IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO: AAMIYAH DE'NASIA LAMB AND CHRISTOPHER LAMONT BYNUM, JR., MINORS.	)	Case No. 69047 Dist. Ct. No. D-11-446967-R
KEAUNDRA DEBERRY, AAMIYAH DE'NASIA LAMB AND CHRISTOPHER LAMONT BYNUM, JR., MINORS Co- Appellants, vs. CLARK COUNTY DEPARTMENT OF FAMILY SERVICES, Respondents.	)	

CO-APPELLANTS' OPENING BRIEF

Appeal from Order Granting Petition to Terminate Parental Rights, Eighth Judicial District Court, Honorable Robert W. Teuton, Clark County, Nevada

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

There are no corporations or publicly held companies involved in this litigation. The natural mother's true name is Keaundra Deberry. She was previously represented by Mr. Romeo Perez, Esq., of the Law Offices of Romeo R. Perez.

Dated this 4th day of February, 2016.

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CO-APPELLANTS' OPENING BRIEF

COMES NOW the Appellant, KEAUNDRA DEBERRY, by and through her Counsel of Record, DAVID M. SCHIECK, ESQ., Special Public Defender and MELINDA E. SIMPKINS, ESQ., Deputy Special Public Defender and DEANNA

MOLINAR, ESQ., Deputy Special Public Defender and herein file the Appellant's Opening Brief with this Court.

DATED this 4th day of February, 2016.

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JURISDICTIONAL STATEMENT

This appeal was filed pursuant to Rule 4(a) of the Nevada Rules of Appellate Procedure and is an appeal of a final judgment terminating parental rights. Written notice of the entry of judgment was filed on September 22, 2015, and the Notice of Appeal was filed October 23, 2015.

STATEMENT OF THE ISSUES

I. Standard of Review

II. The District Court's Decision to Terminate Keaundra Deberry's Parental Rights was not Supported by Substantial Evidence

A. The District Court Erroneously Terminated Parental Rights on the Grounds of Token Efforts, Failure of Parental Adjustment and Unfitness

B. As Repeatedly Admitted by the Department of Family Services, Keaundra Deberry had Completed her Case Plan, had a Bond with her Children and had Otherwise Cooperated with the Department

C. The Only Reason the Department of Family Services Sought and the District Court Granted Termination of Parental Rights was due to Keaundra Deberry's Failure to Admit to a Crime

D. It was Not in the Children's Best Interests to Terminate Parental Rights

STATEMENT OF THE CASE

On May 13, 2010, a Petition alleging abuse and neglect was filed against the natural mother, Keaundra Deberry ("Ms. Deberry"). (AA I, pg. 1-3). On February 4, 2011, the adjudicatory hearing was held. (AA I, pg. 52). After that hearing, the Petition was substantiated. (AA I pg. 52-59). On or about March 15, 2011, the natural mother's case plan was submitted to the court. (AA I pg. 72-79).

On May 24, 2011, the Petition to Terminate Parental Rights was filed. (AA I pg. 101-108). After several continuances, trial began in earnest on November 2, 2012, and concluded on March 15, 2013. (AA II pg. 203; AA III, pg. 468, 559). On April 29, 2013, the decision terminating parental rights was filed with the Notice of Entry of Order filed on April 30, 2013. (AA III, pg. 564-570). On May 28, 2013, Appellant timely filed the first Notice of Appeal. (AA III, pg. 576-577). On November 13, 2014, the Supreme Court of the State of Nevada Reversed and Remanded for a new trial as to appellant's parental rights. (AA IV, pg. 766-776). On December 8, 2014, Remittitur was issued and was received by the District Court on December 11, 2014. (AA IV, pg. 776). On March 10, 2015, the hearing on remand was held and on March 25, 2015, closing arguments were heard. (AA V, pg. 889; AA VI, pg. 962, 987). On September 21, 2015, Judge Teuton issued the Decision on Remand and reaffirmed the court's finding that there have been no

behavioral changes of Ms. Deberry that would warrant return of the children to her care. (AA VI, pg. 1058). On October 23, 2015, Appellants filed the Joint Notice of Appeal. (AA VI, 1066-1067).

STATEMENT OF FACTS

In April of 2010, an anonymous call was received by the child abuse hotline alleging that the father, Christopher Bynum, Sr., burned the child on the face with an iron and that the parents leave drugs and drug paraphernalia within reach of the children. (AA I, pg. 37; AA II, pg. 277-278). As a result, Ms. Roberta Mossman ("Ms. Mossman") was assigned to investigate the allegations. (AA II, pg. 277). Although she was able to make contact with the oldest child at school, she was only able to make contact with Ms. Deberry via telephone. (AA II, pg. 278). Ms. Mossman verified that her notes regarding her interview with Aamiyah reflected that Aamyah stated that her father told her to watch her brother, that instead of watching her brother she was watching T.V., her mother had ironed some clothes and left the iron on the coffee table, that her mother went into the bathroom to do her hair and her brother "kissed the iron" and burned his left cheek. (AA II, pg. 298).

Ms. Deberry has maintained that she was the only adult in the home at the time of the injury, which took place in her bedroom. (AA I, pg. 54; AA II, pg.

340). While Christopher Bynum, Sr. had picked up the oldest child from school and dropped her off at home, he was not home at the time of the injury, but was at the home approximately five to ten minutes after the burn occurred. (AA II, pg. 340-341). Ms. Deberry maintains that while she was in the bathroom at the time getting ready for work, she heard the iron hit the floor and came out to investigate. (AA II, pg. 345, 350). It was at that time that Aamiyah, who was six years old at the time, stated that Christopher tried to pull at the cord of the iron and tried to kiss the iron. (AA II, pg. 350).

Ms. Deberry looked at the injury and immediately contacted her mother in Louisiana, who was a nurse of some fifteen years. (AA II, pg. 331). Ms. Deberry's mother indicated to her that she should put ointment on the injury, to watch the burn and if it blistered, immediately take the child to the emergency room. (AA II, pg. 331-332). Ms. Deberry also contacted her employer, who sent over some burn cream for the baby. (AA II, pg. 331-332). When the injury didn't immediately blister and the child was relatively comforted, Ms. Deberry left the children with Christopher Bynum, Sr., and went to work. (AA II, pg. 331-332). After the subsequent contact with DFS in May of 2010, however, Ms. Deberry moved her family to Bossier City, Louisiana, where her step father was stationed at Barksdale Air Force Base. (AA II, pg. 323).

Upon learning of the family's move, Ms. Mossman contacted the Base for help in gaining protective custody of the children. (AA II, pg. 283-284). Office of Special Investigations in Louisiana (OSI) went to the home, photographs were taken of Christopher's face, and Aamiyah was removed from Ms. Deberry. (AA I, pg. 46; AA II, pg. 283-284). The photographs of Christopher's burn were admitted into evidence during the Adjudicatory Trial of Ms. Deberry. (I, pg. 9-15).[1] Although these photographs are the only photographs that have ever been entered into evidence in either the Juvenile or Domestic case, they were not authenticated as the photographs viewed by Dr. Mehta during her determination of whether or not the injury was consistent with abuse/ neglect, even though the photographs were presented to her at the Adjudicatory Hearing. (AA V, pg. 943-945).

At the time Aamiyah was removed, Christopher was visiting the father and paternal grandmother in another city in Louisiana. (AA II, pg. 335, 337). Once contact was made with the paternal grandmother, the baby was taken to see a doctor in Louisiana for an evaluation at the request of the Department of Family Services ("DFS"). (AA II, pg 337). That doctor examined the child, with the background information that it was suspected that natural father burned the baby with the iron and determined that there was "no evidence of abuse." (AA I, pg.

[1] Photographs are in the condition received by the court. Appellant possesses color copies of the same photographs that can be provided to the Court upon request.

134, 183; AA VI, pg. 1063). Subsequently, Christopher was also removed and, after a UCCJEA hearing, both children were returned to Nevada. (AA I, pg. 33).

A Petition for Abuse/ Neglect was filed on or about May 13, 2010, and alleged that Ms. Deberry had either physically abused or improperly supervised Christopher Bynum, Jr., resulting in a burn to his face. (AA I, pg 1-3). Additional allegations as to Ms. Deberry included medical neglect, drug use, domestic violence and absconding from the jurisdiction during the pendency of a CPS investigation. (AA I, pg 1-3). At the plea hearing on May 25, 2010, Ms. Deberry entered a denial and the matter was set for adjudicatory hearing. (AA VI, pg. 1078). In addition, a request for placement of the children with the maternal grandmother pursuant to the Interstate Compact for the Placement of Children was submitted and the children were subsequently placed with their grandmother. (AA I, pg. 99).

In December of 2012, Ms. Deberry was pregnant and subsequently gave birth to Keaundre Bynum, a child who was never removed from her care. (AA III, pg. 480). Further, despite the allegations against Ms. Deberry and her pending case in Nevada, neither the case worker nor her supervisor reported Ms. Deberry to the other state's child protective services division. (AA III, pg. 480).

Thereafter, the adjudicatory hearing was continued several times and actually didn't take place until almost a year later, on February 4, 2011. (AA I, pg. 52). During the adjudicatory hearing, the Hearing Master took testimony from Dr. Mehta, who testified she had reviewed photographs of the child's injuries. (AA I, pg. 53-54). Dr. Mehta was able to testify by looking solely at the photographs that the shape of the injury was not consistent with an accidental injury and that the iron had actually been held to the baby's face. (AA I, pg. 54).

When previous counsel attempted to rebut Dr. Mehta's testimony, and the resulting presumption, with the reports from the doctor in Louisiana who had actually examined the child and found that no abuse occurred, the Hearing Master refused to allow the introduction of such evidence due to counsel's inability to provide certified copies of the doctor's report. (AA I, pg. 52-59). Thus, with no rebuttal evidence, the State moved to strike language from the Petition which alleged that Ms. Deberry had improperly supervised her child. (AA I, pg. 52-59). This request was granted and the Hearing Master found that Ms. Deberry had physically abused her child by holding an iron to her baby's face. (AA I, pg. 52-59). While the allegations regarding medical neglect and absconding were also found to be true, the Hearing Master dismissed allegations of drug use and domestic violence. (AA I, pg. 52-59).

On February 22, 2011, the report lodged by DFS contained the Investigation Summary Disposition Report and the Affidavit of Roberta Mossman, stating that the report received by the CPS hotline alleged that "Christopher Bynum Sr. burned the child on the face with an iron." (AA I, pg. 37, 45).

On or about March 15, 2011, Ms. Deberry received her case plan. (AA I, pg. 72-79). Ms. Deberry's case plan included that she maintain stable housing and income, keep in contact with DFS, and complete parenting classes.[2] (AA I, pg. 72-79). In addition, Ms. Deberry was required to complete a physical abuse assessment and "be able to articulate in dialogue with the specialist and therapist(s) the sequence of events which resulting (sic) in physical abuse, as sustained by the Court, and how he/she will be able to ensure that no future physical abuse to Christopher occurs. In further measurement of mitigation of the risk for physical abuse, there will be no further injuries to their child which are incompatible with an accidental explanation." (AA I, pg. 76). In April of 2011, despite having had her case plan only one month, DFS listed the concurrent goal as Termination of Parental Rights and its goal for the next review period to "refer the case to the District Attorney for TPR and adoption." (AA I, pg. 100).

[2] The drug assessment requirement was removed from the case plan due to its dismissal at the Adjudicatory Hearing.

Due to the amount of time it took to get to the Adjudicatory Hearing, the children had already been placed with their maternal grandmother in Louisiana. (AA I, pg. 99). Ms. Deberry, having already moved to Louisiana, worked on her case plan from there. (AA II, pg. 333-339; AA III, pg. 484-486). While in Louisiana, she maintained stable housing and regular, almost daily, contact with her children as supervised by the grandmother. (AA II, pg. 333-339; AA III, pg. 484-486). Ms. Deberry completed parenting classes she commenced immediately after receiving her case plan. (AA II, pg. 357; AA III, pg. 503). In order to further address the parenting component of her case plan, Ms. Deberry sought counseling in Louisiana through Nicky Pharr. (AA II, pg. 346-347). The caseworker was in touch with this therapist and, in fact, contacted a regular service provider in Las Vegas regarding the subjects covered in physical abuse treatment so that she could communicate this information to Ms. Deberry's therapist in Louisiana. (AA III, pg. 488). Once this information was passed along, Ms. Deberry did attend and complete therapy in Louisiana. (AA III, pg. 488).

A regular six month review was held in September of 2011, and DFS presented a report to the Court outlining Ms. Deberry's progress on her case plan. (AA I, pg. 131-138). At that time, Ms. Deberry had completed parenting, had maintained housing, had held jobs throughout the matter, and had completed both

her assessment and therapy through the therapist in Louisiana. (AA I, pg. 131-138). At that time, DFS was satisfied with Ms. Deberry's progress on her case plan and with the programs she had been involved with and even stating:

> "Ms. Deberry has successfully completed her case plan and has the knowledge and tools to effectively parent her children. Natural Mother has diligently worked to complete her case plan and regain custody of her children. The Department of Family Services recommends postponement of TPR and lifting the supervised visit order as it pertains to the natural mother." (AA I, pg. 136).

In the same report, the case worker reported to the court that Ms. Deberry had completed her case plan and that there was a doctor in Louisiana who examined the child and found that no physical abuse had occurred. (AA I, pg. 134). In fact, DFS was so satisfied with Ms. Deberry's progress that they approached the District Attorney and asked if the evidence regarding the burn to the baby could be re-evaluated; their request was denied. (AA III, pg. 500). Despite Ms. Deberry's progress and DFS's satisfaction therewith, the District Attorney and the Hearing Master determined that the therapy wasn't sufficient because Ms. Deberry did not admit to holding the iron to the baby's face. (AA III, pg. 486). In fact, DFS admits that but for Ms. Deberry's refusal to admit to holding the iron to the child's face, termination of parental rights would not have been sought. (AA III, pg. 487).

Thereafter, in March of 2012, another report was submitted to the court by DFS. (AA I, pg. 150-155). In that report as well, DFS indicated that Ms. Deberry had completed her case plan and referenced the Louisiana doctor's findings of no physical abuse once again. (AA I, pg. 150-155). The Department further noted that Ms. Deberry had acknowledged negligence and improper supervision resulting in the injury. (AA I, pg. 153). Once again, however, because Ms. Deberry refused to admit the she held an iron to the baby's face, the recommendation remained termination of parental rights and adoption. (AA I, pg. 150-155).

Sometime in the early part of 2012, Ms. Deberry moved to South Carolina and took possession of a home that her father had left her in his will. (AA II, pg. 360). She provided this proof of continued housing to DFS. (AA II, pg. 370-89; AA III, pg. 484). In addition, Ms. Deberry obtained full time employment in South Carolina sufficient to support both herself and her after-born child. (AA II, pg. 367-368). While she had seen her children almost daily while living in Louisiana, she continued to keep in contact with them telephonically, sometimes several times per day. (AA II, pg. 370-373). Further, the grandmother would bring the children to see their mother and brother in South Carolina on occasion. (AA II, pg. 372-373).

Because the Hearing Master had determined that the therapy Ms. Deberry had completed was not sufficient, the DFS supervisor, Michelle Douglas, located another therapist for Ms. Deberry. (AA III, pg. 393). While the supervisor did not check the therapist's qualifications, it turns out that Jane Fortune ("Ms. Fortune") was imminently qualified to address the Department's issues, having spent years dealing with parents who abuse their children and children who suffered abuse. (AA II, pg. 216-220).

The caseworker was in regular contact with Ms. Fortune and consulted with Ms. Fortune regarding the issues to be addressed in therapy. (AA III, pg. 488). As a result of this therapy, both Ms. Fortune and the case worker noted a marked change in Ms. Deberry's behavior and demeanor. (AA III, pg. 498-499). Ms. Fortune further observed Ms. Deberry's interaction with her after-born child at the request of DFS. (AA II, pg. 232). Ms. Fortune, who is also a mandatory reporter, expressed no concern regarding Ms. Deberry's treatment of her child. (AA II, pg. 232-233). It was Ms. Fortune's position that Ms. Deberry had successfully completed physical abuse therapy and that she is not at risk to re-offend. (AA II, pg. 231-242).

The only "fly in the ointment" with regard to the therapy was Ms. Fortune's misunderstanding that the court had "metaphorically" found that Ms. Deberry had

physically abused her child. (AA II, pg. 234-235). However, even after it was explained to her that the court found that Ms. Deberry had actually abused her child by holding an iron to the child's face, Ms. Fortune indicated that her opinion would not change. (AAII, pg. 271-272). Ms. Fortune indicated that based upon her years of training and experience in dealing with both the abused and abusers, she saw none of the signs or symptoms in Ms. Deberry that she would expect to see in an abusive parent. (AA II, pg. 271-272). Ms. Fortune noted that Ms. Deberry's demeanor had substantially changed over the course of treatment, she observed Ms. Deberry to be protective and appropriate with her other child, and she opined that Ms. Deberry's risk to re-offend was low. (AA II, pg. 231-242).

Despite two positive reports from two separate therapists, an observed behavioral change in addition to Ms. Deberry's successful completion of the other components of her case plan, DFS still recommended termination of parental rights and adoption because of a perceived "lack of behavioral change". (AA III, pg. 457-458). Specifically, because Ms. Deberry refused to admit she held the iron to Christopher's face, termination of parental rights was the only recourse. (AA III, pg. 397).

Accordingly, trial regarding the state's Petition to Terminate Parental Rights commenced, in earnest, on November 2, 2012, and finished on March 15, 2013.

(AA II pg. 203; AA III, pg. 468, 559). Witnesses testified as outlined above and evidence was presented. Despite admitted evidence to the contrary, the District Court made a finding that Christopher's injury was physical abuse and because Ms. Deberry refused to admit holding the iron to the child's face, parental rights were terminated based upon token efforts, failure of parental adjustment and unfitness. (AA III, pg. 564-570). Further, the District Court found it was in the best interests of the children that parental rights be terminated. (AA III, pg. 564-570). Curiously, however, the District Court did not find that there was a continuing risk of injury to the children if they were returned to their mother. (AA III, pg. 564-570).

On or about March of 2013, Aamiyah and Christopher were removed from their maternal grandmother due to allegations that Aamiyah was sexually abused by her (then 14 year-old) uncle who also resided in the home, and were placed in a foster home in Nevada. (AA III, pg. 590; AA IV, pg. 662). On or about May of 2013, the placement disrupted due to Aamiyah's "behaviors." (AA III, pg. 590). On or about April of 2013 an ICPC was requested for Aamiyah and Christopher to be placed with maternal great uncle and his wife. (AA III, pg. 590). Due to multiple delays, the children languished in foster care for approximately *seventeen*

(17) months while awaiting placement with maternal relatives.[2] (AA IV, pg. 648). Since May of 2010, Christopher has been placed in twelve (12) different homes. (AA III, pg. 588). Because Ms. Deberry's parental rights had been terminated, the children received no visits or contact with Ms. Deberry. (AA III, pg. 586). It was not until August of 2014 that the children were placed with maternal relatives in South Carolina. (AA III, pg. 588).

The Notice of Appeal as to the District Court's decision to terminate Ms. Deberry's parental rights was timely filed on May 28, 2013. (AA III, pg. 576-577). On November 13, 2014, this court granted the appeal, and reversed and remanded the matter for a new trial as to appellant's parental rights. (AA IV, pg. 766-776).

On November 11, 2014, Ms. Deberry filed her Motion for Visitation, Motion to Appoint a CAP and to Change Permanency Plan to Reunification based on the decision from the Supreme Court and the state's refusal to reinstate visits between Ms. Deberry and her children. (AA IV, pg. 718, 723). The matter was set to be heard December 24, 2014 in Department O (District Court Judge Frank Sullivan). (AA IV, pg. 720). The state filed a (late) Opposition to Ms. Deberry's Motion on December 24, 2014 Opposing not only Ms. Deberry's request for visitation and

[2] Christopher and Aamiyah were removed from maternal grandmother March 2013, the ICPC referral was made in April 2013 and approved June 2014; however, placement of Aamiyah and Christopher with great maternal aunt and uncle did not happen until August 2014. (AA IV, pg. 648).

change of permanency plan, but also to the appointment of CAP for the subject minors. (AA IV, pg. 777-787). On December 24, 2014, all parties appeared in Department O and appellant moved to strike the state's untimely Opposition. (AA VI, pg. 1083). District Court Judge Frank Sullivan Ordered the matter continued under "one family, one judge" and referred the matter to CAP. (AA VI, pg. 1083-1084). On January 5, 2015, the matter was heard in front of District Court Judge Robert Teuton. (AA VI, pg. 1084). Although absolutely no evidence was heard, no witnesses were sworn in, and no exhibits were accepted, Judge Teuton Denied appellant's Motion for Visitation. (AA V, 1084). On January 26, 2014, the matter came back on calendar for trial setting; at that hearing, Judge Teuton Ordered visitation between the children and Ms. Deberry at the discretion of the children's therapist in respect to the best interest of the children. (AA V, pg. 799; AA VI 1085). Initially, Aamiyah engaged in therapy services with Ms. Jane Fortune from October 6, 2014- December 25, 2014. (AA V, pg. 801). Therapy ceased once the Department became aware that Ms. Fortune was also treating Ms. Deberry and excused Ms. Fortune's services. (AA V. pg. 801).[3]

Aamiyah and Christopher were seen for their initial appointment with Laura Langley on or about January 21, 2015. (AA V, pg. 820). At the March 4, 2015

[3] Ms. Fortune also testified at Ms. Deberry's termination of parental rights trial in support of Ms. Deberry.(AA II, pg. 216-243).

review, it was reported that visits still had not begun. (AA V, pg. 846; AA VI, pg. 1086). Although Ms. Deberry's counsel attempted to address concerns regarding visitation on the March 4, 2015 review date, Hearing Master Femiano refused to address visitation and directed counsel to address the issues with Judge Teuton. (AA VI, pg. 1086). It was not until March 26, 2015, that visits between Ms. Deberry and the children began (over four months after the termination had been remanded and over three months after Ms. Deberry filed her Motion for Visitation). (AA VI, pg. 993). The report for the September 2, 2016 hearing summarized the visits between the children and Ms. Deberry:

> The therapist reported to the Department in a letter dated June 15, 2015 that both children had reported and demonstrated feeling comfortable and safe with Ms. Deberry, as well as their little brother. Included in the written report was that CHRISTOPHER and AAMIYAH stated that they would like to spend more time with their mother and that Ms. Deberry had "demonstrated appropriate parenting techniques and has set appropriate boundaries with the children." On June 24, 2015, a Visitation Safety Check List was signed by the caregiver, Ms. Deberry and the Department increased the visits to weekly two hour visits that are supervised by the caregivers, either at the placement home or in the community. The caregivers report that the visits are going well.... CHRISTOPHER reported to the Department on August 19, 2015 that he likes seeing Ms. Deberry and the visits are "good." The caregiver reports that the visits are going "excellent" for AAMIYAH and that she looks forward to her visits with mom and that the two of them get (sic) are bonding closer with each visit. Since June 24, 2015, Ms. Deberry has visited with the

> children on June 30, 2015, July 18, 2015, August 7, 2015 and August 15, 2015. Ms Deberry reported to the Department on August 19, 2015 that visits are going "Wonderful," she reported that she is rebuilding the relationship with her children and it is getting easier with each visit. She reports that she stays consistent with her visits and believes that this is assisting the children with overcoming the anxiety. AAMIYAH reported to the Department that the visits are 'great' and that she missed her mom and wants to live with her.

(AA VI, pg. 993, 1018).

The report goes on to state that the caregiver reports that Ms. Deberry had budgeted her money to be able to provide some school clothes and supplies for the children. (AA VI, pg. 994). Also that natural mother does well parenting the children and works to address their needs. (AA VI, pg. 994). The report further states that Ms. Deberry has maintained her housing and the same job for some ten (10) years. (AA VI, pg. 993-994).

On January 26, 2015, the matter was heard following remand. (AA VI, pg. 1058-1059). At that hearing, all parties stipulated that all evidence would be the same as in the prior termination trial, and therefore, the only issue was the inappropriate finding of parental fault based on the exclusion of evidence. (AA VI, pg. 1059). The parties further stipulated to admission of the Juvenile file ("J file"). (AA V, pg. 937- 938). On March 10, 2015, the hearing on remand was held. (AA VI, pg. 1058). At that trial, Judge Teuton admitted Dr. Newman's report as Exhibit

A and Dr. Mehta testified for the state.[4] (AA VI, pg. 1058-1064). Dr. Mehta's testimony was allowed over objection by Ms. Deberry's counsel based on the state's failure to provide Dr. Mehta's Curriculum Vitae to opposing counsel. (AA V, pg. 906, 909).

Dr. Mehta testified when evaluating the digital photographs of Christopher's burn, testifying she was given minimal facts history and the explanation that the child had sustained a burn by attempting to kiss an iron. (AA V, pg. 910). Dr. Mehta's evaluation was that the burn was throughout a triangular area with sharp edges and no smearing. (AA V, pg. 911). Further, that she did not believe it to be consistent with the explanation given, because if an object approaches the face, it doesn't leave a perfect imprint, it's dragged downward and you don't see distinct borders that are filled, you see varying degrees of burn with uneven edges. (AA V, pg. 915-916). Dr. Mehta testified that she could not recall smearing from the images she reviewed. (AA V, pg. 916). However, at neither the Adjudicatory Hearing on February 4, 2011, nor at the hearing on remand did the District Attorney offer any photographs that Dr. Mehta could identify as the same photographs she reviewed in making her assessment. (AA V, pg. 942-944).

[4] Appellant attempted to attain the marked Exhibit without success. Dr. Neuman's report dated May 11, 2010 is quoted, verbatim, in Judge Teuton's "Decision on Remand" (AA VI, pg. 1063). A copy of the report is also attached to Ms. Deberry's Motion for Visitation. (AA IV, pg. 731-734).

During her testimony at the hearing on remand, Dr. Mehta was unable to testify as to what degree of burn the subject minor had received—stating it was most likely second, but could not exclude third degree. (AA V, pg. 917). Dr. Mehta was further unable to give a time period the iron was against the skin, and was only able to testify it was not consistent with the child putting the iron to his own face. (AA V, pg. 918). Further, Dr. Mehta did not make any reports in regards to her evaluation of the photos of the subject minor. (AA V, pg. 926).

Dr. Mehta did testify that it would be ideal to perform a comprehensive evaluation, and that obtaining history from a child or guardian is something that she would recommend. (AA V, pg. 922, 927). However, Dr. Mehta never saw Christopher in person, never diagnosed or treated any other medical conditions of Christopher, and was not given any information with regard to the motor skills of Christopher. (AA V, pg. 925-926).

During her testimony, Dr. Mehta was unable to recall how many photos she looked at. (AA V, pg. 927). In fact, Dr. Mehta testified she did not look at any photos in preparation of her testimony on the date of the rehearing, and only reviewed her testimony from the prior trial. (AA V, pg. 928). She testified it was her understanding that the District Attorneys' office no longer has the initial photographs Dr. Mehta reviewed when first evaluating the case. (AA V, pg. 928).

Further, when shown multiple photos, Dr. Mehta was unable to recall if they were, in-fact, the photos she examined. (AA V, pg. 931-932).

Although Dr. Mehta testified that it is possible to medically make a diagnosis of abuse, she was only able to testify that the injury was not consistent with the explanation given. (AA V, pg. 933-934). No other explanations were given to Dr. Mehta other than Christopher kissing the iron at the time she initially examined the photographs of the burn. (AA V, pg. 914). Dr. Mehta's assessment was based on her understanding that the explanation was that Christopher held the iron to his own face, and testified that within a reasonable degree of medical certainty that the burn did not occur in accordance with the explanation that Christopher held the iron to his own face. (AA V, pg. 918).

Dr. Mehta also testified that additional scene investigation would be helpful, including eye-witness statements, if there were any other adults or children who could provide information; and that her recommendation would be to obtain as much information as possible. (AA V, pg. 919). Dr. Mehta further testified that ideally, she would like to know what temperature things were at, and where they were located in the house. (AA V, pg. 924). Yet, despite evidence that both Aamiyah and Ms. Deberry were present during the incident, neither was given the opportunity to explain their perception of the incident to Dr. Mehta, as Dr. Mehta

never spoke with either. (AA V, pg. 935-936). Further, she was not given any information regarding where the iron had fallen. (AA V, pg. 925). Even more, despite the Department being in possession of a doctor's report from a doctor who saw the child, Dr. Mehta testified she had not seen any alternative medical records at the time she rendered her opinion. (AA V, pg. 920, 937). In fact, Dr. Mehta wasn't even given alternative explanations given by Ms. Deberry, including that the iron may have fallen on the child. (AA V, pg. 35). When questioned whether anyone advised Dr. Mehta that there was no evidence in the case that the child was holding an iron, Dr. Mehta testified that she did not have any additional scene information (AA V, pg. 921).

On September 21, 2015, Judge Teuton issued his decision affirming the decision terminating Ms. Deberry's parental rights. (AA VI, pg. 1058-1064). On October 5, 2015, the Court held that visitation between Ms. Deberry and the children would continue so long as an appeal of the TPR case was timely filed. (AA VI, pg. 1088).

ARGUMENT SUMMARY

The District Court found that Ms. Deberry's parental rights should be terminated based upon the grounds of token efforts, failure of parental adjustment, unfitness and that it was in the best interests of the children that parental rights

should be terminated. (AA III, pg. 565-570). The District Court's decision terminating Ms. Deberry's parental rights was appealed, and the matter was reversed and remanded to the District Court for a rehearing. (AA IV, pg. 766-776). The District Court reaffirmed the Court's previous finding that there have been no behavioral changes of Ms. Deberry that would warrant return of the children to her care. (AA VI, pg. 1058-1064).

This determination continues to be based solely upon Ms. Deberry's refusal to admit that she intentionally burned her child's face and thus complete the only remaining component of her case plan which required that she "[t]horoughly, comprehensively, convincingly, and in a forthright manner, address precipitating risk factors, triggers and sequence of antecedent events that led to the physical abuse sustained by the Court as to his/her children (sic) Christopher Bynum, Jr. and actively participates in the development of a safety plan to prevent recurrence." (AA III, pg. 568).

Such an admission, however, is criminal in nature due to the court's finding that Ms. Deberry had physically abused her child and held an iron to the child's face. Thus, this requirement violated Ms. Deberry's rights under the Fifth Amendment to the United States Constitution. Accordingly, while the court could order that she participate in therapy to address the issue, the court could not require

such an admission from Ms. Deberry in order to reunify. According to Ms. Fortune, (Ms. Deberry's therapist who testified at trial) therapy was successful and Ms. Deberry was a low risk to re-offend. (AA II, pg. 241-242). Ms. Fortune maintained this assessment even after she was informed of the Hearing Master's findings that Ms. Deberry burned her child. (AA II, pg. 270-272).

Further, the District Court, while admitting that Ms. Deberry had substantially completed her case plan, found that she had not remedied the "circumstances, conduct or conditions which lead to the removal of Christopher" because she refused to admit she held an iron to her child's face. (AA III, pg. 569-570). This finding not only ignored Ms. Deberry's substantial case plan compliance and the strong bond she had with the children, but also ignores Ms. Deberry's Fifth Amendment Rights.

Subsequent to the adjudicatory hearing, the Department of Family Services (DFS) repeatedly referenced the report of the doctor who saw Christopher in person and made a determination that there was "no evidence of abuse" in at least two reports to the court. (AA I, pg. 136, 153). It was this admission by DFS (that a doctor who actually examined the child found that no abuse had occurred) that was before the District Court during the Termination of Parental Rights (TPR) trial on remand. (AA VI, pg. 1058-1064). In addition, DFS admitted that, given the two

different doctor's evaluations, they were unsure what happened to the child. (AA III, pg. 443). DFS also admitted that the only reason they were seeking TPR was due to Ms. Deberry's refusal to admit she held the iron to the baby's face but that, otherwise, Ms. Deberry had completed her case plan. (AA III, pg. 485-486). DFS also admitted that Ms. Deberry had an after-born child in her care and, despite the allegations in the instant matter, they did not report Ms. Deberry to South Carolina authorities with regard to that child. (AA III, pg. 460-461).

Despite the favorable report from Ms. Deberry's therapist, the fact that Ms. Deberry had demonstrated a behavior change by having another child in her care without incident and DFS' admissions as to case plan compliance, and the favorable reports regarding Ms. Deberry's visits, the District Court ignored this evidence. Despite the bond with her children and her substantial compliance with the case plan, the decision to terminate Ms. Deberry's parental rights was reaffirmed because she refused to admit a crime. There has never been any evidence regarding any other negligent treatment, accidental or purposeful injury, or inappropriate discipline other than the single burn to Christopher's cheek that led to the children's removal from Ms. Deberry. Further, the court gave little to no weight to Ms. Deberry's bond with her children and the effects a termination of parental rights could have. As seen after the first termination, the court ruled that it

was in the children's best interest for Ms. Deberry's parental rights to be terminated. This resulted in both children being brought back to a state where they hadn't resided for years, all contact being cut-off from the only relatives they've ever known, Aamiyah being moved between foster homes, Christopher being moved among twelve different placements, and the children languishing in foster care for some *seventeen (17)* months. (AA III, pg. 586-588, 590; AA IV, pg. 648, 662). By any stretch of the imagination, it was not in the children's best interest for Ms. Deberry's parental rights to have been terminated, rather than the children being reunified with their mother and younger brother when their mother had successfully completed her case plan and had maintained a strong bond with both children.

The court largely credits Dr. Mehta's testimony in its conclusion that the burn was intentional, however, Dr. Mehta never testified that Christopher's burn was abuse, simply that it was not consistent with the explanation that he kissed the iron. (AA VI, pg. 1058-1064;AA I, pg. 54). Dr. Mehta's testimony further reflected that she never saw Christopher in person, that she only saw digital photographs, that she never spoke to anyone present during the incident, that she did not receive any medical history regarding Christopher, that she could not recall any of the photos she examined to make her determination, and that she did not make a report

regarding her examination of the photographs. (AA V, pg. 910-938). From the photographs, Dr. Mehta couldn't even identify whether the burns were second or third degree burns. (AA V, pg. 917). Despite Dr. Mehta's testimony regarding how little information she had, and that she had not reviewed any photographs in this case since the first time she examined the photographs prior to the February 4, 2011 adjudicatory trial date, and *did not* make a determination that the burn was abuse, the decision to terminate Ms. Deberry's Parental Rights was reaffirmed. (AA V, pg. 927-932).

ARGUMENT

I. Standard of Review

A Petition to Terminate Parental Rights may result in the severance of a fundamental legal right. Accordingly, on appeal, a decision made with regard to the termination of parental rights is subject to close scrutiny: Termination of parental rights is "an exercise of awesome power." *Smith v. Smith*, 102 Ne 263, 266, 720 P.2d 1219, 1220 (1986). Severance of the parent-child relationship is "tantamount to imposition of a civil death penalty." *Drury v. Lang*, 105 Nev. 430, 433, 776 P.2d 843, 845 (1989). Accordingly, this court closely scrutinizes whether the district court properly preserved or terminated the parental rights at issue. *See, e.g., Matter of Parental Rights as to Carron*, 114 Nev. 370, 956 P.2d 785 (1998);

Matter of Parental Rights as to Gonzales, 113 Nev. 324, 933 P.2d 198 (1997); *Scalf v. State, Dep't of Human Resources,* 106 Nev. 756, 801 P.2d 1359 (1990); *Kobinski v. State*, 103 Nev. 293, 738 P.2d 895 (1987). Due process requires that clear and convincing evidence be established before terminating parental rights. *See Cloninger v. Russell*, 98 Nev. 597, 655 P.2d 528 (1982). This court will uphold termination orders based on substantial evidence and will not substitute its own judgment for that of the district court. *See Kobinski*, 103 Nev. at 296, 738 P.2d at 897.*In the Matter of Termination of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126 (2000).

Here, the termination of parental rights was not supported by substantial evidence and, as a result, Ms. Deberry is requesting that the District Court's order be overturned.

II. The District Court's Decision to Terminate Keaundra Deberry's Parental Rights was not Supported by Substantial Evidence.

A. The District Court Erroneously Terminated Parental Rights on the Grounds of Token Efforts, Failure of Parental Adjustment and Unfitness.

The grounds for terminating parental rights are set forth in NRS 128.105, which states:

> The primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination. An order of the

court for the termination of parental rights must be made in light of the considerations set forth in this section and NRS 128.106 to 128.109, inclusive, and based on evidence and include a finding that:
1. The best interests of the child would be served by the termination of parental rights; and
2. The conduct of the parent or parents was the basis for a finding made pursuant to subsection 3 of NRS 432B.393 or demonstrated at least one of the following:
(a) Abandonment of the child;
(b) Neglect of the child;
(c) Unfitness of the parent;
(d) Failure of parental adjustment;
(e) Risk of serious physical, mental or emotional injury to the child if the child were returned to, or remains in, the home of his or her parent or parents;
(f) Only token efforts by the parent or parents:
(1) To support or communicate with the child;
(2) To prevent neglect of the child;
(3) To avoid being an unfit parent; or
(4) To eliminate the risk of serious physical, mental or emotional injury to the child; or
(g) With respect to termination of the parental rights of one parent, the abandonment by that parent.

In the instant matter, the District Court found that token efforts, failure of parental adjustment and unfitness existed in addition to the presumptions found under NRS 128.109, which states that:

1. If a child has been placed outside of his or her home pursuant to chapter 432B of NRS, the following provisions must be applied to determine the conduct of the parent:

(a) If the child has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months, it must be presumed that the parent or parents have demonstrated only token efforts to care for the child as set forth in paragraph (f) of subsection 2 of NRS 128.105.

> (b) If the parent or parents fail to comply substantially with the terms and conditions of a plan to reunite the family within 6 months after the date on which the child was placed or the plan was commenced, whichever occurs later, that failure to comply is evidence of failure of parental adjustment as set forth in paragraph (d) of subsection 2 of NRS 128.105.
>
> 2. If a child has been placed outside of his or her home pursuant to chapter 432B of NRS and has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months, the best interests of the child must be presumed to be served by the termination of parental rights.
>
> 3. The presumptions specified in subsections 1 and 2 must not be overcome or otherwise affected by evidence of failure of the State to provide services to the family.

Specifically, the District Court found that the presumption relating to Token Efforts, NRS 128.109(1)(b) applied to the instant matter. (AA III, 564-570). The District Court either did not apply this presumption to the best interests portion of its analysis or found that such presumption had been rebutted. The District Court did, however, find that there was clear and convincing evidence that it was in the best interests of the children to terminate parental rights. (AA III, pg. 564-570). Further, the District Court found that such presumption with regard to token efforts, which had not been rebutted.

The District Court did acknowledge that Ms. Deberry did complete age appropriate parenting classes and "otherwise complied with the case plan." (AA

III, 564-570). The entire thrust of the District Court's decision rested on Ms. Deberry's alleged failure to "comply with that aspect of the case plan which required her to address the risk factors and sequence of events that lead to the physical injury sustained by Christopher Bynum, Jr." (AA III, pg. 569). In its decision, the District Court quoted from that portion of Ms. Deberry's case plan which required her to "thoroughly, comprehensively, convincingly, and in a forthright manner, address precipitating risk factors, triggers and sequence of antecedent events that led to the physical abuse sustained by the Court as to his/her children (sic) Christopher Bynum, Jr. and actively participates (sic) in the development of a safety plan to prevent recurrence." (AA III, pg. 569).

In its Decision on Remand, the District Court found Dr. Mehta's testimony to be compelling and stated that her credentials to form a medical opinion are overwhelming, whereas the credentials of the Louisiana doctor are unknown. (AA VI, pg. 1058-1064). Further, that although Dr. Mehta was handicapped by the fact she did not personally examine the child, she testified to multiple, consistent facts which can only lead to the conclusion that the burn was intentional and found "clear and convincing evidence that the minor child was physically abused." (AA VI, pg. 1064).

It is important to note that the court, although finding that the child was

physically abused, did not make a clear and convincing finding that Christopher was physically abused by Ms. Deberry. (AA VI, pg. 1058-1064).

However, even with this finding, the District Court clearly ignored all of the other substantial evidence presented which indicated that Ms. Deberry had substantially completed her case plan, that she had successfully engaged in therapy, no less that twice, that DFS had presented conflicting evidence as to the mechanism of the injury, that there was a change in demeanor observed by DFS and the therapist, that Ms. Deberry had an after-born child in her care with no concerns noted, and that any risk to re-offend was low. (AA I, pg. 136; AA II, pg. 231-242; AA III, pg. 488, 498-499). As will be set forth in more detail below, the District Court's determination was based solely, and improperly, upon Ms. Deberry's refusal to admit a crime - holding an iron to her child's face.

B. As Repeatedly Admitted by the Department of Family Services, Ms. Deberry had Completed her Case Plan, had a Bond with her Children and had Otherwise Cooperated with the Department.

An unfit parent is defined in NRS 128.018 as: "any parent of a child who, by reason of the parent's fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." This definition has been further discussed by this Court in *Champagne v. Welfare Division*, 100

Nev. 640, 691 P.2d 849 (1984), *overruled on other grounds by Termination of Parental Rights as to N.J.*, 116 Nev. 790, 801, 8 P.3d 126 (2000), where this Court stated that:

> A neglected child is one who does not receive "*proper*" care; an unfit parent is one who fails to provide a child with "*proper*" care. Again: All parents are guilty of failure to provide proper care on occasion; and a parent does not deserve to forfeit the sacred liberty right of parenthood unless such unfitness is shown to be **severe and persistent** and such as to render the parent *unsuitable* [footnote omitted] to maintain the parental relationship.
> (emphasis added)

NRS 128.106 sets forth specific factors that the court must consider when making a determination of unfitness:

> In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent:
>
> 1. Emotional illness, mental illness or mental deficiency of the parent which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time. The provisions contained in NRS 128.109 apply to the case if the child has been placed outside his or her home pursuant to chapter 432B of NRS.
>
> 2. Conduct toward a child of a physically, emotionally or sexually cruel or abusive nature.
> 3. Conduct that violates any provision of NRS 200.463, 200.464 or 200.465.
>
> 4. Excessive use of intoxicating liquors, controlled

substances or dangerous drugs which renders the parent consistently unable to care for the child.

5. Repeated or continuous failure by the parent, although physically and financially able, to provide the child with adequate food, clothing, shelter, education or other care and control necessary for the child's physical, mental and emotional health and development, but a person who, legitimately practicing his or her religious beliefs, does not provide specified medical treatment for a child is not for that reason alone a negligent parent.

6. Conviction of the parent for commission of a felony, if the facts of the crime are of such a nature as to indicate the unfitness of the parent to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development.

7. Unexplained injury or death of a sibling of the child.

8. Inability of appropriate public or private agencies to reunite the family despite reasonable efforts on the part of the agencies.

Here, because the District Court bases its decision on Ms. Deberry's failure to provide an explanation consistent with the finding of physical abuse, it is clear that the court based its unfitness findings on 128.106(7)—unexplained injury.

As to failure of parental adjustment, it arises when a parent or parents are unable or unwilling within a reasonable time to correct substantially the circumstances, conduct or conditions which led to the placement of their child outside their home, notwithstanding reasonable and appropriate efforts made by the

state or a private person or agency to return the child to his home. *Champagne v. Welfare Division*, 100 Nev. 640, 691 P.2d 849 (1984), *overruled on other grounds by Termination of Parental Rights as to N.J.*, 116 Nev. 790, 801, 8 P.3d 126 (2000).

However, this Court warned that: "[t]he task in failure to adjust cases is to *realistically evaluate* the parent's efforts to adjust 'circumstances, conduct or conditions' within a reasonable amount of time to justify the child's return home." *Id.* (emphasis added).

Token efforts deals with a parent's effort to support or communicate with the child, to prevent neglect of the child, to avoid being an unfit parent or to eliminate the risk of serious physical, mental or emotional injury to the child. NRS 128.109. With regard to token efforts, however, it should be noted that: "[w]ith regard to neglect occurring after the children were taken away, it is obvious that the mother cannot be charged with neglect to "provide proper or necessary subsistence, education, medical or surgical care, or other care" during a time when the children were not in her custody. *See Chapman v. Chapman*, 96 Nev. 290, 607 P.2d 1141 (1980)." *Champagne v. Welfare Division*, 100 Nev. 640, 691 P.2d 849 (1984), *overruled on other grounds by Termination of Parental Rights as to N.J.*, 116 Nev. 790, 801, 8 P.3d 126 (2000).

The problem with the District Court's findings is that they are not supported by substantial evidence and rely solely upon one factor (which is not a determinative factor) - that of unexplained injury. (AA III, pg. 564-570). The evidence adduced at trial, both through testimony and exhibits, indicated that the injury to the child was an isolated incident as no history of prior CPS involvement was adduced. (AA III, pg. 564-570). This is neither severe nor persistent so as to render Ms. Deberry unsuitable to parent her children. Further, there was no evidence of any anger management issues or improper discipline on the part of Ms. Deberry. (AA III, pg. 564-570). Ms. Deberry has also had another baby in her care for a substantial period of time without incident and without any concern from the DFS case worker, her supervisor or the therapist, Ms. Fortune, despite the fact that all these individuals were mandatory reporters of child abuse. (AA III, pg. 460-461). Further, Ms. Deberry has only received positive reports in regards to her (still-ongoing) visits with the children. (AA VI, 993, 1018).

Despite the State's repeated efforts to the contrary, there was no proven allegation of domestic violence in the home. (AA I, pg. 52-59). The best that the State could produce was an allegation of domestic violence against Ms. Deberry which was later dismissed due to an inability to determine the primary physical aggressor. (AA I, pg. 52-59). Although domestic violence was alleged in the

original abuse and neglect petition, it was subsequently dismissed as well. (AA I, pg. 52-59).

Further, DFS repeatedly reported to the Court during regularly scheduled review hearings that Ms. Deberry had completed her case plan. (AA I, pg. 136, 153). Ms. Deberry has housing, has maintained employment, maintained a bond with her children, has provided for them financially, she kept in contact with DFS and she successfully completed therapy— twice. (AA I, pg. 130-140; AA II, pg. 360, 367-368, 370-379, AA VI, pg. 989-1057). By September of 2011, DFS indicated to the Court that they were satisfied with Ms. Deberry's therapy and her progress on her case plan. (AA I, pg. 136). DFS repeatedly referenced in court reports that another doctor had personally examined the injured child and had indicated that no abuse existed. (AA I, pg. 66-74; 180-86). Further, the DFS case worker and her supervisor had approached the District Attorney about re-evaluating the Court's decision regarding physical abuse. (AA III, pg. 500). Their request was denied. (AA III, pg. 500).

The Department further noted that Ms. Deberry had acknowledged negligence and improper supervision resulting in the injury. (AA I, pg. 134). The Department also maintained that Ms. Deberry had obtained the "knowledge and tools to effectively parent her children." (AA I, pg. 136). The evidence adduced

from the therapist who testified, Ms. Fortune, indicated that Ms. Deberry did not exhibit any signs or symptoms of a parent who abuses their children and that, even if Ms. Deberry had held an iron to her child's face, the risk to re-offend was low due to the successful completion of therapy. (AA II, pg. 231-242). Evidence presented regarding the first therapist who treated Ms. Deberry, Ms. Pharr, was in accord with Ms. Fortune. (AA I, pg. 170). Ms. Pharr treated Ms. Deberry after DFS sent to her exactly what needed to be covered. (AA III, pg. 488). No comparable contrary evidence was propounded - only the opinion of the DFS supervisor, Michelle Douglas.

In fact, the only evidence the State provided to rebut Ms. Fortune's testimony and the prior therapist's letter was the testimony of the DFS supervisor, Michelle Douglas. Ms. Douglas testified that, despite her notation of the change in Ms. Deberry's demeanor and Ms. Deberry's ability to articulate her wrongdoings, it was Ms. Douglas's opinion that the therapy Ms. Deberry went through was more like an assessment and was not in depth enough, even though she had not spoken with either the therapist in Louisiana, or Ms. Fortune regarding her concerns. (AA III, pg. 452- 455). Ms. Douglas, however, admitted she was not a licensed counselor. (AA III, pg. 454).

In fact, Ms. Douglas noted that until Ms. Deberry was able to articulate that

she physically abused her child and the events leading up to that abuse, the Department would never recommend reunification. (AA III, pg. 397). Ms. Douglas indicated, that despite the very favorable aspects of her report to the Court, Ms. Deberry had not demonstrated a "behavioral change". (AA III, pg. 457-458). Ms. Douglas then admitted that she has never observed Ms. Deberry interact with her child in her care, thus her ability to ascertain whether or not there had been a behavior change was non-existent. (AA II, pg. 462).

In it's decision, the District Court also noted that Ms. Deberry had completed her case plan. (AA III, pg. 565-570). The sole basis for terminating parental rights was Ms. Deberry's continued refusal to admit that she held an iron to the baby's face. (AA III, pg. 565-570). These findings as well as the requirement that Ms. Deberry admit wrongdoing were prejudicial error. The District Court ignored evidence that Ms. Deberry had completed her case plan and posed no threat to any child as evidenced by not one but two therapists – professionals that DFS referred Ms. Deberry to in order to address any concerns relating to physical abuse. Instead, the District Court based its findings on one sole factor - that of unexplained injury - a factor which is not determinative of the issue and is only one of many factors that the Court is required to consider. *See* NRS 128.106 and 128.107. Accordingly, the District Court's decision is not based upon substantial

evidence and should be overturned.

C. The Only Reason the Department of Family Services Sought, and the District Court Granted, Termination of Parental Rights was due to Ms. Deberry's Failure to Admit to a Crime.

Although this issue has never been addressed by the Nevada Supreme Court, *numerous* other Courts have addressed the issue of compelled admissions in relation to termination of parental rights proceedings. Consistently, these Courts have held that neither the State nor the Court can compel a parent to admit to a crime. Once the threat of termination of parental rights is raised, the threat alone is sufficient to act as a compulsion which would trigger Fifth Amendment protections.

In *In the Matter of the Welfare of J.W.*, 415 N.W.2d 879 (Minn. 1987), the Minnesota Supreme Court addressed this issue. The Court held that threat of termination of parental rights is sufficient to trigger Fifth Amendment protections. "When a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment." *citing Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 53 L.Ed.2d 1, 97 S.Ct. 2132 (1977). The Court went on to note that "We hold that the trial court's order, to the extent it requires appellants to incriminate themselves,

violates appellants' Fifth Amendment rights and is unenforceable." *Id.* at 883.

The Minnesota Supreme Court was careful to note, however, that the compelling of such admissions by the State or the Court is as far as the Fifth Amendment protections went. "While the state may not compel therapy treatment that would require appellants to incriminate themselves, it may require the parents to otherwise undergo treatment. Therapy, however, which does not include disclosures may be ineffective; and ineffective therapy may hurt the parents' chances of regaining their children. These consequences lie outside the protective ambit of the Fifth Amendment." *Id.* at 883.

Numerous other Courts have made similar findings. In *In re M.C.P., Juvenile*, 153 Vt. 275, 571 A.2d 627 (Vt. 1989) the Vermont Supreme Court found that the Court cannot require an admission in order to reunify parents and children but parents can have their rights terminated if therapy is ineffective. In *In the Matter of the Welfare of M.D.O.*, 462 N.W.2d 370 (Minn. 1990) the Minnesota Supreme Court took it one step further and indicated that if the State advocates there can be no rehabilitation without an admission, they bear the burden of proving that assertion. *Id.* at 378.

In *State vs. P.Z.*, 152 N.J. 86, 703 A.2d 901 (N.J. 1997), the Supreme Court of New Jersey found that requiring a parent to choose between the Fifth

Amendment protections and another right is inherently coercive. The State cannot compel testimony that requires an admission of criminal wrongdoing and the question is whether therapy can be effective without such admission. In *In the Interest of E.H. III,* 578 N.W.2d 243 (Iowa, 1998), the Supreme Court of Iowa found that where a Court only required treatment, not an admission, this did not violate a parent's Fifth Amendment rights. In *In the Interest of C.H.,* 652 N.W.2d 144 (Iowa 2002), the Iowa Supreme Court found that a court cannot compel a parent to admit guilt in order to be reunified. The court could require treatment, but not an admission of guilt as part of that treatment.

In *Minh T. v. Arizona Department of Economic Security*, 202 Ariz. 76, 41 P.3d 614 (Az. 2001), the Court of Appeals of Arizona found that the Court cannot specifically compel therapy which requires an admission - the Court may only compel therapy.

In *State v. Brown*, 286 Kan. 170, 182 P.3d 1205 (Kan. 2008), the Supreme Court of Kansas found that while termination of parental rights can be based on a lack of effective therapy, the trial court cannot require a parent to admit criminal conduct on order to reunite the family. Similarly, in *In re A.W.*, 231 Ill.2d 92, 896 N.E.2d 316 (Ill. 2008), the Supreme Court of Illinois found that the court can only require effective therapy but cannot compel a parent to admit to a crime.

Finally, in *Brent v. Wayne County Dep't. of Human Services*, __ F.Supp. ___, 2012 U.S. Dist. LEXIS 163204 (E. Dist. Michigan, Southern Div., November 15, 2012), the United States District Court for the Eastern District of Michigan noted that "It is well established that government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right." *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999). To establish such a claim, a plaintiff must show that "[he] engaged in conduct protected by the Constitution or by statute, the defendant took an adverse action against the plaintiff, and this adverse action was taken (at least in part) because of the protected conduct." *Id.* at 386-87. The Sixth Circuit further explained that the adverse action must be "one that would deter a person of ordinary firmness from the exercise of the right at stake." *Id.* at 398 (citation and internal quotation marks omitted).

In the instant matter, the Hearing Master's findings indicated that Ms. Deberry physically abused her child by holding an iron to Christopher's face. (AA I, pg. 62-69). The subsequently filed case plan indicated that Ms. Deberry must be able to articulate the series of events which led to the injury consistent with the Court's findings. (AA I, pg. 72-29). The sole reason that the Department of Family

Services sought termination of Ms. Deberry's parental rights was her failure to admit her wrongdoing consistent with the Court's findings. (AA III, pg. 486). Thereafter, the sole reason for terminating Ms. Deberry's rights was that she did not admit her wrongdoing in a manner consistent with the Court's findings (that the burn was non-accidential) and she consistently stated that the injury to the child was accidental.

What happened here is that Ms. Deberry's parental rights were terminated due to her steadfast refusal to state that she physically abused her son by holding an iron to the baby's face. Such an admission is a crime. The case plan and subsequent termination constitute improper compulsion. Accordingly, because the Hearing Master, the State, and DFS were requiring such admission, the Fifth Amendment applied and that portion of the case plan requiring an admission should have been held as unenforceable by the District Court.

The only question before the District Court should have been whether the natural mother's therapy that she engaged in (with two different providers) was effective without an admission of physically burning Christopher, when both therapists reported successful completion of Ms. Deberry without such admission. Further, as reported by Ms. Fortune, any risk to re-offend was low, as Ms. Deberry did not present as a parent who abused their child, she exhibited no signs or

symptoms of an abuser, and she had a child in her care who was safe. (AA II, pg. 231-242).

The State offered no competent testimony challenging whether such therapy was effective - only the opinion of the DFS supervisor who admitted that she never spoke to the therapists and never observed Ms. Deberry with her children. DFS sent Ms. Deberry to these therapists for a reason- to obtain their expert opinions regarding Ms. Deberry's ability to parent and risk to re-offend. They are the witnesses with knowledge, not DFS and not the Court. There was no basis to disregard their testimony and evidence.

There was uncontroverted evidence that the therapy was, in fact, effective even without such improper admission. As a result, termination of parental rights should have been denied. Requiring Ms. Deberry to admit to a crime or suffer termination of parental rights was an improper compulsion and violated Ms. Deberry's constitutional rights. Further, the state has not offered a single piece of evidence from an expert on the matter to support its contention that an admission to the physical abuse is necessary to provide a safe home. The District Court committed error in terminating Ms. Deberry's parental rights based solely upon her refusal to admit to a crime.

D. It was Not in the Children's Best Interests to Terminate Parental Rights

Because the District Court affirmed its (already unclear) decision, the District Court's decision remains unclear. Although the Court found it would be in the best interests of the children to terminate parental rights, it did not elaborate on the basis for that decision. (AA III, pg. 565-570). It is unclear if that decision was based upon the presumption as to best interest contained in NRS 128.109 or, if that presumption had been rebutted, whether there was clear and convincing evidence that it was in the best interests of the children to terminate parental rights. Either way, the evidence adduced was insufficient to support a best interest determination.

Specifically, witnesses testified that Ms. Deberry had moved out of state to be close to her children and had visited them on a regular basis when she resided in Louisiana. (AA III, pg. 478-503). When she moved to South Carolina, she continued to have telephone contact with both children several times per day. (AA III, pg. 478-503). In addition, the maternal grandmother would bring the children to South Carolina to visit their mother and their sibling on a regular basis. (AA III, pg. 478-503).

The case worker, Michelle Jordan, testified that the oldest child, Aamiyah, had repeatedly asked when she could go home with her mother. (AA III, pg. 478-503). In fact, the child would beg and cry to be reunited. (AA III, pg. 478-503). Further, Ms. Deberry helped the maternal grandmother in caring for the children and helped to support the children by giving money and gifts. (AA III, pg. 478-503). It's clear from the evidence adduced that the children were strongly bonded to their mother.

These are exactly the type of factors that this Court found to be sufficient to overcome the presumptions as to best interests in the case of *In the Matter of the Parental Rights to J.L.N.*, 118 Nev. 621, 55 P.3d 955 (Nev. 2002) and *In the Matter of Termination of Parental Rights as to N.J.*, 116 Nev. 790, 8 P.3d 126 (Nev. 2000).

In *N.J.,* this court cited to NRS 128.005 wherein the Legislative declaration and findings clearly indicate that "[t]he continuing needs of a child for proper physical, mental, and emotional growth and development are the decisive considerations in proceedings for termination of parental rights." *In the Matter of Termination of Parental Rights as to N.J.*, 116 Nev. 790, 800, 8 P.3d 126 (Nev. 2000). Further, this Court stated that ". . .in determining whether it was in the best interests of the child to terminate the mother's parental rights, the district court

considered that particular child's physical, mental and emotional well-being." *Id.* at 116 Nev. at 801.

In *In the Matter of the Parental Rights to J.L.N.*, 118 Nev. 621, 55 P.3d 955 (Nev. 2002), this Court specifically looked at the bond between parent and child in determining that the presumptions of NRS 128.109 had been overcome:

> First, the record establishes that Diana and J.L.N. have a strong, loving bond and that the child wants to be reunited with Diana. J.L.N. also has a firmly established, loving relationship with the maternal grandparent and has expressed a desire to continue this relationship. though J.L.N. had spent time playing with the children in the prospective adoptive home, and admittedly had a positive relationship with the family, J.L.N. has never lived in that home.
>
> ...
>
> While J.L.N. did express concern over waiting another year for reunification, there is no evidence to suggest that this anxiety was jeopardizing J.L.N.'s health or well being. Taken together with the testimony regarding the potential effects of termination upon J.L.N. when she becomes a teenager, we conclude that the positive experiences J.L.N. had as a guest in the prospective adoptive home, and the likelihood that she might have a permanent home with that family, together with her general wish for permanency, do not constitute substantial evidence supporting the district court's conclusion that termination was in J.L.N.'s best interests.

Id. at 118 Nev. at 626.

In April of 2013, the district court determined it was in the children's best interests for Ms. Deberry's rights to be terminated. (AA III, 565-570). The result

was that the children were placed in foster care in Nevada and all contact was cut off from any known relatives. (AA III, pg. 586). The children were shuffled from home-to-home and separated, with Christopher being moved between *twelve* homes since May of 2010. (AA III, pg. 588, 590; AA IV, pg. 662). Although a family placement in South Carolina made themselves immediately available, the ICPC process resulted in the children waiting seventeen (17) months to be placed with their maternal relatives. (AA IV, pg. 648). After being placed with family, the children's negative behaviors have drastically subsided. (AA VI, 989-1057). This placement (along with Ms. Deberry and the children's multiple requests) has allowed visitation to re-commence between Ms. Deberry and her children which has had very positive results. (AA VI, pg. 993, 1018).

Not only did Ms. Deberry correct the circumstances which led to the removal of the children, alleviating parental fault, the termination of Ms. Deberry's parental rights has shown that it has not been in the children's best interests.

Based upon the substantial evidence of Ms. Deberry's bond with her children, the finding that it was in the best interests of the children to terminate parental rights was erroneous, not supported by substantial evidence and should be overturned.

CONCLUSION

Based upon the arguments above, Ms. Deberry herein respectfully requests that this Court overturn the District Court's order terminating parental rights.

DATED this 4th day of February, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(3), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I hereby certify that this brief also complies with NRAP 32(a)(4) - (6), that the typeface is Times New Roman in 14 point font and that it complies with the page volume limitation. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 4th day of February 2016, a copy of the Co-Appellant's Opening Brief was served as follows:

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