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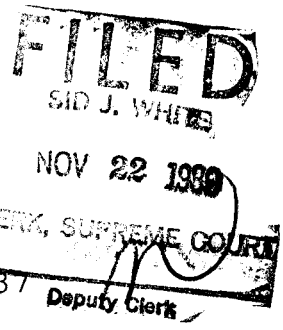

IN THE SUPREME COURT OF FLORIDA

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

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

CASE NO. 74,537

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The state submits this brief in general support of the position taken by petitioner.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Appointed appellate counsel of record should not be required to obtain the concurrence of trial counsel, who is no longer record counsel, before filing an Anders brief.

The expanded Anders procedures adopted by the First District Court of Appeal are unwise and constitutionally suspect.

ARGUMENT

INTRODUCTION

These consolidated cases present essentially the same issue as In Re: Order of First District Court of Appeal Regarding Brief Filed in Kenneth Atwood Forrester.

The State's position remains that taken in Forrester. However, based on the oral argument colloquies of Forrester the state will recast its argument to respond to concerns of the Court and to clarify its position on these concerns. Initially, the state wishes to make clear its view that the expanded Anders [1] procedures established by the First District Court of Appeal present legitimate constitutional and policy problems and that these problems should not be characterized or treated as a refusal of appointed counsel to follow directions of the First District Court of Appeal. This is not, in the state's view, a bar disciplinary problem which can be resolved by simply directing the public defender to file whatever the First District Court of Appeal directs. It is the state's view, for the reasons which follow, that whatever salutary purposes the First District Court of Appeal had in mind in filing the orders and opinions in Smith v. State, 496 So.2d 971 (Fla. 1st DCA 1986), Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989), and in the instant cases, that these opinions and order do not serve the primary and

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[1] Anders v. California, 386 U.S. 738 (1967).

overriding purpose of ensuring that indigent appellants receive effective assistance of counsel.

POINT I

THE REQUIREMENT THAT APPELLATE COUNSEL OBTAIN THE CONCURRENCE OF TRIAL COUNSEL BEFORE FILING AN ANDERS BRIEF SERVES NO POSITIVE PURPOSE AND NEGATIVELY IMPACTS ON THE PROVISION OF EFFECTIVE ASSISTANCE OF COUNSEL.

This point has been well argued by petitioner here and in Forrester and by amicus curiae in Forrester. The state would add that the relationship between the Attorney General and the various state attorneys who prosecute crimes in the trial courts of the state parallels that of the appellate public defender and the trial public defender and is thus instructive.

In prosecuting appeals on behalf of the state, it is the appellate division of the Attorney General's Office which is responsible for determining whether and how an appeal should be prosecuted. It is not the state attorney who represented the state at trial. Because of time constraints and a lack of familiarity with appellate case law state attorneys often file notices of appeal which, upon exam nation of case law and the record on appeal, are not well-founded, i.e., have no merit. Under modern appellate practice there is no assignment of error controlling the disposition of the case. The appointed appellate public defender, like the Attorney General, is responsible for providing effective assistance of appellate counsel to the client. Although the appellate division routinely consults with

the cognizant state attorney before dismissing a state appeal or conceding error, this is done entirely for the purposes of (1) obtaining any special knowledge the state attorney might possess by having tried the case and (2) professional courtesy. There is no suggestion that appellate counsel must obtain the concurrence of trial counsel. Appointed appellate and trial counsel should have the same relationship as the Attorney General and state attorneys. [2]

The state suggests that a notice of appeal and a statement of judicial acts, whatever value the latter may have for purposes of obtaining a record on appeal, have no appreciable significance in determining whether reversible error has occurred. The statement of judicial acts is essentially a wish list consisting of every unf'avorable ruling. It serves only to obtain a record on appeal which can be reviewed by a knowledgable appellate counsel for arguably meritorious issues. It is only after the record on appeal is complete and has been reviewed by a counsel who routinely follows and argues case law that a rational decision can be made on whether reversible error occurred. The state suggests that requiring the concurrence of trial counsel in an Anders brief serves no useful purpose and is constitutionally suspect in that it places a portion of the decision making process on an attorney who is no longer assigned as counsel.

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[2] There is of course no requirement that counsel for the state file an Anders brief, the appeals are voluntarily dismissed.

POINT II

THE EXPANDED ANDERS PROCEDURES ADOPTED BY THE FIRST DISTRICT COURT OF APPEAL IS UNWISE AND CONSTITUTIONALLY SUSPECT.

It is the state's position that the right to counsel under article I, section 16 of the Florida Constitution and the Sixth Amendment to the United States Constitution are congruent. Thus, if Florida wishes, it may, without abrogating the constitutional right to counsel, establish the procedures for Anders briefs which were upheld in McCoy v. Court of Appeals of Wisconsin, 100 L.Ed.2d 440 (1988). However, while McCoy permits such procedures, it does not mandate them. The state suggests that the McCoy procedures are unwise for several reasons. First, the McCoy procedures come very close to requiring an appointed counsel to argue against the client. (See J. Brennan's dissent, joined by Justices Marshall and Blackmun, arguing that they do in fact require such argument.) These procedures present an inherent conflict in appointed counsel. On the one hand counsel wants to represent the client. On the other hand, counsel will have a very human desire to show that his professional judgment of no merit is well-founded and to vigorously defend that professional judgment against challenge by the court before which he practices. Consequently, there is a real danger of overkill in responding to the McCoy procedures. The McCoy procedures may be constitutionally permissible in the abstract but will they be constitutional in the application? The state anticipates that they will not but will, instead, furnish more grist for the

already overloaded post-conviction mill. Second, from a constitutional viewpoint, the McCoy procedures in no way relieve the appellate court of its responsibility to review the record for arguably meritorious issues. Penson v. Ohio, 102 L.Ed.2d 300, 310 (1988) and cases cited therein; State v. Causey, 503 So.2d 321 (Fla. 1987); State v. Davis, 290 So.2d 30 (Fla. 1974). Even more seriously, as in Forrester and the cases at hand, when an appellate court reaches the point where it is identifying specific issues to be argued, as opposed to a general injunction to appointed counsel that a brief does not comply with Anders, it would appear that the court has made a determination that the specified issue(s) is arguably meritorious. If so, and nothing else makes sense, then what is constitutionally required is a brief on behalf of the client. The court no longer has the option of deciding the case without benefit of advocacy.

> Most significantly, the Ohio court erred by failing to appoint new counsel to represent petitioner after it had determined that the record supported "several arguable claims." App 41. As Anders unambiguously provides, "if [the appellate 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. 386 US, at 744, 18 L Ed 2d 493, 87 S Ct 1396; see also McCoy, 486 US, at ____ - _____, 100 L Ed 2d 440, 108 S Ct 1895.

Penson, 102 L.Ed.2d at 310-311. The state recognizes that in Penson the court had previously discharged the Anders counsel and that, conceivably, the requirement for advocacy might have been

satisfied by reappointment of previous counsel as "new" counsel. Pragmatically, however, the state believes that counsel who is on record that there are no meritorious issues is ill-suited to act as an advocate on an overlooked, or rejected, issue which the court rules must be argued. At least in appearance, if not in fact, coercing counsel into arguing an issue(s) does not furnish effective assistance of counsel. Moreover, even if effective assistance is in fact provided, the appearance furnishes more grist for the post conviction mill. The state's, and indeed everyone's interest, is twofold. First, and most important, the effective assistance of counsel to indigents. Second, finality through rules of law or procedures which resolve or obviate issues, not create them.

Anders appeared to draw a distinction between wholly frivolous and without merit under which appellant counsel would file an Anders brief on wholly frivolous issues and a merits brief on issues without merit provided they were not wholly frivolous. This artificial distinction without any realistic difference appears to have been discarded by McCoy as the First District Court of Appeal noted in Forrester: "[t]he terms "without merit" and "wholly frivolous" are used synonymously by the United States Supreme Court [in McCoy]." Forrester, 542 So.2d at 1361, fn. 2. Applying, the more precise "without merit" as the test should give appointed counsel stronger guidance and result in more Anders briefs than were filed under the more nebulous "wholly frivolous" test. The state suggests that the problem facing appellate courts is not that too many Anders

briefs are filed but rather that too few are filed. The First District Court of Appeal's treatment of briefs on the merits in criminal cases suggests de facto that it agrees. For instance, during the period 31 October through 9 November 1989, the First District Court of Appeal issued twenty opinions affirming convictions on direct appeal. Of these twenty affirmances, eighteen were per curiam affirmance without comment. During the same period, two cases were affirmed and three were reversed with opinions. A per curiam affirmance generally indicates that the issues argued by appellant were well settled contrary to appellant's position, involved only the discretion of the trial court or jury, or were not even arguably supported by case law of the state and that writing an opinion refuting the arguments would not have contributed to the jurisprudence of the state. Newmons v. Lake Worth Drainage District, 87 So.2d 49 (Fla. 1956); Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983); Taylor v. Knight, 234 So.2d 156 (Fla. 1st DCA 1970). This high rate of per curiam affirmances in criminal appeals seems to suggest that more not less Anders briefs are in order.

Finally, the approach taken by the First District Court of Appeal, if it becomes the norm, will have one inevitable effect: the death of the Anders brief in Florida. If submitting an Anders brief in good faith results in questions being raised about the professional competence and integrity of the appointed counsel, the lesson will be clear: don't submit Anders briefs, argue some issue no matter how frivolous or non-meritorious. The appellate court can then per curiam affirm based upon a review of

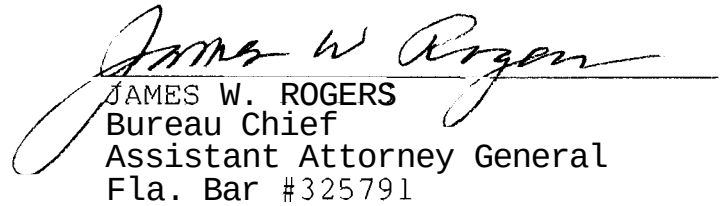
that single non-meritorious issue and the responsibility of providing effective assistance of appointed counsel will be submerged in form, not substance, at least until post conviction remedies are sought. On this last point, the state suggests that if in fact the appointed counsel sees no arguably meritorious issues, the interests of the client are better served by a good faith Anders brief than they are by a coerced non-meritorious issues brief. The reasons are twofold. First, overlooking a meritorious issue by filing an Anders brief meets at least the first prong of Strickland v. Washington, 466 U.S. 668 (1984) and requires only that the client show the extent of the prejudice in a post conviction claim of ineffective assistance of counsel. Second, and more significantly, a brief purporting to argue an issue considered non-meritorious by the attorney submitting the brief does not alert the appellate court, as an Anders brief does, that a review of the record for arguably meritorious issues is required.

CONCLUSION

In summary, the state suggests that the paramount interests of the indigent criminal appellant and the subsidiary interests of the courts, appointed counsel, and the state will be best served if the First District Court of Appeal strictly follows Anders, Penson, and Causey. If appointed counsel does not comply with Anders, order compliance; if appointed counsel complies with Anders and the court's review per Causey reveals an arguably meritorious issue, appoint new counsel per Penson; if the experience of the court discloses that one or more appointed counsel are derelict in their duties, initiate bar disciplinary action independent of the handling of the particular criminal cases involved. As Forrester and the two instant cases demonstrate, the right of a criminal appellant to the timely assistance of counsel should not be put on hold while the courts and counsel, including the state, dispute the fine points of Anders and its progeny.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carl S. McGinnes and Larry Korn, Assistant Public Defenders, Leon County Courthouse, Tallahassee, Florida 32301, this 22nd day of November, 1989.

JAMES W. ROGERS