NO. SC100136

IN THE SUPREME COURT OF MISSOURI

IN THE INTEREST OF E.G.,

A Juvenile.

Appeal from the Circuit Court of the
Twenty-Third Judicial Circuit of Missouri
The Honorable Edward Page

BRIEF OF RESPONDENT JUVENILE OFFICER

JASON D. SAPP, MBE 58511
Sapp Law LLC
75 West Lockwood Avenue
Suite 222
Webster Groves, MO 63119
P: (314) 782-3500
F: (314) 782-3400
Jason@sapplawllc.com

ABIGAIL W. SAPP, MBE 58539
Law Office of Abigail W. Sapp, LLC
P.O. Box 31552
St. Louis, MO 63131
P: (314) 495-5587
Abigail @abigailsapplaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages Cited**

Statutes

Rules

JURISDICTIONAL STATEMENT

The Missouri Supreme Court has appellate jurisdiction to hear this appeal from a final judgment from the Juvenile Court of the Circuit Court of Jefferson County, Missouri, terminating parental rights of Appellant. As this action involves a question as to the validity of a Missouri statute, Section 211.447.2(4), RSMo., the Supreme Court of Missouri has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

INTRODUCTION

Missouri has not only a right, but a duty, to protect children. At times performing that duty entails terminating parental rights. This case involves termination of Appellant Father's parental rights based on his guilty plea to two felony sexual offenses perpetrated against a child under the age of fourteen. Juvenile Officer's pursuit of termination of Appellant's parental rights was both required and appropriate under Section 211.447.2(4) RSMo, which mandates the Juvenile Officer pursue an action to terminate parental rights based on a conviction or guilty plea to certain felonies, including those committed by Appellant, where a child is the victim.

Appellant moved to dismiss the petition for termination of parental rights on the sole ground that Section 211.447.2(4) is unconstitutional. Appellant cited no specific provision of the Missouri or United States Constitution in support of dismissal. Appellant's motion was denied. The trial Court then conducted an evidentiary hearing. Appellant made no objection or argument that Section 211.447.2(4) was not a statutory ground for termination, but rather stood on his constitutional objection and offered no evidence. The Court entered an order terminating Appellant's parental rights.

Appellant now appeals arguing that Section 211.447.2(4) is not a statutory ground for termination of parental rights and that it violates Due Process under the United States Constitution. Appellant failed to preserve these arguments for appeal. Termination of Appellant's rights on grounds found in Section 211.447.2(4) was proper, constitutional, and supported by the evidence. Appellant does not challenge the finding that termination of his parental rights was in the best interests of Child E.G.

STATEMENT OF FACTS

Appellant appeals from the May 30, 2023, judgment that terminated his parental rights under Section 211.447.2(4), RSMo. [Legal File ("L.F.") at D7 p.1-6]. The child at issue, E.G., who was born on November 17, 2019, is currently four years old. [L.F. at D2 p.1].

On September 29, 2022, the Juvenile Officer in the 23rd Judicial Circuit filed a petition to terminate the parental rights of both the child's mother and of Appellant.[1] [L.F. at D1 p.3]. As to Appellant, the Petition alleged:

"On May 3, 2022, the father of the juvenile…pled guilty to two felony violations of Chapter 566 when a child was the victim. Specifically, the father pled guilty to Child Molestation-3rd Degree-Child Less Than 14 Years of Age (Felony C RSMo: 566.069) and Sexual Misconduct Involving A Child Under 15 (Felony E RSMo.: 566.083), in which the victim of both violations was a child under the age of eighteen." [L.F. at D2 p.2].

Counsel was appointed for Appellant. [L.F. at D1 p.8]. Appellant filed a Motion to Dismiss, which was subsequently amended due to a clerical error by Appellant and re-filed. [L.F. at D1 p.9, 11; L.F. D.3; L.F. D.5]. In his Motion, Appellant requested that Section 211.447.2(4) be declared unconstitutional and the Petition to Terminate Parental Rights be dismissed. [L.F. at D5 p.1]. Appellant argued that Section 211.447.2(4) "impinges on the fundamental rights as guaranteed by the United States and Missouri Constitutions," is

[1] The Juvenile Officer's Petition to Terminate Parental Rights included one count as to the mother of the juvenile. [L.F. at D.2 p.2]. Evidence was presented as to this count at the hearing and the trial court subsequently terminated the mother's parental rights under Section 211.444, RSMo. [L.F. at D7, p.4]. The mother does not appeal.

"unconstitutionally broad in that the right to parent is a fundamental right" and is "unconstitutionally overbroad and not narrowly defined." [L.F. at D5 p.1]. Appellant further argued that the statute "seemingly makes a presumption that anyone convicted of certain offenses, in and of itself, is unfit to be a parent." [L.F. at D5 p.1]. Appellant also argued that "the statute is unconstitutional in that it does not specifically require the movant to prove actual unfitness of a parent. [L.F. at D5 p.2]. At no point in the Motion does Appellant specifically cite or quote language from any Article, Section, or Amendment of either the United States Constitution or the Missouri Constitution or argue that Section 211.447.2(4) is not a statutory ground for termination of parental rights. [L.F. at D5 p.1-2].

The Juvenile Officer's Petition to Terminate Parental Rights was called for hearing on March 22, 2023. [Transcript "T.R." at 5:3-5]. Prior to the start of the hearing, the Court heard argument on Appellant's Motion to Dismiss. [T.R. at 6:25-11:15]. Appellant argued that the Juvenile Officer's pleadings did not "square with the constitutional floor" for a parent to be found unfit. [T.R at 7:20-25]. Appellant also argued that 211.447.2(4), RSMo. "is overbroad and therefore…is unconstitutional because parental rights are a constitutional guarantee." [T.R. at 8:16-18]. Appellant claimed that the statute is in conflict with the "long-held proposition that we presume parental competency." [T.R. at 8:19-21]. According to Appellant, the statute created an irrebuttable presumption, which "does not square with the constitutional floor set by *Granville v. Troxel* and all the other cases that say you have to be an 'F' parent" to have your parental rights terminated. [T.R. at 8:22-9:5]. At no point in the argument did Appellant specifically cite, mention, or quote language from any Article, Section, or Amendment of either the United States Constitution

or the Missouri Constitution or argue that Section 211.447.2(4) is not a statutory ground for termination of parental rights. [T.R. at 7:8-9:5]. Following argument, the Court denied Appellant's Motion to Dismiss. [L.F. at D.5 p.2; T.R. at 11:14-15].

The trial Court then proceeded with the hearing on the Petition to Terminate Parental Rights filed by the Juvenile Officer. [T.R. at 11:18]. Throughout the hearing, the Court sustained objections made by Appellant to the admission of certain exhibits and evidence or specified that certain evidence and exhibits would be admitted as to allegations against Mother only. [T.R. at 11:22-15:8; 16:10-15; 17:10-22; 22:18-23:18; 23:22–26:8]. As to Appellant, the Court took judicial notice of the termination of parental rights cause, specifically that Appellant was served on October 27, 2022. [T.R. at 15:9-20]. The Court then admitted into evidence Petitioner's Exhibit 3, a certified copy of cause number 21SL-CR00239-01, which showed that Appellant pled guilty to two felonies under Chapter 566, RSMo. [T.R. at 17:23-18:14; Respondent's Appendix "Res. App." at A001-A009]. Appellant pled guilty to the class C felony of Child Molestation in the Third Degree, where the victim child was less than fourteen years of age, under Section 566.069 RSMo. [Res. App. at A001-A003]. According to the indictment, Appellant "knowingly subjected A.M. who was less than 14 years old to sexual contact by using a vibrator on A.M." [Res. App. at A001]. Appellant also pled guilty to the class E felony of Sexual Misconduct Involving a Child under fifteen-First Offense, under Section 566.083 RSMo. [Res. App. at A001-A003]. According to the indictment, Appellant "knowingly exposed (his) genitals to A.M., a child less than fifteen years of age, and did so for the purpose of arousing or gratifying his own sexual desire." [Res. App. at A001]. The events underlying both charges occurred

between August 1, 2018 and December 31, 2018. [Res. App. at A001-A003]. Appellant was sentenced to eight years in the Missouri Department of Corrections for the class C felony and four years in the Missouri Department of Corrections for the class E felony, to be served concurrently. [Res. App. at A005-A009]. Appellant is also subject to lifetime supervision and must register as a sex offender upon release. [Res. App. at A001, A008].

A foster care case manager from Family Forward (the "Case Manager"), a contracted case management agency, testified on behalf of the Juvenile Officer. [T.R. at 19:5]. As to Appellant, Case Manager testified that she was assigned to the case involving E.G. and that Appellant was then incarcerated. [T.R. at 19:18-24; 21:15-22:10]. The Juvenile Officer then rested as to the grounds portion of the hearing. [T.R. at 26:9-11].

The Court asked Appellant if he had any evidence that he would like to present, to which Appellant responded that he did not. [T.R. at 26:12-14]. No other party offered any evidence as to grounds. [T.R. at 26:12-22]. Appellant moved for dismissal of the petition "because it's unconstitutional because they have failed to prove that the father is unfit." [T.R. at 27:3-6]. Appellant did not cite, mention, or quote language from any Article, Section, or Amendment of either the United States Constitution or the Missouri Constitution, or argue that Section 211.447.2(4) is not a statutory ground for termination of parental rights. [T.R. at 27:3-6]. Appellant's oral motion was denied. [T.R. at 27:7].

Following the close of evidence at to grounds, the Court opened evidence as to the best interest of the child. [T.R. at 27:10]. With no objection, the Court took judicial notice of all evidence previously presented during the grounds portion of the hearing. [T.R. at 27:11-21]. Case Manager then testified on behalf of the Juvenile Officer. [T.R. at 27:24].

During her testimony the Juvenile Officer offered and the Court accepted into evidence Petitioner's Exhibits 4 and 5, the Termination of Parental Rights Study and an Addendum to the Study, both of which had been prepared by Case Manager. [T.R. at 27:24-29:23; Res. App. at A014-A020; A021-A023]. As to Appellant, Case Manager testified that there were no emotional ties between Appellant and E.G.; that Appellant had not maintained regular visitation or contact with E.G.; that Appellant sent the E.G. approximately five or six letters throughout her entire time in care; that Appellant had not provided E.G. with any monetary support, nor had Appellant paid court-ordered child support for her care. [T.R. at 30:4-31:12]. Case Manager additionally testified that Appellant was employed while in prison; was projected to be released in the year 2030; and that she was unaware of any additional services that could be provided to Appellant that would bring about a lasting parental adjustment that would allow E.G. to be returned to his care in the future. [T.R. at 31:13-32:7]. According to Case Manager, E.G. was currently placed and bonded with her maternal grandparents and has regular visitation with her paternal grandparents. [T.R. at 32:8–33:6]. Case Manager stated that, to her knowledge, it is the intention of the maternal grandparents to continue the relationship between the child and her paternal grandparents. [T.R. at 33:7-11]. Case Manager testified that it is in E.G.'s best interest for parental rights to be terminated. [T.R. at 33:12-22].

According to the Termination of Parental Rights Study dated October 17, 2022, Appellant had a Family Treatment Plan court-ordered on May 3, 2021. [Res. App. at A016]. As part of this Treatment Plan, Appellant was ordered to complete a psychological evaluation; follow through with any and all recommendations of a mental health care

provider; participate in individual therapy; be evaluated by a psychiatrist and follow through with any treatment recommendations; participate in a psycho-sexual evaluation and follow through with any recommendations; submit to random drug screens; complete a drug and alcohol assessment and follow through with any treatment recommendations; participate in and complete parenting classes; pay child support for the care of the child; and maintain contact with E.G. [Res. App. at A016-A019]. According to the Study and the Addendum, Appellant was provided with resources to complete the required services on multiple occasions throughout the duration of the case. [Res. App. at A016-A019; A022]. Other than sending a few letters to E.G., Appellant failed to comply with any of the requirements contained in his Family Treatment Plan. [Res. App. at A016-A019; A022].

On cross-examination, Appellant questioned Case Manager only about Appellant's available income to pay child support and about the E.G.'s relationship with the paternal grandparents. [T.R. at 34:2–35:6]. The Court asked all parties if they had any additional evidence to present as to the best interest of the child. [T.R. at 36:8]. All parties, including Appellant, stated that they did not have any evidence to present. [T.R. at 36:9-17].

During closing argument Respondent Juvenile Officer asked the Court to grant the petition to terminate parental rights based on the evidence presented and noted that, pursuant to Section 211.038 RSMo[2]., Appellant would be unable to have E.G. placed in his home upon his release from prison in 2030 due to his pleas of guilt to two felony sexual

[2] According to Section 211.038.1, RSMo., "a child under the jurisdiction of the juvenile court shall not be reunited with a parent or placed in a home in which the parent or any person residing in the home has been found guilty of any of the following offenses when a child was the victim: (1) a felony violation of section…566.069…566.083".

offenses. [T.R at 38:17-39:3]. During Appellant's closing argument he argued that "the issue before the Court today is whether the petition filed states the case for termination of parental rights. I persist in saying that not only do you have to prove a violation of statute, you have to include general unfitness, which they did not allege." [T.R. at 39:6-13]. Appellant requested that the Court dismiss the Juvenile Officer's Petition. [T.R. 39, L. 14-18]. Appellant did not cite, mention, or quote language from any Article, Section, or Amendment of either the United States Constitution or the Missouri Constitution, or argue that Section 211.447.2(4) is not a statutory ground for termination of parental rights, during his closing argument. [T.R. at 39:6-18]. E.G.'s Guardian ad Litem, stated that he believed that the petition complied with the statute, that the statute sets forth the appropriate grounds to terminate parental rights under the circumstances, and that the Juvenile Officer met their burden. [T.R. at 40:1-6]. The Guardian ad Litem also maintained that it would be in the E.G.'s best interest for parental rights to be terminated. [T.R. at 40:7-10]. The Court entered its Judgment and Decree terminating Appellant's parental rights under Section 211.447.2(4), RSMo. on May 30, 2023. [L.F. at D.7 p.4-6]. This appeal follows. [L.F. D.6].

STANDARD OF REVIEW FOR TERMINATION OF PARENTAL RIGHTS

Termination of parental rights under Missouri law is a two-step process. First, a statutory ground for termination must be shown by "clear, cogent and convincing evidence." *Interest of D.L.S.*, 606 S.W.3d 217, 222 (Mo. App. W.D. 2020) (citing *In Interest of J.A.F.*, 570 S.W.3d 77, 82 (Mo. App. W.D. 2019)). Then the court must find termination to be in the child's best interest by a preponderance of the evidence. *Id*. "The judgment of the trial court will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Id.*

ARGUMENT

I. **The Court Did Not Err In Treating Section 211.447.2(4) As A Ground For Termination Of Parental Rights.** (Responds to Appellant's Point I).

In Point I, Appellant argues that Section 211.447.2(4) is not a statutory ground for termination of parental rights, but merely a trigger mandating the filing of a termination petition. This argument was never asserted before the trial Court and, therefore, only subject to discretionary review for plain error. *Interest of Y.B.*, 669 S.W.3d 695, 699 (Mo. App. S.D. 2023). If this Court chooses to review Appellant's unpreserved Point I, the plain language of Section 211.447, this Court's prior guidance regarding the statute and the statute's legislative history clearly show that Section 211.447.2(4) is a ground for termination of parental rights and not merely a "trigger" mandating filing of a termination petition. The trial court's decision should be affirmed.

A. Appellant did not argue that Section 211.447.2(4) is not a ground for termination before the trial Court or request plain error review.

The question of whether Section 211.447.2(4) is only a trigger mandating filing of a petition and not a statutory ground for termination of parental rights was never raised before the trial Court and appears for the first time in Appellant's brief. "A party is not 'entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court the opportunity to rule on the question.'" *Interest of Y.B.*, 669 S.W.3d at 699 (quoting *Matter of Stiles*, 662 S.W.3d 322, 328 (Mo. App. 2023)). "This prerequisite is intended to avoid error by granting the trial court an opportunity to intelligently rule on the question while avoiding the expense, delay, and hardship of an appeal and retrial." *Interest of D.L.S.*, 606 S.W.3d at 225 (quoting *In Interest of I.K.H.*, 566 S.W.3d 629, 632 (Mo. App. S.D. 2018)). "The failure to object at trial on the same basis as that asserted on appeal fails to preserve that issue for appellate review." *Id.* (quoting *Thomas v. Harley-Davidson Motor Co. Grp. LLC*, 571 S.W.3d 126, 135 (Mo App. 2019)). "Plain 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." Mo. R. Civ. Pro. 84.13(c). "[A]ll errors – whether statutory, constitutional, structural, or based in some other source – are subject to the same treatment under this Court's plain error framework." *Interest of Y.B.*, 669 S.W.3d at 700 (quoting *State v. Brandolese*, 601 S.W.3d 519, 529 (Mo. banc 2020)). The party seeking review bears the burden of establishing manifest injustice.

Id. "Plain error review, however, rarely is granted in civil cases." *Id.* at 699 (quoting *In the Interest of J.C.S.*, 658 S.W.3d 260, 265 (Mo. App. 2023)).

Appellant's failure to raise this issue before the trial Court is undeniable. Appellant's motion to dismiss the termination petition spoke only to generalized questions of constitutionality and did not challenge Section 211.447.2(4) as a statutory ground for termination. L.F. D5. At the close of evidence as to grounds, Appellant again raised only a general constitutional objection. T.R at 26:9-27:8. In closing argument, Appellant did not dispute that Section 211.447.2(4) was a statutory ground for termination. T.R. at 39:6-18. Appellant's failure to raise an absence of statutory grounds by motion or objection before the trial court fails to preserve this issue for appeal.[3] Appellant has not requested plain error review nor argued that the failure to provide plain error review would result in manifest injustice or a miscarriage of justice. Review of Appellant's Point I is, therefore, at the Court's discretion, which is rarely granted in civil cases and should be denied.

B. Applicable rules of statutory interpretation.

"The primary rule of statutory construction is to determine the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute." *Piercy v. Mo. State Hwy Patrol*, 583 S.W.3d 132, 140 (Mo. App. W.D. 2019) (citing *Wolfe v. Mo. Dep't of Corr.*, 199 S.W.3d 219, 221 (Mo. App. W.D. 2006)). The Court should give meaning to all language within the statute and presume that the legislature did not insert

[3] Appellant further never raised the issue in his notice of appeal. L.F. D6.

superfluous language. *Id.* (citing *Middleton v. Mo. Dep't of Corr.*, 278 S.W.3d 193, 196 (Mo. banc 2009)).

C. Section 211.447.2(4) is a statutory ground for termination of parental rights.

1. The language of Section 211.447, prior interpretations of the statute and legislative history provide a clear guide to determining whether Section 211.447.2(4) is a ground for termination of parental rights.

The language of Section 211.447 coupled with this Court's prior guidance and the legislature's subsequent revisions to the statute clearly show that Section 211.447.2(4) is a statutory ground for termination of parental rights. Subsection 2 of Section 211.447 sets forth circumstances under which "a petition to terminate the parental rights of the child's parent or parents shall be filed." Section 211.447.2 RSMo. Section 211.447 includes in subsection 2 a mandate for filing a termination petition when "[t]he parent has been found guilty of or pled guilty to a felony violation of charter 566, 567, 568, or 573 when the child or any child was a victim." Section 211.447.2(4).

While subsection 2 does not itself expressly reference grounds, the plain language of Section 211.447 expressly recognizes the existence of statutory grounds for termination within subsection 2. Subsection 4 provides exceptions for when a petition must be filed when "grounds exist for termination of parental rights pursuant to subsection 2 of this section." Subsection 7 provides factors that must be addressed "[w]hen considering whether to terminate the parent-child relationship pursuant to subsection 2." Under the rules of statutory construction, the express reference found in other portions of the statute regarding grounds for termination set forth in subsection 2 must be given meaning and

cannot be disregarded as surplusage. The Court must find that at least some circumstances mandating filing of a petition listed in subsection 2 are also grounds for termination.

Appellant does not contend that all subdivisions in subsection 2 of Section 211.447 constitute only triggers mandating the filing of a petition and not independent grounds for termination. Appellant argues only that a lack of specific statutory guidance differentiating which parts of subsection 2 are triggers versus grounds for termination creates an improper "roving commission for a juvenile court [to] determine what are 'grounds for termination' by implication." Appellant's Brief ("App.Br.") at 19-20. He thus concedes that at least some circumstances in subsection 2 are grounds for termination. Contrary to Appellant's complaints of a "roving commission," this Court has provided clear guidance to juvenile courts as to when subsection 2 provides statutory grounds for termination of parental rights.

In examining a prior version of Section 211.447, this Court addressed the effect of express references to "grounds" in subsection 2 included within other subsections of the statute. *In re M.D.R.*, 124 S.W.3d 469 (Mo. banc 2004). In *In re M.D.R.*, the Court analyzed whether the requirement that a petition be filed when a child has been in foster care for at least 15 of the prior 22 months set forth in Section 211.447.2(1) constituted a ground for termination. This Court held that the "references to subsection 2 in subsections 3 and subsection 5 do not transform the filing trigger of section 211.447.2(1) into a statutory ground for termination of parental rights."[4] *In re M.D.R.*, 124 S.W.3d at 475. In doing so, the Court noted that the specific circumstances addressed in Section 211.447.2(1) were

[4] Subsections 3 and 5 of the version of Section 211.447 at issue in *In re M.D.R.* were renumbered as subsections 4 and 6 of the current version of Section 211.447 at issue here.

temporal and did not necessarily "demonstrate parental unfitness." *Id.* The Court stopped short, however, of holding that all circumstances set forth in subsection 2 were merely triggers requiring the filing of a petition but not grounds for termination.

The Court differentiated the remaining circumstances included in subdivision 2 at the time (a determination that the parent abandoned the child (Section 211.447.2(2)) and a determination that "a parent has committed certain criminal acts" (Section 211.447.2(3))) as circumstances that "identify conduct by the parents that requires a termination petition to be filed *and that demonstrates parental unfitness*" in a manner similar to circumstances "explicitly labeled 'grounds for termination'" elsewhere in the statute. *Id.* (emphasis added). The Court thus harmonized the statutory language by recognizing that subdivisions of subsection 2 are grounds for termination if they speak to (1) conduct by the parent that demonstrates unfitness and (2) are similar to other circumstances that have been expressly identified by the statute as grounds for termination of parental rights.

Appellant acknowledges that the test set forth in *In re M.D.R.* governs which circumstances of subsection 2 constitute statutory grounds for termination of parental rights, although Respondent disagrees with Appellant's articulation of the two determinations. App.Br. at 20. Appellant's analysis of the two-part test, however, is flawed. The test set forth in *In re M.D.R.* clearly illustrates that Section 211.447.2(4) is a statutory ground for termination of parental rights.

2. *Section 211.447.2(4) speaks to the conduct of the parent that goes to parental unfitness thus satisfying the first prong of the test for grounds set forth in In re M.D.R.*

The current version of Section 211.447 at issue includes in subsection 2 a mandate for filing a termination petition when "[t]he parent has been found guilty of or pled guilty to a felony violation of charter 566, 567, 568, or 573 when the child or any child was a victim." Section 211.447.2(4). As with the subdivisions involving abandonment and criminal acts addressed by the Court in *In re M.D.R.*, Section 211.447.2(4) undeniably relates to specific parental conduct because it is based on the parent's conviction or guilty plea to regarding the parent's conduct that amounted to a felony offense involving a child victim. Such conduct also goes directly to the parent's fitness as evidenced by the fact that convictions under Chapter 566 already provide the basis for other limitations of the same parental rights. *See* Sections 210.117.1 & 211.038.1 RSMo. (precluding reunification with a parent found guilty of certain offenses under Chapters 566, 568 or 573 when a child was the victim, including felony violations of Sections 566.069 and 566.083 at issue in this case) and Section 452.375.3 RSMo. (precluding the court from awarding custody or unsupervised visitation of a child when the parent has been found guilty of, or plead guilty to, certain offenses under Chapters 566, 568 or 573 where a child was the victim, including felony violations of Sections 566.069 and 566.083).

Appellant does not, and cannot, argue that the convictions or guilty pleas to felony criminal violations addressed in Section 211.447.2(4) fails to speak to a parent's individual conduct. Rather, Appellant disputes that such convictions adequately relate to parental unfitness. Appellant contends that Section 211.447.2(4) fails to show a lack of parental

fitness to the requisite standard of clear and convincing evidence. Br. at 20. This contention is based largely on his interpretation that the statute creates an improper irrebuttable presumption of unfitness that precludes a parent from offering contrary fitness evidence.

Appellant's contention that Section 211.447.2(4) fails to meet the standard of clear and convincing evidence of a statutory ground lacks merit. Where the statutory ground for termination is the conviction or guilty plea related to a certain offense, proof of the conviction or guilty plea is clear, cogent and convincing proof of the ground. *See In re L.E.C.*, 182 S.W.3d 680, 687 (Mo. App. W.D. 2006) ("Father had a full and fair opportunity to litigate the issue of his guilt of a felony violation of chapter 566 when any child in the family was a victim, and such a finding of guilt is *all that is required* to establish adequate grounds for termination under Section 211.447.4(4)").[5] Appellant does not, and cannot, contend that the fact of a conviction or guilty plea of an offense under Chapter 566 involving a minor was not proven by clear and convincing evidence in this case.[6] Appellant also does not, and cannot, contest that a conviction under the higher evidentiary standard of guilt beyond a reasonable doubt or a guilty plea constituting an admission fails to evidence the facts of the underlying criminal act by clear and convincing evidence. *See State v. Williams*, 548 S.W.3d 275, 289 (Mo. banc 2018) (guilty plea "remov[es] any doubt

---

[5] At the time that *In re L.E.C.* was decided felony violation of chapter 566 where the parent's child was the victim was a express ground for permissive filing of a termination petition. The ground is now mandatory under Section 211.447.2(4) and has been expanded to include felony offenses of Chapter 566 where any child is the victim.

[6] Appellant did not contest the fact that he pled guilty to an offense covered by Section 211.447.2(4) or the age of the victim.

as to whether he had committed the criminal act"). Instead, Appellant raises multiple arguments that proving the underlying criminal conviction or plea is insufficient to show unfitness by clear and convincing evidence because (1) while such convictions could create "a strong inference of unfitness" it does not necessarily rebut a presumption of parental fitness (Br. at 20), (2) that the ground is overbroad because not all felony offenses under Chapters 566, 567, 568 and 573 clearly and convincingly show unfitness (Br. at 21-22) and (3) the ground improperly creates an irrebuttable presumption of unfitness (Br. at 23-26).

Appellant's argument that the circumstances in Section 211.447.2(4) do not rebut a presumption of parental fitness misconstrues the nature of that presumption and its purpose. Missouri courts have recognized a natural parent's entitlement to "a presumption of fitness as the custodian of the children." *In Interest of A.H.*, 662 S.W.2d 317 (Mo. App. E.D. 1983). That presumption, however, was applied in the context of a best interests analysis in a custody case where no allegation of unfitness was presented. *Id.* Appellant's other authority, *Troxel v. Granville*, 530 U.S. 57, 68 (2000), involved a parent's right to control visitation that similarly involved no allegation or finding of parental unfitness. "That aspect of the case is important, for there is a presumption that *fit parents* act in the best interests of their children." *Id.* (emphasis added). Neither *In Interest of A.H.* nor *Troxel* stand for the proposition that a general presumption of parental fitness withstands a conviction beyond a reasonable doubt or an admission by plea that the parent committed a felony act of the nature included in Section 211.447.2(4) involving a child victim. Where parental unfitness has been shown in such a manner any presumption of parental fitness must fall.

Appellant's argument that the Section 211.447.2(4) is "overbroad" is not a due process argument. Overbreadth challenges relate to First Amendment claims, which are not at issue in this case. *Jackson County v. State*, 207 S.W.3d 608, 614 (Mo. banc 2006). Moreover, Appellant's argument that certain criminal acts under Chapters 566, 567, 568 and 573 are insufficient to evidence a lack of parental fitness is also overstated. Chapter 566 governs criminal sexual offenses. Chapter 567 governs criminal prostitution offenses. Chapter 568 governs criminal offenses against the family. Chapter 573 governs criminal pornography and related offenses. There is a more than reasonable logical connection between a person engaging in felonious criminal acts under any of these Chapters where a child is the victim and that person's fitness to serve in a parent's authoritative role of responsibility for the care and well-being of a child. It also clearly shows a lack of the "maturity, experience and capacity for judgment required for making life's difficult decisions" that underlies the general presumption of parental fitness applied in custody or visitation cases where fitness is not contested. *See Troxel*, 530 U.S. at 67 (2000).

Appellant's extreme hypotheticals he suggests are insufficient to show parental unfitness do not aid the analysis in this case and should not be indulged by the Court. First, no such charges are at issue here. As discussed below in Section II.D, to the extent Appellant is arguing that including those offenses under the described conditions falls below constitutional standards, arguing hypotheticals of potential constitutional infirmity is inconsistent with a facial constitutionality analysis and Appellant lacks standing to litigate those hypothetical situations in an as-applied constitutional analysis. Second, regardless of whether Appellant believes such hypotheticals speak less to fitness than the

felonies he admittedly committed, each involves an adult who engaged in conduct sufficiently harmful to a child to subject the perpetrator to felony criminal prosecution. Further, before Section 211.447.2(4) could be applied, those acts would have had to have been sufficiently egregious to warrant prosecution and either have been admitted to or found to have occurred beyond a reasonable doubt after a full and fair opportunity to assert every available defense in a criminal trial, which provides sufficient constitutional safeguards.[7] Even the hypotheticals offered by Appellant would sufficiently speak to unfitness to find application of Section 211.447.2(4) meets the test articulated by *In re M.D.R.* to be deemed as a statutory ground for termination of parental rights.

[7] Appellant cites no authority showing such convictions or guilty pleas have occurred and the likelihood of such is low. Appellant's hypothetical regarding felony criminal non-support under Section 568.040 fails to recognize that such a conviction requires that the parent withheld a full year's child support (Section 568.040.5) and could not successfully raise an affirmative defense of good cause (Section 568.040.3), in which case such conviction speaks significantly toward parental fitness. It also fails to recognize that the facts as offered, including full repayment of support and completed probation, likely would meet the criteria for expungement of the conviction (Section 568.040.6(3)) and therefore insufficient to support termination under Section 211.447.2(4). Appellant's hypothetical regarding sexual conduct with a student fails to recognize that the charge likely would not apply to an 18-year-old "student manager" because student volunteers are exempted (Section 566.086.1(4)), and that marriage is an affirmative defense to numerous sexual offenses (Section 566.023) and at least a colorable argument would exist for marriage as a defense to prosecution under Section 566.086. Appellant's endangering the welfare of a child hypothetical assumes that selling a legal product (rolling papers) to a minor would satisfy the requirement in Section 568.045.1(3) that the parent knowingly encourage, aid or cause a violation, and incorrectly assumes that rolling papers, by themselves, constitute drug paraphernalia absent a factual association between the rolling papers and actual drug use. *See State v. Brown*, 801 S.W.2d 474, 477 (Mo. App. S.D. 1990) (close proximity of rolling papers to a supply of marijuana provided a basis to find that rolling papers were intended to make marijuana cigarettes and "were, therefore, drug paraphernalia.").

Appellant's argument that Section 211.447.2(4) was overbroad as applied in this case lacks merit. Section 566.069.1 involves "subject[ing] a child who is less than fourteen years of age to sexual contact." Section 566.083.1 involves the knowing exposure of a person's genitals to a child less than fifteen or knowingly coercing or inducing a child to expose the child's genitals where either is done to arouse or gratify sexual desire. The charging documents put into evidence also provided the Court with specific information regarding the underlying facts of Appellant's. Res. App. at A001. Appellant does not dispute the severity of these crimes or that they speak to his conduct toward children. Instead, he complains that application of Section 211.447.2(4) on a basis of these statutes is "overbroad" because it "supposedly" creates a "conclusive presumption of unfitness," that he was "denied the opportunity to present" rebuttal evidence, and that the Court is "required to review the totality of the circumstances." App.Br. at 23. Appellant's complaints are not supported by the law or the record.

All of the grounds in Section 211.447 including those in subsection 2(4) provide elements or factors must be shown to reach a conclusion of unfitness. A general finding of unfitness based on a "totality of the circumstances" is not required. Nor, as discussed below do prior United States Supreme Court decisions require such a general showing. *See,* Section II.C, discussing *Santosky v. Kramer*, 455 U.S. 745 (1982) and *Stanley v. Illinois*, 405 U.S. 645 (1972). The grounds in Section 211.447 require only a showing of felony conviction under an applicable statute where a child was the victim by clear, cogent and convincing evidence. The legislature has determined that conduct underlying such unfitness is sufficiently severe to constitute abuse. Proving Section 211.447.2(4) is not a

presumption of unfitness but a recognition that actions by the parent constituting grounds for termination have already been proven to a higher standard in a manner akin to collateral estoppel. Appellant had an opportunity to rebut the elements of the ground under Section 211.447.2(4), including the existence of the underlying conviction or plea, whether the crime at issue falls within the statute and whether the victim was a child. He also had an opportunity to rebut the allegations underlying those criminal charges through the criminal judicial process. In fact, other courts addressing termination based on a Chapter 566 offense have allowed introduction of contrary evidence. *See In re E.C.H.J.*, 160 S.W.3d at 819. There is no support for Appellant's argument that he was denied a full and fair opportunity to rebut the relevant allegations against him. See App.Br. at 24 (*citing Vlandis v. Kline*, 412 U.S. 441, 446 (1973)).

Appellant's claim that he was denied an opportunity to present evidence is vastly overstated. To the extent he believed that an irrebuttable presumption of unfitness prevented him from doing so, it was a restriction of his own making. The trial Court never ruled that Section 211.447.2(4) created an irrebuttable presumption of unfitness. While Appellant suggested such in his motion to dismiss and subsequent arguments, the motion was denied without comment. L.F. D5 at 1-2; T.R. 8:22-9:5, 11:14-15. Appellant never requested guidance or a specific ruling on his interpretation nor did he ever attempted to enter rebuttal evidence requiring the trial Court to rule on its admissibility. This is true even though the trial Court specifically invited Appellant to present evidence as to grounds for termination. T.R. at 26:9-14. Even in the face of a perceived irrebuttable presumption, evidence as to the guilty plea and age of the child would have been admissible as would

evidence offered by Appellant to support his constitutional arguments. Had the Court rejected such evidence, Appellant should have, and indeed was required to, request to make an offer of proof to preserve those issues for appeal. He did not. Appellant's failure to make an offer of proof regarding the substance of any rebuttal evidence prevents this Court from finding a claim of error supporting reversal. *Call v. Heard*, 925 S.W.2d 840, 846 (Mo. banc 1996). ("Without an offer of proof, we cannot ascertain how [Appellant] was prejudiced by the operation of the statute, if at all. For this reason alone, we cannot find that [Appellant]'s claims of error warrant reversal."); *see also*, *Hink v. Helfrich*, 545 S.W.3d 335, 342 (Mo. banc 2018) ("this Court can act only on the record before it, not based on hypothetical facts not supported by the record.").

Appellant's argument that Section 211.447.2(4) is invalid because it speaks only to past acts and does not show an indication of future harm is also incorrect. App.Br. at 23 (citing *In re K.A.W.*, 133 S.W.3d 1, 9-10 (Mo. banc 2004)). Appellant focuses on whether past acts provide an indication of the same harm. *In re K.A.W.* does not require that the future harm be the *same*.[8] The relevant question is not whether Appellant "would probably sexually abuse his children in the future" but rather if there would be "harm to the children that would likely be caused to them if Father's parental rights were not terminated." *In Interest of E.G.G.*, 483 S.W.3d 435, 438 (Mo. App. S.D. 2016). Such harm includes the fact that Appellant, by virtue of his guilty plea, will be incarcerated for a substantial portion

[8] For example, Section 211.447.2(3) mandates termination where a parent has murdered a sibling. Such an act undoubtably supports termination of a parent's rights and cannot itself be repeated.

of E.G.'s life and will never be able to have custody or unsupervised visitation with his children after his release. *See Id.*; *see also*, *In re E.C.H.J.*, 160 S.W.3d 815, 818 (Mo. App. W.D. 2005) (interpreting Section 211.447 as not providing grounds for termination in a situation where guilt for violating Chapter 566 prevented reunification "could absurdly doom such an abused child to a life of foster care, without hope of either adoption or reunification."); *In re L.E.C.*, 182 S.W.3d 680, 686-87 (Mo. App. W.D. 2006) (noting when terminating parental rights based on a felony violation of Chapter 566 the fact that child will be deprived of a stable home in the future based on the conviction "weighed heavily against father."). When a felony violation of Chapter 566 is proven beyond a reasonable doubt there is a "presumption of continued unfitness." *Cannon v. Cannon*, 280 S.W.3d 79, 87 (Mo. banc 2009).

Appellant's argument that Section 211.447.2(4) will result in a higher risk of improper parental rights terminations is unfounded. Appellant bases this argument on Section 211.447.5(5)(a), which only applies to acts of abuse "determined by the Court to be of a duration or nature that renders the parent unable for the reasonably foreseeable future to care appropriately for the ongoing physical, mental, or emotional needs of the child." Section 211.447.5(5)(a) allows for termination based on a broader universe of abuses. It is not limited as Section 211.447.2(4) is to felony violations of specific statutory Chapters involving child victims and does not include the prerequisite of a conviction or guilty plea. Because Section 211.447.5(5) is less limited, a broader scope of evidence would be relevant for the Court to make its termination decision than would be relevant under Section 211.447.2(4).

Acts of the nature covered by Section 211.447.2(4) are sufficiently severe standing alone to constitute abuse. The legislature is qualified to identify those acts. Its determination that the crimes covered by Section 211.447.2(4) satisfies this requirement is consistent with this Court's prior rulings that felony violations under Chapter 566 are sufficiently severe to constitute abuse of a child. *See In re K.A.W.*, 133 S.W.3d at 11; *see In re L.E.C.*, 182 S.W.3d 680, 686 (Mo. App. W.D. 2006) (acknowledging that Section 211.038 preventing reunification for Chapter 566 violations was passed to address crimes described as sufficiently severe in *In re K.A.W.* to constitute abuse). What evidence may be relevant for the termination under the less specifically defined criteria of Section 211.447.5(5)(a) is not illustrative of what would be relevant to the more definitive grounds of Section 211.447.2(4). The crux of the issue, then, is whether the nature of the offense itself indicates a risk of future harm. The offenses sufficient to satisfy Section 211.447.2(4) indicate such a risk as recognized by numerous other statutes limiting a parent's rights for custody or unsupervised visitation, or preventing reunification based on many of the same convictions, including those to which Appellant pled guilty. *See* Sections 210.117.1(1), 211.038.1(1), 452.375.3(1) RSMo.;). *see In re E.C.H.J.*, 160 S.W.3d at 818. Limiting a parent's rights to associate with his children pursuant to those statutes does not violate a parent's fundamental rights. *Cannon,* 280 S.W.3d at 88.

Appellant litany of factors that he believes the Court should consider in rebuttal to a petition for termination of parental rights under Section 211.447.2(4) is irrelevant. App.Br. at 23-24. None of those issues speak to whether the statutory elements for

termination under Section 211.447.2(4) have been met.[9] Because the grounds in Section 211.447.2(4) are sufficient for the state to intervene, the additional evidence Appellant says should be considered is properly reserved for the issue of best interests of the child. Such consideration would not, as Appellate contends, run afoul of constitutional issues because the requisite showing to support the statutory ground would already have been met and parental fitness issues that do not speak to the grounds would be relevant only to the best interests analysis. App.Br. at 22.

3. *Section 211.447.2(4) is sufficiently similar to other circumstances that have been expressly identified in the statute as grounds for termination of parental rights to satisfy the second prong of the test set forth in In re M.D.R.*

The circumstances in Section 211.447.2(4) are also consistent with circumstances that have been expressly identified in the statute as grounds for termination. In fact, felony violations of Chapter 566 were previously included in Section 211.447 as an express permissive ground for termination. In 2017, the express list of permissive grounds for filing of a termination petition included convictions or guilty pleas to felony offenses under Chapter 566 where the victim was a member of the parent's family. 211.447.5(5) RSMo. (2017); see App. at A032. Convictions and pleas to such offenses were subsequently moved to subsection 2, indicating that the legislature viewed those grounds to be of such a magnitude not only to support, but to mandate, the filing of a petition. Section 211.447.2(4)

[9] Appellant cites *In re Z.L.R.*, 306 S.W.3d 632, 636 (Mo. App. S.D. 2010) for the proposition that the time of commission of the felony is relevant to the inquiry of unfitness. App.Br. at 24. That case involves whether voluntary acts leading to incarceration were sufficient to show an inference of intent to abandon a child. *Id*. at 635. The Court noted that a parent could not intend to abandon a child before he knew the child existed. *Id.* That case has no application to the circumstances in this case where intent is not at issue.

RSMo. (2018); see App. at A023. That Subsection 2 ground was subsequently further amended to include such offenses where any child was the victim as reflected in current Section 211.447.2(4). The legislature is deemed to have known the status of the law as reflected in *In re M.D.R.* when the statute was amended to include the current version of Section 211.447.2(4). *State ex rel. T.J. v. Cundiff*, 632 S.W.3d 353, 357 (Mo. banc 2021) ("the Court must presume the legislature was aware of the state of the law at the time of its enactment") (quoting *D.E.G. v. Juv. Officer of Jackson Cnty.*, 601 S.W.3d 212, 2016 (Mo. banc. 2020)). The legislature's intent that Section 211.447.2(4) would be both a trigger and grounds for termination is thus clearly illustrated by the legislative history. Interpreting those changes to effect a mandate for filing but a removal of the circumstances as a ground for termination would be illogical.

The circumstances of Section 211.447.2(4) are also similar to the current express permissive ground for termination set forth in Section 211.447.5(5). That permissive ground applies generally to unfitness illustrated by, among other things, commission of a specific abuse of a nature that renders the parent unable to care appropriately for the child. As discussed above, the main distinctions between Section 211.447.2(4) and Section 211.447.5(5) relate to the specificity of the applicable conduct and the necessity of a prior judicial determination. In circumstances governed by Section 211.447.2(4), the legislature has determined the nature of the specific abuses are sufficient to show abuse. Under Section 211.447.5(5), the Court must undertake that analysis due to the wider variety of conduct that can support the ground and the lack of prior conviction or guilty plea. However, both speak to severe abuse as a ground for termination.

The subsequent statutory amendments to Section 211.447.5(5) related to children in foster care for 15 of the preceding 22 months further illustrate that Section 211.447.2(4) is not intended to be solely a filing trigger. In light of this Court's holding in *In re MDR* that time in foster care is not itself a ground for termination, the legislature expressed that such circumstances create a presumption of unfitness under Section 211.447.5(5)(b)(e). Had the legislature intended for Section 211.447.2(4) not to be a ground for termination, but only a trigger, it would presumably also have referenced convictions or guilty pleas to felony violations of Chapter 566 as a presumption within another express ground of Subsection 5. The legislature's decision not to do so evidences its intent, consistent with this Court's guidance in *In re MDR*, that Section 211.447.2(4) is grounds for termination in and of itself.

Appellant contends that the circumstances set forth in Section 211.447.2(4) are "markedly different" than other grounds in the statute. Br. at 31. Appellant argues that Section 211.447.2(4) differs from the other grounds under the statute (albeit without limiting his argument to grounds in subsection 5) in three ways: (1) stated limitations such as a familial relation to the victim, (2) required elements of some proof of additional indication of unfitness and (3) whether or not the condition can be rebutted. Br. at 31.

Regarding the first argument, Section 211.447.2(4) does contain significant stated limitations because it only applies to limited felony convictions where the victim of such crime is a child. Appellant offers no argument as to why victimization of a child outside of the family cannot reasonably be deemed an indication of parental unfitness. As noted previously, the State already recognizes the potential for harm based on victimization of a child outside the family as a basis to impair parental rights regarding custody, visitation

and reunification. Regarding Appellant's second argument, Section 211.447.2(4) requires sufficient evidence to make a showing of its elements by clear, cogent and convincing evidence. Additional evidence beyond that standard is not required under Missouri law or, as discussed in Section II.C below, the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The fact that other grounds have different elements is irrelevant. Lastly, Section 211.447.2(4) does not prevent rebuttal evidence. However, to be relevant, such evidence has to speak to the statutory requirement of that ground. Evidence of general parental fitness that do not speak to those elements is not relevant, but it does not render Section 211.447.2(4) irrebuttable on proper grounds. None of Appellant's arguments overcome the similarity in circumstances between Section 211.447.2(4) and Section 211.447.5(5), let alone the inclusion of convictions under Chapter 566 as an express permissive ground in early versions of Section 211.447. Section 211.447.2(4) meets the second prong of the *In re M.D.R.* test.

Based on the language of Section 211.447, this Court's prior interpretation of that language as stated in *In re M.D.R* and the legislative history of the statute, it is clear that a prior conviction or guilty plea to a felony offense under Chapter 566 involving a child is a statutory ground for termination of parental rights. Such a ground is consistent with Missouri's legal requirement that termination of parental rights must be based on clear and convincing evidence of a statutory ground for termination. Further, as discussed in the next section, such a statutory ground does not violate Appellant's rights of Due Process under the United States Constitution.

II. **Application of Section 211.447.2(4) to Appellant did not violate his constitutional rights.** (Responds to Appellant's Points I and II).

Appellant asserts various arguments that termination of his parental rights was unconstitutional under the Due Process Clause of the United State Constitution.[10] The Due Process Clause has a procedural component, which speaks to the fundamental fairness of the process, and substantive due process, which encompasses protection of certain fundamental rights. Appellant raises only substantive due process issues.[11] Appellant did not, however, sufficiently preserve any constitutional argument for appellate review and the Court should decline to address Appellant's Point II. Should the Court choose to address Appellant's unpreserved constitutional arguments, Appellant fails to sufficiently show a constitutional infirmity in Section 211.447.2(4) or its application in this case. Appellant's Point II should be rejected and the trial Court's ruling affirmed.

A. Appellant failed to preserve a constitutional challenge for appellate review.

The Court need not reach Appellant's constitutional arguments because Appellant failed to properly preserve a constitutional issue. Proper preservation of a constitutional question requires four steps. The party seeking review must:

---

[10] Consistent with his generalized constitutional arguments in the trial Court, Appellant does not cite to a specific constitutional article or amendment in his argument or cite any constitutional language. He appears to argue only under the Due Process clause found in the Fourteenth Amendment and not, for example, the Due Process clause of the Fifth Amendment, which has no bearing on state parental termination issues.

[11] Appellant does not claim that he lacked sufficient procedural opportunities to defend against his underlying criminal convictions or that he was denied a hearing on the grounds for termination or whether termination was in the best interests of E.G. The procedures in this case met the fundamental fairness necessary under procedural due process.

> (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.

Bridegan v. Turntine, ___ S.W.3d ___, No. SC 99700, 2023 WL 4201544 (Mo. banc. June 27, 2023) (quoting *United C.O.D. v. State*, 150 S.W. 3d, 311, 313 (Mo. banc 2004)). While Appellant timely raised a generic constitutional objection, he failed to meet the three remaining requirements for preserve a constitutional issue for appellate review.

Appellant did not designate a specific constitutional provision he claimed was at issue, which is necessary to provide the trial Court a reasonable opportunity to address the constitutional arguments at issue. Appellant's motion to dismiss fails to cite by article and section or quote any constitutional provision. Instead, Appellant made only general statements characterizing the statute as "unconstitutionally broad" and noting that "termination of parental rights impinges on the fundamental rights as guaranteed by the United States and Missouri Constitutions."[12] L.F. D1 at 1, ¶¶ 5-7.[13] Appellant similarly failed to cite any specific constitutional provision in arguing his motion, stating only that the asserted grounds for termination "do[] not square with the constitutional floor that you

---

[12] Appellant abandoned any Missouri constitutional argument by failing to raise it in his brief. *State v. Williams*, 548 S.W.3d 2018, 280 n. 5 (Mo. banc 2018).

[13] Nor can Appellant argue that a specific constitutional provision was inferred by virtue of cited authority. Appellant's sole authority, *In Interest of A.H.*, 662 S.W.2d 317 (Mo. App. E.D. 1983), discusses a general constitutional right with no reference to any constitutional provisions.

have to find him unfit to be a parent," that "[t]he statute is overbroad," and that the statute "is unconstitutional because parental rights are a constitutional guarantee." T.R. at 7:9-9:6.

Appellant's vague constitutional arguments failed to preserve review. His generic assertions that a statute is "unconstitutional" are insufficient to advise the Court of a specific constitutional challenge. *City of Eureka v. Litz*, 658 S.W.2d 519, 521 (Mo. App. E.D. 1983) (bare allegation that portions of ordinance "are unconstitutional" does not preserve issue), *Gaffigan v. Whaley*, 600 S.W.2d 195, 197 (Mo. App. E.D. 1980) (allegation that rule violates United States Constitution and Missouri Constitution do no preserve issue). Nor could the nature of the action or the generic terms used by Appellant put the Court on sufficient notice as to specific constitutional issues. "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). "Overbreadth challenges arise under the First Amendment." *Jackson County*, 207 S.W.3d at 614. Absent reference to a specific constitutional provision by article and section or quotation the trial Court was left with no guidance as to what specific constitutional challenge was at play.

Appellant further failed to preserve a constitutional question by electing not to offer any evidence regarding his parental fitness and thereby depriving the Court of any facts with which to analyze his constitutional claims. This Court has recently acknowledged that the absence of relevant factual evidence renders the Court incapable of addressing the merits of a constitutional violation argument. *Bridegan*, 2023 WL 4201544 at *2, n.5 (appellant's "decision not to offer any evidence of noneconomic damages . . . likely would

have prevented this Court from reaching the merits of her claim that the provision in section 303.390 prohibiting her from recovering such damages violates her constitutional right to a jury trial."). The lack of factual evidence before the trial Court fails to meet the third requirement for preservation of a constitutional review.

Appellant's failure to even attempt to offer evidence of his fitness further operates as a waiver of any claim that an irrebutable presumption of unfitness under the statute violates his constitutional rights. In *Bridegan*, the Court found that an appellant waived her claims of a violation of her right to a jury trial when she agreed to proceed with a bench trial. *Bridegan*, at *2. The Court deemed that waiver to be an abandonment of her constitutional claims. *Id*. Here, Appellant argued in his motion to dismiss that the statute "seemingly makes a presumption that anyone convicted of certain offenses, in and of itself, is unfit to be a parent." L.F. D5 at ¶ 8. In arguing the motion, Appellant took the position that the statute "is making an irrebuttable presumption." T.R. at 8:22-9:5. However, as previously discussed, Appellant relied solely upon his own reading of the statute. The Court made no such ruling and excluded no evidence. By failing to even attempt to offer evidence related to fitness, even when invited to do so, Appellant waived any claim that the Court violated his constitutional rights by failing to consider such evidence, if it exists.

B. Standard of review.

A constitutional challenge to a statute is reviewed *de novo*. *Bridegan v. Turntine*, 2023 WL 4201544, at *2 (quoting *Lewellen v. Franklin*, 441 S.W.3d 136, 143 (Mo. banc 2014)). "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *Id.* (quoting *Rentschler v. Nixon*, 311 S.W.3d 783

786 (Mo. banc 2010)). The Court will "resolve all doubt in favor of the act's validity" and may "make every reasonable intendment to sustain the constitutionality of the statute." *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007) (quoting *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984)). In reviewing constitutionality, the Court reviews the entire statute in a light of a strong presumption of constitutionality. *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 768 (Mo. banc 2006) (citing *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. banc 1993)). "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.* (citing *Ashbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993)). The challenging party has the burden to show the statute "clearly and undoubtedly contravenes" the constitution." *Bridegan v. Turntine*, 2023 WL 4201544, at *2. (quoting *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004)).

C. Section 211.447.2(4) is subject to a balancing-of-interests review, which it easily survives.

Appellant's substantive due process argument is premised on the fundamental right of natural parents in the care, custody and management of their children. App.Br. at 34. Appellant cites Justice Thomas's concurring opinion in *Troxel v. Granville*, 530 U.S. 57, 65 (2000), for the proposition that Due Process mandates that "any government infringement" on a parent's fundamental right in the care, custody and management of their children is subject to strict scrutiny. App.Br. at 35. This Court has noted, however, that "[w]hile strict scrutiny is generally required when fundamental rights are implicated, the

United States Supreme Court applies a different standard when the fundamental right at issue is a parent's right to the care, custody and control of a child." *Weigand v. Edwards*, 296 S.W.3d 453, 457 (Mo. banc 2009) (citing *Weinschenk v. State*, 203 S.W.3d 201, 210-11 (Mo. banc 2006) and *Cannon v. Cannon*, 280 S.W.3d 79, 86 (Mo banc. 2009)). In fact, this Court has expressly rejected application of strict scrutiny in parental rights cases based on *Troxel*. *Cannon*, 280 S.W.3d at 86 ("while a parent's interest in his or her children is entitled to 'heightened protection,' it is not entitled to 'strict scrutiny'") (citing *Troxel v. Granville*, 530 U.S. 57, 80 (2000)).

The appropriate standard for reviewing a case involving a parent's rights to the care, custody or control of his children is a balancing-of-interests standard. *Weigand*, 296 S.W.3d at 458; *Cannon*, 280 S.W.3d at 86 (Mo banc. 2009)). Applying this standard involves the interest of "a natural parent's desire for and right to the companionship, care, custody, and management of his or her children." *Cannon*, 280 S.W.3d at 86 (Mo. banc. 2009) (citing *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)). That interest must be balanced against the "state's '*parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." While *Weigand* involved a custody issue and *Cannon* involved visitation rights, these are the same interests at play in a termination of parental rights case. *Cannon*, 280 S.W.3d at 86.

Termination of parental rights under Section 211.447.2(4) provides a reasonable balance between the rights of a parent and both the state's *parens patriae* interest in protecting the welfare of children and its interest in reducing fiscal and administrative

costs. The parent's rights are protected by virtue of the Section 211.447.2(4) limitation to persons convicted of certain offenses thus proving conduct (i.e. the criminal activity at issue) to a degree exceeding the minimal constitutionally required clear and convincing evidence standard set forth in *Santosky*. The parent's rights are further protected by the narrow application of Section 211.447.2(4) to only criminal acts that are sexual in nature (Chapters 566, 567 and 573) or offenses against the family (Chapter 568) and the further prerequisites that there be a child victim and that the acts rise to a felony. Even then, the parent is entitled to a termination hearing on grounds for termination where the conviction and age of the child must be shown by clear, cogent and convincing evidence.

The state's interests are also served by Section 211.447.2(4). The state's interest in protecting the welfare of children is served by removing them from the care, custody and management of persons who have already been proven beyond a reasonable doubt to have victimized children in a sexual manner or in a manner that constitutes an offense against the family. Doing so through Section 211.447.2(4) also avoids the significant administrative and financial burden of the Court, the state and court appointed counsel from having to re-litigate matters already been proven through a full and fair criminal procedure. It is further consistent with notions of finality and avoids concerns of inconsistent adjudications. Section 211.447.2(4) thus reasonably balances the interests of all parties involved and satisfies constitutional standards.

Even if the Court applied strict scrutiny (which it should not), Section 211.447.2(4) would survive such a challenge. There is no single defined analysis for applying strict scrutiny. "Strict scrutiny is generally satisfied only if the law at issue is 'narrowly tailored

to achieve a compelling interest." *State v. McCoy*, 468 S.W.3d 892, 897 (Mo. banc 2015). However, "the application of strict scrutiny depends on context, including the controlling facts, the reasons advanced by the government, relevant differences, and the fundamental rights involved." *Id.* (citing *Grutter v. Bolinger*, 539 U.S. 306, 327 (2003)). "[T]hat strict scrutiny applied 'says nothing about the ultimate validity of any particular law; that determination is the job of the court applying' the standard." *Id.* (citing *Dotson v. Kander*, 464 S.W.3d 190, 198 (Mo. banc 2015)). "Courts routinely uphold laws when applying strict scrutiny, and they do so in every major area of the law." *Id.* (quoting Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 795-96 (2006)).

Section 211.447.2(4) is narrowly tailored to achieve a compelling state interest. Appellant does not challenge that Missouri has a compelling state interest in protecting the welfare of children. *See Cannon*, 280 S.W.3d at 88 (citing *Sable Comm. of California, Inc. v. F.C.C.*, 492 US 115, 128 (1989)). This is particularly true where, like here, the state is protecting children from persons with a history of sexually assaulting minors. "[N]arrow tailoring 'does not require exhaustion of every conceivable . . . alternative." *State v. McCoy*, 468 S.W.3d at 898 (citing *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003)). As discussed above, Section 211.447.2(4) is narrowly tailored in numerous respects including limiting the (1) crimes that come within its purview, (2) that rise to the level of a felony, (3) which were perpetrated against a child and (4) have been proven to have occurred beyond a reasonable doubt.

Appellant's arguments that Section 211.447.2(4) does not meet strict scrutiny alleges two failings. Appellant argues that there is an insufficient nexus between the crimes at issue and parental unfitness thus rendering 211.447.2(4) overbroad. App.Br. at 37-40. Appellant further argues that declaring a parent unfit based on a prior conviction without providing an opportunity for rebuttal regarding general parental fitness runs afoul of the "necessary precision and narrowness" required by *Santosky v. Kramer* and fails to establish parental unfitness by individualized proof as required by *Stanley v. Illinois*. App.Br. at 36-37, 40-41. Neither argument warrants invalidation of Section 211.447.2(4).

Appellant does not show a lack of sufficient nexus between the crimes in Section 211.447.2(4) and his parental unfitness. In analyzing this claim, it is important to note that the only underlying crimes at issue in this case are child molestation of a child less than 14 years old under Section 566.069 and Sexual Misconduct involving a child under 15 years old under Section 566.083. Appellant implicitly invites this Court to second guess the legislature's decision as to which underlying crimes sufficiently speak to parental fitness to warrant termination of parental rights. App.Br. at 37. Appellant cites no authority for the Court to undertake a *de novo* review of the legislature's decision-making. Appellant further provides no evidence that the legislature failed to undertake a proper consideration of which offenses to include in Section 211.447.2(4). Instead, Appellant only notes that he "is not aware that the Missouri Legislature undertook to, in a scholarly manner, investigate the scientific basis for the conclusion that felony convictions proves convincingly parental unfitness and danger to the child." App.Br. at 37. Even if this Court were inclined to

undertake such analysis and had the authority to do so, Appellant has offered no evidence in this case related to this issue and the Court should decline such an invitation.

Appellant argues that certain evidentiary rules show a disconnect between prior convictions and parental unfitness. He cites both the Federal Rules of Evidence and Missouri law related to propensity evidence. Appellant's authority is inapposite to the facts of this case. Further, "[t]he practice of admitting evidence of the defendant's prior sexual misconduct for purposes of proving the defendant's propensity to commit the sex offense with which he was charged has long been a feature of American law." *See State v. Williams*, 548 S.W.3d 275, 281 (Mo. banc 2018) (citations omitted). The use of such propensity evidence is even stronger in cases involving sexual misconduct against children. Neither Federal Rule of Evidence 404 nor the cases cited by Appellant specifically speak to this issue, but other Federal rules and Missouri cases show that prior sexual misconduct against children is probative of similar future conduct. Federal Rule of Evidence 414 allows the use of evidence (not limited to convictions or guilty pleas) that a criminal defendant charged with child molestation had previously molested another child. Federal Rule of Evidence 415 specifically allows the use of evidence (not limited to convictions and guilty pleas) of child molestation of another child in civil cases involving molestation of a child. Missouri law similarly allows for the introduction of prior sexual misconduct involving a minor in criminal prosecutions for crimes of a sexual nature involving a child victim. *See State v. Williams*, 548 S.W.3d at 281. Rules of evidence do not, as Appellant contends, suggest a lack of sufficient nexus between the crimes included in Section 211.447.2(4) and parental unfitness.

Appellant further argues that strict scrutiny would invalidate Section 211.447.2(4) because it includes an irrebuttable presumption of unfitness. Appellant's argument is based on a mischaracterization of the statute's recognition of a prior proven fact as a presumption and an overreading of the holdings of *Santosky* and *Stanley.* Finding grounds to terminate under Section 211.447.2(4) is not a presumption of unfitness, but a recognition of a prior judicial proceeding involving the parent under a higher standard of proof and is, thus, akin to collateral estoppel. Further, Appellant reads *Santosky* to require a general finding of "unfitness" by clear and convincing evidence. However, *Santosky* did not address what facts could sufficiently support a termination of parental rights. Instead, *Santosky* addresses only the burden of proof necessary to "convey[] to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982).

Appellant similarly misreads *Stanley* to require a generalized finding of "unfitness" based on individualized proof. *Stanley* is an equal protection case that involved Illinois dependency statutes that presumed unwed fathers unfit without a hearing and regardless of parental qualifications merely based on a lack of marriage to the child's mother. *Stanley v. Illinois*, 405 U.S. 645, 649-50 (1972). The United States Supreme Court held that unwed parents, like married parents, divorced parents and unmarried mothers, were "constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Id.* The ruling in *Stanley*, unlike here, involved no allegation of any facts that the parent at issue was unfit. Absent such a specific allegation, the Court was only able to speak to unfitness in a general sense. *Stanley* does not hold that, in the face of

specific facts showing unfitness, the state must engage in a broader general adjudication of parental fitness. Moreover, the chief complaint of *Stanley* was the lack of any hearing where individual unfitness had to be shown. Termination of parental rights under Section 211.447.4(2) can only be accomplished upon a hearing and is based on the parent's specific conduct related to children by virtue of his prior criminal acts. To the extent that *Stanley* requires an individualized showing of unfitness, a hearing to show the parent's prior conviction or guilty plea to a limited set of felony offenses against children by clear and convincing evidence satisfies that requirement. In other words, the finding of a ground for termination under Section 211.447.2(4) is individualized proof of unfitness. *Stanley* does not require, as Appellant argues, the court to perform a broader risk analysis. App.Br. at 41.

Appellant separately argues that Section 211.447.2(4) fails under strict scrutiny because "it is not the least restrictive means to limit infringement of a fundamental right." App.Br. at 42 (citing *State ex rel. Cokder-Garcia v. Blunt*, 849 S.W.2d 81 (Mo. App. W.D. 1993)). *Blunt* is a First Amendment case and does not speak to termination of parental rights. The argument that least restrictive means is always required when dealing with a fundamental right also conflicts with this Court guidance in *McCoy* that "narrow tailoring 'does not require exhaustion of every conceivable . . . alternative." *Id.* at 898 (citing *Grutter*, 539 U.S. at 309). Appellant's contention that termination of parental rights is unnecessary because sections 210.117 and 211.038 RSMo. already prevent reunification is not a reasonable limitation. Merely limiting custody in many cases, including this one, would impair the state's interest in providing children with a permanent and stable home by making them ineligible for adoption. *See* Section 211.443(3); *see also In re E.C.H.J.*,

160 S.W.3d at 818. Nor should the Court entertain unlikely hypotheticals to find a lack of least restrictive means. See footnote 7, *supra*. As discussed below, such an analysis would be inconsistent with standard for facial unconstitutionality. Further, Appellant lacks standing to attack the constitutionality of Section 211.447.2(4) based on hypothetical fact patterns inapplicable to his case. *State v. Richard*, 298 S.W.3d 529, 532-33 (citing *Lester v. Sayles*, 850 S.W.2d 858, 832-33 (Mo. banc 2009)). Finally, the suggestion that the state should be forced to rely on permissive grounds under other subsections that could have been alleged in this case ignores the State's interest in efficiency where underlying acts supporting termination have already been proven beyond a reasonable doubt. Section 211.447.2(4) is significantly *more restrictive* than the other, permissive bases that Appellant cites. A least restrictive means test, even if applicable, which it is not, would not invalidate Section 211.447.2(4).

This Court's holding in *McCoy* is instructive on the fact that Section 211.447.2(4) would survive even strict scrutiny review here. In *McCoy*, the appellant was convicted of unlawful possession of a firearm based on his status as a felon. *State v. McCoy*, 468 S.W.3d at 894. McCoy claimed the statute was not narrowly tailored to meet the government's "compelling interest in ensuring public safety and reducing firearm-related crime." *Id.* at 897. McCoy offered many of the same criticisms offered by Appellant. McCoy complained that the statute was "overbroad" in what underlying crimes triggered supported application of the statute for numerous reasons including that it could have been applied "only to violent felonies, dangerous felonies, or some other subset of felonies; [or] only to those on probation or parole." *Id.* at 898-99. McCoy also complained that the law could be applied

only for a period of years or "until the person qualifies for some form of reinstatement." *Id.* at 899. McCoy further argued that the law "could have set out 'procedural safeguards' or provided for judicial review to determine a person's actual danger to the public before banning firearms possession." *Id.* In upholding the law, the Court implicitly rejected all of these arguments. It also expressly found that, like Section 211.447.2(4), the exclusion of misdemeanor offenses "shows that the legislature decided to tailor the law so that it would apply only to those who have committed more serious offenses." *Id.* This Court's analysis in *McCoy* directly undercuts Appellant's arguments of constitutional infirmity of Section 211.447.2(4) even if strict scrutiny were applied.

D. Section 211.477.2(4) is not facially unconstitutional.

The Court should not entertain a facial challenge to Section 211.447.2(4). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *State v. Perry*, 275 S.W.3d 237, 243 (Mo. banc 2009) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The issue raised by Appellant in support of facial unconstitutionality is his characterization of *Santosky* as requiring a generalized showing of unfitness and his characterization of Section 211.447.2(4)'s recognition of prior judicial findings as an irrebuttable presumption. As previously discussed, Appellant's characterizations of what *Santosky* requires and Section 211.447.2(4)'s presumptions are incorrect.

Further, the hypotheticals offered by Appellant throughout his brief are irrelevant to a facial constitutional analysis. "A person to whom a statute may be constitutionally applied

may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013) (citations omitted). Indeed, engaging in the analysis of hypothetical cases is undesirable and should be avoided. *Id.* In this case, the statute can constitutionally be applied to Appellant. The Court should decline to engage in hypotheticals, which would flip the appropriate as-applied analysis on its head.

E. Section 211.447.2(4) is not unconstitutional as applied in this case.

Appellant argues that Section 211.447.2(4) was unconstitutionally applied against him in this case, but then proceeds to make further *general* arguments about potential mitigating factors. Appellant's failure to argue specific issues related to the application of Section 211.447.2(4) to him alone is sufficient to reject this argument. Further, Appellant failed to attempt to present any contrary evidence regarding his fitness as a parent, even when invited by the Court to do so. This failure to include any evidence upon which to find an error by the Court is also sufficient, by itself, to reject Appellant's as applied argument. On the record before it, Appellant cannot show that Section 211.447.2(4) was unconstitutionally applied in this case.

Appellant pled guilty to two felony offenses under Chapter 566 involving a child victim under the age of 14. Res. App. at A001-A003. Those offenses were based on Appellant's knowing use of a vibrator on the child and his knowing exposure of his genitals to the child for the purpose of arousing or gratifying his own sexual desires. *Id.* Those offenses occurred within 5 years of termination of Appellant's parental rights. *Id.* Appellant was sentenced to eight years imprisonment and is required to register as a sex offender. *Id.*

at A005-A009. As a result of Appellant's guilty plea, among other restrictions, he is ineligible to have custody or unsupervised visitation of E.G., and may not be reunited with E.G. Sections 210.117.1(1), 211.038.1(1), 452.375.3(1) RSMo. These facts were introduced before the trial court by virtue of a certified copy of the underlying criminal case and without objection. T.R. at 17:23-18:14; Res. App. A001-A013. Appellant does not dispute the fact or validity of his guilty plea, that a child was the victim of those crimes or that the crimes do not fall within the ambit of Section 211.447.2(4). Therefore, the express requirements of Section 211.447.2(4) for termination were shown by clear and convincing evidence.

The criminal acts to which Appellant admitted show both sufficient severity and future injury to E.G. to constitute grounds for termination. Appellant cites *In re K.A.W.*, 133 S.W.3d 1 (Mo. banc 2004) for the proposition that the Court must determine whether the acts of parent are sufficiently severe to constitute abuse or neglect. However, while this Court noted that "not every criminal act committed by the parent is severe enough to be abuse or neglect" it specifically stated that felony violations of Chapter 566 and felony convictions that are of a such a nature that the child will be deprived of a stable home for a number of years are not only sufficient to show abuse but "provide guidance as to how severe a parent's criminal conduct must be to constitute abuse." *Id.* at 11. Appellant engaged in criminal conduct of exactly the type the Court found to be a guide for sufficient severity in *In re K.A.W.* Nor does Appellant's conduct speak only to past acts. This Court has also recognized that once a person has been convicted or pleaded guilty to a crime

sufficient to prevent custody or unsupervised visitation under Section 452.375, there is a "presumption of continued unfitness." *Cannon*, 280 S.W.3d 79, 87 (Mo. banc. 2009).

The generic arguments offered by Appellant provide no basis to find application of Section 211.447.2(4) under the circumstances of his case unconstitutional. Appellant lists factors he says provide more narrow circumstances for termination of parental rights based on sexual misconduct in other states. App.Br. at 46-48. The question presented in this case, however, is whether Section 211.447.2(4) passes constitutional muster. Whether Appellant's conduct would have been sufficient to meet standards under other state's statutes is irrelevant. Even if it were relevant, Appellant does not contend that his specific conduct would not support termination under any of other state's law.

Appellant also contends that recidivism rates for sex offenders are too low to present a sufficient risk to children to warrant interference with parental rights. App.Br. at 48-49. Regardless of Appellant's tolerance for such risk, the legislature has already made the determination that persons who have been convicted of the crimes to which Appellant pled guilty present too much of a risk to allow custody of a child. *Cannon*, 280 S.W.at 87; *see also, In Interest of P.M.*, 801 S.W.2d 773, 776 (Mo. App. W.D. 1991) (requiring a child to experience the harm proven to have been inflicted on another child before termination of parental rights "would be a tragic misapplication of the law") (quoting *In Interest of J.A.J.*, 652 S.W.2d 745, 749 (Mo. App. 1983)). Appellant lastly argues that there are other measurement tools to assess Appellant's risk to children. Br. at 50-53. Appellant presented no evidence that he undertook such assessments or, if he did, the results. Instead, he offers the list of potential evaluating tools only to illustrate the "myriad of factors that could more

narrowly establish grounds for termination." Br. at 53. However, absent evidence in the record specific to Appellant, the abstract possibility of evaluation tools provides no insight in the application of Section 211.447.2(4) to Appellant.

Additionally, there is substantial evidence in the record to show that the outcome of this case would not be different had the Court engaged in a generalized analysis of Appellant's parental fitness. The evidence showed Appellant had no emotional ties with E.G., that Appellant had not maintained visitation or contact with E.G., and that Appellant had not provided any support for her care. See Statement of Facts, *supra,* at 12-14. Appellant will also be incarcerated until 2030 and will not be eligible for reunification with E.G. T.R. 31:13-32:7; *see* 211.038.1(1). While Appellant objected to much of this evidence in hearing on grounds on the basis that it was not relevant to termination under Section 211.447.2(4), had the Court engaged in the generalized fitness inquiry advocated for by Appellant, such facts would certainly have been relevant and admissible. In light of the evidence that was admitted, the evidence in the record that would be admissible in a generalized fitness inquiry and the complete lack of contrary evidence offered by Appellant, the Court cannot find that Section 211.447.2(4) was unconstitutional as applied to Appellant.

F. If necessary, Section 221.447.2(4) can be interpreted to avoid constitutional questions by allowing rebuttal evidence of parental fitness.

Appellant has offered no basis to declare Section 211.447.2(4) unconstitutional. However, should the Court have any concern with the constitutionality of Section 211.447.2(4), such concerns could be mitigated by interpreting Section 211.447.2(4) to

allow the Court to consider rebuttal evidence regarding parental fitness generally as Appellant suggests. Such a reading would not be contrary to Section 211.447.2(4)'s plain language. For example, Section 211.447.5(4) expressly states that a conviction or guilty plea of forcible rape or rape in the first degree of a birth mother "shall be conclusive evidence supporting the termination of the biological father's parental rights." No such reference to conclusive evidence is included in Section 211.447.2(4). The existence of a presumption of unfitness, albeit a rebuttable one, could also be logically read into Section 211.447.2(4). Under the plain language of the statute, the conviction or plea requirement and the scope of offenses are clearly sufficient to make a prima facia case of parental unfitness based on clear and convincing evidence. Like other prima facia cases, however, contrary rebuttable evidence is not necessarily precluded. The mandate that a petition be filed further illustrates that a presumption is warranted as it would be illogical for the state to require that a juvenile officer attempt to terminate a parent's rights if the circumstances, if unrebutted, were not sufficient to support termination. Section 211.447.2(4) passes constitutional muster without consideration of unrelated rebuttal evidence. However, should the Court have constitutional concerns, it can guide the juvenile courts to allow such evidence. Even if such a requirement were implemented by this Court, Appellant's failure to offer evidence would not warrant reversal.

III. Sufficient Evidence Supports Termination Of Appellant's Parental Rights.

(Responding to Appellant's Point III)

Appellant contends that there was insufficient evidence presented to the Court to show that grounds for termination of his parental rights exists. Appellant does not contend

that there was insufficient evidence to support that termination was in the child's best interest. The Court need not spend considerable time on this issue. Appellant's argument is, in essence, only a restatement of his constitutional arguments in Point II.

"The judgment of the trial court will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Interest of D.L.S.,* 606 S.W.3d at 222. In determining whether sufficient evidence existed to support a termination of parental rights, the Court must "view the evidence in the light most favorable to the judgment, disregarding all contrary evidence or inferences." *Interest of D.L.S.*, 606 S.W.3d at 223. Judgment should be reversed only if the Court is "left with a firm belief that the judgment is wrong." *In re S.Y.B.G.*, 443 S.W.3d 56, 59 (Mo. App. E.D. 2014) (citing *In re C.J.G.*, 75 S.W.3d 794, 797 (Mo. App. W.D. 2002)). Juvenile Officer submitted a certified copy of Appellant's underlying criminal case. That evidence showed that Appellant pled guilty to two felony violations of Chapter 566 when the victim was a child. Appellant did not object to this evidence and does not contest it on appeal. This evidence, standing alone, is sufficient to meet the grounds in Section 211.447.2(4) by clear, cogent and convincing evidence. *See, In re J.B.*, 214 S.W.3d 353, 355 (Mo. App. S.D. 2007)). Appellant offered no evidence at trial, nor did he try to. Even if he had, under the applicable standard of review, that evidence would have been disregarded. The trial Court's judgment should be affirmed.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the judgment of the hearing court should be affirmed.

CERTIFICATE OF COMPLIANCE

I, Jason D. Sapp, certify as follows:

1. The attached brief includes all information as required by Rule 55.03.

2. The brief complies with the limitations as contained in Rule 84.06(b). The brief contains 14,833 words, as determined by the Word Count function of Microsoft Word. The brief was completed in Times New Roman, 13-point font. The cover page, signature blocks, Appendix and this certification page were excluded from the word count.

3. This brief has been scanned for viruses and is virus free according to the Microsoft Defender Antivirus program.

/s/ Jason D. Sapp
Jason D. Sapp, MBE 58511
Sapp Law LLC
75 N. Lockwood Ave., Suite 222
Webster Groves, MO 63119
P: (314) 782-3500
jason@sapplawllc.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this brief was electronically filed through the Missouri Case.net e-filing system on November 20, 2023, for service upon all attorneys of record.

/s/ Jason D. Sapp
Jason D. Sapp, MBE 58511
Sapp Law LLC
75 N. Lockwood Ave., Suite 222
Webster Groves, MO 63119
P: (314) 782-3500
jason@sapplawllc.com