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### WOLF! WOLF!—THE RAMIFICATIONS OF FRIVOLOUS APPEALS

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The author is First Assistant Public Defender of Cook County (Chicago), Illinois, and Chief of its Appellate Division. He has been associated with the Public Defender's Office since 1956.

In his article Mr. Doherty deplores the practice of frivolous appeals and discusses the deleterious effect upon meritorious cases which warrant the best efforts of appeal counsel and adequate attention from the reviewing courts.

As a career defender of indigent persons accused of crime, I find myself in the anomalous and regrettable position of criticizing a decision of the Supreme Court of the United States that was intended to benefit the very persons I defend. The decision is the one rendered in *Anders v. California* in May, 1967.<sup>1</sup>

A 6 to 3 majority of the Court held that court-appointed appeal counsel does not fulfill his role as an active advocate in behalf of his client by writing a no-merit letter to the reviewing court. The Court established the following guidelines for the handling of appeals considered frivolous by appointed counsel:

... 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 re-

quires. 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.

An earlier (1958) Supreme Court decision, *Ellis v. United States*,<sup>2</sup> had held that appointed appeal counsel need only ask to withdraw whenever, after "conscientious investigation", he considered the appeal to be frivolous, after which the court of review would deny the appeal if it was satisfied that the withdrawing counsel had "diligently investigated the possible grounds of appeal". In *Anders* a new dimension was added: counsel who seek to withdraw must now submit a brief "referring to anything in the record that might arguably support the appeal". This places counsel in quixotic position, as the dissent points out, of trying to find support for an appeal which he has already concluded to be without any merit whatsoever.

The dissenting opinion noted that California, the state out of which *Anders* arose, had earlier developed a workable, fair system whereby the appellate court could satisfy itself "from its own review" of the record whether counsel's assessment of the record was correct. Moreover, the dissent voiced its concern over the majority's imposition of "a single inflexible answer to the difficult problem of how to accord protection to indigent appellants in each of the 50 States". This latter

<sup>1</sup> 386 U. S. 738 (1967).

<sup>2</sup> 356 U. S. 674 (1958).

observation calls for further exploration and embellishment.

Before we can seek to improve our law, we must attain some fairly clear conviction of what goals are to be desired. Then the decision of whether a law is good entails judgment not only on the desirability of its goal but also on its practical working. Prognosticating whether a legal device will really work depends on a sane evaluation of each rule and practice in law. This cannot be done more than tentatively; it cannot be done by deduction from prevailing principles. Justice Holmes, in his lectures entitled, "The Common Law", stated that "the life of the law has not been logic, it has been experience".

We are totally unaware of any compelling experience which would prompt the Court in *Anders* to say that the procedure that it commands "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".

The new procedure will do no such thing. In fact, it will accomplish an opposite result. The most startling feature of the *Anders* decision is that the people it will hurt the most are those whom it purports to help—the indigent prisoners. There are three reasons why the procedure commanded will hurt indigent appellants: 1) it will encourage mediocrity; 2) it will contribute to a backlog of unreviewed convictions; and 3) it will impair the effectiveness of the forma pauperis bar.

#### THE ENCOURAGEMENT OF MEDIOCRITY

All lawyers should be justifiably proud to play an active role in the expanding horizons of due process of law. But their efforts and accomplishments will be hampered, delayed, and discouraged if they are forced to give formal priority to frivolous appeals. It is naive to expect that counsel who writes a brief will simultaneously move to withdraw. The decision invites sophistry; it offers counsel the choice of filing a schizophrenic motion to withdraw (accompanied by a formal brief opposing the motion), or the alternative of writing the brief and not moving to withdraw. Human nature will force the selection of the latter alternative. That will satisfy the form of due process without regard to substance. Thus, the decision will encourage mediocrity or default.

On the other hand, by *trusting* the forma pau-

peris bar and by challenging it, the Court can call forth heroic efforts. Almost without exception, the lawyers in recent landmark cases of substance were court-appointed.<sup>3</sup>

#### A BACKLOG OF UNREVIEWED CONVICTIONS

With the advent of increased criminal appeals, the task of briefing and arguing forma pauperis appeals has been delegated, and will increasingly be delegated, to tax-supported groups of lawyers assigned to appeal work exclusively. If such groups of lawyers are forced to brief frivolous appeals, the people who will suffer the most are the indigent prisoners who have been *unjustly* convicted; they will languish in prison while the lawyers devote time and energy to hopeless causes, on a first come-first served basis.<sup>4</sup>

The Appeals Departments of various Public Defender Offices throughout the country are the places where backlogs of unreviewed convictions will first be revealed. Since such offices are notoriously understaffed and underpaid, frivolous appeals will compound the evil of delay in reviewing meritorious appeals. It takes far more time to write a frivolous appeal than it does to write one that a lawyer can really sink his teeth in. In the meantime, the backlogs continue to grow, and backlogs of unreviewed convictions could produce situations whereby a convicted person may have already served his time before his case comes to the attention of an appellate court.

It is no answer to suggest that the organized bar of private practitioners could render the needed relief. That this probably would not happen is illustrated by the experience in Cook County, Illinois, where, in 1930, an unworkable assigned counsel system had produced such a backlog of criminal cases on the trial docket that it became necessary to create the office of Public Defender.

It makes no difference whether a log-jam is at the mouth of the river or at the outlet. Assuming that the large law firms briefed and filed all the appeals in the Public Defender's backlog within 30 days, it would simply move the log-jam into the State's Attorney's office. If that office received sufficient outside help to cope with the inundation of appeals, it would simply move the log-jam into the reviewing courts.

<sup>3</sup> For example, see *Gideon v. Wainwright*, 372 U. S. 335 (1963).

<sup>4</sup> A first come-first served basis is the only fair method of handling appeals assigned to a public agency.

The place to attack any evil is in its cause. One of the causes of growing backlogs of unreviewed convictions is the frivolous appeal.

#### IMPAIRMENT OF THE EFFECTIVENESS OF THE FORMA PAUPERIS BAR

Every lawyer who undertakes the appeal of a law suit has a duty to his client to win if at all possible. He also has a duty to his profession, the reviewing court, the law, justice, and above all to himself, to make sure that if he does prevail it is indeed by honorable means. He has not only the right but the duty to vigorously and fearlessly champion the most unpopular cause, but he should not urge a frivolous position or undertake an appeal on a gamble that the reviewing court will err in his favor. The lawyer who does the latter will lose stature which may extend beyond the particular case; he will find himself in the position of the shepherd boy who cried, "Wolf, wolf!" when there was no wolf. The reviewing court will not know when he is sincere.

Candor, fairness and sincerity are every lawyer's responsibility to every court in which he appears. He does not have to be right, but he has to believe he is right. And the court has to believe that he believes he is right. Anything short of that is intellectual dishonesty.

The statement in *Anders* that the procedure commanded "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 are able to afford the retention of private counsel", is predicated upon the inarticulated and false premise that private lawyers will undertake the appeal of any criminal conviction, even a frivolous one, so long as they are compensated. With deference and respect for the Court, I cannot subscribe to such an unwarranted denigration of the Bar.

Under the standards of ethical conduct prescribed in the Canons of Professional Ethics, a private lawyer who is approached to undertake a criminal appeal should charge a reasonable

fee to make a preliminary study of the record.<sup>5</sup> If he decides that the contemplated appeal is without merit, he should so advise the client and decline to undertake the appeal. Under those same standards, a court appointed counsel on appeal who conscientiously arrives at the conclusion that an appeal is frivolous—that there are no grounds of appeal—should be permitted to withdraw upon the filing of an affidavit which recites the facts (with record reference) and his opinion that the appeal is without merit.

In the Third Book of Moses, called *Leviticus*, we find the following at Chapter 19, verse 15:

Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: *but* in righteousness shalt thou judge thy neighbor.

From this authority it is respectfully submitted that an indigent prisoner is entitled to counsel on appeal as much as an affluent prisoner, but not more.

Any client is entitled to the very best that a lawyer has to offer; his skill, his knowledge, his experience, and his diligence. But no one has the right to make an intellectual prostitute out of a lawyer.

A lawyer's time and advice are for sale. His integrity is not for sale. And it should not be given away.

#### CONCLUSION

When viewed realistically, undue solicitude for indigent prisoners who have been proved guilty beyond a reasonable doubt in a fair trial is a denial of equal protection to those indigents who have not been proved guilty beyond a reasonable doubt or who have not received a fair trial, because of *delay in reviewing their convictions*.

For the benefit of indigent prisoners who have been *unjustly* convicted, the frivolous appeal should not be permitted to consume the time of appeal lawyers and reviewing courts.

<sup>5</sup> See Canons 5, 12, 15, 22, 30, 31, and 44.