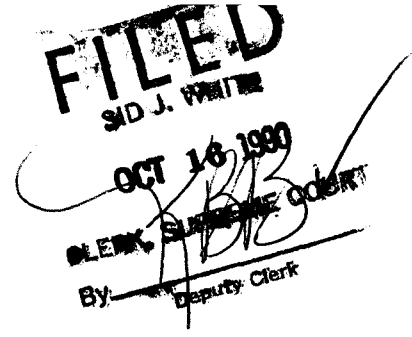

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 76,483

DAVID COUPE, et al.,

Respondents.

_____/

PETITIONER'S REPLY TO RESPONDENTS COUPE AND WILLIAMS

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PETITIONER'S REPLY TO RESPONDENTS COUPE AND WILLIAMS

PRELIMINARY STATEMENT

Respondents Coupe and Fennell (without Respondent Williams) have filed a joint brief. They agree with the State, that a Ree issue (i.e., provision of written departure reasons simultaneously with verbal imposition of sentence) is not properly raised in an Anders brief. Otherwise, the State adopts the preliminary statement in its initial brief. Note that references to "Respondents" necessarily refers only to Respondents Coupe and Fennell.

STATEMENT OF THE CASE AND FACTS

Respondent Williams moved to withdraw from this appeal. He also moved to toll time to file his answer. Respondents Coupe and Fennell answered separately, and contemporaneously filed a motion that their separate brief be accepted. Otherwise the State adopts the statement of the case and facts in its initial brief.

SUMMARY OF ARGUMENT

Respondents Coupe and Williams argue in favor of judicial economy. The First District's decision, however, will thwart judicial economy by generating litigation over what kind of sentencing errors may be argued on the merits while Anders is invoked as to conviction.

By giving Respondent Coupe (and Williams) an unlimited time to file a pro se brief, the First District abused its discretion. It also abused its discretion by authorizing co-representation of Coupe and Fennell.

The decision below violates §924.06(3), Florida Statutes by compelling court review for error occurring before a plea. Since federal case law does not require state courts to allow substantive argument within Anders briefs, the decision nullifies §924.06(3) without reason.

ARGUMENT

ISSUE

WHETHER ARGUMENT ON THE MERITS PRECLUDES ANDERS REVIEW PROCEDURES IN CRIMINAL APPEALS

Preliminarily, Respondents continue to seek the best of both worlds, claiming more process than is due. They want to argue "minor sentencing issues" or "matters" (answer brief, p. 3-4) on the merits, while invoking Anders to compel the court to review the entire record independently.

Respondents miss two important points. First, the First District did not limit argument on the merits to those errors Respondents consider to be "minor." In fact, the First District expressly excluded only arguments on the substantive sufficiency of guidelines departure reasons, believing those arguments to be "so substantive that Anders review cannot be justified." (slip op., p.4).[1] Second, the First District obviously does not consider the Ree issue minor, as do Respondents. In fact, it is not clear what other "relatively minor sentencing issue[s]" (slip op., p.4) may be argued in an Anders brief.

In a point not answered by Respondents, the State asked (initial brief, p. 12) whether other errors relating to sentencing can be raised. Again, can an appellant invoke Anders, yet argue the proof of his status as an habitual

[1] The opinion below is now reported at 564 So.2d 1199.

felon was not sufficient? If so, could an appellant argue that proof of firearm use was insufficient, by claiming it was a "sentencing error" to impose the minimum mandatory sentence?

If relatively minor sentencing issues can be argued, it would follow that relatively minor issues as to conviction could also be raised in an Anders brief. If the opinion below is correct, why should an appellant be faced with "losing the right to Anders review" (slip op., p. 4), simply by arguing a relatively minor error as to conviction? In short, there is nothing in Anders or its progeny that treats sentencing errors differently from trial errors. Respondents cite nothing to that effect.

Judicial economy, commendable in other settings, is neither appropriate nor achieved through Respondents' position. It is not economical to litigate what sentencing errors are minor and can attend Anders review.

This court's jurisdiction, when reviewing a certified question, extends to the entire decision. Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976). The First District's decision allows argument of sentencing errors beyond those contemplated by Respondents. The decision does not further judicial economy and is not required by federal case law.

Respondents overlook another problem with the opinion below. In Coupe the State moved to preclude filing of a pro se initial brief, when Coupe did not timely file or obtain an extension. (See State's initial brief, App. B-20 through B-22). By denying the State's motion (slip op., p. 4), the First District allows him unlimited time to file his pro se brief.[2] This constitutes abuse of discretion.

Respondents did not answer the State's argument based on chapter 924, Florida Statutes. Without belaboring that point (see the State's initial brief, p. 13-14), the State again notes that the First District's position is contrary to law. Section 924.06(3), Florida Statutes, conditions the right to appeal, after a plea,[3] to preclude direct review. The statute was construed by this court as establishing a waiver of pre-plea matters only. Robinson v. State, 373 So.2d 898 (Fla. 1979).

Allowing an appellant, after a plea, to invoke Anders and argue sentencing errors on the merits violates §924.06(3). When Anders is invoked, the court must independently review the entire record for error, despite the statutory waiver precluding direct review of pre-plea

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[2] Likewise, the State moved to preclude Wililams' pro se brief. (See State's initial brief, App. C-26 through C-27). That motion was denied with no new deadline imposed. (slip op., p. 4).

[3] Respondent Coupe pled nolo contendere to two counts of fradulent use of a credit card. (Coupe R 78). He did not reserve any issues.

matters. This need not occur, as federal law does not require state courts to allow argument of sentencing matters within Anders briefs. In short, the First District has departed from the requirements of law [i.e., §924.06(3)], even though it is not required to do so under federal decisions. This also is an abuse of discretion.

At least until the First District passes on the merits of each case, Respondents may file pro se briefs. In the meantime, the State apparently must serve any motions on Respondents and their counsel, and wait for responses from both. Such co-representation impedes each appeal, and is not judicially economical. In fact, it is condemned by the First District. Whitfield v. State, 517 So.2d 23 (Fla. 1st DCA 1987), rev. denied, 525 So.2d 881 (Fla. 1988).

On one hand, Respondents claim that dual representation (or co-representation) is a "false issue." (answer brief, p.6). On the other hand, they rely on judicial economy to sustain their position. By not directing counsel to withdraw and allowing unlimited time to file pro se briefs, the First District frustrates the judicial economy vaunted by Respondents. Under these circumstances, dual representation of Respondents is also abuse of discretion. Even Respondents do not find abuse of discretion to be a "false issue."

CONCLUSION

The opinion below must be reversed, with the directions specified by the State in the conclusion to its initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, and to Nickolas G. Petersen, P.O. Box 873, Shalimar, Florida 32579, this 16th day of October, 1990.

Charlie McCoy
Assistant Attorney General