IN THE SUPREME COURT OF MISSOURI

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| STATE OF MISSOURI, ex. rel., CHRISTOPHER BARTON, | ) | |
| Relator, | ) | |
| Vs. | ) | Cause No. SC84643 |
| HONORABLE CAROL KENNEDY BADER, Judge of the Juvenile Division of the Twenty-Third Judicial Circuit of Missouri, | ) | |
| Respondent. | ) | |

**RESPONDENT'S BRIEF IN OPPOSITION TO PROHIBITION**

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## STATEMENT OF FACTS

On February 9, 2001, Respondent, as Judge of the Juvenile Division of the Twenty-Third Judicial Circuit of Missouri, entered an order that placed R.B., S.B., and J.B., Relator's minor children, in the temporary protective custody of the Division of Family Services. (A1, A9, A17). On that same date, the Juvenile Officer of the Twenty-Third Judicial Circuit filed a petition in the interest of each child; those petitions were set for hearing on April 25, 2001. *Id*. A protective custody hearing, under Mo. Sup. Ct. R. 111.14, was originally set for February 21, 2001. *Id*. On February 20, 2001, Relator applied for court-appointed counsel. In his application, Relator indicated that his monthly income was between $800.00 and $1,200.00, and that his monthly expenses were $220.00. Respondent denied Relator's application for court-appointed counsel. (A42). On February 21, 2001, Respondent continued the protective custody hearing to February 28, 2001, in order that Relator could retain an attorney. (A1, A9, A17). The protective custody hearing was held on February 28, 2001. At that hearing, Respondent found only that there was probable cause to believe that the children were subject to the jurisdiction of the Juvenile Division under Section 211.031. 1. (1), RSMo, for neglect or abuse. (A2, A10, A18). On April 25, 2001, Relator and other parties appeared in answer to the summons issued upon filing of the Petitions, and the cause was set for trial on August 15, 2001. (A2, A10, A18). On August 25, 2001, Respondent entered a judgment assuming jurisdiction over the minor children and

placing them in the legal custody of the Division of Family Services for foster care. (A3, A11, A19). Subsequently, on February 4, 2002, Respondent conducted a permanency planning hearing as required by Section 210.720, RSMO. (A28). To correct Relator's assertion, Relator's Brief at 2, Respondent did not find that the permanency plan should be termination. Rather, Respondent found only that the Division of Family Services should submit information to the Juvenile Officer for a determination by the Juvenile Officer whether a petition to terminate parental rights should be filed. Respondent's order explicitly stated that "No determination has been made by the Court whether there are grounds for termination of parental rights or that such action would be in the best interests of the juvenile." (A30).

On March 15, 2002, the Juvenile Officer filed petitions to terminate Relator's parental rights with respect to his three children. (A32, A35, A38). Upon his application, an attorney was appointed for Relator on June 3, 2002. On June 5, 2002, Relator was served with summons with regard to the petitions to terminate parental rights. On June 17, 2002, the matter was set for trial on the merits on November 12, 2002. (A26). On June 18, 2002, Relator, through counsel, filed his Request for Change of Judge. (A25). Respondent denied his request "as untimely for the reason that the Court has prior and continuing jurisdiction over the juveniles."

## POINTS RELIED ON

### I.

RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THESE CAUSES OTHER THAN SUSTAINING RELATOR'S REQUEST FOR CHANGE OF JUDGE BECAUSE RESPONDENT DID NOT ACT IN EXCESS OF, OR ABUSE HER DISCRETION, IN DENYING SAID REQUEST FOR CHANGE OF JUDGE BECAUSE A TERMINATION OF PARENTAL RIGHTS ACTION FILED IN A CASE WHERE THE JUVENILE COURT HAS PRIOR AND CONTINUING JURISDICTION UNDER SECTION 211.031. 1. (1), RSMO, SHOULD NOT BE DEEMED AN INDEPENDENT CIVIL ACTION UNDER SUPREME COURT RULE 126.01, GIVING RISE TO A RIGHT TO A PEREMPTORY CHANGE OF JUDGE.

*State ex. rel Noranda Aluminum v. Rains*, 706 S.W.2d 861 (Mo banc 1986).

*Derfelt v. Yocum*, 692 S.W.2d 300 (Mo. 1985).

MO. SUP. CT. R. 126.01.

*State ex. rel. Brault v. Kyser*, 562 S.W.2d 172 (Mo. App. W.D. 1978).

MO. SUP. CT. R. 51.05.

*In Interest of L.J.M.S*., 844 S.W.2d 86 (Mo. App. 1992),

*In Interest of K.O*., 933 S.W.2d 930 (Mo. App. 1996).

Section 210.720, RSMO.

Section 211.447, RSMO.

Price, William Ray. State of the Judiciary 2001.

Adoption and Permanency Guidelines, Improving Court Practice in Child Abuse and Neglect Cases, National Council of Juvenile and Family Court Judges (Fall 2000).

Section 478.063, RSMO.

Section 211.181, RSMO.

Section 211.477, RSMO.

Section 211.500, RSMO.

MO. SUP. CT. R. 119.05

Section 452.455, RSMO.

*Medawar v. Gaddis*, 779 S.W.2d 323 (Mo. App. 1989).

*State ex. rel. B.C.C. v. Conley*, 568 S.W.2d 605 (Mo. App. 1978).

MO. SUP. CT. R. 55.03

*State ex. rel. Stubblefield v. Bader*, 66 S.W.3rd 741 (Mo. Banc 2001).

*State ex. rel Walters v. Schaepperkoetter*, 22 S.W.3rd 740 (Mo. App. 2000).

*State ex. rel Bates v. Rea*, 922 S.W.2d 430 (Mo. App. 1996).

*State ex. rel. Burns v. Goeke*, 884 S.W.2d 60 (Mo. App. 1994).

*State ex. rel. Cohen v. Riley*, 994 S.W.2d 546 (Mo banc 1999).

## ARGUMENT

### I.

RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THESE CAUSES OTHER THAN SUSTAINING RELATOR'S REQUEST FOR CHANGE OF JUDGE BECAUSE RESPONDENT DID NOT ACT IN EXCESS OF, OR ABUSE HER DISCRETION, IN DENYING SAID REQUEST FOR CHANGE OF JUDGE BECAUSE A TERMINATION OF PARENTAL RIGHTS ACTION FILED IN A CASE WHERE THE JUVENILE COURT HAS PRIOR AND CONTINUING JURISDICTION UNDER SECTION 211.031. 1. (1), RSMO, SHOULD NOT BE DEEMED AN INDEPENDENT CIVIL ACTION UNDER SUPREME COURT RULE 126.01, GIVING RISE TO A RIGHT TO A PEREMPTORY CHANGE OF JUDGE.

Respondent believes that both of Relator's points relied on and arguments deal with a common issue, and may be dealt with in one response.

Relator seeks an extraordinary remedy in prohibition. Prohibition lies only when the trial court has usurped judicial power because it lacks personal or subject matter jurisdiction; or when the trial court has clearly acted in an excess of jurisdiction or has abused its discretion; or when there is no adequate remedy on appeal. *State ex. rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861 (Mo. banc 1986). This Court has held that whether prohibition should issue is within the

sound discretion of the court to which the application is made, and that it should be used "judiciously and with great restraint" and only when the facts of the case "demonstrate unequivocally that there exists an extreme necessity for preventive action." *Derfelt v. Yocum*, 692 S.W.2d 300, 301 (Mo. 1985). Gleaned from this is that prohibition should not issue unless there is clear law to guide the trial court, and clear abuse of discretion by the trial court in disregarding that law.

The facts in this case are not in dispute. Without question, Respondent had prior and continuing jurisdiction over the minor children under Section 211.031. 1. (1), RSMO, pursuant to a judgment of neglect entered on August 15, 2001. (A3, A11, A19). Without question, the Juvenile Officer filed petitions to terminate parental rights on March 15, 2002. (A5, A13, A21). Without question, Respondent entered an order on June 17, 2002 that set those petitions for trial on November 12, 2002. (A7, A15, A23). Without question, Relator filed an application for a change of judge on June 18, 2002, one day after the date on which Respondent set the trial date. (A25). In denying Relator's request for a change of judge, Relator found that the request was "untimely for the reason that the Court has prior and continuing jurisdiction over the juveniles." *Id*.

A reasonable inference from Respondent's statement is that Respondent did not deem the termination of parental rights petition to be an "independent civil action" within the meaning of MO. SUP. CT. R. 126.01. c., allowing for a change of judge in the termination proceeding, where Relator had previously had the opportunity to obtain a change of judge in the underlying neglect action filed

under Section 211.031, RSMO. If the termination of parental rights proceeding is an independent civil action, Relator is entitled to obtain a change of judge as his request was timely filed within five days after the termination petition was set for trial.

The question presented herein is whether Respondent lacks jurisdiction to do other than grant Relator a change of judge upon his request under Supreme Court Rule 126.01, with regard to a Petition to Terminate Parental Rights, where the children who are the subject of the termination of parental rights petition are already subject to the Respondent's jurisdiction under Section 211.031. 1. (1), RSMO, for neglect. Certainly, if no prior neglect jurisdiction exists, and a termination petition is filed, any party to the case, upon the party's first exposure to the trial judge, would be entitled to a change of judge. In essence, the question is whether the termination of parental rights petition filed in a case where the juvenile court has prior jurisdiction is a supplemental petition under SUP. CT. R. 126.01, or an independent civil action.

This is a question of first impression before this Court, and there are no recent decisions from the Courts of Appeals, interpreting current rules, to guide a judge of the juvenile court on this issue. This case is also one of general interest, and will have an impact on juvenile courts throughout the state. With this case, this Court will decide whether the principle of judicial continuity in child custody cases, embodied in the phrase "one-family, one judge" will continue to be the law in the State of Missouri, or whether this State will revert to a system in which

different judges may make decisions on children's lives, based on the pleading at issue, with the possibility of conflicting orders.

Relator argues that Respondent is governed by the holding in *State ex rel. Brault v. Kyser*, 562 S.W.2d 172 (Mo. App. W.D. 1978), and should have granted Relator's request for change of judge based on that decision. Respondent submits that *Brault* does not reflect current statutes, rules, and public policy, and the reasoning of the case should not be followed. Preliminarily, Respondent notes *Brault* was decided under a precursor to MO. SUP. CT. R. 51.05, and not under either the current rule for a change of judge in civil cases or the corresponding juvenile rule, MO. SUP. CT. R. 126.01. Further, the result in *Brault* could have been reached under current rules, since the trial judge ultimately assigned to hear the termination of parental rights petition was not the same judge as originally assigned to the matter. MO. SUP. CT. R. 51.05 (a), 126.01 (c).

In *Brault*, the court ruled that a party was entitled to a change of judge upon the filing of a petition to terminate parental rights, notwithstanding that the party had obtained a change of judge in the earlier neglect proceeding. The *Brault* court held that termination of parental rights "had a fundamentally different purpose" than adjudication of neglect, and that a "much stronger test for parental default" is required for termination. 562 S.W.2d 172,174. If this were true at the time of *Brault*, Respondent submits that it is no longer true due to subsequent legislative and rule changes. First, the legislature has declared that the "child welfare policy of this state is what is in the best interests of the child." Section 1.092, RSMO.

This is true in child abuse/neglect proceedings brought under Section 211.031. 1. (1), RSMO, and in termination of parental rights proceedings brought under Section 211.444, et seq. Secondly, if there ever was a "much stronger test for parental default" in termination proceedings, as *Brault* indicates, this is no longer true. The standard of proof in child abuse/neglect proceedings brought under Section 211.031. 1(1), RSMO, and in termination of parental rights proceedings brought under Section 211.444, et seq., is the same: clear, cogent, and convincing evidence. *In Interest of L.J.M.S*., 844 S.W.2d 86 (Mo. App. 1992); *In Interest of K.O*., 933 S.W.2d 930 (Mo. App.1996).

Third, and most important, the presently declared obligation of the Juvenile Division with respect to any foster child, from the very first day the child is placed in care, is to achieve permanency for that child, whether with natural parents or adoptive parents following termination of parental rights. Section 210.720, RSMO, provides that the court must conduct a permanency planning hearing with respect to a foster child each year. Indeed, indicating its desire for prompt permanency planning, the General Assembly has mandated the filing of a petition to terminate parental rights when a child has been in foster care for fifteen months out of twenty-two months. Section 211.447. 2. (1), RSMO. Justice Price has recognized that when a child is removed from a parent, "it is the state's obligation to determine what to do with that child as soon as possible", and that the litigation process involved in determining a permanent placement should be expedited. State of the Judiciary 2001, William Ray Price, C.J. (Copy attached).

A fundamental precept of permanency planning, presumably known to and intended by the legislature, is that it is:

> strongly preferred that the same judge or judicially supervised magistrate preside over the entire child welfare case from the preliminary protective hearing through permanency, including adoption. Following a case from start to finish offers the judge the opportunity to see the impact decisions have made on the child, creates the best possibility of seeing that case plans relate to the specific needs of the child and family and allows for development of perspective about cases.

*Adoption and Permanency Guidelines, Improving Court Practice in Child Abuse and Neglect Cases*, 5, National Council of Juvenile and Family Court Judges (Fall 2000). (Copy attached).

This strong preference for "one family - one judge" is borne out by the facts of this case. Respondent has dealt with these children, and their parents, for more than sixteen months, since February 2001. Her familiarity with the facts and circumstances surrounding this family enhances her ability to make decisions that are in the best interest of these children.

Further, under Missouri law, one division of the Circuit Court is designated as the Juvenile Division. Section 478.063, RSMo. In much of Missouri, this means that one judge is assigned to hear juvenile cases, including child abuse/neglect matters. If Relator's view prevails, the judge that is most familiar not only with

the facts pertaining to a given child and family, but also to the body of law pertaining to child abuse/neglect and termination of parental rights, will be subject to disqualification at the most critical phase of the proceeding: whether to terminate parental rights. This view defies logic, and is judicially inefficient, as a newly assigned judge would have to master the facts and the law pertaining to the case, a process that would involve time and may delay expeditious handling of the matter and achievement of permanence for the children involved. Moreover, if Relator's view prevails, the specter arises that two judges may exercise jurisdiction over the same child, with the possibility of different rulings. If Relator is correct that the termination of parental rights case is a separate civil action, that case, upon disqualification of the original judge, will go to another judge. The original judge will still have jurisdiction over the children in the neglect proceeding, as a final judgment and order was obtained in that case, as it was regarding these children. At best, this will lead to confusion as to which judge governs the ultimate placement of the child at issue. To illustrate, under Section 211.181, RSMO, the judge with jurisdiction over the minor children in the neglect action under Section 211.031, RSMO, may have placed the children in a foster home, may have received good reports about their progress in that home, and may have entered an order that they remain in the foster home. Under Section 211.477, RSMO, the judge with jurisdiction over the termination of parental rights case may order that the minor children be placed with a relative, either upon granting or denying the

termination. If Relator's view that the termination is a separate civil action prevails, which order governs?

The *Brault* court also relied upon the physical separation of the provisions relating to termination of parental rights from the remainder of Chapter 211, RSMO, as indicative of a legislative intent that termination of parental rights be treated distinctly from a neglect proceeding. However, such physical separation is not now unique to the termination provisions of Chapter 211, RSMO. For example, "Regional Juvenile Detention Districts" is now also physically separated from the remainder of Chapter 211. Section 211.500, RSMO. Accordingly, physical separation of statutory provisions should not be viewed as creating substantive or procedural rights, as held in *Brault*. Relator apparently attempts to buttress *Brault's* focus on this physical separation of the termination statutes as proof that termination actions are a separate civil action. Relator argues that the statutory requirement that the Division of Family Services prepare a study for the termination of parental rights hearing means that the termination of parental rights proceeding is an independent civil action, allowing a change of judge upon timely request. Relator's Brief, 11. There is no logical connection between the two issues. Social studies may be required in any case for a hearing on disposition. MO. SUP. CT. R. 119.05. For example, when a juvenile is subject to the jurisdiction of the juvenile court as a delinquent or as a neglected child, following adjudication on a petition, a new social study may be required if a motion to modify the prior order of disposition is filed, or if a supplemental petition is filed.

Under such circumstances, the preparation of a new social study does not trigger a new right to obtain a change of judge. MO. SUP. CT. R. 126.01. c. Legislative recognition of a juvenile court's need for current social information in a termination of parental rights proceeding similarly, and certainly, does not indicate legislative intent that the termination proceeding is an independent civil action, where prior neglect jurisdiction exists. This is particularly true where the legislature has adopted the concept of family court, with its emphasis on "one-family, one-judge", and where one judge has jurisdiction over the lives of the children, and parents, regardless of the nature of the pleading involved or the statute at issue. Section 487.010, *et. seq*., RSMO.

Where the court has prior neglect jurisdiction, the requirement that a separate petition for termination of parental rights be filed, that the petition be personally served, and that the parents have the right to appointed counsel, does not prove that the termination of parental rights proceeding is an independent civil action requiring the granting of a change of judge motion upon request. By analogy, a party in a dissolution of marriage proceeding may file a motion to modify an order of custody or may be served with such a motion. In such action, the party may lose all custody or visitation rights to the child at issue, even if the legal relationship of parent and child is maintained. Personal service of summons is required. Section 452. 455, RSMO. At the time of *Brault*, a motion to modify a decree of dissolution was considered an independent civil action, allowing for a change of judge. *Medawar v. Gaddis*, 779 S.W.2d 323 (Mo. App. 1989). This

Court has now determined that the motion to modify is not an "independent civil action" allowing the party a change of judge upon application. MO. SUP. CT. R. 51.05. At the time of *Brault*, a change of judge was allowed on a motion to modify a previous order of disposition in a juvenile delinquency proceeding. *State ex. rel. B.C.C. v. Conley*, 568 S.W.2d 605 (Mo. App. 1978). In current MO. SUP. CT. R. 126.01, adopted after the *Brault* and *B.C.C.* decisions, this Court recognized that a motion to modify an order of disposition previously entered under the Juvenile Code, or a supplemental petition filed under the Juvenile Code, did not trigger a right to a change of judge. These current rules are, again, supported by the concept of family court, where one judge stays with the matter throughout, and is familiar with the needs of the children involved.

Relator claims that the term supplemental petition should be governed by MO. SUP. CT. R. 55.33, relating to civil pleadings, and should accordingly be limited to pleadings that set "forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented." Relator's Brief, 13. Respondent does not believe that the issues herein should be decided by mere semantics or word torture, and submits that this Court may interpret its rules of juvenile procedure based on precedent indicating a preference for judicial continuity in child custody matters. However, this Court should note that the petition to terminate parental rights in this matter does fit within the meaning of "transactions or occurrences or events that have happened" since the original neglect petition. The General Assembly, in Section 211.447. 4. (3), RSMO, which

is the statute pled in these termination of parental rights cases, provides that termination could occur if "the child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist. . ." The statute thus contemplates juvenile court action based on transactions or events that have happened since the original neglect petition.

Finally, Relator's reliance on the holding in *State ex rel. Stubblefield v. Bader*, 66 S.W.3d 741 (Mo. banc 2002), is misplaced. The issue of change of judge in that case turned on what, under the current version of MO. SUP. CT. R. 126.01. b, constituted the setting of the trial date of the neglect petition filed under Section 211.031, RSMO. *Stubblefield* does not address, even peripherally, whether a termination of parental rights petition is an independent civil action under MO. SUP. CT. R. 126.01, allowing for a change of judge without cause upon application, in the situation where the juvenile court had obtained prior jurisdiction over the children.

Of course, the right of a litigant to seek a change of judge, when a new case is brought before a judge, is a keystone of Missouri's judicial system, and black letter law requires the right to be liberally construed. *State ex. rel. Walters v. Schaepperkoetter*, 22 S.W.3rd 740 (Mo. App. E.D. 2000). But, trial courts are also obligated not to disqualify themselves unnecessarily. *State ex. rel. Bates v. Rea*, 922 S.W.2d 430 (Mo. App. S.D. 1996). Respondent submits that disqualifying

herself, without a clear mandate to do so and in view of the current public policy, statutes, and judicial rules favoring judicial continuity in child custody cases, is unnecessary. In *State ex.rel. Burns v. Goeke*, 884 S.W.2d 60 (Mo. App. E.D 1994), the court considered whether a trial judge was required to disqualify himself upon request under MO. SUP. CT. R. 51.05 after remand of a dissolution of marriage proceeding following reversal of a judgment. The court held that the change of judge rules require the parties "to assess the acceptability of the trial judge within a short time after the judge's identity has been determined" and request a change if appropriate. *Id*. at 61. This does not bind this Court, as it is an opinion of an appellate division, and does not directly interpret the juvenile rule at issue. Notwithstanding, the logic is persuasive, particularly in view of the present legislative and judicial mandate to achieve timely permanent placement with respect to foster children, and the emphasis on maintaining judicial continuity with respect to child custody issues. Relator, at the time the petition was filed under Section 211.031, RSMO, had the time to assess the acceptability of Respondent as a trial judge. At that time - the time of the original neglect action - the juvenile court was charged with the goal of achieving permanence for Relator's children, and one means to that goal, known to all, was termination of parental rights. Relator did not seek a change of judge. Relator should not now have a second bite of the apple.

It may be suggested that, as a matter of policy, the judge who hears a termination of parental rights case should not be the same judge that heard the

original neglect proceeding and subsequent reviews and permanency planning hearings. It may be argued that "familiarity breeds contempt, and that a judge too long exposed to a given family may bring some bias or prejudice to the termination case. This view gives too little credit to the judiciary; certainly a judge may preside fairly over a case, over a long period of time, without forming a personal bias or prejudice toward any party, and without forming an opinion on the final result prior to the presentation of evidence. It is well settled that a party is not entitled to a change of judge merely because of prior adverse rulings by the trial judge. *State ex. rel. Cohen v. Riley*, 994 S.W.2d 546, 548 (Mo. Banc 1999). And, if actual bias or prejudice could be shown, any party, at any time, has the right to seek a change of judge for cause.

## CONCLUSION

Relator bears the burden of demonstrating that Respondent usurped judicial authority because she lacked personal or subject matter jurisdiction; because she clearly acted in an excess of jurisdiction or abused her discretion; or because there is no adequate remedy on appeal. *State ex. rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861 (Mo. banc 1986). There is no question raised that Respondent lacked personal or subject matter jurisdiction in this matter. The question is whether she clearly acted in excess of her jurisdiction or abused her discretion by denying a change of judge request made in a termination of parental rights proceeding where she exercised prior and continuing jurisdiction over the children under Section 211.031, RSMO.

The answer to this question depends on whether the termination of parental rights cause, in these circumstances, is deemed an "independent civil action." As argued herein, it should not be so deemed. Relator knew the identity of the trial court early, Relator had the option of seeking a change of judge prior to any judicial investment in this case and prior to any investment by the children with the trial judge, and did not do so. The public policy of this State in judicial continuity in child custody matters, as exemplified by statute and judicial rule, requires that Respondent not be prohibited from exercising jurisdiction in this matter.

For the reasons set forth, Respondent prays that a Writ of Prohibition not issue and that the preliminary order in prohibition be quashed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that two copies of Respondent's Brief, and one diskette containing the same, were mailed by first class mail to Ms. Mary Lake, Attorney at Law, 321 Main St., Hillsboro, MO 63050; Mr. Robert Miller, Attorney at Law, 1504 Gravois, High Ridge, MO 63049; and Ms. Lisa Page, Attorney at Law, #8 Seclusion Woods, Festus, MO 63058, on this _____ day of September 2002.

_____

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies on this ____ day of September 2002, that this Brief includes the information required by MO. R. CIV. P. 55.03, and complies with the limitations contained in MO. R. CIV. P. 84.06(b), and further certifies that the disk containing this Brief filed with the Brief has been scanned for viruses and is virus-free. The number of words in this Brief is 4,904.

_____

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