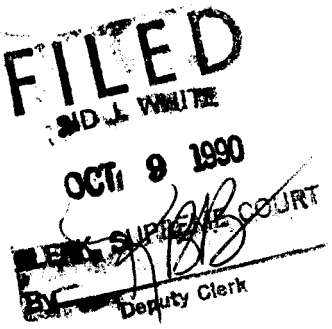
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA	:	
Petitioner,	:	
VS.	:	CASE NO. 76,483
DAVID COUPE, et al.,	:	
Respondent.	:	
_____	:	

RESPONDENTS'BRIEF ON THE MERITS

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I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990).

This brief is being filed on behalf of respondents COUPE and FENNELL. Respondents agree with the state that this cause does not address the merits of the cases, but rather, seeks a constitutionally acceptable balance between the defendant's right to a meaningful appeal and the judicial system's interest in avoiding unnecessary labor for the courts. Their disagreement lies in what the constitutional balance consists of.

Any record references will be made in accordance with the appendix attached to the state's brief on the merits. Respondents will be referred to as such or by name.

II STATEMENT OF THE CASE AND FACTS

Respondents accept the state's version of the case and facts as reasonably accurate.

III SUMMARY OF ARGUMENT

While the state sees the issue as much broader, respondents Coupe and Fennell see the issue here as whether the improper imposition of court costs can be raised in an Anders brief. They see Coupe's probation condition, which imposes another cost, as legally indistinguishable from court costs. The question of aliases raised in Fennell's brief was not intended to raise a meritorious issue, but merely to comply with the admonition of Forrester to draw attention to anything that might "arguably support the appeal." Respondents also believe a Ree issue is not properly raised in an Anders brief, and thus, that Williams was improperly joined with their cases.

Respondents believe the problem of dual representation is a false issue, that relatively few defendants file pro se appellate briefs, that the state has failed to demonstrate otherwise, that the district court has the authority to control the timing and number of briefs to be filed, and that such control is appropriately exerted on a case-by-case basis.

The issues that really matter to a defendant are those directly related to the judgment and sentence, and it is to those issues that the Anders procedure is directed. As for the heart of the matter here, the issue of judicial economy,

respondents believe it is a reasonable balancing of their constitutional right to appellate due process against the judiciary's interest in orderly and not-unduly-delayed appeals, that the issue of court costs, and similar minor sentencing issues, may be raised in Anders briefs. The interests of judicial economy cannot usurp respondents' right to procedural due process, and they respectfully request that this court permit their Anders briefs to stand.

IV ARGUMENT

ISSUE PRESENTED (RESTATED)

WHETHER ARGUMENT ON MINOR SENTENCING MATTERS PRECLUDES ANDERS REVIEW PROCEDURES IN CRIMINAL APPEALS.

To put it simply, in the view of respondents COUPE and FENNELL, the issue before the court is whether the improper imposition of court costs may be raised in an Anders brief. The state, on the other hand, sees the issue as more complicated. This case also raises the issue of what constitutes a "wholly frivolous" appeal which triggers the appellate review procedures of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

This is an appeal from the decision of the First District Court of Appeal in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990), which certified the following as a question of great public importance:

> What, if any, issues may be raised by counsel for appellant in an initial brief without losing appellant's right to the Anders procedure, including permission for appellant to serve his own pro se brief and an examination of the entire record by the appellate court for the existence of reversible error?

Each of the three respondents filed Anders briefs, each of which briefly argued a minor sentencing matter, such as the imposition of court costs without notice and hearing (Coupe and Fennell), the addition of a probation condition to the written order, which was not orally pronounced (Coupe), and the failure to enter a written guideline departure order contemporaneously

(Williams). The state moved to strike each Anders brief on the ground that by arguing any issue, the appeals were not wholly frivolous, and as they had some merit, Anders review was precluded.

Respondents agree that Anders and its progeny have used phrases such as "wholly frivolous" and "no merit" to describe the typical Anders case. No case has yet defined, however, exactly what constitutes a wholly frivolous appeal for purposes of triggering the Anders procedure. That is the issue here.

Respondents believe that, while there was no reason at the time it was first used to consider it so, the use of the no merit/wholly frivolous language was somewhat careless. In none of the cases cited by the state did the questioned language occur in the context now presented to this court. None of the cases cited by the state addressed the issue here of whether, in an appeal which is mostly without merit, but in which court costs have been improperly imposed, an Anders brief can be filed. Rather, in all the cases cited by the state, defense counsel took the position, justifiable or not, that the appeal was wholly without merit.

In its opinion below, the First District Court said:

> It is obvious that there are countervailing policy arguments which can be made on behalf of both parties. The state contends that the rationale of Anders is clear enough and applies only where counsel for appellant can make no argument for reversible error. Appellants argue the unfairness of losing the right to Anders review simply because counsel is able to identify some relatively minor sentencing issue.

Coupe, 564 So.2d at 1200. Without much in the way of explanation, the First District took the position of respondents, that is, raising minor sentencing issues does not preclude the filing of an Anders brief.

The state has two main complaints to filing an Anders brief which raises any sort of meritorious issue. The state called the first "abuse of discretion" (Petitioner's Brief on Merits (PBM), 9). Respondents prefer to call it the judicial economy issue. The state's second complaint concerns dual representation.

Taking the second one first, the state complains that permitting respondents to raise a meritorious issue in an Anders brief and also permitting them, in accordance with Anders procedure, to file pro se briefs amounts to dual representation. Respondents contend strongly that this is a false issue.

First, as the state noted, no rule, statute or caselaw forbids dual representation. See State v. Tait, 387 So.2d 338 (Fla. 1980). On the other hand, defendants have no right to dual representation. Whether dual representation is truly a problem which needs to be addressed by this court would depend in substantial part on the factual question of how often defendants file pro se briefs after their appointed attorneys have filed Anders briefs. If only one Anders defendant in ten files a pro se brief, this court may still wish to address the issue, but it would hardly be as compelling a problem as it would be if nearly every Anders defendant filed a pro se brief. The record below does not contain any information from which could

be determined what percentage of Anders briefs are in fact followed by pro se briefs. It is noteworthy that no pro se brief has been received in any of the three cases herein appealed (PBM-14, n.12). Respondents believe that the district court has the authority to control the timing and number of briefs to be filed, and that such control is appropriately exerted on a case-by-case basis.

The far more troublesome problem here is the judicial economy issue. When a merit brief is filed, the appellate court may rely on defense counsel's assessment of which issues are meritorious and review only the issue or issues argued by defense counsel. On the other hand, when an Anders brief is filed, the appellate court is obliged to review the entire record for errors. State v. Causey, 503 So.2d 321 (Fla. 1987). All things being equal, an Anders brief is naturally going to be more trouble for the court because it is obliged to review the entire record for error which may not have been previously identified. On the other hand, the court's interest in judicial economy must be balanced against the defendant's right to meaningful appellate review. At some level, this issue will reach the level of whether the defendant is receiving constitutional due process, and that is the level at which the court must address the issue.

Far from wasting judicial resources by pointing a minor, but meritorious, issue in an Anders brief, counsel is attempting to conserve judicial resources while at the same time preserving respondents' opportunity to argue any substantive

issues of merit they might find, subject to the thorough judicial scrutiny the appellate court properly gives no merit briefs. Further, as counsel is obliged to point out any issues of possible merit, he or she does only what is required by pointing out these minor sentencing issues.

This truth must be addressed - while it is inappropriate for a court, for example, to impose costs without notice, and this should be corrected, it is a small comfort to the defendant to raise the issue of court costs, but thereby, to deny him the independent judicial review that comes with a "no merit" brief, and deny him the opportunity to raise any issue that counsel might miss. The issues that really matter to a defendant are those directly related to the judgment and sentence, and it is to those issues that the Anders procedure is directed. The interests of judicial economy cannot usurp respondents' right to procedural due process, and they respectfully request that this court permit their Anders briefs to stand.

As for the specific issues raised in the Anders briefs:

Court costs (Coupe and Fennell). It is improper to impose court costs without notice and hearing. Jenkins v. State, 444 So.2d 947 (Fla. 1984), but see Rhodes v. State, ____ So.2d ____, 15 FLW D2331 (Fla. 1st DCA Sept. 12, 1990) (notice to invoke filed). At least one district court, however, has expressly found the issue to be a frequent, but not significant, appellate issue. Riley v. State, 534 So.2d 927 (Fla. 4th DCA 1988) (assessment of costs without notice "is frequently

one of several points on appeal these days and we suggest it should not be.") The First District Court has previously addressed the issue when it was raised in an Anders brief, thereby implicitly approving the practice of raising the issue of costs in an Anders brief. Ayers v. State, 538 So.2d 545 (Fla. 1st DCA 1989); Christie v. State, 538 So.2d 544 (Fla. 1st DCA 1989).

The state's proposed solution to the court cost problem is to allow the issue to be raised in 3.800 and 3.850 motions, but not in Anders briefs. Aside from the unwieldiness of the state's proposal, which would add another layer of post-conviction review for very routine matters, there is the additional problem that at least one district court has said that court costs are not a sentence, which principle would make the issue hard to raise as a sentencing error. See Johnson v. State, 502 So.2d 1291 (Fla. 1st DCA 1987).

Discrepancy in written probation condition (Coupe). A probation condition appears in the written order that Coupe is to pay $1 to First Step, Inc. The judge did not announce this condition orally. This is error. In Rowland v. State, 548 So.2d 812, 814 (Fla. 1st DCA 1989), the First District Court said:

> The inclusion of special conditions of probation in a written order that were not orally pronounced at the sentencing hearing mandates a reversal and remand for correction of the written order to conform to the oral pronouncement.

Accord, Smith v. State 558 So.2d 534 (Fla. 1st DCA 1990). In effect, however, this probation condition is similar to the imposition of costs, in that it imposes a financial burden upon Coupe. In fact, it results in a smaller financial burden than the court costs. The arguments which apply to the court cost issue essentially apply here also.

Use of aliases (Fennell). In Fennell's initial brief, counsel argued that a witness was improperly questioned about Fennell's use of aliases. The state argued that the discussion of the alias examination raised a meritorious issue, which precluded the filing of an Anders brief.

The state's complaint is inexplicable in light of Forrester's admonition to "draw attention to anything in the record that might arguably support the appeal in order to assist the court in determining whether counsel conducted the required detailed review of the case" (emphasis in original). Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989), approved in part, quashed in part, 556 So.2d 1114 (Fla. 1990). In making some argument concerning the use of aliases, appellate counsel was merely complying with the admonition of Forrester.

Perhaps the state's complaint is merely one of style. Perhaps it would have satisfied the state had counsel made more overt assurances that the issue was not meritorious, rather than arguing as though it were reversible error. It is not clear how, or whether, the state thinks defense counsel could comply with the Forrester requirement to draw attention to anything that might "arguably support the appeal," if, whenever

this is done, the state will complain that a meritorious issue was raised, precluding the filing of an Anders brief. The alias issue was raised only to comply with Forrester's admonition.

Contemporaneity of written reasons for departure (Williams). This is the Ree issue. Ree v. State, 565 So.2d 1329 (15 FLW S395) (Fla. 1990) (decision on rehearing). Respondents COUPE and FENNELL do not in any way purport to argue this point on behalf of respondent WILLIAMS. Quite to the contrary, they believe a Ree issue is not properly raised in an Anders brief because it is a meritorious issue. They believe they must address the Ree issue in the Anders context, however, because they see the issue now before this court as very narrow, essentially a court cost issue, while the state sees it as, at least potentially, very broad, and points to the Ree issue as proof of its position (PBM-6, n.5: "[e]xcept for its value as an example of Anders appeal procedures used by the First District, Williams could be severed and remanded for consistent proceedings").

Coupe and Fennell believe the First District's joinder of a Ree issue in this appeal stems, at heart, from the district court's misapprehension of Ree and its consequences, both in general and as to prospectivity.

In Ree, the Florida Supreme Court held that when the trial court departs from the presumptive guideline sentence, the written order must be entered contemporaneously with the sentence. Ree itself does not expressly state what relief is to

be granted a defendant whose departure sentence was not supported by a contemporaneous written order. Coupe and Fennell believe the key to the relief to be granted is contained in the supreme court's decision Pope v. State, 561 So.2d 554 (Fla. 1990). In Pope, this court said that, where the trial court failed to enter written reasons, on remand, it could impose only a guidelines sentence and could not again depart. Coupe and Fennell believe this policy will be extended to written reasons which are untimely under Ree.

A related issue is what Ree means when it says it is prospective only. This issue is presently pending a decision on jurisdiction in this court. Brown v. State, 565 So.2d 369 (15 FLW D2015) (Fla. 1st DCA 1990), pending decision on jurisdiction, no. 76,616. Traditionally, "prospective only" decisions applied to "pipeline" cases. Pipeline cases are cases which are not final, by trial or on appeal. Reed v. State, 565 So.2d 708 (15 FLW D1867) (Fla. 5th DCA 1990); Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986).

The state argued in a footnote (PBM-6, n.5) that this issue had been resolved against Williams, but this is an exaggeration, as the Brown decision is contrary to extant caselaw defining what prospective application means, and Brown is presently pending before this court.

Of course, this court need not decide the Ree issue in this appeal. It is enough that, were respondents correct on reading Ree and Pope together, and on the traditional view of prospectivity, then the relief to Williams on the Ree issue

would be remand for resentencing within the guidelines. This would be substantial relief for Williams, whose departure sentence was life imprisonment. If the district court shared this view of the caselaw, it could hardly find Ree to be an appropriate issue to raise in an Anders brief. Respondents believe, therefore, that the district court must have a much different view of the issue, one in which Williams is probably entitled to no substantial relief.

To summarize, while the state sees the issue as much broader, respondents Coupe and Fennell see the issue here as whether the improper imposition of court costs can be raised in an Anders brief. In their view, Coupe's probation condition, the imposition of yet another cost, is legally indistinguishable from the court costs issue. Moreover, the additional issue raised in Fennell's brief was not intended to raise a meritorious issue, but merely to comply with the admonition of Forrester to draw attention to anything that might "arguably support the appeal." Lastly, Coupe and Fennell believe a Ree issue is not properly raised in an Anders brief, and thus, that Williams was improperly joined with their cases.

Respondents believe the problem of dual representation is a false issue, that relatively few defendants file pro se appellate briefs, that the state has failed to demonstrate otherwise, that the district court has the authority to control the timing and number of briefs to be filed, and that such control is appropriately exerted on a case-by-case basis.

The issues that really matter to a defendant are those directly related to the judgment and sentence, and it is to those issues that the Anders procedure is directed. As for the heart of the matter here, the issue of judicial economy, respondents believe it is a reasonable balancing of their constitutional right to appellate due process against the judiciary's interest in orderly and not-unduly-delayed appeals, that the issue of court costs, and similar minor sentencing issues, may be raised in Anders briefs. The interests of judicial economy cannot usurp respondents' right to procedural due process, and they respectfully request that this court permit their Anders briefs to stand.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondents request that this Court answer the certified question by permitting minor sentencing issues to be raised in an Anders brief. With some reservation due to the wide array of cases in which Anders briefs are filed, and assuming representation of a variety of interests in the decision-making process, respondents do not oppose the state's suggestion for rulemaking procedures to cover Anders procedures.

Respectfully submitted,

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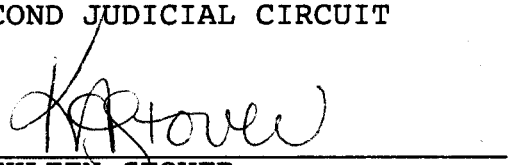
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and copies have been mailed to Mr. Nickolas Petersen, P.O. Box 873, Shalimar, Florida 32579, Mr. Lonnie Fennell, inmate no. 084598, Florida State Prison, P.O. Box 747, Starke, Florida 32091, and Mr. David Coupe, 971 Arbours Drive, Panama City, Florida 32401, this 9 day of October, 1990.

KATHLEEN STOVER