IN THE
SUPREME COURT OF MISSOURI

NO. SC91141

IN RE THE ADOPTION OF C.M.B.R., MINOR,

S.M. and M.M.,
Respondents,

v.

E.M.B.R.,
Appellant.

Appeal from the Circuit Court of Jasper County
Hon. David C. Dally

APPELLANT'S SUBSTITUTE OPENING BRIEF

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JURISDICTIONAL STATEMENT

Appellant E.M.B.R. ("Mother") appeals the October 9, 2008 Judgment Of Adoption, Termination Of Parental Rights, And Change Of Name (the "Judgment") of the Jasper County Circuit Court (the "Juvenile Court").

This case involves the unlawful termination of Mother's parental rights under Chapter 211.442 *et seq.* of the Missouri Revised Statutes, and the unlawful adoption of Mother's biological son C.M.B.R. ("Child") under Chapter 453.005 *et seq.* of the Missouri Revised Statutes. Thus, the case involves the deprivation of a natural parent's fundamental liberty interest guaranteed under Mo. Const., art. I, §2, and in violation of the natural parent's due process rights guaranteed by the U.S. Const. amend. XIV, § 1.

By Order dated July 23, 2009, this Court granted Mother "leave to file a notice of appeal in the Jasper County Circuit Court on or before August 24, 2009…. directed to this Court." (LF. 154).[1] Mother timely filed her notice of appeal on August 13, 2009 (LF. 132). Following substantial motion practice in this Court, and after Mother filed her opening brief in this Court (in what was then Case No. SC90359), by Order dated February 1, 2009, the "[c]ause [was] ordered transferred to the Missouri Court of Appeals, Southern District."

[1] The record on appeal is cited herein as follows: October 18, 2007 hearing transcript "(2007TR. [page]:[line]);" October 7, 2008 hearing transcript "(2008TR. [page]:[line]);" legal file "(LF. [page]);" and appendix to this brief "(A[page])."

On July 21, 2010, the Southern District filed its *unanimous* opinion "revers[ing] the judgment ordering adoption of Child and termination of Mother's parental rights, and direct[ing] the trial court to dismiss the petition." (A47). Respondents' motion for rehearing or transfer was denied on August 12, 2010. This Court sustained Respondents' application for transfer on September 17, 2010.

Although Mother complied with Rule 81.07 and § 512.060, *and* timely filed her notice of appeal "on or before August 24, 2009" as directed by this Court (LF. 154), Respondents assert in their transfer application that somehow Rule 81.07 is supposedly in conflict with § 512.060 and, therefore, Mother should lose her Child for allegedly failing to properly file a piece of paper labeled "notice of appeal." But that is *not* the law, and cannot be the law. Respondents' novel theory fails for several reasons.

This Court has Already *Twice* Denied Respondents' Jurisdiction Argument

Before this case was transferred to the Southern District, this Court granted Mother leave to file her notice of appeal. (LF. 154). Thus, although Respondents assert often in their transfer application that the Southern District relied on a so-called "imaginary writ," Respondents are really attacking this Court's July 23, 2009 Order. Respondents offer no grounds for reversing this Court's July 23, 2009 Order.

Moreover, as Respondents admit in their transfer application, while this case was previously pending before this Court, "[t]he Court denied Respondents' motion to

dismiss for lack of appellate jurisdiction and motion for reconsideration."[2] No matter how Respondents try to spin this Court's *two* prior orders, the fact that Respondents' jurisdiction argument was previously rejected *twice* by this Court should end the inquiry. *See Williams v. Kimes*, 25 S.W.3d 150, 153 (Mo. banc 2000) ("The doctrine of law of the case governs successive appeals involving substantially the same issues and facts, and applies appellate decisions to later proceedings in that case.").

This Court Ruled on Nine Motions *Before* Transfer to Southern District

This Court retained jurisdiction for more than three months *after* first denying Respondents' jurisdiction argument. During those three months this Court also ruled on no less than nine additional motions *before* transferring to the Southern District.[3] And even more importantly, this Court granted relief in *six* of those nine rulings. The fact that this Court did "rule on the merits" of nine additional motions *before* transferring to the Southern District — and did grant *six* of those nine motions — should also end the inquiry.

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[2] This Court's October 28, 2009 Order overruling "Respondents' motion to dismiss" and December 23, 2009 Order overruling "Respondents' motion for reconsideration" are attached to the appendix at A21 and A23, respectively.

[3] This Court's Orders dated December 22, 2009; December 23, 2009; December 24, 2009; January 13, 2010 (containing at least five separate rulings); and January 19, 2010, are attached to the appendix at A22-A31.

Rule 81.07 is *Not* in Conflict with § 512.060

Even if this Court had not previously *twice* denied Respondents' novel theory, a plain reading of § 512.060 proves that there is no conflict with Rule 81.07.

Respondents assert in their transfer application that supposedly "§ 512.060.1 requires that the notice of appeal itself be filed *within* the six-month window." But read in its entirety, § 512.060.1 belies that assertion, because the last sentence of § 512.060.1 expressly provides that "[w]hen notified of the issuance of a special order by the appellate court the clerk of the trial court in which the final judgment was entered ***shall permit the appellant to file a notice of appeal*** and the appellant shall then proceed to prepare the transcript on appeal ***as if the appeal had been allowed without a special order***." Mo. Rev. Stat. § 512.060.1 (emphasis added).

The last sentence mandates that a notice of appeal filed after "issuance of a special order" be treated "as if the appeal had been allowed without a special order." In other words, the last sentence of § 512.060.1 makes the date of filing the notice of appeal retroactive to the date of filing the motion for special order. The Court of Appeals has held that Rule 81.07 works in precisely the same way. *See Paskon v. Wright*, 230 S.W.3d 24, 28 (Mo. App. 2007) ("This Court granted Wright's motion [for a special order], which permits Wright to move forward with the appeal from the denial of his motion to set aside the judgment as though it was filed timely.").

Accepting Respondents' tortured reading of § 512.060 would eviscerate the plain meaning of the last sentence of § 512.060.1 and renders that language surplusage. *See Hyde Park Hous. P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993) ("it will

be presumed that the legislature did not insert verbiage or superfluous language in a statute").

Rule 81.07 and § 512.060 Must Be *Liberally* Construed

This Court has repeatedly and consistently held that "[s]tatues and rules should be construed liberally in favor of allowing appeals to proceed." *Sherrill v. Wilson*, 653 S.W.2d 661, 663 (Mo. banc 1983); *see also Brown v. Hamid*, 856 S.W.2d 51, 53 (Mo. banc 1993) ("Cases should be heard on the merits if possible, construing the court rules liberally to allow an appeal to proceed."); *Schroff v. Smart*, 120 S.W.3d 751, 755 (Mo. App. 2003) ("The right to appeal 'should be liberally construed as appeals are favored in the law. ***Where doubt exists as to the right to appeal, it should be resolved in favor of that right***.") (emphasis added).

This Court has also found that "Section 512.060 … has been applied liberally." *State v. Robbins*, 269 S.W.2d 27, 29 (Mo. 1954). Accordingly, even assuming *arguendo* that there was some ambiguity concerning Rule 81.07 and § 512.060, the Court should construe the rule and statute liberally in favor of allowing this appeal to proceed on the merits.

Procedural Rules Govern Over Contradictory Statutes

Respondents have previously admitted to this Court, in the briefing on Mother's petition for a writ, that Rule 81.07 is procedural: "Rule 81.07 provides a procedure for discretionary relief." (A100). Thus, even assuming *arguendo* that the procedural mechanism in Rule 81.07 is in conflict with § 512.060, this Court has repeatedly held that "Supreme Court rules govern over contradictory statutes in procedural matters unless the

General Assembly specifically annuls or amends the rules in a bill limited to that purpose." *State v. Reese*, 920 S.W.2d 94, 95 (Mo. banc 1996) (citing *Ostermueller v. Potter*, 868 S.W.2d 110, 111 (Mo. banc 1993)).

Respondents Elevate Form Over Substance

Respondents' novel theory also elevates form over substance. For example, to comply with Respondents' theory, an appellant would have to simultaneously file within the six-month window both a motion for a special order and a piece of paper labeled "notice of appeal." That, however, is prohibited by Rule 81.07, which requires an appellant to first "seek a special order." Respondents counter in their reply brief in support of transfer that "it is easy enough for a party to be diligent … by seeking a special order early enough that the appellate court grants it and the party files a notice of appeal 'with[in] six months from the date of such final judgment.'" But a similarly novel theory has been squarely rejected. *See Zweifel v. Dougherty*, 761 S.W.2d 215, 217 (Mo. App. 1988) ("Defendants claim Rule 81.07(a) requires not only a motion to seek a special order but also the existence of a special order within six months of the date the judgment became final. We reject this contention.").

Respondents' Interpretation Would Treat Appellants *Unequally*

Complying with Respondents' interpretation of § 512.060 would also place an appellant at the mercy of the docket and would unequally *eliminate* the substantive right to appeal for some appellants. For example, if Appellant X filed her motion for a special order within five months of the judgment, and the appellate court's docket was light enough that a special order was issued within a few weeks, then Appellant X may be able

to also file her notice of appeal within six months of the judgment. In contrast, if Appellant Y filed her motion for a special order within four months of the judgment, and the appellate court's docket was so congested that a special order was not issued for a few months, then Appellant Y would be precluded from filing her notice of appeal within six months. Thus, under Respondents' tortured interpretation, Appellant Y would lose the right to appeal, even though (as Mother here) the court granted her motion for special order.

The right to appeal cannot be subject to elimination based on docket congestion.

Respondents' Novel Theory Cannot Be Applied *Retroactively* to Mother

Accepting Respondents' novel theory would require this Court to overrule, among several other cases, the precedent on which Respondents themselves rely, which holds that "[t]he authority … to grant leave to file a late notice of appeal can be exercised only ***if a motion for the same is filed within six months*** from the date of final judgment." *Frankoviglia v. City of Branson*, 791 S.W.2d 7, 9 (Mo. App. 1990) (emphasis added); *see also Berger v. Cameron Mut. Ins. Co.*, 173 S.W.2d 639 (Mo. banc 2005) ("[appellant] filed his motion to file a late notice of appeal within six months of the final judgment"); *Kattering v. Franz*, 360 Mo. 854, 856 (Mo. 1950) ("As a safeguard … authority is given the appellate courts (upon proper showing) to grant a special order for an appeal within six months after final judgment.").

Moreover, Mother cannot be retroactively penalized for complying with Rule 81.07 and existing § 512.060 precedent. She filed her motion for a special order within six months of the Judgment, which is all that she was required *and allowed* to do under

existing Rule 81.07 and § 512.060 precedent, and this Court granted Mother "leave to file a notice of appeal." (LF. 154). Thus, even assuming *arguendo* this Court decides to adopt Respondents' novel theory prospectively, it cannot be applied retroactively to Mother. *See Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 769 (Mo. banc 2007) ("The Missouri Constitution prohibits laws that are retrospective *in operation*."); *State v. Shafer*, 609 S.W.2d 153, 157 (Mo. banc 1980) ("it has been held such change in statutory interpretation operates prospectively so as not to impair 'the rights, positions, and course of action of parties who have acted in conformity with and in reliance upon' the former construction").

STATEMENT OF FACTS

"The termination of parental rights is one of the most serious acts that a court can undertake." *In re L.*, 937 S.W.2d 734, 737 (Mo. App. 1996). Indeed, as this Court has observed, "[t]he termination of parental rights has been characterized as tantamount to a 'civil death penalty.'" *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. banc 2004). The execution here was swift — consisting of a hearing that lasted for only *106 minutes* — and the treatment given to the fundamental rights at issue was anything but serious.

This story begins as tragically as it ended in the Juvenile Court.

Mother and Child

Mother is a citizen of Guatemala. (LF. 12, 96, 113). Her native language is Spanish and the record evidences that she does not speak or read English. (LF. 89; 2008TR. 47:20-48:6, 103:22-25).

Child was born on October 17, 2006. (LF. 12, 113). Before Mother was incarcerated, Mother and Child were living in "her brother's home with his wife and two children." (LF. 114).

Despite that Mother's fundamental rights were on trial in a "civil death penalty" case, the Judgment states that, "[n]ot much more is known about the biological mother except from what could be discovered through her plea agreement and the testimony of Laura Davenport, a Parents-as-Teachers worker in the Carthage community." (LF. 113).

Raid and Incarceration

On May 22, 2007, Immigration and Customs Enforcement ("ICE") raided the poultry processing plant in Barry County where Mother was employed. (LF. 96, 114). Mother and more than one hundred other undocumented immigrants from Guatemala and Mexico were taken into custody. (LF. 96, 114). Rather than immediately deport Mother and her son, ICE prosecuted her for aggravated identity theft. (LF. 95; 2007TR. 3:13-15).

In October 2007, under an application of a federal statute subsequently rejected by a unanimous U.S. Supreme Court decision (*see Flores-Figueroa v. U.S.*, 129 S.Ct. 1886, 1894 (2009)), Mother pled guilty to aggravated identity theft, which carried a mandatory penalty of two years of imprisonment. (LF. 95, 114-115). Mother was incarcerated at the St. Clair County Jail in Osceola and then subsequently at the U.S. Penitentiary Hazelton in Bruceton Mills, West Virginia until her release in February 2009. (LF. 90, 91, 109, 113, 115).

Family and Babysitting

When Mother was incarcerated, the Child was with family members. (LF. 118). Child was first cared for by Mother's brother (and sister-in-law), and then by Mother's sister (and brother-in-law). (LF. 118; 2008TR. 78:11-79:7). As is common in many cultures, even before she was incarcerated, Mother "traded the child care with family members." (2008TR. 76:25-77:3).

Although no testimony was obtained from Mother or any of her family members, the Judgment recites the following timeline concerning care of the Child by Mother's family members:

> The biological mother's brother, however, did not want to take care of the child and thus, turned the child over to the biological mother's sister. The sister likewise did not want to take care of the child, and turned the child over to some local clergy of a Hispanic church in Carthage in late May, only a few days after the biological mother was arrested.

(LF. 118).

Ms. Davenport, however, testified that the "local clergy" — *i.e.*, Jennifer and Oswaldo Velazco (the "Velazcos") — were providing babysitting services: "Well, he was living with the aunt but he was getting ***child care*** from another family." (2008TR. 79:16-17) (emphasis added). In fact, Ms. Davenport testified that Child was "living" with Mother's sister and merely getting child care from the Velazcos:

> Q: And how was it that the aunt became aware of the

Velasco's?

A: I referred them.

Q: Why?

A: The Velasco's had helped another family that I had in the program that they had met through their church and in looking for that family I found them at the Velasco home.

Q: Another Hispanic family?

A: Yes, a mom - an expectant mom and a baby.

Q: So, after that did the aunt place the child with the Velasco's?

A: ***They helped her with <u>child care</u>***.

(2008TR. 79:20-80:7) (emphasis added).

<u>Placement and Transfer</u>

Again, although no testimony was obtained from Mother or any of her family members (nor the Velazcos), the Judgment recites the following timeline concerning the Velazcos' placement of the Child, in their capacity as alleged "clergy," with the Respondents:

> The couple from the church then cared for the child from late May until late September, at which time they started visitations between the child (then still an infant) and the

> Petitioners in this case. The child went to stay with the Petitioners on a full time basis beginning on October 3, 2007.

(LF. 118). Respondents' Petition For Adoption (the "Petition") also alleges that "[Child] is currently in the actual physical custody of Oswaldo and Jennifer [Velazco-]Hernandez in Carthrage, Missouri due to a ***voluntary placement*** by biological mother's sibling." (LF. 5) (emphasis added). And the Juvenile Court's adoption worksheet and checklist (the "Adoption Checklist") notes that "placement" was made by the Velazcos. (A254-A255).[4]

Ms. Davenport, however, testified that on September 9, 2007 she visited Mother in the St. Clair County Jail. (2008TR. 81:17-21, 84:17-18). The purpose of Ms. Davenport's visit was "to see if [Mother] was willing to adopt – let her child be put up for adoption." (2008TR. 81:23-24). Mother responded "[t]hat she wasn't – did not want [Child] to be put up for adoption." (200TR. 82:8-9).

During that same visit in September 2007, Ms. Davenport testified that she told Mother that Child was living with Mother's sister:

> Q: Okay. And had she mentioned at that time [September 9, 2007] – at that time did [Mother] know where the

[4] This Court sustained Mother's motion to supplement the legal file with the Adoption Checklist on January 19, 2010, *before* the case was transferred to the Southern District. (A31).

child was or did you tell her where the child was?

A: ***I told her that she [sic] was*** with her aunt – or ***with her sister***, I'm sorry. ***The baby's aunt***.

(2008TR. 83:14-18) (emphasis added).

On September 24, 2007, only a few days after Ms. Davenport's visit with Mother, M.M. testified that the Velazco family contacted Respondents about adopting Child (2008TR. 8:14-16), and the Velazcos begin granting Respondents' visitation with the Child. (2008TR. 9:24-10:1). After ten days of visitation and one overnight visit, Child began living with Respondents "full time" on October 5, 2007. (2008TR. 10:11-21).

On October 5, 2007, *after* the Velazcos already transferred custody of Child to Respondents, but *before* there is anything in the record evidencing that the babysitters (*i.e.*, the Velazcos) even informed Mother's sister that Child would not be returned to her, the Respondents filed their Petition to terminate Mother's parental rights and adopt Mother's biological son. (LF. 5). The Juvenile Court, in fact, subsequently determined that Child "has been in the actual custody of the petitioners since ***October 5, 2007***" (LF. 62) (emphasis added) — *i.e.*, the Velazcos transferred, and Respondents took, custody of Child ***before*** entry of any court order.

Although the private adoption of Child was supposedly facilitated by Mother's "clergyman," the record contains no evidence whatsoever that the Velazcos are "clergyman" as defined by Missouri law. There is no evidence in the record that the Velazcos are Mother's "clergyman." In fact, the record is devoid of any evidence demonstrating that the Velazcos ever met Mother.

Notice and Service

On October 18, 2007, more than two weeks *after* the Respondents had already taken custody of Child, the Juvenile Court held a transfer of custody hearing (the "Custody Hearing"). (2007TR. 1:1). The Custody Hearing was scheduled with only one day's notice, and the caption on the "Notice of Hearing Set" indicates that only Joseph Hensley (Respondents' counsel) and Jamie Garrity (the guardian ad litem ("GAL")) received notice of the Custody Hearing. (LF. 21). Mother is *not* referenced in the caption. The body of the notice tells the noticed attorneys to "ADVICE YOUR CLIENTS OF THIS HEARING." (LF. 21). But no attorney was noticed on Mother's behalf, because Mother had not yet been appointed counsel! (LF. 79).

Moreover, the October 18, 2007 Judgment Transferring Legal Custody (the "Custody Order") states that Mother was "personally served" with the summons and petition at the St. Clair County Jail "on October 16th" — *i.e.*, only two days before the Custody Hearing. (LF. 62, 68). But a note in the record states that "[a]s of 10/28/07 No paper's have been sent to the Mother." (LF. 74). The Respondents also admit (in briefing to this Court) that there were problems with "accomplishing personal service." (A101). And there is nothing in the record evidencing that Mother received the Petition or any other pleadings in her native language.

Selection and Appointment of Counsel

Mother was not present nor represented by counsel at the Custody Hearing on October 18, 2007. In fact, counsel was not "appointed" for Mother until December 3,

2007 (LF. 79), nearly two months *after* the Custody Hearing was held and the Custody Order was entered.

Subsequently, there is no evidence in the record demonstrating that Mother's first "appointed" counsel (James Calton) took *any* steps to defend Mother for more than ***six months***. Indeed, although Mr. Calton did not withdraw, and although neither the Respondents nor their counsel possessed any authority whatsoever to substitute new counsel on Mother's behalf, Mr. Calton's failings apparently caused the Respondents' counsel to contact and retain Aldo Dominguez (LF. 89), who was somehow later "appointed" as counsel for Mother on June 13, 2008. (LF. 85).

The Respondents have, in fact, admitted their control over the appointment and dismissal of Mother's counsel. For example, the Respondents' counsel (Joseph Hensley) represented the following to the Juvenile Court:

> The reason why it's taken so long is there were some problems with the biological mother's legal counsel. She was previously represented by Mr. Calton. And then after ***we realized*** that she probably needed counsel for this so ***we hired*** Mr. Dominguez to represent here today.

(2008TR. 2:23-35) (emphasis added). Mr. Dominguez also acknowledges that he was "asked" by Mr. Hensley "to represent" Ms. Bail. (2008TR. 44:18-20) ("When [the Respondents'] attorney called me and asked me to represent the mother of the child he sent a packet of information that he had in his file....").

Reporting and Procedures

During the Custody Hearing, Respondents presented an "assessment for the foster program" (2007TR. 6:14-15), which was prepared on April 22, 2007 — *i.e.*, a month ***before*** ICE raid of the poultry plant that forced Mother's separation with Child and several months ***before*** the Respondents had any contact with Child. (LF. 22). The "assessment for foster program" includes concerns about S.M.'s criminal background and history of drug abuse (LF. 28-30), and the involvement of M.M.'s brother, who sexually abused M.M. as a child. (LF. 32, 34). The "assessment for foster program" made two recommendations before Respondents could be licensed foster parents: (1) create a safer home environment for children because Respondents lived in a basement apartment (LF. 45); and (2) further assessment from the "Children Division's representations" regarding the presence of M.M.'s brother. (LF. 34). There is no evidence of compliance with either of these requirements in the record.

Moreover, the "assessment for foster program" was prepared to assess Respondents' fitness to serve as foster parents (2007TR. 6:5-11); there is no evidence in the record demonstrating that the "assessment for foster program" was prepared at the direction of, or by a party appointed by the Juvenile Court. Nor does the record reference or evidence the completion of any investigation, report, assessment, or recommendation of any kind by the Velazcos. The Adoption Checklist indicates that the Juvenile Court did not even consider ordering an "investigation & S.Summary" or "post placement assessment." (A255).

In fact, in the briefing before the Southern District, Respondents concede that the "mandatory" section 211.455 "written investigation and social study" was not completed. (A105). Respondents also admit in the briefing before the Southern District that the Juvenile Officer "was ***not*** in this case." (A106) (emphasis added). And there is no evidence in the record demonstrating that the GAL conducted a diligent and independent investigation or even attempted to find Mother or her family.

Combined Termination and Adoption Proceeding

On October 7, 2008, the Juvenile Court held a combined termination and adoption hearing (the "Termination Hearing"). There is no evidence in the record demonstrating that Mr. Dominguez, the counsel selected by Mother's adversaries, conducted even a minimal investigation or diligently prepared. Indeed, the sum total of Mr. Dominguez's representation consisted of filing a general denial on September 3, 2008 — ***one month*** before Mother's parental rights were terminated. (LF. 3).

At the Termination Hearing, Mr. Dominguez was confused as to the timeline of events (2008TR. 83:19-23) and surprised by references to Mother's family members:

> [Y]ou're testifying today that there [was] a brother also?...
>
> That is the first I've heard of it personally. Who is this brother that you're talking about? What's his name?

(2008TR. 90:2-7). Mr. Dominguez rarely objected, including failing to object to obvious hearsay regarding critical dates. (2008TR. 11:21-12:3). Mr. Dominguez did not call any witnesses on Mother's behalf, he did not make any arrangements for Mother to testify via

affidavit, videotaped deposition, or otherwise, and he presented only one exhibit. (2008TR. 93:19-94:17).

The Termination Hearing lasted for only 106 minutes. (2008TR. 1:19, 102:19). At the conclusion of the Termination Hearing, without identifying or articulating any findings, the Juvenile Court orally stated its decision to terminate Mother's parental rights (2008TR. 101:6-10) and grant adoption of her biological son to the Respondents. (2008TR. 101:24).

Only two days later, on October 9, 2008, the Juvenile Court entered the formulaic Judgment prepared by Respondents' counsel. (2008TR. 101:13-24). The Juvenile Court terminated Mother's parental rights under § 211.447.2(2)(b), and *only* that section of Chapter 211: "Pursuant to Section 211.2(2)(b), grounds exist for the termination of parental rights…." (LF. 120). As to Mother's lack of consent, the Juvenile Court granted adoption of Child to the Respondents under § 453.070(7), and *only* that section of Chapter 453: "Pursuant to § 453.070(7) R.S.Mo., the consent of the biological parents is not necessary…." (LF. 117).

Reversal by Court of Appeals

On July 21, 2010, the Southern District filed its *unanimous* opinion "revers[ing] the judgment ordering adoption of Child and termination of Mother's parental rights, and direct[ing] the trial court to dismiss the petition." (A47). The Southern District held that the trial court erred by failing to strictly and literally comply with §§ 43.026.01 and 453.014: "The order transferring custody of Child to Respondents failed to adhere to the

requirements of sections 43.026.01 and 453.014." (A43).

Specifically, the Southern District found that "neither the Children's Division nor a child placing agency was involved in the placement of Child with Respondents;" that "[i]t is clear from the record that Mother did not consent to the adoption and did not give anyone authority to place Child for adoption;" and that "neither Sister nor the Velazco family constitutes an intermediary, which the statutory language describes as an attorney, physician or clergyman of the parents." (A41). The Southern District also found that "the Velazco family was not authorized to place Child for adoption, Child was placed before any report was furnished to the court and the GAL, no report under section 453.026.1 was prepared at all, and no inquiry was made by the trial court as to what gave the Velazco family the authority to place Child for adoption." (A43).

Moreover, the Southern District found ***seven*** "open, obvious, and evident errors" in addition to the failure to comply with § 453.014:

> ***It is clear from the record that there were serious failures to follow statutory requirements in this case, including***: (1) the Velazco family had absolutely no legal authority to place Child with Respondents, a violation of section 453.014.1; (2) Mother was given no notice for the transfer of custody hearing, in violation of Rule 44.01(d), Mother did not attend the hearing, and was prejudiced by not being present; (3) Mother was not appointed counsel until two months after the transfer of custody hearing was held, in violation of section 453.030.12, RSMo Cum.Supp.2004, and there was absolutely no evidence that the initial counsel tried to contact

> Mother or whether Mother knew about said counsel; (4) no report or investigation was done into Mother's background, history, or ability to care for Child, a violation of section 453.026.1; (5) no report was done on Child's relationship with Mother prior to her arrest, in contravention of section 453.026.1; (7) there was no evidence that Respondents were licensed foster parents, pursuant to section 210.486, thus, they were not eligible to seek adoption under section 210.566.4(1), RSMo Cum.Supp.2006; and (8) the transfer of custody occurred prior to a court order granting such transfer, in violation of section 453.110(1), RSMo Cum.Supp.2004.

(A46-A47) (emphasis added).

POINTS RELIED ON

I. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT FAILED TO SCRUPULOUSLY ADHERE TO THE STATUTORILY MANDATED PLACEMENT REQUIREMENTS GOVERNING A PRIVATE ADOPTION, AND BECAUSE THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THERE IS NO EVIDENCE THAT THE INTERMEDIARIES ARE "CLERGYMAN" AS CONTEMPLATED BY SECTION 453.014.1(4) AND MOTHER'S

"CLERGYMAN".

In re C.W., 211 S.W.3d 93 (Mo. banc 2007)

In re K.A.W., 133 S.W.3d 1 (Mo. banc 2004)

In re C.D.G., 108 S.W.3d 669 (Mo. App. 2002)

MO. REV. STAT. § 453.014.1(4)

MO. REV. STAT. § 453.026

Mo. Code Regs. tit. 13 § 40-73.010

Mo. Code Regs. tit. 13 § 40-73.080

II. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT FAILED TO STRICTLY AND LITERALLY COMPLY WITH THE STATUTORILY MANDATED REQUIREMENTS FOR INVESTIGATIONS, ASSESSMENTS, WRITTEN REPORTS, AND RECOMMENDATIONS, AND BECAUSE THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT NONE OF THE REQUIRED INVESTIGATIONS, ASSESSMENTS, WRITTEN REPORTS, AND RECOMMENDATIONS WERE COMPLETED AS REQUIRED BY SECTIONS 211.455, 453.026, 453.070, 453.077, 453.080, AND 453.110.

In re C.W., 211 S.W.3d 93 (Mo. banc 2007)

In the Interest of N.A.H., 247 S.W.3d 157 (Mo. App. 2008)

In the Interest of A.H., 169 S.W.3d 152 (Mo. App. 2005)

In re J.L.H., 647 S.W.2d 852 (Mo. App. 1983)

MO. REV. STAT. § 211.455

MO. REV. STAT. § 453.026

MO. REV. STAT. § 453.070

MO. REV. STAT. § 453.077

MO. REV. STAT. § 453.080

MO. REV. STAT. § 453.110

Mo. Code Regs. tit. 13 § 40-73.080

III. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT FAILED TO STRICTLY AND LITERALLY COMPLY WITH THE REQUIRED TRANSFER, NOTICE, AND COUNSEL APPOINTMENT REQUIREMENTS, AND BECAUSE THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THE CHILD WAS TRANSFERRED PRIOR TO THE ENTRY OF A COURT ORDER IN VIOLATION OF SECTIONS 453.110.1 AND 453.110.3, MOTHER WAS NOT GIVEN AT LEAST FIVE DAYS NOTICE OF THE TRANSFER HEARING AS REQUIRED BY SUPREME COURT RULE 44.01(D), AND MOTHER WAS NOT APPOINTED COUNSEL PRIOR TO THE TRANSFER HEARING.

In re Baby Girl, 850 S.W.2d 64 (Mo. banc 1993)

Wheatley v. State, 559 S.W.2d 526 (Mo. banc 1977)

Sitelines, L.L.C. v. Pentstar Corp., 213 S.W.3d 703 (Mo. App. 2007)

In the Matter of Baby Girl Smith, 339 S.W.2d 490 (Mo. App. 1960)

MO. REV. STAT. § 453.110.1

MO. REV. STAT. § 453.110.3

Supreme Court Rule 44.01(d)

IV. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT'S FINDINGS OF ABANDONMENT UNDER SECTIONS 211.447(2)(B) AND 453.040(7) ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THE JUVENILE COURT RELIED EXCLUSIVELY ON HEARSAY TESTIMONY TO SUPPORT ITS FINDINGS OF ABANDONMENT THAT SHOULD BE EXCLUDED AS PLAIN ERROR UNDER SUPREME COURT RULE 84.13(C).

In re S.M. and A.M., 938 S.W.2d 910 (Mo. App. 1997)

State v. Sockel, 490 S.W.2d 336, 339 (Mo. App. 1973)

Supreme Court Rule 84.13(c)

V. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE

THE JUVENILE COURT'S FINDINGS OF ABANDONMENT UNDER SECTION 453.040(7) ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THE EVIDENCE IN THE RECORD NEGATES ANY FINDING OF ABANDONMENT DURING THE STATUTORILY MANDATED 60-DAY PERIOD PRECEDING THE FILING OF THE PETITION.

In re the Adoption of N.L.B., 212 S.W.3d 123 (Mo. banc 2007)

In re the Adoption of K.A.S. and T.S., 933 S.W.2d 942 (Mo. App. 1996)

In re L., 937 S.W.2d 734 (Mo. App. 1996)

In re Interest of Baby Girl W., 728 S.W.2d 545 (Mo. App. 1987)

MO. REV. STAT. § 453.040(7)

VI. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT'S FINDINGS OF ABANDONMENT UNDER SECTION 211.447(2)(B) ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT EVEN RESPONDENTS ADMIT THAT MOTHER LEFT HER SON IN HER FAMILY'S CARE BELIEVING HE WOULD BE ADEQUATELY CARED FOR, THERE IS NO EVIDENCE PROVING THAT MOTHER HAD THE ABILITY TO MAKE ANY FINANCIAL CONTRIBUTIONS WHILE INCARCERATED, THERE IS NO EVIDENCE DEMONSTRATING THAT MOTHER WAS ABLE TO VISIT HER

SON AND, IN FACT, EVIDENCE THAT SHE DID REQUEST VISITATION, AND THE JUDGMENT IGNORES SEVERAL COMMUNICATIONS.

In re A.S.W., 137 S.W.3d 448 (Mo. banc 2004)

In re Interest of Baby Girl W., 728 S.W.2d 545 (Mo. App. 1987)

In re L., 937 S.W.2d 734 (Mo. App. 1996)

In the Interest of W.F.J., 648 S.W.2d 210 (Mo. App. 1983)

MO. REV. STAT. § 211.447(2)(b)

VII. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT'S TERMINATION FINDINGS UNDER SECTION 211.447.7 ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THE JUVENILE COURT'S FINDINGS ARE FORMULAIC AND CONCLUSORY, THERE IS NO EXPERT TESTIMONY CONCERNING CHILD'S EMOTIONAL TIES TO MOTHER, THE CONCLUSION THAT CHILD DOES NOT CONSIDER ANYONE ELSE HIS PARENT IS BASED ONLY ON HEARSAY, MS. DAVENPORT TESTIFIED THAT EVEN AS LATE AS SEPTEMBER 2007 CHILD WAS IN THE CARE OF MOTHER'S SISTER, MOTHER DID REQUEST VISITATION, ANY PRESUMPTION OF SERVICE WAS REBUTTED, THERE IS NO EVIDENCE PROVING THAT MOTHER HAD THE ABILITY TO MAKE ANY FINANCIAL CONTRIBUTIONS WHILE INCARCERATED, AN

ASCERTAINABLE PERIOD OF TIME EXISTED FOR RETURN OF CHILD, AND THE JUVENILE COURT ERRONEOUSLY CONSIDERED THE ALLEGED LACK OF FAMILY SUPPORT, ERRONEOUSLY INJECTED MOTHER'S IMMIGRATION STATUS INTO THE PROCEEDING, AND ERRONEOUSLY CONSIDERED MOTHER'S ALLEGED CRIME.

In re C.W., 211 S.W.3d 93 (Mo. banc 2007)

In re K.A.W., 133 S.W.3d 1 (Mo. banc 2004)

In re A.S.W., 137 S.W.3d 448 (Mo. banc 2004)

In the Interest of W.F.J., 648 S.W.2d 210 (Mo. App. 1983)

MO. REV. STAT. § 211.447.7

VIII. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT'S MISAPPLICATION OF THE BEST INTERESTS TEST IS CONTRARY TO THE LAW AND THE JUVENILE COURT'S BEST INTERESTS FINDINGS ARE NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THERE ARE NO FINDINGS AS TO MOTHER, HER CONSTITUTIONAL RIGHTS, AND THE PROTECTION OF HER RELATIONSHIP WITH HER SON, THE JUVENILE COURT ERRONEOUSLY INJECTED MOTHER'S IMMIGRATION STATUS INTO THE PROCEEDING, THERE IS NO EVIDENCE SUPPORTING THE CONCLUSION THAT MOTHER WOULD BE UNABLE TO PROVIDE FOR CHILD IN

GUATEMALA, THE JUVENILE COURT ERRONEOUSLY FOCUSED ON THE RESPONDENTS' WEALTH AND CONTRASTED THE RESPONDENTS' WEALTH WITH MOTHER'S CIRCUMSTANCES, THE JUVENILE COURT IGNORED ITS OWN FINDING THAT MOTHER WAS NOT UNFIT AND THERE WAS NO EXPERT TESTIMONY CONCERNING MOTHER'S FITNESS, AND THE JUVENILE COURT PLACED UNDUE RELIANCE ON ALLEGED BONDING.

In re the Adoption of N.L.B., 212 S.W.3d 123 (Mo. banc 2007)

In re K.A.W., 133 S.W.3d 1 (Mo. banc 2004)

In re S.M.H., 160 S.W.3d 355 (Mo. banc 2005)

In re S.J.H., 124 S.W.3d 63 (Mo. App. 2004)

MO. REV. STAT. § 211.443

IX. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE EVIDENCE REBUTS ANY PRESUMPTION OF PROPER SERVICE, MOTHER DID NOT RECEIVE THE REQUIRED NOTICE OF THE CUSTODY HEARING, RESPONDENTS' PETITION REFERENCES OBSOLETE STATUTORY PROVISIONS, AND MOTHER DID NOT RECEIVE THE PETITION OR ANY OTHER PLEADINGS IN HER NATIVE LANGUAGE.

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

Weidner v. Anderson, 174 S.W.3d 672 (Mo. App. 2005)

Cody v. Old Republic Title Co., 156 S.W.3d 782 (Mo. App. 2005)

In re E.F.B.D., 138 S.W.3d 145 (Mo. App. 2004)

Supreme Court Rule 44.01(d)

X. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE MOTHER WAS NOT APPOINTED COUNSEL PRIOR TO THE CUSTODY HEARING AND RESPONDENTS WERE IMPROPERLY INVOLVED IN THE SELECTION OF MOTHER'S COUNSEL.

In re Buder, 217 S.W.2d 563 (Mo. 1949)

In the Interest of J.S.W., 295 S.W.3d 877 (Mo. App. 2009)

In the Interest of J.C., Jr., 781 S.W.2d 226 (Mo. App. 1989)

MO. REV. STAT. § 211.462.2

XI. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE GAL AND JUVENILE OFFICER FAILED TO DISCHARGE THEIR DUTIES TO ACT

DILIGENTLY IN THE BEST INTERESTS OF THE CHILD, INCLUDING FAILING TO INVESTIGATE OR EVEN SPEAK ONCE WITH MOTHER, AND UNDERTAKE AN INVESTIGATION INDEPENDENT OF THE RESPONDENTS.

In re M.D.R., 124 S.W.3d 469 (Mo. banc 2004)

Baumgart v. Baumgart, 944 S.W.2d 572 (Mo. App. 1997)

In re In Interest of J.L.H., 647 S.W.2d 852 (Mo. App. 1983)

MO. REV. STAT. § 211.447.2

MO. REV. STAT. § 211.462.3

XII. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE MIXING OF THE TERMINATION AND ADOPTION PROCEEDINGS IN THE SAME HEARING IMPROPERLY INTERJECTED THE ISSUE OF THE RESPONDENTS' FITNESS INTO MOTHER'S TERMINATION PROCEEDING.

In re J.F.K., 853 S.W.2d 932 (Mo. banc 1993)

In re Trapp, 593 S.W.2d 193 (Mo. banc 1980)

*In re D_L_C_*, 834 S.W.2d 760 (Mo. App. 1992)

In re M.O., 70 S.W.3d 579 (Mo. App. 2002)

XIII. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE

MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE MOTHER DID NOT RECEIVE A FAIR AND NEUTRAL HEARING UNENCUMBERED BY ERRONEOUSLY INJECTED, AND LEGALLY-IRRELEVANT, CONSIDERATIONS OF HER IMMIGRATION STATUS AND ALLEGED CRIME WHILE THE JUVENILE COURT SIMULTANEOUSLY IGNORED S.M.'S SERIOUS CRIMINAL PAST AND DRUG USE AND MR. PADEN'S UNRESOLVED MOLESTATION HISTORY.

Flores-Figueroa v. U.S., 129 S.Ct. 1886 (2009)

Zadvydas v. Davis, 533 U.S. 678 (2001)

In re M.D.R., 124 S.W.3d 469 (Mo. banc 2004)

In re K.A.W., 133 S.W.3d 1 (Mo. banc 2004)

XIV. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE MOTHER DID NOT HAVE ANY COUNSEL (EFFECTIVE OR OTHERWISE) FOR TEN MONTHS AND THEN, DURING REMAINING TWO MONTHS BEFORE TERMINATION HEARING,DID NOT RECEIVE EFFECTIVE COUNSEL THAT PROVIDED A MEANINGFUL HEARING BY DILIGENTLY INVESTIGATING THE FACTS, PRESENTING EVIDENCE CONCERNING MOTHER'S

NUMEROUS EFFORTS TO MAINTAIN CONTACT WITH AND CARE FOR HER SON, CROSS-EXAMINING KEY WITNESSES, INTRODUCING EVIDENCE OF MOTHER'S SEVERAL PHONE CALLS, REVEALING WITNESSES' MOTIVES TO TAKE HER CHILD, CHALLENGING ASSERTIONS THAT SHE WAS PROPERLY SERVED, DEMONSTRATING THAT CHILD WAS CRIMINALLY PLACED BY INTERMEDIARIES THAT DID NOT SATISFY THE REQUIREMENTS FOR A PRIVATE ADOPTION, QUESTIONING THE LACK OF REQUIRED INVESTIGATIONS AND REPORTS, AND MAKING SOME ATTEMPT TO PRESENT MOTHER'S TESTIMONY.

In re Interest of F.M., 979 S.W.2d 944 (Mo. App. 1998)

In the Interest of J.M.B., 939 S.W.2d 53 (Mo. App. 1997)

In Interest of J.C., Jr., 781 S.W.2d 226 (Mo. App. 1989)

MO. REV. STAT. § 211.462.2

ARGUMENT

Missouri appellate courts have repeatedly held that, in a termination of parental rights proceeding, the "Court must be diligent to uphold the requirements of due process and protect the parent's fundamental liberty interest in the parent-child relationship." *In re E.A.C.*, 253 S.W.3d 594, 601 (Mo. App. 2008). "Consequently, when reviewing a trial court's termination of parental rights, appellate courts must examine the trial court's findings of fact and conclusions of law closely…. Statutes that provide for the

termination of parental rights are strictly construed in favor of the parent and preservation of the natural parent-child relationship." *In re K.A.W.*, 133 S.W.3d at 12.

Given the fundamental rights at issue, Missouri appellate courts (including this one) have not hesitated to reverse termination and adoption judgments. *See In re Adoption of N.L.B.*, 212 S.W.3d 123, 129 (Mo. banc 2007) (reversing termination and adoption because insufficient evidence of abandonment); *In re C.K.*, 221 S.W.3d 467, 474 (Mo. App. 2007) (reversing termination and adoption because trial court failed to consider mother's current ability and willingness to parent children); *In the Matter of E.F.B.D.*, 138 S.W.3d 145, 151 (Mo. App. 2004) (reversing termination and adoption because father's due process rights violated); *In the Interest of C.J.G. v. D.G.P*, 75 S.W.3d 794, 803-804 (Mo. App. 2002) (reversing termination and adoption because evidence insufficient to support finding that incarcerated father willfully abandoned child); *In the Matter of I. D. v. B. C. D.*, 941 S.W.2d 658, 663 (Mo. App. 1997) (reversing termination and adoption because mother's consent did not satisfy strict statutory requirements); *In re L.*, 937 S.W.2d 734, 737 (Mo. App. 1996) (reversing termination and adoption because not in the best interest of child).

As discussed below, the Judgment here should be reversed for several, independent reasons. In Points I-III, Mother analyzes the several ways the combined termination and adoption proceeding in the Juvenile Court ("Termination Proceeding") failed to strictly comply with the governing statutes. In Points IV-VI, Mother explains why the Juvenile Court's findings of abandonment are contrary to the law and not supported by clear, cogent and convincing evidence. In Point VII, Mother addresses

why the Juvenile Court's findings under section 211.447.7 are formulaic and conclusory, contrary to the law, and not supported by clear, cogent, and convincing evidence. In Point VIII, Mother demonstrates why the Juvenile Court's misapplication of the best interests test is contrary to the law and not supported by clear, cogent, and convincing evidence. In Points IX-XIII, Mother examines the multiple due process violations. Finally, in Points XIV, Mother discusses the ineffective assistance of counsel.

In short, this Court has myriad points for reversing the Judgment. The Termination Proceeding did not strictly comply with controlling statutes, the Judgment is contrary to the law, and Juvenile Court's formulaic findings are not supported by clear, cogent, and convincing evidence. In addition, the numerous due process violations are no less serious than the several strict statutory compliance failures and multiple misapplications of the law, for the due process violations, by themselves, require reversal. Accordingly, the Judgment of the Juvenile Court should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

APPLICABLE STANDARDS OF REVIEW

"In termination of parental rights cases, appellate courts defer to the trial court's ability to judge the credibility of witnesses and will affirm the judgment unless there is no substantial evidence to support it, it is contrary to the evidence, or it erroneously declares or applies the law." *In re K.A.W.*, 133 S.W.3d at 12. Appellate courts must review whether the grounds for termination were supported by clear, cogent, and convincing

evidence. *See id.*[5]

Questions of law, however, are reviewed de novo. *Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo. banc 1999); *see also Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. banc 2002) ("Statutory interpretation is a question of law, which this Court reviews de novo."). And "given the fundamental interests involved, there must be strict and literal compliance with the statutes authorizing the State to terminate the parent-child relationship." *In re of C.W.*, 211 S.W.3d 93, 98 (Mo. banc 2007); *see also State of Wash. ex rel. Lewis v. Collis,*

[5] Mother respectfully submits, however, that this Court's review should not be so circumscribed since the Juvenile Court merely adopted the findings of fact, conclusions of law, and form judgment prepared by Respondents. (2008TR. 101:13-24). The Juvenile Court's total deference to the Respondents' formulaic submission reflects a lack of the considered analysis of the evidence and the applicable legal standards which the Court in *Murphy* implicitly presumed underlies a judgment in a bench-tried case. *See Weeks v. State,* 140 S.W.3d 39, 49 (Mo. banc 2004) ("advocates are prone to excesses of rhetoric and lengthy recitals of evidence favorable to their side but which ignore proper evidence or inferences from evidence favorable to the other party"); *Neal v. Neal*, 281 S.W.3d 330, 337-38 (Mo. App. 2009) ("judiciary is not and should not be a rubber-stamp for anyone"); *E.L.S. v. F.M.S.*, 829 S.W.2d 19, 21 (Mo. App. 1992) (adopting party's proposed findings of fact "is unwise in a contested case" because "[e]ven the most conscientious advocate cannot reasonably be expected to prepare a document which would reflect precisely the trial court's view of the evidence").

963 S.W.2d 700, 704 (Mo. App. 1998) ("Because of the 'awesome power' the State has to sever a parent-child relationship, strict and literal compliance with the statutory authority is necessary.").

Moreover, "[t]he constitutional implications of a termination of parental rights also inform the standard of appellate review." *In re K.A.W.*, 133 S.W.3d at 12. "A parent's right to raise her child is a fundamental liberty interest protected by the constitutional guarantee of due process." *Id.* "[T]he requirements of constitutional due process are a question of law.… we review these issues de novo." *Patrick v. City of Jennings*, 295 S.W.3d 921, 927 (Mo. App. 2009).

SEVERAL FAILURES TO STRICTLY COMPLY WITH STATUTES

"The statutes governing the termination of parental rights must be strictly and literally complied with." *In the Interest of N.A.H.*, 247 S.W.3d 157, 159 (Mo. App. 2008); *see also Taylor v. Taylor*, 47 S.W.3d 377, 385 (Mo. App. 2001) ("As the court's authority to terminate parental rights is a creation of statute, 'strict and literal compliance with the statutory authority' is required in exercising that authority."). As discussed below in Points I-III, here the Termination Proceeding failed in several ways to strictly comply with the governing statutes.

I. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT FAILED TO SCRUPULOUSLY ADHERE TO THE STATUTORILY MANDATED PLACEMENT

REQUIREMENTS GOVERNING A PRIVATE ADOPTION, AND BECAUSE THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THERE IS NO EVIDENCE THAT THE INTERMEDIARIES ARE "CLERGYMAN" AS CONTEMPLATED BY SECTION 453.014.1(4) AND MOTHER'S "CLERGYMAN".

"'Placement' although not a defined term in Chapter 453 does carry a ***particularized meaning referring to the transfer of custody*** to prospective parents for the purpose of future adoption." *In re C.D.G.*, 108 S.W.3d 669, 676 (Mo. App. 2002) (emphasis added). "Other provisions of Chapter 453 also indicate that 'placement' is essentially the first step in the adoption process. For example, § 453.077, RSMo, requires post-placement assessments before a final decree of adoption." *Id.*; *see also* MO. REV. STAT. § 453.026 ("the person placing the child for adoption, ***as authorized by section 453.014***, shall furnish to the court, the guardian ad litem and the prospective adoptive parent a written report regarding the child") (emphasis added).

Although "placement" is not defined, § 453.014.1(4) is unequivocal concerning who may "place" a child for adoption:

> The following persons may ***place*** a minor for adoption: … An intermediary, which shall include an attorney licensed pursuant to chapter 484, RSMo; a physician licensed pursuant to chapter 33, RSMo; or a ***clergyman of the parents***.

MO. REV. STAT. § 453.014.1(4) (emphasis added); *see also In re C.D.G.*, 108 S.W.3d at

675 n.6 ("Section 453.014, RSMo, ***specifies*** those individuals or entities who may place children for adoption.") (emphasis added); 21 Jack Cochran & Nancy Garris, *Mo. Practice Series, Family Law* § 17.7 (3d ed. 2009) ("Missouri statutes provide that acceptable intermediates in [private] adoptions are ***limited*** to attorneys, physicians, or ***the parents' clergyman***.") (emphasis added); Irving J. Sloan, The Law of Adoption and Surrogate Parenting, 65 (1988) ("Missouri ***limits*** intermediary eligibility to attorneys, physicians, or ***clergyman of the biological parents***.") (emphasis added).

Moreover, other provisions, as well as the regulations, also reference only the three specified categories of intermediaries — *i.e.*, "attorney," "physician," or "clergyman of the parents." *See* MO. REV. STAT. § 210.481 ("but ***excluding*** the attorney, physician, or clergyman of the parents") (emphasis added); Mo. Code Regs. tit. 13 § 40-73.010 ("***excluding*** the attorney, physician, or clergyman of the parents ***per section 453.014(4)***") (emphasis added); Mo. Code Regs. tit. 13 § 40-73.080 ("intermediaries ***as defined in section 453.014***, RSMo (includes attorneys licensed pursuant to Chapter 484, RSMo; physicians licensed pursuant to Chapter 334, RSMo; or clergyman of the parents)") (emphasis added).

Here, the record is void of any evidence demonstrating that the Velazcos (*i.e.*, the babysitters) are "clergyman" as contemplated by section 453.014.1(4). Even if the Velazcos satisfy the statutory "clergyman" requirement, there is ***no*** evidence whatsoever that the Velazcos are Mother's "clergyman." Put simply, even if the Respondents' story (which is built entirely on hearsay) concerning the supposed placement of Child with the Velazcos were somehow true (which it is not), this private adoption should never have

occurred given that the purported intermediary here (*i.e.*, the Velazcos) were not authorized to "place" Child with the Respondents. *See In re C.W.*, 211 S.W.3d at 98 ("there must be strict and literal compliance with the statutes"); *In re K.A.W.*, 133 S.W.3d at 16 ("[s]trict and literal compliance with the statutory requirements is necessary").

Because the Termination Proceeding failed to scrupulously adhere to the mandated placement requirements governing a private adoption, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

II. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT FAILED TO STRICTLY AND LITERALLY COMPLY WITH THE STATUTORILY MANDATED REQUIREMENTS FOR INVESTIGATIONS, ASSESSMENTS, WRITTEN REPORTS, AND RECOMMENDATIONS, AND BECAUSE THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT NONE OF THE REQUIRED INVESTIGATIONS, ASSESSMENTS, WRITTEN REPORTS, AND RECOMMENDATIONS WERE COMPLETED AS REQUIRED BY SECTIONS 211.455, 453.026, 453.070, 453.077, 453.080, AND 453.110.

Sections 211.442 *et seq.* and 453.005 *et seq.* mandate certain investigations, assessments, written reports, and recommendations to be completed at various times, and

by various parties, during the course of any termination and/or adoption proceeding. Among other requirements, the termination and adoption statutes at issue here require: (1) a written investigation and social study regarding the natural parent and natural parent's fitness (*see* MO. REV. STAT. § 211.455); (2) a written report by the placing intermediary regarding the child, including background information regarding the child's birth family (*see* MO. REV. STAT. § 453.026; Mo. Code Regs. tit. 13 § 40-73.080); (3) a full investigation and written report that includes an assessment of the adoptive parents and the child, including whether the child is suitable for adoption (*see* MO. REV. STAT. § 453.070); and (4) a postplacement assessment including an update of the preplacement assessment and the emotional, physical, and psychological status of the child (*see* Mo. Rev. Stat. §§ 453.077, 453.080).

This Court has held, for example, that "the written investigation and social study referenced in section 211.455 is mandatory." *In re C.W.*, 211 S.W.3d at 97. Section 211.455 requires the circuit court to order the mandatory investigation and social study ***after*** the petition is filed. *See In the Interest of E.C. and A.C.*, 232 S.W.3d 727, 729 (Mo. App. 2007). "[P]reparation of this report ***prior*** to the trial court's selection of the [appropriate] agency as the preparer and submitter is in conflict with the intent of section 211.455." *In the Interest of A.H.*, 169 S.W.3d 152, 158 (Mo. App. 2005) (emphasis added).

Similarly, section 453.026 requires that, "[a]s early as is practical ***before*** a prospective adoptive parent accepts physical custody of a child, the person placing the child for adoption, as authorized by § 453.014, shall furnish to the court, the guardian ad

litem and the prospective adoptive parent a written report regarding the child." MO. REV. STAT. § 453.026 (emphasis added). Section 453.070 requires the juvenile court to direct a full investigation, requires an assessment of the would-be adoptive parents and child, requires that "a written report shall be submitted to the court within ninety days of the request for investigation," and requires the assessment to be submitted to the "court ***prior*** to the scheduled hearing of the adoptive petition." MO. REV. STAT. § 453.070 (emphasis added). And section 453.080 requires that, before any adoption can be finalized, the juvenile court must have "received and reviewed a postplacement assessment on the monthly contacts with the adoptive family pursuant to section 453.077," and the juvenile court must have "received and reviewed the recommendations of the guardian ad litem and received and reviewed the recommendations of the person placing the child, the person making the assessment and person making the postplacement assessment." MO. REV. STAT. § 453.080.

The mandated investigations/assessments/reports/recommendations must be objective and must comply with promulgated rules and regulations. *See* MO. REV. STAT. § 453.077 (requiring "specific content"); *In the Interest of C.G.*, 212 S.W.3d 218, 224-225 (Mo. App. 2007) ("There is no indication in the report that the Division contacted Father or anyone on Father's behalf in order to obtain and ***objectively*** set forth in the report to the court Father's factual information and position on the best interests of the Child.") (emphasis added); *In re J.L.H.*, 647 S.W.2d 852, 864 (Mo. App. 1983) ("it is imperative that the guardian ad litem investigate ... if a guardian ad litem is to err it should be on the side of investigating too much rather than too little").

"[T]he appealing parent [need not] show that some sort of prejudice resulted from a failure to follow the literal requirements of the statute." *In the Interest of N.A.H.*, 247 S.W.2d at 159-160. Rather, failure to comply with the mandated investigations/assessments/reports/recommendations requirements "is reversible error." *In re C.W.*, 211 S.W.3d at 98.

Here, as a threshold matter, Respondents concede in the briefing before the Southern District that the "mandatory" section 211.455 "written investigation and social study" was not completed. (A105-A106). On that basis alone, the Judgment must be reversed. *See In re C.W.*, 211 S.W.3d at 98 ("Failure to strictly comply with section 211.455 is reversible error.").

Even assuming *arguendo* that a private petitioner seeking termination does not need to strictly comply with Chapter 211's mandates, the Custody Order erroneously states that "[a] full investigation has been made and written reports as required by §§ 453.026 and 453.070, RSMo, have been submitted to and reviewed by the Court as required by § 453.110, RSMo." (LF. 63). The Judgment also erroneously states that "[a] full investigation has been made and written reports have been submitted to this Court as required by §§ 453.026 and 453.070, RSMo" (LF. 125) and erroneously states that "[t]he Court … has received and reviewed the recommendations of the post-placement assessment." (LF. 126). But, in fact, the record contains ***no*** evidence of such mandated investigations, assessments, reports, or recommendations.

The only purported "assessment" in the record is the Respondent's "assessment for the foster program." (2007TR. 6:14-15). That purported "assessment," however, was

prepared on April 22, 2007 — a month ***before*** ICE raid of the poultry plant that forced Mother's separation with Child. (LF. 22). The purported "assessment" was not prepared at the direction of, or by a party appointed by, the Juvenile Court as required by sections 211.455, 453.026, 453.070, and 453.080. The purported "assessment" does not contain the "specific content" required by the applicable rules and regulations. Indeed, because the purported "assessment" was prepared months ***before*** the Respondents had any contact with Child, the purported "assessment" does not address in anyway whatsoever Child or Mother. *See* Mo. Code Regs. tit. 13 § 40-73.080 (listing required information concerning child).[6]

Tellingly, neither the Custody Order nor the Judgment reference the completion of the mandated investigations/assessments/reports/recommendations required by sections 211.455 and 453.080. Indeed, the Adoption Checklist indicates that the Juvenile Court did not order or require completion of any investigation, report, assessment, or recommendation by anyone. (A255). And although the GAL, "recommended" adoption (2008TR. 97:10-24), there is ***no*** evidence whatsoever that the GAL conducted a diligent investigation. In fact, the record demonstrates that that GAL conducted no investigation

[6] An "Amended Updated Information" prepared by the GAL was filed on July 18, 2008. (LF. 86). But that purported "update" also does not contain the "specific content" required by the applicable rules and regulations. Nor was it prepared by the author of the non-existent original report as required.

whatsoever concerning Mother and, instead, simply relied on the story presented to him by the Respondents' attorney. (2008TR. 48:10-49:3, 97:10-24). In short, ***none*** of the mandated investigations, assessments, reports, or recommendations were completed as required by statute.

Because the Termination Proceeding failed to strictly and literally comply with the statutorily mandated investigations/assessments/reports/recommendations, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

III. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT FAILED TO STRICTLY AND LITERALLY COMPLY WITH THE REQUIRED TRANSFER, NOTICE, AND COUNSEL APPOINTMENT REQUIREMENTS, AND BECAUSE THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THE CHILD WAS TRANSFERRED PRIOR TO THE ENTRY OF A COURT ORDER IN VIOLATION OF SECTIONS 453.110.1 AND 453.110.3, MOTHER WAS NOT GIVEN AT LEAST FIVE DAYS NOTICE OF THE TRANSFER HEARING AS REQUIRED BY SUPREME COURT RULE 44.01(D), AND MOTHER WAS NOT APPOINTED COUNSEL PRIOR TO THE TRANSFER HEARING.

Section 453.110 provides that a court order must be obtained before the transfer of custody of a would-be adoptive child:

> No person … shall surrender custody of a minor child, or transfer the custody of such a child to another, and no person … shall take possession or charge of a minor child so transferred, without ***first*** having filed a petition before the circuit court sitting as a juvenile court of the county where the child may be, praying that such surrender or transfer may be made, and ***having obtained such an order*** from such court approving or ordering transfer of custody….

MO. REV. STAT. § 453.110 (emphasis added). "The obvious purpose of the legislature in enacting § 453.110.1 was to prohibit the indiscriminate transfer of children, the concept that a parent could pass them on like chattel to a new owner." *In re Baby Girl*, 850 S.W.2d 64, 68 (Mo. banc 1993).

Here, the Respondents filed their Petition to terminate Mother's parental rights and adopt Mother's biological son on October 5, 2007. (LF. 5). Following the Custody Hearing held on October 18, 2007, the Juvenile Court subsequently determined that Child "has been in the actual custody of the petitioners since ***October 5, 2007***" (LF. 62). Thus, the record demonstrates that the babysitters transferred (although they never possessed the authority to do so), and Respondents took, custody of Child ***before*** entry of any court order. Not only should the Judgment be reversed because the Respondents failed to strictly comply with the controlling statute, but also the Respondents and Velazcos are

guilty of a class D felony. *See* Mo. Rev. Stat. § 453.110.3 ("Any person violating the terms of this section shall be guilty of a ***class D felony***.") (emphasis added).

In fact, this Court has held that "[t]his is precisely the type of action that the legislature sought to avoid when it enacted § 453.110.1…. Because an appropriate order was not obtained, all acts thereafter regarding custody were void from any legal perspective. The transfer of custody of [Carlos] from [the Velazcos] to [Respondents] … was 'illegal from its inception.'" *In re Baby Girl*, 850 S.W.2d at 68; *see also In the Matter of Baby Girl Smith*, 339 S.W.2d 490, 492 (Mo. App. 1960) ("the transfer made was illegal from its inception"); *Davis v. Brady*, 285 S.W.2d 35, 36 (Mo. App. 1955) ("It appears quite obvious that it was the intention of the Legislature to lay down a rule whereby the custody of a child could not be transferred at the will or whim of an individual in charge of it, but, on the contrary, transfer of custody of a child must have the sanction of a court given by an order approving such transfer.").

Moreover, Rule 44.01(d) requires a minimum of five days notice before any hearing. The Custody Hearing, however, was scheduled with only one day's notice. (LF. 21). The caption on the "Notice of Hearing Set" also indicates that only Respondents' counsel and the GAL received that improper one-day's notice; Mother is *not* referenced in the caption. (LF. 21). And although Mother was entitled to appointed counsel at such a critical and important hearing, Mother was not "appointed" counsel until December 3, 2007 (LF. 79) — nearly two months ***after*** the Custody Hearing was held on October 18, 2007. "It is a cardinal principle, that whenever a party's rights are to be affected by a summary proceeding, or motion in court, that party should be notified, in order that he

may appear for his own protection." *Wheatley v. State*, 559 S.W.2d 526, 527 (Mo. banc 1977). The required notice is "a prerequisite to the lawful exercise of the court's power." *Sitelines, L.L.C. v. Pentstar Corp.*, 213 S.W.3d 703, 706 (Mo. App. 2007); *see also Lambert v. Holbert*, 172 S.W.3d 894, 898 (Mo. App. 2005) ("A judgment procured without complying with the notice and service requirements of the rules of civil procedure is irregular by definition, i.e., it is one achieved in a manner materially contrary to the law's established procedures for the orderly administration of justice.").

Because the Termination Proceeding failed to strictly and literally comply with the required transfer, notice, and counsel appointment procedures, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

ERRONEOUS FINDINGS OF ABANDONMENT

Even if the Termination Proceeding did not fail to strictly comply with governing statutes, as discussed below in Points IV-VI, the Judgment should be reversed because the Juvenile Court erred by relying exclusively on hearsay, failing to focus only on the relevant 60-day time period, and ignoring substantial evidence negating any finding of abandonment.

IV. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT'S FINDINGS OF ABANDONMENT UNDER SECTIONS 211.447(2)(B) AND 453.040(7) ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND

CONVINCING EVIDENCE, IN THAT THE JUVENILE COURT RELIED EXCLUSIVELY ON HEARSAY TESTIMONY TO SUPPORT ITS FINDINGS OF ABANDONMENT THAT SHOULD BE EXCLUDED AS PLAIN ERROR UNDER SUPREME COURT RULE 84.13(C).

Under Rule 84.13(c), "[p]lain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Particularly where (as here) the bests interests of a child are involved, "court[s] "elect[] to review … point[s] for plain error pursuant to Rule 84.13(c)." *In re S.M. and A.M.*, 938 S.W.2d 910, 923 (Mo. App. 1997); *see also State v. Sockel*, 490 S.W.2d 336, 339 (Mo. App. 1973) ("When the evidence erroneously admitted is the only evidence which supports the verdict, then the plain error rule will be applied because, without the erroneously admitted evidence, there is no competent evidence to sustain the conviction.").

Here, the Juvenile Court's findings of abandonment are predicated on the following alleged timeline of events concerning the arrangements made for Child's care and the purported "placement" and transfer of custody:

> In regard to this finding, the biological mother went to prison on May 22, 2007. She had made no provisions for the care of her child, but assumed her brother would take care of the child. The biological mother's brother, however, did not want to take care of the child and thus, turned the child over

> to the biological mother's sister. The sister likewise did not want to take care of the child, and turned the child over to some local clergy of a Hispanic church in Carthage in late May, only a few days after the biological mother was arrested. The couple from the church then cared for the child from late May until late September, at which time they started visitations between the child (then still an infant) and the Petitioners in this case. The child went to stay with the Petitioners on a full time basis beginning on October 3, 2007.

(LF. 118).

Only Respondents and Ms. Davenport, however, testified at the Termination Hearing. Thus, all of the evidence on which the Juvenile Court based these findings is hearsay testimony from individuals who had no personal knowledge as to the arrangements Mother made for the care of her child. For example, M.M. testified as follows:

> Q: Okay. Did you know anything to all about [sic] the biological family, in other words, any extended family in this area?
>
> A: When they [*i.e.*, the Velazcos] first contacted us they told us that there was a biological aunt that also lived in Carthage that had cared for him just a couple of days then had asked Jennifer and Oswaldo [Velazco]

to care for him because they were unable.

(2008TR. 11:21-12:3). M.M.'s testimony is based on what she supposedly heard from the Velazcos, and the Velazcos' alleged statements to M.M. are based on what Mother's family members supposedly told the Velazcos. In other words, M.M.'s testimony is double hearsay.

Similarly, Ms. Davenport testified that she had no personal knowledge of the events that transpired during the critical 60-day period prior to the filing of the Petition:

Q: Okay. At some point then you kind of dropped out of the picture; is that correct?

A: Yes.

Q: Can you estimate for the Court when that would have been?

A: When [Child] was about ***eight or nine months old***.

(2008TR. 80:12-17) (emphasis added). Child was born on October 17, 2006. (LF. 12). He would have been "eight or nine months old" in June/July 2007. Respondents filed their Petition on October 5, 2007 (LF. 5). Accordingly, the relevant 60-day period began on August 6, 2007. But Ms. Davenport testified that she had already "dropped out of the picture" by that time.

The parties who *were* involved in the care arrangements, including Mother and her family members, were not present at the hearing and did not have the opportunity to present evidence regarding the arrangements that were actually made. Under the plain error rule, this Court should exclude the hearsay evidence. There can be no serious

dispute that the erroneously admitted evidence affected Mother's substantial rights. Indeed, the hearsay testimony formed the basis of the Juvenile Court's finding of abandonment and resulted in the termination of Mother's parental rights. (LF. 118).

Moreover, because the hearsay testimony constitutes the ***only*** evidence on which the Juvenile Court's findings are based, a manifest injustice would result if such evidence were not excluded. And without the hearsay testimony, the Juvenile Court's findings plainly are not supported by clear, cogent, and convincing evidence of abandonment. In fact, without the hearsay testimony, the only remaining evidence concerning the critical 60-day period is the Respondents' testimony concerning their first contact on "September 24." (2008TR. 8:8-16). But September 24 is only *9 days* prior to October 5 (the filing of the Petition), and *51 days* short of the required 60 days.

Because the Juvenile Court's findings rely exclusively on hearsay testimony that should be excluded under the plain error rule, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

V. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON BECAUSE THE JUVENILE COURT'S FINDINGS OF ABANDONMENT UNDER SECTION 453.040(7) ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THE EVIDENCE IN THE RECORD NEGATES ANY FINDING OF ABANDONMENT DURING THE STATUTORILY MANDATED 60-DAY

PERIOD PRECEDING THE FILING OF THE PETITION.

"Abandonment is defined as the voluntary and intentional relinquishment of custody of the child with the intent to never again claim the rights or duties of a parent, or the intentional withholding by the parent of his or her love, protection and presence, without just cause or excuse." *In re L.*, 937 S.W.2d at 737. "Abandonment implies a ***willful positive act*** such as deserting the child." *In re C.J.G.*, 75 S.W.3d at 801 (emphasis added). A finding of abandonment, therefore, "is generally not compatible with a case where custody of the child has been taken from the parent involuntarily," because the enforced separation of parent and child — "without intervention by the juvenile officer to effect reconciliation" — creates the very circumstances (*e.g.*, lack of communication and visitation) complained of in the termination proceeding. *In re Interest of Baby Girl W.*, 728 S.W.2d 545, 549 (Mo. App. 1987).

"Adoption statutes are strictly construed in favor of natural parents." *In re L.*, 937 S.W.2d at 737. "Consent, or the facts which made consent unnecessary, are ***jurisdictional***." *In re the Adoption of K.A.S. and T.S.*, 933 S.W.2d 942, 946 (Mo. App. 1996) (emphasis added). "The party petitioning for adoption must plead and prove the exception to the requirement of consent of the natural parents." *Id.* "Proof of intent must be shown by clear, cogent and convincing evidence." *In re L.*, 937 S.W.2d at 737. "The party seeking to invoke the statute must carry the full burden of proof." *In re Baby Girl W.*, 728 S.W.2d at 549.

Here, there was never any recognition of a prospect to reconcile mother and son, "only a studied purpose to consummate the adoption" (*In re Baby Girl W.*, 728 S.W.2d at

549), and Respondents failed their heavy burden of proving abandonment "by clear, cogent and convincing evidence." *In re L.*, 937 S.W.2d at 737. Specifically, Respondents petitioned for adoption under section 453.040(7) (LF. 7), and the Juvenile Court findings are based on section 453.040(7). (LF. 117). For a child under one year of age, section 453.040(7) requires willful abandonment of at least sixty days "immediately prior to the filing of the petition for adoption." MO. REV. STAT. § 453.040(7). "The statutory requirement to prove abandonment 'for a period of at least sixty days,' implies abandonment for ***a <u>continuous</u> period of sixty days***." *In re the Adoption of N.L.B.*, 212 S.W.3d at 129 (emphasis added).

Even if the hearsay testimony is not excluded as plain error, the Juvenile Court's findings are not supported by clear, cogent, and convincing evidence of abandonment during the statutorily mandated 60-day period. In fact, the hearsay testimony negates any possibility of the required showing, because Ms. Davenport testified that Child was living with Mother's sister, and the Velazcos were merely providing babysitting services, as of September 2007. (2008TR. 79:12-83:18). Respondents filed their Petition on October 5, 2007.[7] If, as Ms. Davenport testified, Child "was living with the aunt" in September 2007, then satisfying the required 60-day period is a legal impossibility. *See In re the Adoption of N.L.B.*, 212 S.W.3d at 129 (reversing termination and adoption where 60-day

[7] The Respondents appear to have timed the filing of their Petition to take advantage of the 60-day period versus the longer 6-month period.

period not satisfied.).

Moreover, the Judgment ignores contemporaneous documentary evidence in the record demonstrating that Mother was making arrangements to secure a passport for Child as of "9/27/07." (LF. 71-73). A handwritten letter also states that "[Child's] Aunt has been trying to find the baby" and that the Velazcos were providing babysitting services, but then gave away Child: "The Velazco family took care of the baby during the week – the Aunt would take care of him on the weekends. When the Aunt went to pick the baby up the Velazsco family said they didn't have the baby." (LF. 69). The Velazcos own "no longer contact us" letter confirms that someone was looking for Child. (LF. 74). *See In re Baby Girl W.*, 728 S.W.2d at 548 (no abandonment where contact "effectively preclud[ed]").

Because the Juvenile Court's findings are contrary to the law and not supported by clear, cogent, and convincing evidence of abandonment during the statutorily mandated 60-day period, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

VI. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT'S FINDINGS OF ABANDONMENT UNDER SECTION 211.447(2)(B) ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT EVEN RESPONDENTS ADMIT THAT MOTHER

LEFT HER SON IN HER FAMILY'S CARE BELIEVING HE WOULD BE ADEQUATELY CARED FOR, THERE IS NO EVIDENCE PROVING THAT MOTHER HAD THE ABILITY TO MAKE ANY FINANCIAL CONTRIBUTIONS WHILE INCARCERATED, THERE IS NO EVIDENCE DEMONSTRATING THAT MOTHER WAS ABLE TO VISIT HER SON AND, IN FACT, EVIDENCE THAT SHE DID REQUEST VISITATION, AND THE JUDGMENT IGNORES SEVERAL COMMUNICATIONS.

The Juvenile Court erroneously found that, "[p]ursuant to Section 211.447(2)(b), grounds exist for the termination of parental rights." (LF. 120). The party seeking to terminate parental rights on the ground of abandonment under that section, however, has the burden to prove "by clear, cogent and convincing evidence" that the "parent, without good cause, [1] left the child without any provision for parental support ***and*** [2] without making any arrangements to visit or communicate with the child, ***although able to do so***." MO. REV. STAT. § 211.447.2(2)(b) (emphasis added).

"Incarceration in and of itself may not be used as a ground upon which to terminate parental rights." *In re Baby Girl W.*, 728 S.W.2d at 548. The Juvenile Court's findings of abandonment under section 211.447(2)(b) is contrary to the law and not supported by clear, cogent, and convincing evidence.

First, the Juvenile Court erred in concluding that Mother "made no provisions for the care of her child." (LF. 118). In fact, Respondents themselves testified (albeit hearsay) that Child was with Mother's family when she was first incarcerated. (2008TR. 11:21-12:3). And the Judgment recites that Mother believed Child would be adequately

cared and provided for until she was released from prison. (LF. 118). Where there is good cause, because of a temporary situation, a parent may leave a child in the custody of a third party without abandoning the child. *See In re A.R.*, 52 S.W.3d 625, 635 (Mo. App. 2001). Indeed, in many cultures extended family members regularly provide care and support for each other's children. *In re A.S.W.*, 137 S.W.3d 448, 453 (Mo. banc 2004). ("Parenting is frequently a group effort. Children are often raised with extensive help from grandparents, siblings, extended family, neighbors, day care, baby sitters, a nanny, or an array of public and private service organizations."). The fact that Child was involuntarily ripped from Mother's care as a result of ICE's raid, and Mother's subsequent reliance on family members to care for her son, is insufficient evidence of abandonment.

Second, the Juvenile Court erred in concluding that Mother supposedly failed to offer financial support or visit her son while she was incarcerated. Proof of abandonment must include evidence showing some ability on the part of the parent to make a monetary contribution toward support of the child, and evidence of accessibility of the child for purposes of visitation or communication. *See In re Baby Girl W.*, 728 S.W.2d at 547. None of these conditions were met by the evidence in this case. There is no evidence in the record proving that Mother actually had earned — ***or even had the ability to earn*** — any wages while incarcerated and, thus, no evidence that Mother had any ability to make monetary contributions. *See id.* at 548 (holding that because parent was incarcerated, he was unable to seek employment to acquire funds with which to contribute to his child's support). In any event, "[w]e have found no case where failure to provide support alone

has been held to warrant termination of parental rights." *In re L.*, 937 S.W.2d at 738.

Third, there is no evidence demonstrating that Mother was able to visit her son. Mother did, in fact, request "visitation with my son." (LF. 70, 94). But Mother was transferred to a federal penitentiary in West Virginia, rendering visits impossible *unless, of course, Respondents were willing to bring Child to her*. *See* 728 S.W.2d at 548 (holding that parent's incarceration rendered him incapable of visiting the child). There is also no evidence demonstrating that Mother failed to contact her son while he was with family members. And although the Judgment recites that Respondents' contact information could be found in the Petition (LF. 120), which was supposedly served on Mother in prison, the Judgment ignores a note in the record evidencing that "[a]s of 10/28/07 No paper's have been sent to the Mother." (LF. 74). A handwritten letter also contained in the record states that "[Mother] said she had not received any papers concerning the adoption." (LF. 69). In fact, even the Respondents admit that there were problems with service. (A101). And, in any event, Mother does not read English.

Fourth, the Judgment ignores Mother's several communications, despite virtually insurmountable odds. For example, on October 28, 2007, Mother wrote that she did not want her son to be adopted and expressed her preference that Child be placed in foster care until she was released. (LF. 70, 94). On August 18, 2008, Mother again communicated her opposition to adoption and expressly placed Child in the temporary care and custody of Corina Rodriquez. (LF. 108). And although the Juvenile Court erroneously depicted her several other communications as a factor weighing in favor of a finding of abandonment, the Judgment acknowledges that Mother "also sent a letter to

both the [Respondents]' attorney and the Guardian ad Litem … in September 2008 objecting to the adoption." (LF. 121).

Fifth, "[a]bandonment requires that there be a settled purpose to forego all parental duties and relinquish all parental claims." *In the Interest of W.F.J.*, 648 S.W.2d 210, 215 (Mo. App. 1983). A "prior abandonment may be may be ***repented of and terminated***." *Id.* Even assuming *arguendo*, that the record sufficiently establishes that Mother abandoned Child at some point in time while she was incarcerated (which she did not do, particularly during the 60-day period preceding the filing of the Petition), the record plainly evidences that Mother has been fighting for the return of her son. (LF. 70, 94, 108, 111, 121). "The fundamental liberty interest of natural parents in raising their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State." *In re K.A.W.*, 133 S.W.3d at 22 (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). Accordingly, "[m]easured by the above precepts, it cannot be said the evidence in this case showed any intent at all on the part of appellant to abandon [her son]…. [She] resisted efforts … to deprive h[er] of h[er] parental rights. When the judgment was entered against h[er], [s]he prosecuted this appeal." *In re Baby Girl W.*, 728 S.W.2d at 549.

Because the Juvenile Court's finding of abandonment under section 211.447(2)(b) is contrary to the law and not supported by clear, cogent, and convincing evidence, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

FORMULAIC AND CONCLUSORY FINDINGS

Even if the Juvenile Court's findings of abandonment were not contrary to law *and* supported by clear, cogent, and convincing evidence, as discussed below in Point VII, the Juvenile Court's required findings under section 211.447.7 are meaningless, formulaic regurgitations of legally-irrelevant evidence.

VII. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT'S TERMINATION FINDINGS UNDER SECTION 211.447.7 ARE CONTRARY TO THE LAW AND NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THE JUVENILE COURT'S FINDINGS ARE FORMULAIC AND CONCLUSORY, THERE IS NO EXPERT TESTIMONY CONCERNING CHILD'S EMOTIONAL TIES TO MOTHER, THE CONCLUSION THAT CHILD DOES NOT CONSIDER ANYONE ELSE HIS PARENT IS BASED ONLY ON HEARSAY, MS. DAVENPORT TESTIFIED THAT EVEN AS LATE AS SEPTEMBER 2007 CHILD WAS IN THE CARE OF MOTHER'S SISTER, MOTHER DID REQUEST VISITATION, ANY PRESUMPTION OF SERVICE WAS REBUTTED, THERE IS NO EVIDENCE PROVING THAT MOTHER HAD THE ABILITY TO MAKE ANY FINANCIAL CONTRIBUTIONS WHILE INCARCERATED, AN ASCERTAINABLE PERIOD OF TIME EXISTED FOR RETURN OF CHILD, AND THE

JUVENILE COURT ERRONEOUSLY CONSIDERED THE ALLEGED LACK OF FAMILY SUPPORT, ERRONEOUSLY INJECTED MOTHER'S IMMIGRATION STATUS INTO THE PROCEEDING, AND ERRONEOUSLY CONSIDERED MOTHER'S ALLEGED CRIME.

Termination of parental rights requires, in addition to a finding that termination is in the child's best interests, findings that establish the existence of at least one ground under section 211.447. *See* MO. REV. STAT. § 211.447.6. Those findings must be supported by "clear, cogent and convincing evidence." MO. REV. STAT. § 211.447.5.

Here, the Juvenile Court erroneously terminated Mother's parental rights on (and only on) the ground of abandonment pursuant to 211.447(2)(b). (LF. 120). Section 211.447.7, thus, requires that the Juvenile Court make findings on seven enumerated factors, "when appropriate and applicable to the case." MO. REV. STAT. § 211.447.7. "[W]hen reviewing a trial court's termination of parental rights, appellate courts must examine the trial court's findings of fact and conclusions of law ***closely***." *In re K.A.W.*, 133 S.W.3d at 12 (emphasis added). "Given the fundamental interests involved, there must be strict and literal compliance with the statutes authorizing the State to terminate the parent-child relationship." *In re C.W.*, 211 S.W.3d at 98.

"Each [of the seven] factor[s] that has application to the facts is relevant and a finding must be made on it, not merely on those factors that favor termination." *In re K.A.W.*, 133 S.W.3d at 19. The Juvenile Court here supposedly made findings on six factors. The Judgment, however, must be reversed, because each factor was merely mechanically applied without the support of clear, cogent, and convincing evidence.

Section 211.447.7(1): The Judgment summarily concludes that "[t]he child sought to be adopted has no emotional ties to his biological mother." (LF. 120). ***No*** expert testified concerning Child's emotional ties to Mother, which constitutes reversible error. *See In re K.A.W.*, 133 S.W.3d at 16 (rejecting trial courts finding that "'there are no emotional ties' between the twins and Mother" because finding was "not supported by the testimony of any of the ***experts*** who observed Mother interact with the twins") (emphasis added).

Moreover, the supposed "clear" evidence that Child considers the Respondents his parents (LF. 120) is, in fact, based only on the following hearsay:

> Q: Does [Child] know anyone else to be Mom or Dad to your knowledge?
>
> A: No, he doesn't call anybody else Mommy or Daddy.

(2008TR. 63:8-10).

Section 211.447.7(2): The Judgment summarily concludes that "[t]he child's mother has failed to maintain regular visitation and other contact with the child." (LF. 120). But that finding is squarely contradicted by Ms. Davenport's testimony that *even as late as September 2007*, Child was in the care of Mother's sister. (2008TR. 79:12-19, 83:14-18). Mother did request visitation (LF. 70, 94), and she did, in fact, express her desire for placement of Child on several occasions (LF. 70, 94, 108). Respondents, however, ignored Mother's desire to see Child; instead, they took him on "multiple trips" to Minnesota, Branson, and "Silver Dollar City." (2008LR. 20:16-21:1). The enforced separation between Mother and Child *by the Respondents* cannot sustain a finding that

Mother failed to maintain regular visitation or other contact with Child. *See In re W.F.J.*, 648 S.W.2d at 215 ("the conduct of a parent under ***enforced*** separation must be examined with due recognition of all surrounding circumstances") (emphasis added).

Moreover, Juvenile Court's finding as to section 211.447.7(2) is predicated on the erroneous premise that Mother was "served with the Petition on October 16, 2007." (LF. 120). But the Judgment ignores all evidence demonstrating that Mother had ***not*** received the Petition. (LF. 69, 74). The returned letters also rebut any presumption that service was effective. (LF. 81-83).

Section 211.447.7(3): The Judgment summarily concludes that "[t]he child's biological parents have contributed no support towards the cost of care and maintance of the child although financially ***able to do so***." (LF. 121). As discussed above, the record is devoid of any evidence proving that Mother actually had earned, or even had the ability to earn, any wages while incarcerated.

Section 211.447.7(4): The Judgment summarily concludes that "[t]here are no additional services that could be provided by any agency that could bring about a lasting parental adjustment enabling a return of the child with an ascertainable period of time." (LF. 120). As a threshold matter, the Judgment notes elsewhere that the period of time is ascertainable, because Mother was set to be released from prison in "February of 2009" (LF. 115, 122) — ***only four months from the date of the Judgment (October 9, 2008)***. As an additional threshold matter, the Juvenile Court's finding suggests that Mother was receiving agency services. Mother received none.

Moreover, the Juvenile Court's "no services" finding is not based on any evidence

in the record, let alone expert testimony. *See In re C.W.*, 211 S.W.3d at 102 (because "there was no current, expert testimony establishing Mother's capacity to adequately parent C.W. … the court has no substantial basis to assess what services may be helpful and if those services would assist Mother in parenting C.W"); *see also In re A.S.W.*, 137 S.W.3d at 453 ("[T]here is no evidence that additional services would fail or be unavailable.").

Most importantly, that Mother may eventually be deported does not render impossible reunification with her son. Child, like any other dual citizen, can freely live with Mother in Guatemala.

Section 211.447.7(5): The Judgment summarily concludes that "[i]t is difficult to gauge the biological mother's interest or commitment to the child" and supposedly "[s]he took no proactive steps to maintain contact with the child." (LF. 121). In fact, Mother specifically requested visitation, but the Respondents ignored her request (LF. 70, 94); Mother and her family tried to locate Child after he was transferred to the Respondents (LF. 69, 74); and Mother was trying (*before* and *after* Child's illegal transfer to the Respondents) to secure a passport for Child so he could be cared for by family in Guatemala. (LF. 71).

Moreover, the Juvenile Court's "disinterest" finding is predicated on an alleged lack of family support (LF. 121) ("the mother apparently expected someone in her family to take care of the child for her until she was released and deported"), which is plainly insufficient. *See In re K.A.W.*, 133 S.W.3d at 15 ("[A] lack of family support is not evidence that instantly tilts the scales in favor of termination without additional evidence

as to the necessity of the family support.").

Section 211.447.7(6): The Judgment summarily concludes that Mother's "felony conviction … is of a nature that would deprive the child of a stable home for a period of years." As a threshold matter, this finding is in direct conflict with *In re K.A.W.*:

> Although it was not explicitly relied upon by the trial court in the termination of parental rights, Mother pleaded guilty to welfare fraud because she provided ***false information*** and failed to provide required information to the state. Considering the severity of the crimes described in subdivisions 211.447.4(4) and 211.447.[7](6), welfare fraud of this nature is not abuse, and the trial court correctly declined to include it as supporting termination.

133 S.W.3d 1, 11 n.7 (emphasis added). Even if it were still a "crime" (which it is not), Mother's alleged use of improper work documentation should not have been used to support termination.

Moreover, even if Mother's "crime" was the type of "felony offense" appropriate for consideration under section 211.447(5), the Juvenile Court's own findings demonstrate that it would ***not*** deprive Child of a stable home "for a period of years," because Mother was set to be released (and was released) in February 2009. (LF. 115, 122).

Section 211.447.7(7): The Juvenile Court correctly finds that is no evidence "of any deliberate acts toward by [sic] the child by the biological mother or anyone else that

might have subjected the child to a substantial risk of physical or mental harm." (LF. 122).

Because "[s]tatutory mandates to make findings may not be overlooked on appeal" (*In re K.A.W.*, 133 S.W.3d at 16-17), the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

MISAPPLICATON OF BEST INTERESTS TEST

Even if the Juvenile Court's required findings were not improperly formulaic, as discussed below in Point VIII, the Juvenile Court's misapplication of the requisite best interests test is evidenced by the Judgment itself.

VIII. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE THE JUVENILE COURT'S MISAPPLICATION OF THE BEST INTERESTS TEST IS CONTRARY TO THE LAW AND THE JUVENILE COURT'S BEST INTERESTS FINDINGS ARE NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE, IN THAT THERE ARE NO FINDINGS AS TO MOTHER, HER CONSTITUTIONAL RIGHTS, AND THE PROTECTION OF HER RELATIONSHIP WITH HER SON, THE JUVENILE COURT ERRONEOUSLY INJECTED MOTHER'S IMMIGRATION STATUS INTO THE PROCEEDING, THERE IS NO EVIDENCE SUPPORTING THE CONCLUSION THAT MOTHER WOULD BE UNABLE TO PROVIDE FOR CHILD IN

GUATEMALA, THE JUVENILE COURT ERRONEOUSLY FOCUSED ON THE RESPONDENTS' WEALTH AND CONTRASTED THE RESPONDENTS' WEALTH WITH MOTHER'S CIRCUMSTANCES, THE JUVENILE COURT IGNORED ITS OWN FINDING THAT MOTHER WAS NOT UNFIT AND THERE WAS NO EXPERT TESTIMONY CONCERNING MOTHER'S FITNESS, AND THE JUVENILE COURT PLACED UNDUE RELIANCE ON ALLEGED BONDING.

"The goal of a termination hearing is not to justify termination, but to determine if grounds exist for termination and if termination is in the child's best interests." *In re K.A.W.*, 133 S.W.3d at 43-44. "[T]he notion of the welfare of the person sought to be adopted - the child - is informed by the fundamental proposition and ***presumption*** that maintaining the natural parent-child relationship is in the best interests of the child." *In re Adoption of N.L.B.*, 212 S.W.3d at 128 (emphasis added).

The termination of parental rights is "an exercise of awesome power and should not be done lightly." *In re S.J.H.*, 124 S.W.3d 63, 66 (Mo. App. 2004). "Such rights should be terminated only when grave and compelling circumstances exist." *Id*. at 70. Thus, in addition to finding that at least one ground for termination as been proven "by clear, cogent, and convincing evidence" a trial court must also by a "clear, cogent, and convincing evidence" find that is in the best interests of the child. *See* MO. REV. STAT. § 211.447.6; *see also In re C.W.*, 211 S.W.3d at 99 ("These findings must be supported by 'clear, cogent and convincing evidence.'").

The Juvenile Court's cursory, and erroneous, best interests conclusions are

summed up by Respondents' counsel's equally conclusory, and erroneous, remarks: "In terms of best interest, I mean, ***that almost goes without saying***…. [T]his child is an American citizen. The mother is a Guatemalan citizen and she will be returning to Guatemala. I think the best interest standard also weighs very, very, heavily in favor of my clients." (2008TR. 96:10-97:6) (emphasis added). No party here — neither the Respondents nor the State — carried their heavy burden.

First, section 211.443 enumerates three specific factors that must be considered in determining best interests: (1) the protection of the constitutional rights of all parties, including the biological parent, (2) the protection of the birth family relationship, and (3) the entitlement of every child to a stable home. *See* MO. REV. STAT. § 211.443. The Juvenile Court here did not consider (1) or (2), and for that failure alone the Judgment should be reversed. *See In the Interest of D.F.P.*, 981 S.W.2d 663, 663 (Mo. App. 1998) ("Absent a finding that termination is in the best interest of a child, manifest injustice may have occurred.").

Second, the Juvenile Court also erroneously concludes that Mother's pending deportation automatically means that Child will be deprived of a stable home under factor (3). Not true. As a threshold matter, Mother's counsel has located ***no*** Missouri authority condoning the consideration of immigration status in termination proceedings. Other state supreme courts have squarely rejected consideration of immigration status in termination proceedings. *See In re Angelica L.*, 767 N.W.2d 74, 93 (Neb. 2009) ("[W]e do not conclude that Maria's attempt to bring herself and her child into the United States, in the belief that they would have a better life here, shows an appreciable absence of care,

concern, or judgment.… [T]he State introduced testimonial evidence attempting to show that it would be in the children's best interests to remain with their foster parents, because living in Guatemala would put them at a disadvantage compared to living in the United States. What we are dealing with here is a culture clash. ***However, whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests.*** We reiterate that the "best interests" of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another.") (emphasis added).

Third, the Juvenile Court's finding on factor (3) (*i.e.*, "stable home") is unsupported by any evidence, let alone clear, cogent, and convincing evidence. The Judgment erroneously concludes "that [Mother] will be deported thereafter" (LF. 125), and surmises — without support of any evidence in the record — that deportation would result in an unstable home, because Mother would supposedly be "unable to provide adequate food, clothing, or shelter to a child in her physical custody in the future." (LF. 123). ***There is no evidence whatsoever in the record supporting this bald conclusion***. In fact, the only evidence in the record that even remotely touches on Mother's life in Guatemala is M.M.'s testimony, wherein she admits that she is "unaware" of Mother's home or employment prospects in Guatemala. (2008TR. 52:15-24). The Juvenile Court's finding is plainly unsupported by clear, cogent, and convincing evidence.

Fourth, rather than focus on the constitutional rights of all parties (including Mother) and protection of the birth family relationship (which is statutorily required), the Juvenile Court's findings are centered entirely on the Respondents' purported fitness.

(LF. 124-25). Indeed, the entire focus of the Juvenile Court's "best interests findings" concern the Respondents' alleged wealth and stature in the community, except for these four sentences:

> This contrasted with the biological mother and her family. The only certainties in the biological mother's future is that she will remain incarcerated until next year, and that she will be deported thereafter. The biological family was either unwilling or unable to care for the child. From the description given by Laura Davenport, the care the child received in the mother's care was substandard.

(LF. 125). The Juvenile Court's complete disregard for Mother's constitutional rights and the protection of the birth family relationship is contrary to the law. *See In re S.M.H.*, 160 S.W.3d 355, 362 (Mo. banc 2005) ("[B]ecause parental rights are a fundamental liberty interest, statutes that provide for the termination of parental rights are strictly construed ***in favor of the parent and preservation of the natural parent-child relationship***.") (emphasis added).

Fifth, the Juvenile Court improperly contrasted the Respondents' alleged wealth and stature with Mother's circumstances. For example, the Judgment discusses at length Respondents' property ownership, businesses, and income. (LF. 13). The fact that the Respondents may have more resources should not have been considered in determining the child's best interest. *See In re S.J.H.*, 124 S.W.3d at 70 ("The primary concern is the best interests of the children, not whether the children would be better off in a foster

home."); *In re M.D.R.*, 124 S.W.3d 469, 476 (Mo. banc 2004) ("The statutory exhortation to act in the child's best interest should not be a pretext for a hyper-technical application of statutory criteria to achieve a result where the child would be 'better off' in someone else's care.").

Sixth, the Juvenile Court specifically found, but apparently ignored in its weighing of best interests, that there were "no deliberate acts toward … the child by the biological mother or anyone else that might have subjected the child to a substantial risk of physical or mental harm." (LF. 122). Even M.M. admitted that Mother was (and is) a fit parent. (2008TR. 50:7-11). Notwithstanding the Juvenile Court's own findings elsewhere in the Judgment, in its perfunctory conclusions the Juvenile Court recited Ms. Davenport's un-expert testimony. (LF. 125) ("From the description given by Laura Davenport, the care the child received in the mother's care was substandard."). Ms. Davenport's unqualified opinions do not satisfy the requisite evidentiary burdens. *See In re C.W.*, 211 S.W.3d at 102 (rejecting juvenile court's best interests findings because "there was no current, expert testimony establishing Mother's capacity to adequately parent [the child]"). No expert testified at the Termination Hearing on the quality of care Child received from Mother or her family. Indeed, the entire Juvenile Court proceeding is devoid of any expert testimony.

Seventh, the Juvenile Court erroneously concluded that Mother supposedly had little interest or commitment to her son, because Mother allegedly failed to make arrangements for her child when she was, without warning, incarcerated following ICE's raid. But, as discussed above, Mother left her son in her family's care (LF. 121); Mother

did request visitation (LF. 70, 94); Mother did, in fact, express her desire for placement of Child on several occasions (LF. 70, 94, 108); and there is no evidence that Mother had any ability to make monetary contributions or visit her son.

Finally, the Juvenile Court placed undue reliance on the child's attachment to the would-be adoptive parents and the child's supposed lack of recollection of Mother as his parent. (LF. 124) ("[Child] most likely has no recollection nor will have any independent recollection of any people before them as his parents."). Indeed, it is "almost a foregone conclusion that when a child is taken so early in his or her life that the bond with the biological parent will not be as strong as it would otherwise be" and trial courts should "take into account this reality." *See In re C.A.L.*, 228 S.W.3d 66, 77 (Mo. App. 2007). Here, the Juvenile Court's finding that the Respondents "have clearly developed a strong bond with the child" is both unsupported by clear, cogent, and convincing evidence and has little relevance. (LF. 124). "Bonding" was not established by expert testimony. *See In re K.A.W.*, 133 S.W.3d at 16 ("[T]he trial court failed to cite any support for the alleged lack of emotional ties or bonding, which is not supported by the testimony of any of the experts who observed Mother interact with the twins."). Instead, the purported "bonding" is based only on the Respondents' testimony that Child calls them "Mommy" and "Daddy." (LF. 124). Under the logic of the Juvenile Court's findings, any termination of parental rights would satisfy the requisite best interests test where (as here) an infant was (for example, by reason of incarceration) not in the custody of the biological parent. But that is not the law. *See In re C.W.*, 211 S.W.3d at 101 ("The finding that Mother and C.W. were not bonded, while relevant, is not surprising given

that C.W. was removed from Mother's custody days after birth….").

Because the Juvenile Court's misapplication of the best interest test is contrary to the law, and because the Juvenile Court's purported best interests findings are not supported by clear, cogent, and convincing (and *legally relevant*) evidence, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

MULTIPLE DUE PROCESS VIOLATIONS

Even if the Juvenile Court did not misapply the best interests test, as discussed below in Points IX-XIII, the Termination Proceeding is riddled with multiple due process violations. Appellate courts do not defer to lower courts on issues of due process, which are questions of law and reviewed de novo. *See Patrick*, 295 S.W.3d at 927; *In re T.A.S.*, 62 S.W.3d 650, 657 (Mo. App. 2001).

IX. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE EVIDENCE REBUTS ANY PRESUMPTION OF PROPER SERVICE, MOTHER DID NOT RECEIVE THE REQUIRED NOTICE OF THE CUSTODY HEARING, RESPONDENTS' PETITION REFERENCES OBSOLETE STATUTORY PROVISIONS, AND MOTHER DID NOT RECEIVE THE PETITION OR ANY OTHER PLEADINGS IN HER

NATIVE LANGUAGE.

Missouri appellate courts have consistently held that an individual's parental rights may not be terminated in proceedings that do not meet the requisites of due process. *See In re E.A.C.*, 253 S.W.3d 594 at 601; *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *In re K.A.W.*, 133 S.W.3d at 12 ("A parent's right to raise her children is a fundamental liberty interest protected by the constitutional guarantee of due process. It is one of the oldest fundamental liberty interests recognized by the United States Supreme Court.").

"The phrase [due process] expresses the requirement of 'fundamental fairness.'" *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 25 (1981). As articulated by the U.S. Supreme Court, "due process" embodies the following "essential" concepts:

> [N]otice of the factual basis for [the determination], and a fair opportunity to rebut the [Respondents'] factual assertions before a neutral decisionmaker. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" … "due process requires a 'neutral and detached judge in the first instance.'" "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be

> affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" These essential constitutional promises may not be eroded.

Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (internal citations omitted). From the start, the Termination Proceeding here violated due process.

First, the Judgment erroneously concludes that Mother was "served with the Petition on October 16, 2007." (LF. 120). But the Juvenile Court ignored that a note in the record stated that "As of ***10/28/07*** No paper's have been sent to the Mother." (LF. 74) (emphasis added). A second letter confirms that "[Mother] said she had not received any papers concerning the adoption. (LF. 69). Moreover, the record contains evidence that two separate attempts (by the Jasper County Juvenile Division and Respondents' counsel) to send Mother court documents failed and those documents were returned. (LF. 81-83; 2008TR. 92:12-93:4). Thus, any presumption that service of process was effective was rebutted. *See Weidner v. Anderson*, 174 S.W.3d 672, 678 (Mo. App. 2005) ("presumption could be rebutted by evidence that (a) the mailing was not received by Plaintiffs, or (b) that it was not Plaintiffs' correct address").

Second, at a minimum, there can be no serious dispute that Mother did *not* receive the required notice (or any notice) of the Custody Hearing. "Due process requires that a party be informed of any proceeding which is to be accorded finality either by actual

notice or by 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Cody v. Old Republic Title Co.*, 156 S.W.3d 782, 784 (Mo. App. 2005).

Third, even if Mother was personally served (which she was not) and received adequate notice (which she did not), the Petition moved for termination of Mother's parental rights under a stale, obsolete version of section 211.447. Specifically, the Petition seeks termination under "211.447… ***RSM 1998***." (LF. 8) (emphasis added). Section 211.447 "RSM 1998" was not applicable at the start of the Termination Proceeding. Indeed, the Petition references, among other inapplicable sections, section 211.4476(1) which does not exist, but at no point during the proceeding did Respondents amend their Petition. "Due process demands that '[t]he petition in a termination of parental rights case should contain allegations likely to inform those persons involved of the charges." *In re E.F.B.D.*, 138 S.W.3d at 150; *In the Interest of W.F.J.*, 648 S.W.2d at 216 ("The petitions leave to speculation what cause is contended under § 211.447.").

Fourth, even if Mother was personally served (which she was not) and received adequate notice (which she did not), there can be no dispute that she did ***not*** receive the Petition or other pleadings in Spanish, her native language. Other state appellate courts have held that parents are entitled to an interpreter in the course of a parental termination proceedings. *See In the Interest of Doe*, 57 P.3d 447, 460 (Haw. 2002) ("Procedural due process requires that an individual whose rights are at stake understand the nature of the proceedings he or she faces. In light of the constitutional protection afforded parental

rights, we hold that, as an aspect of procedural due process, individuals must, as needed be provided an interpreter at family court proceedings where their parental rights are substantially affected."); *In re Valle*, 31 S.W.3d 566, 573 (Tenn. Ct. App. 2000) ("Considering the drastic nature of a termination of parental rights case, it is particularly incumbent upon the trial court to be careful in exercising discretion for the appointment of an interpreter.").

Fifth, given that this Court has recognized that the termination proceedings are "tantamount to a 'civil death penalty'" (*In re K.A.W.*, 133 S.W.3d at 12), Mother should have received, at least the charging document (*i.e.*, the Petition) in Spanish. *See U.S. v. Mosquera*, 816 F. Supp. 168, 175 (E.D.N.Y. 1993) ("For a non-English speaking defendant to stand equal with others before the court requires translation.").

Because Mother did not receive sufficient notice of the serious charges leveled against her, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

X. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE MOTHER WAS NOT APPOINTED COUNSEL PRIOR TO THE CUSTODY HEARING AND RESPONDENTS WERE IMPROPERLY INVOLVED IN THE SELECTION OF MOTHER'S COUNSEL.

Even if Mother had received proper notice and service (and in her native language), the Judgment should be reversed because Mother's right to effective counsel was denied by appointing counsel selected by her adversarial opponents.

"Failure to appoint counsel to represent the natural parents ***or to obtain an affirmative waiver*** of that right has been held to be ***reversible error***." *In the Interest of J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. App. 1989) (emphasis added); *see also In the Interest of J.S.W.*, 295 S.W.3d 877, 881 (Mo. App. 2009) ("At no time did the court make an inquiry or even an entry on the record concerning Mother's lack of representation….").

Here, the Juvenile Court "transferred custody of the minor child to the petitioners [*i.e.*, the Respondents] on October 18, 2007" (LF. 63) months ***before*** Mother was first appointed counsel. (LF. 79). In addition to having no counsel present at such an important initial hearing, and even assuming *arguendo* that Mother was "personally served" October 16, 2007 (LF. 62), there can be no dispute that Mother "did not receive the statutorily-required notice of her right to counsel until two days before the hearing." *In the Interest of J.S.W.*, S.W.3d at 881 (reversing termination).

Moreover, it is undisputed that the Respondents — Mother's adversaries — were intimately involvement with the dismissal and retention of Mother's counsel. In fact, Respondents' counsel unabashedly told the Juvenile Court that "[t]he reason why it's taken so long is there were some problems with the biological mother's legal counsel. She was previously represented by Mr. Calton. And then after ***we realized*** that she probably needed counsel for this so ***we hired*** Mr. Dominguez to represent her today."

(2008TR. 2:23-3:5) (emphasis added). The random appointment of counsel *by a court* is a far cry from *an adversary* hand-picking and paying their opponent. The Missouri Rules of Professional Conduct prohibit such transactions. *See* Mo. Supreme Court Rule 4-1.8(f).

The "appointment" of Mother's counsel was akin to the fox guarding the henhouse. Indeed, Respondents' counsel has even admitted in briefing to this Court that he somehow had access to attorney-client privileged communications between Mother and Mr. Dominguez: "It ignores that her attorney … wrote her a letter in her own language explaining what the Judgment meant…." (A102). Mother had a statutory right to a counsel who would zealously represent her interests, and hers alone. Instead, what she got was a lawyer retained for her by her opponents who stood as a passive, potted plant throughout the proceedings beholden to Respondents. "The policy of the law, the rules of this Court, the Canon of Ethics and the adjudicated cases have long held that a lawyer can have but one client in any given matter. Not even the most versatile lawyer 'can serve two masters.'" *In re Buder*, 217 S.W.2d 563, 574 (Mo. 1949).

Because Mother's due process rights were denied by appointing counsel selected by her adversary, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

XI. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE

JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE GAL AND JUVENILE OFFICER FAILED TO DISCHARGE THEIR DUTIES TO ACT DILIGENTLY IN THE BEST INTERESTS OF THE CHILD, INCLUDING FAILING TO INVESTIGATE OR EVEN SPEAK ONCE WITH MOTHER, AND UNDERTAKE AN INVESTIGATION INDEPENDENT OF THE RESPONDENTS.

Even if Mother's due process rights were not violated by appointment of counsel handpicked by her opponents, the Judgment should be reversed because the GAL's and Juvenile Officer's failures precluded a meaningful hearing.

Section 211.462.3(3) delineates specific enumerated duties for the GAL. *See* MO. REV. STAT. § 211.462.3(3) ("The guardian ad litem shall, during all stages of the proceedings…. Protect the rights, interest and welfare of a minor…"). To that end, the GAL is empowered to examine, cross-examine, and subpoena witnesses, offer testimony (*see* MO. REV. STAT. § 211.462.3(1)) and "***shall*** conduct all necessary interviews, other than the parent, having contact with or knowledge of the child…."). MO. REV. STAT. § 211.462.3(2) (emphasis added).

Under standards promulgated by this Court, the GAL is required to, *inter alia*, (i) be guided by the best interest of child (ii) exercise independent judgment, (iii) present recommendations to the court on the basis of evidence presented and he must provide reasons in support of any recommendations, and (iv) must ensure that the court receives independent, objective information about the child ***from all sources***, including the parents. *See In Re: Standards for Guardians Ad Litem in Missouri Juvenile and Family*

Court Matters (Mo. September 17, 1996), §§ 2, 14, 14 cmt.

The guardian ad litem's failure to discharge his duties constitutes reversible error. *See e.g. Baumgart v. Baumgart*, 944 S.W.2d 572, 579 (Mo. App. 1997) (reversing custody determination because "[t]he failure of the guardian here deprived the court of independent evidence"); *see also In re Interest of J.L.H.*, 647 S.W.2d at 861 ("If persons appointed as guardian ad litem sit back at trial and let two competing interests fight it out for custody, the best interests of the child are not necessarily being protected.").

Similarly, § 211.447.2 mandates that when a "petition has been filed by another party, the juvenile officer or the division ***shall*** seek to be joined as a party to the petition." MO. REV. STAT. § 211.447.2 (emphasis added). The State cannot play a passive (or non-existent) role in the termination proceeding. *See In re M.D.R.*, 124 S.W.3d at 476.

Here, there is no evidence that the GAL conducted a diligent and independent investigation. In addition to failing to investigate (or even speak once with) Mother, there is no evidence demonstrating that the GAL investigated (or even spoke with) the babysitters (*i.e.*, the Velazcos) that supposedly "placed" Child with the Respondents, Mother's family members, or anyone else that might contradict the story presented to the GAL by the Respondent's attorney. Instead, the GAL, beholden to the Respondents, restricted his investigation to visits to the Respondents' home on "multiple occasions." (2008TR. 36:3-22).

Moreover, the Juvenile Officer played no role whatsoever in the proceeding before the Juvenile Court. The Juvenile Officer made no attempt to investigate whether the

statutory requirements where satisfied for a private adoption. It is not even clear that the Juvenile Officer appeared at the Termination Hearing (2008TR. Cover Page). In fact, in the briefing before the Southern District, Respondents admit that the Juvenile Officer "was ***not*** in this case." (A106). (emphasis added). On that basis alone, the Judgment must be reversed. *See* MO. REV. STAT. § 211.447.2 ("the juvenile officer or the division ***shall*** seek to be joined as a party").

Because the GAL and Juvenile Office failed their statutory obligations to act diligently and independently of the Respondents, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

XII. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE MIXING OF THE TERMINATION AND ADOPTION PROCEEDINGS IN THE SAME HEARING IMPROPERLY INTERJECTED THE ISSUE OF THE RESPONDENTS' FITNESS INTO MOTHER'S TERMINATION PROCEEDINGS.

Even if the GAL and Juvenile Officer did not fail their obligations, the Judgment should be reversed because Mother's right to a fair hearing focused exclusively on the statutory grounds applicable to termination was violated.

"The sole issue before the juvenile court in [a termination] proceeding is the

present fitness of the parents to have custody of their children returned to them." *Ruth v. State*, 830 S.W.2d 528, 531 (Mo. App. 1992). Thus, the intervention of foster parents or would-be adoptive parents constitutes reversible error because "[t]he presence of the foster parents … tends to interject the ***false issue*** of the fitness of the foster parents to have custody of the children." *In re Trapp*, 593 S.W.2d 193, 205 (Mo. banc 1980) (emphasis added); *see also In re D_L_C_*, 834 S.W.2d 760, 768 (Mo. App. 1992) (participation of foster parents in termination proceedings "***tainted the proceeding to a degree that reversal is required***") (emphasis added).

"The proper approach in dealing with a contested termination under Chapter 453 would obviously be to avoid confusing the issues of termination and adoption. The termination issue must be considered first." *In re M.O.*, 70 S.W.3d 579, 588 (Mo. App. 2002). "The General Assembly has not authorized the removal of children from the custody of their parents on the ground that the children would be 'better off' in another home." *In re Trapp*, 593 S.W.2d at 205. "[I]n severing parental rights … the [juvenile] court is not to consider the quality of a particular adoptive home…. If it were otherwise, any person offering a wonderful home could successfully bring an action under Chapter 453 to adopt any child of a struggling parent merely by proving that there had been neglect within the pertinent time period, and by proving the superiority of the home offered by the proponent." *In re M.O.*, 70 S.W.3d at 588.

Missouri appellate courts have carefully guarded against the involvement of foster parents or prospective adoptive parents in custody and termination of parental rights proceedings. *See In re J.F.K.*, 853 S.W.2d 932, 936 (Mo. banc 1993) (denying

intervention because foster parents' proposal to adopt child was "different from the 'subject of the [termination proceeding]'"); *In re Trapp*, 593 S.W.2d at 205 ("There are sound policy reasons for rejecting respondents' attempt to intervene in this proceeding."); *In re D_L_C_*, 834 S.W.2d 760 at 768 (finding reversible error where, among other evidence, foster parents presented evidence concerning their education and affection for child).

Here, the mixing of the termination and adoption proceedings in the same hearing improperly interjected the issue of the Respondents' fitness into Mother's termination proceedings. For example, a substantial portion of the already short 106-minute hearing was devoted to the Respondents' purported fitness. (2008TR. 15:16-38:1, 51:14-52:13, 55:3-63:13). The GAL's examination also focused exclusively on the Respondents' purported fitness. (2008TR. 36:3-38:3, 62:5-63:15). And, in fact, Respondents' counsel admitted he mixed the evidence into one improper proceeding:

> BY MR. HENSLEY: We put on enough evidence, I believe – ***or I put on all the adoption evidence <u>at the same time</u>***, so if the Court's inclined to grant the adoption, then I will also include that in the judgment.

(2008TR. 101:17-22) (emphasis added).

Moreover, in its flawed best interests analysis, the Juvenile Court found that the Respondents owned and rented property and ran a small business; that their income exceeded their expenses; that their employment allowed for them to spend time with the child; that childcare was available; and that the child would be eligible for healthcare

through S.M.'s employment. (LF. 124). The Juvenile Court then erroneously contrasted the Respondents' wealth with Mother's circumstances: "This is ***contrasted*** with the biological mother and her family." (LF. 125) (emphasis added). "Even if the rulings were correct, which we need not decide, it is manifest that the [prospective adoptive] parents' roles in the trial were those of parties in everything but name. To countenance what occurred here would ignore *Trapp*, *M.K.P.*, and *M.B.A.*" *In the Interest of D_L_C_*, 834 S.W.2d at 767.

Because the Respondents' improper participation tainted the Termination Proceeding, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

XIII. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE MOTHER DID NOT RECEIVE A FAIR AND NEUTRAL HEARING UNENCUMBERED BY ERRONEOUSLY INJECTED, AND LEGALLY-IRRELEVANT, CONSIDERATIONS OF HER IMMIGRATION STATUS AND ALLEGED CRIME WHILE THE JUVENILE COURT SIMULTANEOUSLY IGNORED S.M.'S SERIOUS CRIMINAL PAST AND DRUG USE AND MR. PADEN'S UNRESOLVED MOLESTATION HISTORY.

Even if the termination was not improperly mixed with the adoption proceeding, the Judgment should be reversed because Mother was denied a fair a neutral hearing unencumbered by erroneously injected, and legally-irrelevant, considerations of her immigration status and purported crime.

As a threshold matter, it is axiomatic that Mother's immigration status has no bearing on her right to due process and equal protection. *See Zadvydas*, 533 U.S. at 693 ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

Here, the Juvenile Court improperly fixated on Mother's immigration status and pending deportation and erroneously extrapolated "past acts" to predict the future. (LF. 123). But a prognosis for future behavior must be established by clear, cogent, and convincing evidence, and there is no evidence in the record (expert or otherwise) supporting the Juvenile Court's assertion that Mother's immigration status "would cause future harm." *In re K.A.W.* 133 S.W.3d at 14; *see also*, *e.g.*, *In re C.W.*, 211 S.W.3d at 100 (requiring expert testimony).

Mother's immigration status should not have been considered or used as a pretext to find that Child is supposedly "better off" with Respondents, because Missouri law strictly forbids any analysis "to achieve a result where the child would be 'better off' in someone else's care." *In re M.D.R.*, 124 S.W.3d at 476. If that were permitted, every undocumented immigrant in the State of Missouri who is taken into custody by federal immigration enforcement could have their parental rights terminated. That is not the law, and is reversible error.

Moreover, in *Flores-Figueroa*, the U.S. Supreme Court subsequently rejected application of the aggravated identity theft statute in the manner it was applied to Mother. *See* 129 S.Ct. at 1894. Given that the U.S. Supreme Court rejected — by a unanimous decision — application of the aggravated identity theft statute in the manner that resulted in Mother's incarceration in the first place, her purported "crime" should not be used as a basis for terminating her parental rights. And even if the U.S. Supreme Court had not determined that Mother's alleged past acts are no longer sufficient to substantiate a crime, the Juvenile Court erroneously took judicial notice of Mother's "criminal" case. (2008TR. 3:23-24). This Court has held that pleading guilty to crimes concerning the supplying of false information cannot support the termination of parental rights. *See In re K.A.W.*, 133 S.W.3d 1, 11 n.7. Accordingly, Mother's now defunct (pursuant to *Flores-Figueroa*) "criminal" offense should not have considered by the Juvenile Court, or sprinkled throughout the Judgment. (LF. 113-15, 121-23, 125).

The Juvenile Court also erroneously considered Mother's "criminal" conviction (which is no longer good law) while simultaneously ignoring the mountain of evidence concerning S.M.'s serious criminal history and Bart Paden's (M.M.'s brother) history of sexual molestation. In fact, the record contains substantial evidence of S.M.'s criminal past. He was incarcerated for "almost a year" for a felony criminal conviction related to possession of stolen property worth over $15,000. (2008TR. 57:16-58:3, 64:25-65:11; LF. 29, 53-54). In the course of investigating S.M.'s felony charge, he received a "J-5 rating, which you only receive for assaulting a police officer." (LF. 29). S.M. was arrested for grand theft auto "resulting in a high speed, multi state police pursuit through

Missouri, Kansas, and Oklahoma" (LF. 29; 2008TR. 64:8-24), which resulted in a car accident, from which S.M. fled from the scene. (LF. 29). S.M. was arrested for, *inter alia*, evading arrest, auto theft, and served time in jail. (LF. 29). Felony charges were filed against S.M. in Missouri, Kansas, and Oklahoma. (LF. 29). S.M. was a arrested for shop lifting and assault. (LF. 30; 2008TR. 65:11-18). S.M. also has a history of drug abuse, which he initially denied at the Termination Hearing (2008TR. 61:22-23), but later admitted to during cross-examination. (2008TR. 63:25-64:7) ("Q. Did you use marijuana in the past? A: I have, yes. Q: Thank you. Did you try acid in the past, Seth? A: Yes. Q: How about cocaine? A: Yes. Q: How about speed? A: Yes.").

The Juvenile Court also ignored Mr. Paden's history of sexual abuse. The record evidences that Mr. Paden (six years older than M.M.) sexually abused his sister, when she was three until she was seven. "This abuse consisted of [M.M.] performing oral sex on her brother at his direction and her brother fondling and digitally penetrating her vagina." (LF. 32). Mr. Paden also involved "three other neighborhood boys in these activities." (LF. 32). The evidence of abuse was extensive and serious enough that the Respondents' own "assessor" could not determine "for certain" whether Mr. Paden posed a threat to children. (LF. 34).

Although the Juvenile Court's findings repeatedly reference Mother's supposed crime, the Judgment contains not one word concerning S.M.'s criminal past or drug use, or even a passing reference to Mr. Paden's unresolved history of sexual abuse. If the Juvenile Court was committed to considering Mother's supposed crime, it should also have made findings on S.M.'s and Mr. Paden's serious, and concerning, past acts.

Because the Termination Proceeding was tainted by the injection of Mother's immigration status and purported "criminal" past, the Judgment should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

INEFFECTIVE ASSISTANCE OF COUNSEL

Even if the Termination Proceeding was not riddled with numerous other due process violations, as discussed below in Point XIV, Mother was not afforded effective assistance of counsel.

XIV. THE JUVENILE COURT ERRED IN TERMINATING MOTHER'S PARENTAL RIGHTS AND GRANTING ADOPTION OF HER SON, BECAUSE MOTHER WAS DENIED DUE PROCESS AND THE JUVENILE COURT'S FINDINGS ARE CONTRARY TO THE LAW, IN THAT THE MOTHER DID NOT HAVE ANY COUNSEL (EFFECTIVE OR OTHERWISE) FOR TEN MONTHS AND THEN, DURING REMAINING TWO MONTHS BEFORE TERMINATION HEARING, DID NOT RECEIVE EFFECTIVE COUNSEL THAT PROVIDED A MEANINGFUL HEARING BY DILIGENTLY INVESTIGATING THE FACTS, PRESENTING EVIDENCE CONCERNING MOTHER'S NUMEROUS EFFORTS TO MAINTAIN CONTACT WITH AND CARE FOR HER SON, CROSS-EXAMINING KEY WITNESSES, INTRODUCING EVIDENCE OF MOTHER'S SEVERAL PHONE CALLS, REVEALING WITNESSES' MOTIVES TO TAKE HER CHILD, CHALLENGING ASSERTIONS THAT

SHE WAS PROPERLY SERVED, DEMONSTRATING THAT CHILD WAS CRIMINALLY PLACED BY INTERMEDIARIES THAT DID NOT SATISFY THE REQUIREMENTS FOR A PRIVATE ADOPTION, QUESTIONING THE LACK OF REQUIRED INVESTIGATIONS AND REPORTS, AND MAKING SOME ATTEMPT TO PRESENT MOTHER'S TESTIMONY.

Missouri recognizes a right to counsel in actions brought to terminate parental rights. *See* MO. REV. STAT. § 211.462.2. This statutory right to counsel "includes the right to effective assistance of that counsel." *In re Interest of F.M.*, 979 S.W.2d 944, 946 (Mo. App. 1998).

Here, both (a) the record itself and (b) the offer of proof demonstrate that Mother was denied effective counsel. And because "the requirements of constitutional due process are a question of law," this Court must "diligently" review de novo Mother's ineffective assistance of counsel claims without deference to the flawed Juvenile Court record or Judgment. *See Patrick*, 295 S.W.3d at 927; *In re E.A.C.*, 253 S.W.3d at 601.

A. <u>Record Demonstrates Ineffective Assistance of Counsel</u>

Without explaining the meaning or parameters of the phrase "on the record," the Court of Appeals has stated that "[i]n Missouri, the test is whether the attorney was effective in providing his client with a meaningful hearing based on the record." *In the Interest of J.M.B.*, 939 S.W.2d 53, 55-56 (Mo. App. 1997). This Court, however, has not yet had occasion to address any aspect of ineffective assistance of counsel claims in the context of an appeal of a termination of parental rights. As discussed below in Point

XIV.B., this Court can and should review Mother's proffered materials. But even if this Court decides that it should not review Mother's proffer, the record itself demonstrates ineffective assistance of counsel because (1) Mother had no counsel (effective or otherwise) for ten months, and (2) the counsel hand-picked by her adversaries failed to provide Mother with a meaningful hearing.

1. Mother had *No* Counsel (Effective or Otherwise) for Ten Months

Respondents filed their Petition on October 5, 2007 (LF. 5), and the Judgment is dated October 9, 2008. (LF. 112). Thus, the combined termination and adoption proceeding in the Juvenile Court was pending for a total of twelve months. But Mother had ***no*** counsel for ten of those twelve months.

Specifically, there is no dispute that Mother had no counsel from October 5, 2007 (the date the Petition was filed) to December 3, 2007 (the date Mr. Calton was appointed). (LF. 79). During that ***two***-month lapse, a hearing was held and judgment was entered transferring legal custody of Child to the Respondents on October 18, 2007. (LF. 62). Mother did not receive the required five days notice of that critical hearing, was not present at that critical hearing, and was not represented by counsel at that critical hearing. "At no time did the [Juvenile Court] make an inquiry or even an entry on the record concerning [Mothers]'s lack of representation." *In the Interest of J.S.W.*, 295 S.W.3d at 881. "Failure to appoint counsel to represent the natural parents or to obtain an affirmative waiver of that right has been held to be ***reversible error***." *In the Interest of J.C., Jr.*, 781 S.W.2d at 228 (emphasis added).

Even if Mother was properly served with the statutorily-required notice of her right to counsel (which she was not), the Judgment (albeit erroneously) states that she only received the mandated notice "on October 16, 2007" (LF. 120) — *i.e.*, only two days before the October 18, 2007 hearing. "To expect [Mother] to defend herself two days after service of this [notice] would result in a due process violation." *B.L.E. v. Elmore*, 723 S.W.2d 917, 921 (Mo. App. 1987). And even if Mother did not request an attorney, "it was incumbent upon the *court* to either appoint counsel or obtain an affirmative waiver of her right to counsel." *In the Interest of J.S.W.*, S.W.3d at 881 (emphasis in original). "The court's failure to take either of these steps constitutes ***reversible error***." *B.L.E.*, 723 S.W.2d at 920 (emphasis added).

Following the Juvenile Court's belated appointment of Mr. Calton, the record contains zero evidence that Mr. Calton took any steps to defend Mother for more than ***six months***. Indeed, Respondents admitted to the Juvenile Court that "there were some ***problems*** with the biological mother's legal counsel. She was previously represented by Mr. Calton." (2008TR. 2:23-35) (emphasis added).

After having no counsel for more than two months, and after Mother's first-appointed counsel did nothing for an additional six months, the counsel hand-picked by Respondents (*i.e.*, Mr. Dominguez) then failed to contact Mother for yet another month. Mr. Dominguez was "appointed" on June 13, 2008. (LF. 85). But Mr. Dominguez admits that he did not even bother to write a letter to Mother until July 29, 2008. (LF. 90). Mr. Dominguez also admits that he let another month go by before his first actual contact with Mother on August 12, 2008. (LF. 90).

In sum, for ***ten* of the twelve months** — from October 5, 2007 (the date the Petition was filed) to August 12, 2008 (the date of Mr. Dominguez's first contact) — Mother had no counsel, effective or otherwise. And the record contains zero evidence of any action by any counsel on behalf of Mother during those ten months. On that basis alone, the Judgment should be reversed.

2. Counsel Selected by Respondents was *Not* Effective During Remaining Two Months Before *or* During Termination Hearing

Mr. Dominguez represented to the Juvenile Court that his first contact with Mother was August 12, 2008 (LF. 90) — *i.e.*, less than two months before the Termination Hearing on October 7, 2008. Mr. Dominguez then waited nearly an additional month to file a motion for an extension of time to answer the Petition. (LF. 89-92). Importantly, Mr. Dominguez did not move to continue the hearing or otherwise attempt to secure additional time to adequately prepare, even though the Termination Hearing was subsequently set for October 7, 2008 (LF. 110) — *i.e.*, only one month after Mr. Dominguez requested additional time to answer the Petition.

The record itself demonstrates that Mr. Dominguez was ill-prepared. For example, Mr. Dominguez was confused as to the timeline of events (2008TR. 83:19-23) and did not even know that Mother had a brother. (2008TR. 90:2-7). And despite that Mother's fundamental rights were on trial, Mr. Dominguez made no effort whatsoever to develop any evidence about Mother, as confirmed by the Judgment: "Not much more is known about the biological Mother except from where could be discovered through her plea agreement and the testimony of Laura Davenport." (LF. 113). Mother should not be

punished for her prior counsels' failings. *See In the Interest of J.M.B.*, 939 S.W.2d at 56 ("counsel did little as mother's counsel beyond appear for the hearing … [i]t can hardly be said he advocated his client's interest").

Moreover, the record itself demonstrates that Mr. Dominguez did not develop any evidence about Mother's family; he did not serve any discovery or depose anyone; he did not investigate Ms. Davenport or the Velazcos; he did not challenge Ms. Davenport's testimony during the hearing; he rarely objected, even to obvious hearsay; he did not make arrangements for Mother to participate at the hearing or present her testimony in another form; he did not call any witnesses; and, except for a single document, he did not present any affirmative evidence. In short, "[M]other's counsel did little to advocate her cause, failing even to request a continuance or recess so that he might secure mother's presence. [Accordingly,] [i]t appears from the record that mother was deprived of a meaningful hearing before the termination of her parental rights." *In the Interest of J.M.B.*, 939 S.W.2d at 57.

B. <u>Proffer Demonstrates Ineffective Assistance of Counsel</u>

The record itself plainly demonstrates that Mother was denied effective assistance of counsel. Mother also makes the following proffer as a *prima facie* showing of additional and independent grounds in support of her ineffective assistance of counsel claims. If the Court reverses the Judgment based on any of Mother's several Points discussed above (*i.e.*, Points I-XIII, or the portion of Point XIV based on the record itself), then the Court need not review Mother's proffer. In any event, the proffer was

also presented to the Juvenile Court in a Rule 74 proceeding.[8]

1. The Proffer

The offer of proof presented here is evidence that would be in the record but/for ineffective assistance of counsel. The reason this proffer was unavailable to the Juvenile Court goes to the heart of Mother's ineffective assistance of counsel claims. Had Mother received effective assistance of counsel, the Juvenile Court would have been confronted with a significantly and substantively different record.

a. Fabricated Abandonment

When imprisoned, Mother's infant Child was cared for by her brother and his wife, and then when the task was beyond them, Mother's sister and her husband. (A109, A158). The sister, who also needed to work, utilized the babysitting services of the Velazcos to care for Child during the week, while Mother's family continued to care for him on weekends. (A110, A158, A165). Mother monitored this care arrangement.

[8] In the Rule 74 proceeding, Mother detailed several independent grounds why the Judgment should be set aside. On March 3, 2010, however, the Juvenile Court denied relief based on two procedural arguments advanced by Respondents in their motion for judgment on the pleadings. The appeal of the Juvenile Court's March 3, 2010 Order has been fully briefed, but has not yet been docketed for oral argument. Thus, the bulk of the proffer presented here has also been filed with the Southern District as part of the legal file in Case No. SD30415.

(A109-A110, A158).

Although the Judgment erroneously assumes that Mother made "no attempts all the way back to May 22, 2007" to contact Child (LF. 119), in truth, Mother maintained constant contact with her family members and placed numerous calls to check-up on Child. (A109-A110, A158). In fact, between May 22, 2007 (the ICE raid) and October 5, 2007 (the filing of the Petition) Mother called her sister more than ***forty*** times (A110, A232-A236) to, *inter alia*, "to make sure that [Child] was doing well." (A110, A158). And during several calls of those calls, Mother could hear Child talking and playing. (A110).

Moreover, despite Mother's incarceration, she continued to make arrangements for Child's care. For example, Mother actively sought assistance from three different individuals to secure a passport for Child, so that he could be placed with family in Guatemala. (A110). Mother requested help from her pastor. (A244) ("The pastor told me he's going to do his best to get a passport for the child."). Mother also requested help from her sister. (A244) ("I asked my sister for information that I can sign requesting a passport for my son."). Mother also requested (and received) help from a family friend, Wayne Walter, who visited Mother on October 28, 2007 at the St. Clair County Jail. (A177).

During her incarceration and before Child was taken, Mother was aware that Child was healthy, and that Ms. Davenport had helped to arrange babysitting services for Child. (A110, A158). In September 2007, Mother also made arrangements for Ms. Davenport to bring Child to visit her at St. Clair County Jail. (A110). While Ms. Davenport

eventually did visit Mother, Ms. Davenport either did not bring Child as planned or Ms. Davenport refused, for reasons known only to Ms. Davenport, to bring Child into the visiting room. (A110). And instead of permitting Mother to see Child, Ms. Davenport tried to convince Mother to consent to adoption. (A110, A239-A253). But Mother steadfastly refused to give her consent, and told Ms. Davenport that she did not want Child to be adopted, that she loved Child, and that she intended to take Child to Guatemala if she were deported. (A110, A239-A253).

During the same visit, Mother also requested that Ms. Davenport mail pictures of Child:

> Mother: The only thing I ask is if you could do me a favor. Somebody told me there are some photos and that you could bring them to me. They don't allow pictures to be brought but you could mail them to me. There is a lady here who has children and that is how she does it. Will you do that favor for me?
>
> Davenport: Yes. [Child]'s ***babysitter***, Jennifer, was going to get them for me but she didn't.

(A246) (emphasis added). Mother also asked again that Ms. Davenport bring Child to visit as promised: "Is there any way that you could bring him here? (A247).

b. <u>Illegal Transfer</u>

Although the Judgment erroneously assumes that Child was somehow voluntarily

"placed" with the Velazcos, and also assumes that the Velazcos — in their capacity as purported ministers — placed Child with the Respondents, in fact, Mother's sister (and brother-in-law) cared for Child until he was taken from Mother's sister by the Velazcos, and illegally placed for adoption without Mother's — nor any of Mother's family members' — permission or consent. (A151-A152, A159, A165).

Moreover, the Child was not "turned over" to the Velazcos (LF. 118); rather, as discussed above, the Velazcos provided babysitting services (2008TR. 79:16-17) and, in fact, Ms. Davenport testified that Child was "living" with Mother's sister and merely getting child care from the Velazcos. (2008TR. 78:8-80:7, 81:17-21, 84:17-18). Although Ms. Davenport also erroneously testified at the Termination Hearing that the Velazcos' "help" turned into "pretty much a full-time placement" (2008TR. 80:5-11), Ms. Davenport subsequently testified at a public hearing (the "Board Hearing") convened by the Carthage R-9 School District Board of Education (the "Carthage Board") that Mother's sister cared for Child during the first four months Mother was in St. Clair County Jail:

> Q: Where was the baby during those four months?
>
> A: In – the aunt. Her sister was talking care of the baby.
>
> Q: And [he] was there the entire four months?
>
> A: He was there the entire four.

(A317).

Ms. Davenport also admitted to Mother that Child remained in her sister's care, even though the Velazcos babysat during the week (A247) ("He stays from Sunday

through Saturday, but when your sister can come to pick him up, she comes and gets him. Well your sister doesn't come, her husband comes."), and between May 22, 2007 and October 5, 2007 nearly two dozen of the more than forty calls Mother made to her sister occurred on the weekend. (A232-A236). Mr. Walter also saw Child on the weekends in the care of Mother's sister (A177), and Mr. Walter's contemporaneous letter filed with the Court describes the arrangements made with Mother's sister to care for Child, and the Velazcos' kidnapping:

> ***Child Aunt has been trying to find the baby.*** The mother gave the baby to her sister to take care of it when she was incarcerated. Laura Davenport told the Aunt that the Velazco family would take care of the baby until other arrangements could be made. ***The Velazco family took care of the baby during the week – the Aunt would take care of him on the weekends. When the Aunt went to pick the baby up the Velazsco family said they didn't have the baby.*** In the meantime, the Aunt asked Wayne Walter about getting a passport so they could send the baby to Guatemala to another sister of the baby to take care of it. ***Then the Aunt received a letter (copy) from the Velazco family.*** Wayne was very concerned about the baby. He visited the mother who is being held in Oseola, Mo. by the Fed. gov. The mother said she did not want the baby adopted out. She wants to take the

> baby back to Guatamala with her, if or when, she is deported. ***She said she had not received any papers concerning the adoption***.

(LF. 69) (emphasis added). The passport application that was included with the letter Mr. Walter filed with the Court also identifies Child's residence as with Mother's sister. (LF. 71).

On or about October 10, 2007, Mother learned that Child had been taken. (A110). Mother was informed that her brother-in-law had attempted to pick-up Child from the Velazcos on or about October 6, 2007, but Child was not there and the Velazcos told her sister and brother-in-law that the "government" and "marshals" took Child. (A110-A111, A151, A158-A159, A165). Although contained in the Court record, the Judgment ignores that the Velazcos actually admit — *in a letter dated October 8, 2007* — to transferring Child:

> To: ***The Family of Child M. Bail Romero***
>
> To Whom It May Concern:
>
> I am writing this letter to Child Miguel Bail Romero. ***Who will no longer be in our care or living in our house after 10-7-2007***. The couple Mr. And Mrs. [M.] is pursuing adoption in the case of Child Bail Romero. The papers for them to get guardianship of Child has already been sent to the family courts of Jasper County by their lawyer. And there is nothing that we can do legally nor can you. The only person

> that has the chance to do anything is the mother. The proper papers have already been sent to the mother in jail. If you wish to know more about this matter you need to be in contact with Child' mom. ***And we ask that you please no longer contact us in respect to this matter***. Because it is out of our hands now.
>
> Sincerely,
>
> The Velazco Family

(LF. 74) (emphasis added). If, as the Judgment presumes, Mother and her family were not trying to locate Child, there would have been no reason for the Velazcos to request that Mother's family cease contacting the Velazcos.

In fact, Mother and her family were desperately searching for Child. (A110-A112, A158-A159, A165). Mother's family sought help from Mr. Walter, and Mr. Walter contacted the U.S. Marshals' Office (because the Velazcos had falsely informed Mother's family that the "marshals" took Child), and Ms. Davenport. (A110-A112, A158-A159, A165, A177-A178). Mother and her family members also enlisted the assistance of several other people to help locate information concerning Child. (A110-A112, A172, A187-A188, A208-A210, A219-A220). And the instant that Mother learned that her son had been taken, Mother immediately called Ms. Davenport and the Velazcos. (A111). The St. Clair County Jail telephone logs evidence that Mother made ***eleven*** calls, collectively, to Ms. Davenport and the Velazcos between October 10, 2007 and October 13, 2007, but all of Mother's calls were refused. (A111, A230-A231, A237-A238).

Mother's public defender in her federal plea bargaining proceeding also corroborates that, while incarcerated, Mother "frequently expressed concern about her son;" that Mother "was having trouble locating her son and asked [for] help;" and that after the Velazcos criminally placed Child with the Respondents, Mr. Walter was trying to help, because Mother's "sister had been taking care of [Mother]'s son, but the babysitter gave [Mother]'s son to another family." (A187-A189). In fact, Mother even asked the federal judge "about her son and stated [as the Velazcos falsely told Mother's family members] that her 'child is in the custody of the government at this time,'" but the federal judge responded "that he did not 'have control over that situation.'" (A188, A196-A197).

c. Criminal Placement

On October 5, 2007, before the Velazcos even informed Mother's sister that Child would not be returned to her (LF. 74; A158-A159, A165), the Respondents filed their Petition to terminate Mother's parental rights and adopt Mother's biological son. Even if the Velazcos are "clergyman" as contemplated by Missouri law, the Velazcos are ***not*** Mother's pastors or "clergyman." (A110). In fact, Mother has never met the Velazcos, and she did not give the Velazcos, or anyone else, permission or consent to adopt Child or place Child for adoption. (A110, A151-A152). And although the Adoption Worksheet notes that placement (albeit illegally) was made by the Velazcos, the Adoption Worksheet also notes that the Velazcos have "***no legal standing in case***." (A254) (emphasis added).

Moreover, after selecting and retaining Mr. Dominguez to purportedly "represent"

Mother, Respondents' counsel then informed Mr. Dominguez that supposedly the "clergy" (*i.e.*, the Velazcos) had presented "the option" of placing Child with the Respondents. (A257). In Mother's Rule 74 proceeding, Ms. Velazco testified that she was contacted by Bart Paden (M.M.'s brother) to confirm that Ms. Velazco was "ordained" and to explain "that there was a law … a minister could place a child out." (A286). But, importantly, Ms. Velazco also testified that she is ***not*** Mother's "clergyman." (A298). And Jennifer confirmed that she has never met Mother! (A299).[9]

d. Invalid Procedures

No one — not the Respondents, the Velazcos, the GAL, or the Juvenile Officer — made any attempt to comply with the statutorily mandated investigation and reporting requirements. In fact, both Ms. Velazco and Mr. Paden testified in Mother's Rule 74 proceeding that neither the GAL nor the Juvenile Officer even contacted them concerning Child. (A279, A282). Respondents' counsel also asserted in a letter to Mr. Dominguez that the "assessment for the foster program" was "confidential" and, therefore, he was withholding from Mother on that basis, which eliminates any possibility that the "assessment for the foster program" qualifies as one of the many mandatory investigations and reports required under Chapter 211 or 453. (A257).

Moreover, Mother did not receive notice or any court documents, including the

[9] Ms. Velazco's testimony also demonstrates that she and her husband are ***not*** even "clergyman" as contemplated by Missouri law. (A292, A295-A298).

Petition and summons, prior to the Custody Hearing. (A112). Nor did she receive any pleadings in her native language. (A112). And, in fact, Mother did not know where Child was after he was taken from Mother's sister. (A151).

e. Improper Appointments

In addition to admitting Respondents' impermissible control over the appointment and dismissal of Mother's counsel to the Juvenile Court (2008TR. 2:23-35), Respondents' counsel (Mr. Hensley) also recently admitted that the Respondents selected Mr. Dominguez in an e-mail exchange with a reporter for the New York Times: "This is one reason why ***we hired*** Mr. Dominguez…. Further, when Mr. Calton was no longer on the case ***we got*** Mr. Dominguez involved…." (A271, A273) (emphasis added).

Even more remarkable is that Respondents' counsel encouraged Mr. Dominguez to shirk his duties of loyalty to, and zealous advocacy of, Mother by instructing Mr. Dominguez on ways to save the Respondents money and preparing a script for Mr. Dominguez to use to convince Mother to consent to Child's adoption:

> After speaking with you, it is now my understanding it is your intent to try to communicate with your client *by letter* first before going to visit her. Again, I am not requesting any information about attorney/client privileged contact you have with her, but I would appreciate you keeping me informed as to whether she does get back to you. My expectation would be that if she does not (as Mr. Calton said she did not get back with him) then I would not think that a trip to see her would

> be necessary. Also, if you do develop a dialogue, it may not be necessary to see her if you can communicate by mail, therefore by ***saving my clients money*** (particularly if she is agreeable to consenting to the adoption).
>
> In that regard, I am sending you another Consent to Adoption….
>
> I mentioned to you on the phone that I have been in your situation many times as several attorneys in Missouri contact me to represent biological parents in this geographic area, particularly those who are incarcerated. As such, I have developed somewhat of a "script" to assist me in these sometimes rather difficult meetings. Sometimes, of course, the biological parent realizes that the children is better off with someone else and the meeting is quick. Other times, it takes soul searching for the biological parents to do the right thing….
>
> Thank you for your attention to these matters. ***My script***, as I mentioned, is enclosed.

(A259-A261) (bold emphasis added).

In addition to Respondents' counsel's admission that he somehow had access to attorney-client privileged communications between Mother and Mr. Dominguez (A102), Mr. Dominguez's very first letter to Mother — ***written before he ever spoke to Mother***

— also evidences that Mr. Dominguez was already beholden to the story he was told by the party who selected and hired him: "Since you have not had any type of contact with your son for a period of six months…." (A274-A276).

f. Ineffective Counsel

Mother's first "appointed" counsel (*i.e.*, Mr. Calton) never contacted Mother. (A151). Even the Respondents' counsel has acknowledged that Mother was abandoned by her first "appointed" counsel: "Though I do not know if you will be able to get in touch with Mr. Calton (I am not sure where he is anymore)…." (A256).

Mother did not know that Mr. Dominguez was located, selected, and retained by Respondents and their counsel. (A151). And in addition to the above-described failings contained in the record, the additional evidence concerning Mr. Dominguez's *in*-action is shocking. For example, Mr. Dominguez attests in his Extension Motion that "Counsel located Mother M. Bail-Romero at the US Penitentiary-Hazelton in Bruceton Mills, West Virginia." (LF. 90). In truth, Mother (with the assistance of a prison counselor named Lisa Christmas aka Counselor Johnson) located Mr. Dominguez. (A111, A209).

Even after Mother successfully located Mr. Dominguez, on the rare occasions that Mr. Dominguez would actually take Mother's calls, he told Mother that "there was nothing she could do" (A219-A220), and from the beginning Mr. Dominguez declared that it was "out of his hands." (A111, A210). Apparently, after speaking with the Respondents' counsel, but before he had ever spoken with Mother, Mr. Dominguez had already determined that Child should remain with the Respondents. (A260) ("[A]s you have already experienced in thinking about this case, these adoptions do present

somewhat of a challenge in the sense of what is in the best interest of the child versus a right to try and be a parent.").

g. Perjured Testimony

Despite having been informed that Child had been taken without Mother's permission (and not abandoned), and despite having been specifically informed that Mother had attempted to contact Ms. Davenport (A111, A124, A130-A131), Mr. Dominguez requested entry of only one item into evidence and did not call any witnesses on Mother's behalf or cross examine Ms. Davenport concerning the several inconsistencies in her story.

Ms. Davenport was the only non-party to testify at the Termination Hearing. She testified on behalf of the Respondents, and her testimony is predicated on multiple layers of perjury concerning issues particularly material to the Judgment.

First, Ms. Davenport testified that the Respondents were the only family interested in adopting Child. (2008TR. 81:14-82:6) ("Q: Was there anyone else that you were aware of that wanted to adopt the child? A: No."). But during her visit with Mother on September 19, 2007, Ms. Davenport described a different family:

> There are two modes of adoption.... This family does not want to keep you from seeing your son or knowing his well-being. This is an established family. ***He is from Mexico, but he looks like a Guatemalan. The wife is American. They have a little six year old girl.*** The little girl loves Child a lot. He has adapted very well to them. They are a complete

family....

(A242). Ms. Davenport was not describing the Respondents; rather, the description squarely fits the Velazco family. (A301). The record contains no reasonable explanation for why the Velazcos were interested in adopting Child as of September 19, 2007, but allegedly within days were "seeking out" the Respondents regarding a private adoption pursuant to the clergy placement exception. (2008TR. 9:21-10:4).

Second, Ms. Davenport also testified that she had no contact with Mother after "September 9, 2007." (2008TR. 84:14-20).[10] In truth, immediately after Child was taken on or about October 6, 2007, Mother attempted to contact Ms. Davenport ***eight*** times, but Ms. Davenport refused her calls. (A111, A231). M.M. similarly testified at the Custody Hearing that Mother had not "tried to get in touch" with anyone. (2007TR. 7:19-23). In fact, Mother made numerous calls to her sister both before and after Child was taken, and several calls to both Ms. Davenport and the Velazcos immediately after learning Child had been abducted. (A111, A230-A231). M.M. also testified at the Termination Hearing that Mother had not requested visitation. (2007TR. 12:20-23). In fact, Mother requested visitation on multiple occasions (A110, A151), including during Ms. Davenport's September 19, 2007 visit to the St. Clair County Jail (A110, A247) and in an October 28,

[10] Ms. Davenport actually visited Mother at the St. Clair County Jail on September 19, 2007. (A225).

2007 letter. (LF. 70, 94) ("I would like to have visitation with my son").[11]

Moreover, Mother (and others on her behalf) *did*, in fact, make contact with Ms. Davenport. (A111, A208). Counselor Johnson, on Mother's behalf, spoke to Ms. Davenport on at least two occasions. (A208). In their first conversation, Ms. Davenport told Counselor Johnson that Child had been "placed." (A111, A208). Ms. Davenport refused to give Counselor Johnson further information, and Ms. Davenport ended the call abruptly. (A111, A208). In the second instance that Counselor Johnson connected with Ms. Davenport, Counselor Johnson informed Ms. Davenport that Mother wanted to speak with her, but when Counselor Johnson handed the phone to Mother, Ms. Davenport hung up before Mother could ask any questions. (A111, A208). Counselor Johnson attempted to contact Ms. Davenport at least one additional time, but Ms. Davenport would not accept Counselor Johnson's call. (A208). Ms. Lugo, on Mother's behalf, also made multiple calls to Ms. Davenport, but Ms. Lugo was never able to connect with Ms. Davenport. (A219). Ms. Lugo's brother in California also tried calling Ms. Davenport, but he too was not able to connect. (A219).

Documentary proof, in the form of a memo written by Ms. Davenport and admitted into evidence at the Board Hearing, also evidences Mother's attempts to contact

[11] Respondents may assert that the October 28, 2007 letter somehow demonstrates that Mother was timely notified of the legal proceedings in the Juvenile Court. In fact, that letter was filed by Mr. Walter. (A178).

Ms. Davenport after Child was taken:

> However, during the summer of 2008, while on vacation, I did receive 2 collect calls-one from a jail that I declined not knowing who I could possibly know in jail. Then I got a call from [Mother]'s sister (I'm not sure which one) saying it was she trying to contact me. I told her I was on vacation and not at work. Another time the same summer, a pastor from a jail called on her behalf. I told him I did not know anything that could help her.

(A306).

Third, Ms. Davenport testified at the Termination Hearing that, during her jail visit, Mother informed her that there was someone in the St. Clair County Jail who could read English. (2008TR. 83:5-13). In truth, the transcript of Ms. Davenport's jail visit demonstrates unequivocally that no part of the conversation whatsoever touched on any inmates' or jail personnel's English reading skills. (A239-A253). No one, in fact, at the St. Clair County Jail, where Mother was detained until July 2008, helped her understand the legal proceedings concerning Child. (A112, A220).

h. Post-Judgment Revelations

On February 13, 2009, Mother was released from prison. Prior to her release, Mother fought for ***and was granted*** a stay of her deportation so that she could pursue restoration of her parental rights. (A112). Unbeknownst to Mother, on April 21, 2009, at nearly the same time that she was fighting for a special order, Ms. Davenport's

supervisor, Lynda Homa, was placed on administrative leave "pending completion of an investigation into allegations of improper behavior by a Parents As Teachers educator [*i.e.*, Ms. Davenport] in an incident [*i.e.*, the fraudulent adoption of Child] that occurred under [Ms. Homa's] supervision of the Parents As Teachers program." (A307).

On June 16, 2009, the Carthage Board charged Ms. Homa with "immoral conduct," based on her supervision and knowledge of Ms. Davenport's participation in an illegal adoption:

> A. Ms. Homa authorized her subordinate [*i.e.*, Ms. Davenport] to travel to jail in Osceola, Missouri, on September 19, 2007, to visit a former participant in the Parents as Teachers Program [*i.e.*, Mother]. ***This visit was for an improper purpose and related to the adoption of the incarcerated woman's child [i.e., Child]***.
>
> B. Ms. Homa authorized this visit with the knowledge that her subordinate ***had helped arrange the transfer of custody of the incarcerated woman's child [i.e., Child] to another family without court or parental approval***.

(A319) (emphasis added).

On August 13, 2009, the Carthage Board held a public hearing concerning Ms. Homa's and her subordinate's (*i.e.*, Ms. Davenport's) "immoral conduct" involving the

illegal adoption of Child. Ms. Davenport and Ms. Velazco testified at the Board Hearing. (A311). The transcript of Ms. Davenport's jail conversation with Mother on September 19, 2007, which materially contradicts the testimony Ms. Davenport gave before the Juvenile Court at the Termination Hearing, was admitted into evidence at the Board Hearing. (A323).[12]

On August 31, 2009, the Carthage Board terminated Ms. Homa based on "substantial and competent evidence to support the Statement of Charges preferred against Ms. Homa." (A340). Specifically, the Carthage Board found that "[t]he significant discrepancies in Ms. Davenport's sworn testimony before the Board of Education and the translation of the audio recording of her conversation with Ms. Bail at the jail, ***removes <u>any credibility</u> given to Ms. Davenport's testimony***." (A334) (emphasis added). The Carthage Board also concluded that the "evidence supports the finding" that Ms. Davenport's jail visit "was for an ***<u>improper purpose</u>*** and related to ***the adoption of the incarcerated woman's child***." (A334-A335) (emphasis added). And the Carthage Board concluded that "Ms. Homa has demonstrated ***<u>immoral conduct</u>*** as defined by Missouri law," involving the illegal adoption of Child. (A336) (emphasis added).

2. <u>This Court Can and Should Review the Proffered Materials</u>

[12] The Carthage Board's decision, including the admission of the jail transcript into evidence, has been affirmed on appeal to the Jasper County Circuit Court. (A341-A344). Ms. Homa is represented by one of the two law firms representing Respondents. (A310).

This Court has not yet addressed whether, in the context of an appeal of a termination of parental rights, an appellant is precluded from proffering materials outside the record to support ineffective assistance of counsel claims. Two districts of the Court of Appeals, however, have suggested that materials outside the record may be required, if not informative. Specifically, in *In the Interest of D.S.G.*, 947 S.W.2d 516 (Mo. App. 1997), the Eastern District denied the appellant's ineffective assistance of counsel point because the appellant "fail[ed] to allege that he suffered any prejudice" and "***cite[ed] no evidence that should have been introduced or course of action which should have been taken***." 947 S.W.2d at 519 (emphasis added). In *In the Interest of C.N.W.*, 26 S.W.3d 386 (Mo. App. 2000), the Eastern District again denied the appellant's ineffective assistance of counsel point because the appellant offered only "[c]onclusory statements" and "failed to ***allege*** how she was prejudiced." 26 S.W.3d at 393 (emphasis added). And in *In the Interest of S.T.W.*, 39 S.W.3d 517 (Mo. App. 2001), the Southern District noted the Eastern District's prejudice requirement and found that "an examination for prejudice is ***informative*** to the determination of whether Appellant was afforded a meaningful hearing." 39 S.W.3d at 518 (emphasis added).[13]

[13] Missouri's appellate courts have also found exceptions to the general rule against considering materials outside the record. *See Baker v. Aetna Casualty & Surety Co.*, 193 S.W.2d 363, 366 (Mo. App. 1946) ("However in the very nature of things there must be inherent power in an appellate court to look beyond the record where the orderly administration of justice so requires…."); *Reynolds v. City of Valley Park*, 254 S.W.3d

Although the Court of Appeals has generically and generally used the phrase "on the record," ***no*** Missouri court has held that appellants are precluded from proffering materials outside the record to support ineffective assistance of counsel claims. The answers to the following key questions demonstrate precisely why, in the context of an appeal of a termination of parental rights, it is both necessary and appropriate to look outside the record.

a. <u>Whether an allegation of ineffective assistance of counsel can be made collaterally or only on direct appeal</u>?

The Eastern District has held that an allegation of ineffective assistance of counsel must be made on direct appeal or "the issue is deemed waived." *In the Interest of C.N.W.*, 26 S.W.3d at 393. The Eastern District has also held that an allegation of ineffective assistance of counsel many not be raised in a collateral attack. *See* 26 S.W.3d at 392 (an allegation of ineffective assistance of counsel not "properly raised after the entry of a final judgment by a Rule 74.06 motion").

264, 266 (Mo. App. 2008); *Fitzpatrick v. Hannibal Regional Hosp.*, 922 S.W.2d 840, 843 (Mo. App. 1996); *Citizens for Safe Waste Management v. St. Louis County Air Pollution Control Appeal Bd.*, 896 S.W.2d 643, 644 (Mo. App. 1995); *Davis v. Davis*, 799 S.W.2d 127, 130 (Mo. App. 1990); *accord U.S. v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000) (recognizing inherent equitable power to supplement the record on appeal); *Newton County Wildlife Assoc. v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) (recognizing evidence outside the record proper where bad faith or improper behavior).

Other states have held that a collateral attack is the appropriate vehicle for raising an allegation of ineffective assistance of counsel. *See In re Darlice C.*, 129 Cal. Rptr. 2d 472, 475 (Cal. App. 2003) ("In general, the proper way to raise a claim of ineffective assistance of counsel is by writ of habeas corpus, no appeal."). Those states that require a collateral attack recognize the necessity of looking outside the record:

> The establishment of ineffective assistance of counsel ***most commonly <u>requires</u> a presentation which goes beyond the record of the trial***.... Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record.... Evidence of the reasons for counsel's tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be presented by declarations or other evidence filed with the writ petition.

129 Cal. Rptr.2d at 475 (emphasis added; quotation marks omitted); *see also O.S. v. C.*, 126 Cal. Rptr.2d 571, 575 n.2 (Cal. App. 2002) ("To bring a claim of ineffective assistance of counsel, [Appellant] ***needed to introduce documentation outside the record***, which he may only do through a writ petition.") (emphasis added).

In the criminal context, Missouri courts also recognize the necessity of looking outside the record, which is permitted in Missouri by collateral attack. *See Bequette v. State*, 161 S.W.3d 905, 908 (Mo. App. 2005) ("Assuming that Movant's allegations that he adequately contributed to his children's support are true, they constitute facts, not conclusions, which could constitute a defense. Movant's allegations that Counsel was

ineffective in misinforming him about the possibility of a defense are not refuted by the record because they are based on information Movant ***obtained subsequent to*** his plea and sentencing testimony.") (emphasis added).

A civil appellant in Missouri in the context of a *direct* appeal of a termination of parental rights faces a "heads you win, tails I lose" scenario: A civil appellant must bring a direct appeal, but may be precluded from proffering materials outside the record that Missouri courts recognize as necessary in the criminal context. This Court should permit (if not require) civil appellants in the parental termination context to proffer materials to support ineffective assistance of counsel arguments.

b. Whether to apply the *Strickland* test or a more "relaxed" test of ineffectiveness?

The districts of the Court of Appeals disagree as to the test of ineffectiveness. In *In Interest of J.C., Jr.*, the Western District found the *Strickland* test inappropriate, opting instead for a more "relaxed" test:

> Some states have held that the *Strickland* test as to whether a convicted person was afforded effective assistance of counsel is also applicable to termination of parental rights cases, i.e., deficiency in counsel's performance and actual prejudice…. Other states have *relaxed* the criminal standard and have held the test of ineffectiveness to be that "if it appears from the record that an attorney was not effective in providing a meaningful hearing, due process guaranties have not been

> met."… We hold the latter standard is the correct one.

781 S.W.2d at 228.

The Eastern District, however, in *In the Interest of D.S.G.*, applied the *Strickland* test:

> Trial counsel is ineffective if (1) he or she fails to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances, and (2) the failure to exercise such diligence is prejudicial.

947 S.W.2d at 519. And in *In the Interest of C.N.W.*, the Eastern District again articulated the test as requiring prejudice. *See* 26 S.W.3d at 393 (discussing prejudice requirement).

The Southern District, in *In the Interest of S.T.W.*, recognized disagreement among the district courts. *See* 39 S.W.3d at 518 n.3. "Nevertheless" the Southern District, applying the "relaxed" test, held that "***an examination for prejudice*** is informative to the determination of whether Appellant was afforded a meaningful hearing." *Id*. at 518 (emphasis added).

In their briefing before the Southern District, Respondents did not dispute that the more "relaxed" test should apply. And Mother agrees that the more appellant-friendly, and less difficult to satisfy, test should adopted by this Court.

c. Whether to permit or preclude or require proffered materials to support ineffective assistance of counsel claims?

Whether this Court adopts the more "relaxed" test or opts for the *Strickland* test, the Court should not allow *the lack of* a record to be used as both a sword and a shield.[14] Indeed, "in some cases it will be impossible to determine the merits of an ineffectiveness claim from the appeal record. This is probably the most serious disadvantage to raising an ineffectiveness claim on direct appeal." Susan Calkins, *Ineffective Assistance Of Counsel In Parental-Rights Termination Cases: The Challenge For Appellate Courts*, 6 J. App. Prac. & Process 209 (2004). "Various courts have highlighted the record requirement and the problem it poses for appellants who urge ineffective-assistance claims in termination cases." *In the Interest of K.K.*, 180 S.W.3d 681, 685 (Tex. App. 2005).

For example, in *People in the Interest of C.H.*, 166 P.3d 288 (Co. App. 2007), the Colorado Court of Appeals discussed the necessity of permitting appellants in the parental termination context to proffer materials to support ineffective assistance of counsel arguments:

> Certain problems may arise if an ineffective assistance claim is presented for the first time on direct appeal. The chief

[14] Mother does not mean to suggest that the Court should adopt the *Strickland* test. To the extent, however, the Court conducts an "an examination for prejudice" as an informative exercise (as the Southern District did in *In the Interest of S.T.W.*), then this Court need not resort to "hypotheticals," because Mother has proffered materials to "inform" her ineffective assistance of counsel claims.

> problem is that the record may not contain sufficient information to enable the appellate court to resolve the parent's contentions.

166 P.3d at 291. The Colorado Court of Appeals concluded that an offer of proof was required:

> At our request, [Appellant]'s appellate attorney has submitted an offer of proof in support of this allegation. (We extended this opportunity only because this is the first time that a Colorado appellate court has explained the degree of specificity required when an ineffective assistance claim is raised on appeal from a termination proceeding. ***We note that, in future cases, parents and their attorneys will be expected to present their allegations, with the requisite specificity, in the petition on appeal***.)

Id. at 292 (emphasis added).

Here, Mother has made such an offer of proof. No Missouri court has held that appellants are precluded from proffering materials outside the record to support ineffective assistance of counsel arguments. And the phrase "on the record" cannot (and should not) be interpreted to be so restrictive. Otherwise, in cases where (as here) nearly everything that transpired in the trial court was improper, it would be harder for an appellant to establish that she did not receive a "meaningful hearing" (*i.e.*, the more "relaxed" test), because the appellant is supposedly so strictly limited to the *lack of* a

record, and yet the appellant could more easily satisfy the *Strickland* test (*i.e.* the more difficult test) by proffering material outside the record.

As discussed above, in the criminal context, Missouri courts recognize the necessity of looking outside the record, as do courts in Missouri's sister states. *See Henke v. State*, 767 N.W.2d 881, 886 (N.D. 2009) ("On claims of ineffective assistance of counsel, the record and transcripts are generally not adequate…. '[A] petitioner may allege ineffective assistance of counsel based on matters occurring outside the record or transcript….").

Missouri's sister courts that have addressed the issue in the parental termination context have also recognized that it is both necessary and appropriate to look outside the record on ineffective assistance of counsel arguments. *See In re Petition of R.E.S.*, 978 A.2d 182, 194-95 (D.C. App. 2009) ("based on affidavits which proffer in some detail what appellant and other witnesses would have said if they had been called to testify"); *N.J. Div. Of Youth & Family Serv. v. B.R.*, 929 A.2d 1034, 1040 (N.J. 2007) ("That will include the requirement of an evidentiary proffer in appropriate cases."); *People in the Interest of C.H.*, 166 P.3d at 292 ("in future cases, parents and their attorneys will be expected to present their allegations, with the requisite specificity, in the petition on appeal"); *In the Matter of Geist*, 796 P.2d 1193, 1203 (Or. 1990) ("She must produce some credible evidence which demonstrates that her termination proceeding was not fundamentally fair.").

3. Mother was Denied Effective Assistance of Counsel

It would be a perverse result if the application of the more "relaxed" test here

meant that Mother was precluded from proffering materials that *would* satisfy the *Strickland* test. The Court should at least permit Mother's proffer to "inform," or serve as "hypotheticals" of, the many ways Mother was denied a meaningful hearing. *See In the Interest of S.T.W.*, 39 S.W.3d at 518 ("examination … is informative").

Here, the totality of the record and proffered materials demonstrates that Mother was denied effective representation by counsel at numerous times and in numerous ways. For example, Mother's first "appointed" counsel did nothing for the six months when he supposedly "represented" her, and then simply disappeared. Even Respondents' counsel admits that Mr. Calton abandoned Mother. (2008TR. 2:23-3:5). Mother's second "appointed" counsel (Mr. Dominguez) — who was chosen by the Respondents — was no better. Indeed, Mother had no information concerning her "appointed" counsel until Counselor Johnson located Mr. Dominguez in August 2008. (A111, A209-A210, A219-A220). Even then, Mr. Dominguez placed little importance on Mother's case since it was "out of his hands" and he told Mother "there was nothing she could do." (A111, A209-A210, A219-A220).

Counsel's ineffectiveness not only left the Juvenile Court with "not much … known about" Mother, but a record entirely lacking in evidence going to the key issue before the Juvenile Court, namely whether Mother had in fact abandoned her child while incarcerated. The *effective* counsel to which Mother was entitled could have developed favorable evidence of her unabated affection for, and interest in, her child by introducing evidence of her many phone calls and queries to others about her child's welfare, the constant monitoring of who was caring for him, and efforts to have Ms. Davenport ***and***

Child visit her in prison. (A109-A112, A151, A158, A165, A172, A177, A187-A188, A208-A210, A219-A220, A230-A236, A240, A247).

Effective counsel, or at least one as effective as the New York Times reporter who ferreted out Ms. Davenport's and Ms. Homa's violations of law in dealing with Mother and her child, would have been able to show that it was Ms. Davenport who had thwarted Mother's efforts to maintain contact with her child. (A249) ("That's not necessary because you will hear everything from the other people."). And effective counsel would have demonstrated that the allegations of abandonment are fabricated by obtaining, among other evidence, the St. Clair County Jail telephone logs that evidence that, until Child was taken from Mother's sister in October 2007 and illegally "placed" with the Respondents, Mother maintained constant contact and made numerous calls to check-up on Child (A230-A236).

Effective counsel would have shown that Ms. Davenport had an agenda to take Mother's child away from her, and that Ms. Davenport's testimony to the Juvenile Court — the only witness cited by the Juvenile Court in its opinion (LF. 113) — is the unreliable testimony of a witness who lies under oath. Although the August 2009 Board Hearing confirming Ms. Davenport's duplicity, unlawfulness, and mendacity was not available to Mother's prior counsel in 2008, the *evidence* relied upon by the Carthage Board (not to mention New York Times reporter) was certainly available, including the jail recording of Ms. Davenport's key September 19, 2007 conversation with Mother, which would have made clear Ms. Davenport's agenda, that Mother remained intensely interested in her child's welfare, and that Ms. Davenport was lying about both. (A239-

A253).

Effective counsel would have presented evidence that Mother left her son in her family's care believing he would be adequately cared and provided for until she was released from prison. (A109-A110, A158, A165). And effective counsel would have challenged the assertion that Mother was properly served, but failed to make any attempts to locate Child. (A110-A112, A151-A152, A158, A165, A172, A177, A187-A188, A208-A210, A219-A220, A230-A236, A240, A247). For example, M.M. testified that Mother had not "tried to get in touch" with anyone. (2007TR. 7:19-23). Minimally competent counsel not only would have made a hearsay objection, but also would have consulted the available St. Clair County Jail telephone logs and could easily have developed contrary evidence demonstrating that Mother made numerous calls to her sister both before and after Child was taken, and several calls to both Ms. Davenport and the Velazcos immediately after learning Child had been abducted. (A110-111, A230-A231).[15]

Effective counsel could have easily demonstrated that Child was criminally "placed," because the Velazcos "transferred" custody without Mother's permission and

[15] M.M. also incorrectly asserted that Mother had not requested visitation. (2008TR. 12:20-23). In fact, Mother requested visitation on multiple occasions (A110, A151), including during Ms. Davenport's September 19, 2007 visit to the St. Clair County Jail. (A247).

without legal authority (*see* MO. REV. STAT. § 453.014.1(4)), and the Respondents took custody of Child before entry of any court order. *See* MO. REV. STAT. § 453.110. And effective counsel could have prevented this private adoption from moving forward in the first place by investigating the Velazcos' status as purported "clergyman." Indeed, with one simple question to Mother, effective counsel would have known that the Velazcos are **not** Mother's "clergyman" as required under section 453.014.1(4) for placements in a private adoption. (A110, A298-A299).

Effective counsel would have questioned the lack of required investigations and reports. Instead, Mr. Dominguez, who apparently had determined that Child should remain with the Respondents after speaking with the Respondents' counsel (A260), did not question the Velazcos' status as purported "clergyman" and did not otherwise make any effort to ensure that the proceeding strictly complied with the termination and adoption statutes. *See In Interest of J.C., Jr.,* 781 S.W.2d at 228 (reversing termination where, *inter alia*, the natural parents' counsel failed to call witnesses, offered no evidence on behalf of the natural parents, and made a statement indicating it was a foregone conclusion to everyone at the hearing that the natural parents' rights would be terminated).

Effective counsel would have made some attempt to locate witnesses — including family and friends which have now submitted sworn affidavits — and present testimony on Mother's behalf evidencing Mother's monitoring of her Child while incarcerated, her several requests for visitation, and her attempts to locate Child after he was taken by the Velazcos and criminally placed with Respondents. (A157-A163, A164-A170, A171-

A175, A176-A186, A187-A206, A207-A217, A218-A220).

Perhaps most importantly, effective counsel would have made some attempt to interview Mother and prepare a sworn affidavit — which have now been proffered (A108-A149, A150-A156) — that could have been submitted in lieu of personal appearance, or attempt to have a sworn deposition taken, or otherwise make some effort to present Mother's side of this tragic story. "[M]other's absence made the need for effective assistance from counsel even more important, especially in light of the awesome power wielded by a court in severing the parent-child relationship." *In the Interest of J.M.B.*, 939 S.W.2d at 56.

CONCLUSION

For the reasons stated, the Judgment of the Juvenile Court should be reversed with directions to dismiss the Petition and return custody of Child to Mother.

RESPECTFULLY SUBMITTED this 5th day of October, 2010.

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CERTIFICATE REQUIRED BY SUPREME COURT RULE 84.06(c)

I hereby certify that the foregoing brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b)(1). The foregoing brief contains 30,783 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Rule 84.05(g) has been scanned for viruses and is virus-free.

By:_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Appellant's Substitute Opening Brief, and a diskette formatted in Microsoft Office Word 2003, were delivered via first class U.S. Mail, postage prepaid, on this 5th day of October 2010, to:

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