

June 23, 2023



Pursuant to 28 U.S.C. § 2071(b), comments are invited on proposed revisions to Circuit Rule 4-1, Counsel in Criminal Appeals.

The revisions to Circuit Rule 4-1 (Counsel in Criminal Appeals) clarify the scope and application of the rule with respect to the responsibilities of counsel (both retained and appointed) in criminal and habeas corpus appeals, and abrogate subsection (f), payment of appointed counsel, which will be replaced by a separate CJA Plan for the Court of Appeals.

Because of the nature of the revisions, they are provided in both clean and redlined versions.

If ultimately approved by the Court, these rules would become effective December 1, 2023.

Please direct comments to Molly C. Dwyer, Clerk of Court, at [Molly\\_Dwyer@ca9.uscourts.gov](mailto:Molly_Dwyer@ca9.uscourts.gov), and Susan V. Gelmis, Chief Deputy Clerk, at [Susan\\_Gelmis@ca9.uscourts.gov](mailto:Susan_Gelmis@ca9.uscourts.gov). Comments must be submitted no later than July 31, 2023.

**[Proposed Rule]**

**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 brief 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 in not in custody, counsel may instead provide a declaration under penalty of perjury that counsel served 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 the government, 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 brief 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.

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

This rule applies to appeals in the categories of cases listed 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) Continuity of Representation on Appeal Duties of counsel**

#### **(1) Initiation of Appeal**

~~Counsel in criminal cases, whether retained or appointed by the district court, shall~~ must ascertain whether the defendant or petitioner wishes to appeal and must file a notice of appeal upon the ~~defendant’s 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, Retained counsel shall~~ 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 ~~in accordance with this rule.~~ If counsel was appointed by the district court pursuant to 18 U.S.C. § 3006A and a notice of appeal has been filed, eCounsel’s appointment ~~automatically shall~~ continues on appeal unless and until counsel is relieved ~~in accordance with this rule~~ by this court. (Rev. 12/1/19)

### **(b) Application for Indigent Status on Appeal**

~~A person for whom counsel was appointed by the district court under section 3006A of the Criminal Justice Act may appeal to this Court without prepayment of fees and costs or security therefor and without filing the affidavit required by 28 U.S.C. § 1915(a).~~

~~If the district court did not appoint counsel, but the defendant or petitioner appears to qualify for appointment of counsel on appeal, retained counsel, or the defendant if the defendant proceeded pro se before the district court, shall file on the client’s behalf a financial affidavit (CJA Form 23). If the notice of appeal is filed at the time of sentencing, the motions to proceed on~~

~~appeal in forma pauperis and for appointment of counsel shall be presented to the district court at that time. If the district court finds that appointment of counsel is warranted, the Court shall appoint the counsel who represented the defendant in district court, a Criminal Justice Act defender, or a panel attorney to represent the defendant or petitioner on appeal. The district court shall require appointed counsel and the court reporter to prepare the appropriate CJA form for preparation of the reporter's transcript. A copy of the order appointing counsel on appeal shall be transmitted forthwith by the Clerk of the district court to the Clerk of this Court. Substitute counsel shall within 14 days of appointment file a notice of appearance in this Court. (Rev. 12/1/09)~~

~~If the district court declines to appoint counsel on appeal, and if counsel below believes that the district court erred denied, or did not determine, in forma pauperis status and did not appoint counsel, counsel shall the defendant or petitioner may seek in forma pauperis status in this court by, within 14 days from the district court's order, file with the Clerk of this Court a motion for appointment of counsel accompanied 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. (Rev. 12/1/09)~~

~~(c) Motion to withdraw~~ **Withdrawal of Counsel After Filing the Notice of Appeal**

~~(e)~~ **(1) In general**

~~A motion to withdraw as counsel on appeal Counsel whose representation continues on appeal under this rule may seek to withdraw within 14 days after the filing of the notice of appeal by filing one of the following; where counsel is retained in a criminal case or appointed under the Criminal Justice Act, shall be filed with the Clerk of this Court within 21 days after the filing of the notice of appeal and shall be accompanied by a statement of reasons and: (Rev. 12/1/09)~~

~~(1)(A) A motion by appointed counsel to withdraw and to appoint substitute counsel substitution of counsel which indicates that new counsel has been retained to represent defendant; or~~

~~(2)(B) A motion by retained counsel for leave to proceed in forma pauperis and for appointment of counsel to withdraw and to appoint counsel under the Criminal Justice Act, supported by a completed financial affidavit (CJA Form 23); (Rev. 7/1/06) or~~

~~(3)(C) A motion by appointed counsel to be relieved and for appointment of substitute counsel notice of appearance by new retained counsel; or (Rev. 7/1/06)~~

~~(4)(D)~~ A motion by ~~defendant to proceed pro se; or~~ retained or appointed counsel to withdraw and, in a direct criminal appeal, to permit the defendant to proceed pro se.

~~An affidavit or signed statement from the defendant showing that the defendant has been advised of his or her rights with regard to the appeal and expressly stating that the defendant wishes to dismiss the appeal voluntarily.~~

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

*(Rev. 7/1/06)*

~~(5)~~—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

~~Alternatively, if,~~ after conscientious review of the record, appointed counsel ~~believes concludes that~~ the appeal is frivolous, on or before the due date for filing the opening brief ~~appointed counsel shall must file a separate motion to withdraw and~~ an opening brief that presents the strongest arguments in the defendant's favor, supported by identifies anything in the record that might arguably support the appeal, with citations to the record and to applicable legal authority. The motion and brief shall be accompanied by proof of service on defendant. See *Anders v. California*, 386 U.S. 738 (1967);, and *United States v. Griffy*, 895 F.2d 561 (9<sup>th</sup> 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 ~~shall must~~ state that the brief is being filed pursuant to *Anders v. California*, and the brief must be accompanied by a separate. The filing of a 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, as counsel along with a proposed *Anders* brief serves to vacate the previously established briefing schedule. If the client is in not in custody, counsel may instead provide a declaration under penalty of perjury that counsel served the brief on the client at the client's home address.



To facilitate this ~~c~~Court's independent review of the district court proceedings, counsel ~~shall~~ must designate all ~~appropriate~~ reporter's transcripts, including but not limited to complete transcripts for the plea hearing and sentencing hearing, and shall include ~~the transcripts~~ 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 Counsel are advised to consult Circuit Rule 30-1 and section (d)(3) of the court's Criminal Justice Act Plan.

~~When an appointed attorney has properly moved for leave to withdraw pursuant to Anders and has included all appropriate reporter's transcripts, this Court will establish a briefing schedule permitting the defendant to file a pro se supplemental opening brief raising any issues that defendant wishes to present. The order will also direct appellee by a date certain either to file its answering brief or notify the Court by letter that no answering brief will be filed. (New 1/1/01) Anders briefs in jury-trial or bench-trial cases are disfavored and may only 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 the government, 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. The ~~c~~Court will permit defendants in direct criminal appeals to represent themselves if: (1) the defendant's request to proceed pro se and the waiver of the right to counsel are knowing, intelligent and unequivocal; (2) the defendant is apprised of the dangers and disadvantages of self-representation on appeal; and (3) self-representation would not undermine a just and orderly resolution of the appeal. If, after granting leave to proceed pro se, the ~~c~~Court finds that appointment of counsel is essential to a just and

~~orderly resolution of the appeal, leave to proceed pro se may be modified or withdrawn. (New 7/1/01)~~

(e) Post-Decision Appeal Proceedings

~~If the decision of this Court is adverse to the client, in part or in full, eCounsel, whether appointed or retained, shall must promptly transmit the decision of this court to the client, within 14 days after entry of judgment or denial of a petition for rehearing, advise the client of the right to initiate further review by filing. If the decision is adverse to the client, counsel must inform the client of the right to file a petition for a writ of certiorari in the United States Supreme Court and must advise the client whether any reasonable ground exists for filing a petition. See Sup. Ct. R. 13, 14.~~

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 in counsel's considered judgment there are no 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 for seeking Supreme Court review that are non-frivolous and consistent with the standards for filing a petition, see Sup. Ct. R. 10, counsel shall further notify the client that counsel intends to move this Court for leave to withdraw as counsel of record if the client insists on filing a petition in violation of Sup. Ct. R. 10.~~

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 in not in custody, counsel may instead provide a declaration under penalty of perjury that counsel served the brief on the client at the client's home address.

- ~~(e) — 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. In cases in which a defendant who had retained counsel or proceeded pro se in this Court wishes to file a petition for writ of certiorari in the United States Supreme Court or wishes to file an opposition to a certiorari petition, and is financially unable to obtain representation for this purpose, this Court will entertain a motion for appointment of counsel within 21 days from judgment or the denial of rehearing. It is the duty of retained counsel to~~

~~assist the client in preparing and filing a motion for appointment of counsel and a financial affidavit under this subsection.~~

~~If requested to do so by the client, appointed or retained counsel shall petition the Supreme Court for certiorari only if in counsel's considered judgment sufficient grounds exist for seeking Supreme Court review. See Sup. Ct. R. 10.~~

~~Any motion by appointed or retained counsel to withdraw as counsel of record shall be made within 21 days of judgment or the denial of rehearing and shall state the efforts made by counsel to notify the client. A cursory statement of frivolity is not a sufficient basis for withdrawal. See *Austin v. United States*, 513 U.S. 5 (1994) (per curiam); Sup. Ct. R. 10. Within this same period, counsel shall serve a copy of any such motion on the client. If relieved by this Court, counsel shall, within 14 days after such motion is granted, notify the client in writing and, if unable to do so, inform this Court. (Rev. 12/1/09)~~

~~Unless counsel is relieved of his or her appointment by this Court, counsel's appointment continues through the resolution of certiorari proceedings and includes providing representation when an opposing party files a petition for certiorari.~~

### ~~Counsel's Claim for Fees and Expenses~~

~~An attorney appointed by the Court shall be compensated for services and reimbursed for expenses reasonably incurred as set forth in the Criminal Justice Act. All vouchers claiming compensation for services rendered in this Court under the Criminal Justice Act shall be submitted to the Clerk of this Court no later than 45 days after the final disposition of the case in this Court or after the filing of a petition for certiorari, whichever is later. Subsequent work on the appeal may be claimed on a supplemental voucher. A voucher for work on a petition for a writ of certiorari must be accompanied by a copy of the petition. If a party wishes interim payment, a request for such relief may be filed.~~

~~The Clerk shall refer all vouchers, including those requesting payment in excess of the statutory maximum, to the CJA Administrative Attorney for approval of such compensation as the CJA Administrative Attorney deems reasonable and appropriate under the Criminal Justice Act. If the CJA Administrative Attorney concludes that an amount less than that requested by the attorney is appropriate, he or she shall communicate to the attorney the basis for reducing the claim. The CJA Administrative Attorney will offer the attorney an opportunity to respond regarding the propriety and reasonableness of the voucher before approving a reduction in the amount. If the amount requested is reduced, and the attorney seeks reconsideration, the~~

~~CJA Administrative Attorney shall receive and review the request for reconsideration and may grant it in full or in part. If the CJA Administrative Attorney does not grant a request for reconsideration in full or in part, the request shall be referred to and decided by the Chief Judge or his or her designee. (Rev. 12/1/09; 3/1/21)~~

~~Whenever the CJA Administrative Attorney certifies payment in excess of the statutory maximum provided by the Criminal Justice Act, the Clerk shall forward the voucher to the Chief Judge's designee for review and approval. (eff. 7/95; amended 1/1/99; 3/1/21) Cross Reference:~~