IN THE SUPREME COURT OF FLORIDA

GLORIA PULLEN,

Petitioner,

v. CASE NO. SC00-1482
1DCA CASE NO. 99-4384

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLA. BAR NO. 197890
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

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APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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District Court of Appeal of Florida,
First District.

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

No. 1D99-4384.
June 19, 2000.

In involuntary civil commitment proceeding, the Division of Administrative Hearings, Diane Cleavinger, Administrative Law Judge, authorized patient's continued commitment. Patient appealed. The District Court of Appeal held that appeal would be dismissed in absence of identification of any arguable issues by counsel or patient.

Appeal dismissed.

West Headnotes

[1]
92 Constitutional Law
  92XII Due Process of Law
    92k255 Deprivation of Life or Liberty in General
      92k255(5) k. Diseased and Mentally Disordered Persons; Addicts.

257A Mental Health
  257AII Care and Support of Mentally Disordered Persons
    257AII(A) Custody and Cure
      257Ak37 Admission or Commitment Procedure
        257Ak41 k. Hearing and Determination in General.

The right to counsel in civil commitment cases arises not from the Sixth Amendment but rather from the due process clause. U.S.C.A. Const.Amends. 5, 6.

[2]
257A Mental Health
  257AII Care and Support of Mentally Disordered Persons
    257AII(A) Custody and Cure
      257Ak37 Admission or Commitment Procedure
        257Ak45 k. Review.

Where neither appointed counsel nor pro se patient challenging involuntary civil commitment identified any arguable issues, appellate court was not obligated to conduct an independent review of the record in an effort to identify any such issues.

[3]
257A Mental Health
  257AII Care and Support of Mentally Disordered Persons
    257AII(A) Custody and Cure
      257Ak37 Admission or Commitment Procedure
        257Ak41 k. Hearing and Determination in General.

Where counsel in a civil commitment proceeding conducts conscientious review of record and can find no meritorious grounds on which to appeal, counsel can move to withdraw on that basis, court will then afford pro se appellant the opportunity to file a brief and if appellant fails to do so appeal will be dismissed for failure to prosecute, but if appellant does file brief, case will proceed as any ordinary appeal, subject to appellate court's consideration of propriety of summary affirmance. West's F.S.A. R. App. P. Rule 9.315.

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 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.

[1][2] 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.

[3] 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.

END OF DOCUMENT

IN THE SUPREME COURT OF FLORIDA

GLORIA PULLEN, Petitioner, v. STATE OF FLORIDA, Respondent.	:	CASE NO. SC00-1482 1DCA CASE NO. 99-4384

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the patient before the trial court and the appellant in the lower tribunal. A one volume record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses. A one volume transcript will be referred to as “I T.”

Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Pullen v. State, 764 So. 2d 704 (Fla. 1st DCA 2000). This brief is also being submitted on a disk in WordPerfect format.

II STATEMENT OF THE CASE AND FACTS

By Petition filed on September 23, 1999, the Administrator of the West Florida Community Care Center requested that petitioner be continued as a patient (I R 1-2). The Petition alleged that petitioner was still mentally ill and needed to be treated with psychotropic medications. Petitioner had been committed from Escambia County on April 28, 1999. The clinical summary alleged that petitioner had made slow progress and needed supervision with her medication (I R 3-5).

On October 12, 1999, a hearing was held before Hearing Officer Diane Cleavinger. Psychiatrist Robert Cronemeyer testified that petitioner had bipolar disorder, manic, with psychotic features. She had delusions, and was grandiose. She was in need of care or treatment because she was not able to care for herself and could not function in a less restrictive setting (I T 1-2).

Petitioner testified that she was ready to go back to a hotel in Miami where her bank account was located. She did not believe she had a mental illness, but was suffering from hypoglycemia (I T 3-4).

On October 20, 1999, the hearing officer entered an Order finding that petitioner was still mentally ill and in need of care and treatment. Petitioner was ordered committed until April 12, 2000 (I R 9-10).

On November 18, 1999, a timely notice of appeal was filed (I R 11). The Public Defender of the Second Judicial Circuit was later designated to represent petitioner.

On appeal, the undersigned filed a no-merit brief, and the lower tribunal granted the state's motion to dismiss the appeal:

> 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 (1967), her appointed counsel has filed an initial brief indicating that he 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.

Appendix at 2. The First District cited Ostrum v. Department of Health and Rehabilitative Services, 663 So. 2d 1359 (Fla. 4th DCA 1995), and dismissed the appeal:

> [T]he 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.

Appendix at 3-4. A timely notice of discretionary review was filed, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(ii) and (iii), and Art. V, §3(b)(3), Fla. Const. This Court granted review by order dated January 8, 2001.

III SUMMARY OF THE ARGUMENT

The First District's opinion in this case held that because the right to counsel in involuntary civil commitment cases flows from the due process clause, a patient is not entitled to review by the appellate court of his or her commitment decision when court-appointed counsel files a no-merit brief. Thus, the court differentiated between the Fifth and Fourteenth Amendments' due process right to counsel on appeal and the Sixth Amendment right to counsel on appeal. This is a distinction without a difference.

Regardless of how one characterizes the right to counsel on appeal from a commitment order, due process and fundamental fairness require that the appellate court review the record to determine if the commitment decision was proper. Such review is necessary to ensure that a person is not continued in involuntarily hospitalization longer than is necessary for his or her mental health.

The standard of review is de novo, since this case involves only a question of law.

An order of involuntary hospitalization affects the patient's liberty interests. This Court held in In re Beverly, 342 So. 2d 481, 489 (Fla. 1977), that because the order acts as a deprivation of liberty, the patient is entitled to the assistance of counsel. Where court-appointed counsel fails to

uncover a meritorious issue, appellate review pursuant to Anders v. California, 386 U.S. 738 (1967), is the proper remedy. Otherwise, the patient receives no meaningful appellate review (or any appellate review at all) if the appellate court summarily dismisses the appeal.

Due process requires that a person who is subject to involuntary commitment is entitled to a hearing before a neutral magistrate, the assistance of counsel, a record of the proceedings, the right to be present, the right to present testimony, and the right to appellate review.

If the appellate court refuses to independently review the record, all of the due process protections afforded the patient on the trial level are meaningless. Meaningful appellate review of a commitment order is constitutionally required.

Other states, in determining whether a civil commitment attorney performed in a competent manner, have applied the standard for ineffective assistance of counsel in criminal cases. This extension of the law is a normal result of the fluid nature of due process, since due process depends on the nature of the proceedings. Because a civil commitment is a deprivation of liberty, the full Anders procedure should be adopted as the standard of appellate review.

The principle that a parent is not entitled to Anders review when court-appointed counsel files a no-merit brief in an appeal

from the termination of parental rights is not applicable to an appeal from a civil commitment. The civil commitment requires a deprivation of liberty, while the termination of parental rights does not. The lower court was wrong to base its decision on Ostrum v. Department of Health and Rehabilitative Services, *supra*. Four states which have had the occasion to consider the issue have required "full" Anders review of commitment decisions, two of which for at least 15 years. "Full," as opposed to "limited," Anders review means that the appellate court conducts its own independent review of the record to determine if any meritorious issues are present, without regard to whether the appellant has filed a pro se brief.

Ostrum allows the appellate court to exercise limited review if the parent files a pro se brief on a meritorious point. In that situation, the appellate court will not automatically dismiss the appeal but will review the parent's brief to determine if it sets forth any meritorious point. But the appellate court will not conduct its own independent review of the record.

This limited appellate review procedure, depending on whether the person files a pro se brief, cannot be applied to an appeal from a civil commitment. By its very nature, a civil commitment proceeding involves a patient who is mentally ill and in need of care or treatment. While a parent in a termination of

rights appeal may be able to file a coherent pro se brief, a patent in a civil commitment proceeding probably does not have that capability. Moreover, several other states have granted full appellate review to ensure that the patient received effective assistance of counsel at the commitment hearing.

Thus, even if this Court agrees with the lower tribunal on the narrow legal issue presented, this Court should extend the right to full Anders review to a civil commitment case which involves the deprivation of liberty, as a function of the Due Process Clause. Also, as a matter of public policy, the indigent appellant should have the benefit of full Anders review of her commitment order, because a commitment order also involves so many significant collateral legal consequences.

IV ARGUMENT

THE FIRST DISTRICT ERRED IN HOLDING THAT THE ANDERS PROCEDURE DOES NOT APPLY TO AN APPEAL FROM AN ORDER OF INVOLUNTARY HOSPITALIZATION.

The First District's opinion in this case held that because the right to counsel in involuntary civil commitment cases flows from the due process clause, a patient is not entitled to review by the appellate court of his or her commitment decision when court-appointed counsel files a no-merit brief. Thus, the court adopted the view of the Fourth District in Ostrum, *supra*, which differentiated between the Fifth and Fourteenth Amendments' due process right to counsel on appeal and the Sixth Amendment right to counsel on appeal. This is a distinction without a difference.

The standard of review in this case is de novo, since this case involves only a question of law. City of Jacksonville v. Cook, 765 So. 2d 289 (Fla. 1st DCA 2000).

A. THE RIGHT TO APPELLATE REVIEW OF THE ORDER FLOWS FROM THE DUE PROCESS CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

It is beyond peradventure that an order of involuntary hospitalization results in a "massive curtailment of liberty," Humphry v. Cady, 405 U.S. 504, 509 (1972), much like a sentence for a criminal conviction. The constitutional due process rights granted to mental patients –- the right to notice of the commitment petition and a hearing on the petition; the right to appointed counsel; the right to have the state prove his or her condition by clear and convincing evidence before a neutral magistrate; the right to confront and present witnesses; the right to an appeal; and the right to appointed counsel on appeal –- flow from the due process clauses of the Fifth and Fourteenth Amendments. *See generally*: Specht v. Patterson, 386 U.S. 605 (1967); O'Connor v. Donaldson, 422 U.S. 563 (1975); and Addington v. Texas, 441 U.S. 418 (1979).[1]

This Court has held that because the order acts as a deprivation of liberty, the patient is entitled to effective assistance of counsel:

> The subject of an involuntary civil

[1]The Florida appellate courts have specifically held that the patient has the due process rights to be present at the hearing, *Joehnk v. State*, 689 So. 2d 1179 (Fla. 1st DCA 1997), to testify in his or her own behalf, *Ibur v. State*, 765 So. 2d 275 (Fla. 1st DCA 2000), and to have his or her counsel present a closing argument. *Chalk v. State*, 443 So. 2d 421 (Fla. 2nd DCA 1984).

> commitment proceeding has the right to the effective assistance of counsel at all significant stages of the commitment process. ... By significant stages we mean all judicial proceedings and any other official proceedings at which a decision is, or can be, made which may result in a detrimental change to the conditions of a subject's liberty.

In re Beverly, *supra*, 342 So. 2d at 489.

The filing of an appeal is a significant stage of the commitment process under In re Beverly, *supra*. This Court has also held that when an indigent patient takes an appeal from an order of involuntary commitment, the due process and equal protection clauses of the federal and state[2] constitutions, and the access to courts provision of the state constitution,[3] require that a transcript of the hearing be prepared at public expense:

> Petitioners submit that as the right to appeal from an order requiring continued involuntary hospitalization is provided by law to all, this right cannot constitutionally be denied to those unable to pay the cost of the transcript necessary for review. To hold otherwise, it is maintained, would deny indigents equal access to the courts, due process and equal protection of the law, in violation of the Florida and the Federal Constitution. For the reasons hereinafter expressed, we accept petitioners' contention.

Shuman v. State, 358 So. 2d 1333, 1335 (Fla. 1978).

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[2]art. I, §9, Fla. Const.

[3]art. I, §21, Fla. Const

Public defenders represent the overwhelming number of mental patients who challenge their involuntary hospitalization on appeal. Where a public defender fails to uncover a meritorious issue for appeal, the lower tribunal held that any appellate review pursuant to Anders v. California is no longer available.

B. MEANINGFUL APPELLATE REVIEW OF THE COMMITMENT ORDER IS CONSTITUTIONALLY REQUIRED.

In Shuman v. State, *supra*, this court held that "meaningful appellate review" of a commitment order is constitutionally required, just like meaningful review of a criminal conviction:

> **A transcript of the hearing** provided by Section 394.467(4)(a), Florida Statutes (1975), **upon which an order requiring continued involuntary hospitalization is based, is necessary for meaningful appellate review. The indigent petitioners in the case sub judice have a right to an appellate record of these commitment proceedings, provided at public expense, under both the Florida and the Federal Constitution** for the reason succinctly stated in *Williams v. Oklahoma City,* 395 U.S. 458, 459-460, 89 S.Ct. 1818, 1819, 23 L.Ed.2d 440 (1969):
>
> > "This Court has never held that the States are required to establish avenues of appellate review, but **it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts**. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811; *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892; *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899." *Rinaldi v. Yeager*, 384 U.S. 305, 310-311, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966). Although the Oklahoma statutes expressly provide that "(a)n appeal to the Court of Criminal Appeals may be taken by the defendant, *as a matter of right* from any judgment against him . . . ," the decision of the Court of Criminal Appeals wholly denies any right of

> appeal to this impoverished petitioner, but grants that right only to appellants from like convictions able to pay for the preparation of a "case-made." This is an "unreasoned distinction" which the Fourteenth Amendment forbids the State to make. *See Griffin v. Illinois* (and) *Draper v. Washington* (supra); *Eskridge v. Washington State Board*, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958). (Emphasis in original)
>
> *Accord, Grissom v. Dade County*, 293 So.2d 59 (Fla. 1974); *Bell v. State*, 208 So.2d 474 (Fla. 1st DCA 1968).

Shuman v. State, *supra*, 358 So. 2d at 1335-36; bold emphasis added.

If public defenders file a no-merit brief, the patient will receive no review at all, much less “meaningful appellate review” when the lower tribunal summarily dismisses the appeal. The deprivation of liberty resulting from an involuntary hospitalization is no less important than a deprivation of liberty resulting from a criminal conviction.

C. FOUR OTHER STATES HAVE REQUIRED "FULL," NOT "LIMITED," APPELLATE REVIEW OF THE COMMITMENT PROCEEDINGS.

Four states which have had the occasion to consider the issue have required "full" Anders review of commitment decisions, two of which for at least 15 years. "Full," as opposed to "limited," Anders review means that the appellate court conducts its own independent review of the record to determine if any meritorious issues are present, without regard to whether the appellant has filed a pro se brief.

In In the Matter of McQueen, 495 N.E. 2d 128 (Ill. Ct. App. 1986), Ms. McQueen was involuntary committed, and her court-appointed appellate counsel filed a motion to withdraw and a memorandum brief in accord with Anders v. California. The court held, on authority of a previous case involving the termination of parental rights,[4] that the full Anders procedure applied to an appeal from a civil commitment order, so that indigent appellants would be "on the same footing as those able to afford private counsel:"

> Counsel's motion to withdraw and memorandum are consistent with an "Anders brief" in that the documents set forth all aspects of the case and demonstrate that there is no merit to the appeal. (*Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493.) *Anders* enunciated the procedures to be followed in order to

[4] *In re Keller*, 486 N.E. 2d 291 (Ill. Ct. App. 1985), discussed later in this brief at 27.

> properly discharge appellate counsel appointed to represent a defendant in a criminal case when the appeal is frivolous. (386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed. 493, 489.) Recently, we have held that the *Anders* procedure is applicable to an appeal from a judgment terminating parental rights where appointed counsel moved to withdraw on the ground that the appeal was without merit. (*In re Keller* (1985), 138 Ill. App. 3d 746, 93 Ill. Dec. 190, 486 N.E.2d 291.) In so holding, we reasoned that the appointment of counsel in a civil case, as in a criminal case, "has put the indigent appellants on the same footing as those able to afford private counsel and accomplishes the constitutional or statutory purpose for their appointment.["] (138 Ill. App.3d 746, 747-48, 93 Ill. Dec. 190, 191, 486 N.E.2d 291, 292.) **Following our reasoning in *Keller*, we hold that the *Anders* procedure is applicable to the case at bar.**
>
> We have reviewed counsel's *Anders*' brief and respondent's reply; **we have thoroughly examined the record in accordance with the dictates of *Anders***; and we conclude that no justiciable issues are presented for review and no meritorious grounds exist for appeal.

In the Matter of McQueen, 495 N.E. 2d at 129; bold emphasis added. Six years later, that same court was given another Anders brief in an appeal from an involuntary commitment. In the Matter of Brazelton, 604 N.E. 2d 376 (Ill. Ct. App. 1992). It sua sponte gave the patient additional time to submit her own legal authorities. Even though Ms. Brazelton filed nothing in pro se, because the court found counsel's Anders brief to be legally insufficient, it ordered counsel to file another brief.

Likewise, a sister Illinois appellate court was faced with

the same problem in In the Matter of Juswick, 604 N.E. 2d 528 (Ill. Ct. App. 1992). The court held:

> We must first consider the question of whether the procedure set forth in *Anders* and [*People v.] Jones* [, 231 N.E.2d 390 (Ill. 1967),] is applicable in this context in which counsel has been appointed in a civil proceeding to represent an indigent person who has been involuntarily hospitalized. *Anders* set forth procedures required to permit the withdrawal of counsel appointed to represent a defendant in the appeal of a criminal case when the appeal is frivolous, and stated that those procedures would afford a convicted defendant "that advocacy which a nonindigent defendant is able to obtain." (*Anders v. California* (1967), 386 U.S. 738, 745, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493, 498.) The Appellate Court, Fourth District, has relied upon that language in concluding that the *Anders* procedure may be applied in the appeal of an involuntary commitment order. (*In re McQueen* (1986), 145 Ill. App.3d 148, 99 Ill. Dec. 63, 495 N.E.2d 128.) Our independent consideration of the issue leads us to the same conclusion. We accordingly hold that the *Anders* procedure is applicable to the present case. *See In re Keller* (1985), 138 Ill. App.3d 746, 93 Ill. Dec. 190, 486 N.E.2d 291; *see also People v. Espinoza* (1977), 54 Ill. App.3d 36, 11 Ill. Dec. 871, 369 N.E.2d 325; *People v. Beksel* (1973), 10 Ill. App.3d 406, 294 N.E.2d 111.
>
> **After carefully examining the record in this case, as well as the motion to withdraw and the accompanying memorandum of law, we agree with appellate counsel that there is no issue that might support an appeal.**
>
> We therefore allow the motion to withdraw as counsel in this appeal, and we affirm the judgment of the circuit court.

In the Matter of Juswick, 604 N.E. 2d at 530; bold emphasis

added.

Thus, it is obvious from the bold language quoted above that the Illinois appellate courts have taken their role in Anders appeals seriously, and have, for the last 15 years, conducted their own “careful” and “thorough” review of the record when counsel files a no-merit brief in a civil commitment appeal.

In 1986, the question also arose in California in Conservatorship of Besoyan, 226 Cal. Rptr. 196, 181 Cal. App. 3d 34 (Ct. App. 1986). There a man was involuntarily committed as “gravely disabled” under that state’s equivalent of our Baker Act. His counsel filed a no-merit brief, but asked the court to review the commitment under that state’s Anders procedure, because his confinement involved a liberty interest. The court agreed that the confinement was a serious deprivation of personal liberty and reviewed the many collateral consequences which resulted from a civil commitment. The court held that Anders review applied to an appeal from a civil commitment:

> As simply stated most recently by the court in *Waltz v. Zumwalt, supra.*, 167 Cal. App.3d at page 839: "[In grave disability proceedings], we deal with persons threatened with loss of liberty and exposure to social stigma, persons similarly situated to defendants in criminal matters. As such, they must be granted the same benefits as if the proceedings were truly criminal." In sum, we hold [*People v.] Wende* [, 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979)] review is applicable where appointed appellate counsel has filed a brief on behalf of an LPS conservatee which raises no specific issues

> or describes the appeal as frivolous.
>
> This court granted appellant permission to file a brief on his own behalf and further granted one 30-day extension of time upon his request. The extended time period has elapsed and no brief has been filed. **A review of the entire record discloses no reasonably arguable appellate issues.** Substantial evidence supports the jury's findings and the trial court's order. Appellant was competently represented by counsel below and on this appeal.

Conservatorship of Besoyan, 226 Cal. Rptr. at 198-99, 181 Cal. App. 3d at 38; bold emphasis added.[5] Thus, that court conducted a full review of the entire record.

In a series of "unpublished disposition" opinions since 1989, the appellate court in Wisconsin has reached the same conclusion. In In the Matter of the Mental Condition of P.R., 449 N.W. 2d 338 (Wisc. Ct. App. 1989), appellate counsel filed a "no merit report" pursuant to Anders in an appeal from an involuntary commitment, and the appellant filed no response. The court reviewed the testimony of the three medical experts presented at the commitment hearing and elements of the commitment statute and the factual findings of the committing judge under the "clearly erroneous" test. The court then held:

> Counsel identifies no other potentially meritorious issues on appeal, **and based on**

[5]It is true that the California supreme court cited *Besoyan* with disapproval in declining to extend the *Anders* procedure to a termination of parental rights appeal, but did not expressly overrule it. *In re Sade C.*, 920 P. 2d 716, 720 (Cal. 1996).

> **our independent review of the record**, neither do we. Any further proceedings would therefore be frivolous and without arguable merit. Accordingly, we affirm the order of commitment and relieve P.R.'s counsel of any further representation of him on this appeal.

Id.; bold emphasis added. Thus, that court also conducted a full and independent review of the entire record. *See also* In the Matter of the Condition of C.G., 455 N.W. 2d 914 (Wisc. Ct. App. 1990), and In the Matter of the Mental Commitment of Jeffrey M., 520 N.W. 2d 112 (Wisc. Ct. App. 1994), in which the same court also reviewed the records of the involuntary commitment appellants even though neither filed any response to his counsel's Anders briefs. Likewise, in State v. Crawford, 528 N.W. 2d 93 (Wisc. Ct. App. 1994), the same appellate court also conducted its full Anders review of an appeal from an order committing Mr. Crawford after he was found not guilty of several sex crimes by reason of insanity.

Texas has reached the same result. In In the Matter of E.M., 1997 WL 217186 (Tex. Ct. Civ. App. May 1, 1997), the patient was temporarily committed for mental health treatment, and her counsel filed an Anders brief. She filed nothing on her behalf in the appellate court. The civil court of appeals noted that it normally would affirm because the appellant had not presented any points of error, but borrowed the Anders procedure from its brethren on the criminal appellate bench, because the commitment involved a loss of liberty and social stigma:

However, we note the similarities between involuntary commitment and incarceration. Both involve involuntary loss of liberty and possible stigma. *Vitek v. Jones*, 445 U.S. 480, 491-492, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); *Addington*, 441 U.S. at 425-26. Therefore, the defendant in an involuntary commitment proceeding has due process rights not normally implicated in civil proceedings. *Addington*, 441 U.S. at 425-26; *Moss v. State*, 539 S.W.2d 936, 941 (Tex. Civ. App. – Dallas 1976, no writ). But those rights are not necessarily co-extensive with the rights accorded criminal defendants. *Addington*, 441 U.S. at 427-431 (rejecting argument that need for commitment must be proven "beyond a reasonable doubt"). Accordingly, without holding that it is necessary, we will use the *Anders* analysis by analogy.

A court reviewing a criminal conviction has two obligations upon receipt of an *Anders* brief. *See Anders*, 386 U.S. at 744. First, the court must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. *Id.* The court may order the attorney to rebrief if the brief is inadequate. *Stafford v. State*, 813 S.W.2d 503, 510 (Tex. Crim. App. 1991); *Johnson v. State*, 885 S.W.2d 641, 645 (Tex. App. – Waco 1994, pet. ref'd). Second, the court must determine whether counsel has correctly concluded that the appeal is frivolous by examining the record itself. *Anders*, 386 U.S. at 744-45; *Stafford*, 813 S.W.2d at 511. If the court determines that the appeal is not frivolous, it must abate the appeal to allow the trial court to appoint new appellate counsel. *Penson v. Ohio*, 488 U.S. 75, 85, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988); *Stafford*, 813 S.W.2d at 511; *Bruns v. State*, 924 S.W.2d 176, 177 n.1 (Tex. App. – San Antonio 1996, no pet.).

In the Matter of E.M., *supra*, 1997 WL 217186 at 2.

The court then conducted a full Anders review of the commitment proceedings, including a discussion of the testimony of all of the witnesses at the hearing (one psychiatrist, a case manager, a deputy sheriff, and the patient herself):

> Appellant's attorney timely perfected an appeal, provided a statement of facts, and filed a brief. The brief summarizes the evidence, includes record cites, and concludes that the testimony is sufficient to meet the statutory requirements for commitment. Its reference to legal authority is slim, but, given the legal questions presented, is adequate. Accordingly, it meets the standards for an *Anders* brief.
>
> **We have examined the record and find that it supports counsel's conclusion. The record shows that the commitment proceeding met the statutory requirements.** E.M. was present, was represented by counsel, cross-examined witnesses, and testified on her own behalf. *See* Tex. Health & Safety Code Ann. §574.024 (West 1992) (proposed patient and attorney shall have opportunity to appear and present evidence). Further, the evidence adduced supports the trial court's findings.

Id.; bold emphasis added. Thus, Texas has joined the three other states in conducting full Anders review in a civil commitment appeal.

D. THE DISTINCTION BETWEEN THE RIGHT TO APPEAL A COMMITMENT ORDER UNDER THE SIXTH AMENDMENT AND THE RIGHT TO APPEAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS IS MEANINGLESS, BECAUSE SIGNIFICANT POLICY INTERESTS SUPPORT THE RIGHT TO APPEAL.

The First District's differentiation between the right to appeal which is founded on the right to counsel – versus the right to appeal which is founded on the right to due process – is a distinction without a difference. There is a significant policy interest in ensuring that an order of involuntary commitment will be favored with meaningful review by the appellate court. In In the Interest of E.H., 609 So. 2d 1289 (Fla. 1992), the trial court entered an order terminating the parental rights of the mother of E.H., a minor child. The mother's attorney filed a notice of appeal one day late. The First District dismissed the appeal, but certified the question of whether ineffective assistance of counsel entitled the mother to a belated appeal. In the Interest of E.H., 591 So. 2d 1097 (Fla. 1st DCA 1992).

This Court quashed the opinion of the First District and held that a belated appeal must be granted as a matter of public policy from an order terminating parental rights:

> We did not grant the belated appeal in this case based on precedent, but on the significant policy interest in ensuring that a parent and child are not separated without a thorough review of the merits of the case.

In the Interest of E.H., 609 So. 2d at 1291.

The same “significant policy” considerations apply to an appeal from an order authorizing continued involuntary hospitalization. There is a "significant policy interest" in ensuring that a person is not continued in involuntarily hospitalization longer than is necessary for his or her mental health. There is a "significant policy interest" in ensuring that an order of involuntary commitment will be favored with meaningful review by the appellate court.

Thus, even if this Court accepts the artificial distinction between the Fifth and Sixth Amendments’ right to counsel, it should still require the lower tribunal to conduct full Anders review, as a matter of public policy. “Full,” as opposed to “limited,” Anders review means that the appellate court conducts its own independent review of the record to determine if any meritorious issues are present, without regard to whether the appellant has filed a pro se brief.

E. THE OSTRUM PROCEDURE FOR "LIMITED" APPELLATE REVIEW SHOULD NOT APPLY TO AN APPEAL FROM A COMMITMENT ORDER.

The procedure crafted by the court in Ostrum, *supra*, to review an appeal from an order terminating parental rights in which a no-merit brief is filed, constitutes only limited review, because it is wholly dependent upon whether that parents file a pro se brief:

> It will be enough for appellate counsel to file a motion seeking leave to withdraw as counsel for the parent whose rights have been terminated. As we do in all civil appeals where appellate counsel seeks leave to withdraw, we can then give the party a period of time in which to argue the case without an attorney. If the party then fails to file a brief within the time period granted for that purpose, we will conclude that the party no longer wishes to prosecute the appeal and dismiss for failure to prosecute. If the party has filed a brief, we will review the brief and if it fails to present a preliminary basis for reversal we will summarily affirm under rule 9.315. When we find that the party's brief presents a preliminary basis for reversal, the case will then proceed as any ordinary appeal.

Ostrum, *supra*, 663 So. 2d at 1361.

Although the Florida appellate courts have adopted the Ostrum procedure in appeals from the termination of parental rights,[6] other states have declined to do so. For example, in In

[6] *In re J.A., et al. v. Department of H.R.S.*, 693 So. 2d 723 (Fla. 5th DCA 1997); *Jimenez v. Department of Health and Rehabilitative Services*, 669 So. 2d 340 (Fla. 3rd DCA 1996); and *In the Interest of K.W. v. State Department of Children and Families*, 24 Fla. L. Weekly D87 (Fla. 2nd DCA Dec. 23, 1998).

re Keller, *supra*, the Illinois appellate court, after receiving an Anders brief, conducted its own independent examination of the record before it affirmed the termination order.

In Morris v. Lucas County Children Services Board, 550 N.E. 2d 980 (Ohio Ct. App. 1989), the court appointed a guardian ad litem and ordered him to file another brief when counsel for the mentally retarded parent filed a no-merit brief.

In In re V.E. and J.E., 611 A. 2d 1267 (Pa. Super. Ct. 1992), the court found appointed counsel's Anders brief to be insufficient and conducted its own independent examination of the record before it affirmed the termination order. In J.K. v. Lee County Department of Human Services, 668 So. 2d 813 (Ala. Ct. Civ. App. 1995), the court, after receiving an Anders brief, ordered counsel to file a supplemental brief and then conducted its own examination of the record before it affirmed the termination order.

The lower tribunal adopted the Ostrum procedure in the instant case. This limited review procedure, wholly dependent on whether the appellant files a pro se brief, should not be applied to appeals from an order of involuntary commitment, for the simple reason that, by its very nature, a civil commitment proceeding involves a patient who is mentally ill and in need of care or treatment. While a parent in a termination of rights appeal may be able to file a coherent pro se brief, a patient in

a civil commitment proceeding probably does not have that capability.[7]

This Court must require the appellate courts of this state to conduct a full Anders review of the record, regardless of whether the patient files a pro se brief. To do otherwise would be to deny not only meaningful appellate review, but any appellate review at all. The number of involuntary commitment appeals in this state is not significant.[8]

F. FULL APPELLATE REVIEW IS NECESSARY TO DETERMINE IF THE PATIENT HAS RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

While involuntary commitment proceedings are civil in nature, several courts have applied the criminal courts' standard for effective assistance of counsel[9] to determine if counsel in a commitment hearing gave his client effective representation. *See, e.g.*, K.W. v. Logansport State Hospital, 660 N.E. 2d 609 (Ind. Ct. App. 1996); and In re Dibley, 400 N.W. 2d 186 (Minn. Ct. App. 1987).

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[7]Significantly, the Texas appellate court said:

> "We note the apparent incongruity of offering a person adjudicated as mentally ill the opportunity to represent himself or herself.

In the Matter of E.M., *supra*, 1997 WL 217186 at 2.

[8]According to the Clerk of the First District, there were 15 Baker Act appeals docketed in that court during calendar year 2000.

[9]See *Strickland v. Washington*, 466 U.S. 668 (1984).

In In re Commitment of Hutchinson, 421 A. 2d 261 (Pa. Super. Ct. 1980), *affirmed* 454 A. 2d 1008 (Pa. 1982), the trial court refused to apply the standard of ineffective assistance of counsel in a criminal case to evaluate whether an attorney in a civil commitment hearing was ineffective. The appellate court recognized the similarities between criminal prosecutions and civil commitments and held that the standard of effectiveness should be the same:

> Due process is a flexible concept which calls for such procedural safeguards as the particular situation demands in light of the interests at stake.

Id., 421 A. 2d at 407-408. In the instant case, because due process is a "flexible concept," this Court should require that the full Anders procedure be employed in reviewing an involuntary commitment order as a requirement of due process.

Public policy also requires full Anders review of the record in an involuntary commitment case. This Court has already been made aware of the many significant collateral legal consequences which flow from a commitment order:

> We here in this Court, reviewing nothing but an abstract and voiceless record, tend to forget the very real and disruptive legal consequences that can flow from an illegal civil commitment. **Caught up in our review of these cold words printed on cold paper, we tend to forget exactly what civil commitment means: The person is taken out of society, deprived of liberty, stripped of the right to make personal and legal decisions, and**

involuntarily subjected to examination and treatment.

There is very little difference between this procedure and incarceration for crime. And the continuing disruption of a person's life caused by illegal civil commitment can be every bit as devastating as illegal incarceration. All aspects of the person's life can be rendered chaotic. Business and employment opportunities may languish. Marriages may sour from the strain of separation and stigma, causing divorce. Advantages may evaporate. Legal rights may be neglected, leading to continuing loss. In effect, the majority opinion appears to be saying that persons can be unlawfully deprived of virtually all their civil rights for the duration of their civil commitment, and have no recourse whatsoever even if a direct and provable harm has resulted.

And my review of the law discloses one point very vividly: The potential loss of civil rights during the period of an illegal civil commitment is truly staggering, exceeded only by imprisonment for crime. Persons adjudged to be incompetent may not register to vote, section 97.041(3)(a), Florida Statutes (1989), and may be stripped of their voter registration by court order. §744.3215(2)(b), Fla. Stat. (Supp. 1990). They may not register for a drivers' license, section 322.05(5), Florida Statutes (1989), and a court may confiscate any such license previously given them. §322.2505, Fla. Stat. (1989). In some circumstances, they may be tested for acquired immune deficiency syndrome (AIDS) without their consent. §381.609(3)(i)(3), Fla. Stat. (Supp. 1990).

Florida law specifies that incompetent persons cannot consent to an abortion on their own behalf. §390.001(4), Fla. Stat. (1989). A court can deprive them of the right to marry, to personally apply for government benefits, to travel, or to seek or

> retain employment. §744.3215(2), Fla. Stat. (Supp. 1990). Likewise, a court may delegate to someone else the authority to make personal and business decisions for an incompetent person; this includes the right to enter contracts, the right to sue and be sued, the right to manage property, the right to make gifts, the right to determine one's place of residence, the right to consent to medical treatment, and the right to make decisions about social matters in general. §744.3215(3), Fla. Stat. (Supp. 1990).
>
> Incapacitated persons or those committed to a mental institution cannot hold a concealed weapons' permit, §790.06(10), Florida Statutes (1989), or carry a weapon openly. Compare §790.053, Fla. Stat. (1989) with § 790.25(2)(b)1., Fla. Stat. (1989). Nor may they carry an explosives permit or use explosives. §552.094(5)(c), Fla. Stat. (1989). It also is illegal for anyone to allow an incompetent person to participate in any "game of chance," presumably including such lawful activities as church bingo or the Florida Lottery. §849.04, Fla. Stat. (1989).

Godwin v. State, 593 So. 2d 211, 216 (Fla. 1992) (Kogan, J., concurring and dissenting) (bold emphasis added).[10]

Thus, this Court must require the lower tribunal to conduct a full Anders review of petitioner's involuntary commitment record as a matter of due process and public policy.

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[10]The California appellate court in *Conservatorship of Besoyan, supra,* also set forth the many collateral consequences suffered by one who is involuntarily committed in that state as "gravely disabled," 226 Cal. Rptr. at 197-98, 181 Cal. App. 3d at 37-38, and used this "social stigma" as one reason, in addition to the loss of liberty, to extend *Anders* review to such cases.

V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court to hold that the procedures of Anders v. California apply to appellate review of an involuntary commitment order.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Charlie McCoy, Assistant Attorney General, Civil Division, The Capitol, Plaza Level, Tallahassee, Florida; and by U.S. mail to Marcia M. Perlin, Assistant Public Defender, Thirteenth Judicial Circuit, Counsel for Florida Public Defender Association, Hillsborough County Courthouse Annex, Fifth Floor, North Tower, 801 East Twiggs Street, Tampa, Florida 33602; on this ___ day of February, 2001.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New 12 point type.

_____
P. DOUGLAS BRINKMEYER