

IN THE SUPREME COURT OF FLORIDA

GLORIA PULLENS,

Petitioner,

v.

CASE NO. SC00-1482

1DCA CASE NO. 99-4384

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW FROM  
THE FIRST DISTRICT COURT OF APPEAL

AMENDED BRIEF OF AMICUS CURIAE

FLORIDA PUBLIC DEFENDER  
ASSOCIATION, INC.

JULIANNE M. HOLT  
PUBLIC DEFENDER  
THIRTEENTH JUDICIAL CIRCUIT

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AMICUS CURIAE

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## PRELIMINARY STATEMENT

The Florida Public Defender Association is composed of the twenty elected Florida Public Defenders, 1147 appointed assistant public defenders and support staff. The Association is concerned with matters of interest to Public Defenders as well as those which affect the administration of justice at the appellate level. The Florida Public Defender Association, Inc. believes that the indigent, mentally ill patients' right to appellate counsel is a critical statewide issue.

This brief is also being submitted on a disk in WordPerfect format.

## SUMMARY OF THE CASE AND FACTS

Rule 9.370 Fl.R.App.P. does not specifically address summary of case and facts. However, Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So. 2d 522 (App. 4 Dist. 1996), suggests that amicus briefs should, in the interest of brevity, not contain statement of the case or facts, but rather should get right to the additional information which the amicus believes will assist the court.

## SUMMARY OF THE ARGUMENT

The Brief of Petitioner on the Merits rightly suggests that the distinction, made by the First District Court of Appeals, of where the right to counsel emanates from is without a

difference. As the petitioner suggests due process and fundamental fairness requires that the appellate court review the record to determine if the commitment decision was proper. The legislature pursuant to Chapter 394 FS, has mandated the right to counsel (specifically the public defender) in commitment hearings and the appellate court cannot eliminate or repeal this right, nor can the appellate court require self-representation from a mentally ill patient whose liberty is at stake.

The standard outlined in Petitioner's Brief is correct. The standard of review is de novo, since this case involves only a question of law.

When a liberty interest is involved, the right to counsel is mandated. First, through Chapter 394 FS itself, next through Chapter 27 FS, regarding the appointment of the Public Defender and last by virtue of the Courts. *See generally In re Beverly* 342 So.2d 481 (Fla. 1977).

When court-appointed counsel finds no meritorious issue for appeal, appellate review pursuant to Anders V. California, 386 U.S. 738 (1967), is not only proper but necessary. If the appellate court refuses to independently review the record, as it has done in this cause, the right to access to the courts is denied, the patient is deprived of the right to appellate

counsel and the right to meaningful appellate review becomes a fiction.

The First District Court of Appeal determined that like termination of parental rights, a civil commitment proceeding is civil in nature and not subject to full Anders review. The distinction between "full" as opposed to "limited" Anders review is the difference between an independent review and no review at all, depending on whether the patient has filed or is capable of filing a pro se brief.

The civil versus criminal distinction also fall short. The First District finds that, since this type of proceeding is civil in nature, it does not require a full review. This court must recognize that the liberty interest of a mentally ill patient is based on the parens patriae doctrine and therefore granting full review is the only method to guarantee patients all the rights to which they are entitled. For the court to conclude that a mentally ill patient meets the criteria set forth in Chapter 394 for involuntary hospitalization the court must find that the individual lacks sufficient capacity to act for themselves. The subject of an involuntary commitment proceeding has the right to effective assistance of counsel at all significant stages of the commitment process.

The question of where the right to counsel, in a civil

commitment case, emanates is superfluous. Whether it arises from the due process clause or from the sixth amendment right to counsel is an erroneous distinction. Whether this cause is civil in nature or criminal in nature is fallacious. The paramount issue is the result of the commitment. And that is deprivation of liberty.

Rather than reargue those issues addressed in the Petitioners brief on the merits, this amicus curiae brief will only address those issues which require further elaboration or those issues not fully raised.

## ARGUMENT I

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

The decision of the First District effectively eliminates the right to appellate review for patients subjected to involuntary hospitalization. The First District's reliance on Ostrum V. Department of Health and Rehabilitative Services, 663 So.2d 1359 (Fla. 4<sup>th</sup> DCA 1995), is misplaced. It presumes that the right to appellate review in criminal cases arises from the sixth amendment. The right to appeal is also grounded in the due process clause of the fourteenth amendment not just the sixth amendment right to counsel. Martinez V. Court of Appeal of California, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), finds that the right to appeal in criminal cases arises from the due process clause and not the sixth amendment right to counsel. The First District's opinion made a distinction between the right to counsel arising from the due process clause, thereby limiting the right to appellate review. The effect is the denial of the right to appellate review, in cases where court-appointed counsel files a "no-merit brief." However, the distinction between where the right arises is a distinction without a difference. When one's liberty is at stake, the right to counsel and the right to appeal is fundamental.



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

The right to appeal and the right to counsel on appeal flow from the due process clause of the Fourteenth Amendment. Martinez V. Court of Appeal of California, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), finds that the right to appeal in criminal cases also arises from the due process clause not just the sixth amendment right to counsel. According to the Supreme Court's rationale in Martinez, there is no constitutional right to proceed without counsel on appeal.

The right to self-representation granted in Faretta V. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) does not apply to criminal defendants on appeal. However, the First District in this case has mandated just that. By requiring a mentally ill patient to proceed pro se, the Court, in effect, has mandated self-representation. Mandating that the patient proceed pro se, would require a full evidentiary hearing pursuant to Faretta. At the hearing the court would have to determine the patient's ability to act pro se. If this procedure is upheld, denial of the right to counsel as well as access to the court will be profound. A mentally ill patient, by virtue of the proceedings against them, is likely incapable of providing a pro se brief to the Court. Therefore, the necessity of a full

Anders review is apparent.

Liebman v State, 555 So.2d 1242 (Fla.App. 4<sup>th</sup> Dist. 1989), suggests that the District Court of Appeal in holding that a hearing officer may constitutionally conduct a hearing for continued involuntary hospitalization placement after a circuit court has made initial placement determination made a finding that the adequate remedy in these hearings was on plenary appeal of any final order of continued hospitalization placement. The courts finding were absolute as to the right to appellate review. The Public Defenders represent the majority of patients in continued commitment hearings, by the First District's ruling, only those who can afford private counsel will be afforded appellate rights and the right to counsel on appeal. This disparate treatment of similarly situated individuals constitutes a denial of equal protection. This court held in Shuman V. State, 358 So.2d 1333 (Fla. 1978), that once a state has chosen to establish an avenue of appellate review for continued involuntary hospitalization, indigent patients must be afforded review commensurate to that available to nonindigents. The rationale behind Anders was to create equal protection for indigents involved in the appellate process.

B. THE STATUTORY RIGHT TO APPOINTMENT OF THE  
PUBLIC DEFENDER CREATES A HYBRID  
CRIMINAL/CIVIL PROCEEDING RATHER THAN CIVIL.

The right to counsel when liberty is being curtailed is a fundamental right which extends beyond the bounds of civil or criminal. CHAPTER 394 FS

Chapter 394 requires the appointment of counsel, (specifically the public defender), "within 1 court working day after the filing of a petition for involuntary placement." Furthermore, the clerk of the court is directed to "immediately notify the public defender of such appointment." The legislature by virtue of chapter 394, has provided the right to counsel for any individuals who is subjected to a loss of liberty by virtue of a civil commitment proceeding. With regard to continued involuntary placement, the state provides that: "unless the patient is otherwise represented or is ineligible, he or she shall be represented at the hearing on the petition for continued involuntary placement by the public defender of the circuit in which the facility is located." These provisions express a clear legislative intent to provide legal counsel for all persons subjected to involuntary commitment proceedings. In the last expression of legislative will, the right to waive such a hearing was removed and a hearing was mandated for each and every patient who continues to be subjected to involuntary

placement.

The individuals who are subject to this type of proceeding are considered to be mentally ill. The term is defined in section 394.455(18) FS "Mental illness" means an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with a person's ability to meet the ordinary demands of living, regardless of etiology."

Section 394.453 FS outlines the legislative intent, finding that individual dignity and human rights are guaranteed to all people who are admitted to mental health facilities or who are being held under s. 394.464 FS

Section 394.459 (1) FS outline the rights of patients pursuant to this act. "A person who is receiving treatment for mental illness in a facility shall not be deprived of any constitutional rights. However, if such a person is adjudicated incapacitated, his or her rights may be limited to the same extent the rights of any incapacitated person are limited by law." The right to counsel and the right to access to the courts may not be limited.

The guarantees provided by the legislature are fundamental in nature and require that the mentally ill patient be afforded

more rights rather than less.

## CHAPTER 27 FS

Section 27.51 FS, identifies the persons the Public Defender must represent. This section provides that "the Public Defender shall represent, without additional compensation, any person who is determined by the court to be indigent as provided in S. 27.52 and who is: sought by petition filed in such court to be involuntarily placed as a mentally ill person . . . ." The public defender, by design represents only those individuals who cannot afford to hire private counsel and who are confronted with loss of liberty. In fact, the public defender is precluded from representing individuals when the court files an order of no imprisonment. By definition the public defender represents only those individuals who face a loss of liberty.

The liberty interest, as well as the appointment of the public defender, creates a hybrid criminal/civil proceeding. If Chapter 394 were shown to be punitive in nature, it would clearly be a criminal proceeding, however, the civil (non-punitive) nature of the proceeding has been undisputed by the courts. In defining the involuntary commitment proceeding as "civil," the courts have extended additional rights and privileged not afforded to other civil proceedings. In Shuman V. State, 358 So.2d 1333 (Fla.1978), the court held that those

who have been involuntarily committed to a mental institution receive equal protection and due process just as those who are committed to a correctional institution. The fact that ones liberty is being curtailed is the decisive factor, and the guaranteed right to effective assistance of counsel extends far beyond other civil proceedings. Due process of law requires effective assistance of counsel. It is well settled that the seriousness of the deprivation of liberty which occurs when one is subject to involuntary placement cannot be accomplished without procedural due process.

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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AMICUS CURIAE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301; and Charlie McCoy, Assistant Attorney General, Civil Division, The Capitol, Plaza Level, Tallahassee Florida 32301; on this \_\_\_\_ day of February, 2001.

CERTIFICATE OF FONT SIZE

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

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