IN THE SUPREME COURT OF FLORIDA

N.S.H., THE MOTHER ,
Appellant,

v.

DEPARTMENT OF CHILDREN AND FAMILY SERVICES,
Appellee,
_____/

CASE NO: SC02-261
5th DCA NO: 5D01-1595
L.T. NO: JUD98-38 (9th Jud. Cir.)
Osceola County

ANSWER BRIEF ON THE MERITS

APPELLEE

DEPARTMENT OF CHILDREN AND FAMILY SERVICES

On review from a certified question by the Fifth District Court of Appeal

In Case No. 5D01-1595

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This was an appeal by the mother from an Order of Termination of Parental Rights entered in the Ninth Judicial Circuit Court, Osceola County, by the Honorable Daniel P. Dawson.

Appellant, N.S.H., is the mother. In this brief she will be referred to as "Appellant," the "Mother" or "N.S.H." Appellee is the Department of Children and Family Services and will be referred to as "Appellee" or the "Department."

STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of the case and facts as stated in Appellant's initial brief.

SUMMARY OF THE ARGUMENTS

Cases originating through Chapter 39 of the Florida Statutes are civil proceedings. Being civil in nature they are not entitled to *Anders* procedures.

Termination of parental rights proceedings have some of the "form" of criminal cases but not the "substance."

Federal due process does not require *Anders* procedures. After the due process analysis one finds that the parent(s) and the child have competing interests, the Department's interest is in promoting the welfare of the child and an interest in reducing the costs and burden of the proceedings, and that the risk of the present *Ostrum* procedure causes incorrect conclusions without *Anders* procedures all result in the determination that *Anders* procedures are not necessary in termination of parental rights cases.

Federal equal protection concerns do not require *Anders* procedures. Criminal defendants and parents are not similarly situated by law in procedures or cases. Under the present application of *Anders* there is a denial of equal protection. Appellate courts raise arguable error only for indigent criminal defendant/appellants whose counsel moves to withdraw while the nonindigent criminal defendant appellant does not get that benefit. Furthermore, if the indigent criminal defendant/appellant's counsel raises some meritorious points on appeal, that defendant is not entitled to the appellate court's independent review to raise other arguable points.

Florida law presently protects the indigent parent's right to counsel through

seventeen (17) different statutes and three (3) rules of procedure. That is more than sufficient to protect the parent.

This Court's determination that *Anders* procedures should apply to involuntary commitments is distinguishable. Both criminal cases and involuntary commitment cases lack the competing interest of another party that is not the State. In termination of parental rights cases the child possesses an independent liberty interest that competes with the parents liberty interest that has been used to justify the imposition of *Anders* procedures. The child's competing liberty interest has been determined to be higher than the parent's liberty interest by the legislature and the people of the State of Florida.

Other states have rejected the use of *Anders* procedures in termination of parental rights cases. Some states have rejected the use of *Anders* procedures in criminal cases.

The certified question concerns only the requirements needed to guide the indigent parent's appellate attorney. The question does not ask that this Court make the determination of applying full *Anders* procedures to appeals of termination of parental rights. Appellee requests this Court disallow motions to withdraw by appellate counsel for the indigent parent rather than adopting the full *Anders* procedures as being fairer and more expeditious.

Determining whether *Anders* procedures should be applied to termination of parental rights cases logically involves the larger determination of whether *Anders* procedures should be applied to every indigent parent appeal of a loss of their liberty interest, the companionship, care, custody, and management of their child, temporary or permanent.

The size of records on appeal and the number of Chapter 39 case appeals argues against the imposition of *Anders* procedures.

CERTIFIED QUESTION

IN TERMINATION OF PARENTAL RIGHTS CASES, IF AN ATTORNEY APPOINTED TO REPRESENT AN INDIGENT PARENT BELOW IN GOOD FAITH DETERMINES THERE IS NO VALID ISSUE ON APPEAL, SHOULD THAT ATTORNEY BE PERMITTED TO WITHDRAW PURSUANT TO *OSTRUM*, OR BE REQUIRED TO FILE AN *ANDERS* TYPE BRIEF

Anders v. California, 386 U.S. 738 (1967) (hereafter *Anders*) established certain procedures in a distinct class of criminal appeals.

If after a conscientious examination, appointed appellate counsel in an indigent criminal defendant's first appeal as of right, asks the appellate court for leave to withdraw on the ground that the appeal is wholly frivolous, without merit, or lacking any basis in law or fact, counsel must file an *Anders* brief referring to anything in the record that might arguably support the appeal.

The defendant must be provided a copy of the brief and given time to raise any points that he chooses. The appellate court must then conduct an *Anders* review which is a "full examination of all the proceedings…to decide whether the case is wholly frivolous." If the court does not find any point to be arguable on its merits, the appellate court my grant counsel's motion to withdraw and proceed to dismiss the appeal, or decide it on the merits on the basis that the case is wholly frivolous. (*Anders* at 744)

Ostrum v. Department of Health and Rehabilitative Services, 663 So.2d 1359 (Fla. 4th DCA 1995) (hereafter *Ostrum*) requires appointed appellate counsel for the indigent parent to examine the record for any good faith possibilities for arguing error. If no error appears after a good faith review, the attorney may file a motion seeking to withdraw as counsel for the indigent parent. The parent is then given a period of time in which to argue the case without an attorney.

If the parent fails to file a brief within the time period granted, the appellate court concludes that the party no longer wishes to prosecute the appeal and dismisses the appeal for failure to prosecute the appeal.

If the parent files a brief, the appellate court reviews the brief. If the brief fails to present a preliminary basis for reversal the appellate court summarily affirms pursuant to Rule 9.315, Fla. R. App. P. If the parent's brief presents a preliminary

basis for reversal, the case will then proceed as any ordinary appeal. (*Ostrum* at 1361).

CASES ORIGINATING UNDER CHAPTER 39 OF THE FLORIDA STATUTES ARE CIVIL PROCEEDINGS

Cases originating under Chapter 39 of the Florida Statutes are civil proceedings. *J.B. v. Department of Children and Family Services,* 780 So.2d 6 (Fla. 2001); *Ostrum v. Department of Health and Rehabilitative Services,* 663 So.2d 1359 (Fla. 4th DCA 1995). Being civil in nature they are not entitled to the *Anders* procedures. *C.f. Austin v. U.S.,* 513 U.S. 5 (1994); *Pennsylvania v. Finley,* 481 U.S. 551 (1987). Although termination of parental rights procedures have some of the characteristics of a criminal case procedures [*Santosky v. Kramer,* 455 U.S. 745 (1982)] this goes to form and not to substance. *Lassiter v. Department of Social Services,* 452 U.S. 18 (1981) (conc. opn. Burger, C.J.).

THERE IS NO FEDERAL CONSTITUTIONAL REQUIREMENT TO FOLLOW THE PROCEDURES OUTLINED IN *ANDERS* IN CHAPTER 39 PROCEEDINGS

The "safeguards" of *Anders* are not from an independent command derived from the United States Constitution itself. *Pennsylvania v. Finley,* 481 U.S. 551 (1987). These procedures do not extend to an appeal that is discretionary. *Austin*

v. U.S., 513 U.S. 5 (1994). They do not reach collateral post conviction proceedings. These are civil in nature and not criminal. *Anders* procedures are limited in their applicability to effective assistance of appointed appellate counsel in counsel's representation of an indigent criminal defendant in his first appeal as of right in a criminal action. *Anders* procedures are dependent on the existence of an indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses. *Anders, supra; Pennsylvania v. Finley, supra. See also Evitts v. Lucy,* 469 U.S. 387 (1985); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 (1998). When the defendant has no underlying constitutional right to appointed counsel, he has no constitutional right to insist on the *Anders* procedure which were designed solely to protect that underlying constitutional right. *Pennsylvania v. Finley, supra.* These *Anders* procedures have not been applied to the type of proceedings involved in this case through any federal constitutional law analysis.

DUE PROCESS

The three-element due process analysis is set forth in *Matthews v. Eldridge*, 424 U.S.319, (1976): (1) the private interests at stake; (2) the state's interests involved; and (3) the risk that the absence of the (*Anders)* procedures would lead to an incorrect resolution of the appeal.

Here the private interests at stake are those of the parent and of the child. These interests have been found to be implicit in the "liberty" protected by the Fourteenth Amendment's due process clause. *See Santosky v. Kramer* 455 U.S. 745 (1982) (hereafter *Santosky*).

The indigent parent has a fundamental liberty interest in the companionship, care, custody, and management of his child. But, in an appeal from termination of the parent's parental rights, the underlying decision, adverse to the parent, is predicated on the detriment the parent caused or allowed his child to suffer. That underlying decision is presumptively accurate and just.

This is in light of the competing fact that the child has a "liberty" interest in a normal family home, a home that is stable. A child's development requires secure, long-term, continuous relationships with their caretakers. The child's sound development is adversely affected when uncertainty over the child's future is prolonged. As a practical matter, the interests of the child argue against the interests of a parent in a termination of parental rights case appeal.

Requiring *Anders* procedures can cause the child harm by prolonging the uncertainty affecting his life. After the Department has established parental unfitness by clear and convincing evidence, the appellate court may assume that the interests of the child and the interests of the parents do not coincide (*Santosky*).

The second element is the Department's interests involve preserving and promoting the welfare of the child (*Santosky*). This does involve an interest in an accurate and just resolution of the parent's appeal (*Santosky*). It also includes a fiscal and administrative interest in reducing the cost and burden of the proceedings (*Santosky*). Costs are not significant enough to overcome private interests as important as those of the parent and child. However, they are a consideration.

Time counts more. *Anders* proceedings must be concluded as soon as possible as a period of time that may not seem long to an adult may be a lifetime to a young child. *See* Section 39.815(1), Florida Statutes (2001) (requiring the district court of appeal to give priority to an appeal from an order terminating parental rights and render a decision as expeditiously as possible). *See also* Rule 9.146, Fla. R. App P. [The court shall give priority to…(dependency and termination of parental rights)…appeals under this rule]. Childhood does not wait for the parent to become adequate.

These interests mentioned in this second element are in opposition to the use of *Anders* procedures. After termination of a parent's parental rights and the motion to withdraw filed by appointed counsel for the parent, the presumption is that the competing liberty interest of the child's welfare lies with someone other than the parent and overcomes the parent's liberty interest in the child. The

additional time needed for *Anders* procedures does not benefit the child.

The final element concerns the risk that the absence of *Ander's* procedures will lead to an incorrect conclusion of the indigent parent's appeal. The chance of error is very low. The focus here is on appellate counsel. This risk ignores the high standards required of attorneys in Florida through the Rules of Professional Conduct. This risk presumes that attorneys handling appeals in Chapter 39 proceedings will not and do not raise meritorious issues on behalf of their clients. This risk has no established basis in fact when considering the previous success of *Anders* procedures reversing criminal convictions through appeals using *Anders* procedures.

Upon evaluating and balancing all three elements, the requirement of fundamental fairness in the Fourteenth Amendment's due process clause does not require *Ander's* procedures

EQUAL PROTECTION

Criminal defendants and parents are not similarly situated. By definition, criminal defendants face punishment. Parents do not. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (conc. opn. of Burger, C.J.) Criminal defendants are expressly given protections in the United States Constitution (*See* U.S. Const., Amends. V, VI, VIII, & XIV). Parents are not. The criminal

defendant enjoys the protection of having the state prove a case beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970). The parent has the clear and convincing evidence standard for sustaining termination of parental rights. (*Santosky).* All of this is to say that criminal defendants and parents are not similarly situated for invoking equal protection under the U. S. Constitution.

Additionally, if an appellate court reviews each record and raises arguable error only for an indigent appellant whose counsel moves to withdraw, then the nonindigent is disadvantaged as compared to the indigent; a denial of equal protection of the law. Also, an indigent defendant whose counsel raises only some meritorious points is not entitled to the appellate court's independent review to raise other arguable points that counsel may not have raised. *See and Compare: Smith v. Murray,* 477 U.S. 527 (1986); *Jones v. Barnes,* 463 U.S. 745 (1983).

FLORIDA LAW

Indigent parents in Florida are given the right to have appointed counsel represent them in all Chapter 39 proceedings. *See* sections 39.013(1), (9)(a), (b), (c) 3., (11); 39.402(3), (5)(b)2., (8)(c)2.; 39.601(9)(c); 39.701(7)(b); 39.802(4)(b); 39.805; 39.807(1)(a), (b), (c); Florida Statutes (2001); Rules 8.290(d); 8.320; 8.515, Fla. R. Juv. P. This includes appointed counsel on appeal. Section 39.510(1), 39.0134(2), Florida Statutes (2001).

There is no need for the establishment of right to the *Anders* procedures in light of the above extensive Florida law affording indigent parents the right to counsel. There is no command for the establishment of *Anders* procedures in termination of parental rights cases through the U.S. Constitution upon the State of Florida.

CIVIL INVOLUNTARY COMMITMENTS

In *Gloria Pullen v. State of Florida,* 802 So. 1113 (Fla. 2001), this Court held that *Anders* procedures apply to involuntary civil commitments. While the 5th District Court of Appeal noted that *Pullen* may have some bearing on applying *Anders* procedures to termination of parental rights cases in its opinion in this case, and while this Court referred to termination of parental rights cases as part its discussion of *Anders* application to civil cases, the distinction between criminal cases involving *Anders* procedures and involuntary civil commitments compared to termination of parental rights proceedings is significant.

As noted above, there is an additional party that has a competing due process liberty interest in the termination of parental rights and that is the child. That would make *Pullens* reasoning and *Anders* reasoning inapplicable to termination of parental rights cases. This competing interest of the child has an acknowledged higher standing of importance in Chapter 39 proceedings. Under

section 39.001(1)(b)1., Florida Statutes (2001), the health and safety of the children served shall be of paramount concern. *See also* 39.001 (1)(a), Florida Statutes, (2001); *Padgett v. Department of Health & Rehabilitative Services*, 577 So.2d565 (Fla. 1991) (the child's entitlement to environment free of physical and emotional violence when compared to the parent's interest in maintaining parental ties).

There is no automatic appointment of counsel for children in dependency cases. *But see* section 39.4086, Florida Statutes (2001). While the parent's rights to counsel is given extensive protection through the series of statutes and rules involved in dependency proceedings, that same protection is not afforded the child who has a competing due process liberty interest. While the question here involves extending a legal procedure for the parent's benefit, no underlying right of counsel to appear on behalf of the child at trial or on appeal is available to the child. That should a consideration of this Court when viewing the adoption of *Anders* procedures in termination of parental rights proceedings.

OTHER STATES

The following cases rejected the imposition of *Anders* procedures as constitutionally mandated in appeals from dependency matters: *Denise H. v. Arizona Dep't of Econ. Sec.*, 972 P.2d 241 (Ariz. Ct. App. 1998); *In re Harrison*, 526 S.E. 2d 502 (N.C. Ct. App. 2000); *In re Sara H.*, 52 Cal. Rptr. 2d 434 (6 Dist.

1997). Missouri, Colorado, Indiana, Idaho, North Dakota, Massachusetts, Georgia, Mississippi, Oregon, New Hampshire, Hawaii, Kansas, Maryland, New Jersey, Alaska, and Nebraska do not follow *Anders* or had followed *Anders* but later abandoned *Anders* in criminal cases. *See* Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others',* 23 Fla. St. U. L. Rev. 625 (1996), at 643-651.

THE CERTIFIED QUESTION

In the Certified Question, the 5th District Court of Appeals asks whether the appellate attorney should file an "*Anders* type brief." The certified question does not ask for a determination of whether *Anders* procedures should be applied to termination of parental rights appeals as suggested by Appellant. The obvious difference being the absence of the *Anders*-required record review by the appellate court, a time consuming tax on judicial resources. If this Court determines that some form of enhanced appellate procedural safeguard is needed in termination of parental rights appeals and declines to reject the application of *Anders*, Appellee requests that this Court rule on this narrow question only.

DISALLOWING MOTIONS TO WITHDRAW

Considering that time is an important factor in dependency proceedings because of the due process liberty interests of the child, it would be better to

develop a procedure that requires appellate attorneys to remain on appellate cases, denying them the opportunity of withdrawing from the case.

Having the indigent parent's appellate attorney file an advocate's brief on all meritorious issues regardless of whether or not the issues would cause reversal would be more expeditious than having the attorney file an *Anders* brief and having the appellate court conduct a full independent review of the record to determine if there are any meritorious issues in the appeal.

With the parent's attorney filing an advocate's brief, the Department's attorney would be filing the normal answer brief allowing the appellate court to maintain it's independent status instead of becoming a possible advocate for the parent on appeal. It would also obviate the delicate imbalance between the parent's attorney's responsibilities to the Court as an officer of the Court, and, that same attorney's responsibilities as an advocate for the indigent parent on appeal required in *Anders* cases. *See* Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others'*, 23 Fla. St. U. L. Rev. 625 (1996), at 643-651, 662-667.

OTHER CONSIDERATIONS

OTHER CUSTODY DEPRIVATIONS

Another part of the Certified Question that needs to be addressed is the fact

that the question only involves "TERMINATION OF PARENTAL RIGHTS CASES." Since the argument attempting to apply *Anders* procedures to termination of parental rights cases involves the due process liberty interests of the parent because of the parent's right to the companionship, care, custody and management of the child, this same liberty interest becomes involved when the parent is temporarily deprived of the child's companionship, care, custody and management caused by sheltering the child (Section 39.402, Florida Statutes), and through an adjudication of dependency [Section 39.521(1)(b)3., 39.507(5), 39.522(1), Florida Statutes, (2001)]. Logic would require the *Anders* procedures to be required for all Chapter 39 proceedings where the indigent parent is appealing some form of the loss of custody of the child, whether temporary or permanent.

In general, records on appeal in termination of parental rights cases consist of less than four hundred (400) pages of trial transcript and less than one hundred fifty (150) pages of circuit court documents/pleadings/filings. However, it is not unusual for records on appeal to contain more than twice that amount. If this Court imposes all of *Anders* procedures in termination of parental rights appeals, the cost and time involvement of an appellate court will be significantly greater that the cost and time involvement by appellate courts now required for involuntary commitments by *Pullen.*

NUMBER OF CASES AFFECTED

Through informal telephone calls to the Chief Assistant/Chief Deputy Clerks of the five district courts of appeals in Florida, undersigned counsel for the Department was told that the number of appeals in dependency cases for the calendar year 2001, was as follows:

	Dependency Appeals	Termination of Parental Rights Appeals
First DCA	21	61
Second DCA	41	86
Third DCA	(no figure available)	67
Fourth DCA	32	37
Fifth DCA	67	53

These figures were approximations based on different methods of classifications of cases and different methods of keeping these statistics. These figures may or may not contain case counts for appeals in adoption cases and family law cases where there was a companion or consolidated dependency case involving the same parents and/or children. These figures may or may not contain case counts for change of custody matters through Chapter 39.

CONCLUSION

The decision by the 5th District Court of Appeal in this case, granting

Appellant's first court appointed appellate counsel's motion to withdraw and its dismissal of the appeal after Appellant failed to file a pro se brief, should be affirmed. *Ostrum* and its progeny should be maintained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail/Interoffice/hand delivery to Ryan Thomas Truskoski, Esquire, Ryan Thomas Truskoski, P.A., P.O. Box 568005, Orlando, Florida 32856-8005 this 18th day of March, 2002.

_____
Charles D. Peters, Esquire

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief has been submitted in Times New Roman 14 point font.

_____

Charles D. Peters