No. 1 CA-CR 15-0482 PRPC

IN THE COURT OF APPEALS
STATE OF ARIZONA, DIVISION ONE

STATE OF ARIZONA, Respondent,

vs.

LINO ALBERTO CHAVEZ, Petitioner.

On Petition for Review of an Order of the
Superior Court in Maricopa County
Hon. Bruce R. Cohen, Presiding
Super. Ct. No. CR2012-005785-001

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, THE PIMA COUNTY PUBLIC DEFENDER, AND THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA IN SUPPORT OF PETITIONER

JOEL FEINMAN
Pima County Public Defender

DAVID J. EUCHNER #021768
Assistant Public Defender
33 North Stone Avenue, 21st Floor
Tucson, Arizona 85701
(520) 724-6800 voice
(520) 770-4168 facsimile
David.Euchner@pima.gov

JON M. SANDS
Federal Public Defender

KEITH J. HILZENDEGER #023685
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700 voice
(602) 382-2800 facsimile
keith_hilzendeger@fd.org
Attorneys for Amici Curiae

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INTERESTS OF *AMICI CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The Pima County Public Defender's Office (PCPD) is the second largest indigent defense agency in the state. Its 80 attorneys represent many thousands of clients every year on felony charges, both in superior court and in juvenile court. PCPD has a small appellate unit that represents clients in criminal cases before the Arizona Court of Appeals, the Arizona Supreme Court, and, on occasion, the Supreme Court of the United States. The appellate courts of this state publish opinions in several of PCPD's cases every year.

The Federal Public Defender for the District of Arizona (FPD-AZ) is the entity established under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, to provide indigent representation in criminal cases before the federal courts. Under § 3006A(a)(2)(B), FPD-AZ regularly represents state prisoners seeking postconviction relief in federal court under 28 U.S.C. § 2254, and thus has an interest in protecting the rights of state prisoners who plead guilty to preserve for

federal review constitutional claims relating to the validity of their pleas and sentences. All *amici* join in this brief by invitation of the Court on May 3, 2017.

STATEMENT OF THE CASE

In January 2012, a grand jury in Maricopa County indicted Mr. Chavez on one count of first-degree felony murder, in violation of A.R.S. § 13-1105(A); one count of robbery, in violation of A.R.S. § 13-1902; and one count of trafficking in stolen property, in violation of A.R.S. § 13-2307. Ultimately, Mr. Chavez pleaded guilty to second-degree murder pursuant to a plea agreement, and was sentenced to 16 years in prison. Under the terms of the plea agreement, the state dismissed the other two counts in the indictment.

Because he pleaded guilty, Mr. Chavez did not have the right under Arizona law to take a direct appeal from his conviction and sentence. *See* A.R.S. § 13-4033(B); Ariz. R. Crim. P. 17.1(e). But because the state constitution affords all criminal defendants a right to review of a criminal conviction, he did have the right to invoke postconviction review as of right. *See* Ariz. R. Crim. P. 32.1; *Montgomery v. Sheldon* (*Montgomery I*), 181 Ariz. 256, 889 P.2d 614 (1995). He did so by filing a *pro se* notice of postconviction relief with the superior court on January 20, 2013, asking the court to prepare the record and appoint counsel to assist him. In response to the notice, the court appointed the Maricopa County Public Defender to assist him in preparing a petition for postconviction relief. *See* Ariz. R. Crim. P. 32.4(c)(2).

Mr. Chavez's assigned deputy public defender, Peg Green, gathered the transcripts of the change-of-plea and sentencing hearings that the superior court ordered, and also ordered a transcript of a settlement conference. She reviewed Mr. Chavez's sentencing counsel's file and a letter that she had received from Mr. Chavez. Upon review, Ms. Green filed a "notice of completion" with the court. She listed the materials that she had reviewed and then explained that she was "unable to find any claims for relief to raise in post-conviction relief proceedings." Thus, she explained, she had no petition to file "at this time." She asked the court to set a deadline for Mr. Chavez to file a *pro se* petition.

In response to Ms. Green's notice, the court ordered her to "remain in an advisory capacity for defendant until a final determination is made by the trial court regarding any post-conviction relief proceeding." The court also ordered Ms. Green to forward prior counsel's files to Mr. Chavez, and set a deadline for Mr. Chavez to file a *pro se* petition for postconviction relief.

Mr. Chavez filed a timely *pro se* petition. In his petition, he contended that sentencing counsel were ineffective for failing to argue his minimal role in the crime and the reckless or negligent nature of his conduct as a basis for a lower sentence. He also contended that his counsel were ineffective for failing to persuade the prosecutor to charge a lesser degree of homicide in light of his minimal role and the nature of his conduct. He pointed to places in the record that supported his assertions regarding his minimal role and the nature of his conduct. And he asked for an evidentiary hearing at which he could prove his allegations.

In response, the state argued that Mr. Chavez waived his claim of ineffective assistance of counsel at sentencing by pleading guilty. The state also argued that Mr. Chavez's claims were not colorable because "defense counsel not only presented a thorough mitigation case on behalf of Defendant," but they also "succeeded in limiting the ultimate sentence to the presumptive term, despite the court having heard compelling aggravating circumstances." Accordingly, the state countered that an evidentiary hearing was unnecessary.

The superior court denied Mr. Chavez's claims of ineffective assistance at sentencing on the merits. It reviewed the record as well as the aggravating and mitigating evidence presented at the sentencing hearing. In light of that evidence, the court ruled that it was "impossible to find that there is a colorable claim for relief under any section of Rule 32."

Mr. Chavez filed a timely petition for review with this Court. In addition to the ineffective-assistance claims that he raised below, he also argued that this Court must review the record for fundamental error before ruling on his petition. The state did not respond to Mr. Chavez's petition for review.

ARGUMENT

A criminal defendant has a federal constitutional right to the assistance of counsel in his first-tier direct appeal as of right from his conviction. *See Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (citing *Douglas v. California*, 372 U.S. 353, 357 (1963)). When, after a "conscientious examination" of the record, appointed counsel concludes that the appeal is "wholly frivolous," counsel may advise the

court of that conclusion and request permission to withdraw. *Anders v. California*, 386 U.S. 738, 744 (1967). "That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* This procedure safeguards the defendant's rights to due process and equal protection in his direct appeal. *See Smith v. Robbins*, 528 U.S. 259, 276–78 (2000); *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

When the defendant has been convicted at a trial and his appointed appellate counsel finds no arguable issues to present on his behalf, this Court requires counsel to follow the dictates of *Anders*. "Under our procedure, when appointed counsel determines that a defendant's case discloses no arguable issues for appeal, counsel files an *Anders* brief. The brief contains a detailed factual and procedural history of the case, with citations to the record." *Id.* But a defendant who is convicted by his plea of guilty is not afforded a direct appeal as of right. *See* A.R.S. § 13-4033(B); Ariz. R. Crim. P. 17.1(e). Rather, his state constitutional right of review of his conviction and sentence is provided in a postconviction proceeding. *See* Ariz. R. Crim. P. 32.1; *State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996). This Court has invited *amici* to discuss whether the procedures required by *Anders* and *Clark* when appointed counsel finds no arguable issues to raise on direct appeal apply with equal force to these of-right postconviction proceedings.

This brief will proceed in four parts. First, *amici* will trace the history of Arizona's decision to place appellate review of criminal convictions obtained by guilty plea outside the conventional direct-appeal procedure. Second, *amici* will

identify the minimum requirements that the federal constitution imposes on states that afford appellate review in criminal cases. Third, *amici* will describe the scope of review to which defendants are entitled in of-right postconviction proceedings. Fourth, *amici* will explain how courts should apply the requirements of *Anders* to of-right postconviction proceedings.

1. Twenty-five years ago, Arizona eliminated the conventional direct appeal in criminal cases where the defendant pleaded guilty, and relegated those defendants' rights of review to a postconviction proceeding.

Since statehood, Arizona has treated the right of review in criminal cases as fundamental. Article II, section 24, of the Arizona Constitution affords the accused in a criminal case "the right to appeal in all cases." Our supreme court has called the protections set forth in this section "essential for the perpetuation of free government." *Stephens v. State*, 20 Ariz. 37, 39, 176 P. 579, 580 (1918). The right of appeal in criminal cases is so important that it cannot be waived in a plea agreement. Public policy, our supreme court has said, "forbids a prosecutor from insulating himself from review by bargaining away a defendant's appeal rights." *State v. Ethington*, 121 Ariz. 572, 573, 592 P.2d 768, 769 (1979). This public policy, the court said, allows a defendant "to bring a timely appeal from a conviction notwithstanding an agreement not to appeal." *Id.* at 574, 592 P.2d at 770. Thus, for at least the first 80 years of statehood, Arizona law regarded the right of direct review of a criminal conviction as an indispensable component of a fair criminal trial.

A guilty plea waives all antecedent nonjurisdictional defects in the proceedings. *See, e.g.*, *State v. Hamilton*, 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984) (citing *Tollett v. Henderson*, 411 U.S. 258, 266 (1973); *State v. Diaz*, 121 Ariz. 16, 17, 588 P.2d 309, 310 (1978)). But a defendant who pleads guilty nevertheless retains the right to challenge the validity of the guilty plea. *See, e.g.*, *State v. Zunino*, 133 Ariz. 117, 118, 649 P.2d 996, 997 (App. 1982) (citing *Santobello v. New York*, 404 U.S. 257 (1971); *State v. Owens*, 127 Ariz. 252, 619 P.2d 761 (App. 1980)). He also retains the right to challenge any aspect of the sentence imposed. *See State v. Phillips*, 139 Ariz. 327, 329, 678 P.2d 512, 514 (App. 1983).

In the 1980s, our supreme court began to express a preference for defendants raising such challenges in postconviction proceedings rather than on direct appeal. In *State v. Crowder*, 155 Ariz. 477, 747 P.2d 1176 (1987), the court said that if the record of the change-of-plea proceeding does not contain enough evidence to determine whether the defendant was or should have been aware of the amount of restitution to which his guilty plea would expose him, the proper procedure is not to vacate the guilty plea but rather to "submit the matter to the trial judge by petition for post-conviction relief." *Id.* at 479, 747 P.2d at 1178. Over a year after *Crowder*, the court suggested a similar course of action when a defendant who pleads guilty challenges the validity of a prior conviction used as a recidivist sentence enhancement. *State v. Anderson*, 160 Ariz. 412, 414, 773 P.2d 971, 973 (1989).

The court in *Anderson* pointed out that using the postconviction review process would have allowed for speedier resolution of the sentencing challenge than through the direct-appeal process and suggested that it would ease the burden on the appellate courts. *See id.* at 414–15, 773 P.2d at 973–74 "The appellate process is taxed enough with the volume of cases that pose serious questions for resolution. It is an abuse of the process to clog an already crowded docket with appeals that could easily be resolved under the Rule 32 process." *Id.* at 415, 773 P.2d at 974. The data bore out the *Anderson* court's observation that the appellate courts were inundated with direct criminal appeals from guilty pleas. In fiscal year 1991, two-thirds of the direct criminal appeals heard by Division One of this Court were appeals from guilty pleas. *See* Charles R. Krull, *Eliminating Appeals from Guilty Pleas*, 28 *Arizona Attorney* 34, 35 (Oct. 1992) [hereinafter "Krull, *EAGP*"].

In an effort to reduce this workload, three important changes to Arizona law took effect in 1992. First, the legislature amended § 13-4033 to add subsection (B): "In noncapital cases a defendant may not appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation." *See* H.B. 2481, 40th Leg., 2d Reg. Sess. (Ariz. 1992). Second, our supreme court amended Rules 17.1, 17.2, and 27.8 to reflect the change to § 13-4033 and to caution that the defendant may "seek review only by filing a petition for post-conviction relief pursuant to Rule 32." *See* Krull, *EAGP*, at 34. Third, our supreme court also amended Rule 32.4 to require the appointment of counsel to assist the defendant in seeking postconviction relief. *See* Ariz. R. Crim. P. 32.4(c) (Dec. 1, 1992). Two benefits cited for these changes in the law were the speedier resolution of the

review of criminal cases where the defendant pleaded guilty and a reduction of the caseload of the court of appeals. *See* Crane McClennen, *Eliminating Appeals from Guilty Pleas*, 28 *Arizona Attorney* 15, 17 (Nov. 1992) [hereinafter "McClennen, *EAGP*"].

Soon after this change in the law, our supreme court emphasized that the change did not affect the fundamental right to appellate review in all criminal cases. Because the state constitution guarantees a right to appellate review, the court explained that the change had "expressly left open the avenue of appellate review by PCR in lieu of direct appeal." *Wilson v. Ellis*, 176 Ariz. 121, 123, 859 P.2d 744, 746 (1993). The court reiterated that that right "cannot be waived merely by a plea or admission." *Id.* (citing *Ethington*, 121 Ariz. at 573–74, 592 P.2d at 769–70). It also emphasized that that right "cannot be diluted by a defendant's poverty." *Id.* (citing *Lindsey v. Normet*, 405 U.S. 56, 77 (1972)). In light of these basic principles, the court held that a defendant who pleads guilty is entitled to the transcripts necessary to prepare a petition for postconviction relief. *Id.* at 124, 859 P.2d at 747.

The change in the law also expressly provided for appointment of counsel to assist the defendant in seeking postconviction relief. If appointed counsel reviews the record, finds "no grounds" for relief, and accordingly "refuses to proceed" in the case, the change in the law gives the defendant the right to file his own petition for postconviction relief. *Montgomery I*, 181 Ariz. at 260, 889 P.2d at 618. If there was a petition filed, whether *pro se* or through counsel, and the defendant sought appellate review of the superior court's denial of that petition, state law required

the court of appeals to search the record for fundamental error. *See Montgomery v. Sheldon* (*Montgomery II*), 182 Ariz. 118, 119–20, 893 P.2d 1281, 1282–83 (1995). In that situation, for "all practical purposes" counsel's representation would "end[] when they refused to submit PCR petitions." *Montgomery I*, 181 Ariz. at 260–61, 889 P.2d at 618–19.

Over time, the notice that counsel files to indicate to the court that review of the record is complete and a petition will not be filed has come to have different names. For example, the notice that Ms. Green filed in this case was captioned "notice of completion." The two indigent defense agencies in Pima County use two other names for this filing. For the sake of consistency, this brief will refer to that notice as a "*Montgomery* notice." The notice that Ms. Green filed here comports with the current standard of practice in Arizona.

Although, under the change in the law, the defendant was entitled to a transcript and to appointed counsel in these postconviction proceedings, our supreme court stressed that the independent review required by *Anders v. California*, 386 U.S. 738 (1967), was not part of the procedure in of-right postconviction proceedings. "[W]e are not commanding, nor do we want, trial courts to conduct *Anders*-type reviews in PCRs," the court said. *Wilson*, 176 Ariz. at 124, 859 P.2d at 747. If the defendant exercises his right to file a *pro se* petition, however, the court in *Montgomery* said that an "*Anders*-like review for fundamental error" was not required. *Montgomery I*, 181 Ariz. at 260, 889 P.2d at 618. Because the appellate court was required by statute to review the record for fundamental

error, "no new procedures" were "necessary" in order to implement the change in review procedures for defendants who plead guilty. *Montgomery II*, 182 Ariz. at 120, 893 P.2d at 1283.

In 1995, the legislature repealed the fundamental-error statute. *See* 1995 Ariz. Legis. Serv. ch. 198, § 1. Our supreme court then weighed in to explain the effect on postconviction review for defendants who plead guilty. Our supreme court held that the repeal of the fundamental-error statute relieved the court of appeals from having to review the record *at all*. *See Smith*, 184 Ariz. at 459–60, 910 P.2d at 4–5. This holding is consistent with the view that the independent-review requirements of *Anders* did not apply to cases where the defendant pleaded guilty and invoked his right to appellate review.

The court also articulated two limitations on the scope of the right to appointed counsel in connection with of-right postconviction review. First, in *Smith* our supreme court also held that the appointment of counsel on which the *Montgomery* court relied did not extend to seeking appellate review of the denial of relief by the superior court. *See* 184 Ariz. at 459, 910 P.2d at 4. Because the appellate court's review is discretionary, the court reasoned that there was no right to counsel in connection with that review. *See id.* (citing *State v. Shattuck*, 140 Ariz. 582, 584, 684 P.2d 154, 156 (1984)). Second, in *Lammie v. Barker*, the court explained that counsel's role after filing a *Montgomery* notice was to "assist the *pro per* defendant should that defendant or the trial court discover a viable issue that counsel had not previously considered or when, in the interest of justice,

appointment of counsel seems necessary." 185 Ariz. 263, 264, 915 P.2d 662, 663 (1996) (citing *Smith*, 184 Ariz. at 459, 910 P.2d at 4 n.2; *Shattuck*, 140 Ariz. at 584–85, 684 P.2d at 156–57). Counsel's role in postconviction proceedings was expressly "[u]nlike counsel's role under *Anders*." *Id.* Thus the court did not explain how the trial court would be able to discover a viable issue if counsel were not required to file some kind of "brief referring to anything in the record that might arguably support" granting relief. *Anders*, 386 U.S. at 744.

2. When a criminal defendant pleads guilty and seeks of-right postconviction review, the due process and equal protection principles of the Fourteenth Amendment require counsel to remain in the case until a court has independently reviewed the record for arguable issues, not simply reversible error.

The "Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions." *Halbert*, 545 U.S. at 610 (citing *McKane v. Durston*, 153 U.S. 684, 687 (1894)). "Having provided such an avenue, however, a State may not bolt the door to equal justice to indigent defendants." *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)). Arizona has provided an avenue of appellate review to defendants who plead guilty—an of-right postconviction proceeding. *See* Ariz. R. Crim. P. 32.1; *Summers v. Schriro*, 481 F.3d 710, 715–16 (9th Cir. 2007). It follows that the procedures afforded to a criminal defendant in such a proceeding must comport with both the equal-protection and the due-process guarantees of the Fourteenth Amendment. "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their ability to pay core costs, while the due process concern homes in on the

essential fairness of the state-ordered proceedings." *Halbert*, 545 U.S. at 610–11 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996)).

Thus the Constitution imparts a right to the effective assistance of appointed counsel in such proceedings. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas*, *supra*; *Osterkamp v. Browning*, 226 Ariz. 485, 250 P.3d 551 (App. 2011); *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995). Occasionally, counsel appointed in these proceedings will determine that there are no arguable issues in the case. When that happens, the Supreme Court has said that counsel must act as an *advocate* on behalf of the defendant, supporting the defendant's case to the best of her ability. *Anders v. California*, 386 U.S. 738, 744 (1967). The Constitution also requires the reviewing court to establish some "prophylactic framework" to ensure that the indigent criminal defendant does not receive less treatment than a defendant with means could procure for himself. *See Robbins*, 528 U.S. at 273 (2000). These prophylactic measures must ensure that "an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Id.* at 277 (citing *Griffin*, 351 U.S. at 17–18).

These prophylactic measures must have four main features:

1. First, the reviewing court may not resolve the defendant's appeal based solely on counsel's representation that the defendant is unlikely to prevail. *See id.* at 279.

2. Second, counsel must be provided for the defendant throughout the process. The reviewing court cannot relieve counsel and force the defendant to be *pro se* at any time before it resolves the case. *See id.* at 280. If there are arguable issues, the reviewing court must appoint

counsel to file a brief on the defendant's behalf that discusses those issues. *See id.*; *see also Penson v. Ohio*, 488 U.S. 75, 83 (1988).

3. Third, the reviewing court must insist that counsel set forth the basis for his conclusion that the defendant has no arguable issues. Counsel's advocacy on behalf of the defendant "ensures that a trained legal eye has searched the record for arguable issues and assists the reviewing court in its own evaluation of the case." *Robbins*, 529 U.S. at 281.

4. Fourth, to ensure that the defendant has received the effective assistance of counsel, a court must independently review the record to ensure that counsel's assessment of the case is correct. *See id.* This review should not be conducted by the sentencing judge—not because trial judges are "intellectually dishonest," McClennen, *EAGP*, at 18, but because review by some judge other than the one who might have committed an error facilitates the discovery of arguable issues as to which the defendant has a right to partisan advocacy.

Arizona's of-right postconviction procedure is a hybrid of direct and collateral review. As a vehicle for *direct review*, it serves as the primary means of correcting legal error in the proceedings that gave rise to the conviction and sentence. Yet as a vehicle for *collateral review*, it also serves as the defendant's first opportunity to raise claims of ineffective assistance of counsel and other claims that require evidence outside the record. *See generally Martinez v. Ryan*, 566 U.S. 1, 11 (2012); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Applying the procedures required by *Anders* to Arizona's hybrid procedure ensures that the defendant's right to counsel in both contexts is appropriately safeguarded.

To be sure, the assistance of counsel in the collateral-review aspect of these proceedings is not constitutionally required. *See Martinez*, 566 U.S. at 9 (citing *Coleman v. Thompson*, 501 U.S. 722, 755 (1991)). But it is an entitlement under state law. *See* Ariz. R. Crim. P. 32.4(c)(2). And the failure to furnish the assistance of

counsel as required by law can support an equitable reason for a federal habeas court to review a claim on the merits. *See Martinez*, 566 U.S. at 14. It follows that the failure to ensure that the defendant's due-process and equal-protection rights in Arizona's hybrid review procedure could furnish an equitable ground for a federal habeas court to review a claim on the merits that was overlooked by virtue of the failure to afford an independent review of the extended record.

3. Counsel must create and review the extended record to verify that the plea and sentencing proceedings comply with both state and federal law.

"When the defendant claims his plea was unknowing and therefore involuntary, the question is not simply what the defendant was told but what he knew from any source." *Crowder*, 155 Ariz. at 479, 747 P.2d at 1178. A direct appeal is limited to correcting error in the proceedings before the court and thus is not well suited for facilitating review of the information the defendant received outside of court concerning the nature and consequences of his plea. A court reviewing a plea on direct appeal might make assumptions about this information without the benefit of original evidence. *See id.* at 481–82, 747 P.2d at 1180–81. Reviewing a guilty plea in the context of postconviction proceedings allows a court to make an "inquiry into the extended record." *Id.* at 480, 747 P.2d at 1179. But in order for a court to do that, counsel must first *create* that extended record.

In large measure, the modern American criminal justice system is "a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Although the range of legal issues available for review to a defendant who pleads

guilty is narrower than that available to a defendant who goes to trial, those issues nevertheless implicate important rights. For example, a defendant who pleads guilty may nevertheless challenge certain aspects of the plea proceedings and preceding events, including:

- the knowing and voluntary character of the guilty plea, *see Boykin v. Alabama*, 395 U.S. 238, 242 (1970); *Brady v. United States*, 397 U.S. 742, 748 (1970);
- the adequacy of the factual basis of the plea, *see State v. Bousley*, 171 Ariz. 166, 829 P.2d 1212 (1992);
- the judge's decision not to allow him to withdraw his guilty plea or from a plea agreement, *see State v. Leyva*, 241 Ariz. 521, 525 & n.5, 389 P.3d 1266, 1270 & n.5 (App. 2017); *State v. Dockery*, 169 Ariz. 527, 528–29, 821 P.2d 188, 189–90 (App. 1991);
- the judge's decision to deny his request for a change of counsel, *see United States v. Velazquez*, 855 F.3d 1021 (9th Cir. 2017);
- the effective assistance of counsel in connection with his guilty plea, *see Hill v. Lockhart*, 474 U.S. 52 (1985);
- counsel's advice about the immigration consequences of the guilty plea, *see Lee v. United States*, 137 S. Ct. 1958 (2017); *Padilla v. Kentucky*, 559 U.S. 356 (2010);
- counsel's failure to convey a plea offer or to accurately convey the terms of a plea offer, *see Missouri v. Frye*, 566 U.S. 134 (2012);. *Cooper*, *supra*; *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000);
- the prosecution's compliance with the terms of any plea bargain, *see Santobello*, *supra*;
- whether the charges were brought to penalize the defendant for exercising a statutory right, *see Blackledge v. Perry*, 417 U.S. 21 (1974);

- whether double-jeopardy principles barred prosecution, *see United States v. Broce*, 488 U.S. 563 (1989); and

- whether he was competent to plead guilty, *see Godinez v. Moran*, 509 U.S. 389 (1993).

And because it functions as a direct appeal, the of-right postconviction proceeding allows a defendant to bring legal challenges to the sentence imposed, including these:

- the correct reliance on aggravating factors, *see, e.g.*, *State v. Flores*, 236 Ariz. 33, 35 P.3d 555 (App. 2014); *State v. Trujillo*, 227 Ariz. 314, 257 P.3d 1194 (App. 2011); *see also generally Alleyne v. United States*, 133 S. Ct. 2151 (2013); *Blakely v. Washington* 542 U.S. 296 (2004);

- whether consecutive sentences were proper, *see State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989);

- the correct application of recidivist sentence enhancements, *see, e.g.*, *State v. Loney*, 230 Ariz. 542, 545–57, ¶¶ 14–22, 287 P.3d 836, 839–41 (App. 2012);

- the classification of the offense as a dangerous crime against children, *see, e.g.*, *Wright v. Gates*, 240 Ariz. 525, 382 P.3d 83 (App. 2016), *review granted* (May 15, 2017); *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007);

- the correct calculation of presentence incarceration credit, *see, e.g.*, *State v. Cecena*, 235 Ariz. 623, 334 P.3d 1282 (App. 2014); *State v. Seay*, 232 Ariz. 146, 302 P.3d 671 (App. 2013);

- the amount of any fine imposed, *see State v. Leyva*, 195 Ariz. 13, 985 P.2d 498 (App. 1998);

- the propriety of requiring the defendant to register as a sex offender, *see State v. Serrano*, 234 Ariz. 491, 323 P.3d 774 (App. 2014);

- the assessments imposed as a part of the sentence, *see State v. Reyes*, 232 Ariz. 468, 307 P.3d 35 (App. 2013);

- the propriety of any restitution award and the procedures used to impose it, *see, e.g.*, *Lindsay R. v. Cohen*, 236 Ariz. 565, 343 P.3d 435 (App. 2015); *State v. Slover*, 220 Ariz. 239, 204 P.3d 1088 (App. 2009); *State v. Dixon*, 216 Ariz. 18, 162 P.3d 657 (App. 2007);

- the lawfulness of imprisonment as punishment for the offense, *see, e.g.*, *State v. Joyner*, 215 Ariz. 134, 158 P.3d 263 (App. 2007);

- the denial of the right of allocution, *see State v. Fettis*, 136 Ariz. 58, 664 P.2d 208 (1983);

- the effective assistance of counsel in connection with sentencing, *see Glover v. United States*, 531 U.S. 198 (2001); and

- the constitutionality of the sentence, *e.g. Graham v. Florida*, 560 U.S. 48 (2010); *Solem v. Helm*, 463 U.S. 277 (1983); *State v. Florez*, 241 Ariz. 121, 384 P.3d 335 (App. 2016).

A defendant who seeks of-right review is entitled to the effective assistance of counsel. Effective counsel preserves a criminal defendant's claims for review by both the state and federal courts. *See Martinez*, 566 U.S. at 12 (citing Fed. R. Crim. P. 52(b); *Edwards v. Carpenter*, 529 U.S. 446 (2000)). Effective counsel who files a notice of completion in of-right postconviction proceedings thus ensures that the plea and sentencing proceedings comply with all of these requirements.

4. This Court should hold that when counsel files a *Montgomery* notice with the superior court in an of-right postconviction proceeding, counsel may not be permitted to withdraw until the court conducts an independent review of the record for arguable issues.

Although our supreme court has said otherwise, *see Montgomery I*, 181 Ariz. at 260, 889 P.2d at 618, the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that the prophylactic measures dictated by *Anders* and its progeny apply fully to Arizona's of-right postconviction proceedings when

defendants plead guilty and exercise their right of appeal. Arizona already follows the dictates of *Anders* in direct appeals where the defendant was convicted at a trial. *See State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); *Clark*, *supra*. Having chosen to afford a defendant who pleads guilty a mechanism of review by way of an of-right postconviction proceeding, Arizona must likewise follow the dictates of *Anders* in those cases.

In light of the requirements of *Anders*, *amici* therefore recommend that this Court articulate three requirements for processing of-right postconviction cases. First, instead of filing a *Montgomery* notice, counsel must file a "*Chavez* brief" that outlines the facts of the case, the circumstances surrounding the plea, and the legal basis for the sentence. Second, the court must independently review the extended record, carefully scrutinizing the *Chavez* brief for arguable grounds for relief. Third, the court must ensure that counsel remains in the case to advocate any such arguable grounds on the defendant's behalf, and allow counsel to withdraw only when the independent review is complete.

A. Counsel must file a brief that describes the extended record by outlining the facts of the case, explaining the circumstances of plea negotiations and the guilty plea, and reviewing the legal basis for the sentence.

Many postconviction counsel file *Montgomery* notices in of-right cases that contain nothing but the bare assertion that counsel could find no claims for relief. The best *Montgomery* notices will resemble what Ms. Green filed here—they will list the documents reviewed, and then explain that counsel was "unable to find any claims for relief" and therefore would not file a petition. This comports with the

current practice among the Arizona postconviction bar—*amici* in no way suggest that Ms. Green failed to discharge her responsibilities in this case—but this practice does not comport with *Anders* because it fails to tie the conclusion that there are "no claims for relief" with a detailed recitation of the record and exposition of arguable issues.

That detailed recitation—a "*Chavez* brief"—must reflect that counsel has complied with her obligations to the court and the client. Counsel owe it to the client to "show their work." Counsel's review of the record should reflect consideration of any potential ground for relief from the conviction or sentence, as demonstrated above. The *Chavez* brief should document that the review of the record included the sources from which those grounds for relief might come. Counsel should review the court record and prior counsel's file. Counsel should also provide evidence of meaningful communication with the client about his understanding of the nature and consequences of the plea, his understanding of any plea offers that may have been extended to him, and what outcome he hopes to see from the proceeding. *See* Ariz. R. Sup. Ct. 42, ER 2.1. At the same time, counsel must take care not to reveal client confidences to the court without his informed consent. *See* Ariz. R. Sup. Ct. 42, ER 1.6. In appropriate circumstances, after consultation with the client, counsel might explain in the *Chavez* brief that the client does not wish to raise claims of ineffective assistance of counsel and limit her discussion to issues relating to the sentence.

The *Chavez* brief thus "serves the valuable purpose of assisting the court in determining… that counsel in fact conducted the required detailed review of the case." *Penson*, 488 U.S. at 81. Reducing a description of the case to writing will assist the court in confirming that there are, in fact, no arguable issues relating to the plea or sentence lurking in the record. Counsel will be loath to make a false assertion to the court about the scope of review in the case. *See* Ariz. R. Sup. Ct. 42, ER 3.3. And the court can reject *Chavez* briefs that are not adequate to this task. *Cf. United States v. Mendoza Guizar*, 611 F.3d 1026 (9th Cir. 2010) (rejecting an *Anders* brief that did not refer to anything in the record that did not arguably support the appeal).

The court could even insist that counsel follow a particular checklist before filing a *Chavez* brief. Several appellate courts publish checklists for counsel to follow when filing *Anders* briefs and strongly encourage counsel to include the completed checklist with their briefs. *Amici* have attached these courts' guidelines and checklists for *Anders* briefs in an appendix to this brief. *Amici* can assist the court and the bar by preparing a similar checklist adapted for use by counsel in of-right postconviction proceedings. Such a checklist could be included with the set of standard forms that accompany the Arizona Rules of Criminal Procedure and distributed through the state's indigent defense agencies and offices that control appointment of counsel.

B. The court must conduct an independent review of the extended record set forth in counsel's brief to determine that the plea was knowing and voluntary and that the sentence is lawful.

Our supreme court has repeatedly made clear that the *Anders* procedures do not apply in of-right postconviction proceedings. Accordingly, the current practice imposes no obligation on the reviewing court to review even the record that exists for arguable issues about the guilty plea or sentence. The current practice thus leaves defendants with a lawyer who has declined to advocate on their behalf and a court that has no obligation to determine whether that choice was appropriate under the circumstances. Only if the defendant files a *pro se* petition for postconviction relief will the court review *any* claim for relief on his behalf—and will do so against the backdrop of an assertion from counsel that any claim he has advanced is not even colorable. As *Anders* and its progeny make plain, this procedure denies the defendant both due process and equal protection of the law.

This Court accordingly should direct the lower courts to begin conducting an independent review of the record for arguable challenges to the guilty plea or sentence in of-right postconviction cases. And this Court should stress that this review is not limited to fundamental error (or any other kind of non-harmless error) that may require a reversal of the conviction or a change to the sentence. The defendant is entitled to an adversary presentation on any arguable basis for relief from his conviction or sentence. This entitlement is not satisfied when the proceeding is resolved on the ground that there were no "grave or prejudicial errors." *Robbins*, 528 U.S. at 279 (2000) (quoting *Anders*, 386 U.S. at 742). The question of whether there is error in any given appeal is distinct from whether that

error is reversible, and it often happens that the parties agree on the former question but dispute the latter. Independently reviewing the record for arguable issues thus allows the court to ensure that counsel have correctly declined to advocate on behalf of their clients and to protect the defendant's right to counsel in cases where counsel's conclusion is incorrect. *See Penson*, 488 U.S. at 86 (rejecting the argument that the court complied with *Anders* when it found no prejudicial error).

The independent review of the record required by *Anders* contemplates that from time to time the court will identify arguable issues as to which further briefing is required. Relatedly, the court's independent review of counsel's *Chavez* brief may lead the court to reject it as insufficient and direct further review of certain issues. When these issues relate to potential claims of ineffective assistance of counsel, the risk arises that the court will prematurely compel a waiver of the defendant's attorney-client privilege. *Cf. State v. Cuffle*, 171 Ariz. 49, 51–52, 828 P.2d 773, 775–76 (1992) (raising claim of ineffective assistance of counsel implicitly waives the attorney-client privilege). But flagging an issue and calling for further briefing would not necessarily compel such a waiver. Counsel's response to the court could simply be that, after consultation with the defendant, he has chosen to assert his attorney-client privilege and declines to raise the issue flagged by the court's review. *See Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003) (en banc).

Along these lines, this Court should stress that the independent review should be conducted by a judge other than the sentencing judge. This would require an exception to the usual rule that postconviction cases are assigned to the sentencing judge. *See* Ariz. R. Crim. P. 32.4(e). When a *Chavez* brief is filed, sentencing judges "understandably [have] little incentive to find any error warranting" relief. *Robbins*, 528 U.S. at 281 (citing *Anders*, 386 U.S. at 742–43). *Anders* review is meant to avoid this kind of confirmation bias. The better practice thus is to assign the of-right postconviction proceeding to another judge. *Amici* note that this would be easy to accomplish—in 12 counties, the superior court has more than one division, and in the other 3 there are local rules in place to accommodate the reassignment of cases when the assigned judge has a conflict of interest, is removed for cause, or is noticed peremptorily, under Ariz. R. Crim. P. 10.1 and 10.2. Under these circumstances, the usual procedure of assigning postconviction cases to the sentencing judge must yield to the defendant's rights to due process and equal protection of the law.

C. The court must not allow counsel to withdraw, or otherwise leave the defendant unrepresented, until it has either received briefing on arguable issues or determined, based on an independent review of the record, that there are no arguable issues.

Under the current practice, there is some confusion about counsel's role after filing a *Montgomery* notice. Our supreme court has said that counsel's role essentially ends at that point, and that the defendant is *pro se* from then on. *See Montgomery I*, 181 Ariz. at 260–61, 889 P.2d at 618–19. But our supreme court has also said that counsel must "remain on the case" "until the trial court makes its

required review and disposition." *Lammie*, 185 Ariz. at 264, 915 P.2d at 663. And because *Anders* review is not presently required in of-right postconviction proceedings, "the purpose of having counsel remain in the case… is not to file a PCR petition" on the defendant's behalf. *Id.* "Rather, counsel's only function… is to assist the *pro per* defendant should that defendant or the trial court discover a viable issue that counsel had not previously considered." *Id.* (citations omitted). But because independent review of the record is not presently required, it would almost never be the situation that counsel would be able to assist the defendant in briefing an arguable issue that emerges after a *Montgomery* notice is filed.

This Court should clarify counsel's duties, and the court's obligation to ensure compliance, when a *Chavez* brief is filed, in order to ensure compliance with *Anders*. Counsel's role is not simply that of an intermediary between the defendant and the court, available only to inform the defendant of deadlines and present ministerial requests to the court on the defendant's behalf. *Cf. Anders*, 386 U.S. at 744 (counsel's role is not that of an *amicus curiae*). The law is clear that counsel may not withdraw from a case until the court allows it. *See* Ariz. R. Crim. P. 6.3(b), (c). Allowing counsel to minimize her advocacy on the defendant's behalf subjects a *pro se* prisoner to the vagaries of individual judges' practices for enforcing deadlines and risks penalizing defendants for the failures of counsel. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 636–37 (2010); *State v. Diaz*, 236 Ariz. 361, 362, ¶¶ 3–4, 340 P.3d 1069, 1070 (2014). It also forces the prisoner to rely on the prison mail system to deliver pleadings, giving him "no choice but to entrust" the delivery

of his court filings "to prison authorities whom he cannot control or supervise and who may have every incentive to delay." *Houston v. Lack*, 487 U.S. 266, 271 (1988).

In *Anders* cases, when counsel files a motion to withdraw, counsel remains in the case to brief any arguable issue uncovered by the court's independent review. *See Penson*, 488 U.S. at 83; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The same procedure should apply when counsel files a *Chavez* brief. Withdrawal from representation may seem to be the more ethical avenue in the abstract, but in practice this creates far more ethical problems than it could ever solve. The duty to send the file exists whether or not the attorney withdraws. In the event that an arguable issue is identified, reappointing a withdrawn lawyer creates significant tension between a lawyer and client, and appointing a new lawyer to the case introduces a measure of delay in the proceedings while new counsel becomes familiar with the case. Maintaining counsel in the case until completion also preserves the defendant's trust in counsel.

CONCLUSION

Amici respectfully ask the Court to grant the petition for review. *Amici* also ask the Court to hold, in a published opinion, that Arizona's current procedures in of-right postconviction proceedings do not comport with *Anders*. To the extent that this Court is constrained by Arizona Supreme Court cases that hold otherwise, *amici* respectfully ask the Court to publish an opinion calling those cases into question. *See* Ariz. R. Sup. Ct. 111(b)(3); *see also Martinez*, 566 U.S. at 18 (characterizing a *Montgomery* notice as "akin to an *Anders* brief"); *Pacheco v. Ryan*,

No. CV-15-2264-PHX-DGC, 2016 WL 7407242 (D. Ariz. Dec. 22, 2016) (holding of-right postconviction proceedings to be subject to the requirements of *Anders*).

Respectfully submitted: July 14, 2017.

JON M. SANDS
Federal Public Defender

s/Keith J. Hilzendeger
KEITH J. HILZENDEGER
Assistant Federal Public Defender
DAVID J. EUCHNER
Assistant Pima County Public Defender
Attorneys for Amici Curiae

APPENDIX to BRIEF OF DEFENSE *AMICI CURIAE*

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APPENDIX to BRIEF OF DEFENSE *AMICI CURIAE*
State v. Chavez, No. 1 CA-CR 15-0482 PRPC

Anders Guidelines

Section I details *Anders* briefs submitted in cases with a guilty plea.

Section II details *Anders* briefs submitted in a jury or bench trial.

Section III details additional responsibilities of an *Anders* attorney.

Section IV details an *Anders* appellant's right to access the appellate record.

SECTION I

Anders Brief in Guilty Plea Cases

If appointed counsel intends to file an *Anders* brief in a guilty plea case, counsel must comply with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967). In addition to complying with Rule 38 of the Texas Rules of Appellate Procedure, an *Anders* brief must address:

(1) Whether appellant was properly admonished pursuant to article 26.13 of the Texas Code of Criminal Procedure;

(2) Whether appellant was mentally competent when the court accepted his plea;

(3) Whether appellant's plea was free and voluntarily made; and

(4) The adequacy of the sentence and whether arguable error was committed during the punishment phase.

SECTION II

Anders Briefs in Jury or Bench Trial Cases

If appointed counsel intends to file an *Anders* brief and supporting motion to withdraw in a jury or bench trial case, counsel must comply with *Anders*, 386 U.S. 738, 87 S. Ct. 1396, *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978), and *Stafford v. State*, 813 S.W.2d 503, 512 (Tex. Crim. App. 1991). In addition to complying with Rule 38 of the Texas Rules of Appellate Procedure, an *Anders* brief must address, at a minimum:

(1) Sufficiency of the indictment;

(2) Any adverse pretrial rulings affecting the course of the trial (e.g., motions to suppress, motions in limine, motions to quash, and speedy trial motions);

(3) Any adverse rulings during trial on objections or motions (e.g., objections regarding the admission or exclusion of evidence, objections premised on prosecutorial or judicial misconduct, and mistrial motions);

(4) Any adverse rulings on post-trial motions (e.g., motion for new trial or post-judgment verdict of acquittal);

(5) Jury selection (n/a in bench trial);

(6) Jury instructions (n/a in bench trial);

(7) Sufficiency of the evidence. Include the elements of the offense(s) and facts and evidence adduced at trial relevant to the offense(s) of conviction;

(8) Any errors that may rise to the level of fundamental error which were not objected to;

(9) The punishment range of the offense(s) and the reasonableness of the sentence(s) imposed.

SECTION III

Additional Responsibilities of *Anders* Attorney

The appointed attorney who files an *Anders* brief must file a motion to withdraw in compliance with Rule 6.5 of the Texas Rules of Appellate Procedure and also send a letter to appellant to:

(1) Notify appellant of the motion to withdraw and the *Anders* brief along with providing a copy of each to appellant;

(2) Inform appellant of his right to file a *pro se* response and of his right to review the record before filing such response; and

(3) Inform appellant of his *pro se* right to seek discretionary review if the court of appeals declares the appeal frivolous.

See Kelly v. State, 436 S.W.3d 313 (Tex. Crim. App. 2014).

The appointed attorney must also notify this Court, in writing, that he has:

(1) Informed appellant of the motion to withdraw and attendant *Anders* brief;

(2) Provided appellant with the requisite copies while notifying him of his various *pro se* rights; and

(3) Supplied appellant with a form motion for *pro se* access to the appellate record to be filed within ten days

An example of the form motion to provide to this Court:

NO. 01–___–_____–CR

_____	§	COURT OF APPEALS
v.	§	1ST DISTRICT
The State of Texas	§	HOUSTON, TEXAS

CERTIFICATE OF COUNSEL

In compliance with the requirements of *Anders v. California*, 386 U.S. 378, 87 S. Ct. 1396 (1967), I, [**Name of attorney]**, court-appointed counsel for appellant, **[name of appellant]**, in the above-referenced appeal, do hereby verify, in writing, to the Court that I have:

1. Notified appellant that I filed a motion to withdraw as counsel with an accompanying *Anders* brief, and provided a copy of each to appellant;

2. Informed appellant of his right to file a pro se response identifying what he believes to be meritorious grounds to be raised in his appeal, should he so desire;

3. Advised appellant of his right to review the appellate record, should he wish to do so, before filing that response;

4. Explained the process for obtaining the appellate record, provided a *Motion for Pro Se Access to the Appellate Record* lacking only appellant's signature and the date, and provided the mailing address for this Court; and

5. Informed appellant of his right to seek discretionary review pro se should this Court declare his appeal frivolous.

Respectfully submitted,

_____

Attorney for Appellant

SECTION IV

Pro Se Access to the Appellate Record

To comply with *Anders*, appointed counsel must notify appellant of his right to access the appellate record and provide him with a form motion for *pro se* access to the appellate record. *See Kelly*, 436 S.W.3d at 319–20. An example of the form motion to provide appellant:

NO. 01–__–_____–CR

_____	§	COURT OF APPEALS
v.	§	1ST DISTRICT
The State of Texas	§	HOUSTON, TEXAS

Pro se Motion for Access to Appellate Record

To the Honorable Justices of Said Court:

On _____[attorney to fill in date], appellant's appointed counsel filed a brief in the above styled and numbered cause pursuant to *Anders v. California*, 386 U.S. 738 (1967).

_____, appellant, moves this Court to provide him/her access to a copy of the appellate record including the clerk's record and the court reporter's record.

Appellant requests an extension of time of 30 days from the date he/she receives the appellate record to file a pro se response to counsel's *Anders* brief.

Respectfully submitted,

_____

Pro se Appellant

ANDERS GUIDELINES

Section I addresses the requirements for *Anders* briefs submitted in guilty plea cases.

Section II addresses the requirements for *Anders* briefs submitted in a jury or bench trial.

Section III addresses the requirements for notifying your client of his/her right to access the appellate record.

SECTION I

Anders Briefs in Guilty Plea Cases

If you plan to file an *Anders* brief and supporting motion to withdraw in a guilty plea case, please take note of the following information. To assure and demonstrate compliance with *Anders v. California*, 386 U.S. 738 (1967), the *Anders* brief in support of a motion to withdraw in a guilty plea case ordinarily must contain a discussion of whether the defendant was properly admonished pursuant to article 26.13 of the Texas Code of Criminal Procedure, and whether arguable error was committed during the punishment phase. As with any brief, compliance with Texas Rule of Appellate Procedure 38 is required. See the briefing checklist for a complete list of requirements. The *Anders* guidelines do not replace but rather supplement these requirements.

Compliant *Anders* briefs

(1) examine the trial court's compliance with Texas Code of Criminal Procedure article 26.13;

(2) examine whether appellant was mentally competent when the court accepted his plea;

(3) examine whether appellant's plea was free and voluntarily made; and

(4) examine the adequacy of the sentence.

SECTION II

Anders Briefs in Jury and Bench Trial Cases

If you plan to file an *Anders* brief and supporting motion to withdraw in a jury or bench trial case, please take note of the following information. To assure and demonstrate compliance with the holdings of *Anders v. California*, 386 U.S. 738 (1967), *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978), and *Stafford v. State*, 813 S.W.2d 503, 512 (Tex. Crim. App. 1991), the *Anders* brief in support of a motion to withdraw must contain, at a minimum, a discussion of the items listed below. You are encouraged to include these items in the Table of Contents, which will assist the court in conducting its examination of the record. As with any brief, compliance with Texas Rule of Appellate Procedure 38 is

required. For a complete list of requirements, see the briefing checklist. If there are any issues unique to the case not covered by the items listed below, those should be discussed as well. These guidelines do not replace but rather supplement these briefing requirements.

The items to be included, at a minimum, are:

(1) Sufficiency of the indictment;

(2) Any adverse pretrial rulings affecting the course of the trial (e.g., motions to suppress, motions in limine, motions to quash, speedy trial motion);

(3) any adverse rulings during trial on objections or motions (e.g., objections regarding the admission or exclusion of evidence, objections premised on prosecutorial or judicial misconduct, mistrial motions);

(4) any adverse rulings on post-trial motions(e.g., motion for a new trial or post-judgment verdict of acquittal);

(5) jury selection [N/A in bench trial];

(6) jury instructions [N/A in bench trial];

(7) sufficiency of the evidence, which would include a recitation of the elements of the offense(s), and facts and evidence adduced at trial relevant to the offense(s) of conviction;

(8) any errors for which there were no objections but may rise to the level of fundamental error; and

(9) calculation of the sentence and the reasonableness of the sentence imposed.

Section III

Pro Se Access to the Appellate Record

To comply with Anders, the Court of Criminal Appeals requires you to notify your client of his/her right to access the appellate record and provide him/her with a form motion for pro se access to the appellate record. *Kelly v. State*, 436 S.W.3d 313 (Tex. Crim. App. 2014).

You must provide the court with a transmittal letter in which you notify your client of his/her right to access the appellate record and provide him/her with a form motion for pro se access to the appellate record. An example of a form motion is below.

Return to:
Fourteenth Court of Appeals
301 Fannin, Room 245
Houston, TX 77002

NO. 14-__-_____-CR

_____	§	COURT OF APPEALS
v.	§	14TH DISTRICT
The State of Texas	§	HOUSTON, TEXAS

Pro se Motion for Access to Appellate Record

To the Honorable Justices of Said Court:

On _____ [attorney to fill in date], appellant's appointed counsel filed a brief in the above styled and numbered cause pursuant to *Anders v. California*, 386 U.S. 738 (1967).

_____, appellant, moves this court to provide him/her access to a copy of the appellate record including the clerk's record and the court reporter's record.

Appellant requests an extension of time of 30 days from the date he/she receives the appellate record to file a pro se response to counsel's *Anders* brief.

Respectfully submitted,

_____
Pro se Appellant

***ANDERS* CHECKLIST**

You are strongly encouraged to complete and include in your *Anders* brief the court's *Anders* checklist to ensure compliance with *Anders* and to assist the court in conducting its examination of the record. Provide citations to the record and to relevant authority, where appropriate, in the right hand column to demonstrate compliance by the trial court and/or parties.

GUILTY PLEA — TEX. CODE CRIM. PROC. ANN. ART. 26.13	
I. Admonishments	
(1) range of punishment	
(2) recommendation of the prosecuting attorney as to punishment is not binding on the court.	
(3) in plea agreement, the trial court must give its permission to the defendant before the defendant may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial;	
(4) consequences of non-citizenship, *see Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)	
(5) sex offender registration requirements	
II. Pretrial	
(1) sufficiency of the indictment	
(2) any adverse pretrial rulings	
III. Acceptance of plea defendant is mentally competent and plea is free and voluntary	
IV. Punishment (1) adverse rulings regarding evidence or other issues (2) calculation and reasonableness of sentence	
JURY OR BENCH TRIAL ON PLEA OF NOT GUILTY	
I. Pretrial	
(1) sufficiency of the indictment	
(2) any adverse pretrial rulings	
II. Trial	
(1) jury selection, if applicable	
(2) any adverse rulings during trial on objections or motions (for both guilt-innocence phase and punishment phase)	
(3) sufficiency of the evidence, which would include recitation of elements and evidence adduced at trial	
(4) jury instructions, if applicable	
(5) any error not objected to that may rise to the level of fundamental error	

III. Post-trial	
(1) any adverse rulings on post-trial motions	
(2) calculation and reasonableness of sentence	

ANDERS GUIDELINES

If counsel in a direct criminal appeal files a brief characterizing the appeal as without merit and moves to withdraw, *Anders v. California*, 386 U.S. 738 (1967), or responds to a motion to dismiss by stating that any argument in opposition would be frivolous, counsel must advise the Clerk's Office of the client's address. In addition to fully complying with *Anders*, counsel must provide a copy of his *Anders* brief to the defendant, and the brief should include in the Certificate of Service a statement that this requirement has been complied with, and a statement that counsel has reasonably attempted to communicate, in a manner and a language understood by the defendant: (i) that counsel has fully examined the record and reviewed the relevant law, and there are no meritorious issues for appeal; (ii) that counsel has therefore moved to withdraw; (iii) that if granted, the motion will result in dismissal of the appeal; but (iv) the defendant has the right to file a response in English, opposing counsel's motion, within thirty days.

Section I addresses the requirements for *Anders* briefs submitted in guilty plea cases.

Section II addresses the requirements for *Anders* briefs submitted in a jury or bench trial.

SECTION I

Anders Briefs in Guilty Plea Cases

If you plan to file an *Anders* motion and supporting brief in a guilty plea case, please take note of the following information. In order to assure and demonstrate compliance with *Anders v. California*, 386 U.S. 738 (1967) and *United States v. Johnson*, 527 F.2d 1328 (5th Cir. 1976), the *Anders* brief in support of a motion to withdraw in a guilty plea case ordinarily must contain a discussion of the below listed items. *See United States v. Flores*, 632 F.3d 229 (5th Cir. 2011). As with any brief, compliance with Federal Rule of Appellate Procedure 28 and Fifth Circuit Rule 28 is required. See the briefing checklist at www.ca5.uscourts.gov/clerk/docs/brchecklist.pdf for a complete list of requirements. The *Anders* guidelines do not replace but rather supplement these requirements.

Compliant *Anders* briefs

(1) examine the district court's compliance with Federal Rules of Criminal Procedure Rule 11 and 32; **note**, however, that, at the defendant's request, counsel may pretermit examination of the defendant's guilty plea provided

that there is sufficient confirmation in the record of the defendant's request; s*ee United States v. Garcia*, 483 F.3d 289, 291 (5th Cir. 2007);

(2) examine the validity of any waiver of the right to appeal the conviction or sentence and certify, pursuant to *United States v. Acquaye*, 452 F.3d 380, 382 (5th Cir. 2006), that the Government intends to rely on the defendant's appellate waiver;

(3) examine the Government's compliance with any plea agreement;

(4) if there is no valid sentencing waiver, examine whether the district court committed any significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, failing to consider the 18 U.S.C. § 3553(a) factors, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range; and whether the sentence is substantively reasonable.

You are strongly encouraged to complete and include in your *Anders* brief the court's *Anders* checklist to ensure compliance with *Anders* and to assist the court in conducting its examination of the record. The checklist is available at http://www.ca5.uscourts.gov/clerk/AndersChecklist.pdf.

SECTION II

Anders Briefs in Jury and Bench Trial Cases

If you plan to file an *Anders* motion and supporting brief in a jury or bench trial case, please take note of the following information. In order to assure and demonstrate compliance with the holdings of *Anders v. California*, 386 U.S. 738 (1967), and *United States v. Johnson*, 527 F.2d 1328 (5th Cir. 1976), the *Anders* brief in support of a motion to withdraw must contain, at a minimum, a discussion of the below listed items. You are encouraged to include these items in the Table of Contents which will assist the court in conducting its examination of the record. As with any brief, compliance with Federal Rule of Appellate Procedure 28 and Fifth Circuit Rule 28 is required. See the briefing checklist at www.ca5.uscourts.gov/clerk/docs/brchecklist.pdf for a complete list of requirements. If there are any issues unique to the case not covered by the items listed below, those should be discussed as well. These guidelines do not replace but rather supplement these briefing requirements.

The items to be included, at a minimum, are:

(1) sufficiency of the indictment;

(2) any adverse pretrial rulings affecting the course of the trial (e.g., motions to suppress, motions in limine, motions to quash, speedy trial motion);

(3) any adverse rulings during trial on objections or motions (e.g., objections regarding the admission or exclusion of evidence, objections premised on prosecutorial or judicial misconduct, mistrial motions);

(4) any adverse rulings on post-trial motions(e.g., motion for a new trial or post-judgment verdict of acquittal);

(5) jury selection [N/A in bench trial];

(6) jury instructions [N/A in bench trial];

(7) sufficiency of the evidence, which would include a recitation of the elements of the offense(s), and facts and evidence adduced at trial relevant to the offense(s) of conviction;

(8) any errors for which there were no objections but which may rise to the level of plain error; and

(9) calculation of the advisory guideline sentence and the reasonableness of the sentence imposed. With regard to the discussion of the sentence imposed, counsel is encouraged to attach a checklist, in addition to any discussion, which covers all the aspects of the current Federal Rule of Criminal Procedure 32 requirements, found in the *Anders* checklist for guilty plea cases, (see Section I above).

ANDERS CHECKLIST

Provide citations to the record, including the presentence report (PSR), and to relevant authority, where appropriate, in the right hand column to demonstrate compliance by the district court and/or the parties.

GUILTY PLEA - FED. R. CRIM. P. 11 (**NOTE:** May be pretermitted, per *United States v. Garcia*, 483 F.3d 289 (5th Cir. 2007), if the record reflects that the defendant does not wish to challenge the guilty plea)	
I. Advising and Questioning the Defendant - FED. R. CRIM. P. 11(b)(1)	
(A) risk of perjury	
(B) right to plead not guilty or persist in not-guilty plea	
(C) right to a jury trial	
(D) right to counsel at trial and every other stage	
(E) certain specific rights at trial	
(F) defendant's waiver of trial rights	
(G) nature of the charge	
(H) maximum possible penalty	
(I) mandatory minimum penalty	
(J) any applicable forfeiture	
(K) court's authority to order restitution	
(L) court's obligation to impose a special assessment	
(M) court's obligation to calculate guidelines range and consider that range, possible departures, and other 18 U.S.C. § 3553(a) factors	
(N) terms of waiver of right to appeal or collaterally attack the sentence	
II. Voluntariness of Plea - Rule 11(b)(2)	
III. Plea's Factual Basis - Rule 11(b)(3)	
IV. Judicial Consideration of Plea Agreement - Rule 11(c)(3) (advisory to defendant if plea agreement is of specified type)	
V. Accepting Plea Agreement - Rule 11(c)(4) (informing defendant that, to the extent agreement is of specified type, the agreed disposition will be in the judgment)	
VI. Enforcing Plea Agreement (Government's compliance with plea agreement, defense counsel's certification whether government intends to enforce appeal waiver, and validity of appeal waiver)	

SENTENCING - FED. R. CRIM. P. 32 (**NOTE:** May be pretermitted if the record reflects a valid, enforceable sentencing waiver)	
I. Rule 32(e)(2) (disclosing the PSR)	
II. Rule 32(i)(1) (verifying that defendant and counsel read and discussed the PSR and any addendum to the PSR and allowing counsel to comment on PSR and sentencing matters)	
III. Rule 32(i)(3) (findings on disputed matters)	
IV. Rule 32(i)(4) (allowing counsel and defendant to speak)	
V. Rule 32(j)(1) (advising defendant of any right to appeal and right to appeal in forma pauperis)	
VI. Rule 32(k)(1) (judgment correctly sets forth plea, offense(s) of conviction, and sentence, including conditions of supervised release imposed at sentencing)	
VII. Adequacy of reasons for sentence; 18 U.S.C. § 3553(c)	
VIII. Calculation of sentence	
Offense level calculation (identify base offense level and any adjustments)	
Criminal history calculation (identify prior convictions and any additional points)	
Advisory guidelines range	
Statutory minimum or maximum, if any, term of imprisonment and supervised release	
Fine range, if fine was imposed; *see* U.S.S.G. § 5E1.2, and findings on fine and on defendant's ability to pay; *see id.*; 18 U.S.C. §§ 3571 & 3572	

HOW TO FILE AN ANDERS BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

General Instructions

These instructions detail the requirements for filing an "Anders brief" in the event defendant-appellant's counsel determines that no non-frivolous issues exist on appeal after thorough review of the district court record. An Anders brief must set forth a "conscientious examination" of the appellant's case and explain fully why there are no non-frivolous issues. This Court has set a high standard for determining what constitutes a satisfactory Anders brief. See Anders v. California, 386 U.S. 738, 744 (1967); Nell v. James, 811 F.2d 100, 104 (2d Cir. 1987).

In the event that counsel fails to articulate fully why there are no non-frivolous issues present, the Court may direct counsel to file a new brief addressing the inadequately briefed issues and possibly reduce or deny payment of counsel's CJA fees. See United States v. Burnett, 989 F.2d 100, 105 (2d Cir. 1993). The Court may also elect to appoint new counsel when the submitted Anders brief is ruled insufficient. See id.

An Anders brief must state on the cover "Pursuant to Anders v. California, 386 U.S. 738 (1967)." A copy of the transcript of the proceedings below must be submitted with the brief. The transcript should be included in the appendix filed with the brief, as well.

When filing an Anders brief, counsel must file: (1) a motion to be relieved as counsel and (2) a Pre-Sentence Investigation Report (PSR). If the case involves imposition of a sentence constituting a variance from the United States Sentencing Commission Guidelines, counsel must also file the statement of reasons issued by the district court in accordance with Fed. R. Crim. P. 32(h). The Court of Appeals will review the PSR and statement of reasons, if filed, and determine the motion at the time it hears the case.

When filing an Anders brief, counsel must also submit to the Court an affidavit or affirmation stating that the client has been informed that:

(1) A brief pursuant to Anders v. California, 386 U.S. 738 (1967), has been filed;
(2) The filing of an Anders brief will probably result in the dismissal of the appeal and affirmance of the conviction; and
(3) The client may request assistance of other counsel or submit *pro se* response papers.

When counsel has reason to believe that the client may not speak English, or may be illiterate, or

both, counsel's affidavit or affirmation should describe counsel's reasonable efforts to communicate to the client the above three Anders notice requirements and the substance of the Anders brief in a manner and a language understood by the client. See United States v. Leyba, 379 F.3d 53 (2d Cir. 2004); United States v. Santiago, 495 F.3d 27 (2d Cir. 2007).

In addition, counsel must submit proof of service detailing the means by which a copy of the Anders brief, the motion to be relieved as counsel, and the Court's so-ordered scheduling notification was served on the client and any other party.

Response of U.S. Attorney: In lieu of an appellee's brief, the U.S. Attorney may file a motion for summary affirmance. The time for filing the motion for summary affirmance is governed by the procedures set forth above regarding the timing for filing appellee's brief.

Response of Defendant: When the attorney has submitted an Anders brief, the defendant has an automatic right to submit a *pro se* responsive brief arguing that there are meritorious issues to the appeal. A defendant who intends to file a responsive brief must notify the Court in writing within 14 days of receipt of the Anders brief and set forth the date by which the brief will be filed. Unless the case involves a voluminous transcript, the defendant must select a filing date that is within 91 days of receipt of the Anders brief. Defendant's letter will be so-ordered unless the Court determines the selected filing date is unacceptable.

Anders Briefs in Guilty Plea Cases

To demonstrate compliance with Anders and Burnett, the Anders brief in guilty plea cases ordinarily must contain the following discussion points:

(1) Examination of the validity of the guilty plea — including whether the defendant was competent, whether the plea was knowing and voluntary and supported by a factual basis, and whether the district court complied with Federal Rule of Criminal Procedure 11 — and/or whether it would be against defendant's interest to contest the plea. See United States v. Ibrahim, 62 F.3d 72, 74 (2d Cir. 1995).

(2) Examination of the validity and scope of any waiver of the right to appeal the conviction or sentence, in light of the standard discussed in United States v. Gomez-Perez, 215 F.3d 315 (2d Cir. 2000). If counsel concludes that there is no basis to contest the validity of the waiver, counsel's brief must address only: (a) whether defendant's waiver of appellate rights was knowing, voluntary, and competent; (b) whether defendant's plea was knowing, voluntary, and competent or whether it would be against defendant's interest to contest the plea; and (c) whether any issues implicate defendant's constitutional or statutory rights that either cannot be waived or considered waived in light of the circumstances. See id. at 319. Additionally counsel's brief must address the scope of the defendant's waiver (*i.e.*, whether the waiver bars the defendant from appealing the conviction; the imprisonment component of the sentence; and/or any non-imprisonment components of the sentence) and whether any ambiguity in the language of the waiver

affects the validity and scope of the waiver. See, e.g., United States v. Oladimeji, 463 F.3d 152, 156-57 (2d Cir. 2006). If the waiver does not unambiguously cover certain components of the sentence, counsel's brief must discuss whether there is any non-frivolous basis for challenging those components of the sentence.

(3) Examination of the Government's compliance with any plea agreement.

(4) Examination of the substantive and procedural reasonableness of the sentence, including whether the district court complied with Federal Rule of Criminal Procedure 32, whether the district court committed any significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, failing to consider the 18 U.S.C. § 3553(a) factors, or failing to adequately explain the imposed sentence and any deviation from the Guidelines range, and whether the sentence is substantively reasonable. Counsel may, however, pretermit examination of any component of the sentence that is within the scope of a valid waiver of appellate rights. See Gomez-Perez, 215 F.3d at 319.

(5) If the district court imposed a sentence that was outside of the Guideline range, examination of whether the district court complied with 18 U.S.C. § 3553(c)(2) by preparing a written statement of reasons (counsel must also submit any such statement of reasons with the Anders motion). See United States v. Hall, 499 F.3d 152 (2d Cir. 2007)(per curiam); but see *United States v. Elbert*, __ F.3d ___, 2011 WL 4347191 (2d Cir. 2011) (partially abrogating *Hall* with respect to the nature of the remedy for non-compliance with 18 U.S.C. § 3553(c)(2)).

Counsel is strongly encouraged to use the Court's *Anders* checklist to ensure compliance with Anders and Burnett. The checklist is available in Appendix A of this guide.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
APPENDIX A: *ANDERS* CHECKLIST

This checklist is provided as a guide when preparing a motion to withdraw as counsel pursuant to *Anders v. California,* 386 U.S. 738 (1967).

I. SUMMARY

A. Offense(s) of which defendant was convicted:

B. Proceedings below: (check all that apply)

☐ Guilty plea without a plea agreement?
  ☐ Government prepared a *Pimentel* letter?

☐ Guilty plea pursuant to a plea agreement?
  ☐ Appeal waiver provision contained in plea agreement?
    ☐ Waiver covers conviction?
    ☐ Waiver covers imprisonment component of sentence?
    ☐ Waiver covers non-imprisonment components of sentence?

☐ District court imposed a sentence that was within the Guidelines range?

☐ District court imposed a sentence that was outside the Guidelines range?
  ☐ District court prepared a written statement of reasons for non-Guidelines sentence?

C. Summary of Guidelines Calculations (fill in)**:**

	PSR:	Dist. Court:
Total offense level:	____	____
Total criminal history points	____	____
Criminal history category:	____	____
Guidelines range (Imprisonment):	____ - ____	____ - ____
Guidelines range (Superv. Rel.):	____ - ____	____ - ____
Guidelines range (Fine):	_____ - _____	_____ - _____

D. Summary of Sentence Imposed (fill in)**:**

Imprisonment: _____
Supervised release: _____
Special assessment: _____
Fine: _____
Restitution: _____
Forfeiture: _____

	Citations to the Record
II. GUILTY PLEA (**NOTE:** Counsel must review guilty plea even for cases in which there is a valid appeal waiver. *See United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000).)	
A. Competency: Before accepting plea, court must determine that defendant is competent. *See Godinez v. Moran*, 509 U.S. 389, 400 (1993); *United States v. Rossillo*, 853 F.2d 1062, 1066-67 (2d Cir. 1988); *United States v. Livorsi*, 180 F.3d 76, 82 (2d Cir. 1999).	
B. Advising and Questioning Defendant — Fed. R. Crim. P. 11(b)(1), (c) Before accepting plea, court may place defendant under oath and must determine that defendant understands the following:	
1. government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath. *See* Fed. R. Crim. P. 11(b)(1)(A).	
2. right to plead not guilty or persist in not-guilty plea. *See* Fed. R. Crim. P. 11(b)(1)(B).	
3. right to a jury trial. *See* Fed. R. Crim. P. 11(b)(1)(C).	
4. right to counsel, including: — court-appointed counsel; — counsel at trial; and — counsel at every other stage of the proceeding. *See* Fed. R. Crim. P. 11(b)(1)(D).	
5. trial rights: — right to confront adverse witnesses; — right against compelled self-incrimination; — right to testify; — right to present evidence; and — right compel the attendance of witnesses. *See* Fed. R. Crim. P. 11(b)(1)(E).	
6. by pleading guilty, defendant waives trial rights. *See* Fed. R. Crim. P. 11(b)(1)(F).	
7. nature of each charge to which the defendant is pleading. *See* Fed. R. Crim. P. 11(b)(1)(G).	
8. any maximum possible penalty, including imprisonment, fine, and term of supervised release. *See* Fed. R. Crim. P. 11(b)(1)(H).	
9. any mandatory minimum penalty. *See* Fed. R. Crim. P. 11(b)(1)(I).	
10. any applicable forfeiture. *See* Fed. R. Crim. P. 11(b)(1)(J).	
11. court's authority to order restitution. *See* Fed. R. Crim. P. 11(b)(1)(K).	

12. court's obligation to impose a special assessment. *See* Fed. R. Crim. P. 11(b)(1)(L).	
13. court's obligations to calculate Guidelines range and consider that range and other 18 U.S.C. § 3553(a) factors. *See* Fed. R. Crim. P. 11(b)(1)(M).	
14. terms of any waiver of right to appeal or collaterally attack the sentence. *See* Fed. R. Crim. P. 11(b)(1)(N).	
15. special advisories for cases involving certain types of plea agreements — *See* Fed. R. Crim. P. 11(c)(3), (4): — if plea agreement is of the type described in Fed. R. Crim. P. 11(c)(1)(B) (non-binding sentencing recommendation or request), inform defendant that there is no right to withdraw plea if court does not follow recommendation or request; — if plea agreement is of the type specified in Fed. R. Crim. P. 11(c)(1)(A) (Gov't agrees to not bring, or dismiss, other charges) or (c)(1)(C) (binding sentencing recommendation or request), inform defendant that the agreed disposition will be included in the judgment.	
C. Voluntariness of Plea — Fed. R. Crim. P. 11(b)(2) Court must determine that the plea is voluntary and did not result from force, threats, or promises.	
D. Factual Basis for Plea — Fed. R. Crim. P. 11(b)(3) Court must determine that the plea is supported by a factual basis.	
III. SPECIAL ISSUES FOR CASES INVOLVING WAIVER OF APPELLATE RIGHTS *See United States v. Gomez-Perez*, 215 F.3d 315 (2d Cir. 2000)	
A. Appeal waiver provision (cite to location in the record)	
B. Defendant's waiver of appellate rights must be knowing and voluntary	
IV. SENTENCING (**Note**: Discussion of sentencing in the *Anders* brief may be pretermitted if record reflects a valid, enforceable waiver of right to appeal sentence, but only with respect to those components of the sentence covered by appeal waiver)	
A. Pre-Sentence Investigation Report (PSR)	
1. PSR's offense level calculation (**Note**: *Anders* brief should identify PSR's findings for base offense level and any adjustments)	
2. PSR's criminal history calculation (**Note**: *Anders* brief should identify PSR's findings for prior convictions and any additional points)	
3. PSR's Guidelines range	

4. Relevant statutory minimum and maximum penalties (term of imprisonment, supervised release, etc.), if any, for each offense of which defendant was convicted	
5. PSR's fine range (if fine was imposed), and findings on fine and on defendant's ability to pay; *see* U.S.S.G. § 5E1.2; 18 U.S.C. §§ 3571, 3572	
6. PSR's restitution findings and recommendations	
7. Disclosure: PSR must be timely disclosed prior to sentencing — Fed. R. Crim. P. 32(e)(2)	
B. Court's compliance with Rule 32 at sentencing	
1. Court must verify that defendant and counsel have read and discussed the PSR and any addendum to the PSR — Fed. R. Crim. P. 32(i)(1)(A)	
2. Court must allow parties' attorneys an opportunity to comment on the PSR — Fed. R. Crim. P. 32(i)(1)(C)	
3. For each objection to the PSR, Court must either rule on the objection or determine that a ruling is unnecessary — Fed. R. Crim. P. 32(i)(3)(B)	
4. Court must provide counsel with an opportunity to speak on defendant's behalf — Fed. R. Crim. P. 32(i)(4)(A)	
5. Court must permit defendant to speak or present any information to mitigate the sentence — Fed. R. Crim. P. 32(i)(4)(A)	
6. Court must advise defendant of any right to appeal and right to appeal *in forma pauperis* — Fed. R. Crim. P. 32(j)(1)	
7. Written judgment must correctly set forth plea, offense(s) of conviction, and sentence (in conformity with oral sentence) — Fed. R. Crim. P. 32(k)	
C. Court's Guidelines calculations	
1. Court's offense level calculation (**Note**: *Anders* brief should identify any district court findings for base offense level and any adjustments)	
2. Court's criminal history calculation (**Note**: *Anders* brief should identify any district court findings for prior convictions and any additional points)	
3. Court's Guidelines range	
D. Court's pronouncement of sentence	
1. Court must treat Guidelines range as advisory — *United States v. Booker*, 543 U.S. 220 (2005)	
2. Court must consider the 18 U.S.C. § 3553(a) factors — 18 U.S.C. § 3553(a)(1)–(7)	

3. Court must provide oral explanation for the sentence imposed — 18 U.S.C. § 3553(c); *see also* 18 U.S.C. § 3553(c)(1) (if court imposes Guidelines sentence and Guidelines range exceeds 24 months, court must state the reason for imposing a sentence at a particular point within the range)	
4. If court imposes a non-Guidelines sentence, court must provide a written statement of reasons ("SOR") as required by 18 U.S.C. § 3553(c)(2). (**Note**: In cases subject to the requirements of 18 U.S.C. § 3553(c)(2), appellate counsel will not be permitted to withdraw pursuant to *Anders* until: (1) appellate counsel submits the written statement of reasons to the appellate court; and (2) appellate counsel addresses the district court's compliance with § 3553(c)(2) as part of the *Anders* analysis. *See United States v. Hall,* 499 F.3d 152, 154 (2d Cir. 2007).) (per curiam); *but see United States v. Elbert*, __ F.3d ___, 2011 WL 4347191 (2d Cir. 2011) (partially abrogating *Hall* with respect to the nature of the remedy for non-compliance with 18 U.S.C. § 3553(c)(2)).	
V. *Anders* Notice	
1. As part of the *Anders* motion, appellate counsel must submit an affidavit or affirmation showing that the client has been informed that: ☐ A brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), has been filed; ☐ The filing of an *Anders* brief will probably result in the dismissal of the appeal and affirmance of the conviction; and ☐ The client may request assistance of other counsel or submit *pro se* response papers.	
2. Defendant's language abilities (fill out): Did the defendant use a foreign language interpreter in the proceedings below? ☐ No ☐ Yes, a _____ language interpreter The record indicates that (check all that apply, and provide citations to record): ☐ defendant speaks English ☐ defendant does not speak English ☐ defendant's primary language is a non-English language: _____ (fill in) ☐ defendant is able to read in English ☐ defendant is able to read in a non-English language: _____ (fill in) ☐ defendant may be illiterate (**Note**: Where counsel has reason to believe that the client may not speak English, or may be illiterate, or both, counsel's affidavit or affirmation should describe counsel's reasonable efforts to communicate the three *Anders* notice requirements and the substance of the *Anders* brief to the client in a manner and a language understood by the client. *See United States v. Leyba*, 379 F.3d 53 (2d Cir. 2004); *United States v. Santiago,* 495 F.3d 27 (2d Cir. 2007).	