

REPLY TO STATE’S RESPONSE TO PETITION TO TRANSFER

Indiana is one of few States, if not the only State, that has yet to clarify a public defender’s duty when perfecting an appeal that he believes is frivolous. Martha C. Warner, Anders in the Fifty States: Some Appellants’ Equal Protection is More Than Others, 23 Fla. St. U.L. Rev. 625 (1996). The fact that the Anders issue is in front of this Court, via dicta, is no reason to further delay addressing this important, recurring issue.

ARGUMENT

Mosley’s case is not moot. Appellate courts will typically not engage in discussions of moot questions or render advisory opinions. Samm, Jr. v. State, 893 N.E.2d 761, 765 (Ind.Ct.App. 2008). An advisory opinion is one where there is no live case or controversy in front of the court. Hill v. State, 592 N.E.2d 1229, 1230 (Ind. 1992). Here, there is a live controversy in front of this court. Mosely asked for this Court to vacate his conviction due to insufficiency, and the State argued otherwise. Pet. to Transfer, p. 11, 13; Response to Pet. to Transfer, p. 2.

Mosley agrees that the Court of Appeals *sua sponte* raised the Anders issue in dicta. However, this alone should not prevent this Court from clarifying a public defender’s obligation in perfecting an appeal he feels is frivolous. Appellate courts can address a moot issue “if it concerns a question of great public importance which is likely to recur in a context which will continue to evade review.” DeSalle v. Gentry, 818 N.E.2d 40, 49 (Ind.Ct.App. 2004); Samm, Jr., 893 N.E.2d at 765. The issue of Anders briefs falls within this exception.

First, at the heart of the Anders issue are two of the most basic principles of fairness in our jurisprudence, *i.e.*, that “every defendant stands equal before the law” and

“lawyers in criminal cases ‘are necessities, not luxuries.’” U.S. v. Cronin, 104 S.Ct. 2039, 2043 (1984) (quoting Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)). The issue of whether the Anders approach is the best method of affording indigent defendants the same right to appeal and counsel that richer defendants enjoy is of great public importance. See, e.g., Williams v. State, 898 So.2d 804 (Fla. 2004) (appellate court certified as an issue of great public importance the application of Anders to civil commitments appeals).

Moreover, Indiana public defenders have been given mixed messages on how to perfect an appeal. Compare Packer v. State, 777 N.E.2d 733 (Ind.Ct.App. 2002) and Seals v. State, 846 N.E.2d 1070 (Ind.Ct.App. 2006) with Dixon v. State, 152 Ind.App. 430, 284 N.E.2d 102, 103 (1972), *overruled, in part, by Music v. State*, 489 N.E.2d 949 (Ind. 1986)). Although dicta, the Court of Appeals’ comments in Mosley fuel the confusion and divide in the appellate courts regarding the public defender’s ethical duty. The State mischaracterizes these comments as an “offhand complaint about the quality of the Defendant’s argument.” Response to Pet. to Transfer, p. 2. These comments were judicial advice that an “appeal should not be field in every case” and that “the better approach is to file an [Anders] brief.” Mem. Op., p. 5-6.

Second, the Anders issue is not just likely to recur, but certain to recur on a regular basis. Inevitably, most appellate public defenders will be faced with a case where they see no issue. With no clear answer from the Indiana courts, appellate public defenders find themselves in an unfair position of walking the thin line between their ethical duties to competently represent clients and not to raise frivolous claims.

Third, the Anders issue, by its very nature, evades review. Where a public defender files an Anders brief and moves to withdraw, the appellate court will either: (1) disagree with the public defender, order briefing on the merits and possibly appoint new counsel; or (2) agree with the public defender, grant the motion to withdraw and affirm the trial court's judgment. In the first situation, the issue of Anders will always be moot because the issues were briefed on the merits. In the second situation, a defendant will be forced to petition for transfer *pro se*. It is unfair to allow a possible denial of the right to counsel to perpetuate until an indigent defendant has the legal savvy to recognize and cogently raise the denial of his right. The very constitutional problem at the heart of Anders causes the issue to evade review.

A few State Supreme Courts, recognizing the importance of the Anders issue, have seized upon the opportunity to clarify the law in their states. See, e.g., Commonwealth v. Moffett, 383 Mass. 201, 418 N.E.2d 585, 588 (1981) (“when it became apparent that the Anders issue had to be confronted, [Massachusetts Supreme Court] transferred the case to [itself] on [its] own motion.”). The New Hampshire Supreme Court explicitly accepted the public defender's request to clarify the procedure attorneys should take when they believe the appeal involves only frivolous issues. Cigic v. State, 138 N.H. 313, 639 A.2d 251 (1994).¹

Overall, the Indiana appellate courts have evoked the exception to the mootness doctrine on far less pervasive issues. In re T.B., 895 N.E.2d 321 (Ind.Ct.App. 2008)

¹ Although the New Hampshire Supreme Court does have the power to issue advisory opinions in very limited situations, the Cigic case was not such a situation. Compare with Opinion of the Justices (Appointment of Chief Justice of Supreme Court), 842 A.2d 616 (N.H. 2003). New Hampshire recognizes the policy against moot issues in order to avoid deciding purely academic issues. Bleiler v. Chief of Dover Police Dept., 927 A.2d 1216, 1219 (N.H. 2007).

(addressing the moot issue of the release of juvenile court records to the media); Samm, Jr., 893 N.E.2d at 765 (addressing the moot issue of excessive bond); Johnson v. State, 847 N.E.2d 190, 200-01 (Ind.Ct.App. 2006) (addressing the moot issue of whether good time credit applies to a sentence for contempt). Most State Courts have decided the issue of Anders years ago. There is no reason to delay the issue any longer.

CONCLUSION

WHEREFORE, the Appellant respectfully requests this court to grant transfer, vacate his conviction, and issue an opinion clarifying that Anders briefs are not to be filed in Indiana.

Respectfully submitted,

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VERIFICATION OF WORD COUNT

I verify that this brief contains no more than 1,000 words.

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CERTIFICATE OF SERVICE

I hereby certify that two true copies of the forgoing has been served, by personal service, upon the Indiana Attorney General, 219 State House, Indianapolis, Indiana 46204, this ____ day of _____, 2008.

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