

No.
In The
Supreme Court of the United States

N.M., MOTHER OF A.J., C.M.
AND S.M., CHILDREN,
Petitioner,
v.

DEPARTMENT OF CHILDREN AND FAMILIES,
Respondent.

On Petition For A Writ Of Certiorari To The
Florida Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment and Fourteenth Amendment guarantee of Due Process of Law was violated when the State of Florida terminated the parental-rights of petitioner, when there was no clear and convincing evidence provided by the State in support of a termination of those rights.
2. Whether Florida Statutes §§ 39; 827, are unconstitutional with respect to the lack of Due Process of Law afforded to a marital-partner, where no showing of clear and convincing evidence of child abuse is required in order to terminate the parental-rights of the parent who did not commit the alleged abuse.

PARTIES TO THE PROCEEDING

The original parties to this case were the State of Florida, by and through the Department of Children and Families (previously Petitioner/Appellee), against Natalie Morris (previously Respondent/Appellant). Rule 14.1(b) of the Supreme Court Rules.

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED.....	I
PARTIES TO THE PROCEEDING.....	II
TABLE OF CONTENTS.....	III
APPENDIX.....	V
TABLE OF AUTHORITIES.....	VII
DECISIONS BELOW.....	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	10
I. Review is necessary for this court to determine whether the petitioner's guarantees within the fourteenth and fifth amendment of due process of law, as well as the fundamental liberty interest to parent, require that the court find a nexus between the alleged child abuse and the termination of the parental rights.	
II. Due process requires at least clear and convincing evidence before the termination of parental rights of	

the natural parents, who poses a fundamental liberty
interest in the care, custody, and maintenance of their
children.....15

III. The Florida Statute applied to the Petitioner
should be found void for vagueness, due to the
arbitrary and indefinite deprivation of the Petitioner's
substantive due process
rights.....19

CONCLUSION.....28

APPENDIX

Appendix A: Opinion in the District Court of Appeal of the State of Florida, Fifth District (Dated April 9, 2015).....	App. 1
Appendix B: Final Judgement Regarding Petition for Termination of Parental Rights and Determination of Dependency in the Circuit Court of the Fifth Judicial Circuit in and for Hernando County, Florida (Dated March 29, 2017).....	App. 3
Appendix C: Order Denying Motion for Rehearing, Issuance of a Written Opinion, and Certification in the District Court of Appeal of the State of Florida, Fifth District (Dated September 27, 2017).....	App. 29
Appendix D: U.S. Const. Amend. V.....	App. 31
U.S. Const. Amend. XIV.....	App. 32
Fla. Stat. 39.01.....	App. 34
Fla. Stat. 39.001.....	App. 35
Fla. Stat. 827.03.....	App. 39
Appendix E: Appellant's Initial Brief in the District Court of Appeal of the State of Florida, Fifth District (Dated June 14, 2017).....	App. 43
Appendix F: Appellant's Initial Brief in the District Court of Appeal of the State of Florida, Fifth District (Dated August 14, 2017).....	App. 75

Appendix G: Motion for Rehearing, Issuance of a Written Opinion, and Certification of Conflict Pursuant to Rule 9.330(a) in the District Court of Appeal of the State of Florida, Fifth District (Dated August 28, 2017).....	App. 87
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TABLE OF AUTHORITIES

CASES	Page(s)
<u>A.H. v. Florida Dep't of Children and Family Servs.</u> , 85 So.3d 1213 (Fla. 1st DCA 2012).....	16
<u>Cruzan by Cruzan v. Director, Miss. Dept. of Health</u> , 497 U.S. 261 (1990).....	15
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972).....	<i>passim</i>
<u>Kolender v. Lawson</u> , 461 U.S. 352 (1983).....	20,21
<u>Lassiter v. Department of Soc. Serv.</u> , 452 U.S. 18 (1981).....	15
<u>M.L.B. v. S.L.J.</u> , 519 U.S. 102 (1996).....	15
<u>N.L. v. Dep't of Children and Family Servs.</u> , 843 So.2d 996 (Fla. 1st DCA 2003).....	16
<u>R.S. v. Department of Children & Families</u> , 831 So.2d 1275 (Fla. 4th DCA 2002).....	25,26
<u>Rochin v. California</u> , 3472 U.S. 165 (1952).....	17
<u>S.P. v. Department of Children & Families</u> , 866 So.2d 1253 (Fla. 5th DCA 2004).....	25
<u>Santosky v. Kramer</u> , 455 U.S. 745 (1982).....	10,11,15
<u>Troxel v. Granville</u> , 530 U.S. 57 (2000).....	11

In Interest of J.A.T.,
590 So.2d 524 (Fla. 2d DCA 1991).....15

In A.R. v. Department of Children & Families,
784 So.2d 622 (Fla. 5th DCA 2001).....25

In re C.R., 937 So.2d 1257 (Fla. 2d DCA 2006).....24

In re D.A.D. II,
903 So.2d 1034 (Fla. 2d DCA 2005).....16

In re D.W., 793 So.2d 39 (Fla. 2d DCA 2001).....12,13

In re J.A.H., 876 So.2d 647 (Fla. 2d DCA 2004).....24

In re L.C.,
947 So.2d 1240 (Fla. Dist. Ct. app. 2007).....23,24

In re R.W., 495 So.2d 133 (Fla. S.Ct. 1986).....15

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. V.....i,2,10,11,15,28

U.S. Const. Amend XIV.....i,2,10,11,15,28

Fla. Stat. § 39.01(30)(j).....*passim*

Fla. Stat. § 39.001.....i,2

Fla. Stat. § 827.03.....i,2

PETITION FOR WRIT OF CERTIORARI

Petitioner, Natalie Morris, respectfully prays that a writ of certiorari be issued to review the judgment of the Circuit Court of the Fifth Judicial Circuit in and for Hernando county, Florida Juvenile Division entered in the above-entitled case on March 29, 2017.

DECISIONS BELOW

The August 15, 2017 opinion of the Florida Fifth District Court of Appeal, whose judgment is herein sought to be reviewed, is not reported, and is reprinted in the separate Appendix to this Petition, page App. 1.

Because the Florida Fifth District Court of Appeal issued a per curiam affirmed decision without written opinion, it is the court of last resort in the State of Florida.

STATEMENT OF JURISDICTION

The decision of the Circuit Court of the Florida Fifth District Court of Appeal to be reviewed was entered August 15, 2017. The instant Petition is filed within 90 days of the date of decision and within 30-days of an extension granted by this Court. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

**CONSTITUTIONAL PROVISIONS,
TREATIES, STATUTES, RULES
AND REGULATIONS INVOLVED¹**

U.S. Const. Amend. V

U.S. Const. Amend XIV

Fla. Stat. § 39.01(30)(j)

Fla. Stat. § 39..001

Fla. Stat. § 827.03

STATEMENT OF THE CASE

Natalie Morris' parental rights were terminated on March 29, 2017 following the Final Judgement by the Circuit Court of the Fifth Judicial Circuit, in and for Hernando county, Florida. The Department of Children and Families began an investigation into Natalie Morris (hereinafter, "Petitioner") and her husband, James Morris, on August 9, 2016, following a report of alleged child abuse. The two parents brought their six (6) week old baby, [REDACTED] [REDACTED] (hereinafter, "S.M."), to the hospital on August 9, 2016 after the baby had spent the weekend crying and not allowing the parents to

¹ Aforementioned provisions are reproduced in the appendix.

touch his leg. Upon arriving to the hospital S.M. was seen by doctors and diagnosed with two fractures in his right leg and a fractured tibia. (The Father was taken in for questioning by investigators on August 22, 2016 due to the nature of S.M.'s injuries. During his questioning the father admitted to police that he believed S.M. hated him and sometimes he got angry with the baby. The father indicated that on one occasion he may have been too rough while he was changing the baby and believed that he twisted his leg. The father was arrested following his questioning with police. A shelter hearing was held on August 24, 2016, at which time all three of the Petitioner's children were placed with her maternal aunt.

A Petition for Dependency was filed by the State of Florida on September 12, 2016. Within the petition for dependency the State alleged that all three of Petitioner's children are at a substantial risk of being abused as defined under Florida Statutes §§ 39.01(2); (30)(a). The Petitioner told police that she was never aware of any harm done to S.M. or any of her children and she was in utter disbelief that her husband could harm their kids. (CITE). Nonetheless, the State alleged that Petitioner abused her child because she failed to seek timely and appropriate medical care for the serious health problem. The State based its argument on the fact that the Petitioner was aware that S.M. was favoring his right leg on August 5, 2016 and she did not make any effort to see a doctor until August 8, 2016. Further, the State argued that the Petitioner negligently failed to protect the children

from physical or mental injury caused by the acts of another under the Florida Statutes §§ 39.01(30)(j); 39.01(2).

Previously, the Petitioner filed a motion for order to show cause and motion to dismiss on January 4, 2017 pursuant to Florida Rule of Juvenile Procedure 8.240(d)(4)(B). In this motion the Petitioner indicated that all three of her children were sheltered on August 24, 2016 and the children had not been adjudicated dependent and remained in the shelter status. The Petitioner argued that pursuant to Florida Statute § 39.507, which states that the adjudicatory hearing shall be held as soon as practicable after the petition for dependency is filed and in accordance with the Florida Rules of Juvenile Procedure, but no later than thirty days after the arraignment. Florida Statute § 39.402(13) states that a child may not be held in shelter under an order so directing for more than sixty days without an adjudication of dependency. At the time that Petitioner filed this motion the children had been held in shelter status for one-hundred thirty-three (133) days.

The State filed a Verified Expedited Petition for Involuntary Termination of the Parent's Parental Rights on January 6, 2017. Within this petition the State indicated the grounds for terminating a mother's parental rights to be: 1) mother has engaged in and/or failed to prevent egregious conduct; 2) continuing the parent-child relationship threatens the safety of the children. With respect to the first grounds the State

alleged that the Petitioner's actions were egregious because she works as a nurse and did not take S.M. to the hospital until five days after first noticing he was fussier. Further, the State alleged that the Petitioner is aware that the father has issues controlling his anger, the Petitioner is aware that the father gets frustrated with the baby when he cries, and the Petitioner has repeatedly reprimanded the father for being too rough with the baby. The State also alleged that the Petitioner was aware of a previous injury to S.M.'s eye allegedly caused by the father. However, there was never a report of this incident and no actual proof that S.M. had been injured. The State also argued that the Petitioner's actions were egregious, because even after the father confessed to willfully and repeatedly injuring the child, the Petitioner refused to acknowledge that it is possible that the father injured the child. The State's second argument relied on the exact same presumptions as the first.

The State concluded by arguing that the termination of the parental-rights was in the manifest best interest of the children and was the least restrictive means possible. The State argued pursuant to Fla. Stat. § 39.810(1)-(11), it is in the manifest best interest of the child for the parents' rights to be terminated. The state alleged: "The parents do not have the capacity to care for the children to the extent that the children's safety, well-being, and physical, mental, and emotional health will not be endangered upon his return home. The father currently has court ordered no contact with the children due to the

injuries he inflicted upon S.M. at just one month of age. He does not have the capacity to safely care for the children. The State argued: the Petitioner, who is a nurse, failed to seek medical attention for S.M.'s broken/fractured legs even though he had been screaming in pain for days. She does not have the capacity to safely care for the children."

The Petitioner's trial took place on February 7, 2017 and the father's trial took place on February 22, 2017. Following the Petitioner's trial all parties were required to submit closing arguments by written brief. In its closing argument the State argued that there was egregious abuse in this case, and the Petitioner's actions engaged in and/or failed to prevent the egregious conduct committed by the father. In her closing argument, the Petitioner argued that the department has failed to prove by clear and convincing evidence the grounds that they have alleged in their petition for termination of parental rights of her minor child. Similarly, the Department failed to prove by a preponderance of the evidence that the mother has abused the minor child, or that the child is at any risk of abuse. Despite arguing that the State had failed to prove clear and convincing evidence that she was aware of the abuse and had done nothing to prevent it, the court still terminated Petitioner's parental-rights.

The court issued a final judgement regarding the petition for termination of parental rights and determination of dependency on March 29, 2017

following the trials. The court held “[h]aving heard and considered the testimony of the witnesses, having reviewed the court file, having reviewed certain testimony (including but not limited to the police interview of the father (James Morris), after the adjudicatory hearing, having considered each party’s written closing argument, and otherwise being fully advised in the premises, does enter the following final judgement. As set forth in this final judgement, the court hereby terminates the parental rights of the mother and father as to the children known as [REDACTED] (C.M.) and [REDACTED] (S.M.) and finds the minor child [REDACTED] (A.J.) to be a dependent child.”

The final judgement by the court was entered on March 29, 2017. The Petitioner appealed the judgement by the court on June 14, 2017. (App. 43) The Petitioner appealed to the Fifth District Court of Appeals, for the State of Florida. The Petitioner raised six issues on appeal:

- 1) The trial court abused its discretion when finding that the department proved by clear and convincing evidence that the mother had the opportunity and capability to prevent the injuries and knowingly failed to prevent the injuries to the minor child, S.M.;
- 2) The trial court abused its discretion when finding that the department proved by clear and convincing evidence that the

mother engaged in conduct toward the child(ren) that demonstrates that the continuing involvement of the other in the parent-child relationship threatens the life, safety, wellbeing, or physical, mental, or emotional health of the child(ren) irrespective of the provision of services;

3) The trial court erred as a matter of law when finding that a nexus of harm was not required.

4) The trial court erred when finding that the department did not have to prove that termination of the mother's parental rights were the least restrictive means of protection the children;

5) The trial court abused its discretion when finding that the department proved by clear and convincing evidence that termination of parental rights was in the best interest of the minor children;

6) The trial court abused its discretion when finding that the department proved by a preponderance of the evidence that the child, A.J. is at substantial risk of imminent abuse, abandonment, or neglect by the mother.

(App. 43)

The Florida Fifth district court of appeals issued an opinion on August 15, 2017 of per curium

affirmed. The Petitioner filed a motion for a rehearing on August 28, 2017, which was denied. (App. 87).

The Petitioner further argued that the evidence on record, as well as the lack of evidence presented by the State does not support the decision reached by the trial court. (App. 87). The Petitioner argued that at the very least the cases cited by the trial court and the State show that conflicts exists with the court's prior decisions and the First, Second, and Fourth District Court's decisions in similar cases. (App. 87). Petitioner raised the argument that the issues in this matter concerns weighty constitutional issues of fundamental liberty interests that not only affects all parents similarly situated, but also the children who are similarly situated.

Despite the court order, the Petitioner was deemed to be a danger to her children if she remained in their lives, she has continued to perform her motherly duties to the best of her ability. Her children still know her to be their mother and she still cares for them on a regular basis. No evidence was presented that the mother/child relationship has lessened or been compromised in any way, despite the children having been placed by the court with the maternal aunt.

The Petitioner's motion for rehearing was denied by the Florida Fifth District Court of Appeal. Because the same court affirmed the trial court judgment without a written opinion, under Florida

law further review cannot be pursued to the Florida Supreme Court, rendering the Fifth District Court of Appeal the court of last resort.

This timely Petition follows.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY FOR THIS COURT TO DETERMINE WHETHER THE PETITIONER'S GUARANTEES UNDER THE FOURTEENTH AND FIFTH AMENDMENT DUE PROCESS OF LAW, AS WELL AS THE FUNDAMENTAL LIBERTY INTEREST TO PARENT, REQUIRE THAT THE COURT FIND A NEXUS BETWEEN THE ALLEGED CHILD ABUSE AND THE TERMINATION OF THE PARENTAL RIGHTS

In this case, the Circuit Court terminated the Petitioner's parental-rights despite the State's failure to make a showing of clear and convincing evidence indicating that the Petitioner was involved in the alleged egregious conduct against the infant child. The argument put forth by the State was weak, conclusory, and failed to meet the standard required by this Court to make a valid showing for termination of parental rights.

In Santosky v. Kramer, this Court held that the natural parents of a child have a fundamental liberty

interest in the care, custody, and management of their child. 455 U.S. 745, 754 (1982). This Court further indicated that this fundamental liberty “does not evaporate simply because they have not been model parents or have lost temporary custody of their child[ren] to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, *persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.*” *Id.* (emphasis added). Furthermore, this Court ruled “when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. *Id.* When proceeding with the termination of parental rights, a balance is required between the private interest of the parents and the interest of the state. *Id.* at 755. Specifically, the minimum standard of proof tolerated by Due Process requirements is the standard of clear and convincing evidence. *Id.* at 770.

In Troxel v. Granville, this Court held that the Due Process clause of both the Fourteenth and Fifth Amendments protect the fundamental right of parents to make decision as to the care, custody and control of their children. 530 U.S. 57 (2000). Notably this court held in Troxel “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state

judge believes a 'better' decision could be made." Id. at 73.

This Court set the precedent to be followed for the necessary proof required to meet the Due Process requirements in the termination of parental rights. In deciding this standard, this Court acknowledge the incredible impact and far reaching consequences that may result from intruding into the private lives and fundamental liberties of parents. For this reason, Petitioner urges this Court to consider her petition for writ of certiorari, where her fundamental liberty has been terminated despite a lack of any clear and convincing evidence.

Similar to the case now before the Court, in In re D.W., the District Court of Appeals of Florida held that termination of parental rights based on a single incident was premature. 793 So.2d 39 (Fla. 2d DCA 2001). The mother in D.W. appealed the final order terminating her parental rights to her three children. The Department of Children and Families (hereinafter, "DCF") filed a petition to terminate parental rights after the mother was seen in the store committing the following:

mistreating her baby by knocking over the baby's stroller, causing the baby to fall on the floor, swinging the baby around by one arm as if she were a 'rag doll,' shaking her, slamming her onto the hood of a car, and placing her on the hot pavement in the parking lot. . . also

observed slapping her two-year-old son
and knocking him into a glass door.

Id. Notably, DCF filled a petition to terminate the father's parental rights, which was summarily denied by the court without further consideration.

The trial court terminated the mother's parental rights under Florida Statutes § 39.806. The entire basis for terminating the mother's right was on the one incident at the store. Id. On appeal, the court found that DCF did not prove that termination was the only option to protect the children and the mother was never given the opportunity to establish she could safely maintain a relationship with her children on a limited basis. Id. The trial courts decision was reversed on appeal.

Like In re D.W., the case now before the Court also came out of Florida, under the same statute, and occurred as a one-time instance. However, unlike D.W., the Petitioner before the Court is not the alleged abuser, but rather the marital spouse who was unaware of the abuse.

Relying on the decision in D.W., the Petitioner argues that the facts do not support the position reached by the court below. Unlike the defendant in D.W. no nexus was shown between the injuries sustained by S.M. and the involvement of the Petitioner in this case. Here, however, the court did terminate parental-rights of both parents based on assumptions and without any clear and convincing

evidence of abuse or failure to act by the Petitioner. This action by the court violated the Petitioner's Due Process rights.

The Petitioner is now at the point where she has lost her case and her children. Already suspicious of the court system, she now must rely on another court to try and undo the damage caused to her family. The Petitioner is faced with the reality that her last chance of being a parent to her children is by pleading to this Court.

The Petitioner's parental rights were terminated based upon a Florida statute which essentially criminalizes the behavior of a parent who fails to act to prevent any physical, mental, or sexual harm against their child. However, the Petitioner argues herein that not only was her right to Due Process violated, but also the statute she was charged under is unconstitutionally vague. The State provided little to no evidence in this case indicating that the Petitioner was involved or aware in anyway of the injuries caused to her child. The State's main argument was that the Petitioner waited five days before taking her fussy baby to the hospital. The State then faulted the mother for requesting an x-ray once at the hospital. In the entirety of the case before the trial court, the evidence indicated that there was no history of physical, mental, or sexual abuse committed against any of the children; the infant child had no signs of a serious injury warranting rushing him to the hospital; and the Petitioner was genuinely shocked

and upset upon discovering the injuries that had occurred to her child.

The Petitioner prays for relief from this Court.

II. DUE PROCESS REQUIRES AT LEAST CLEAR AND CONVINCING EVIDENCE BEFORE THE TERMINATION OF PARENTAL RIGHTS OF THE NATURAL PARENTS, WHO POSSESS A FUNDAMENTAL LIBERTY INTEREST IN THE CARE, CUSTODY, AND MAINTENANCE OF THEIR CHILDREN

This Court has ruled that natural parents have a fundamental right and fundamental liberty interest in the care, custody, and maintenance of their children which is protected by the Due Process Clause of the Fourteenth and Fifth Amendments. See Santosky v. Kramer, 455 U.S. 745, 753 (1982); see also Lassiter v. Department of Soc. Serv., 452 U.S. 18 (1981); M.L.B. v. S.L.J., 519 U.S. 102 (1996); Cruzan by Cruzan v. Director, Miss. Dept. of Health, 497 U.S. 261 (1990); In Interest of J.A.T., 590 So.2d 524 (Fla. 2d DCA 1991); In re R.W., 495 So.2d 133 (Fla. S.Ct. 1986). Substantive Due Process guarantees under the Fourteenth and Fifth Amendments protect individuals from arbitrary deprivation of their liberty by government. County of Sacramento v. Lewis, 523 U.S. 833 (1998). The Court has repeatedly “spoken of the cognizable level of executive abuse of power as that which shocks the conscience.” Id. at 846. “[O]nly the

most egregious official conduct can be said to be arbitrary in a constitutional sense.” Id. (internal quotations and citation omitted). Such conduct can be shown by “conduct intended to injure in some way unjustifiable by any government interest.” Id. at 849. It is not enough to allege conscience shocking action, instead a petitioner must show that the government has deprived them of life, liberty, or property in such a way that shocks the conscience or interferes with rights implicit in concept of ordered liberty. Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998). Any one act by a parent, considered in isolation, may not rise to the level of egregious conduct so as to warrant termination of parental rights. See A.H. v. Florida Dep’t of Children and Family Servs., 85 So.3d 1213 (Fla. 1st DCA 2012); N.L v/ Dep’t of Children and Family Servs., 843 So.2d 996 (Fla 1st DCA 2003); In re D.A.D. II, 903 So.2d 1034 (Fla. 2d DCA 2005).

This case was built entirely on one isolated incident that resulted in an injury to the infant child while petitioner was working. The Petitioner testified at her trial and the evidence supported her that there has never been an incident of abuse in the past. Similarly, she testified that she was not home nor did she have any reason to believe her child had been abused. It is without question that the government has a justifiable interest in the care and safety of children; however, that does not justify the deprivation of fundamental liberties of parents who were unaware, uninvolved, and unable to prevent

harm to their children. The State set forth a case against the Petitioner which failed to provide by and clear and convincing evidence that she was aware of any egregious conduct against her child. Nevertheless, the lower courts made a subjective determination under the facts and arbitrarily deprived the Petitioner of her parental-rights to all three of her children.

As this Court ruled in Nunez v. City of Los Angeles, it is not enough that the Petitioner here alleges conscience shocking action, she must show it occurred. For this reason, it is necessary that this Court look at the whole course of proceedings to ascertain whether the Petitioner's Due Process guarantees have been violated. See Rochin v. California, 3472 U.S. 165 (1952). Relying on this Court's ruling in Rochin, the Due Process clause of the Fourteenth Amendment does not allow for a state's conviction to be brought about by methods that offend a sense of justice. Id. at 173. The Due Process clause gives this court the power to nullify any state law which "shocks the conscience, offends a sense of justice, or runs counter to the decencies of civilized conduct," when it is applied by the state. Id.

Here, the Petitioner urges this Court to find that her Due Process rights have been violated; arguing that the termination of her parental rights to her three children clearly shocks the conscience of normal human decency. As stated above, no evidence was offered by the state indicating that the Petitioner was aware or should have been aware that her

husband had injured her child. Further, absolutely no history of abuse towards any of the Petitioner's three children was offered, yet, the lower court terminated her parental rights to all of her children. Finally, the State conclusively argued that the Petitioner knew that her husband had an anger problem, and for that reason it is axiomatic that she failed to protect her children from abuse.

Under the arguments put forth by the State: The Petitioner was either aware of the abuse against her infant child and allowed it to happen; or she simply should have known that it was possible for her husband to abuse her child, despite no history of abuse, simply because he can get angry. These types of conclusory arguments put the Petitioner in a situation where no matter what she knew or the evidence before the court she was unable to ever offer a legitimate defense on her behalf. As a result, the Petitioner's parental rights to all three of her children was terminated. Furthermore, no clear nexus was ever shown indicating that the injuries sustained by S.M. were the result of the Petitioner's actions, or failure to act. This is a clear violation of her Due Process rights and should be found to be an unjustifiable abuse of discretion by the state and the court.

III. THE FLORIDA STATUTE
APPLIED TO THE PETITIONER
SHOULD BE FOUND VOID FOR
VAGUENESS, DUE TO THE
ARBITRARY AND INDEFINITE
DEPRIVATION OF THE
PETITIONER'S SUBSTANTIVE DUE
PROCESS RIGHTS

It is a basic principle of the Fourteenth Amendment of the United States Constitution and Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined. U.S.C.A. Const. Amend. 14. Vagueness attacks are made most often in a criminal context, yet this Court held that 'civil statutes' are susceptible to vagueness challenges as well. See A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925). This Court previously decided in Grayned v. City of Rockford, 408 U.S. 104 (1972) that vague laws offend several important values:

First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those

who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.

Grayned, 408 U.S. at 109.

Further, this Court previously held that under the void for vagueness doctrine, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner, that **does not encourage arbitrary and discriminatory enforcement**." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (emphasis added). The void for vagueness adopted by this Court reviews the two elements of actual notice and arbitrary enforcement. Id. However, the arbitrary enforcement is viewed as the more essential element in preventing the inherent harms associated with a vague statute. Id. at 358. Nevertheless, even if an enactment is found to be clear

and precise the Court may still find it to be overbroad if in its reach it prohibits constitutional protected conduct. Grayned, 408 U.S. at 109.

The District Court of the Virgin Islands addressed a similar statute to the present one in the case Government of Virgin Islands v. Ayala, 853 F.Supp. 160 (D.V.I. 1993). The statute in Ayala known as Title 14, Virgin Islands Code, Section 505 stated:

Any person ... who knowingly or recklessly causes a child to be placed in a situation where it is reasonably foreseeable that a child may suffer ... mental or emotional injury ... shall be punished by a fine of not less than \$500, or by imprisonment of not more than 20 years or both.

Ayala, 853 F. Supp at 162. The District Court relied on this Court's decision in Kolender in finding that the child abuse statute the defendant was charged with was unconstitutionally vague.

The court ruled that section 505 was unconstitutionally vague, because the statute encompassed any degree of risk, and of injury, **no matter how de minimis**, the statute provided law enforcement with an unacceptable level of discretion. Id. (emphasis added) (citing Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, 18 (S.D.Iowa 1975) finding that phrase "conduct . . . detrimental to

the physical health or morals of the child” unconstitutionally allows officials to “subjectively determine . . . what parental conduct is detrimental.”). The court ruled that section 505 created a broad sweep of actions for which no interpretational escape exists. Further, the court held “the terms ‘mental or emotional injury,’ in contrast to the term ‘physical injury,’ are inherently abstract and fraught with ambiguity.” *Id.* Ultimately, section 505 was invalidated for unconstitutional vagueness due to the potential danger of arbitrary enforcement and the unrestricted license afforded to law enforcement to intervene in the family sphere under the protection of the statute.

Applying the same analysis the District Court in Ayala followed, it should be ruled that Florida Statute § 39.01(30)(j) is unconstitutionally vague. As stated previously, the plain language of section 39.01(30)(j) states: “Harm to a child’s health or welfare can occur when any person: (j) negligently fails to protect a child in his or her care from inflicted physical, mental, or sexual injury caused by the acts of another.” Fla. Stat. § 39.01(30)(j).

Following the logical reasoning of the court above, the Petitioner argues that the plain language of section 39.01(30)(j) encompasses any and all actions against a child, even those which may be de minimis. Under this statute, law enforcement has been afforded an unrestricted license to intervene into the family sphere, and to effectively deem any subjective activity

to be considered harmful to a child's health. The Petitioner argues that she is not guilty of knowingly or negligently allowing her children to be abused; but rather, her conviction is the product of a poorly drafted statute adopted to encompass any offense against a child. In the present matter, the State failed to show by any clear and convincing evidence that the Petitioner was aware of the injuries sustained to her child. Instead, the State, absent of any proof, argued that the Petitioner's parental-rights should be violated because as a medical professional she failed to seek out immediate medical treatment for her son, and instead waited five days before going to the doctor.

Two separate cases have been decided in the Florida courts under the same statute applied here. First, the Florida courts held in In re L.C., two nexuses must be proved in a failure to protect case: "first, that the abuser's acts demonstrate the he or she will continue the abuse; and second, that the parent's behavior shows that he or she will continue failing to protect the child." 947 So.2d 1240, 1245 (Fla. Dist. Ct. app. 2007). The petition for dependency in L.C. alleged that the mother's parental rights should be terminated under Florida Statute section 39.01(30)(j) because both she and her husband engaged in domestic violence with each other and she frequently allowed her children to be left alone with the father, whom she knew to be violent. Id. at 1244. Further, she had no problem with leaving the children with the father in the future. Ultimately, the Florida court ruled that the evidence of past behavior of domestic

violence did not demonstrate that the parents would abuse the children in the future or that they would fail to protect them. Id. For these reasons, the court did not terminate their parental rights.

In In re C.R., the Florida Second District Court of Appeal considered whether a mother's parental rights should be terminated under Florida Statute section 39.01(30)(j), where the father injured the child's leg and DCF alleged that the mother negligently failed to protect the child. 937 So.2d 1257 (Fla. 2d DCA 2006). The court acknowledged that the case law with respect to the above-mentioned statute is mixed, but found that the Department must demonstrate that the parent who failed to protect knew or should have known that the abusive person was engaging in abuse. Id. at 1260. The court conducted a detailed review of the Florida case law indicating a clear divide among the courts: In In re J.A.H., 876 So.2d 647, 648 (Fla. 2d DCA 2004) the court concluded adjudication of dependency was proper where "competent, substantial evidence was presented that the mother knew of the grandfather's propensity to abuse the child but nonetheless permitted them to be together without direct and continuous supervision." In re C.R., 937 So.2d at 1261; In In A.B. v. Florida Department of Children & Family Services, 901 So.2d 324 (Fla. 3d DCA 2005), the court affirmed a finding of dependency as to the mother for failing to protect her teenage daughter from the stepfather's sexual abuse when the daughter had informed the mother of the situation and the mother's

response was to suggest prayer, fasting, and locking the bedroom door.” Id.; In In A.R. v. Department of Children & Families, 784 So.2d 622 (Fla. 5th DCA 2001) where the youngest child of three died of shaken baby syndrome while the mother was at work the court reversed dependency, stating:

The Department concedes that no evidence was presented that [the mother] knew or should have known that [the father] constituted a danger to [the baby] and that [the mother] failed to protect [the baby]. The Department was relegated to showing that [the other two children] were at substantial risk of imminent abuse, abandonment or neglect by the mother.

Id.; (A.R. at 623).

Next, in S.P. v. Department of Children & Families, 866 So.2d 1253 (Fla. 5th DCA 2004) the mother claimed she did not know her child sustained injuries which would be caused by a sharp instrument. Although the mother testified she knew of no way the child could have sustained the injuries, the court concluded that the abuse could not have occurred without the mother’s knowledge, and for that reason she failed to protect the child. Finally, the court referenced R.S. v. Department of Children & Families, 831 So.2d 1275 (Fla. 4th DCA 2002), a termination of parental rights case in which the court wrote:

In order for the father to have failed to protect, there must have been evidence that he had the capability to prevent the abuse. **This by necessity requires proof that he knew or should have known of the mother's conduct** [dropping their four-month-old child on his head and hitting him on the face with her hand] and resulting injury to [the child].

Id.; (R.S. at 1278)(emphasis added).

In the present matter now before the Court, and relying on the case law described herein, the Petitioner argues that Florida Statutes § 39.01(30)(j) is unconstitutionally vague and should be invalidated. Relying on this Court's decision in Grayned v. City of Rockford, the Petitioner argues that section 39.01(30)(j) does not provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited; the statute delegates a wide discretion to DCF and judges to make decisions on an ad hoc and subjective basis; and third, the statute infringes on lawful conduct, such as the fundamental right to raise one's children.

Petitioner's main argument is that section 39.01(30)(j) may lead, and has led, to arbitrary interpretations by the court and fails to adequately warn parents of what conduct is prohibited while also

giving judges unbridled subjective discretion. The plain language of the statute states: [(30) Harm to a child's health or welfare can occur when any person:] "Negligently fails to protect a child in his or her care from inflicted physical, mental, or sexual injury caused by the acts of another." Florida Statutes § 39.01(30)(j) (West). Petitioner argues that this language encompasses any and all forms of contact with a child, by any person, and punishes parents who may be unaware that the prohibited activity is even taking place. Further, the statute does not provide any specific standards that must be met in order for a parent to show that they have acted adequately to try and prevent harm to the child's health or welfare. Finally, this law, on its face, gives the court broad discretion to rule subjectively and discriminatorily.

Petitioner further argues that her Due Process right to life, liberty, and property, as well as her fundamental right to parent have been violated as a result of the vague statute. As this Court held in Grayned, a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Grayned, at 104. Petitioner argues that section 39.01(30)(j) fails to meet this requirement, because nowhere in the plain language of the law does it indicate that a spouse's parental rights may be violated for failure to protect the child where she was: unaware that abuse was taking place; there was no history of abuse which would lead her to suspect it was taking

place; and the one time abuse did not happen while she was present.

CONCLUSION

The fundamental liberty to raise and care for one's children is protected by the guarantees of the Fourteenth and Fifth Amendment right of Due Process. Termination of parental rights requires a showing by clear and convincing evidence that the parents were involved in egregious activity which threatened the mental, physical, and emotional wellbeing of the child. Without a showing of the foregoing, Due Process of law is merely rendered to be a meaningless phrase.

The facts and circumstances of this case show that the rules and requirements handed down by this Court have not been adhered to by the lower courts, and instead, the arbitrary and unjustifiable deprivation that was intended to be prevented is taking place. The time has come for this Court to step in and re-affirm the basic rule of law to promote uniformity of application and to instill confidence in a fair, impartial, and neutral court system.

For the reasons described herein, the Petitioner respectfully requests that this Court grant her petition for a writ of certiorari, and review the proceedings below.

Respectfully submitted on this 19th day of
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