WD80805

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE INTEREST OF [redacted] [redacted] and [redacted]

JUVENILE OFFICER OF JACKSON COUNTY,
Respondent,

vs.

[redacted]
Appellant.

On Appeal from the Circuit Court of Jackson County
Honorable David M. Byrn, Circuit Judge
Case Nos. 1616-JU000991, 1616-JU000992, and 1616-JU000993

REPLY BRIEF OF THE APPELLANT

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I. Reply as to Point I

The Juvenile Officer does not dispute that to terminate Father's rights for being unfit due to a mental condition under §§ 211.447.5(2)(a) and 211.447.5(3)(c), R.S.Mo., three aspects of analysis had to be satisfied: that (1) the condition's existence is supported by competent evidence; (2) the condition is permanent or such that there is no reasonable likelihood it can be reversed; and (3) the condition is so severe as to render Father unable to knowingly provide the Children with even minimally acceptable care (Brief of the Respondent ("Resp.Br.") 11, 15, 18).

In his first point, Father explained that the trial court's conclusion that he was unfit due to a mental condition misapplied the law under §§ 211.447.5(2)(a) and 211.447.5(3)(c), because it failed all three of these required aspects (Brief of the Appellant ("Aplt.Br.") 45-53).

A. The deletion of "Personality Disorder NOS" from the DSM in 2013 because so-called "not otherwise specified" diagnoses were a "structural problem" in the prior diagnostic scheme means it is not a generally scientifically recognized condition; the current "unspecified personality disorder" is not the same.

First, Father explained that [redacted] June 2015 diagnosis that he suffered from the supposed mental disorder of "Personality Disorder NOS", "NOS" meaning "Not Otherwise Specified", is not supported by competent evidence, because psychiatry does not recognize such a condition (Aplt.Br. 47-49). This is because in 2013, the American Psychiatric

Association ("APA") in its DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM"), Fifth Edition ("DSM-5") disclaimed "not otherwise specified" diagnoses as a "structural proble[m] rooted in the basic design of the previous DSM classification", and stopped recognizing their validity as of then, some two years before Mr. [redacted] one evaluation of Father and four years before trial (Aplt.Br. 48) (quoting DSM-5, p. 12).

The Juvenile Officer does not dispute that in June 2015, at the time of trial, and today, the APA did not and does not recognize "Personality Disorder NOS" as a diagnosable mental disorder (Resp.Br. 13-14). Instead, he argues Mr. [redacted] validly could use "the edition of the DSM published in the year 2000 in making his diagnosis" rather than the current edition, because the "behaviors, characteristics, and other data used by Mr. [redacted] in making his diagnosis … are the same regardless of which edition of the DSM was used" (Resp.Br. 13-14).

The Juvenile Officer's argument that a diagnosis of a mental disorder that the American Psychiatric Association has deleted from the DSM, especially as vocally as it did here, scientifically qualifies as a diagnosable "mental condition" at all, let alone one to be the basis on which a parent's rights can be terminated, is without merit.

Science must have "gained general acceptance in the particular field in which it belongs" before it is acceptable evidence. *Frye v. United States*, 293 F. 1013, 1014 (C.A.D.C. 1923). So, if a deprivation of liberty rests on a diagnosis that the subject suffers from a mental condition, it must be a legitimate illness widely recognized by the psychiatric community. *See*

Kansas v. Hendricks, 521 U.S. 346, 358-60 (1997). In *Hendricks*, the U.S. Supreme Court upheld Kansas's "sexually violent predator" commitment scheme. *Id.* While divided five-to-four on the holding, all nine justices agreed that civil commitment is constitutional only if we can distinguish individuals who are mentally disordered from those who are not. *Id.* at 360 (the disorder must be one that "the psychiatric profession itself classifies as a serious mental disorder"); *id.* at 373 (Kennedy, J., concurring) (confinement cannot be based on a mental abnormality that is "too imprecise"); *id.* at 375 (Breyer, J., dissenting) (Kansas's statute was constitutional, among other reasons, because pedophilia is a "serious mental disorder").

The commonly accepted way to determine "general acceptance" with respect to psychiatric disorders is to refer to the DSM. *See, e.g., Hall v. Florida*, 134 S.Ct. 1986, 1991, 1994, 2000 (2014) (determining meaning of "intellectual disability" using the DSM); *State v. Johnson*, 244 S.W.3d 144, 152 n.6 (Mo. banc 2008) (the DSM "is the standard classification of mental disorders used by mental health professionals in the United States"; using it to determine whether, based on I.Q., criminal defendant was competent to stand trial); *State v. Greene*, 984 P.2d 1024, 1028 (Wash. 1999) (the DSM is an authoritative source that "'reflect[s] a consensus of current formulations of evolving knowledge' in the mental health field") (citations omitted).

For this reason, and contrary to the Juvenile Officer's argument, it is well-established that when the APA deletes a previously recognized mental disorder from the DSM, especially while giving a reason, it no longer has

general acceptance as a diagnosable mental disorder and a diagnosis of it cannot predicate a deprivation of liberty.

A well-known example of this is psychiatry's view of homosexuality. Under the term "homosexuality", the APA listed same-sex attraction as a mental disorder in the DSM from its inception until 1974, when the second edition of the DSM deleted it, stating "homosexuality per se is one form of sexual behavior, and with other forms of sexual behavior which are not by themselves psychiatric disorders are not listed in this nomenclature." 56 *Interpreter Releases* 398, 398-99 (Aug. 17, 1979).

Accordingly, as of 1974 homosexuality no longer found general acceptance as a diagnosable mental disorder, and a diagnosis of it could not predicate a deprivation of liberty. *See, e.g.*, *United States v. Donaghe*, 50 F.3d 608, 613 (9th Cir. 1994) (acceptance of presentence report that included earlier diagnosis as "homosexual" under prior DSM was error, requiring resentencing); 56 *Interpreter Releases* at 398-99 (direction from Surgeon General to U.S. Public Health Service that as the DSM no longer included homosexuality as mental disorder, fact that an alien was gay no longer qualified as a reason to exclude him due to a mental disease or defect); *Hill v. U.S. Immigration & Naturalization Serv.*, 714 F.2d 1470, 1472-73 (9th Cir. 1983) (due to deletion of homosexuality from DSM, diagnosis of alien as homosexual could not be basis for his exclusion from country); *Comw. v. Bey*, 841 A.2d 562, 565 (Pa. Super. 2004) (as homosexuality is not listed as a disorder in the DSM, fact that defendant was gay did not support his being designated "sexually violent predator"; designation reversed).

Under the Juvenile Officer's reasoning, gays and lesbians validly *could* be labeled "mentally disordered", regardless of homosexuality's present not-a-disorder DSM status, simply because it was listed as a disorder in a previous, now-discarded DSM diagnostic scheme. Plainly, that cannot be. Just as with the deletion of homosexuality, the deletion of "Personality Disorder Not Otherwise Specified" was done for a specific reason: that it was the result of a structural problem in the previous diagnostic scheme, and so was scientifically invalid. DSM-5, p. 12. The DSM reflects the consensus of the scientific community as to what presently does and does not qualify as a diagnosable mental disorder. Neither "homosexuality" nor "Personality Disorder NOS", both of which have been deleted for specific reasons, qualify.

The only authority the Juvenile Officer cites to the contrary is *In re Cozart*, 433 S.W.3d 483 (Mo. App. 2014). *Cozart* is inapposite. It did not involve a disorder that already had been deleted from the DSM. Rather, in 2011, before the DSM-5 was released, a defendant who had been convicted of a sexually violent crime was diagnosed with "paraphilia, not otherwise specified (NOS), nonconsent", and the State sought him committed as a sexually violent predator. *Id.* at 486. On appeal, he argued this never had been a DSM diagnosis at all: that it "is not a diagnosis listed in the DSM-IV-TR (DSM) and has been rejected for inclusion in the DSM-V and cannot be diagnosed under the category of paraphilia, because rape is considered to be more of a crime than a mental disorder." *Id.*

Notably, the Court did not discuss the DSM-5 at all, likely because it had not been released yet, and by putting "DSM" in parentheses after the

previous edition's acronym, the Court only discussed whether the disorder fit that edition, which was the scientific consensus at the time of the defendant's 2011 diagnosis. *Id.* at 490-91. Instead, the Court affirmed based on the physicians' testimony that they had followed the DSM as it existed at the time of the diagnosis, as well as previous cases holding the same diagnosis qualified as a "mental abnormality" under the sexually-violent-predator statute and did fit the DSM as it existed. *Id.*

Here, Mr. [redacted] evaluation of Father was in June 2015, some two years after the APA deleted "Personality Disorder NOS" from the DSM as a "structural problem". At that time, at the time of trial, and today, no such disorder was or is recognized. *Cozart* has no bearing on this case.

Finally, the Juvenile Officer argues that the DSM-5's classification of "unspecified personality disorder" is "exactly" the same as "Personality Disorder NOS", so Mr. [redacted] obsolete diagnosis did not matter (Resp.Br. 14). This also is untrue, as the DSM-5 itself explains:

> To enhance diagnostic specificity, DSM-5 replaces the previous NOS designation with two options for clinical use: *other specified disorder* and *unspecified disorder*. The other specified disorder category is provided to allow the clinician to communicate the specific reason that the presentation does not meet the criteria for any specific category within a diagnostic class. This is done by recording the name of the category, followed by the specific reason. For example, for an individual with clinically significant depressive symptoms lasting 4 weeks but whose symptomatology

> falls short of the diagnostic threshold for a major depressive episode, the clinician would record "other specified depressive disorder, depressive episode with insufficient symptoms." If the clinician chooses not to specify the reason that the criteria are not met for a specific disorder, then 'unspecified depressive disorder' would be diagnosed.

DSM-5, pp. 15-16 (emphasis in the original).

Mr. [redacted] did not do this. "Unspecified personality disorder" only would be available if he *could not* specify the reason the criteria were not met for a particular disorder. That was not his testimony. Rather, *specifying* his reasoning, he stated he suspected "antisocial or narcissistic" personality disorder but did not diagnose Father with them because of a lack of information (Tr. 353, 356).

That is not "choosing not to specify the reason that the criteria are not met", allowing for an "unspecified disorder" diagnosis. Instead, Mr. [redacted] did what the DSM simply no longer recognizes as valid, because allowing it was a "structural problem": mixing aspects of two "possible" personality disorders under the guise of a "not otherwise specified" diagnosis when by his own admission he lacked sufficient information to diagnose an actual disorder, and for reasons he explained (Tr. 353, 356; J.O.Ex.6).

"Personality Disorder NOS" had no general acceptance as a diagnosable mental disorder at the time Mr. [redacted] evaluated and diagnosed Father in June 2015. It had none at the time of trial. It has none today. There is no competent evidence that Father suffers from a serious mental condition.

B. Even if "Personality Disorder NOS" somehow were a scientifically recognized condition, there had to be evidence that Father continued to suffer from it at the time of trial, and there was not.

Father then explained that, even if "Personality Disorder NOS" were scientifically recognized, the only evidence he suffered from it was Mr. [redacted] diagnosis 19 months before trial, with no evidence it continued in Father at the time of trial, which failed the second required aspect of a mental-condition termination (Aplt.Br. 49-51).

The Juvenile Officer argues "there is no authority for the assertion that a finding of a 'mental condition,' upon which a termination of parental rights is based, be diagnosed immediately prior to the termination of parental rights hearing" (Resp.Br. 18). This is untrue.

As Father explained, and the Juvenile Officer does not address, the law of Missouri is that evidence of *all* earlier negative conditions "must be updated to reflect the conditions existing at the time of the termination trial" (Aplt.Br. 50) (quoting *In re M.A.M.*, 500 S.W.3d 347, 357 (Mo. App. 2016)).

Mental conditions are no different. As authority for this, Father cited *In re K.M.*, 249 S.W.3d 265 (Mo. App. 2008), *overruled on other grounds by In re M.N.*, 277 S.W.3d 843, 845 (Mo. App. 2009). The Juvenile Officer attempts to distinguish *K.M.* on the basis that there, "an overriding concern of this Court … was that the specialist … specifically testified as to the importance of 'follow-up' treatment" which "was never provided", and here this was not the case (Resp.Br. 16) (citing *K.M.*, 249 S.W.3d at 272).

The Juvenile Officer misreads *K.M.* The fact that the only diagnosis of the parents there occurred nineteen months before trial *alone* failed the second required aspect for termination, because there had to be evidence of the condition at the time of trial, not just at the time of taking jurisdiction. *Id.* at 271-72. The Court could not have been clearer:

> Dr. Nolen evaluated Parents only once, in May 2005. He prepared his report at that time, nineteen months before the termination hearing. "Courts have required that abuse or neglect sufficient to support termination under section 211.447.4(2) be based on conduct at the time of termination, not just at the time jurisdiction was initially taken."
>
> Dr. Nolen testified that he recommended Parents participate in individual counseling sessions and that Mother be evaluated for psychotropic medications. He also stated that avoidant personality disorder is something that can be addressed in psychotherapy. He further testified that it would be important to follow up after giving a diagnosis and making recommendations, but in this case he never did. When asked why he failed to follow up, he replied that "[i]t got discussed but never actuated." Additionally, Dr. Nolen did not do a full-scale parenting evaluation, although he frequently did in other cases. He also stated that he had no indication from his evaluations that either parent had ever emotionally abused the children.

> To support the requirement that a mental condition be permanent or have no reasonable likelihood of reversal, the Division submits only Dr. Nolen's testimony that Parents' disorders have poor prognoses. However, he also testified that he recommended counseling and follow-up, evidencing that these may not be permanent disorders affecting their ability to parent. ***Because Dr. Nolen's testimony was based on information he learned nineteen months before the termination hearing, no clear, cogent, and convincing evidence was presented to support termination of parental rights on the basis of Parents' mental condition.***

Id. at 271-72 (internal citations omitted) (emphasis added).

Here, too, Mr. [redacted] testimony was the only evidence the Juvenile Officer submitted that Father suffered from any mental condition or that it was permanent or had no reasonable likelihood of reversal. But he, too, testified he recommended counseling because the condition "can be treated", evidencing that Father's mental conditions may not be permanent affecting his ability to parent (Tr. 350). So, just as in *K.M.*, "Because [Mr. [redacted]s testimony was based on information he learned nineteen months before the termination hearing, no clear, cogent, and convincing evidence was presented to support termination" on this basis. *Id.* at 272.

The Juvenile Officer's attempt to distinguish *K.M.* is without merit. Here, too, there was no evidence that the supposed condition Mr. [redacted] diagnosed continued in Father at the time of trial.

C. Not even the Juvenile Officer can point to any evidence that Father's supposed mental condition rendered him incapable of providing even minimally acceptable care.

Finally, Father explained that even if Mr. [redacted] testimony of his evaluation 19 months before trial was sufficient, there was evidence that the condition he diagnosed made Father incapable of providing the Children even minimally acceptable care (Aplt.Br. 51-53). This was especially true given (a) Mr. [redacted] own testimony that his diagnosis did not prevent Father from parenting and (b) the trial court's own findings that there was no evidence Father ever committed, knew of, or should have known of any act of abuse against the Children, failed to provide the Children with any necessity, or committed any act he knew or should have known would subject the Children to physical or mental harm (Aplt.Br. 51-53).

The Juvenile Officer barely responds to this (Resp.Br. 18-19). He does not point to any evidence Father was incapable of providing even minimally acceptable care, because there was none. Instead, citing no authority, he states the court's finding Father had a pattern of "not acknowledging or accepting any responsibility for the issues in the case which led the Court to assume jurisdiction" was sufficient (Resp.Br. 19) (citing L.F. 111).

This is without merit. There had to be evidence that Father's condition made it impossible for him to provide the Children with even "minimally acceptable care." *In re T.J.P., Jr.*, 432 S.W.3d 192, 202 (Mo. App. 2014).

Father cited numerous decisions holding that a finding that a parent *did not* fail to provide for a child precluded finding he was incapable of

providing minimally acceptable care (Aplt.Br. 53). The Juvenile Officer offers no response to this at all. But here the trial court itself expressly found:

- "there was no evidence presented that the Father committed a severe or recurrent acts of physical, emotional or sexual abuse toward the child or a child in the family, including an act of incest, or circumstances exist that suggest that the Father knew or should have known that acts of physical, emotional or sexual abuse toward child or another child in the family were being committed" (L.F. 113, ¶13(c));
- "There was no evidence presented that the Father repeatedly and continuously failed, although physically and financially able, to provide the child with adequate food, clothing, shelter, education, or other care necessary for the child's physical, mental or emotional health and development" (L.F. 113, ¶13(d));
- "There was no evidence of deliberate acts by any parent which the parents knew or should have known that subjects the child to a substantial risk of physical or mental harm" (L.F. 124, ¶17(8)); and
- "The father, being financially able to do so, has provided some financial or other support for the cost of the care and maintenance of the child since the child came into care in April of 2015" (L.F. 124, ¶17(4)).

The law of Missouri is that it cannot be said Father was incapable of providing the Children even minimally acceptable care when the trial court itself found no evidence he ever had failed to provide any necessity for the children, never had harmed them, and had provided them support even after coming into care (Aplt.Br. 53). The third required aspect cannot be met.

II. Reply as to Point II

In his second point, Father explained that the trial court also misapplied the law in concluding he was unfit due to abuse or neglect under § 211.447.5(2) (Aplt.Br. 54-59). Besides the mental condition finding, already addressed in Point I, the only allegations of abuse were deemed unfounded and unsubstantiated, and the single finding of neglect from pushing Mother and not supporting [redacted] going into counseling in 2014 did not support a finding of neglect now (Aplt.Br. 54-59). There was no evidence of any abuse or neglect since, and the trial court itself expressly found there was "no evidence" Father ever in any way abused the children, knew or should have known they were being abused, or failed to provide any care necessary for any physical, mental, or emotional health and development (Aplt.Br. 57-59).

The Juvenile Officer hardly offers any response (Resp.Br. 21-23). First, citing no authority, he argues he did not have to show abuse or neglect since the entry of the Children into care in April 2015 because "there has been no opportunity for [Father] to abuse or neglect his children" since then (Resp.Br. 21). He suggests Father "cites no authority for the assertion that abuse or neglect, sufficient to support termination" under § 211.447.5(2) "must have occurred immediately prior to the time of trial" (Resp.Br. 21).

This is untrue. As Father explained, citing numerous decisions holding that evidence of abuse or neglect from the time of assumption of jurisdiction alone is insufficient, evidence of "neglect" sufficient to meet § 211.447.5(2) *always* must be of *continuing* neglect closer to the time of trial, and this is

especially true when, as here, the trial court found the parent never failed to provide for the children (Aplt.Br. 57-59).

When "neglect" is based on actions that occurred *after* the children came into care, even if the parent no longer had custody of the children – or even was incarcerated – a sufficient finding of "neglect" still must rest on his failure since then. *See, e.g.*, *In re I.L.J.*, 530 S.W.3d 511, 514-15 (Mo. App. 2017) (Father's failure to provide any support for children while he was incarcerated and they were in custody supported termination due to neglect); *In re V.C.N.C.*, 458 S.W.3d 443, 449 (Mo. App. 2015), *abrogated on other grounds by In re K.M.A.-B.*, 493 S.W.3d 457, 473 n.6 (Mo. App. 2016) (same re: parents' failure to attend visitation while children were in care); *In re J.A.R.*, 426 S.W.3d 624, 630-31 (Mo. banc 2014) (same re: failure to attend visitation and failure to provide support); *Mo. Dep't of Social Servs. v. B.T.W.*, 422 S.W.3d 381, 392-93 (Mo. App. 2013) (same).

Here, there were no such failures, nor did the trial court find any, nor does the Juvenile Officer point to any. As the trial court found, there was no evidence Father ever had failed to provide any necessary care for the children (L.F. 113, ¶13(d)), he always attended visitation with the children while they were in care (L.F. 123, ¶17(2)), and he always provided support for them while they were in care (L.F. 124, ¶17(4)). Instead, all the Juvenile Officer offered, and all the court found, was evidence of two singular pieces of neglect in 2014, with none since. The law of Missouri is that this is insufficient (Aplt.Br. 57-59).

Beyond that, all the Juvenile Officer offers is the same argument he made in response to the third aspect of Point I, again citing no authority, that because Father exhibited what the trial court found to be a pattern of "not acknowledging or accepting any responsibility for the issues in the case which led the Court to assume jurisdiction", this was sufficient to find grounds for termination due to a mental condition (Resp.Br. 22) (quoting L.F. 111). As Father already explained, *supra* at pp. 14-15, that does not in any way show Father was incapable of providing the Children even minimally acceptable care, and cannot qualify as grounds to terminate Father's parental rights.

Notably, the Juvenile Officer does not attempt to defend any allegation that Father had abused the Children, and he does not point to any examples of Father failing to provide for the Children, which is what termination due to "neglect" requires – the parent's "failure to provide … the proper or necessary support, education as required by law, nutrition or medical, surgical, or any other care necessary for the child's well-being." *In re M.J.H.*, 398 S.W.3d 550, 561 (Mo. App. 2013). This is because, as even the trial court itself expressly found, there was no evidence that Father ever had failed to provide any of this.

III. Reply as to Point III

In his third point, citing numerous similar cases in which terminations were reversed, Father explained the trial court also misapplied the law in concluding he was unfit under § 211.447.5(3) due to his not making sufficient progress in complying with his plan and, for this reason, the juvenile officer's efforts at reunification had failed (Aplt.Br. 60-68).

First, Father choosing his own therapist was legally of no consequence (Aplt.Br. 62). Second, while the trial court disapproved of Father's therapists and psychological evaluations, this did not show non-compliance with the plan, but instead as a matter of law his attending counseling *was* compliance (Aplt.Br. 62-63). Third, Father's expressions of anger at visitation and failure, in the trial court's view, to take responsibility for what brought the children into care are irrelevant to whether he complied with the plan (Aplt.Br. 63-64). Finally, the trial court's use of meaningless buzzwords failed to show any specific harm Father posed to the Children, especially given its findings that he never had abused, harmed, or failed to provide for them (Aplt.Br. 64-67). So, just as in the many authorities he cited, as a matter of law Father's actions vis-à-vis the plan, even under the trial court's adverse findings, did not amount to grounds for termination under § 211.447.5(3).

In response, the Juvenile Officer does not distinguish Father's authorities at all, because he cannot (Resp.Br. 25-31). Nor does he offer any contrary authorities of his own in which termination was affirmed and suggest this case is similar to them (Resp.Br. 25-31).

Instead, the Juvenile Officer first argues the "mental condition" portion of the inquiry was sufficient, pointing to his previous response to Father's first point (Resp.Br. 26-27). That response is without merit. *Supra* at pp. 4-15. It does not aid the Juvenile Officer's cause.

Next, the Juvenile Officer takes issue (Resp.Br. 27) with Father's characterization of the trial court's findings under § 211.447.5(3)(a)-(b) as "choosing to hire his own therapists instead of those Children's Division provided, choosing some classes the court found did not have components ideally fitting those Mr. [redacted] recommended 19 months before, scoring results on a test from PAUSE the court did not like, and expressing anger at Ms. [redacted] all of which it said showed nothing had changed" (Aplt.Br. 62) (though the Juvenile Officer omits much of this language (Resp.Br. 27)). He then proceeds to block-quote the trial court's findings at length, including that:

- The court found Father chose not to participate with a therapist provided by Children's Division and instead chose his own, to whom the court gave little weight (Resp.Br. 28) (citing L.F. 115);
- The court found Father provided Ms. [redacted] with limited information and her testimony "was of little value" as to Father's progress (Resp.Br. 28-29) (citing L.F. 115);
- The court found Father's online domestic violence and anger management classes did not have components Mr. [redacted] recommended (Resp.Br. 29) (citing L.F. 116);

- The court did not like Father's results in the Pause Parenting Program, despite Ms. [redacted] testimony (Resp.Br. 29-30) (citing L.F. 116); and
- The court found Father exhibited anger at the visitation and violated some of Ms. [redacted] rules (Resp.Br. 30-31) (citing L.F. 117).

This is exactly what Father stated the trial court found, both in his statement of facts and his third point (Aplt.Br. 38-40, 62-65). And Father then explained why these findings were insufficient to conclude he was unfit under § 211.447.5(3) due to his not making sufficient progress in complying with his plan and, for this reason, the juvenile officer's efforts at reunification had failed (Aplt.Br. 62-68).

But beyond his block-quoting, the Juvenile Officer offers no counter-analysis of the trial court's findings whatsoever. This is because he cannot. He does not offer any argument or authorities to counter Father's explanation that choosing his own therapist was legally of no consequence (Aplt.Br. 62). He does not offer any argument or authorities to counter Father's explanation that, while the trial court disapproved of his therapists and psychological evaluations, this did not show non-compliance with the plan, but instead as a matter of law his attending counseling *was* compliance (Aplt.Br. 62-63). He does not offer any argument or authorities to counter Father's explanation that his expressions of anger at visitation and failure, in the trial court's view, to take responsibility for what brought the children into care are irrelevant to whether he complied with the plan (Aplt.Br. 63-64). Finally, and cardinally, he does not address the trial court's fatal failure show any

specific harm Father posed to the Children, especially given its findings that he never had abused, harmed, or failed to provide for them (Aplt.Br. 64-67). The Juvenile Officer's raw block-quotes of the trial court's findings do not remotely counter Father's third point.

Finally, at the tail end of his response, the Juvenile Officer singles out *In re X.D.G.*, 340 S.W.3d 607 (Mo. App. 2011), one of 14 decision on which Father relied in his third point and the only one the Juvenile Officer mentions at all (Resp.Br. 31). He paraphrases *X.D.G.* as holding "failing to provide a reasonable explanation for a child's injuries is not, in and of itself, sufficient to warrant a judgment of termination" (Resp.Br. 31).

That is not the holding of *X.D.G.* Rather, there the Court held failure to "take responsibility for ***or*** reasonably explain" injuries is not "evidence that either [a parent]'s participation in services or [his] failure to take responsibility for having abused Child constitutes evidence of the likelihood of future harm." *Id.* at 622 (emphasis added). The point to Father's invoking *X.D.G.* is that the trial court's finding here that he failed to take responsibility for conduct that brought the children into care *does not* support a likelihood of future harm. *Id.* The Juvenile Officer does not counter this.

The Juvenile Officer then quotes *X.D.G.*'s statement that "a parent's past patterns provide vital clues about present and future conduct" and a statement from *In re K.A.W.*, 133 S.W.3d 1, 9 (Mo. banc 2004), that "[a]n essential part of any determination whether to terminate parental rights is whether, considered at the time of the termination and looking into the

future, the child would be harmed by a continued relationship with the parent." Indeed.

But as Father explained, the problem here was there was no evidence of any such required harm, nor did the trial court specifically state what that harm was (Aplt.Br. 64-68). This is especially so considering its express findings that there was no evidence Father ever had abused or harmed the Children or failed to provide them any necessity (Aplt.Br. 65). The Juvenile Officer offers no response to that at all.

Conclusion

The Court should reverse the trial court's judgments and remand this case with instructions to order the Children released back into Father's custody.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in Century Schoolbook, size-13 font, which is not smaller than Times New Roman, size-13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule XLI, as this brief contains 4,993 words.

/s/Jonathan Sternberg
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Certificate of Service

I certify that on December 20, 2017, I filed a true and accurate Adobe PDF copy of this brief via the Court's electronic filing system, which notified the following of that filing:

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