IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC03-1660

ANTHONY WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Discretionary Review
of a Certified Question of Great Public Importance
from the Fifth District Court of Appeal

REPLY BRIEF

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IF *ANDERS* PROCEDURES ARE TO APPLY IN JIMMY RYCE ACT APPEALS, THIS COURT SHOULD REQUIRE ATTORNEY-CLIENT COMMUNICATION *PRIOR TO* A MOTION TO WITHDRAW AND THE SUBMISSION OF AN *ANDERS* BRIEF

The State argues (1) that the certified question should be answered in the affirmative, based upon *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), *cert. denied*, 536 U.S. 915, 122 S. Ct. 2381, 15 L.Ed.2d 199 (2002), and (2) that this Court should either decline to address Anthony Williams' argument that *Anders* procedures should include an attorney-client communication requirement, or that this Court should reject that argument. For the reasons that follow, the State's arguments are unpersuasive.

Appellant Anthony Williams has, as the State notes, acknowledged the apparent force of this Court's *Pullen* decision in the context of Jimmy Ryce Act appeals. *See* Initial Brief at 9-10. But Williams urges the Court to revisit how *Anders* is to be applied in Florida – something that the Court has the power to do (*see* Initial Brief, p. 20) (*citing Smith v. Robbins*, 528 U.S. 259, 265, 120 S. Ct. 746, 753, 145 L.Ed.2d 756 (2000)), and which has not been done since *In re Appellate Court Response to Anders Briefs*, 581 So. 2d 149 (Fla. 1991).

The State argues that the Court should refuse to address the attorney-client consultation issue, because it is "[i]n addition to" the certified question and has not

been "subjected to the crucible of the jurisdictional process set forth" in the Florida Constitution. (Answer Brief, p. 3) (*citing Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001)). But in the *Morsani* footnote the Court said it declined to address a claim raised by the petitioner because it was "outside the scope of the certified question and was not the basis of our discretionary review." 790 So. 2d at 1080 n. 26. That is not this case.

Here, the certified question is whether the *Anders* procedure should apply in Jimmy Ryce Act appeals. Whether that procedure should include an advance attorney-client communication is fairly within the scope of that question and should be addressed by this Court. Indeed, to the extent that *In re Appellate Court Response to Anders Briefs, supra,* set forth the *Anders* procedures to be used in this state, those procedures could only be changed by this Court. *See Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973) (district courts are bound to follow the case law set forth by the Supreme Court of Florida); *cf.* Art. V, § 2(a), Fla. Const. (giving this Court exclusive jurisdiction to prescribe rules of practice and procedure for courts of this state). That principle, buttressed by the fact that this Court has the discretion to consider any issue in a case once it has accepted jurisdiction, *see State v. Hubbard,* 751 So. 2d 552, 565 n. 30 (Fla. 1999), is sufficient for this Court to decide the certified question in light of the argument made in the Initial Brief, that *Anders* procedures should include the

requirement for some attorney-client communication prior to an attorney filing a motion to withdraw.

The State's selective quotation from, and misuse of, *Commonwealth v. Torres*, 630 A.2d 1250 (Pa. Super. 1993), a case featured in the Initial Brief, undermines the State's arguments. The State argues that an attorney-client consultation requirement would be "redundant" (Answer Brief, p. 1), saying that "[t]he Superior Court of Pennsylvania also recognized that such a consultation requirement would be redundant. . . ." *Id.*, pp. 4-5 (*citing Commonwealth v. Torres*, 630 A.2d at 1253-53). But the excerpt quoted from *Torres* was preceded in the opinion by a lengthy discussion of Torres' counsel's efforts for his client during his representation of Torres. The words "***Under the circumstances of this case***, additional communication by letter, phone or face to face interview would be redundant and unnecessary," 630 A.2d at 1253 (emphasis supplied), must be read in light of Torres' counsel's history with his client.

Torres' appellate attorney had "represented appellant at every stage of the proceedings in this case until his petition to withdraw was filed. . . ." *Id.* at 1251 n. 3. The *Torres* court found counsel's history with his client to be significant, noting that "[o]bviously counsel who has represented the defendant from the trial through sentencing and post-conviction proceedings would feel lesser need to interview,

telephone or write to the defendant than counsel first involved by appointment for appeal purposes." *Id*. at 1252. That sentence was omitted from the block quotation in the State's Answer Brief at page 5, and, along with this also-omitted excerpt from *Torres,* was replaced with ellipses:

> It thus becomes counsel's responsibility to determine when and to what extent communication is necessary. For example, in the case before us, ***counsel, a public defender, represented appellant throughout the proceedings and was aware of the issues appellant sought to present on appeal***. As such, no interview of appellant was necessary for counsel to make the requisite determination of the appeal's merit.

630 A.2d at 1252 (emphasis supplied).

The portions of the *Torres* opinion that were omitted by the State provide the context necessary to understand *Torres*, and reveal that the *Torres* majority did not adopt the State's inflexible position that "a consultation requirement would be redundant and would cause unwarranted and unnecessary expense and misuse of attorney time to the detriment of the legal defense system." Answer Brief, p. 1. *Torres* thought that face-to-face consultation, "if required, with the wide dispersal of defendants throughout the penal system of Pennsylvania, would place an unwarranted and unnecessary expense and misuse of attorney time to the detriment of the legal defense system." 630 A.2d at 1253. Understanding the logistical challenges that

would present in some cases, we have not argued that a face-to-face consultation is the only acceptable option. *See* Initial Brief, pp. 19-20.

We respectfully submit that the prosecutorial arm of the State is particularly ill-positioned to opine on what would be to the detriment or benefit to the legal defense system. This Court, however, is the proper authority to evaluate whether attorney-client communication prior to the appointed appellate lawyer filing a motion to withdraw is so basic a requirement of an attorney-client relationship that the failure to have such a communication is a "disservice to the defendant in particular and the judicial system and the principles upon which it rests in general." *Commonwealth v. Torres*, 630 A.2d at 1256 (Popovich, J, concurring and dissenting).[1] This Court should reject the State's argument that a rule requiring attorney-client communication prior to a motion to withdraw would be a "misuse of attorney time" (Answer Brief, p. 1), and adopt the better view of the *Torres* dissenters. *See* Initial Brief, pp. 16-18.

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[1] The argument we make is not revolutionary. The Rules of Professional Conduct impose a duty to communicate with one's client. *See* Rule 4-1.4, R. Regulating Fla. Bar ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. . . A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). The fact that the client is indigent and incarcerated does not eliminate one's professional responsibilities.

CONCLUSION

For the foregoing reasons, the Court should grant the relief as specified in detail in the Conclusion of the Initial Brief. The decision below should be approved in part and disapproved in part, and the certified question should be answered in the affirmative with the caveat that an appointed appellate attorney should communicate with his or her client on the subject of the appeal in advance of filing a motion to withdraw and an *Anders* brief.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel named below, by U.S. Mail on this 11th day of May, 2004:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14-point font.

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