To be argued by:
Alfred O'Connor
(15 minutes)

State of New York

Court of Appeals

The People of the State of New York,

Respondent,

-against-

Roger Stokes,

Defendant-Appellant.

Brief for Defendant-Appellant

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STATE OF NEW YORK
COURT OF APPEALS

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

-against-

ROGER STOKES,

Appellant.

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PRELIMINARY STATEMENT

By permission of the Honorable George Bundy Smith, Associate Judge of the Court of Appeals, granted May 11, 2000, appellant Roger Stokes appeals from an order of the Appellate Division, Third Department, entered December 16, 1999, which relieved assigned counsel of her duty to represent appellant and affirmed a judgment of the Chemung County Court, dated October 2, 1998, convicting appellant, after a jury trial, of aggravated harassment of an employee by an inmate (Penal Law §240.32) (Class E felony), and sentencing him to 15 years to life imprisonment.

Question Presented

Did the "no-merit" brief filed by assigned counsel below fail to provide Appellant with the effective assistance of counsel on appeal?

Summary of Argument

The no-merit brief filed by assigned counsel below affirmatively revealed that she had made no conscientious review of the record for non-frivolous issues to support appellant's appeal from his jury trial conviction and life sentence. Counsel's perfunctory six-page "brief" misidentified the type of criminal conviction under review, and the place where the crime was alleged to have occurred. The brief's "statement of facts" failed to contain a single reference to the trial evidence, and the two "frivolous issues" identified by counsel -- a one-page "weight of the evidence" point and a one-half page sentencing point -- were so hopelessly incomplete and distorted by legal errors as to raise doubt about whether counsel had even *read* the full record before moving to withdraw. Consequently, the Appellate Division should not have ruled on the merits of the appeal without assigning new counsel to represent appellant, and he should now be granted a de novo appeal.

This conclusion is not undermined by the Supreme Court's recent decision in Smith v. Robbins, 120 S.Ct. 746 (2000), which held that states are free to adopt procedures for the evaluation of purportedly frivolous appeals other than the one outlined in Anders v. California, 386 U.S. 738 (1967). Although the Court made clear that the conventionally understood "Anders brief" is not constitutionally mandated, it held that any alternative procedure must "adequately safeguard" an indigent criminal appellant's right to the effective assistance of counsel on appeal, a standard the Appellate Division failed to meet when it affirmed appellant's conviction in the face of clear evidence of assigned counsel's ineffectiveness. In any event, the procedure outlined in Anders has long been the law in New York, and assigned counsel's brief violated it because it failed to include a statement of facts and a reasonably thorough analysis of all issues that might arguably have supported a conventional appeal. This Court should now

reaffirm the Anders guidelines on state policy grounds. When the courts vigorously enforce its requirements, the "Anders brief" has proven to be a reliable and efficient means of safeguarding both the right to counsel and the integrity of the criminal appellate process in this State.

Statement of Facts

The Trial

In June 1998, Roger Stokes, a prisoner at Southport Correctional Facility, was tried in shackles before a jury in the Chemung County Court on an indictment charging him with the Class E felony of aggravated harassment of an employee by an inmate. The allegation was that Stokes expelled a mixture of urine and feces from some unknown container and caused it to come into contact with correction counselor, Virginia Livermore. The evidence at trial was sharply contested. While Stokes conceded that Livermore had been sprayed with the foul liquid, he denied responsibility for the act. The defense offered eyewitness testimony that someone else committed the crime.

Livermore was the only prosecution witness to connect Stokes to the crime. She testified that on February 18, 1997, she was on her weekly morning rounds in the C block at Southport Correctional Facility, a prison that houses inmates in 23-hour lockdown status in their cells (A. 161-163). While speaking to an inmate in cell C-11, Livermore noticed a sheet hung behind the bars and metal screen in the adjoining cell, number C-10 (A.164). Livermore testified there was nothing unusual about the sheet, as inmates often hung them in this manner for privacy (A.197). Livermore testified that she saw, through the "corner of her eye," part of the sheet being pulled back (A.164). Suddenly, a stream of liquid hit her. Shocked, Livermore dropped her folders and

tried to move out of the way, but the liquid continued to spray on her for an estimated five seconds before she was able to hurry off the gallery (A.166-167, A.199).

Livermore conceded that she did not see the person who did this to her (A.197). Nor did she see the container that had been used to propel the liquid (A.198). She explained, "I wasn't looking at it to get hit in the face" (A.199). However, Livermore claimed that she momentarily saw the stream of spray and was able to determine that it originated from inside cell number C-10 (A.199, A.204). Livermore recalled that, one week earlier, she had issued a prison misbehavior report on Roger Stokes, and, at that time, Stokes had been housed in cell number C-10 (A.182-183).

The defense later called Nelson Villanueva, the inmate who occupied cell number C-8 that morning (A.315). Villanueva testified that he witnessed the incident through his "eye spy mirror," which, he explained, is a small mirror attached to a spoon or sheet of paper that affords a view of the entire gallery when positioned outside one's cell (A.316). Villanueva further testified that he saw the inmate in cell number C-12 reach his hands through his food tray slot and spray Livermore with liquid that morning. Id. At the time of the incident, Villaneuva was conversing with Stokes, who was housed in cell number C-10 (A.319).

In the immediate aftermath of the incident, all of the inmates on the gallery remained locked in their cells (A.268-269). Correction Officer Charles Woodruff made arrangements for Livermore to change and then bagged her clothing for possible use as evidence (A.209-210).[1] [Later examination by a forensic expert confirmed the presence of urine and feces on the clothing (A.240-260).] Some fifteen minutes after the incident, Woodruff conducted a thorough search of Stokes' cell, but found no evidence linking him to the crime (A.215-216). Woodruff

[1] Livermore showered and returned to work later that day (A.170, A.193-194).

found no container that possibly could have been used to spray Livermore in the manner she described, or any other evidence suggestive of Stokes' guilt, such as liquid on the floor inside or outside of cell number C-10, or on the metal mesh screen in front of the cell (A.223, 264-267, A.273). Woodruff also searched in vain for evidence that Stokes might have wiped away evidence of the crime. He checked every cloth item in Stokes' cell with negative results (A.268).

Correction Officer Leonard Vanderpool also closely examined cell number C-10, and he too was unable to find any evidence to support Livermore's contention that Stokes was the culprit (A.282). Vanderpool did testify that he had noticed a suspicious stain on the far wall of the gallery "at an angle towards" cell number C-10 (A.282-284). Although Woodruff had a camera and was taking photographs of the scene for possible use as evidence, Vanderpool was "not sure" if he ever alerted Woodruff to this discovery so that it could be photographed (A.295). In fact, none of the photographs admitted in evidence at trial, including those depicting the wall across from cell number C-10, revealed any evidence that tended to connect Stokes to the crime (A.264, A.295).

Lacking any physical evidence to support the charge, the prosecutor sought to bolster his case with "expert" testimony designed to show how Stokes might have committed the crime and yet managed to conceal evidence of his guilt. Over defense counsel's objection, the court allowed Woodruff to offer "expert" testimony about other urine "throwing" incidents in the prisons (A.218). Woodruff suggested to the jury that Stokes might have committed the crime with a plastic shampoo bottle that "they" (meaning inmates in general) occasionally managed to smuggle past guards after showering (A.219-222, A.271). No shampoo bottle was found in Stokes' cell, but Woodruff insinuated that Stokes might have flushed one down the toilet after

the incident (A.216-217). Woodruff conceded, however, that when inmates had previously tried to flush these six-to-eight inch bottles down the toilet, they sometimes clogged the pipes and caused flooding (A.221-224). Woodruff carefully inspected the plumbing in Stokes' cell that morning and found no problems (A.224, A.266). Finally, Woodruff testified that locked-down inmates sometimes passed items to each other using a length of string, and suggested that Stokes might have disposed of a shampoo bottle in this manner (A.270). But, again, Woodruff was forced to concede that no string was found in Stokes' cell (A.276-277).

Neither Woodruff nor Vanderpool searched other cells on the gallery for evidence linking any other inmate to the crime (A.266-267).

Throughout the trial, defense counsel raised objections and made applications that resulted in adverse rulings from the trial judge. For example, counsel strenuously objected to the shackling of his client during the trial, arguing that the reasons advanced by the prosecutor in support of the drastic action – Stokes' prior record, alleged misconduct in prison, and the nature of the instant offense – were insufficient to outweigh the "extraordinary" prejudice that Stokes would suffer if he were forced to appear before the jury for the duration of the trial in leg irons (A.122-123). The trial judge overruled the objection (A.129). The trial judge also overruled defense counsel's objections to the "expert" testimony offered by Correction Officer Woodruff on the People's direct case (A.219), and to testimony by Woodruff in rebuttal to the effect that he *had never seen* an "eye spy mirror" as large as the one defense witness Nelson Villanueva had described using that morning (A.333). Counsel also unsuccessfully moved for a trial order of dismissal, specifically citing the "inadequate evidence in terms of [the defendant's] identity as the person who committed the act" (A.309). Finally, defense counsel requested a jury charge on circumstantial evidence, pointing out that, inasmuch as Livermore had not seen her assailant,

Stokes' identity as the perpetrator had been established, if at all, by circumstantial evidence only: the testimony of Woodruff and Vanderpool that Stokes had occupied cell number C-10 on the morning of the incident (A.339-344). The Court denied the requested charge (A.344).

Verdict and Sentence

The jury found Stokes guilty of aggravated harassment of an employee by an inmate. Following a contentious hearing concerning Stokes' predicate felony offender status (A.396-457), the court adjudicated him a discretionary persistent felony offender (A.499). At sentencing, the trial judge characterized as "laughable" the Legislature's 1996 classification of this crime as a Class E felony (A.500). Agreeing with the prosecutor's request that the court should send "an extremely powerful deterrent message . . . all across the state to inmates in correctional facilities," the court sentenced Stokes to 15 years to life (A.486, A.504-506). The transcript of the judge's sentencing remarks was later reprinted by the New York State Department of Correctional Services in its monthly magazine under the headline: Judge throws sentencing book at inmate 'thrower'.[2]

The Appeal

Stokes filed a notice of appeal and, because he lacked funds to hire a lawyer, requested the Appellate Division to assign him counsel to prosecute the appeal.[3] The Appellate Division assigned Stokes a solo practitioner from Binghamton, Bernice Dozoretz, who has not raised a substantive legal issue in any of the 26 criminal appeals she has handled to date since she first undertook such assignments in 1997, except for four cases in which she raised "excessive

[2] DOCS TODAY, Jan. 1999 at p. 5 (A.508).
[3] Stokes had been represented in the trial court by the Chemung County Public Defender.

sentence" points,[4] and one in which she challenged the denial of a motion to withdraw a guilty plea.[5] In 21 of these 26 cases, Dozoretz has filed no-merit briefs, seeking nothing more than an order relieving her of any further duty to represent her assigned clients.[6] Indeed, since late 1998, Dozoretz has filed 19 consecutive no-merit briefs in criminal appeals to the Appellate Division.[7]

The No-Merit Brief

Asserting that a "careful review of the record clearly indicates that there are no nonfrivolous issues to appeal," Dozoretz filed a no-merit brief in Stokes' case, and asked the Appellate Division to relieve her of the assignment. (Br. at 6[8]) (A.12). The "brief" Dozoretz submitted to justify the abandonment of her client's legal cause was six double-spaced pages. Problems with the brief were apparent from the very first page. In the table of contents, Dozoretz wrongly informed the Appellate Division that the conviction under review involved promoting prison contraband (A.5). Although she later correctly identified the crime of conviction, she then mistakenly told the court the site of the incident was Elmira Correctional Facility (it was Southport) (Br. at 2) (A.8).

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[4] People v. Guillermo, 679 NYS2d 346 (3d Dept. Oct. 15, 1998); People v. Trumbach, 667 NYS2d 322 (3d Dept. Jan. 29, 1998); People v. LaFrance, 667 NYS2d 936 (3d Dept. Jan. 29, 1998); People v. Cross, 661 NYS2d 877 (3d Dept. Sept. 11, 1997).

[5] People v. Henry, 661 NYS2d 1013 (3d Dept. Sept. 4, 1997).

[6] In addition to the 19 cases listed in footnote 7, see People v. Jones, 678 NYS2d 310 (3d Dept. Sept. 10, 1998) and People v. Humphrey, 678 NYS2d 311 (3d Dept. Sept. 10, 1998).

[7] People v. Garnett, ___ A.D.2d ___ , 2000 WL 964973 (3d Dept. July 13, 2000); People v. O'Neil, 708 NYS2d 905 (3d Dept. May 11, 2000); People v. Hastings, 706 NYS2d 367 (3d Dept. April 6, 2000); People v. Jeffrey, 704 NYS2d 525 (3d Dept March 9, 2000); People v. Haennel 704 NYS2d 519 (3d Dept. February 24, 2000); People v. Inman, 700 NYS2d 875 (3d Dept. Jan. 27, 2000); People v. Jackson, 700 NYS2d 868 (3d Dept. Jan. 20, 2000); People v. Sanders, 700 NYS2d 775 (3d Dept. Jan. 13, 2000); People v. Kutney, 700 NYS2d 767 (3d Dept. Jan. 6, 2000); People v. Stokes, 699 NYS2d 320 (3d Dept. Dec. 16, 1999); People v. Duvall, 700 NYS2d 410 (3d Dept. Dec. 9, 1999); People v. Bass, 698 NYS2d 924 (3d Dept. Dec. 2, 1999); People v. Jarvis, 696 NYS2d 912 (3d Dept. Oct. 28, 1999); People v. Pope, 696 NYS2d 910 (3d Dept. Oct. 21, 1999); People v. McLean, 687 NYS2d 306 (3d Dept. Apr. 15, 1999); People v. Young, 686 NYS2d 525 (3d Dept. Mar. 11, 1999); People v. Smith, 687 NYS2d 202 (3d Dept. Mar. 4, 1999); People v. Ryder, 683 NYS2d 441 (3d Dept. Dec. 30, 1998); People v. Hilliard, 681 NYS2d 773 (Dec. 10, 1998).

[8] A copy of the brief is attached hereto as an Exhibit.

Foremost among the brief's many shortcomings was the one-and-one-half -page "statement of facts," which contained not a single reference to the trial evidence. It consisted of a short description of the allegation, which was copied verbatim from the indictment, followed by a brief summary of several pre-trial rulings that bore absolutely no relationship to the legal "issues" later identified in the brief. As for the trial and sentencing proceedings, Dozoretz mentioned only that her client had been found guilty "after a two day jury trial" and sentenced to 15 years to life imprisonment (Br. at 3) (A.9).

The argument section of the brief also was riddled with errors and omissions. Dozoretz identified only two "frivolous issues" as warranting discussion. In Point One, she purported to address the weight of the evidence, but she confused weight of the evidence review with legal sufficiency review.[9] She asserted, without explanation or elaboration, that the evidence against Stokes was sufficient because "[t]he victim, Virginia Livermore, *testified credibly as to the event itself*" (Br. at 4) (A.10) (emphasis added). This unenlightening and inappropriate statement was then followed by a brief summary of testimony that corroborated the fact that Livermore had been sprayed with urine and feces on the morning of February 18, 1997 – a fact that was never disputed by the defense at trial.

Dozoretz did not refer at all to the defense that *was* interposed at trial: that Stokes had been mistakenly identified as the culprit. While the brief mentioned in passing that the defense had "produced a witness" (Br. at 6) (A.12), Dozoretz offered no clues about the name of the witness [Nelson Villanueva], or hints about the substance of his testimony [that he had witnessed someone else commit the crime]. Nor did Dozoretz alert the Court to the lack of physical

[9] The point heading referred to "weight of the evidence" review, but the text of the one-page argument referred to review for legal sufficiency (Br. at 3-4) (A.9-10).

evidence in the case.[10] In fact, Dozoretz's only reference to the defense case was her vague assurance that trial counsel had provided Stokes with a "competent, spirited defense" (Br. at 6) (A.12).

The entire discussion about the sufficiency of the evidence comprised one page of the no-merit brief.

The legal analysis underlying the second "frivolous issue" identified in the brief was even worse. Dozoretz wrongly concluded in Point Two that Stokes had been adjudicated a *mandatory* persistent violent felony offender and was, therefore, sentenced within "statutory parameters" (Br. at 5) (A.11). In reality, her client had been convicted of a Class E non-violent felony, and the trial court had sentenced him to 15 years to life as a *discretionary* persistent felony offender. Dozoretz erroneously cited Penal Law § 70.30 (1) – a section pertaining to sentence calculation rules for multiple terms of imprisonment – as the controlling statutory provision. This Penal Law section had no bearing on Stokes' situation. Laboring under an obvious cloud of confusion about New York's sentencing laws, Dozoretz summarily concluded that no non-frivolous arguments could possibly be mustered in opposition to her client's life sentence. She reached this conclusion in one-half page of text, in an argument that was exactly three sentences long (Br. at 5) (A.11).

Even the appendix was not without serious errors of omission. Dozoretz attached to the brief an odd assortment of pages from the trial transcript and called it an "appendix." For some

[10] Dozoretz made only a passing reference to the investigation and mischaracterized the testimony. She claimed that Correction Officer Vanderpool testified that the wall across from Stokes' cell was "soaked" with urine and feces (Br. at 4) (A.10). In fact, Vanderpool claimed he had seen a dried stain on the wall "at an angle towards" cell number C-10 (A.282-284). Moreover, none of the photographs in evidence supported Vanderpool's claim (A.264, A.295).

reason, she chose to include only the direct testimony of some of the prosecution witnesses. Inexplicably, Dozoretz omitted the testimony of the People's main witness, Virginia Livermore. She also failed to include any cross-examination of the People's witnesses, as well as the defense case in chief (A.13-63).

Pro Se Brief

When Stokes received a copy of the no-merit brief, he made a determined effort to convince the Appellate Division to assign him a new lawyer. In his own words, Stokes sought to demonstrate that "there is nonfrivolous appealable issues [and] new counsel should be assigned because prior counsel . . . overlooked the nonfrivolous issues. Not caring" (A.69). Although Stokes did not have access to the trial record, he filed two handwritten pro se supplemental briefs, wherein he offered some 20 issues for the Court's consideration. For example, Stokes maintained that he should not have been shackled during the trial (A.85-86), that the prosecution should not have been permitted to introduce evidence that he had received a disciplinary report from Livermore in the week before the incident (A.87-88), and that his sentence of 15 years to life for this Class E felony was harsh and excessive (A.100-102). He also pointed out numerous defects in Dozoretz's brief, including the missing transcript pages from the appendix, the improper and perfunctory statement of facts, and the slipshod analysis of possible legal issues (A.112-113).

The People's Response

The District Attorney chose not to respond to any of Stokes' pro se claims. "[I]n light of [Dozoretz's] representation that there were no non-frivolous issues to be raised on appeal," the

District Attorney advised the Clerk of the Court that the People would not file a brief in the case (A.117).

Appellate Division's Decision

In a memorandum dated December 16, 1999, the Appellate Division affirmed the judgment of conviction and relieved Dozoretz of her assignment:

> *Based upon our review of the record, defense counsel's brief and defendant's pro se submissions, we agree that there are no nonfrivolous issues. Defendant pro se recites a litany of alleged errors, but his claims are based upon legal principles which are inapplicable and/or facts which have no support in the record. The judgment is affirmed and defense counsel's application for leave to withdraw is granted.* (A.2-3).

That same day, the Clerk of the Court wrote to Dozoretz to express the Court's "appreciation for your cooperation in completing your assignment in the prosecution of this appeal" (A.118). Enclosed with the letter was a voucher for Dozoretz to apply for payment for her legal services on Stokes' behalf.

Stokes retained pro bono counsel and sought leave to appeal to the Court of Appeals. By an order dated May 11, 2000, the Hon. George Bundy Smith granted Stokes leave to appeal to this Court (A.1).

ARGUMENT

Convicted upon a jury trial and sentenced to life imprisonment, appellant was provided with ineffective assistance of counsel on appeal when his assigned lawyer submitted – and the Appellate Division accepted – a perfunctory and unprofessional "no-merit" brief that failed to include a statement of facts, and a reasonably thorough and proper analysis of all issues that might arguably have supported a conventional appeal.

Introduction – The right to effective assistance of counsel on review of the record for non-frivolous issues

It has long been recognized that an indigent criminal defendant is constitutionally entitled to assigned counsel on a first appeal as of right, and that this guarantee encompasses the right to the effective assistance of an attorney who is single-mindedly devoted to the client's cause. *See* Douglas v. California, 372 U.S. 353 (1963); Evitts v. Lucey, 469 U.S. 387 (1985); People v. Hughes, 15 N.Y.2d 172 (1965). The only limitation on this constitutional guarantee is that an indigent defendant does not have the right to an assigned attorney in order to pursue a wholly frivolous appeal. Anders v. California, 386 U.S. 738 (1967). In order to prevent this "limitation on the right to appellate counsel from swallowing the right itself" [Smith v. Robbins, 120 S.Ct. 746, 760 (2000)], courts must carefully scrutinize an assigned lawyer's conclusion that an indigent client's appeal is so unsupportable that counsel should be permitted to withdraw.

Before permitting an attorney to withdraw, an appellate court must be satisfied that counsel has conscientiously evaluated the record with an eye toward zealously challenging the judgment of conviction on any available non-frivolous ground. The court must also conduct its own independent examination of the record to confirm the correctness of counsel's opinion that all available claims are frivolous. If the court's independent examination reveals even one non-frivolous issue, the court may not proceed to rule on the merits without assigning new counsel to

represent the defendant. *See* Penson v. Ohio, 488 U.S. 75 (1988); People v. Casiano, 67 N.Y.2d 906 (1986). The key to both prongs of this constitutionally mandated review process is the written submission that must be filed whenever an assigned lawyer concludes that the record will not support the filing of a conventional adversarial brief. *See* Anders v. California, 386 U.S. 738; Smith v. Robbins, 120 S.Ct. 746.

In the instant case, the no-merit brief filed by assigned counsel below was, in every respect, constitutionally insufficient to support the affirmance of appellant's conviction and life sentence. Counsel's unprofessional "brief" affirmatively revealed that she had not conscientiously reviewed the record in search of non-frivolous issues to raise on Stokes' behalf, and its perfunctory and error-strewn presentation of the facts and law could have served only as an impediment -- not as an aid -- to the court's proper understanding and evaluation of the merits of his appeal. Consequently, the Appellate Division should not have reviewed the merits of Stokes' case without first assigning him a new lawyer.

The no-merit brief filed by Stokes' assigned counsel offered conclusive evidence of her ineffectiveness.

The "brief" submitted by counsel below violated the most basic principles of appellate advocacy. First, it contained factual errors that would have been noticed by any person who possessed even the slightest interest in Stokes' legal situation, much less one duty-bound to be his legal advocate. For example, the table of contents prepared by Dozoretz mistakenly asserted that Stokes had been convicted of promoting prison contraband in the first degree, an error which, no doubt, was the result of careless and inappropriate use of a document from an

unrelated case.[11] In the "statement of facts," Dozoretz asserted that the crime had been committed at Elmira Correctional Facility, despite numerous references in the record to the actual site of the crime: Southport Correctional Facility. But by far the most serious oversight in the one-and-one-half- page "statement of facts" was Dozoretz's complete failure to refer to the trial and sentencing proceedings. Dozoretz merely noted that Stokes had been "convicted after a two day jury trial" and sentenced to 15 years to life.

This Court has made it abundantly clear that an assigned lawyer's decision to file a no-merit brief does not provide license to dispense with the hard work normally associated with the crafting of an effective statement of facts in an appellate brief. *See* People v. Gonzalez, 47 N.Y.2d 606, 611 ("lengthy, indiscriminate" statement of facts in no-merit brief that made no effort to relate facts to legal issues or to show weaknesses in prosecution's case cited as ineffective lawyering). A clear presentation of the facts is generally regarded as the most important element in an effective appellate brief. In a no-merit brief, a thorough and lucid fact statement is especially important because the court is required to sift through the entire record in search of *any* non-frivolous issue, a process that is quantitatively and qualitatively different from the evaluation of specific assignments of error in a conventional adversarial brief. Moreover, a clear statement of facts serves to aid the client in his independent search for possible issues to include in a pro se supplemental brief. Here, assigned counsel's statement that Stokes had been convicted after trial and sentenced to 15 years to life shed no more light on the legal proceedings than could have been learned from a glance at the certificate of conviction. Dozoretz's total failure to address the trial and sentencing proceedings, therefore, left the Appellate Division with no basis to conclude that she had conscientiously searched the record for appealable issues.

[11] *See* People v. Young, 686 NYS2d 525 (3d Dept. March 11, 1999) (rejecting "no-merit" brief filed by Dozoretz on appeal from jury trial conviction involving promoting prison contraband in the first degree).

Indeed, the absence of a meaningful fact statement should have given the court every reason to suspect that she had not.

If the almost farcical errors and missing fact statement left any lingering doubt about the depth of Dozoretz's review of the record, the argument section of the brief clearly laid bare the shallowness of her effort on Stokes' behalf. Dozoretz identified only two "frivolous issues" as worthy of discussion. In Point One, she confused weight of the evidence review with legal sufficiency review [*see* People v. Bleakley, 69 N.Y.2d 490 (1987)], and claimed that Stokes' guilt was conclusively established by the victim, Virginia Livermore, who "testified credibly as to the event itself." Counsel offered no details about Livermore's "credible testimony," and made absolutely no effort to contrast it with the testimony of Nelson Villaneuva, who swore that Livermore was mistaken and that another inmate had committed the crime. Incredibly, Dozoretz did not even mention Villaneuva in her brief, except for a belated reference to the slim fact that Stokes had "produced a witness of his own choosing." Nor did she recount any details of the crime scene investigation by Correction Officers Woodruff and Vanderpool, which had uncovered no incriminating evidence and, therefore, tended to support the defense theory of mistaken identification. Instead, Dozoretz devoted the majority of the one-page discussion (i.e., three sentences) to establishing that Livermore had been sprayed with urine and feces on the morning of the incident – a fact that was never disputed by the defense.

Dozoretz's obvious lack of familiarity with New York's predicate felony offender sentencing laws was on full display in Point Two of the brief, where she wasted no time in wrongly concluding that her client had been sentenced within "statutory parameters" as a mandatory persistent violent felony offender. In fact, the crime of conviction was a non-violent felony, and Stokes had been sentenced as a discretionary persistent felony offender. Because

Dozoretz cited an irrelevant section of the Penal Law in support of her truncated and erroneous analysis [Penal Law § 70.30 (1)], it is unclear whether she believed Stokes had received the mandatory minimum sentence under the persistent violent felony offender statute, or if she simply believed that no plea for reduction of a persistent felony offender sentence could be addressed to the Appellate Division's interest of justice jurisdiction. In either case, she was wrong. *See* Penal Law § 70.08 (3) and People v. Tolbert, 93 N.Y.2d 86 (1999) (establishing minimum sentence for Class E felony under persistent violent felony offender law at 3 years to life). *See also* People v. Collazo, ___ A.D.2d ___; 709 NYS2d 78 (1st Dept. June 15, 2000) (persistent felony offender sentence of 15 years to life reduced to 3 ½ to 7 years in interest of justice).

Thus, from start to finish, the document Dozoretz filed to support her contention that Stokes' appeal was frivolous revealed only the frivolous nature of her own inquiry on the matter. "Far from demonstrating conscientious examination of the record and the law, the [brief] before the Appellate Division . . . clearly portrayed the contrary." People v. Gonzalez, 47 N.Y.2d at 611. Indeed, given its distorted and grossly incomplete recitation of the trial evidence, the brief failed to offer any real assurance that Dozoretz even *read* the full trial court record before moving to withdraw as Stokes' counsel. Her thoroughly unprofessional brief leaves no room for doubt that Dozoretz ineffectively reviewed the record of Stokes' trial for appealable issues, a duty that lies at "the irreducible core of [an appellate lawyer's] obligation to a litigant in an adversary system." Smith v. Robbins, 120 S.Ct. at 768 (Souter, J., dissenting). Since neither a pro se supplemental brief, nor the court's independent examination of the record is an acceptable substitute for the single-minded advocacy of competent counsel, the order of the Appellate

Division should be reversed and a de novo appeal ordered. People v. Casiano, 67 N.Y.2d 906 (1986); Penson v. Ohio, 488 U.S. 75; Anders v. California, 386 U.S. 738.

The holding in Smith v. Robbins does not affect Stokes' right to relief because, by any measure, his assigned lawyer provided ineffective assistance of counsel on appeal.

The obvious conclusion that Dozoretz's representation violated Stokes' right to the effective assistance of counsel is not undermined by the Supreme Court's recent decision in Smith v. Robbins, 120 S.Ct. 746, which substantially limited the holding of Anders v. California, 386 U.S. 738. In Anders, the Supreme Court held that an assigned lawyer's conclusory letter stating that there was "no merit" to his indigent client's appeal was, standing alone, constitutionally insufficient to support a deprivation of counsel on appeal. In a final section of the opinion, widely interpreted as part of the holding of the case, the Court stated that an assigned attorney's request to withdraw from an appeal thought to be frivolous "must . . . be accompanied by a brief referring to anything in the record that might arguably support the appeal" (386 U.S. at 744). In Smith v. Robbins, the Court held (5-4) that this language was dicta, and that Anders did not establish minimum procedural requirements for state courts to follow in the evaluation of purportedly frivolous criminal appeals. Rather, the Court held that the conventionally understood "Anders brief" is merely "one method" of satisfying constitutional requirements, and that states are free to adopt alternative ones so long as those methods provide reasonable assurance "that an indigent's appeal will be resolved in a way that is related to the merit of the appeal" (120 S.Ct. at 759-760).

In Smith v. Robbins, the Court reviewed a procedure established by the California Supreme Court in People v. Wende, 25 Cal.3d 436 (1979), which requires an assigned attorney to file a no-merit brief that includes a statement of facts with citations to the record, but not an

analysis of possible legal issues. The procedure also requires that an assigned attorney remain on the appeal (as opposed to withdrawing from it) in order to brief any issues a reviewing court may find to be non-frivolous in its independent review of the record. Evaluating the Wende procedure in light of its "established practice. . . of allowing the States wide discretion . . . to experiment with solutions to difficult problems of policy" (120 S.Ct at 757), the Supreme Court held that it provided adequate safeguards for indigent appellants whose appeals are, in fact, non-frivolous because it requires a written summary of the procedural and factual history of the case, and entails two levels of scrutiny of the trial court record – one by appellate counsel and another by the court itself (120 S.Ct. at 762-763).

In Smith v. Robbins, the Court did not retreat from the fundamental constitutional rule, rooted in the Due Process and Equal Protection Clauses, that an indigent criminal appellant is entitled to the effective assistance of counsel on appeal. *See* Smith v. Robbins, 120 S.Ct. at 760 (fn. 10); Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Evitts v. Lucey, 469 U.S. 387 (1985). The Court's opinion was concerned solely with the permissible *means* by which courts can determine whether an assigned attorney has fulfilled her constitutional duty to conscientiously review the record for appealable issues before concluding that none exist and abandoning further partisan effort on the client's behalf. The Court apparently reaffirmed the narrow holding of Anders, i.e., that courts may not rely solely on counsel's unsupported assertion that the record discloses no non-frivolous grounds to support a conventional appeal.[12] But, in all other respects, the Court held that states are "free to adopt different procedures" than those set forth in Anders, so long as they "adequately safeguard a

[12] In his majority opinion, Justice Thomas even left some room for doubt on this point, as he took pains to emphasize that the conclusory assertion by defense counsel that had been condemned in Anders - that the appeal had "no merit" - was not equivalent to an opinion that the appeal was "frivolous," and that only the latter conclusion by counsel could have supported a deprivation of counsel under the Court's precedents (120 S.Ct. at 756, 761).

defendant's right to appellate counsel," a standard the California Wende procedure was held to have satisfied (120 S.Ct. at 753).

As will be argued below, this Court should continue to adhere to the long-standing and familiar Anders procedure as the appropriate method for evaluating purportedly frivolous criminal appeals in this State. But no matter what procedure is used to evaluate attorney performance in no-merit cases, the abysmal representation provided to Roger Stokes in the Appellate Division, Third Department fell short of constitutional requirements. Regardless of whether she was under any federal constitutional obligation to do so, Dozoretz filed a "brief" on appeal in professed compliance with state law in Stokes' case. *See* People v. Cruwys, 113 A.D.2d 979 (3d Dept. 1985). This "brief" offered conclusive evidence of her ineffectiveness, as it affirmatively revealed that she made no serious examination of the record for non-frivolous issues. Thus, by any measure, the Appellate Division failed to "adequately safeguard" Stokes' right to counsel when it affirmed his conviction in the face of clear evidence of Dozoretz's ineffectiveness. Smith v. Robbins, 120 S.Ct. 753. [13]

The brief filed below failed to conform to the procedure outlined in Anders v. California, which has long been the law in this state and which New York courts should continue to follow.

For more than twenty years, each of the four departments of the Appellate Division in New York has required that an assigned lawyer's request to withdraw from an appeal deemed wholly frivolous must be "accompanied by a brief reciting the underlying facts and *highlighting anything in the record that might arguably support the appeal*." People v. Saunders, 52 A.D.2d

[13] Indeed, Dozoretz's failure to supply the Appellate Division with a statement of facts was, by itself, a violation of the Court's holding in Smith v. Robbins.

833 (1st Dept. 1976) (emphasis added). The Third and Fourth Departments appear to have arrived at this rule independently of the decision in Anders v. California. In the leading cases on the subject, both courts characterized Anders as having established "guidelines" for no-merit briefs, as opposed to constitutional requirements. *See* People v. Cruwys, 113 A.D.2d 979 (3d Dept. 1985); People v. Crawford, 71 A.D.2d 38 (4th Dept. 1979). This Court also appears to have viewed the issue as one ungoverned by any hard-and-fast rules imposed by the Supreme Court. *See* People v. Gonzalez, 47 N.Y.2d at 612 (fn. 3) (noting controversy over frivolous appeals and suggesting Appellate Divisions develop appropriate procedures to deal with them). However, the issue is not as clear in the First and Second Departments. *See* People v. Saunders, 52 A.D.2d 833 (Anders "established" the "procedures to be followed" for no-merit briefs). Regardless of the source of the issue-spotting requirement in New York, the brief filed by assigned counsel below violated it.

In addition to the defects apparent on its face, Dozoretz's no-merit brief was patently insufficient because it made no attempt to explain why numerous adverse rulings by the trial court failed to even arguably raise issues to support a conventional appeal. For example, Dozoretz neglected to address such obvious issues as: (1) the court's decision to force Stokes to appear before the jury in shackles throughout the trial [*see* People v. Gonzalez, 115 A.D.2d 899 (3d Dept. 1985)]; (2) the overruling of defense counsel's objection to "expert" testimony about other such incidents in the prisons, which served only to improperly bolster the prosecution's theory of Stokes' guilt [*see* People v. Ciaccio, 47 N.Y.2d 431 (1979]; (3) the overruling of defense counsel's objection to improper rebuttal evidence [People v. Harris, 57 N.Y.2d 335 (1982)]; and (4) the denial of defense counsel's request for a circumstantial evidence charge [*see* People v. Sanchez, 61 N.Y.2d 1022 (1984)]. All of these issues "might arguably" have

supported the appeal and should have been analyzed by Dozoretz in her no-merit brief.[14] Since the "brief" Dozoretz did file in the Appellate Division, standing alone, clearly establishes that Stokes' right to the effective assistance of counsel was violated, it is not strictly necessary for this Court to go further and determine whether Dozoretz's failure to analyze these claims also violated state procedural rules governing minimum requirements for no-merit briefs. However, in light of the Supreme Court's holding in Smith v. Robbins that analysis of legal issues is not constitutionally mandated -- a requirement that has long been imposed on no-merit briefs in New York -- this Court should reaffirm the Anders guidelines on state policy grounds, and reverse the order of the Appellate Division on this basis as well.

The Meaning and Simple Merits of Anders

The conventionally understood "Anders brief" strikes a proper accommodation between the sometimes conflicting needs of indigent clients, who are often strongly motivated to pursue appeals from criminal convictions, and their assigned lawyers, who must refrain from pressing frivolous claims on the courts. When its requirements are vigorously enforced, the Anders brief has proven to be a straightforward, reliable and efficient means of safeguarding both the right to counsel and the integrity of the criminal appellate process in New York. Contrary to the opinion of some legal commentators, the Anders procedure does not require counsel to take inconsistent positions in a no-merit brief – to state that the appeal is frivolous and, at the same time, to

[14]Every one of these issues is actually meritorious, or at least non-frivolous, and should have been raised, along with the two "issues" that Dozoretz mischaracterized as frivolous below, in a conventional brief seeking reversal of the judgment of conviction and/or modification of the sentence. Thus, Dozoretz was ineffective in failing to file a merits brief on Stokes' behalf, and, in any event, the Appellate Division should not have affirmed the judgment because there were non-frivolous issues to support the appeal. However, the actual merits of Stokes' appeal is not before this Court, which does not have review authority over all of the claims. *See* People v. Gonzalez, 47 N.Y.2d at 610; CPL § 470.15 (3) (5) (6). Therefore, for purposes of the present discussion it is sufficient to note that these issues -- even if deemed frivolous -- "might arguably" have supported a conventional appeal.

identify non-frivolous claims.[15] Nor does the procedure outlined in Anders draw fine distinctions between "frivolous" issues and claims that are not "arguable." Under Anders, claims that are not "arguable" are "frivolous" by definition.

Under the Anders scheme, there are three classes of claims: (1) frivolous claims, i.e. ones so worthless as to be inadmissible in serious professional argument; (2) arguable claims, i.e., ones which may appear weak but which are sufficiently tenable to permit a professional advocate to advance them; and (3) meritorious claims, i.e. ones sufficiently strong to be sustained by the review court.[16] For the purposes of a no-merit brief, only the distinction between the first and second types of claims is important. In the argument section of an "Anders brief," counsel is under no obligation to analyze all *conceivable* frivolous claims that might be wrung from the record. Rather, the task at hand involves analysis of those claims that, although frivolous, come closest to being "arguable," and which, therefore, might conceivably be found non-frivolous (arguable) by the reviewing court. The issue-spotting no-merit brief serves three important goals: (1) it provides written evidence that counsel has met constitutional expectations concerning partisan review of the record; (2) it facilitates the required independent judicial examination of the record for non-frivolous issues; and (3) it supplies the client with a complete summary of the facts and a ready means of identifying those issues that might be appropriate for pro se briefing.

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[15] See e.g., Pengilly, Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 Crim. Jus. J. 45, 50 - 52 (1986) (A.509, A.514-516).

[16] A "frivolous" claim has been described as one "so clearly without a rational argument based in law, or [which] is otherwise so clearly and facially untenable that it has no prospect for success." This definition obviously excludes good faith arguments offered in support of extension, modification or reversal of existing law. "If there is doubt about whether an argument is frivolous, it is not frivolous unless the circumstances reveal clearly that the sole motivation for the assertion in question was harassment or intimidation, or some other abuse of the system." Martin v.State, 2000 WL 342133 (Mo. Ct. App. April 4, 2000).

The first and most obvious purpose of the conventionally understood Anders brief is to provide reviewing courts with "some reasonable assurance that the lawyer has not relaxed his partisan instinct" before concluding that a client's appeal is wholly frivolous. Smith v. Robbins, 120 S.Ct. at 769 (Souter, J., dissenting). The facts in Stokes' case are a testament to the need for "some process to assess the lawyer's efforts after the fact." Id. The brief filed by Dozoretz, especially the argument section, supplied obvious evidence of her ineffectiveness – proof that was available to the Appellate Division and is now available to this Court on discretionary review. If Dozoretz had been under no obligation to provide some written account of her legal work, clear proof of her ineffectiveness would have been unavailable and Stokes may have had difficulty establishing that his rights had been violated – even with the assistance of pro bono counsel. In most cases, of course, indigent appellants in Stokes' situation would have no access to counsel, and constitutional violations would simply go undetected. As Justice Souter eloquently stated in dissent in Smith v. Robbins, "A judicial process that renders constitutional error invisible is. . . itself an affront to the Constitution" (120 S.Ct. at 769).

Secondly, by requiring counsel to supply the court with a concise statement of facts and possible legal issues, the Anders procedure respects the valuable time of appellate judges, who otherwise would be forced to tackle the required independent judicial review on the basis of the cold record alone. Without an Anders brief, even the judges of this Court would be required to independently review trial court records in no-merit cases because there would be no other means to evaluate pro se applications for permission to appeal. Thus, it is not surprising that the great majority of state courts require attorneys to adhere to Anders when filing no-merit

briefs[17], and that at least one court has already reaffirmed Anders as a matter of state procedural law in the wake of Smith v. Robbins. *See* Martin v. State, 2000 WL 342133 (Mo. Ct. App. April 4, 2000).

Moreover, the scheme contemplated by Anders imposes no real burdens on the bar. Even if there were no rules governing the content of no-merit briefs, a good appellate lawyer would consider it a professional duty to provide an explanation to the court and a client when ethical considerations have forced her to abandon her preferred role as partisan advocate. If counsel has undertaken her duties seriously and has conscientiously examined the record and the law before deciding the appeal is wholly frivolous, supplying the court with support for her legal conclusions is not an onerous task. In most cases, the circumstances that render an appeal "wholly frivolous" are relatively easy to explain. Anders briefs are rarely, if ever, appropriate in

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[17] The following thirty-one states follow Anders – Alabama: *Ex Parte Sturdivant*, 460 So. 2d 1210 (1984); Arkansas: *Seals v. State*, 256 Ark. 11 (1974); Connecticut: *State v. Pascucci*, 161 Conn. 382 (1971); Delaware: *Smith v. State*, 248 A.2d 146 (1968); Florida: *State v. Wooden* 246 So. 2d 755 (1971); Illinois: *People v. Jones*, 38 Ill. 2d 384 (1967). Iowa: *Toogood v. Brewer*, 187 N.W.2d 748 (1978); Kentucky: *Robbins v. Commonwealth*, 719 S.W.2d 742 (1986); Louisiana: *State v. Mouton*, 653 So. 2d 1176 (1995); Maryland: *Tippett v. Director, Patuxent Institution*, 2 Md. App. 465 (1967); Michigan: *Holt v. State Bar Grievance Board*, 388 Mich. 50 (1972); Missouri: *Martin v. State*, 2000 WL 342133 (2000); Montana: *State v. Swan*, 199 Mont. 459 (1982); Nebraska: *State v. Russ*, 187 Neb. 319 (1971); New York: *People v. Gonzalez*, 47 N.Y.2d 606 (1979); North Carolina: *State v. Kinch*, 314 N.C. 99 (1985); Ohio: *State v. Duncan*, 57 Ohio App. 2d 93 (1978); Oklahoma: *Mapp v. State*, 1976 OK CR 323 (1976); Pennsylvania: *Commonwealth v. McClendon*, 495 Pa. 467 (1981); Rhode Island: *State v. Leonardo*, 115 R.I. 957 (1976); South Carolina: *Flood v. State*, 251 S.C. 73 (1968); South Dakota: *Loop v. Solem*, 398 N.W.2d 140 (1986); Tennessee: *Doyle v. Henderson*, 221 Tenn. 156 (1968); Texas: *Gainous v. State* 436 S.W.2d 137 (1969); Utah: *State v. Clayton*, 639 P.2d 168 (1981); Vermont: *State v. Kalis*, 127 Vt. 311 (1968); Virginia: *Brown v. Warden of the Virginia Penitentiary*, 238 Va. 551 (1989); Washington: *State v. Koehler*, 73 Wn.2d 145 (1968); West Virginia: *Rhodes v. Leverette*, 160 W. Va. 781 (1977); Wisconsin: *Flores v. State*, 183 Wis.2d 587 (1994) [see also *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 (1988); Wyoming: *Trujillo v. State*, 565 P.2d 1246 (1977).

Courts in the following four states profess to follow Anders, but state public defenders apparently decline to file no-merit briefs – Alaska: *McCracken v. State*, 439 P.2d 448 (1968); Hawaii: *Carvalho v. State*, 81 Haw.185 (1996); Minnesota: *State v. Borough*, 279 Minn. 199 (1968); New Jersey: *State v. Allen*, 99 N.J. Super. 314 (1968).

Courts in the following six states require counsel to file a brief on the merits in all circumstances – Idaho: *State v. McKenney*, 98 Idaho 551 (1977); Indiana: *Hendrixson v. State*, 161 Ind. App. 434 (1974); Massachusetts: *Commonwealth v. Moffett*, 383 Mass. 201 (1981); Mississippi: *Killingsworth v. State*, 490 So. 2d 849 (1986); Nevada: *Ramos v. State*, 113 Nev. 1081 (1997); New Hampshire: *State v. Cigic*, 138 N.H. 313 (1994).

trial cases, which inevitably tend to generate arguable claims for appeal. *Cf.* United States v. Hasting, 461 U.S. 499, 508-509 ("[T]aking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial . . ."). No-merit briefs are usually necessary only in appeals from judgments entered upon guilty pleas, where the universe of potential issues is limited, and counsel's duty of explanation correspondingly confined. *See* People v. Taylor, 65 N.Y.2d 1, 5 (1985) (a guilty plea generally "marks the end of a criminal case, not a gateway to further litigation"); *see also* People v. Seaberg, 74 N.Y.2d 1 (1989); People v. Lopez, 71 N.Y.2d 662 (1988); People v. Claudio, 64 N.Y.2d 858 (1985). In any event, whatever effort *is* required to write a good Anders brief is professional time well spent on a client's behalf. The brief helps explain to the client why counsel has provided no partisan advocacy, and may even give him a head start in the writing of a pro se brief.

No alternative to Anders that requires *less* effort on an attorney's part would satisfy constitutional requirements in New York.

Finally, no alternative to Anders that required *less* effort on the part of an assigned attorney in New York would provide "reasonable assurance" against erroneous deprivations of counsel on appeal. The California alternative to Anders upheld by the Supreme Court in Smith v. Robbins arose in the context of an indigent defense system that provides systemic guarantees to poor persons concerning effective representation on appeal, guarantees that are notably absent in New York. California operates a state-funded system of Appellate Projects, whose staff attorneys review records on appeal, match cases with panel attorneys based on their skill and experience levels, and provide mentoring, consultation, research and training services. The Appellate Project offices routinely monitor the briefs of assigned lawyers, especially in "no-

merit cases, which are governed by special rules and require a second opinion and permission prior to filing. *See* Amicus Curiae Brief of the California Academy of Appellate Lawyers in Smith v. Robbins, 120 S.Ct. 746 (A.529). By contrast, New York's decentralized and underfunded indigent defense system offers virtually no systemic safeguards against ineffective lawyering on appeal. The circumstances in Stokes' case are a testament to the continuing need for Anders briefs in this State.

Indigent criminal appellants in many parts of New York, including most of the Third Judicial Department, are chiefly represented by 18-B attorneys, whose hourly rate of compensation ($40) has not been increased since 1986, and who are frequently subject to enforcement of "arbitrary" fee caps that "bear no connection to modern economic reality." *See* New York State Office of Court Administration – Assigned Counsel Compensation in New York: A Growing Crisis (January 2000) (A.551, A.560). As a result of this "woefully inadequate" compensation, there has been a "mass exodus of attorneys from assigned counsel panels," and those attorneys who remain tend to be far less experienced.[18] This situation has been recognized as a "crisis" with "serious implications for the quality of lawyering provided to indigent litigants" in New York.[19] Indeed, it has led the President of the State Bar Association to fear that New York "risk[s] forfeiting our proud heritage as a national leader in providing competent legal counsel in criminal cases."[20]

To make matters worse, unlike other departments of the Appellate Division, the Third Judicial Department has established no minimum qualifications for attorneys to be appointed as

[18] *A Growing Crisis* (A. 551, A.558)); *see also* Chief Judge Kaye – The State of the Judiciary Address (Jan. 10, 2000) (A.565, A.570-571).
[19] *A Growing Crisis* (A. 558)
[20] Statement by NYSBA President Thomas O. Rice, June 2, 1999 (A.578).

counsel for indigent criminal appellants.[21] In fact, the Third Department has no formal application process. Nor does the Court impose any continuing legal education requirements on attorneys who accept such assignments. But perhaps most disturbing is the Court's failure to remove attorneys from the appointment roster when their skills and knowledge have consistently been found deficient. To date, the attorney who represented Roger Stokes in the court below has filed an astounding 19 *consecutive* no-merit briefs in criminal appeals to the Third Department. While Dozoretz's performance in these other cases is, of course, not an issue before this Court, the Appellate Division itself has rejected three no-merit briefs filed by Dozoretz in appeals from jury trial convictions since March of 1999 (one of which involved a sentence of 25 years to life).[22] Yet, she continues to receive appointments from the Court in criminal cases, and to relentlessly file no-merit briefs.

Most assigned appellate lawyers in New York are committed and effective advocates who would never dream of abandoning a client's cause, even a seemingly desperate one, without first honoring their duty to zealously represent a client within the bounds of the law. But, as the instant case makes clear, there are exceptions to the rule. A state's system for dealing with purportedly frivolous criminal appeals must provide "reasonable assurance" against erroneous deprivations of counsel for indigent appellants whose appeals are non-frivolous. Smith v. Robbins, 120 S.Ct. 746. The unfortunate reality is that New York's present system for providing counsel to indigent criminal defendants tolerates lawyers of the caliber witnessed below. The rules for no-merit briefs must be designed with lawyers like these in mind. The guidelines laid

[21] The First Department has established minimum standards that address a candidate's recent experience in the prosecution or defense of criminal cases, knowledge of the law, and ability to research and write an effective appellate brief. *See* General Requirements for Certification to the Criminal Panels of the Assigned Counsel Plan in the Appellate Division, First Department (A.579, A.587-588).

[22] People v. Young, 686 NYS2d 525 (3d Dept. Mar. 11, 1999); People v. Jeffrey, 704 NYS2d 525 (3d Dept. Mar. 9, 2000) (sentence of 25 years to life); People v. Garnett, 2000 WL 964973 (July 13, 2000).

out 33 years ago in Anders v. California have worked reasonably well, and should be reaffirmed as minimum requirements under state law. The lower appellate courts should also be encouraged to vigorously enforce these requirements.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE ORDER OF THE APPELLATE DIVISION SHOULD BE REVERSED AND THE MATTER REMITTED FOR A DE NOVO APPEAL.

Respectfully submitted

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EXHIBIT

11/99

10934

To be Submitted by: Bernice R. Dozoretz, Esq.

CHEMUNG COUNTY: CLERK'S DOCKET # 10934

NEW YORK SUPREME COURT
APPELLATE DIVISION-THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

v.

ROGER STOKES

Defendant-Appellant

APPELLANT'S BRIEF AND APPENDIX

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APPENDIX

CASE SUMMARY

Appellant appeals from a judgment upon a verdict rendered on October 2, 1998, following a jury trial on June 15, 1998 and June 16, 1998 in Chemung County Court convicting him of aggravated harassment of an employee by an inmate, while incarcerated in Elmira Correctional Facility. Following conviction as a persistent felony offender, appellant was sentenced to an indeterminate term of not less than fifteen years to life.

Because there do not appear to be any nonfrivolous appealable issues, counsel requests permission to withdraw.

QUESTIONS PRESENTED

1. WHETHER THE VERDICT AND SUBSEQUENT CONVICTION OF AGGRAVATED HARASSMENT OF AN EMPLOYEE BY AN INMATE WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE PRODUCED AT TRIAL?

2. WHETHER THE SENTENCE IMPOSED WAS HARSH AND EXCESSIVE?

3. WHETHER THE RECORD CONTAINS ANY NON FRIVOLOUS ISSUES WHICH MAY PROVIDE A BASIS FOR APPEAL?

STATEMENT OF FACTS

Defendant/Appellant Roger Stokes, while incarcerated in Elmira Correctional Facility (hereinafter E.C.F.), was indicted on January 29, 1998, for the crime of aggravated harassment of an employee by an inmate in violation of Section. 240.32 of the New York Penal Law.

On or about February 18, 1997, Defendant/Appellant Roger Stokes, while incarcerated at Elmira Correctional Facility, with the intent to harass, annoy, threaten or alarm a person in that facility, whom he knew or reasonable should have known to be an employee, threw, tossed or or expelled a mixture of urine and feces onto Correction's Counselor Virginia Livermore. These substances landed upon the person of Virginia Livermore.

Following his indictment on January 29, 1998, appellant was arraigned in Chemung County Court on February 6, 1998 and provided assigned counsel.

On March 13, 1998, appellant appeared in court, upon his counsel's omnibus motion, however the Grand Jury minutes were not available, and the matter was adjourned to April 3, 1998, after the Judge admonished the Assistant District Attorney with regard to their filing a Certificate of Readiness for trial.

On April 3, 1998, the Grand Jury minutes were inspected and the motion for dismissal was denied. On this date, appellant pled not guilty to the charge.

On June 15, 1998, the first day of trial, prior to jury selection, a *Sandoval* Hearing was held, at which time it was determined that appellant's inmate disciplinary history, including an incident involving feces throwing at another inmate would be more prejudicial than probative if he elected to testify and no cross examination would be permitted in this area. The judge also

precluded the People from cross-examining appellant on any prior juvenile delinquency proceeding or on a 1985 burglary conviction as being remote in time. (A-3-11))

On June 15, 1998, prior to jury selection, the People made an application that appellant be shackled during the trial due to his assaultive history. Following appellant's attorney's spirited objections, the determination was made to have appellant's legs shackled throughout the proceedings, with instructions to the jury to disregard the shackling and not draw any adverse inferences. (A-12-21) This instruction was given to the jury in the course of charging the jury prior to jury deliberation. (A-22)

On June 16, 1998, following a two day jury trial, appellant was found guilty of the crime of aggravated harassment of an employee by an inmate.

On August 21, 1998, appellant was present in court with counsel, for a persistent felony offender hearing.

On October 2, 1998, appellant was sentenced as a persistent felony offender to an indeterminate term of not less than fifteen years to life. Appellant is serving that sentence in the Attica Correctional Facility.

ARGUMENT

POINT I.

THE VERDICT AND SUBSEQUENT CONVICTION FOR AGGRAVATED HARASSMENT OF AN EMPLOYEE BY AN INMATE WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE PRODUCED AT TRIAL.

It is well settled that the standard for reviewing the sufficiency of the evidence in a criminal case is "whether ' after viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'" *People v. Contes*, 60 NY2d 620, 621, quoting *Jackson v. Virginia*, 443 US 307, 3119[emphasis in original].

In the instant case, the evidence presented at the trial held on June 15, 1998 and June 16,1998, was sufficient to permit the jury to conclude that appellant was guilty of the crime charged. The victim, Virginia Livermore, testified credibly as to the event itself.

Charles Woodruff, a Correctional Officer at Southport Correctional Facility testified that following the incident he was present when Virginia Livermore had her photograph taken with the feces on her clothing, and that after she took a shower, the stained clothing was turned over to Officer Woodruff, who then took pictures of the clothing and then stored the clothing in a sealed evidence locker. (A-23-30)

Gary Harmor, an expert forensic serologist testified that he received the victim's stained clothing, performed serological tests on them, determined that feces and urine were present in three garments, and that no other substances would give the same test results . (A-31-45)

Leonard Vanderpool, Correctional Officer at Southport Correctional Facility testified that on the day of the feces throwing incident he saw Virginia Livermore shortly after the incident, that she was soaked with urine and feces, as was the wall across from appellant's cell. (A-46-51)

POINT II

THE SENTENCE IMPOSED WAS NOT HARSH AND EXCESSIVE.

It has been held that where a sentence is within permissible statutory ranges it will not be disturbed unless the sentencing court abused its discretion or extraordinary circumstances exist warranting a modification (see *People v. Dolphy*,_____ AD2d____ [Jan. 7, 1999]).

In the case at bar, Appellant was sentenced pursuant to Section 70.30, Subdivision 1, as a persistent violent felony offender, having previously been convicted of two or more prior felonies, three of which involved violent felonies. As such, he was sentenced to an indeterminate term of imprisonment of fifteen years to life for the instant crime of aggravated harassment of an employee by an inmate, which sentence is within the statutory parameters.

POINT III.

APPELLANT'S COUNSEL SHOULD BE PERMITTED TO WITHDRAW BECAUSE THERE ARE NO NONFRIVOLOUS ISSUES TO RAISE ON APPEAL.

In *Anders v. California*, 386 U.S. 738 (1967), it was held that, if after reviewing the record, appellant's counsel finds that there are no issues to appeal, appellate counsel may request permission to withdraw from representing the appellant. Counsel should follow the standard practice of filing the record on appeal and appellant's brief with the appellate court. *People v. Cruwys*, 493 NYS 2d 653 (3d Dept. 1985). A copy of each should be provided

held that if the appellate court concludes that there are no issues to appeal, counsel's request to withdraw should be granted.

In the case at bar, a careful review of the record clearly indicates that there are no nonfrivolous issues to appeal. Appellant was afforded a jury trial at which he produced a witness of his own choosing. His attorney was fully familiar with the case, and provided him with a competent, spirited defense. The testimony offered by the witnesses called including the victim herself, was credible. The jury unanimously found him guilty of the charge after receiving the court's appropriate charge to the jury. His sentence was within the statutory guidelines.

I have written to Appellant and informed him that he may petition this Court for permission to file a supplemental pro se brief if he believed that there was a basis to appeal his conviction or sentence.

CONCLUSION

For the foregoing reasons, it is respectfully requested that counsel be permitted to withdraw because there are no nonfrivolous issues to appeal.

Dated:May 7, 1999.

Respectfully Submitted,

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