

CIRCUIT RULE 4-1. COUNSEL IN CRIMINAL AND HABEAS APPEALS

This rule applies to appeals in the categories of cases set forth in 18 U.S.C. § 3006A. As used in this rule, “habeas appeal” means any appeal involving a request for relief under section 2241, 2254, or 2255 of title 28.

(a) Duties of counsel

(1) Initiation of Appeal

Counsel must ascertain whether the defendant or petitioner wishes to appeal and must file a notice of appeal upon the individual’s request. If the district court determined that the defendant or petitioner was entitled to in forma pauperis status and the individual’s financial status has not materially changed, the individual may appeal to this court without payment of fees and costs.

(2) Continuity of Representation

Counsel, whether retained or appointed, must continue to represent the defendant or petitioner on appeal unless and until counsel is relieved and replaced by substitute retained counsel, appointed counsel, or by the defendant or petitioner pro se. Counsel’s appointment continues on appeal unless and until counsel is relieved by this court.

(b) Application for Indigent Status on Appeal

If the district court denied, or did not determine, in forma pauperis status and did not appoint counsel, the defendant or petitioner may seek in forma pauperis status in this court by submitting a completed financial affidavit (CJA Form 23). The defendant or petitioner may also request appointment of counsel by submitting the court’s Form 24.

(c) Motion to withdraw

(1) In general

Counsel whose representation continues on appeal under this rule may seek to withdraw within 14 days after filing the notice of appeal by filing one of the following:

- (A) A motion by appointed counsel to withdraw and to appoint substitute counsel; or
- (B) A motion by retained counsel to withdraw and to appoint counsel under the Criminal Justice Act, supported by a completed financial affidavit (CJA Form 23); or
- (C) A notice of appearance by new retained counsel; or
- (D) A motion by retained or appointed counsel to withdraw and, in a direct criminal case, to permit defendant to proceed pro se.

Any motion or notice under this rule must include proof of service on the defendant or petitioner, including the inmate registration number and mailing address. If the client is not in custody, counsel may instead provide a declaration under penalty of perjury that counsel served the motion or notice on the client at the client's home address.

Alternatively, if the defendant or petitioner no longer wishes to prosecute the appeal, counsel may move for voluntary dismissal of the appeal. Under Circuit Rule 27-9.1, any such motion in a criminal appeal must include the defendant's written consent or an explanation why consent was not obtained.

(2) Frivolous Appeals

If, after conscientious review of the record, appointed counsel concludes that the appeal is frivolous, on or before the due date for filing the opening brief counsel must file an opening brief that presents the strongest arguments in the defendant's favor, supported by citations to the record and to applicable legal authority. See *Anders v. California*, 386 U.S. 738 (1967); *United States v. Griffy*, 895 F.2d 561 (9th Cir. 1990). Under *Anders*, a brief that states only that there are no arguable issues will be deemed insufficient; rather, the brief must point to anything in the record that might arguably support the appeal.

The cover of the opening brief must state that the brief is being filed pursuant to *Anders v. California*, and the brief must be accompanied by a separate motion to withdraw. Counsel must attach to both the motion and the brief proof of service on the defendant that includes the inmate registration number and mailing address. If the client is not in custody, counsel may instead provide a declaration under penalty of perjury that counsel served the motion and the brief on the client at the client's home address.

To facilitate this court's independent review of the district court proceedings, counsel must designate all reporter's transcripts necessary to the court's review of the judgment on appeal, including but not limited to complete transcripts for the plea hearing and sentencing hearing, and shall include them in the excerpts of record. Counsel must also file under seal the final presentence investigation report and, if available, probation's sentencing recommendation. Counsel should consult Circuit Rules 27-13(d) and 30-1 and section (d)(3) of the court's Criminal Justice Act Plan.

Anders briefs in jury-trial or bench-trial cases are disfavored and may be filed only if, following a full review of all pre-trial, trial, and post-trial proceedings, including sentencing, as well as any motions filed in the district court, counsel cannot identify an arguable issue for appeal.

The filing of the motion to withdraw and *Anders* brief vacates the existing briefing schedule.

(d) Motions for Leave to Proceed Pro Se in Direct Criminal Appeals

A defendant does not have a right to self-representation in a direct criminal appeal, even if the defendant proceeded pro se in the district court. Self-representation will not be permitted in direct criminal appeals except in the unusual case where the court determines that allowing the defendant to proceed pro se is in the best interests of the defendant, and would not undermine a just and orderly resolution of the appeal. Any motion seeking permission to proceed pro se on appeal must explain how these interests would be served. This court does not appoint standby counsel.

(e) Post-Decision Proceedings

Counsel, whether appointed or retained, must promptly transmit the decision of this court to the client. If the decision is adverse to the client, counsel must inform the client of the right to file a petition for writ of certiorari in the United States Supreme Court and must advise the client whether any reasonable ground exists for filing a petition.

Appointed counsel must file a petition for writ of certiorari if the client so requests and, in counsel's considered judgment, there are grounds that are not frivolous and are consistent with the standards for filing a petition under the applicable rules and case law.

If appointed counsel concludes that there are not sufficient grounds and the client nevertheless insists on seeking further review, counsel must file a motion to withdraw that explains why withdrawal is warranted; a cursory statement of frivolousness is insufficient.

In the event the client wants to seek certiorari, the motion to withdraw must: (i) be filed as soon as practicable and (ii) attest that counsel has advised the client on how to file a timely pro se petition for writ of certiorari.

Counsel must attach to any motion to withdraw proof of service on the client that includes the inmate registration number and mailing address. If the client is not in custody, counsel may instead provide a declaration under penalty of perjury that counsel served the motion on the client at the client's home address. If a motion to withdraw is granted, counsel must notify the client in writing within seven days or inform the court that counsel is unable to notify the client.

(f) Counsel's Claim for Fees and Expenses. (Abrogated Dec. 1, 2023)