

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). An Anders brief need not, however, address the validity of the plea (or process leading to the plea) if counsel (1) believes that challenging the plea would lead to potential risks, including the risk of a higher sentence; and (2) is able to state that the defendant, after being informed by counsel of the potential risks and benefits of challenging the validity of the guilty plea, has decided not to bring such a challenge.
- (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, pretermitt 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 <i>Pimentel</i> 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. <i>See United States v. Gomez-Perez</i>, 215 F.3d 315, 319 (2d Cir. 2000).)	
A. Competency: Before accepting plea, court must determine that defendant is competent. <i>See Godinez v. Moran</i>, 509 U.S. 389, 400 (1993); <i>United States v. Rossillo</i>, 853 F.2d 1062, 1066-67 (2d Cir. 1988); <i>United States v. Livorsi</i>, 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. <i>See Fed. R. Crim. P. 11(b)(1)(A).</i>	
2. right to plead not guilty or persist in not-guilty plea. <i>See Fed. R. Crim. P. 11(b)(1)(B).</i>	
3. right to a jury trial. <i>See Fed. R. Crim. P. 11(b)(1)(C).</i>	
4. right to counsel, including: — court-appointed counsel; — counsel at trial; and — counsel at every other stage of the proceeding. <i>See Fed. R. Crim. P. 11(b)(1)(D).</i>	
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. <i>See Fed. R. Crim. P. 11(b)(1)(E).</i>	
6. by pleading guilty, defendant waives trial rights. <i>See Fed. R. Crim. P. 11(b)(1)(F).</i>	
7. nature of each charge to which the defendant is pleading. <i>See Fed. R. Crim. P. 11(b)(1)(G).</i>	
8. any maximum possible penalty, including imprisonment, fine, and term of supervised release. <i>See Fed. R. Crim. P. 11(b)(1)(H).</i>	
9. any mandatory minimum penalty. <i>See Fed. R. Crim. P. 11(b)(1)(I).</i>	
10. any applicable forfeiture. <i>See Fed. R. Crim. P. 11(b)(1)(J).</i>	
11. court’s authority to order restitution. <i>See Fed. R. Crim. P. 11(b)(1)(K).</i>	

12. court's obligation to impose a special assessment. <i>See</i> 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. <i>See</i> Fed. R. Crim. P. 11(b)(1)(M).	
14. terms of any waiver of right to appeal or collaterally attack the sentence. <i>See</i> Fed. R. Crim. P. 11(b)(1)(N).	
15. special advisories for cases involving certain types of plea agreements — <i>See</i> 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 <i>See United States v. Gomez-Perez</i> , 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 <i>Anders</i> brief may be pretermitted if record reflects a valid, enforceable waiver of right to appeal sentence, <u>but</u> 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: <i>Anders</i> brief should identify PSR's findings for base offense level and any adjustments)	
2. PSR's criminal history calculation (Note: <i>Anders</i> 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; <i>see</i> 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 <i>in forma pauperis</i> — 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: <i>Anders</i> brief should identify any district court findings for base offense level and any adjustments)	
2. Court's criminal history calculation (Note: <i>Anders</i> 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 — <i>United States v. Booker</i> , 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); <i>see also</i> 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 <i>Anders</i> 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 <i>Anders</i> analysis. <i>See United States v. Hall</i>, 499 F.3d 152, 154 (2d Cir. 2007).) (per curiam); <i>but see United States v. Elbert</i>, __ F.3d __, 2011 WL 4347191 (2d Cir. 2011) (partially abrogating <i>Hall</i> with respect to the nature of the remedy for non-compliance with 18 U.S.C. § 3553(c)(2)).	
V. <i>Anders</i> Notice	
1. As part of the <i>Anders</i> motion, appellate counsel must submit an affidavit or affirmation showing that the client has been informed that: ☐ A brief pursuant to <i>Anders v. California</i>, 386 U.S. 738 (1967), has been filed; ☐ The filing of an <i>Anders</i> 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 <i>pro se</i> 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 <i>Anders</i> notice requirements and the substance of the <i>Anders</i> brief to the client in a manner and a language understood by the client. <i>See United States v. Leyba</i>, 379 F.3d 53 (2d Cir. 2004); <i>United States v. Santiago</i>, 495 F.3d 27 (2d Cir. 2007).	