No. 22-281

In the
Supreme Court of the United States

IN RE BABY BOY DOE, MINOR

PETER KRUITHOFF
Petitioner,
v.
CATHOLIC CHARITIES WEST MICHIGAN,
and
ADOPTIVE PARENTS 1 & 2,
Respondents.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

REPLY TO BRIEF IN OPPOSITION
with Appendix, Volume III

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INTRODUCTION

Respondents, and the State, fault Petitioner for including his request for custody in a Complaint for Divorce instead of on a State form, despite no rule or statute requiring its use.

They fault him for being too proactive by filing too early, despite not knowing when the child would be born. They fault him not being proactive enough because the Ottawa court did not find the notice in time, despite the ad being put in a print paper in another county.

They fault him for filing a motion to compel his wife's compliance with the divorce court's order to give information about the child, despite the fact that he knew of no other source of information. They fault him for *not* filing a motion to get the Ottawa court to do their job, despite there being no requirement in the law for him to do so.

They fault him for not demanding that the probate court let his attorney speak after telling him not to, despite the practical realities of litigation practice. They fault him for not filing an appeal of the termination order, despite knowing the adoption agency's refusal to provide information forestalled such efforts.

They fault Petitioner for everything that has nothing to do with the central questions before this court.

This petition is Mr. Kruithoff's last opportunity to have his parental rights restored. It is the first opportunity for all other nonsurrendering parents in all other States to prevent the abrogation of theirs.

REPLY

I. This Court should correct plain errors affecting substantial rights to uphold the integrity of the justice system.

In *Manuel v City of Joliet*, this Court granted certiorari and reversed the Seventh Circuit's dismissal of an unlawful detention claim on a Fourth Amendment basis even though the petitioner "ignored the Fourth Amendment in his complaint[.]"[2] The failure to specifically state that the rights violation was specifically that of the Fourth Amendment did not change the nature of the violation. The facts constituted a violation regardless of what label was given to it, and his objections to the process by which his rights were deprived was sufficient even if he did not use the right language at the right time to describe what was happening to him.

Here, Petitioner consistently argued that he did not receive proper notice, and that the Safe Delivery of Newborns Law ("SDNL") was flawed. He argued at all levels that his parentage should not have been ignored. He tried, at the one and only hearing in the surrendered-newborn case, to articulate a constitutional argument, only to be stopped by the trial court stating "[w]ell, you – you are barking up the wrong tree for an unconstitutional statute."[3] Petitioner endured, and then appealed. In that appeal, he argued that the published notice was

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[2] *Manuel v City of Joliet, III*, 580 U.S. 357 (2017).

[3] See Appendix U, herein, at 27a.

improper, and insufficient to justify termination of his parental rights.[4]

Regardless of the eloquence of Petitioner's arguments before, this Court has the authority, and discretion, to review constitutional claims even if they were not raised below if the claim concerns deprivation of a fundamental right. As this Court stated back in 1941, in *Hormel v Helvering*, "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them […] Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."[5] Further, though appellate courts generally "confine themselves to the issues raised below," this Court has stated that such a confinement "should not be applied where the obvious result would be the plain miscarriage of justice."[6]

If there is a plain error that affects substantial rights, this Court "should" correct it "if the error seriously affects the fairness, integrity or public reputation of judicial proceedings."[7] This is

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[4] See *Delayed Application for Leave to Appeal,* filed June 10, 2020, in the Michigan Court of Appeals, at 1.

[5] *Hormel v Helvering*, 312 U.S. 552, 557 (1941).

[6] *Id.* at 558; See also *Singelton v Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt[.]")

[7] *Rosales-Mireles v United States*, 201 L Ed 2d 376 (2018).

especially so when faced with a novel constitutional claim, as explained by this Court in *Reed v Ross*:[8]

> Despite the fact that a constitutional concept may ultimately enjoy general acceptance […] when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose. Although there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand.

There is a critical need for fair procedures when the mutually-held liberty interest of parents and children—to be free from State interference with their family unit—are at risk of erroneous deprivation.[9] This Court has recognized that parental status/termination cases are set apart other civil actions, especially other domestic relations matters such as divorce, paternity, and child custody, because "[i]n contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy

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[8] *Reed v Ross,* 468 U.S. 1, 15 (1984).

[9] *Santosky v Kramer,* 455 US 745, 769 (1982); *Troxel v Granville,* 530 U.S. 57, 65 (2000).

permanently all legal recognition of the parental relationship." [10]

Due to the intrinsic nature of the mutual liberty interests at stake in surrendered-newborn cases, Due Process requires heightened procedural protections, especially for families with weakened familial bonds.[11] This case is undoubtedly unusual in its procedural posture. But any procedural flaws in this case are not reasons to deny certiorari any more than they would have been in *Gideon v Wainright*.[12] No person should be faulted for falling prey to the machinery of an unconstitutional law.

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[10] *MLB v SLJ,* 519 U.S. 102, 127-128 (1996), internal quotations and marks omitted.

[11] *Santosky v Kramer*, 455 U.S. 745, 747-48 (1982).

[12] *Gideon v Wainwright*, 372 U.S. 335 (1963) (right to court appointed counsel).

II. Petitioner was under no obligation to "locate" the other court.

Respondents emphasize the delays in-between the formal court filings this matter. Their repeated refrain is that Petitioner should have done more to get the Ottawa court to search for the SDNL action. The main problem with their argument is that it hinges on assumptions that (1) the Ottawa court was not actively trying to locate the Safe Delivery court, and (2) the court shirked its statutory obligations.[13] Of course, neither the court staff nor Petitioner had any chance of rebutting these assumptions because there was no hearing.

Rather than assuming that the court staff did nothing, rather than assuming they shirked their statutory obligation, one could just as easily assume that they were actively engaging in efforts to locate the safe-delivery court but simply failed to find a single anonymously titled case in a distant and unknown court.

Another problem with these arguments is that the SDNL does not contain any requirement for a nonsurrendering parent to do anything other than file a petition for custody. There is no indication in the language of the statute, nor in any caselaw in Michigan, that the court's obligation to "locate and contact the court that issued the order and shall transfer the proceedings to that court" is anything other than automatic.

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[13] MCL 712.10(2), Appendix I, Petition Volume I, at 94a.

If there is a hidden obligation for a nonsurrendering parent to specifically request that the court comply with its statutory "locate" obligation—or if there is special wording that a nonsurrendering parent must use to satisfy such a non-statutory obligation—then the question to this Court becomes: is it constitutional to deprive any person of any right if they do not follow an unspoken filing procedure?

As discussed by this Court in *Schwab v Reilly*, from 2010, there is a legal presumption "that parties act lawfully and with knowledge of the law."[14] But though *ignorantia juris non excusat*,[15] there must be a law to be ignorant of for that presumption to make any sense.

Here, there is no law that requires a nonsurrendering parent to tell their court clerk how to do their job. Though Petitioner clearly disputes the allegation that he sat on his laurels, the emphasis on *ex post facto* inaction in Respondents' oppositional brief, and in the Michigan Supreme Court, increases the need for this Court to grant certiorari to put an end to such an egregious application of law.

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[14] *Schwab v Reilly*, 560 U.S. 770, 790 (2010).
[15] "Ignorance of the law excuses no one."

III. Degrading Petitioner's character does not improve the constitutionality of the SDNL.

The Constitution protects both victims and villains alike. The constitutionality of a State's statutes are not measured by the likability of those to whom they are applied, because they do not apply to just a single individual.

This Court has heard cases involving murderers, rapists, child molesters, and terrorists. In a case related to the issues herein, this court, in *Lassiter v Department of Social Services of Durham County, North Carolina,*[16] granted certiorari to determine whether due process was denied when a trial court did not appoint counsel for a mother during proceedings to terminate her parental rights even though she was a convicted murderer.

A significant portion of Respondent's oppositional brief is devoted to describing acts of domestic violence and degrading Petitioner's character—as though doing so will somehow cure the constitutional defects of the SDNL— despite the Michigan Supreme Court specifically ordering "any allegations of domestic violence that were not substantiated by official court records" to be stricken/redacted from Respondents' filings.[17] But in addition to the questionable decision to present factual allegations to this court after being stricken for presenting the same allegations to a lower court,

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[16] *Lassiter v Dept of Soc Services of Durham County, N. C.* 452 U.S. 18, 34 (1981).

[17] Appendix F, Petition Volume I, at 52a.

the factual recitations included in their brief are mostly hyperbole.

At the risk of permitting a red herring to swim wild, Petitioner openly admits that in 2016 (two years prior to the birth of his son) he was accused of strangling his spouse. Petitioner pled no contest and the charges were later dismissed.[18] Petitioner later accepted accountability for an assault in June 2018, pleading guilty to misdemeanor charges of domestic violence, interference with electronic communications, and a probation violation.[19]

While domestic violence is never acceptable, these misdemeanors are not the horror show depicted in the oppositional brief.[20] But even if Respondents' version of events were true, we must keep in mind that the permanent destruction of the parental relationship in this case was not because Petitioner engaged in domestic violence. Petitioner's rights were severed because the Michigan Supreme Court declared that his request for custody was untimely because it was filed the day before the child

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[18] *State of Nevada v Peter Kruithoff*, Clark County, Nevada, Case No. 16F18771X (11/08/2016 arrest date, 08/02/2017 disposition/dismissal date).

[19] *State of Michigan v Peter Kruithoff*, 20th Judicial Circuit Court for the County of Ottawa, Case No. 18-042271-FH (06/03/2008 incident date).

[20] The allegations about domestic violence occurring in Florida, as recited on page 3 of Respondents' brief, are nowhere to be found in the lower court record, being raised for the first time in their brief to this Court.

was born. They were severed because his wife chose to utilize the SDNL.

If there is any temptation to reject the petition for certiorari because Petitioner pled guilty to misdemeanors—rather than because of the functionality of the laws itself—then consider this: had Petitioner engaged in felonious assault, had he beaten his wife to the point of hospitalization, had she given birth while in an abuse-induced coma, had she remained unconscious and thus unable to provide any identifying information about herself or Petitioner, then child protective services would have been called in and termination proceedings under Michigan's child protection laws would have certainly been commenced.

Had protective services been involved, then Michigan's Absent Parent Protocol would have been applied.[21] Under that protocol, there would have been far more attempts at notice than just a single notice being placed in the classified ads for one day in an out-of-county print newspaper.

Petitioner would have had a better chance of receiving notice of the proceedings if he had beaten his wife to near-death because, under Michigan's child protection laws, there is a continuous search requirement at every stage of a termination case. Petitioner would have had multiple opportunities to assert his parental rights over an extended period prior to termination. All the while, his wife would have received the benefit of parent-focused services

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[21] See Appendix O, Petition Volume II, at 130a(II).

and his child would be in the care of a State-approved foster family or, possibly, a relative-placement.

The repeated assertions of domestic violence should spur this Court not to reject the petition, but to consider the disparity in procedural protections afforded to similarly-situated individuals based on another individual's choice of law, and evaluate whether there is any rational reason for such disparate treatment.[22]

IV. The deprivation of liberty interests in Michigan should not be ignored simply because the laws are worse in other States.

Respondents provided tables that purportedly summarize the laws of other States, without any supporting legal references by which their claims can be confirmed. Though they seek to convince this Court that Michigan is the best-of-the-worst by purportedly comparing notice provisions amongst the various State surrendered-newborn laws, their analysis is contextually hollow because it does not address whether another State's laws might be "better" for a nonsurrendering parent than Michigan's framework if that State limits the circumstances of surrender or otherwise provides other mechanisms for securing rights.

But even if their tables are accurate, and even if Michigan's surrendered-newborn laws are the best-

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[22] e.g. *Skinner v State of Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

of-the-worst, constitutionality is not determined based on whether another State's laws are more egregiously flawed. This Court must not reject a request to review the constitutionality of the SDNL because the laws of some other State might be worse.

Nor is there any precedent for Respondents' position that this Court should avoid this case of first impression because of the prevalence of surrendered-newborn laws. After all, before the 1954 decision of *Brown v Board of Education*,[23] segregation was prevalent throughout many States. Before *Miranda v Arizona*,[24] police throughout the nation lacked clear guidance as to how to, or whether they must, inform suspects of their rights.

No one would argue that this Court should have declined to decide *Brown* or *Miranda* on the basis that the wrongs to be righted were pervasive throughout the States. There is no room for an "everybody else is doing it, so why can't we" argument when it comes to constitutional analysis, and Respondents' arguments to that effect must be rejected.

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[23] *Brown v Board of Ed. of Topeka, Shawnee County, Kansas*, 347 U.S. 482 (1954).
[24] *Miranda v State of Arizona*, 384 U.S. 436 (1966).

V. The double-edged sword of an untestable theory.

When granting Petitioner's motion to strike the unsubstantiated allegations of domestic violence that littered Respondents' lower court filings, the Michigan Supreme Court also ordered the redaction of unverified statistics as to the SDNL's efficacy.[25] Nonetheless, Respondents chose to again include unverified statistics in their oppositional brief, such as the claim that "the statute has proven to save the lives of 298 newborn babies in Michigan".[26]

Their assumption is as untestable as it is grand. There is no manner in which Respondents or anyone else can differentiate between surrendered children who were at risk of infanticide versus surrendered children whose parent(s) would have utilized the traditional adoption process if the short cut of the SDNL was not available.

The trouble with untestable theories is that nobody can truly win an argument based on assumptions and conjecture. Yet while Respondents cannot point to any case where they can say with certainty that a particular infant would have died but for the SDNL, we can point to several cases where an infant was murdered despite the SDNL. For instance, in 2015, when the SDNL was in effect, a newborn was found frozen on a conveyer belt of a recycling facility after his mother gave birth to him in an unheated garage, put a cushion on him, left

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[25] See Appendix F, Petition Volume I, at 52a.
[26] See Response Brief, at 12, 22, and 38.

him to freeze to death, and, later, apparently tossed him into a recycling bin.[27]

Ultimately, if these statutes are truly as life-saving and important as Respondents claim they are, then why would they oppose a chance for the highest court in our land to confirm their efficacy and ensure that the procedures by which this purportedly life-saving measure are consistently and constitutionally applied?

CONCLUSION

Despite Respondents' best attempts to expand the record to distract from the constitutional issues at hand, a thorough discussion of what efforts Petitioner did or did not undertake to preserve his rights cannot be had because there was no hearing as to what he did or did not do.

The issues of first impression presented in this case are of immense significance, and certiorari should be granted.

Respectfully submitted,
Saraphoena B. Koffron
Counsel of Record for Petitioner

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[27] *People of the State of Michigan v Angela Marie Alexie*, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, Docket No. 332830 (Oct 2017).

APPENDIX

Appendix T

STATE OF MICHIGAN
IN THE 20TH CIRCUIT COURT
FOR THE COUNTY OF OTTAWA
FAMILY DIVISION

PETER WILLIAM KRUITHOFF,
Plaintiff,

v

[redacted]
Defendant.

File No. 2018- 88972-DM

Hon. Engle

PLAINTIFF FATHER'S MOTION FOR ORDER TO SHOW CAUSE

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[redacted]
Defendant In Pro Per
[redacted]

PLAINTIFF-FATHER'S MOTION FOR ORDER TO SHOW CAUSE

NOW COMES Plaintiff-Father, Peter Kruithoff, by and through his attorney, and for his Motion for Order to Show Cause sets forth unto this

Honorable Court as follows:

1. Plaintiff-Father filed a complaint for divorce on August 8, 2018;
2. Included with the complaint were ex-parte motions regarding DNA testing and custody of the then-unborn child;
3. The Court signed an Ex-Parte Order for DNA testing and a Restraining Order regarding the child on August 10, 2018;
4. Plaintiff-Father was unable to locate Defendant-Mother until August 30, 2018, when she was personally served by a private investigator with the complaint for divorce documents as well as the Ex-Parte and Restraining Orders;
5. Defendant-Mother has failed to contact Plaintiff counsel to make arrangements for DNA testing;
6. When the private investigator served Defendant-Mother, he saw no signs of the child being present at the property, and Defendant-Mother refused to speak with him about the condition of the child;
7. On September 4, 2018, Plaintiff counsel sent a letter to Defendant-Mother by restricted certified mail requesting that Defendant-Mother contact Plaintiff counsel by September 7, 2018 at 5:00 pm (Exhibit A);
8. The letter was delivered to Defendant-Mother on September 6, 2018 (Exhibit B);
9. Defendant-Mother has failed to respond to

Plaintiff counsel regarding any aspect of this matter;

10. Plaintiff-Father does not know the whereabouts of the child at this time;

11. Plaintiff-Father is aware that Defendant-Mother intended to give the child up for adoption or exercise the Safe Delivery option (Exhibit C);

12. Thus far, Defendant-Mother has refused to provide any information to Plaintiff-Father regarding the child, despite Plaintiff-Father's status as legal father due to the parties being married at the time of conception.

WHEREFORE, Plaintiff-Father requests the following relief:

First, that this Court hold the Defendant-Mother, [redacted], in contempt for violating its order dated August 10, 2018.

Second, that this Court order Defendant-Mother to provide Plaintiff-Father with the following information:

- Date and location of the child's birth
- Child's name, if any
- Child's current whereabouts
- Name of the person or agency currently caring for the child
- When the child will be made available for DNA testing

Third, that this Court sentence Defendant-Mother to ten (10) days in jail for civil contempt,

to be suspended provided there are no further violations of the Court's order.

Fourth, that Plaintiff-Father be awarded costs and $300.00 in attorney's fees associated with filing this motion.

Respectfully Submitted,

/s/_____
Peter Kruithoff
Plaintiff-Father

9/11/18
Date

STATE OF MICHIGAN)
) SS.
COUNTY OF OTTAWA)

On the 11th day of September, 2018, before me personally came the above-named Plaintiff-Father and made oath that he has read foregoing Motion for an Order to Show Cause by him subscribed, and knows the contents thereof and the same is true of his own knowledge, except as to those matters which are stated to be on his information and belief, and as to those matters he believes them to be true.

/s/_____
MARISSA BARKEMA, Notary Public

Appendix U

STATE OF MICHIGAN
9TH JUDICIAL CIRCUIT COURT - FAMILY DIVISION
FOR THE COUNTY OF KALAMAZOO

IN THE MATTER OF BABY BOY DOE
(08/09/2018)

Case No.: 2018-6540-NB

_____/

MOTION TO UNSEAL ADOPTION FILE
BEFORE THE HONORABLE JULIE K. PHILLIPS
Kalamazoo, Michigan - Tuesday, December 10, 2019

APPEARANCES:

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None.

EXHIBITS:
IDENTIFIED **ADMITTED**

None.

Kalamazoo, Michigan

December 10, 2019 - 1:30 p.m.

THE COURT: Thank you. Please be seated.

THE CLERK: Court calls the matter of Baby Boy Doe. Case number 2018-6540-NB. Will the parties please state their appearances for the record?

MR. MORITZ: John Moritz.

THE COURT: Good morning.

MR. VILLAR: Good afternoon, your Honor, Mike Villar --

THE COURT: Good afternoon, sorry.

MR. VILLAR: -- also on behalf of Petitioner Peter Kruithoff.

THE COURT: Good afternoon.

MR. MONSMA: Good afternoon, your Honor, Tim Monsma on behalf of Catholic Charities.

THE COURT: Okay. Good afternoon. Nice to meet you all.

So this is a motion by Mr. Villar, Mr. Moritz concerning unsealing our adoption records, is that what your motion is, sir?

MR. VILLAR: That is correct, your Honor.

THE COURT: Okay. I will let you argue it.

MR. VILLAR: Do you prefer us argue from the podium?

THE COURT: There is a microphone. If you are more comfortable you are welcome to sit, if you've got all your notes right there. Whatever you are more comfortable with.

MR. VILLAR: Your Honor, we filed an extensive motion with our -- with this pleading and then we also filed a brief in support of our motion to unseal the adoption file.

The concern that we have here is that the possibility exist that everyone can hide behind the Safe Delivery Statute and say we did everything required by the statute. I think the statute does have some problematic issues in that it doesn't distinguish between a married and unmarried person surrendering a child.

From the start of this case if the Court looks -- I think the most -- one of the

most important things in our motion is Exhibit O -- is the timeline for Mr. Kruithoff and right from the start Mr. Kruithoff was attempting to obtain custody of his child and Exhibit O. Is the very last exhibit that we included with our motion.

So here -- there was a divorce action pending. The divorce action was filed actually day before the child was born. On the 10th the father obtained an ex parte order for DNA testing and restraining order prohibiting the mother form trying to adopt the child --

THE COURT: I read it. I mean, you don't have to go through it all.

MR. VILLAR: Okay. I didn't know if the Court --

THE COURT: I am with you.

MR. VILLAR: So I don't -- I don't care to proceed and give the Court a second overview or an oral rendition of the things that we wrote.

THE COURT: Okay.

MR. VILLAR: But what I -- what I do hope that happens today is that we have the

right to review what happened in this adoption file because we are obviously upset about what happened, my client is upset about what happened, his child was taken from him and I know in the response people were saying, well he had 28 days to respond, well my client lived in Ottawa County, the mother was living in Muskegon County and then the baby was born in Kent County. He had no idea when the baby was born she he had no idea -- so when the notice come out in the paper saying this is Baby Boy Doe, born on such and such a date in Kent County, first of all he didn't live in Kent County, secondly he didn't know that she was in Kent County, third he didn't know the date the child was born.

So that notice which was used to then terminate his parental rights would have been completely useless to him even had he read it, which he didn't read it.

The other thing that I would say that this distinguishes -- this case is distinguished from others if there is no marriage -- I mean, my client is the presumed father of the child because he is married to Ms. Kruithoff.

THE COURT: He is the legal father, not the presumed father.

MR. VILLAR: He is the legal father, that is correct. I misspoke, your Honor.

He is the legal father so he would not think that he would have some obligation under the statute to file with the State of Michigan that he is the father of that child. He didn't think that and I don't know that he should have been thinking that.

Obviously in retrospect he probably should have done it, but I think because he was married and there was a divorce action he could assume that that would not happen.

The other thing I think that is important in this case the Court consider -- could consider is that we filed -- Mr. Moritz, who is representing Mr. Kruithoff in the divorce action, filed a subpoena on June 16th to get records from Catholic Charities because it took him some time to figure out where the child was and to find out who was the adoptive agency.

When he finally found out --

THE COURT: So nine months later after the termination?

MR. VILLAR: Well --

THE COURT: Is that what --

MR. VILLAR: -- nine months after the termination he found out, but that was -- that didn't mean he wasn't looking the entire time.

THE COURT: I understand.

MR. VILLAR: So he was looking the entire time. He only found out about Catholic Charities nine months later. So we had, in fact, the mother didn't participate in any -- we couldn't find the mother. We could -- we tried to get her deposed -- we finally got her deposed because she was in jail. Then that is how we found out about Catholic Charities because we deposed her while she was in the jail some months after the divorce action started and she has been served.

So it wasn't -- if there is an indication by the Court that my client was dilatory in trying to find his child I think that would be in appropriate or not a good assumption to make.

Then once Mr. Kruithoff, through his attorney, sent a subpoena to Catholic Charities that subpoena was dated on January 16, 2019 -- that subpoena was sent to Catholic Charities. Catholic Charities

did not inform Mr. Kruithoff that there was an upcoming or impending date for the finalization for the adoption the did not inform this Court -- at least I don't believe that they informed this Court of the impending adoption -- or the impending divorce case so no one, as far as we know -- no one told us we know that. We don't know if anyone told the Court that is part of why we want to what is in the adoption file to see if the Court was informed that in fact there was a legal father who was seeking to find information about his child.

And so the other thing is when we finally -- instead of notifying us of that Catholic Charities filed an objection, motion to quash the subpoena --

THE COURT: (Inaudible).

MR. VILLAR: -- then we went through all that, I gave the Court the transcripts.

THE COURT: Yep.

MR. VILLAR: And by the time we received the information it was July 12th and a long -- a long time after we filed, it took us seven -- almost eight months to get the -- just the information from Catholic Charities and then once we got that we saw that Catholic Charities had provided us a safe adoption --

or adoption report and evaluation to the Court and in that report it indicated that they informed the Court that Ms. Kruithoff was married when the child was born.

And so we would like to confirm those issues out of the adoption file. And we would like to be able to see what was done. We have no objection, your Honor, to any kind of protective order the Court might craft in regards to the information that we would review or see in that file and we would not object to it.

I think that I read the opposition's brief saying that my client isn't a party, well that is technically correct. His parental rights were terminated and I think what might distinguish this case from any others is while his rights were terminated while he was pursuing custody in a circuit court in Ottawa County.

And just from a matter of jurisdictional argument, I think the Court is probably aware of it, the circuit court I think had jurisdiction before the probate court has far as the child goes.

So what we would ask for, I guess, the -- one of the things we asked for in our motion is that if the Court was aware that he was married we would ask the Court to

consider recusing yourself because of the decision. If the Court decides not to do that we would ask the Court to open up the adoption file for us to review subject to any kind of protective orders the Court might issue. Thank you.

THE COURT: Thank you, Ms. Villar.
And you said you name was Monsma?

MR. MONSMA: Monsma, that's right.

THE COURT: Okay.

MR. MONSMA: Thank you, your Honor.

THE COURT: Make sure that I have got the right guy, thanks.

MR. MONSMA: Before getting into the argument, your Honor, we did file a response brief yesterday afternoon. I don't know if you had an opportunity to read it.

THE COURT: I have no clue what's there.

MR. MONSMA: Yeah, we tried to call in, but as you know the county's phone systems are a little haywire right now. So I apologize for that --

THE COURT: This one that -- yeah, I have got it.

MR. MONSMA: Okay.

THE COURT: Sorry.

MR. MONSMA: Okay. Good and I know it was -- we filed it yesterday so if you have any questions obviously I am happy to answer them.
THE COURT: Sure.

MR. MONSMA: I think it is important to start here Counsel is right they did file an extensive brief, the only thing missing from it is any legal basis for the request they are making here. They don't cite any statute that allows an adoption file to just be unsealed for other parties to take a look at and satisfy their curiosity frankly for lack of a better way of putting it.

There is no legal basis for doing that whether there is a protective order or otherwise. Those records, as you know, to well, are strictly confidential.

I think the legal analysis is frankly very simple. Under the Safe Delivery Law that -- first of all that law makes clear MCL 712.2(3) that safe delivery proceedings and that statute -- that statutory mechanism for safe delivery proceedings are intended by the legislature to be separate and apart.

So you look at the Safe Delivery Law, not anything else.

And under that law, your Honor, MCL 712.2a(1) the five -- adoption files are strictly confidential. The only exception in the statute being that parties to the proceeding are entitled to records of those proceedings.

On page 6 of their brief they admit, as I think they have to, that their client was not a party to the proceeding and therefore under the law, under the Safe Delivery Law Mr. Kruithoff is not entitled to those files. Now -- and I think that is the end of the analysis frankly.

The -- there has been this suggestion throughout the briefing that Catholic Charities somehow was hiding the ball. First of all that is legally irrelevant, but it is also just factually not true.

As we point out in our response brief the reason we filed the motion to quash in Ottawa County circuit Court in proceedings that at that -- until that subpoena we didn't even know about because remember Catholic Charities doesn't know who these birth parents are. They had no identifying information.

They followed the statute and you determined, correctly I think, that Catholic Charities made reasonable efforts under the circumstances to try to locate the birth father and the fact of the matter is they simply did not have any identifying information about either of the parents. And so they followed the statute. You follow the procedure that the legislature set up and after the -- Mr. Kruithoff's parental rights had been terminated and after Baby Boy Doe had been placed with an adoptive family we get a third party subpoena and we learn for the first time that there is potentially a divorce proceeding between these two parents. We had no way to know about that before receiving that subpoena.

And the reason that we filed a motion to quash again as we point out in the brief is it is actually a crime to disclose placement agency records without a court order.

So Catholic Charities wasn't -- again it is legally irrelevant, but just so the record is clear Catholic Charities was not trying to hide anything here. We were simply seeking direction from a judge on what to do with these highly confidential records.

And if you look at -- I think this is important as well -- Exhibit 6 to our brief, your Honor, is a transcript of our latest

hearing with Judge Engle in the divorce proceeding. On page 7 of that transcript he makes it very clear that he does not want the adoptive family involved in this at all. The original subpoena was just a blanket demand for all of Catholic Charities records. Judge Engle makes clear in that transcript that -- he is talking about the adoptive family -- that is an innocent third party that I don't think ultimately would have reason to be dragged into this fight. And he goes on to explain why he doesn't think that their information should be disclosed at all.

He ordered Catholic Charities to produce redacted copies of the pleadings that -- what we had, which we did. We complied with his order and it is pretty clear Judge Engle intended that to be the end of it as far as the divorce proceeding was concerned and I think candidly, your Honor, what you have here now is an attempt to get around that ruling.

They are asking you to just give them carte blanche to look through the adoption file and again, there is absolutely no legal basis for granting that relief. At least they haven't identified any.

If you have any questions I am happy to answer them, but otherwise we would respectfully ask that the motion be denied.

THE COURT: What do you -- my only question is -- the statute is the statute. It doesn't address notice, it doesn't address anything other than making sure a newborn baby that is unwanted is safe -- so their argument is pretty much notice. Do you want to respond to that?

MR. MONSMA: Sure, your Honor. I think you just have to look at the language of the statute. The statute does talk about notice in that it says if you can't find out who the non-surrendering parent is you publish notice in the paper of the county where the baby was born. This is exactly what Catholic Charities did.

THE COURT: Well let me ask you this. In the county where the baby was born is almost a default mechanism. Do you believe there is anything in the statute where mom had a duty to disclose where she lived or the father lived or anything like that?

MR. MONSMA: I don't believe there is and I think that is consistent with the policy behind the statute. The goal, as you said, is to make sure the baby is safe and I am assuming the legislature did not impose requirements like that because they want to facilitate the process, but I don't think there

is anything in the plain language of the statute that imposed that obligation on the birth mother. Even if there was I think then the potential remedy, if there is one, would be from the birth mom, not from the adoptive parents or from the Court here.

THE COURT: Thank you, that is all I have.

MR. MONSMA: Thank you.

THE COURT: Mr. Villar? Is it Villar or Villar?

MR. VILLAR: Villar, your Honor.

THE COURT: Villar.

MR. VILLAR: I just have two brief responses, Judge, maybe three, I guess. With lawyers we don't know how to count that well. I didn't go to accounting school.

THE COURT: We are all pretty windy, I know.

MR. VILLAR: First is it's not -- this is not done to satisfy our curiosity. We are very serious about proceeding whether in this Court or some other court and we will ultimately find out what happened to my client's son.

The statute does require reasonable efforts under the circumstances. So the reasonable efforts that were made in this case, they say we just -- we put it in the paper in the county it was born according to the statute, but in our motion you will see that they knew -- the mother called one of the people from West Catholic Charities -- she called them and talked to them. They would have had a phone number. They could have called back. They -- so they knew -- they knew at the time of the call -- because they put it in their safe delivery report that she was married and she had actually talked to them. They called one of the workers.

And so at that point they know she is married and they talk to her I think they have an obligation to say, are you married, where is the father?

THE COURT: You think that is a legal duty? Whoa, don't use words like obligation, you are getting into your moral opinion.

MR. VILLAR: Well, I think that there's a --

THE COURT: What is their legal duty? You really think they should have caller I.D. and record that number to make sure they can track down who that mom was?

MR. VILLAR: Yes, I do, actually.

THE COURT: You do.

MR. VILLAR: They are required -- the have a duty to make a reasonable -- a reasonable inquiry or try to reasonably find -- take reasonable efforts to find the father. So that I think that reasonable efforts is by its very nature a duty and I think that if they have the mother's phone number and the mother's --

THE COURT: So what should they have done? Tell me all the things you think they should have done?

MR. VILLAR: Well first of all once they knew that the mother was married they probably should not have proceeded until they found out where the divorce case was and whether there was an ongoing custody action, which there was. I think that once --

THE COURT: Well, wait a second. You -- do you think that the hospital or the Catholic Charities or even the mom knew there was a divorce pending? From your client said he filed for divorce August 10th.

MR. VILLAR: She was not served until after that. She was not served I think until

-- I don't have my brief in front me, but she was served in late September. So that -- so she --

THE COURT: So all through this she didn't know he was divorcing her?

MR. VILLAR: Well, the -- they were separated and they knew she -- I can't say what she -- I can't speak to what she knew.

THE COURT: Well, of course not.

MR. VILLAR: But I think that the situation was that there was going to be a divorce coming, there was communication between -- and this, of course, is all hearsay, but there was communication between --

THE COURT: It is all speculative.

MR. VILLAR: -- my client and the mom of the -- the father of the --

THE COURT: You are speculating what she knew.

MR. VILLAR: Well --

THE COURT: So let me just -- because I really I want to get a handle on this as well besides just whether or not we should unseal or records which I will get to that in

a minute.

MR. VILLAR: Yep.

THE COURT: But first of all your client files for divorce. The surrendering parent does not know that until when was she served?

MR. VILLAR: I do -- I don't have it, I would have to look at my brief, your Honor, but it was until -- it was after this baby was surrendered, I know that.

THE COURT: Okay. So after the baby is surrendered, so she doesn't even know she is divorced so you are expecting Catholic Charities to go hunt down with a divorce and they don't even have the mom's name?

MR. VILLAR: No, I wasn't expecting them to hunt down the divorce at all. I am expecting them to hunt the father, which is what they are required --

THE COURT: How do they know the father's name?

MR. VILLAR: They --

THE COURT: Let me ask you this. Did you client file a notice of intent to claim paternity with the state?

MR. VILLAR: He did not.

THE COURT: How does anybody know anything to track anything down? That is the whole way the statute is written is this all secret squirrel.

MR. VILLAR: Right.

THE COURT: For the reason to keep the baby safe so that people who don't have to admit to any wrongdoing or whether or not they are even pregnant they can deliver a baby in the middle of the night and nobody ask any questions. That is the entire intent of the legislature, is it not?

MR. VILLAR: That may be the entire intent of the legislature. I think it is unconstitutional statute because here my guy --

THE COURT: Well, you -- you are barking up the wrong tree for an unconstitutional statute.

MR. VILLAR: Well, I know. We are going to be barking up other trees.

THE COURT: Okay.

MR. VILLAR: But I mean, the thing that I

am saying is that my client didn't think to file a notice of intent because he was married and had filed this divorce action he thought that it proceed under the divorce statute. He did not -- he did not believe that she was going to give up the baby for a safe delivery.

THE COURT: Whether he understands the law or not, we have pro per litigants in here all the time and they don't understand. It doesn't change the procedures. So let me -- let me just make sure I understand. So he gets an ex parte order from Ottawa County. Who knows about it? Does mom get served the ex parte? If so, when?

MR. VILLAR: She got served after the baby was surrendered, after -- when she got the divorce complaint.

THE COURT: So sometime in September?

MR. VILLAR: Yes.

THE COURT: So mom doesn't know she is getting divorced. Mom lives in a different county than dad for how many years or whatever, I don't know. I don't know any of those circumstances. Ottawa County will through the complaint. Mom doesn't know there is an ex parte order to say dad wants DNA, don't do anything. Mom doesn't know

anything like that. So what happened, who did what wrong?

MR. VILLAR: Well, I think obviously the mother when she found out that there was an ongoing litigation and she found out that there was supposed to be an ex parte order against her not to do anything that involved adoption. The mother did something wrong. She had -- I think she had an obligation --

THE COURT: Can you tell me specifically if you can go back to your table and find the date that the mother was served. Was his parental rights terminated prior to that?

MR. VILLAR: I do not believe so, Judge. Hang on there just a second.

THE COURT: I just find it interesting. It is not that I need it for my decision, but this is a phenomenal situation that I hope the legislature will tweak the statute so this never happens in the future because it is sad.

MR. VILLAR: You know what, Judge, I do not have it in this file the exact date.

THE COURT: Okay.

MR. VILLAR: I can -- I can submit a supplemental brief with that information,

but I don't have that exact date.

THE COURT: Okay.

MR. VILLAR: Other than --

THE COURT: Can you --

MR. VILLAR: I know that it was after --

THE COURT: Can you tell me what is the law that you are relying on that this Court should unseal adoption records? I do not want to set that precedent.

MR. VILLAR: I understand, your Honor.

THE COURT: What's the law?

MR. VILLAR: I think here the Court -- the Court is in a -- kind of a -- my client is not technically a party, but he is the father, the legal father of that child and I think had there been notice he could have showed up, he could have been a party, should have been a party if the Court believes that no reasonable actions for notice to my client were not taken he should have been a party. So but for the actions of -- if you are asking my argument -- but for the actions of the Defendant I think that he would have showed up and attempted to try to become a party in this case.

So now what we are having -- the legal, I think, fiction that we are entertaining is that the Court can terminate my client's rights without him being a party. And I think that is within the statute, I mean I don't think --

THE COURT: Okay.

MR. VILLAR: -- I mean, but I think that the --

THE COURT: So your beef --

MR. VILLAR: -- reality of it is --

THE COURT: Your beef is with the legislature because that is what the legislature has -- that is the drafted law that the courts have to follow.

MR. VILLAR: I understand that the Court could rule that way, I do. I mean, I understand it, but I do think --

THE COURT: Well, I can't --

MR. VILLAR: -- that --

THE COURT: -- make --

MR. VILLAR: -- that --

THE COURT: -- up new law.

MR. VILLAR: Well --

THE COURT: I am not a legislator.

MR. VILLAR: I think if the Court looked at a reality test of whether he should have been a party he is the father so we are going to leave the room with a ruling that even though he was the legal father, he has a custody order, I mean Judge Engle did want the adoptive parents left out, but Judge Engle after that awarded us physical custody of that child. Because in that case what Catholic Charities was not a party -- I that case the adoptive parents weren't a party -- in that case he awarded us custody based on who has the claim -- the better claim to custody between Mr. Kruithoff and Mrs. Kruithoff.

So we go awarded custody even after he said he didn't want them involved. He also said he didn't know how this was going to shake out and I don't either. It is just its --

THE COURT: Well, wait a second. Are you sure you are representing to me what really happened? And I mean that respectfully --

MR. VILLAR: Yeah.

THE COURT: -- I am not trying to say -- the way I understand it the Ottawa County Judge had no idea of the surrender because dad didn't know it at the time. The Ottawa County Judge had a divorce filed in front of him and they set it in front of a FOC hearing. Mom failed to appear. For a temporary order the child, Baby Doe, whenever he was born should be awarded to dad. That's way before the Judge knew anything about any surrender. He didn't trump any other county or anything else.

The problem with all of this is nobody knew what the other one was doing. Nobody in Ottawa knew anything was going on in Kent. Anybody in Kent didn't know what was going on in Ottawa. Catholic Charities found a family that wanted to adopt that evidentially was in Kalamazoo and that's why it's not in Kent or Ottawa.

MR. VILLAR: Right.

THE COURT: The family must be in Kalamazoo. I am going to presume that, but -- it is unfortunate, but that is way -- the way the law is written. The law says -- and if you want to get really ugly about this proposed law is even going to be worse. Have you heard about the boxes where you

put the baby in and you close it and you can't touch it anymore and somebody on the other sides collects the baby? Kind of like a mail deposit box. For the very reason of cases like this. That a -- nobody should have a right to know when somebody wants to surrender a newborn for the intent or the goal so that these babies aren't put in a dumpster. They are trying to encourage somebody that really doesn't want their baby to give the baby up with no questions asked.

You, sir, are trying to pursue all of these questions and by law they can't ask them. In your statement of -- and I have to ask you this -- the hospital obtained the maiden name of [redacted] -- how do you know that?

MR. VILLAR: Well, I assume that because the hospital --

THE COURT: You assumed?

MR. VILLAR: I did assume that.

THE COURT: Don't speculate.

MR. VILLAR: But I -- you wanted --

THE COURT: Yeah, I do. I am sorry. Go ahead.

MR. VILLAR: If you want to know why I said that I will tell you.

THE COURT: Okay.

MR. VILLAR: Because the hospital is required to give over whatever records they have about the child to the transferring agency and I think that --

THE COURT: Where did she write her name [redacted]?

MR. VILLAR: It is in the hospital records.

THE COURT: Okay. So your argument is -- and I am going to read it right out of your brief -- what is mystifying is why the hospital did not look at Mrs. Kruithoff's driver's license or other identifying documents to ascertain her personal information. By law they are required not to. That is the Safe Delivery Act. Read the Safe Delivery Act.

MR. VILLAR: I have, your Honor.

THE COURT: Okay.

MR. VILLAR: I have, but I think that --

THE COURT: Have you read *In re Miller*

because it is very similar to these facts. Have you read that?

MR. VILLAR: No.

THE COURT: It is a 2018 case. Let me share it with you -- and I will give you the cite -- I don't have the cite. It doesn't' say on here, it just says the -- it is just *In re Miller* and it was decided January 9, 2018, and it was published. It is a published case.

Same concept. Mom delivers twins, surrenders them, she is married. It goes all the way to the -- trial court says that the Safe Delivery Act does not pertain to the legal father, only the mother. They reverse it. Court of Appeals reverse it and says oh yes it does.

So let me just read one of the paragraphs, it is on page 4 of that-- of that case and it says, if the trial court terminates the parental rights of the non-surrendering parent, the husband, and if the husband later seeks to assert his parental rights he would have to demonstrate that he was not the biological father to show that the order terminating his rights did not apply to him. He would be without parental rights to assert -- to disrupt an adoption.

They have got the legislature, the

Court of Appeals, everybody has said this is secure haven. I understand you are arguing that mom went rouge and she had a duty -- or somebody had a duty to let dad know what's going on, I mean that is really the heat of your argument, I get it. It is unfortunate for him.

She is going to the hospital, telling the hospital there -- there has been -- what did she say -- there has been abuse -- domestic violence -- I don't remember her exact terms and that the best interest or my baby is for me to give my baby up. The hospital can't ask any questions, takes the baby, contacts the people on the list. Catholic Charities gets the baby placed. No questions by law can be asked.

I don't have any clear and convincing evidence of any legal argument from you why the confidential records for an adoption should be opened up in this case. There is nothing unique.

Other than the statute never addresses what happens if there is really no actual notice. There is legal notice. How many times -- I don't know what kind of law you guys do, but I don't know how many times this Court has had published notice in the Climax Crescent, some tiny little newspaper within the county, but it is

general circulation, meets the criteria of the statute. Do we think dad had actual notice? Probably not, but did he get legal notice? Absolutely.

I find that dad got legal notice. Did mom bamboozle everybody? Maybe. But that in and of itself is not a reason to change the confidential records and open up Pandora's Box and let me just assure you everything that Catholic Charities gave to this Court Ottawa County has already given to you, just redacted with the third -- innocent third parties names on it and the information about them.

So I really don't think our files would have anymore to give you. You've got the orders, you have submitted them to us and we've got the information that Catholic Charities already gave you. That's all that is there.

MR. VILLAR: Well, I think -- I do appreciate the Court saying that because part of what we were looking for is to see if those were really the records that were given. I mean honestly, that's -- they were given to us as answers to interrogatories, but without seeing the file we couldn't confirm that.

THE COURT: Right. Well, I can confirm it

for you.

MR. VILLAR: Thank you.

THE COURT: Sure, but I really don" want to unseal our adoptive records. I don't think you've shown anything that shows that anything was violated, that there is any good cause.

So my order is denying your motion.

MR. VILLAR: And I am assuming, Judge, by the fact that you continued you are denying our motion to recuse -- or our allusions to it.

THE COURT: Oh I can be fair and impartial.

MR. VILLAR: Pardon?

THE COURT: I certainly can be fair and impartial so I would deny the motion to recuse.

MR. VILLAR: Thank you, Judge. I just wanted to put that on the record.

THE COURT: I find this very interesting. The only concern that I have is I really think the legislature needs to tweak the law about notice. It is unfortunate that, you

know, there is no requirement that the publication shall be where the mother resides or where the father resides or that shall be some notice a legal father, but again the domestic violence people would be all up in arms to have that for this very reason. Mom is saying there is domestic violence. She is protecting herself allegedly and her baby. She doesn't want that baby to go to dad. I don't know. I don't know what the facts are, but we certainly have lots of cases like that.

So I have to follow the law until the legislature changes it. In fact, *In re Miller* confirms the legislature's intent.

MR. VILLAR: All right. Thank you, your Honor.

THE COURT: Anything else?

MR. VILLAR: I will prepare -- I will prepare the order and send it to Mr. Monsma for approval,

THE COURT: Thank you.

MR. MONSMA: Thank you, your Honor.

THE COURT: You're welcome. We are off the record.

(At 2:04 p.m., proceeding concluded)

STATE OF MICHIGAN)

COUNTY OF KALAMAZOO)

I certify that this transcript, consisting of 31 pages, is a complete, true, and correct transcript to the best of my ability of the proceedings held and testimony taken in this case on Tuesday, December 10, 2019, before the Honorable Julie K. Phillips.

Dated: 12.16.2019

__/s/_____

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