

ANDERS CASE GUIDELINES

At Section I below is a checklist and outline for Anders briefs in guilty plea cases.

At Section II, page 5 below, is a checklist for jury trial/bench trial Anders briefs

The court requests attorneys to use this guidance in preparing Anders briefs.

SECTION I

Checklist and Outline for 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 and checklist. 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), it is strongly recommended that the Anders brief in support of a motion to withdraw in a guilty plea case contain, at a minimum, a discussion of the below listed items. You are encouraged to include this outline in your brief, which will assist the court in conducting its examination of the record. It is anticipated that references to the record volume and page number, or other pertinent record document such as a presentence report, would be listed in the column on the left side of the outline next to each line item. As with any brief, compliance with Fed. R. App. P. & 5th Cir. R. 28 is required. See the briefing checklist on this website at “www.ca5.uscourts.gov/clerk/docs/brchecklist.pdf” for a complete list of requirements. This outline is not intended to replace but rather to supplement the requirements of Fed. R. App. P. & 5th Cir. R. 28.

ANDERS OUTLINE FOR GUILTY PLEA

GUILTY PLEA - FED. R. CRIM. P. 11 requirements

- I. Advising and Questioning the Defendant - Rule 11(b)(1)
- any statement given under oath may be used by Government in prosecution for perjury
 - right to plead not guilty or to persist in not-guilty plea

- right to jury trial
- right to be represented by counsel, appointed by court if necessary, at trial and at every other stage
- right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses
- defendant waives these rights if court accepts plea
- nature of each charge to which defendant is pleading
- maximum possible penalty, including imprisonment, fine, and term of supervised release
- any mandatory minimum penalty
- any applicable forfeiture
- court's authority to order restitution
- court's obligation to impose special assessment
- court's obligation to consider advisory Sentencing Guidelines, and court's discretion to depart or sentence outside guidelines range (Rule 11(b)(1)(M) as modified by United States v. Booker, 543 U.S. 220 (2005))
- terms of any plea-agreement provision waiving right to appeal or collaterally attack sentence

II. Ensuring That Plea is Voluntary - Rule 11(b)(2)

- determine plea is voluntary, not result of force, threats, or promises apart from plea agreement

III. Determining the Factual Basis for Plea - Rule 11(b)(3)

- determine that there is a factual basis for plea

IV. Judicial Consideration of Plea Agreement - Rule 11(c)(3)(B)

- if Government agrees to recommend or not to oppose request for particular sentence, advise that defendant has no right to withdraw plea if recommendation or request is rejected

V. Accepting Plea Agreement - Rule 11(c)(4)

- if Government agrees to not bring or to dismiss other charges, or Government agrees to a particular sentence, and court accepts agreement, advise that the agreed disposition will be in the judgment

APPEAL WAIVER

- Validity of any waiver of right to appeal conviction or sentence (valid waiver may obviate some portions of the checklist, but “it is defense counsel’s obligation to ascertain and certify that the Government would rely on the defendant’s appellate waiver before moving to withdraw.” United States v. Acquaye, 452 F.3d 380, 382 (5th Cir. 2006))

PSR & SENTENCING

- District court applied (enter date of version of Manual used) _____ Sentencing Guidelines Manual

I. Disclosing the PSR - FED. R. CRIM. P. 32(e)(2)

- timing of receipt of PSR - PSR must be furnished to the defendant, defense counsel, and Government not less than 35 days before sentencing

II. Sentencing - Rule 32(i)(1)

- verify that defendant and counsel have read and discussed PSR and any addenda thereto
- allow counsel to comment on PSR and sentencing matters

III. Sentencing - Rule 32(i)(3)

- make findings on disputed matters

IV. Sentencing - Rule 32(i)(4)

- allow counsel and defendant an opportunity to speak

V. Right to appeal - Rule 32(j)(1)

- advise defendant of any right to appeal and any right to appeal in forma pauperis

VI. Calculation of sentence

- base offense level
- offense-level adjustments
- calculation of criminal history
- PSR accurately reports the statutory minimum/maximum, as applicable
- PSR accurately reports applicable term of supervised release
- PSR accurately reports fine range, if fine was imposed
- findings on fine and on defendant's ability to pay
- Government's compliance with plea agreement

SECTION II

Checklist for Jury Trial/Bench Trial Anders Briefs

If you plan to file an Anders motion and supporting brief in either a jury trial or bench trial case, please take note of the following information and checklist. 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), it is strongly recommended that the Anders brief in support of a motion to withdraw in a jury/bench trial case 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 Fed. R. App. P. & 5th Cir. R. 28 is required. See the briefing checklist on this website 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. This outline is not intended to replace but rather to supplement the requirements of Fed. R. App. P. & 5th Cir. R. 28.

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 Fed. R. Crim. P. 32 requirements, found in the Anders checklist for guilty plea cases, (see Section I above).