Not for Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

DANIEL CARLO CASTILLO, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS**, Appellee/Plaintiff.	)))))))))	**S. Ct. Crim. No. 2008-0072** Re: Super. Ct. Crim. No. 129/2007

On Appeal from the Superior Court of the Virgin Islands
Considered and Filed: January 27, 2010

BEFORE: **RHYS S. HODGE,** Chief Justice; **MARIA M. CABRET,** Associate Justice; and **IVE ARLINGTON SWAN,** Associate Justice.

APPEARANCES:

Kele Onyejekwe, Esq.
Territorial Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellant

ORDER OF THE COURT

PER CURIAM.

THIS MATTER comes before the Court on appeal from the Superior Court's Judgment and Commitment, which was orally rendered on August 21, 2008 and memorialized in a written Judgment entered on September 9, 2008, finding Appellant Daniel Castillo (hereafter "Castillo") guilty of voluntary manslaughter and aggravated child abuse and sentencing him, respectively, to life imprisonment and thirty years of incarceration, to be served concurrently. Castillo timely filed his Notice of Appeal on August 28, 2008.[1] On November 30, 2009, Castillo's counsel filed

[1] "A notice of appeal filed after the announcement of a decision, sentence, or order – but before entry of the judgment or order – is treated as filed on the date of and after the entry of judgment." V.I.S.CT.R. 5(b)(1).

a Motion for Leave to Withdraw as Counsel on the grounds that, based upon his review of the record, he does not believe that any non-frivolous issues are present in the instant appeal. Castillo's counsel supported his motion with the brief mandated by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).[2] For the reasons that follow, we shall decline to dismiss Castillo's appeal as frivolous and deny counsel's motion to withdraw.

I. LEGAL STANDARD

"When a court-appointed counsel determines, in a first appeal of right in a criminal case, that there are no non-frivolous grounds for appeal, said counsel shall submit an *Anders* brief which demonstrates that counsel has thoroughly examined the record in search of appealable issues and explains why any such issues are frivolous." *St. Louis v. People*, S.Ct. Crim. No. 2007-086, 2008 WL 5605712, at *1 (V.I. Oct. 11, 2008) (citing *United States v. Youla*, 241 F.3d 296, 299 (3d Cir. 2001)). "A copy of counsel's brief should [then] be furnished [to] the indigent and time allowed him to raise any points that he chooses; the court-not counsel-then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). "If the *Anders* brief initially appears adequate on its face, and the appellant has not submitted a *pro se* brief in response, the proper course 'is for the appellate court to be guided in reviewing the record by the *Anders* brief itself.'" *St. Louis*, 2008 WL 5605712, at *1 (quoting *Youla*, 241 F.3d at 301). However, "[o]nce counsel has satisfied the [*Anders*] requirements, it is then this Court's duty to conduct its own review of the trial court's proceedings and render an independent judgment as to whether the appeal is, in fact, wholly frivolous." *Commonwealth v. Wright*, 846 A.2d 730, 736

[2] In a December 3, 2009 Order, this Court provided Castillo with thirty days in which to submit a *pro se* brief addressing the points raised in his counsel's motion. However, Castillo has not filed any documents with this Court.

(Pa. Super. Ct. 2004).

II. DISCUSSION

In his *Anders* brief, Castillo's counsel identifies eight potential issues that may support Castillo's appeal, but concludes that "[t]hey are all frivolous." (*Anders* Br. at 6.) According to Castillo's counsel, these issues include (1) whether the trial court erred in denying Castillo's motion to suppress; (2) whether there is unlawful multiplicity in Castillo's sentencing; (3) whether title 14, section 61 of the Virgin Islands Code is unconstitutional; (4) whether the trial court erred in enhancing Castillo's sentence pursuant to title 14, section 61; (5) whether Castillo's sentences for voluntary manslaughter and aggravated child abuse should merge; (6) whether the trial court erred in not admitting evidence that another person committed the crime; (7) whether the evidence was sufficient to sustain Castillo's convictions; and (8) whether Castillo was deprived of effective assistance of counsel at trial. (*Id.* at 6-7.) However, while Castillo's counsel's brief largely complies with the requirements established by the United States Supreme Court in *Anders* and this Court in *St. Louis*,[3] and is adequate to guide this Court in its independent review of the record, we find that Castillo's appeal is not wholly frivolous.

As a threshold matter, "we wish to clarify that underlying our assessment in denying counsel's request is the often overlooked, or perhaps misunderstood, distinction between an

[3] This Court notes that although the *Anders* and *St. Louis* procedures required Castillo's counsel to include the entire record in the Appendix, counsel failed to provide this Court with a copy of the Superior Court's order denying Castillo's motion to suppress his confession. Moreover, Castillo's counsel's *Anders* brief, while discussing the Superior Court's finding that Castillo's April 12, 2007 confession was not involuntary, fails to discuss the Superior Court's rejection of Castillo's argument that the April 12, 2007 confession should have been suppressed as the fruit of his April 7, 2007 interrogation, which the Superior Court characterized as an illegal arrest. While it is well established that an attorney is not required to discuss every conceivable issue in an *Anders* brief, Castillo's counsel, having identified the Superior Court's denial of Castillo's motion to suppress as a potential issue, possessed a duty to both provide this Court with a copy of the pertinent order and fully present all arguments that may support reversing the Superior Court. Accordingly, although these errors are not so egregious as to require rejection of the *Anders* brief as inadequate, this Court reminds Castillo's counsel of the need to follow proper procedures, particularly in the *Anders* context.

appeal that lacks merit and one that is wholly frivolous." *Commonwealth v. Edwards*, 906 A.2d 1225, 1231 (Pa. Super. Ct. 2006). While an argument may lack merit when it is "against the weight of legal authority," it is not a frivolous argument unless it "is not only against the overwhelming weight of legal authority *but also* entirely without any basis in law or fact *or* without any logic supporting a change of law." *State v. Turner*, No. W1999-01516-CCA-R3-CD, 2000 WL 298696, at *2 (Tenn. Crim. App. Mar. 17, 2000) (unpublished) (emphases added). "Thus, while an issue may not be reversible because of controlling authority in the appellate court, an attorney might argue for a change in the law, or for the court to rely on a different line of authority. These issues are arguable on the merits, yet not likely to result in reversal." *Shaw v. State*, 756 So.2d 1101, 1102 (Fla. Ct. App. 2000). *See also State v. Hyde*, 670 P.2d 1066, 1067-68 (Or. Ct. App. 1983) ("There is a distinction between 'non-meritorious' and frivolous. . . . 'It seems clear that counsel should not be dissuaded from filing a brief on behalf of the client because of a belief that the claims of error may not be found to be reversible by the appellate court, if there exists some basis for raising those claims. . . . By 'non-frivolous,' we mean an issue for which a reasonable argument can be made, including suggested changes in the law.'") (quoting *State v. Horine*, 669 P.2d 797, 801 n.3 (Or. Ct. App. 1983); *Pingue v. Pingue*, No. 06-CAE-10-0077, 2007 WL 2713763, at *4 (Ohio Ct. App. Sept. 18, 2007) (unpublished) ("Recognizing changes and advancements in the law only occur at the appellate level, yet simultaneously finding the entire action frivolous because the law is already well established appears incongruous. The only way to create change is to initiate change."). As the Supreme Court of Pennsylvania has succinctly explained,

> It should be emphasized that lack of merit in an appeal is not the legal equivalent of frivolity. *Anders* "appears to rest narrowly on the distinction between complete frivolity and absence of merit. The latter is not enough to support either a request

> by counsel to withdraw, nor the granting of such a request by the court." ABA Project on Standards for Criminal Justice, Standards Relating to the Defense Function § 8.3, commentary at 297 (Approved Draft, 1971).

Commonwealth v. Greer, 314 A.2d 513, 514 (Pa. 1974). *See also United States v. Eggen*, 984 F.2d 848, 850 (7th Cir. 1993) ("A more difficult question is whether, although Eggen's appeal plainly lacks merit, it can be pronounced frivolous."). Moreover, the United States Supreme Court, having observed that "[t]he terms 'wholly frivolous' and 'without merit' are often used interchangeably in the *Anders* brief context," has expressly held that "a determination that the appeal lacks any basis in law or fact" must be made before granting the request to withdraw. *McCoy v. Court of Appeals*, 486 U.S. 429, 438 n.10, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988). Accordingly, "[i]t is only in the *very rare* situation when counsel is left with no argument but merely frivolous ones that counsel may file a motion to withdraw and submit an *Anders* brief." *Turner*, 2000 WL 298696, at *2 (emphasis added).

Although Castillo's counsel has explained in his *Anders* brief why he believes the eight identified issues are against the weight of legal authority, counsel has not established that all of these issues are so devoid of any legal or factual support that an attorney cannot ethically make those arguments before this Court. For instance, this Court notes that Castillo's counsel, although characterizing the potential issues of multiplicity and merger as frivolous, has not supported his argument with citations to any decisions rendered by any courts in this jurisdiction, let alone this Court. *See United States v. Condren*, 18 F.3d 1190, 1193 n.8 (5th Cir. 1994) (holding that granting a motion to withdraw brought pursuant to *Anders* is inappropriate when appeal would raise an issue of first impression in the jurisdiction); *State in Interest of L.D.I.*, 714 So.2d 780, 782 (La. Ct. App. 1998) (same); *Justus v. State*, 237 S.W.3d 528, 529 (Ark. Ct. App. 2006) ("If indeed there is no case law that supports Justus's position . . . that does not render

Justus's appeal . . . 'wholly frivolous' . . . . Indeed, without clear case law addressing Justus's claim, it is impossible to meet the rigid *Anders* requirements."); *see also Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 794 (7th Cir. 1983) (holding that appeals raising issues of first impression are not frivolous because to hold otherwise "would have a profound chilling effect upon litigants and would further interfere with the presentation of meritorious legal questions to this court.").[4] Likewise, although Castillo's counsel contends that any challenge to the constitutionality of title 14, section 61 is frivolous, including any argument that section 61's "draconian, unfair and disproportional" sentencing enhancement constitutes cruel and unusual punishment, (*Anders* Br. at 22), counsel supports his argument with only a citation to a single case, *Gov't of the V.I. v. Harrigan*, 791 F.2d 34 (3d Cir. 1986),[5] which—by its own terms—only considered whether section 61 violates the equal protection clause or is unconstitutionally vague. Consequently, multiple non-frivolous issues exist which counsel may argue on Castillo's behalf in this appeal.[6]

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[4] Although one court has nevertheless found that "a ground of appeal can be frivolous even if there is no case on point . . . because, for example, of the clarity of statutory language, or even as a matter of common sense," *United States v. Lopez-Flores*, 275 F.3d 661, 662-63 (7th Cir. 2001), we find that the issues of first impression mentioned in Castillo's counsel's *Anders* brief do not rise to this level.

[5] This Court further notes that Castillo's counsel's *Anders* brief does not consider this Court's recent holding that "decisions rendered by the Third Circuit and the Appellate Division of the District Court . . . only represent persuasive authority when this court considers an issue." *In re People of the V.I.*, S.Ct. Civ. No. 2009-021, 2009 WL 1351508, at *6 n.9 (V.I. May 13, 2009).

[6] Because this Court's obligation under *Anders* and *St. Louis* is limited solely to ascertaining whether Castillo's appeal is wholly frivolous, it is not necessary or proper for this Court, having already identifying at least one non-frivolous issue, to individually analyze all eight issues raised in Castillo's counsel's *Anders* brief. Moreover, this Court's identification of some of the issues mentioned in Castillo's counsel's *Anders* brief as non-frivolous should not be construed as either expressing an opinion as to the ultimate merits of those issues, nor should this Court's failure to discuss other issues be construed as a holding that those issues are wholly frivolous. Finally, because this Court deemed Castillo's counsel's *Anders* brief adequate and, accordingly, used it to guide its review of the record, this Court's failure to *sua sponte* identify non-frivolous issues not raised in Castillo's counsel's *Anders* brief should not be construed as a finding that other non-frivolous appealable issues do not exist.

III. CONCLUSION

Because Castillo's appeal does not rise to the level of being "wholly frivolous," Castillo's counsel has failed to establish that he is entitled to withdraw his representation in this matter. Accordingly, it is hereby

ORDERED that Castillo's counsel's Motion to Withdraw as Counsel is **DENIED**; and it is further

ORDERED that the Clerk of the Court **SHALL RE-ISSUE** a briefing schedule in this matter; and it is further

ORDERED that copies of this Order be served on the parties' counsel.

SO ORDERED this 27th day of January, 2010.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court