

ANDERS GUIDELINES

If counsel in a direct criminal appeal files a brief characterizing the appeal as without merit and moves to withdraw, *see 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 the *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. *See United States v. Moreno-Torres*, 768 F.3d 439, 441 n.2 (5th Cir. 2014).

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 note the following information. In order to assure and demonstrate compliance with *Anders* 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 <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/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 Rule of Criminal Procedure 11 and 32; **note**, however, that, at the defendant's request,

counsel may pretermite examination of the defendant's guilty plea provided that there is sufficient confirmation in the record of the defendant's request, *see United States v. Garcia*, 483 F.3d 289, 291 (5th Cir. 2007); *see also United States v. Polanco-Ozorto*, 772 F.3d 1053, 1054-55 (5th Cir. 2014); and **note also** that if the appeal is indisputably untimely, the *Anders* requirements are satisfied when defense counsel has ascertained, certified, and concluded that the government would file a meritorious motion to dismiss the appeal as untimely, *see United States v. Pesina-Rodriguez*, 825 F.3d 787, 788 (5th Cir. 2016);

- (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), and *United States v. Davis*, 530 F.3d 318, 320-21 (5th Cir. 2008), 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; whether the sentence is substantively reasonable; **and** whether there is any conflict between the written judgment and the oral pronouncement of sentence, *see United States v. Diggles*, 957 F.3d 551 (5th Cir. 2020) (en banc).

You are strongly encouraged to complete and include in your *Anders* brief the court's *Anders* checklist to ensure your compliance with *Anders* and to assist the court in conducting its examination of the record. See the *Anders* checklist <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/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* and *Johnson*, 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 <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/brchecklist.pdf> for a complete list of the 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).