Case No.: WD75693

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TARYN WILLIAMS,

Respondent,

v.

STATE OF MISSOURI,
DEPARTMENT OF SOCIAL SERVICES, CHILDREN'S DIVISION,
CHILD ABUSE AND NEGLECT REVIEW BOARD,

Appellant.

Appeal from the Sixteenth Judicial Circuit, Jackson County,
Missouri, Honorable Marco A. Roldan, Circuit Judge

BRIEF OF RESPONDENT TARYN WILLIAMS

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

Respondent adopts only the portions of Appellant's Statement of Facts contained under Appellant's headings "Judgment's findings of fact" (Appellant's Brief[1] 8-12) and "Judgment's conclusions of law" and "Judgment's operative provision" (App.Br. 12). Respondent further sets out the following Statement of Facts:

Failure of Timely Notice (Section 210.152.2 RSMo)

The trial court found that: (1) Section 210.152.2 RSMo mandates that the Children's Division (hereinafter "Division") "shall" notify an alleged perpetrator of any determination made by the Division within 90 days. (Appx. 4); (2) Section 210.152.2 does not contain a "good cause reason for delay" exception, unlike Section 210.145.14 RSMo. (Appx. 6); (3) Sufficient facts established that the Division failed to comply with Section 210.152.2 and its own promulgated policies and procedures by failing to notify Ms. Williams within 90 days of its determination of whether the abuse allegations have been substantiated. (Appx. 6, 14). Appellant concedes that the Division failed to mail Notice within 90 days; Notice was mailed 133 days after investigation began. (App.Br. 9) (Appx. 3).

Division case worker Monica Morgan testified that she hadn't even completed her investigation within 90 days, let alone mailed notice within 90 days. (Tr. 57:23-24). Ms.

[1] "App.Br." refers to Appellant's Brief. "Appx." refers to the Appendix to Respondent's brief. "LF" refers to the Legal File. "Tr" refers to the transcript. All of the parties' trial exhibits that were admitted into evidence have been electronically filed with this Court.

Morgan testified that could not recall whether she had been trained that 90 days was a deadline. (Tr. 60:4-10).

Failure of Timely Investigation (Section 210.145.14 RSMo & Section 4.1.10 of Child Welfare Manual).

The trial court found that Section 210.145.14 RSMo mandates that the Division "shall complete all investigations within 30 days, unless good cause for the failure to complete the investigation is documented in the information system . . . if the investigation is not completed within 30 days, the information system shall be updated at regular intervals and upon completion of the investigation." (Appx. 3-4).

The court found that the Division, pursuant to Section 210.145.2 RSMo, promulgated rules regarding structured decision-making protocols to be utilized for all child abuse and neglect reports. (Appx. 4). The rules promulgated by the Children's Division are contained in the Child Welfare Manual and Section 4.1.10 of the Manual states "workers shall complete all investigations/family assessments within 30 days unless: good cause for the failure to complete the investigation or assessment is documented in the information system. . . . Delayed conclusions should only be used for 15 days past the 30-day conclusion deadline. Therefore, all investigations/family assessments shall be completed within 45 days." (Appx. 4). Section 4.1.10 of the Manual states that "[i]f there is a delay in receiving information from law enforcement, the juvenile office, or other professionals, staff must attempt to obtain the information, documenting all attempts in the case record. In situations where the information will not be received within 30 days of the report, the supervisor and worker are to take

appropriate steps to secure information necessary to complete the CD process and make a determination." (A5). Section 4.1.10 of the Manual further states in bold type, **"[a]dditionally, CD must maintain weekly follow-up contacts with law enforcement, the juvenile office, other professionals and/or courtesy county/state agencies to obtain respective written reports."** (Appx. 5).

The CS-24 letter, (Petitioner Exhibit 11) prepared by the Division, which was mailed to Ms. Williams, states that "[i]f the Division has delayed the conclusion for good cause, you will be notified regarding the delay within forty-five (45) days." (Appx. 5).

Trial Court's Finding Regarding Time Deadlines

The court found as follows: the Division failed to complete the investigation within the statutory 30-day time frame (A5); the Division failed to complete the investigation within the additional 15-day time frame (A5); the Division failed to mail notice to Respondent of the purported good caused reason for the delayed investigation (Appx. 5); the Division failed to maintain weekly follow-up contacts with law enforcement regarding the purported source of the delay and failed to maintain weekly updates to the information system (Appx. 5), and; the Division failed to notify Respondent of its determination of whether the abuse allegations had been substantiated within 90 days (Appx. 6).

Trial Court's Finding That Division Had No "Good Cause" for Delay

Ms. Morgan testified that her reason for delaying the investigation was "co-investigation with law enforcement, and I was waiting on some documentation and information from law enforcement. . . . [a] copy of official cell phone record texts." (Tr.

33:14-16, 35:3-6). When Ms. Morgan was asked by the trial judge if she had a reason for the failure to diligently pursue the purportedly necessary phone records from law enforcement. Specifically, there was inquiry as to why only a single contact with law enforcement was made in the three (3) months immediately following the thirty (30) day investigation period. In reply, Ms. Morgan testified: "No reason. I think that would be justified as being off work. Other than that, no." (Tr. 70:3-5). The trial court found that this purported reason for delaying the investigation beyond 30 days was not "good cause," as substantial evidence, including Ms. Morgan's own testimony, established that the decision to substantiate the finding of abuse was based entirely upon evidence received within the initial 30 day period. (Appx. 8). The Trial Court further found that Ms. Morgan failed to diligently attempt to obtain access to the cell phone records and she violated Division policy regarding acquisition of missing reports, in that she "failed to maintain weekly follow-up contacts with law enforcement regarding the text messages of photos [and] failed to maintain weekly updates to the information system." (Appx. 5).

The trial court further found that the following evidence adduced at trial, including testimony of Ms. Morgan and Virginia Laughery, established that the Division did not have "good cause" for delaying the completion of the investigation under Section 210.145.14:

a. Section 4.1.10 of the Child Welfare Manual lists "co-investigation with law enforcement" as an appropriate good cause basis for a delayed conclusion.
b. The Children's Division Delayed Conclusion report, lists "co-investigation with law enforcement" as the reason for delay.

c. Ms. Morgan testified at trial that the specific reason for delay caused by co-investigation was that the Division was waiting to obtain text messages and photos from minor child's cell phone in the possession of Blue Springs Police Department.

d. Ms. Morgan entered a notation in her investigation summary on 10/13/10 – the day the investigation commenced – that inappropriate text messages and photos had allegedly been exchanged between Ms. Williams and the minor child and that such evidence was contained on the minor child's cell phone.

e. The minor child and the minor child's parents were interviewed at the Child Protection Center ("CPC") on October 19, 2010, six (6) days after the investigation commenced.

f. Ms. Morgan and Detective Kreissler of the Blue Springs Police Department both attended the Laughery family CPC interviews.

g. Minor child's mother, Virginia Laughery, testified that she used word processing software to manually compile a comprehensive, twelve-page log of verbatim text messages between Ms. Williams and her son.

h. Ms. Laughery testified that she provided a copy of the text log and minor child's physical cell phone to Detective Kreissler at the October 19th CPC interview.

i. Ms. Laughery testified that Ms. Morgan visited her at her home between October 13th and October 19th but Ms. Morgan did not ask to access the minor child's cell phone.

j. Ms. Morgan testified that she did not ask for permission to look at the minor child's cell phone during the CPC interview of October 13.

k. Ms. Laughery testified that she provided a copy of the text log to Ms. Morgan on October 29, 2010 and Ms. Morgan confirmed receipt through her trial testimony.

l. Ms. Morgan testified that on November 13, 2010 she updated the FACES information system indicating a delayed conclusion of the investigation due to a co-investigation with law enforcement.

m. Ms. Morgan testified that she could have requested access to the physical cell phone from the minor child or the minor child's parents but did not do so.

n. Ms. Laughery testified that she received a letter on November 8, 2010 [sic], from the Blue Springs police department requesting additional release forms to be signed if the family wished to pursue prosecution. She testified that on November 15, 2010 she signed the authorization for release, and sent it to the detective and forwarded a copy to Ms. Morgan by e-mail.

o. Ms. Morgan testified that she could have requested access to the physical cell phone from Detective Kreissler but did not do so.

p. Ms. Morgan did not seek an investigative subpoena for minor child's or Ms. Williams' phone records and failed to consult with legal counsel for the Division regarding the procedural or legal requirements for such subpoena.

q. Ms. Morgan did not request Ms. Williams' phone records through Ms. Williams' attorney.

r. Ms. Morgan testified that she did not diligently attempt to obtain the requested text messages and photos and failed to follow Division policy of maintaining weekly contacts with law enforcement to obtain requested reports.

s. Though Ms. Morgan never obtained the text messages or photos from law enforcement, Ms. Morgan substantiated, by a preponderance of the evidence, the allegations of abuse against Ms. Williams, relying upon evidence obtained during the first thirty (30) days of the investigation.

t. Ms. Morgan's Investigation Summary and Ms. Morgan's testimony at trial establish that all pieces of evidence supporting the Division's finding of abuse – itemized in the CS-21 Letter mailed to Ms. Williams pursuant to Section 210.152.2 RSMo – were discovered during the first thirty (30) days of the investigation.

(Appx. 6-7).

Access to Cell Phone Independent of Law Enforcement

The trial court found that "co-investigation with law enforcement" was not sufficient "good cause" for delaying the conclusion of the investigation. (Appx. 8). The foregoing fact determinations are substantially supported by the record on the whole.

The Division was aware, as early as October 13, 2010, that explicit text messages and pictures had been found on Jordan Laughery's phone. (Child Abuse/Neglect Investigation Summary, Petitioner's Exhibit 3) (Appx. 27). Ms. Morgan personally reported on October 13, 2010 that "a child abuse report was received on October 13, 2011" and "The parents [contacted] the police after they found text messages on his

phone and pictures." (Petitioner's Exhibit 3). Assuming the cell phone and text messages contained thereon were "necessary" pieces of evidence, as alleged by Ms. Morgan, the record makes clear that Ms. Morgan had identified such pieces of evidence on October 13, 2010, by virtue of her own report. (Petitioner's Exhibit 3). However, the record establishes that Ms. Morgan had unfettered access to the cell phone before the phone was transferred into the custody of law enforcement, but did not attempt to access it. The record also establishes that after the cell phone came into law enforcement custody, Ms. Morgan failed to diligently access the cell phone.

Ms. Laughery testified that she found sexually explicit photos of Respondent and various text messages on her son's phone. (Tr. 10:16-18, 11:13-14). The Division began its investigation of the incident on October 13, 2010. (Petitioner's Exhibit 3). A Child Protection Center ("CPC") Interview was conducted on October 19, 2010 and in attendance were Ms. Laughery, Ms. Morgan, and Detective Kreissler of the Blue Springs Police Department. (Petitioner's Exhibit 4) (Tr. 19:8-10, Tr. 51:17). Ms. Laughery provided her son's cell phone to Detective Kreissler at the CPC interview. (Tr. 19:20-23). Ms. Laughery's testimony at the trial established the following facts:

- Within a week after she found the texts on her son's phone in early September, she reduced these text messages to a 12-page typed transcript. (Tr. 11:19, Tr. 20:18-22, Tr. 21:23-22:2) (Petitioner's Exhibit 5) (Appx. 37).
- During the initial 6-day window, leading up to the October 19th CPC Interview, Ms. Laughery provided a copy of the text message transcript to Ms. Morgan. (Tr. 22:15-18).

- In that 6-day window, Ms. Laughery was in sole possession of her son's cell phone. (Tr. 20:2-4).
- Prior to the CPC Interview, Ms. Morgan visited Ms. Laughery at her home, but did not ask to look at the cell phone. If Ms. Morgan requested such access, Ms. Laughery would have allowed her to look at it. (Tr. 20:5-9, 28:1-6).
- Before the CPC Interview took place, Ms. Laughery told Ms. Morgan that she had seen explicit photographs on her son's phone. (Tr. 22:22-25).
- Ms. Laughery would have shown the phone to Ms. Morgan at the CPC Interview, but she did not recall Ms. Morgan requesting to look at the cell phone. (Tr. 23:1-14).
- Ms. Laughery produced a timeline of events from Facebook to Ms. Morgan. (Tr. 23:19-24).

Ms. Morgan's testimony regarding her access to the cell phone was as follows:

- She was provided a transcript of the text messages within the first 30 days of the investigation. (Tr. 35:7-10, 50:14-22).
- She was aware that the cell phone was in the possession of the Laughery family from October 13th – October 19th. (Tr. 51:18-21).
- She reported that Mr. Laughery testified at the CPC Interview that he saw text messages from Respondent on his son's phone. (Tr. 53:37).
- She reported that Ms. Laughery stated at the CPC Interview that she saw explicit pictures of Respondent on her son's phone. (Tr. 53:8-10).

- Ms. Morgan was present during the CPC Interview but did not ask to look at the phone. (Tr. 53:14-16).
- She agrees that there could be nothing more official than what is on the cell phone itself. (Tr. 52:5-7).
- As of October 19th, Ms. Morgan could have asked Ms. Laughery for consent to search the phone, but failed to do so. (Tr. 56:13-17).
- Ms. Morgan did not ask Respondent for her cell phone. (Tr. 56:24-57:4).
- She did not ask Respondent's attorney for access to the cell phone. (Tr. 57:6-11).
- She did not attempt to request a court order or subpoena for the cell phone records. (Tr. 56:28-23).
- Ms. Morgan could have visited Blue Springs Police Department to look at the cell phone and its contents, but failed to request such access from Detective Kreissler. (Tr. 58:2-12).
- Ms. Morgan could have looked at the phone and the text messages and made her own determination as to the weight of the evidence, but failed do so. (Tr. 58:20-23).

Co-Investigation with Law Enforcement was Not Good Cause Reason for Delay

Ms. Morgan testified that she had procured enough evidence in the first 30 days of the investigation to substantiate a finding of abuse, notwithstanding the text messages. Ms. Morgan further testified that she conducted an "exhaustive" investigation within the first 30 days, notwithstanding co-investigation of law enforcement. Lastly, she testified

that she did not diligently attempt to procure the text messages from the Laugheries, law enforcement, or any other entity. Her testimony was as follows:

- Ms. Morgan stated on direct examination that the Division's investigation takes a back seat to law enforcement because the Division doesn't want to "jump ahead of law enforcement if they're continuing their investigation." (Tr. 34:4-6).
- Ms. Morgan testified that she delayed concluding her investigation because she did not want to interfere with law enforcement's investigation. (Tr. 45:13-15).
- On cross examination, however, Ms. Morgan stated that the Division performed its own exhaustive investigation at the same time law enforcement was investigating because law enforcement "didn't have an issue with me going ahead and doing that." (Tr. 47:14-22).
- During the first 30 days of the investigation – 10/13/1-11/12/10 – Ms. Morgan interviewed Jason Floyd, Paul Kinder, Detective Kreissler, Jim Finley, Virginia Laughery, Bob Jerome, Jordan Laughery, Bill Shalley, Robert Sturman, Ginny Laughery, Maria Raquel Juarez, and Anna Juarez. Ms. Morgan also attended the CPC Interview. (Tr. 48:2-13).
- The CS-21 Letter prepared by Ms. Morgan set out all of the facts which led to the Division's decision to substantiate the findings and all such facts were discovered within the first 30 days of the investigation. (Tr. 59:9-17).

Knowledge of Time Mandates and Failures to Comply

Ms. Morgan testified as follows:

- She did not complete the investigation within 30 days or even 90 days. (Tr. 57:18-24).
- In her job capacity, Ms. Morgan receives either supervisor training or training memos as to the updated status of the law regarding time deadlines for Division investigations. (Tr. 59:22-60:1).
- She received a memo telling her that she had 30 days to complete investigations and 90 days to notify the alleged perpetrator of her investigative findings. (Tr. 60:2-10).
- She was uncertain as to whether she could delay the notice beyond 90 days if good cause existed – she just mails it at the conclusion of the report; whenever that may occur. (Tr. 60:14-19, 60:25-8).
- She is familiar with the policies contained within the Child Welfare Manual. (Tr. 61:23-5).
- Ms. Morgan was familiar with the Division policy mandating that investigations must be completed within 30 days but, if there is a delayed conclusion, delayed conclusions should only be used for 15 days past the 30-day conclusion deadline. She testified that she did not comply with this policy. (Tr. 62:9-15).
- Ms. Morgan was familiar with the policy listed on the CS-24 letter that if the Division delayed the conclusion for good cause, the alleged perpetrators would be

notified regarding the delay. She testified that she did not comply with this policy, stating "I don't have a reason." (Tr. 63:9-22).

Trial Judge's Direct Examination of Ms. Morgan

The trial court judge, Commissioner Rosen, addressed the time mandates with Ms. Morgan, asking a series of questions. The Exchange between Commissioner Rosen and Ms. Morgan is contained at Tr. 68:21-Tr. 70:25 and is as follows:

COMMISSIONER ROSEN: Can somebody make sure that Ms. Morgan has a copy of Plaintiff's 10, please. Petitioner's 10, whatever it's called. It's the exhibit from the Child Welfare Manual.

BY COMMISSIONER ROSEN:

Q. Do you have that, Ms. Morgan?

A. I do have that.

Q. This is your policy manual. This was the one that Mr. Mirakian pointed out that delayed conclusions should only be used for 15 days past the 30-day conclusion deadline and that all investigations should be completed within 45 days. Now, here it lists a number of situations in which a delayed conclusion might be appropriate; does it not?

A. Yes.

Q. One of them is co-investigation with law enforcement. That is what you cited in your FACES or your entry into FACES; is that correct?

A. Yes.

Q. I'm also looking at this and it says if there is a delay and in situations where you can't get the information in 30 days, the supervisor and worker to take appropriate steps to secure information necessary to complete the process and make a determination and that additionally, and this is in bold, Children's Division must maintain weekly follow-up contact with law enforcement, and then it lists juvenile office and things like that which was not going on here.

Now, I go back and I look at Plaintiff's Exhibit No. 3, which is the investigation summary which you prepared. It shows that your contact with the Blue Springs Police Department – I'm sorry. I need to make sense – that on November 8, 2010, you spoke with Detective Kreissler, and then you did your letter or your notification to FACES I believe on the 13th of November.

A. Yes.

Q. And then I don't show any further contact with Detective Kreissler until January 10, 2011, and then the next contact with Detective Kreissler is February 16, 2011. So doesn't that violate the procedure in the manual here with regard to weekly contacts?

A. Yes.

Q. Is there any reason why you did not do weekly contacts?

A. No reason. I think that would be justified as being off work. Other than that, no.

Q. Let me ask you, the next part says if delays are detected in an ongoing basis due to involvement with law enforcement you're supposed to meet with interdisciplinary investigative team members. Did you do that?

A. No.

Q. Why not?

A. It didn't even –

Q. I can't hear you, Ms. Morgan.

A. I'm not sure. It wasn't done.

Q. Okay. And then – and I need this for information purposes – it says notify perpetrator, parents, noncustodial parents in writing when status determination will be delayed beyond 90 days from receipt of CAN report. I'm not sure what that means. Can you explain what that means to me?

A. That a letter would be sent to the alleged perpetrator and the parents to let them know the report was delayed beyond 90 days, even though it said on the first page it couldn't go over 45; but apparently if it goes over 90, then I have to send a letter to let them know it's going to go over 90.

Q. Did you do that?

A. No, I didn't.

Q. Any reason why not?

A. No.

(Tr. 68:21-70:25).

Ms. Morgan conceded that her actions violated Division Policy but offered no reason for such violations, explaining that she thinks it was probably just due to "being off work." (Tr. 70:4-5).

POINTS RELIED ON

I.

The trial court did not err in ordering Respondent's name to be removed from the Central Registry of child abuse and neglect perpetrators because the statutes imposing time limits upon the completion of child abuse and neglect investigations (Section 210.145.14 RSMo), regular updates to the information system (Section 210.145.14 RSMo), and mailing of notice (Section 210.152.2 RSMo) are mandatory and not directory in that the Legislature has prescribed a sanction for noncompliance, the plain language of the statutes connotes a mandatory duty, the Legislature intended for these statutes to be mandatory, the context of these statutory sections when viewed in *pari materia* with other provisions enacted requires mandatory treatment, and the impact of treating these mandates as directory would render these statutes entirely unworkable.

Bauer v. Transitional School Dist. of City of St. Louis, 111 S.W.3d 405 (Mo. 2003)

Southwestern Bell Tel. Co. v. Mahn, 766 S.W.2d 443 (Mo. banc 1989)

Garzee v. Sauro, 639 S.W.2d 830 (Mo. 1982).

Petet v. State, 32 S.W.3d 818 (Mo. App. W.D. 2000)

II.

The trial court did not err in ordering Respondent's name to be removed from the Central Registry of child abuse and neglect perpetrators because child abuse and neglect investigations implicate due process rights, including the statutory time limits upon completion of investigations, notice to alleged perpetrators, and regular updates of the information system, in that listing an individual's name upon the child abuse and neglect registry implicates a liberty interest by essentially barring her from working with children, and causing her to become unemployed and unemployable in her profession.

Jamison v. State, Dept. of Social Services, Div. of Family Services, 218 S.W.3d 399 (Mo. 2007)

Section 210.145.1(3) RSMo

III.

The trial court did not err in finding as fact that the Division delayed its investigation beyond thirty (30) days without showing "good cause" for the delay because such finding is not against the weight of the evidence but, rather, is supported by substantial evidence in that the cell records were not necessary to the Division's determination and, assuming arguendo, that the records were necessary, the Division's investigator failed to diligently attempt to procure the cell phone and its contents both before and after the phone transferred into the custody of law enforcement, and law enforcement's "co-investigation" had no impact on the Division's ability to diligently investigate the abuse allegations and conclude its investigation in a timely manner.

Pearson v. Koster, 367 S.W.3d 36 (Mo. 2012)

Houston v. Crider, 317 S.W.3d 178 (Mo. App. S.D. 2010).

STANDARD OF REVIEW AND INTRODUCTION TO ARGUMENT

The State concedes it did not notify Respondent in writing of its determination within ninety (90) days, as required by Section 210.152.2 RSMo. Section 210.152.2 RSMo does not contain a "good cause" provision permitting Notice beyond ninety (90) days. The state merely argues that the trial court erred in finding that the 90-day time limit is mandatory and not directory. Appellate Courts apply *de novo* review to questions of law decided in court-tried cases. *Pearson v. Koster*, 367 S.W.3d 36, 43-44 (Mo. 2012). With respect to legal questions, "the appellate court reviews the trial court's determination independently, without deference to that court's conclusions." *Id.* (citing *Moore v. Bi-State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004)). As Section 210.152.2 RSMo contains no "good cause" exception, this Court's ruling that the 90-day deadline is mandatory would affirm the invalidity of any State action beyond 90 days, thereby upholding the Trial Court's decision and ending any further inquiry.

Regarding the 30-day investigation deadline contained in Section 210.145.14 RSMo, the State argues that the trial court erred in finding, as a matter of law, that the deadline is mandatory and not directory and that the trial court erred in finding, as a matter of fact, that the Division's delay was without "good cause." Appellate Courts, "when presented with an issue of mixed questions of law and fact . . . will defer to the factual findings made by the trial court so long as they are supported by competent, substantial evidence, but will review de novo the application of the law to those facts." *Pearson*, 367 S.W.3d at 44 (citing 5 Am. Jur. 2D Appellate Review § 631 (2012)).

"The judgment in a court-tried case will be sustained on appeal unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declared or applied the law. *Jamison v. Department of Social Services*, 218 S.W.3d 399, 404 (Mo. banc 2007) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

The Missouri Supreme Court noted that it "rarely has reversed a trial judgment as against the weight of the evidence." *Pearson*, 367 S.W.3d at 52 (Mo. 2012). "A claim that there is no substantial evidence to support the judgment or that the judgment is against the weight of the evidence necessarily involves review of the trial court's factual determinations." *Id.* "A court will overturn a trial court's judgment under these fact-based standards of review only when the court has a firm belief that the judgment is wrong." *Id.* "Implicit in these standards is the recognition that the trial court, in reaching its judgment, is in a better position to determine factual issues than an appellate court reviewing only the record on appeal." *Id.*

In *Houston v. Crider*, 317 S.W.3d 178, 187 (Mo. App. S.D. 2010), the Court held that the party challenging the sufficiency of evidence has the burden of "demonstrat[ing] why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition."

ARGUMENT

I.

The trial court did not err in ordering Respondent's name to be removed from the Central Registry of child abuse and neglect perpetrators because the statutes imposing time limits upon the completion of child abuse and neglect investigations (Section 210.145.14 RSMo[2]), regular updates to the information system (Section 210.145.14 RSMo), and mailing of notice (Section 210.152.2 RSMo) are mandatory and not directory in that the Legislature has prescribed a sanction for noncompliance, the plain language of the statutes connotes a mandatory duty, the Legislature intended for these statutes to be mandatory, the context of these statutory sections when viewed in *pari materia* with other provisions enacted requires mandatory treatment, and the impact of treating these mandates as directory would render these statutes entirely unworkable.

The stark, but straight forward, issue in this case is whether the Division's knowing failure to comply with Sections 210.145.14 and 210.152.2 and Section 4.1.10 of the Child Welfare Manual deprives the State of jurisdiction and authority to impose sanction against Respondent and renders the DSS findings against her void, voidable, or invalid. Appellant admits it did not complete the investigation within 30 days, but rather, completed it 127 days after receipt of the report of abuse. (App.Br. at 40). Appellant

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[2] Section 210.145 RSMo was amended August 28, 2012 and the operative 30-day time limit is now contained within Section 210.145.15 RSMo.

admits it did not provide written notice of its findings within 90 days, but rather, prepared the notice 128 days after receipt of the report. (App. Br. At 40). The written notice was mailed 133 days after receipt of the report. (Petitioner's Trial Ex. No. 7); (Appx. at 44).

Section 210.145.14 RSMo provides as follows:

> "The division **shall** complete all investigations within thirty days, unless good cause for the failure to complete the investigation is documented in the information system. If a child involved in a pending investigation dies, the investigation **shall** remain open until the division's investigation surrounding the death is completed. If the investigation is not completed within thirty days, the information system **shall** be updated a regular intervals and upon the completion of the investigation." (emphasis added) (Petitioner's Trial Ex. No. 8); (Appx. at 17).

Section 210.152.2 RSMo provides as follows:

> "Within ninety days after receipt of a report of abuse or neglect that is investigated, the alleged perpetrator named in the report . . . **shall** be notified in writing of any determination made by the division based on the investigation. The notice **shall** advise either:
>
> (1) That the division has determined by a . . . preponderance of the evidence . . . that abuse or neglect exists and that the division shall retain all identifying information regarding the abuse or neglect; that such information shall remain confidential and will not be released except to law enforcement agencies, prosecuting or circuit attorneys, or as provided in section

210.150; that the alleged perpetrator has sixty days from the date of receipt of the notice to seek reversal of the division's determination through a review by the child abuse and neglect review board as provided in subsection 4 of this section; or

(2) That the division has not made a probable cause finding or determined by a preponderance of the evidence that abuse or neglect exists."

(emphasis added) (Petitioner's Trial Ex. No. 9); (Appx. at 21).

The Child Welfare Manual, promulgated pursuant to Sections 210.145.1 and 210.145.2 (RSMo), at Section 4.1.10 under the heading "Delayed Conclusions," states as follows: "Workers shall complete all investigations/family assessments within 30 days, unless:

Good cause for the failure to complete the investigation or assessment is documented in the information systems; or

The Division may not close a pending child abuse or neglect investigation if a child involved in the investigation dies during the course of the investigation.

Delayed conclusions should only be used for 15 days past the 30-day conclusion deadline. Therefore, all investigations/family assessments shall be complete within 45 days."

(Petitioner's Trial Ex. No.10); (Appx. at 47).

Appellant argues that the Division is not required to abide by the time limits set out in Sections 210.145 and 210.152 because such limits are directory, not mandatory. The Division argues, quite literally, that investigations of child abuse may be indefinitely prolonged and notice of findings may be sent years or decades later or, perhaps, not sent

at all. Appellant asks this Court to find that the judiciary, though having co-extensive power with the legislature, is without the power to compel the State's adherence to investigation and notice requirements as clearly set forth clearly in the foregoing statutory sections. (App.Br. at 41).

In primary support of this contention, Appellant argues that the statutes fail to prescribe a consequence in the event a time limit is missed and, in any event, due process protections do not apply to child abuse and neglect investigations. (*See generally* App.Br. at 41, 55). These arguments are without merit. The Missouri Legislature has expressly recognized the liberty interest at stake and the due process rights of alleged perpetrators, legislating that the "division shall develop protocols which give priority to . . . [p]roviding due process for those accused of child abuse or neglect." RSMo § 210.145.1(3). Hence, the consequence is implicit. If the State fails to afford a citizen due process, the State loses the authority to impose a sanction that would deprive the citizen of a liberty or property interest.

With respect to whether a statute is directory or mandatory, Missouri courts evaluate statutory schemes and relevant fact patterns on case-by-case basis, considering factors and contexts unique to each situation. Missouri courts have interpreted "shall" as directory in some cases and mandatory in others, considering such factors as the statute's plain language, the presence of a penalty provision, legislative intent, the liberty interest involved, the use of similar terms in similar statutes, the effect of ruling one way or another, etc. Simply put, there exists no "one size fits all" solution for the present issue.

The inescapable reality is, however, that the liberty interest at stake and the due process rights of alleged perpetrators central to the investigation and notice time deadlines in 210.145 and 210.152 require mandatory treatment. To rule otherwise would necessarily mean that the judiciary is without power to compel the Division's compliance with the due process protections set forth in 210.145 and 210.152. The Division would be afforded cart blanche to decide *when* to conclude its investigations and provide notice to an alleged perpetrator or *whether* such investigation will be conducted or notice given in the first place. If this Court is without the power to compel the Division to abide by the time deadlines set out in 210.145 and 210.152, the Court would logically also be without the power to compel the Division to even investigate and/or notify a citizen before placing an individual on the child abuse registry. This cannot be the law of Missouri.

Missouri courts have uniformly held that the presence or absence of a penalty provision is but one method for determining whether a statute is directory or mandatory. Courts consider myriad factors, the first of which is commonly the plain language of the statute itself.

a. Plain Language

"The legal instruments that are the subject of interpretation have not typically been slapped together thoughtlessly but are the considered expression of intelligent human beings. In whatever age or culture, human intelligence follows certain principles of expression that are as universal as principles of logic. For example, intelligent expression does not contradict itself or set forth two propositions that are entirely redundant. Lapses

sometimes occur, but they are departures from what would normally be expected. ANTONIN SCALIA, BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 51 (Thomson/West 2012).

"Mandatory words impose a duty; permissive words grant discretion. The text of this canon is entirely clear, and its content so obvious as to be hardly worth the saying. The trouble comes in identifying which words are mandatory and which permissive. The traditional, commonly repeated rule is that shall is mandatory and may is permissive. . . . When drafters use shall and may correctly, the traditional rule holds – beautifully." ANTONIN SCALIA, BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 112 (Thomson/West 2012).

A basic tenet of administrative law provides that "an administrative agency has only such jurisdiction or authority as may be granted by the legislature." *Carr v. North Kansas City Beverage Co.*, 49 S.W.3d 205, 207 (Mo. App. W.D. 2001) (citing *Livingston Manor, Inc. v. DSS.*, 809 S.W.2d 153, 156 (Mo.App. W.D.1991)); *Mikel v. Pott Industries/St. Louis Ship*, 896 S.W.2d 624, 626 (Mo. 1995). Agencies created by statute possess no authority beyond that granted by statute and if an agency "lacks statutory power, it is without subject matter jurisdiction." *Id.* (citing *Livingston*, 809 S.W.2d at 156). Subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties. *Id.*

"Time limits imposed upon administrative agencies by statute are jurisdictional. When a limit expires, the agency loses jurisdiction." *Laidlaw Waste Systems, Inc. v. City*

of Kansas City, Missouri, 858 S.W.2d 753, 756 (Mo. App. W.D. 1993) (citing *R.B. Industries, Inc. v. Goldberg*, 601 S.W.2d 5, 7 (Mo. banc 1980)).

The Missouri Supreme Court in *Bauer v. Transitional School Dist. of City of St. Louis*, noted that "to determine the meaning of a statute, 'the starting point is the plain language of the statute itself.'" 111 S.W.3d 405, 408 (Mo. 2003) (citing *Jones v. Director of Revenue*, 981 S.W.2d 571, 574 (Mo. banc 1998)). "The primary rule of statutory construction is to ascertain the intent of the lawmakers by construing words used in the statute in their plain and ordinary meaning. Where the language is clear and unambiguous, there is no room for construction. It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute. *State ex rel. Outcom, Inc. v. City of Peculiar, Missouri*, 350 S.W.3d 57, 63 (Mo. App. W.D. 2011) (citing *Hyde Park Hous. P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993)); *Kaczynski v. Mo. Bd. of Prob. & Parole*, 349 S.W.3d 354, 358 (Mo. App. W.D. 2011) (citing *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 108 (Mo. App. W.D. 2008)).

"Where the language of the ordinance is clear and unambiguous, no statutory construction is needed, as a court should merely give effect to the ordinance as it is written." *Id.* (citing *Cousin's Adver., Inc. v. Bd. of Zoning Adjustment of Kansas City*, 78 S.W.3d 774, 779 (Mo. App. W.D. 2002)); *State v. Carroll*, 165 S.W.3d 597, 602 (Mo. App. S.D. 2005) (citing *Hadel v. Board of Educ. Of School Dist. Of Springfield*, 990 S.W.2d 107, 111 (Mo. App. S.D. 1999)).

"Generally, the word 'shall' connotes a mandatory duty." *Bauer,* 111 S.W.3d at 408 (citing *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 920 (Mo. banc 1993)). In construing statutes, generally, "shall" is "used to express compulsion, obligation or necessity[,]" and "mandates an action." *Y.O. v. Barton County Juvenile Office (In the Interest of A.H.)*, 169 S.W.3d 152, 157 (Mo. App. S.D. 2005) (citing *State ex rel. Hunter v. Lippold*, 142 S.W.3d 241, 244 (Mo.App. S.D. 2004)).

Courts "must avoid statutory 'interpretations that are unjust, absurd, or unreasonable.'" *Carroll*, 165 S.W.3d at 602. "When a term is undefined, the legislature is presumed to intend that the term be used in its plain and ordinary meaning according to the dictionary." *Tendai v. Missouri State Bd. of Reg. for Healing Arts*, 161 S.W.3d 358, 366 (Mo. banc 2005); *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993).

In analyzing statutes containing both the mandatory term "may" and permissive term "shall," courts should employ the statutory construction rule that "it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings." *Collier v. Roth*, 468 S.W.2d 57, 59 (Mo. App. S.D. 1971) (citing 3 Sutherland Statutory Construction, 3d Ed., § 5821, at p. 116; *State ex rel. Hopkins v. Stemmons*, 302 S.W.2d 51, 54 (Mo. App. S.D. 1957). The *Hopkins* Court stated that "the general rule is that 'shall' indicates a mandate . . . [a]nd, the use of mandatory language in one part of the statute and of permissive language in another part of the same statute . . . sometimes has been thought to have been indicative of purposeful selection, requiring literal interpretation of the language employed. *Hopkins*, 302 S.W.2d at 54.

The *Hopkins* Court further established that "generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory." *Id.* at 53 (citing *State ex rel. Ellis v. Brown*, 33 S.W.2d 104 (Mo. 1930); *Morris v. Karr*, 114 S.W.2d 962, 964 (Mo. 1938); *Sandrowski v. Sandrowski*, 93 S.W.2d 81, 83 (Mo. App. E.D. 1936).

Here, the term "shall" is used clearly and unambiguously and, given its ordinary meaning, should be interpreted by this Court to be mandatory. The plain language of Sections 210.145 and 210.152 RSMo sets out that the Division "shall develop protocols which give priority to . . . [p]roviding due process for those accused of child abuse or neglect" (210.145.1(3)) and, in furtherance of these due process protections, "shall" complete investigations of abuse within thirty (30) days, unless good cause for delay exists, and "shall" provide written notice to the alleged perpetrator within ninety (90) days. Furthermore, Sections 210.145 and 210.152 routinely employ mandatory term "shall" and permissive terms such as "may," "could," "should" in the same Section, sub-sections, and even sentences. (see further discussion infra at Legislative Intent). "Shall" in the context of the foregoing time limitations relates to the essence of the thing to be done (protect due process rights) and to which compliance is a matter of substance and, accordingly, "shall" is mandatory. The Legislature realized the difference in meaning between "shall" and "may" and intended for these verbs to carry with them their ordinary

meaning. The plain language, without further analysis, indicates that the Division is without discretion to deviate from these time mandates.

b. Sanction for Non-Compliance

Appellant argues that despite the plain language of the Sections 210.145 and 210.152 RSMo, the time limits contained therein are nonetheless directory because the statutes fail to expressly prescribe a sanction for the Division's non-compliance with investigative and notice time limits. (App.Br. 41). Chapter 210 RSMo does, in fact, sanction non-compliance with time deadlines set out in Sections 210.145 and 210.152. Furthermore, the presence or absence of an express penalty provision is but one method for determining whether a statute is directory or mandatory; particularly when the sanction is implicit in light of the purpose of the statute.

i. Sanction

Missouri penalizes non-compliance with the time mandates set forth in Sections 210.145 and 210.152 and, accordingly, use of the term "shall" connotes a mandatory duty. Section 210.110(3) defines "Central Registry" as a "registry of persons where the division has found . . . by a preponderance of the evidence . . . that the individual has committed child abuse or neglect." (Appx. 24). Placement upon the Central Registry is contingent upon a prerequisite preponderance of the evidence finding. *Id.* A fair reading and interpretation of this registration trigger is that the underlying preponderance of the evidence finding is valid, lawful and comports with due process. Certainly, if the underlying finding of abuse was not arrived at in a statutorily or procedurally proper

manner and a Court so found, it is unlikely that the legislature intended for the alleged perpetrator to nonetheless be placed upon the Central Registry.

Stated differently, the legislature intended for the Central Registry to contain only those names of people for whom the Division has made a legitimate, lawful, and procedurally proper preponderance of the evidence finding. The Division's failure to arrive at a lawful and procedurally proper preponderance of the evidence finding under Sections 210.145 and 210.152 strips the State of the ability to avail itself of the central registry listing under Section 210.110. The inability to list a person in the Central Registry is the sanction and penalty for non-compliance with procedural mandates set out in Sections 210.145 and 210.152. Because of this sanction, this Court should construe and apply the term "shall" in Sections 210.145 and 210.152 as mandatory and uphold the Trial Court's Order. If this Court declines to recognize the aforementioned sanction and penalty, this Court should nonetheless construe the term "shall" in Sections 210.145 and 210.152 as mandatory because the absence of a penalty provision is but one method for determining whether a statute is mandatory.

ii. Absence of Sanction Does Not Override Other Considerations

The Trial Court held that even if Chapter 210 does not contain a penalty for the Division's non-compliance with time mandates in Sections 210.145 and 210.152, the term "shall" must still be deemed mandatory "because the absence of a penalty provision does not override other considerations, including but not limited to, the plain language of the statute, statutory context when viewed in *pari materia* with other enacted provisions, legislative intent, the liberty interest involved, and the effect of ruling one way or

another." (LF 71); (Appx. 1). The Trial Court's ruling is not erroneous but, rather, accurately states the law of Missouri.

The Supreme Court in *Bauer* identified the principle that a statute may be considered directory and not mandatory where a sanction is not provided, but went on to hold that "the presence or absence of a penalty provision is 'but one method' for determining whether a statute is directory or mandatory." *Bauer,* 111 S.W.3d at 408 (citing *Southwestern Bell Tel. Co. v. Mahn*, 766 S.W.2d 443, 446 (Mo. banc 1989)). "Indeed, '[t]he absence of a penalty provision does not automatically override other considerations.'" *Id.* "Whether the statutory word 'shall' is mandatory or directory is primarily a function of context and legislative intent." *Id.* (citing *Farmers & Merchants Bank and Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo. banc 1995)); *see also State v. Teer,* 275 S.W.3d 258 (Mo. 2009)*; Garzee v. Sauro*, 639 S.W.2d 830 (Mo. 1982); *State v. Wilkerson*, 330 S.W.3d 851 (Mo.App. W.D. 2011); *Lippold*, 142 S.W.3d at 244; *Firemen's Ret. Sys. v. City of St. Louis*, 2006 Mo. App. E.D. LEXIS 1234 (Aug. 22, 2006); *In re A.H.*, 169 S.W.3d at 152; *Hopkins,* 302 S.W.2d at 52.

c. Context when viewed in *pari materia* with other provisions enacted

The *Bauer* Court and myriad other authority cited *supra* establish that the meaning of "shall" – in absence of a penalty provision – should be determined within context and "in *pari materia* with the other provisions enacted." 111 S.W.3d at 408. The United States Supreme Court has consistently held that "statutory language . . . cannot be construed in a vacuum." *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 1357 (2012). "It is a fundamental canon of statutory construction that the words of a statute

must be read in their context and with a view to their place in the overall statutory scheme." *Id.* The Missouri Supreme Court has likewise held that "no portion of a statute is read in isolation, but rather is read in context of the entire statute, harmonizing all provisions." *Util. Serv. Co., Inc. v. Dep't of Labor & Indus. Relations*, 331 S.W.3d 654, 658 (Mo. 2011). As stated above, the procedural time mandates in Sections 210.145 and 210.152 must be read in context with Section 210.110, which defines who may be placed on the Central Registry. When read in context and in view of the fact that Sections 210.145 and 210.152 serve as a predicate for placement on the Central Registry under Section 210.110, this Court should determine that the term "shall" is mandatory and that the Division must abide by statutory proscriptions if it desires to avail itself of other statutory proscriptions set out in the same Chapter.

The Court should consider the provision enacted by the Legislature in Section 210.145.1(3), wherein the Legislature mandates that the "division shall develop protocols which give priority to . . . [p]roviding due process for those accused of child abuse or neglect." Appellant argues that the time deadlines in Section 210.145 and 210.152 are merely directory because placement on the child abuse registry doesn't invoke a liberty interest and an alleged perpetrator is not afforded due process rights in child abuse and neglect investigations. (App.Br. 54-55). This argument fails, upon consideration of 210.145.1(3).

This Court should also consider other provisions of the statute where the Legislature expressly provided for an indefinite, open ended investigation period (Section 210.145.14 RSMo. Section 210.145 (14) provides that the an investigation of abuse

"shall" be completed within thirty (30) days. In the very next sentence, the Legislature provides "[i]f a child involved in a pending investigation dies, the investigation shall remain open until the division's investigation surrounding the death is completed." When the specific time deadlines in Sections 210.145 and 210.152 are compared against this open-ended, indefinite time period in the case of a child's death, this Court should conclude that the time deadlines are mandatory and not permissive.

As will be discussed in further detail *infra* – Legislative Intent – Sections 210.145 and 210.152, when read in their totality, in *pari materia* with other provisions enacted, contain mandatory time deadlines, non-compliance with which, results in loss of jurisdiction.

d. Legislative intent

The Missouri Legislature intended for time deadlines in Section 210.145 and 210.152 to be mandatory instead of directory. Such intent is evidenced in various ways. First, the Legislature couched the time mandates in mandatory terms of "shall complete all investigations" and an alleged perpetrator "shall be notified in writing," instead of using terms permissive terms like "may," "should," or "could." The deliberateness of the Legislature's careful choice of the mandatory term "shall" instead of the directory terms "may" or "should" can be gleaned by its use of these terms within Sections 210.145 and 210.152, often combining mandatory and permissive terms in the same sentence. Second, had the Legislature truly intended for the investigative and notice time limits to be indefinite, the Legislature knew how to so legislate. Third, the Legislature recognizes the important liberty interest at stake and the need for protecting the due process rights of

alleged perpetrators. Fourth, the Legislature's failure to legislate an express, literal penalty for non-compliance does not establish that time limits in Sections 210.145 and 210.152 are directory, for the Legislature likewise did not legislate an express, literal penalty for noncompliance with other mandatory provision, including an alleged perpetrator's failure to timely seek appellate review to the CANRB or the trial court.

i. Legislature's Choice of Words

In analyzing statutes containing both the mandatory term "may" and permissive term "shall," courts should employ the statutory construction rule that "it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings." *See supra Collier v. Roth*, 468 S.W.2d at 59; *Hopkins* 302 S.W.2d at 54. The general rule is that "'shall' indicates a mandate . . . [a]nd, the use of mandatory language in one part of the statute and of permissive language in another part of the same statute . . . sometimes has been thought to have been indicative of purposeful selection, requiring literal interpretation of the language employed." *Hopkins*, 302 S.W.2d at 54; *see generally Outcom, 350 S.W.3d 57; Sho-Me Power Corp. v. City of Mountain Grove*, 467 S.W.2d 109 (Mo. App. S.D. 1991).

If the Legislature truly intended for the time mandates contained in Sections 210.145.14 and 210.152.2 to be merely directory, the Legislature would have instead inserted the term "may" or "should" like it did numerous other times within the same Chapter. Some brief examples of the Legislature's deliberate, exacting choice of words within Chapter 210 are as follows:

210.152.2: Within ninety days after receipt of a report of abuse or neglect that is investigated, the alleged perpetrator named in the report . . . **shall** be notified in writing of any determination made by the division based on the investigation. The notice **shall** advise either:

> (1) That the division has determined . . . by a preponderance of the evidence . . . that abuse or neglect exists and that the division **shall** retain all identifying information regarding the abuse or neglect; that such information shall remain confidential and will not be released except to law enforcement agencies, prosecuting or circuit attorneys, or as provided in section 210.150.

210.152.3: The children's division **may** reopen a case for review at the request of the alleged perpetrator, the alleged victim, or the office of the child advocate. . . . If the alleged victim is under the age of eighteen, the request for review **may** be made by the alleged victim's parent, legal custodian, or legal guardian. All requests to reopen an investigation for review **shall** be made within a reasonable time and not more than one year after the children's division made its decision. The division **shall** not reopen a case for review based on any information which the person requesting the review knew, **should** have known, or **could** by the exercise of reasonable care have known before the date of the division's final decision in the case. . . . The children's division **shall** not reopen an investigation under any circumstances while the case is pending before a court of this state nor

when a court has entered a final judgment after de novo judicial review pursuant to this section.

The Legislature understands the plain language meaning of mandatory terms like "shall" and permissive, directory terms such as "may," "should," or "could" because the Legislature has deliberately used these specific terms in conjunction with one another within the same Section, Subsection, and even sentences contained in Chapter 210. In the context of Section 210.152 and 210.145 where these terms are deliberately used in harmony with one another, a statutory interpretation that gives the exact same, interchangeable textual meaning to the terms "shall" and "must" would render Sections 210.152 and 210.145 non-sensical, unworkable, and likely, unconstitutionally void.

Were this Court to rule that "shall" in the context of Sections 210.145.14 and 210.152.2 actually means "may," the orderly process and procedure of statutory actions under Chapter 210 would devolve into chaos. The only way to ensure bright guideposts for the State, the affected parties, and the Court alike is to clearly distinguish between the terms "shall" and "may," assign a mandatory meaning to the former and a directory meaning to the latter and apply such construction consistently throughout Chapter 210 and, in particular, Sections 210.145.14 and 210.152.2.

ii. Legislature Understands How to Differentiate Between Indefinite and Fixed Investigation and Notice Procedures

Had the Legislature intended for investigation and notice procedures in 210.145 and 210.152 to be merely discretionary and indefinite, the Legislature surely knew how to do so, as evidence by Section 210.145.14. Section 210.145.14 provides, in pertinent

part: "The division **shall** complete all investigations within thirty days, unless good cause for the failure to complete the investigation is documented in the information system. If a child involved in a pending investigation dies, the investigation **shall remain open** until the division's investigation surrounding the death is completed." (emphasis added). The Legislature understands how to differentiate and distinguish between investigations that are open-ended and discretionary and those investigations that are fixed in time. The language is plain. As such, there is no room for construction. As the Court stated in *Outcom*, "it is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." 350 S.W.3d at 63.

iii. Absence of Express, Literal Penalty Provision Does not Render Section 210.145 and 210.152 Time Limits Merely Directory.

Appellant argues that the Legislature's intention that the time deadlines be treated as directory can be gleaned from their failure to specifically, literally provide a sanction for non-compliance, i.e., failure to employ the phrase "and no more" or "and the Division shall not have jurisdiction to investigate thereafter" after the time limitation (App.Br. at 43). Appellant cites *In re Donaldson*, 214 S.W.3d 331, 332-333 (Mo. banc 2007) in support of this proposition. (App.Br. 43-44). Appellant's proposition is unsound for two (2) reasons. First, *In re Donaldson* is not on point. Second, the Legislature does not provide for specific, literal penalties for non-compliance with any mandate set out in

Sections 210.145 and 210.152. Such failure cannot result in the entirety of 210.145, 210.152 being treated as merely advisory.

In re Donaldson arrived in the Supreme Court from this Court's decision in *In re Donaldson*, 2006 Mo.App. LEXIS 28, *5-11 (Mo. App. W.D. Jan. 10, 2006). At issue in *Donaldson* was whether a the 90 day time limit for holding a retrial after a mistrial imposed by the legislature in the sexually violent predator law (RSMo § 632.495) was mandatory or directory. This Court held that the 90 day deadline was mandatory and stated that the Defendant's motion to dismiss should have been granted. This Court recognized that a penalty provision was absent, but treated the 90 day deadline as mandatory regardless. On transfer, the Supreme Court reversed this Court, holding that the Legislature could have expressed a penalty for noncompliance if it truly so intended. However, the Supreme Court's holding turned on the existence of a similar statutes, Section 217.469 RSMo, wherein the Legislature expressly provided that a Court shall not have jurisdiction over indictments, informations, or complaints not timely brought to trial and Section 217.490 RSMo, wherein the Legislature set out under the interstate agreement on detainers law that dismissal with prejudice must occur if certain conditions are not met. In light of these similar statutory schemes, the Court held that the absence of similar language in Sections 632.492 and 632.495 negates finding any similar legislative intent to require dismissal if the 90-day time limit was not satisfied. *In re Donaldson*, 214 S.W.3d at 333.

In the present case, no such similar statutes have been cited. In fact, quite the opposite is true. In similar subsections within the same Chapter, Sections 210.152.4, 6,

the Legislature has enacted similar, mandatory criteria and time frames within which an alleged perpetrator must seek administrative and judicial review, without setting out literally and specifically that non-compliance will result in dismissal or will bar the review from the CANRB and/or Circuit Court.

Section 210.152.4 provides: Any alleged perpetrator aggrieved by a determination of abuse or neglect by the division may seek an administrative review, but "such request for review **shall** be made within sixty days of notification of the division's decision." (emphasis added).

Section 210.152.6 provides: Any alleged perpetrator aggrieved by the decision of the CANRB may seek *de novo* judicial review, but such request "**shall** be made within sixty days of notification of the decision of the child abuse and neglect review board decision." (emphasis added).

Neither of the two (2) foregoing subsections expressly provides a penalty or sanction for non-compliance. Appellant's argument, taken to its logical extension, would be that such appellate time limits are merely directory as they do not expressly contain a sanction such as, for example, "and the Circuit Court shall not have jurisdiction to hear the *de novo* appeal." *See* (App.Br. At 43).

Interestingly, the State does appear to argue that such appellate time mandates placed upon an alleged perpetrator are merely directory or advisory. Surely the State does not argue that CANRB and/or circuit court nonetheless retains jurisdiction to entertain non-timely appeals for administrative or *de novo* judicial review. In fact, the State routinely argues against such an unwarranted construction, employing the

mandatory time limitations set out in 210.152.4, 6 as a shield against untimely appeals filed by aggrieved individuals. The absence of an express penalty provision in the similarly situated mandatory Sections 210.152.4, 6 negates a finding that the legislature intended for the time deadlines in Sections 210.145 and 210.152 to be directory simply because such sections lack express, literal penalty provisions.

This Court should find that the Legislature understood the difference between mandatory terms such as "shall" and directory terms like "may" when it enacted Sections 210.152 and 210.145. If the Legislature truly meant and intended to legislate that "within ninety days after receipt of a report of abuse or neglect that is investigated, the alleged perpetrator named in the report ***may*** be notified in writing" or "the division ***may*** complete all investigations within thirty days," the Legislature certainly could have done so – just as it did in multiple other provisions contained within Chapter 210. This Court should conclude that the Legislature deliberately and intentionally distinguished between the terms to bestow a mandatory duty upon the State.

e. Division's Own View

Another factor this Court should consider is the Department of Social Service's own view and interpretation of Chapter 210 and the impact of *Jamison* thereon. Appellant claims confusion over the Respondent's assertion that non-compliance with Chapter 210 RSMo has resulted in an infringement of her due process rights and implication of her protected liberty interests. In fact, Appellant goes so far as to suggest that due process protections do not apply to child abuse and neglect investigations. (App.Br. 55). These arguments should be cast aside, upon consideration of *Jamison* and

the language of Section 210.145.1(3) – "division shall develop protocols which give priority to . . . [p]roviding due process for those accused of child abuse or neglect." These arguments should further be disregarded in light of the Department's own "Memorandum for all Children's Division Staff" that was authored by Department Director Paula Neese and circulated on April 12, 2007. (LF 37). The Department Memo highlights the impact that *Jamison* will have upon Department procedures under Chapter 210, specifically identifying the "issue of whether proper due process is afforded to individuals alleged to have committed child abuse or neglect." The Memo expressly recognizes and inferentially identifies the power and potential danger of the Central Registry, noting it "has become a source of data which is often accessed for background screening for employment and licensing activities." The Memo highlights that "it is imperative that Children's Service Supervisors ensure that an individual's name is not inadvertently put into the Registry by entering a final determination prior to the expiration of the 60 day appeal period." Though this Memorandum involves the *Jamison* precedent, rendering unconstitutional the placement of an alleged perpetrator's name on the registry unless "Final Determination and Court Adjudicated findings" have been rendered, the memo unequivocally identifies the 60 day appeal period – set out in Section 210.152.4 RSMo – as mandatory per the statute.

f. Effect of Ruling One Way or the Other

This Court should consider the "effect of ruling one way or the other," as set out *supra* in *In re A.H.,* 169 S.W.3d at 157. Though there may arguably be adverse consequences for determining that "shall" as used in Sections 210.145 and 210.152

actually means "may," the most obvious problem would arise in other sections of Chapter 210 where "shall" precedes some time deadline. If the term "shall" is to be treated as "may," the State, alleged perpetrators and the Courts will be cast into a field of uncertainty from which any number of diverging, opposing, contradictory results would derive.

i. Uncertainty

Section 210.152.4 states that administrative appeals to the CANRB "shall be made within sixty days of notification of the division's decision under this section." Section 210.152.6 establishes that the CANRB "shall sustain the division's determination if such determination was . . . supported by a preponderance of the evidence . . . and is not against the weight of such evidence." Section 210.152.6 states that the "request for a judicial review shall be made within sixty days of notification of the decision of the child abuse and neglect review board decision." "In reviewing such decisions, the circuit court shall provide the alleged perpetrator the opportunity to appear and present testimony." None of these foregoing provisions contain a penalty or sanction for non-compliance. Thus, were Appellant's argument to be accepted by this Court – "shall" actually means "may" where no penalty is provided – absurd results would follow. For instance, the State probably does not concede that an alleged perpetrator may merely disregard the 60 day administrative appeal deadline and appeal to the CANRB in, say, 120 days because no penalty has been legislated in Section 210.152 for non-compliance. Under the State's analysis, could an alleged perpetrator disregard the 60 day judicial review deadline set out in Section 210.152?

Any interpretation of the word "shall" to mean "may" within this statute would arguably permit such confusing and outrageous results would be arbitrary and unreasonable. This Court should decide that "shall," as it precedes the various time deadlines in Sections 210.145 and 210.152, is mandatory, failure with which to comply, results in loss of jurisdiction.

ii. Sections 210.145 and 210.152 Would be Unconstitutional

Sections 210.145 and 210.152 will be rendered unconstitutionally void for vagueness if "shall" were to be changed by judicial fiat from a mandatory term to a directory term. These Sections will further be unconstitutional as violative of an alleged perpetrator's liberty interest and due process rights as identified in *Jamison*.

As discussed in further detail *infra*, *Jamison* holds that listing an individual's name in the central registry "squarely implicates a protected liberty interest." Therefore, before an individual may be placed on such a registry, such person must be afforded due process rights. 218 S.W.3d at 406. The Legislature expressly recognized in Section 210.145.1(3) that the due process rights of those accused of child abuse should be protected through structured decision-making protocols. Fixed, mandatory time deadlines within which investigations shall be conducted and within which notice shall be provided in writing are crucial to ensuring an alleged perpetrator's due process rights are protected. If investigations are permitted to be indefinite and notice can be provided at any time, the due process rights of accused individuals will be obliterated. Under Appellant's argument, that "shall" is merely directory and the Division doesn't lose

jurisdiction over a case for non-compliance, an investigation could quite literally extend 10 months or 10 years into the future.

This Court should interpret "shall" as mandatory because of the constitutional protections of due process and notice presented under Sections 210.145 and 210.152 RSMo. In *Garzee v. Sauro*, the Missouri Supreme Court approached the mandatory v. directory issue in relation to notice requirements in Section 141.440 RSMo. 639 S.W.2d 830 (Mo. 1982). Section 141.440 provides that "the collector shall cause to be prepared and mailed a brief notice of the filing of the foreclosure suit. This section also provides: 'The failure of the collector to mail the notice . . . shall not affect the validity of any proceedings brought pursuant to sections 141.210 to 141.810.'" *Id.* at 832. The issue before the *Garzee* Court was whether "shall" was mandatory despite the absence of a penalty provision.

The *Garzee* Court held that despite the absence of a penalty provision in Section 141.440, the notice-by-mail provision in the Statute was mandatory. *Id.* In pertinent part, the Court stated: "The notice requirement of § 141.440 is notice by mail. . . . Giving the statute a directory meaning would imply that the publication of notice of foreclosure in § 141.430 satisfies the notice requirements . . . . [W]e cannot interpret § 141.440 as directory only. Under *Mullane*, within the limits of practicability, notice must be such as is reasonably calculated to reach the interested parties. . . . Thus, the collector is required, as a matter of law, to prepare and mail a brief notice of the filing of the foreclosure suit. *Id.* at 832-33 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

In *Citizens for Envtl. Safety v. Missouri Dep't of Natural Resources*, 12 S.W.3d 720, 724-725 (Mo. App. S.D. 1999) – cited by Appellant for the proposition that "shall" is merely directory – the Court dismissed the Appellant's citation of *Garzee* as being inapplicable to the issue of the DNR's issuance of a permit to construct a landfill. In pertinent part, *Citizens* stated as follows: "The *Garzee* court was faced with a unique situation in which following the general mandatory-versus-directory rule would render the statute at issue unconstitutional. The supreme court elected to interpret the statute consistent with our state and federal constitutions rather than follow the general mandatory-versus-directory rule. In so doing, the supreme court appears to have followed the common rule of statutory construction that an 'ambiguous statute[] . . . susceptible to more than one construction should be construed in a manner consistent with the constitution.'" *Id.* at 725.

This case presents the very issue presented in *Garzee*; whether the liberty interest and due process protections invoked in Sections 210.145 and Section 210.152 require a mandatory reading of the term "shall." Because, as discussed *supra*, a directory interpretation of "shall" would render the statute at issue unconstitutional, this Court should determine that "shall" is mandatory.

g. Liberty Interest

When analyzing the treatment of the term "shall" in the context of Sections 210.145 and 210.152, this Court should recognize the liberty interest at stake and the due process rights which are implicated by placement upon the Central Registry.

Listing an individual in the registry implicates a liberty interest by "essentially barr[ing] him from working with children, and caus[ing] him to become unemployed and unemployable in his profession." *Jamison* 218 S.W.3d at 407-408. "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference implicates constitutionally protected liberty interests." *Id.* (citing *Greene v. McElroy*, 360 U.S. 474 (1959)). Individuals are entitled to due process protections during child abuse and neglect investigations because "individuals subject to having their names included in the Central Registry have a constitutionally protected liberty interest because the dissemination of their names from the Central Registry creates a stigma damaging to their reputation and effectively precludes their employability in the profession of their choosing." *Id.*

Like the Court stated in *In re A.H.* when analyzing severance of the parent-child relationship, placing one's name on a child abuse registry, which carries a magnificently negative stigma and which directly implicates one's life and liberty, is an "exercise of awesome power and demands strict and literal compliance with the statutory authority from which it is derived." *See In re A.H.,* 169 S.W.3d at 158. Like the *Teer* Court stated, statutes should not be extended by judicial interpretation where one's liberty interest has been implicated. 275 S.W.3d at 261.

Appellant suggests 210.145 and 210.152 don't implicate an individual's due process interests. (App.Br. 55). The Legislature, however, disagrees. The Division is required to develop protocols which provide due process for those accused of child abuse and neglect. RSMo § 210.145.1(3).

The Legislature intended for the time deadlines in Sections 210.145 and 210.152 to be fixed and mandatory in furtherance of its stated goal of protecting the due process rights of alleged perpetrators. The Legislature specifically sets out in Section 210.145.1(3) that "the division shall develop protocols which give priority to . . . [p]roviding due process for those accused of child abuse or neglect." The Legislature further set out that "the division shall promulgate rules regarding the structured decision-making protocols to be utilized for all child abuse and neglect reports." Section 210.152.2 RSMo. The Legislature has plainly and clearly expressed its intention to protect the due process rights of alleged perpetrators and to ensure a structured, decision-making process through which child abuse allegations will be investigated and resolved. Any interpretation of the express time deadlines in Sections 210.145 and 210.152 as anything other than mandatory, flies in the face of the Legislature's intent.

Furthermore, the time deadlines should be treated as mandatory as they relate to the essence and substance of the Legislature's desire to protect due process rights and process child abuse allegations in an orderly, structured manner. As stated in *Hopkins*, " those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory." *Hopkins,* 302 S.W.3d at 53. Legislative intent can be ascertained by assessing "all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished." *Id.* Here, a primary subject of the legislation is to process child abuse allegations in an orderly, structured

manner, while protecting the due process rights and liberty interests of those alleged to have perpetrated.

Appellant also seems to argue that an individual's liberty interest and due process protections are not invoked until her name is placed on the registry, which can only occur "after the perpetrator does not seek review of the [CANRB] determination." (App.Br. 56). Of course, in the present case, Respondent's name was placed on the Registry after the CANRB determination, despite the fact that she had timely requested *de novo* review in the Circuit Court. (CANRB Determination Letter at LF 31). On September 15, 2011, the CANRB notified Respondent that it had upheld the Division's finding and "[y]our name has been entered in the Central Registry. This finding of abuse or neglect may affect future employment if a Central Registry search is part of a background screening." (LF 31). As Appellant has conceded that an individual's name can only permissibly be placed upon the Registry at such time as the individual does not seek review of the CANRB determination, Appellant must also concede that the State's placement of Respondent's name upon the Registry while her appeal was pending in the Circuit Court was premature and unconstitutional.

Respondent wrote a letter to the CANRB and Division demanding removal from the Registry, citing this Court's holding in *Pitts v. Williams*, 315 S.W.3d 755, 760 (Mo. App. W.D. 2010) that "[a]s long as the appeal is progressing, the alleged perpetrator's name will not be added to the child abuse and neglect registry." (citing *Jamison*, 218 S.W.3d at 417). (Demand Letter at LF 32-33). The State did not respond to this letter.

Individuals are entitled to due process protections during child abuse and neglect investigations because "individuals subject to having their names included in the Central Registry have a constitutionally protected liberty interest because the dissemination of their names from the Central Registry creates a stigma damaging to their reputation and effectively precludes their employability in the profession of their choosing.

h. Appellant's Cases are Inapposite.

Appellant argues that statutory time limits in 210.145 and 210.152 are merely discretionary, the failure with which to comply, does not result in the loss of jurisdiction to make a decision or perform an act. (App.Br. at 44-49). Stated simply, the Division argues it does not lose jurisdiction to place an alleged perpetrator on the child abuse registry even if it fails to first complete an investigation or provide written notice, or to do these things in a timely manner. In support of this argument, Appellant cites *Farmers*, 896 S.W.2d 30, 33 (Mo. banc 1995), *Citizens,* 12 S.W.3d at 724-26; *Seeley v. Anchor Fence Co.*, 96 S.W.3d 809, 815-17 (Mo. App. S.D. 2002), *Jenkins v. Croft*, 63 S.W.3d 710, 713 (Mo. App. S.D. 2002), and *Hedges v. Department of Social Services*, 585 S.W.2d 170, 172 (Mo. App. KC. 1979). For a number of reasons, and in consideration of the various factors set out *supra* at (a-g) these cases are inapposite and unsupportive of Appellant's position.

Missouri courts review the entire context of the statute to ascertain whether the legislature intended terms like "shall" to be treated as mandatory. One factor, among many, that courts routinely consider is whether a liberty interest has been affected. When a Defendant's liberty interest has been implicated, Courts have treated statutory terms

like "shall" as mandatory. *Petet v. State*, 32 S.W.3d 818, 820-24 (Mo.App. W.D. 2000) (continuing child abuse and neglect investigations beyond statutory time limit); *Jamison,* 218 S.W.3d at 406 (placement of name on child abuse registry); *Teer*, 275 S.W.3d at 261 (determining prior offender status); *In re A.H.*, 169 S.W.3d at 157 (termination of parental rights hearings); *Wilkerson*, 330 S.W.3d at 855-56 (requiring mental health examinations in criminal cases). For example, there are significant differences between one's right not to be listed on a child abuse and neglect registry without due process, and a company's right to be issued a permit to construct a landfill.

In *Farmers*, the Court addressed whether the Department of Revenue was required to mail a tax refund within 120 days. 896 S.W.2d. 30. The *Farmers* Court considered the context of the statute, noting that, absent express language, the Legislature probably intended to "protect the state's coffers from unwarranted refunds automatically given as a result of administrative oversight." *Id.* at 33. For this reason, the *Farmers* Court determined that the context of the statute did not require mandatory treatment of "shall." This context of the *Farmers* statute, Section 143.831 RSMo, is quite different than the statutes presently at issue, which implicate the constitutional rights of alleged perpetrators and for which the Legislature expressly states that protection of an alleged perpetrator's due process rights "shall" be prioritized.

Appellant further cites for support the holdings in *In re Donaldson* (App.Br. at 43-44) and *Citizens* (App.Br.45). As previously discussed, *In re Donaldson* and *Citizens* are distinguishable from the present case. *See* analysis of *In re Donaldson* (*supra* at 44-45) and *Citizens* (*supra* at 53-54).

Appellant cites *Jenkins* (App.Br. at 47) in support of its position. The *Jenkins* Court addressed a time provision in the Adult Abuse Act (Sections 455.010-085) requiring the court to hold a hearing within 15 days of the filing of the petition. *Jenkins*, 63 S.W.3d at 712. Evaluating the entire context of the statute and the facts and circumstances unique to adult abuse cases, the Court determined that the hearing deadline was directory, for "a contrary construction would only serve to frustrate the goals of the Adult Abuse Act." *Id.* Here, a stated goal of Chapter 210 is developing protocols that protect the due process rights of alleged perpetrators. Reading the requirements of investigation and notice, let alone timeliness of same, as merely directory would frustrate a stated goal of Section 210.145 and 210.152.

Appellant's citation of *Hedges* (App.Br. at 48) is further inapplicable. The *Hedges* Court held that the notice requirement set out in State Regulation 20-3.040(2) was merely directory, reasoning that "[i]n the present case, no statute requires the notice in question." 585 S.W.2d at 172. Here, timely investigation and notice are expressly provided for by statute.

Appellant's position is further weakened by a plethora of Missouri cases holding that State action must be invalidated when the State fails to abide by mandatory statutory provisions.

The *Bauer* Court reviewed the question of whether a school district was under a mandatory duty, pursuant to Section 162.666 RSMo to certify a Student Bill of Rights and place it on the ballot for voter approval. 111 S.W.3d at 408-409. In determining whether the statute was mandatory or directory, the Court analyzed the temporal mandate

"in *pari materia* with the other provisions enacted" in the particular statutory section and – despite the absence of a penalty for non-compliance – held that the "the word 'shall' was intended to be mandatory." *Id.* at 408.

In *Southwestern Bell Telephone Co., Inc. v. Mahn*, the Missouri Supreme Court upheld the trial court's determination that Section 164.021 RSMo mandated the Clerk to certify the vote and assess the new tax rate as of a specific date. 766 S.W.2d 443 (Mo. 1989). The Court held that a directory reading of the statute would lead to an absurd result. *Id.* The Court specifically held that "[t]he absence of a penalty provision does not automatically override other considerations." *Id.* at 446. The *Southwestern Bell* Court cited with approval the holding in *Garzee v. Sauro*, discussed *supra* at 45-46, wherein the *Garzee* Court properly "balanced the absence of a penalty provision against the characteristics of proper notice." *Id.* at 446.

In *In re A.H.*, the court analyzed the use of the term "shall" in the context of §211.455 RSMo, which relates to, *inter alia*, the investigation of and potential termination of parental rights. 169 S.W.3d 152. The Court specifically addressed the language in the statute that mandated "within thirty days after the filing of the petition [for termination], the juvenile officer **shall** meet with the court in order to determine that all parties have been served with summons and to request that the court order the investigation and social study." *Id.* at 156 (emphasis added). Section 211.455 does not contain a penalty provision for non-compliance by the juvenile officer. Reviewing the above statutory section, the *In re A.H.* Court noted "in construing statutes, generally, 'shall is used to express compulsion, obligation or necessity,' and mandates an action."

Id. at 157 (citing *Lippold*, 142 S.W.3d at 244). The Court went on to recognize the principles set out in *Bauer* and *Southwestern Bell* that the absence of a penalty provision does not override other considerations. *Id.* The Court further recognized that "[w]hether the statutory word 'shall' is mandatory or directory is primarily a function of context and legislative intent." *Id.* The Court added that "[a]nother consideration in this determination is the effect of ruling one way or the other." *Id.* The Court analyzed the foregoing legal principles and the liberty interest at stake in termination proceedings and held that despite the absence of a sanction, "compliance with statutory requirements is mandatory," because "[s]everance of the parent-child relationship by act of law is an exercise of awesome power and demands strict and literal compliance with the statutory authority from which it derived." *Id.* at 158 (emphasis added) (citing *In the Interest of B.R.S.*, 937 S.W.2d 773, 774 (Mo. App. 1997)).

In *Teer*, the Missouri Supreme Court analyzed the use of the term "shall" in Section 558.021.2 RSMo, relating to factual prerequisites for establishing prior offender status in criminal matters. 275 S.W.3d 258. The Court properly recognized the prevailing precedent set forth above that the term "shall" is generally mandatory and the "presence or absence of a penalty provision is 'but one method' for determining whether a statute is directory or mandatory." *Id.* Though the statute in question does not contain a sanction for non-compliance, the court noted that Section 558.021.2 is one of the statutes that provide a means for enhancing sentences based upon prior offenses and, "as such, section 558.021.2 implicates a defendant's liberty and, like other criminal statutes, should not be extended by judicial interpretation so as to embrace persons and acts not

specifically and unambiguously brought within its terms." *Id.* at 261 (emphasis added) (citing *State v. Lloyd*, 7 S.W.2d 344, 346 (Mo. 1928)). Because the statutory act "implicated the Defendant's liberty" the Supreme Court held that "the absence of a penalty provision does not necessarily mean that compliance with the statute is merely directory." *Id.* The Court reversed and remanded to the trial court for sentencing pursuant to its finding that the term "shall" is mandatory. *Id.* at 262.

In *Lippold*, the Court recognized that the term "shall" must be interpreted in the proper context and that, "[g]enerally, the legislature's use of the word 'shall' removes any discretion from the official who is directed to perform the specified act." 142 S.W.3d 241 (citing *Welch v. Eastwind Care Center*, 890 S.W.2d 395, 397 (Mo. App. W.D. 1995)). The *Lippold* Court went on to hold that "[i]n light of the context here in which 'shall' is used, we conclude that the absence of a penalty for the commission's failure to fund the program in the amount of $10,000 does not transform the legislature's clear mandate into a mere suggestion." *Id.*

In *Firemen's*, the Court considered whether the City was obligated to contribute funds to the Firemen's Retirement System pursuant to Statute and Ordinance. 2006 LEXIS 1234. The Court held that "shall" as used in Section 87.355 RSMo and City Code 4.18.320 is mandatory, not directory or advisory, notwithstanding the absence of a penalty for failure to do that which "shall" be done, noting that absence of a penalty provision is only one method for determining if a statute is mandatory. *Id.* at * 37. Considering the "context and legislative intent" underlying the statute at issue, the *Firemen's* Court concluded that "shall" was mandatory. *Id.*

In *Wilkerson*, this Court addressed the mandatory nature of the term "shall" in the context of mental health reports in criminal cases. 330 S.W.3d 851. Section 552.020.3 RSMo establishes that mental health examinations "shall include" a number of factors in determining whether an accused is legally competent to stand trial. *Id.* The State argued that the requirements of Section 552.020 were merely discretionary because the Legislature did not prescribe a sanction for noncompliance. *Id.* This Court cited *Teer*, 275 S.W.3d at 261, for the proposition that "determining if the word 'shall' is mandatory or directory requires courts to review the context of the statute and to ascertain legislative intent." *Id.* Considering the context of the statute and the liberty interest involved, this Court held that "there is an obvious line of logic connecting the purpose of the statute with a requirement to order a mental health exam and a requirement for the report of that exam to include certain categories of information." *Id.*

In *Hopkins*, 302 S.W.2d at 52, the Court considered the use of the term "shall" in the context of statutory redemption proceedings under Sections 443.420 and 443.430 RSMo. The Court held that "shall" is mandatory and, in support of its holding, provided the following reasons: (1) the provision related to the essence of the thing to be done and as to which compliance is a matter of substance; (2) the plain language of "shall be given" is couched in the language of command; (3) the general rule is that "shall" indicates a mandate; (4) the use of mandatory language in one part of a statute and of permissive language in another part of the same state is indicative of purposeful selection, requiring literal interpretation of the language employed, and; (5) mandatory "shall" must

not be transmuted into the permissive "may" simply to rescue an individual from the consequences of his disregard of plain statutory requirements.

Perhaps no case is more supportive of the Trial Court's legal conclusions than *Petet v. State*, 32 S.W.3d 818 (Mo. App. W.D. 2000). Appellant attempts to distinguish *Petet* from the facts of the present case, arguing that the Division re-opened its investigation in *Petet*, whereas here, the Division merely failed to conclude its investigation or sent notice in a timely fashion. (App.Br. 45-46). Appellant's distinction is without merit. The holding in *Petet* is applicable, on point, and conclusive of the present issue.

In *Petet*, Appellant Division claimed that the circuit court erred in concluding that the Division lacked jurisdiction to continue ***or*** re-open an investigation after making an initial determination that there was insufficient evidence to establish probable cause. The Division argues that it has the implied and inherent power to continue investigations because it is not prohibited from doing so by statute and because it is necessary to carry out its statutory purpose. *Id.* at 822. This Court upheld the Trial Court, determining that Sections 210.145 and 210.152 were mandatory, failure with which to comply, stripped the Division of jurisdiction to act. *Id.* This Court held as a threshold matter that "[w]here the language of a statute is clear and unambiguous, we will give effect to the language as written and will not resort to statutory construction." *Id.* Furthermore, "[a]n administrative agency possesses only such jurisdiction or authority as it has been granted by the legislature." *Id.* (citing *Jenkins*, 858 S.W.2d at 260.

This Court cited the relevant portions of Sections 210.145 and 210.152, confirming that the Division "shall" complete investigations within 30 days and "shall" provide written notice within 90 days.

Evaluating the entire context of the statute, this Court held that "[t]he clear intent of the legislature in enacting Sections 210.145.6 and 210.145.12[3] was for the Division to immediately investigate hotline calls and to diligently pursue those investigations to their conclusion. The statutory language simply cannot be read to allow the division to place investigations on the back-burner and to revisit those investigations at its convenience." *Id.* at 823. Notwithstanding the hyper technical procedural distinction between the *Petet* case and the present case, the foregoing summary of the legislature's intent in enacting Sections 210.145 and 210.152 could not be any more applicable to the facts of this case.

In the present case, like in *Petet*, the Division violated the clear proscriptions of mandatory Sections 210.145 and 210.152 RSMo. This Court should again determine that the Trial Court's invalidation of the Division's conduct is proper and uphold the trial court's order that the Division remove Respondent's name from the registry.

Stated simply, "shall," as used in these Sections, is mandatory. The Division's failure to comply with such deadlines deprives it of jurisdiction to place an alleged perpetrator's name on the Registry. This Court should uphold the Trial Court's Order in its entirety. (Although there are ample due process concerns to justify the use of the

[3] Section 210.145 has been amended several times since 2000, such that Section 210.145.12 is now codified as Section 210.145.14.

word, "shall" in this context, the General Assembly can consider modifying the statute *if* that is an ongoing concern. It is not appropriate for the Court to change the plain meaning of "shall" to "may.")

II.

The trial court did not err in ordering Respondent's name to be removed from the Central Registry of child abuse and neglect perpetrators because child abuse and neglect investigations implicate due process rights, including the statutory time limits upon completion of investigations, notice to alleged perpetrators, and regular updates of the information system, in that listing an individual's name upon the child abuse and neglect registry implicates a liberty interest by essentially barring her from working with children, and causing her to become unemployed and unemployable in her profession.

Having fully briefed the constitutional issue with regard to Point I on appeal, counsel will not restate the argument. In short, the trial court did not err in ordering Respondent's name to be removed from the Central Registry as listing an individual's name upon the Registry implicates a liberty interest. Individuals are entitled to due process protections during child abuse and neglect investigations and "individuals subject to having their names included in the Central Registry have a constitutionally protected liberty interest because the dissemination of their names from the Central Registry creates a stigma damaging to their reputation and effectively precludes their employability in the profession of their choosing." *Jamison*, 218 S.W.3d at 407-408. *See* further discussion *supra* at 47 – 50.

Furthermore, the Legislature expressly recognizes the due process rights of alleged perpetrators in child abuse and neglect investigations, legislating in Section 210.145.1(3) that "the division shall develop protocols which give priority to . . . [p]roviding due process for those accused of child abuse or neglect." *See* discussion *supra* at 47-50.

III.

The trial court did not err in finding as fact that the Division delayed its investigation beyond thirty (30) days without showing "good cause" for the delay because such finding is not against the weight of the evidence but, rather, is supported by substantial evidence in that the cell records were not necessary to the Division's determination and, assuming arguendo, that the records were necessary, the Division's investigator failed to diligently attempt to procure the cell phone and its contents both before and after the phone transferred into the custody of law enforcement, and law enforcement's "co-investigation" had no impact on the Division's ability to diligently investigate the abuse allegations and conclude its investigation in a timely manner.

Appellant argues that the Trial Court's determination should be overturned because the Division had good cause to delay the conclusion. (App.Br. at 26). As an initial matter, the question of whether the investigation was delayed for "good cause" is irrelevant if this Court determines that the time deadline for "Notice" set out in Section 210.152 RSMo is mandatory. The Trial Court accurately stated that Section 210.152.2 does not contain a good cause exception, unlike Section 210.145.14. Appellant does not contest this legal conclusion. However, appellant argues that the 90 day time frame is directory, not mandatory. This Court should not rewrite the statute. There is no "good cause" exception set out in the statutory scheme.

Nonetheless, the Division had no "good cause" to delay the investigation because the cell records were unnecessary to its substantiation determination. Assuming the records were needed, the Division failed to diligently or doggedly pursue the records. Furthermore, law enforcement's "co-investigation" had no impact on the Division's ability to diligently investigate the abuse allegations and timely conclude its investigation.

The Missouri Supreme Court noted that it "rarely has reversed a trial judgment as against the weight of the evidence. *Pearson*, 367 S.W.3d at 52 (Mo. 2012). Appellant carries the burden of "demonstrat[ing] why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition." *Crider*, 317 S.W.3d at 187. Appellant cannot meet this burden. The trial court's findings of fact were not against the weight of the evidence.

a. Cell Phone Records Were Not Necessary to Substantiation Determination

Ms. Morgan testified that her reason for delaying the investigation was "co-investigation with law enforcement, and I was waiting on some documentation and information from law enforcement. . . . [a] copy of official cell phone record texts." (Tr. 33:14-16, 35:3-6). The trial court found that this purported reason for delaying the investigation beyond 30 days was not "good cause," as substantial evidence, including Ms. Morgan's own testimony, established that the decision to substantiate the finding of abuse was based entirely upon evidence received within the initial 30 day period. (Appx. 8).

Ms. Morgan never obtained the text messages or photos from law enforcement. However, Ms. Morgan substantiated, by a preponderance of the evidence, the allegations of abuse against Ms. Williams, relying exclusively upon evidence obtained during the first thirty (30) days of the investigation. The record on the whole, supported by substantial evidence, establishes that the cell records were not necessary to the Division's investigation and, accordingly, the Division's delayed investigation was not for "good cause."

b. Law Enforcement's "Co-Investigation" Had No Impact on Division's Ability to Diligently Investigate the Abuse Allegations and Conclude its Investigation in Timely Manner.

Appellant argues that "good cause" existed to delay the investigation because "co-investigation" with law enforcement somehow precluded the investigator from diligently attempting to obtain access to the phone.

The trial court found that "co-investigation with law enforcement" was not sufficient "good cause" for delaying the conclusion of the investigation. (Appx. 8). Ms. Morgan stated on direct examination that the Division's investigation takes a back seat to law enforcement because the Division doesn't want to "jump ahead of law enforcement if they're continuing their investigation." (Tr. 34:4-6). Ms. Morgan testified that she delayed concluding her investigation because she did not want to interfere with law enforcement's investigation. (Tr. 45:13-15). Ms. Morgan was unable to provide testimony as to how accessing the cell phone *before* it was taken into police custody would cause interference with law enforcement's investigation. Likewise, Ms. Morgan

was unable to testify as to how requesting access to the cell phone *after* it was taken into police custody would cause interference. In fact, on cross examination, Ms. Morgan stated that the Division performed its own exhaustive investigation at the same time law enforcement was investigating because law enforcement "didn't have an issue with me going ahead and doing that." (Tr. 47:14-22). The Division's interference theory notwithstanding, Ms. Morgan testified that during the first 30 days of the investigation – 10/13/1-11/12/10 – she interviewed Jason Floyd, Paul Kinder, Detective Kreissler, Jim Finley, Virginia Laughery, Bob Jerome, Jordan Laughery, Bill Shalley, Robert Sturman, Ginny Laughery, Maria Raquel Juarez, and Anna Juarez. Ms. Morgan also attended the CPC Interview. (Tr. 48:2-13). She testified that she acquired enough information about this case in the first 30 days to substantiate the findings. (Tr. 48:14-20, 54:21-23). Substantial evidence on the whole record establishes that "co-investigation" with law enforcement was not an impediment to Ms. Morgan's access to the cell phone and, accordingly, such proffered justification for delay was not for "good cause."

c. Division Failed to Diligently Attempt to Procure the Cell Phone and its Contents

The Trial Court further found that Ms. Morgan failed to diligently attempt to obtain access to the cell phone records and she violated Division policy regarding acquisition of missing reports, in that she "failed to maintain weekly follow-up contacts with law enforcement regarding the text messages of photos [and] failed to maintain weekly updates to the information system." (Appx. 5). Substantial evidence on the whole record establishes that if the cell phone content was truly necessary, as the

Division purports, Ms. Morgan failed to doggedly pursue such records. Ms. Morgan could have accessed the phone and its contents *before* it went into police custody and failed to doggedly pursue the phone and its contents *after* it went into police custody.

i. Access to Phone Pre-Custody

The Division was aware, as early as October 13, 2010 – beginning date of investigation – that explicit text messages and pictures had been found on Jordan Laughery's phone. (Child Abuse/Neglect Investigation Summary, Plaintiff's Exhibit 3). In fact, Ms. Morgan personally reported on October 13, 2010 that "a child abuse report was received on October 13, 2011" and "[t]he parents [contacted] the police after they found text messages on his phone and pictures." (Plaintiff's Exhibit 3). Assuming the cell phone and text messages contained thereon were "necessary" pieces of evidence, as alleged by Ms. Morgan, the record makes clear that Ms. Morgan had identified such pieces of evidence on October 13, 2010, by virtue of her own report. (Plaintiff's Exhibit 3). However, the record establishes that Ms. Morgan had unfettered access to the cell phone before the phone was transferred into the custody of law enforcement, but did not attempt to access it.

Ms. Laughery testified that she found sexually explicit photos of Respondent and various text messages on her son's phone. (Tr. 10:16-18, 11:13-14). The Division began its investigation of the incident on October 13, 2010. (Plaintiff's Exhibit 2). A Child Protection Center ("CPC") Interview was conducted on October 19, 2010 and in attendance were Ms. Laughery, Ms. Morgan, and Detective Kreissler of the Blue Springs Police Department. (Plaintiff's Exhibit 4) (Tr. 19:8-10, Tr. 51:17). Ms. Laughery

provided her son's cell phone to Detective Kreissler at the CPC interview. (Tr. 19:20-23). Within a week after she found the texts on her son's phone in early September, Ms. Laughery reduced these text messages to a 12-page typed transcript. (Tr. 11:19, Tr. 20:18-22, Tr. 21:23-22:2). Prior to the CPC Interview, Ms. Laughery provided a copy of the text message transcript to Ms. Morgan. (Tr. 22:15-18). In that 6-day window, Ms. Laughery was in sole possession of her son's cell phone. (Tr. 20:2-4). Prior to the CPC Interview, Ms. Morgan visited Ms. Laughery at her home, but did not ask to look at the cell phone. If Ms. Morgan requested such access, Ms. Laughery would have allowed her to look at it. (Tr. 20:5-9, 28:1-6). Ms. Morgan did not ask to see the phone during the CPC interview. (Tr. 23:1-14). As of October 19th, Ms. Morgan could have asked Ms. Laughery for consent to search the phone, but failed to do so. (Tr. 56:13-17).

From the factual record set forth above, there is a substantial amount of evidence establishing that Ms. Morgan had every opportunity to access the phone and its contents without "interfering" with law enforcement, but failed to do so, without explanation. Ms. Morgan further failed to diligently pursue the phone once it entered the custody of law enforcement.

iii. Access to Phone Post-Custody

After the phone came into police custody on the seventh day of the investigation, Ms. Morgan made no effort to gain access to it over the course of the next twenty-three days. Upon reaching the 30 day investigation deadline, Ms. Morgan made no effort to pursue the evidence from the phone and expeditiously conclude the investigation. No evidence is more supportive of the trial court's finding than the exchange between

Commissioner Rosen and Ms. Morgan on the record. (Tr. 68:21-70:25); Statement of Facts *supra* at 14-16.

The trial court found that Ms. Morgan, on behalf of the Division, did not have good cause reason for delaying the investigation beyond 30 days. This finding was grounded in substantial evidence on the record, but perhaps no single piece of evidence was more supportive of the court's finding than Ms. Morgan's answer to Commissioner Rosen's question regarding her attempts to procure the cell phone records from Detective Kreissler. (Tr. 69:17-70:5). Commissioner Rosen noted that Ms. Morgan reported a contact with Detective Kreissler regarding the cell phone on November 8, 2010, approximately the 26th day of the investigation (Tr.69:19) (Petitioner's Exhibit 3 at 7-8). Commissioner Rosen noted, however, that more than two (2) months passed before Ms. Morgan contacted Detective Kreissler again on January 10, 2011. (Tr. 69:23-24) (Petitioner's Exhibit 3 at 8). And after the January 10th contact, another month passed before Ms. Morgan reported her last contact with Detective Kreissler on February 16, 2011. (Tr. 69:24) (Plaintiff's Exhibit 3 at 8). Commissioner Rosen asked whether such wide gaps in time violated the Division's policy regarding weekly contacts and whether Ms. Morgan had any reason for not doing weekly contacts to procure the text messages. (Tr. 69:23 – 70:3). Ms. Morgan conceded that her actions violated Division Policy but offered no reason for such violations, explaining that she thinks it was probably just due to "being off work." (Tr. 70:4-5).

d. Ms. Morgan's Knowledge of Deadlines

Ms. Morgan testified that she did not complete the investigation within 30 days or even 90 days. (Tr. 57:18-24). In her job capacity, Ms. Morgan receives either supervisor training or training memos as to the updated status of the law regarding time deadlines for Division investigations. (Tr. 59:22-60:1). She received a memo telling her that she had 30 days to complete investigations and 90 days to notify the alleged perpetrator of her investigative findings. (Tr. 60:2-10). She was uncertain as to whether she could delay the notice beyond 90 days if good cause existed. Instead, she elected to mail it at the conclusion of the report; at some convenient time. (Tr. 60:14-19, 60:25-8). Yet, she considers herself familiar with the policies contained within the Child Welfare Manual. (Tr. 61:-23-5). She testified that she did not comply with this policy. (Tr. 62:9-15).

Ms. Morgan was familiar with the policy listed on the CS-24 letter that if the Division delayed the conclusion for good cause, the alleged perpetrators would be notified regarding the delay. She testified that she did not comply with this policy, stating "I don't have a reason." (Tr. 63:9-22).

The evidentiary record as a whole establishes that certified cell phone records were not necessary to the Division's determination and, even assuming they were, Ms. Morgan did not diligently attempt to procure such records. She was apparently on vacation. Ms. Morgan's failure to abide by the 30 day and 90 day deadlines set out in 210.145.14 and 210.152 was not due to co-investigation with law enforcement. Ms. Morgan simply didn't believe she was under a duty to abide by statutory time mandates

for investigating abuse allegations, updating the information system, and/or notifying alleged perpetrators of the findings.

CONCLUSION

The Trial Court's Findings of Fact and Conclusions of Law and Judgment reversing the decision of the CANRB and ordering Respondent's name to be removed from the Registry should be upheld by this Court. The Trial Court did not err, as a matter of law, in determining that time limits contained in Sections 210.145 and 210.152 are mandatory, non-compliance with which deprives the State of jurisdiction and authority to place Respondent's name on the Registry. The Trial Court did not err in finding that child abuse and neglect investigations invoke an alleged perpetrator's liberty interest and implicate such individual's due process rights. Lastly, the Trial Court did not err, as a matter of fact, in determining that the Division failed to show "good cause" for delaying the conclusion of the investigation beyond 30 days and, as a matter of law, that the 90-day notice deadline does not contain a "good cause" for delay exception. For these reasons, among others cited in this Brief, the Trial Court's Findings of Fact and Conclusions of Law and Judgment should be upheld by this Court.

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CERTIFICATE OF SERVICE

I hereby certify that the original and a copy of the above and foregoing was sent via electronic mail and via First Class Mail, postage prepaid, on this 15th day of April, 2013, to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFIY that Brief of Respondent in the above-captioned matter complies with Rule 84.06(b); was prepared using Microsoft Word 2010, printing in Times New Roman proportionally spaced type font at 13 point. I further certify that the above brief contains 17,357 words, excluding the cover, signature block, certificate of service and certificate of compliance pursuant to Rule 84.06(c).

/S/ JAMES R. HOBBS
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