IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-261

N.S.H., Mother of A.M., A.M., A.H., Minor Children,

Appellant,

vs.

DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Appellee.

______________________________________/

APPELLANT'S INITIAL BRIEF ON THE MERITS

On review from a question certified by the Fifth District Court of Appeal, *en banc*, in Case No. 5D01-1595

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PREFACE

This is an appeal originating from the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida, the Honorable Daniel P. Dawson presiding. N.S.H. was the Defendant/Mother in the trial court and will be referred to as "Mother" in this brief. The Department of Children and Families was the plaintiff in the trial court and will be referred to as "Department" in this brief.

The Mother is appealing the trial court's decision to terminate her parental rights. The Fifth District Court of Appeal sitting *en banc* dismissed her appeal, but certified a question as one of great public importance.

STATEMENT OF THE CASE AND FACTS

The Mother is an indigent parent and was appointed counsel to represent her at both the trial and appellate levels.[1] The Mother's appellate attorney, Shawn L. Hungate, Esq., filed a motion to withdraw with the Fifth District Court of Appeal pursuant to Ostrum v. Department of Health & Rehabilitative Services, 663 So.2d 1359 (Fla. 4th DCA 1995), asserting: "Counsel has reviewed the record on appeal and no errors appears in good faith to court appointed counsel."

On September 10, 2001 the Fifth District granted the motion to withdraw and gave the Mother 30 days to file a *pro se* brief. The Fifth District has adopted the Ostrum procedure. See In re J.A., 693 So.2d 723 (Fla. 5th DCA 1997). The Mother did not file a *pro se* brief.

On September 13, 2001 this court decided the case of Pullen v. State, 802 So.2d 1113 (Fla. 2001), which mandates that a district court must conduct an independent review of the record pursuant to *Anders*[2] in involuntary civil commitment proceedings when counsel cannot find a meritorious issue.

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[1] The undersigned appellate attorney substituted in as counsel after the Fifth District rendered its decision. See Fifth District order dated January 23, 2002.

[2] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Thereafter, in the *en banc* decision at issue, N.S.H. v. Department of Children & Family Services, 803 So.2d 877 (Fla. 5th DCA 2002), the Fifth District certified the following question as one of great public importance:

> 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.

The Fifth District stated that the statements relating to termination of parental rights cases in Pullen appeared to be dictum and that the court would continue to adhere to the Ostrum procedure, N.S.H. at 879, which does not require an *Anders* brief and does not require the court to conduct an independent review of the record to discern error. The court then dismissed the Mother's appeal.

The Fifth District admitted that it may have misinterpreted the scope of Pullen and certified the question at issue as a result. The court than modified the previously granted motion to withdraw to allow the Mother to be represented in this court only. The Mother's initial brief follows.

SUMMARY OF ARGUMENT

Termination of parental rights is the "death penalty" of juvenile law. State action to terminate parental rights is the most drastic legal intrusion into the sanctity of family life. The effect is to sever completely and irrevocably, a parent's right to ever regain custody and the right to visit or communicate with the child again.

This court's decision in Pullen and the U.S. Supreme Court's decision in Troxel necessitate that *Anders* be applied in termination cases because a parent's fundamental right of liberty is at stake. Failing to apply *Anders* would result in violations of a multitude of United States and Florida Constitutional provisions. The *Anders* doctrine was explicitly created to protect indigent persons when fundamental rights are adversely affected.

The district court, when reviewing the record pursuant to *Anders*, would not only represent the parent, but would also represent the best interests of the child as well. The Ostrum court and its progeny have overlooked this fact.

Significantly, the State has a *parens patriae* interest in promoting the welfare of the child which means it also has an interest in an accurate resolution of the appeal. The current procedure when appointed counsel cannot discern error is woefully unconstitutional. *Anders* must be applied.

ARGUMENT: AN INDIGENT PARENT WHOSE PARENTAL RIGHTS HAVE

BEEN TERMINATED IS ENTITLED TO AN *ANDERS* TYPE REVIEW OF HER APPEAL WHEN COURT APPOINTED COUNSEL CANNOT DISCERN ANY MERITORIOUS CLAIM OF ERROR BECAUSE OF THE FUNDAMENTAL LIBERTY INTERESTS AT STAKE

A. Parents maintain a fundamental liberty interest in preserving the family unit

Termination of parental rights is the "death penalty" of juvenile law. State action to terminate parental rights is the most drastic legal intrusion into the sanctity of family life. The effect is to sever completely and irrevocably, a parent's right to ever regain custody and the right to visit or communicate with the child again.

"The significance of the rights at issue here cannot be overstated." J.B. v. Department of Children & Families, 768 So.2d 1060, 1064 (Fla. 2000). The court in Lewis v. Department of Health and Rehabilitative Services, 670 So.2d 1191 (Fla. 5th DCA 1996), stated that:

> We note further that the United States Supreme Court has held that a natural parent has a "fundamental liberty interest" that is protected under the federal constitutional provisions relating to due process of law. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

Id. at 1194. See also Padgett v. Department of Health & Rehabilitative Services, 577 So.2d 565, 570 (Fla. 1991); In the Interest of R.W., 495 So.2d 133, 134 (Fla. 1986); N.S.H. v. Department of Children & Family Services, 803 So.2d 877, 879

(Fla. 5th DCA 2002) (holding the same).

"Florida has established a strong public policy in favor of protecting the relationship between natural parents and their children." In the Interest of E.H., 609 So.2d 1289, 1290 (Fla. 1992), *citing* Burk v. Department of Health and Rehabilitative Services, 476 So.2d 1275 (Fla. 1985). "We recognize that a constitutionally protected interest exists in preserving the family unit and in raising one's children. Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)." E.H. at 1290. See also Stanley v. Illinois, 405 U.S. 645, 651, 753, 92 S.Ct. 1208, 1212-13 (1982).

B. *Anders* applies to cases where fundamental rights are at stake and not merely criminal cases

This court's decision in Pullen v. State, 802 So.2d 1113 (Fla. 2001), clearly mandates how the certified question should be answered. This court held that a district court should conduct an *Anders* review in a civil proceeding where the nature of the individual interest is within the contemplation of the "liberty" or "property" language of the Fourteenth Amendment.

In Pullen, this court held that *Anders* applies to involuntary civil commitment hearings and in so holding drew analogies to termination of parental rights cases.

The nexus that this court made was that just because the case is labeled "civil" does not mean that the interests involved are no less important than in a criminal case. This court expressly rejected the notion that *Anders* only applies to criminal cases.

Pullen went on to state that the curtailment of the fundamental right of liberty is implicated in involuntary civil commitments, and therefore held that *Anders* applies. **As previously discussed, the curtailment of the fundamental right of liberty is also implicated in termination of parental rights cases. Accordingly, *Anders* must apply.**

In fact, the majority of states apply *Anders* to termination of parental rights or juvenile dependency proceedings. See In the Interest of K.S.M., 61 S.W.3d 632 (Tex.App. 2001); In re Christopher B., No. L099-1065, 2000 WL 281739 (Ohio Ct. App. Mar. 17, 2000); In the Interest of D.C., 963 P.2d 761 (Utah App. 1998); J.K. v. Lee County Dep't of Human Res., 668 So.2d 813 (Ala.Civ.App. 1995) (juvenile dependency); In re V.E.., 417 Pa.Super. 68, 83-84, 611 A.2d 1267 (1992); In re Jamie C., 1990 Conn.Super. LEXIS 1869 (Conn.Ct.App.1990) (not designated for publication); Morris v. Lucas County Children Srvs., Bd., 49 Ohio App.3d 86, 550 N.E.2d 980 (Ohio App. 1989); In the Interest of J.R.W., 149 Wis.2d 399, 439 N.W.2d 644 (1989); In re Keller, 138

Ill.App.3d 746, 486 N.E.2d 291 (1985).

This court in Pullen noted the minority views on the subject. "See Denise H. v. Arizona Dep't of Econ. Sec., 193 Ariz. 257, 972 P.2d 241 (Ct.App.1998); In re Sade C., 13 Cal.4th 952, 55 Cal.Rptr. 771, 920 P.2d 716 (1996); In re Harrison, 136 N.C.App. 831, 526 S.E.2d 502 (2000)." Pullen at 1118. This court should adopt the majority view.

C. Classifying termination of parental rights proceedings as "civil" is misleading because such actions are actually quasi-criminal in nature

This court already decided in Pullen that labeling a proceeding "civil" does not prevent the application of *Anders*. However, a review of the nature of termination of parental rights proceedings is necessary to fully illustrate the point.

Even though a termination of parental rights trial is classified "civil" it bears many of the indicia of a criminal trial. Department of Children & Families, v. V.V., 26 Fla.L.Weekly D2717 (Fla. 5th DCA, November 16, 2001).[2]

Parents should be entitled to an *Anders* review of their appeal because

[2] V.V. held that a parent's invocation of Fifth Amendment rights cannot be taken as an admission of guilt or support an inference of guilt in a proceeding of dependency or termination of parental rights, even though such proceedings are classified as civil rather than criminal, where such proceedings bear many of the indicia of criminal trials.

termination proceedings are quasi-criminal and involve state action. This is due to the highly compulsory nature of the proceeding and the fundamental liberty interests involved. **"[R]emoval of a child from the parents is a penalty as great, if not greater, than a criminal penalty."** Lassiter v. Department of Social Services, 452 U.S. 18, 40 (1981) (Blackmun, J., dissenting) (quoting H.R. Rep. No. 95-1386, at 22 (1978).

> A termination proceeding does not comfortably fall within the usually understood parameters of either a civil or criminal case. It seems best characterized as "quasi-prosecutorial." Although the purpose of the action is expressly not to punish the person creating the condition of dependency, the complete and irrevocable termination of the rights of a natural parent to his or her child is undeniably a significant and intrusive exercise of state power. Because of this consequence, which necessarily entails the deprivation of certain liberties, the U.S. Supreme Court has held that due process requires the state to support its allegations by at least clear and convincing evidence.
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> * * * * *
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> Another unique fact about the termination process in Florida is that indigent parents are held to have a constitutional right to counsel at state expense. This right derives not from the Sixth Amendment's right to counsel, but from the Fourteenth Amendment's guarantee of due process. Additionally, the compulsory nature of a termination is more like a criminal trial than a civil trial. For instance, if the parents fail to substantially comply with the case plan . . . [the Department] is mandated to file for termination of parental rights.

Hubert, Lila H. In the Child's Best Interests: The Role of the Guardian ad Litem in Termination of Parental Rights Proceedings, 49 U.Miami L.Rev. 531, 554 (1994).

(citations omitted).

The United States Supreme Court in Santosky v. Kramer, 455 U.S. 745, 762 (1982), stated that "the fact finding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial" because of the following factors:

> The Commissioner of Social Services charges the parents with permanent neglect. They are served by summons. The fact finding hearing is conducted pursuant to formal rules of evidence. The State, the parents, and the child are all represented by counsel . . . The attorneys submit documentary evidence, and call witnesses who are subject to cross-examination . . . [T]he judge then determines whether the State has proved the statutory elements [by the burden of proof].

Id. (citations omitted).

The United States Supreme Court stated that it has "repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody." M.L.B. v. S.L.J., 519 U.S. 102, 127, 117 S.Ct. 555. (emphasis added). The high court went on to state that:

> [T]ermination decrees work a unique kind of deprivation. In contrast to matters modifiable at the parties will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship. Our . . . decisions recognizing that parental termination decrees are among the most severe forms of state action . . . have not served as precedent in other areas.

> We are therefore satisfied that the label "civil" should not entice us to leave undisturbed the Mississippi courts' disposition of this case.

(citations and quotations omitted) (emphasis added).

The court in In the Interest of D.C., 963 P.2d 761 (Utah App. 1998), held that strict compliance with *Anders* procedures in termination cases is required and stated:

> The cases before us differ from *Anders* cases because appeals from orders terminating parental rights are civil rather than criminal. Despite this difference the cases before us and *Anders* cases have many similarities. Like indigent criminal appellants, indigent appellants challenging an order terminating their parental rights enjoy a right to counsel on appeal. *See*, *e.g*., Utah Code Ann. § 78-3a-513(1)(a) (1996) (providing that "the parents, guardian, custodian, and the minor," have right to counsel at "every stage of the proceedings," and if indigent, shall be appointed counsel (emphasis added).[3]
>
> In addition, the difference in 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 as in an appeal from a criminal conviction. *See e.g*., Utah R. Prof. Conduct 1.1 (requiring competent representation); id. 1.3 (requiring diligent and prompt representation).[4]
>
> Moreover, in both criminal and termination of parental rights cases, counsel

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[3] Florida's Chapter 39 contains virtually identical language. See i*nfra*.

[4] The current procedure in Florida allows for the dubious practice of withdrawing without the client's consent.

> 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 represent the indigent client who wants to appeal while still complying with counsel's other ethical duties as a member of the bar.

Id. at 763-764. (footnote omitted). See also In the Interest of K.S.M., 61 S.W.3d 632 (Tex.App. 2001), holding the same.

Previously, courts had fixated on the term "civil" and refused to apply *Anders*. Clearly, the label "civil" does not always properly convey the importance of the proceeding and therefore it should not be dispositive of the issue – as this court aptly held in Pullen.

D. Legislative intent and a parent's right to counsel in Florida

The Florida legislature has explicitly announced its intent to ensure due process and protect constitutional rights in juvenile proceedings. Fla. Stat. § 39.001(l).

Parents are entitled to appointed counsel in juvenile dependency proceedings and termination of parental rights proceedings. J.B. v. Department of Children & Families, 768 So.2d 1060, 1067 (Fla. 2000); Fla. Stat. § 39.013(1); Fla. Stat. § 39.013(9)(a), 39.807(1)(a); Fla.R.Juv.P. 8.320(a)(2), 8.515(a)(2). This public

policy of Florida is carved in stone.

"As a matter of due process, an indigent parent who is a defendant in a parental termination proceeding is entitled to appointed counsel at both the trial and appellate level." In the Interest of K.W., 779 So.2d 292, 293 (Fla. 2d DCA 1998).[5]

This right necessarily means that the parent is entitled to effective assistance of counsel. This fact is both explicit and implicit in the statutory scheme. The Fifth District in Department of Children & Families, v. V.V., 26 Fla.L.Weekly D2717 (Fla. 5th DCA, November 16, 2001), expressly upheld the trial court's finding that "[a]n essential element of due process is missing and that is the effective assistance of counsel as provided in Chapter 39 . . .".

"Impoverished parents' due process right to assistance of appointed counsel in proceedings for termination of parental rights entitles parents to services sufficient to provide meaningful assistance." In the Interest of M.R., 565 So.2d 371 (Fla. 1st DCA 1990).

Failing to apply *Anders* would be contrary to the legislature's intent to ensure effective assistance of counsel at every stage of the proceeding.

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[5] Conclusive evidence that indigent parents are entitled to counsel on appeal is Fla. Stat. § 39.0134 which sets the maximum amount of compensation for a court-appointed appellate attorney. See also Fla. Stat. §§ 39.510, 39.815; Fla.R.App.P. 9.146(b), allowing a parent to appeal *any* court order that affects them.

E. Due Process Clauses of the United States and Florida Constitutions

The Due Process Clauses of both constitutions are violated if this court does not apply *Anders* to termination cases. It is worth noting that Article I, Section 9 of the Florida Constitution provides higher standards of protection than the United States Constitution. Traylor v. State, 596 So.2d 957 (Fla. 1992); Brown v. State, 484 So.2d 1324, 1328 (Fla. 3d DCA 1986); Hlad v. State, 585 So.2d 928, 932 (Fla. 1991) (Kogan, J., dissenting). This is especially true in Florida when the family unit is concerned.[6]

In Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the high court held that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions as to the care, custody, and control of their children, and that this "is perhaps the oldest of the fundamental liberty interests recognized by this Court." Id. at 65.

The court in Y.H. v. F.L.H., 784 So.2d 565, 571 (Fla. 1st DCA 2001),

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[6] The doctrine of primacy also requires the application of *Anders* because of the unequivocal legislative intent for effective appellate counsel and the wide-berth of appellate review allowed in these juvenile cases. Parents are allowed to appeal any order which affects them.

acknowledged and adopted this long-line of precedent:

> [T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). See Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); Parham v. J.R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571,
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> L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401-02, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

See also M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), and the litany of cases in Section A.

In Troxel, the United States Supreme Court went on to state that the Due Process Clause of the Fourteenth Amendment guarantees more than fair process; **"it also includes a *substantive* component that provides *heightened* protection against government interference with certain fundamental rights and liberty interests."** Id. (emphasis added). See also Von Eiff v. Azicri, 720 So.2d 510, 513 (Fla. 1998).

This court has stated that "[t]he extent of the procedural due process protections varies with the character of the interest and nature of the proceeding

involved." M.W. v. Davis, 756 So.2d 90 (Fla. 2000); J.B. v. Department of Children & Families, 768 So.2d 1060, 1064 (Fla. 2000).

Given the fundamental liberty interest at issue, and the accompanying "heightened" and "substantive" protections, parents should be afforded the highest due process protections. Accordingly, *Anders* must be applied.

Failing to apply *Anders* violates both procedural and substantive due process. See J.B. v. Department of Children & Families, 768 So.2d 1060 (Fla. 2000), noting that substantive due process protects the full panoply of individual rights and requires an inquiry into whether the individual is being treated in an unfair manner in derogation of their substantive rights. Id. at 1063.

This court also stated in J.B. that procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice and contemplates that an individual be given fair notice and afforded a real opportunity to be heard and defend before judgment is rendered. Id. at 1063-1064. The opportunity the Mother was presented with in this case, the opportunity to file a *pro se* brief, was not a "real" opportunity. The inadequacy of the current procedure will be discussed in Section G below.

A mere "no-merit" letter to a district court does not comport with the standards of fundamental fairness and equality required by the Fourteenth

Amendment.

In sum, the decisions in Troxel and Pullen have forever changed this area of the law by mandating additional protections when fundamental liberty interests are at stake. All decisions rendered prior to these two cases have been rendered obsolete. Due process now clearly demands that *Anders* be applied to termination cases.

F. Current appellate procedure when appointed counsel cannot discern error

The current procedure when appellate counsel cannot discern any error is for the attorney to file a motion to withdraw in the district court. ***This motion is automatically granted.*** The district court then gives the parent time to file a *pro se* brief and the parent alone undertakes the burden to point out any litigable issue. See In the Interest of K.W., 779 So.2d 292 (Fla. 2d DCA 1998); In re J.A., 693 So.2d 723 (Fla. 5th DCA 1997); Jimenez v. Department of Health & Rehabilitative Services, 669 So.2d 340 (Fla. 3d DCA 1996); Ostrum v. Department of Health & Rehabilitative Services, 663 So.2d 1359 (Fla. 4th DCA 1995).

The Ostrum court summarily dismissed the termination of parental rights appeal before it when the parent's attorney could not find a meritorious issue. In so doing the court emphasized the need to handle such cases expeditiously and

myopically focused on the fact that *Anders* was based upon the Sixth Amendment right to counsel of a criminal defendant – and that the right to counsel in termination proceedings is a statutory right not grounded in that Amendment. Ostrum at 1361.

In Pullen, this court expressly rejected this reasoning. Pullen noted that even though the right to counsel in civil involuntary commitment proceedings is provided by Florida statute and not the constitution, the constitutional guarantee of due process still applies. Pullen at 1119, *citing* Lynch v. Baxley, 386 F.Supp. 378, 388 (M.D. Ala. 1974). Significantly, Ostrum did not consider the Due Process Clauses of either the United States or Florida Constitutions.

The seemingly dispositive issue in Ostrum was the court's view that appellate judges should not depart from their role as neutral decision makers by trying to make a case for one party. This fact is not dispositive of anything given that this exact same circumstance occurs in an *Anders* review of any type of case. However, in termination cases, the district court would not only be representing the parent when reviewing the appeal, but would also be representing the best interests of the child as well.

Ostrum stated that it was not going to allow district judges to depart from their neutrality in appeals which are "purely civil." Ostrum at 1361. As previously discussed in detail, termination of parental rights cases are clearly not "purely civil."

G. Inadequacy of the current procedure

Anders review is required because the attorney for the parent may make a mistake. Mistakes do happen. Alternatively, the attorney may not be diligent or may be insufficiently skilled. An unenthusiastic attorney is likely to rubber-stamp the appeal and file a motion to withdraw. Court-appointed juvenile attorneys are typically under-compensated, thus increasing the need to take on an increasing number of cases to make ends meet. It is therefore possible that an appeal could slip through the cracks of a busy juvenile practice.

In In the Interest of E.H., 609 So.2d 1289 (Fla. 1992), this court held that in a termination proceeding a parent is entitled to a belated appeal based on the ineffectiveness of counsel in failing to timely file the notice of appeal.

> The mother's attorney inadvertently failed to file the notice of appeal within 30 days of the court's order. We do not believe that the attorney's mistake should be imputed to the mother when the consequence of the mistake is the permanent loss of custody of her children.

Id at 1290.

The logic of this decision necessarily extends to the issue at hand. A mistake on the attorney's part would automatically be imputed to the parent. **The current safeguard is to allow the parent to file a *pro se* brief. This is akin to having**

no safeguard at all. The parent is inevitably not versed in these types of proceedings. As the United States Supreme Court has recognized:

> The parents [involved in these cases] are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are . . . thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made.

Lassiter v. Department of Social Services, 452 U.S. 18, 30, 101 S.Ct. 2153, 2161 (1981).

A termination of parental rights trial is governed by intricate rules that to a layperson would be hopelessly forbidding. A *pro se* parent is unable to protect the vital issues at stake. Nominal representation on appeal is wholly inadequate and akin to having no counsel at all.

The current procedure fails to satisfy due process because it fails to minimize, and may even increase, the risk of error. Currently, the district court automatically grants the motion to withdraw without even looking at the case. An *Anders* review by a district court would ensure that the trial court's decision was accurate and that the manifest best interests of the child were properly considered.

In a criminal case we know that the defendant was competent to stand trial and therefore will have at least some ability to present his or her own argument to an appellate court. In contrast, there is no similar guarantee with a parent whose

rights have been terminated. The parent could be entirely incompetent and unable to raise any meritorious issues. This makes a district court's independent review of the record even more important.

Additionally, because the burden of proof in termination trials is clear and convincing evidence and therefore is lower than beyond a reasonable doubt it is more important to apply *Anders* in termination cases because there is more risk of error. In re V.E., 417 Pa.Super. 68, 611 A.2d 1267 (1992). The V.E. court further stated: "Given the less stringent standard of proof required and the quasi-adversarial nature of a termination proceeding in which a parent is not guaranteed the same procedural and evidentiary rights as a criminal defendant. . . " Id.

"A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." Lassiter, *supra*, at 27.

There is an unnecessary risk of error in the current procedure. Significantly, there is no remedy for this error. The "consequence of a mistake," see E.H., *supra*, is a loss to both the parent and the child that can never be undone. Standard *Anders* procedures should be employed in termination cases as delineated by the United States Supreme Court in its seminal decision which was further elucidated upon by this court in In re Anders, 581 So.2d 149 (Fla. 1991).

As this court has conclusively stated, "[t]he right to counsel in

termination of parental rights cases is part of the process designed to ensure that the final result is reliably correct." J.B., *supra*, at 1068.

H. Equal Protection Clauses of the United States and Florida Constitutions

Failing to apply *Anders* would violate the Equal Protection Clauses of the United States Constitution and Article I, Section 2 of the Florida Constitution. The Equal Protection Clause of the Florida Constitution provides (or should provide) more protection than its Federal counterpart. Regardless, both Clauses would be violated in several different ways.

Equal Protection is essentially a direction that all persons similarly situated should be treated alike. Duncan v. Moore, 754 So.2d 708, 712 (Fla. 2000), *citing* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). This court noted in Duncan that, "[i]n the absence of a fundamental right or a protected class, equal protection demands only that a distinction which results in unequal treatment bear some rational relationship to a legitimate state purpose." Id. Significantly, the issue in the case at bar involves a fundamental liberty interest so the highest level of protection is required.

"The integrity of the family unit has found protection in the Equal Protection

Clause of the Fourteenth Amendment." Stanley v. Illinois, 405 U.S. 645, 651, 753, 92 S.Ct. 1208, 1212-13 (1982).

Failing to apply *Anders* would violate equal protection because this court would be treating persons protected by a fundamental liberty interest differently. *Anders* would apply to juvenile delinquents, criminal defendants, those involuntarily committed, but not to those who have had their parental rights terminated.

These groups are similarly situated in that they all enjoy a fundamental liberty interest in their respective proceedings. Excluding parents would be arbitrary and capricious and violate equal protection: inequitable classes would be created.

Equal protection will also be violated in that indigent persons are not on the same footing as those who can afford to retain private counsel. This premise was the backbone of the original *Anders* decision and it applies with equal force in the case at bar. The U.S. Supreme Court stated in *Anders* that:

> This procedure will assure penniless defendants the same rights and opportunities on appeal – as nearly as practicable – as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.

Anders at 745.

Failing to apply *Anders* in termination cases deprives indigent appellants of substantially equal access to the reviewing court. See In re Keller, 138 Ill.App.3d

746, 486 N.E.2d 291 (1985) (*Anders* is required to place indigent parents and indigent criminal defendants on same footing as those able to afford private counsel). In fact, the whole point of the *Anders* decisions is to protect indigent persons when fundamental rights are adversely affected.

Florida's right to equal protection has been particularly sensitive to the rights of indigents. See Pineda v. State, 2002 WL 83772 (Fla. 4th DCA, January 23, 2002) (compelling criminal defendant to wear prison clothes during trial violates equal protection because this situation only operates against those who cannot afford to post bail prior to trial); P.B. v. State, 533 So.2d 883 (Fla. 3d DCA 1988) (equal protection violated where indigent juvenile was committed because he was not able to pay restitution).

In sum, failing to apply *Anders* would not be rationally related to the legislature's goal of providing effective appellate counsel and will result in disparate treatment of persons protected by fundamental liberty interests and those who cannot afford to retain private counsel.

I. Perceived negatives of employing an *Anders* review

Any perceived delay involved when a district court conducts an independent

review of the appeal is illusory. First, Fla.R.App.P. 9.146(g) mandates expedited review for dependency and termination appeals. See also G.L.S. v. Department of Children & Families, 724 So.2d 1181, 1186-1187 (Fla. 1998) ("Consistent with that directive, the district courts have correctly emphasized the need to move these cases quickly through the judicial system").[7]

Other states disallowing *Anders* review raised the concern of the child being in limbo longer. However, any additional delay by applying *Anders* is *de minimis* and pales in comparison to the need of having an accurate and just decision.

In fact, the manifest best interests of the child is an element of proof that the Department must meet in its case-in-chief before parental rights can be terminated. See Fla. Stat. § 39.810 (eleven factor test). Accordingly, a district court would also review whether the Department met its burden of proof as to best interests. See K.M. v. Department of Children & Families, 795 So.2d 1129 (Fla. 5th DCA 2001) (termination reversed where trial court failed to consider manifest best interests of child).

The pole star of Chapter 39 is the best interests of the child. Accordingly, a

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[7] The Fifth District greatly expedites the appellate process by requiring the circuit court clerk to prepare the record within 25 days and requiring initial briefs to be served within 40 days of its acknowledgment of new case. Thereafter, answer briefs must be served within 15 days, and reply briefs within 5 days after that. The Fifth District's order in all dependency and termination cases further states that: "No enlargement of time shall be granted except for good case."

district court would also be representing the child in an *Anders* review. While the child would be in limbo while the case was under consideration, ***this time would be no longer than in a normal termination appeal that proceeded on the merits***. Regardless, ensuring the accuracy of the decision is the paramount consideration.

In addition, the State itself has a *parens patriae* interest in preserving and promoting the welfare of the child which means it also has an interest in a just and accurate resolution of the appeal.

As for the notion that costs would increase in the nature of utilizing judicial resources, termination of parental rights appeals generally make up a very small percentage of a district court's workload. Even if such cases constituted a large percentage, the additional time spent on the case is justified because of the importance of the issues at stake. It is a small price to pay to ensure that the rights of the parent and the best interest of the child are properly served.

J. Children also maintain a fundamental liberty interest in preserving the family unit

The fundamental rights at issue in termination cases are even more applicable to the children who have had their parental rights terminated and had their family

unit forever destroyed. See Troxel at fn 8, *citing* Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights").

The children at issue also have an important interest in the accuracy of the outcome of the appeal. The Ostrum court and its progeny have not balanced this corresponding right into the equation.

K. Ninth Amendment of the United States Constitution

The Ninth Amendment states that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Failing to apply *Anders* to termination cases would violate the Ninth Amendment because the Ninth Amendment protects the integrity of the family unit. See Stanley v. Illinois, 405 U.S. 645, 651, 753, 92 S.Ct. 1208, 1212-13 (1982); Griswold v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J. concurring). The Ninth Amendment is broad enough to encompass and protect the need for accurate appellate review in termination proceedings.

L. Privileges and Immunities Clauses of the United States Constitution

Failing to apply *Anders* would violate the Privileges and Immunities Clause of the Fourteenth Amendment and Article IV, Section 2 of the United States Constitution. See Troxel at 80, (Thomas, J., concurring), *referring to* Saenz v. Roe, 526 U.S. 489, 527-528, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (Thomas, J., dissenting) (raising as possible issue).

These Clauses have been seemingly abandoned, unjustifiably, but fully apply to the case at bar because of the fundamental right at issue. The Privileges and Immunities Clause should be further resurrected as hinted in Saenz.

The Clauses guarantee equal access to all public benefits – *Anders* review is such a public benefit. The privilege of having an *Anders* review cannot merely apply to criminal defendants, juvenile delinquents, those involuntarily committed, but not to those who have had their parental rights terminated. Such a result would arbitrarily favor a select class of beneficiaries.

If *Anders* is not applied to termination cases the Clauses would also be violated in that some States apply the privilege of *Anders* and some do not. Parents are entitled to the same protection in their home State as they are in other States –

when the protection stems from the United States Constitution.

CONCLUSION

For all the foregoing arguments and authorities set forth herein, the Appellant/Mother, N.S.H., respectfully requests this Honorable Court to reverse the Fifth District's decision to dismiss her appeal and allow counsel to file an *Anders* brief and require the Fifth District to independently review the whole record-on-appeal to determine whether error is present, and answer the certified question accordingly.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to: DANIEL LAKE, ESQ., Attorney for Department of Children & Families, 2540 Michigan Avenue, Kissimmee, Fl. 34744 on this 23rd day of February 2002.

____
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this 23rd day of February 2002.

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