IN THE SUPREME COURT OF FLORIDA

GLORIA PULLEN,

Petitioner,

vs. **CASE NO. SC00-1482**

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary Review from the First District Court of Appeal

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ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Pullen appealed from an order re-committing her to a mental facility under §394.467(7), Florida Statutes, the "Baker Act." Before the First DCA, the Public Defender filed a "no-merit" brief expressly purporting to comply with Anders v. California, 87 S.Ct. 1396 (1967). Counsel also moved Pullen be allowed to file a brief for herself, but did not seek to withdraw from the case.

The First DCA authorized Pullen to file a brief; she did not do so. The State moved to dismiss (App. B), urging Anders was not available upon appeal from civil commitment. After the Public Defender responded (App. C), the First DCA dismissed the appeal. *See* Pullen v. State, 764 So.2d 704 (Fla. 1st DCA 2000) (App. A, p.1).

The order of dismissal issued June 19, 2000. On July 11, Pullen filed her notice to invoke the Court's discretionary jurisdiction, which was accepted on January 18, 2001.

SUMMARY OF THE ARGUMENT

Commitment under §394.467, Florida Statutes, is a civil proceeding. The Sixth Amendment is facially inapplicable, and not available to Pullen.

In Mathews v. Eldridge, 96 S.Ct. 893 (1976), the U.S. Supreme Court announced a three part test for determining whether a particular procedure affords due process. That test balances the

affected person's private interest; the probable value and burden of the additional procedure; and, the State's interest. Here, Pullen's private interest in not being improperly committed to an institution for up to 6 months is strong. However, the State's interest in protecting and treating the mentally ill is equally strong. Any delay caused by court record review is significant, given the 6-month maximum term of commitment, and the value of the Anders procedure in preventing improper commitment is very low.

Balancing these factors, due process does not require wholesale incorporation of Anders into appeals from civil commitment. It does not require a second review of the entire record by the appellate court, particularly when civil commitment is to a "less restrictive" facility. The order below adopted a procedure, predicted on a sufficient motion to withdraw, which affords Pullen all the process she is due.

The Anders procedure has been pointedly criticized, and is inherently illogical. The Court should draw a bright line, and hold Anders is constitutionally required only in appeals from criminal prosecutions. It should decline Pullen's invitation to make public policy, and affirm the order below.

ARGUMENT

ISSUE I

WHETHER THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION REQUIRES THE PROCEDURE ANNOUNCED IN ANDERS BE APPLIED TO APPEALS FROM CIVIL COMMITMENT ORDERS.

There is no dispute that Pullen has a right to appeal, and a right to effective appellate counsel. The issue is whether she has a due process right that Anders be completely incorporated into appeals from civil commitment.[1] This necessarily assumes appellate counsel has reviewed the record from an advocate's perspective, and found no meritorious points.

The order under review followed Ostrum v. Department of Health & Rehabilitative Services, 663 So.2d 1359 (Fla. 4th DCA 1995). There, the Fourth DCA announced the procedure to be employed when appointed counsel could discern no reversible error in appeals from termination of parental rights (TPR) hearings.[2] That procedure requires counsel who can find no meritorious argument to file a motion to withdraw. *Id*. at 1361. The order below does the same:

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[1]Review is *de novo*. *See* Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd., 752 So.2d 582, 584 (Fla. 2000) (a ruling on a motion to dismiss based on a question of law is reviewed de novo).

[2]All four district courts of appeal which have reached the issue, have concluded Anders is not available in TPR appeals. *See* Interest of K.W., 24 Fla.L.W. D87 (Fla. 2d DCA 1998), *citing* J.A. v. Department of Health & Rehab. Servs., 693 So.2d 723 (Fla. 5th DCA 1997); Jimenez v. Department of Health & Rehab. Servs., 669 So.2d 340 (Fla. 3d DCA 1996); Ostrum.

> [W]here counsel in a civil commitment proceeding conducts a conscientious review of the record and can find no meritorious grounds on which to appeal, it will be sufficient for counsel to move to withdraw on that basis. [e.s.].

(*See* App. A, p.2).

Significantly, the order below expressly assumes counsel will conscientiously review the record; and, upon finding no meritorious points, move to withdraw "on that basis." To do so, counsel would have to supply the same information that would be in an Anders brief; thereby comporting with an established rule of this Court. *See* Fla.R.App.P. 9.440(b) (requiring an attorney seeking to withdraw to file a motion "stating the reasons therefor"). The only practical difference between the "full" Anders review advocated by Pullen, and the procedure adopted below, is whether the appellate court must review the record a second time when appointed counsel has already done so.

A. The Sixth Amendment Does Not Apply To Civil Commitments Under The Baker Act.

In relevant part, the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense." [e.s.]. Facially, this amendment does not pertain to commitment under the Baker Act. Pullen's initial brief does not rely on the Sixth Amendment, except to equate the express right to counsel in "criminal prosecutions" with the right to counsel implied by the Due Process Clause of the Fifth Amendment.

Involuntary commitment under §394.467 is a civil proceeding. *See* Kansas v. Hendricks, 117 S.Ct. 2072 (1997) (concluding Kansas' Sexually Violent Predator Act, which provides for continued confinement of such predators, is "civil" in nature); Westerheide v. State, 767 So.2d 637, 646 (Fla. 5th DCA 2000) (concluding §§394.910-.930, Florida Statutes, which provide for confinement of sexually violent predators after incarceration ends, is a "civil rather than a criminal proceeding"), *review pending*, case no. SC00-2124 (oral argument set for May 4, 2001). *See also* The Natural Parents of J.B. v. Florida Department of Children and Family Services, etc., case no. 96171 (Fla. Feb. 22, 2001) (upholding statute requiring closure of proceedings to terminate parental rights, and agreeing with the Fourth DCA's rejection of the "parents' criminal model for TPR proceedings").

The Sixth Amendment does not apply to civil commitment under the Baker Act. The Anders procedure is not available to Pullen by virtue of that amendment.

B. Due Process Does Not Require Wholesale Incorporation of the *Anders* Process into Civil Commitment Appeals.

Seeking to invoke Anders in total, Pullen unavoidably asks this Court to adopt a criminal "model" for civil commitment appeals. Because the Sixth Amendment is not available to her, the Court should reject her request, just as it rejected the "parents' criminal model for TPR proceedings" in Natural Parents of J.B.

Strict adherence to the process announced in Anders is not required, even in criminal prosecutions, so long as a state's process adequately protects a criminal defendant's right to appellate counsel. *See* Smith v. Robbins, 120 S.Ct. 746, 757 (2000):

> [T]he Anders procedure is not "an independent constitutional command," but rather is just "a prophylactic framework" .... We did not say that our Anders procedure was the only prophylactic framework that could adequately vindicate this right; instead, by making clear that the Constitution itself does not compel the Anders procedure, we suggested otherwise. [e.s.].

If strict adherence to Anders is not required for criminal prosecutions, Pullen cannot reasonably maintain she is entitled to strict adherence in appeal from her civil commitment order.

The procedure upheld in Robbins included appellate court review of the record. *See id.* at 754 (noting the California appellate court had examined the entire record). Since the appellate court had independently reviewed the record, the Supreme Court did not directly pass on whether it must always be done. *But see* McCoy v. Court of Appeals of Wisconsin, 108 S.Ct. 1895, 1903-4 (1988) ("[A]n appellate court ... must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record ...."). Still, the McCoy decision was addressing only criminal appeals.

Pullen dwells on the result of commitment rather than the "meaningfulness" of the process afforded by the order under review.

She vigorously argues the full Anders procedure must be applied to all civil commitments because of the substantial deprivation of liberty which can result.[3] By depicting the outcome of commitment so coarsely, she does not account for the fact civil commitment to an institution, even for 6 months, is far less harsh than prison; or the fact some commitments are to a less restrictive alternative. She also overlooks the difference between re-commitment, as here, and initial commitment. Consequently, she completely misses the flexible approach endorsed by Robbins.

With these observations in mind, the State will turn to the three part test used by the U.S. Supreme Court:

> [T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 96 S.Ct. 893, 903 (1976). *See* Lassiter v. Department of Social Services of Durham County, N. C., 101 S.Ct. 2153, 2159-61 (1981) (employing the "three elements" from Eldridge to conclude the due process right to counsel in termination of

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[3]Were potential loss of liberty the sole reason for Anders, then non-indigent criminal defendants--who face equally harsh sanctions--would be able to invoke it. They cannot.

parental rights is not absolute, but can be determined on a case-by-case basis).

As to the first element, Pullen's private interest is obvious. She was re-committed to a mental institution for as much as 6 months. This is a very significant restraint on liberty, but not nearly so harsh or longlasting as typical imprisonment for felony convictions. Also, re-commitment implies a previous commitment which had been upheld. Without denigrating the constraint placed on Pullen's liberty, such restraint is less compelling than commitment for the first time. *See* M.W. v. Davis, 756 So.2d 90, 99 (Fla. 2000) (holding that placement of dependent child in locked mental health treatment facility before having an evidentiary hearing did not violate due process, when the judge was already familiar with the child's situation by virtue of several hearings in the months preceding placement, etc.).

To the extent Pullen seeks to apply Anders to all appeals from civil commitment, she overlooks the fact someone's liberty interest is much reduced when commitment is to a "less restrictive facility." *See* §394.467(1)(b), Florida Statutes; Lassiter, 101 S.Ct at 2159 ("Significantly, as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.").

Personal liberty in an institution is substantially less constrained than in state prison.[4] Unlike prison sentences, which greatly vary in length depending on factors such as the severity of the crime and past criminal record; civil commitment can last 6 months, at most, regardless of the severity of a person's affliction or number of prior commitments.

A civilly committed person must be released; transferred to "voluntary status" on request; or, if improved, placed on "convalescent status" in a "community facility" if she or he "no longer meet[s] the criteria for involuntary placement." §394.469(1), Florida Statutes. This is true, regardless of whether the original term of commitment has been completed. *See* §394.467(6)(b) ("The facility shall discharge a patient any time the patient no longer meets the criteria for involuntary placement, unless the patient has transferred to voluntary status." [e.s.]).

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[4] *See* §394.459, Fla. Stat. (Rights of Patients). *See also* Rule 65E-5.150, Fla. Admin. Code (Patient's Rights to Individual Dignity):

> (1) To preserve a patient's right to freedom of movement, ... receiving and treatment facilities shall maximize patient access to fresh air, sunshine and exercise, within the facility's physical capabilities and management of risks. ... [E]ach patient shall be afforded an opportunity to spend at least one half hour per day in an open, out of doors, fresh air activity area ....
>
> (2) Use of special clothing ... to identify patients ... in need of special precautions ... is prohibited as a violation of patient dignity. Prison or jail attire shall not be permitted ....

Prisoners are afforded nothing comparable, and even early release is highly conditional. *See e.g.*, §947.1405(7), Florida Statutes (requirements for conditional release). In contrast, confinement in state prison is largely the same for everyone. Nevertheless, her particular liberty interest is significant; the great loss of autonomy, if nothing else, through commitment to a fulltime institution weighs strongly in Pullen's favor.

The second Eldridge element is the "risk of an erroneous deprivation ... and the probable value, if any, of additional or substitute procedural safeguards." For this element, Pullen does not fare well. Civil commitment hearings are usually brief and factually straightforward. Very rarely is the person's mental illness contested. The most common issue is whether the State has proved its case with clear and convincing evidence.

Legal sufficiency of the State's evidence is not a difficult issue for Public Defenders, who routinely challenge the legal sufficiency of the State's evidence in criminal prosecutions. As said in the order below, appointed counsel must justify withdrawal motion based upon a "conscientious review of the record." Under these circumstances, a meritorious issue is not likely to go undetected absent record review by the court. *See* Warner, M. Anders in the Fifty States [etc.], 23 Fla.St.U.L.Rev. 625 (1996) at 655 ("While the author [now the Chief Judge of the 4th DCA] has never reviewed a case involving an Anders brief that, after

independent review, resulted in a reversal of conviction, there is such precedent." [e.s.; footnotes omitted]). Consequently, both the risk of error and probable value of incorporating Anders are minimal. This element weighs heavily in the State's favor.

The third element is "the Government's interest, including the function involved and the fiscal and administrative burdens." The State has a compelling interest in providing treatment to the mentally ill, and preventing them from hurting themselves or others. The State needs to resolve, promptly, any challenges to its legal authority to do so. Given commitment can last 6 months at most, any delay attributable to the Anders process is significant. The administrative burden of requiring judges to devote significant time to "no-merit" appeals from civil commitment is substantial.

Altogether, the first element weighs strongly in Pullen's favor. However, the second element weighs strongly in the State's favor; the third element, only somewhat less so. Balancing the three elements, Anders should not be required at all. The procedure adopted below satisfies due process, and should be approved by affirming the order below.

Instead of considering the three Eldridge elements, Pullen belittles the difference between the rights to counsel under the Fifth and Sixth Amendments, respectively. Without authority, she deems such difference "meaningless" and "artificial" (initial

brief, p.25-6), despite the fact this Court itself recognizes the difference. *See* In the Interest of D.B., 385 So.2d 83, 89 (Fla. 1980) ("Right to counsel in dependency proceedings, on the other hand, is governed by due process considerations, rather than the sixth amendment.").

If the difference in Fifth and Sixth Amendment rights to counsel is, indeed, artificial and meaningless, then Pullen's due process right is no broader, and is also limited to "criminal prosecutions." Therefore, she would have no right to appellate counsel at all.

The State will not go so far. However, the Court must keep in mind that due process is a flexible concept. Its rigors are proportional to the interest at hand:

> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 92 S.Ct. 2593, 2600 (1972). *See* Gagnon v. Scarpelli, 93 S.Ct. 1756, 1763 (1973) (finding "no justification" for requiring counsel to be appointed for all parole revocation hearings, and allowing a state to determine the need for counsel on a case-by-case basis, when required by "fundamental fairness").

The procedure adopted in the order below intimates such flexibility. It does not obligate the appellate court to grant a

motion to withdraw. To the contrary, if the motion reflected a conscientious but troubling analysis of the record, the court would deny the motion and direct counsel to re-examine certain issues. Under the adopted procedure, the appellate court could go so far as to appoint different counsel, and could expedite the appellate process. *See* G.L.S. v. Department of Children and Families, 724 So.2d 1181 (Fla. 1998) (recognizing the legislative and judicial policy of expediting TPR proceedings and other cases which affect children). Again, the order below adopted a procedure comporting with due process, and should be affirmed.

The State notes an issue Pullen failed to raise. She has never contended the Due Process Clause of the Florida Constitution requires Anders be applied to civil commitment appeals, even if the U.S. Constitution does not. (*See* App. B & C). Also, the order below did not consider whether Pullen had a broader due process right under the Florida Constitution. This issue is not before the Court, and should not be considered. *See* M.W. v. Davis, 756 So.2d at 108 n.24 (holding Baker Act proceeding not required to place juvenile in locked mental health facility before evidentiary hearing, and observing: "M.W. has not advanced the argument in this Court that the Florida Constitution provides greater due process protection than the United States Constitution. Accordingly, we do not address this question.").

C. *Anders* Should Not Be Adopted As Public Policy.

[Response to parts C-F of Pullen's initial brief.]

Much of Pullen's brief urges this Court to graft Anders onto civil commitment appeals, as a matter of "public policy." That argument is inherently flawed. With all due respect, if this Court agrees someone civilly committed has no due process right to the Anders procedure, then this Court has no authority to create such right by adopting a procedural rule for its implementation. *See* Comptech Intern., Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219, 1222 (Fla. 1999) ("If the courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the Legislature's right to act in this area."); State v. Ashley, 701 So.2d 338, 343 (Fla. 1997) ("[T]he making of social policy is a matter within the purview of the legislature--not this Court[.]").

Even if some additional procedure is constitutionally required, Anders itself is not. As the Robbins Court said:

> [T]he Ninth Circuit's view runs contrary to our established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy.

Id., 120 S.Ct. at 756-57. *See* Murray v. Giarratano, 109 S.Ct. 2765, 2772 (1989) ("[N]or does it seem to me that the Constitution requires the States to follow any particular federal model in

[postconviction] proceedings.... States [have] considerable discretion") (O'Connor, J., concurring). Were this Court to adopt Anders in total, it would be foregoing the opportunity to "experiment with [a] solution[]" more appropriate to the alleged problem.

The Anders procedure is inherently illogical. The appellate court does not independently review the record when appointed counsel ineptly raises but one weak point while overlooking a stronger issue; yet the court must do an independent review, when the same counsel competently decides there are no meritorious points to be raised on appeal.

The Anders procedure has been pointedly criticized. *See* Robbins, 120 S.Ct. at 762 ("[W]e note that it [the Anders procedure] has, from the beginning, faced " 'consistent and severe criticism.' "), *citing* In re Sade C., 920 P.2d 716, 731, n. 7 (Cal. 1996). *See* "Anders in the Fifty States":

> These appeals [invoking Anders] ... require devotion of court resources and time to appeals already deemed by counsel to have no merit; they require the court to review the record much more meticulously than in appeals raising meritorious issues; and they demand that the court raise, sua sponte, any issues that it deems arguably meritorious, even when counsel has not briefed those issues.

Id. If this Court is inclined toward Pullen's position, the Anders procedure should not be the model for "no-merit" appeals from Baker Act commitment orders.

Recall, the exact procedure announced in Anders is not mandatory, even for criminal prosecutions. The ethical concerns of having appointed counsel urge there is no merit to an appeal are not at issue. Here, the Public Defender is not troubled by such issues; perhaps, in part, because this is not a criminal case. The only remaining difficulty is the decision to commit so much court time and resources.

Implying the additional workload is minimal, Pullen observes the "number of involuntary commitment appeals in this state is not significant." (initial brief, p.28). Relying on information from the First DCA Clerk's office, she notes "there were 15 Baker Act appeals docketed in that court during calendar year 2000." (initial brief, p.28 n.8).

This seemingly low number may reflect only the fact that 15 appellants correctly filled out the First DCA's standard docketing statement. It has nothing to do with the number of such appeals in other district courts. Most significantly, it also has nothing to do with how many commitments, which might not otherwise be appealed, would be replaced with an Anders-type proceeding.

If Anders is grafted onto appeals from civil commitment, it would be difficult to treat appeals from TPR proceedings differently. It would virtually compel Anders be applied to appeals from involuntarily admission for substance abuse treatment under §397.675, Florida Statutes; and, notably, to appeals from

continued confinement as a sexually violent predator. *See* §394.910, Florida Statutes (declaring legislative intent to "create a civil commitment procedure for the long-term care and treatment of sexually violent predators").

Florida, perhaps uniquely, allows indigent criminal appellants to raise minor sentencing issues in Anders briefs. *See* Anders Briefs, In re, 581 So.2d 149, 152 (1991). If Anders is adopted as Pullen suggests, persons appealing from any type of civil commitment or TPR orders would also be able to raise minor issues relating to the "sanction" imposed. While applying Anders to appeals from mental health commitments alone might not place a large burden on appellate courts, applying Anders to appeals arising from TPR proceedings and other civil commitments would do so.

The recurrent theme, and flaw, of Pullen's entire brief is that she advocates wholesale adoption of Anders. The State, without conceding Anders can be adopted by this Court in a non-criminal proceeding, suggests the flexible approach adopted below is sufficient.

If this Court is inclined otherwise, it should still hold *no* Anders-type process would be available when someone is committed to a facility "less restrictive" than an institution. Second, the appellate court would never be required to review the entire record for error, but only to verify appointed counsel's assessment by

reviewing that part of the record necessary for the issues identified in counsel's motion to withdraw. This would allow the appellate court to adequately assess counsel's conclusion of "no-merit," while somewhat reducing demand on judicial resources.

Section 394.467(1), Florida Statutes, establishes several requisites for involuntary commitment, some with alternative showings. The Court can reasonably assume that a single Anders brief would not suggest insufficient proof as to all criteria. To the contrary, it is reasonable to assume a committed person would very rarely challenge the sufficiency of evidence that she or he was mentally ill. This is true because the State readily produces the examining psychiatrist, qualifies that person as an expert, and solicits an opinion on the disorder suffered. In reality, the most common points on appeal are those which contend the State's evidence, often the only evidence, is not "clear and convincing" as to the likelihood of harm to person committed or to others. *See* §394.467(1)(a)2a. & b. Under these circumstances, there is no need to require the court to review the entire appellate record. The court could adequately ascertain the fairness of the proceeding below only by spot-checking the record as to the points noted in a motion to withdraw.

The State returns to its essential theme. Baker Act commitments, regardless of the potential for 6 months' commitment, are "civil." This principle alone justifies declining to adopt

Anders, while approving the procedure announced in the order below. At the least, the Court should endorse the State's proposal for a flexible approach."[5]

If the order below is not affirmed outright, another alternative is the procedure announced in State v. Balfour, 814 P.2d 1069 (Or. 1991). There, appointed counsel for indigents determined there were no meritorious issues to appeal. Counsel sought to withdraw. Ultimately, the Oregon Supreme Court held withdrawal was not mandatory (*id*. at 1078); and, if not sought, there was "no ethical obligation to file an Anders brief" (*id*. at 1079). When withdrawal was not sought, an indigent would not be unrepresented, and other "appropriate procedures" would ensure an indigent's right to a meaningful appeal. *Id*.

The Court then described such procedures. The prominent characteristic was a bifurcated brief, with a "part A" setting forth the statement of the case; and a "part B" raising any "frivolous" issue requested by the client. Only part A would be signed by counsel. *Id*. at 1080.

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[5]Again, the difference between civil and criminal proceedings is important. *See* State v. Causey, 503 So.2d 321, 322 (Fla. 1987) (concluding the better policy is to require the appellate court to review the entire record). Note, however, that Causey was decided well before Robbins, and speaks in terms of "policy," not a constitutional requirement. It did not find review of the entire record to be required by the Florida Constitution alone.

Most significant here, the appellate court treats the appeal "in the same manner as ... any other direct criminal appeal." The court is not required "to search the record for error." *Id*. The Balfour procedure has not considered by a federal court, however, it seems constitutional for criminal appeals in light of Robbins; and seems more so in civil appeals.[6] It is a better approach than Anders.[7]

Pullen advances decisions from other states, in which Anders has been used in civil appellate proceedings. Reflecting diligent research, this array of cases suffers from two common flaws. First, not one of the decisions addresses whether Anders must be available in its entirety. Second, and somewhat surprising, none of the cases mentions a response by the respective state as to whether Anders must or should be available. Thus, the decisions do not reflect a genuinely adversarial process, and are not as persuasive as depicted by Pullen.

It is one thing for a court to declare the Anders procedure is "applicable,"[8] and another to hold it is constitutionally mandated

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[6]Balfour was one of four cases consolidated in the lower appellate court. Two of the other three cases were a mental health commitment and termination of parental rights case, respectively. No issue under the Oregon Constitution was raised. *Id.*, 814, P.2d at 1071 & n.1.

[7]For other approaches, *see* Anders in the Fifty States, p.657-62.

[8]In the Matter of McQueen, 495 N.E.2d 128, 129 (Ill. Ct. App. 1986).

in its entirety. Not confronted with an adversarial response, those courts were not forced to justify their conclusions beyond the "constraint of liberty" rationale employed by Pullen. Also, they were not forced to consider alternative approaches, including the somewhat less burdensome "spot-check" record review; and the possibility of no record review when commitment is to a facility other than an institution.

In short, the cases from other States do implicitly what the court did expressly in In the Matter of E.M., 1997 WL 217186 (Tex. Civ. App. May 1, 1997) [unpub.]:

> Accordingly, without holding it is necessary, we will use the Anders analysis by analogy. [e.s.].

Id. at *2.[9] To be sure, these cases illustrate heightened judicial concern for the possible loss of liberty, and a predilection to reflexively turn to the procedure announced in Anders. They do not, however, compel Anders be adopted, and reflect no concern for such adoption as a precedent for other types of civil commitment.

Although it is a Florida case, the State will respond to Pullen's use of Godwin v. State, 593 So.2d 211 (Fla. 1992), here. The issue in Godwin was whether a person's release from commitment

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[9]Ironically, the E.M. court, immediately before the language quoted above, came as close to Pullen's position as any court: "Therefore, the defendant in an involuntary commitment proceeding has due process rights not normally implicated in civil proceedings. But those rights are not necessarily co-extensive with the rights accorded criminal defendants." [cites omitted]. *Id.* at *2.

mooted a pending appeal. This Court said "no," because of the collateral consequence of a statutory lien. *Id*. at 214. As part of its reasoning, the Court distinguished a number of other consequences, such as restriction on the right to vote. This Court deemed such consequences significant, but not collateral, as they "can be or are removed when the patient is discharged or released from active treatment." *Id.*

Pullen inadvertently distorts the majority opinion, by quoting at length from Justice Kogan's partial dissent over whether the lien was the sole collateral legal consequence. *Id*. at 214-15. Compassionate, the dissent culminated in this observation: "In effect, the majority opinion appears to be saying that persons can be unlawfully deprived of virtually all their civil rights ... and have no recourse whatsoever ...." *Id*. at 216. The majority said no such thing.

This case arose upon trained counsel's declaration, through an Anders brief, that Pullen's appeal had no merit. Such declaration would also be required in the procedure adopted below. In either instance, the possibility of "illegal" commitment is too remote to be important. Pullen's long quote from the Godwin dissent verges on sensationalism, and must be disregarded.

This Court must draw a bright line, and hold that independent court review of the record is constitutionally required only in

appeals from criminal prosecutions. The Court should decline Pullen's invitation to make public policy.

ISSUE II

RESPONSE TO AMICUS BRIEF

FPDA claims the order below has "mandated self-representation." This is not accurate. The order below contemplates the possibility of withdrawal by counsel, but did not require it; declaring only: "[I]t will be sufficient for counsel to move to withdraw." (*See* App. A, p.2). Pullen's appointed counsel never sought to withdraw. This alone would preclude application of Anders, for the Oregon Supreme Court. *See* Balfour, 814 P.2d at 1079; *but see* In re Sade C., 920 P.2d at 732 & n.8 (disagreeing with Balfour).

Remarkably for a statewide association, the FPDA does not address whether the fact Pullen's counsel did not seek to withdraw is a statewide practice in appeals from civil commitment. Instead, FPDA advances a point at odds with the relief Pullen seeks. Anders itself contemplates self-representation by allowing counsel to withdraw when the court, after reviewing the record, agrees the appeal has no merit. The only way to avoid such "self-representation" is to require continued representation by the Public Defender, which obviates the need for Anders.

FPDA's argument that a Faretta inquiry would be required to as a prerequisite to "self-representation" on appeal is simply wrong. Faretta has no applicability to appeals. Martinez v. Court of Appeal of California, Fourth Appellate Dist., 120 S.Ct. 684, 690 (2000). *See* Hill v. State, 656 So.2d 1271, 1272 (Fla. 1995) ("The principle of Faretta concerning self-representation is not applicable to appeals." [full cite omitted]).

FPDA relies on the final sentence of Liebman v. State, 555 So.2d 1242 (Fla. 4th DCA 1989). Liebman held hearing officers, under the applicable statutes, had concurrent jurisdiction to conduct re-commitment hearings. *Id.* at 1245. The court then observed: "In addition, both petitioners have an adequate remedy on plenary appeal ...." *Id*. This observation is dicta. Moreover, if the Anders process is not constitutionally required, Pullen's appeal is "adequate" without it. The fact she has a right to meaningful appellate review, of itself, does not compel the conclusion she must be able to invoke Anders.

FPDA then claims the procedure adopted below denies equal protection, because "only those who can afford private counsel will be afforded ... the right to counsel on appeal." (amicus brief, p.7). Equal protection was not raised or ruled upon below (*see* App. A,B,C), and Pullen herself did not raise it in her initial brief. Also since the Public Defender did not move to withdraw, Pullen did (and does still) have counsel throughout her appeal.

Consequently, she would not have standing to rely on the absence of counsel as depriving her of a meaningful appeal. Since Pullen would not have standing to raise this point, FPDA cannot do so as amicus. *See* Turner v. Tokai Financial Services, Inc., 2000 WL 668530*6 n.1, 25 Fla. L. Weekly D1278 (Fla. 2d DCA 2000); Acton v. Fort Lauderdale Hosp., 418 So.2d 1099, 1101 (Fla. 1st DCA 1982) ("Amici do not have standing to raise issues not available to the parties, nor may they inject issues not raised by the parties."), *affirmed with opinion*, 440 So.2d 1282 (Fla. 1983).

Parsing ch. 394, Florida Statutes, FPDA notes a "patient" must be represented at the re-commitment hearing by the Public Defender. (amicus brief, p.8). *See* §394.467(7)(c). Facially, this provision has nothing to do with representation on appeal.[10] If deemed to include representation on appeal, it would be unreasonable to assume the Legislature silently grafted Anders into the appellate process when it has never done so in the criminal statutes.

Statutes must be construed in accord with legislative design. *See* Drury v. Harding, 461 So.2d 104, 108 (Fla. 1984) ("[A]n interpretation of a statute which leads to ... a result obviously not designed by the legislature will not be adopted."). Pullen's interpretation of §394.467(7)(c) leads to such result, and must be rejected.

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[10]§394.467(7)(c) provides: " ...[The patient] shall be represented at the hearing on the petition for continued involuntary placement by the public defender ....

CONCLUSION

This Court should affirm the order under review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a true copy of this initial brief has been furnished by U.S. Mail to **P. DOUGLAS BRINKMEYER**, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301; this ___ day of March, 2001.

Charlie McCoy
Assistant Attorney General

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I certify Courier New 12-point, non-proportionately spaced type is used in this brief, in accord with Fla.R.App.P. 9.210(a)(2).

TABLE OF APPENDICES

Appendix	Item	Date
A	Opinion Below	06/19/2000
B	State's Motion to Dismiss	04/25/2000
C	Pullen's Response to the State's Motion to Dismiss	05/08/2000
D	Warner, M. Anders in the Fifty States [etc.], 23 Fla.St.U.L.Rev. 625 (1996) [appendix omitted]	Winter, 1996

APPENDIX A

764 So.2d 704

DISTRICT COURT OF APPEAL FIRST DISTRICT OF FLORIDA.

In the Interest of Gloria PULLEN, Appellant,
v.
STATE of Florida, Appellee.

No. 1D99-4384.

June 19, 2000.

Nancy Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, and Charlie McCoy, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Gloria Pullen seeks review of an order authorizing her continued involuntary civil commitment under the Baker Act. In purported compliance with Anders *v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), her appointed counsel has filed an initial brief indicating that he ***705.** can discern no reversible error in the proceedings below. Despite being afforded the opportunity to do so, Ms. Pullen has not filed a pro se initial brief. Noting that neither Ms. Pullen nor her appointed counsel have identified any arguable issue of reversible error, the state has moved to dismiss this appeal, arguing that the Anders procedure does not apply. We agree and dismiss the appeal accordingly.

In *Ostrum v. Department of Health & Rehabilitative Services,* 663 So.2d 1359 (Fla. 4th DCA 1995), the court addressed the question of whether the full panoply of Anders procedures should attend an appeal of an order of termination of parental rights ("TPR"). In so doing, the court noted that the procedures outlined in Anders are grounded on the Sixth Amendment right to counsel in criminal prosecutions, and concluded that because TPR cases are civil in nature and the right to counsel therein arises from due process considerations, Anders is not applicable. We reach the same conclusion with respect to Baker Act appeals. Like TPR cases, the right to counsel in civil commitment cases arises not from the Sixth Amendment but rather from the due process clause. *See Jones v. State,* 611 So.2d 577 (Fla. 1st DCA 1992); *see also In re Beverly,* 342 So.2d 481 (Fla.1977). Thus, Anders is not implicated in this circumstance, and where neither

appointed counsel nor the pro se appellant identify any arguable issues, this court is not obligated to conduct an independent review of the record in an effort to identify any such issues.

Having determined that Anders does not apply in appeals from involuntary commitment orders, we hereby adopt the procedure outlined in *Ostrum* for purposes of processing cases of this nature. That is, where counsel in a civil commitment proceeding conducts a conscientious review of the record and can find no meritorious grounds on which to appeal, it will be sufficient for counsel to move to withdraw on that basis. We will then afford the pro se appellant the opportunity to file a brief, and if appellant fails to do so, the appeal will be dismissed for failure to prosecute. If appellant does file a brief, the case will proceed as any ordinary appeal, subject to our consideration of the propriety of summary affirmance under rule 9.315.

In this case, appellant's counsel has failed to identify any potentially meritorious issues and appellant herself has already declined the court's invitation to file a pro se initial brief. Accordingly, we hereby dismiss this appeal.

BARFIELD, C.J., BOOTH and WOLF, JJ., concur.

APPENDIX B

APPENDIX C

APPENDIX D