IN THE
MISSOURI SUPREME COURT

SC89118

SUSAN CANNON (RANDALL)
Appellant,

v.

JAMES CANNON
Respondent

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Robert D. Schollmeyer, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

In the interest of judicial accommodation, Respondent will not repeat the facts that the Appellant has previously stated. Respondent will supplement and clarify the facts stated by Appellant only when Respondent believes further facts are necessary for this court to fully adjudicate the issues on appeal.

Randall Cannon, Respondent in this matter, herein after referred to as "Randy", committed acts against his step-daughter, S.S., which were in violation of Section 566.032 and Section 566.062, (RSMo. 1994). (Tr. III 294: 17-22) Randy pled guilty and was sentenced to seven years with the Missouri Department of Corrections. (Tr. III 294: 23-24) After serving four years of this sentence, Randy was paroled in February of 2004. (Tr. III 295: 11-16)

Randy was paroled with conditions similar to other individuals convicted of violations of the same statutes, including participation in outpatient sex offender treatment, the requirement to obtain a mental health evaluation from the treatment provider, refraining from using any alcohol or drugs, and not to have any unsupervised contact with children. (Tr. III 295: 17-25, 296: 1-10; Appendix A-7) Randy was discharged successfully from his parole in February of 2008. (Tr. III 296: 11-14)

While serving with the Missouri Department of Corrections, Randy successfully completed the Missouri Sexual Offenders Program and was counseled by Mary Stearn, MSW, MOSOP. (Appendix A-13) Additionally, while incarcerated at Farmington Correction Center, Randy also had an individual therapist, Jane Walton, LPC. (Appendix

A-14, A-15) At Farmington, Randy further underwent periodic Mental Status Examinations, and his End of Treatment Report, prepared by Ms. Stearn, indicated that Randy's participation in the program had been excellent in all twelve categories listed. (Appendix A-15) The report submitted by Ms. Stearn stated that "he was open and receptive to group input to help him change his thinking errors, and that he appeared to grow tremendously in his personal responsibility and accountability for his life's choices and deviant cycle." (Appendix A-15, A-16) Ms. Stearn went on to state that "Mr. Cannon became a strong vocal leader for the group" and a "strong asset in the group" to help out the group members. (Appendix A-16) Ms. Stearn reported that Randy was "able to trace the development of his deviant sexual behavior and gained much insight about the internal and external triggers associated with this deviance" and that he "took full responsibility for his crime and the harm he caused to his victim and his family." (Appendix A-16)

Ms. Stearn reported that Randy had obtained a moderate/low score on the Hare Psychopathic Checklist, Screening Version, and a low score on the Static-99, a test utilized to assist in an evaluation of males age 18 or older who are known to have committed at least one sex offense. (Appendix A-4, A-16) Ms. Stearn further identified additional factors that decrease Randy's risk to re-offend, including his completion of the MOSOP Program, the significant psychological growth he showed during treatment, and his apparently genuine commitment to his relapse prevention plan. (Appendix A-16)

Since his release, Randy has devoted his energy to trying to reestablish his

relationship with his children, finding employment, and attending school. (Appendix A-7)

Soon after his release, Randy entered the state-approved Sexual Offender Outpatient Treatment Program at Serenity Counseling where he continued until December of 2004. (Appendix A-8) This treatment at Serenity Counseling was eventually transferred to Provident Counseling where he successfully completed his parole conditions and was released. (Appendix A-16)

While with Provident Counseling, Randy was required to complete an assessment and he was diagnosed with Major Depressive Disorder in Full Remission, Sexual Abuse of a Child (perpetrator) and Narcissistic Personality Disorder. (Appendix A-16) There were no diagnoses of Bipolar Disorder or Pedophilia found by Provident Counseling in January of 2005. (Appendix 16)

In 2005, Randy filed with the Circuit Clerk of Cole County, Missouri, his request for visitation with his children. (Tr. III 296: 15-19) At that time, his son, A.S.C., was almost ten years old and his daughter, M.B.C., was eight years old. (LF 21, 22) At the conclusion of that matter, the parents stipulated that Randy would receive supervised visitation with the children to be supervised by a professional in the field of counseling, family services, or the like. (LF 22) The schedule of supervised visitation was to be established by the supervisor with input from the parties. (LF 22) Randy was responsible for all costs associated with these visits. (LF 22)

Randy testified that he had been exercising his supervised visitation since approximately July of 2005. (Tr. III 297: 7-19) This visitation was supervised by both Henry Laws and Barbara Abshier, who was selected by the Guardian ad Litem in the initial modification action. (Tr. I 24: 10-15, 21-24.) Furthermore, the initial stipulation from 2005 allowed the court to order the parties and children into counseling to better effectuate the reunification and reestablishment of Randy's relationship with his children. (LF 22, 23)

Randy was further awarded reasonable weekly telephone access to the children, without interference by Susan Randall, Appellant in this Matter, herein after referred to as "Susan". (LF 23) This telephone contact was to occur either via a dedicated land line telephone, dedicated cellular telephone, or both, at Randy's option, with Randy to be responsible for the costs associated with the same, so that the use of the same was to be exclusive to communications between Randy, Randy's family, and Randy's children. (LF 23)

Although the stipulation contemplated ordering the family into therapy, Susan has refused and continues to refuse to participate. (LF 22, Tr. III 297: 25, 298: 1-11, 410: 20-25, 412: 8-10, Tr. I 163: 20-21, Tr. II 163: 16-22)

Barbara Abshier, the court-appointed visitation supervisor, has a contract with Division of Family Services since sometime in the 1980's. (Tr. II 101: 8-9) In that capacity, she works with sex offenders and children of sex offenders, as well as physically abused children. (Tr. II 101:13-16) She has worked for no less than five years

with Dr. Paul Rexroad conducting therapy for children that were sexually abused in group therapy as well as mothers in collusion with perpetrators. (Tr. II 101: 18-23) Prior to her contract with Division of Family Services, Ms. Abshier worked with juveniles and the Krider Mental Health Program known as the "Pinocchio Program" which was a behavioral program for children in school who had behavioral issues not related to developmental delays. (Tr. II 102: 8-13)

Ms. Abshier has been providing supervised visits for the Franklin County Circuit Court and the St. Louis Circuit Courts for more than ten years. (Tr. II 102: 15-19) This work includes the supervision of sex offenders with supervised visitation. (Tr. II 103: 1-8) During the course of twenty years, Ms. Abshier estimated that she had supervised "a thousand-plus" children with visits with their sex offender parent. (Tr. II 103: 9-19) In her experience, Ms. Abshier has worked to reunify children of sex offenders with their sex-offending parents over a hundred times. (Tr. II 106: 8-16) This reunification requires the creation and implementation of some kind of plan which Ms. Abshier has either participated in or designed. (Tr. II 106: 16-21) The plan would require continued analysis of the furtherance of the parties' and the children's relationship so that the plan works until everyone feels satisfied that the children are safe. (Tr. II 106: 22-25, 107: 2-7) Previously, Ms. Abshier had been certified as an expert in Franklin County and St. Louis County in the area of sex abuse of children. (Tr. II 107: 8-20)

The visitation between Randy and his children has progressed slowly. Randy has attempted to cooperate and work with Susan in regards to best visitation scheduled for the

children but these efforts have not been returned by Susan. (Tr. III 381: 17-25, 382: 1-25, 383: 1-16)

Ms. Abshier testified that steps she took to initiate visitation between Randy and his children were extensive. (Tr. II 111: 9-24) This involved speaking with the Guardian ad Litem and both parents, as well as being provided a copy of the psychological evaluation performed by Dr. Clark in 2005. (Tr. II 111: 15-24)

The visitation between Randy and his children started first with supervision afforded by Henry Laws. (Tr. II 85: 22-25, 86: 1-4) The first visitation occurred at the Capital Mall in Jefferson City, Missouri. (Tr. II 86: 18-23) Henry Laws was responsible for picking up the children and delivering them to Capital Mall where they would meet their father. (Tr. II 86: 25, 87: 1-7) Henry Laws testified that Randy was appropriate with the children in that he did not say or do anything that gave Henry Laws cause for concern in regards to the children's welfare. (Tr. II 89: 19-25, 90: 1-3) The first visit lasted approximately one and one-half hours to two hours and during that time, the children were distant with their father. (Tr. II 90: 6-19) From July of 2005 to December of 2005, Henry Laws supervised approximately eight visits. (Tr. II 91: 13-17) The activities during these periods included shopping at the mall, going to a movie, playing in the arcade, bowling, playing at the park, and playing miniature golf. (Tr. II 92: 1-6) During none of these visits did Henry Laws ever observe any actions by Randy that would cause Henry Laws concern for the welfare of the children. (Tr. II 92: 9-19)

Henry Laws further stated that the children's behavior towards their father changed throughout the visits. (Tr. II 92: 25, 93: 1-6) He noted that the children would engage and it seemed that they enjoyed what they were doing but then, apparently when they realized they were doing it, they would stop. (Tr. II 93: 1-3)

Ms. Abshier has served as visitation supervisor from July of 2005, through the date of hearing in this matter in July of 2007. (Tr. II 112: 18-25, 113: 1-3)

Ms. Abshier also testified as to the demeanor of the children and the behaviors of Randy during her supervised visitation. (Tr. II 114: 9-23) Ms. Abshier testified that in the beginning, the children were very quiet and unresponsive. (Tr. II 114: 21-22) Ms. Abshier felt that that behavior, on the part of the children, was common in these situations. (Tr. II 115: 1-3) She did note that it was a little more pronounced with these two kids because it had been years since they had seen Randy. (Tr. II 115: 3-6)

Ms. Abshier testified that as time went on, the children began to lighten up and began to make suggestions about what they did and did not want to do. (Tr. II 115: 20-23.) Eventually, they became even more comfortable and began to address Randy personally. (Tr. II 115: 24-25, 116: 1-4) The children would finally call Randy "dad". (Tr. II 116: 6-7)

Ms. Abshier also confirmed that during the visitation periods that she supervised, she did not observe any action by Randy that gave her any cause for concern as to the health, safety, or welfare of the children. (Tr. II 118: 8-17) He acted appropriately at all times and seemed to have a good set of parenting skills and did not require guidance from

Ms. Abshier as to how to interact with the children. (Tr. II 118: 18-25, 119: 1-3) Ms. Abshier did testify that Randy struggled with keeping his emotions in check because he wanted to be able to tell them that he loved them and cared for them but he generally refrained from overstepping. (Tr. II 119: 1-12)

Ms. Abshier testified that when she picks up the kids from Susan's home, the children would not be very enthusiastic about the visits. (Tr. II 123: 12-15) Additionally, Susan would sometimes inform Ms. Abshier that the children did not want to go. (Tr. II 123: 17-18)

However, once the children were alone with Ms. Abshier they would begin to open up a little bit more. (Tr. II 124: 4-6) Ms. Abshier went on to testify that when the children would cross the Missouri River Bridge and get out of Jefferson City, the children would start brightening up and start talking and seemed fine. (Tr. II 124: 7-10)

Ms. Abshier's opinion as to why the Missouri River Bridge in Jefferson City, Missouri seemed to be a "line of demarcation" is that the children have compartmentalized their emotions due to the struggle between their parents and the custody issues and so there is a very marked boundary where the children's behavior changes. (Tr. II 124: 11-25, 125: 1-13)

Ms. Abshier testified that once the children were doing their visits with their father outside the Jefferson City area, their behavior changes were almost instantaneous. (Tr. II 125: 25, 126: 1) At this point the children would engage with their father as well as behave, play, and quarrel. (Tr. II 126: 5-6) On the way home, they would talk to Ms.

Abshier but upon reaching the Missouri River Bridge in Jefferson City, Ms. Abshier testified that it was "like a button just turns off and they just stop." (Tr. II 126: 7-9) Ms. Abshier testified that even though the visits had been going on over two years at the time of the hearing, the compartmentalizing and drastic change of behavior of the children had not changed. (Tr. II 127: 1-10)

Ms. Abshier went on to detail in her testimony a number of things that Randy did with his children during his visitation periods. (Tr. II 130: 14-25, 131: 1-6) These items included playing sports, board games, shopping, eating out, making crafts, visiting family, and going to the zoo. (Tr. II 130: 14-25, 131: 1-6) During the time from July, 2006, to date, Randy did nothing in Ms. Abshier presence that caused her any concern as to the health, safety, and welfare of the children. (Tr. II 131: 7-19)

The children developed to a place with their father where they were able to express affection and Ms. Abshier testified that the signs of affection remarkably increased since the beginning of the visits. (Tr. II 134: 11-16) Ms. Abshier detailed examples of signs of affection between A.S.C., M.B.C., and their dad. (Tr. II 135: 3-25, 136: 1-5) These included a comfort level that allowed M.B.C., the initially more hesitant and temperamental of the two, to poke and giggle with Randy, and make efforts to get Randy's attention. (Tr. II 136: 14-17, 135: 16-25, 136: 1-5) Ms. Abshier further testified that she believed that A.S.C. and M.B.C. had developed a relationship with their father and emotional ties. (Tr. II 220: 18-23) She testified that the children now actively engage him, touch him and fight when they do not get his attention. (Tr. II 221: 3-7)

Ms. Abshier further went on to testify and render an expert opinion that she did not believe that Randy posed a threat of harm to his children. (Tr. II 160: 13-14) She further stated that she believed Randy was ready for unsupervised visits and that the kids could handle unsupervised visits. (Tr. II 160: 20-22) Her only hesitation was the fact that she did not think the situation was ready for unsupervised visits. (Tr. II 160: 22-23) Ms. Abshier articulated that the situation was not ready because the parties were not afforded the opportunity to get engaged in family counseling and work through whatever issues they had as parents. (Tr. II 158: 6-8, 163: 16-19) Ms. Abshier's expert opinion was that the only impediment to a family therapy setting that would allow a more conducive environment for the children is Susan's refusal to participate. (Tr. 164: 17-25, 165: 1-6)

When asked by the Guardian ad Litem which was worse for the children, the need to compartmentalize their feelings or a termination of their relationship with their father, Ms. Abshier was clear that terminating a relationship with their father was the greater evil. (Tr. II 179: 16-25, 180: 1-6)

Ms. Abshier testified that it took almost a year before the children were comfortable enough for her to consider transitioning the supervision to a family member. (Tr. II 116: 10-15) Ms. Abshier worked with the proposed family member so they were aware of the rules of the supervision and their responsibilities. (Tr. II 116: 20-25, 117: 1-4, 128: 13-25, 129: 1-14)

Family supervisors included William Cannon and Shelli Lehmen. Mr. Cannon is the brother of Randy and paternal uncle of A.S.C. and M.B.C.. (Tr. II 223: 17-19, 22-24)

Mr. Cannon has been employed as a school teacher for twelve years. (Tr. II 223: 20-21, 224: 12-14) Mr. Cannon was approved as a supervisor in this situation by John Beetem, the former Guardian ad Litem in this matter, and Ms. Abshier. (Tr. II 224: 15-22) He was instructed as to his role as a supervisor by Ms. Abshier. (Tr. II 224: 23-24)

Mr. Cannon supervised visits since approximately June 2006. (Tr. II 226: 15-20) Mr. Cannon has had the opportunity to supervise twenty to twenty-five visits. (Tr. II 229: 3-6) These visits typically occurred on Sundays with Mr. Cannon responsible for the transportation. (Tr. II 229: 8-11)

Mr. Cannon also testified to the kids' demeanor as they crossed the "line of demarcation." (Tr. II 230: 23-25, 231: 1-10) He noted that the kids interact well with Randy and that even M.B.C. had started to gravitate toward him. (Tr. II 231: 18-25, 232: 1-4) Mr. Cannon has not seen the children express any fear of their father, nor has he seen them react negatively when Randy touches them. (Tr. II 232: 18-25, 233: 1-7)

Mr. Cannon gave a number of examples as to how the children have bonded with their father including making him gifts, getting their picture taken with him and showing jealousy when the other sibling gets more attention. (Tr. II 235: 14-25, 236: 1-5, 237: 1-25, 238: 1-25, 239: 11-15) Mr. Cannon testified that there was nothing about Randy's behavior towards the children that caused him concern. (Tr. II 244: 16-20)

Furthermore, Mr. Cannon testified that Randy was not the same person that he was back at the time of his conviction. (Tr. II 244: 23-25, 245: 1-4) Mr. Cannon specifically stated that he believed Randy to be harder working than he used to be, and more caring.

(Tr. III 245: 5-8) He further testified that Randy's family is comfortable leaving him alone with Mr. Cannon's nieces. (Tr. II 246: 2-9)

Randy testified that they children have expressed affection for their father. (Tr. III 303: 9-19) Randy's daughter, M.B.C., has even hugged Randy before shutting down and preparing for the return to her mother's home at the conclusion of her visit. (Tr. III 308: 3-12) This affection has developed over time and the children are now comfortable with Randy. (Tr. III 309:6-17)

Randy complained that Susan had not kept him informed about events in the children's lives. (Tr. III 310: 7-22) This included when A.S.C. broke his arm in an ATV accident as well as when he got hit by a baseball and had to go to the emergency room. (Tr. III 310:7-13, 311:14-25, 312:1-8) Randy stated that Susan had his contact information and could have, at least, provided him with the information. (Tr. III 310:14-17) Randy further stated that communication between the parents could occur via e-mail. (Tr. III 312: 20-25) Randy testified that he would and could put the discord between himself and Susan aside to co-parent A.S.C. and M.B.C.. (Tr. III 313:1-6)

Randy admitted that a transition, as suggested by Barbara Apshier, would be appropriate to allow him and the children to have a normal father-child relationship. (Tr. III 318: 29-25, 319:1-16) Additionally, Randy believed that family therapy was necessary to resolve the hostile and volatile issues that have put A.S.C. and M.B.C. in the middle. (Tr. III 319: 17-25, 320:1-21)

When asked why he initially asked for sole legal and physical custody but, at the hearing, had proposed an alternative for the court to consider joint legal and physical custody, thereby increasing and removing the requirement of supervision from his custody, Randy answered that although he would love to have the children with him, the reasons he abandoned that request at hearing included his conviction, the fact the children have lived with their mother in Jefferson City, Missouri their entire lives and that the geographical difference would require a relocation. (Tr. III 361:1-21)

Even Susan testified that damaging the children's relationship with their father would be harmful. (Tr. III 417: 2-9) However, she then contradicted herself by stating that it would serve the children's best interest if they were to have no further contact with Randy. (Tr. III 417: 10-12) Susan testified that she believed Randy presented a "clear and present danger to A.S.C. and M.B.C. if he's left alone with them." (Tr. III 424: 4-7) She testified that this opinion was based on her knowledge of Randy though she had not had any direct contact with Randy since before he was arrested in July of 1999. (Tr. III 424: 4-7, 431: 8-10, 20-21, 433: 5-16) Susan admitted that any testimony that she proffered as to Randy's relationship with his children did not come from the direct knowledge she had of that relationship. (Tr. III 431: 11-15) Susan rendered an opinion that she did not believe Randy was capable of rehabilitation. (Tr. III 431: 24-25, 432: 1) She stated that it was his manipulation of her during the time of his arrest that led her to this belief. (Tr. III 432: 10-12) Susan testified that she had stopped supporting Randy as a father and as a father-figure for A.S.C. and M.B.C.. (Tr. III 435: 13-17)

Susan had testified that Randy's relationship with his children prior to his incarceration was not very strong. (Tr. III 437: 7-10) Additionally, she testified that the children did not have any memories of their father and did not ask about him. (Tr. III 437: 22-25, 438: 1-10) Susan testified that she did not give Randy pictures or updates on the children during his incarceration. (Tr. III 438: 11-14) Susan explained this lack of contact in that she was attempting to protect her children. (Tr. III 439: 6-10) However, she could come up with no direct knowledge of any harm Randy had ever perpetrated against A.S.C. or M.B.C. of any kind. (Tr. III 439: 11-13)

Numerous references were made to the children's counselor, Elizabeth Ewers-Strope. However, Ms. Strope was not called to testify, or to render an opinion as to the requested unsupervised visitation. However, Susan did testify that she had met with Dr. Strope during the children's sessions. (Tr. III 442: 21-23) Although Susan tried to minimize this contact with the kids' counselor as to a "hi", in fact, she goes into Dr. Strope's office, closes the door, leaving the kids in the waiting room, while she talks with the children's counselor. (Tr. III 442: 23-25, 443: 1-16) She did not tell the children what it is she has discussed with their counselor, instead leaving it up to their imagination. (Tr. III 443: 17-23)

Even the Guardian Ad Litem, Tom Snider, testified in his report to the Trial Court that when he met with the children at Dr. Strope's office, this meeting occurred within "the sphere of the mother's influence" and that is was in that environment that the children expressed their desires to him to not see their father. (Tr. V 714:7-18)

When asked about whether or not the children would be damaged if their father was demeaned to them, Susan explained away her previous answer in saying that the children would be damaged "because their friends and the people that they have relationships with would know what has happened and what their father had done." (Tr. III 445: 3-15) Susan then further stated that she would feel obligated to tell the parents of the children's friends of Randy's conviction if he attended the children's events where other children were. (Tr. III 464: 22-25, 465: 1) However, she had previously stated if the children were to find out about Randy's conviction, it would be damaging to the children. (Tr. III 445: 3-15.)

Susan denied the opinion regarding the children compartmentalizing their feelings. (Tr. III 446: 2-6) However, she admitted that in her presence the children expressed no love for Randy, affection towards Randy, or any excitement about Randy at all. (Tr. III 446: 7-10) Susan admitted that the children knew of Randy's crimes and that in fact it was her daughters, S.S. and S.S., who informed the children of these acts. (Tr. III 447: 5-9) This conversation did not take place in Susan's presence but instead, Susan left it to the children's older sisters, one of whom was the victim in this matter, to relay Randy's previous acts. (Tr. III 447: 10-12) Although pressed, Susan could not provide an opinion as to whether or not it would be better for her children if she and Randy could communicate like parents. (Tr. III 451: 22-25, 452: 1-2)

Dr. Bruce Harry, M.D. testified on behalf of Susan. (Tr. IV 474: 8-9) Dr. Harry testified that he was retained by Susan to review Randy's records as well as interview

Randy and give him an examination. (Tr. IV 490: 6-8) The records Dr. Harry reviewed include everything reviewed by Dr. David B. Clark, PhD., Randy's expert. (Tr. IV 489: 25, 490: 1-5) Dr. Harry testified that he examined Randy for not quite five hours and administered no tests. (Tr. IV 490: 9-11) He also interviewed Susan and S.S., the victim of Randy's crime. (Tr. IV 490: 12-15) Based on only that review, Dr. Harry testified that he had been afforded a number of documents he said he needed to render an opinion. (Tr. IV 492: 19-25, 493: 1-25, 494: 1-25, 495: 1-25, 496: 1-25, 497: 1-25, 498: 1-25, 499: 1-25, 500: 1-25, 501: 1-23) Of the 15 different sets of documents Dr. Harry asked to review, he only reviewed four. (Tr. IV 492: 10-25, 493: 1-25, 494: 1-25, 495: 1-25, 496: 1-25, 497: 1-25, 498: 1-25, 499: 1-25, 500: 1-25, 501: 1-23; Appendix A-20, A-21)

In fact, the only records Dr. Harry was able to actually review were those provided by Dr. Clark and included Randy's records from Menninger Clinic, St. John's Mercy Medical Center, John Rabun, M.D., Fulton State Hospital. (Tr. IV 498:12-25, 499:1-25, 500:1-25, 501:1-23) No other records were procured by Dr. Harry nor were any additional interviews conducted by Dr. Harry. (Tr. IV 491: 5-25, 492: 10-25, 493: 1-25, 494: 1-25, 495: 1-25, 496: 1-25, 497: 1-25, 498: 1-25, 499: 1-25, 500: 1-25, 501: 1-23)

However, Dr. Harry had specifically stated in correspondence to Susan's counsel that, before he could render an opinion to a reasonable degree of medical certainty as to the psychiatric condition of Randy, he would need all 15 sets of records requested and interview 15 different individuals. However, other than Randy, Susan and S.S., no other

interviews were performed. (Tr. IV 498:12-25, 499:1-25, 500:1-25, 501:1-23, Appendix A-21, A-22)

Dr. Harry did state that he had reviewed the police reports from 1999 and Dr. Clark's evaluation. (Tr. IV 502: 17-24) Other than the assessment summary from Provident Counseling, which was dated 2005, and Dr. Clark's report from 2005, the only records reviewed by Dr. Harry were prepared at or before the time of Randy's incarceration in 1999. (Appendix A1-A-19, Tr. VI 509: 14-25, 510: 1-13) Although much focus was made by Susan of Randy's mental state at the time of his conviction, the only personal evaluation conducted by Susan's expert of Randy was the five hour interview conducted in 2007. (Tr. IV 490: 9-11)

When cross-examined, Dr. Harry testified that the only basis for any finding of Randy being diagnosed with pedophilia was Randy's self-report back in 1999. (Tr. VI 575: 6-25, 576: 1-11) There was no other information in the records reviewed by Dr. Harry to support a diagnosis of pedophilia. (Tr. VI 576: 7-11) This includes information procured in the extensive examination conducted by Dr. Rabun and later reviewed by Dr. Harry. (Tr. VI 576: 18-25, 577: 1-25, 578: 1-4) Dr. Harry rendered no personal opinion as to Randy's ability to parent his children, whether or not he had been rehabilitated, or the risk of recidivism in regards to Randy's past crimes, but instead can only talk about "pedophiles" generally. (Tr. VI 567: 17-25, 568: 1-25, 569: 1-25, 570: 1-25, 571: 1-25, 572: 1-19)

Although Dr. Harry failed to administer any test on Randy personally, he was asked to offer an opinion as to the threat that would be posed by Randy if he was granted unsupervised visitation with his children. (Tr. VI 579: 10-21)

In response to Dr. Harry's testimony, the Respondent retained David B. Clark, PhD to do an evaluation. (Tr. VI 589: 4-6) Dr. Clark had initially been retained in the previous modification in this action to prepare an evaluation on the family as well. (Tr. VI 589: 7-9, Appendix A-1 – A-21) In 2005, Dr. Clark reviewed over nineteen different sets of records, conducted twelve interviews and submitted Randy to five different psychological tests. (Appendix A-2) Additionally, Dr. Clark submitted Susan and the minor children to psychological testing and interviews in the pursuit of his evaluation. (Tr. V 598:14-25, 599:1-25, 600: 1-4, Appendix A-2)

Subsequently, Dr. Clark updated his evaluation in November 2007. (Appendix A-23 – A-38) In that subsequent evaluation, he again submitted Randy to six psychological tests, conducted four additional interviews, separate from those individuals previously interviewed, and reviewed sixteen new sets of documents. (Appendix A-25, A-26) Based on Dr. Clark's updated evaluation he continued his recommendation from 2005 which stated "it was his opinion that there is no psychological reason that Randy's contacts with his children need to be supervised." (Appendix A-35) Counseling was again recommended by Dr. Clark for Randy and the children, as had previously been recommended in 2005, but Dr. Clark found that other than this counseling to help foster

his relationship with his children, Randy does not need any other psychological or psychiatric treatment at this time. (Appendix A-36)

Dr. Clark further stated, unequivocally, that Randy was not a pedophile. (Tr. V 605: 18-19) Additionally, Dr. Clark specifically noted that Randy was able to use self-restraint in his current situation to the benefit of the minor children. (Tr. V 617: 2-6) This was an important consideration for Dr. Clark because, as he noted "These are children who started off with a very skeptical attitude toward (Randy). These are children that live in a home where the attitude toward him is extremely negative and they cannot help but be affected by that." (Tr. 617: 16-20) Dr. Clark noted that it is very important that Randy go at the children's pace when attempting to reestablish his relationship with the children and that Randy was successfully doing so. (Tr. V 617: 21-25).

Dr. Clark felt that Randy's ability to progress at the children's pace was an indirect sign of his relatively low risk to reoffend as he was doing what the kids needed instead of what he needed or wanted and placing the children's needs above his own. (Tr. V 618: 6-19)

Dr. Clark also detailed for the Court the importance he placed on Randy's self-awareness or insight and how that could prevent Randy from re-offending. (Tr. V 622: 2-14) Dr. Clark testified about what he felt had changed in Randy's life to make him trustworthy and responsible. (Tr. V 689: 17-25, 690: 1-4) These included Randy's learnings from the MOSOP program and seeing the impact of his offense on everyone including his children, his family and the victim. (Tr. V 689: 17-25, 690: 1-4)

The Guardian ad Litem testified that the children had made statements to him regarding not caring whether or not their father was alive or dead. (Tr. V 713: 9-11) The Guardian ad Litem further testified that he had elicited statements from the children regarding hating their father and not wanting to see him. (Tr. V 713: 11-13) This interview of the children occurred in the office of Elizabeth Strope. (Tr. V 713: 21-22) Elizabeth Strope was present for those interviews. (Tr. V 713: 22-25, 714: 15-18) Although the children's statements to the Guardian ad Litem were somewhat harsh, the Guardian ad Litem still felt that the appropriate recommendation regarding the best interest of these children was to allow unsupervised visitation between Randy and A.S.C.. (Tr. V 718: 2-4) However, due to M.B.C. gender, the Guardian ad Litem was not comfortable enough to recommend unsupervised visitation with that child. (Tr. V 717: 2-5) Yet, even with the limitation on supervision for M.B.C., the Guardian ad Litem still entertained and recommended an overnight visitation for both children to occur in Randy's home in St. Louis, Missouri. (Tr. V 719: 15-18)

Based on the extensive findings of Dr. Clark and the additional evidence presented by both Susan and Respondent, the court rendered its Judgment on 13th day of February, 2008, finding that the best interest of the minor children would be served by affording the parties joint legal and physical custody of the children and granting Respondent's specific custody which included alternating weekends from Friday to Sunday, specific holidays scheduled, and six weeks each summer. (LF 313-328)

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN FINDING THAT SECTION 452.375.3 (RSMO. 2005) WAS UNCONSTITUTIONAL IN THAT SAID SECTION OPERATES RETROSPECTIVELY, DENIES RESPONDENT DUE PROCESS AND VIOLATES RESPONDENT'S EQUAL PROTECTION IN THAT AT THE TIME RESPONDENT PLED GUILTY TO THE APPLICABLE CRIMES, SECTION 452.375 ALLOWED RESPONDENT TO PURSUE UNSUPERVISED CONTACT WITH HIS CHILDREN, AND ALLOWED RESPONDENT AN OPPORTUNITY TO PRESENT EVIDENCE AS TO HIS FITNESS AS A PARENT IN PURSUIT OF UNSUPERVISED CONTACT WITH HIS CHILDREN AND TREATED RESPONDENT THE SAME AS SIMILARLY SITUATED PERSONS, THUS NOT VIOLATING RESPONDENT'S EQUAL PROTECTION.

Hamdi v. Runsfeld, 542 U.S. 507, 533, 1124 S.Ct. 2633, 2648 (2004)

Jane Doe I v. Phillips, 194 S.W.3d 833, 852 (Mo. banc 2006)

Kohring v. Snodgrass, 999 S.W.2d 228, 232 (Mo. banc 1999)

Mathews v. Eldrige, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed2d 18 (1976)

R.L. v. State of Missouri Department of Corrections, 245 S.W.3d 236 (Mo. 2008)

Santosky v. Cramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed 2d 599 (1982)

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972)

Section 452.375 RSMo 2005

Section 452.375 RSMo 1995

Section 452.400 RSMo 2005

Section 452.400 RSMo 1995

Missouri Constitution, Bill of Rights, Article I, Section 2

Missouri Constitution, Bill of Rights, Article I, Section 10

Missouri Constitution, Bill of Rights, Article I, Section 13

United States Constitution, Bill of Rights, Amendment V

United States Constitution, Bill of Rights, Amendment XIV

II. THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENT JOINT LEGAL AND PHYSICAL CUSTODY, ALONG WITH AWARDING UNSUPERVISED CONTACT WITH THE CHILDREN BECAUSE THE EVIDENCE PRESENTED IN SUPPORT OF SAID PRAYER WAS SUBSTANTIAL, MORE CREDIBLE AND OUTWEIGHED ANY EVIDENCE PRESENTED BY APPELLANT IN THAT:

A. RESPONDENT NEVER ABANDONED HIS CLAIM FOR JOINT LEGAL AND PHYSICAL CUSTODY BUT ONLY ACKNOWLEDGED THAT A TRANSFER OF CUSTODY WOULD REQUIRE THE CHILDREN TO BE REMOVED FROM THE ONLY HOME THEY HAVE EVER KNOWN AND RELOCATE FROM JEFFERSON CITY, MISSOURI TO ST. LOUIS, MISSOURI;

B. THAT RESPONDENT CLEARLY ARTICULATED THAT HE WOULD WORK WITH APPELLANT TO CO-PARENT THE CHILDREN AND THAT THERE WAS NO EVIDENCE PRESENTED THAT THE PARTIES, IN FACT, DID NOT SHARE A COMMONALITY OF BELIEFS; AND

C. THE EVIDENCE PRESENTED BY RESPONDENT'S EXPERT CLEARLY SHOWED RESPONDENT'S CURRENT MENTAL STATUS, UNLIKELIHOOD TO REOFFEND AND NO THREAT OF HARM TO THE MINOR CHILDREN.

Burkhart v. Burkhart, 876 S.W. 2d 675, 678 (Mo. App. W.D. 1994)

In re Marriage of M.A., 149 S.W.3d 562, 596 (Mo.App. E.D. 2004)

Janes v. Janes, 242 S.W.3d 744, 748 (Mo. App. W.D. 2007)

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)

Riley v. Campbell, 89 S.W.3d 551, 552 (Mo. App. W.D. 2002)

Section 452.375.1(2) RSMo. 2005

Section 452.375.1(3) RSMo. 2005

Section 452.375.4 and .6 (RSMo. 2005)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING THAT SECTION 452.375.3 (RSMO. 2005) WAS UNCONSTITUTIONAL IN THAT SAID SECTION OPERATES RETROSPECTIVELY, DENIES RESPONDENT DUE PROCESS AND VIOLATES RESPONDENT'S EQUAL PROTECTION IN THAT AT THE TIME RESPONDENT PLED GUILTY TO THE APPLICABLE CRIMES, SECTION 452.375 ALLOWED RESPONDENT TO PURSUE UNSUPERVISED CONTACT WITH HIS CHILDREN, AND ALLOWED RESPONDENT AN OPPORTUNITY TO PRESENT EVIDENCE AS TO HIS FITNESS AS A PARENT IN PURSUIT OF UNSUPERVISED CONTACT WITH HIS CHILDREN AND TREATED RESPONDENT THE SAME AS SIMILARLY SITUATED PERSONS, THUS NOT VIOLATING RESPONDENT'S EQUAL PROTECTION.

A. *Standard of Review*

Construction of a statute is a question of law, which this Court reviews *de novo,* and which will not be declared unconstitutional unless it clearly contravenes some constitutional provision. *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. Banc 1993). In addition, it should be obvious that a statute cannot supersede a constitutional provision. *Id. at 341*.

As this Court has previously stated, because there is no provision of the federal constitution which is comparable to Missouri's ban on laws retrospective in their

operation as found within Missouri Constitution Article I, Section 13, federal decisions provide no guide to this Court's interpretation of that clause. *Jane Doe I v. Phillips,* 194 S.W.3d 833, 852 (Mo. banc 2006).

In regard to the terms "due process", "equal protection" or *ex post facto,* it is understood that this Court will interpret these phrases consistently with their interpretation under federal law. *Phillips at 841.* Susan appears to merge the arguments as to three principles of law into the same argument in Point I. Those being:

1) The finding by the Trial Court that the statutory provision Section 452.375.3(1) RSMo (2005), applied retrospectively. (LF 298 and Section B of Appellant's Brief – Page 25) ;

2) The finding by the Trial Court that the statutory provision Section 452.375.3(1) RSMo (2005) denied Randy a fundamental right without due process. (LF 298) and Section B of Appellant's Brief – Page 25); and

3) The finding by the Trial Court that the statutory provision Section 452.375.3(1) RSMo (2005) deprived Randy of equal protection. (LF 299 and Section C of Appellant's Brief – Page 31).

In addition, the Trial Court in its Judgment and Susan in her Brief did only reference analysis of Section 452.375(3).1 RSMo (2005), the provision for determination of "custody", presumably due to the Court awarding Randy joint legal and joint physical custody. Desiring not to abandon or waive any claim(s) he may have to both Section 452.375.3(1) and Section 452.400.2(2) RSMo (2005) (the applicable provision if

modification of "visitation" is at issue) should there be further proceedings subsequent to this Court's ruling, since the amendments to each of the above statutory provisions were identical, Randy's arguments will be directed to both provisions accordingly.

B. Sections 452.375.3(1)and 452.400.2(2) RSMo Operate Retrospectively

The Trial Court found that Section 452.375.3(1) RSMo (2005) violated Article I, Section 13 of the Missouri Constitution, which the Trial Court stated had been held to prohibit the enactment of any law that is "retrospective in its operation". (LF 298) The Trial Court, (citations omitted), expressly justified its ruling stating that "retrospective laws" are generally defined as laws which take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty or attach a new disability in respect to transactions or considerations already past. (LF 298)

Upon *de novo* review, this Court should affirm the finding of the Trial Court because the amendment to Section 452.375.3(1) RSMo, upon which the Court expressly ruled, and Section 452.400.2(2), RSMo, upon which the Court was silent, clearly contravene a constitutional provision. Specifically, Article I, Section 13 of the Missouri Constitution, as determined within this Court's prior statements of the law, analysis and findings contained within *Jane Doe I v. Phillips,* 194 S.W.3d 833, 852 (Mo. banc 2006) and *R.L. v. State of Missouri Department of Corrections*, 245 S.W.3d 236 (Mo. 2008), which are both controlling authority.

The analysis of this Court in *Phillips* acknowledged that the constitutional bar on civil laws retrospective in their operation has been a part of Missouri law since this State

adopted its first constitution in 1820 and that the 1875 constitutional debates noted this bar is broader than the *ex post facto* bar in other states. *Phillips at 850.*

This Court in *Phillips* ruled that a law requiring registration as a sex offender for an offense that occurred prior to the registration laws effective date was an invalid retrospective law in violation of Article I, Section 13 of the Missouri Constitution. Said registration requirement was invalid because when the person(s) challenging the registration pled guilty, they had no obligation to register and the duty to register stemmed only from a subsequent change in the law. *Phillips at 852.*

In the present matter, a new disability to his detriment and prejudice was attached to Randy, which is the complete and utter inability to seek or obtain unsupervised visitation or custody rights with his children. This disability is based solely on the fact of an offense that occurred prior to the effective date of the amendments to Section 452.375.3(1) RSMo (2005) and Section 452.400.2(2) RSMo (2005). The amendments were subsequent changes in the law from the time Randy entered his plea of guilty.

Subsequent to *Phillips*, this Court, in February 2008, recently considered another retrospective law in regard to the same general topic of sex offenders in *R.L. v. State of Missouri Department of Corrections*, 245 S.W.3d 236 (Mo. 2008).

Like *Phillips*, upon which the Trial Court expressly relied, the present matter before this Court is also analogous to *R.L.*, and the relevant facts of *R.L.* are as follows:

In December 2005, R.L. plead guilty to attempted enticement of a child in violation of 566.151 RSMo (2000). Among other things, R.L. was required to register as

a sex offender. *Id. at 236.* At the time he pled guilty, there was no provision in Missouri law restricting where he could live based upon his status as a sex offender. *Id. at 237.*

In June 2006, Section 566.147 RSMo. became effective so that those convicted, like R.L., were prohibited from residing within one thousand feet of a public school and the Department of Corrections notified R.L. that he needed to relocate or could be subject to criminal prosecution. *Id. at 237.*

R.L. sought and obtained a declaration that Section 566.147 RSMo. 2006 was an unconstitutional retrospective law as to he and others similarly situated who already resided within 1,000 feet of a school. *Id. at 237.* Upon review of the Trial Court finding said provision unconstitutional, this Court again reiterated the above-stated, long-standing principle of law in Missouri that: "A retrospective law is one which creates a new obligation, imposes a new duty or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired." *Id., (citing Squaw Creek Drainage Dist. v. Turney,* 235 Mo. 80, 138 S.W. 12, 16 (1911).

In affirming the Judgment of the Trial Court, this Court concluded in *R.L.* as to the residency restrictions, as it did in *Phillips* as to the registration requirements, that the statute imposed a new obligation on R.L. and Doe *(Phillips)* and others similarly situated, by requiring them to change their place of residence (R.L.) and register (Doe – [*Phillips*]) based solely upon offenses committed prior to the enactment of the statute. *Id. at 237* That attaching new obligations to past conduct in such a manner violated the bar

on retrospective laws set forth in Article I, Section 13.

The principle of law as contained within *Phillips* and *R.L.* is consistent and controlling as applied to the facts of the present matter. Here, a new disability was attached to Randy, which was based solely on the fact of an offense that occurred prior to the effective date of the respective amendments to the above statutory provisions.

Based upon the principles recently espoused by this Court, pursuant to the above-stated broad constitutional prohibition in effect in Missouri as to retrospective laws, which includes prohibitions other than as to the impairment of vested rights, the issue primarily if not exclusively relied upon and argued in Susan's Brief, the amendments to Section 452.375.3(1) RSMo (2005) and Section 452.400.2(2) RSMo (2005), operate in this instance as retrospective laws. The application of these laws clearly contravenes Article I, Section 13 of the Missouri Constitution, and thus this Court should affirm the Trial Court's finding that Section 452.375.3(1) RSMo is unconstitutional, and find the same in regard to Section 452.400.2(2) RSMo, about which there was no specific ruling by the Trial Court.

C. Sections 452.375.3(1) RSMo and 452.400.2(2) RSMo Violate Due Process and Equal Protection

The Trial Court found that Section 452.375.3(1) RSMo (2005) denied Randy a fundamental right without due process of law when the legislature enacted the statute (Section 452.375.3(1) RSMo) without proper notice to Randy and a corresponding right to be heard. (LF 298) Said procedural and substantive "due process" rights are

guaranteed within Missouri constitution article 1, section 10 and the Fifth and Fourteenth Amendment to the United States Constitution.

Upon *de novo* review, this Court should affirm the finding of the Trial Court because the amendment to Section 452.375.3(1) RSMo upon which the Court expressly ruled, and Section 452.400.2(2) RSMo, upon which the Court was silent, clearly contravene the above constitutional provisions.

Procedural Due Process

For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Hamdi v. Runsfeld,* 542 U.S. 507, 533, 1124 S.Ct. 2633, 2648 (2004), (*citing Fuentes v. Shevin,* 407 U.S. 67, 80, 32 L. Ed. 2d 556, 92 S.Ct. 1983 (1972), (*quoting Baldwin v. Hale, 68 U.S. 223, 1 Wall, 223, 233, 17 L. Ed. 531 (1864); Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S.Ct. 1187 (1965) (other citations omitted); See also: Scott County Master Docket,* 672 F.Supp. 1152, 1170 (8th Cir. 1987). The constitutional interest in the development of parental and filial bonds free from government interference has many attars, above all it is manifested in the reciprocal rights of parent and child to one another's companionship. *Bohn v. County of Dakota,* 772 F.2d 1433, 1435 (8th Cir. 1985). A parent's interest in the custody of his or her child is among the most basic and fundamental of the liberties protected by the

constitution. *Davis v. Page,* 618 F.2d 374, 379 (5th Cir. 1980). The integrity of the family unit has found protection in the Due Process Clause and the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972). Further, because associational interest with a child is an asserted "right", it falls under the measure of strict judicial scrutiny. *Kohring v. Snodgrass,* 999 S.W.2d 228, 232 (Mo. banc 1999).

Susan has stated within her Brief that the parent-child relationship deserves due process protection.

Section 452.375.3(1) RSMo and 452.400.2(2) RSMo do not and did not allow for any hearing or an opportunity to be heard at any time, let alone a meaningful time prior to the deprivation of his associational contact with his children. In addition absent intervention by this Court, there is no post determination or deprivation remedy by which Respondent can avail himself or restore himself to his status as existed prior to the statutory amendments. While in some circumstances, post-deprivation remedies provided by state law and regulations may be sufficient to satisfy the strictures of procedural due process, notwithstanding that the deprivation of liberty or property took place without the benefit of a notice or a hearing, *Scott County Master Docket,* 672 F.Supp. 1152, 1170 (8th Cir. 1987), that is not the case in the present matter, as the statute strictly prohibits any avenue for a hearing as to the award of custody or unsupervised visitation pursuant to its own terms. The practical effect of the application of the statutes in the present matter is to remove the discretion typically afforded the Court to determine

custody and/or visitation as in the best interests of the children at issue.

Additionally, Section 452.375.3(1) RSMo and Section 452.400.2(2) RSMo create the irrebuttable presumption that Randy is an unfit person to have custody and/or unsupervised visitation with his children, all without a hearing prior to said determination. The fundamental liberty interest of natural parents in the care, custody, and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their child. *Santosky v. Cramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed 2d 599 (1982). In addition, it would not appear that any significant fiscal administrative burden would be entailed by the granting of a hearing in some fashion, either pre-deprivation or post-deprivation. *See: Mathews v. Eldrige*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed2d 18 (1976) (*Stating three factors to determine the quantum of process measurement: 1) Private interest affected by initial action; 2) Risk of erroneous deprivation through procedures used and value of added safeguards; and 3) Function of additional fiscal administration).*

A fundamental liberty interest has been encroached upon by the State of Missouri. This has been performed with absolutely no notice to Randy and without any pre-deprivation or post deprivation remedy.

Procedural "due process" rights are guaranteed within Missouri constitution article 1, section 10 and the Fifth and Fourteenth Amendment to the United States Constitution.

Upon *de novo* review, this Court should affirm the finding of the Trial Court

because the amendment to Section 452.375.3(1) RSMo upon which the Court expressly ruled, and Section 452.400.2(2) RSMo, upon which the Court was silent, clearly contravene the above constitutional provisions.

Substantive Due Process / Equal Protection

The Trial Court found Section 452.375.3(1) RSMo violated the Equal Protection Clauses of the United States constitution, (Fifth and Fourteenth Amendment – not both cited) as well as the Missouri constitution (Article I, Section 2 – not cited). (LF 299) Each requires that similarly situated persons be treated similarly. The violation occurred by impinging upon Randy's fundamental right implicitly protected by the constitutions to associate with his children and maintain a relationship with them. (LF 299) The Court may or may not have determined a substantive due process claim as found within the Due Process Clause of the Fifth Amendment to the United States Constitution and the Fourteenth Amendment to the United States constitution and article 1 section 10 of the Missouri constitution. Randy proffers a claim for substantive due process herein as to both statutory sections at issue.

Upon *de novo* review, this Court should affirm the finding of the Trial Court because the amendment to Section 452.375.3(1) RSMo upon which the Court expressly ruled, and Section 452.400.2(2) RSMo, upon which the Court was silent, clearly contravene the above constitutional provisions.

Claimed violations of a right to personal privacy, to procreate and similar rights not specifically set out in the constitution but inherent in the concept of ordered liberty

are analyzed under substantive due process claims. *Jane Doe I. v. Phillips*, 194 S.W.3d 833 (Mo.banc 2006)

Courts have frequently emphasized the importance of the family. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972). The rights to conceive and raise one's children have been deemed essential, *Stanley at 651, (citing Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Stanley at 651, (citing Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "rights far more precious...than property rights," *Stanley at 651, (citing May v. Anderson*, 345 U.S. 528, 533 (1953). *Id. at 651.* The integrity of the family unit has found protection in the Due Process Clause and the Fourteenth Amendment. *Stanley at 651.* Further, because an asserted "right" is an associational interest with a child, it falls under the measure of strict judicial scrutiny. *Kohring v. Snodgrass*, 999 S.W.2d 228, 232 (Mo. banc 1999)

"Procedure by presumption is always cheaper and easier than individualized determination, but when the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interest of both parent and child. It therefore cannot stand." The words of Justice White of the United States Supreme Court in his opinion in *Stanley v. Illinois*, 405 U.S. 645, 646, 92 S.Ct. 1208, 1210, 31 L. Ed. 2d 551, 555 (1972).

This present matter before this Court is analogous to *Stanley* and the relevant facts of *Stanley* are worthy of comparison to the present matter.

Joan Stanley lived with Peter Stanley for an eighteen year period of time within which they had three children. *Stanley at 646.* (In the present matter, Susan and Randy were married and had two children). Joan Stanley died, and the State of Illinois had a statutory provision which dictated that the children of unwed fathers became wards of the state. *Id. at 646.* As a result, the Stanley children were placed with court-appointed guardians. *Id.* (Subject to the present statutory restriction on Randy, Susan has exclusive custody of the parties' children). Peter Stanley appealed asserting that he had never been determined to be an unfit parent, and that since married fathers and unwed mothers could not be so deprived, he was denied equal protection of the laws guaranteed him pursuant to the Fourteenth Amendment. *Stanley at 646.* (Randy has never been determined to be an unfit parent but does not have custody or unsupervised visitation with his children, however persons who are not divorced who are similar offenders and surviving spouses of deceased parents who are similar offenders suffer no such presumptive restriction).

The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim holding that Stanley could be separated from his children only upon the proof of the single fact that he and the dead mother had not been married, and that Stanley's actual fitness as a father was not relevant. *Id. at 646.* (The Missouri legislature has made this same presumption as to Randy only upon the single fact of his conviction of a specific crime).

The Court, through Justice White, concluded that as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were

taken from him and, that by denying him a hearing and extending it to all other parents whose custody of their children was challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment. *Id. at 649.*

The Court reasoned that Illinois law dictated that while the children of all parents can be taken from them in neglect proceedings, only after notice, hearing and proof of such unfitness as a parent amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding, and that by use of said proceeding, the State, only upon a showing that the father was not married to the mother, need not prove unfitness in fact, because it was presumed at law, and that an unwed father's claim of parental qualification was avoided as "irrelevant". *Id. at 650.* (The same presumption under the law of unfitness applies to Randy in the present matter if the statue is upheld).

The *Stanley* Court also asked what the state interest was in separating children from fathers without a hearing designed to determine whether the father was unfit in a particular disputed case, and observed that the State would register no gain towards its declared goals of protecting the moral, emotional, mental and physical welfare of the minor child and the best interests of the community by separating a child from the custody of a fit parent. *Stanley at 652.* (Presumably the goal of the statutes challenged at this time are identical, the protection of the moral, emotional, mental and physical welfare of minor children). The Court further stated the State would spite its own articulated goals when it needlessly separated said child from his family. *Id at 653.*

Of further import, the Court declared that while it may very well be that most

unmarried fathers are unsuitable and neglectful parents, and even Stanley himself may have been such a parent but that all unmarried fathers were not in that category, in that some were wholly suited to have custody of their children, ***and that given an opportunity to make his case***, Stanley may have been seen to be deserving of custody of his offspring. *Stanley at 655.* ***(Emphasis added)***. (The irony in this determination is that Randy apparently did make his case, as evidenced by the ruling of the Trial Court granting him custody with no supervision required).

The *Stanley* Court further relied upon a previous decision by the United States Supreme Court. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Court found a residency statute determining who was eligible to vote within the State of Texas to have violated the Equal Protection clause. The presumption was created that all servicemen, who were not residents of Texas before their induction into the armed forces, were restricted from voting, regardless of their individual qualifications, and said conclusion was so definite and incapable of being overcome by proof of the most positive character. *Stanley at 656, (citing Carrington at 96).* (In the present matter, Respondent is also permanently denied custody or unsupervised visitation without any opportunity to overcome the conclusive presumption imposed upon him).

Of additional importance in *Carrington* was the Court's refusal to tolerate a blanket exclusion depriving all servicemen of the vote, when some servicemen clearly were bona fide residents and when more precise tests were available to distinguish members of the latter group. *Stanley at 655, (citing Carrington at 96).* By forbidding a

soldier ever to controvert the presumption of non-residence, the Court ruled that the State unjustifiably effected a substantial deprivation in that it viewed servicemen one-dimensionally (as servicemen), when a finer perception could readily have been achieved by assessing a serviceman's claim to residency on an individualized basis. *Stanley at 656, (citing Carrington at 96).*

Justice White recognized that it may be argued that unmarried fathers would be so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's, and that the establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. *Stanley at 656.* Justice White then, however, asserted that the Constitution recognized higher values than speed and efficacy, and indicated that one may fairly say the Bill of Rights in general and the Due Process Clause in particular were designed to protect the fragile values of a vulnerable citizenry. *Id. at 656.* (Respondent in the present matter is a convicted sex offender, and as un-palatable as that may be, is subject to ever increasing restrictions) from the overbearing concern for efficiency and efficacy that may characterize praise worthy government officials no less, and perhaps more than mediocre ones. *Stanley at 658.*

The Court invoked the Due Process Clause to determine that the interest of the State in caring for Stanley's children would be *de minimus* if Stanley were shown to be a fit father. *Stanley at 658.* The Court found the State insisted on presuming rather than proving Stanley's unfitness solely because it was more convenient to presume than to

prove yet under the Due Process Clause that advantage was insufficient to justify refusing a father a hearing when the issue at stake was the dismemberment of his family. *Stanley at 658.*

The State of Illinois assumed custody of the children of married parents, divorced parents and unmarried mothers only after a hearing and proof of neglect. *Stanley at 658.* (There is no other found provision of Missouri law known to counsel that presumptively denies custody without a hearing of some sort at some level). The children of unmarried fathers however, were declared dependent children without a hearing on parental fitness and without proof of neglect. (Respondent is denied unsupervised visitation or custody pursuant to the current statutory schemes without a hearing at any level by any standard).

The Supreme Court concluded that Stanley and others like him, being denied a hearing on his fitness as a parent, before his children were removed from him, while such a hearing was afforded to other Illinois parents, was inescapably contrary to the Equal Protection Clause. *Id. at 658.*

The application of Sections 452.375.3(1) RSMo and 452.400.2(2) RSMo has resulted in Missouri creating a class of "Peter Stanleys", parents that for no other reason than a presumptive and conclusive finding, are denied unsupervised visitation and/or custody of their children without an opportunity to be heard on the issue of fitness or a determination of the best interests of the child.

This is particularly an affront in the present matter in that the results of the hearing within which Susan now claims Randy should not have been able to seek a remedy, were

against the statutory presumption and in favor of granting Randy what he has been denied based upon the best interests of the children.

The Trial Court noted the tension within Section 452.375.3(1) RSMo when it stated the contradiction existing within the statute which dictated a jurisdictional Court exercise discretion in advancing the stated public policy of using the "best interest of the child" requirement, gauged by what scheme allows for frequent and meaningful contact between both parents. (LF 299-300) In the present matter, the presumptive removal by the statute of the discretion of the Court in the instance of persons convicted of certain crimes must fail substantive due process and equal protection analysis accordingly.

Recognizing that to pass a strict scrutiny analysis, the court must determine whether it is necessary to accomplish a compelling state interest. *In the matter of Care & Treatment of Michael Norton,* 123 S.W.3d 170, 173 (Mo. Banc 2004) To pass strict scrutiny review a governmental intrusion must be justified by a compelling state interest and must be narrowly drawn to express the compelling state interest at stake. *Id. at 173.*

Moral misconduct alone is not sufficient to prohibit a parent from exercising rights with their children unless the misconduct is so gross, promiscuous, open or coupled with other antisocial behavior as to directly affect the physical, mental, economic and social well being of the child. *Buschardt v. Jones,* 998 S.W.2d 791, 796 (Mo.App. W.D. 1999) While a court can consider a parent's sexual or moral conduct to determine its detrimental effect on the mental, physical, economical or social well being of a child, such conduct does not make a parent ipso facto unfit for visitation. *Id. at 801.* A court's

primary consideration in determining custody or visitation is the best interest of the child. *Humphrey v. Humphrey,* 888 S.W.2d 342, 346 (Mo.App. E.D. 1994)

The statute does not pass strict scrutiny in that although it may serve a compelling state interest in protecting children, it casts too broad a net and operates to create a disadvantaged / disparate separate and distinct class of persons. These are divorced parents with a certain criminal conviction who seek unsupervised contact through visitation or custody of their children, compared to other offenders of a similar or like nature who are not challenged at all and suffer no adverse presumption in their theoretical and practical ability to have unfettered care, custody and control of their children.

The statute also does not pass strict scrutiny in that it operates to create a disadvantaged / disparate separate and distinct class of children as said statute limits the care and custody of the children in a dissolution proceeding or modification distinct from those children whose parents remain married or are in the care of an offender due to the death of a parent.

An absurd result of this distinct class of persons can be found in the situation where a parent, convicted of an enumerated crime as Randy, but not engaged in a dissolution or modification proceeding, can have unfettered access, including visitation and care, custody and control of his children, despite the compelling state interest in protecting children.

Another absurd result of this distinct class of persons can be found in the example where a parent, convicted of an enumerated crime as Randy, remarried to another with

children, can have unfettered access to those step-children, and in fact adopt those step children as his own, but cannot have unfettered access, including visitation and care, custody and control of their own children, also despite the compelling state interest in protecting children.

An additional absurd result of this distinct class of persons can be found in the example of a person who goes to trial for an enumerated crime within the statute and is found not guilty despite that fact that the conduct in questions actually did occur.

Based upon the above analysis, the statue is unquestionably not narrowly tailored to serve the compelling state interest.

In addition, if the state interest is the protection of children, the statute also fails to be narrowly tailored to serve that compelling state interest, in that it eliminates the possibility of a "legal custody" designation. With legal custody, there is less a component of actual contact, and decreased need for protection in that context.

The applications of these amendments clearly contravenes the Equal Protection Clauses of the United States constitution, Fifth and Fourteenth Amendment as well as the Missouri constitution Article I, Section 2, and thus this Court should affirm the Trial Court's finding that Section 452.375.3(1) RSMo is unconstitutional, and find the same in regard to Section 452.400.2(2) RSMo, about which there was no specific ruling by the Trial Court.

For all of the foregoing reasons, the Court should affirm the ruling of the Trial Court in all respects and further declare the provision of Section 452.375.3(1) and

Section 452.400.2(2) unconstitutional on any of the enumerated grounds stated here or on any “plain error” basis the Court deems just and proper.

II. THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENT JOINT LEGAL AND PHYSICAL CUSTODY, ALONG WITH AWARDING UNSUPERVISED CONTACT WITH THE CHILDREN BECAUSE THE EVIDENCE PRESENTED IN SUPPORT OF SAID PRAYER WAS SUBSTANTIAL, MORE CREDIBLE AND OUTWEIGHED ANY EVIDENCE PRESENTED BY APPELLANT IN THAT:

A. RESPONDENT NEVER ABANDONED HIS CLAIM FOR JOINT LEGAL AND PHYSICAL CUSTODY BUT ONLY ACKNOWLEDGED THAT A TRANSFER OF CUSTODY WOULD REQUIRE THE CHILDREN TO BE REMOVED FROM THE ONLY HOME THEY HAVE EVER KNOWN AND RELOCATE FROM JEFFERSON CITY, MISSOURI TO ST. LOUIS, MISSOURI;

B. THAT RESPONDENT CLEARLY ARTICULATED THAT HE WOULD WORK WITH APPELLANT TO CO-PARENT THE CHILDREN AND THAT THERE WAS NO EVIDENCE PRESENTED THAT THE PARTIES, IN FACT, DID NOT SHARE A COMMONALITY OF BELIEFS; AND

C. THE EVIDENCE PRESENTED BY RESPONDENT'S EXPERT CLEARLY SHOWED RESPONDENT'S CURRENT MENTAL STATUS, UNLIKELIHOOD TO REOFFEND AND NO THREAT OF HARM TO THE MINOR CHILDREN.

A. Standard of Review

The standard of review in a custody modification case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The appellate court must affirm the trial court's judgment 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. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

In making that determination, the appellate court affords the trial court deference with regard to its determinations of credibility and view the evidence in the light most favorable to the trial court's decision. *Janes v. Janes*, 242 S.W.3d 744, 748 (Mo. App. W.D. 2007) (quoting *Haden v. Riou*, 37 S.W.3d 854, 860 (Mo. App. W.D. 2001). The appellate court defers to the trial court's assessment of witnesses' credibility and accepts the trial court's resolution of conflicting evidence. *Riley v. Campbell*, 89 S.W.3d 551, 552 (Mo. App. W.D. 2002). The appellate court presumes that the trial court reviewed all evidence and based its decision on the child's best interests. *Id*. at 562. The presumption is based upon the trial court being in a better position to evaluate the credibility of witnesses than an appellate court. *Id.* at 596. The resolution of conflicting evidence is left to the trial court. *Id.* at 596.

The trial court's determination in child custody proceedings is given greater deference than in any other type of case. *Burkhart v. Burkhart*, 876 S.W. 2d 675, 678 (Mo. App. W.D. 1994). An appellate court will not disturb the trial court's judgment unless it is firmly convinced that the welfare of the child requires some other disposition,

or unless it is clearly against the logic of the circumstances or is arbitrary or unreasonable. *Graves v. Graves*, 967 S.W.2d 632, 640 (Mo. App. W.D. 1998).

In assessing the sufficiency of evidence upon review, the appellate court examines the evidence and its inferences in the light most favorable to the trial court's order. *Riley v. Campbell*, 89 S.W.3d 551, 552 (Mo. App. W.D. 2002). The appellate court defers to the trial court's assessment of witnesses' credibility and accepts the trial court's resolution of conflicting evidence. *Id*. at 562. The appellate court presumes that the trial court reviewed all evidence and based its decision on the child's best interests. *Id*. at 562. The trial court's determination in child custody proceedings is given greater deference than in any other type of case. *Burkhart v. Burkhart*, 876 S.W. 2d 675, 678 (Mo. App. W.D. 1994) .

B. Joint Legal Custody

Susan argues in her brief that Randy abandoned his request for joint legal and physical custody. That is simply false. Randy stated that he abandoned his claim for a **transfer of custody** from the children's primary residence with their mother in Jefferson City, Missouri to his home in St. Louis, Missouri. Randy acknowledged that this transfer of custody was unlikely given his conviction, Susan's role as the children's primary caretaker and the necessity of a relocation if said request was granted. At no time and in no way did Randy ever declare to the court that he was not still pursuing joint legal and physical custody that would not have required a change of actual physical custody.

Susan argues that by conceding that an actual physical custody transfer was unlikely, this constituted an abandonment of his claim for **any** custody rights and therefore, that the Trial Court could not have granted him joint legal and physical custody. (App. Brief pg 35-36) There is simply no logic to that argument.

The cases cited by Susan in support of her contention include a medical malpractice claim where one allegation of neglect was abandoned by plaintiff (*Krinard v. Westerman)*, a property dispute case where the lienholder failed to preserve for appeal his claim of insufficient service of process (*Steins v. Steins*), and a suit to recover damages against a corporate defendant which owned a building where the plaintiff was assaulted and where the plaintiff abandoned her other pleaded theories in favor of submitting to the jury only the theory of the defendant's failure to provide and maintain a safe premises for client use (*Strauss v. Hotel Continental Co., Inc.*).

None of these cases are analogous to the case at hand, nor do they work, in any fashion, to preclude Randy from pursuing a modification of the prior custodial arrangement.

"Joint Legal Custody" is defined by Section 452.375.1 (2) RSMo. 2005 to be the parents share the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child, and, unless allocated, apportioned, or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities, and authority. Randy testified repeatedly that he not only wanted to be a part of the decision-making process but that he would work to overcome whatever

hurdles existed between himself and Susan to do that. (Tr. III 3129-25, 313:1-6, 316: 19-25).

"Joint Physical Custody" is also defined in Section 452.375 as "an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents. Joint physical custody shall be shared by the parents in such a way as to assure the child of frequent, continuing and meaningful contact with both parents." Section 452.375.1(3) RSMo. 2005.

Randy submitted to the Court a Parenting Plan setting out his proposal regarding his initial claim for sole legal and physical custody of the children. (L.F. 96-106). However, this Parenting Plan also included an alternative proposal asking the Court, if not convinced a complete transfer of custody would serve the children's best interests, to award the parties' joint legal and physical custody. This Parenting Plan was filed with the Court in April 2007 and admitted as Respondent's Exhibit 3 at trial. (L.F. 96-106, Tr. III 323: 4-7). As specifically submitted to the Court by Randy for consideration, it is ridiculous now to assert that his claim for joint legal and physical custody was ever abandoned.

C. Support for Award of Joint Legal Custody

Susan further argues that there was insufficient evidence for the Court to award joint legal custody. However, the Court specifically found that in regards to factor 2 of Section 452.375.2, which requires the Court to consider the "needs of the children for a

frequent, continuing and meaningful relationship with both parents and the ability and willingness of the parents to actively perform their function for the needs of the children", Randy was favored. (L.F. 317) The Trial Court specifically stated that Susan had failed to encourage a relationship between the children and Randy and that Susan's household and family members have further discouraged a relationship between the children and Randy. (L.F. 317)

Additionally, the Court found that in regards to factor 4 of Section 452.375.2, wherein the Court is required to determine "which parent is more likely to allow the children frequent, continuing and meaningful contact with the other parent", Randy was favored. (L.F. 317) The Court specifically stated that Susan had inhibited Randy's relationship with his children and that Susan's family has further attempted to damage Randy's relationship with A.S.C. and M.B.C.. (L.F. 317)

It is clear that the Court was convinced, and the evidence supports, that Susan would not voluntarily communicate or include Randy in the decisions affecting their children. (Tr. III 297: 25, 298: 1-11, 410: 20-25, 412: 8-10, Tr. I 163: 20-21, Tr. II 163: 16-22, Tr. II 164: 17-25, 165: 1-6, Tr. III 319: 17-25, 320:1-21). Further, Susan would work hard at making sure Randy's relationship with his children was as fraught with struggle as possible, like telling the children's friend's parents of Randy's conviction if he were to try and go to the children's events. (Tr. III 464: 22-25, 465: 1)

Since it was clear that a transfer of physical custody would require the children to be uprooted, the Trial Court was left with no option to attempt to secure and protect

Randy's relationship with his children but to require the parties to communicate and co-parent in a joint legal custody setting.

Susan cites that an award of joint legal custody is appropriate provided there is substantial evidence that despite acrimony between the parties, they have the ability and willingness to fundamentally cooperate in making decisions concerning the children's upbringing. *In re Marriage of M.A.*, 149 S.W.3d 562, 596 (Mo.App. E.D. 2004)

Randy expressed, repeatedly, his willingness to cooperate with Susan and proposed that family therapy begin to effectuate this cooperation. (Tr. III 313:1-6, 319: 17-25, 320:1-21). It is self-serving and counter-intuitive for Susan to argue that it is due to only her refusal to cooperate and communicate with Randy that she should be granted sole legal custody.

D. Threat Posed to Children by Randy

Susan alleges in her brief that the two experts submitted for the Court's consideration agreed that Randy was "incurable". An allegation so far removed from reality that it should be stricken from this Court's consideration.

In reality, Dr. Harry, Susan's expert testified only as to "pedophiles" and his vast knowledge and experience with the treatment of these types of individuals. He had no direct knowledge of Randy's risk of re-offense but generally stated that pedophiles cannot be "cured" but that the goal of treatment is to manage and minimize risk as best as possible. (Tr. IV 563: 2-15) He further stated that most mental diseases don't have a

cure, per se, but the work is done to keep the risk at a minimum. (Tr. IV 563: 15-17) It begs the question, but is that not entire point of a treatment plan?

Additionally, only one of the multiple evaluators, treatment providers and individuals deeply involved in Randy's incarceration, rehabilitation and release made any finding of pedophilia. As both Dr. Clark and Dr. Harry testified, neither could find any basis for the diagnosis of pedophilia in Randy's records or after personal examination. (Tr. IV 576:2-17)

The Trial Court specifically found after four full days of testimony that Randy was, in fact, rehabilitated. (L.F. 318) The evidence supporting the Trial Court's finding is extensive. To compare the testimony of Dr. Harry and Dr. Clark and treat the two as equal in weight, does the Trial Court a true disservice. Dr. Harry's evaluation was based on such minimal testing and review that the Trial Court was appropriate in discounting its' weight. Dr. Clark, however, thoroughly evaluated Randy in 2005 and, in an attempt to update his evaluation, again performed numerous tests and record reviews in 2007. (Appendix 2005 and 2007 reports).

The stated public policy of the State of Missouri is for the trier of fact to make a determination as to the best interests of the minor children. Section 452.375.4 and .6 (RSMo. 2005) and *Humphrey v. Humphrey*, 888 S.W.2d 342, 346 (Mo.App. E.D. 1994). That determination is to be reached only after thorough consideration of all the evidence presented, the credibility of the witnesses, and the needs of the children specifically. Susan would ask this Court to disregard actual testimony of the proffered experts and find

that ALL individuals who have committed acts of sexual abuse on a person under the age of 18 should be prohibited from unsupervised contact with their children, regardless of when it occurred, that individual's treatment, or the needs of the children to have a relationship with their parent. That position is exactly what the Trial Court found to be an unconstitutional impingement on Randy.

The Trial Court heard from four different individuals, who testified to supervising Randy's visits with his children and their confidence that he was not a risk to the children's safety. (Tr. II 89: 19-25, 90: 1-3 Tr. II 92: 9-19 Tr. II 118: 8-17 Tr. II 131: 7-19 Tr. II 244: 16-20 Tr. II 269: 24-25, 270:1) Furthermore, Susan would have you believe that there was no evidence for the Trial Court to consider regarding Randy's interaction with underage females since his release. To the contrary, William Cannon, Randy's brother, specifically testified that the family does leave Randy alone with his two young nieces without fear of harm to those children. (Tr. II 245:19-25, 246:1-9)

Susan would argue that denying Randy the "opportunity" to reoffend should be sufficient to deny him unsupervised contact but Dr. Clark specifically replied that when considering the benefits of continued supervised visitation, the cost to the children of such a restrained relationship with Randy would far outweigh what risks he specifically determined Randy posed to A.S.C. and M.B.C.. (Tr. V 691: 11-25, 692: 1-2)

The Trial Court clearly made the appropriate determination and found that the evidence supported and the children's best interests would be served by awarding Randy unsupervised custody of his children.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court's opinion affirming the trial court's Judgment for Respondent. The Trial Court appropriately evaluated and determined the statute barring Randy's unsupervised contact with his children was unconstitutional. Stepping past that analysis to the facts of this specific case, the Trial Court further appropriately determined that the best interests of A.S.C. and M.B.C. would be served by a set schedule of unsupervised custody with their father and a joint legal custody arrangement allowing both parents to participate in the decisions affecting their health, education and welfare.

CERTIFICATE OF COMPLIANCE

Comes now Sara C. Michael and Clifford W. Cornell, Attorneys for Respondent and pursuant to Supreme Court Rule 84.06 hereby certifies that:

1. Respondent's Brief as submitted in the above styled cause includes the information required by Rule 84.06.

2. This Brief complies with the limitations contained in Rule 84.06 and Local Rule 360.

3. As reported by the undersigned's data processing software, the word count is 13,443.

4. The diskette submitted to the court and to Appellant's counsel has been scanned for viruses and is virus free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief, including the certificate of compliance and certificate of service, and one diskette containing Respondent's Brief were mailed on this _____ day of October, 2008, to:

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