No. _____

Arizona Supreme Court No. CV-21-0085-PR
Arizona Court of Appeals No. 1 CA-JV 20-0062
Coconino County Superior Court No. S0300AD201900011

IN THE

Supreme Court of the United States

_____

PARADISE L.,

Petitioner,

v.

DEPARTMENT OF CHILD SAFETY; A.L. (a minor),

Respondents.

_____

On Petition For Writ of Certiorari
From The Arizona Supreme Court

_____

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The State Of Arizona Failed To Terminate Mother's Parental Rights By At Least Clear & Convincing Evidence As Required By The Due Process Clause Of The Fourteenth Amendment?

2. Whether The Termination Of Mother's Parental Rights Was Erroneously Predicated Solely Upon The Children's Best Interests In Violation Of The Due Process Clause Of The Fourteenth Amendment?

3. Whether Statements By The Attorney General And Exclusion Of Mother's Witness Constituted A Violation Of Mother's Constitutional Right To Due Process?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner/Mother, Paradise L. (hereinafter "Mother"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Order of the Arizona Supreme Court denying Mother's Petition for Review is annexed as Appendix A. A copy of the Memorandum Decision of the Arizona Court of Appeals, Division One, affirming the termination of Mother's parental rights is annexed as Appendix B. A copy of the Under Advisement Ruling from the Coconino County Superior Court, State of Arizona, is annexed as Appendix C.

JURISDICTION

The date on which the Arizona Supreme Court filed its order denying the Petition for Review was June 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Fourteenth Amendment to the United States Constitution

b) 28 U.S.C. §1257

c) A.R.S. §8-533

STATEMENT OF THE CASE

The Department of Child Safety (hereinafter "DCS" or the "Department") filed its Second Amended Petition for Termination of Parent-Child Relationship to terminate the parent-child relationship between Paradise L. ("Mother") and the fathers of the

Child, A.L. (the "Child"). Regarding Mother, DCS alleged: (1) mental deficiency pursuant to ARS § 8-533(B)(3); (2) that the Child is again being cared for in an out-of-home placement within eighteen months after the Child was previously returned to Mother (the Child was removed on 3/14/18) pursuant to ARS § 8-533(B)(11); and (3) the Child was being cared for in an out of home placement for fifteen months or longer pursuant to A.R.S. §8-533(B)(8)(c). The State also alleged that Mother had abused dangerous drugs and that the abuse would continue for an indeterminate period of time. The court dismissed this ground after a directed verdict motion. T. 9/24/2019 at 25.[1] The Second Amended Petition further alleged that the best interests of the Child would be served by a termination of the parent-child relationship.

The matter came before the trial court for a final trial on the Second Amended Petition for Termination of Parent-Child Relationship filed on July 23, 2019. A contested adjudication hearing was conducted on the following dates: September 10, 2019, September 12, 2019, September 13, 2019, September 24, 2019, October 1, 2019, October 18, 2019 and October 30, 2019. The trial court wrote a detailed outline of trial testimony. Mother will adopt the synopsis set forth by the trial court except to further supplement the evidence.

Background

Mother was a party to two prior dependencies which were dismissed, and A.L. was returned to Mother. The second dependency was an in-home dependency. T.

[1] Citations to the record are to the record on direct appeal in the Arizona state courts.

9/10/19 @ 120, 163. In 2018, a third dependency was filed. T. 9/10/19 @ 139. Mother's services included a psychological evaluation, substance abuse services, visitation, parent aid skills, TASC, family counseling, and transportation. T. 9/10/19 @ 139.

A.L. had a placement disruption during the dependency. T. 9/10/19 @ 149. Foster mother reported behaviors, and it was alleged that A.L.'s behaviors coincided with visits with Mother. T. 9/10/19 @ 150, 172.

Mother expressed her concerns that A.L.'s situation in foster care was detrimental. T. 9/10/19 @ 151. Mother was very concerned regarding A.L.'s health and welfare and changing of placements. T. 9/10/19 @ 154. In A.L.'s placement, there were three other children, and two of them were under the age of five. DCS made a referral for placement stabilization services. T. 9/10/19 @ 157.

Case Manager Grantham did not observe A.L. exhibiting any concerning behaviors. Grantham did not have any concerns regarding Mother's parenting of A.L. at the supervised visits. The foster parents reported that A.L. was having issues at home and in school. T. 9/12/19 @ 58. Case Manager O'Connell testified that A.L.'s reactions would be after a visit or if a visit did not occur. O'Connell could not recall significant incidents with A.L. during a visit. T. 9/12/19 @ 105.

Regarding services, O'Connell confirmed that family therapy was inconsistent due to turnover at Child and Family Support Services. O'Connell admitted that Mother advocated for those services when CFSS was not providing them. T. 9/12/19 @ 125-126.

O'Connell testified that the "best prediction of future behavior" was "past and current behavior". O'Connell (even though not on the case since April 2019) testified

that Mother would not be able to successfully parent A.L. "at any time". T. 9/12/19 @ 139.

Dr. Thal Evaluation

Dr. Thal testified about his evaluation of Mother from November 2018. T. 9/12/19 @ 170-190. Dr. Thal opined that Mother would be at risk for another manic episode with psychosis if she was not compliant with treatment. T. 9/12/19 @ 180. Dr. Thal agreed he did no further review of Mother after the evaluation. T. 9/12/19 @ 184. Dr. Thal agreed that compliance with real changes is an indicator of the ability to parent. T. 9/12/19 @ 185. All parties stipulated that there was never any physical abuse of A.L. T. 9/12/19 @ 195.

Deanna Vance

Vance admitted that she never reviewed the CFT meeting notes or court reports or police reports or visitation reports. She obtained information from DCS and the foster mother. Vance never spoke to Mother. T. 9/13/19 @ 84-85, 87. Vance worked with the foster mother to help her with A.L. Vance did not provide the same treatment to Mother because A.L. "wasn't acting out with her". T. 9/13/19 @ 86. The primary sources of information for Vance were foster mother and A.L. T. 9/13/19 @ 88, 91, 93-94. Vance never observed A.L.'s alleged reactions to visits with Mother. These were reported by foster mother. T. 9/13/19 @ 94.

Due to Vance's testimony and documents reviewed by the court, the court granted the motion to suspend visitation between Mother and A.L. until such time as a trauma therapist would work with A.L. to identify how to re-engage visitation with

Mother. Mother commented that during the visits that A.L. was engaged, excited, and expressed love towards Mother. T. 9/13/19 @ 131. The court acknowledged that the trauma could not be pinpointed. Information was provided that A.L. would be getting yet another counselor. T. 9/13/19 @ 132.

Caseworker Testimony

Yazzie was the current case manager. Mother was enrolled and participating in substance abuse treatment. T. 9/13/19 @ 42. Mother started the Matrix Program at the guidance center in February or March 2019 and received her certificate of completion. T. 9/13/19 @ 44.

During the case plan staffing in early 2019, it was recommended that visitation completely stop. So instead of suspending visits, it was recommended reducing visits to five hours and replacing the other hour visit with family therapy at CFSS. T. 9/13/19 @ 54.

A.L.'s placement was an adoptive home. A.L. has special needs, and Yazzie stated the placement was able to meet his needs. T. 9/13/19 @ 65. Yazzie stated that A.L. is placed with a family member that has a significant relationship with him. T. 9/13/19 @ 69.

Yazzie worked with Mother in both her in-home dependency and the current dependency. T. 9/13/2019 at 156-157. Mother has a seriously mental ill designation (SMI) which entitles her to more services. T. 9/13/2019 @ 157-158. Mother has taken advantage of the services and stayed voluntarily at the facility for 3-4 weeks. T.

9/13/2019 @ 158-159. Mother could discharge from the guidance center at any time she deems appropriate. T. 9/13/19 @ 56.

Yazzie confirmed that Mother made progress towards behavioral changes and protective capacities that DCS required. Mother understands her mental illnesses and utilizes her recovery plans, but she does not acknowledge her diagnosis of Cannabis-Dependence Disorder. T. 9/13/19 @ 161.

Mother's visits have been structured and limited to six hours per week, but during those visits, Mother provided food and clothes. T. 9/13/19 @ 163. The CASA has indicated to Yazzie that Mother's home is appropriate for A.L. T. 9/13/19 @ 164. The parent aid reports indicated that Mother was utilizing her therapeutically learned parenting techniques at visitations. Mother has been meeting her own emotional needs and coping skills. T. 9/13/19 @ 165-166. Mother has a support system through her family and professional support for her SMI designation. T. 9/13/19 @ 166. Mother has demonstrated that she does want to make sure that A.L.'s needs are met, and she has advocated for A.L. to receive individual and family therapy. T. 9/13/19 @ 167-169.

Yazzie has observed Mother being thoughtful and responding appropriately to stressful situations. Yazzie stated that Mother makes A.L. her number one priority, and she has shown this through actions and sacrifices. T. 9/13/19 @ 170. Mother has seen the effects of her actions on A.L., but sometimes Mother requires more thorough conversation to explain further. Mother has been "reality-oriented with realistic choices, behaviors and actions". T. 9/13/19 @ 171. Part of being realistic is taking care

of her mental health issues and Mother has been doing that since at least March 2019. Prior to March 2019, Mother was taking care of herself, in part. T. 9/13/19 @ 172.

Yazzie acknowledged that Mother's medical provider recommended medical marijuana for her and there was a letter in the file. Mother started with the Matrix program at the guidance center per DCS's recommendation. Mother transferred to the Native American for Community Action (NACA) program. NACA operates a Matrix Intensive Outpatient Treatment. T. 9/13/2019 @ 180. Mother completed a 36-hour recognized treatment program. Yazzie has seen that Mother has been incorporating the knowledge that she learned in mental health classes, such as her DBT. T. 9/13/2019 @ 181. Mother uses parenting skills that she has learned with her parent-aid. T. 9/13/2019 @ 182.

Yazzie acknowledged that family therapy was a required service, but it did not begin. Yazzie was not sure if the agency had anyone to do the therapy. T. 9/13/2019 @ 186.

Yazzie opined that it was in A.L.'s best interests for the parental rights to be terminated. Yazzie stated that A.L. was adoptable. T. 9/13/2019 @ 201. Mother has been understanding her emotional needs and managing them. Ultimately, Yazzie stated that this was not enough. T. 9/13/19 @ 202-207.

Attorney General

Throughout the trial, the attorney general made certain objections and comments regarding Mother at trial. The attorney general objected that there was "silent testimony going on in the form of nodding" by Mother. The court stated that she had

already admonished Mother, and the attorney general stated that it was not doing anything and there were no "behavioral changes". The court found that the head nodding was not evidence. T. 9/13/19 @ 175.

The attorney general discussed Mother's "behaviors". The attorney general complained that the substance abuse allegation was dismissed and that she had a "strike" against her. The attorney general accused Mother of "trying to get a one-on-one rapport going with you, your honor. That's all she is trying to do. It's inappropriate. She's been sanctioned before. She will not stop. It's prejudicing my case. It's prejudicing DCS. It's prejudicing poor [A.L.], who's been sitting in state care for five years…have her sit in the hall until she testifies because she can't control herself and stop engaging with the Court….There's no way now for us to ever be able to show that it wasn't somehow that the mom endeared herself to the judge by the repeated times that she's approached the judge one-on-one. I'd ask you to have her take a seat outside for the remainder of the proceeding….And that's my minimal sanction. If you want to go higher, fine." T. 9/24/2019 @ 35-37. The court stated that Mother could stay in, but if she had another outburst, then she would have to sit outside. T. 9/24/2019 @ 37.

Throughout Mother's witnesses' testimony, the attorney general objected profusely. *See e.g., Guinn testimony*, T. 9/24/2019 @ 51-69, *Coffman testimony,* T. 9/24/19 @ 24-38; *Gebler testimony,* T. 10/18/19 @ 22-31; *Mother testimony,* T. 10/18/19 @ 50-75.

During Coffman's testimony, the attorney general stated, "the interaction I see going on again, snickers on the part of [Mother] and things of that nature. I just want to

put that on the record again." The judge stated that she did not notice anything, but the bailiff could be asked to come in. The attorney general further stated, "It doesn't seem that anything matters when it goes on, but I am going to make a record of it." T. 9/24/2019 @ 22.

During Mother's testimony, Mother responded to a question, "At that time it was a concern for me, **yes**." The attorney general stated, "It is a yes-or-no question." T. 10/18/19 @ 106 (Emphasis added.).

During closing, the attorney general made the following statement regarding Mother's stress tolerance, "She behaves fine when she's in complete control of the situation and when she's working in unison with her attorney on direct examination, but when not, she quickly flies off the handle, and it repeatedly happened, and we almost had to get a bailiff in here, and I can't tell you how many times I asked for contempt sanctions." T. 10/30/19 at 42. The attorney general further stated, "[Regarding Mother's counsel's statements to not judge Mother based on her appearance in court], I would submit to your Honor, that, in fact, [is how Mother should be judged]. I've been trying cases for 30 years. I've never seen this kind of behavior—the sighing, the audible groans…And then what else epitomizes it is not only that, but the two interruptions that I saw during her counsel's closing…Again, wants to be in control; and if anywhere one is supposed to maintain in the whole wide world, it's right here." T. 10/30/19 at 78.

The attorney objected when Mother's counsel asked if Mother told a provider that she had an SMI designation (even though the SMI designation was an undisputed

fact and brought out numerous times in the State's case). The court overruled the objection. T. 10/18/19 @ 17-18.

Preclusion of Mother's Witness

The state moved for Mother's witness, Mary Beth Laurano, to be excluded based on a court staff member seeing her listening to the testimony through the door. The court conducted voir dire on the witness, and the witness stated that she was not listening. A court staff member identified her as the one who was listening, and then another person heard Ms. Laurano exit the courtroom and tell the people in the hallway what the judge had asked her about on voir dire. T. 9/24/2019 @ 25-43. The court precluded this witness from testifying.

Mother's Witnesses

Paulette Walker Guinn discussed Mother's success in the DBT program, and Mother's growth during the program (which she completed twice). Mother has made long-term behavioral changes. Mother started in August 2018, and Guinn defined Mother's progress as exceptional. At the clinic, not only does Mother do DBT, but she sees a behavioral health medical provider, a therapist, and case manager. Based on Guinn's training and experience, people who go through DBT for a year or more, retain the skills on a long-term basis. *Under Advisement Ruling*, paragraph 11, T. 9/24/19 @ 51-69.

Eve Coffman testified to Mother's growth in therapy and the services that she was doing. Mother participated in medication management, therapy, case management, vocational rehabilitation, job search, obtaining her GED, and substance

abuse therapy, including a group called Seeking Safety. *Under Advisement Ruling*, paragraph 12; T. 9/24/19 @ 102-117, T. 10/2/19 @ 35-42.

Danielle Centner is a therapist that worked with both Mother and A.L. since October 2018. *Under Advisement Ruling,* paragraph 13. Centner observed that Mother's participation was attentive, and if she had to miss an appointment, she always provided 24-hour notice. T. 10/1/19 @ 59. Mother worked on the following and made progress: time management and calendaring, family support sessions, parenting class, Matrix program, Circles of Security, Child and Family Team Meetings, family counseling sessions, and attended guidance center appointments and stayed consistent with mental health treatment. T. 10/1/19 @ 65-67. Mother volunteered to do Circles of Security. T. 10/1/19 @ 70. Mother completed The Great Behavior Breakdown which was important because it is a book that helps parents who are working with children with severe trauma history and it provides different ways to handle the behaviors. Mother was engaged in this program as well. T. 10/1/19 @ 71.

Family therapy had taken some time to implement due to changes in staff issues, and DCS had to refer out the family counseling. Mother advocated for family counseling and individual counseling for A.L. Centner felt that Mother and A.L. did not have the support that they needed. (This answer was objected to as nonresponsive and the objection was sustained.). The staff changeover or lack of staff affected A.L. and Mother's ability to have a family relationship. T. 10/1/19 @ 74-75.

Centner was only aware of the placement reporting negative behaviors by A.L., not parent aids, visitation coaches or anyone else. T. 10/1/19 @ 85. (It is notable that

the GAL asked for and received relief from visiting with A.L. due to him living out of state and was going to obtain updates on A.L. from the placement. T. 10/18/19 @ 6.) Centner observed situations where Mother applied skills she had learned in The Great Behavior Breakdown and Circles of Security. T. 10/1/19 @ 87.

Mandy Gebler testified regarding the successful participation of services by Mother. The only reason for "unsuccessful completion" as set out in Gebler's report was that A.L. was placed out of state in Oklahoma. The designation had nothing to do with Mother's participation. Gebler asked multiple times for unsupervised visits and for DCS to approve Mother's appropriate home which had a room for A.L. *Under Advisement Ruling,* paragraph 14; T. 10/18/19 @ 20-22. Gebler was told by Yazzie that Mother was not offered in-home visitation because there was a concurrent case plan of severance and adoption, and if the dependency was amended to solely reunification, DCS would then look at in-home visits. A.L. was always very comfortable with Mother, and they interacted well. Gebler never saw A.L. act out after a visit. She only heard about it from others. T. 10/18/19 @ 29-30, 34, 42.

Mother would advocate for A.L., particularly for family therapy. Mother advocated for A.L.'s emotional needs and wellbeing in foster care. T. 10/18/19 @ 15, 32-33. When A.L. was upset at the end of visits and would cry, Mother would be very calm in the hand-off, and she would not express her own sadness until A.L. was not present. T. 10/18/19 @ 26. Gebler was not allowed by the court to talk about injuries that she observed on A.L. after arriving from the foster home. T. 10/18/19 @ 31.

Mother had a safety plan in place in case she needed additional help if A.L. was returned home to her. T. 10/18/19 @ 45.

Mother's testimony

Mother testified to her significant amount of services. *Under Advisement Ruling,* paragraph 15; T. 10/18/19 @ 50-78, 115-116; T. 10/30/19 @ 8-9. Mother hopes to study to be a dental hygienist. T. 10/18/19 @ 53. Mother stated that in the prior dependencies she was immature and had a lack of knowledge, guidance, and support. T. 10/18/19 @ 70. Mother did not know how to address her mental health after the prior two dependencies, but DBT has helped her greatly. T. 10/18/19 @ 82. Mother has support from Coffman and her family members. T. 10/18/19 @ 86. Mother testified that for a period of time, she was on the wrong medication, had the wrong diagnosis, and was not receiving the correct support. Mother had a negative reaction to Abilify. Mother's medications changed approximately ten times in a 2-3 year period. When Mother stayed at the PAC unit, she stayed for eight days the first time and thirty days the second time. Mother testified that bipolar and schizophrenia/schizo-effective disorder had been removed from her current diagnoses. T. 10/18/19 @ 111, 116-119; T. 10/30/19 @ 12-14, 25, 28. Mother never observed negative behaviors from A.L. T. 10/18/19 @ 113-114.

Court Rulings

After a severance trial, the trial court took the matter under advisement. The trial court signed a final order on February 3, 2020 terminating Mother's parental rights to the Child. Mother timely filed her Notice of Appeal. The Arizona Court of Appeals

affirmed the termination of Mother's parental rights on March 4, 2021. *See* Appendix B. Mother filed a Petition for Review with the Arizona Supreme Court; however, the Arizona Supreme Court denied review on June 30, 2021. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

This appeal arises from Mother's claims that the State of Arizona failed to support its allegations to terminate Mother's parental rights by at least clear and convicting evidence, as required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Despite that failure, the Arizona court's terminated Mother's parental rights to A.L. Also, the trial court violated Mother's right to due process during the trial. Therefore, Mother requests that this Court assess the constitutional adequacy of Arizona's procedures for terminating a parent-child relationship.

I. The State Of Arizona Terminated Mother's Parental Rights Without Clear & Convincing Evidence In Violation Of The Due Process Clause Of The Fourteenth Amendment.

This Court has recognized on numerous occasions that the relationship between parent and child is constitutionally protected. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (U.S. 1978); *See also Lehr v. Robertson*, 463 U.S. 248, 258 (U.S. 1983) (relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection). State intervention to terminate such a relationship must be accomplished by procedures meeting the requisites of the Due Process Clause of the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). "Before a State may sever completely and irrevocably the

rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Santosky*, 455 U.S. at 747-748. Until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. *Id*. at 760.

A. The Procedures To Terminate Mother's Parental Rights On The Grounds Of Mental Illness Did Not Meet The Requisites Of The Due Process Clause Of The Fourteenth Amendment Because Such Termination Was Not Predicated Upon Clear & Convincing Evidence

A.R.S. §8-533(B)(3) permits the court to terminate parental rights when the parent is unable to discharge his or her parental responsibilities due to mental illness. There must be reasonable grounds to believe that the condition would continue for a prolonged indeterminate period. *Matter of Appeal in Maricopa County Juvenile Action No. JS-5209 and No. JS-4963,* 143 Ariz. 178, 184, 692 P.2d 1027, 1033 (Ct. App. Div. 1 1984). There was no evidence Mother's condition would continue for a prolonged indeterminate period because at the time of trial Mother was on a trajectory to success and health.

The court needed to base its termination ruling on the circumstances existing at the time of trial. *See Shella H. v. Dep't of Child Safety*, 239 Ariz. 47, 50, 366 P.3d 106 (App. 2016) (court must base its ruling on the circumstances at the time of dependency trial). By the time of trial, Mother had remedied the circumstances that brought A.L. into care. Mother participated in medication management, therapy, case management, vocational rehabilitation, job search, obtaining her GED, and substance abuse therapy, including a group called Seeking Safety. *Under Advisement Ruling*, paragraph 12; T. 9/24/19 @ 102-

117, T. 10/2/19 @ 35-42. Mother also worked on the following and made progress: time management and calendaring, family support sessions, parenting class, Matrix program, Circles of Security, Child and Family Team Meetings, family counseling sessions, and attended guidance center appointments and stayed consistent with mental health treatment. T. 10/1/19 @ 65-67. Mother volunteered to do Circles of Security, which was not a required DCS service. T. 10/1/19 @ 70. Mother completed a program for working with children with a trauma history. Mother was engaged and succeeding in all programs. T. 10/1/19 @ 71.

Mother also completed The Great Behavior Breakdown which was important because it helps parents who are working with children with severe trauma history and it provides different ways to handle the behaviors. A.L. was traumatized from being removed from Mother's home and not understanding what was going on. While in foster care, A.L. did not receive the support that was supposed to be provided to him as a foster child. Experiencing the challenges of being removed from Mother's care, and not being able to understand what is going on, along with a lack of support, had a very negative impact on A.L. At Child and Family Team meetings the foster parent would break down crying and state A.L. was miserable in the foster home and foster parent could not handle it. This is why Mother sought out the The Great Behavior Breakdown and Circle of Security programs to provide A.L. with the support he was not receiving in foster care. The Circle of Security program was a long-term program, which met weekly over the course of eight months with a child and family support specialist who provided one on one sessions. The information that Mother gained from doing those

additional programs was much more beneficial and applicable to supporting A.L. than the support provided by the State.

The State's evidence mainly consisted of dated evidence from the time of the Child's removal. The State cited to Mother's frustration in court as a reason for the termination. However, a trial where the State is attempting to permanently take away one's Child is a stressful endeavor. Mother was approximately 17 or 18 at the time of the first dependency. T. 9/10/19 @ 55. Mother did very well by the time of trial, and there was no indication that she would "backtrack". Despite the State's argument, no one can predict how someone will behave in the future. T. 9/10/19 @ 63, 66. If parents were judged solely on their past behavior, then no reunification would ever be successful. The evidence demonstrated that Mother had remedied her situation and was able to safely parent the Child with a safety plan at the time of trial. T. 9/13/2019 @ 181-182. In fact, since the termination trial Mother has been stable and raising her new baby. Mother is currently a healthy and loving mother to her almost one-year old child. Mother had the capability to provide care for the Child and discharge her parental duties. Clearly, Mother's history was not an accurate predictor of her ability to parent at the time of trial (and in the future). Mother should not have been punished for her past mental health issues by terminating her parental rights to A.L. when she was finally stable and had demonstrated the ability to parent.

The trial court found that Mother had been diagnosed with Bipolar disorder and Borderline Personality Disorder, among other diagnosis. The trial court specifically noted Mother's treatment records from the Guidance Center (Exhibit 15) reflect she had

"consistently been diagnosed with these orders for several years." However, the Department disclosed a Change in Diagnosis from The Guidance Center dated July 12, 2019 showing Mother's mental health diagnosis had changed and no longer included Bipolar disorder or Borderline Personality Disorder. Instead, Mother's diagnosis was generalized anxiety disorder, ADHD, and amphetamine induced mood disorder (in full remission). Mother's provider at The Guidance Center questioned the "historical diagnosis" of Bipolar I given Mother's mood stability. The provider felt Mother's historical diagnosis of Bipolar was made in the wake of meth-induced psychosis and mania and was therefore inaccurate. Since Mother had been sober from meth for at least 1-year, the provider noted Mother had no signs or symptoms of hypomania/mania nor sleep inconsistencies, which provided further evidence that Mother had previously been misdiagnosed. Therefore, Mother's mental health diagnosis prior to July 12, 2019, which were relied on by both the Department and the trial court to terminate Mother's parental rights, were obsolete by the time of trial.

Mother filed a Motion to Supplement the Record on Appeal because her diagnoses were corrected. Bipolar was removed, and Mother was diagnosed with anxiety and ADHD (along with alcohol and drug abuse and mood disorders). The diagnosis was not proper at the time of the trial, and that Mother did not have the condition that the State alleged would cause Mother to "backtrack".

Additionally, it was error for the court to terminate Mother's parental rights for failure to remedy her mental illness when the Department never offered all of the proper services to do so. Yazzie testified that Mother had not remedied the conditions

where the Child would be safe in Mother's care, but family counseling was never provided for Mother and A.L. T. 9/13/19 @ 84-87. Mother was never provided the opportunity to do an at home visit or overnight visit to assess her progress and A.L.'s behaviors. Without providing Mother and A.L. with the proper mental health treatment, there was no way to ascertain whether Mother's condition would continue for a prolonged indeterminate period. The State, before acting to terminate parental rights, has an affirmative duty to make all reasonable efforts to preserve the family relationship; in the case of a parent with a disabling mental illness, this includes a duty to undertake rehabilitative measures with a reasonable possibility of success. *Mary Ellen C. v. Arizona Dep't of Economic Sec.*, 193 Ariz. 185, 971 P.2d 1046 (Ct. App. 1999).

The Department failed to provide Mother with the opportunity to participate in family counseling, which was designed to help her become an effective parent. Furthermore, the DBT services were only provided in the third dependency. Arguably, if that service would have been provided initially, Mother may never have been involved in the subsequent dependencies. Mother testified regarding her medication issues, and if properly medicated, she would have not had the subsequent dependencies and would have resolved the issues much sooner. T. 10/18/19 @ 82, 111, 116-119; T. 10/30/19 @ 12-14, 25, 28. Although the Department need not provide "every conceivable service," it must, however, undertake measures with a reasonable prospect of success. *Maricopa County Juv. Action No. JS-501904,* 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). Because the Department did not ensure Mother was provided with the appropriate mental health treatment, the Department failed in its duty to attempt to

preserve the parent-child relationship. On the record in this case, the juvenile court could not reasonably conclude that the Department made a diligent or even reasonable effort to preserve the parent-child relationship. *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 193, 971 P.2d 1046, 1054 (Ct. App. 1999) (to establish a severance, the Department must prove by clear and convincing evidence that it made a reasonable effort to provide the parent with rehabilitative services or that such an effort would be futile).

The evidence at the time of trial demonstrated that Mother was stable and able to discharge her parental responsibilities given the skills she had learned and the support system she had established. Not only was Mother stable and able to parent A.L. at the time of trial, but she has been parenting her other child since the trial with no issues. The evidence in this case fell far below the clear and convincing standard required by the United States Constitution to terminate Mother's rights for mental illness. By terminating Mother's parental rights upon less than clear and convincing evidence, the trial court failed to afford Mother her constitutional due process protections.

B. The Procedures To Terminate Mother's Parental Rights Pursuant To A.R.S. §8-533(B)(11) Did Not Meet The Requisites Of The Due Process Clause Of The Fourteenth Amendment Because Such Termination Was Not Predicated Upon Clear & Convincing Evidence.

Arizona authorizes the termination of a parent-child relationship pursuant to A.R.S. §8-533(B)(11) upon clear and convincing evidence that: 1) The child was cared for in an out-of-home placement pursuant to court order; 2) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services; 3)

The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed; and 4) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

Termination on this ground is erroneous because Mother was able to discharge her parental responsibilities at the time of the severance trial. In the span between the Child's removal from Mother and the severance trial, Mother had made significant progress and completed or participated in all the services provided to her. Mother voluntarily completed additional services and went through some programs more than once on a voluntary basis. Mother supported the Child's services. For example, Mother was adamant about being involved in the Child's brain mapping. Mother continued to advocate for additional services for family reunification. A.R.S. § 8-533(D) requires the trial court, in considering the grounds for termination pursuant to A.R.S. §8-533(B)(11), to consider the participation of the parent in reunification services. Mother was attending weekly counseling. Mother completed parenting classes. Mother and her witnesses reported no issues with visits. All visits were appropriate. A.L. did not have a difficult time, and there were no safety issues with Mother's parenting style. Although the foster mother reported at every child and family team meeting that she was having problems with A.L., Mother never had behavioral issues with A.L. when he was in her care.

There was no reasonable evidence that Mother was *currently* unable to discharge her parental responsibilities. At the time of trial, Mother was fully compliant with the case plan of reunification. The only reason visits were not happening was because A.L. was moved to an out of state placement. The State argued that because Mother had some difficulty in the past, that would continue in the future. The state argued "We are focused on the past. The past is part of the present. The past behavior is the best prediction of what the future behavior is going to be." T. 9/10/19 @ 15. That is not the standard. In fact, Mother has been completely stable since trial and is currently raising her baby. Instead, Mother's provider at the Guidance Center has noted on both 4/14/2020 and 9/9/2020, that Mother had maintained stability, made tremendous progress, and was capable of successfully parenting the Child. The provider again noted his opinion that Mother does NOT suffer from Bipolar I Disorder, and that any previous diagnosis in that regard violated multiple standards of practice.

The evidence in this case fell far below the clear and convincing standard required by the United States Constitution to terminate Mother's rights under A.R.S. §8-533(B)(11). By terminating Mother's parental rights upon less than clear and convincing evidence, the trial court failed to afford Mother her constitutional due process protections. Therefore, Arizona's procedures for terminating a parent-child relationship on the basis of substance abuse are constitutionally deficient.

C. <u>The Procedures To Terminate Mother's Parental Rights On The Grounds Of 15-Months Time-In-Care Did Not Meet The Requisites Of The Due Process Clause Of The Fourteenth Amendment Because Such Termination Was Not Predicated Upon Clear & Convincing Evidence.</u>

Arizona also authorizes the termination of a parent-child relationship pursuant to A.R.S. §8-533(B)(8)(c) upon clear and convincing evidence that a parent is unable to remedy the circumstances causing their child to be in court-ordered, out-of-home care for fifteen months or longer. It must also be established that there is a substantial likelihood the parent will not be capable of exercising proper and effective parental care and control of the Children in the near future. *Id*. It is not a parent's burden to prove he or she will be capable of parenting effectively in the near future, but the moving party's burden to prove there is a substantial likelihood he or she will not. *Jordan C. v. Ariz. Dep't of Econ. Sec*., 223 Ariz. 86, 97 (App. 2009). In order to accomplish termination on this ground, the Department must first make a diligent effort to provide appropriate reunification services to the parent. A.R.S. § 8-533(B)(8). The trial court must then consider the availability of those services to the parent and the parent's participation in those services. A.R.S. § 8-533(D).

The Supreme Court recognized that the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95 (1982). The right to the control and custody of one's children is fundamental and the state cannot deprive a parent of this relationship without due process of law. *Father in Pima County Juvenile Action No. S-114487 v. Adam*, 179 Ariz. 86, 93, 876 P.2d 1121, 1128 (1994). The court must use whatever means to preserve the parent-child relationship and severance is a last resort and should be used only in the most extraordinary circumstances when all other efforts to preserve the parental

relationship have failed. *See Maricopa County Juvenile Action No. JA 33794*, 171 Ariz. 90, 828 P.2d 1231 (Ct. App. 1991), cited in *Michael J. v. Arizona Dept. of Economic Security*, et. al., 196 Ariz. 246, 995 P.2d 682 (2000).

The state, before acting to terminate parental rights, has an affirmative duty to make all reasonable efforts to preserve the family relationship; in the case of a parent with a disabling mental illness, this includes a duty to undertake rehabilitative measures with a reasonable possibility of success. *Mary Ellen C. v. Arizona Dep't of Economic Sec.*, 193 Ariz. 185, 971 P.2d 1046 (Ct. App. 1999) (emphasis added). Arizona courts have long required the State to demonstrate that it has made a reasonable effort to preserve the family. *Id.* at 192. Although DCS need not provide "every conceivable service," it must provide a parent with the time and opportunity to participate in programs designed to improve the parent's inability to care for the child. *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (Ct. App. 1994) (emphasis added). The State does not provide such opportunity or make a "concerted effort to preserve" the parent-child relationship when it neglects to offer the very services that its consulting expert recommends. *Mary Ellen C.*, 193 Ariz. at 192. Therefore, the Court must consider whether the State met its obligation to make a reasonable rehabilitative effort in this case. *Id.* at 187. Because the State did not make such an effort, this Court must reverse the juvenile court termination order. *Id.*

The evidence suggested the services provided during Mother's first and second dependency were not enough and not appropriate for what Mother needed. Mother testified (and it was undisputed) that her bad reaction to the Abilify medication caused

most of her issues. Getting the medication on track helped Mother reach success in her services. T. 10/18/19 @ 111, 116-119; T. 10/30/19 @ 12-14, 25, 28.

In the final order, the trial court found that Mother was currently unable to discharge parental responsibilities. The trial court erred in this determination. To prevail on termination of Mother's parental rights, DCS must have shown by clear and convincing evidence that Mother never remedied her mental health that placed her Child at risk. In fact, all witnesses who testified acknowledged that Mother was actively participating in services and was putting A.L. first. The testimony further presented that Mother was making good decisions that would continue to benefit her Child. Mother participated in all her services, voluntarily participates in other services, and remained active in the mental health and parenting programs. The actual witnesses to the visits with Mother observed A.L. as engaged and happy. The evidence at trial demonstrated that Mother was, at least, a minimally adequate parent. There was no testimony that Mother had failed to remedy the concerns related to her SMI designation. Since the termination trial, Mother has been stable and raising her new baby for nearly a year.

Yazzie and Mother's witnesses verified that Mother had been compliant with all of the requests of DCS since at least March 2019. The testimony demonstrated that Mother was utilizing skills learned from the mental health services and parenting classes and therapy. Mother has been applying the information and skills learning from her services to successfully raise her new baby.

The court failed to acknowledge the significant progress made by Mother with her services and with A.L. by the time of trial. Mother went above and beyond by participating in services that were not required. The severance order on the 15-month time-in-care ground is unsupported by the evidence.

Under those circumstances, no reasonable evidence supported the trial court's finding there was a substantial likelihood that Mother was incapable of exercising proper and effective parental care in the near future. *See Roberto F. v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 45, 56, 301 P.3d 211, 222 (Ct. App. 2013). The Department was required to prove a substantial likelihood that Mother would not be capable of parenting in the near future. *See Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93 (Ct. App. 2009) (emphasis added). Not just a mere chance, but a substantial likelihood. The Department failed in meeting that burden with specific and articulable evidence. *Id.*, 223 Ariz. at 97 (it is not a parent's burden to prove she will be capable of parenting effectively in the near future, but the moving party's burden to prove there is a substantial likelihood she will not).

Mother had remedied the circumstances that caused the Child to be in State custody and was able to parent. The trial court simply ignored the evidence regarding Mother's progress once Mother's medication was stabilized. The trial court made the finding that Mother was unable to remedy the circumstances that cause the Child to be in an out-of-home placement even though the evidence and testimony at trial were contrary to that finding. "In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual

discretion to underweigh probative facts that might favor the parent." *Santosky*, 455 U.S. at 762.

Mother did not receive due process in this case. The evidence at trial fell far below the clear and convincing standard required by the United States Constitution to terminate Mother's rights on Arizona's statutory ground of 15-months time in care, but the trial court terminated Mother's parental rights anyways. Therefore, Arizona's procedures are constitutionally deficient.

II. Since The State Failed To Prove Mother's Unfitness By Clear & Convincing Evidence, The Termination Of Mother's Parental Rights Was Erroneously & Solely Predicated Upon The Children's Best Interests.

This Court has recognized that the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children. *Id*. The Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest. *Quilloin v. Walcott*, 434 U.S. 246, 255 (U.S. 1978).

In Arizona, in addition to the statutory findings a court must make to support termination, the court must also find severance to be in the best interest of the child: that is, that severance provides some benefit over the continuation of the parent-child relationship. *In re Maricopa County Juvenile Action No. JS-8441*, 175 Ariz. 463, 857 P.2d

1317 (Ct. App. 1993). Although the best interests of the child alone are not sufficient to grant termination, they may be sufficient to deny termination. *In re Appeal in Maricopa County Juvenile Action*, 155 Ariz. 556, 559 (Ct. App. 1988).

This Arizona requirement – that termination cannot be predicated solely on a finding of best interests – appears to be in line with the Due Process requirements expressed in *Quilloin*. However, given the procedures in this case that resulted in a termination of Mother's parental rights without clear and convincing evidence of her parental unfitness, the trial court's termination was granted solely on a finding of best interests. Such a result runs afoul of the Fourteenth Amendment.

A parent's rights should be preserved "when the parent grasps the opportunity [to reunify with a child] quickly, diligently, and persistently" and without failure. *Father in Pima County Juvenile Action No. S-114487 v. Adam*, 179 Ariz. 86, 101, 876 P.2d 1121 (1994). Mother did so here, and the trial court did not consider Mother's rehabilitation efforts in its best-interests determination in this case. By the time of trial, Mother had completed a plethora of services. The trial court ruled that A.L. suffered "trauma upon trauma such that his bond with Mother is based upon that trauma". The trial court found that termination would further the case plan of adoption, and the Child would have permanency.

Regarding the Court's finding that Mother's bond with the Child is based upon trauma, a trauma bond occurs between an abuser and victim. Mother never abused the Child – not physically, emotionally, or in any other manner. Although the Child was in an adoptive placement, the evidence established the Child would actually be harmed if

the relationship with Mother were to be terminated. A.L. had a placement disruption during the dependency. T. 9/10/19 @ 149. The outbursts and behaviors exhibited by the Child were *only* reported by the foster placement. T. 9/10/19 @ 172. The child's therapist, Vance, never spoke to Mother. T. 9/13/19 @ 84-85, 87. Vance worked with the foster mother to help her with A.L., but Vance did not provide the same treatment to Mother because A.L. "wasn't acting out with her". T. 9/13/19 @ 86. Vance never observed A.L.'s alleged reactions to visits with Mother. T. 9/13/19 @ 94. Although the foster placement expressed at every child and family meeting that A.L. was having behavioral problems in the foster home that the foster mother was not able to handle, A.L. never exhibited behavioral problems when he was with Mother.

Mother expressed her concerns that A.L.'s situation in foster care was detrimental to him. Foster mother attended the majority of the Child's therapy sessions with Vance, thus not allowing the Child one-on-one time with Vance which impacted the Child's therapy and healing process. Mother was concerned about A.L. disrupting and moving to another placement. T. 9/10/19 @ 151. Mandy Gebler asked multiple times for unsupervised visits and for DCS to approve Mother's appropriate home which had a room for A.L. *Under Advisement Ruling,* paragraph 14; T. 10/18/19 @ 20-22. A.L. was always very comfortable with Mother. Gebler never saw A.L. act out after a visit. T. 10/18/19 @ 29-30, 34, 42.

Despite this information, the court never considered that A.L.'s reported behaviors may have been a negative reaction to foster care as opposed to a negative reaction to Mother. Mother testified that the visits were amazing. A best interest and

bonding assessment between Mother and the Child were never ordered or conducted. Without a court-ordered best interests and bonding assessment, there was insufficient evidence for the trial court to make a best-interests determination.

Since the termination of Mother's parental rights was not supported by clear and convincing evidence of Mother's unfitness, the termination was based solely upon what the trial court felt would be in the best interests of the Child. Such a procedure violates the Due Process Clause of the Fourteenth Amendment.

III. Statements Made By The Attorney General During Mother's Trial & Exclusion Of Mother's Witness From Testifying Were A Violation Of Mother's Constitutional Right To Due Process.

A parent has a fundamental interest in the care, custody and control of her child, a right that is protected by the Due Process Clause of the United States Constitution. *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, ¶ 24, 38 P.3d 41, 45 (App. 2002), *citing Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. *Santosky*, 455 U.S. at 753-754. There were numerous times during Mother's trial that the State did not allow Mother to conduct her case, including improper comments the attorney general made about Mother. These statements amounted to vouching by the attorney general and attempted to cast Mother in a bad light. For example, the attorney general accused Mother of "trying to get a one-on-one rapport going with you, your honor. That's all she is trying to do…. It's prejudicing DCS. It's prejudicing poor [A.L.], who's been sitting in state care for five years…have her sit in the hall until she testifies because she can't control herself.…. I'd

ask you to have her take a seat outside for the remainder of the proceeding….And that's my minimal sanction. If you want to go higher, fine." T. 9/24/2019 @ 35-37. The attorney general stated, "snickers on the part of [Mother] and things of that nature. I just want to put that on the record…." T. 9/24/2019 @ 22.

During closing arguments, the attorney general made the following statement regarding Mother's stress tolerance, "She behaves fine when she's in complete control of the situation.…I can't tell you how many times I asked for contempt sanctions." T. 10/30/19 at 42. The attorney general further stated, "I've been trying cases for 30 years. I've never seen this kind of behavior—the sighing, the audible groans…And then what else epitomizes it is not only that, but the two interruptions that I saw during her counsel's closing…Again, wants to be in control; and if anywhere one is supposed to maintain in the whole wide world, it's right here." T. 10/30/19 at 78

The Attorney General's inflammatory statements were unnecessary and brought to the attention of the Court behaviors that had nothing to do with trial and allowed the State to basically "testify" regarding Mother's conduct. (This is especially vexing since the attorney general constantly objected to Mother's testimony regarding herself based on vouching.). It is also notable that, but for the Attorney General pointing some of these "behaviors" out to the court, the court stated it did not notice them. T. 9/24/2019 @ 22.

Additionally, the state moved for Mother's witness, Mary Beth Laurano, to be precluded from testifying due to Laurano's alleged behaviors outside the courtroom having nothing to do with Mother. A trial court has broad discretion in admitting or

excluding evidence, and the Court will not disturb its decision absent a clear abuse of its discretion and resulting prejudice. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82-83 (App. 2005).

Mother was fighting for her Child, and any evidence regarding Mother's ability to care for the Child was relevant to the findings the court had to make in this case. The juvenile court abused its discretion in excluding evidence for reasons that had nothing to do with Mother. This was a bench trial, and the court could have assessed the witness's testimony rather than exclude it in its entirety. The exclusion of the evidence and the inflammatory statements of the State denied Mother a fair trial. Therefore, Mother's case should be remanded for a new trial.

CONCLUSION

If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections. *Santosky*, 455 U.S. at 753. The State of Arizona did not provide Mother with those Constitutional protections or fundamentally fair procedures before terminating Mother's parental rights. Therefore, Mother requests this Court grant certiorari and vacate the judgment of the Coconino County Superior Court.

RESPECTFULLY SUBMITTED this 14th day of September 2021.

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