

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-422

Filed: 17 April 2018

Wake County, No. 09 CRS 203008

STATE OF NORTH CAROLINA

v.

FLAVIO VELASQUEZ-CARDENAS

Appeal by Defendant from order entered 26 September 2016 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 16 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for Defendant-Appellant; and Flavio Jo Velasquez-Cardenas, pro se.

McGEE, Chief Judge.

I. Procedural and Factual Background

A jury found Flavio Velasquez-Cardenas (“Defendant”)¹ guilty on 16 February 2012 of the first-degree murder of Patsy Barefoot (“Ms. Barefoot”), based on both premeditation and deliberation and the felony murder rule. This Court upheld Defendant’s conviction on direct appeal in *State v. Velasquez-Cardenas*, 228 N.C. App.

¹ While the order spells Defendant’s name as “Valasquez-Cardenas, we use the spelling of Defendant’s name as reflected in the indictment and in Defendant’s *pro se* Notice of Appeal and Defendant’s other *pro se* filings in the record.

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139, 746 S.E.2d 22, 2013 WL 3131252 (2013) (unpublished) (“*Velasquez-Cardenas I*”), and additional facts can be found in that opinion.

As recounted in *Velasquez-Cardenas I*, Defendant gave a statement to police admitting that he killed and sexually assaulted Ms. Barefoot in her apartment in Wake County, North Carolina, before stealing her car and credit card and driving to Florida, where he was ultimately apprehended. *Id.* at *1-3. In *Velasquez-Cardenas I*, there was testimony that the State Bureau of Investigation (“SBI”) also “confirmed that the hair found in Decedent’s hand was a match to Defendant’s hair[.]” *Id.* at *2. Testifying at trial, Defendant admitted to inadvertently killing Ms. Barefoot after they engaged in consensual sex, claiming he “put her against the wall’ in an attempt to calm her down” when she became upset that he was using cocaine in her bathroom. *Id.*

In April 2016, Defendant filed a motion to locate and preserve evidence and for post-conviction DNA testing pursuant to N.C. Gen. Stat. §§ 15A-268 and 269 (2017), which are sections of the DNA Database and Databank Act of 1993 (the “Act”). N.C. Gen. Stat. § 15A-266 *et seq.* The trial court denied Defendant’s motion by order entered 26 September 2016. After reviewing the record, including Defendant’s confession and the other evidence adduced at trial, the trial court concluded that Defendant had “failed to allege or establish that there [wa]s any reasonable probability that the verdict would have been more favorable to [him] had DNA testing

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been conducted on the evidence prior to [his] conviction.” See N.C.G.S. § 15A-269(b)(2). Defendant appealed as a matter of right pursuant to N.C. Gen. Stat. § 15A-270.1 (2017), and Counsel was appointed to represent Defendant on appeal. *Id.* (“The defendant may appeal an order denying the defendant’s motion for DNA testing under this Article, including by an interlocutory appeal. The [trial] court shall appoint counsel in accordance with rules adopted by the Office of Indigent Defense Services upon a finding of indigency.”). Upon reviewing the denial of Defendant’s request for the preservation and testing of DNA, Defendant’s appellate counsel perfected Defendant’s appeal, but determined that she was unable to identify any issue with sufficient merit to support a meaningful argument for relief. Acting consistent with the requirements set forth in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), Defendant’s appellate counsel advised Defendant of his right to file written arguments with this Court and provided Defendant with the documents necessary for him to do so. She then filed an *Anders* brief with this Court stating she had been unable to find any meritorious issues for appeal, had complied with the requirements of *Anders*, and asked this Court to conduct an independent review of the record to determine if there were any identifiable meritorious issues therein. Defendant filed a *pro se* “Addendum in Support of *Anders* Brief” on 15 May 2017.

II. Analysis

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A. Applicability of Anders

In the State's brief, it does not argue that this Court should, upon *Anders* review, affirm the ruling of the trial court. Instead, apparently for the first time in an appeal, the State makes the argument that the protections provided in *Anders* and *Kinch* are not available to defendants appealing orders denying post-conviction DNA-related relief pursuant to N.C.G.S. § 15A-270.1.²

In all prior opinions of this Court involving *Anders* briefs filed pursuant to an N.C.G.S. § 15A-270.1 appeal, the State has implicitly accepted the validity of the *Anders* procedure, and simply argued that the defendants' appellate counsel were correct in their determinations that no meritorious issues were identifiable from the trial records. *See State v. Riggins*, __ N.C. App. __, 809 S.E.2d 378 (2018) (unpublished); *State v. Bayse*, __ N.C. App. __, 808 S.E.2d 614 (2017) (unpublished); *State v. Sayre*, __ N.C. App. __, 803 S.E.2d 699 (2017) (unpublished); *State v. Rios*, __ N.C. App. __, 803 S.E.2d 698 (2017) (unpublished); *State v. Tapia*, __ N.C. App. __, 799 S.E.2d 909 (2017) (unpublished); *State v. Castruita*, __ N.C. App. __, 798 S.E.2d 440 (2017) (unpublished); *State v. Barrera*, __ N.C. App. __, 798 S.E.2d 440 (2017) (unpublished); *State v. Nettles*, __ N.C. App. __, 797 S.E.2d 715 (2017) (unpublished); *State v. Needham*, __ N.C. App. __, 781 S.E.2d 532 (2016) (unpublished); *State v.*

² The State makes this same argument in two additional appeals currently before this Court, *State v. Ross*, COA17-442, and *State v. Tapia*, COA17-471, the decisions of which we file concurrently with this opinion.

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Harris, 238 N.C. App. 200, 768 S.E.2d 63 (2014) (unpublished); *State v. Gladden*, 234 N.C. App. 479, 762 S.E.2d 531 (2014) (unpublished); *State v. Mickens*, 233 N.C. App. 789, 759 S.E.2d 711 (2014) (unpublished); *State v. Autry*, 215 N.C. App. 390, 716 S.E.2d 89 (2011) (unpublished). In all of those cases, this Court has conducted the *Anders* review requested without questioning its duty or authority to so do, including addressing the defendants' arguments when they have filed *pro se* briefs in accordance with *Anders* and *Kinch*.

The State now argues that, because “there is . . . no constitutional right to post-conviction proceedings[.]” “[t]here is no constitutional right to an attorney in state post-conviction proceedings.” (Citations omitted). Relying on the United States Supreme Court’s opinion in *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539 (1987), the State concludes: “Thus, even when an indigent defendant has a state-created right to counsel at post-conviction, ‘she has no constitutional right to insist on the *Anders* procedures which were designed solely to protect’ the ‘underlying constitutional right to appointed counsel.’ *Finley*, 481 U.S. at 557, 95 L. Ed. 2d at 547.”

While we agree with the State, as discussed below, that defendants who appeal pursuant to N.C.G.S. § 15A-270.1 have no constitutional right to seek *Anders* review, we disagree with the clear implication of the State’s argument – that this Court is

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prohibited from recognizing a right of *Anders*-type review separate from that constitutionally mandated pursuant to the *Anders* decision itself and its progeny.

1. Review Mandated by the United States Constitution

In *Finley*, the United States Supreme Court held that “*Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel.” *Finley*, 481 U.S. at 555, 95 L. Ed. 2d at 545. The Court reasoned:

We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.

Id. at 555, 95 L. Ed. 2d at 545-46. For this reason, the Court held that the protections of *Anders* are not constitutionally mandated in post-conviction proceedings, even when defendants have been provided access to appointed appellate counsel by statute: “[W]e reject respondent’s argument that the *Anders* procedures should be applied to a state-created right to counsel on postconviction review just because they are applied to the right to counsel on first appeal[.]” *Id.* at 556, 95 L. Ed. 2d at 546. As explained in *Finley*, “[s]ince [the defendant] has no underlying constitutional right

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to appointed counsel in state postconviction proceedings, [he] has no constitutional right to insist on the *Anders* procedures which were designed solely to protect that underlying constitutional right.” *Id.* at 557, 95 L. Ed. 2d at 547.

The right to counsel on appeal from an order denying post-conviction DNA testing is not of constitutional origin. It is purely a creature of statute, specifically N.C.G.S. § 15A-270.1, which provides as follows:

The defendant may appeal an order denying the defendant’s motion for DNA testing under this Article, including by an interlocutory appeal. The court shall appoint counsel in accordance with rules adopted by the Office of Indigent Defense Services upon a finding of indigency.

Id. For these reasons, appellate counsel representing defendants based upon the right of appeal granted pursuant to N.C.G.S. § 15A-270.1 are not *constitutionally mandated* to conform to the requirements established in *Anders* when they are unable to identify any meritorious grounds for appellate review. However, our review of this issue does not end here.

The United States Supreme Court is charged with determining what constitutes the *minimum* rights and protections guaranteed by the United States Constitution. States are of course free to permit, or require, procedures that afford protections beyond what is constitutionally mandated.³ Therefore, because the

³ Absent federal preemption.

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General Assembly has created a general right of appeal from the denial of motions made pursuant to the Act, this Court clearly has *jurisdiction* to consider the request for *Anders*-type review made by Defendant’s appellate counsel. *State v. Thomsen*, 369 N.C. 22, 25, 789 S.E.2d 639, 641–42 (2016) (“because the state constitution gives the General Assembly the power to define the jurisdiction of the Court of Appeals, only the General Assembly can take away the jurisdiction that it has conferred”). Absent some superseding statute, holding, or rule, this Court has the discretion to decide whether to conduct the review requested by Defendant’s appellate counsel. The State directs us to no contrary authority.

2. The Authority of This Court to Recognize a
Right to *Anders*-Type Review

The State first notes that “this Court has declined to apply *Anders* to civil proceedings, notwithstanding a defendant’s statutory right to counsel at such proceedings.”⁴ The State then argues that “a motion for post-conviction DNA testing is comparable to a collateral civil action, much like a habeas petition[.]” and is therefore “not a criminal action[.]” In support, the State cites the statutory definitions of civil and criminal actions, and this Court’s opinion in *State v. Gardner*, 227 N.C. App. 364, 742 S.E.2d 352 (2013). The State contends that in *Gardner* this Court applied “the general rule in civil cases to defendant’s motion for post-conviction

⁴ As noted below, our Supreme Court *has* decided to afford *Anders*-type review to certain civil proceedings pursuant to Rule 3.1(d) of the North Carolina Rules of Civil Procedure.

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DNA testing[.]” However, we do not read *Gardner* as holding that actions pursuant to the Act are civil in nature. In *Gardner*, this Court stated that, as a general rule in civil cases, when the trial court rules on motions or enters orders *ex mero motu*, findings and conclusions are only required if specifically requested by a party. *Id.* at 370, 742 S.E.2d at 356 (citation omitted). This Court then stated: “N.C. Gen. Stat. § 15A–269 contains no requirement that the trial court make specific findings of facts, and we decline to impose such a requirement.”⁵ *Id.*

However, this Court, in an earlier opinion, introduced discussion of a defendant’s right of appeal pursuant to N.C. Gen. Stat. § 15A–270.1 as follows: “In North Carolina, a defendant’s right to appeal *in a criminal proceeding* is purely a creation of state statute. . . . Generally, there is no right to appeal in a criminal case except from a conviction or upon a plea of guilty.” *State v. Norman*, 202 N.C. App. 329, 332, 688 S.E.2d 512, 514–15 (2010) (quotation marks and citations omitted) (emphasis added); *see also State v. Rios*, __ N.C. App. __, 803 S.E.2d 698 (2017) (unpublished) and *State v. Carroll*, __ N.C. App. __, 797 S.E.2d 710 (2017) (unpublished) (both opinions applying N.C. R. App. P. 4(a)(2) in determining the defendants’ notices of appeal from denial of motions for post-conviction DNA testing were not timely filed);⁶ *State v. Patton*, 224 N.C. App. 399, 2012 WL 6590534 (2012)

⁵ Chapter 15A is, of course, the Criminal Procedure Act.

⁶ “Rule 4. Appeal in Criminal Cases – How and When Taken” is the rule of appellate procedure that applies to criminal appeals. N.C.R. App. P. 4(a). If appeal from N.C.G.S. § 15A-270.1 was an appeal from a civil proceeding, we would apply Rule 3. N.C.R. App. P. 3.

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(unpublished) (the defendant’s oral notice of appeal given immediately after the trial court denied his motion for post-conviction DNA testing preserved his right to appeal pursuant to N.C. Gen. § 15A–270.1);⁷ *State v. Brown*, 170 N.C. App. 601, 605-06, 613 S.E.2d 284, 287 (2005) (emphasis added) (a case decided before the enactment of N.C.G.S. § 15A–270.1 and applying N.C. R. App. P. 4(a), holding that, because the right to appeal in criminal proceedings is a purely statutory right, no right of appeal existed from decisions of the trial court pursuant to the Act because no right of appeal was included in that section, and no “other statutes governing *criminal proceedings* provide a right to appeal in cases such as this one”). Appeal pursuant to N.C.G.S. § 15A–270.1 is an appeal from a criminal proceeding.

In the absence of precedent from criminal appeals, the State directs us to prior decisions of this Court in which we decided not to extend the right to *Anders* procedures to certain civil matters. For example, the State cites *In re Harrison*, 136 N.C. App. 831, 526 S.E.2d 502 (2000), an opinion in which we declined to extend the *right to Anders* review to parents who appeal from orders terminating their parental rights (“TPR” orders). It is instructive to conduct a review of this Court’s opinion in *Harrison*, and to review other opinions addressing the issue of the availability of *Anders* review when the right to that review is not *constitutionally mandated*.

⁷ Oral notice of appeal is only valid in an appeal from a criminal proceeding.

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In deciding not to extend *Anders* protections to appeals from TPR orders, this Court in *Harrison* reasoned: “An attorney for a *criminal* defendant who believes that his client’s appeal is without merit is permitted to file what has become known as an *Anders* brief.’ However, this jurisdiction has not extended the procedures and protections afforded in *Anders* and *Kinch* to civil cases.” *Id.* at 832, 526 S.E.2d at 502 (citation omitted).⁸ In support of our decision not to extend *Anders* protections to TPR cases, this Court in *Harrison* noted: “The majority of states who have addressed this issue have found that *Anders* does not extend to civil cases, including termination of parental rights cases.” *Id.* This Court decided to adopt what it then considered to be the “majority rule,” and directly adopted the reasoning from an Arizona opinion, concluding that “counsel for a parent appealing from a juvenile court’s severance order has no right to file an *Anders* brief.” *Id.* at 833, 526 S.E.2d at 503 (quoting *Denise H. v. Arizona Dept. of Economic Sec.*, 193 Ariz. 257, 259, 972 P.2d 241, 243 (1998)). Despite holding that there was no right of *Anders* review in TPR appeals, this Court in *Harrison* exercised its discretion and conducted the requested *Anders* review anyway.⁹ *Id.* Importantly, for our analysis in the present case, in *Harrison*

⁸ It is important to note that the language in *Harrison* stating that *Anders* protections have not been extended to civil cases is *not* a holding — it is a statement of fact made to introduce this Court’s subsequent analysis. Unfortunately, this language has been cited in some subsequent opinions as if it constituted binding precedent.

⁹ We note that in a number of opinions in which this Court determined *Anders* did not apply, this Court, in its discretion, still conducted the requested *Anders* review. This Court’s authority to conduct *Anders* review in those cases was never challenged.

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this Court implicitly recognized that *it has the authority to decide whether to extend Anders protections and requirements beyond what is constitutionally mandated. Id.*

To the extent that this Court in *Harrison* included a general holding that we would not extend *Anders* review to civil cases, two very important facts were thereby established.¹⁰ First, *Harrison* and its progeny have always recognized the difference between civil and criminal appeals, and nothing in any of our opinions suggests that *Anders* related holdings in civil appeals should inform, much less bind, this Court when considering criminal appeals. *Harrison* itself mainly reaches its holding on the basis that the rights of the appealing parties and the burdens of proof required in termination of parental rights cases, which are civil, are not comparable to those in criminal appeals. *Harrison*, 136 N.C. App. at 833, 526 S.E.2d at 503 (citation omitted) (“the burdens of proof are neither “very similar” nor do they derive from the same source. Because a parent whose rights are terminated is not equivalent to a convicted criminal, we conclude that counsel for a parent appealing from a juvenile court’s severance order has no right to file an *Anders* brief.”). We can find no case in which

¹⁰ Although the holding in *Harrison* has been characterized as one denying *Anders* review in civil cases, see *In re N.B., N.B., J.B., N.B., & J.B.*, 183 N.C. App. 114, 116-17, 644 S.E.2d 22, 24 (2007) (“[i]n *Harrison*, this Court declined to extend the holding of *Anders* to civil cases, including termination of parental rights cases”), this Court in *Harrison* was specifically considering a termination of parental rights case, and it specifically adopted the reasoning of an Arizona case in support of its holding. The Arizona case was also limited to a termination of parental rights proceeding, and the portion of that opinion quoted and adopted in *Harrison* does not make any holding broader than that counsel for parents appealing an order terminating their parental rights have “no right to file an *Anders* brief.” *Harrison*, 136 N.C. App. at 833, 526 S.E.2d at 503 (citation omitted). It is unclear that the holding in *Harrison* was intended to be applied outside the termination of parental rights context.

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an appellate court of this State has denied *Anders* review in a criminal appeal. The closest we come is in the satellite based monitoring (“SBM”) context, where this Court relied on *dicta* from *Harrison* to deny *Anders* review:

[C]ounsel appointed to represent defendant on appeal has filed an *Anders* brief indicating he “has been unable to identify any non-frivolous issue that could be raised in this appeal.” He asks this Court to conduct its own review of the record for possible prejudicial error in accordance with *Anders* and *Kinch*. “Our Court has held that SBM hearings and proceedings *are not criminal actions, but are instead a ‘civil regulatory scheme[.]’* “[T]his jurisdiction has not extended the procedures and protections afforded in *Anders* and *Kinch* to civil cases.” *In re Harrison*, 136 N.C. App. 831, 832, 526 S.E.2d 502, 502 (2000). Nevertheless, in the exercise of our discretion pursuant to N.C. R. App. P. Rule 2 (2012), we have reviewed the record and found no error. Consequently, we affirm the trial court’s SBM order.

State v. Lineberger, 221 N.C. App. 241, 243, 726 S.E.2d 205, 207 (2012) (citations omitted) (emphasis added). This Court in *Lineberger* determined it was bound by *Harrison* because SBM proceedings are *civil* in nature. Neither *Harrison* nor any other opinion involving *Anders* review in civil matters constitutes binding precedent in the criminal matter presently before us.

Second, this Court in *Harrison* – by the very act of conducting an analysis of the issue, considering the “majority” and “minority” rules from other jurisdictions, and adopting one of those rules – was exercising its *authority* to make that determination. Put differently, this Court in *Harrison* *could* have held that *Anders* applied in appeals from TPR proceedings, but *decided* not to. This Court in *Harrison*

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did not hold, state, or in any manner indicate that it was *without the authority to make that choice absent action by our Supreme Court or our General Assembly*. Further, as discussed further below, this Court has held, without any prior “right” created by our Supreme Court or our General Assembly, that the right to effective assistance of counsel – which is only a “right,” in the constitutional sense, that applies to criminal defendants – also applies in civil TPR proceedings. *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996). This right, in the TPR context, was therefore “created” by this Court, acting alone.

Also of note, this Court, acting without prior permission or guidance from either our Supreme Court or the General Assembly, has held that *Anders* review applies in appeals from proceedings in which a juvenile has been adjudicated delinquent. *In re May*, 153 N.C. App. 299, 301, 569 S.E.2d 704, 707 (2002) (“an attorney for an indigent juvenile adjudicated to be delinquent may file an *Anders* brief in the appellate courts of this state”). Juvenile delinquency proceedings are generally considered civil proceedings. *See Turner v. Rogers*, 564 U.S. 431, 443, 180 L. Ed. 2d 452, 462 (2011) (referring to the “civil juvenile delinquency proceeding”). For this reason, the United States Supreme Court has held that not all constitutional protections required in a criminal proceeding are required in the analogous juvenile proceeding. *In re Gault*, 387 U.S. 1, 30-31, 18 L.Ed.2d 527, 548 (1967) (“We do not mean to indicate that the hearing to be held [in a juvenile proceeding] must conform

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with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.”); *see also In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970).

Post-*Harrison*, this Court was again asked to extend the *Anders* procedures to TPR proceedings in *N.B.*, 183 N.C. App. at 117, 644 S.E.2d at 24. After determining that we were bound by the holding in *Harrison*,¹¹ and could not recognize a right that had already been specifically denied by *Harrison*, this Court stated:

[W]e take this opportunity to urge our Supreme Court or the General Assembly to reconsider this issue. As Respondent’s counsel has forcefully argued, an attorney appointed to represent an indigent client whose appeal is wholly frivolous is faced with a conflict between the duty to “zealously assert[] the client’s position under the rules of the adversary position[,]” N.C. Rules of Professional Conduct, Rule 0.1, and the prohibition on advancing frivolous claims, N.C. Rules of Professional Conduct, Rule 3.1. Further, at the present time, courts in at least thirteen states have allowed attorneys to file no-merit briefs pursuant to *Anders* in juvenile appeals. *See* Wis. Stat. § 809.32(1)(a) (requiring appointed counsel to file a “no-merit report” in an appeal of a termination order if the appeal is frivolous); *In the Matter of Justina Rose D.*, 28 A.D.3d 659, 659, 813 N.Y.S.2d 229, 231 (N.Y. App. 2006) (applying the *Anders* procedure to an appeal of an order terminating an indigent parent’s rights); *Linker–Flores v. Dept. of Human Services*, 359 Ark. 131, [141], 194 S.W.3d 739, 747 (Ark. 2004) (holding that the *Anders* procedure correctly balances the rights of indigent parents with the obligations

¹¹ *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

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of their appointed attorneys, and adopting the procedure for appeals of termination cases involving indigent parents)[.¹²] However, other than North Carolina, only four states that have addressed the issue continue to prohibit such a practice. Additionally, permitting such review furthers the stated purposes of our juvenile code. *See* N.C. Gen. Stat. § 7B–100 (2005).

Id. at 117–19, 644 S.E.2d at 24–25 (citations omitted). Our Supreme Court added a provision to our Rules of Appellate Procedure, effective for all cases appealed after 1 October 2009, allowing an *Anders*-like procedure for appeals taken pursuant to N.C. Gen. Stat. § 7B-1001, including from TPR orders. N.C. R. App. P. R. 3.1(d).¹³ Thus, our Supreme Court has also recognized the authority of our appellate courts, even absent enabling legislation, to decide whether to extend *Anders* protections into areas, such as determinations of child custody, not constitutionally *required* by *Anders* or its progeny – such as *Finley*. This is in line with other jurisdictions that recognize this authority in their appellate courts. *See N.B.*, 183 N.C. App. at 117-19, 644 S.E.2d at 24-25 and cases cited therein; *see also In re NRL*, 344 P.3d 759, 760 (Wyo. 2015) and cases cited.

¹² Following these three citations, *N.B.* includes ten more citations to opinions from different jurisdictions that affirmed or granted *Anders* review in TPR appeals.

¹³ We can find nothing in our Rules of Appellate Procedure that would prevent us from allowing *Anders*-type review in the matter before us. Further, our Supreme Court has repeatedly stated its preference that appeals be decided on the merits, and not be dismissed for non-jurisdictional rules violations. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198–99, 657 S.E.2d 361, 365–66 (2008).

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In the 2015 case of *NRL*, the Supreme Court of Wyoming noted that the majority of jurisdictions had decided to apply *Anders* protections to TPR cases, and adopted that majority position. *Id.* at 760. In so doing, the Court in *NRL* recognized that, in deciding to extend *Anders* protections, “many states reasoned that the nature of the case,”

i.e., civil rather than criminal, makes no difference in the duties court-appointed counsel owes his or her client. From counsel’s perspective, counsel’s duty to competently and diligently represent the client is exactly the same in a civil appeal from an order terminating parental rights as in an appeal from a criminal conviction. Moreover, in both criminal and termination of parental rights cases, counsel may conclude, after thoroughly and conscientiously examining the case, that a case lacks any nonfrivolous issues for appeal. Despite the civil or criminal nature of the appeal, counsel in such a situation faces the same dilemma of having to diligently represent the indigent client who wants to appeal while still complying with counsel’s other ethical duties as a member of the Bar.

Id.

We also find the reasoning of the Texas Court of Appeals, 14th District, instructive:

Although the Texas Supreme Court has not addressed the applicability of *Anders* to parental-termination appeals, its holdings in two recent cases are instructive. Last year, the Texas Supreme Court held that a Statutory right to effective assistance of counsel exists in parental-rights termination cases. In doing so, our high court extended the *Strickland* test used in the criminal context to civil

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parental-rights termination proceedings.¹⁴ The procedure prescribed by the United States Supreme Court in *Anders* derives from the Sixth Amendment right to counsel. Therefore, it seems logical to conclude that the Texas Supreme Court would allow the filing of an *Anders* brief derived from this right in the parental-rights termination context.

In re D.E.S., 135 S.W.3d 326, 329 (Tex. App. – 14th Dist. 2004) (citations omitted).

This Court has also recognized that, where a statutory right to counsel exists, that right includes the right to effective assistance of counsel as set forth in *Strickland*:

N.C. Gen. Stat. § 7A–289.23 (1995) guarantees a parent’s right to counsel in all proceedings dedicated to the termination of parental rights. Given that this right exists, it follows that a remedy must also exist to cure violations of this statutory right. If no remedy were provided a parent for inadequate representation, the statutory right to counsel would become an “empty formality.” *In re Bishop*, 92 N.C. App. at 664-65, 375 S.E.2d at 678. “Therefore, the right to counsel provided by G.S. 7A–289.23 includes the right to effective assistance of counsel.” *Id.* at 665, 375 S.E.2d at 678.¹⁵

Oghenekevebe, 123 N.C. App. at 436, 473 S.E.2d at 396. The *Strickland* test is the appropriate test to demonstrate ineffective assistance of counsel in North Carolina as well, whether in a criminal or a civil setting. *Id.*; *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). N.C.G.S. § 15A-270.1 provides a statutory right to

¹⁴ *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

¹⁵ We point out that in *Bishop*, this Court for the first time recognized a right to effective assistance of counsel in termination proceedings, and imposed the *Strickland/Braswell* test, even though this right is not constitutionally mandated.

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counsel, and thus the right to effective assistance of counsel as set forth in the Sixth Amendment based *Strickland/Braswell* test. We see no valid reason to deny *Anders*-type protections to defendants in criminal proceedings from which there is a statutory right of appeal, and can discern no compelling reason why this Court, or the State, would find it desirable to place appointed counsel in the position of choosing “between the duty to ‘zealously assert[] the client’s position under the rules of the adversary position[,]’ N.C. Rules of Professional Conduct, Rule 0.1, and the prohibition on advancing frivolous claims, N.C. Rules of Professional Conduct, Rule 3.1.” *N.B.*, 183 N.C. App. at 117, 644 S.E.2d at 24.

We find the decision to apply *Anders* procedures to appeals pursuant to N.C.G.S. § 15A–270.1 even more compelling in light of this Court’s recent opinion in *Sayre*. In *Sayre*, the defendant’s counsel filed an *Anders* brief stating he could find no meritorious issues for appeal. *Sayre*, __ N.C. App. __, 803 S.E.2d 699, 2017 WL 3480951, *1 (2017). The defendant filed a *pro se* brief pursuant to *Anders*, and this Court conducted the appropriate review. *Id.* The majority affirmed, holding: “We have been unable to find any possible prejudicial error, and we conclude that the appeal is wholly frivolous.” *Id.* at *2. Judge Murphy dissented, stating: “I respectfully dissent from the Majority’s opinion because [the d]efendant made allegations sufficient under the plain language of the statute entitling him to the appointment of counsel to maintain his motion for post-conviction DNA testing.” *Id.*

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at *4. *Sayre* is currently awaiting review by our Supreme Court. Absent this Court's decision to conduct an *Anders* review in *Sayre*, the defendant would not have had the opportunity to present his possibly meritorious argument once his counsel determined that he could not locate any non-frivolous arguments based upon the record before him.

In the present matter, the concurring opinion, relying on N.C.R. App. P. 28, argues that we should not address the *Anders* issue in this opinion because it was not first brought up and argued in Defendant's brief. We believe the fact that Defendant's attorney *filed an Anders brief* is sufficient to raise the issue and present it for appellate review. Further, the State's *sole* argument on appeal is that we should dismiss Defendant's appeal based on a determination that *Anders* review cannot be requested in an appeal pursuant to N.C.G.S. § 15A-270.1. The concurring opinion would have us refuse to address the State's argument on appeal. If this Court was to refuse to address the State's argument, our remaining option for review would be to simply conduct the requested *Anders* review, just as we have done in every prior appeal that requested *Anders* review pursuant to N.C.G.S. § 15A-270.1. However, the concurring opinion implicitly argues that we *should* conduct the review, but only to the point where we determine *Anders* review is not constitutionally mandated on appeal pursuant to N.C.G.S. § 15A-270.1, and *then* use our discretionary supervisory powers to conduct an *Anders* review in this case, without making any broader holding.

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As stated, we believe Defendant’s brief requesting *Anders* review and the State’s brief contending that we cannot apply *Anders* review to this appeal place this issue squarely before us and meet the requirements of Rule 28. Assuming, *arguendo*, this issue was not preserved for appellate review, in light of Defendant’s clear reliance on the precedent of this Court in conducting *Anders* review, without reservation, whenever it has been asked to do so on appeal pursuant to N.C.G.S. § 15A-270.1, we invoke Rule 2 of our Rules of Appellate Procedure to “suspend or vary the requirements” of Rule 28 in order to “prevent manifest injustice” and “expedite decision in the public interest,” N.C.R. App. P. 2, address the State’s sole argument in opposition to Defendant’s appeal, and settle a question of law that would be certain to otherwise recur.

Our precedent establishes that this Court has *both* jurisdiction *and* the authority to decide whether *Anders*-type review should be prohibited, allowed, or required in appeals from N.C.G.S. § 15A-270.1. Exercising this discretionary authority, we hold that *Anders* procedures apply to appeals pursuant to N.C.G.S. § 15A–270.1. We wish to make clear, in order to avoid potential misapplication, that our holding is limited to the issue before us – appeal pursuant to N.C.G.S. § 15A–270.1. Having held that Defendant’s counsel had the right to proceed in this matter pursuant to *Anders* procedures, we now address the merits of Defendant’s arguments.

B. Anders Review

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“Under our review pursuant to *Anders* and *Kinch*, ‘we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous.’” *State v. Frink*, 177 N.C. App. 144, 145, 627 S.E.2d 472, 473 (2006) (citation omitted). “In carrying out this duty, we will review the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous.” *Id.* (citation omitted).

Based on our review, we agree with counsel that the appeal is wholly frivolous. Defendant asserts he did not act with premeditation and deliberation in killing Ms. Barefoot; nor did he “c[o]me to Ms. Barefoot’s apartment with an intent to commit a felony therein.” Defendant’s averments bear no relation to the integrity of the DNA evidence presented at his trial or to the potential value of additional testing. Thus, they are not relevant to the issue currently before this Court: whether the trial court erred in denying Defendant’s motion to locate and preserve evidence and for post-conviction DNA testing under N.C.G.S. § 15A-269. Defendant’s argument is also wholly at odds with the theory presented in his motion to the trial court, *i.e.*, that further DNA testing would prove he was not the perpetrator of the crime. We note on that account that Defendant has not demonstrated how, based upon the facts of this case, DNA testing could possibly assist him in any post-conviction review. Accordingly, we affirm the trial court’s order.

AFFIRMED.

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Judge CALABRIA concurs.

Judge DILLON concurs with separate opinion.

DILLON, Judge, concurring.

I concur in the result reached by the majority. I write separately, however, to address the majority’s statement that “*Anders* procedures apply to appeals pursuant to N.C.G.S. § 15A-270.1.” I agree with the majority’s statement to the extent that it suggests that we have jurisdiction (i.e., the authority) to conduct an *Anders*-like review in the context of an appeal brought pursuant to N.C. Gen. Stat. § 15A-270.1. However, to the extent that the majority’s statement suggests that we are *required* to conduct an *Anders*-like review, I respectfully disagree. I conclude that an appellant’s *right* to have issues reviewed on appeal is limited by Rule 28 of our Rules of Appellate Procedure promulgated by our Supreme Court, which provides that “[t]he scope of review on appeal is limited to issues so presented in the several briefs.” N.C. R. App. P. 28(a).

Our State Constitution provides that our “Supreme Court shall have exclusive authority to make rules of procedures and practice for the Appellate Division.” N.C. Const. Art. IV, sec. 13(2). Pursuant to its exclusive authority, our Supreme Court has promulgated Rule 28(a), which limits *the right* to a review by our Court to those issues raised in the appellate briefs, though *in our discretion* we can waive Rule 28(a) by invoking Rule 2 of the North Carolina Rules of Appellate Procedure in order to review other issues. N.C. R. App. P. 2. Rule 28(a)’s limited right to review, however, is qualified somewhat by the United States Supreme Court decision in *Anders v. California*, 386 U.S. 738 (1967), in which the U.S. Supreme Court determined that

an appellant has the right to review of issues not raised in his brief in certain circumstances. Specifically, in *Anders*, that Court held that indigent defendants are entitled under our federal constitution to certain procedures during a *first* appeal of right where appointed counsel fails to discern a non-frivolous appellate issue. *Anders v. California*, 386 U.S. at 744. These procedures include (1) a party's right to file a brief when his attorney has filed a "no merit" brief and (2) a party's right to a full search of the record by the appellate court, even if no meritorious issues were raised by the party or the party's attorney.

In a later case, the U.S. Supreme Court held that under our federal constitution, an indigent defendant is not entitled to *Anders* procedures on *subsequent* post-conviction appeals even where state law provides such defendants a right to counsel for that appeal. *See Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987).

Our General Assembly has provided indigent defendants the right to appellate counsel when appealing an order denying post-conviction DNA testing. *See* N.C. Gen. Stat. § 15A-270.1. However, our General Assembly has not provided these defendants the right to *Anders* procedures, including any right to a full *Anders* review. Neither our State Constitution nor the federal constitution provides for such right. And our Supreme Court has not provided for such a right by appellate rule or otherwise. Our Court's authority to recognize such a right is limited by any controlling authority to the contrary. Therefore, I conclude that Rule 28(a) compels us to hold that an

indigent appellant who appeals pursuant to N.C. Gen. Stat. § 15A-270.1 has no *right* to review by our Court of any issues not properly raised in the briefs.

I find instructive the process by which the right to certain *Anders* procedures were provided in the context of an indigent parent’s appeal of a disposition order. Like in the current case, our General Assembly has provided the right to appellate counsel in that civil context. We held, though, that an indigent parent with this statutory right to counsel had no right to *Anders* procedures; but we urged “our Supreme Court or the General Assembly to reconsider this issue.” *In re N.B.* 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). Our Supreme Court responded by promulgating Rule 3.1(d), creating a right to *certain Anders*-type procedures in that context. N.C. R. App. P. 3.1(d). Specifically, Rule 3.1(d) grants an indigent parent the right to raise issues in a separate brief where appellant’s counsel has filed a “no-merit” brief; however, Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal.

In any case, Rule 3.1(d) does not apply to this present criminal matter brought pursuant to N.C. Gen. Stat. § 15A-270.1. Further, neither our Supreme Court nor our General Assembly has created any *right* to an *Anders*-like review by our Court in the context of an appeal brought pursuant to N.C. Gen. Stat. § 15A-270.1. Therefore, until our Supreme Court, by rule or holding, or our General Assembly, by law, creates

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DILLON, J., concurring

such a right, I conclude that we must follow Rule 28(a), which limits the right of appellants to review only of issues raised in their briefs. This is not to say that we cannot exercise our discretion to consider issues not properly raised in the briefs, as we have done here.