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IN THE SUPREME COURT OF FLORIDA

TYRONE POWELL, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC14-593

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT STATE OF FLORIDA'S ANSWER BRIEF

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0045489

JOSHUA R. HELLER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0502901

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

This is a discretionary appeal in a criminal case based on certified question jurisdiction. Appellant raises three issues, all of which are contested, and the last two of which should not be considered as outside the certified question.

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, TYRONE POWELL, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of four volumes, which will be referenced as the Record on Appeal and by appropriate volume, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement omits facts critical to the issues presented and the applicable standards of appellate review. Because of these serious defects, mere supplementation without extensive explanation would not render the statement comprehensible. Accordingly, the State declines to accept it in its entirety, urges the court to reject it, and presents the following statement of the case and facts:

On September 17, 2012, the State of Florida filed an Information in the Circuit Court for the Fourth Judicial Circuit in and for Duval County, that was ultimately amended to charge Petitioner with one count of aggravated battery on a person 65 years of age or older, in violation of Section 784.08(2)(a), Florida Statutes, a first-degree felony. (R. 11, 15.) Prior to trial, the State filed notices of intent to classify Petitioner as a prison releasee reoffender (PRR), a habitual violent felony offender (HVFO), and a violent career criminal (VCC). (R. 12-13, 16-18.) Petitioner ultimately proceeded to jury trial on January 17, 2013, where he was found guilty as charged. (R. 20.)

The trial court held a sentencing hearing on March 5, 2013. After hearing from the parties, the trial court refused to find that sentencing Petitioner as an HVFO and VCC was not necessary for the protection of the public, but rather ruled Petitioner was "a danger to the community." (R. 142.) The trial court orally pronounced that Petitioner was sentenced to mandatory life imprisonment as a VCC, a thirty-year minimum mandatory as a PRR, and a fifteen-year minimum mandatory as an HVFO. (R. 143-46.)

Petitioner also waived hearing on a Public Defender lien, which the judge orally pronounced as a $400 cost. (R. 146.)

On March 5, 2013, the trial court rendered a judgment and sentence. In that judgment and sentence, the trial court adjudicated Petitioner guilty and sentenced him to life imprisonment, with a fifteen years minimum mandatory sentence as a HVFO, a thirty-year minimum mandatory sentence as a PRR, and a life minimum mandatory sentence as a VCC. (R. 102-108.) In the written judgment and sentence, the trial court also imposed various costs, including a $450 cost for court-appointed counsel's fees. (R. 104.) Petitioner appealed to the First District.

On appeal, counsel ultimately filed an *Anders*[1] brief on September 9, 2013, wherein counsel discussed why the motion for judgment of acquittal did not present an arguable issue, why counsel was unable to argue in good faith that the sentence was reversible, and indicating that the First District could remand the case for a Public Defender lien cost to be conformed to the oral pronouncement. (Anders Br. 8-9.) Upon receipt of the *Anders* brief, the First District issued an order on September 9, 2013, stating:

> Appellant in proper person is granted 30 days from the date of this order to serve an initial brief. Failure to timely serve a pro se brief will result in this case being presented to the court without benefit of a pro se brief. Pending further order of the court, Appellee shall not be required to serve an answer brief. If the panel of judges which considers the merits of this appeal finds that the record or briefs support any arguable claims, additional briefing

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[1] *See Anders v. California*, 386 U.S. 738 (1967).

will be ordered in accordance with *In re Anders Briefs*, 581 So. 2d 149 (Fla. 1991).

(Ord. of Sept. 19, 2013.) After seeking an extension of time, Petitioner did not file a pro se brief.

On February 26, 2014, the First District issued a per curiam opinion stating:

> Defendant was convicted of aggravated battery of a person over 65. The trial court sentenced him as an habitual violent felony offender under section 775.084(4)(b), Florida Statutes (2012), and a violent career criminal under section 775.084(4)(d). A defendant may be sentenced for one criminal conviction under only one recidivist category from 775.084, even if the defendant meets the criteria for more than one. *See Clines v. State*, 912 So. 2d 550 (Fla. 2005). We affirm, however, because defendant did not object at sentencing or file a motion under Florida Rule of Criminal Procedure 3.800(b)(2). *See A.L.B. v. State*, 23 So. 3d 190 (Fla. 1st DCA 2009). We certify the following question as we did in *A.L.B.*
>
> > NOTWITHSTANDING *MADDOX*, SHOULD AN APPELLATE COURT CORRECT A SENTENCING ERROR IN AN *ANDERS* CASE WHICH WAS NOT PRESERVED PURSUANT TO THE APPLICABLE RULES OF PROCEDURE? IF NOT, WHAT STEPS SHOULD AN APPELLATE COURT FOLLOW TO CARRY OUT THE MANDATES OF *ANDERS* AND *CAUSEY* IN SUCH A CASE?
>
> We AFFIRM defendant's convictions and sentence without prejudice to his right to seek post-conviction relief. *See Jones v. State*, 964 So. 2d 855 (Fla. 2d DCA 2007).

Powell v. State, 133 So. 3d 594 (Fla. 1st DCA Feb. 26, 2014). This Court subsequently accepted discretionary jurisdiction.

STATEMENT OF THE ISSUES

ISSUE I (Initial Brief Issues I & II) (Restated)

WHETHER A DISTRICT COURT SHOULD *SUA SPONTE* GRANT RELIEF TO UNPRESERVED SENTENCING ERRORS OR CONTINUE TO PROPERLY APPLY *ANDERS* PROCEDURES WHICH, WHEN PROPERLY APPLIED, ALLOWS COUNSEL THE OPPORTUNITY TO PRESERVE THOSE ALLEGED ERRORS FOR REVIEW; AND WHETHER THE SENTENCING DESIGNATIONS WERE PROPER.

ISSUE II (Initial Brief Issue III) (Restated)

WHETHER, IF PROPERLY CONSIDERED AND PROPERLY PRESERVED, THE TRIAL COURT DETERMINED A FACT OTHER THAN A PRIOR CONVICTION THAT INCREASED THE MAXIMUM SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL.

ISSUE III (Initial Brief Issue IV) (Restated)

WHETHER, IF PROPERLY CONSIDERED, THIS CLAIM IS PRESERVED AND THIS COURT SHOULD RECEDE FROM THE RULE THAT A DEFENDANT CAN RAISE CERTAIN ERRORS IN AN *ANDERS* BRIEF.

SUMMARY OF ARGUMENT

ISSUE I - Although the First District erred in this *Anders* case, it is not for the reasons set forth by Petitioner. Rather, the First District erred because it should have asked for briefing on a prospective error that could have been preserved through a Rule 3.800(b) motion—not because it failed to resurrect fundamental sentencing error. Under Rule 3.800(b), an *Anders* brief does not operate at the "party's first brief" within the meaning of the rule, permitting a defense attorney to file a Rule 3.800(b) motion upon receipt of a *Causey* order. The First District decision to the contrary should be rejected and the First District here erred by failing to issue a *Causey* order upon discovery of a prospective sentencing error. This reading serves the purpose of the rule and the purpose of *Anders*.

On the merits, while it makes no difference to Petitioner's conviction or sentence, Petitioner's assertion that his sentencing designation is limited only to violent career criminal is incorrect. Rather, this Court has held that Petitioner may also be designated as a prison releasee reoffender and a violent career criminal. Petitioner's claims that *Anders* counsel was constitutionally ineffective are also incorrect. Petitioner suffers no actual prejudice from counsel's failure to raise the issue and, in fact, a reasonable lawyer could choose not to raise an issue that makes no difference to their client in order to subject the case to *Anders* review.

ISSUE II - This issue is outside the certified question and was not presented to the First District and, therefore, should not be considered.

Further, the issue is unpreserved. Finally, the issue is without merit. Section 775.084(3) does not involve a factual finding other than a prior conviction that raises the sentencing ceiling. The trial court's possible factual finding only reduces the sentencing ceiling, so it does not violate the Sixth Amendment's right to a jury trial.

ISSUE III - This Court should not consider this issue because it is outside the certified question. However, this claim is unpreserved and this Court should require cost issues to be raised by a Rule 3.800(b) and be briefed on the merits for proper consideration, and this Court should recede from the pre-Rule 3.800(b) case of *In re Anders Briefs*, 581 So. 2d 149 (Fla. 1991).

ARGUMENT

ISSUE I: WHETHER A DISTRICT COURT SHOULD *SUA SPONTE* GRANT RELIEF TO UNPRESERVED SENTENCING ERRORS OR CONTINUE TO PROPERLY APPLY *ANDERS* PROCEDURES WHICH, WHEN PROPERLY APPLIED, ALLOWS COUNSEL THE OPPORTUNITY TO PRESERVE THOSE ALLEGED ERRORS FOR REVIEW; AND WHETHER THE SENTENCING DESIGNATIONS WERE PROPER. (RESTATED)

A. *Standard of Review.*

This issue presents a question of law that is reviewed *de novo*. *See Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling of law; rather, the appellate court makes its own determination of the legal issue. *See Health Options, Inc. v. Agency for Health Care Admin.*, 889 So. 2d 849, 851 (Fla. 1st DCA 2004). Under the *de novo* standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. However, a trial court's factual findings on which its decision of law is based will be sustained and given deference by the appellate court if supported by competent substantial evidence. *See, e.g., Dillbeck v. State*, 882 So. 2d 969, 972-973 (Fla. 2004) (addressing a mixed question of law and fact).

B. *The First District Erred When It Did Not Ask Counsel to Brief an Unpreserved Possible Sentencing Error That Could Have Still Been Preserved Through a Properly Filed Rule 3.800(b) Motion.*

Petitioner contends that the district court should be able to *sua sponte* correct fundamental sentencing errors that were not briefed in the *Anders* procedures. While the First District's decision is flawed, Petitioner has failed to apprehend the proper reason why. The error in the

First District's resolution of this case is that it did not ask counsel to brief a prospective error that could have been preserved through a Rule 3.800(b) motion. Rather than advocate the correct procedure, Petitioner's efforts to resurrect fundamental sentencing error in *Anders* cases undercuts this Court's decisions on Rule 3.800(b) motions. Accordingly, the State addresses why Petitioner's theory is incorrect and then sets forth the proper way cases where an *Anders* court discovered a prospective sentencing error that has not been preserved should be considered. The State then addresses the merits of the asserted error in this case. Finally, the State addresses Petitioner's repeated incorrect assertions of counsel's purported ineffectiveness.

1. Petitioner's attempt to resurrect fundamental sentencing error is meritless, but the First District erred by failing to issue a *Causey* order, which would have permitted counsel to file a Rule 3.800(b)(2) motion.

Petitioner begins his Initial Brief with a brief (and somewhat selective) history and this Court's precedent related to Rule 3.800(b) motions. Petitioner ends his discussion with *Maddox v. State*, 760 So. 2d 89 (Fla. 2000), as this Court's final word on Rule 3.800(b) motions. Petitioner, however, has overlooked that many of the arguments he raises have been considered, and at times, rejected, by this Court's subsequent decisions, most notably, *Jackson v. State*, 983 So. 2d 562 (Fla. 2008).

Generally, errors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental. *See, e.g., Goodwin v. State*, 751 So. 2d 537, 544 (Fla.

1999)("If the error is not properly preserved or is unpreserved, the conviction can be reversed only if the error is 'fundamental.'"). Fundamental error is "error which goes to the foundation of the case or goes to the merits of the case of action." *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994).

However, because of Rule 3.800(b), sentencing errors are different. Rule 3.800(b) allows the filing of a "motion to correct any sentencing error, including an illegal sentence . . . ." FLA. R. CRIM. P. 3.800(b). This Court has recognized: "Sentencing errors include harmful errors in orders entered as a result of the sentencing process. This includes errors in orders of probation, orders of community control, cost and restitution orders, as well as errors within the sentence itself." *Jackson v. State*, 983 So. 2d 562, 572 (Fla. 2008).[2]

Under Rule 9.140(e) of the Rules of Appellate Procedure, "[a] sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of sentencing; or (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b)." FLA. R. APP. P. 9.140(e). "Thus, rule 3.800(b) creates a two-edged sword for defendants who do not object to sentencing errors before sentence is rendered: on the one hand, it allows defendants to raise

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[2] This Court distinguished sentencing errors from sentencing *process* errors, which are errors in the sentencing process that do not "involve errors related to the ultimate sanctions imposed." *See Jackson*, 983 So. 2d at 572-73. Petitioner does not dispute that his allegation of error here is a sentencing error.

such errors for the first time *after* the sentence; on the other hand, it also *requires* defendant to do so if the appellate court is to consider the issue." *Jackson*, 983 So. 2d at 569 (emphasis added); *see Brannon v. State*, 850 So. 2d 452, 456 (Fla. 2003) ("for defendants whose initial briefs were filed after the effective date of rule 3.800(b)(2), the failure to preserve a fundamental sentencing error by motion under rule 3.800(b) or by objection during the sentencing hearing forecloses them from raising the error on direct appeal."). "In other words, for sentencing errors, to raise even fundamental error on appeal, defendants must first file a motion under rule 3.800(b)." *Jackson*, 983 So. 2d at 569.

Petitioner ignores this case law and asserts that "when an appellate court discovers a patent unpreserved sentencing error, it has the power, and in fact the duty, to correct that error if it constitutes fundamental error." (IB. 22.) Petitioner's contention is diametrically opposed to the language of Rule 9.140(e) and this Court's decisions in *Brannon* and *Jackson*, which unambiguously held that "for sentencing errors, to raise even fundamental error on appeal, defendants must first file a motion under rule 3.800(b)." *Jackson*, 983 So. 2d at 569; *see Brannon*, 850 So. 2d at 456.

Petitioner seeks to resurrect *sua sponte* correction of "fundamental sentencing errors" on direct appeal, because he contends it is supported by *Maddox v. State*, 760 So. 2d 89 (Fla. 2000). Petitioner is wrong. In *Maddox*, this Court addressed fundamental sentencing errors in the wake of the Criminal Appeal Reform Act of 1996 for defendants "whose appeals fall

into the window period between the effective date of the Act and the effective date of our recent amendment to rule 3.800 in *Amendments II* [761 So. 2d 1015 (Fla. 1999)]." *Id.* at 94. In fact, the "failsafe" language that Petitioner relies upon unambiguously refers to defendants within this limited period of time. (IB. 22.) The sentence after the one that Petitioner quotes in his brief (but fails to mention) states: "Thus, the failure of rule 3.800(b) to provide a failsafe method for defendants to raise and preserve sentencing errors, *see id.*, is a major consideration in our decision not to give literal effect to rule 9.140(d) ***during the window period***." *Maddox*, 760 So. 2d at 97-98 (bold, underline, italics added).

And, had there been any question about *Maddox*'s limited applicability, *Maddox* was specifically referenced by *Jackson* as applying only to a certain "window" of defendants---those "whose appeals fell within the window between the effective date of the Act and the 1999 amendment to rule 3.800---allowing those defendants, as a matter of equity based on the change in law, to correct "a narrow class of 'patent and serious' unpreserved errors . . . on direct appeal as fundamental error." *See Jackson*, 983 So. 2d at 569 (citing *Maddox*, 760 So. 2d at 95, 99). *Maddox* involves the specific period of time between the effective dates of the Criminal Appeals Reform Act and Amendments to Rule 3.800(b). It is inapplicable.

That is not to say that the First District's method of resolution of this case was correct. It wasn't. The First District erred, but not

because it failed to correct an unpreserved sentencing error.[3] Rather, the First District erred because it failed to follow correct *Anders* procedures.

The Fourteenth Amendment's Equal Protection and Due Process Clauses require that an indigent "criminal appellant pursuing a first appeal as of right [have] minimum safeguards necessary to make that appeal 'adequate and effective.'" *Evitts v. Lucey*, 469 U.S. 387, 392 (1985). While not expressly required by those constitutional rights, *Smith v. Robbins*, 528 U.S. 259, 272-76 (2000), in *Anders*, the Supreme Court set forth a prophylactic procedure that would satisfy this constitutional requirement:

> If counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court---not counsel---then proceeds, after a full examination of the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds **any of the legal points *arguable on the merits* (and therefore not frivolous)** it must, prior to the decision, afford the indigent the assistance of counsel to argue the appeal.

Anders, 386 U.S. at 744 (underline, bold and italics added).

Florida has adopted this prophylactic procedure. *See State v. Causey*, 503 So. 2d 321 (1987). Further, this Court has indicated a district court must "allow both the appellant and the state to submit briefs on issues that the court has found in its independent review to be arguable on the

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[3] The State notes that its input was neither invited nor permitted in the disposition of this case in the First District.

merits." *Id* at 323.

The issue then becomes whether an unpreserved sentencing error that can be corrected or preserved by a Rule 3.800(b)(2) motion, in a case where counsel has filed an *Anders* brief, is "arguable on the merits." The flaw in the First District's decision is its failure to recognize that such an error is arguable on the merits. Although the sentencing error was initially unpreserved, all that counsel must do to preserve the issue to allow for appellate review (and possibly moot it for appellate consideration) is file a Rule 3.800(b)(2) motion.

Rule 3.800(b)(2) limits the filing such a motion to "before the party's first brief is served." Three districts have found that an *Anders* brief is not "the party's first brief" within the meaning of Rule 3.800(b)(2). *See Proctor v. State*, 901 So. 2d 994 (Fla. 1st DCA 2005); *Lopez v. State*, 905 So. 2d 1045 (Fla. 2d DCA 2005), *abrogated on other grounds as recognized in Pifer v. State*, 59 So. 3d 225 (Fla. 2d DCA 2011); *Tanzler v. State*, 6 So. 3d 711 (Fla. 5th DCA 2009) (en banc). This makes sense. An *Anders* brief is not an assertion of reversible error, but rather an assertion that counsel cannot present an argument that is not wholly frivolous.

When a district court identifies a possible sentencing error, it alerts the parties and begins the merits briefing process. Only then does the defendant file his initial brief on the merits, ending the time to file a Rule 3.800(b)(2) motion. Accordingly, upon receipt of the district court's order identifying an "arguable claim" of sentencing error, the defendant can seek to expeditiously correct that error by presenting it to the trial

court for correction and, if the trial court denies it, assert it as error to the district court.[4]

However, the First District has concluded that this understanding of Rule 3.800(b)(2) is incorrect. In *Collando-Pena v. State*, 141 So. 3d 229 (Fla. 1st DCA 2014), the First District determined that, in *Anders* cases, upon issuing an order for briefing of a specific issue, it was improper for counsel to file a Rule 3.800(b)(2) motion to have the trial court correct an overlooked sentencing error. *Id.* at 231. Concluding that the language of 3.800(b)(2) "contemplates an end point after which time the trial court no longer has concurrent jurisdiction to correct sentencing errors during the pendency of an appeal," the First District determined that when "the period for filing and serving the pro se brief has expired, the appeal is perfected, and the appellate court assumes the duty under *Anders* and its Florida progeny to conduct an independent review for arguable issues apparent on the face of the record." *Id.* So, the First District concluded, "once the *Anders* review is triggered, judicial efficiency is best achieved by allowing this process to proceed to completion." *Id.*

However, there is no basis for the First District's conclusion in *Anders* cases in either the text or the rationale behind the rule. The text

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[4] Of course, if the defendant chose to waive a sentencing error, which is certainly possible in a case such as this one where the defendant receives no real benefit from its correction, counsel can explain that the defendant did not wish to pursue that claim of error in the hope that the district court would have discovered an arguable claim that actually benefitted him in some tangible way.

of the rule prohibits the filing of a Rule 3.800(b)(2) motion "before the party's first brief is served." And an *Anders* brief is not considered a "first brief." *See Proctor*, 901 So. 2d at 994); *Lopez*, 905 So. 2d at 1045; *Tanzler*, 6 So. 3d at 711.[5] Accordingly, the plain language of the rule does not prohibit the filing of a Rule 3.800(b) motion after an *Anders* brief is filed and after a district court issues a briefing order outlining an arguable issue.

Nor is the purpose of the rule served. Rule 3.800(b) was "intended to provide defendants with a mechanism to correct sentencing errors in the trial court at the earliest opportunity, especially when the error resulted from a written judgment and sentence that was entered after the oral pronouncement of sentence" as well as "a means to preserve these errors for appellate review." *Amendments II*, 761 So. 2d at 1015. In fact, it is in the interest of the defendant, the State and the judicial system to correct any actual errors on the face of a sentencing order at the earliest possible opportunity. *See Jackson*, 983 So. 2d at 568-69 (discussing the multiple methods of post-conviction relief available to correct errors on the face of a sentencing order).[6]

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[5] And, while a pro se brief is allowed, it is not required and certainly is not necessary to the appellate court's *Anders* review process. So it should not be the trigger for the end point of the 3.800(b)(2) motion window either.

[6] Nor does the First District's rule particularly serve judicial efficiency. Because, in many cases, the First District's rule will result in a per curiam affirmed decision after an *Anders* brief, unsuccessful litigants will file claims alleging ineffective assistance of appellate

The First District concluded that "[t]he language in rule 3.800(b)(2) contemplates an end point after which time the trial court no longer has concurrent jurisdiction to correct sentencing errors during the pendency of the appeal." *Collando-Pena*, 141 So. 3d at 231. This is correct. However, rather than arbitrarily placing that end point at the end of the filing of the *pro se* brief, it appears more consistent with the language of the rule to place that end point at the filing of the post-*Causey* order Initial Brief on the Merits.

This timing is also more consistent with the purpose of *Anders* itself. The purpose of the district court's independent review is to ensure that the "constitutional requirement of substantial equality and fair process" is met because counsel is, in fact, acting as an "active advocate in behalf of his client." *Anders v. California*, 386 U.S. 738, 744 (1967).[7] A district court's issuance of a *Causey* order suggests that, as to a particular issue, counsel may have fallen below that standard. It seems incongruous to find that the district court can engage in its review of counsel's advocacy, find it may be lacking for failure to file a Rule

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counsel in the district court resulting in another direct appeal and possibly requiring an additional direct appeal or post-conviction proceeding, to address an otherwise easily presented and resolved issue that could have been addressed through a Rule 3.800(b)(2) motion and then on direct appeal.

[7] This is why Petitioner's assertion that the district court should be able to correct the error if it is reviewing the record (IB. 23) is wrong. The district court reviews the record to determine whether counsel's performance was properly as an advocate, rather than an amicus, not to engage in a search for reversible error on Petitioner's behalf.

3.800(b) motion on an arguable error on the face of the sentencing order, but, upon discovering that failure, conclude that counsel may not bring the issue to the trial court's attention and preserve the issue now (if, in fact, counsel did make a mistake, rather than choose not to present the issue).

Therefore, the State suggests that the First District erred, but not for the reasons set forth by Petitioner. Rather, the First District should have issued a *Causey* order asking counsel to brief the arguable sentencing issue that it found within the record, rather than issuing an opinion finding that the issue was not preserved for review. Petitioner's argument, which seeks to resurrect fundamental sentencing error, despite its elimination by the Criminal Appeals Reform Act of 1996 and Rules, is without merit.[8]

2. While it makes no difference to Petitioner's conviction or sentence, Petitioner's assertion that his sentencing designation is limited to only violent career criminal is incorrect.

Although ambiguous, Petitioner appears to suggest that he may not be sentenced under multiple recidivist categories for a single crime. Petitioner is only partially correct.

As stated above, the trial court sentenced Petitioner to life imprisonment, with a fifteen years minimum mandatory sentence as a Habitual Violent Felony Offender, a thirty year minimum mandatory sentence as a

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[8] However, it appears Petitioner agrees, in part, with the State's resolution. (IB. 28.)

Prison Releasee Reoffender, and a life minimum mandatory sentence as a Violent Career Criminal. (R. 102-108.) This Court has held that a defendant may not be sentenced to more than one recidivist category for the same offense in the habitual offender hierarchy: habitual offender, habitual violent felony offender, three-time violent felony offender, and violent career criminal. *See Clines v. State*, 912 So. 2d 550 (Fla. 2005). Accordingly, Petitioner's designation as a habitual violent felony offender and a fifteen-year minimum mandatory on that designation were improperly imposed. However, the greater designation as a violent career criminal and minimum mandatory sentence of life were properly imposed.

However, Petitioner is not correct about his Prison Releasee Reoffender designation. In *Grant v. State*, 770 So. 2d 655 (2000), this Court determined that a prison releasee reoffender designation could be imposed on the same offense with a designation in the habitual offender hierarchy. There, this Court concluded that "the imposition of an applicable longer, concurrent term of imprisonment with a PRR mandatory minimum sentence does not violate double jeopardy," based on the express language of Section 775.082(8)(c-d). *Id.* at 658-59. Therefore, Petitioner's sentence based on both VCC and PRR designations was proper.

Further, Petitioner's proposed remedy is incorrect. Petitioner asserts that "in the interest of justice and judicial economy," this Court should remand for resentencing. Yet Petitioner does not challenge that his minimum mandatory life sentence as a Violent Career Criminal was legally imposed. Therefore, the trial court has no discretion to sentence on

remand to anything other than life imprisonment. Accordingly, the proper remedy is to remand with instructions to strike the habitual violent felony offender designation as a ministerial act, so the circuit court can strike the designation in chambers and Petitioner does not have to be present for the sentence to be corrected. *See Jordan v. State*, 143 So. 3d 335, 339 (Fla. 2014) (recognizing that the right of presence does not exist where the resentencing concerns issues that are purely ministerial in nature); *see also United States v. Jackson*, 923 F.2d 1494, 1495 (11th Cir. 1991) (finding, "in constitutional terms, a remedial sentence reduction is not a critical stage of the proceedings; so the defendant's presence is not required."); *United States v. Erwin*, 277 F.3d 727, 731 (5th Cir. 2001) ("[W]here the entire sentencing package has not been set aside, a correction of an illegal sentence does not constitute a resentencing requiring the presence of the defendant, so long as the modification does not make the sentence more onerous.").

3. Petitioner's assertions of ineffective assistance of appellate counsel are not correct.

While not necessary to address this case, since the First District did err in how it handled this *Anders* brief, Petitioner repeatedly asserts that appellate counsel was constitutionally ineffective for failing to raise this issue. That is not the case.

"Generally, an ineffective assistance of appellate counsel claim is analyzed under the two-prong test enunciated in *Strickland* . . . ." *Grubbs v. Singletary*, 120 F.3d 1174, 1176 (11th Cir. 1997). "The test requires a

defendant to show both that (1) appellate counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *Id.* at 1176-77.

"When reviewing whether an attorney is ineffective, courts 'should always presume strongly that counsel's performance was reasonable and adequate.'" *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (quoting *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir.1992). "'[A] court should be highly deferential to those choices . . . that are arguably dictated by a reasonable trial strategy." *Id.* (quoting *Devier v. Zant*, 3 F.3d 1445, 1450 (11th Cir.1993)). As *Strickland* found, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The "presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." 466 U.S. at 697.

A showing that different attorneys might have handled the case differently does not establish ineffectiveness. There are "countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Chandler*, 218 F.3d at 1313 (quoting *Strickland*, 466 U.S. at 693).

"[P]erfection is not required. Nor is the test whether the best

criminal defense attorneys might have done more." *Chandler*, 218 F.3d at 1313 n.12. "[O]missions are inevitable, but the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled." *Id.* at 1313 (quoting *Burger v. Kemp*, 483 U.S. 776 (1987)). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. "[E]very effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system." *Id.* at 689.

Furthermore, because the test is objective, the question is whether no reasonable lawyer would have made the same decision under the circumstances. *See Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."); *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)(stating that "[e]ven if many reasonable lawyers would not have done as defense counsel did at

trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so.") (underline added).

Additionally, the "winnowing out of weaker arguments" to be raised on appeal "is the hallmark of effective advocacy," *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 2667 (1986), because "every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court." *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989); *see also McBride v. Sharpe*, 25 F.3d 962, 973 (11th Cir. 1994) (stating that counsel's actions were not deficient because counsel omitted a weak issue to avoid cluttering the brief with weak arguments). Thus, appellate counsel is not ineffective for winnowing out weaker arguments on appeal and focusing on those more likely to prevail. *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S. Ct. 3308, 3312-13 (1983).

Second, in addition to cognizable deficiency, the petitioner must show that the performance prejudiced the defense, so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the

judge or jury." *Id.* at 695-96, 104 S. Ct. at 2068.[9]

While prejudice is typically determined for appellate counsel based on whether there is a reasonable likelihood of prevailing on appeal, that is not always dispositive. *Cf. Smith v. Robbins*, 528 U.S. 259, 285-86 (2000) (espousing general rule of appellate prejudice that defendant "must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal"). However, prejudice does not occur where counsel fails to obtain a "paper victory." *See Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) ("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.") This is because "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding . . . . In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696.

In *Clark v. Maggio*, 737 F.2d 471, 475 (5th Cir. 1984), the Fifth Circuit found that no prejudice occurs where counsel failed to raise an

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[9] Of course, it is also axiomatic that an attorney cannot be ineffective for failing to raise a meritless issue. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument . . . cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue.").

argument that has no impact on a defendant's life sentence. *Id.* at 475-76; *accord Brown v. Collins*, 937 F.2d 175, 182-83 (5th Cir. 1991) ("Brown's sentence for his conviction of aggravated battery . . . would have been the same [as the sentence he is currently serving], and therefore, he cannot demonstrate any constitutional prejudice . . . ."). Similarly, in *Rainey v. Varner*, 603 F.3d 189 (3d Cir. 2010), the Third Circuit found that where counsel's failure to raise an issue had no effect on his life sentence, the defendant suffered no prejudice. *Id.* at 201-02.

Petitioner's claim of prejudice here is even less meritorious. Neither Petitioner's offense of conviction nor the amount of time Petitioner spends incarcerated is affected at all by counsel's failure to raise this sentencing issue. Both Petitioner's crime of conviction and the amount of time Petitioner spends in prison are not changed one iota by counsel's failure to raise this claim. At best, Petitioner is entitled to have the HVFO designation and fifteen-year minimum mandatory stricken, which he is serving concurrently with the minimum mandatory life sentence as a VCC and PRR. Therefore, Petitioner cannot establish prejudice.

Further, in light of *Anders*, counsel's failure to raise this argument is not deficient either. The prospect of *Anders* review provides an odd incentive to an appellate lawyer who is unable to find a good faith appellate issue that will actually help his or her client in a tangible way. As Judge Wolf of the First District has pointed out, under *Anders* a party "gets greater review . . . when it does not file a brief than when it does file a brief but does not raise" a certain issue. *See Watson v.*

State, 975 So. 2d 572, 575 (Fla. 1st DCA 2008) (Wolf, J., concurring). So, counsel, faced with a "paper victory" of eliminating a designation that has no impact on Petitioner's judgment and sentence but will result in application of the "raise or waive" rule; or filing an *Anders* brief, where the district court will engage in an independent review of the entire record and possibly find an issue that actually could benefit Petitioner, has two possible strategies. Counsel could seek the "paper victory." Or counsel could choose not to raise sentencing issues (or other minor issues, such as costs), and subject the case to *Anders* review, hoping that the appellate court will succeed where counsel has not: finding an arguable issue that could actually matter to Petitioner. It is hard to say that abandoning issues that might have merit, when there is hope the appellate court can independently succeed where counsel has not, is an unreasonable appellate strategy. Certainly, it cannot be said that no reasonable lawyer would consider it.

Therefore, while it does not impact this case, Petitioner's conclusory assertion that appellate counsel was constitutionally ineffective for failing to raise this sentencing issue is without merit. Petitioner would not be able to demonstrate either deficient performance or prejudice.

ISSUE II: WHETHER, IF PROPERLY CONSIDERED AND PROPERLY PRESERVED, THE TRIAL COURT DETERMINED A FACT OTHER THAN A PRIOR CONVICTION THAT INCREASED THE MAXIMUM SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL (RESTATED)

A. This Court Should Not Consider this Issue, Because It is Outside the Certified Question and Not Raised in the District Court.

Petitioner asserts in a footnote that "[a]lthough this issue was not raised in the district court, once this Court has obtained jurisdiction over a case, this Court has discretion to review other issues." (IB. 30 n.1.) While Petitioner is correct as a matter of jurisdiction, he is not as a matter of this Court's prudential considerations. In *Savoie v. State*, 422 So. 2d 308 (Fla. 1982), this Court made clear that "[t]his authority . . . is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case." *Id.* at 312. Petitioner's second issue plainly fails to meet these prudential concerns. By Petitioner's own admission "this issue was not raised in the district court." (IB. 30 n.1.) *Savoie* instructs that, as a prudential matter, this Court should decline to consider it.

B.. Standard of Review.

When properly raised, an issue concerning whether a defendant is entitled to a jury trial involves a pure question of law, which is reviewed *de novo*. *See Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own

determination of the legal issue. *See Health Options, Inc. v. Agency for Health Care Admin.*, 889 So. 2d 849, 851 (Fla. 1st DCA 2004). However, a trial court's factual findings on which its decision of law is based will be sustained and given deference by the appellate court if supported by competent substantial evidence. *See, e.g., Dillbeck v. State*, 882 So. 2d 969, 972-973 (Fla. 2004) (addressing a mixed question of law and fact).

C. This Issue is Either a Trial Error or a Sentencing Process Error and is Unpreserved and, Even if it Were a Sentencing Error, is Unpreserved.

This Court has recently determined that an *Apprendi* error is a sentencing error, correctable by Rule 3.800(a). *See Plott v. State*, 148 So. 3d 90 (Fla. 2014). *Plott*, however, should be reconsidered. The error alleged in *Apprendi* is that a particular fact being determined by a judge violates the Sixth Amendment right to a jury trial. In other words, the reason that a sentence is illegal is because the wrong person made the decision about an element of the offense: namely a judge, rather than a jury. *Plott* reasons that the sentence is not available based on the facts found by the jury and, therefore, is illegal. However, *Plott* seems to overlook why the illegality has arisen. It is not because the sentence is always unavailable; it is because the fact that makes the sentence unavailable is determined by a judge rather than a jury, in violation of the Sixth Amendment. Therefore, an *Apprendi* error is who found a fact that permitted a higher sentence, not the higher sentence *per se*.

So, the error---who made a factual determination, the judge rather than the jury---is not one that is on the face of the sentencing order, nor is

is one that "no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." *See Plott*, 148 So. 3d at 93-94. While it is unclear whether the fact that a judge determines an element of an offense rather than a jury is a trial error or a sentencing process error, it should be clear that *Apprendi* error is not a sentencing error.

Petitioner has not raised his *Apprendi* claim contemporaneously during either his trial or his sentencing and raises it for the first time before this Court. Further, he has not alleged that the claim is fundamental. *Cf. Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) ("[A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief."). Therefore, it is unpreserved for appellate review. *See* § 924.051(1)(b), FLA. STAT.; *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (proper preservation requires (1) a timely, contemporaneous objection, (2) the party must state a legal ground for that objection, and (3) "[i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."); *accord Rodriguez v. State*, 609 So. 2d 493, 499 (Fla. 1992) (stating that "the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal")[10]

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[10] Even if the *Apprendi* claim were a sentencing error, it was not included in a Rule 3.800(b) motion and, therefore, is not preserved for review

D. Even if This Court Were to Consider This Issue, it is Devoid of Merit Because The Statute Conforms to the Sixth Amendment Jury Trial Right Because It Sets The Ceiling and the Trial Court's Factual Findings Only Reduce the Available Sentence.

Petitioner, for the first time before this Court, contends that Sections 775.084(3)(a) & (c), Florida Statutes, violate the Sixth Amendment right to trial by jury because, Petitioner contends the Sixth Amendment requires the trial judge to make a factual finding in order to impose the aggravated sentence. Petitioner's argument has been rejected by every district.[11] That is because Petitioner is wrong.

Petitioner either grossly misreads *Apprendi* and its progeny, simply ignores the full proposition they represent, or misapprehends Section 775.084, Florida Statues. First, *Apprendi* and its progeny stand for the proposition that, "Other than the fact of a prior conviction, any fact that ***increases*** the penalty for a crime ***beyond the prescribed statutory maximum*** must be submitted to a jury, and proved beyond a reasonable doubt."

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either. *See Jackson*, 983 So. 2d at 569; *Brannon v. State*, 850 So. 2d 452, 456 (Fla. 2003) ("for defendants whose initial briefs were filed after the effective date of rule 3.800(b)(2), the failure to preserve a fundamental sentencing error by motion under rule 3.800(b) or by objection during the sentencing hearing forecloses them from raising the error on direct appeal.").

[11] *See, e.g., Tillman v. State*, 900 So. 2d 633 (Fla. 2d DCA 2005); *Calloway v. State*, 914 So. 2d 12, 14 (Fla. 2d DCA 2005); *Grant v. State*, 815 So. 2d 667, 668 n.3 (Fla. 2d DCA 2002); *Matthews v. State*, 891 So. 2d 596 (Fla. 3d DCA 2004); *Frumenti v. State*, 885 So. 2d 924 (Fla. 5th DCA 2004); *McBride v. State*, 884 So. 2d 476 (Fla. 4th DCA 2004); *Fyler v. State*, 852 So. 2d 442 (Fla. 5th DCA 2003); *Jones v. State*, 791 So. 2d 580 (Fla. 1st DCA 2001); *Saldo v. State*, 789 So. 2d 1150 (Fla. 3d DCA 2001); *Dennis v. State*, 784 So. 2d 551 (Fla. 4th DCA 2001); *Gordon v. State*, 787 So. 2d 892 (Fla. 4th DCA 2001).

Booker, 543 U.S. at 231 (quoting *Apprendi*, 530 U.S. at 490) (emphasis and bold added). The "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303.

In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court determined that provisions of *state law* limited the defendant's sentence to 53 months based on the facts determined by the jury. Accordingly, the trial judge's sentencing of the defendant to 90 months after finding, without a jury, that the defendant committed the crime with "deliberate cruelty," ran afoul of the Sixth Amendment jury trial guarantee. Similarly, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court determined that the federal sentencing guidelines limited the defendant's sentence to 262 months. However, the defendant was actually sentenced to 360 months based on the judge's preponderance of the evidence finding, without a jury, that the defendant possessed 566 grams of crack in addition to the 92.5 grams that the jury determined the defendant had. Accordingly, the Sixth Amendment only applies when the judge makes findings, other than the fact of a prior conviction, that "*increase*" a defendant's sentence "*beyond the prescribed statutory maximum.*" *Booker*, 543 U.S. at 231 (quoting *Apprendi*, 530 U.S. at 490) (emphasis added)

Section 775.084, Florida Statutes, does not allow a judicial fact other than a prior conviction to "increase" a defendant's sentence "beyond the prescribed statutory maximum." Under Section 775.084, the various designations are established by the fact of prior convictions and that

alone sets the maximum sentence. *See* § 775.084(1), (4)(a), Fla. Stat. However, Sections 775.084(3)(a), and (c),Florida Statute Sections 775.084(3)(a), and (c),[12] Florida Statutes, allow a trial judge to make a factual finding that ***decreases*** the statutory maximum sentence.

Section 775.084(3)(a)6., Florida Statutes provides, in pertinent part:

> For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment pursuant to this section unless the court finds that such sentence is ***not necessary*** for the protection of the public. If the court finds that it is not necessary for the protection of the public to sentence the defendant as a habitual felony offender or a habitual violent felony offender, the court shall provide written reasons; a written transcript of orally stated reasons is permissible, if filed by the court within 7 days after the date of sentencing.

§ 775.084(3)(a)6., Fla. Stat. (bold, italics and underline added).

Similarly, Section 775.084(3)(c)5., Florida Statutes provides, in pertinent part:

> For an offense committed on or after October 1, 1995, if the state attorney pursues a violent career criminal sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a violent career criminal, subject to imprisonment pursuant to this section unless the court finds that such sentence is ***not necessary*** for the protection of the public. If the court finds that it is not necessary for the protection of the public to sentence the defendant as a violent career criminal, the court shall provide written reasons; a written transcript of orally stated reasons is

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[12] And, although not pertinent to this case, subsection (b) as well.

permissible, if filed by the court within 7 days after the date of sentencing.

§ 775.084(3)(c)5., Fla. Stat. (bold, italics and underline added).

So, under the plain language of these provisions, the fact of a prior conviction is what increases the statutory maximum sentence, which is entirely within the Sixth Amendment's right to a jury trial. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Under Section 775.084, a finding by the trial court can only lower that statutory maximum sentence, but cannot raise it. Petitioner cites no authority for the proposition it violates the Sixth Amendment jury trial right for a trial court's factual finding to lower the maximum available sentence. That is because none exists.

Petitioner asserts that the trial court here did make a factual finding that Petitioner was a danger to the community and his aggravated sentence was necessary for the protection of the public. (IB. 35.) This misses the point. The trial court's finding is irrelevant to establishing the sentencing ceiling (the statutory maximum sentence). It is the fact that the trial court did not make a finding that the aggravated sentence is not necessary for the protection of the public that matters. The statutory sentencing ceiling is set by the Legislature in Section 775.084 and based on the facts of Petitioner's prior convictions. Nothing the trial court found increased that ceiling. The Sixth Amendment's right to a jury trial is not implicated. Every district court to have considered this issue is right. Petitioner is not. Even if this Court could consider this issue, it is devoid of merit.

ISSUE III: WHETHER, IF PROPERLY CONSIDERED, THIS CLAIM IS PRESERVED AND THIS COURT SHOULD RECEDE FROM THE RULE THAT A DEFENDANT CAN RAISE CERTAIN ERRORS IN AN *ANDERS* BRIEF (RESTATED)

A. This Court Should Not Consider this Issue, Because It is Outside the Certified Question and Not Expressly Raised as a Claim of Error in the District Court.

Petitioner offers no reason why this Court should depart from its prudential requirements and address a cost issue that was not addressed by the district court. In *Savoie v. State*, 422 So. 2d 308 (Fla. 1982), this Court made clear that, although it has jurisdiction to consider all issues in a case, "[t]his authority . . . is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case." *Id.* at 312. Petitioner's third issue fails to meet these prudential concerns. This issue was not considered and addressed by the district court and *Savoie* instructs that, as a prudential matter, this Court should decline to consider it.

B. Standard of Review.

This issue presents a question of law that is reviewed *de novo*. *See Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling of law; rather, the appellate court makes its own determination of the legal issue. *See Health Options, Inc. v. Agency for Health Care Admin.*, 889 So. 2d 849, 851 (Fla. 1st DCA 2004). Under the *de novo* standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. However, a trial court's factual findings on which its decision of law is based will be sustained

and given deference by the appellate court if supported by competent substantial evidence. *See, e.g., Dillbeck v. State*, 882 So. 2d 969, 972-973 (Fla. 2004) (addressing a mixed question of law and fact).

C. This Court Should Require Cost Issues to Be Raised By Rule 3.800(b) and Be Briefed on the Merits For Proper Consideration and this Claim is Unpreserved.

Petitioner did not file a Rule 3.800(b) motion bringing any error in costs to the trial court's attention and counsel included that the cost order did not conform to the oral pronouncement in her *Anders* brief. Now, in this Court, Petitioner asserts that a portion of the cost order does not conform to the oral pronouncement. Such misuse of proper appellate procedures on cost issues has become a regular occurrence in the First District and, if this Court considers this issue, should address the proper method to preserve and raise cost issues in the wake of Rule 3.800(b).

The basis upon which counsel in this case appears to have operated in presenting a cost issue in an *Anders* brief was this Court's decision in *In re Anders Briefs*, 581 So. 2d 149 (Fla. 1991). In that case, this Court found that "appellate courts are to follow the *Anders* procedure fully even when costs or other *minor* sentencing errors are raised in 'no merit' briefs; but the *Anders* procedure is not appropriate where counsel raise substantial sentencing errors of any kind." *Id.* at 152 (emphasis in original). This Court's reasoning was that "minor sentencing issues" do not merit losing a pro se litigant's *Anders* rights. At the time it was issued, the Court's decision could be justified by the fact that there was not an avenue for appellate counsel to raise cost issues and other claims

on the face of the sentencing order that may have been overlooked to the trial court, making the need to present those claims on appeal, without waiver of *Anders* important as a form of minor mistake correction.

However, five years after *In re Anders Briefs*, this Court codified the present form of Rule 3.800(b) of the Florida Rules of Criminal Procedure. Rule 3.800(b) was enacted specifically for "providing a vehicle to correct sentencing errors in the trial court." FLA. R. CRIM. P. 3.800, 1996 ADV. COMM. NOTES. The purpose of the rule was that "scarce resources were being unnecessarily expended in . . . appeals relating to sentencing errors." *Amendments to Florida Rules of Appellate Procedure*, 685 So. 2d 773 (Fla. 1996). And this Court's commentary includes within the ambit of Rule 3.800 "errors in order of probation, orders of community control, cost and restitution orders, as well as errors in the sentence itself." FLA. R. CRIM. P. 3.800, COURT CMT. (underline added). So Rule 3.800(b) provides for a procedure that allows the trial court to correct sentencing errors, including cost errors, without enlisting the appellate process.

Petitioner here did not file a Rule 3.800(b) motion alleging the cost error, meaning that, it should not be properly preserved for appellate review. Other defendants, however, have filed Rule 3.800(b) motions raising cost issues and then their counsel have filed *Anders* briefs that raise cost issues as a claim of error. *See, e.g., Harrison v. State*, 146 So. 3d 76 (Fla. 1st DCA 2014) (on rehearing).

In light of the 1996 change to Rule 3.800(b)(2), this Court should recede from *In re Anders Briefs*. To the extent that *In re Anders Briefs*

allows a defendant, such as Petitioner, asserting a cost error or "other minor sentencing errors" raise that claim on appeal, codification of the Rule 3.800(b)(2) seems to have eviscerated it for the reasons discussed in Issue I.

But even more concerning, when a defendant actually files a Rule 3.800(b) motion raising an error within *In re Anders Briefs*, there is less reason to allow assertion of error in a brief that asserts no good faith argument to be made. When a defendant files a 3.800(b) and the trial court either denies or refuses to rule upon the motion in the set time period, no longer has trial court overlooked a provision of law or put a scrivener's error in the sentencing order. The defendant is now asserting that the trial court not only erred in the sentencing order, but that the trial court engaged in reversible error for failing to grant the Rule 3.800(b) motion. That is not "minor" and was not a mere oversight by the trial court. It is a direct assertion that the trial court, presented with a claim of error, rejected it or ignored it. The "minor" error correction of *In re Anders Briefs*, 581 So. 2d 149 (Fla. 1991), is no longer reason to avoid the adversarial process through the *Anders* procedure, even when a Rule 3.800(b)(2) motion is filed.

The First District's decision in *Harrison* provides an egregious example. After asserting to the trial court that it engaged in sentencing errors through a Rule 3.800(b) motion, conflict counsel filed an *Anders* brief, but still asserted those sentencing errors, and failed to inform either the trial court or the First District that the Legislature had

changed the nature of the costs at issue, essentially seeking relief while avoiding the adversarial process. *See Baldwin v. State*, 857 So. 2d 937, 940 (Fla. 1st DCA 2003) ("*In re Anders Briefs* explicitly provides that the state need only be given an opportunity to respond if this court discovers an issue of apparent merit.") (emphasis in original).

In light of Rule 3.800(b)(2), there is no reason for a dichotomy between cost errors and "other minor sentencing errors" and other sentencing errors. All claims of error should be treated equally and placed in merits briefing, subject to "raise or waive" rule. And *Anders* briefs should exist for one and only one reason: for counsel to assert that he or she cannot argue any claim of error in good faith.[13]

Further, as explained above, certain defendants, such as Petitioner here, could choose not to raise sentencing errors and cost issues because they make no practical difference to that defendant, as the sentencing error here makes no difference to Petitioner who is guaranteed a life

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[13] While it may seem trivial at first glance, the First District's remedy creates ethical problems for Assistant Attorneys General handling *Anders* cases. *See Harrison*, 146 So. 2d at 80-81. Using a post-conviction procedure for *Anders* makes it difficult for the State to know whether a particular defendant is represented or who to serve. If the defendant is counseled (as he would be through the briefing process), the Assistant Attorney General is ethically prohibited from communicating with the defendant personally. *See* R. REGULATING FLA. BAR 4-4.2; *see also* FLA. R. CRIM. P. 3.030(a); FLA. R. JUD. ADMIN. 2.516(b). However, if a defendant is not counseled, since counsel has asserted errors in an *Anders* brief and moved to allow a brief by the defendant in proper person (particularly when the defendant has filed a *pro se* brief), service of *Anders* counsel is inappropriate. This only reiterates why issues should not be raised in the representation "limbo" of the *Anders* process and instead through the counseled merits briefing process, even if done after a *Causey* order.

sentence and the cost issue here likely makes no difference to Petitioner who is probably judgment-proof. Accordingly, as discussed above, a defendant could decide to waive asserting such errors and hope that the district court's *Anders* review finds an error that actually matters in some real, tangible way. There is no reason to permit such a defendant's counsel to assert such errors, but also be reviewed by the appellate court to determine, during the direct appeal process, whether there are other arguable points that counsel may have overlooked. A defendant is entitled to only one effective appellate attorney; not an effective appellate attorney and the appellate court engaging in the same task.

In light of Rule 3.800(b)(2) providing a vehicle for appellate counsel to raise the same errors and the appropriateness of applying the raise-or-waive rule uniformly, this Court should recede from *In re Anders Briefs*, 581 So. 2d 149 (Fla. 1991), and make clear that all sentencing errors must be either contemporaneously objected to or raised by Rule 3.800(b)(2) motions, and raised on appeal in a merits brief urging reversal based on the error rather than through an *Anders* brief. Petitioner's unpreserved cost claim is properly denied.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the manner described above, and this Court should decline to consider the other issues raised by Petitioner.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on December 10, 2014: Henry G. Gyden, Esq., Anderson Law Group, P.A., hgyden@floridalawpartners.com, Counsel for Petitioner.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Trisha Meggs Pate
TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

/s/ Joshua R. Heller
By: JOSHUA R. HELLER
Assistant Attorney General
Florida Bar No. 0502901

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)
AG# L14-1-8287

Attorneys for the State of Florida