State of New Hampshire Supreme Court

NO. 96-815

2000 TERM

AUGUST SESSION

IN RE BRITTANY L.

RULE 7 APPEAL FROM FINAL DECISION OF DISTRICT COURT

BRIEF OF PETITIONER/APPELLEE, DEBORAH RICHER

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

In 1996 Deborah Richer (then Deborah Cazares) filed a Petition for Termination of Parental Rights. Thereafter, the respondent, Ernest (Buddy) Langlois, sought to dispute the Petition, and to secure his appearance in court during the trial. The litigation on that issue involved a number of filings in both the Probate and Superior Courts.

On February 21, 1997, Mr. Langlois filed a Motion for Transportation in the Probate Court,[1] noting that "[h]e should be allowed to provide his testimony first hand." MOTION FOR TRANSPORTATION (2/21/97), *Appendix to Petitioner's Brief* at 1. Several days thereafter, the Petitioner, Ms. Richer, objected. She noted that the Probate Court had already indicated that it would not order Mr. Langlois to be transported from his residence at the federal penitentiary in New Jersey to the Probate Court in New Hampshire. OBJECTION TO MR. LANGLOIS' MOTION TO CONTINUE AND MOTION FOR TRANSPORTATION (2/24/97), *Appendix to Petitioner's Brief* at 4. On February 25, 1997, the Probate Court denied the Motion for Transportation, writing in longhand, "Probate Court has no jurisdiction to order federal authorities to transport the defendant." Denial (2/25/97), *Appendix* at *to Petitioner's Brief* 7.

On March 5, 1997, Mr. Langlois, apparently resigned to the lack of Probate Court jurisdiction, filed in the Hillsborough County Superior Court, a Petition for Writ of *Habeas Corpus Ad Prosequendum*. The Petition indicated that Mr. Langlois's attorney believed that such a writ would be sufficient for federal marshals to take custody of and transport a federal prisoner. PETITION FOR WRIT OF *HABEAS CORPUS AD PROSEQUENDUM* (3/5/97), *Appendix to Petitioner's*

[1]The motion is styled as being filed in Hillsborough County (North) Superior Court. A review of subsequent filings lead Counsel to believe the motion was erroneous styled, and was filed in the Hillsborough County Probate Court.

Brief at 8. Mr. Langlois simultaneous filed a Motion to Continue in the Probate Court indicating that he was seeking from the Superior Court an order assuring Mr. Langlois's presence. MOTION TO CONTINUE (3/5/97), *Appendix to Petitioner's Brief* at 11.

On March 6, 1997, the Superior Court apparently signed the Writ. On April 23, 1997, having the Writ in hand, Mr. Langlois attempted to get the state to pay for the transportation. MOTION FOR SERVICES OTHER THAN COUNSEL (4/23/97), *Appendix to Petitioner's Brief* at 14. On the chance that the State wouldn't pay, he also requested that his testimony be heard by phone. MOTION FOR TRANSPORTATION OR IN THE ALTERNATIVE MOTION TO ALLOW TELEPHONIC TESTIMONY (4/23/97), *Appendix to Petitioner's Brief* at 17.[2]

On April 29, 1997, the Superior Court partially granted Mr. Langlois's motions. NOTICE OF DECISION (4/29/97), *Appendix* at *to Petitioner's Brief* 22. Several days later, it clarified its order, writing

> "As this matter is not pending in the Superior Court, none of the costs of transportation will be borne by the Superior Court. This order on the Habeas Corpus petition was issued to comply with U.S. Marshall procedure for prisoner transport."

NOTICE OF DECISION (5/6/97), *Appendix to Petitioner's Brief* at 24.

Thereafter, a hearing was held in the Probate Courts on the merits of the termination petition. The Court ruled that Mr. Langlois had abandoned Brittany L. and ordered his parental rights terminated. The facts, although containing considerable bias, are adequately presented in Mr. Langlois's brief. This appeal followed.

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[2]The motion is styled as being filed in Probate Court. A review of the cover letter and subsequent orders lead Counsel to believe the motion was erroneous styled, and was filed in the Hillsborough County (North) Superior Court.

SUMMARY OF ARGUMENT

Deborah Richer is the petitioner for termination of parental rights of Ernest (Buddy) Langlois, who is incarcerated, over their daughter Brittany L.

Deborah Richer first argues that Mr. Langlois waived his right to be present by not requesting transportation from the federal court – the only court having authority to provide it. She then argues that he did not preserve a due process claim to be present at the termination hearing because, until his brief, never raised the issue. Ms. Richer nonetheless then argues that, balancing the due process factors, Mr. Langlois has no right to be personally present at his termination hearing.

Ms. Richer goes on to argue that Mr. Langlois did not preserve a record of his testimony, thereby waiving any sufficiency claim.

She then lays out the elements a court must consider in determining whether an incarcerated person's parental rights may be terminated, and argues that the matter is already covered by settled law. Ms. Richer then shows that whatever the necessary elements, Mr. Langlois introduced no evidence that he took anything beyond the most minimal steps to show a parental intent, and his conduct thereby demonstrated his intent to abandon the child. Ms. Richer also argues that if the Probate Court was otherwise guilty of any error, because Mr. Langlois offered no evidence of parental intent, the error was harmless.

Returning to Mr. Langlois's claimed right to be present at his hearing, Ms. Richer argues that by getting incarcerated, Mr. Langlois voluntarily waived any such right. She also argues that Mr. Langlois did not preserve any claimed confrontation rights as well, and that in any event confrontation applies in criminal cases only.

Ms. Richer then argues that the Probate Court committed no error in not allowing extrinsic impeachment testimony to be introduced when the person who allegedly made the statement was not confronted with the alleged prior inconsistent statement.

Finally, Ms. Richer notes that Mr. Langlois conceded, did not argue, or failed to state an appellate claim on the question he posed to this Court. Based on this, and a number of procedural defaults obviating Mr. Langlois's case, Ms. Richer requests attorneys fees.

ARGUMENT

I. Mr. Langlois Waived his Right to be Present

In his brief, Mr. Langlois correctly points out that he asked the Probate Court to order his presence at his trial. The Probate Court, however, does not have the authority to order him transported from an out-of-state federal prison to New Hampshire. *See* RSA 516; RSA 613. Mr. Langlois also correctly points out that he filed a Writ of *Habeas Corpus Prosequendum* with the Superior Court for the same purpose, which was granted. The Superior Court, however, also has no authority over transportation of federal prisoners. In fact, no state court, in any state, has the power to tell the federal government what to do. *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819). In our federalist system, states cannot command federal authorities – whether they work for the Bureau of Prisons, the Federal Marshals, or any other federal agency. To assert otherwise turns the federal constitution and the supremacy clause on its head.

For this reason, there exists a procedure – writ of *habeas corpus ad testificandum* – in the federal district court, which can command federal authorities. The procedure exists for the explicit purpose of obtaining the presence of federal prisoners in state court proceedings in which they are a witness or a party. 28 U.S.C. § 2241(c)(5). The procedure has long been recognized, *see Ex parte Boolman*, 8 U.S. (4 Cranch.) 75 (1807), and applies to state civil as well as criminal proceedings. *See, e.g., In re Burrell*, 186 B.R. 230 (E.D. Tenn. 1995); *Barber v. Page*, 390 U.S. 719 (1968). The writ reaches prisoners outside of the federal district in which it is filed, *Duncan v. Maine*, 295 F.2d 528 (1st Cir. 1961), *cert. denied*, 368 U.S. 998; *ITEL Capital Corp. v. Dennis Mining Supply & Equip., Inc.,* 651 F.2d 405 (5th Cir. 1981), and has been employed in numerous state court termination proceedings. *See*, *e.g.*, *People in Interest of C.G.*, 885 P.2d 355

(Colo.Ct. App. 1994); *In re Randy Scott B.,* 511 A.2d 450 (Me. 1986); *In re Juvenile Appeal*, 446 A.2d 808 (Conn. 1982). The procedure is so well established that the Supreme Court has held that an out-of-state witness held in federal custody is not "unavailable" for evidentiary purposes in a state proceeding if the writ has not been requested by the party desiring the witness. *Barber v. Page*, 390 U.S. 719, 724-25 (1968).

It is thus untenable that Mr. Langlois is here complaining that he was not afforded the right to appear personally at his trial when he did not take advantage of the only procedure likely to secure it. As such, he waived any claim that he was not afforded his right.

II. Due Process Was Not Preserved

An issue argued for the first time in an appellant's brief, but not mentioned in his Notice of Appeal, is not adequately preserved and is deemed waived. *Belcher v. Paine*, 136 N.H. 137, 149 (1992) ("The plaintiffs refer in their brief to alleged violations of their rights to access to our courts provided by part I, article 14 of our State Constitution . . . . The record discloses no constitutional claim having been asserted below, and the notice of appeal makes no claim of violation of constitutional rights. Under these circumstances we hold that the constitutional issues have not been preserved for appeal."); SUP. CT. R.16(3)(b).

In his brief, Mr. Langlois argues that his due process rights were violated because the Probate Court allegedly prevented him from being physically present at trial. The issue is not mentioned in his Notice of Appeal, nor in the litigation below.[3] His Notice of Appeal raises four questions: the appropriate standard of proof, impeachment of a witness, sufficiency of the evidence, and the right of confrontation. *NOA* at 2. Due process is nowhere mentioned. Nowhere in any of the various filings before either the Probate or the Superior Court did Mr. Langlois mention an alleged due process right to be personally present in court, and nowhere did he cite the due process clause of either the Federal or New Hampshire Constitutions.

Because due process was not litigated below, nor mentioned in his Notice of Appeal, and was raised for the first time in his brief, the issue was waived.

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[3]In his March 5, 1997 Motion to Continue filed in the Probate Court, Mr. Langlois cited *Stanley v. Illinois*, 405 U.S. 645 (1972). *Stanley*, however, while establishing as a matter of procedural due process a person's right to have a hearing before a court can address parental rights, says nothing about a person's right to be personally present in court at such a hearing. The case is correctly cited in the context of the Motion to Continue, but the citation cannot be used to claim Mr. Langlois preserved the alleged due process right to be personally present which he now asserts.

III. A Federal Prisoner Has No Due Process Right to Be Personally Present at His Termination Proceeding

Even if the issue were preserved, Mr. Langlois had no due process right to be personally present at his termination hearing.

Because of the schedule dictated by the federal penitentiary, Mr. Langlois testified first. After an extensive chambers discussion, during which the limitations of the court's phone system and the lack of a speaker-phone was discussed, Mr. Langlois offered his telephone testimony. As there were just three phone extensions, the judge used the phone in chambers, the petitioner and her attorney used the phone in an adjoining office (although the petitioner could not hear the testimony, *Transcript* at 18), and the respondent's attorney shared a phone with the GAL in an adjoining conference room.

The determination of whether a process must be accorded to an inmate in a termination case is governed by the three-prong due process balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 27 (1981). *Mathews* mandates the

> "consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews, 424 U.S. at 335; *see also In re Tracy M.*, 137 N.H. 119 (1993).

A. First Prong – Respondent's Interest

Rodney P.'s parental rights are important constitutional rights. *Lassiter*, 452 U.S. at 18; *In re Jessie E.*, 137 N.H. 336 (1993).

B. Second Prong – Process Afforded

1. Inmates Have Diminished Rights of Due Process and Diminished Access to the Courts

Inmates have diminished rights in virtually all areas of their lives. Among the rights diminished by incarceration are the right to privacy in one's mail, *Procunier v. Martinez*, 416 U.S. 396 (1974), *Wolff v. McDonnell*, 418 U.S. 539 (1974), to talk to the press, *Pell v. Procunier*, 417 U.S. 817 (1974), to associate to organize a labor union, *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), to read what one wishes, *Thornburgh v. Abbott*, 490 U.S. 401 (1989), *Bell v. Wolfish*, 441 U.S. 520 (1979), to correspond, *Turner v. Safley*, 482 U.S. 78 (1987), to practice one's religion, *O'Lone v. Shabazz*, 482 U.S. 342 (1987), to eat as one wishes, *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993), to wear one's hair as one wishes, *Powell v. Estelle*, 959 F.2d 22 (5th Cir. 1992) (long hair and beards), to change one's name, *Ali v. Dixon*, 912 F.2d 86 (4th Cir. 1990), to be free from searches, *Hudson v. Palmer*, 468 U.S. 517 (1984), *Avery v. Perrin*, 473 F. Supp 90 (D.N.H. 1979), to be private, *Timm v. Gunter*, 917 F.2d 1093 (8th Cir. 1990), to be free from seizures, *Parratt v. Taylor*, 451 U.S. 527 (1981), to refuse medical attention, *Washington v. Harper*, 494 U.S. 210 (1990), to refuse food, *In re Caulk*, 125 N.H. 226 (1984), to be free from assault, *Hudson v. McMillian*, 112 S. Ct. 995 (1992), to vote, *Richardson v. Ramirez*, 418 U.S. 24 (1974), and to have social security and disability benefits, *Davel v. Sullivan*, 902 F.2d 559 (7th Cir. 1990).

While it is clear that inmates must be afforded meaningful access to the Courts, *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 518 U.S. __, 116 S. Ct. 2174 (1996), their due process rights and rights of access to the courts are likewise diminished.

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by [28 U.S.C. § 1654] to parties in all courts of the United States to 'plead and manage their own causes personally.'"

Price v. Johnston, 334 U.S. 266 (1948). Thus,

> "the Fourteenth Amendment due process claim based on access to the courts has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint."

Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (citations omitted).

2. Factors for Due Process Consideration

A number of courts have furnished lists of elements which should be considered when determining whether an inmate should be present at her/his civil proceeding.

When an inmate demands access to the courts, a determination is based upon the discretion of the court.

> "[T]his discretion is to be exercised with the best interests of both the prisoner and the government in mind. If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the prison, that he is capable of conducting an intelligent and responsible argument and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ. But if any of those factors were found to be negative, the court might well decline to order the prisoner to be produced."

Price v. Johnston, 334 U.S. at 284-85. Similarly, a set of questions that may be asked are:

> "How substantial is the matter at issue? How important is an early determination of the matter? Can the trial reasonably be delayed until the prisoner is released? Have possible dispositive questions of law been decided? Has the prisoner shown a probability of success? Is the testimony of the prisoner needed? If needed, will a deposition be reasonably adequate? Is the prisoner requested? If not, is his presence reasonably necessary to present his case?"

Moeck v. Zajackowski (Matter of Warden of Wisconsin State Prison), 541 F.2d 177, 181 (7th Cir.

1976). In *In re Marriage of Allison*, 467 N.E. 310 (Ill. Ct. App. 1984), the court extended the *Moeck* list of questions to family law matters. In *Mancino v. City of Lakewood*, 523 N.E.2d 332 (Ohio App. 1987), the court synthesized various lists of questions and considerations in other cases and produced as comprehensive a method of determination as any court which has visited the issue.

> "Whether a prisoner should be permitted to be brought to trial to argue his case personally depends upon the particular circumstances of each case. We hold that the following criteria are to be weighed in making this determination: (1) whether the prisoner's request to be present at trial reflects something more than a desire to be temporarily freed from prison; (2) whether he is capable of conducting an intelligent and responsive argument; (3) the cost and convenience of transporting the prisoner from his place of incarceration to the courthouse; (4) any potential danger or security risk the prisoner's presence might pose; (5) the substantiality of the matter at issue; (6) the need for an early resolution of the matter; (7) the possibility and wisdom of delaying the trial until the prisoner is released; (8) the probability of success on the merits; and (9) the prisoner's interest in presenting his testimony in person rather than by deposition."

Mancino, 523 N.E.2d at 335.

Because Mr. Langlois had an opportunity to testify, and because he has enunciated no other reason for his presence, one must assume that his desire to attend was motivated in large part by an opportunity for a hiatus from prison life. Because he was represented and did not indicate that he wished to proceed *pro se*, there is no need for him to conduct an argument. The cost of transporting him from New Jersey and housing him while in New Hampshire, according to his pleading, is $2,000. MOTION FOR SERVICES OTHER THAN COUNSEL (April 23, 1997), *Appendix* at 14. As he is a federal prisoner, maintaining him would be likely to be inconvenient and difficult. Given the need of Brittany L. to have a stable home life, and the need for Deborah and Scott Richer to maintain bonds with her, there was an need to have as quick as possible a

resolution of the matter, and delaying it until Mr. Langlois is released is not reasonable. Because incarceration is a viable element of a termination decision, because of the inmate's apparent unwillingness to take care of his *other* child, and because of his lack of attention to the child in this case, his chance of success on the merits were slim. Finally because he had an opportunity to testify, and because his case was in capable legal hands, there was no need to have him at the hearing at all.

Based on these considerations, it is apparent that the Probate Court did not deprive Mr. Langlois of his due process rights by conducting the hearing without his personal presence.

3. The Respondent Got All the Process He Was Due

In the case at hand, Mr. Langlois got all the process that was due. He was not prosecuting the case *pro se*, and was able to testify as he wished. By being capably represented, he was present for all the purposes factually necessary.

Had he been afforded additional process, he could not have made use of it. Had he been present, of course, he would have been able to absorb the goings-on in the courtroom first-hand. But because he was able to testify and because he was not forced to conduct the hearing *pro se*, his presence would not have provided him any additional opportunities to participate in or make a meaningful contribution to the proceeding. *Matter of Murphy*, 414 S.E.2d 396 (N.C. Ct. App. 1992) (presence of inmate unlikely to lessen risk of error).

Any alternative additional process, such as obtaining a writ of *habeas corpus ad testificandum*, was in the respondent's own power to pursue. Reducing the risk of error could not have been facilitated by any conceivable additional process that was in the court's power to grant. Mr. Langlois has conceded in this Court that the termination decision did not depend upon

his credibility. DEFENDANT'S OBJECTION TO MOTION TO STRIKE ISSUES FROM APPEAL (5/11/98) (on file in this Court).

Because his absence could not have affected the quality or outcome of the determination made by the court and could not have increased the risk of erroneous deprivation, there was no value in any additional process. Thus, there was no violation of Mr. Langlois's due process rights caused by the procedures used in this case

C. Third Prong – Other Interests

1. State's Interest

The third prong of the due process analysis is the state's interest. The Probate Court recognized that it had no authority to order the respondent to be there. The Superior Court exercised the full extent of its power. The state of New Hampshire has an interest in the powers of its courts as the legislature has seen fit to grant them, and has no interest in a constitutional show-down over the federal supremacy clause. The state, as an intervener for the purposes of procuring a witness, could have applied for a writ of *habeas corpus ad testificandum*, but it would be a misplaced burden to require the state, rather than the respondent, to go to federal court. (It was clearly not the burden of the petitioner to get the respondent to the court.) Probate courts generally do not have the facilities to handle the security concerns raised by the presence of a federal prisoner. The State should not be required to bear the burden of providing security personnel not generally available in probate courts. Finally, the State has an interest in avoiding the expense of transporting and maintaining the prisoner, as well as the cost associated with the security that the prisoner's presence would require.

2. Child's and Petitioner's Interests

In most due process cases, the item about the which litigation is concerned has no independent interest. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972) (loss of job). In a termination case, however, the item (*res litigiosae)* is a child, and Brittany L. herself has an interest not addressed in the *Mathews v. Eldridge* formulation. New Hampshire's termination statute requires that the court act in the best interests of the child. RSA 170-C:1. *In re Kristopher B.*, 125 N.H. 678 (1984); *see also Matter of Guardianship & Custody of A.O.*, 596 N.Y.S.2d 971 (Fam.Ct. 1993) (in due process balancing to determine father's right to be present at custody hearing, interest of child outweigh interest of parent). Moreover, the petitioning parents have interests in the emotional life and development of their family. Thus, in addition to the State's pecuniary and security interests, the *Mathews* balancing should also take into account the child's and the petitioning family's interests.

D. Numerous Courts Have Found That Inmates Do Not Have A Right to Be Present At Their Termination Proceedings

Mr. Langlois failed to cite a single case in which a court found that an inmate's lack of personal attendance at his termination hearing was a violation of his due process rights.

There are, however, numerous cases holding that there is no due process violation when an out-of-state inmate is not personally present at her/his termination proceeding. *In re Gary U.*, 186 Cal. Rptr. 316 (Ct. App. 1982); *People in Interest of C.G.*, 885 P.2d 355 (Colo. Ct. App. 1994); *People in Interest of V.M.R.*, 768 P.2d 1268 (Colo. Ct. App. 1989); *In re Juvenile Appeal*, 446 A.2d 808, 811-12 (Conn. 1982); *In Interest of R.J.P.*, 476 S.E.2d 268 (Ga. Ct. App. 1996); *In Interest of S.R.*, 554 N.W.2d 277 (Iowa Ct. App. 1996) (same-state incarceration); *In Interest of*

C.J., 650 N.E.2d 290 (Ill.App. 1995); *Matter of Welfare of A.Y.-J.*, 558 N.W.2d 757 (Minn. Ct. App. 1997) (incarceration in out-of-state federal facility); *Matter of Welfare of HGB*, 306 N.W.2d 821, 825-26 (Minn 1981); *In re Interest of L.V.*, 482 N.W.2d 250 (Neb. 1992) (inmate was present by phone having been sworn by on-site attorney, and participated in hearing); *Matter of Quevedo*, 419 S.E.2d 158 (N.C. Ct. App. 1992); *Matter of Murphy*, 414 S.E.2d 396 (N.C. App. 1992); *Matter of Adoption of J.S.P.L.*, 532 N.W.2d 653 (N.D. 1995); *Matter of Adoption of J.W.M.*, 532 N.W.2d 372 (N.D. 1995); *In Interest of F.H.*, 283 N.W.2d 202 (N.D. 1979); *Matter of Rich*, 604 P.2d 1248, 1252-53 (Okla. 1979); *In re Adoption of Dale A.*, 683 A.2d 297 (Pa. Super. Ct. 1996); *In re Clark*, 611 P.2d 1343 (1980); *In the Interest of Darrow*, 649 P.2d 858, 861 (1982) ("The right to appear *personally* and defend is not guaranteed by due process so long as the prisoner was afforded an opportunity to defend through counsel and by deposition or similar evidentiary techniques."); *Najar v. Oman*, 624 S.W.2d 385, 387-88 (Tex. Ct. App. 1981) (same-state incarceration).

In *In re Juvenile Appeal*, 446 A.2d 808 (Conn. 1982), a Connecticut court in a termination proceeding allowed the inmate who was incarcerated in an out-of-state prison to testify via telephone. The court held two hearings. At the first, the principal witness against the inmate testified. The inmate was then allowed to privately review the transcript with his attorney by phone. At the second hearing, the inmate testified by phone, and was cross-examined by the other sides. The Connecticut Supreme Court found that the inmate could not establish what assistance he might have provided his attorney had be been physically present, and that the trial court was able to assess the witness adequately by phone. Accordingly, the Court ruled that the procedure was adequate.

In re Randy Scott B., 511 A.2d 450 (Me. 1986) peripherally involves New Hampshire. When the child was three years old, his father shot and killed his wife, the child's mother, for which he was convicted of manslaughter and served four years in the Maine State Prison. Four years after his release, the father shot and killed his second wife and was convicted of murder in New Hampshire, for which he received a sentence of life without parole. *See State v. Bruneau*, 131 N.H. 104 (1988). Thereafter, Maine authorities moved to terminate his parental rights. The father, being incarcerated in New Hampshire, was not present at the hearing, but was represented at all times by an attorney. Prior to the hearing, the father moved for a writ of *habeas corpus ad testificandum*, and for an order requiring the father's attendance. The court denied the motions, but upon the attorney's representation that it could be accomplished, allowed a continuance to secure the father's presence. The attorney's plans didn't materialize, and the hearing went on without the father's attendance, but with him still represented by counsel. The court also allowed the father to be deposed after the hearing, and indicated that the hearing could be reopened after the deposition if necessary. Based on the evidence taken at the hearing, as well as the post-hearing deposition, the father's parental rights were terminated.

Upon the father's claim of a violation of constitutional rights for conducting the termination hearing in his absence, the Maine Supreme Judicial Court applied the *Mathews* due process analysis. It recognized the "extremely important" "liberty interest in maintaining his parental relationship with" the child. *Randy Scott B.*, 511 A.2d at 453. On the second prong, it rejected the father's contention that the court's procedures were likely to lead to an erroneous termination because the father was not present to assist his counsel in cross-examination of the opposing witnesses. The Court found that the father was not prejudiced by his absence because

he was at all stages of the proceeding represented by counsel who had full opportunity to cross-examination all witnesses, because the father's full testimony was considered by the court, and because the court gave the father the opportunity (not availed) to re-open the proceedings. Finally, the Court found that the state's interest in the protection of children, the security risk of having the father attend, and the cost and administrative burden of transporting and maintaining custody of the father, were substantial enough to warrant denial of the father's appearance.

There is nothing extraordinary about the case at hand such that New Hampshire should not follow the precedents of Connecticut and Maine and many other states.

Numerous courts have also found that inmates do not have a right to personally appear in a variety of non-termination family law proceedings. *Belser v. Belser*, 575 So. 2d 1139 (Ala. Civ. App. 1991) (divorce); *M.J.F. v. J.W.*, 680 So.2d 302 (Ala. Civ. App. 1996) (inmate action against custodian of child for contempt); *Head v. Head*, 612 So. 2d 1224 (Ala. Civ. App. 1992) (divorce; no right to personally appear even when intend to testify on own behalf); *Strube v. Strube*, 764 P.2d 731 (Ariz. 1988) (divorce); *Quaglino v. Quaglino*, 152 Cal. Rptr. 47 (Cal. App. 1979) (child support and appointment of receiver for inmate's property); *In re Marriage of McGonigle*, 533 N.W.2d 524 (Iowa 1995) (divorce); In *re Marriage of Schmidt*, 609 N.E.2d 345 (Ill. Ct. App. 1993) (divorce); *In re Marriage of Allison*, 467 N.E. 310 (Ill.App. 1984) (divorce, marital property dissolution, custody, and visitation); *Alexander v. Alexander*, 900 S.W.2d 615 (Ky. Ct. App. 1995) (visitation); *State ex rel. Kittrell v. Carr*, 878 S.W.2d 859 (Mo. Ct. App. 1994) (divorce); *In re Marriage of Burnside*, 777 S.W.2d 660 (Mo.App. 1989) (divorce); *Caynor v. Caynor*, 327 N.W. 633 (Neb. 1982) (visitation); *Matter of Guardianship & Custody of A.O.*, 596 N.Y.S.2d 971 (Fam. Ct. 1993 (custody); *Throndset v. Hawkenson*, 532 N.W.2d 394 (N.D.

1995) (paternity and child support); *State ex rel. Vanderlaan v. Pollex*, 644 N.E.2d 1073 (Ohio Ct. App. 1994) (custody); *Sullivan v. Shaw*, 650 A.2d 882 (Pa. Super. Ct. 1994) (visitation); *State v. Mott*, 692 A.2d 360 (Vt. 1997) (violation of court-ordered family violence order); *State ex rel. Taylor v. Dorsey*, 914 P.2d 773 (Wash. Ct. App. 1996) (paternity); *Hall v. Hall*, 341 N.W.2d 206 (1983) (divorce).

Courts have also found that inmates do not have a right to personally appear in variety of non-family civil proceedings. *Latiolais v. Whitley*, 93 F.3d 205 (5th Cir. 1996) (civil rights); *In re Collins*, 73 F.3d 614 (6th Cir. 1995); *Michaud v. Michaud*, 932 F.2d 77 (1st Cir. 1991); *Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990) (prison conditions); *Jones v. Hamelman*, 869 F.2d 1023 (7th Cir. 1989) (civil rights); *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987); *Dorsey v. Edge*, 819 F.2d 1066 (11th Cir. 1987); *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1986); *Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982); *Holt v. Pitts*, 619 F.2d 558 (6th Cir. 1980); *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976); *Moeck v. Zajackowski*, 541 F.2d 177, 181 (7th Cir. 1976); *In re Burrell*, 186 B.R. 230 (Bkrtcy, E.D. Tenn. 1995) (bankruptcy); *Lightfoot v. McDonald*, 587 So. 2d 936 (Ala. 1991) (malpractice plaintiff); *Clements v. Moncrief*, 549 So.2d 479 (Ala. 1989) (negligence plaintiff); *Hubbard v. Montgomery*, 372 So. 2d 315 (Ala. 1979) (civil rights plaintiff); *Post v. Duckett*, 672 So.2d 1298 (Ala. Ct. App. 1992) (party alleging errors in administration of estate); *Wantuch v. Davis*, 39 Cal. Rptr. 2d 47 (Cal. Ct. App. 1995) (malpractice plaintiff); *Adkins v. Winkler*, 592 So. 2d 357 (Fla. App. 1992) (tenant suit against landlord); *Brown v. Sheriff of Broward County Jail*, 502 So. 2d 88 (Fla. Ct. App. 1987) (plaintiff); *Myers v. Emke*, 476 N.W.2d 84 (Iowa 1991) (civil rights plaintiff); *Proctor v. Calahan*, 663 So.2d. 110 (La. Ct. App. 1995) (malpractice plaintiff); *Taylor v. Broom*, 526 So.

2d 1367 (La. Ct. App. 1988) (plaintiff in suit against prison); *In re Merrell*, 658 So. 2d 50 (Miss. 1995) (party in action against trustee); *Call v. Heard*, 925 S.W.2d 840 (Mo 1996) (wrongful death defendant); *State ex rel. McCulloch v. Lasky*, 867 S.W.2d 697 (Mo. Ct. App. 1993) (post-conviction civil proceeding); *Callahan v. Marsh*, 717 S.W.2d 260 (Mo.Ct. App. 1986) (civil rights plaintiff); *Wells v. St Vincent's Hosp.*, 605 N.Y.S.2d 12 (N.Y.A.D. 1993) (negligence plaintiff); *Mancino v. City of Lakewood*, 523 N.E.2d 332 (Ohio Ct. App. 1987) (party in enforcement of lien); *Nance v. Nance*, 904 S.W.2d 890 (Tex. Ct. App. 1995) (negligence defendant); *Byrd v. Attorney Gen. of Tex. Crime Victims Compensation Div.*, 877 S.W.2d 566 (Tex. Ct. App. 1994) (plaintiff in suit claiming entitlement to portion of crime victims fund); *Lackey v. Carson*, 886 S.W.2d 232 (Tenn.App. 1994) (perjury plaintiff); *Armstrong v. Randle*, 881 S.W.2d 53 (Tex. Ct. App. 1994) (damages defendant); *Pruske v. Dempsey*, 821 SW2d 687 (Tex. App. 1991) (damages defendant); *Birdo v. Holbrook*, 775 S.W.2d 411 (Tex. Ct. App. 1989) (plaintiff).

Accordingly, this Court should find that Mr. Langlois's due process rights were not violated.

IV. Trial Court Has Discretion over the Order of Testimony

Trial courts have great discretion regarding the order in which witnesses are heard and testimony is taken in order to promote orderly and expeditious trials. *Putnam v. United States*, 162 U.S. 687 (1896); *Kent v. Tyson*, 20 N.H. 121, 125 (1849); *Jenness v. Berry*, 17 N.H. 549 (1845).

Mr. Langlois has alleged that the court erred in requiring his testimony first. *Petitioner's Brief* at 20. This issue does not appear to be preserved. The court heard him first because that was apparently the only time the telephone hookup could be arranged with the federal penitentiary. Such a consideration, for the purpose of an efficient and expeditious trial, is precisely the type of issue trial courts are charged with deciding, and it cannot be disturbed on appeal.

Even if the court erred, however, it was harmless. Had it been requested, it was within the trial court's discretion to have Mr. Langlois testify a second time for rebuttal. *In re Randy Scott B.,* 511 A.2d 450 (Me. 1986) (court in termination proceeding gave father option to re-open hearing and submit rebuttal deposition); *Peters v. McNally*, 123 N.H. 438 (1983); *Taylor v. Gagne*, 121 N.H. 948 (1981); *McKinney v. Riley*, 105 N.H. 249 (1964). At no time, however, did Mr. Langlois's attorney request rebuttal testimony.

V. Mr. Langlois Did Not Ensure His Testimony Was Recorded

Because of the scheduling requirements of the federal penitentiary, Mr. Langlois was the first witness. Before his testimony, the parties' attorneys had a conversation in chambers about the lack of sophistication of the court's phone system. There was an extended, unrecorded conversation about the fact that the court's phones did not have a speaker-phone, that because there were only three phone available someone would have to double-up with one phone, and who would sit where on what phone. Given the configuration of the courthouse, all the participants – judge, GAL, petitioner's counsel, respondent's counsel – were in earshot of each other during Mr. Langlois's telephone testimony.

Given these conditions, it was obvious to all that the testimony was not being recorded. It was obvious that there was no phone to which a stenographer could listen. It was obvious that, given the limitations of the telephone system, a tape recording machine was not attached to the system or any phone extension. It was obvious to all participants that the court's tape recording machine operator was not present during Mr. Langlois's testimony.

No objection was made to these arrangements. There was no request to record Mr. Langlois's testimony. His counsel at no time made any effort to ensure that Mr. Langlois's testimony was preserved.

It is the appellant's duty to present "a record sufficient for the court to decide the questions of law presented by the case." N.H. SUP. CT. R. 13(3). When the appellant

> "intends to argue in the supreme court that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion."

N.H. SUP. CT. R. 15(3) (emphasis added). The rule is mandatory. This court has dismissed

portions of cases for failure to provide a sufficient record. *See e.g.*, *Rix v. Kinderworks, Corp.*, 136 N.H. 548 (1992); *State v. Menard*, 133 N.H. 708 (1990); *Brown v. Cathay Island, Inc.*, 125 N.H. 112 (1984). There is no known case in which this court has determined a question in the face of an incomplete record with regard to it.

Had there been some break-down in the court's equipment, or had Mr. Langlois's attorney not been apprized of the limitations of the phone system, Mr. Langlois could understandably argue that he was not responsible for providing a transcript of his testimony. But under the conditions of this case, the burden remains his.

Mr. Langlois cites *State v. Castle*, 128 N.H. 649 (1986) as standing for the proposition that the lack of a transcript should not be ascribed to him. *Respondent's Brief* at 20, n. 7. There is a right, upon request, to have all parts of a criminal trial recorded. *State v. Bailey*, 127 N.H. 416 (1985). In *Castle*, the defendant had no opportunity to request a record because the defendant's attorney was not made aware of the judge's private *voir dire* of a juror. Here, however, there was ample opportunity for Mr. Langlois's counsel to request a record.

Mr. Langlois has alleged that the evidence upon which his parental rights were terminated was insufficient, and has asked this court to reverse the trial court's decision on the merits. In his brief, Mr. Langlois acknowledges that a record his testimony was not preserved and therefore not presented to this court. *Respondent's Brief* at 8, n. 3.

Nonetheless, Mr. Langlois argues in his brief that during his trial his credibility was intact, and that the various witnesses called by the Petitioner were not to be believed. Mr. Langlois also argues that he took various actions, which were disputed by the Petitioner. The Probate Court's termination of parental rights was directly based on its view of these matters.

One cannot determine from the incomplete record, however, whether Mr. Langlois was able to maintain his credibility, or whether the Petitioners successfully undermined it. One also cannot determine whether Mr. Langlois took the actions he claims, or instead whether his allegations did not withstand the scrutiny of cross examination. (Alternatively, Mr. Langlois also concedes that even if his credibility were sterling, he could not win on sufficiency. DEFENDANT'S OBJECTION TO MOTION TO STRIKE ISSUES FROM APPEAL (5/11/98) (on file in this Court)).

Credibility and competing factual claims are precisely the types of factual issues to which this court must defer to the trial judge. *See*, *In re Lisa H.*, 134 N.H. 188 (1991) (Probate Court determines abandonment as a matter of fact, and decree not disturbed unless unsupported by evidence or plainly erroneous). Without a record of Mr. Langlois's testimony – and without a record of his cross examination – this court lacks the only tool it has to determine whether the trial court's view of the facts was unsupported or erroneous. While Mr. Langlois may now claim that his credibility was not an issue, it is clear that his entire sufficiency-of-the-evidence claim turns on it.

Thus, the failure to present this Court with a transcript of Mr. Langlois's testimony is squarely in the territory of Supreme Court Rules 13 and 15. Accordingly, this court has no basis on which to second-guess the credibility determinations made by the trial court, and cannot reach the sufficiency-of-the-evidence question posed by Mr. Langlois.

VI. Abandonment and Incarceration

New Hampshire law allows termination of parental rights when a child is abandoned and termination is in the best interests of the child. The case against the terminated parent must be proved beyond a reasonable doubt. *In re Jessica B.*, 121 N.H. 291 (1981); *State v. Robert H.*, 118 N.H. 713 (1978). The Probate Court determines abandonment as a matter of fact and its decree is not disturbed unless unsupported by the evidence or plainly erroneous. *In re Lisa H.*, 134 N.H. 188 (1991).

A court must look at the totality of the circumstances, *In re Jessie E.*, 137 N.H. 336, 342 (1993), but a child is presumed abandoned when the child is left by the parent in the care and custody of another without any provision for his support, or without communication from the parent for six months. RSA 170-C:5. To rule a child abandoned by a parent, the Court must find that the parent evidenced by his conduct a settled purpose to forego all parental duties and relinquish all parental claims. *Jessie E.*, 137 N.H. at 343; *In re Sara S.*, 134 N.H. 590, 592 (1991). A "mere flicker" of interest by the parent will not defeat a termination action. *Jessica B.*, 121 N.H. at 292.

While incarceration alone is not sufficient grounds for termination, RSA 170-C:5, VI, it is a viable consideration in making a determination of abandonment. *See Parent's Confinement as Evincing Neglect*, 79 ALR 3d 417 (and cases therein collected); Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757 (1991); Peter Ash and Melvin Guyer, *Involuntary Abandonment: Infants of Imprisoned Parents*, 10 BULL.AM.ACAD. PSYCHIATRY & L. 103 (1982).

When incarcerated, a parent's responsibilities are not tolled, and to defeat a termination claim the parent must show that he used the means available to him to attempt to overcome the obstacles he faces as a result of his imprisonment. This principle flows precisely from this Court's prior termination decisions. This Court has consistently held that the focus of the Probate Court's inquiry is on the conduct of the parent, and whether the parent has taken affirmative steps to demonstrate a parental intent. *Jessie E.*, 137 N.H. at 342-43 ("a parent abandons his child when his conduct evidences a settled purpose" to abandon); *Sara S.*, 134 N.H. at 592 (emphasis added); *Jessica B.*, 121 N.H. at 292. Incarceration is not such a peculiar circumstance calling for a departure from settled law.

Other courts have stated this explicitly. In *In re Juvenile Appeal*, 446 A.2d 808 (Conn. 1982), the father was incarcerated in an out-of-state jail. The mother moved and took an unlisted address and phone number. The Connecticut Court nonetheless found that the father's rights could be terminated because while "the inevitable restraints imposed by incarceration do not in themselves excuse a failure to make use of available though limited resources for contact with a distant child," *id.* at 814, the Court found that the father made little effort to make contact with the child.

In *In Interest of M.H.*, 828 S.W.2d 951 (Mo.App. 1992), the Missouri court also terminated a father's parental rights. If found that

> "the substantially reduced wages received by incarcerated parents do not excuse their obligation . . . to make monetary contributions towards support of their children. Granted, such a contribution from an incarcerated parent will not significantly assist in providing the parent's child with essentials, but even a minimal contribution evinces the parent's intent to continue the parent-child relationship. Evidence of this intent, a central consideration in the court's determination, is lacking when, such as here, the parent fails to make any

contribution, no matter how diminutive the amount."

In Interest of M.H., 828 S.W. at 955 (quotations, citations omitted).

In *In re Adoption of Dale A., II*, 683 A.2d 297 (Pa. Super. 1996), the Pennsylvania Court ruled that the fact finder

> "must examine the individual circumstances of the case and any explanation offered by the parents to determine if that evidence, in light of the totality of the circumstances, clearly warrants involuntary termination of that parent's rights. In making such a determination the court must consider the barriers to exercising his or her parental rights which the parent faced in deciding whether that parent has abandoned the child. To obtain benefit of this excuse, a parent must exhibit reasonable firmness in attempting to overcome the barrier or obstructive behavior of others; he or she must affirmatively demonstrate love, protection and concern for the child."

Dale A., II, 683 A.2d at 301 (citations omitted, emphasis added). The court found that although the parent occasionally sent cards, he didn't request photos, copies of report cards, or otherwise show an interest in his children's development. In terminating his rights, the court wrote that the "father has not even adequately utilized the minimal opportunities available to him, in his circumstances, to attempt to take and maintain a place of importance in the children's lives." *Id.* at 302. *See also Baby Boy A. v. Catholic Social Services*, 517 A.2d 1244, 1246 (Pa. 1986) (law requires incarcerated parent to do something to show interest); Jackson, *The Loss of Parental Rights as a Consequence of Conviction and Imprisonment: Unintended Punishment*," 6 NEW ENG. J. OF PRISON L. 61 (1979) (the limitations of prison is not in itself an excuse failure to not take advantage of resources); Payne, *The Law and the Problem Parent: Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcerated Parents*, 16 J. FAM. L. 797 (1977-78) (same).

Incarceration, of course, does not automatically lead to a loss of parental rights. In *In re*

T.M.R., 116 Cal.Rpts. 292 (Cal.Ct.App. 1974) the court rejected termination:

> "In the case at bar, . . . defendant communicated with her children on a frequent, regular and continuing basis, commencing such communications immediately after she was deprived of their custody [by incarceration] and long prior to the commencement of the [termination] action. Since defendant was incarcerated during the period when she wrote to her children twice a month, it is obvious that she was utilizing the only means of communication available to her."

Id. at 294-95. That the children were too young to read, the court said, was not relevant because,

> "the uncontradicted evidence shows that during the entire period when she was separated from her children due to her incarceration, defendant utilized the only means of communication available to her by writing to them twice a month. . . . [H]er letters frequently contained pictures suitable for young children, and . . . she also sent them birthday and Christmas cards. The fact that defendant's children were themselves unable to read her letters is of no particular importance, since their foster mother was able to read the letters aloud to them. It seems equally certain that although of tender years, the children were able to appreciate the significance of their mother's continuing attempts to keep in touch with them and thereby express her affection for them."

Id. at 295.

Likewise, in *Adoption of M.T.T.*, 354 A.2d 564 (Pa. 1976), the Pennsylvania Court found that the incarcerated father exhausted the resources he had available to him in attempting to locate his child, and in trying to contact and support it. It was only because he consistently ran into barriers created by the rules of the prison and by various social service agencies that he was unsuccessful. His termination was overturned on appeal.

VII. Mr. Langlois Made No Effort to Exercise Parental Duties and Claim Parental Rights

Many of the particular facts in this case are disputed by the various witnesses. Mr. Langlois's defense was mostly an attempt to diminish the credibility of Deborah Richer and the GAL. *Respondent's Brief* at 9-11. The relevant facts of how much parental contact Mr. Langlois attempted, however, were unassaulted.

The evidence shows that, at most, Mr. Langlois sent Brittany L. a few cards and a Christmas present through a charity, *Respondent's Brief* at 8-9, and that he might have spoken to Brittany L. on several occasions by phone. *Respondent's Brief* at 10-11. He made no effort to find the Richer's address and phone number. Regardless of Brittany's location, Mr. Langlois at all times had the ability to communicate with her because both Mr. Langlois's sister and Deborah's Richer's brother (with whom he spoke weekly) at all times were able to relay messages, letters, or gifts. *Respondent's Brief* at 11. Nonetheless, there was no evidence of systematic or regular attempts at communication.

Mr. Langlois offered no evidence that he ever asked about Brittany L.'s health, performance in school, involvement in other activities, first words, first steps, favorite toy, favorite song, best friend, whether she liked to climb trees, what she wants to be when she grows up, or any other matter. He never asked for report cards, photos, pictures she drew, or artwork she made. When he called, it was for the purpose of trying to rekindle his relationship with Deborah Richer, not to tell Brittany L. he loved her or to ask about her physical, emotional, psychological, medical, educational,, or artistic development. Mr. Langlois did not offer any evidence of any effort to contact his child, send her money, express his affection, offer his

guidance, or to play any parental role. Mr. Langlois never attempted to apologize to Brittany L. for his absence from her life, his inability to hold her and care for her, and never communicated his apologies for not being able to support her, or to provide for her nurturing.

These blanks in Mr. Langlois's alleged relationship with his daughter show an intent to abandon her. Mr. Langlois's interest did not rise even to the "flicker"which this Court has ruled is insufficient to overcome a charge of termination by abandonment. Accordingly, the Probate Court's finding of abandonment, and termination based on it, must stand.

VIII. If the Court Erred, it was Harmless Error

Even if the Court erred in allowing Mr. Langlois to testify by telephone and out of standard trial order, the error was harmless. There was overwhelming evidence of abandonment by Mr. Langlois. He has conceded that his testimony was not enough to dispute that evidence. DEFENDANT'S OBJECTION TO MOTION TO STRIKE ISSUES FROM APPEAL (5/11/98) (on file in this Court). This Court gives wide discretion to the Probate Court on matters of veracity and credibility. *See In re Lisa H.*, 134 N.H. 188 (1991). Because any error made by the Probate Court cannot result in a different outcome, this Court must affirm.

IX. By Getting Incarcerated, Mr. Langlois Voluntarily Waived Any Right to be Present

Criminal activity likely to result in incarceration is a voluntary waiver of any due process right to be personally present at a termination proceeding. When, as here, the criminal activity resulting in incarceration was done after Mr. Langlois's child was born, waiver is apparent.

Whether a defendant voluntarily absented himself from a criminal proceeding and thereby voluntarily waived his right to be present at trial is a question of fact for the trial court to be established by a preponderance of the evidence. *State v. Lister*, 119 N.H. 713 (1979). Thus, this Court's only role is to determine whether there was competent evidence to support the court's finding.

Brittany L. was born in 1990. The Probate Court found that Mr. Langlois committed the crime for which he is incarcerated when the child was 11 months old. ORDER, *Appendix to NOA* at 19

There has been no allegation that Mr. Langlois was not duly convicted of the crimes for which he was incarcerated, and no allegation that he had a defense such as duress or coercion to show that the crimes were not voluntarily committed.

Other courts have found that incarcerated parents voluntarily absented themselves from termination proceedings because of their criminal activity. In *In re B.A.G., Jr.*, 457 N.W.2d 292, 296 (Neb. 1990), the court found that "[a]lthough his incarceration . . . was nonvoluntary in a sense of the word, his actions that put him in prison were every bit as voluntary as if he had purchased a ticket for a 6-, 7-, or 8-year trek into Siberia."

In *In re Miller*, 179 N.Y.S. 181, 182 (1979), the court commented that "[h]owever harsh the rule of law may appear to [the incarcerated father] he alone has placed himself beyond the

pale of the law by conduct which has deprived himself of citizenship and of liberty."

In *In Interest of F.H.*, 283 N.W.2d 202, 213 (N.D. 1979), the court found that

> "no evidence was introduced which suggests that [the father] committed the crime to obtain finances or to earn money to help support the child or to obtain food for his own sustenance. He performed the acts which led to his incarceration voluntarily; he was not coerced or under duress to commit those acts; the acts must therefore be deemed to be voluntary. While he may not have committed the act with the specific intent to be incarcerated, nevertheless the reasonable consequence thereof should have been known and accepted."

In *Hamby v. Hamby*, 216 S.E.2d 536, 538 (S.C. 1975), the father "voluntarily pursued a course of lawlessness which resulted in his imprisonment and inability to perform his parental duties." *See also State ex rel. M.W.H. v. Aguilar*, 794 P.2d 27 (Utah 1990).

X. Confrontation Right Does not Require Physical Presence in a Termination Case

Mr. Langlois has argued the lack of his personal presence at trial violated his confrontation rights. *Respondent's Brief* at 26-28.

The issue was not preserved. While it appears in his Notice of Appeal, it is not mentioned in any pleading. As such the issue is waived.

If this Court reaches the issue, it nonetheless doesn't apply to this case. The New Hampshire constitution provides that:

> "Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel."

N.H. CONST., Pt. I, Art. 15.

The provision, however, applies only to criminal cases. The Article is entitled "Right of Accused." Each of the sentences of Article 15 refers to the rights of criminals. The Article begins, "No subject shall be held to answer for any crime, or offence . . . " The confrontation clause itself requires that a subject "be fully heard in his defense." The sentence following begins, "No subject shall be arrested, imprisoned . . ." The next, and final, sentence begins, "Every person held to answer in any crime or offense . . ." *Id.* (emphases added). Each of the Article's provisions applies specifically to criminal cases. There are no known non-criminal cases construing the clause. Accordingly, insofar as the Article may be construed to confer a right of personal appearance, that right applies only to criminal cases and is inapposite in this civil termination proceeding.

Even if the clause applies in this case, it merely guarantees the right to have a litigant's representative question witnesses; it does not guarantee an in-person viewing. *State v. Howard*,

121 N.H. 53 (1981); *see also Larose v. Superintendent, Hillsborough Cty. Cor.*, 142 N.H. 364 (1997) (video arraignments not violate due process right).

In *State v. Castle*, 128 N.H. 649 (1986), the judge conducted a *voir dire* interview with a juror who, in the middle of trial, realized one of the witnesses may have been an acquaintance. Without contacting defense counsel, the judge determined that the juror had no bias. This Court, in holding that the trial judge violated the defendant's confrontation right, wrote: "When a defendant, or defense counsel alone, is present during an inquiry into possible juror bias, there is an opportunity to suggest voir dire questions." *Castle*, 128 N.H. at 652 (emphasis added). Thus, this Court recognized that confrontation rights do not require the physical presence of the defendant, but merely require that the defendant's counsel be given an opportunity to pose questions.

XI. No Error to Disallow Testimony of Paralegal

Mr. Langlois has suggested that he was wronged by the Probate Court's refusal to allow his attorney to present the testimony of the attorney's paralegal.

One of the witnesses called by Mr. Langlois was David Cazares. Mr. Cazares is the brother of Deborah Cazares, now Deborah Richer, the Petitioner. While he testified at the request of the respondent Mr. Langlois, his testimony in several instances was not helpful to Mr. Langlois. The last question David was asked on direct examination by Mr. Langlois's attorney was: "At any point did [Deborah] make a statement to you that she didn't want Buddy [Langlois] up here because if Buddy was up here, she couldn't lie?" David answered "No." *Transcript* at 99.

The attorney's paralegal had allegedly spoken to David on the phone at some earlier point. During that conversation, David allegedly told the paralegal that Deborah told him that the answer to the question was: Yes, Deborah said she would lie if Buddy were not in court. Mr. Langlois's attorney thus wanted to impeach David, his own witness, using the prior allegedly inconsistent statement. To do so Mr. Langlois's attorney attempted to present the testimony of the paralegal.

The Court refused to hear the paralegal's testimony, correctly ruling that David "never was cross-examined on it. [I]f you have the statement, it was never presented to him." *Transcript* at 123.

Rule 613 is addressed to prior statements of witnesses. It says:

> "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness

> thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent."

N.H. R. Ev. 613(b).

The attempted testimony of the paralegal is precisely the evidence barred by Rule 613. The paralegal's statement is extrinsic evidence of an alleged prior inconsistent statement David. As such it is not admissible unless David was given the opportunity to explain or deny the alleged statement. Upon Mr. Langlois's attorney asking David whether Deborah ever said she would lie, he said no. But Mr. Langlois's attorney never presented David with the alleged statement he, David, made to the paralegal. Without having asked that question, Rule 613 bars the paralegal's testimony.

Whether Deborah would lie or not is not an admission of a party-opponent because, even if Deborah said she would lie, it is not an admission. An admission is an "extrajudicial statement giving rise to a reasonable inference of guilt." *State v. Lesnic*, 141 N.H. 121, 129 (1996); *State v. Martineau*, 116 N.H. 797, 799 (1976). An admission is "an inculpatory statement." *State v. Jansen*, 120 N.H. 616, 617 (1980); *see State v. Gomes*, 116 N.H. 113 (1976). An admission is a statement that creates an inference of liability. C*urrier v. Grossman's of New Hampshire, Inc.*, 107 N.H. 159 (1966). An admission is <u>not</u> merely a statement that reflects poorly on the person or undermines her credibility. While the alleged statement, if it were actually said, does not flatter Deborah, it is far below inculpation. Thus, the statement is not exempted by the rule.

In his brief, Mr. Langlois also attempts to create a hearsay issue. Citing Rule 801(d), he alleges that the statement is an admission of a party opponent. As noted, however, the statement is not an admission. It is also not a prior statement by a witness because, as the trial judge

correctly pointed out, Mr. Langlois's attorney didn't give David a chance to testify about the alleged statement. Accordingly, the proposed testimony by the paralegal is also hearsay and was properly excluded.

XII. Mr. Langlois Conceded, Did Not Argue, or Failed to State an Appellate Claim on the Standard of Proof Question He Posed

In his Notice of Appeal, Mr. Langlois posed to this Court the question:

> "1. Did the probate court fail to use the appropriate standard of proof in the case at hand, where the respondent was incarcerated and unable to attend the trial or hear testimony against him."

Notice of Appeal at 2. The Court wrote in its order that:

> "A hearing was held and the court applied the standard of proof of beyond a reasonable doubt."

ORDER, *Appendix to Notice of Appeal* at 19.

That the Court must apply the reasonable doubt standard is beyond argument because it is settled law. *In re Jessica B.*, 121 N.H. 291 (1981); *State v. Robert H.*, 118 N.H. 713 (1978); N.H.CONST., Pt. I, Art. 2. Moreover, there is no higher standard of proof known to the American legal system.

For these reasons, it is supposed, Mr. Langlois either conceded the issue, *Respondent's Brief* at 28, or did not address it. The matter is therefore waived.

If, by "standard of proof" in his Notice of Appeal Mr. Langlois intends to refer to the elements necessary to be proved in order to establish termination of the parental rights of an incarcerated person, the issue is both preserved and argued. It is, however, not open to serious debate. The elements proposed by Mr. Langlois are identical to those used by the Probate Court and also identical to those proposed by his opponent below. In a Rule 7 appeal, one is required to provide a "direct and concise statement of the reasons why a substantial basis exists for a difference of opinion on the questions." *See* Appendix to Supreme Court Rules, Rule 7 Notice of Appeal Form. Because there is no legal dispute on the question, Mr. Langlois has failed to state an appellate claim, and the question is therefore moot.

XIII. Request for Attorneys Fees and Costs

The Supreme Court rules allow for taxation of costs and for "attorneys' fees related to an appeal to a prevailing party if the appeal is deemed by the court to have been frivolous or in bad faith." N.H. SUP.CT.R. 23.

In this case, every substantive issue was procedurally defaulted. Mr. Langlois waived his right to be present by not seeking a writ of *habeas corpus ad testificandum* in the federal court. He failed to preserve the core issue in this case – the alleged due process right to be present. He waived the ability to raise the sufficiency claims he nonetheless argues because he did not ensure that there was a transcript. He conceded, did not argue, or failed to state an appellate claim on the standard of proof question.

The central issues on appeal, therefore, cannot be reached by this Court. As such, maintenance of the appeal qualifies for an award of costs and fees.

CONCLUSION

Because the substantive issues supposedly on appeal have all been procedurally defaulted, Deborah Richer requests this court summarily affirm the Probate Court's ruling, and also award fees and costs.

If this Court reaches the substantive issues, it should nonetheless uphold the termination of Mr. Langlois's parental rights. Mr. Langlois got all the process from the Probate Court that he could reasonably be accorded and that he reasonably could account for needing. Moreover, while incarceration alone is not sufficient cause for abandonment, Mr. Langlois offered no evidence, even given the limitations of his situation, that he had an interest in Brittany L.

Respectfully submitted,

Deborah Richer,
By her Attorney,

Law Office of Joshua L. Gordon

Dated: August 8, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Petitioner, Deborah Richer, requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 8, 2000, a copy of the foregoing will be forwarded to Kathleen Goulet, Esq.; Laura Brevitz, Esq.; Wayne Healey, Esq., GAL; and Ann Larney, Esq., Assistant Attorney General.

Dated: August 8, 2000

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APPENDIX