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IN THE SUPREME COURT OF FLORIDA

GLORIA PULLEN,

Petitioner,

vs. CASE NO. SC00-1482

STATE OF FLORIDA, (First DCA Case No. 99-4384)

Respondent.

______________________/

On Discretionary Review from the First District Court of Appeal

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT CERTIFYING TYPE SIZE AND STYLE

I certify Courier New 12-point, non-proportionately spaced type is used in this brief, in accord with this Court's administrative order of July 13, 1998.

STATEMENT OF THE CASE AND FACTS

As noted in the decision below, Pullen appealed from an order continuing her involuntary commitment under the Baker Act. The Public Defender filed an initial brief invoking Anders v. California, 87 S.Ct. 1396 (1967). The State moved to dismiss on the ground the Anders procedure was not available to Pullen. The First DCA ordered dismissal on June 19, 2000; Pullen filed a notice to invoke this Court's discretionary jurisdiction on July 11.

SUMMARY OF THE ARGUMENT

Pullen was re-committed to a mental health facility under the Baker Act, §394.467, Florida Statutes. The decision below held her right to counsel arose "not from the Sixth Amendment but rather from the due process clause." (App., p. A-1). It directed "counsel in a civil commitment proceeding," when unable to identify reversible error, to move to withdraw rather than invoke Anders. The holding and directive was not exclusive to Public Defenders.

The opinion makes no mention of the Florida Constitution, but refers only to the U.S. Constitution. Again, the crucial sentence holds Pullen's right to counsel "arises not from the Sixth Amendment but rather from the due process clause." This language does not construe the Due Process Clause or the Sixth Amendment. Instead, it applies a well known principle of law--that the Sixth Amendment applies only to "criminal prosecutions"--to the

undisputed fact Pullen was not a criminal defendant. This Court lacks jurisdiction described under Art. V, §3(b)(3).

The decision below follows highly persuasive precedent. It directs counsel to move for withdrawal rather than invoke Anders--thereby requiring justification for discontinued representation. It does not present an issue important enough to demand this Court's attention. If jurisdiction exists, review on the merits should be declined.

ARGUMENT

ISSUE I

WHETHER THE OPINION BELOW ESTABLISHES DISCRETIONARY JURISDICTION IN THIS COURT

A. No Express Effect on a Class of Officers

Pullen first urges this Court has discretionary jurisdiction under Art. V, §3(b)(3), Florida Constitution; as the decision "affects the class of public defenders in how they treat appeals from involuntary commitments." (Pullen brief, p.7). She fails to recognize more than literal exclusiveness is required. The decision "must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state." Spradley v. State, 293 So.2d 697, 701 (Fla. 1974). This is so, because "[s]uch cases naturally affect all classes of constitutional or state officers,

in that the members of these classes are bound by the law the same as any other citizen." *Id.* *See* Kogan & Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L.R. no. 2B (Winter 1994) at p.122-22 (describing the jurisdictional test as "very restrictive").

Spradley held the decision under review must "exclusively" affect a class of officers. *Id.* at 710. Read correctly, the decision below applies to anyone, such as private counsel or counsel appointed due to conflict, representing a person committed under the Baker Act. By inescapable analogy, it applies to an counsel representing someone involuntarily admitted for substance abuse treatment pursuant to §397.675, Florida Statutes.

Pullen observes: "Public defenders represent the overwhelming number of mental patients ... on appeal." (Pullen brief, p.6-7). She thereby admits mental patients are occasionally represented by others, and concedes the effect of the decision below is not exclusive to Public Defenders. Since the effect is not exclusive, the Court lacks jurisdiction on this ground.

B. No Express Construction of a Constitutional Provision

The decision below concludes Pullen's right to counsel "arises not from the Sixth Amendment but rather from the due process clause." (App., p. A-1). In context, this unadorned cite to the Due Process Clause refers only to the U.S. Constitution. The Florida Constitution is not construed at all, much less expressly

construed. *See* Croteau v. State, 334 So.2d 577, 581 (Fla. 1976) ("No court can construe a provision of our constitution without reference to it." [internal quote omitted]).

The opinion below does not actually construe the Due Process Clause or the Sixth Amendment. Instead, it applies a well known principle of law--that the Sixth Amendment applies only to "criminal prosecutions"--to the undisputed fact Pullen was not a criminal defendant. Significantly, it then declines to extend the Anders procedure to a non-criminal proceeding.

Since the decision below does not extend[1] the law, it does not represent an "evolutionary development" establishing this Court's jurisdiction. *See* Kogan & Waters at p.1221:

> The better approach is the one suggested in the Court's earlier cases. For jurisdiction to exist, the district court's opinion must explain or amplify some identifiable constitutional provision in a way that is an evolutionary development in the law or that expresses doubt about some legal point.

citing Ogle v. Pepin, 273 So.2d 391 (Fla. 1973); Dykman v. State, 294 So.2d 633 (Fla. 1973) ,*cert. den.*, 419 U.S. 1105 (1975).

The above analysis is particularly apropos. Had the decision below extended Anders to a non-criminal proceeding, it would have been the first Florida case to do so. It would have been an

[1]Pullen obliquely concedes this point: "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." [e.s.] (Pullen brief, p.9).

evolutionary development construing constitutional provisions. The decision below does not extend Anders, and does not "expressly construe" the U.S. or Florida Constitution as contemplated by Art. V, §3(b)(3).

ISSUE II

WHETHER THE COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THIS CASE ON THE MERITS.

Should this Court decide it has jurisdiction, it should still decline review on the merits. The decision below implicitly turns on the unremarkable proposition the Sixth Amendment applies only to criminal proceedings.[2] Its reasoning follows Ostrum v. Department of Health and Rehabilitative Services of State of Fla., 663 So.2d 1359, 1361 (Fla. 4th DCA 1995) (the "right to counsel in Anders is based on the Sixth Amendment, but the right to counsel in TPR cases does not arise under the Sixth Amendment"). Ostrum, in turn, relied on In the Interest of D.B., 385 So.2d 83 (Fla.1980), which stated:

> Right to counsel in dependency proceedings, on the other hand, is governed by due process considerations, rather than the sixth amendment.

Id. at 89.

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[2]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 defence. [e.s.].

Similarly, in Beverly, In re, 342 So.2d 481, 488-89 (Fla. 1977), this Court concluded the right to counsel does not attach as soon in the civil commitment process, and reasoned:

> There is a differentiation between persons in need of mental treatment and persons who violated the criminal laws.
>
> * * *
>
> Appellant also contends that he was denied his right to counsel, saying that the patient has the right to counsel at the interview with the examining psychiatrist. ... The right to counsel does not extend to preliminary stages, such as psychiatric interview where custodial decisions are not made. The presence of counsel at that stage would unduly interfere with the objective evaluation of the patient's mental condition by the examining physician. We hold that a patient does not have a right to counsel at the psychiatric interview, as no such right is applicable at the psychiatric examination stage.

Id. [cites omitted].

Given this Court was contrasting the rights of a criminal defendant with the rights of a person being committed, it necessarily concluded the right to counsel of a person being committed is narrower. In so doing, it strongly implied the committed person's right does not arise under the Sixth Amendment.

The court below was persuaded by Ostrum, which held Anders was not available to persons appealing from termination of parental rights. Two other district courts have followed it. *See* 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).[3] Given the so-far unanimous conclusion Anders is not available in appeal from termination of parental rights, the First DCA's analogous conclusion in the context of Baker Act appeals does not warrant review by this Court.

Pullen's last point asserts this case raises a "significant policy interest," and cites to In the Interest of E.H., 609 So.2d 1289 (Fla.1992). (Pullen brief, p.8-9). E.H. involved the availability of a belated appeal from an order terminating parental rights. Such orders permanently sever the legal bond between parent and child. In contrast, commitment under the Baker Act is for a maximum of six months, subject to re-assessment and release at a lesser interval when appropriate. *See* §394.467(6)(b) & (7)(d); and §394.469, Florida Statutes.

The First DCA has already rejected Pullen's point in a case involving the right to appellate counsel after civil commitment. In Archer v. Administrator, Florida State Hosp., 622 So.2d 107 (Fla. 1st DCA 1993), the notice of appeal from Archer's commitment was filed late. Ultimately dismissing for lack of jurisdiction, the First DCA noted Archer contended the "issue involved is a restraint of liberty." 622 So.2d at 108. It then rejected her premise, since the authority advanced applied only to criminal

[3]In an opinion not yet final, the Second DCA has agreed. *See* Interest of K.W., 24 Fla.L.W. D87 (Fla. 2d DCA 1998) ("We now align ourselves with the three Florida district courts which have spoken on the subject and we reject the necessity for Anders treatment of parental termination appeals ....").

cases. *Id.* It also described the E.H. holding as "predicated on the narrow policy grounds involved in the termination of parental rights" [e.s.]. Archer, 622 So.2d at 108-9. This Court denied review. 634 So.2d 622 (Fla. 1994).

Pullen--who did not ask the First DCA to certify a question--makes an argument identical to the one rejected in Archer. (Pullen brief at p.4-5,7,9: characterizing involuntary commitment as a "deprivation of liberty".) She should be no more successful.

In contrast to the narrow policy ground (parental rights termination) recognized by E.H., Pullen's "deprivation of liberty" ground is broad. It would compel Anders be applied in other civil proceedings which could restrain liberty, such as involuntarily admissions for substance abuse treatment under §397.675, Florida Statutes.[4]

As a matter of public policy, it is not certain the Anders procedure should be the model for "no-error" appeals from Baker Act commitment orders. After all, the Anders procedure itself is not mandatory, 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 (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

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[4]Such persons have the right to counsel under §397.501(8), Fla. Stat.

> framework that could adequately vindicate this right; instead, by making clear that the Constitution itself does not compel the Anders procedure, we suggested otherwise.
>
> * * *
>
> Finally, any view of the procedure we described in the last section of Anders that converted it from a suggestion into a straitjacket would contravene our established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy.

Id. at 757. Notably, the Court upheld California's variation on Anders, which permitted counsel to remain silent on the merits while expressing "availability to brief any issues on which the court might desire briefing." *Id.* at 753. *See also,* Robbins at 773 n.7, *citing* Warner, Anders in the Fifty States [etc.], 23 Fla.St.U.L.Rev. 625, 642-662 (1996) (surveying "state court responses to Anders").

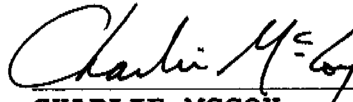
The decision below still requires counsel, unable to identify reversible error, to move for withdrawal; thereby requiring justification for discontinued representation. Arguably, this is a constitutionally acceptable "solution"--even if Anders did apply to civil commitments. Consequently, the decision below does not present an issue important enough to demand this Court's attention. If jurisdiction exists, review on the merits should be declined.

CONCLUSION

The decision below does not establish discretionary jurisdiction in this Court. Alternatively, it does not warrant review on the merits; the Court should not exercise its jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I certify a true copy of the State's jurisdictional brief has been sent by U.S. Mail to **P. Douglas Brinkmeyer**, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301; this 24th day of July, 2000.

Charlie McCoy
Assistant Attorney General

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TABLE OF APPENDICES

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A	Opinion Below	06/19/2000

APPENDIX A

25 Fla. L. Weekly D1497a

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.)