IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC03-1660

ANTHONY WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Discretionary Review of a Certified
Question of Great Public Importance from
the Fifth District Court of Appeal

INITIAL BRIEF OF APPELLANT

BEVERLY A. POHL
BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Ste. 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394
(954) 767-8909

Counsel for Anthony Williams

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STATEMENT OF THE CASE AND FACTS

This case presents the question of whether the *Anders* procedures,[1] used by appointed counsel in criminal cases when counsel cannot in good faith find any meritorious issues on appeal and files a brief raising arguable issues in conjunction with a motion to withdraw, are applicable to cases involving appeals from the involuntary civil commitment of sexually violent predators under the Involuntary Civil Commitment of Sexually Violent Predators' Treatment and Care Act, §§ 394.910-394.931, Florida Statutes, commonly known as the "Jimmy Ryce Act." [2]

In 1995, at age 14 (R2-109), Petitioner Anthony Williams pled "guilty in his best interest" to a charge of sexual battery. R1-3; R5-155-156.[3] The offense carried a 15-year maximum, but, consistent with the State's recommendation, the court sentenced

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[1] *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967); *In re Appellate Court Response to Anders Briefs*, 581 So. 2d 149 (Fla. 1991).

[2] The statute was called the Jimmy Ryce Act when it was enacted and made part of Chapter 916 (*see* Chap. 98-64, § 1, Laws of Fla.), although the name Jimmy Ryce was omitted when the Act was amended and moved to Chapter 394. *See* Chap. 99-222, § 1, Laws of Fla. *See State v. Goode*, 830 So. 2d 817, 822 n. 3 (Fla. 2002). Nevertheless, the shorthand term "Jimmy Ryce Act" is now part of Florida's legal lexicon, and we use it in this Brief.

[3] Record references to the Record on Appeal in this Court will be designated as "R-[page]." Record references to the five-volume record transmitted from the District Court of Appeal will be designated with the volume number and page, for example, "R1-5" is page 5 of Volume I of the DCA record.

Williams to 8 1/2 years imprisonment, to be followed by three years probation. R1-5. Williams was unaware that his guilty plea could lead to potentially lifelong "civil commitment," as the Jimmy Ryce Act had not yet been enacted. When it was enacted in 1998, the Act was made retroactively applicable "to all persons currently in custody who have been convicted of a sexually violent offense," as well as to those who committed such offenses in the future. *See* § 394.925.[4]

Prior to Williams' anticipated release date, the State filed a Petition for Involuntary Civil Commitment, seeking to have him declared a sexually violent predator as defined in Florida Statute Section 394.912, and that he be kept in custody pending further proceedings under the Jimmy Ryce Act. R1-1-40; *see §* 394.914, Fla. Stat.[5] The Circuit Court found probable cause (R1-41-42; § 394.915, Fla. Stat.), and

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[4] This Court has said that "any bargain that a defendant may strike in a plea agreement in a criminal case would have no bearing on a subsequent involuntary civil commitment for control, care, and treatment." *Murray v. Regier*, 27 Fla. L. Weekly S1008, 2002 WL 31728885 (2002). Williams' appointed counsel recognized *Murray* in the *Anders* brief. SR-43. However, the mandate in *Murray* has been stayed pending a decision in *State v. Harris*, No. SC02-2172, and *State v. Gentes*, No. SC02-2440, consolidated cases that squarely present the issue of whether civil commitment under the Jimmy Ryce Act violates a prior plea bargain with the State. Williams could benefit from a favorable decision in *Harris* and *Gentes*.

[5] A "sexually violent predator" is defined in Section 394.912(10), as any person who:

> (a) Has been convicted of a sexually violent offense; and

after pretrial litigation of numerous legal issues raised by Williams' public defender (R1-61-76, 78-81, 83-85, 120), the matter was tried before a jury. *See* R1-128-130; R2-1-200; R3-201-335; § 394.916, Fla. Stat. The jury unanimously found that Williams "is a sexually violent sexual predator" (R1-131; R3-327-28; § 394.917, Fla. Stat.), and the court entered a Sexually Violent Predator Judgment and Commitment Order on November 26, 2002. R4-138. However, the court was sympathetic and optimistic:

> THE COURT: [I]f there is anybody that I've seen who is amenable to treatment, meaning, who at 14 was a different person than he is now, you are the one.
>
> I think you are a different person than you were at age 14.
>
> * * *
>
> I know boys at 14 and what they do and I've seen you and I've listened to you and I really do think that you are the kind of guy that can get in there and get it done.

R3-329. Pursuant to the Judgment and Commitment Order, Williams is confined in the custody of the Department of Children and Family Services at the Florida Civil Commitment Center in Arcadia, Florida.

> (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

Williams appealed the November 26, 2002 Sexually Violent Predator Judgment and Commitment Order (R-1), and because he was indigent, the public defender for the Seventh Judicial Circuit was appointed to represent him in the Fifth District Court of Appeal. *See* § 394.917(3).

Williams' appointed appellate counsel failed to timely file an Initial Brief. *See* R-12, ¶ 6. Instead, subsequent to the due date for the initial brief, counsel filed a Motion to Withdraw (R-2-3), asserting that he had "carefully reviewed the case and is unable to argue in good faith any reversible error of the trial court." R-2, ¶ 1. With the Motion to Withdraw, counsel submitted a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967), in which the Supreme Court prescribed procedures for appointed counsel to follow in criminal appeals, "after that attorney has conscientiously determined that there is no merit to the indigent's appeal." *Id.* at 739, 87 S. Ct. at 1397. Counsel also cited *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), which had held that *Anders* procedures were appropriate in civil appeals under the Florida Baker Act, §§ 394.451, *et seq.,* which authorizes involuntary civil commitment for up to six months, for mental health reasons. [6] *See*

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[6] The record in this Court has been supplemented to include Counsel's *Anders* brief, which was not included in the original record. *See* SR-31-45.

SR-31-45. Counsel stated that his office had "mailed to the Appellant a copy of this Motion and the Brief." R-2, ¶ 2.[7]

The Fifth District Court of Appeal issued an order to show cause why the Motion to Withdraw and *Anders* brief should not be stricken, since *Anders* applied explicitly to criminal proceedings, and since this Court's decision in *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), had extended *Anders* procedures only to civil commitments under Florida's Baker Act, not to Jimmy Ryce Act cases. R-4.

Williams' appellate public defender filed a response to the order to show cause (R-5-7), arguing that the reasoning of *Pullen* should be applied to civil commitment proceedings under the Jimmy Ryce Act because *Pullen* held that "`the *Anders* procedure should apply ***to involuntary civil commitments***'" (R-5) (emphasis in original) (*quoting Pullen*), and that the wording of *Pullen* "in no way suggests an intention to limit *Anders* protection to respondents ordered into six-month Baker Act commitments, to the exclusion of those ordered into open-ended, potentially lifelong

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[7] Counsel did not indicate that he had any conversation with his client prior to moving to withdraw. According to Anthony Williams, he never had a conversation with his appointed appellate counsel, and his only contact from counsel prior to receiving the *Anders* brief and motion to withdraw was a letter advising Williams of the appointment and instructing him to notify counsel if his address should change.

Ryce Act commitments." R-5-6.[8] Counsel noted that "[u]npublished opinions reflect that the California and Wisconsin appellate courts afford *Anders* protection to respondents in sexual predator commitment cases." R-7. Counsel asked the Fifth District to "accept the brief filed in this case, and to proceed as it would in a criminal case where an *Anders* brief had been filed." *Id.*

Williams disagreed. He filed a *pro se* response to the order to show cause, taking a different position. R-9-13. Williams moved to strike the public defender's Motion to Withdraw and accompanying *Anders* brief, arguing that those submissions failed to address the issues set forth in trial counsel's "statement of judicial acts to be reviewed" (R-12), improperly applied *Anders* and *Pullen* to a Jimmy Ryce Act case (*id.* at 10-11), and "severely prejudiced appellant's constitutional right to appeal the final order and judgment in the underlying commitment proceeding." R-12. Williams'

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[8] Counsel was correct that Jimmy Ryce Act commitments are "open-ended, potentially lifelong." Although the Act includes procedures leading to the release of persons civilly committed under the Jimmy Ryce Act (§ 394.918-920; § 394.9215, Fla. Stat.), apparently no one has ever been released. *See Florida Statewide Advocacy Council White Paper Report Florida Civil Commitment Center*, Aug. 2003, p. 14-15 (finding, *inter alia*, that the four-stage treatment program for residents of the Center is not fully implemented; there is no funding for the final community-based treatment program; there is no statutory authority for such funding; and that absence of funding "could lead to a legal argument that Florida does not ever intend to release residents" from civil commitment). *See also* Greg Martin, *Center Described as Substandard Prison*, Sun-Herald, Dec. 14, 2003 ("After more than three years in operation, the facility has recommended no one for release"); R3-330-33 (Williams' description of the program).

need for the assistance of counsel is supported by the record, which reflects "an IQ score of 86, which fell within the low average range, consistent with Mr. Williams' level of education and demographic characteristics." R1-12. He attended school up to the eighth grade (*id.*) and has been incarcerated since age 14. He is now 23 years old. *Id.*

The State filed a Reply to the Response to Order to Show Cause (R-15-17), agreeing with the public defender's submission that "the principles of *Anders v. California*, 386 U.S. 738 (1967), should apply to sexually violent predator involuntary civil commitment proceedings" (R-15), while acknowledging that courts in other jurisdictions are in conflict about the application of *Anders* procedures to sexual predator involuntary commitment proceedings. R-16.

The Fifth District issued an "INTERIM NON-DISPOSITIVE OPINION" (R-18-22) (*Williams v. State*, 852 So. 2d 433 (Fla. 5th DCA 2003)) (the decision now under review), not reaching the merits of the appeal but addressing only Williams' appointed counsel's Motion to Withdraw and the question of whether *Anders* applies to a civil Jimmy Ryce Act proceeding. Relying upon *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), *cert. denied* 536 U.S. 915 (2002), the Fifth District concluded that "[i]f *Anders* applies to Baker Act cases, then it clearly applies to cases arising out of the

Jimmy Ryce Act." R-21. "[T]he liberty interest at stake in Jimmy Ryce Act cases justifies the application of the *Anders* procedure." *Id.*

Acknowledging that "we may have misinterpreted the scope of *Pullen*" (R-22), the Fifth District certified the following question of great public importance:

> ARE THE *ANDERS* PROCEDURES APPLICABLE TO CRIMINAL CASES TO BE FOLLOWED IN CASES INVOLVING APPEALS FROM JIMMY RYCE ACT COMMITMENT ORDERS?

R-22.

Williams timely sought discretionary review in this Court (R-23), and since his *pro se* anti-*Anders* submission conflicted with the position of his appointed appellate counsel, on December 8, 2003 this Court appointed undersigned counsel to represent Williams in this case. The same order postponed a decision on jurisdiction. [9]

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[9] Williams did not file a *pro se* brief in the district court. On January 6, 2004, the Fifth District entered a per curiam affirmance without opinion on the merits of Williams' appeal, and an order granting the public defender's Motion to Withdraw. R-29-30. Undersigned counsel filed a Motion to Stay Issuance of the Mandate pending a resolution of this case, and that Motion was granted by the District Court on February 2, 2004.

SUMMARY OF ARGUMENT

If the procedures in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967), are to be applied in appeals from Jimmy Ryce Act involuntary civil commitments, this Court should revisit how *Anders* is to be applied in Florida, and should require appointed appellate counsel to certify in their motion to withdraw that they have consulted with their client at a meaningful time (*i.e.,* prior to transmitting an *Anders* brief to the client) and discussed any issue that the client believes has arguable merit and the implications of the lawyer's assessment of the record.

It appears that this Court's recent precedent, *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), *cert. denied,* 536 U.S. 915, 122 S. Ct. 2381, 15 L.Ed.2d 199 (2002), compels the conclusion that *Anders* procedures should be employed in appeals from civil commitment orders under the Jimmy Ryce Act. As the District Court recognized, the liberty interest at stake in a Jimmy Ryce Act appeal – the loss of liberty for an indeterminate period of time, possibly for life, remedied only through a procedure that the State does not even have fully in place – dwarfs the six-month commitment period in a Baker Act case, considered in *Pullen*. Thus, where this Court has concluded that "the policies and interests served by the *Anders* procedure in criminal proceedings are also present in involuntary civil commitments under Florida's Baker Act," 802 So. 2d at 1119, *stare decisis* suggests that the *Anders* procedure – or an

improved variation of it (*see infra*) – is applicable to involuntary civil commitments under the Involuntary Civil Commitment of Sexually Violent Predators' Treatment and Care Act, §§ 394.910-394.931, Florida Statutes.

The deficiency in the existing procedure that prompted Williams' *pro se* response to the Fifth District order to show cause, which conflicted with the position taken by appointed appellate counsel, is that *Anders* briefs accompanied by a motion to withdraw are not presently required to be preceded by any meaningful communication between appointed appellate counsel and his or her client. This Court should remedy that deficiency, if *Pullen* indeed mandates *Anders* procedures in Jimmy Ryce Act cases. Where a client has a statutory and Fourteenth Amendment right to counsel (or a Sixth Amendment right to counsel, in a criminal case), appointed appellate counsel ought to be required to certify that they have consulted with their client (in person or by telephone) ***prior*** to filing a motion to withdraw and an *Anders* brief. Such consultation may identify issues that counsel could brief in good faith on the merits (and so avoid an *Anders* appeal), or at the least would provide an opportunity for the respondent / defendant to hear ***why*** counsel concludes that no issues can be argued in good faith, necessitating a motion to withdraw.

Since there was no attorney-client consultation in this case, the *Anders*

proceeding below deprived Williams of the meaningful assistance of counsel guaranteed to him by statute and due process of law. *See* § 394.917(3). This Court should reverse the interim decision of the Fifth District, and remand with directions that new appellate counsel be appointed to represent Williams in his appeal from the involuntary civil commitment judgment. Further, this Court should instruct the District Court to vacate its *per curiam* affirmance and to accept supplemental briefing from new counsel, which, if *Pullen* applies, could include an *Anders* brief if deemed appropriate ***and*** if counsel certifies that he or she consulted with Williams in advance.

The consultation requirement we suggest should be made applicable to all *Anders* appeals in Florida. *Compare, Commonwealth v. Torres*, 630 A.2d 1250 (Pa. Super. 1993) (*en banc*) (Popovich, J., concurring and dissenting, joined by Del Sole and Ford Elliott, JJ) ("The withdrawal of counsel, newly appointed to represent a defendant at the . . . appellate level, without first making inquiry of the accused . . . is a disservice to the defendant in particular and the judicial system and the principles upon which it rests in general").

ARGUMENT

I.

THE *ANDERS* PROCEDURE, AS SET FORTH IN *PULLEN V. STATE*, IS INSUFFICIENT TO PROTECT THE JIMMY RYCE ACT RESPONDENT'S STATUTORY AND DUE PROCESS RIGHT TO COUNSEL, BECAUSE IT FAILS TO REQUIRE COUNSEL'S CONSULTATION WITH THE CLIENT PRIOR TO FILING AN *ANDERS* BRIEF AND A MOTION TO WITHDRAW

The certified question for review is:

> ARE THE *ANDERS* PROCEDURES APPLICABLE TO CRIMINAL CASES TO BE FOLLOWED IN CASES INVOLVING APPEALS FROM JIMMY RYCE ACT COMMITMENT ORDERS?

The question presents a question of law, subject to *de novo* review. The answer, based upon this Court's decision in *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), *cert. denied,* 536 U.S. 915, 122 S. Ct. 2381, 15 L.Ed.2d 199 (2002), is a qualified yes, if *Anders* procedures in Florida are made to require certification of an attorney-client consultation prior to filing a motion to withdraw and an *Anders* brief.

* * *

Whether the procedures of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967), should apply to an appeal from a judgment for involuntary civil commitment under the Jimmy Ryce Act depends on whether one perceives those

procedures to be beneficial to the respondent. Although commentators have questioned the benefits of *Anders* briefs (*see* discussion, *infra*, footnote 10), its application to criminal cases in Florida, and, *via Pullen*, to involuntary civil commitment cases, puts to rest a challenge to the applicability of *Anders* here.

In counsel's Response to Order to Show Cause (R-5), Williams' appointed appellate counsel referred to "*Anders* ***protection*** to respondents in sexual predator commitment cases." (R-7) (emphasis supplied). But in Williams' *pro se* Response to the Fifth District's Order to Show Cause, incorporating a Motion to Strike Counsel's Motion to Withdraw (R-9), Williams complained that his appointed appellate counsel failed to file a timely Initial Brief, and that his "impromptu election . . . to file an *Anders* brief . . . severely prejudiced appellant's constitutional right to appeal the final order . . . ." R-12, ¶ 6. Williams' *pro se* submission shows that he

felt abandoned by his appointed counsel, not benefitted by the invocation of the *Anders* procedures; Williams did not perceive that *Anders* provided "protection." [10]

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[10] Williams' appellate counsel's view that *Anders* provides "protection" perhaps reflects that appellate courts have an independent duty to make "a full examination of the proceedings to determine whether the case is wholly frivolous." *Pullen*, 802 So. 2d at 1115. Whether courts are equipped to assume that quasi-advocate role has been the subject of criticism of the *Anders* procedure. *See* Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others*, 23 FLA. ST. UNIV. L. REV. 625, 641, 662 (Winter 1996) (calling *Anders* briefs "[a] continuing source of frustration for the appellate judge;" the

Clearly, the Supreme Court in *Anders* was concerned with providing indigent criminal defendants with "fair procedure" and the "equality that is required by the Fourteenth Amendment." 386 U.S. at 741, 87 S. Ct. at 1398. *See also id.* at 741-742, 87 S. Ct. at 1399 (reaffirming the Court's commitment to its earlier right-to-counsel precedents). In finding that appointed counsel's mere no-merit letter to the court fell short of the duty to "active[ly] advocate in behalf of his client," *id.* at 743, 87 S. Ct. at 1400, the *Anders* Court recognized that counsel's "role as advocate requires that he support his client's appeal ***to the best of his ability***." 386 U.S. 744, 87 S. Ct. at 1400 (emphasis supplied). In our view, that cannot be done without consulting with the client, listening to his ideas and concerns and advising him about counsel's assessment of potential issues in the appeal. There should be a meaningful dialogue at

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independent review "a function the appellate court performs for no other class of appellants;" and referring to the "vexatiousness of *Anders* meritless appeals"). Judge Warner also observed that the incidence of *Anders* briefs is a function of public defenders' caseloads ("[m]ore *Anders* briefs are filed when caseloads of public defenders increase") (*id.* at 665), which could reasonably lead the incarcerated or civilly committed client to wonder how committed his lawyer was to his case. (We make no judgment here about the correctness of Williams' appointed appellate counsel's assessment of the trial record, as that inquiry is beyond the scope of this case). In sum, Judge Warner's comprehensive article casts substantial doubt on whether, in practice, *Anders* provides "protection" for the indigent. For example, other than this case, there are no reported decisions in Jimmy Ryce appeals where an *Anders* brief was filed.

a meaningful time. The dialogue might convince counsel that there are non-frivolous issues and avoid an *Anders* brief, or it might convince the client that an appeal is frivolous and should be forgone, or at least the client may better understand the issues and present a better *pro se* brief, should he choose to do so. In any event, the client would have been accorded the respect and professionalism that should occur in every lawyer-client relationship and the client's respect for the legal profession and the judicial system may be increased, despite his desperate situation.

We recognize that *Anders* did not impose a requirement that counsel consult with the client prior to filing the no-merit brief and motion to withdraw, but perhaps that was the product of the record in that case, which showed that counsel ***had*** consulted with his client. *See Anders*, 386 U.S. at 739 ("after a study of the record ***and consultation with petitioner***, the appointed counsel concluded that there was no merit to the appeal") (emphasis supplied)). The Supreme Court has not imposed a consultation requirement in any of its subsequent cases addressing *Anders* issues. Nor have we identified any state or lower federal court that has adopted a consultation requirement as part of the *Anders* procedure.[11] But one commentator has included it

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[11] On the contrary, it appears that some courts have rejected a consultation requirement. *See United States v. Russo*, 780 F.2d 712, 715 (7th Cir. 1986) (a habeas corpus case alleging ineffective assistance of counsel) ("We agree with the Court of Appeals for the Fourth Circuit that although actual consultation with the defendant

as an essential element in his summary of the *Anders* scheme:

> First, counsel must closely review the record searching for any error which could support reversal. If these efforts prove fruitless, ***counsel must then consult their client to determine what, if any, issues they feel should be raised on appeal***. Obviously, clients will contend numerous errors prejudiced their case. However, only those which would support a good faith argument need be raised on appeal. . . .

Jack M. Bains, *Termination of the Attorney-Client Relationship: How Far Must Anders Compliance Go?: A Survey of Decisions*, 16 J. LEGAL PROF. 229 (1991) (emphasis supplied).

But the well-reasoned dissenting opinion in *Commonwealth v. Torres*, 630 A.2d 1250 (Pa. Super. 1993) (*en banc*), best explains why such a requirement makes sense and should be adopted in Florida:

> ***The withdrawal of counsel, newly appointed to represent a defendant at the post-trial stage or appellate level, without first making inquiry of the accused*** as to what transpired in the case to achieve a proper perspective of the presence or absence of any meritorious claim(s) is a

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prior to the filing of the request to withdraw and accompanying *Anders* brief is ***highly desirable***, it is not constitutionally required. *Smith v. Cox*, 435 F.2d 453, 458-59 (4th Cir. 1970), *vacated on other grounds sub nom. Slayton, Penitentiary Supt. v. Smith*, 404 U.S. 53, 92 S. Ct. 174, 30 L.Ed.2d 209 (1971)") (footnotes omitted) (emphasis supplied); *accord, United States v. Watie*, 20 Fed. Appx. 583, 2001 WL 1190999 (8th Cir. 2001) (unpublished) ("Watie is not entitled to reversal on the basis that counsel failed to consult with him before filing the *Anders* brief") (citing *Russo*).

disserviceto the defendant in particular and the judicial system and the principles upon which it rests in general.

It is true that under [*Anders* and Pennsylvania law] the focus of inquiry is whether the advocate conducts himself/herself in a fashion which fosters the client's interests, which, of necessity, requires counsel to act "to the best of his/her ability. . . ." ***How better to assure that the client's judicial-review concerns are being maximized than with some form of interaction between counsel and client***. . . .

Invariably, as noted by the Majority, all things reduce themselves to the ubiquitous "onerous burden" on the judicial system protestation versus the benefits to a defendant by availing the accused a certain modicum of procedure aimed at providing the *minimum* required under the law.

I do not equate the requirement of some form of interaction between attorney and client, in advance of counsel formulating a course of action intimately tied to the client's interests, to be without its benefits. ***Surely the effort and energy to be expended by counsel appointed to represent a defendant in conversing is minimum in contrast to the liberty interests generally hanging in the balance***. Also, ***the assiduous review by counsel knowledgeable in the law can only be enhanced with the defendant's input so as to chart the course to pursue***.

Unlike the Majority, I am not willing to exclude a defendant from the judicial review equation. Ironically, the law jealously guards a defendant's right to be present and participate at the pre-trial, trial and post-trial phase of the criminal justice system. . . . The accused has a ***right*** to be

> involved in matters affecting, ultimately, his liberty interests.
>
> Yet, the Majority would discount the defendant's role and find illusory the defendant's right to be part of the judicial review process, which I find to be no less crucial than any other step in the criminal justice continuum.
>
> Indeed, ***it is axiomatic that the attorney-client relationship begins with consultation***. So, then, ***that relationship can only be terminated with consultation and not be an abrupt, unilateral act by the professional***.
>
> Ergo, to the extent that the Majority looks askance at the requirement that consultation be had between counsel and the defendant prior to deciding the merits of post-trial and appellate action in the context of a petition to withdraw by counsel, I respectfully dissent from such a position.

Torres, 630 A.2d at 1256-57 (Popovich, J., concurring and dissenting, joined by Del Sole and Ford Elliott, JJ) (internal citations omitted) (bold emphasis supplied).

Torres, *supra*, was an appeal from a sentence imposed after a plea of guilty, in which appointed counsel filed a motion to withdraw pursuant to *Anders*. The majority concluded that "[a]n interview is unnecessary in most instances, and we find no justification in making one an additional *Anders* requirement." 630 A.2d at 1252. However, the majority acknowledged that "[p]rior communication may or may not be necessary for counsel to fulfill adequately his responsibility, depending on the circumstances of the particular case. Obviously counsel who has represented the defendant from the trial through sentencing and post-conviction proceedings would

feel lesser need to interview, telephone or write to the defendant than counsel first involved by appointment for appeal purposes." *Id.* Torres' lawyer had "represented appellant throughout the proceedings and was aware of the issues appellant sought to present on appeal. As such, no interview of appellant was necessary for counsel to make the requisite determination of the appeal's merit." *Id.* Declining to impose a *per se* interview requirement, the *Torres* majority predicted optimistically that appointed counsel "will engage in such communication as required by each case and his prior involvement in the case." *Id.* at 1253. At least in Anthony Williams' case, where appointed appellate counsel ***did not*** represent Williams at the civil commitment trial, that prediction has failed to come true.

The *Torres* majority feared imposing "an onerous burden on the public defenders and the judicial system." 630 A.2d at 1253. "Particularly, face to face interviews, if required, with the wide dispersal of defendants throughout the penal system of Pennsylvania, would place an unwarranted and unnecessary expense and misuse of attorney time to the detriment of the legal defense system." *Id.* We recognize the force of that argument, as to face-to-face interviews. However, it is not an onerous burden to require appointed counsel to arrange a telephone call with a client, if a face-to-face visit is impractical. The meaningful advance communication between attorney and client, which we urge is an essential aspect of the relationship,

can occur economically, efficiently and effectively over the telephone, particularly if the issues to be discussed are introduced in a prior written communication.[12]

Thus, Judge Popovich's dissent in *Torres*, joined by two colleagues, aptly illustrates that an important element of effective appellate representation – at least in a case where counsel concludes that there are no good-faith meritorious issues that can be raised on appeal, and that withdrawal is the only option – is now absent from Florida's version of the *Anders* procedure. It is clear that states are free to deviate from *Anders*, "so long as those procedures adequately safeguard a defendant's right to appellate counsel." *Smith v. Robbins*, 528 U.S. 259, 265, 120 S. Ct. 746, 753, 145 L.Ed.2d 756 (2000). The consultation requirement would serve to make the right to counsel (guaranteed by statute and the Due Process Clause) more meaningful, and would eliminate the unacceptable situation presented on this record, where appointed appellate counsel only reached out to his client twice, by mail: once to say hello, and once to say goodbye.

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[12] In the experience of undersigned counsel, both the Florida Civil Commitment Center and the various prisons throughout the state are cooperative in arranging an attorney-client telephone call for the purpose of discussing an ongoing case, with 24 hours notice and a fax confirmation from the attorneys' office.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction and decide the question of great public importance certified by the District Court. Art. V, § 3(b)(4), Fla. Const. The certified question should be answered in the affirmative, with an important *caveat*: counsel filing *Anders* briefs should be required to certify that they have consulted in advance with their client.

The decision below permitting *Anders* procedures in Jimmy Ryce Act involuntary civil commitment proceedings should be disapproved to the extent that the District Court, and *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), did not require certification from appointed appellate counsel that he had consulted with the client prior to filing a motion to withdraw and an *Anders* brief. This Court should remand with instructions that the District Court (1) vacate its per curiam affirmance on the merits of Anthony Williams' Jimmy Ryce Appeal, (2) appoint new appellate counsel to represent Williams in that appeal, and (3) permit supplemental briefing by new counsel, after attorney-client consultation.

Respectfully submitted,

BEVERLY A. POHL
Florida Bar No. 907250
BRUCE S. ROGOW
Florida Bar No. 067999
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Boulevard
Fort Lauderdale, Florida 33394
Ph: (954) 767-8909
Fax: (954) 764-1530

By: ____________________________
BEVERLY A. POHL

By: ____________________________

BRUCE S. ROGOW

Counsel for Anthony Williams

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following, by U.S. Mail this 8th day of March, 2004:

DOUG SQUIRE
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., Fifth Floor
Daytona Beach, FL 32118

Courtesy Copy to:

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT
112 Orange Avenue
Daytona Beach, Florida 32114

SHELDON GUSKY
Florida Public Defender Assoc., Inc.
P.O. Box 11057
Tallahassee, FL 32302

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla. R. App.P., and is prepared in Times New Roman 14-point font.

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BEVERLY A. POHL