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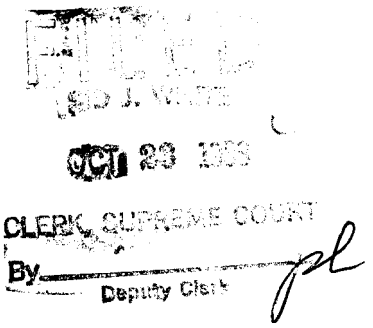
IN THE SUPREME COURT OF FLORIDA



KENNETH A. FORRESTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 74,166

BRIEF OF AMICUS CURIAE
THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.
IN SUPPORT OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Public Defender Association, Inc. (FPDA) is a non-profit Florida corporation. Its membership comprises the Public Defenders of the twenty judicial circuits of Florida, their assistant public defenders, and their staff, charged under the Constitution and laws with the responsibility of providing representation to indigent persons charged with criminal law violations in the State of Florida. The FPDA seeks to improve the representation of indigent criminal defendants through various educational and professional activities and by advocating criminal law and procedure issues of importance to its membership. The FPDA has frequently filed briefs as amicus curiae on such issues and in particular in cases involving the authority, role, and duties of Public Defenders.

SUMMARY OF ARGUMENT

The first district's holding in Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989), requires court-appointed counsel to argue the case against his client. Such an action causes serious damage to a criminal defendant's constitutional right to counsel. The requirement to consult with trial counsel and obtain his agreement on the Anders brief or express reasons why such agreement could not be obtained also deprives the defendant of the effective assistance of counsel and violates the work product doctrine. Additionally, the procedure outlined by the district court causes court-appointed lawyers to violate the rules of professional conduct.

ARGUMENT

THE DISTRICT COURT'S NOVEL REQUIREMENTS FOR ANDERS BRIEFS VIOLATES AN INDIGENT CRIMINAL DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The opinion of the first district in Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989), introduces novel, needless prerequisites for court-appointed appellate lawyers to perform in order to fulfill their obligations under Anders v. California, 386 U.S. 738 (1967). The district court's construction of **"hoops"** through which counsel must jump totally deprives the appellant of counsel in his behalf, requiring counsel to join forces with the state and argue against the client's interests.

In Anders v. California, the Court ruled that, even in a situation where court-appointed appellate counsel viewed the appeal as frivolous, counsel was still required under the constitutional right to counsel to be an advocate on behalf of his client and to file a brief "referring to anything in the record that might arguably support the appeal." Anders, 386 U.S. at 744. This procedure still required counsel to act as an advocate rather than as amicus curiae, and would not force the

court-appointed lawyer to "brief his case against his client." Id. at 745.

The first district, however, misinterprets Anders and its progeny to require a detailed argument showing that the appeal is, in fact, wholly frivolous. Such a requirement flies in the face of the above-quoted language, and exhibits a lack of understanding of the Anders process and the quandary in which a court-appointed appellate attorney is placed when, after a conscientious examination of the record, he determines that the appeal is frivolous. The Anders decision carefully weighed the defendant's right to counsel on appeal with counsel's ethical obligations not to present frivolous arguments to the court. In creating the Anders brief format announced by that decision, the Court struck a delicate balance between the two conflicting duties. Counsel maintains his advocacy (as much as is possible under the circumstances) for his client, yet discharges his ethical duties to the court. To require additional disclosures and detailed legal arguments against his client tips this delicate balance, and destroys the indigent's right to appellate counsel. See Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987).

The district court in Forrester seeks to have the indigent's attorney become a staff lawyer for the court, to file a brief detailing the frivolity of the appeal "as an aid to the court in reaching any decision regarding whether the case is wholly frivolous. . . ." Forrester v. State, supra at 1360. Yet this requirement runs contrary to this Court's opinion in State

v. Causey, 503 So.2d 321 (Fla. 1987), and the holding in Anders, supra, that once appellate counsel has concluded that the appeal is frivolous and has submitted the aforementioned required brief, the **court** must conduct an **independent** review of the proceedings to determine whether the appeal is frivolous.

> The requirement in Anders of submitting a brief stating that the public defender has found no reversible error even worthy of a good faith argument is intended to promote fair appellate review, not stifle it. This requirement was specifically meant to "induce the court to pursue all the more vigorously **its own review."** Anders, 386 **U.S.** at 745. This implies that some degree of **independent** review is required, and we disapprove Stokes [v. State, 485 So.2d 875 (Fla. 1st DCA 1986)] to the extent that it is inconsistent with the instant opinion.
>
> * * *
>
> At the very least, however, pursuant to Anders, in order to assure indigents fair and meaningful appellate review, **the appellate court** must examine the record to the extent necessary to discover any errors apparent on the face of the record.
>
> Dissenting in Stokes, Judge Barfield stated that "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." 485 So.2d at 877 (Barfield, J., dissenting). We agree that this is the better policy. While courts should not assume the role of appellate counsel, reversible error should not be ignored simply because an indigent appellant or a public defender failed to point it out.

State v. Causey, supra at 322-323 (emphasis added). See also Anders v. California, 386 U.S. at 744; Penson v. Ohio, 488 U.S. ___, 102 L.Ed.2d 300, 310 (1988). Once the Anders brief is

filed, as it was here, detailing the record and noting the potential issues on appeal, along with supplying citations to controlling authority on those issues, the court -- not counsel-- must proceed to conduct an independent review of the record to determine if the appeal is wholly frivolous. The district court must do its own work at this stage. While the Anders brief may act to serve as a guide to the appellate court in order to conduct its own independent inquiry into the otherwise "cold record," Anders v. California, 386 U.S. at 745, it may not be a substitute for that review. **See** McCoy v. Court of Appeals of Wisconsin, 486 U.S. ___, 100 L.Ed.2d 440, 463 n.3 (1988) (Brennan, J., dissenting). Only after the court has conducted that independent review can it require additional briefs from appellant's counsel -- not to condemn the appellant and his issues on appeal, but at that point to support those issues.

It appears from the district court's opinion that the court has not undertaken that independent review prior to its request for an additional brief; rather the opinion clearly shows that it wants, nay -- commands, the appellant's attorney to take an active part in that review by briefing the case in detail against the client and by seeking an additional statement from trial counsel as to the frivolity of the appeal. This is simply not the independent review required by Anders and State v. Causey. The court has "changed the adversarial process into an inquisitorial one" by having the defendant's current and former

attorneys "joining the forces of the state and working against [their] client." Robinson v. Black, 812 F.2d at 1085.

A proper reading of the United States Supreme Court cases since Anders does not require the procedure conjured up by the first district court. First of all, McCoy v. Court of Appeals, supra, does not hold that Anders v. California **requires** the procedure outlined there (as the first district court apparently believes), but simply holds that the federal constitution and Anders **permit** the procedure dictated by the State of Wisconsin. Additionally, the procedures promulgated by the district court in Forrester go far beyond that envisioned in McCoy. The Wisconsin rule in McCoy was more in the nature of putting the court on **"notice"** regarding the non-meritorious nature of the case and the facts, cases, or statutes on which counsel based this conclusion. It does not require, as the Forrester court would mandate, that counsel "engage in a protracted argument in favor of the conclusion **reached."** McCoy v. Court of Appeals, 100 L.Ed.2d at **454,** quoting from McCoy v. State, **403** N.W.2d **449, 454** (Wis. **1987).**

Nor does it require a statement from appellate counsel that he has consulted with the trial counsel who now agrees that the appeal is frivolous or **"a** satisfactory explanation of why such concurrence could not be obtained." Forrester v. State, supra at **1361.** Such a statement of concurrence does nothing more than require a "no-merit letter" (albeit a second one) of the type condemned in Anders v. California, supra. **See** Carter v.

State, Case No. 88-1265 (Fla. 1st DCA October 13, 1989), slip opinion at 4 (Barfield, J., dissenting). As stated by Justice Brennan in his dissent in McCoy v. Court of Appeal, 100 L.Ed. 2d at 458:

> [D]efense counsel have an ethical duty not to press appeals they believe to be frivolous, even though other lawyers might see an issue of arguable merit. See Polk County [v. Dodson, 454 U.S. 312, 323-324 (1981)].

If trial counsel does not concur, then appellate counsel, in order to provide the "satisfactory explanation of why such concurrence could not be obtained," is forced to further argue the case against his client and is also forced to divulge "work product" discussions with trial counsel which are not to be disclosed. See Colonial Penn Insurance Company V. Blair, 380 So.2d 1305 (Fla. 5th DCA 1980). Such a procedure violates the attorney-client privilege and Rule 4-1.6, Rules of Professional Conduct.

There is plainly no such requirement under Anders or McCoy and simply no need to require this disclosure in an Anders brief. Instead such a requirement places an additional burden on an appellate public defender, both in terms of ethics and his already over-extended work load.

> We are convinced that [indigent defendants] receive [effective assistance of counsel] when one attorney, in exercising professional competence and judgment, determines that there are no non-frivolous issues to raise on appeal. That is, in fact, the same exercise of judgment that takes place when an attorney finds one

> arguable issue to raise and there are no other non-frivolous issues presented by the case; we see no constitutional distinction between those situations.

State v. Horine, 669 P.2d 797, 805 (Ore. 1983) (first emphasis added; footnote omitted). See also Jones v. Barnes, 463 U.S. 745 (1983). Appellate public defenders, experienced in handling the vagaries of appellate practice, including preservation of issues, harmless and invited error, and waiver, are more likely to realistically and accurately see issues in terms of whether or not they are frivolous (see Jones v. Barnes, 463 U.S. at 751), while trial attorneys often view the issues with the passion stirred in their breasts from the heat of battle at trial. (See Brief of Respondent, pp. 12-13.) As recently stated by Judge Barfield:

> [T]he language of Forrester is . . . in my judgment, wholly unreasonable and unworkable. Forrester seem to call for nothing short of capitulation by either the trial counsel or the appellate counsel as to the merits of the trial lawyer's position on the record. While some trial lawyers may confess to being frivolous on the record below, it is doubtful that this will often occur. . . . To propel the language of that opinion into standards for all Anders cases simply clogs the appellate process unnecessarily. There are adequate safeguards already existing for the Anders review. State v. State v. Causey, 503 So.2d 321 (Fla. 1987).

Carter v. State, supra, slip opinion at 4 (Barfield, J., dissenting).

Adequate safeguards do already exist in the state appellate process and no abuse of the Anders procedure has been

shown by the first district. The Attorney General has agreed with the petitioner that no widespread problem exists in this state's Anders procedure. (See Brief of Respondent, pp. 5, 15 19) The requirement of Anders v. California, concerning the type of brief to be filed (not one in which the attorney must argue the case for the state) and the independent review of the record by the appellate court pursuant to State v. Causey, assure the indigent defendant that his case receives careful review sufficient to meet state and federal constitutional standards. Should the appellate court or the defendant find the representations of appellate counsel lacking in its professional standards, then other adequate remedies are available to correct that isolated problem. (See Brief of Respondent, pp. 5-6, 15, 17-18.) Until any of the isolated problems become widespread, there is no need to tamper with the Anders procedure and cause considerable mischief to the appellate system and an unnecessary burden on our appellate advocates.

Accordingly, the Florida Public Defender Association urges this Court to reject as unnecessary and unconstitutional the procedures set forth by the first district court in Forrester v. State, supra. In so doing, the Court should reaffirm the principles of Anders v. California and State v. Causey and thereby assure indigent appellants the effective assistance of appellate counsel, free from any requirement to argue the case against the client.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, Amicus Curiae, the Florida Public Defender Association, Inc., respectfully requests that this Honorable Court quash the opinion of the District Court of Appeal, First District, in the above-styled cause.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

for P. Douglas Brinkmeyer

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DEFENDERS ASSOCIATION, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida **32399-1050**, and to Michael E. Allen, Public Defender and David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, **301** South Monroe Street, Tallahassee, Florida **32301**, this 23 day of October, **1989**.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER