.").

A. Procedure

{¶25} Today we adopt a new procedure like that described in *Cigic* and *Mosley, supra*. Counsel should discuss the case with the defendant and decide whether to appeal. If counsel believes the appeal is 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 belief that the appeal is frivolous. This does not mean counsel must argue every issue the defendant believes meritorious. Counsel may exercise strategic judgment in the presentation of the issues in the brief. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (holding that a defendant has no constitutional right to compel appointed counsel to raise issues, if counsel, as a matter of professional judgment, decides not to present them).

{¶26} If counsel files a brief that fails to raise an issue that the appellant still believes has arguable merit, appellant may proceed under App. R. 15(B) and App. R. 16(C) to seek leave to file a supplemental brief. App. R. 15(B) allows the court to grant a procedural motion at anytime without awaiting a response from opposing counsel. And App. R. 16(C) provides the court with authority to grant leave for supplemental briefing. Accordingly, an appellant may file a motion seeking leave to file a supplemental brief to raise purported errors that counsel has not addressed. The motion should include a statement of the error(s) the appellant wishes to raise, along with references to the

record and legal authority that support appellant's position. If the court grants the motion, appellant will be directed to file a brief within 30 days that conforms with App. R.16 and 19 and Loc.R.10.

{¶27} It is important to note that this approach is available to all parties regardless of whether their appeal is civil or criminal in nature and regardless of their economic status. This approach also allows an appellant to first read and consider counsel's brief before deciding whether to seek leave to raise additional arguments. However, we caution appellants to exercise their option to seek leave in a timely manner so as not to delay our deliberations. In that regard, 45 days after the date of the certificate of service of counsel's brief would seem to be a reasonable period, absent extraordinary circumstances. The brief should conform with App.R. 16 and 19 and Loc.R. 10.

{¶28} Under this procedure counsel will not compromise the attorney-client relationship by subtle or open concessions that the appeal is frivolous. It is this Court's role to evaluate the merits of the appeal. *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) ("the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous."); *Lane v. Brown,* 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963) (finding unconstitutional the process in which the state public defender's office determined the frivolity of client's appeal and prevented the client access to a transcript and appellate review of appeal); *Mosley*, 908 N.E.2d at 605 (discussing the screening process for frivolous appeals and recognizing "The duty to make this decision properly attaches to the appellate tribunal rather than to the trial court, trial counsel, or appellate counsel.").

We will give counsel's merit brief the same level of review we afford all other appellate briefs: We will review the assignments of error identified by counsel, and by the appellant if leave is granted, but will not "scour" the record for issues not specifically raised in the brief. As with all criminal appeals, we will exercise our discretion in noticing plain errors or defects affecting substantial rights in accordance with Crim.R. 52(B).

{¶29} Counsel should submit the case on the briefs without requesting oral argument pursuant to Loc.R. 12. If the court sua sponte requires oral argument under Loc.R. 12(A), counsel may choose not to appear. *See* App.R. 21(F). "A lawyer who has filed a brief advocating as well as possible only grounds which he finds weak or hopeless need not be called upon to stand up in court and attempt to make an oral argument that conceal the deficiencies in the case." *State v. Gates*, 466 S.W.2d 681, 683 (Mo. 1971) quoting the ABA Standards, The Prosecution Function and the Defense Function, Advisory Committee.

{¶30} After we journalize our judgment, the defendant will be afforded the same safeguards other appellants receive and may apply for reopening of the appeal as provided in App.R. 26(B).

B. Counsel's Ethical Concerns

{¶31} The procedure we establish today is consistent with counsel's ethical obligation under Ohio Rules of Professional Conduct. Rule 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in 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. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Even though adherence to the Idaho rule may require appellate counsel to bring a frivolous appeal, we agree with the *Cigic* court that such instances "would be extremely rare." *Cigic,* 138 N.H. at 317, 639 A.2d at 253. Under Rule 3.1, it is not frivolous to make "a good faith argument for an extension, modification, or reversal of existing law." Comment 1 to Rule 3.1 states "the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." And Comment 2 to Rule 3.1 states that an action is not frivolous "even though the lawyer believes that the client's position ultimately will not prevail." Although we can envision appeals in which identifying a meritorious issue may be a challenge – such as a case in which the defendant is bound by a negotiated plea and sentence agreement and an agreement to waive his right to appeal – this case involves a multi-day jury trial on an aggravated murder charge. Under our new procedure Wilson's appellate counsel will be compelled to investigate and brief an issue that "may be less frivolous than it initially appears." *Cigic* at 253 quoting *Gale, supra* (Ferren, A.J. dissenting).

{¶32} More importantly, Comment 3 to the rule makes it explicit that counsel's obligation to avoid frivolous conduct is subordinate to certain rights of a criminal defendant: "The lawyer's obligation 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." Thus, an exception for criminal defense counsel pursuing frivolous appeals already exists. *See also Huguley v. State*, 253 Ga. 709, 710, 324 S.E.2d 729, 731 (1985) ("the opinion of the United States Supreme Court [in *Anders*] does not intimate

that an attorney should be subjected to discipline or even disapproval for filing a frivolous appeal in a criminal case."); *Gale,* 429 A.2d at 182, (Ferren, A.J. dissenting) (under the Idaho rule, "it would be disingenuous for the court * * * to berate appointed counsel for meritless arguments."); *Mosley*, 908 N.E.2d at 608 (finding no ethical violation under Indiana Professional Conduct Rule 3.1 because comments to the rule expressly state that "The professional obligation to avoid frivolous contentions is expressly '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."); *Ramos,* 113 Nev. at 1085, 944 P.2d at 858 ("As the *Cigic* court recognized, this procedure may, on rare occasions, force counsel to assert frivolous issues before the court. In those rare cases, we create an exception to the rules of professional conduct to allow the pursuit of a frivolous appeal."); *Cigic*, 138 N.H. at 318, 639 A.2d at 254 ("As we have noted, our adoption of this procedure may, on rare occasions, require appellate counsel to assert a frivolous issue before this court. Accordingly, we create an exception to New Hampshire Rule of Professional Conduct 3.1 for such conduct. We caution, however, that under the procedure we adopt today, appellate counsel is still otherwise absolutely obligated not to deceive or mislead the court.").

{¶33} We also emphasize that counsel is still under an absolute obligation not to deceive or mislead the court. The Ohio Rules of Professional Conduct, Rule 3.3 requires candor toward the tribunal and strictly prohibits counsel from making a false statement of law or fact or failing to correct one previously made and from failing to disclose legal authority in the controlling jurisdiction known to the lawyer to be directly

adverse to the client's position and not disclosed by opposing counsel. Thus, if in addition to pursuing a frivolous issue, the client insists that counsel make false statements or otherwise breach the duty of candor to the court in violation of Rule 3.3, counsel may request to withdraw. This has always been true. Our procedure today only prohibits withdrawal when the sole ground for the motion is counsel's belief the appeal is frivolous.

C. Better (but not perfect)

{¶34} Because appellate counsel cannot withdraw when counsel simply believes an appeal is frivolous, our procedure goes beyond the minimum safeguards afforded by the *Anders* and is constitutional. *See Smith v. Robbins,* 528 U.S. 259, 276-277, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (the Equal Protection and Due Process Clauses "largely converge to require that a State's procedure 'affor[d] adequate and effective appellate review to indigent defendants,' * * * A State's procedure provides such review so long as it reasonable ensures that an indigent's appeal will be resolved in a way that is related to the merits of that appeal."); *McKenney,* 98 Idaho at 553, 568 P.2d at 1215 ("Our announced procedure of today extends the protections of Anders.").

{¶35} Although none of the alternative approaches referred to are perfect, we believe our new procedure and the Idaho rule in general address the criticism of *Anders* more comprehensively than other approaches. The *Wende* procedure, although laudably addressing concerns about counsel's conflict of interest, substantially increases concerns about role reversal, the lack of an adversary process and the burdens on judicial economy. The Eighth District's approach in *Taylor, supra,* adopting the narrower *Wagner* record review goes far to alleviate judicial economy concerns, but

leaves unresolved counsel's conflict of interest tension and concerns about the lack of an adversary process. Our procedure resolves the conflict of interest tension by recognizing that counsel's ethical obligation under Rule 3.1 of the Ohio Rules of Professional Conduct is subordinate to federal or state constitutional law that entitles a criminal defendant assistance of counsel. We resolve role reversal/adversary process concerns by restoring counsel to the role of advocate and the judiciary to the role of deciding the merits/frivolity of an appeal. We restore judicial economy by providing purportedly frivolous appeals the same level of appellate review we give all other criminal appeals, not more. The indigent criminal appellant retains all the procedural safeguards and collateral attack strategies available to the non-indigent.

IV. CONCLUSION

{¶36} Henceforth, we no longer accept *Anders* motions and briefs. But in this instance we grant counsel's motion to withdraw, because counsel has already disclosed a belief that no errors of arguable merit exist. We will appoint new counsel by separate entry and order counsel to file a merit brief in conformity with this decision within 60 days from the journalization of the entry of appointment.

MOTION GRANTED WITH CONDITIONS. IT IS SO ORDERED.

Abele, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: ________________________
William H. Harsha, Judge

APPENDIX

Anders v. California, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d. 493 (1967):

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. (Footnote omitted.)