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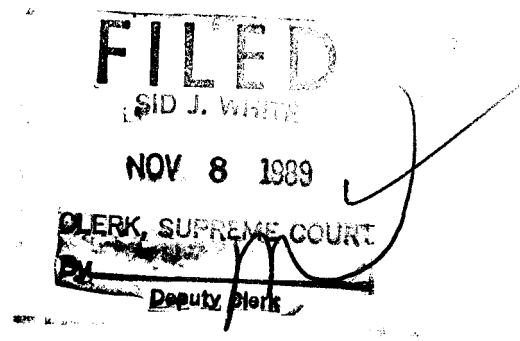
IN THE SUPREME COURT OF FLORIDA

IN RE: ORDER OF THE FIRST DISTRICT COURT OF APPEAL REGARDING BRIEF FILED IN MCDONALD V. STATE.

CASE NO. **74,537**



PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

IN RE: ORDER OF THE FIRST DISTRICT COURT OF APPEAL REGARDING BRIEF FILED IN MCDONALD V. STATE. : CASE NO. 74,537

PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

James McDonald was the defendant in the trial court, and appellant before the District Court of Appeal, First District. He will be referred to in this brief as petitioner. Reference to the record on appeal will be by use of the symbol "R" followed by the appropriate page number in parentheses.

11. STATEMENT OF THE CASE AND FACTS

On May 13, **1988,** an information containing ten charges was filed against petitioner for various offenses occurring April 22, **1988.** Count III alleged that petitioner committed aggravated assault with a **.38** pistol upon Trooper Chris Roper. Count IV alleged that petitioner resisted Trooper Roper with violence. Count VI charged that petitioner was in possession of more than 20 grams of cannabis. Count IX alleged that petitioner, having been previously convicted of a felony, was in possession of a pistol. Count X alleged that petitioner was in possession of between 200 grams and **400** grams of cocaine (R-1-4).

Petitioner entered a no contest plea to the above-described charges in exchange for a guidelines sentence, and in exchange for the state's promise to drop the other counts of the information (R-22-24).

The guidelines called for a sentencing range of 12 to 17 years incarceration. Petitioner was adjudged guilty of all charges. For Count X, possession of cocaine, petitioner was sentenced to 14 years in prison, with a five year mandatory minimum and $100,000.00 fine. For Count 111, aggravated assault, petitioner was sentenced to three years in prison with a mandatory three year minimum, to be served consecutively to the sentence imposed on Count X. For Counts IV and VI, resisting arrest with violence and possession of marijuana, petitioner was sentenced to two, five year terms of imprisonment, to be served concurrently with Count X. For

Count IX, possession of a firearm by a convicted felon, petitioner was sentenced to ten years, to be served concurrently with the sentence imposed for Count X (R-7-14).

Notice of taking an appeal to the District Court of Appeal, First District, was timely filed (R-15), petitioner was adjudged insolvent (R-18), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

In the district court, the undersigned appointed counsel filed, on April 6, 1989, a brief pursuant to Anders **v.** California, 386 U.S. 738 (1967), which provided as follows:

> The statement of judicial acts to be reviewed questions the legality of "stacking" the minimum mandatory sentence of three years for use of a pistol in an aggravated assault, with the five year mandatory minimum for trafficking by possession of between 200 and **400** grams of cocaine, for a total of eight years (R-21).
>
> In Palmer v. State, 438 So.2d 1 (Fla. 1983), the defendant was convicted of thirteen robberies occurring during a single transaction. The trial court had "stacked" the three year mandatory minimum sentences for a total of 39 years. On review to the Supreme Court of Florida, the Court held that it was error to have imposed the consecutive mandatory terms. In doing so, the Court noted that "Palmer...was sentenced to thirty-nine years, without eligibility for parole, based on a statute expressly authorizing denial of eligibility for parole for only three years." 438 So.2d at 3.
>
> Palmer, then, suggests that the trial court here erred in stacking the mandatory minimum sentences. However, since the legislature provided for a mandatory term in the trafficking statute, and separately provided for a mandatory term where firearms are used to commit certain offenses here, unlike Palmer, there are separate and distinct legislative authorizations for the two mandatory terms imposed here.
>
> Appellant [sic] sentences fall within the limitations authorized by statute, the guidelines, and the plea agreement. Based upon

> the foregoing considerations, this brief is being filed pursuant to Anders v. California, 386 U.S. 738 (1967). It is respectfully requested that appellant be given a reasonable length of time within which to file a brief in proper person if he so chooses, raising any issue which he deems worthy of the consideration of the Court. A motion to effectuate this request is being filed with this brief.

On July 6, 1989, the district court issued an order providing, in pertinent part, as follows:

> Pursuant to Smith v. State, 496 So.2d 971 (Fla. 1st DCA 1986), and Forrester v. State, 14 FLW 1064 (Fla. 1st DCA Apr. 28, 1989), the assistant public defender is directed to brief more fully the statement made in the initial brief that "since the legislature provided for a mandatory term in the trafficking statute, and separately provided for a mandatory term where firearms are used to commit certain offenses here, unlike Palmer, there are separate and distinct legislative authorizations for the two mandatory terms imposed here," including citations to support such argument. Additionally the assistant public defender is directed to address whether the "stacked" mandatory minimum sentences might otherwise be affirmable under Palmer insofar as the underlying offenses were separate and distinct offenses.

On June 14, 1989, the undersigned filed a Motion to Appoint New Counsel Or To Stay Proceedings. In that pleading, the undersigned contended that the requirements that the undersigned brief the Palmer issue "more fully", that the requested brief include "citations to support such argument," and that the undersigned inform the district court why the defendant's sentences "might be otherwise affirmable" collectively amount to a directive that the undersigned file a brief against his own client, notwithstanding that Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989) indicates otherwise.

And since the undersigned had already expressed the view that the mandatory terms imposed in petitioner's case are legal, the undersigned maintained that Penson v. Ohio, 488 U.S. ___, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988), requires that other counsel be appointed to represent petitioner.

By order dated August 1, 1989, the Motion To Appoint New Counsel Or to Stay Proceedings was denied.

On August 3, 1989, the undersigned timely filed a Notice To Invoke Discretionary Jurisdiction. By order dated October 23, 1989, this Court entered an order accepting jurisdiction.

III. SUMMARY OF ARGUMENT

The district court'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. The order under review that was issued in Mr. McDonald's case clearly so requires. 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. The procedure causes appointed counsel to violate accepted norms of professional conduct.

IV. ARGUMENT

THE ORDER ENTERED BY THE DISTRICT COURT IN McDONALD V. STATE MUST BE QUASHED AS 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. IN THE SUPREME COURT OF FLORIDA.

The order in this case, as well as the opinion 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, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The district court's construction of "hoops" through which counsel must jump totally deprives an appellant of counsel in his behalf, requiring counsel to join forces with the state and argue against the client's interests.

In Anders, 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 amicus curiae, and would not force the court-appointed

lawyer to "brief his case against his client." Id. at 745.[1] 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, exhibiting a lack of understanding of the Anders process and the quandary into which a court-appointed appellate attorney is placed when, after a conscientious examination of the record and a detailed research of the applicable law, he or she determines that the appeal is frivolous. The Anders decision carefully weighed the defendant's right to counsel on appeal against counsel's ethical obligations not to present frivolous arguments to the tribunal. In creating the Anders brief format announced in that decision, the Court struck a delicate balance between the two often-times conflicting duties. Counsel maintains his advocacy (as much as possible under the circumstances) for his client, yet discharges his ethical duties to the court. To require additional

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[1] However, the fears expressed by Justice Stewart in his dissent in Anders appear to have been borne out in forrester. Justice Stewart noted that the Anders opinion implied some degree of intellectual or ethical dishonesty in indigent appellate counsel. Anders v. California, 386 U.S. at 747. (Stewart, J., dissenting). This implication was made expressly in Forrester by the First District and the undersigned strongly resents the allegation that the has ever performed his duties in any manner besides ethically, honestly, and dilligently. Indeed, as Justice Stewart stated, "if the record did present any such 'arguable' issues, the appeal would not be frivolous and counsel would not have filed a 'no merit' letter in the first place." Id. at 746. (footnote omitted) (Stewart, J., dissenting).

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), cert. denied, __, U.S. __, 109 S.Ct. 541 (1988).

The district court here, and 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, 542 So.2d 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, 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 nor 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, 503 So.2d at 322-23. See Anders v. California, 386 U.S. at 744; Penson v. Ohio, 488 U.S. ___, 109 S.Ct. 346, 102 L.Ed. 300, 310 (1988). Once the Anders brief is filed, as it was here, detailing the record and noting the potential issues on appeal, 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, 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. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440, 463 n.3 (1988) (Brennen, 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 order in this case that the court has not undertaken that independent review prior to its request for an additional brief; rather the opinion in

Forrester clearly shows that it wants the appellant's attorney to take an active part in that review by briefing the case in detail, against his client if necessary, 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 or 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.

The Forrester court professed that the procedures enunciated in that decision do not require appellate counsel to brief the case against the indigent defendant. That such a claim is wrong is amply illustrated by the facts of the instant case. Prior to Forrester, the district court in Smith v. State, 496 So.2d 971 (Fla. 1st DCA 1986) imposed upon appellate counsel the requirement that an Anders brief discuss each allegation made in the judicial acts to be reviewed filed by trial counsel. The undersigned believes this requirement is fraught with the danger of counsel briefing the case against the client. However, in order to satisfy the Smith decision, the undersigned, in the instant case, included the following conclusory statements as to why the "stacking" of the mandatory minimum sentences did not violate the Court's decision in Palmer:

> [T]he Court noted that "Palmer...was sentenced to thirty-nine years, without eligibility for parole, based on a statute

> expressly authorizing denial of eligibility for parole for only three years." 438 So.2d at 3.
>
> Palmer, then, suggests that the trial court here erred in stacking the mandatory minimum sentences. However, since the legislature provided for a mandatory term in the trafficking statute, and separately provided for a mandatory term where firearms are used to commit certain offenses here, unlike Palmer, there are separate and distinct legislative authorizations for the two mandatory terms imposed here.

Anders brief filed in McDonald, page 4.

The above may very well amount to the undersigned filing a brief against Mr. McDonald. But the reason it was done was because, as noted, it flowed from the requirement of Smith that each judicial act be discussed in an Anders brief. But the district court here was not satisfied. The order under review here, after noting the above statement, required the undersigned to "brief [the "stacking" issue] more fully...including citations to support such argument."

Thus, the district court has seemingly recognized that the Anders brief contains an "argument" that is not in Mr. McDonald's interests, even though it was intended only to satisfy Smith. The Smith requirement having diluted Mr. McDonald's right to advocacy on appeal, the district court here wants to eliminate it entirely by requiring the undersigned to file a new brief that "more fully" describes why Mr. McDonald should lose, "including citations to support such argument."

The order under review in this case, if complied with, will result in a brief like the one justly criticized in Robinson v. Black, supra. And if that were not enough, the order here also requires the undersigned to "address whether

the "stacked" mandatory minimum sentences might otherwise be affirmable under Palmer insofar as the underlying offenses were separate and distinct offenses" (emphasis supplied).

The district court has failed to recognize that the undersigned is not in the business of informing any appellate court why his client's sentences are "affirmable." Rather, the undersigned, in attacking sentences imposed upon his clients, is ethically required to inform the appellate court why his clients sentences are not "affirmable." This does not mean, however, that the judges of the district court are without assistance in determining whether any particular sentence or sentences, including those of Mr. McDonald, are affirmable. The September 1989 edition of The Florida Bar Journal reveals that the District Court of Appeal, First District, has a whopping twenty-six judicial Law Clerks in its employ. Moreover, the Attorney General's Office in this area has ten lawyers handling criminal appeals. Surely, one or more of these thirty-six individuals are able to tell an appellate judge why an indigent criminal defendant's sentences are "otherwise affirmable."

However well intended Forrester may have been, the reality of the situation is that the district court has used Forrester in a manner where the only result would be a brief by the undersigned that advocates a position diametrically opposed to the interests of Mr. McDonald.

A proper reading of the United States Supreme Court Cases since Anders reveals no requirement that appellate counsel

follow the procedure conjured up by the first district in Forrester and this case. Initially, McCoy does not hold, as the first district stated, that Anders requires the procedure outlined in Forrester. Rather, that case 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 that case 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 might have based that conclusion. It does not require, as the Forrester court mandated, that counsel "engage in a protracted argument in favor of the conclusion reached." McCoy, 100 L.Ed.2d at 454, quoting from McCoy v. State, 137 Wis. 90, 403 N.W.2d 449, 454 (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, 542 So.2d at 1361. Such a statement of concurrence does nothing more than require a second "no-merit letter" of the type condemned in Anders. See Carter v. State, 14 FLW 2405 (Fla. 1st DCA October 13, 1989), slip op. at 4 (Barfield, J., dissenting). As stated by Justice Brennen in his dissent in McCoy:

> [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, 323-24 (1981)].

McCoy, 100 L.Ed.2d at 459 (Brennen, J., dissenting).

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 divulge "work product" discussions with trial counsel which should not be disclosed. See Colonial Penn Ins. Co. v. Blair, 380 So.2d 1305 (Fla. 5th DCA 1980).

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 workload.

> 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) (emphasis in original; omitted). See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Appellate public defenders, experienced in handling the quirks of appellate practice, including preservation of issues, harmless or invited error, and waiver, are more likely to realistically and accurately see issues in terms of whether they are frivolous, while trial attorneys often view the issues with the passion stirred by the heat of trial. As recently stated by Judge Barfield:

> [T]he language of Forrester is . . . in my judgment, wholly unreasonable and unworkable. Forrester seems to call for nothing short of capitulation by either the trial counsel or 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 safequards already existing for the Anders review. State v. Causey, 503 **So.2d** 321 (Fla. **1987).**

Carter v. State, supra, **14** FLW at **2406** (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 in Forrester has agreed that no widespread problem exists in this state's Anders procedure. See Brief of Respondent in Forrester, pp. 5, 15, 19. The requirement of Anders, 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 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. 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 undersigned assistant public defender urges this Court to reject as unnecessary and unconstitutional the procedures set forth by the First District Court of Appeal in Forrester, and followed in this case. In so doing, the Court should reaffirm the principles of Anders and Causey and thereby assure indigent appellants the effective assistance of counsel, free from any requirement to argue the case against the client.

V. CONCLUSION

Based upon the foregoing cases, authorities and policies, the undersigned assistant public defender respectfully requests this Honorable Court to quash the order of the First District Court of Appeal in McDonald v. State, 1st DCA Case No. **88-2907.**

Respectfully submitted,

MICHAEL E. ALLEN
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant JAMES MCDONALD, **#058435,** Tomoka Correctional Institution, **3950** Tiger Bay Road, Daytona Beach, Florida, **32014,** on this 8th day of November, **1989.**

CARL S. MCGINNES