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IN THE SUPREME COURT OF FLORIDA

TONY RAY PALEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: 77,592

PETITIONER'S BRIEF ON MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
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IN THE SUPREME COURT OF FLORIDA

TONY RAY PALEN, Petitioner,	)	
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STATEMENT OF THE CASE AND FACTS

Petitioner entered into a negotiated plea whereby he pled nolo contendere to various criminal charges. Thereafter, and prior to sentencing, Petitioner sought to withdraw his plea. (R 31-32, 49-50, 52-57) This was denied and Petitioner was sentenced. Petitioner filed a timely notice of appeal and the Office of the Public Defender was appointed to represent him on appeal. (R 168-169, 174)

On appeal, appointed counsel filed a motion to withdraw and submitted a brief in compliance with the dictates of Anders v. California, 386 U.S 738, 87 S.Ct. 1296, 18 L.Ed.2d 493 (1967) asserting that there was no meritorious issue which could be presented on behalf of the Petitioner. [copy of the brief attached as appendix B hereto] In the brief which was submitted, appointed counsel noted by way of a footnote that it appeared that the Petitioner did not receive notice or an opportunity to object to the imposition of court costs in the amount of $225.00. Appointed counsel further presented the issue regarding the propriety of the denial of Petitioner's motion to withdraw his plea.

On February 7, 1991 the Fifth District Court of Appeal issued its opinion on the motion to withdraw denying the motion on the grounds that appointed counsel by inclusion of footnote regarding the unlawful imposition of costs, had admitted that there was a meritorious issue which could be raised. Palen v. State, 574 So.2d 269 (Fla. 5th DCA 1991). [copy attached as appendix A hereto] In so ruling, the Court specifically disagreed with the position of the First District Court of Appeal in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990) wherein the court held that they will accept briefs in accordance with Anders which find no error as to the trial or plea proceedings, but which identify minor sentencing errors. The Coupe court also certified the question as one of great public importance and also determined that its decision is one which expressly affects the class of constitutional officers. The decision of the First District Court of Appeal in Coupe is currently pending review by this court sub nom In Re: Appellate Court Response to Anders Brief, Case No. 76,483.

Petitioner timely filed its notice to invoke discretionary jurisdiction on March 8, 1991. By order dated April 25, 1991, this Court accepted jurisdiction and dispensed with oral argument.

SUMMARY OF ARGUMENT

All persons are entitled to a direct appeal from a conviction and sentence for a crime. Where appointed counsel is unable to make a good faith argument that a judgment and sentence should be reversed, he may file a brief in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967). In those situations, the reviewing court is required to independently review the entire record on appeal to determine whether any reversible error occurred. Fundamental fairness dictates that this right to Anders review not be denied simply because counsel was able to identify some relatively minor sentencing issue. Thus, the identification of an issue regarding the improper imposition of costs without notice and opportunity to object is properly raised in an Anders brief which identifies other more substantive issues sought to be reviewed by the Appellant. The Anders brief originally filed in the instant case should have been allowed.

ARGUMENT

IN PROCEEDING WITH A DIRECT APPEAL PURSUANT TO THE DICTATES OF ANDERS V. CALIFORNIA, 386 U.S. 738, 87 S.Ct. 1296, 18 L.Ed.2d 493 (1967), APPOINTED COUNSEL IS NOT PRECLUDED FROM RAISING MINOR SENTENCING ERRORS.

Petitioner entered into a negotiated plea whereby he pled nolo contendere to various criminal charges. Prior to sentencing, however, Petitioner sought to withdraw his plea. This was denied and Petitioner was sentenced. Petitioner filed a timely notice of appeal and the Office of the Public Defender was appointed to represent him on appeal. On appeal, appointed counsel filed a motion to withdraw and submitted a brief in compliance with the dictates of Anders v. California, 386 U.S. 738, 87 S.Ct 1296, 18 L.Ed.2d 493 (1967), wherein appointed counsel addressed the sole potential issue, the propriety of the denial of Petitioner's motion to withdraw his plea. In this brief, appointed counsel also noted by way of a footnote, that it appeared costs were improperly imposed without notice and an opportunity to object. The Fifth District Court of Appeal denied appointed counsel's motion to withdraw and deemed it improper since the reference in the footnote constituted a meritorious issue thus making an Anders brief inappropriate. Palen v. State, 574 So.2d 269 (Fla. 5th DCA 1991). Petitioner contends that the holding of the Fifth District Court of Appeal is unfair in that it effectively denies Petitioner his right to a direct appeal by forcing appellate counsel to raise one minor and insignificant meritorious point, thus precluding review of other

more substantive potential issues which Petitioner desires to be reviewed.

Also persons convicted of a crime are entitled to a direct appeal of their convictions and sentences. Further, these persons are entitled to representation by counsel. In the instant case, Petitioner timely perfected his direct appeal, and the Office of the Public Defender was appointed to represent him. In the proper discharge of its duty, appointed counsel examined the primary issue on appeal, the propriety of the denial of Petitioner's motion to withdraw his plea. After determining that no meritorious argument could be made in Petitioner's behalf, appointed counsel followed the dictates of Anders v. California, and submitted a brief setting forth the applicable law and drawing the reviewing court's attention to this potential issue. The question that this court must decide, is whether Petitioner can be denied his right to a full review of this primary issue simply because the record reveals a minor sentencing error. In every appeal, 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 time consuming for the court, because it is obliged to review the entire record for error, which may not have been previously identified. However, such is the necessary cost to ensure the

defendant's right to meaningful appellate review. Petitioner asserts that it is fundamentally unfair to deny a person his right to direct appeal by forcing appointed counsel to raise minor sentencing issues on appeal rather than permitting review pursuant to the dictates of Anders v. California.

Turning to the specific issue raised below, it is improper to impose court costs without notice and hearing. Jenkins v. State, 444 So.2d 947 (Fla. 1984). However, the Fourth District Court of Appeal in Riley v. State, 534 So.2d 927 (Fla. 4th DCA 1988), has noted that the assessment of costs without notice "is frequently one of several points on appeal these days and we suggest it should not be." The Fifth District Court of Appeal itself has expressed its belief that costs issues are less than important in the grand scheme of the appellate process. In Henry v. State, 567 So.2d 566 (Fla. 5th DCA 1990) the Fifth District Court of Appeal noted that as one method of expediting the handling of criminal cases in its court, it informally adopted the policy of dealing with the single issue cost appeal by court order striking the assessment of costs. The court concluded:

> It seems clear to us that the last thing we need is another DCA opinion echoing Mays; Harriel v. State, 520 So.2d 271 (Fla. 1988) and Jenkins v. State, 444 So.2d 947 (Fla. 1984). Its publication in Southern Reporter is superfluous, and a waste of everyone's time and effort.

Thus, it appears, if the Fifth District Court of Appeal is dealing with the cost issue by unpublished court order, requiring appointed counsel to raise it in a brief, thus preclud-

ing an Anders review, is conflicting and inappropriate.

Another example of the type of issue which should be permitted to be raised in an Anders brief is the so-called "scrivener's error." Typically, these errors occur when the judgment and sentence reflect an improper notation such as the degree of crime for which the person is convicted or whether the person pled nolo contendere or guilty to the offense. Petitioner suggests that requiring a merit brief to be filed on these insignificant issues is fundamentally unfair. This is particularly true in a situation where a person proceeded to trial in which there were perhaps several potential issues raised. Appointed counsel could not allow his client to receive his right to full review of these potential issues if he were forced to file a brief raising the single "meritorious" issue of no possible significance to his client. Petitioner asserts that this places appellate counsel in a most untenable position.

Petitioner further asserts that the First District Court of Appeal has adopted the correct approach to this problem in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990) wherein the court noted that it will accept briefs in accordance with Anders, pursuant to which counsel claims inability to make good-faith argument that judgment and sentence should be reversed, if those briefs find no error as to trial or plea proceedings, but identify minor sentencing errors. The court based this decision on the argument that it would be basically unfair to lose the right to an Anders review of a person's conviction, simply because counsel was able to identify some relatively minor sentencing issue.

In summary, Petitioner argues that the issues that really matter to a criminal defendant on appeal are those directly related to his judgment and sentence, and it is to those issues that the Anders procedure is directed. Petitioner believes it is a reasonable balancing of his constitutional right to appellate due process against the judiciary's interest in orderly appeals, that the issue of court costs and similar minor sentencing issues may be raised in Anders briefs. The interest of judicial economy cannot usurp Petitioner's right to procedural due process. The decision of the Fifth District Court of Appeal sub judice in effect does just this. This court must quash the decision of the Fifth District Court of Appeal and permit Petitioner's appeal to proceed pursuant to the dictates of Anders v. California.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner requests this Honorable Court to quash the decision of the Fifth District Court of Appeal and hold that minor sentencing issues may be properly raised in a brief pursuant to the procedure set forth in Anders v. California. This court should order that the instant appeal proceed as originally filed.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Michael S Becker
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Phone: 904/252/3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal and mailed to: Tony R. Palen, P.O. Box 028538, Miami, FL 33102, this 22nd day May, 1991.

Michael S. Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

TONY RAY PALEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.: 77,592
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I C E S

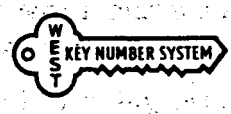
A - Palen v. State, 574 So.2d 269 (Fla. 5th DCA 1991)

B - Initial Brief of Appellant, Palen v. State, DCA Case No. 90-1269

substantial deficiency falling measurably outside the range of professionally acceptable conduct and that this deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Johnson v. Wainwright*, 463 So.2d 207 (Fla.1985). Even though *Coy* was decided five days after the time in which the motion for rehearing could have been filed in his direct appeal (*Disinger I*), we concluded in *Disinger II* that *Coy* did not represent a change in the law "[i]n view of the long-standing recognition of face-to-face confrontations as a requirement of the Confrontation Clause and the absence of any statutory authority for the use of the screen used in the instant case ..." *Disinger II* at 827.

Disinger seeks a new trial in the instant petition although the proper relief would be to permit a new appeal. However, if appellate counsel had brought the confrontation issue to our attention on direct appeal, a new trial would have been granted. In this case, a new appeal would be redundant because in *Disinger II* we acknowledged that reversible error occurred at trial. *Cf. Johnson v. Wainwright*, 498 So.2d 938 (Fla.1986). Therefore we REVERSE Disinger's convictions, VACATE his sentences and direct that he be retried.

COWART, COBB and HARRIS, JJ., concur.



Tony Ray PALEN, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1269.

District Court of Appeal of Florida, Fifth District.

Feb. 7, 1991.

In a criminal appeal from the Circuit Court, Brevard County, Vernon C. Mize, Jr., J., public defender filed *Anders* brief and motion to withdraw from further representation of defendant. The District Court of Appeal, W. Sharp, J., held that public defender's motion to withdraw from further representation of defendant, based upon *Anders* brief, would be denied, where public defender raised in *Anders* brief a meritorious legal issue, namely claim that trial court imposed costs on defendant without notice or meaningful opportunity to object.

Motion denied.

1. Criminal Law ⇐1077.3

Public defender's motion to withdraw for further representation of defendant, based upon *Anders* brief, would be denied, where public defender raised in *Anders* brief a meritorious legal issue, namely claim that trial court imposed costs on defendant without notice or meaningful opportunity to object; appeal was not fully frivolous, and was not properly presented as an *Anders* appeal.

2. Criminal Law ⇐1077.3

Appellant does not have a "right" to the *Anders* procedure in cases where the appeal is not wholly frivolous.

James B. Gibson, Public Defender, and Barbara L. Condon, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and James N. Charles, Asst. Atty. Gen., Daytona Beach, for appellee.

ON MOTION TO WITHDRAW

W. SHARP, Judge.

[1] In this case, the Public Defender filed a brief in purported compliance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and also filed a motion to withdraw from further representation of the appellant. However, the Public Defender raised in the *Anders*

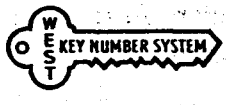
brief a meritorious legal issue—a claim that the trial court imposed costs on the appellant without notice or a meaningful opportunity to object. The appeal therefore is not wholly frivolous and is not properly presented as an *Anders* appeal.

Anders held that where court-appointed appellate counsel finds an appeal in a criminal case to be wholly frivolous he should so advise the appellate court and request permission to withdraw. Only if the appellate court, after a full examination of all the proceedings, finds any legal points arguable on their merits (and therefore not frivolous), must it afford the indigent appellant the assistance of counsel to argue the appeal. It is inappropriate for counsel to argue that an appeal is completely without merit and at the same time to submit that the trial court committed an error which requires corrective action by this Court.

[2] We disagree with the position of the First District in *Coupe v. State*, 564 So.2d 1199 (Fla. 1st DCA 1990), that an appellant has a "right" to the *Anders* procedure in cases where the appeal is not wholly frivolous. Therefore, we deny the Public Defender's motion to withdraw, and we direct the appellee to file a supplemental answer brief within fourteen days after issuance of this opinion, addressing the issue of costs.

IT IS SO ORDERED.

GOSHORN and DIAMANTIS, JJ., concur.



Charles James FREEMAN, Appellant,

v.

STATE of Florida, Appellee.

No. 89-02436.

District Court of Appeal of Florida, Second District.

Feb. 8, 1991.

Defendant was convicted in the Circuit Court, Hillsborough County, Harry Lee Coe, III, J., and received a departure sentence following revocation of community control, and he appealed. The District Court of Appeal, Threadgill, J., held that no departure for probation violation is permissible if it exceeds the one-cell increase permitted by the Sentencing Guidelines.

Reversed and remanded.

1. Courts ⇐100(1)

Supreme Court's *Ree* decision requiring a written departure order contemporaneously with the sentence has prospective application only.

2. Criminal Law ⇐982.9(7)

No departure for a probation violation is permissible if it exceeds the one-cell increase permitted by the Sentencing Guidelines.

James Marion Moorman, Public Defender, and Stephen Krosschell, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Dell H. Edwards, Asst. Atty. Gen., Tampa, for appellee.

THREADGILL, Judge.

Charles James Freeman appeals a departure sentence following revocation of his community control. We reverse.

Freeman pleaded guilty to the purchase of cocaine, a second-degree felony, and was placed on community control. On August 4, 1989, he pleaded guilty to technical violations of community control. He was not charged with committing any new substantive offenses. The trial court departed from the recommended guidelines range, including the one-cell bump-up for violation of community control, and sentenced Freeman to fifteen years in prison followed by twenty-five years' probation.

[1] Freeman raises three issues on appeal. First, Freeman argues that the trial

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

TONY R. PALEN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO.: 90-1269
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
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APPENDIX B

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TABLE OF CITATIONS

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

TONY R. PALEN, Appellant,	)	
vs.	)	CASE NO.: 90-1269
STATE OF FLORIDA, Appellee.	)	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

Tony Ray Palen, hereafter Appellant was charged in an amended information filed September 8, 1989 with the following offenses: count I - burglary, in violation of Section 810.02(1)(3) and 810.07, Florida Statutes (1989); count II - petit theft, in violation of Section 812.014(1)(2)b, and (2)(c), Florida Statutes (1989), count III - dealing in stolen property, in violation of Section 812.019, Florida Statutes (1989); and count IV - uttering a forgery, in violation of Section 831.02, Florida Statutes (1989). (R 110-111)

On November 13, 1989 Appellant appeared for trial held before the Honorable C. Vernon Mize, Circuit Judge, Eighteenth Judicial circuit in and for Seminole County, Florida. (R 1-20) Before proceeding to trial, counsel for the defense suggested that the case could be resolved through a plea negotiation. (R 2-8) The Court entertained the request and stated that if the Appellant's guideline recommendation was 4½ to 5½ years incarceration, he would sentence Appellant to 5 years incarceration.

Alternatively, if Appellant "qualifies as habitual offender", the Court would triple the sentence and "commit to fifteen years" sentence. (R 11-12)

On January 5, 1990, Appellant requested to withdraw his plea asserting that the state's key witnesses were unreliable because their testimony conflicted. (R 31-32) After hearing Appellant's claimed defense to the charged offenses, the Court denied the motion to set aside the plea. (R 38) The Court deferred sentencing to permit the state to corroborate contested prior record. (R 39-40)

On May 16, 1990, Appellant appeared before Judge Mize. (R 44-77) Based upon Appellant's prior record and confirmed date of release from prison, his prior record technically qualified him to be sentenced as an habitual felon offender. (R 44-45, 48) Appellant again requested that he be permitted to withdraw his plea because he could prove that he was not guilty and also alleged violation of privacy (the prosecutor permitted the victims to listen to Appellant's taped statement) which would result in a dismissal of the case. (R 49-50, 52-57) The Court again rejected Appellant's request to withdraw his previously entered plea. (R 61-62, 65) Subsequently, the Court permitted counsel to present argument why the habitual offender law should not be applied. (R 66-69) Thereafter, the state and the Court questioned the content and meaning of the original plea agreement. Specifically, the meaning of the word "qualified." (R 73-77) Because of the different interpretation of the original plea agreement, the Court deferred sentencing and ordered the transcript of the initial plea hearing. (R 76-77)

On May 24, 1990, the Appellant appeared for sentencing. (R 80-95) After reviewing the entire transcript of the initial plea hearing held November 13, 1989, the Court determined that the plea agreement was if Appellant technically qualified as an habitual felon offender, then Appellant would receive a fifteen year sentence, as an habitual felon offender. (R 81) Despite this determination, the Court permitted counsel once again, to present mitigating evidence and argument. (R 84-86, 89) Thereafter, the Court sentenced Appellant in the following manner: count I - burglary, to a term of 10 years incarceration; count III, dealing in stolen property, a concurrent term of fifteen years incarceration; count IV - uttering a forgery, a concurrent term of 10 years incarceration. As to the petit theft charge (count II) a term of 60 days incarceration. On each count Appellant received 331 days credit for time served. The Court imposed $225.00 court costs.[1] (R 94)

On June 13, 1990, a timely noticed of appeal was filed. (R 168-169) The Office of the Public Defender was duly appointed to perfect the following appeal. (R 174)

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[1]It appears that Appellant did not receive notice nor did he have a meaningful opportunity to object to said imposition of costs.

SUMMARY OF ARGUMENT

This brief is submitted in partial fulfillment of the requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1296, 18 L.Ed.2d 493 (1967). There, the court held that where appointed counsel moves to withdraw on the grounds that he finds the appeal wholly frivolous, the Motion to Withdraw should be accompanied by a "brief referring to anything in the record that might arguably support the appeal." The Anders court also stated that "this requirement would not force appointed counsel to brief his case against his client..."Anders v. California, 386 U.S. at 745.

ISSUE

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEA?

This brief is submitted in partial fulfillment of the requirements of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967). There, the court held that where appointed counsel moved to withdraw on the grounds that he finds the appeal wholly frivolous, the motion to withdraw should be accompanied by a "brief referring to anything in the record that might arguably support the appeal." The Anders court also stated that "this requirement would not force appointed counsel to brief his case against his client..." Anders v. California, 386 U.S. at 745.

It is well-established that a defendant should be permitted to withdraw a guilty plea when such plea "was based upon a misunderstanding or misapprehension of facts considered by the defendant in making the plea." Wade v. State, 488 So.2d 126, 129 (Fla. 3rd DCA 1986) citing, Forbert v. State, 437 So.2d 1079, 1081 (Fla. 1983). The burden is upon the defendant to clearly demonstrate the misunderstanding or misapprehension. Yenes v. State, 440 So.2d 628 (Fla. 1st DCA 1983); See also, Florida Rule of Criminal Procedure 3.170(f).

Appellant sought to withdraw his nolo contendere plea based on a discrepancy in the amounts that were taken during the burglary. The two witnesses, the victim (Mrs. Fiscus) and the dispatcher believed different amounts of money were removed

during the burglary. Additionally, one report indicated the point of entry was the west front door whereas the owner alleged that the windows were used to enter the premises. (R 31-32)

Appellant also requested that his previous nolo contendere plea be set aside because the prosecutor violated Appellant's privacy rights by playing Appellant's taped confession regarding the burglary in the presence of the victim. Appellant generally alleged that he could prove that he was not guilty of the charged crime. (R 49, 53-54, 60)

The taped confession was not sealed by court order and was filed in the public record. (R 61) The fact that the witnesses observed different points of entry or exit does not necessarily mean that the testimony was contradictory. Appellant's confession was not suppressed.

CONCLUSION

For the above-stated reasons, the undersigned counsel requests permission to withdraw as counsel for the Appellant. Further, counsel requests this Court to allow Appellant, in his own behalf or through other counsel, sufficient time to submit a brief on points he may deem appropriate.

If this Court finds reversible error in this appeal, counsel requests this application to be withdrawn, and an opportunity be granted to file another brief for the Appellant.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Barbara L. Condon

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Daytona Beach, Florida 32114
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto Road, Suite 447, Daytona Beach, FL 32114, in his basket, at the Fifth District Court of Appeal, and a copy mailed to: Tony R. Palen, P.O. Box 028538, Miami, FL 33102, this 7th day of September, 1990.

Barbara L. Condon

BARBARA L. CONDON
ASSISTANT PUBLIC DEFENDER