

Protecting The Rights Of Non-English Speakers

BY LAZAR EMANUEL

Under the Supreme Court's decision in *Anders v. California*, 386 U.S. 738 (1967) court appointed appellate counsel may ask the court for leave to withdraw "if counsel is convinced, after conscientious investigation, that the appeal is frivolous." Counsel's request "must be accompanied by a brief referring to anything in the record that might arguably support the appeal." Counsel must furnish the client with a copy of the motion and brief and with a letter advising the client that he may proceed pro se.

In the recent case of *U.S. v. Ruben Leyba*, 2nd Circuit Judge Jose A. Cabranes considered the implications of *Anders* when the defendant involved speaks a language other than English. Judge Cabranes recited first the instructions developed by the Second Circuit to control the *Anders* notice. Under these instructions, court appointed counsel must submit, in addition to the brief, an affidavit stating that the client has been informed: 1) that an *Anders* brief has been filed; 2) that filing of the brief will probably result in dismissal of the appeal and affirmance of the conviction; and 3) that the client may request assistance of other counsel or submit a pro se response.

Attorney Philip Weinstein submitted a declaration which appeared to comply with all these requirements. However, Judge Cabranes noted, "It is unclear from Mr. Weinstein's declaration whether he has simply mailed a letter to defendant containing this information, or has also had some oral communication with defendant. It is also unclear whether counsel's letter was written in English or Spanish, or whether his oral communications (if any) were in English or Spanish."

The facts showed that the defendant had not responded to the *Anders* motion, that he spoke Spanish but not English, and that he was unable to read in either language. "It is therefore possible that the defendant's only notice of his rights to respond to the *Anders* motion was contained in a letter, written in English, that he could not read."

Judge Cabranes found that such a notice would be inadequate and a violation of due process. "As a general matter, due process imposes a requirement of reasonableness in giving notice." In a jurisdiction embracing New York, "one of the polyglot capitals of the world," where almost 5 million residents speak a language other than English (almost half of them Spanish), due process requires that a defendant known to counsel to be a non-English speaker is entitled to more than a written statement in English. At a minimum, counsel should make reasonable efforts to contact the defendant in person or by telephone, with the aid of an interpreter, to explain the consequences of the *Anders* appeal.

Because it was not clear whether Weinstein had complied with these requirements, he was ordered to file a new declaration showing that the requirements had been met.