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## NO-MERIT BRIEFS UNDERMINE THE ADVERSARY PROCESS IN CRIMINAL APPEALS

Randall L. Hodgkinson\*

This year the United States Supreme Court revisited the difficult issue of the “dilemma” an appellate criminal defense attorney faces when an appeal supposedly has “no merit.”<sup>1</sup> This case, and its forerunners, set forth the constitutional rules under which states can allow an attorney to forego an appeal on behalf of his or her client. This essay discusses some of the ramifications of no-merit briefs and concludes that, at least in cases involving direct appeals from conviction, the cost of abandonment of the client far outweighs the benefits.

My career has exposed me to two different sides of this issue. My first job out of law school was working as a judicial clerk to the Honorable Judge Sheldon H. Weisberg for the Arizona Court of Appeals. Arizona utilizes a no-merit brief procedure,<sup>2</sup> and part of my job as a judicial clerk was to assist the judge in the review of these so-called no-merit briefs. After finishing my first clerkship, I returned to my home state of Kansas and worked for a year as a trial public defender and next moved to the Kansas Appellate Defender office, where I represented clients convicted of felonies on appeal for a little over two years. Kansas appellate courts, by informal rule, do not allow no-merit briefs.<sup>3</sup> We filed a brief in every direct appeal from conviction. I returned to Arizona and worked as a judicial

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1. *Smith v. Robbins*, 528 U.S. 259 (2000). See generally James E. Duggan & Andrew W. Moeller, *Make Way for the ABA: Smith v. Robbins Clears a Path for Anders Alternatives*, 3 J. App. Prac. & Process 65 (2001) (urging states, in the wake of *Smith v. Robbins*, to adopt the American Bar Association’s approach to withdrawal on appeal).

2. *State v. Shattuck*, 684 P.2d 154, 156-57 (Ariz. 1984).

3. See Martha C. Warner, *Anders in the Fifty States: Some Appellants’ Equal Protection Is More Equal Than Others’*, 23 Fla. St. U. L. Rev. 625, 651 n. 207 (1996).

clerk for Judge Weisberg for another year and then had a short stint in private practice for about a year and a half in rural Arizona. I have now returned to my position as an assistant appellate defender in Kansas. This varied experience has given me some insight into the benefits and problems with systems that allow no-merit briefs and those that do not.

## I. THE APPELLATE DEFENSE ATTORNEY'S ROLE

A no-merit brief system allows a real breakdown of the adversary system. When an accused's lawyer stands up to the court and says, "My client should lose," no apparent advocacy on behalf of the client takes place. Under *Robbins* and its predecessors, a state appellate court must provide some sort of cursory review to ensure that there are no "arguable issues" left unbriefed.<sup>4</sup> But the appellate court is called upon to make this determination without the assistance of counsel. Judicial functions and adversarial functions are quite different, a fact we learn early in law school when we are called upon to present both sides of an issue in a legal memorandum and reach a neutral decision. The adversarial process is not neutral, however, and an advocate is not neutral. Justice Souter recognized this distinction in his dissent in *Robbins*:

Appellate counsel examines the trial record with an advocate's eye, identifying and weighing potential issues for appeal. This is review not by a dispassionate legal mind but by a committed representative, pledged to his client's interests, primed to attack the conviction on any ground the record may reveal.<sup>5</sup>

I have observed this distinction firsthand in my career. When I first served as a judicial clerk, I assisted the court when reviewing criminal proceedings in which an attorney had filed a no-merit brief. Although I reviewed certain standard elements of every conviction for possible error, I simply could not approach cases with an "advocate's eye"—especially the advocate's ability and motivation to discern more subtle and creative

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4. *Robbins*, 528 U.S. at 268-74 (citing *Penson v. Ohio*, 488 U.S. 75 (1988); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *McCoy v. Court of Appeals*, 486 U.S. 429 (1988); *Anders v. California*, 386 U.S. 738 (1967)).

5. *Id.* at 293 (Souter, J., dissenting).

“arguable issues.” In Kansas, by contrast, I spent over two years filing a brief in every case as an advocate. I believe that this experience helped me to develop that advocate’s eye, to some extent at least. When I returned to assist the judge in Arizona a second time, I was somewhat surprised at the number of no-merit briefs filed from serious convictions that often followed lengthy jury trials. Because of my experience in Kansas, perhaps I had developed a lower threshold for an “arguable issue.” But my impression is that a few Arizona attorneys regularly filed no-merit briefs in matters that they thought simply would not win, regardless of whether they contained arguable issues. It is this attitude of concession that undermines advocacy in the adversarial system.

I recognize that, to some extent, the reliability of a review process is dependent upon the experience of the reviewer; a more experienced reviewer will be more likely to spot an arguable issue, whether reviewing as an advocate or as court staff. But I think the difference goes much deeper. When I returned to work for the judge the second time, I had only a couple of years of legal advocacy experience. But I was assisting in the review of no-merit briefs filed by attorneys with ten times more experience than I had and finding that I could identify issues that I could argue in almost every case. There must be a systemic difference based upon whether attorneys are expected to advocate on behalf of their clients or whether they are expected to abandon their clients.

## II. ADVOCACY LEADS TO ARGUABLE ISSUES

When reviewing a no-merit brief, an appellate court or staff attorney has little motivation to find possible error. My experience leads me to believe that appellate judges are interested in basic fairness, and I have seen the Arizona appellate courts deny no-merit briefs and even reverse convictions in appeals originally submitted as no-merit. However, the vast majority of no-merit appeals are dealt with quite cursorily and do not receive the attention and review

generated by counsel who know that they will file briefs in the matters.<sup>6</sup>

An available no-merit procedure discourages advocacy on the part of attorneys. When I start a case knowing that I will file a brief, I am motivated to research the case in a more thorough manner. In many cases, I have made an initial review of the record on appeal and suspected there was little chance of success. But, because I know I will be filing a brief, I find the best issues I can. And as I work on the case, I constantly keep an open eye towards finding better issues. More than once, I have discovered more issues as I worked on a case, and because of this transformed a bad case into a decent case or even a winner.<sup>7</sup> Justice Stevens recognized the benefit of requiring such issue development in his dissent in *Robbins*:

On a good many occasions I have found that the task of writing out the reasons that support an initial opinion of a question of law . . . leads to a conclusion that was not previously apparent.<sup>8</sup>

There is a psychology that accompanies knowing you will file a brief that encourages advocacy, while reviewing a case knowing that you will probably not file a brief discourages that same advocacy. In states that allow no-merit briefs, if attorneys complete cursory reviews and conclude that cases are losers, they have little motivation to do anything but file no-merit

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6. *Robbins*, 528 U.S. at 289-92 (Stevens, J., dissenting) (stating that employment of a law clerk to review criminal cases does not “provide the indigent appellant with anything approaching representation by a paid attorney”). But a very real source of the problem may lie in poor pay for appointed counsel and overwhelming caseloads for appellate defenders. Both of these problems may undermine zealous advocacy. The Chief Justice of the United States recently voiced his concerns about low pay for appointed counsel. William H. Rehnquist, *1998 Year-End Report of the Federal Judiciary*, 11 Fed. Senten. Rep. 134, 134 (Nov./Dec. 1998).

7. For example, in *State v. Granado*, No. 76,165 (Kan. App. Jan. 23, 1998) (unpublished decision), a possession-of-cocaine case, upon my first review, I did not think there were any good issues. In particular, because there was not a motion to suppress, upon a cursory first review I did not believe that there would be any suppression issues. But because I knew that I would file a brief, I started writing, and as I wrote, found that there was a search and seizure problem. Although in most cases such an issue is waived unless raised below, in this case there was a sufficient record to attempt to have the appellate court find an exception to the waiver rule. In this case, it did. A case that, at first glance, seemed to be controlled by other cases and the waiver rule ended in reversal and suppression.

8. *Robbins*, 528 U.S. at 290 (Stevens, J., dissenting).

briefs. The process of finding issues through an advocacy process is lost.

And knowing that I will file a brief in every case fosters legal creativity. In Kansas, my colleagues and I often, for lack of a better issue, encourage the appellate court to adopt new rules of law, oftentimes gleaned from other jurisdictions or through just plain creative lawyering.<sup>9</sup> An Arizona attorney would be more likely to conclude that there is no controlling Arizona law supporting such issues and file a no-merit brief. But every rule that we now consider black-letter law had a first case, and we, as advocates, cannot predict which rule will be the next one to change.

Other problems associated with a no-merit brief procedure include substantial inequity between criminal defendants on appeal—the exact problem that the *Anders* Court attempted to avoid.<sup>10</sup> If an attorney files a no-merit brief, the appellate court is required to make an independent inquiry into the total record, but if an attorney files a brief with one arguable issue, the court makes no such review. In Arizona, this problem was somewhat mitigated because, until recently, the appellate courts were required to conduct review of every case for fundamental error, so that every accused got the same review regardless of whether his or her attorney filed a no-merit brief. Unfortunately, the Arizona legislature removed the authority for this fundamental error review,<sup>11</sup> and now criminal defendants receive very different review depending upon whether their attorney chooses to represent them or not.

### III. WHY HAVE NO-MERIT BRIEF PROCEDURES?

The practical benefits of a no-merit brief procedure are quite small indeed. If an appellate court is giving appropriate

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9. In my recent practice, I have been citing an Oklahoma case for the proposition that special precautions should be taken when the prosecution uses jailhouse snitch testimony: *Dodd v. Oklahoma*, 2000 Okla. Crim. App. 2, ¶¶ 22-26, 993 P.2d 778, 783-84. This rule has never been adopted in Kansas, and I do not know if it will ever be. But the Kansas courts are unlikely to ever adopt a new rule like this unless they are asked.

10. 386 U.S. at 744 (“The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client.”).

11. Ariz. Rev. Stat. Ann. § 13-4035(B) (repealed 1995).

review to such cases, the work load is considerable compared with fairly low resources used by reviewing a brief containing one or two borderline issues competently briefed by both sides. If appellate counsel are spending appropriate time on criminal cases, their workload is not substantially reduced by a no-merit brief procedure. The only apparent practical beneficiary of a no-merit procedure appears to be the prosecutor, who is allowed to be entirely absent from the process.

The problem with a no-merit brief procedure is that it *encourages* appellate defense counsel to not represent their clients. It sets up a system in which an accused, with little recourse, does not even get an adequate review of his or her conviction. Frequently, the appellate criminal defense lawyer is the last advocate a convicted person will have before spending a significant portion of the rest of his or her life in prison. I prefer a system that requires that attorney to act as an advocate. A client who is represented by an attorney filing a no-merit brief is truly abandoned to the system—or, as noted by Justice Souter, such clients feel as if they are represented by a “dumptruck” seeking to get rid of them.<sup>12</sup>

This leads to the next issue, which is, how can an ethical attorney file a brief in every appeal from a conviction?<sup>13</sup> In fact, no-merit brief procedures have developed as a result of perceived ethical problems with filing meritless pleadings in court. I do not believe that there is an ethical dilemma, however, when defending clients against the loss of liberty that results from criminal convictions in their only direct attack on those convictions in court.

This conclusion is recognized by the model ethical rules adopted by the American Bar Association. Model Rule 3.1,

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12. *Robbins*, 528 U.S. at 295 n. 3 (Souter, J., dissenting).

13. This discussion is limited to appeals from convictions after trials. The author recognizes that there are some proceedings that may, as a class, be more difficult to address on appeal, such as appeals after guilty pleas, appeals from presumptive sentences, and appeals from stipulated probation violations. In Kansas, we file briefs even in most of these difficult cases, but other remedies are available to limit the problems stemming from these situations. See *Ariz. R. Crim. P.* 17.1(e) (1993) (noting that there is no appeal from guilty plea or probation violation stipulation; remedy is by post-conviction relief); *Kan. Stat. Ann.* § 21-4721(g)-(h) (1995) (allowing summary disposition of certain appeals from presumptive sentences without briefs).

which prevents lawyers from filing frivolous pleadings, makes a specific exception for counsel for criminal defendants:

A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.<sup>14</sup>

As a result of this exception, a lawyer for a criminal defendant can enter a plea of not guilty on behalf of his or her client and can zealously attack the State's case in any criminal proceeding, regardless of his or her subjective view of the client's guilt.<sup>15</sup> Few neutral, learned people criticize trial defense counsel for actively representing their clients at trial, regardless of the strength of the government's case.

The United States Supreme Court has distinguished the role of trial and appellate counsel by noting the differing burdens of proof at trial and on appeal:

At the trial level, defense counsel's view of the merits of his or her client's case never gives rise to a duty to withdraw. That a defense lawyer may be convinced before trial that any defense is wholly frivolous does not qualify his or her duty to the client or to the court. Ethical considerations and rules of the court prevent counsel from making dilatory motions, adducing inadmissible or perjured evidence, or advancing frivolous or improper arguments, but those constraints do not qualify the lawyer's obligation to maintain that the stigma of guilt may not attach to the client until the presumption of innocence has been overcome by proof beyond a reasonable doubt.

After a judgment of conviction has been entered, however, the defendant is no longer protected by the presumption of innocence. If a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel, but he must assume the burden of convincing an appellate tribunal that reversible error occurred at trial. Although trial counsel may remain silent and force the prosecutor to prove every element of the offense, counsel for an appellant cannot

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14. ABA Model R. of Prof. Conduct 3.1 (1983).

15. *Id.*, Model Code Comparison (“[T]he lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.”).

serve the client's interest without asserting specific grounds for reversal. In so doing, however, the lawyer may not ignore his or her professional obligations.<sup>16</sup>

But this view of trial counsel's role is simply not consistent with the idea of zealous representation or the model rule. Even when trial defense counsel completely believes the defense frivolous, trial defense counsel can and must zealously *attack* the State's case, both through cross-examination of witnesses and argument to the fact-finder. So long as he or she does not make legal or factual misstatements or otherwise abuse the court process, I cannot imagine a situation wherein trial defense counsel acts unethically by *actively* arguing to the fact-finder that the State had not proved its case beyond a reasonable doubt; that decision is effectively for the tribunal to make. In fact, in almost every criminal trial, at the close of the State's case, trial defense counsel will dutifully make a motion for acquittal, arguing that the State has not made a *prima facie* case, regardless of the strength of the State's case. This is not merely sitting silent, but active participation by the trial lawyer to test the State's case.

Similarly, appellate defense counsel in cases involving a guilt determination should, in every case, be able to ethically argue that the evidence does not support a conviction or other fact in issue, regardless of the strength of the State's case. A criminal defendant is entitled to have the appropriate fact-finder decide whether he or she is guilty beyond a reasonable doubt *and* to have an appellate court review the record to determine whether there was sufficient evidence to support that verdict. This is not to say that sufficiency of evidence *should* be raised in every case; I simply suggest that it *can* be ethically raised in every case involving a guilt determination without impinging upon an attorney's duty as an officer of the court. Because of the extremely deferential standard of review involved in a sufficiency challenge, it will rarely be made if there are other arguable issues. But if a lawyer is able to ethically test the sufficiency of the evidence in every appellate case from a guilt determination, there really are no appeals from convictions that

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16. *McCoy v. Wis. Ct. App.*, 486 U.S. 429, 435-36 (1988).

are entirely without merit and that justify abandonment of the client.

This rationale can also be expanded to other parts of criminal convictions in which the State has a burden of proof, such as legality of seizures and voluntariness of confessions. Because an attorney has the ethical ability to put the State's case to the appropriate test, in circumstances such as these, the attorney, whether at trial or on appeal, can raise these issues, even when he or she does not believe they will ultimately be decided in the client's favor.

And when an appellate attorney finds what he or she believes to be error in a record on appeal, he or she may neutrally conclude it is likely to be declared harmless error. But in the attorney's role as an advocate, he or she can ethically raise such an issue and require the *court* to decide whether the State has proved that the error is harmless. There are many reasons why raising such issues can be of benefit and not detriment to the court, although ultimately being declared harmless. First, some trial errors are so repetitive that an appellate court may reach a point where, even though it has found such error harmless in a hundred previous cases, it will reverse to try to give some teeth to its decisions. Second, in a related vein, even if the appellate court finds error harmless, it usually finds error, which can be instructive to trial courts in future cases. Finally, and most fundamentally, the client is entitled to have his or her day in court and to have the appropriate tribunal decide whether the error was harmless.<sup>17</sup> For constitutional error, before an appellate court may declare harmless error, the State must show "beyond a reasonable doubt" that the error had no effect on the outcome.<sup>18</sup> Just as trial defense counsel should be able to force the State to prove its case at trial, appellate defense counsel

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17. Prosecutorial misconduct during argument is a good example of an issue that can be related to all three of these reasons. Our office has raised prosecutorial misconduct numerous times. Often, the claimed error is found not to be misconduct at all; other times, it is found to be harmless error, and the prosecutor and trial court are admonished. But occasionally, an appellate court finds a case that is sufficiently egregious to warrant reversal, even in a case involving a very serious crime. *See State v. Pabst*, 996 P.2d 321, 325 (Kan. 2000). The point of this essay is that even if the court is not likely to find reversible error, it is difficult for the practitioner to so predict; the client should be able to have an appellate court decide the issue.

18. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

should be able to force the State to prove error harmless on appeal.

#### IV. CONCLUSION

The problem with a no-merit brief system is that it abandons the client to the system. When people ask me about my job as an appellate defense attorney and how I feel about it, I can honestly respond that I love my job because I am helping people who face dire consequences and who desperately need competent legal assistance to have any chance for even a minimally fair review of their convictions. Regardless of one's feelings about persons accused of crimes, most participants in the criminal justice system would agree that any layperson attempting to wind through the maze-like appellate process alone would have little chance of ever being fairly heard on the merits. Furthermore, the direct appeal from conviction is the last significant chance for substantial review of that person's conviction; without a lawyer to guide the person through the maze, the client will not even get that review and, in fact, will likely have other avenues of review closed off by procedural default.

In summary, the justification for a no-merit brief system simply does not nearly outweigh the associated costs. Perhaps it has been my experience, but I have viewed as an important part of my job, both as a trial and appellate public defender, to give my clients their day in court. When my clients are spending a significant portion—or even the rest—of their lives in prison, I want them to look back at the process and see that at least someone fought on their side and vigorously tested the State's case. And when society looks at our system, I want the same thing. If I file a no-merit brief, I think all that the client and society see is an attorney who gave up on his client.