ORIGINAL

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 JURISDICTION

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the patient before the Division of Administrative Hearings and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Pullen v. State, 25 Fla. L. Weekly D1497 (Fla. 1st DCA June 19, 2000). This brief is submitted on a disk in 12 point courier new type.

II STATEMENT OF THE CASE AND FACTS

The facts as related by the First District are essentially correct, and they will be recited here:

> 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 1. 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 2. 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.

III SUMMARY OF THE ARGUMENT

The First District's opinion in this case expressly construes the due process and right to counsel provisions of the state and federal constitutions. It also expressly affects a class of constitutional officers - the public defenders - who routinely represent a patient in proceedings involving 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.

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 if the appellate court summarily dismisses the 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 insofar as mental patients are concerned.

This Court should accept review and decide whether to extend the right to Anders review to a civil case which involves the deprivation of liberty.

IV ARGUMENT

THE FIRST DISTRICT'S OPINION EXPRESSLY CONSTRUES PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS AND EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS - THE VARIOUS PUBLIC DEFENDERS, AND FURTHER REVIEW BY THIS COURT IS DESIRABLE.

Public Defenders are constitutional officers. Art. V, §18, Fla. Const. They are authorized to represent mental patients in involuntary commitment proceedings. §§27.51(1)(d), 394.467(4), 394.467(7)(c), Fla. Stat. (1999).

It is beyond peradventure that an order of involuntary hospitalization affects the patient's liberty interests. O'Connor v. Donaldson, 422 U.S. 563 (1975). 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 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 such a significant stage. Public defenders represent the overwhelming number of mental patients who challenge their

involuntary hospitalization on appeal. Where a public defender failed to uncover a meritorious issue for appeal, the lower tribunal held that appellate review pursuant to Anders v. California, 386 U.S. 738 (1967), is no longer available. The decision affects the class of public defenders in how they treat appeals from involuntary commitments. Thus, the lower tribunal's decision expressly affects a class of constitutional officers and this Court has jurisdiction under Art. V, §3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iii).

If public defenders file a no-merit brief, the patient will receive no 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.

The right to counsel is found in Amend. VI, U.S. Const. The right to due process of law is found in Amend. XIV, U.S. Const. and art. I, §9, Fla. Const. The lower tribunal found that because Anders v. California, *supra*, is founded upon the Sixth Amendment right to counsel and not the right to due process of law, a mental patient whose court-appointed counsel filed a no-merit brief is not entitled to the benefit of Anders review.

Thus, the lower tribunal's decision expressly construed the state and federal constitutions and this Court has jurisdiction under Art. V, §3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(ii).

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 public 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.

This Court should accept review and decide whether to extend the right to Anders review to a civil case which involves the deprivation of liberty.

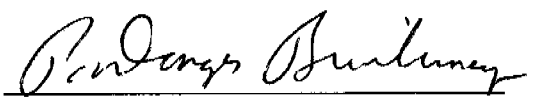
V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court to grant and accept review in this case because it significantly affects the rights of involuntarily-committed citizens of this state to direct review of their continued hospitalization.

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 Petitioner, this 14 day of July, 2000.

Respectfully submitted,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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Appendix

25 Fla. L. Weekly D1497a

Baker Act -- Involuntary commitment -- Appeals -- Appeals from order authorizing party's involuntary civil commitment under Baker Act dismissed, where party's appointed counsel filed initial brief indicating that he can discern no reversible error, and party has not filed pro se brief after being afforded opportunity to do so -- Where neither appointed counsel nor pro se appellant identify any arguable issues, appellate court is not obligated to conduct independent review of record in effort to identify such issues -- Procedures required by Anders v. California not applicable in Baker Act appeals

IN THE INTEREST OF: GLORIA PULLEN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D99-4384. Opinion filed June 19, 2000. An appeal from an order of the Division of Administrative Hearings. Diane Cleavinger, Administrative Law Judge. Counsel: 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 (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.

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.)