IN THE SUPREME COURT OF THE UNITED STATES

H.K.V.,

Petitioner,

v. CASE NO.:19-7738

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, and The GUARDIAN AD LITEM PROGRAM,

Respondents.

_____/

ON PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL WITH THE STATE OF FLORIDA

FLORIDA GUARDIAN AD LITEM PROGRAM'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state appellate court's allegedly erroneous dismissal of a state court proceeding seeking to establish ineffective assistance of appellate counsel in a dependency matter result in a deprivation of due process under the Fourteenth Amendment to the United States Constitution? (Petitioner's questions 1-2.)
2. Do Florida state law procedures, which preclude Florida Supreme Court jurisdiction over unelaborated decisions of the Florida District Courts of Appeal, violate due process under the Fourteenth Amendment to the United States Constitution? (Petitioner's question 3.)
3. Is Florida's statute of repose, which precludes causes of action to overturn an order for the adoption of a child more than one year after the adoption is completed, constitutional when it prevents a litigant from pursuing a claim of ineffective assistance of appellate counsel? (Petitioner's questions 4-5.)
4. Is a person whose parental rights have been terminated constitutionally entitled to notice of a child's pending adoption for purpose of filing collateral attacks to the judgment prior to the child's adoption? (Petitioner's question 6.)

JURISDICTION

Petitioner does not identify a specific jurisdictional basis for this Court's review of his certiorari petition. But, the only potential jurisdictional basis here is 28 U.S.C. § 1257, which applies to final judgments rendered by the "highest court of a state in which a decision could be had." 28 U.S.C. § 1257(a) (emphasis added). Section 1257 permits certiorari jurisdiction where the "validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution." *Id.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section one of the Fourteenth Amendment to the United States Constitution provides that no "State deprive any person of life, liberty, or property, without due process of law ..."

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

This appeal presents another attempt to collaterally attack a 2016 termination order where the child was subsequently adopted in 2018 by the family with whom she has resided since 2014. Petitioner seeks review of a decision of Florida's Second District Court of Appeal summarily dismissing his "petition (for writ of habeas corpus) alleging ineffective assistance of appellate counsel pursuant to [Florida Rule of Appellate Procedure] 9.141(d) and/or [Florida Rule of Appellate Procedure] 9.030(b)(3) . . ." over which the Florida Supreme Court summarily declined to exercise its jurisdiction. In that habeas petition the Petitioner alleged appointed counsel for his appeal of the order terminating his parental rights was ineffective for failing to raise a meritorious issue and, instead, withdrawing upon certifying counsel had found no meritorious issue for appeal.

With his Petition to this Court, the Petitioner has wholly failed to establish a basis for this Court's jurisdiction and a compelling reason for granting review. None of his seven assignments of error, raising four distinct issues, present a basis for relief in this Court. Indeed, none present a federal question, and the Petitioner has not argued reasons exist to grant his petition as to three of the four general issues raised in his Questions Presented.

The sole question *argued* in the Petitioner's certiorari petition is whether the Petitioner was denied constitutional due process when the Second District Court of Appeals dismissed his habeas petition alleging ineffective assistance of counsel. However, in this argument, the Petitioner is seeking nothing more than error correction of a misapplication of a state law rule. Such misapplication, which the

GAL does concede occurred, albeit for different reasons than those asserted by the Petitioner, does not, standing alone, give rise to a constitutional due process violation where there is no further constitutional violation at play. Moreover, an alternative state law basis fully disposes of the Petitioner's habeas petition in the lower court. This court should therefore decline to accept jurisdiction over this petition and dismiss it.

STATEMENT OF THE CASE

The Petitioner is the biological father to a young female child whom the Department of Children and Families sheltered from the Petitioner and her mother two days after her birth in October 2014. The Petitioner's parental rights to her were terminated in 2016 after he was incarcerated for lewd and lascivious battery upon the child's mother, who was fourteen years old at the time of her impregnation. The procedural history of this case is convoluted and unclear from the Petitioner's Petition for Writ of Certiorari; the GAL Program has prepared a time line to assist as follows:

DIRECT APPEAL
(SC 17-6547)

Date	Court	Action
October 2014	Trial	Child Sheltered.
November 2016	Trial	Order terminating parental rights.
May 2017	Second District Court of Appeal	Per curiam affirmance of termination order.

June 2017	Second District Court of Appeal	Motion for rehearing en banc and for written opinion stricken.
July 2017	Florida Supreme Court	Petition for review dismissed for lack of jurisdiction.
July 2017	Second District Court of Appeal	Mandate issued.
January 2018	United States Supreme Court	Petition for Writ of Certiorari dismissed.
January 2018	United States Supreme Court	Motion for Rehearing on Dismissal of Petition for Writ of Certiorari filed.
March 2018	United States Supreme Court	Motion for Rehearing on Dismissal of Petition for Writ of Certiorari denied.
October 2018	Trial	Child adopted.

PETITION FOR WRIT OF HABEAS CORPUS – ILLEGAL DETENTION
(SC 19-7739)

February 2019	Trial Court	Petition for Writ of Habeas Corpus filed.
February 2019	Trial Court	Petition for Writ of Habeas Corpus Denied.
June 2019	Second District Court of Appeal	Decision of trial court denying writ per curiam affirmed.
July 2019	Second District Court of Appeal	Motion for rehearing and certification filed.
July 2019	Second District Court of Appeal	Motion for rehearing and certification denied.

August 2019	Florida Supreme Court	Petition for Review filed.
August 2019	Florida Supreme Court	Petition for Review Dismissed.
October 2019	United States Supreme Court	Petition for Writ of Certiorari filed.
December 2019	United States Supreme Court	Petition for Writ of Certiorari re-filed.

PETITION FOR WRIT OF HABEAS CORPUS – INEFFECTIVE ASSISTANCE OF COUNSEL
(SC 19-7738)

July 2019	Second District Court of Appeal	Petition for Writ of Habeas Corpus filed.
September 2019	Second District Court of Appeal	Petition for Habeas Corpus dismissed.
October 2019	Second District Court of Appeal	Motion for rehearing and clarification filed.
October 2019	Second District Court of Appeal	Motion for rehearing and clarification denied.
October 2019	Florida Supreme Court	Petition for Review filed.
October 2019	Florida Supreme Court	Petition for Review dismissed.
January 2020	United States Supreme Court	Petition for Writ of Certiorari filed.

As is clear from the above, this petition is the Petitioner's third attempt in this Court to challenge the validity of the same underlying termination order. Two years elapsed from when the order affirming termination of his parental rights became final and the Petitioner sought to challenge the effectiveness of his counsel in that appeal through the habeas petition underlying this Certiorari Petition. The Petitioner's

habeas petition in this case relied upon Florida Appellate Rule of Procedure 9.141(d), which authorizes *in criminal cases* post-judgment challenges to the effectiveness of appellate counsel up to two years from the date the judgment and sentence become final. Apparently misled by the Petitioner's reliance on a rule pertaining to criminal cases, the Second District Court of Appeal dismissed the petition because the criminal judgment and sentence had become final more than two years prior to the filing of the petition.

As explained in more detail below, there is no basis for this Court to grant review in this case.

ARGUMENT

I. THIS COURT SHOULD DECLINE JURISDICTION BECAUSE THIS CASE PRESENTS NEITHER A QUESTION OF FEDERAL LAW NOR A QUESTION OF EXCEPTIONAL IMPORTANCE.

The Petitioner in this case puts forth seven individual assertions of error, which can be consolidated into four separate issues, none of which present a federal question. However, the entirety of his argument in this Petition pertains only to the Second District Court of Appeals' dismissal of his habeas petition as untimely. He presents no actual argument in support of his claims he was constitutionally entitled to have the Florida Supreme Court review the propriety of the Second District Court of Appeals' decision, to notice of an adoption after termination of his parental rights, and to proceed with his petition irrespective of other Florida state law that procedurally bars his claim. These arguments are consequently inadequately preserved and argued, and even if they were appropriately argued, would not support this Court's exercise of its discretionary jurisdiction. *Int'l Longshoremen's Ass'n. v.*

Davis, 476 U.S. 380, 387, 106 S. Ct. 1904, 1910 (1986) (Supreme Court has "no authority to review state determinations of purely state law"); *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S. Ct. 830, 834 (1985) (the constitution does not require states afford appeals of right to review trial court errors). Thus, as the Petitioner bears the burden of establishing this Court's jurisdiction, and has wholly failed to argue it as to these issues, the Petitioner has given this Court no legal basis, let alone a compelling reason, for which it should exercise its discretion to grant review.

Therefore, the Guardian ad Litem Program will address only the remaining issue presented in the Petitioner's Statement of Issues—whether a basis for jurisdiction exists regarding the Second District Court of Appeal's disposition of the Petitioner's habeas petition—as well as an alternative state law ground that fully disposes of his claims.

A. The Petitioner has not established a basis for this Court's jurisdiction over the order under review.

This case represents Petitioner's second collateral attack on the termination of his parental rights, an order over which this Court declined to take jurisdiction more than one year ago. It is well established that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion," and "will be granted only for compelling reasons." USCS Supreme Ct. R. 10. Regardless of the specifics of a particular case, a compelling reason to exercise United States Supreme Court jurisdiction will not exist in the absence of a showing the lower court "decided an important federal question." *Id*. Moreover, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated

rule of law." *Id.* Indeed, "'Special and important reasons' [for granting jurisdiction] imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614, 616 (1955).

The basis for this collateral proceeding is the Petitioner's claim to the Second District Court of Appeals, through a habeas petition, that his appointed appellate counsel in the direct appeal was ineffective, and his Petition to this Court relates to the subsequent dismissal of his habeas petition as untimely. The Petitioner presents no specific, discernible argument as to the basis for this Court's jurisdiction over his Petition other than a claim that the Second District Court of Appeal's allegedly erroneous dismissal of his habeas petition was a "denial of the parent's constitutional right to due process."

To evaluate the Petitioner's request this Court exercise its discretion to hear his case, it is necessary to put this case in context. At its core, this is a dependency and termination of parental rights case. It is axiomatic in dependency cases that time is of the essence and children's best interests are paramount. Indeed, this Court has recognized,

> The State's interest in finality is unusually strong in child-custody disputes. . . . It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.

Lehman v. Lycoming Cty. Children's Servs. Ag., 458 U.S. 502, 513-14, 102 S. Ct. 3231, 3238 (1982).

Florida public policy, enshrined in Chapter 39, Florida Statutes (2019) echoes this Court's concern for permanency, especially the harm arising when permanency is unduly delayed. FLA. STAT. § 39.001(1)(h) (2019) (permanent placement should be achieved within one year); FLA. STAT. § 39.0136(1) (2019) (stating "time is of the essence for establishing permanency for a child in the dependency system" and time limitations are a right of the child); FLA. STAT. § 39.621(1) (2019) (noting time is of the essence for permanency of dependent children and a permanency hearing must be held within 12 months of removal); *S.M. v. Fla. Dep't of Children & Families*, 202 So. 3d 769, 782-83 (Fla. 2016) (explaining children suffer harm when permanency is unduly delayed); *J.B. v. Fla. Dep't of Children & Families*, 170 So. 3d 780, 792 (Fla. 2015) (recognizing children are harmed when permanency is unduly delayed).

For that reason Florida has placed stringent requirements on post-judgment, collateral proceedings regarding the ineffective assistance of counsel. Although in *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 101 S. Ct. 2153 (1981), this Court held the United States Constitution did not require the appointment of counsel in every termination of parental rights case, the Florida Supreme Court has concluded "'the Florida due process clause provides higher due process standards than the federal due process clause'" such that counsel is required under state law in every termination case. *J.B.*, 170 So. 3d at 790 (*quoting M.E.K. v. R.L.K.,* 921 So. 2d 787, 790 (Fla. 5th DCA 2006)). Recognizing that where the Florida State Constitution had been held to afford a right to counsel, that right necessarily meant the right to effective counsel, the Florida Supreme Court, in 2015, devised a framework for

ineffective assistance of counsel claims at the trial court level, which was later codified in Florida Rule of Juvenile Procedure 8.525.

In light of "the important interest that the child has in reaching permanency" due to the delay caused by litigation of such claims, the Florida Supreme Court concluded any process provided for ineffective assistance of counsel claims "must proceed within a strictly limited time frame"— a mere twenty days after judgment for ineffective assistance of counsel at the trial court level—and will be judged at a more exacting standard than that used in criminal cases. *J.B.*, 170 So. 3d. at 792-93, 795.

Petitioner here waited two full years to assert a denial of a right to effective assistance of appellate counsel. While a process for any right to effective assistance of counsel on appeal that may exist in Florida was not addressed in *J.B.*, whether the alleged ineffectiveness concerns trial or appellate counsel, under *Lehman* and Florida's state law and policy it is uncontestable that any procedures must take the need for permanency and finality into consideration.

Again, the Petitioner waited a full two years from the date of the mandate in his direct appeal to bring his claim of alleged ineffective assistance of appellate counsel to the appellate court's attention. However, the alleged ineffective assistance was known to the Petitioner even earlier—during the appellate briefing where he raised the very issue he believes counsel was ineffective for not arguing. The Petitioner provides no justification for this extensive delay in bringing a claim he was

acutely aware of at the time it occurred in 2017, while his daughter remained in the care of her adoptive parents.

This case has been pending since the child's shelter two days after her birth in September 2014. The Petitioner's parental rights were validly terminated in 2016 and upheld on appeal in 2017. The child is now more than 5.5 years old, and the entirety of those 5.5 years have been spent in litigation concerning the Petitioner's parental rights. The utter lack of a federal question compels this Court to deny jurisdiction, particularly in light of his unreasonable delay in bringing this claim.

Petitioner's arguments presenting nothing more than state law questions. The GAL cannot dispute here that the Second District Court of Appeal's reliance on Florida Rule of Appellate Procedure 9.141 to dismiss the petitioner's habeas petition was erroneous. That rule, which the Petitioner bears responsibility for raising with the Second District Court of Appeal in the first place, explicitly and exclusively pertains to criminal appeals, which this case is not. The Rule thus could not properly be a basis for the dismissal of the Petitioner's habeas petition arising out of ineffective assistance of appellate counsel in a dependency matter.

However, this error standing alone is not enough confer jurisdiction on this Court, as the case raises no federal question, let alone one decided by or integral to the court's decision below, and presents nothing more than mere error correction for decision that would be little more than futile given the applicable Florida law that otherwise requires dismissal of his habeas petition.

While the claim underlying the Petitioner's habeas petition concerns the effective assistance of appointed counsel, the Petitioner has never asserted he is or has been found to be entitled to appellate counsel under the federal constitution. Not once in his habeas petition to the DCA did he seek a determination that the individual circumstances of his case entitled him to appellate counsel under the Fourteenth Amendment. *See Lassiter*, 452 U.S. at 31-32. The only right to counsel he asserted in his petition derived from Florida state law.

And pursuant to Florida law, which has recognized that "'[i]n the area of termination of parental rights, the Florida due process clause provides higher due process standards than the federal due process clause,'" the Petitioner was appointed counsel for the duration of the dependency, termination, and related appellate proceedings below. *See J.B.,* 170 So. 3d at 790 (*quoting, M.E.K. v. R.L.K.,* 921 So. 2d 787, 789-90 (Fla. 5th DCA 2006))

Thus, even assuming, without conceding, there is some federal constitutional dimension to the Petitioner's entitlement to counsel, that issue is not properly before this Court as it was not raised below, the Second District Court of Appeal did not decide that issue, and resolution of the allegedly federal issue was not necessary to the lower court's dismissal of the habeas petition purely on state law grounds. *De Saussure v. Gaillard*, 127 U.S. 216, 8 S. Ct. 1053 (U.S. 1888) ("it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to

the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.").

Nor does the lower court's dismissal of the petition on an incorrect state law basis create a federal due process deprivation. The Fourteenth Amendment's due process guarantee does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error . . . ." *Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106, 40 S. Ct. 306 (1920). "Mere errors of state law are not the concern of this Court . . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." *Wainwright v. Goode*, 464 U.S. 78, 86, 104 S. Ct. 378, 383 (1983); *see also, Gryger v. Burke*, 334 U.S. 728, 731, 68 S. Ct. 1256, 1258 (1948). Again, here, the Petitioner has never alleged a federal right to counsel in this case under *Lassiter,* so the dismissal of his petition, even on an erroneous basis, cannot be said to rise to "the level of a denial of rights protected by the United States Constitution." *Wainwright*, 464 U.S. at 86, 104 S. Ct. at 383.

Furthermore the Petitioner in fact received counsel throughout the dependency proceeding and appeal until appellate counsel withdrew pursuant to Florida law, having found no meritorious argument to raise on appeal. The Petitioner then asserted in his pro se brief the very issue he believes counsel was deficient for not raising in his appeal, and after responses on the merits of that argument from the GAL Program and the Florida Department of Children and Families in their answer briefs, the Second District Court of Appeal affirmed the termination order on

the merits. Thus, even had the Petitioner's petition gone forward, he would categorically have been unable to meet the high standard for relief on a claim ineffective assistance of counsel, where the alleged error of omission was raised, responded to, and ruled upon unfavorably on the merits below. *J.B.*, 170 So. 3d at 792 (To "obtain relief from a TPR order, a parent must . . . establish that, cumulatively, this deficient representation so prejudiced the outcome of the TPR proceeding that *but for counsel's deficient representation the parent's rights would not have been terminated.*") (Emphasis added.). The Petitioner has therefore failed to identify any federal question or question of great importance that would warrant the exercise of this Court's discretionary jurisdiction, particularly in light of the Petitioner's delay in asserting these claims within the time-sensitive nature of this case.

B. <u>Florida's statute of repose bars collateral attacks more than one year after judgment:</u>

Finally, Florida state law provides a separate procedural bar to this belated attack on the validity of the termination order. From the Petition it is clear the Petitioner is ultimately seeking to undo the order terminating his parental rights, entered more than 3.5 years ago, by claiming he was not afforded effective assistance of counsel during his appeal and had counsel been effective, the termination order would have been reversed. But, even if that were true, at this juncture, any court hearing his petition would be constrained to deny it under FLA. STAT. § 63.182(1), (2019).

Section 63.182(1) provides, in relevant part: ". . . an action or proceeding of any kind to vacate, set aside, or otherwise nullify a judgment of adoption or an underlying judgment terminating parental rights on any ground may not be filed more than 1 year after entry of the judgment terminating parental rights." This statute represents the sound discretion of the Florida legislature and state public policy to ensure finality in termination of parental rights and adoption. *See, United States v. Olano,* 507 U.S. 725, 731, 113 S. Ct. 1770, 1776 (1993) (("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'") (*quoting Yakus v. United States*, 321 U.S. 414, 444, 88 L. Ed. 834, 64 S. Ct. 660 (1944)). And its application prevents precisely what has occurred here—years of litigation after termination of parental rights, continually calling the child's permanency into question. *See Lehman*, 458 U.S. at 513-14, 102 S. Ct. at 3238 ("There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.").

Here there is no dispute that the Petitioner filed the instant action in an attempt to undo the mandate finalizing the termination of his parental rights more than one year after the judgment was entered—indeed the entirety of the Petitioner's claim is that his petition was filed exactly two years after the mandate issued. Thus, the Petitioner's habeas petition was barred on its face, and the Second District Court

of Appeal was correct in summarily dismissing it, albeit for the wrong reason. *See, J. E. Riley Inv. Co. v. Comm'r*, 311 U.S. 55, 59, 61 S. Ct. 95, 97 (1940) ("Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action.").

CONCLUSION

The Petitioner has failed to establish a basis for this Court to exercise its discretionary jurisdiction. The matter may be entirely disposed of on state law grounds, and the lower court was correct to dismiss the Petitioner's petition for writ of habeas corpus, albeit for the wrong reason. Additionally, no federal question was raised or passed upon by the appellate court below, and the Petitioner has not demonstrated a federal right is now, or has ever been, at issue. Accordingly, given the entirety of the circumstances of this case and the lack of a substantive federal issue, the GAL Program respectfully requests this Honorable Court decline to accept jurisdiction for the Petition for Writ of Certiorari.

(Signatures appear on following page.)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief in Opposition has been filed electronically with this Court, this 24th of April 2020, and will be mailed to the parties in accordance with United States Supreme Court Rule 29.3 as follows:

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