O/a 11-6 89

IN THE SUPREME COURT OF FLORIDA



KENNETH A. FORRESTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. **74,166**

---

PETITIONER'S AMENDED BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #271543
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA **32301**
**(904) 488-2458**

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

## TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)



CONSTITUTIONS AND STATUTES



OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

KENNETH A. FORRESTER,

Petitioner,

v. CASE NO. **74,166**

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S AMENDED BRIEF ON THE MERITS

## I STATEMENT OF THE CASE

An information filed in the circuit court for Okaloosa on August **12, 1987** charged Kenneth Forrester with the possession of less than **20** grams of marijuana and the possession of cocaine (R **1-2).** Forrester later filed a Motion to Suppress (R **3-7)** which the court, after hearing evidence and argument on the matter, denied (R **8-9).**

Forrester then pled nolo contendere to the charges, specifically reserving his right to appeal the trial court's order denying his Motion to Suppress (R **23).** The court adjudged him guilty of those offenses and placed him on three years probation for the possession of cocaine offense and one year probation for the marijuana offense (R **28).** The terms of the probation were to run concurrently with one another (R **28).**

Forrester filed a timely appeal. After reviewing the case, Forester's appellate counsel filed a brief complying with what he thought were the dictates of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

In an order dated January 18, 1989 the First District Court of Appeal ordered Appellate counsel to brief the issue of whether, "in the context of a non-consensual, warrantless search, a canine alert, without more, constitutes probable cause." (Appendix A) Appellate counsel, in response, filed a "Motion to Clarify or Appoint Other Counsel" on January 20, 1989. (Appendix B) In that motion, appellate counsel asked the First District to clarify what it wanted him to file. He explained the perceived ethical problems he thought he would have if he complied with this court's order. Specifically, he believed that if he complied with what he thought the court wanted, he would be forced to prepare a brief that went against the best interests of his client.

In an opinion dated April 28, 1989 the court clarified what it wanted appellate counsel to do to comply with what it believed were the dictates of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). (Appendix C) Specifically, on page 8 of its opinion, the First District said appellate counsel must talk with trial counsel about the merits of the appeal, and trial counsel must agree with appellate

counsel's evaluation of the frivolousness of the case. If trial counsel does not agree, then appellate counsel must

> include ...a satisfactory explanation of why such concurrence could not be obtained. We consider it essential that an Anders brief which contains a representation that the appeal is wholly frivolous or without merit shall contain also the above representation of appellate counsel's having communicated with trial counsel.

(emphasis in opinion.)

Upon a timely petition to this court, this court granted review of the First District's opinion.

## II STATEMENT OF THE FACTS

Deputy Johnson of the Okaloosa County Sheriff's office went to the Scampi Restaurant in Okaloosa County on October 27, 1987 because someone had reported some criminal mischief afoot (R 4). When he got there, the person who had reported the incident said that someone had scratched his car, but he did not want the incident reported (R 37). He went on to say that he believed Forrester had drugs in his car which was parked in the restaurant parking lot (R 34). Officer Johnson called Deputy Davis, who came to the restaurant with his "K-9 dog, Brutus" (R 4).[1] Davis walked the dog around several cars, and it alerted to the presence of drugs in Forrester's car and another car (R 5).

Forrester was in the kitchen of the restaurant cooking or preparing food (R 36), and Deputy Johnson went in and asked him to step outside and stand by his car (R 36, 39).

Deputy Davis asked Forrester to open his car, which he did (R 40). The two officers then searched the car and found the cocaine and marijuana (R 40-41, 47).

---

[1] The Dog Handler, Herman Davis, had been trained in dog handling and trained in narcotics detection (R 43). The Okaloosa County Court system had also certified Brutus (R 43).

## III SUMMARY OF THE ARGUMENT

The First District's unique requirements for appellate counsel to follow when he has decided to file an Anders brief are not required by law, and they force counsel to violate several ethical considerations. The guiding rationale of Anders v. California, 386 US 738, 87 S.Ct 1396, 18 L.Ed.2d 493 (1967) is that counsel remain an advocated for his client even when the only issues appellate counsel can raise are frivolous. The First District and the recent U.S. Supreme Court decisions have lost sight of that justification for the Anders Brief. This court should not approve a unique solution to a problem the adversarial system has already solved.

The First District's approach also forces counsel to violate his ethical duty of loyalty, zealousness and confidentiality. The appellant can only wonder who appellate counsel is representing when his lawyer is telling the appellate court that trial and appellate counsel agree the case is frivolous, or appellate counsel is explaining "satisfactorily" why the case is without merit.

## IV ARGUMENT

### ISSUE PRESENTED

THE FIRST DISTRICT'S REQUIREMENT THAT APPELLATE COUNSEL TELL THE COURT THE RESULT OF CONVERSATIONS WITH THE TRIAL LAWYER REGARDING THE MERIT OR LACK OF MERIT OF ISSUES HE PLANS TO RAISE ON APPEAL VIOLATES FORRESTER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND IT ALSO FORCES APPELLATE COUNSEL TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT.

The First District Court of Appeal's order in this case forces appellate counsel, in essence, to tell the appellate court why his client should lose. It also forces appellate counsel to violate several sections of Florida's Rules of Professional Conduct. If this were necessary for justice to prevail, appellate counsel would not have come to this court. But it is not. The First District has created an unnecessary mechanism to solve a problem that the adversarial system has already solved.

As mentioned in the Statement of the Case, the objectionable portion of the First District's opinion focuses upon the actions appellate counsel must take if he has decided the appeal is without merit. Specifically, on page ***8*** of its opinion, the First District said appellate counsel must talk with trial counsel about the merits of the appeal, and trial counsel must agree with appellate counsel's evaluation of the

frivolousness of the case. If trial counsel does not agree, then appellate counsel must

> include ...a satisfactory explanation of why such concurrence could not be obtained. We consider it essential that an Anders brief which contains a representation that the appeal is wholly frivolous or without merit shall contain also the above representation of appellate counsel's having communicated with trial counsel.

(emphasis in opinion.)

Yet that requirement creates significant legal and ethical problems for appellate counsel who already faces a serious ethical crisis. Despite its legal overtones, the frivolous brief is essentially an ethical problem. It is the most difficult recurring ethical problem appellate counsel in a criminal case faces.[2] The problem arises when appellate counsel's ethical obligation to zealously represent his client clashes with his duty to not pursue frivolous appeals. A series of U.S. Supreme Court cases has sought to resolve this dilemma, but in the effort it has lost sight of the role appellate counsel plays in the adversarial system. This court need not and should not follow all that the Supreme Court has said in this area of the law.

---

[2] A frivolous argument is one "which cannot conceivably persuade the court." United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985).

Anders v. California.

Anders v. California, **386** U.S. **738, 87** S.Ct. **1396, 18** L.Ed.2d **493 (1967)** is the leading case in this area. In that case, appellate counsel had written a letter to the court that had appointed him telling it that Anders' case had no merit. It also said Anders wanted to file his own brief which he did after the court refused to appoint another lawyer for him. The appellate court subsequently affirmed his conviction.

When the U.S. Supreme Court reviewed the case, it rejected the no merit letter as being sufficient to discharge appellate counsel's Sixth Amendment obligations to Anders. The foundation for this conclusion arose from cases such as Gideon v. Wainwright, **372** U.S. **335, 83** S.Ct. 792, **18** L.Ed.2d **799 (1963)** where the court said the assistance of counsel is not a luxury but a necessity, and "such representation must be in the role of an advocate....rather than as amicus curiae." Id. at **741.** (cite omitted.)

In place of the no merit letter, the court created what became know as the Anders' brief.

> Of course, 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 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. 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.

Even when counsel can find nothing to raise on appeal, he remains an advocate by pointing out to the court anything that might conceivably be reversible error. Of course, what he shows the court may not be error, but he has done his best to represent the interests of his client even though the appeal is frivolous.

The Anders brief does not present appointed counsel at his most brilliant best, but he has done all that the law and ethics allow. He has remained an advocate for his indigent client. If he becomes an amicus for the court and tells them why his client's case lacks merit, his client is denied his constitutional right to effective assistance of counsel. The person who advocates his cause is now working to defeat him. If he says nothing, he has likewise not done his most to effectively represent his client. The balance struck in Anders forces defense counsel to walk a fine line between doing nothing and doing too much. Two cases from the federal courts show the pitfalls of going too far in either direction.

Lower court reaction to Anders.

In United States v. Blackwell, 767 F.2d 1486 (11th Cir. 1985) counsel moved to withdraw from the appeal because it was frivolous. The brief contained eight pages of excerpted trial

testimony and the Anders' requirements. It also contained a statement that Blackwell's attorney could find no arguable issues.

On appeal to the Eleventh Circuit, the court directed defense counsel to file another brief pointing to any "irregularities which may arguably give rise to appellate grounds." Id. at 1488. In Blackwell, appointed counsel had not done enough to effectively represent his client.

In Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987), appellate counsel filed a 16 page brief, and for seven of those pages counsel "openly supported the trial court's various rulings with case citations and counsel's own opinions." Id. at 1085. The Eighth Circuit disapproved of appellate counsel's treatment of the issues: "Counsel changed the adversarial process into an inquisitorial one by joining the forces of the state and working against his client. Id. Accord, Smith v. United States, 384 F.2d 649, 650 (8th Cir. 1967) ("The cause of advocacy is not served to read a brief filed by appellant's own counsel asserting the government's position in the case.")

At the state level, this court and the other appellate courts in Florida have followed the procedure generally outlined in Anders. e.g. Cooke v. State, 519 So.2d 31 (Fla. 2d DCA 1988); Rodriquez v. State, 483 So.2d 557 (Fla. 3d DCA 1986); Davis v. State, 515 So.2d 426 (Fla. 4th DCA 1987); Hippensteel v. State, 525 So.2d 1027 (Fla. 5th DCA 1988). None has even remotely suggested appellate counsel follow the procedure

announced by the First District in this case.[3] This court in State v. Causey, 503 So.2d 321 (Fla. 1987) has also abided the Anders procedure when it told the First District that Anders required the appellate court to review the entire record. The First District in Causey, said Anders did not require such review. Causey v. State, 484 So.2d 1263 (Fla. 1st DCA 1986).

Recent U.S. Supreme Court Decisions.

The Supreme Court redefined the purpose of the Anders brief when it next considered frivolous criminal appeals. In McCoy v. Court of Appeals of Wisconsin, 486 U.S. __, 108 S.Ct. __, 100 L.Ed.2d 440 (1988), the court approved a Wisconsin statute which required counsel to explain why his client's case was frivolous or lacked merit. Id. 100 L.Ed.2d at 454. Such a requirement did not violate McCoy's Sixth Amendment right to effective assistance of counsel because if counsel has admitted his client's case is frivolous, the client is not hurt if his lawyer explains why it is frivolous. Id. at 456. Instead of

---

[3]The closest any court has come to the First District's approach was the Fifth District in Folds v. State, __ So.2d __, (Fla. 5th DCA February 2, 1989), 14 FLW 356. In that case appellate counsel wanted to supplement the record on appeal with the trial transcript to make sure no reversible error had occurred at trial. Trial counsel had filed a notice of appeal relating only to the sentencing. Denying appellate counsel's motion to supplement, the Fifth District said, "This rule [Rule 9.140(d) Fla.R.App.P.] places primary responsibility on the trial counsel, not separate appellate counsel, to select the appropriate appellate issues and specifically limits its the transcript to that which is necessary to support those issues."

emphasizing the need to maintain the advocate's role, the court defined the Anders' brief as a "device for assuring that the constitutional rights of indigent defendants are scrupulously honored." Id. at 456. Instead of viewing the requirement to tell the court why a case is frivolous as a denial of a defendant's Sixth Amendment right to effective counsel, the court saw it as an additional "safeguard against mistaken conclusions by counsel that the strongest arguments he or she can find are frivolous." Id. at 456. "Counsel may discover previously unrecognized aspects of the law in the process of preparing a written explanation for his or her conclusion." Id.

That is a circular justification. If counsel had found such "unrecognized aspects of the law" he would not have filed the Anders brief. He would have argued the issue on the merits. Now counsel must shed his role as an advocate for the defendant and become an advocate for the state. Instead of advocating anything that might conceivably be arguable, counsel must justify his decision to file a no merit brief.

Penson v. Ohio, 488 U.S. __, 109 S.Ct. __, 102 L.Ed.2d 300 (1988) is the latest case dealing with the Anders problem. In that case, defense counsel on appeal had filed a no-merit letter similar to the one filed in Anders. The court allowed counsel to withdraw from representing Penson, but it later granted Penson partial relief from several of his convictions without requiring any briefs from Penson or the State. Penson had suffered no prejudice, the State court said, because the appellate court had thoroughly examined the record, and it had

received the benefit of the arguments in briefs filed by Penson's co-defendants.

The Supreme Court said the Ohio court erred in not requiring an Anders' brief.

> The so-called "Anders brief" serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation.

Id. 102 L.Ed.2d at 309-310.

The significant error, however, was that the court had not appointed new counsel to represent Penson once the court found arguable claims. Id. Judges judge, they do not argue.

The Supreme Court did not say the court had erred in simply not appointing counsel. Instead, it suggested the court had erred in not appointing **new**, meaning different, counsel to represent Penson.[4]

The court in Penson and more so in McCoy redefined the purpose of the Anders brief. Rather than being the strongest argument an advocate can make in a frivolous case, as the court in Anders intended, the brief now becomes a tool to convince the court that counsel has reviewed the case and found it frivolous. The brief is not so much an advocacy of the defendant's case as it is a tool for the court to use to conclude

---

[4] Whether the Sixth Amendment requires different counsel to represent Penson on appeal is unclear from the court's opinion, but for ethical reasons, the court should have appointed another lawyer to argue Penson's meritorious issues.

the case is frivolous. Thus, the court's conclusion in McCoy logically follows. What could be of more assistance to the court in determining the frivolousness of a case than an explanation, from defense counsel, of why the case lacks merit?

While the Sixth Amendment may countenance appellate counsel briefing the case against his client, this court need not follow the Supreme Court's lead in McCoy, and it should not. Instead, according to an accused person's right to the assistance of counsel guaranteed under Article I Section 16 of the Florida Constitution, this court should let appellate counsel retain his adversary role, and maintain the confidence of his client that counsel will represent him, and not justify his legal position.

The First District's unique procedure[5] evidently springs from its desire to insure that appellate counsel has not overlooked an arguable issue. Trial counsel presumably filed the notice of appeal in good faith that some reversible issue occurred at trial. Thus, common sense dictates that he would be the natural one to talk to about the frivolousness of the

---

[5]No court outside of Florida has adopted the procedure the First District has created. People v. Wende, 600 P.2d 1071 (Calif. 1979); State v. Horine, 669 P.2d 797 (Or. 1983); Commonwealth v. Moffett, 418 N.E. 2d 585 (Mass. 1981); State v. Gates, 466 S.W.2d 681 (Mo. 1971); Dixon v. State, 284 N.E.2d 102 (Ind. 1972); Huguley v. State, 324 S.E.2d 279 (Ga. 1985); Killingsworth v. State, 490 So.2d 849 (Miss. 1986). See also IV ABA Standards for Criminal Justice (2d Ed. 1980), Standard 21-3.2.

issue. He may be able to give appellate counsel some insight into the case that is not readily apparent on the record.

Like the Supreme Court in McCoy, the First District has ignored appellate counsel's role as an advocate in favor of one who helps the court in making sure the case is frivolous. The First District does not realize that the Anders brief is an advocates' brief. The underlying philosophy of Anders is that appellate counsel can never relinquish his role as an advocate. Of course, he may have admitted the issues he raised are frivolous, but he has said that to satisfy his ethical obligations. That confession, however, can in no way qualify or limit his role as an advocate. For appellate counsel to do less undermines the justifications for the adversarial system. Thus, the Anders brief cannot assist the court "in reaching the critical determination that an appeal may be concluded without an adversary presentation." Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989), slip opinion at 9.

Moreover, appellate counsel does not understand how knowing whether trial and appellate counsel agree or not that the case is frivolous helps the court decide the issue is frivolous. After all, as the Supreme Court said in Anders and other cases, courts and not counsel determine whether a case is frivolous. But the First District's order accomplishes the opposite of this by ordering counsel to tell them either why the case has no merit or that everyone agrees it has no merit. Instead of one no-merit letter, it gets two, or if there is no

agreement, it gets a "satisfactory" explanation why the defendant should lose.

If the defendant's two lawyers agree the case is frivolous, it means appellate counsel has convinced trial counsel that the issues he thought were meritorious were not. But such unanimity can only tend to reduce the appellate courts sense of concern that a meritorious issue has been overlooked. That is, the appellate court must conduct "a full examination of all the proceedings, to decide whether the case is wholly frivolous. Anders, at 744. State v. Causey, 503 So.2d 321 (Fla. 1987). If the two advocates for the defendant agree his case has no merit, the natural tendency for a reviewing court is to relax its vigilance.

On the other hand, if counsel disagree, then appellate counsel has to satisfactorily explain the reason for the discrepancy. Forrester, slip opinion at p. 8. Requiring this explanation amounts to telling the court why the defendant should lose. Appellate counsels' explanation, more so than the explanation required by the Wisconsin statute, requires appellate counsel to actively, and extensively if necessary, explain why his client should lose.[6]

---

[6]The Wisconsin Supreme interpreted its rule as more in the nature of putting the court on "notice" regarding the non-meritorious nature of the case. It explicitly said that counsel need not "engage in a protracted argument in favor of the conclusion reached." McCoy at 100 L.Ed.2d 449 quoting from McCoy v. State, 403 NW2d 454 (Wis. 1987). The First District (Footnote Continued)

But defense counsel is ill suited to explain why his client should lose. His natural inclination is to defend his client, to present the strongest case for him. The Anders brief counsel filed in this case, even though it did not meet the First District's standards, was a painful experience. Admitting defeat is never easy, and the Anders brief at least lets counsel maintain his position as an advocate, although as one who can only stand by and watch his client lose.

The Wisconsin approach, and the one adopted by the First District, forces defense counsel to join the hunt and participate in the kill. Such conduct by defense counsel not only destroys whatever confidence the defendant had in appellate counsel, it weakens his confidence in our adversarial system.[7] In such an instance, the defendant can only conclude that counsel is not representing him. Instead he is justifying his decision to an appellate court. How much trust in a system of justice can an indigent defendant have when his advocate becomes his executioner?

---

(Footnote Continued)
has extended Forrester in at least one case so that defense counsel has to tell the court why a case should be affirmed (Appendix D).

[7] The Supreme Court in Polk County v. Dodson, 454 U.S. 312, 324, 102 S.Ct 445, 709 L.Ed.2d 509 (1981) acknowledged that Public Defenders faced with filing an Anders brief may be seen as "hostile state actors'' by the defendants they represent. While they said this view was unfortunate and had little justification, the reality is that defendants have that perception. Such perceptions, whether justified or not, can only weaken the confidence those accused of crime have in the justness of the criminal justice system.

No, the best party to present the case why the defendant should lose is the State. After all, that is the party whose eyes glint, whose lips snarl, and whose hand tightens on the sword at the mention of reversible error. They are the ones who are best suited to support defense counsel's conclusion the case has no merit.

In short, the Wisconsin statute and the First District approach have created a solution for a non-existent problem. This court should maintain the adversarial nature of the appeal. Let Defense counsel make his weak or nonexistent arguments as required by Anders but require the State to come forward with the citations and the arguments why the defendant should lose. This court should not require defense counsel to abandon his normal adversarial role and adopt an amicus position at best and an antagonistic role against his client at worst. Perverting the adversarial system, especially when it is unnecessary, and creating distrust in that system are the inevitable results of the First Districts solution. The better approach maintains, to the greatest extent possible, the traditional roles of the parties.

## THE ETHICAL CONSIDERATIONS

Other elusive, yet real considerations support this conclusion. The Anders brief is at heart an ethical problem, and the U.S. Supreme Court elevated the ethical considerations presented by the frivolous appeal to constitutional level in

Anders. It ignored them in McCoy, yet this court, as a matter of state law and ethics, should not.

When counsel has decided to file an Anders brief, he has decided that, in his judgment, the case is frivolous. Requiring him to convince the trial lawyer he is correct, or explaining to the satisfaction of the appellate court why he is correct, forces appellate counsel to justify his decision at the expense of his client's best interests. He has an ego interest in presenting to the appellate court the strongest case why his client should lose, why the appeal is frivolous, and why the trial counsel should not have appealed the case. He should not be placed in a position where his loyalty is so divided. Rule 4-1.7, Rules of Professional Conduct. ("A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's...own interest").

Besides creating a conflict of interests, the First District's order has forced appellate counsel to ignore his duty of loyalty to his client. Whether counsel is appointed or retained, he owes his client his undivided loyalty. Rule 4-1.7, Rules of Professional Conduct. ("Loyalty is an essential element in the lawyer's relationship to a client.") By undivided, it is meant that he has no conflict with representing other clients, but more pertinent to this case, his loyalty is not questioned because of some conflict the lawyer may personally have with the client.

The United States Supreme Court has recognized the need for professional independence or loyalty of state employed Public Defenders:

> His [the Public Defender's] principle responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation.

Ferri v. Ackerman, 444 US 193, 204 100 S.Ct. 402, 62 L.Ed.2d 355 (1979)(emphasis supplied): Polk County v. Dodson, 454 US 312, 319, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981): State ex. rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1983).

This duty of loyalty does not mean defense counsel has to always agree with his client or other defense counsel on the issues to raise or their merit. But what happens behind closed doors generally stays there. Once the attorney stands before the court, he represents his client and no one else. To force him to reveal what went on behind those closed doors, although perhaps nice to know, does more damage to a client's trust in his lawyer's loyalty than it advances the cause of justice.

As a necessary corollary to this duty of loyalty the lawyer should zealously represent his client. Preamble to Chapter 4, Rules of Professional Conduct. Within the bounds of the law and ethics, he should present the best case for his client with as much vigor as he can muster. That ardor diminishes considerably when counsel must argue with trial counsel, his supposed ally, and then justify to the court a position that his client must lose.

Of course, a lawyer is also an officer of the court. $454.11 Fla. Stats. (1988); Petition of Florida State Bar Ass'n 40 So.2d 902 (Fla. 1949), and in that capacity he has the duty to assist the court in the administration of the law. Olive v. State, 131 Fla. 548, 179 So. 811 (1938). That duty prevents him from arguing issues which are frivolous or without merit.

But what happens when appointed counsel has no meritorious or arguable issues to present to a reviewing court? The defendant still has the Sixth Amendment right to counsel, yet counsel cannot present frivolous issues. There lies the ethical dilemma.

The U.S. Supreme Court resolved it in favor of maintaining the Sixth Amendment right to effective assistance of counsel. The First District's requirements force appellate counsel to abandon his advocacy role and brief his case against his client. To do that he must divulge matters covered by the attorney-client privilege. Rule 4-1.6, Rules of Professional Conduct. That is, it forces him to disclose discussions he had with the defendant's trial counsel. Such discussions, because they concern the defendant's case and the merits of the issues, come within the work product doctrine and should not be disclosed. Colonial Penn Insurance Company v. Blair, 380 So.2d 1305 (Fla. 5th DCA 1980) ("To bring something within the 'work-product' ambit, there must be some indication of personal thought, views, knowledge, or evaluation by the attorney, litigant, or agent.")

Here the First District has apparently determined that a meritorious issue exists because it has ordered counsel to brief the issue of whether "In applying a totality of the circumstances test...[there was] probably cause for the officers to conduct a warrantless search of appellant's automobile." Forrester, slip opinion at 9. But counsel has already told the court that the issue, as far as he is concerned, has no merit. He can do no more and retain his adversarial position as permitted by Anders.

Thus, what procedure should the courts and counsel follow when defense counsel files an Anders brief? When defense counsel files an Anders' brief, it should, as Anders requires, "refer[] to anything in the record that might arguably support the appeal." Anders at 744. Counsel should then forward a copy of the brief to the defendant so he can raise any point he thinks should be argued.

The State, upon receiving counsel and the defendant's brief should respond in the traditional manner.

The court, upon reviewing all the briefs can then determine if the issues raised are frivolous. If so, it should allow defense counsel to withdraw. If not, it should appoint another counsel to represent the defendant and brief the meritorious issue either it or the prosecution has identified. Penson.

Such a procedure maintains the integrity of the adversarial system, and it allows the attorney to retain the trust of

of his client. Adopting the First District's procedure creates more problems than it solves.

This court should quash the First District's order.

## CONCLUSION

Based upon the arguments presented here, Forrester respectfully asks this Honorable Court to quash the First District's order dated 28 April 1989. If the First District wants the issue it identified in its order of 18 January 1989 briefed, it should appoint other counsel.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS #271543
Assistant Public Defender
Leon County Courthouse
Fourth Floor North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Virlindia A. Sample, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Mr. Kenneth A. Forrester, c/o Buford Forrester, Post Office Box 207, Cowarts, Alabama on this 28 day of August, 1989.

DAVID A. DAVIS