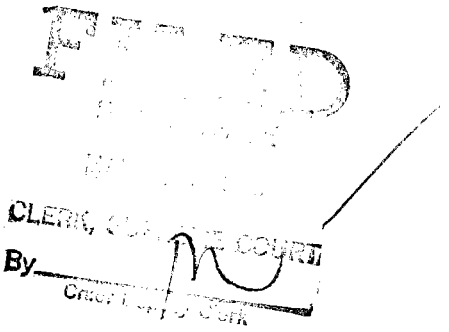
IN THE
SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 68,624

BRENDA CAUSEY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS
PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial level and the appellee before the First District Court of Appeal, will be referred to as the "State" or "petitioner." Brenda Causey, the defendant in the trial court and the appellant before the First District Court of Appeal, will be referred to as "respondent."

The record on appeal consists of one volume of docket instruments and one volume of transcript. Any references thereto will be designated by "R" followed by the appropriate page number and enclosed in parentheses.

A conformed copy of the opinion under review sub judice, Causey v. State, 11 F.L.W. 127 (Fla. 1st DCA January 3, 1986), as well as copies of other relevant documents are included within the attached appendix. References to the appendix will be designated by "A" followed by the appropriate page number and enclosed in parentheses.

STATEMENT OF THE CASE AND FACTS

By information filed March 20, 1984, respondent was charged with arson of a dwelling, "to-wit: a house the property of Pascal Gainer, and located at 914 Louisiana Avenue, Bay County, Florida, contrary to Section 806.01(1), Florida Statutes . . ." (R 154). A jury trial was held June 27, 1984.

The First District summarized the key testimony presented at trial as follows:

> On the evening of February 12, 1984, the Panama City Fire Department responded to a call of fire by persons unknown, at 914 Louisiana Avenue, the rented home of George "Junior" Lovett, Ms. Causey's boyfriend of five years. The door to the back porch was found burning. Officials at the scene determined that the fire had been set with kerosene, poured from a brown beer bottle that was recovered from the back yard.
>
> At trial, the prosecution's theory was that Ms. Causey was motivated by anger; that a quarrel between them had caused Mr. Lovett to move from her apartment back to his house on Louisiana Avenue the day before the fire. Of two latent fingerprints found on the beer bottle, one was Ms. Causey's (one, not hers, was not further identified), and some of her possessions were found in the back yard that night.
>
> Mr. Paul Matthews, testifying for the prosecution, said he was approached by Ms. Causey shortly before the fire, a block or so from Mr. Lovett's house. She was carrying a brown beer bottle that smelled like kerosene, stuffed with paper at the top; she asked him for a match, but produced her own. She then walked away toward Mr. Lovett's house. Upon her return she did not have the beer bottle, and asked Matthews to tell "Junior Lovett" that she was sorry his house was burning. Matthews had not known her before that night. He then went down a trail to Lovett's house, saw the fire, and heard that neighbors had called the Fire Department.

> For the defense, Mr. Lovett and Ms. Causey testified that she was not in the vicinity of his house until after the Fire Department had arrived, had not been carrying a beer bottle, and, that their quarrel was not more serious than others in their relationship. Defense counsel brought forward testimony intended to show that the prosecution's physical evidence was not necessarily indicative of guilt, and further, that Mr. Lovett had seriously quarrelled with his neighbor, shortly before the fire, over ownership of a valuable appliance.

11 F.L.W. 127 (A 2-3).

Prior to trial, the State sought by motion in limine to prohibit defense counsel from asking prosecution witness Paul Matthews on cross-examination where he was at that time residing. Because Mr. Matthews was in jail awaiting disposition of pending grand theft charges, the prosecution contended that any reference to Mr. Matthews' residence "would be an effort to basically impeach him without a conviction." (R 5, 8). The trial court initially reserved ruling on the motion in limine (R 9), and, then, when the prosecution renewed the motion in chambers immediately prior to Mr. Matthews' testimony, the following exchange took place:

> [The prosecutor:] I would again renew my motion in limine regarding his [Matthews'] present place of residence.
>
> [Defense counsel:] I would again object. That is not right.
>
> The Court: I think the purpose of the evidence rule is to prohibit maybe some sort of inuendoes [sic] about prior criminal history of any crime and he can be asked that question in compliance with the evidence code but I think that anything reflects on where he is now that may show he is guilty of some sort of crime might be improper so we will keep that out. You can ask the question whether or not he has ever been convicted of a crime involving honesty or false statement.

(R 30-31). Consequently, no inquiry as to Mr. Matthews' residence was made by defense counsel during her cross-examination of Mr. Matthews.

Subsequently, the jury found the appellant guilty as charged (R 188) and, on September 14, 1984, the trial court issued an order, withholding adjudication and placing respondent on probation for five years. (R 192). Respondent filed her notice of appeal to the First District Court of Appeal on October 8, 1984. (R 193).

On April 19, 1985, respondent's appellate public defender filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), asserting that he had examined the record on appeal and in his professional judgment no reversible error appeared. Consequently, respondent's appellate public defender requested the First District to enter an order allowing the respondent a reasonable period in which to file her own brief pro se. The First District did so and, when the respondent did not file a supplemental brief within the time provided, the State responded with its standard Anders answer brief.

On January 3, 1986, the First District issued its opinion sua sponte reversing respondent's conviction and remanding the cause for a new trial. In reversing, the First District held that the trial court's limitation of defense counsel's cross-examination of Mr. Matthews was error. the Court reasoned:

> Generally, impeachment of a witness on the basis of a prior criminal activity or dishonesty is limited to past convictions, not past arrests or pending charges. Fulton v. State, 335 So.2d 280, 282 (Fla. 1976). There is an exception when a prosecution witness is under pending criminal

> charges by the same prosecuting agency: defense counsel is entitled to bring that fact before the jury for an impeachment based upon motive or bias. Fulton at 283, citing Morrell v. State, 297 So.2d 579 (Fla. 1st DCA 1974). [footnote omitted].

11 F.L.W. at 127. (A 3).

On January 20, 1986, the State filed a motion for rehearing, urging the following:

> First, the State respectfully contends that this Court has misapprehended the procedure clearly set forth in Anders v. California, supra, and, by not adhering to that procedure, the Court has also departed from the essential requirements of the law inasmuch as, despite the clear mandate of Anders, this Court did not provide the parties the opportunity to brief their respective arguments on the issue upon which the Court based its reversal. Second, the State likewise contends that this Court misapprehended the law as well as departed from the essential requirements of the law when it reversed the trial court's actions on grounds never presented to the trial court.

(A 5-6). Along with the motion for rehearing, the State filed a request for certification. (A 16). On March 20, 1986, the First District issued an order denying the motion for rehearing, but certifying the following question as one of great public importance:

> Does the language of Anders v. California, 386 U.S. 738 (1967) stating: "If [the Court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision afford the indigent the assistance of counsel to argue the appeal" require that the parties be allowed to submit appellate briefs regarding the meritorious legal points prior to decision?

(A 17). On April 18, 1986, the State filed its notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

It is the State's position that Anders v. California, supra, requires that reviewing courts, upon discovering an arguably meritorious issue in reviewing the record in an Anders appeal, allow the counsel for both sides to brief the issue of concern prior to rendering its decision. Not only Anders but the desire to ensure that appellate courts do not inadvertently become advocates for criminal defendants mandates such a procedure.

ARGUMENT

ISSUE

(RESTATED) THE LANGUAGE OF ANDERS v. CALIFORNIA, 386 U.S. 738 (1967) AS WELL AS THE NEED TO ENSURE JUDICIAL NEUTRALITY IN THE CONSIDERATION OF ANDERS APPEALS REQUIRES THAT THE PARTIES IN AN ANDERS APPEAL BE ALLOWED, PRIOR TO THE COURT'S DECISION, TO SUBMIT APPELLATE BRIEFS REGARDING ANY MERITORIOUS LEGAL POINTS DISCOVERED BY THE REVIEWING COURT.[1]

In the landmark decision of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the United States Supreme Court set forth the guidelines to be followed in instances in which an indigent's appointed appellate counsel concludes from a conscientious examination of the record that he cannot in good faith make any meritorious argument for reversal on behalf of his client.

In Anders, the defendant, seeking to appeal his conviction for felony possession of marijuana, moved the California District Court of Appeal to appoint counsel for him. The motion was granted, but, after studying the record and consulting with his client, the appointed counsel concluded that there was no merit to the appeal

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[1] It should be noted that on remand to the circuit court, the respondent has pled guilty to the lesser offense of attempted arson. While this disposition of the cause at the trial level may have mooted any claim the State may have wished to make herein regarding the First District's decision on the merits sub judice, the question certified by the First District in this cause is nevertheless still viable as an unresolved issue of great import. See Sadowski v. Shevin, 345 So.2d 330 (Fla. 1977); Tau Alpha Holding Corp. v. Board of Adjustment of City of Gainesville, 171 So.2d 819, 820 (Fla. 1937).

and so advised the appellate court by letter,[2] at the same time informing the court that Anders wished to file a brief in his own behalf.

After the denial of his request for the appointment of another attorney, Anders filed his own pro se brief and the State responded. Subsequently, the appellate court affirmed Anders' conviction.

On certiorari to the United States Supreme Court, the Court concluded "that California's action does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment." 386 U.S. at 741. Specifically, the Court stated that "California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." 386 U.S. at 743. As a result, the Court set forth the appropriate procedure to follow in such instances as the one before it:

> if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the

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[2] The letter stated:

> I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal, I have visited and communicated with Mr. Anders and have explained my views and opinions to him . . . [H]e wishes to file a brief in this matter on his own behalf.

386 U.S. at 742.

> 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. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

386 U.S. at 744. (Emphasis supplied).

In the instant case, appellate counsel reviewed the record on appeal and, pursuant to Anders, filed a brief stating that he could not make a good faith argument in support of reversible error. The First District then, following the dictates of Anders, properly allowed the respondent time in which to file a pro se brief. When no such brief was filed within the time alloted, the State filed its standard Anders answer brief.

Subsequently, the First District conducting its own independent review of the record, discovered a legal point it considered "arguable on its merits," and sua sponte issued an opinion reversing the respondent's conviction and remanding the cause for a new trial.

It is the State's position that this latter independent action by the First District without any opportunity being given to the

parties to brief the issue upon which the Court based its reversal constitutes a deviation from the essential requirements of the law and is in clear violation of the mandate of Anders v. California.

First, it is important to consider whether Anders even requires an appellate court to conduct its own review of the record looking for errors not raised by either the appellant or his counsel. A review of Anders California reveals no such express requirement. Indeed, even the First District has concluded that Anders does not mandate an independent review by appellate courts. In Stokes v. State, 11 F.L.W. 725 (Fla. 1st DCA March 26, 1986), the First District reiterated its position first set our in Reed v. State, 378 So.2d 899 (Fla. 1st DCA 1980), that:

> Anders v. California does not require the appellate court to review the record in search of errors not raised by either appellant or his counsel. This court in Reed v. State, 378 So.2d 899 (Fla. 1st DCA 1980), suggested that the contention raised by the appellant or by his counsel control the extent of the record which must be reviewed by the appellate court.

Id. Accordingly, the court certified the following question as one of great public importance:

> WHETHER THE APPELLATE COURT IS REQUIRED TO REVIEW THE ENTIRE RECORD WHEN THE APPELLANT'S COUNSEL FILES A BRIEF PURSUANT TO ANDERS V. CALIFORNIA, STATING THAT NO GOOD FAITH ARGUMENT CAN BE MADE THAT REVERSIBLE ERROR HAS BEEN COMMITTED, AND IF SO, WHETHER THE APPELLATE COURT MUST CONSIDER POSSIBLE ERRORS WHICH ARE NOT RAISED EITHER BY APPELLANT OR BY HIS APPELLATE COUNSEL.

Id. Both appellant and the appellee in Stokes have declined to apply for certiorari review of that question in this Court.

The Stokes decision was not unanimous. Judge Barfield concurred in the certification of the question but dissented in part, stating:

> In my opinion, although Anders v. California does not specifically require the appellate court to review the entire record when no appealable issues have been raised by either the appellant or his counsel, the United States Supreme Court did not contemplate that an appellate court, faced with the situation presented here, would close its eyes to reversible error appearing in the record simply because that specific error was not raised by the appellant or by his appellate counsel. Although valid arguments can be made for the position that appellate courts cannot and should not serve as appellate counsel for indigent defendants, worthwhile arguments can also be made that a defendant's constitutional right to counsel and to meaningful appellate review is not presented where the appellate court takes the course chosen by the majority in this case.
>
> In my view, the better policy is for the appellate court to review the entire record in each case in which an Anders brief has been filed by appellate counsel, whether or not the appellant files a pro se brief. In the event the appellate court discovers possible reversible error, it should order counsel for both sides to brief the issue, while admonishing appellant's counsel that it is his duty under the law to conscientiously examine the entire record in order to determine, in his professional opinion, whether any reversible error occurred during the trial proceedings and to file with this court a brief referring to anything in the record that might arguably support the appeal, pursuant to Anders v. California.

Id. at 725-726.

The Stokes decision makes clear the confusion the First District is experiencing in interpreting the Anders decision. Indeed, just two months before Stokes, the First District issued

the opinion in the instant case in which it complied neither with the suggested procedure implicit in Reed to review the record only to the extent necessary to a proper disposition of any issues raised nor with Judge Barfield's dissent suggesting that the parties be allowed to brief any issue independently discovered by the Court before the Court renders its decision in the cause. It is submitted that such confusion is not limited to the First District[3] and that in an effort to ensure uniform compliance with Anders as well as the uniform disposition of Anders appeals in this State, this Court must set out the appropriate procedure to be followed by the five district courts of appeal. As it stands now, there is a very real possibility that the procedures followed by one district court in this State in reviewing Anders appeals may

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[3] Although very few of the other district courts appear to have ever articulated the method by which they review Anders appeals, the Second District recently suggested in Jones v. State, 468 So.2d 253, 254 (Fla. 2d DCA 1985), that its review in an Anders appeal is limited to a consideration of the arguable points raised by defense counsel and an examination of the record to the following extent:

> Our review includes making a determination of whether the defendant was charged with an offense under Florida law, the trial court had jurisdiction over defendant, and the judgment and sentence conform to the requirements of law. If we agree with the public defender's analysis and the points raised are controlled by well settled principles, we usually enter a per curiam affirmance without opinion (PCA).

Based upon Jones, it does not appear that the Second District undertakes more of a review than is necessary to determine whether it agrees with appointed counsel's analysis.

very well effect a result quite different from that of another district court operating under a different method of review.

The State agrees with the First District's opinion in Stokes to the extent that it holds that Anders v. California does not require an appellate court to review the record in search of errors not raised by either appellant or his counsel. It is the State's position that Anders requires only a review of the record to the extent necessary to a proper consideration of any issue raised by the appellant or his counsel.

However, should an appellate court in its review of the record discover what appears to be reversible error on the face of the record, the State contends that the proper procedure to be followed by the appellate court would be, as Judge Barfield suggests in his dissent in Stokes, to order the parties to brief the issue of concern. Not to allow the parties to brief the issue and to reverse a conviction sua sponte, can only be premised upon two rather bold presumptions: a) that the appellant's appointed counsel in his review of the record completely overlooked the alleged error and, thus, that his failure to raise the issue was not the result of a deliberate tactical decision, and b) that the State in an answer brief would not be able to persuade the Court that there either was no error committed at the trial level or that the error did not warrant reversal.

Disallowing briefing of the issue based on the first presumption has dangerous implications. First, a sua sponte reversal without receiving input from the appointed counsel suggest that

the appellate court does not consider the appointed counsel to have been competent enough to spot the alleged error himself. It ignores the fact that the appointed counsel may very well have seen the alleged error but in his professional judgment did not believe it could be sustained on appeal[4] and therefore declined to raise it. More importantly, the first presumption cited above overlooks the fact that in many instances it is appointed counsel's strategy not to mention the alleged error to the appellate court because to do so and then to obtain a reversal could place his client in a more detrimental position than he was in prior to taking the appeal. This is especially so with regard to sentencing errors.

As to the second presumption, it is submitted that the fair and neutral administration of justice requires that appellate courts always give the State—as well as the appellant's appointed counsel—the opportunity to brief the issue regarded by the court as reversible error. Indeed, when an appellate court does not allow the State such input, it is effectively shedding its cloak of judicial neutrality and becoming an advocate for the appellant. As state by this Court in a different context:

> It has been suggested by some that courts today seem to be preoccupied primarily with carefully assuring that the criminal has all his rights while at the same time giving little concern to the victim. Upon the shoulders of our

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[4] This conclusion could be based upon any number of valid reasons, such as counsel's perception that the point was not preserved by contemporaneous objection or the fact that the evidence was so overwhelming, the alleged error was harmless.

> courts rests the obligation to recognize and maintain a middle ground which will secure to the defendant on trial the rights afforded him by law without sacrificing protection of society.
>
> As Mr. Justice Cardoza explained in Snyder v. Commonwealth of Mass., 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674, 687:
>
> > "But justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep our balance true."

State v. Jones, 204 So.2d 515, 519 (Fla. 1967).

In order that district courts in Anders situations may continue to "keep the balance true," both parties should always be given an opportunity in Anders cases to brief any issue upon which an appellate court would otherwise sua sponte render its decision. For the appellant, the effect of such a rule would be to allow a defense counsel who has, as occurs in rare instances, overlooked or misconstrued a potentional legitimate basis for reversal, to brief the issue and avoid an affirmance. For the State, such a rule would offer the State an opportunity to thwart reversal by raising arguments perhaps up until that time not considered by the appellate court.

To demonstrate this latter point, the State returns to the facts of the instant case. Sub judice, the facts are such that had the First District allowed the parties to brief the issue found by the court to constitute reversible error, it is the State's position that it may have been able to present argument to the court which would have affected the court's original

inclination to reverse. Specifically, in the instant case the First District found reversible error in the trial court's limitation of respondent's cross-examination of prosecution witness Paul Matthews as to his current residence, the county jail. In so concluding, the court ruled that while generally "impeachment of a witness on the basis of a prior criminal activity or dishonesty is limited to past convictions, not past arrests or pending charges . . .[t]here is an exception when a prosecution witness is under pending criminal charges by the same prosecuting agency: defense counsel is entitled to bring that fact before the jury for an impeachment based upon motive or bias." 11 F.L.W. at 127.

The problem with this rationale from the State's point of view is that the record at no time reflects that defense counsel ever intended to impeach Mr. Matthews based on motive or bias by asking him his current residence. Rather, the record reveals only that the prosecutor sought exclusion of testimony on cross-examination of Mr. Matthews regarding his current residence to avoid improper reference to the fact that charges were pending against him. While respondent's defense counsel did interpose a general objection to the court's granting of the motion in limine, she at no time contended, or even suggested, that she wished to impeach Mr. Matthews as to bias or motive and that such impeachment was proper as an exception to the general rule of exclusion. The fact that she at no time intended to so impeach Mr. Matthews or that she considered the limitation of her cross-examination of Mr. Matthews prejudicial to her case is supported by her failure to include any

reference to the limitation of her cross-examination in her statement of judicial acts to be reviewed. (R 199).

Based upon the vague factual scenario surrounding the issue in this case, the State believes it could have distinguished the cases relied upon by the trial court to reverse (see A 9-14), if it had been given an opportunity to brief the issue. Moreover, the State would most certainly have made a harmless error argument based upon the overwhelming evidence of respondent's guilt. As it was, however, the State was foreclosed from making any argument in favor of affirmance once the court discovered the alleged reversible error.

Whether the State had any chance for success, it nevertheless should have at least been given the opportunity to be heard, and the failure of the First District to allow briefing by the parties effectively denied either side the opportunity to exercise the advocacy upon which the entire appellate judicial system is premised.

Even the United States Supreme Court in Anders stated that if the reviewing court finds any of "the legal points arguable on their merits, it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." Certainly, this language plainly indicates that a reviewing court must allow the appointed counsel the opportunity to brief the issue found to be arguable on its merits before it renders its decision. Implicit within this language, of course is that if the appointed counsel is given the opportunity to brief the issue then, too, in the

interests of a fair disposition of the cause, should the State be afforded a like opportunity. The rationale is plain: once a meritorious point is discovered by the reviewing court, the case is no longer a simple Anders appeal. Rather, the reviewing court has before it what it perceives to be potentially reversible error and, as such, review of the issue should be treated no differently than any other appeal; the parties should be given an opportunity to state their positions in briefs filed with the court prior to the court's disposition of the cause.

CONCLUSION

WHEREFORE, based upon the foregoing, the State requests this Court to disapprove the First District's opinion sub judice to the extent that the court sua sponte reversed the respondent's conviction based upon its own independent review of the record and without ordering the parties to brief the issue considered by the court to be a basis for reversal. Additionally, to ensure the uniform disposition of Anders appeals in the State of Florida, the State requests this Court to set forth guidelines to be followed by the district courts in Anders appeals and urges this Court to include within those guidelines the requirement that in the event a reviewing court finds an issue it considers to be meritorious, it should always order the parties to brief the issue before rendering its decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by United States Mail to Ken Hosford, Special Assistant Public Defender, 345 Office Plaza, Tallahassee, Florida 32304 on this the 19th day of May, 1986.

Patricia Conners

PATRICIA CONNERS, of counsel