

FILED

SID J. WHITE

JUL 19 1991

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TONY RAY PALEN,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 77,592

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 267082
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
ARGUMENT	1
IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN PROCEEDING WITH A DIRECT APPEAL PURSUANT TO THE DICTATES OF <u>ANDERS V. CALIFORNIA</u> , 386 U.S. 738, 87 S.CT. 1296, 18 L.ED.2D 493 (1967) APPOINTED COUNSEL IS NOT PRECLUDED FROM RAISING MINOR SENTENCING ERRORS.	
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

Anders v. California,
386 U.S. 738, 87 S.CT. 1296, 18 L.ED.2D 493 (1967)

1-3

In Re: Appellate Court Response to Anders Briefs
16 FLW S399 (Fla. May 30, 1991)

1, 3

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONER

ARGUMENT

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

Respondent recognizes that this Court has a specifically disapproved the decision of the district court sub judice in its opinion in In Re: Appellate Court Response to Anders Briefs, 16 FLW S399 (Fla. May 30, 1991) but nevertheless argues that this Court was wrong. However, Respondent's arguments in this regard are seriously flawed.

First, although Petitioner in his initial brief and this Court in its opinion in In Re: Appellate Court Response to Anders Brief, speak of the right to an Anders review, in reality what is meant is a convicted person's right to meaningful

appellate review of that conviction.

Second, Respondent argues that this Court's opinion disapproving the decision sub judice deprives an indigent appellant of the right to appellate counsel acting as an advocate in order to provide them the Anders procedure. This conclusion is unsound. The very fact that counsel has noted the minor sentencing error in the Anders brief has provided the indigent appellant with sufficient safeguards to his right to counsel. In this regard, it is interesting to note that although the court below denied counsel's motion to withdraw, it did not order counsel to file a supplemental brief arguing the merits of the cost issue. If, as Respondent suggests, the Fifth District Court of Appeal was concerned with insuring that an indigent appellant had the right to counsel acting as an advocate in his behalf, one must wonder why it did not reject the Anders brief and require the submission of a new brief arguing the merits of the issue.

Third, Respondent's argument evinces ignorance of the Anders procedure followed by the Fifth District Court of Appeal. In cases where an Anders brief is filed, counsel accompanies it with a motion to withdraw. In these cases, the Fifth District Court of Appeal issues an order directed to the indigent appellant informing him or her that he or she may submit a brief on his own behalf arguing any meritorious issues he may wish to address. This order does not grant the motion to withdraw filed by appellate counsel. Rather, the motion to withdraw is not disposed of until after the court has conducted its independent

review of the record and issued its decision in the case. Within days of the issuance of its opinion, the Fifth District Court of Appeal then issues a separate order granting the Public Defender's motion to withdraw in that particular case. Thus, it is evident that at no time during the procedure is an indigent appellant totally without counsel. It is not at all uncommon for the Fifth District Court of Appeal during its independent review to order supplemental briefs on issues it may deem meritorious. Thus, allowing appellate counsel to raise minor sentencing issues in an Anders brief in no way deprives an indigent appellant either of his right to full appellate review or his right to counsel acting as an advocate in his behalf.

In summary, Petitioner submits that this Court was eminently correct in deciding In Re: Appellate Court Response to Anders Brief and thus disapproving the decision sub judice. Respondent has presented no reasons which would warrant this Court to change its mind. Thus, this Court should simply summarily reverse the decision of the Fifth District Court of Appeal sub judice.

CONCLUSION

Based on the foregoing reasons and authorities cited in this brief as well as the initial brief, Petitioner requests this Honorable Court to quash the decision of the Fifth District Court of Appeal and reaffirm its decision in In Re: Appellate Court Response to Anders Briefs.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Michael S. Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 267082
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

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 Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Tony Ray Palen, #060073, P.O. Box 699, Sneads, Fla. 32460 on this 17th day of July, 1991.

Michael S. Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER