
IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 24-0342

IN THE MATTER OF:

A.C.Y. JR.,

A Youth In Need Of Care.

ANDERS BRIEF

On Appeal from Montana's Thirteenth Judicial District Court,
Yellowstone County, The Honorable Jessica T. Fehr Presiding

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Issue1

Statement of the Case.....1

 Procedural History1

 Facts of the Case.....3

 Findings of the District Court.....18

Standards of Review18

Argument.....19

 1. Counsel for A.C.Y. should be permitted to withdraw from this cause in accordance with *Anders v. California* and Mont. Code Ann. §46-8-103.19

 2. A.C.Y. may assert the district court erred when it terminated his parental rights.21

 3. A.C.Y. may argue the district court committed plain error when it terminated his parental rights.....24

Conclusion24

Certificate of Compliance26

TABLE OF AUTHORITIES

Montana Constitution

Article II, Section 1720

Montana Code Annotated

Mont. Code Ann. §41-3-60922

Mont. Code Ann. §46-8-103 1, 20, 21

Montana Case Law

In re A.N.W., 2006 MT 42, 331 Mont. 208.....23

In re A.S., 2004 MT 62, 320 Mont. 268..... 19, 23

In re A.T. and J.T., 2003 MT 154, 316 Mont. 25522

In re B.J.J., 2019 MT 129, 396 Mont. 10824

In re C.B., 2019 MT 294, 398 Mont. 17623

In re C.J., 2010 MT 179, 357 Mont. 219.....23

In re C.M.C., 2009 MT 153, 350 Mont. 39122

In re C.S., 2020 MT 127, 400 Mont. 11523

In re D.B. and D.B., 2007 MT 246, 339 Mont. 24022

In re I.M., 2018 MT 61, 391 Mont. 4219

In re J.S.W., 2013 MT 34, 369 Mont. 1224

In re K.A., 2016 MT 27, 382 Mont. 165, 36519

In re K.B., 2019 MT 73, 395 Mont. 21318

In re M.K.S., 2015 MT 146, 379 Mont. 29319

In re O.A.W., 2007 MT 13, 335 Mont. 30419

In re R.K., 2023 MT 161, 413 Mont. 18418

Schmill v. Liberty Northwest Ins. Corp., 2003 MT 80, 315 Mont. 51.....19

State v. Daniels, 2003 MT 247, 317 Mont. 331.....19

U.S. Constitution

Fourteenth Amendment 20, 23

Federal Case Law

Anders v. California, 386 U.S. 738 (1967)..... 1, 20, 21

Penson v. Ohio, 488 U.S. 75, 81–82 (1988).....21

STATEMENT OF THE ISSUE

Whether, pursuant to the criteria set forth in *Anders v. California*, 386 U.S. 738 (1967) and Mont. Code Ann. §46-8-103, counsel for Appellant should be permitted to withdraw from this cause of action.

STATEMENT OF THE CASE

Father and Appellant A.C.Y. appeals the Order, entered May 6, 2024 by the Montana's Thirteenth Judicial District Court, Yellowstone County, terminating his parental rights to A.C.Y. Jr. (4 years old). (Appendix A) The child's birth mother K.Y. voluntarily relinquished her parental rights. (*Id.*)

Procedural History

The case originated November 13, 2019 when the Yellowstone County Attorney filed a Petition for Emergency Protective Services (EPS), Adjudication as Youth In Need of Care (YINC), and Temporary Legal Custody (TLC) on behalf of the Department of Health and Human Services (the Department) for A.C.Y. Jr., a newborn infant supported by the Affidavit of CPS Julie Peterson. (DC001, DC002) CPS Peterson advised the district court the child was not Native American and ICWA did not apply. (DC002) The district court granted EPS and set a show cause hearing. (DC005)

December 17, 2019 the district court held the show cause hearing. (DC015) Both parents stipulated to adjudication and EPS. (*Id.*) The district court adjudicated

A.C.Y. Jr. as YINC and awarded the Department TLC. (*Id.*) December 31, 2019 the district court entered its adjudication order. (DC015) January 13 2020 the Department filed a treatment plan for each parent, executed by the parent, the Department and the Court. (DC018, DC019) August 25, 2021, upon being advised the parents were in compliance with their treatment plans and “doing well,” the district court dismissed the action and ordered the case closed without objection. (DC047, DC048)

November 1, 2021 the Yellowstone County Attorney filed a second Petition for Emergency Protective Services (EPS), Adjudication as Youth In Need of Care (YINC), and Temporary Legal Custody (TLC) on behalf of the Department of Health and Human Services (the Department) for A.C.Y. Jr., now 1 year old, supported by the affidavit of CPS Chelsey Handford. (DC050, DC051)

January 11, 2022, after a continuance for service upon the parents, the district court held the show cause hearing. (DC058, DC063) Neither parent contested adjudication or TLC, but did not stipulate to the underlying facts. (DC063) The district court again adjudicated A.C.Y. Jr. as YINC and awarded the Department TLC and set a treatment plan hearing. (*Id.*) A.C.Y. was not present for the treatment plan hearing on March 8, 2022 (DC065) Counsel advised the court AC was incarcerated and had not seen the treatment plan but did not object. (*Id.*) The district court approved the treatment plan. (*Id.*, DC068)

The district court entered orders extending TLC on July 12, 2022, November 29, 2022, January 10, 2023 and June 13, 2023. (DC077, DC090, DC095, DC120) November 20, 2023 the Department petitioned for termination of parental rights and permanent legal custody. (DC096) April 9, 2024, after hearing argument and testimony, the district court terminated A.C.Y.'s parental rights to A.C.Y. Jr. (DC145, DC150) May 6, 2024 the district court entered its written order terminating the rights of A.C.Y. to A.C.Y. Jr. (Appendix A) May 29, 2024 A.C.Y. filed notice of appeal with the Montana Supreme Court. (DC152)

Facts of the Case

In her affidavit in support of the Department's Petition for EPS, Adjudication as YINC and TLC, CPS Julie Peterson attested A.C.Y. Jr. was removed from the care of birth mother K.Y. and placed into EPS November 6, 2019 due to concerns with K.Y.'s ability to provide for the child, lack of consistent housing and lack of compliance with previous treatment plans. (DC002) CPS Peterson reported that KM had five other children to which her parental rights had been terminated in December 2018 after three years of efforts to return them to her care. (*Id.*) According to CPS Peterson, neither K.Y. nor A.C.Y. successfully completed court-ordered treatment plans. (*Id.*) CPS Peterson stated A.C.Y. was incarcerated at the time of removal, "has a significant history of criminal behavior... has a significant history of criminal behavior and.... continues to

engage in criminal activity which places his child at risk of harm.” (*Id.*)

A.C.Y. was incarcerated when A.C.Y. Jr. was removed from parental care – and remained in custody until about June 4, 2021. (DC002, 12/17/2019 Hrg. Tr. 5:22-24, DC021, DC023, DC025, DC034, DC038, DC040, DC042, 6/1/2021 Hrg. Tr. 7:11-14) June 1, 2021 A.C.Y. requested permission to reside with birth mother K.Y. and A.C.Y. Jr. – who had been returned to his mother’s care on April 5, 2021. (6/1/2021 Hrg. Tr. 7:17-23, 8:18-21) The district court left the decision to the Department. (*Id.* 14:16-18)

June 29, 2021 the court was advised the family was living together and looking for housing. (6/29/2021 Hrg. Tr. 6:2) The family continued to do well and, August 24, 2021 the parties stipulated to dismissal of the case which the court granted. (DC048)

November 1, 2021 A.C.Y. Jr. was again placed in EPS after the Department received reports A.C.Y. had “been using methamphetamine consistently since August 31, 2021....” (DC051) In her affidavit in support of the Department’s second Petition for EPS Adjudication as YINC and TLC, CPS Chelsey Handford, attested that on or about October 25, 2021 a federal probation officer conducted a home visit and found A.C.Y.’s siter and brother-in-law caring for A.C.Y. Jr. and “fighting over heroine [sic] use” in the presence of the child. (*Id.*) October 27, 2021 CPS Handford met with birth mother K.Y. who said A.C.Y. had been using

methamphetamine but denied using herself. (*Id.*) K.Y. tested positive for methamphetamine. (*Id.*) CPS Handford was advised “the man with the child in the lobby... was having a panic attack and asking how long this would take. (*Id.*)

CPS Handford went out to the lobby and found A.C.Y. sitting on the floor with his head in his hands, breathing heavily, and a large amount of sweat could be observed on A.C.Y.’s t-shirt. A.C.Y. asked if I was taking their son. CPS Handford had A.C.Y. Jr sit with another CPS worker while CPS Handford brought A.C.Y. down to my office. A.C.Y. was given some candy and water to help with his blood sugar and when I began to speak about K.Y.’s positive A.C.Y.’s voice got loud and his body language became erratic. A.C.Y. started shaking and stated he had to go and he had to leave. He began to leave my office and K.Y. started grabbing at him yelling for him not to leave. K.Y. and A.C.Y. left the Department but K.Y. stated she’d return.

(DC051)

CPS Handman reported being advised that A.C.Y. was arrested for “noncompliance with his federal probation and ongoing methamphetamine use.” (DC051) A.C.Y. remained in custody from October 27, 2021 until around April 2022 when he was transferred to inpatient treatment. (DC058, DC063, DC065, 4/19/2022 Hrg. Tr. 6:2-5, DC070) May 31, 2022 the district court was advised A.C.Y. had graduated inpatient treatment, was employed part-time and had an apartment in the same building as K.Y. – who had overnight parenting three nights a week. (5/31/2022 Hrg. Tr. 5:19-6:2, 1):18-11:1) A.C.Y. advised the court he was drug testing every day and would provide releases for the Department. (*Id.* 8:24-9:11) The court cautioned A.C.Y. that he was not to reside with K.Y. and was to

have only video visitation with A.C.Y. Jr. (*Id.* 12:7, DC072) July 8, 2022 in his affidavit in support of the Department’s motion to extend TLC, CPS Jonathan Grewell attested that A.C.Y. was compliant with every task on his treatment plan. (DC075)

July 12, 2022, at the hearing on the motion to extend TLC, the district court was advised both parents were “very engaged with the Department” but that A.C.Y. had suffered a relapse and was working to getting “more treatment.” (7/12/2022 Hrg. Tr. 5:24-6:3, DC076) September 6, 2022 CPS Grewell told the court A.C.Y. had been revoked to federal custody for “testing positive and mandatory revocation” on about July 28, 2022 and would have to go through “all the same treatment steps that he did for them last time.” (9/6/2022 Hrg. Tr. 6:22-7:1, 7:20-23, 8:3-9) The district court expressed frustration with the parents and advised counsel to “let your clients know that I’m running out of steam on them, and running out of faith, and that this baby deserves stability and permanency in his life.” (*Id.* 10:5-10) At the October 4, 2022 status hearing, the district court was advised A.C.Y. had been sentenced to ten months custody at Yellowstone County Detention Facility. (DC085)

November 29, 2022 A.C.Y. told the district court he had completed his federal violation but had a pending possession charge for which he had been offered a plea of five years DOC. (11/29/2022 Hrg. Tr. 10:1-9) After A.C.Y. told

the district court he would “do whatever it takes,” the court expressed support for both parents, telling them “I’m rooting for you both.... Rooting for your sobriety. Rooting for your stability. And certainly, rooting for your son.” (*Id.* 12:1-11, 14:22-25)

January 10, 2023 the Department filed a Petition for Termination of Parental Rights and Permanent Legal Custody. (DC096) In his supporting affidavit, CPS Grewell attested that A.C.Y. had not successfully completed his treatment plan due to incarceration and “ongoing drug use.... A.C.Y. has struggled with usage for extended periods and is often incarcerated for these issues” (DC097) CPS Grewell further stated that, since his birth, A.C.Y. Jr had been in Department care for 19 months during the first removal, returned to the parents’ care for about 60 days before the second removal of about 14 months duration. (*Id.*)

March 6, 2023, on joint motion of the parties, the district court reset the hearing on the petition to terminate parental rights and ordered the matter to mediation. (DC103) May 5, 2023 the district court reconvened the termination hearing at which time A.C.Y. advised the court he had 21 months of federal probation remaining and had entered a change of plea on the state possession charge which, “should be coming to a head her relatively soon.... But no more than three years DOC was the recommendation from the State.” (5/2/2023 Hrg. Tr.

9:20-10:11) A.C.Y. he and K.Y. were getting a divorce and would try to coparent A.C.Y. Jr. (*Id.* 10:12-15) After the court expressed skepticism about such an ambition, A.C.Y. responded, “If you terminate my rights, I’m good with it. As long as she gets a chance, I’d be good with it, absolutely. Do what you have to do.... But I don’t want to lose my child to the foster care on the off chance that I could maybe watch him grow up a little bit in the future before I die.” (*Id.* 14:7-17)

July 11, 2023 A.C.Y. told the district court he was in inpatient treatment and would be transferred to a sober living house for about a year. (7/11/2023 Hrg. Tr. 6:21-7:4) A.C.Y. told the court he had a job, a residence and had completed inpatient treatment and intensive outpatient treatment. (*Id.*) The district court continued the pending termination hearing to see if the parents could attend Family Recovery Court, but advised the parents “if, for any reason, the family recovery doesn’t work out... what you would have with me is that termination hearing.” (*Id.* 9:24-10:6) July 28, 2023 the matter was transferred to Family Recovery Court. September 5, 2023 A.C.Y. confirmed he had a three-year DOC but was trying to get it to run concurrent with the remainder of his federal probation. (9/5/2023 Hrg. Tr. 6:20-7:23) A.C.Y. asked the court, “If you’re not terminating my rights, what sense does it make that I’ve been working so hard to try to get back on my feet and do well so I can see my son?” (*Id.* 11:12-14)

November 20 2023 the Department’s filed a petition to terminate the

parental rights of A.C.Y. asserting that K.Y. had relinquished her parental rights to A.C.Y. Jr. (DC131) In her supporting affidavit, CPS Caitlyn Saunders attested that:

- On August 8, 2023 CPS Saunders met with A.C.Y. who told her he was in sober living and looking for employment. A.C.Y. was alleged to have said “he doesn’t know how to be a good father and has been institutionalized. He stated he isn’t able to handle the emotional stuff.”
- September 15, 2023 A.C.Y. texted CPS Saunders at 3 AM, saying he was working and had been sober for 15 months.
- CPS Saunders stated October 18, 2023 K.Y. executed an affidavit relinquishing her parental rights. K.Y. was alleged to have told CPS Saunders “A.C.Y. has relapsed and is isolating himself from everyone.... He tried to OD on heroin and then turned around and left Rimrock.”
- October 26, 2023 CPS Saunders reported she could not locate A.C.Y. CPS Saunders stated she checked the jail roster and he was in custody at Yellowstone Detention Facility on a federal hold.

(DC132)

CPS Saunders alleged A.C.Y. had not successfully completed his treatment plan due to ongoing drug use and incarceration. (DC132) CPS Saunders noted that A.C.Y. had stated he would like A.C.Y. Jr. returned to his care. (*Id.*) December 1, 2023 K.Y.’s waiver of parental rights was filed. (DC135) The relinquishment was conditioned upon termination of A.C.Y.’s parental rights. (*Id.*) March 14, 2024 the Department filed its exhibits. (DC146) Exhibit 1 was a U.S. District Court Judgment, dated November 29, 2023, sentencing A.C.Y. to 11 months with the U.S. Bureau of prisons for drug use, probation violation and treatment failure and recommending placement for treatment. (Appendix B, Exhibit 1) The second

exhibit was an information from Yellowstone County District Court, filed September 9, 2022, charging A.C.Y. with felony drug possession with a maximum sentence of five years in prison and a maximum fine of \$5,000. (Appendix B, Exhibit 2)

The hearing on the Department’ petition for termination of A.C.Y.’s parental rights commenced March 14, 2024 and concluded April 9, 2024. (DC145, DC150) Counsel advised the district court that A.C.Y.’s criminal charges – state and federal – would be fully discharged in September 2024. (3/14/2024 Hrg. Tr. 6:11-18) The exhibits regarding A.C.Y.’s federal and state charges were entered into evidence and judicial notice was taken without objection. (*Id.* 7:13-8:21)

CPS Jonathan Grewell testified regarding his involvement in the case. (3/14/2024 Hrg. Tr. 9:10, et seq.) CPS Grewell testified that A.C.Y. Jr. had two older siblings who had been removed from parental care due to “chemical dependency issues” and had been adopted by their maternal grandmother. (*Id.* 10:18-11:12) CPS Grewell testified the maternal grandmother reported that A.C.Y. did not visit the older children because, “for one, the children are scared of him and, for two, he’s not allowed on their property. The are not his biggest fans.” (*Id.* 11:13-22)

CPS Grewell detailed the history of both the first removal and the pending removal which consisted of an ongoing cycle of sobriety, incarceration, probation,

in-patient and outpatient treatment, relapse using methamphetamine and revocation of probation. (*Id.* 12:1, et seq.) “A.C.Y. has always been engaged with the Department, but he does struggle with his chemical dependency... The issue always was part of his treatment plan was chemical dependency evaluations and recommendations and also drug testing. And he would just continue to test positive and always had issues with that... A.C.Y. was very professional with me. He was always very honest with me... very engaged. I just think he struggled with his chemical dependency.” (*Id.* 20:20-22, 21:8-16, 23:1-4)

CPS Grewell testified that, in his opinion, termination of A.C.Y.’s parental rights would be in A.C.Y. Jr.’s best interests because, “I think A.C.Y. Jr. needs stability. He needs someone that is there for him all the time. I think it’s been four years and he’s been in state custody for the vast majority of that. I do believe that is way too much time for a child. So, yeah, I do believe it is in his best interest to find permanency.” (3/14/2024 Hrg. Tr. 24:14-29) CPS Grewell testified that A.C.Y.’s current incarceration issues and ongoing chemical dependency were obstacles to reunification that A.C.Y. could not overcome in a reasonable time given his struggles with addiction, continual relapses, current incarceration and pending state charges. (*Id.* 24:20-25:8) On cross-examination, CPS Grewell testified A.C.Y. had not seen A.C.Y. Jr. since May 2022. (*Id.* 31:4-8)

On redirect examination, CPS Grewell testified that A.C.Y. had not

complied with treatment plan requirements regarding drug testing and stable housing. (3/14/2024 Hrg. TR. 37:13-38:1) CPS Grewell said that finding a sober living home that would accept A.C.Y. was challenging because he was required to register as a sexual offender based on a 2002 conviction. (*Id.* 38:2-9)

CPS Caitlyn Saunders testified regarding her involvement in the case. (3/14/2024 Hrg. Tr. 42:15, et seq.) CPS Saunders testified that the major obstacle between consistent parenting opportunities for A.C.Y. was his frequent incarcerations and his drug use which made it neither safe nor appropriate for visitation. (*Id.* 45:18-23) CPS Saunders said that, when she spoke with A.C.Y. about barriers to reunification, they discussed “Stable housing, need for chemical dependency treatment, criminal matters that were pending and then, current incarceration.” (*Id.* 14:18-23) According to CPS Saunders, A.C.Y. understood the concerns “To an extent. But, again, deflected that it was not his fault because he was incarcerated.” (*Id.* 47:1-2) CPS Saunders stated A.C.Y. had not visited A.C.Y. Jr. for about two years “Due to the recommendation from [A.C.Y. Jr.’s] play therapist about visitation and then, the short time frame that A.C.Y. was released from incarceration.” (*Id.* 47:3-15) CPS Saunders testified that A.C.Y. Jr. was nearly five years old, was happy and healthy in a kinship placement that intended to adopt him if parental rights were terminated, and did not exhibit any knowledge of A.C.Y. or curiosity about him. (*Id.* 47:25-48:21)

CPS Saunders testified she had discussed the treatment plan with A.C.Y. and that A.C.Y. had completed CD evaluation and treatment tasks of the plan when he was “sober-living.” (3/14/2024 Hrg. Tr. 50:13-17) A.C.Y. maintained contact with the Department “until he absconded” and “always expressed his desire to parent.” (*Id.* 50:18-20) CPS Saunders said, however, that for A.C.Y. to successfully complete his treatment plan, “At this point, he needs ongoing chemical dependency evaluation – treatment.... He would need to find safe and stable housing. He would need to reestablish that relationship with A.C.Y. Jr. in a way that is therapeutically appropriate. Drug and alcohol testing.” (*Id.* 50:21-51:8) Asked to describe the best case scenario, CPS Saunders testified that since, by the earliest time A.C.Y. was able to begin to have contact with A.C.Y. Jr. “it will have been two and a half years,” she could not give a definitive answer to when visitation could resume. (*Id.* 51:15-3) “I think that is a really delicate situation that would have to be approached therapeutically.” (*Id.* 51:4-6)

Based on her knowledge of the case, CPS Saunders concluded A.C.Y. would not be in a position to safely parent A.C.Y. Jr. within a reasonable time. (3/14/2024 Hrg. Tr. 52:7-11) Noting that A.C.Y. Jr. had been in Department since infancy for all but two months, CPS Saunders expressed the opinion that termination of A.C.Y.’s parental rights was in the best interests of A.C.Y. Jr. (*Id.* 52:12-53:3) “I believe AJY Jr. needs permanency first and foremost. I believe that there is not a

relationship there that, in a timely manner could be back in a parental role due to father's need for chemical dependency treatment, due to his current incarceration, and just the long-term confusion of this child and need for permanency." (*Id.* 52:5-11)

The district court, to "clarify the record," stated that A.C.Y. had not yet changed his plea in the pending district court criminal case.

The plea agreement is not filed.... I'm assuming it is a plea agreement pursuant to subsection C, which means it is a recommendation to the court. And so, until a change of plea is done and he has been sentenced, it is presumptuous of anyone to think that a judge is going to go along with a plea agreement unless we are bound to do so. So, I think that it is great that we understand that everyone hopes that the release date is going to coincide with his federal release in September of 2024. But to date, there has still not been a change of plea or a signed plea agreement filed in the court's file. So as long as everyone is clear that that is the foundation that we are working with here.¹
(3/14/2024 Hrg. Tr. 64:21-65:13)

A.C.Y. testified in opposition to termination of his parental rights.
(3/14/2024 72:1, et seq.) A.C.Y. testified to his criminal history, his attempts to maintain relationships with his other children after his parental rights were terminated, his attempts to complete his treatment plan and his interaction with the Department. (*Id.*) A.C.Y. stated he had never seen a treatment plan and that every

¹ According to the DOC Offender Search website (offendersearch.mt.gov/conweb), ACY is currently incarcerated at Montana State Prison on a 24-month sentence pronounced May 13, 2024 with no time suspended.

conversation he had with CPS Grewell or CPS Saunders “ended with it was going to be a long time before you are going to be able to see him because... I’m going to have to show them a great deal of effort. No treatment plan.” (*Id.* 80:8-23)

A.C.Y. stated that neither CPS Grewell nor CPS Saunders ever specifically discussed what he needed to do to complete his treatment plan and that the Department made no efforts to facilitate visitation. (*Id.*) A.C.Y. contradicted previous testimony regarding Department communication, attempts to facilitate visitation and whether he had maintained a relationship with A.C.Y. Jr. (*Id.*)

A.C.Y. testified he had not remained drug-free, had not maintained safe housing and had not maintained a source of legal income due to his time in jail. (*Id.*) A constant theme throughout A.C.Y.’s testimony can be summarized as “I was just told to stay away. Stay away from K.Y. and my son.” (*Id.*)

A.C.Y. testified that, upon completion of his pending sentence, “My plan is, when I get out, I’m going to be discharged. Nobody to answer to as far as I know.... I’m going to start a ministry. I have a sponsor who goes to church over at Faith Chapel.... I kind of want to throw away all of the garbage people...that I know. I just want to surround myself with people I don’t know.” (3/14/2024 Hrg. Tr. 91:14-92:3) A.C.Y. said, to maintain sobriety, he would seek more CD treatment, get a job, and “just secure myself... not be idle. I will surround myself with people – nondrug users – pass all my tests.” (*Id.* 92:4-20) A.C.Y. said he felt

he would be able to maintain his sobriety because:

I feel like I'm fighting for my life. I took it for granted Kayla was going to get him back before - before because they took my stuff away. So, I took it for granted for her she wasn't going to lose our son. For she – the person they are going with they are not going to deny [her] contact but I will. So now, I feel like I'm fighting for my life.

(3/14/2024 Hrg. Tr. 93:4-12)

A.C.Y. expressed concern he had not seen his child in over two years and argued that it was in A.C.Y. Jr.'s best interest to have his natural father in his life. (Hrg. Tr. 3/14/2024 95:7-96:14) After a lengthy discussion of his plans for establishing employment and housing – including a pending petition to be removed from the sexual offender registry – A.C.Y. conceded he was not currently in a position to parent but argued he would be able to do so in the future. (*Id.* 96:15-98:13)

Asked if he had anything else he wished to tell the district court, A.C.Y. said:

I understand that I haven't showed the court any reason to accept anything that I'm saying. I'm sober. That is the biggest part of it. If I were high, you know, I wouldn't trust me. But I'm sober. There is nothing I want more than to be a father. And I make mistakes, getting out thinking I could take on the whole world. And I can't. I take on too much because I have been institutionalized. My desire is to be a father. I want to learn how to do it. And I want to be able to do it at a pace. And that I can grow old into it.

(Hrg. Tr. 3/14/2024 101:19-102:6)

The district court allowed some cross-examination before continuing the termination hearing due to another hearing. (3/14/2024 102:14-111:18) April 9, 2024 cross-examination of A.C.Y. was concluded and redirect examination was conducted. (4/9/2024 Hrg. Tr. 5:13-49:23) The district court addressed A.C.Y., recognizing his sincere desire to parent A.C.Y. Jr., but pointing out that, “The challenging part about this case is this case is not about you.” (*Id.* 50:18-24) The district court recited at length:

During [A.C.Y. Jr.’s] life of 54 months, you have been incarcerated for 39 of those months. During the remaining 13 to 14 months that you were not incarcerated during A.C.Y. Jr.’s life, only two of those months were when the Department was not involved with A.C.Y. Jr.’s life.

The last time you saw your son was July 27th of 2022. And even looking at the best-case scenario for if everything goes well, you are looking at November of this year before you would be out of custody. And that is assuming that the presentence investigation is waived, that the reporting happens, that the hearing dates stay where they are set now, you still would have to engage in all of the services of the treatment plan.

And then because this child has not seen you in years, you wouldn’t just be thrust back into his life. It would be a long process during which time you would have to continue to engage in all of the treatment, the mental health, the physical health treatment, which are also of concern and remain sober....

And it is not in the best interest of A.C.Y. Jr. that we continue this out any longer. I can’t justify in this young man’s life another year that you are not in it. I just can’t. He needs stability. He needs security. And he needs to be able to know that he’s home and that he is staying where he is. There is simply nothing in the record that

has been established thus far that justifies me disrupting this child's life by a bunch of unknowns.
(3/14/2024 Hrg. Tr. 51:8-52:14)

The district court granted the petition for termination of A.C.Y.'s parental rights to A.C.Y. Jr. (3/14/2024 Hrg. Tr. 53:1-3)

Findings of the District Court

In the Order entered May 6, 2024 the district court, with a brief review of testimony, found, by clear and convincing evidence that termination of A.C.Y.'s parental rights to A.C.Y. Jr. was in the best interest of the child because A.C.Y. had not successfully completed an appropriate approved treatment plan, the condition rendering A.C.Y. unfit, unable or unwilling to adequately care for A.C.Y. Jr. was unlikely to change within a reasonable time and that the condition rendering A.C.Y. unfit, unable or unwilling to adequately care for A.C.Y. Jr. included excessive use of methamphetamine, present incarceration on a federal conviction and pending sentencing on state charges. (Appendix A)

STANDARDS OF REVIEW

A parent's due process rights to the custody of their children requires "fundamentally fair procedures at all stages of termination proceedings." *In re R.K.*, 2023 MT 161, ¶23, 413 Mont. 184, 534 P.3d 659 (citing *In re K.B.*, 2019 MT 73, ¶11, 395 Mont. 213, 437 P.3d 1042). Whether a person has been denied his or her right to due process is a question of constitutional law. *Id.* at ¶9 The Montana

Supreme Court’s review of questions of constitutional law is plenary. *In re A.S.*, 2004 MT 62, ¶9, 320 Mont. 268, 87 P.3d 408 (citing *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290)

Beyond due process concerns, the Montana Supreme Court reviews a district court’s decision to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶19, 382 Mont. 165, 365 P.3d 478. An abuse of discretion can arise from clear error in the district court’s findings of fact, mistake of law or an evidentiary ruling entered arbitrarily or without employment of conscientious judgment, or exceeding the bounds of reason, resulting in substantial injustice. *In re I.M.*, 2018 MT 61, ¶13, 391 Mont. 42, 414 P.3d 797 (citing *In re O.A.W.*, 2007 MT 13, ¶32, 335 Mont. 304, 153 P.3d 6).

The Court may, at its discretion review an issue not raised before the district court for plain error if the issue implicates a fundamental right and not reviewing the asserted error may result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *State v. Daniels*, 2003 MT 247, ¶20, 317 Mont. 331, 77 P.3d 224, *In re M.K.S.*, 2015 MT 146, ¶¶13-14, 379 Mont. 293, 350 P.3d 27.

ARGUMENT

1. Counsel for A.C.Y. should be permitted to withdraw from this cause in

accordance with *Anders v. California* and Mont. Code Ann. §46-8-103.

The Fourteenth Amendment of the United States Constitution and Article II, Section 17 of the Montana Constitution guarantee every defendant the right to a fair trial and due process of law, including fair representation. 386 U.S. 738, 742 (1967). When appellant’s counsel “finds his case to be wholly frivolous” he should, after conscientious examination of the case, advise the court and request permission to withdraw. *Id.* at 744

To ensure protection of appellant’s rights, counsel’s request to withdraw must be accompanied by a brief that references anything in the record that might arguably support an appeal (an *Anders* brief). *Id.* A copy of the brief should be provided to the appellant and the appellant must be afforded the time to respond to counsel’s motion and brief. *Id.*

The State of Montana has codified the requirements of *Anders v. California* in Mont. Code Ann. §46-8-103(2). If, after reviewing the entire record and researching the applicable law, counsel concludes that an appeal would be frivolous or wholly without merit, counsel must file a motion with the Montana Supreme Court requesting permission to withdraw. *Id.* A memorandum discussing any issues that arguably support an appeal must accompany the motion to withdraw. *Id.* The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, along with appropriate

citations to the record and the law bearing on each issue. *Id.*

An *Anders* brief meets the requirements of both *Anders v. California* and Mont. Code Ann. §46-8-103(2). The brief is intended to assist the appellate court in determining that counsel has conducted the required detailed review of the case and that the appeal is so frivolous that counsel's motion to withdraw should be granted. *Penson v. Ohio*, 488 U.S. 75, 81–82 (1988). The requirements of an *Anders* brief are not meant to force counsel to argue against appellant. *Anders*, 386 U.S. at 745.

Pursuant to Mont. Code Ann. §46-8-103(2), counsel for Appellant reluctantly advises the Court that, after conducting diligent review of the record and the relevant law, counsel has not found any non-frivolous issues appropriate for appeal in this matter. While counsel has great sympathy for the Appellant, he can find no meritorious grounds for appeal. In accordance with the requirements of *Anders* and Mont. Code Ann. §46-8-103(2), counsel provides this memorandum (Anders Brief) discussing any issues that arguably support an appeal, a summary of the procedural history of the case and any jurisdictional problems with the appeal, and appropriate citations to the record and the law bearing on each issue. *Id.*

2. A.C.Y. may assert the district court erred when it terminated his parental rights.

The court may order a termination of the parent-child legal relationship upon

a finding established by clear and convincing evidence that the child is an adjudicated youth in need of care, an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful, and the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time. Mont. Code Ann. §41-3-609(1)(f); *In re D.B. and D.B.*, 2007 MT 246, ¶20, 339 Mont. 240, 168 P.3d 691.

An order terminating an individual's right to parent his children must be supported by clear and convincing evidence that the statutory criteria for termination have been met. *In re A.T. and J.T.*, 2003 MT 154, ¶10, 316 Mont. 255, 70 P.3d 1247. Clear and convincing evidence is:

simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure—that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

In re C.M.C., 2009 MT 153, ¶23, 350 Mont. 391, 208 P.3d 809.

Once the criteria for termination of parental rights are met, the decision whether or not to terminate those rights is within the court's discretion.

a. A.C.Y. may assert termination of his parental rights was a violation of Due Process.

As the care and custody of a child is a fundamental liberty interest protected by fundamentally fair procedures, termination procedures must satisfy the Due Process Clause of the Fourteenth Amendment. *In re C.S.*, 2020 MT 127, ¶12, 400 Mont. 115, 464 P.3d 66 (citing *In re C.J.*, 2010 MT 179, ¶26, 357 Mont. 219, 237 P.3d 1282. Due process requires that parents in abuse and neglect proceedings receive “notice and an opportunity to be heard.” *Id.* (citing *In re C.B.*, 2019 MT 294, ¶18, 398 Mont. 176, 454 P.3d 1195). When the State seeks to terminate a parent’s fundamental liberty interest in the care and custody of a child, due process also requires the parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, 2004 MT 62, ¶12, 320 Mont. 268, 87 P.3d 408.

In this case, A.C.Y. may argue that, by failing to more actively facilitate contact between himself and A.C.Y. Jr. during the pendency of the case, the Department “poisoned the well” against him. A.C.Y. may assert that it the Department failed to meet its obligation to maintain the parent-child relationship and facilitate communication between himself and his child.

b. A.C.Y. may assert the district court’s termination of his parental rights was an abuse of discretion.

Upon appeal of a district court’s findings of fact, conclusions of law, and order terminating a parent’s parental rights, the Montana Supreme Court does not substitute its judgment as to the strength of the evidence for that of the district court. *In re A.N.W.*, 2006 MT 42, ¶29, 331 Mont. 208, 130 P.3d 619. Rather, the

Court reviews findings of fact to determine if they are clearly erroneous, conclusions of law for correctness, and the evidence found by the district court to determine whether, on the whole, a preponderance of the evidence is definite, clear, and convincing. *In re B.J.J.*, 2019 MT 129, ¶10, 396 Mont. 108, 443 P.3d 488.

Here, A.C.Y. may argue that there were sufficient facts in the record to indicate the district court's finding that he would be unable to safely and effectively parent A.C.Y. Jr. in a reasonable time was reversible error.

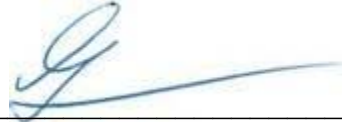
3. A.C.Y. may argue the district court committed plain error when it terminated his parental rights.

The Court employs plain error review sparingly, on a case-by-case basis. *In re J.S.W.*, 2013 MT 34, ¶16, 369 Mont. 12, 303 P.3d 741. A.C.Y. may urge the Court, in light of his life history of institutionalization, to determine this case is appropriate for plain error review as a matter of fairness and to ensure the integrity of the judicial process.

CONCLUSION

After thorough review of the entire record and researching applicable statutes, case law, and rules, counsel has determined that A.C.Y.'s appeal presents no non-frivolous issues and is, therefore, wholly without merit. Counsel respectfully requests the court grant the motion to withdraw on direct appeal.

Respectfully submitted this October 6, 2024.

A handwritten signature in blue ink, appearing to read 'Gregory D. Birdsong', is positioned above a horizontal line.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



Gregory D. Birdsong

CERTIFICATE OF SERVICE

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 10-06-2024:

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