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IN THE SUPREME COURT OF FLORIDA

IN RE:

APPELLATE COURT RESPONSE TO ANDERS BRIEFS,

CASE NO. 76,483

SUPPLEMENTAL ANSWER BRIEF OF RESPONDENTS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I SUMMARY OF ARGUMENT

Respondents agree with the state that the district court lacks subject-matter jurisdiction to hear an appeal of pretrial rulings when a defendant has pleaded guilty or no contest without reservation. While Coupe and Williams entered pleas, however, neither is appealing a pretrial ruling, and both are entitled to appeal their sentences. Section 924.06, Florida Statutes, permits appeals of illegal and departure sentences, and Coupe and Williams are appealing such sentences, thus they are entitled to an appeal. When an Anders brief is filed in such a situation, while section 924.06 relieves the district court from the responsibility of reviewing any pre-plea matters, the court is still required to independently review for error the plea itself and all subsequent proceedings.

II ARGUMENT

ISSUED PRESENTED
WHAT ISSUES MAY BE APPEALED WHEN THE DEFENDANT HAS PLEADED GUILTY OR NOLO CONTENDERE WITHOUT RESERVATION.

Because subject-matter jurisdiction is a creature of statute, respondents agree with the state that the district court lacks subject-matter jurisdiction to hear an appeal of pretrial rulings when a defendant has pleaded guilty or nolo contendere. § 924.06(3), Fla.Stat.; Robinson v. State, 373 So.2d 898, 900 (Fla. 1979). Respondents strongly disagree with the state, however, as to what consequences this principle has for their cases.

A few matters should be noted at the outset. First, the state's arguments concerning subject-matter jurisdiction were not presented to the district court below, and the opinion below makes no mention of this issue. Second, the state has completely changed the focus of its arguments as to Williams and Coupe. Where the state previously presumed that Williams and Coupe had a right to appeal, but complained about their filing Anders briefs, the state now complains they have no right to appeal at all. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). This forces respondents into the weird position of having to argue both that they are entitled to an appeal, but also to argue about what must be done when their appellate attorney believes their appeals to be meritless. Third, as has been pointed out before, from many perspectives, these three cases consolidated by the district

court have little in common with each other, which makes this appeal somewhat chaotic.

In its reply brief in respondent Williams' case, the state asserted that Williams and Coupe not only may not file Anders briefs, but that they have no right to appeal at all because they entered pleas of guilty or nolo contendere. This assertion is only partly correct. Under section 924.06, Williams and Coupe have no right to appeal pretrial rulings, but subsections 924.06(1)(d) and (e) expressly permit the defendant to appeal an illegal sentence or a guidelines-departure sentence. Williams received a departure sentence, which is expressly appealable under the statute. Improperly imposed court costs are illegal, thus Coupe also has an appealable sentencing issue. Lastly, notwithstanding respondents' agreement with the state that a Ree issue is not properly raised in an Anders brief, it is an appealable issue, because a Ree violation renders the sentence illegal. Ree v. State, 565 So.2d 1329 (Fla. 1990) (decision on rehearing).

Before considering their cases in light of the statute, respondents will attend to certain pertinent cases. For purposes of this argument, the following principles are deducible from the pertinent cases: Anders prohibits appointed appellate counsel from filing a bare "no-merit" brief, and requires counsel, at a minimum, to file "a brief referring to anything in the record that might arguably support the appeal." Id., 386 U.S. at 744. Robinson, dealing with the 1977 version of

section 924.06, found the statute to be constitutional and held that the statute's

> ...prohibitions against an appeal from a guilty plea are directed to pretrial rulings and not to matters which may occur contemporaneously with a plea of guilty or a plea of nolo contendere.

Robinson v. State, 373 So.2d 898, 900 (Fla. 1979). Even though Robinson predated the introduction of sentencing guidelines by four years, the court also said that among the types of issue the defendant could appeal after pleading guilty (or no contest without reservation) was the illegality of the sentence. Id. at 902.

In Hughes v. State, 565 So.2d 354 (Fla. 1st DCA 1990), the First District Court of Appeal addressed the issue of whether a pro se defendant's appeal from a guilty plea raised a justiciable issue, held that it did not, and expressed a desire to have such cases quickly dismissed, meaning, before any briefs were filed. The district court opinion here was issued two weeks after Hughes, and neither gives any sign of having considered the effect of the two cases upon each other.

While this information is not included in the record in the instant case, and no motions to dismiss were filed in these cases (since they predated Hughes), undersigned counsel would inform this court that, since the decision in Hughes, the state has adopted a policy of filing a motion to dismiss, very soon after the case is received, in every case in which the defendant pleaded guilty or nolo contendere. This office, in turn, has expended a great deal of time and energy in answering these

motions to dismiss. While this is not of record in the instant case, undersigned is confident that the state will confirm the existence of this policy. Copies of a representative motion to dismiss and defense response are attached hereto as an appendix.

Even if this court were able to countenance the dismissals envisioned by Hughes, respondents must point out that, since even under the most restrictive view, some sentencing errors remain appealable, dismissal before briefs are filed is most inappropriate. To undersigned's knowledge, the state has never foregone a motion to dismiss because the state has determined there to be a meritorious sentencing issue. Only defense counsel can reasonably be expected to search the record for meritorious issues. It only makes sense, therefore, that the soonest an appellate court could consider dismissal is after appellate counsel has filed an Anders brief, and the defendant has been given an opportunity to file a brief in his own behalf, but has not done so. If appellate counsel has filed a merit brief, or the defendant has filed a pro se brief, then presumably, an arguable meritorious issue exists, and dismissal is not appropriate.

There are two different parts to the subject-matter jurisdiction problem here. The first is, what is the duty of appointed appellate counsel who receives a record in which the defendant pleaded guilty or nolo without reservation. The second is, what is the duty of the appellate court which receives an appeal in which the defendant has entered a plea.

Reading Anders, Robinson and section 924.06 together, the following conclusions may be drawn: Anders leaves no doubt as to what is required of appellate counsel. Counsel must submit a brief referring to anything in the record that might arguably support the appeal. Hughes' suggestion that appointed counsel could move for dismissal seems inconsistent with Anders' exhortations to counsel. In Hughes, the First District said the Public Defender for the Fourth Judicial Circuit had moved to dismiss such appeals, but cited only one such case and did not further explain the matter. Hughes, 565 So.2d at 356. There may well be some explanation for the dismissals other than a desire to comply with section 924.06. Neither the statute nor Robinson address the issue of what is required of appellate counsel, thus, they cannot be read as abrogating what Anders requires of counsel.

Respondents believe Anders also answers the question as to what the appellate court must do in these cases. While section 924.06 and Robinson prohibit defendants from appealing rulings on pretrial matters, both permit appeal of matters which arise contemporaneously with and subsequently to the plea, and the statute expressly permits appeals of illegal and departure sentences. When a defendant files an Anders brief, therefore, the court is still obligated under Anders to conduct its independent review of the whole record, but only the record as it concerns the plea itself and post-plea proceedings, which would certainly include sentencing. In its reply brief in Williams, the state argued that "Williams had no right of direct appeal

as to matters occurring before his plea" (reply brief at 6). Respondents agree with this statement, but point out that neither Coupe nor Williams included any preplea hearings in their records on appeal, so the district court could not in fact review any preplea matters.

Even under the state's reading of the caselaw and statute, Fennell's appeal is not barred, because he was convicted after a trial, and Williams' appeal is not barred, because he received a guideline-departure sentence, from which section 924.06 expressly permits an appeal. That leaves the question of what is Coupe's position in terms of the state's arguments.

Having heard the arguments before, undersigned counsel anticipates the state will argue that Coupe is not entitled to an appeal because his sentence is not illegal. The state's position is that only a sentence which exceeds the statutory maximum is illegal. In this view, illegally imposed court costs are not directly appealable. Respondents believe the state takes a much too narrow view of what constitutes an "illegal" sentence for purposes of appeal. In fact, the legislature and the courts have never viewed an illegal sentence as narrowly as the state would like to construe that term. For example, habitual offender sentences were appealable even before the advent of the guidelines. Moreover, it should be remembered that the major case on which the state relies, Robinson, predated the advent of the guidelines. That is, at the time Robinson was decided, most sentences were not appealable, but that is no longer so. With the introduction of the

sentencing guidelines, the legislature has broadened its view of what constitutes an illegal sentence. Respondents believe the better rule is that any sentence, which is reversible when the threshold requirements - whatever they may be - notice and hearing, factual findings, valid departure reasons, etc. - have not been met, is illegal and may be raised on direct appeal.

As a practical matter, the state's interpretation would create a pointless distinction between defendants such as Fennell and Coupe. Fennell would be permitted to raise a sentencing issue, such as court costs, on direct appeal because he went to trial, but Coupe would be precluded from raising the identical issue on direct appeal because he pleaded no contest. This would create a nonsensical distinction between the two defendants.

Finally, respondents must comment on the policy issues involved here. Denying defendants the right to direct appeal would be tantamount to denying them counsel above the trial level. Respondents believe that to be the state's ultimate and ulterior interest: The state wishes to deny counsel to defendants who may very well have meritorious sentencing issues to appeal. Respondents assert that the state is in much too big a hurry to achieve this goal, and wants to do so by ignoring the existence in many plea cases of meritorious issues which arise contemporaneously with or subsequently to the plea.

Despite their varied positions, all respondents have a right to direct appeal under section 924.06, and the state's contrary assertions are wrong.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondents request that this Court hold that they are all entitled to a direct appeal, although each on a different theory, and answer the certified question by permitting minor sentencing issues to be raised in an Anders brief. Respondents believe, however, that a Ree violation would result in substantial relief to the defendant, thus it is not a minor sentencing issue, and should not be raised in an Anders brief.

Respectfully submitted,

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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. David Coupe, 971 Arbours Drive, Panama City, Florida 32401, Mr. Lonnie Fennell, inmate no. 084598, Florida State Prison, P.O. Box 747, Starke, Florida 32401, and Mr. Samuel Williams, inmate no. 116603, Cross City Correctional Institution, P.O. Box 1500, Cross City, Florida 32628, this 19 day of December, 1990.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

IN RE: :

APPELLATE COURT RESPONSE :
TO ANDERS BRIEFS, CASE NO. 76,483

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APPENDIX TO SUPPLEMENTAL
ANSWER BRIEF OF RESPONDENTS