TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
ELLIS T. McCOY, ETC.,	)	
	)	No. 87-5002
Appellant	)	
v.	)	
	)	
COURT OF APPEALS OF WISCONSIN,	)	
	)	
DISTRICT 1	)	

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ELLIS T. McCOY, ETC.,

Appellant

v. : No. 87-5002

COURT OF APPEALS OF WISCONSIN, DISTRICT 1

Washington, D.C.

Wednesday, January 20, 1988

APPEARANCES:

LOUIS BENNETT BUTLER, JR., ESQ., Milwaukee, Wisconsin; on behalf of the Appellant.

STEPHEN W. KLEINMAIER, ESQ., Assistant Attorney General of Wisconsin, Madison, Wisconsin; on behalf of the Appellee.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: Mr. Butler, you may proceed whenever you're ready.

ORAL ARGUMENT OF LOUIS BENNETT BUTLER, JR., ESQ.

ON BEHALF OF APPELLANT

MR. BUTLER: Thank you, Mr. Chief Justice, and may it please the Court:

This matter is before the Court on appeal of the decision by the Wisconsin Supreme Court upholding the constitutionality of a procedural rule requiring Appellate counsel to inform the Court why issues in an appeal lack merit when counsel reaches that conclusion.

We contend in this case that the decision of the Wisconsin Supreme Court is in error and that the effect of the Appellee's argument and the decision of the Wisconsin Supreme Court is to ask this Court to redefine either the role of counsel in an appeal or the nature of an appeal or both.

Now, --

QUESTION: You say that's the result of the Wisconsin Supreme Court's decision?

MR. BUTLER: That is correct.

QUESTION: And what's the matter with that result?

MR. BUTLER: In this particular case, the problem with that result is that, as Appellee concedes in their brief,

it removes an appeal from the adversarial testing process once counsel reaches the conclusion that there is no merit to the appeal.

In so doing, since Wisconsin has provided by its constitution that a client is entitled to an appeal as a matter of right, he is getting something less than that in the Wisconsin judicial system.

QUESTION: Well, of course, indigent defendants who will get appeals as a matter of right as in Wisconsin are entitled to the benefit of counsel, but we have cases that say they're not going to get everything that the well-heeled criminal defendant is going to get. It just isn't in the nature of things.

Probably a well-heeled defendant can walk into some law office and plunk down enough money to get the lawyer to make any claim the defendant tells him to make. It's unfortunate, but it's true.

But certainly you don't contend that the indigent defendant is entitled to that sort of service, do you?

MR. BUTLER: We are not contending that the indigent defendant is entitled to everything. For example, I think you are correct that a client who has a great deal of money can shop around. I think that was recognized in the United States v. Edwards, 7th Circuit case. You can shop around and look for someone to make that argument.

At the same time, this Court has held consistently that, in fact, in discussing the due process rule, they've also discussed it in the context of equal protection, and they say essentially the purpose of Anders is to try to provide a criminal defendant with the same type of representation he would receive if he were having a retained counsel.

So, the Court has made that recognition in the past. Basically, in this situation, Appellee concedes that the purpose of this rule is to take the appeal out of the adversarial testing process.

Now, since the Court has previously described in Polk County v. Dodson and Evitts v. Lucey that an appeal is just that, it's the adversarial testing process, and that a client is deprived of due process when he has less than that. In effect, what they are asking the Court to do is, in a context of a no merit appeal, take the appeal out of the adversarial process, redefine the nature of appeal, and give the client something less than that which he is entitled to as a matter of right in Wisconsin.

Now, in addition --

QUESTION: May I interrupt, Mr. Butler, right there?

Assuming you just applied Anders as written and you don't have this additional requirement of a lawyer explaining why he thinks it's frivolous, do you think the normal Anders case in which the lawyer files an Anders brief, in which he

makes the -- identifies the arguable arguments on behalf of his client and then says, but I think they're frivolous, do you think that takes it out of the adversarial process?

MR. BUTLER: The one thing that Anders did -- I do not. I think the one thing that Anders did --

QUESTION: You think that is the same advocacy that the rich person that the Chief Justice mentioned would get?

MR. BUTLER: Right. I think the one thing that Anders did is to try --

QUESTION: It is the same advocacy that the rich client would get? Do you think his client is going to go in and make some arguable things, saying yes, but I think it's frivolous and I'd like to withdraw?

MR. BUTLER: No. I'm sorry. I misunderstood your question.

No. I can't imagine a client paying a lawyer to go in and argue the case as totally frivolous.

QUESTION: What we've got is a case where the paying client, if he's got a conscience lawyer, would say to him, you're going to waste your money. I'm telling you that in advance. It's not worth $5,000 to file this. Of course, if you want to throw your money away, I'll file your papers for you.

MR. BUTLER: That's correct.

QUESTION: What you're saying is that the poor defendant is entitled to have the state waste the same amount

of money.

MR. BUTLER: That's correct.

QUESTION: That's correct.

MR. BUTLER: In effect, the poor defendant -- for example, in Anders, Anders tried to resolve a difficult ethical dilemma that counsel faces. When, on the one hand, you are obligated to litigate the appeal on the client's behalf to the best of one's ability, but, on the other hand, you have reached the decision that the case is wholly frivolous and without arguable merit.

Now, the client is entitled to have the appeal as a matter of right and he's entitled to a vigorous advocate to put forth issues on his behalf. At the same time, the lawyer is confronted with --

QUESTION: But he's not under Anders. He's not under Anders entitled to that.

MR. BUTLER: Under Anders, he is entitled to that.

QUESTION: No, he's not entitled to the vigorous advocacy. He's entitled to have the points identified, the colorable basis identified and then the lawyer is entitled to withdraw.

MR. BUTLER: That's should the Court reach the conclusion that the case is wholly frivolous. However, Anders does --

QUESTION: But he doesn't go in and make a vigorous

argument, don't let me withdraw. He files his brief with the arguable points in it and says I think these are frivolous.

QUESTION: And then he's out and if the Court thinks there's anything in it, they appoint a new lawyer under Anders.

MR. BUTLER: Right. The one problem I think with that analysis, I think Anders does require you to be an advocate. For example, Anders cites as its support the case of Ellis v. United States.

Ellis v. United States had a discussion requirement very similar to the one that the Wisconsin Supreme Court adopted in this case, and in that particular case, two different attorneys evaluated the appeal, cited possible issues to support the appeal, and then, after raising those issues, then proceeded to advise the Court why those issues lacked merit.

The United States Supreme Court reversed the decision of the United States Court of Appeals and held that that was not acting as an advocate on behalf of the client.

QUESTION: But if he points out these arguable basis for the appeal, and then in the last line says I resign, please let me out, and the Court lets him out, there's nothing wrong with that, is there?

MR. BUTLER: No.

QUESTION: That's what Anders says. That's what Anders says.

MR. BUTLER: That is what Anders says.

QUESTION: And he doesn't need to give any reason for asking to resign or to get out?

MR. BUTLER: I don't think he should. I think at that point --

QUESTION: So, it's just to be inferred that my mother-in-law is sick or what? Is it I just haven't got time or --

MR. BUTLER: No, no. I think --

QUESTION: It's really inferred that he thinks it's frivolous.

MR. BUTLER: Right. I think it ties into Justice Stevens' question. I think counsel is under Anders supposed to make a vigorous argument. I think as a preface to the argument, counsel must advise the Court that, in his opinion, he believes the argument he is about to make is frivolous, but he should still argue the case on behalf of the client.

QUESTION: But that's the kiss of death in any real live court, is to say I'm going to make the following points and I intend to make them very vigorously, but I want to tell you beforehand that I think it's all a pile of junk. That's really what he's saying.

QUESTION: By asking to resign.

MR. BUTLER: In Anders, that essentially is correct. However, the value of that rule and the reason Anders is a

difficult case for an appellate lawyer to defend, because you are doing exactly that. You are telling the Court that, in your opinion, the case is frivolous.

However, by --

QUESTION: And we've said that that doesn't violate the 6th Amendment.

MR. BUTLER: That's correct.

QUESTION: So, why does it violate the 6th Amendment for the lawyer to tell the Court why he thinks it's frivolous?

MR. BUTLER: At that point, by telling the Court why the case is frivolous, the lawyer is doing more than just acknowledging that, in his opinion, the case is weak, but the Court must make the determination.

At that point, counsel is now providing the brief, in effect, for the other side. You are now briefing both sides of the case. Here's our case, here's the state's case. In my opinion, I'd side with the state.

QUESTION: Well, a lawyer has an ethical obligation under some circumstances to bring to the Court's attention authorities on the other side, doesn't he?

MR. BUTLER: That's correct.

QUESTION: Or she?

MR. BUTLER: And that's why I believe that Anders resolved that ethical dilemma. Anders says in that situation, we give you permission to tell us that the case is frivolous,

but we still want you to argue it. So, they have resolved the ethical dilemma.

They allow the attorney to be ethical because you are telling the Court that in your opinion the case is frivolous, and at the same time, they allow you to be an advocate.

QUESTION: And so he can't be sanctioned then, I suppose.

MR. BUTLER: That's correct.

QUESTION: Because most lawyers have, at least under the current rules, have an obligation not to file frivolous papers.

MR. BUTLER: That's correct. And that's, in fact, the case in --

QUESTION: Because they can be -- certainly, in the trial court, Rule 11 would catch them, isn't that right?

MR. BUTLER: That's correct.

QUESTION: So, I don't know that you can say that even a well-paid -- even a paying client isn't entitled to a lawyer who will file frivolous cases. The lawyer isn't supposed to do that.

MR. BUTLER: No. The lawyer is not supposed to do that, and we are not arguing that there are attorneys out there who would be unethical.

QUESTION: It has been done. What about a case where the lawyers argue the case and haven't read the briefs. The

judge says, well, look, is your only part in this that the man was convicted on three counts and was sentenced on count two before he was sentenced on count one. And he says, yes, that's the only point. He said, why are you bringing it here. He said, well, I was appointed and the client insisted on it.

Well, all he wasted was five minutes of the Court's time. That's all.

MR. BUTLER: That's correct. In fact, the irony of the Wisconsin Supreme Court's decision, if it had really -- saves the Court no time whatsoever. The only agency that is saved any time by the Anders procedure is the agency representing the State of Wisconsin.

The Court in either case has to evaluate the arguments that are presented to it by Appellate counsel, whether it's a meritorious appeal or whether it's a no merit appeal. The public defender or the appointed Appellate counsel who is representing the defendant has to brief the issues in either situation, advise the client of the possible ramifications to the appeal, his analysis of the merits of the appeal, and whether or not there's a possibility of success, and then present those arguments to the Court.

The only one who doesn't have to do anything in this situation is the representative of the State of Wisconsin, because, now, appointed Appellate's counsel is doing their job for them. We are now briefing the case for the state.

QUESTION: Yes, but that's not what brings you here. I mean, you're not complaining about saving the state money. You're complaining about prejudice to your client.

MR. BUTLER: That's correct. It was the Wisconsin Supreme Court that complained about the money.

QUESTION: Right. But it seems to me if you assume that the state would come in with an opposing brief anyway, the only effect -- the only possible effect of making counsel state why he thinks it's frivolous is to enable the Court more readily to focus on the fact that his reasons are wrong.

Don't you think if you're going to have a brief for the other side from the state anyway, don't you think it would more likely help than harm the individual defendant for counsel who has very bad reasons for thinking that the appeal is frivolous to set forth those very bad reasons in a brief and the Court can look at it right away?

Otherwise, all the Court knows is, well, he's made these arguments, but in his heart of hearts, he thinks it's all nonsense. I don't see how your client is hurt by that.

MR. BUTLER: In answer to your question, Justice Scalia, first of all, in Wisconsin, the Attorney General's office is not supposed to file a response brief in an Anders situation. In fact, they have taken the position earlier in this case that they should not even be served with a copy of the brief in that situation, and they have taken a consistent

position that they do not have to respond and so far that is the rule of law in Wisconsin.

So, you are not anticipating getting a response from the State of Wisconsin in an Anders situation. The only one who provides the arguments on behalf of the State of Wisconsin in an Anders situation is the attorney for the client.

QUESTION: Yes, but I don't see how that hurts your client. That's the question. (A) It seems to me that it might actually benefit the client in some cases because I've had cases where I thought the answer was perfectly clear and then I started to write out the reasons why it's clear and I find, well, it isn't really all that clear, and if you come to a conclusion that something is frivolous, say, oh, there's nothing to this case, and then you have to explain why, you're going to be darn sure it is frivolous.

It's easy sometimes in a big record to say that I don't think there's anything here. So, doesn't the requirement of articulating the basis for the conclusion it's frivolous actually provide some protection to the client?

MR. BUTLER: Actually, it does not because by providing the Court with those reasons, assuming that you've made an accurate determination, what you have done in that situation is told the Court why the case lacks merit.

It's our position that if it is not readily apparent from the face of the Anders brief why that case is frivolous,

then perhaps counsel was wrong in making that determination.

QUESTION: Yes, but if he is wrong, he won't be able to spell out satisfactory reasons and he'll change his mind. But if he can just file it without stating the reasons, he's going to go ahead and make some mistakes. That's my point.

MR. BUTLER: But the answer to that, Justice Stevens, is that in that situation, the Court can order the opposing side to brief the case for the other side. You don't need for counsel to step in. You don't need to increase the appellate process. You still have an advocate's brief on behalf of the client. The issues are still highlighted.

QUESTION: It seems to me in that case, it would be better for the lawyer to find out himself that he was initially wrong in his judgment of frivolity or frivolousness, whatever the right word is, and to correct it himself and say, no, there is some merit to it, rather than filing an Anders brief without an explanation and then having the state say, well, he acknowledges frivolous, so that's it.

MR. BUTLER: Justice Stevens, I think a lawyer does that when he makes the analysis of the case.

QUESTION: Well, you hope he does.

MR. BUTLER: The problem is not with making the analysis for the case. The problem is within providing that analysis --

QUESTION: Well, if he does it, how often does he do

it wrong? How many Anders briefs have you filed that you think you shouldn't have filed?

MR. BUTLER: Your Honor, I've only filed two Anders briefs in my life. I question whether I should have filed either one of them.

QUESTION: In those cases, do you think it would have really made any difference if you'd included the statement of reasons?

MR. BUTLER: In one of the cases, in fact, I did include a statement of the reasons at my client's direction, and I do think it made a difference because his case came subsequent to this one. His conviction has already been affirmed.

That is one of the unique things about the Wisconsin rule. You don't dismiss an appeal in Wisconsin if the Court accepts an Anders brief. You affirm the conviction. So, he has an appeal, but it's not the same type of appeal that's contemplated by the Constitution.

QUESTION: Well, except the Constitution doesn't really contemplate an awful lot of frivolous appeals. I mean, -- well, anyway.

MR. BUTLER: No. I agree the Constitution does not contemplate a lot of frivolous appeals. I think counsel's responsibility is to try to argue on behalf of his client as best as possible.

In the unlikely event that you do have or the unique event that you do have a frivolous appeal, you're still obligated until you are allowed to withdraw from the case to protect that appeal. You still represent the client, and to the extent if there is a conflict between a client's ethical responsibility and a client's legal responsibility to the client under the Constitution, it's our contention that the Constitution should control.

We are not supposed to be an administrative aid to the Court. Polk County v. Dodson, the Court made it clear. The client is supposed to have the undivided loyalty of the attorney, and what the Wisconsin Supreme Court has admittedly done in admitting that it goes beyond Anders is it says, no, you have two duties in this case. Only one is to the client, the other is to the Court, and we want you to wear both hats at the same time, and that provides the client, and this goes to the second part of the argument, with the redefining of the role of counsel, that provides the client with less than an advocate.

You are not being an advocate. You are being a counselor as Appellee as pointed out --

QUESTION: Yes, but you're arguing -- you say he's entitled to the undivided loyalty of the lawyer. Well, the lawyer gives him his undivided loyalty and when he says to him, I recognize you want to appeal but there is absolutely no merit

to this appeal, it's a waste of time and money and everything else, and, so, I don't think you should appeal. There's nothing inconsistent with that.

MR. BUTLER: There's nothing inconsistent with that.

QUESTION: And then he goes on and he says, moreover, since it's frivolous, I have an ethical duty not to prosecute it and to advise the Court of it. Why is that inconsistent with his duty to his client?

MR. BUTLER: Because the client at that point says, I have a right to an appeal and I want the appeal, and at that point, the lawyer's duty is to protect that appeal. His constitutional duty. Because he has the right to appeal as a matter of right, not as a matter of privilege.

QUESTION: Well, Wisconsin can well look at it a different way, that the reason he's setting forth the causes for frivolousness are not to harm his client, but, rather, to justify to the Court his withdrawal from the case.

Now, there do arise situations where a lawyer has two obligations; one to the Court, one to the client. In justifying his actions to the Court, it seems to me he is certainly being no less loyal to the client that by the mere fact of his saying I will not take an appeal.

I mean, at that point, he's already betrayed the client if you consider that a betrayal. From there on, all he's doing is justifying to the Court the reason for his

withdrawal, so that the Court, if it sees that the reason is no good, can take appropriate action to be sure that a proper appeal is litigated.

MR. BUTLER: I understand your concern, Justice Scalia. The problem in that situation is that, for example, if we liken this to a trial situation as this Court has done in the past, in Evitts v. Lucey, they described the role of counsel. They cited Strickland v. Washington and United States v. Cronic.

If you liken this to a trial situation, this would be akin to a lawyer coming in on the eve of trial, evaluating the case, telling the client it's obvious that you're guilty, it's obvious that we don't have a prayer, we ought to plead and take the best deal possible, and the client says, no, I want a trial, and the lawyer says, no, I'm going to plead you guilty.

QUESTION: Well, Mr. Butler, I think there is a good deal of difference between a trial situation where the burden of proof is always on the Government and any competent attorney knows that he represents the defendant by simply putting the Government to its proof, just by cross examining, and on the other hand, on appeal, you get into situations, which I daresay you've confronted some yourself having filed two Anders, where you have to -- you know, the burden of proof is no longer on the Government, the burden of proof is on the Appellant, and there just isn't much -- there's virtually nothing to complain

about. Everything that you asked the trial court to do, the trial court did. The jury still returned a verdict of guilty.

MR. BUTLER: Justice Rehnquist, I think your question points to the very reason why this case is here. It is precisely because in an appellate situation that the burden is now on the defendant. Precisely because a defendant now needs a lawyer to act as a sword to overturn that appeal, it is for that very reason that the role of counsel becomes critical in appeal. It's critical at that point. He needs help, more help there so that he can come in and try to overturn the decision; otherwise, the judgment of guilt is already in, he has already been sentenced, and there is nothing further that can be done on his behalf.

That is the reason why counsel is critical on appeal.

QUESTION: Yes, but you would agree, I take it, that there are some appeals, I don't know how large a class it is, that even the best lawyer in the world has virtually no chance of getting -- of succeeding on; whereas, it's not nearly as easy to evaluate that in the trial situation. Everybody agrees that abandoning a client or saying I think your defense is frivolous, therefore I won't represent you in trial, it just can't be done. It isn't done. It isn't a problem.

MR. BUTLER: I understand your concern, Justice Rehnquist. That's why we are defending the Anders decision, because Anders came down with a compromise, that allowed the

attorney on the one hand to try to remain that advocate while, on the other hand, recognizing the ethical duty of the lawyer not to knowingly file a frivolous appeal and pass it off as a meritorious.

QUESTION: Well, Mr. Butler, suppose the state as a matter of course set these appeals for a limited oral argument in each instance, and the lawyer comes in representing the defendant and has indicated to the Court that the lawyer wants to withdraw, and the reason is the lawyer thinks that it's frivolous, do you think the Court can properly ask the lawyer to justify that orally and say, tell me why you think we should let you withdraw? Tell me why.

MR. BUTLER: Not if the lawyer is going to remain an advocate on behalf of the client.

QUESTION: You don't think the Court can properly even ask the lawyer at oral argument to explain?

MR. BUTLER: That's correct, Justice O'Connor. I think to do that, you are no longer acting in the role of advocate. At that point, the client no longer has an advocate for appeal.

QUESTION: Then you think that the lawyer has no duty to the Court, even when the Court asks the lawyer's help?

MR. BUTLER: No. I do think that the lawyer has a duty to the Court, and that is why the Anders decision has recognized that dilemma and tried to come down with an answer.

It's an answer that makes everyone uneasy. No appellate lawyer I know likes the Anders decision because it puts you in a very awkward position of arguing a case that you already assessed lacks merit. You have to make meritorious arguments to the best of your ability in that situation.

QUESTION: Well, don't you recognize that every lawyer has two loyalties, in effect; one to the client and one to the Court? Isn't that right?

MR. BUTLER: Yes, but it's the duty --

QUESTION: Yes, that's right, and it seems to me that the Court can ask the lawyer to tell the Court why the lawyer is taking a certain position. In this case, the Court has made a universal question, tell me why.

MR. BUTLER: I think in that situation, it can only do so if it redefines the role of either the appeal or counsel in that setting because as long as this Court has taken the position that a client is entitled to the adversarial process in an appeal, and as long as this Court has taken the position that the client is entitled to an advocate, to then say, but in this narrow realm of cases, we're going to give these clients less than that is giving that class of clients less than the advocacy and the appellate representation than other clients are receiving.

So, in effect, the Court is asking us to wear two hats, to brief both sides, to be more of an administrative aid

to the Court, and actually to argue as an amicus curiae, and this Court in Anders, in Ellis, in Evitts, and all other decisions discussing this issue, has said counsel cannot do that, counsel cannot act as an amicus curiae.

The irony of the state's position and the Wisconsin Supreme Court decision in this case is that it's far less onerous to argue or to take the position of the dissent in Anders as it is to take the position of the Wisconsin Supreme Court in this case because, at least in that setting, the client still had the appeal because the client can still come forward and make, absence of counsel, he can make his own frivolous arguments and still have a full appeal on the merits.

In this setting, the client does not receive that. He receives less than an appeal. He receives less than advocacy, and it is our contention that to adopt this procedure is to provide this class of clients with less than that they're entitled to under Wisconsin law.

QUESTION: Do you think Justice Abrahamson, who dissented below, was very happy with the Anders situation?

MR. BUTLER: I'm not sure she was. I think that was one of the reasons that she called for in her dissent a re-evaluation of the rule. There are obviously problems to this dilemma that Appellate counsel faced, but I am not aware of any position that protects the rights of the client and the ethical duties of the lawyer better than Anders.

So, it is our position that we would ask that this Court reaffirm Anders and reverse the Wisconsin Supreme Court.

I would ask to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Butler.

Mr. Kleinmaier, we'll hear from you now.

ORAL ARGUMENT OF STEPHEN W. KLEINMAIER, ESQ.

ON BEHALF OF THE APPELLEE

MR. KLEINMAIER: Mr. Chief Justice, and may it please the Court:

It is ironic that in an attack on the Wisconsin procedure, which requires the defense attorney to explain the reasons for reaching a conclusion an appeal is frivolous, the case is based on the -- the argument is based on Anders because in the Anders case, the petitioner himself, one of the remedies he thought would be better than the situation he faced was to have the defense attorney provide an explanation.

As quoted, the source of this is a footnote in Nickols, the Nickols v. Gagnon case. The brief on behalf of the Petitioner in Anders recommended a procedure in the District of Columbia Court of Appeals because it afforded more adequate protection because counsel must convince the Court that the issues are truly frivolous.

That's what essentially the discussion requirement of the Wisconsin rule is. The defense attorney who has stated that

-- set forth the facts and the law then asks -- states it's frivolous and seeks to withdraw and all this discussion requirement does it ask him to explain why he reached that conclusion, and in making that requirement on the attorney, I think that is completely consistent with the Anders decision and --

QUESTION: Does the state's procedure here satisfy the Anders requirement that the attorney point to anything in the record that arguably supports his client?

MR. KLEINMAIER: Yes, sir. As part of the procedure in Wisconsin also, the attorney cites the facts and the legal authority.

QUESTION: And then he says, but this is frivolous?

MR. BUTLER: Yes.

QUESTION: Because these things are -- these arguments are so baseless, they're frivolous, is that it?

MR. KLEINMAIER: Yes. The Wisconsin procedure was the Court's attempt. The rule is a codification of the Wisconsin case of Cleghorn v. State, which was a Wisconsin Court's attempt to implement the Anders decision.

QUESTION: Well, Justice Harlan in Anders has said that you can't really point -- if you can point to anything that's arguable, it just isn't frivolous.

MR. KLEINMAIER: That's a difficult part of implementing the Anders decision, and I think what maybe what's

required is that the defense attorney review the case and he finds it's frivolous, and then he or she has to look at it and those things -- when you review a record that you find is frivolous, there are certainly going to be things that draw your attention, you check out, because it just doesn't seem -- seems out of the ordinary.

In reviewing the record and complying with Anders, the attorney would then point out, I think, the things that -- the best arguments that could be found, and --

QUESTION: Anders didn't say on its face that you weren't entitled not only to satisfy what the Court said the attorney had to say, but it didn't say that -- it didn't hold that the -- that it was impermissible for the lawyer to explain why he thought it was frivolous.

MR. KLEINMAIER: Right. It did not make a point of it either way. In fact, in a footnote, it cited the District of Columbia rule and said there was not approving or disapproving of that rule in the Anders case.

QUESTION: But I suppose the case that's arguably more against this Wisconsin procedure is Ellis.

MR. KLEINMAIER: Well, as I recall --

QUESTION: That's a short precarium, but it doesn't say very much.

MR. KLEINMAIER: And that's the problem, I think, that it doesn't say very much because in reading the case, we

don't know what exactly it was the attorneys did. There, they gave an evaluation.

I think a distinction between an amicus and an advocate, the advocate obviously is attempting to serve his client and he's going to review the record to find whether there's merit or whether it's frivolous, he has to review all the facts and all the law in the light most favorable to his client and, if, in reviewing it that way, he can find something that he can make a legitimate argument on, then he should pursue the appeal.

QUESTION: Is it not true that in Ellis, both sides agreed the appeal was not frivolous? That's the difference between that case and these others.

MR. KLEINMAIER: But I think that -- the attorneys who had reviewed it had originally reached a conclusion, I think, based on the argument that --

QUESTION: The Solicitor General agreed when the case was before us that it was not a frivolous case.

MR. KLEINMAIER: But I think a case would be one where I think someone could look at it and say, you're probably going to lose, but it's not frivolous because you have a good argument, but you may still lose it. I think in serving your client as an advocate, you're going to look at a case and say, you may have a chance -- you may lose, but there's a very good argument that we should pursue.

The amicus, I think, would take more -- advising the Court, would take the approach, there may be an argument but it's going to lose, therefore don't -- you know, the advice is it's a losing argument and stop at that point. That's, I think, a distinction between the two roles.

QUESTION: Well, surely you can't withdraw under Anders just because you think the odds are against you on that.

MR. KLEINMAIER: That's precisely right.

QUESTION: Then you wouldn't have any criminal appeals if that was the case.

MR. KLEINMAIER: That's precisely right, and that's where I think the attorney acts as an advocate because he doesn't view it that way. He looks to see whether there's a good argument he can make, even though it might lose. If he can convince the Court, he may be the one able to do it.

I think the discussion requires in compliance with the policy, an important concern of Anders is there's a statement in the Anders case, the Court, in reviewing the letter submitted by the attorney there, said one of the problems was there was no way to determine whether the attorney had acted as an advocate when he reviewed the record and the law.

This discussion requirement provides that information to the Court. If the attorney just cites facts, cites some cases, and then jumps to the statement, the case is frivolous,

there's no way to tell whether he evaluated the law properly. When he gives the evaluation, the Court can then determine whether he reviewed the case as an advocate or more in the light of an amicus where he's just saying it might be a losing case.

In addition, when he does this, there's another concern that's been pointed out, that this constitutes briefing the case against the client in violation of Anders. I don't think it does. Anders already tells the attorney to cite the facts, cite some authorities, advise the Court if you've concluded the case is frivolous, and ask the Court to withdraw.

I think that the additional step of simply explaining how it jumped from law and authorities to the conclusion that it's frivolous does not constitute briefing the case against the client. The damage that is done is flagging the case as being frivolous. Simply to explain how he got to that conclusion is not going to do further damage to the client. It's simply going to help the Court review the case.

QUESTION: But for what it's worth, it does relieve you as representative of the state of a duty to brief the case.

MR. KLEINMAIER: I think that's right, but I think that's part of the whole process, because if the state is briefing the case, what you have is an appeal. You have a brief filed for the client, the defendant; a brief filed for the state, and you have the Court deciding it, and that's a

full-fledged appeal, whereas this is part of a process that recognizes that frivolous cases should not be brought -- followed up on a full appeal, and this is a method of relieving the attorney from representation before the appeal is brought.

QUESTION: Why should they be relieved?

MR. KLEINMAIER: So that the -- the defense lawyer? Because the appeal is frivolous and this Court has also recognized that the courts should not be clogged up with frivolous appeals.

QUESTION: Is it true that the Government does not file briefs in these cases?

MR. KLEINMAIER: Not in Wisconsin. If the Court -- the defense lawyer files the no merit report, if the Court finds merit, then it's sent back to the attorney or a new attorney and the case is briefed and then it follows through regular appeals. The state would file a brief, of course. But, no, the state does not file any response to the no merit report.

QUESTION: So, there's no appeal?

MR. KLEINMAIER: That's right.

QUESTION: Why should the Court have to determine whether there is or is not merit after an Anders brief is filed? Why isn't that your job?

MR. KLEINMAIER: Well, this Court said in Anders that the Court has the responsibility to make the independent

determination whether the appeal is frivolous, and --

QUESTION: I still ask, why isn't it your job, though? It seems to me that the one who benefits is the state attorney.

MR. KLEINMAIER: Yes, there is some benefit, but, again, I think the purpose of this is to avoid an appeal because the issue is determined as frivolous, and if you have the state responding, that is an appeal. I mean, that's the way the -- the full appeal in Wisconsin, there -- in the Court of Appeals, I think in criminal cases, I think in all cases, the Court of Appeals, there are very few oral arguments and the entire appeal constitutes briefs being filed by each side and the Court reaching a decision.

So, another question, I guess, is if the state -- if the Attorney General's office is involved on behalf of the state, what kind of brief was filed. Is this one -- what you have is a report from the defense attorney saying the case is frivolous. Is the state then supposed to respond and say no, it's not frivolous?

The state's position would normally be that that's correct.

QUESTION: May I ask, before this rule -- how long has the rule been in its present form?

MR. KLEINMAIER: I think since 1978.

QUESTION: Do you happen to know whether before 1978,

when an Anders brief was filed without an explanation of why it was frivolous, did the state then respond?

MR. KLEINMAIER: No, it did not.

QUESTION: So, that hasn't changed. I mean, in either event, once the counsel for the Appellant has represented to the Court there's a frivolous appeal, the Attorney General's office says this is not a case to spend a lot of time on. Don't file anything.

MR. KLEINMAIER: I'm not sure if even before this rule, if the briefs -- if the no merit reports were even filed with the Attorney General's office. I think they were filed with the Court. I'm not sure about that point.

QUESTION: Do you know where we could find or I could find an example of a brief that satisfies the Wisconsin rule? Because the one that was filed in Mr. McCoy's case here, I guess, he said he purported to comply with Anders but left out the explanation of frivolity.

MR. KLEINMAIER: Right. I --

QUESTION: And that's the way this original proceeding got started.

MR. KLEINMAIER: Right. To get a brief filed in compliance with that rule, the only source that I would think of would be the Clerk's office for the Wisconsin courts.

QUESTION: You say that it's possible to file a letter that satisfies both Anders and the Wisconsin rule, I

take it? Don't you? I thought that's what you said.

MR. KLEINMAIER: Well, what I meant was I --

QUESTION: All you have to do is add to an Anders brief when you say, I think that the case is frivolous, I want to withdraw, and here's why I think it's frivolous.

MR. KLEINMAIER: That's right. We acknowledge that it is in addition to Anders. I mean, Anders itself does not specifically require it.

QUESTION: But you think it's possible to write a letter that satisfies both Anders and the Wisconsin rule?

MR. KLEINMAIER: Well, I think that if you satisfy the Wisconsin rule, you will -- you have satisfied Anders because the Wisconsin rule requires the same thing as Anders, and, in addition, specifically requires the attorney explain.

QUESTION: But there is nothing in this case and there's nothing -- not in this record, is there, an example of the letter --

MR. KLEINMAIER: No, it's not a situation where the evidence was introduced that would have precluded.

QUESTION: So, we really are sort of dealing in an abstraction.

MR. KLEINMAIER: Yes. In that regard, yes.

The Wisconsin Supreme Court also pointed out one of the rationales for this, and I think it is a fact, and this is also consistent with Anders, that the documents submitted by

the no merit report is of assistance to the Court and assistance to the Court was one of the policies or one of the things that the Court in Anders said was to be accomplished by the report, and this requirement to assist the Court by helping it in its independent review it has to undertake, but it will be of assistance to get the analysis from the -- the evaluation from the defense attorney also.

I think that concludes the argument.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kleinmaier.

Mr. Butler, you have four minutes remaining.

ORAL ARGUMENT OF LOUIS BENNETT BUTLER, JR., ESQ.

ON BEHALF OF THE APPELLANT -- REBUTTAL

MR. BUTLER: Thank you, Mr. Chief Justice.

Very briefly, one of the arguments advanced by the Assistant Attorney General in this case is to argue that there is no way any so-called no merit letter to determine if an attorney acts as an advocate on behalf of the client.

I would point out to this Court that this case does not present that situation. This is a case where counsel has identified issues on behalf of the client, so the Court is in a better position to determine whether or not counsel's assessment is accurate based on the identification of those issues.

This is not the same as the situation that was presented in Anders.

In addition, the state has conceded once again here in the argument that a client will not receive a full appeal in an Anders situation. This is directly contrary to the Wisconsin constitutional provision that provides that all criminal defendants receive an appeal as a matter of right.

QUESTION: Well, certainly the Supreme Court of Wisconsin didn't think it was contrary to the Wisconsin Constitution or they wouldn't have said it was all right.

MR. BUTLER: That's correct, but the Wisconsin Supreme Court in making that ruling basically admitted that it was going beyond the requirements of Anders and that it was asking an attorney to do something more than remain as an advocate.

QUESTION: Well, that is undoubtedly a federal constitutional question. But I don't see how you can rely here on a violation of the Wisconsin Constitution when the Supreme Court of Wisconsin has upheld the thing.

MR. BUTLER: No, I'm not arguing that it's strictly a violation of the Wisconsin Constitution, from that standpoint. Our argument is that by requiring an attorney to act as less than an advocate, which is what the 6th Amendment requires, and by requiring an attorney, once the state provides for an appeal as a matter of right, to provide the client with less than that appeal, then the 14th Amendment and the 6th Amendment of the United States Constitution have been violated.

QUESTION: Mr. Butler, just to help me out on one thing. You say that in this case, the lawyer did find there were arguable claims that could have been asserted on appeal.

Are those in the record, what those points were?

MR. BUTLER: The issues that have been identified are in the record. The issues that were identified, the attorney, myself, after identifying the issues, gave a preface to those issues indicating that, in my opinion, those issues are wholly frivolous and lack arguable merit. However, here they are.

QUESTION: But can you tell me where in the record those issues are identified?

MR. BUTLER: Those are in the joint appendix.

QUESTION: Are you the one who filed the Anders letter?

MR. BUTLER: That's correct.

QUESTION: And said that you couldn't really -- and you left out the explanation of frivolity?

MR. BUTLER: That's correct. It's in the joint appendix, page 11.

QUESTION: Thank you very much.

MR. BUTLER: If there are no further questions, thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Butler.

The case is submitted..

We'll argument next in Case Number 86-1461, Edward J.

DeBartolo Corporation v. Florida Gulf Coast, etc.

(Whereupon, at 11:46 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 87-5002

CASE TITLE: Ellis T. McCoy, Etc., v. Court of Appeals of Wisconsin, District 1

HEARING DATE: Wednesday, January 20, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: 1/20/88

Margaret Daly

Official Reporter

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