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

REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner files this brief in reply to the brief of respondent, which will be referred to as “RB,” followed by the appropriate page number in parentheses. This brief is also being submitted on a disk in WordPerfect format.

II ARGUMENT

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE 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. Respondent agrees with the narrow distinction between the Fifth and Fourteenth Amendments' due process rights and the Sixth Amendment right to counsel on appeal. Petitioner maintains that this is a distinction without a difference.

Respondent relies on the three-part test of Mathews v. Eldridge, 424 U.S. 319 (1976), in arguing that due process does not require a full review of the commitment decision pursuant to Anders v. California, 386 U.S. 738 (1967), by the appellate courts of this state (RB at 7-11).[1] This case is not persuasive

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[1]This is the test:

> 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.

for many reasons.

First, the question there was whether the Social Security Administration had given Mr. Eldridge due process when it terminated his disability benefits without an evidentiary hearing, where he failed to take advantage of the administrative remedies provided by law Mr. Eldridge was not facing a deprivation of his liberty; petitioner is. Thus, the three-part due process test provided by the court has no application to the question before this Court.[2]

Next, assuming the test applies to the case at bar, respondent concedes that petitioner has a "private interest" in her commitment, although it downplays the extent of that restriction on her liberty (RB at 8-10). Any restriction on a person's liberty is a serious matter, and leads to the many collateral legal consequences identified in the initial brief at 30-32.

Respondent argues that there is no "risk of an erroneous deprivation" of petitioner's liberty interest, and that the "probable value" of requiring full Anders review of commitment appeals "weighs heavily in the state's favor" (RB at 10-11). Not so. Even though the vast majority of appellate assistant public

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429 U.S. at 335.

[2]Likewise, the termination of parental rights cases cited by respondent are inapplicable.

defenders are conscientious, sometimes reversible errors do go unnoticed. *See, e.g.*, Davis v. State, 775 So. 2d 350 (Fla. 2nd DCA 2000) (illegal 29.3 month sentence for misdemeanor reversed on Anders brief); Langford v. State, 773 So. 2d 108 (Fla. 5th DCA 2000) (excessive split sentence totaling 22 years for second degree felony reversed on Anders brief); Aquil v. State, 768 So. 2d 523 (Fla. 2nd DCA 2000) (unconstitutional mandatory minimum sentence reversed on Anders brief); and Benning v. State, 768 So. 2d 478 (Fla. 2nd DCA 2000) (illegal sentence under Heggs v. State, 759 So. 2d 620 (Fla. 2000) reversed on Anders brief).

Thus, the appellate courts of this state have reversed illegal sentences at least four times in the last six months of calendar year 2000, even though court-appointed appellate counsel did not raise the errors in a merit brief.

In the involuntary commitment context, there is a great "probable value" in requiring full Anders review of the commitment decision, to ensure that appellate counsel has not missed an issue which may lead to the client's discharge from commitment.

Likewise, there are no "fiscal or administrative burdens" in requiring the appellate courts of this state to employ full Anders review of involuntary commitment appeals. The number of Baker Act appeals is not large (15 out of over 5000 cases in the First District), and so the added burden on the five appellate

courts would not be significant.

Next, respondent asserts that petitioner has no broader due process rights under the Florida Constitution than under the federal constitution (RB at 13). Respondent neglects to acknowledge that this Court in Shuman v. State, 358 So. 2d 1333 (Fla. 1978) (cited in the initial brief at 11-12 and 13-14) held that "meaningful appellate review" of a commitment decision is mandated as a function of equal protection and due process (art. I, §9, Fla. Const.), and access to courts (art. I, §21, Fla. Const.).

It is certainly acceptable to petitioner if this Court wants to require the appellate courts to use the full Anders procedure in reviewing commitment orders, as a function of federalism under the state constitution.[3]

In attempting to rebut petitioner's arguments that four other states require full Anders review of commitment decisions, respondent argues at some length that the present Anders procedure in criminal appeals is "inherently illogical" and has been "pointedly criticized" (RB at 15-16), attaches a copy of a law review article as an appendix to its brief, and then suggests that this Court adopt the Oregon procedure (RB at 19).

It is not necessary or desirable for this Court to debate

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[3] *See, e.g., Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000) (state may allow appellant in direct criminal appeal to represent himself under its state constitution).

the wisdom of the current Anders procedure in criminal appeals to decide the instant narrow legal issue. That may be left to the appropriate rules committees.[4]

But then, surprisingly, respondent finally admits that this Court has the power to require the full Anders procedure in non-criminal appeals (RB at 17), but suggests that it be reserved for only those who are committed to institutions, and "spot-checking" the record would be adequate for those committed to less restrictive settings (RB at 18). In any event, petitioner was committed to an institution, so respondent's "spot-checking" proposal would not apply to her.

Respondent again neglects to consider the many collateral legal consequences identified in the initial brief at 30-32, which flow from any commitment order, whether to an institution or not.

Finally respondent fails to realize that three other states have applied the criminal effectiveness of counsel standard to commitment hearings, as a function of the "flexible nature" of due process, as argued in the initial brief at 29-30.[5]

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[4]*See, e.g., Amendments to Florida Rules of Appellate Procedure,* 25 Fla. L. Weekly S835 (Fla. Oct. 12, 2000), in which this Court declined to adopt "comprehensive rules regarding the filing of *Anders* briefs."

[5]Respondent has acknowledged the "flexible nature" of due process (RB at 12).

II CONCLUSION

Based upon the arguments presented here, as well as in the initial brief, 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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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 March, 2001.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

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

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P. DOUGLAS BRINKMEYER