IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

In the Matter of the Parental Rights as to: AAMIYAH DE'NASIA LAMB AND CHRISTOPHER LAMONT BYNUM, JR. MINORS. KEAUNDRA DEBERRY, Co- Appellant vs. CLARK COUNTY DEPARTMENT OF FAMILY SERVICES Respondent	Nevada Supreme Court No. 69047 District Court No. D446967

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Granting Petition to Terminate Parental Rights, Eighth Judicial District Court, Honorable Robert Teuton, Clark County

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STATEMENT OF THE ISSUES

I. Standard of Review on Appeal
II. Did the District Court Appropriately Find That Termination of Parental Rights was in the Children's Best Interest and that Parental Fault Existed?
III. Was The Fifth Amendment Implicated in this Matter?

STATEMENT OF THE CASE/JURISDICTIONAL STATEMENT

This is an Appeal filed by the Clark County Department of Family Services and the Clark County District Attorney's Office following the entry of a Final Order Granting a Petition Seeking to Terminate the Parental Rights by Eighth Judicial District Court, Honorable Robert Teuton, Clark County, Nevada.

PRELIMINARY STATEMENT REGARDING THE REFERENCES TO THE RECORD ON APPEAL

The citations in the following Statement of Facts and Argument, will be made by referencing matters in the pleadings and papers on appeal in the form of AA XX:LL. "R.A." represents the "Respondent's Appendix", "XX" represents the page number within the Respondent's Appendix upon which the relied upon matter may be found, and "LL" references the lines containing the relied upon matter.

STATEMENT OF THE FACTS

On or about April 9, 2010, CHRISTOPHER JR., sustained a burn to his face.

Between April 9, 2010 and May 6, 2010, Ms. DeBerry treated CHRISTOPHER JR.'s second or third degree burn with Neosporin and Cocoa Butter. R.A. pages 0345-0346.

Between April 9, 2010 and May 6, 2010, Ms. DeBerry did not take CHRISTOPHER JR., to see a doctor regarding the burn. R.A. page 0346, lines 18-20.

On April 27, 2010, the Clark County Department of Family Services (hereinafter DFS) received a hotline report alleging that CHRISTOPHER JR. had been burned on his face by an iron and that the parents leave drugs and drug paraphernalia within reach of the children. R.A., page 0090, lines 19-21.

The reporting party indicated that CHRISTOPHER BYNUM SR. was the person who caused the burn. R.A., page 0090, lines 19-21.

The reporting party also indicated that the burn was approximately one week old and in the healing process when the call was reported to DFS. R.A., page 0090, lines 19-21.

Between April 27, 2010 and May 6, 2010, the family fled from Las Vegas, Nevada to Barksdale Air Force Base, Shreveport, Louisiana in an attempt to hide the children from child protective services. R.A., page 0070, lines 7-8.

On May 6, 2010, Ms. DeBerry and CHRISTOPHER JR. and AAMIYAH flew to Louisiana. When they landed, Ms. DeBerry turned CHRISTOPHER JR., over to CHRISTOPHER SR., who then drove him to Tallulah, Louisiana. Ms.

DeBerry and AAMIYAH remained at Barksdale Air Force Base with the maternal grandparents. R.A. pages 0347-0350.

On May 6, 2010, Bossier County Child Protective Services located CHRISTOPHER JR. and observed the burn scar to his face. R.A. page 0070, lines 6-7.

On May 11, 2010, the paternal grandmother transported CHRISTOPHER JR. to a medical doctor in Tallulah, Louisiana. R.A., page 0347, lines 2-4.

On May 12, 2010, a Uniform Child Custody Jurisdiction and Enforcement Act conference was conducted between the state of Nevada and the state of Louisiana. R.A., page 0070, lines 10-12. The courts determined that jurisdiction was appropriate in the state of Nevada. R.A., page 0070, lines 10-12.

On May 21, 2010, the children were both returned to the state of Nevada and placed into Clark County protective custody. R.A., page 0070, lines 18-21.

In or about July 2010, Ms. DeBerry failed to submit to a drug test requested by DFS. R.A., page 0393, lines 16-24 and page 0394, lines 1-4.

On February 4, 2011, the court heard testimony and examined documentary evidence, including photographs of CHRISTOPHER JR.'S injuries during a contested adjudicatory hearing. R.A., pages 0105-0112.

After considering the evidence, the court found that Ms. DeBerry was the person who physically abused CHRISTOPHER JR. as she testified that she was the only parent home when the injury was sustained. R.A., page 0107, lines 8-11.

On February 4, 2011, Ms. DeBerry testified that she treated CHRISTOPHER JR.'s second or third degree burn to his face by applying Neosporin. R.A. page 0108, lines 9-10.

On April 13, 2011, the District Court accepted the recommendations and adopted the findings of facts and recommendations from the Hearing Master regarding Ms. Deberry causing the physical injury to CHRISTOPHER JR.

Around July 2011, Ms. DeBerry completed parenting classes in Louisiana. R.A., page 0370, lines 13-19.

In or about May 2012, Ms. Deberry attended individual counseling sessions with Jane Fortune in South Carolina. R.A., page 0362, lines 18-24.

On June 27, 2012, Ms. DeBerry attended her last therapeutic session with Jane Fortune. R.A., page 0363, lines 1-5.

In or about November 2012, Ms. DeBerry reported to DFS that CHRISTOPHER BYNUM SR. was arrested in South Carolina. R.A., page 0516, lines 23-24 and R.A., page 0517, lines 1-2.

On April 29, 2013, the District Court issued a written decision which terminated the parental rights of all named parties and freed the children to be adopted by the maternal grandparents. R.A., pages 0057-0062.

On May 28, 2013, Ms. Deberry filed her first Notice of Appeal to address the District Court decision terminating her parental rights.

On November 13, 2014, the Nevada Supreme Court granted the appeal, reversed and remanded the matter to the District Court for consideration of additional evidence.

On March 10, 2015, a second evidentiary hearing was held on the Petition to Terminate Parental Rights. During the second evidentiary hearing, the parties stipulated to all the prior evidence from the first evidentiary hearing and there was additional testimony from Dr. Neha Mehta and the medical reports from Dr. Newman, which was admitted over the objection of the State since Ms. Deberry failed to have Dr. Newman available to testify and specifically available for cross-examination. (AA, VI, pgs. 1058-1064).

On September 21, 2015, District Court Judge Robert Teuton rendered his second decision, again weighing the substantial evidence in this matter and again determining that parental fault existed and that the children's best interest would be served by the termination of Ms. Deberry's parental rights. (AA, VI, pgs. 1058-1064). In the second decision, the District Court had additional testimony from Dr. Neha Mehta and the medical documents from a doctor in Louisiana. (AA, VI, pgs. 1058-1064).

On October 20, 2015, Ms. Deberry filed her notice of appeal challenging the District Court's decision terminating her parental rights.

ARGUMENT

1. STANDARD OF REVIEW ON APPEAL

The Nevada Supreme Court has well-established legal precedence regarding the close scrutiny a district court decision receives regarding the preservation or severance of parental rights. Matter of Parental Rights as to N.J., 116 Nev. 790, 79, 58 P.3d 126, 129, (2000). (See also In Matter of Parental Rights as to A.J.G, 122 Nev. 1418, 1423, 148 P.3d 759, 763 (2006) (internal citations omitted). On appeal, The Nevada Supreme Court "review[s] the district court's factual findings in its order terminating parental rights for substantial evidence." Id. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. State Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

In the present matter, substantial evidence supported the termination of parental rights being in the children's best interest and that numerous parental faults existed.

2. CLEAR AND CONVINCING EVIDENCE SUPPORTED CHRISTOPHER JR. AND AAMIYAH'S BEST INTERESTS BEING SERVED BY THE TERMINATION OF PARENTAL RIGHTS

NRS 128.109(2) provides that when a child has been placed outside of his or her home pursuant to NRS 432B and has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months, the court **must** presume the best interests of the child are served by the termination of parental rights (emphasis added).

There is no dispute that CHRISTOPHER JR. and AAMIYAH were removed from the home of their parents by Bossier County Child Protective Services on May 6, 2010. R.A., page 0070, lines 6-7. CHRISTOPHER JR. and AAMIYAH continued to reside in foster care placement with their maternal grandparents who identified themselves as an adoptive resource. R.A., page 0198, lines 24-27. At the time of the second termination of parental rights trial. CHRISTOPHER JR. and AAMIYAH resided in a placement pursuant to NRS 432B for fifty-eight (58) months. Therefore, the district court correctly applied the statutory presumption regard the termination of parental rights being in the children's best interests. NRS 128.109(2) (See also, A.J.G., 122 Nev. 1418 at 1426).(See also In re D.R.H., 120 Nev. 422, 92 P.3d 1230 (2004). R.A. page 0058, lines 16-19.

Children's "best interests must be viewed from the child's, rather than the parent's, perspective." In re Shon Austin, 194 S.W.3d 490 (2005) (internal citations omitted). "Although the best interests of the child and parental fault are distinct considerations, **determining the best interests of the child necessarily includes considerations of parental fault**, and both standards must be proven by clear and convincing evidence." In re K.D.L., 118 Nev. 737, 744, 58 P.3d 181, 186 (2002) (emphasis added). See Also, Matter of N.J., 116 Nev. 790 at 800, 8 P.3d 126 at 132 (quoting Kobinski v. State, 103 Nev. 293, 296, 738 P.2d 895, 897 (1987)). Additionally, when the child is not in the physical custody of the parent,

the district court shall consider "[t]he physical, mental or emotional condition and needs of the child." A.J.G., 122 Nev. 1418. See NRS 128.107(2).

In the Interest of J.V. a child, (Two Cases), 526 S.E.2d 386, 395 241 Ga. App. 621, 631, (1999), the court found it was in the child's best interest to terminate parental rights where J.V. suffered 13 fractured bones, the parents denied responsibility, and had not provided a medically consistent explanation for how J.V. suffered his injuries. The court reasoned that because the parents **"refused to acknowledge that J.V. needed protection from future injury and failed to provide a plan for such protection and that if he were returned to them, he would go back to the very same environment in which he was injured. Accordingly, the court found that it was in J.V.'s best interest that the rights of his parents be terminated."** J.V., 526 S.E.2d at 391 (emphasis added).

Based on the analysis of J.V., there is clear and convincing evidence in the record that it is in the children's best interest for parental rights to be terminated. Ms. DeBerry demonstrated a lack of insight into CHRISTOPHER JR.'s injury. R.A. When questioned about her understanding of the injuries that CHRISTOPHER JR. had, Ms. DeBerry, stated that "I was told he kissed the iron" R.A. page 0363, lines 17-24, R.A. pages 0364 and 0365. *An explanation that was unreasonable when first proffered and remained so 2 years later.* R.A., page - 365, lines 1-19. Ms. DeBerry testified that she was the only parent present when

CHRISTPOHER JR. sustained a triangle burn to his left check consistent with the shape of an iron. R.A.

Ms. DeBerry denies physically abusing CHRISTOPHER JR. She claims that she did not see the manner in which CHRISTOPHER JR. actually sustained the burn to his face and claims that she learned the manner from AAMIYAH. R.A., page 0363-0364. AAMIYAH actually reported that she did not see how CHRISTOPHER JR. sustained the burn. R.A., page 0093, lines 21-27. Meaningful therapy "to remedy the conditions which resulted in the removal of the child must consist of more than a mere denial of all culpability or responsibility of past conduct." In re Sonia H., 576 N.Y.S.2d 165, 177 A.D.2d 575 (1991). "The requirement that a parent acknowledge and recognize abuse is essential for any meaningful change to occur." In re S.R., 600 N.W.2d 63, 65 (Iowa 1999). Ms. DeBerry has not engaged in meaningful therapy to address the cause of the injuries to CHRISTOPHER JR., to identify the precipitating factors that led to the abuse, and to develop a safety plan to avoid future occurrence. Therefore, clear and convincing evidence supported the finding that termination of parental rights is in the children's best interest.

The court properly terminated respondents' parental rights based upon the best interests of the children, as there is no presumption that the children's well-being will best be served by return to their natural parents (Matter of Star Leslie W., 63 N.Y.2d 136, 147–148, 481 N.Y.S.2d 26, 470 N.E.2d 824).

3. CLEAR AND CONVINCING EVIDENCE SUPPORTS FINDINGS OF PARENTAL FAULT

In order to terminate parental rights, at least one of the enumerated factors under NRS 128.105(2) (a)-(f) must be proved. NRS 128.105. Here, there is substantial evidence to support termination of Ms. DeBerry's parental rights on the following grounds: neglect 128.105(b), unfitness NRS 128.105(c), failure of parental adjustment NRS 128.105(d), risk of serious physical injury to the child if returned to his parents NRS 128.105(e) and only token efforts to avoid neglect or unfitness or reduce the risk of harm if the child is returned to the parents NRS 128.105 (f)(2)(3) and (4).

A. Neglect[1] Was Proven In The Instant Matter As Well As Grounds Found By District Court

Ms. DeBerry neglected CHRISTOPHER JR. by failing to seek medical treatment for his injuries when she knew or should have known medical treatment was required. J.A. at 431. CHRISTOPHER JR. had a burn to the left side of his face. Ms. DeBerry has a court-substantiated petition for neglecting CHRISTOPHER JR.'S medical needs and Ms. DeBerry has not demonstrated *any* observable behavior change to remedy CHRISTOPHER JR. being a neglected

[1] NRS 128.014 in pertinent part defines a neglected child as 1) who lacks the proper parental care by reason of the fault or habits of his parent, guardian or custodian; 2) Whose parent or guardian or custodian neglects or refuses to provide proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health morals or well-being; 3) whose parent, guardian or custodian neglects or refuses to provides the special care made necessary by his physical or mental condition.

child. Id. at 431, 47. She has not even acknowledged that there were any signs that CHRISTOPHER JR. was in pain. Ms. DeBerry testified that she applied Neosporin to the second or third degree burn for a period of one week and then applied coco butter to the healed burn area for another week. According to Ms. DeBerry, the burn was completely healed by May 6, 2010. Therefore, there is clear and convincing evidence that CHRISTOPHER JR. was a neglected child. Accordingly, there was substantial evidence supporting the district court's conclusion that Petitioner proved neglect under NRS 128.105(2)(b) by clear and convincing evidence.

1. NRS 128.106(7)

NRS 128.106(7) applies to AAMIYAH because in determining neglect or unfitness, the court must consider if there is an "**unexplained injury** of a **sibling** of the child." NRS 128.106(7) (emphasis added). "When the warning flags from the storms of abuse and neglect are still flying and there is clear and present danger to children, the court must exercise its proper function in removing the other child from the home." Schenck v. United States, 249 U.S. 47(1919). "The state, under the scrutiny of the court, need not wait until a child's life is permanently and irretrievable impaired before acting." In re Nicole B., 703 A.2d 612, 618 (R.I. 1997) (internal citations omitted).

CHRISTOPHER JR. is AAMIYAH'S brother. AAMIYAH'S sibling suffered unexplained injuries. Id. Because the testimonial and documentary evidence is **uncontroverted** that CHRISTOPHER JR.'S **injuries are unexplained**, there is clear and convincing evidence that AAMIYAH was neglected. Therefore, there is not substantial evidence supporting the district court's conclusion "that Petitioner has not proved unfitness under NRS 128.106(7) by clear and convincing evidence." Id. at 447.

B. Unfitness

NRS128.018 defines unfit parent as "any parent of a child who, by reason of his fault or habit or conduct towards the child or other persons, fails to provide such child with proper care, guidance, and support."

1. NRS 128.106 (2)

In determining unfitness of a parent, NRS 128.106 provides conduct of the parents that diminish suitability. NRS 128.106 (2) provides the district court **shall consider** if the parent engages in **conduct** toward a child of a **physically cruel** or **abusive nature**. NRS 128.106(2) (emphasis added).

A one year old child receiving a second or third degree burn to the left side of his face is cruel and abusive. In such cases, "the injuries speak for themselves...and permit an inference of abuse to be drawn from of the child's age and that his condition is such as, in the ordinary course of things, does not happen if the parents, who have the responsibility for, and the control of the infant, are

protective and nonabusive." In re Tashyne L., 384 N.Y.S.2d 472, 53 A.D.2d 629 (1976).

The medical impression for CHRISTOPHER JR.'S injuries was for "non-accidental trauma." The Court found that The Ms. DeBerry physically abused CHRISTOPHER JR. causing his abusive injury. The medical testimony was consistent with an iron being held to CHRISTOPHER JR.'s in order to create the second or third degree burn. R.A., pages 0106-0107. The injury was physically abusive or physically cruel.

The Ms. DeBerry neglected CHRISTOPHER JR. by failing to seek timely medical care for his injuries. R.A., pages 0107-0108.

Therefore, substantial evidence does support the district court's conclusion that Ms. DeBerry was an unfit parent.

C. Failure of Parental Adjustment

Failure of parental adjustment occurs when a parent is unable, within a reasonable a time, to correct the conduct that led to the child being placed outside the home. NRS 128.0126. Failure of parental adjustment is established when a parent fails to comply with a case plan to reunite the family within six months after the child has been placed outside the home. D.R.H., 120 Nev. at 428.

1. There Was Not Substantial Case Plan Compliance and Therefore Token Efforts.

The objective of Ms. DeBerry's case plan that directly addresses CHRISTOPHER JR.'S physical abuse required her to 1) address the cause of

CHRISTOPHER JR.'S injury; 2) identify the precipitating factors that led to CHRISTOPHER JR.'S physical abuse; and 3) develop a safety plan to avoid future occurrence.

At one year of age, CHRISTOPHER JR. did not cause his own injuries. Someone inflicted these injuries on CHRISTOPHER JR. and Ms. DeBerry testified that she was the only adult in the home at the time that CHRISTOPHER JR. sustained the burn. CHRISTOPHER JR.'s injuries are the result of non-accidental trauma i.e. physical abuse. R.A., page 0106, lines 24-28, R.A. page 0107, lines 1-7.

In such cases, "the injuries speak for themselves...and permit an inference of abuse to be drawn from of the child's age and that his condition is such as, in the ordinary course of things, does not happen if the parents, who have the responsibility for, and the control of the infant, are protective and nonabusive." In re Tashyne L., 384 N.Y.S.2d 472.

A parent must "acknowledge and recognize abuse...for any meaningful change to occur." In re S.R., 600 N.W.2d 63 at 65. Meaningful therapy "to remedy the conditions which resulted in the removal of the child must consist of more than a mere denial of all culpability or responsibility of past conduct." In re Sonia H., 576 N.Y.S.2d 165.

Despite medical evidence to the contrary, Ms. DeBerry continues to profess that CHRISTOPHER JR. accidentally burned his own face from an iron falling on

him. An apparent incident which no one actually witnessed and which is inconsistent with the medical opinion of an expert in child abuse. Ms. DeBerry has not offered another possible cause of CHRISTOPHER JR.'S injury.

Fifty-eight (58) months after CHRISTOPHER JR.'S abuse, Ms. DeBerry has not "identified the factors which led to CHRISTOPHER JR.'S abuse." Id. at 200, 47. Ms. DeBerry has not identified the triggers that led to CHRISTOPHER JR.'S abuse. Id. at 200, 114, 134. Ms. DeBerry has not identified the chronology that led to CHRISTOPHER JR.'S abuse. Ms. DeBerry has not developed a safety plan to prevent further abuse having failed to recognize that CHRISTOPHER JR. Ms. DeBerry has not completed a single part of the most important objective of her case plan. Id. at 43.

After engaging in individual therapy with two separate counselors, Ms. DeBerry did not make any progress in identifying the cause of CHRISTOPHER JR.'S injury, the triggers that led to his abuse, the precipitating factors that led to the abuse. All she did was stay entrenched in her denial of responsibility and accountability for causing CHRISTOPHER JR.'S injuries. Id. at 168.

It was uncontroverted that Ms. DeBerry failed to address the cause of CHRISTOPHER JR.'S injuries, the precipitating factors, her triggers, or the chronology that led up to CHRISTOPHER JR.'S abuse and Ms. Deberry's attempts to claim otherwise is disingenuous. Therefore, the District Court finding

of failure of parental adjustment and token efforts was supported by substantial evidence.

Additionally, pursuant to NRS 128.109(1)(b), Ms. DeBerry's failure to substantially comply with the terms and conditions of her case plan within six months of its filing is evidence of failure of parental adjustment. Therefore, the district court's conclusion that Ms. DeBerry failed to substantially comply with her case plan and that she only engaged in token efforts was supported by substantial evidence.

2. NRS 128.107(4)

NRS 128.107(4) examines whether additional services would be likely to bring about *lasting* parental adjustment enabling the return of the child to the parent within a *predictable* amount of time. (Emphasis added). "It is not enough to simply comply with a case plan if the lessons the case plan seeks to address are not learned." K.D.L., 118 Nev. 737 at 743. Fifty-eight (58) months after removal, Ms. DeBerry is in the **same** position she was in May 2010. She has not even begun to address CHRISTOPHER JR.'S physical abuse. There is nothing to show that additional services will bring about lasting parental adjustment in any amount of time. Her testimony remained consistent throughout the entirety of the case, she was the only adult in the home when the burn occurred, she did not see the events that led to the burn and she could only report what she claims her daughter said which was that CHRISTOPHER kissed the iron. That explanation

was found to lack credibility by a Hearing Master, to be inconsistent with a medical expert certified as an expert child abuse and by a District Court Judge on two separate occasions.

C. NRS 128. 105(e)

NRS 128.105(e) provides a parental fault ground where the parent's behavior demonstrates a "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." Clear and convincing evidence supports a serious risk of physical injury to the child if returned to parents. The unresolved risk and safety factors are at the heart of this case. "Without the manner of abuse being disclosed, the Department of Family Services cannot ensure safety, permanency or reduce the risk of re-offense." CHRISTOPHER JR.'S abusive injury remain unexplained and the identity of the perpetrator unknown, the risk of serious physical injury to CHRISTOPHER JR. if reunified has not been quelled. Id. at 47, 200.

NRS 128.105 (e) exists especially for CHRISTOPHER JR.'S circumstances. NRS 128.105(e) exists to protect a child who suffers abusive injuries where there are no credible explanations for those injuries and no identified perpetrator; therefore no ability to safely plan for the child's return to the parents. Though, this is a case of first impression in Nevada, there are several jurisdictions that terminate parental rights where there is a risk of harm if the child is returned to his/her parents because of the impossibility to plan for safety

where the child suffered abusive injuries, the parents' explanation is medically consistent, and the child was in the care, custody, and control of his/her parents at the time the abuse occurred.

In Graham v. State, 992 P.2d 255, 260 (Nev. 2000), the Supreme Court of Nevada recognized that responsibility for abuse and injury may be imputed onto a minor's caretaker if: the minor sustains injuries while in the caretaker's exclusive control; the caretaker cannot provide a plausible explanation for the abuse; and there is evidence that the injuries sustained were not accidental. The Supreme Court of Nevada denied the defendant's appeal of a first-degree murder conviction and concluded that first-degree murder charges were appropriate as the defendant was responsible for the child abuse leading to the death of an infant because **the infant sustained injuries while in the control of the defendant and defendant could not give a plausible explanation for the injuries the infant sustained while in the defendant's care**. Id. at 258 (emphasis added).

In J.V., 526 S.E.2d 386, a case remarkably similar to the case at bar, the Georgia Court of Appeals upheld termination of parental rights where clear and convincing evidence showed that the infant's injuries were the result of abuse and that the abuse occurred while he was in the exclusive care of his family even though the family was unable to explain the cause of the infant's injuries.

In J.V., during a routine examination, a nurse noticed that the 4 month old infant had bruises on his back and arm. Id. at 388. The infant's mother was

unable to give a satisfactory explanation of how the marks occurred. Id. J.V. had at least thirteen fractures. Id. at 391. J.V.'s left elbow was fractured, both bones in his left forearm were completely broken, and his right forearm had an incomplete fracture. J.V.'s right fibula, femur, and shinbone were fractured. His left leg was fractured through the upper shinbone and the fibula. Id. at 389. J.V.'s radius and ulna (wrists) were broken. Id. J.V.'s left tibia and fibula were broken. Id. The doctor said the fractures were the result of "trauma, and he could find no other explanation for them other than child abuse." Id. The fractures were of different ages. Id. The doctor also excluded osteogenesis imperfecta (OI) that was raised by the parents. Id.

Based on the parents "complete denial of responsibility for J.V.'s fractures and their failure to provide any plan for protecting him from injury, the judge further found that J.V.'s deprivation was likely to continue in the future." Id.

J.V.'s caseworker sought termination of parental rights because "there had been no acceptable explanation for J.V.'s very serious injuries and the only way to ensure J.V.'s safety was to place him in an adoptive home." Id. at 390

J.V.'s parents were provided with a case plan for reunification. The case plan required parenting classes, maintaining contact with the department, and paying child support. Id. "The parents complied with the plan; however, as the [department] caseworker testified, **there was no way to develop a reunification plan which addressed the problem that caused the baby's injuries because**

the parent's never explained how the injuries could have occurred." Id. at 390.

The parents' clinical psychologist testified, "[B]ased on what the mother told her and how the mother presented herself, she concluded that the mother 'did not have anything to do with the injuries.'" Id. at 391. This clinical psychologist at least admitted that her assessment would change when she learned that the injuries could not have happened in the absence of abuse and that the abuse would have come from either or both parents.

The juvenile court correctly entered an order terminating parental rights to J.V. because the infant had **suffered extreme physical abuse while in the care of the mother, father, or material grandmother, all of whom denied inflicting the injuries on the infant and all of whom failed to provide valid explanations for the injuries.** Id. (emphasis added). "The court further found that the [parents] refused to acknowledge that J.V. needed protection from future injury and failed to provide a plan for such protection and that **if he were returned to them, he would go back to the very same environment in which he was injured. Accordingly, the court found that it was in J.V.'s best interest that the rights of his parents be terminated.**" Id. at 391 (emphasis added)

Like J.V., CHRISTOPHER JR., had an unexplained burn to his face. Like J.V., the medical impression for CHRISTOPHER JR.'S injury was for "non-accidental trauma."

Ms. Deberry continues to blame CHRISTOPHER JR.'s injury on an accident which was unwitnessed and contrary to medical evidence. Id. at 344. Ms. DeBerry, like J.V.'s parents, denies *any* responsibility for CHRISTOPHER JR.'s injury. Ms. DeBerry denies physically abusing CHRISTOPHER JR.

The court in J.V., correctly found that clear and convincing evidence supported termination of parental rights where the "child suffered abuse while in the care of his parents, that the abuse resulted from a lack of parental care and control, and without identifying the source of the injuries, the abuse was not remedied. J.V. at 393, 394.

Like J.V., if CHRISTOPHER JR. were returned to his parents, he would **return to the very same environment in which he was injured**; thereby, creating an unreasonable risk of physical harm. Therefore, there is clear and convincing evidence to support termination of parental rights based on risk of harm to the child if reunified and the district court's finding is not supported by substantial evidence.

The Supreme Court of New York, Appellate Division, Third Department affirmed the Family Court's decision to terminate a mother's parental rights because she was unable to provide her children with a safe home based on her inability to recognize that she was responsible for the abuse her children endured while in her care. In re Jesus II, 672 N.Y.S.2d 485, 249 A.D.2d 846, 84 (1998). The natural mother had **an adjudication that [she] was responsible for the**

abuse of her daughter by failing to provide any explanation for the injuries inflicted on her daughter while the daughter was in her care. Id. at 847 (emphasis added). The court terminated mother's parental rights because she "failed to plan for the children's future and **took no meaningful steps towards alleviating the conditions that lead to the children's initial removal from her custody**." Id. (emphasis added). The appellate court upheld the termination of mother's parental rights.

Ms. DeBerry has a court-substantiation for physical abuse causing CHRISTOPHER JR.'S injuries and for medical neglect for failing to seek medical care when she knew or should have known he was injured. R.A., pages 0105-0112 and R.A., pages 0144-0145. Like the mother in Jesus II, Ms. DeBerry continued to deny responsibility for the abuse CHRISTOPHER JR. suffered and did not make any meaningful steps in therapy to remedy the conditions that led to CHRISTOPHER JR.'S removal. Therefore, there is an unreasonable risk of harm to CHRISTOPHER JR. if reunified with Ms. DeBerry.

In Matter of Taylor B., 201 W. Va. 60, 491 S.E.2d 607 (1997), the district court denied termination of parental rights where a child suffered injuries consistent with shaken baby syndrome while in the exclusive care of his parents, the parents did not have a medically consistent explanation for the abuse, and didn't recognize that abuse occurred. The Supreme Court of West Virginia reversed the district court and terminated parental rights. Id. at 610. The West

Virginia Supreme Court held parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser. (See also In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993); In re Sonia H., 177 576 N.Y.S.2d 165; holding termination of parental rights is proper where the child suffered physical abuse, the parents' explanations were not consistent with the medical evidence, and the parents refused to acknowledge responsibility for the abuse, therefore, there was an inability to mitigate the safety concerns due to lack of meaningful steps to remedy situation that brought the child into care).

IV. Ms. DeBerry's Fifth Amendment Privilege Was Not Violated and Her Refusal To Explain What Happened to Christopher Was Not the Only Basis For The Termination of Her Parental Rights.

In *Meyer v. Second Judicial District Court*, 95 Nev. 176, 180-181, 591 P.2d 259, 262-263 (1979), the Nevada Supreme Court analyzed the invocation of the Fifth Amendment and the protections identified therein against self-incrimination in the context of a civil case. The Court stated "In the case at hand, the questions which petitioner has refused to answer go to the heart of the major issues before the court; her fitness, and the fitness of the children's father and his present wife, to serve as custodial parents of the couple's three minor children.

Similarly, the questions asked of Ms. DeBerry were directly related to her parental fitness and ability to provide for the care of the children. The therapeutic sessions Ms. DeBerry participated in were of minimal assistance without Ms. DeBerry providing truthful information about the injury CHRISTOPHER JR. sustained while solely in her care. There was no metaphorical finding by the court of physical injury as expressed by Ms. Deberry in her brief. The Hearing Master and District Court clearly found that she physically injured CHRISTOPHER and she did not provide a credible explanation to the court or in therapy. The District Court did not terminate her rights solely based on her failure to admit criminal conduct, rather it was based upon the totality of the evidence and the ineffectiveness of Ms. DeBerry in addressing the circumstances which led to the children's placement in foster care.

As the Supreme Court of Minnesota observed when faced with a similar refusal by a mother to answer questions, on Fifth Amendment grounds, which related directly to her alleged misconduct as a wife and mother; "a person ought not to be permitted to divulge only that part of the story favorable to his or her position and thus present a distorted and misleading picture of what has really happened." Christenson v. Christenson, supra, 281 Minn. 507, 162 N.W.2d 194, 202 ((1968)).

Sister jurisdictions have also considered, although a parent may plead the Fifth Amendment in juvenile protection proceedings, if a parent does so, "the trial

court may infer that a truthful answer would be harmful." *In the Interest of M.V.*, 253 Ga.App. 669, 672, 560 S.E.2d 125 (2002). See also *In the Interest of S.B.*, 242 Ga.App. 184, 186(1), 528 S.E.2d 278 (2000).

In the instant case, Ms. DeBerry chose to testify and provide the district court with all of the possible changes she had made since the children's removal. She also chose to maintain her version of CHRISTOPHER JR.'s injury which had been determined to be medically inconsistent for a period in excess of five years. Dr. Mehta testified during the second evidentiary hearing as to the injury sustained by CHRISTOPHER and the medically inconsistent nature of Ms. Deberry's explanation. The cross-examination by Ms. DeBerry's counsel was ineffective in challenging Dr. Mehta's expert opinion and even the production of the medical documentation from the doctor in Louisiana was insufficient to assist Ms. Deberry's position. The District Court found Dr. Mehta's testimony compelling and her credential's to form a medical opinion overwhelming. (AA, VI, pg. 1058-1064).

CONCLUSION

In accordance with the arguments referenced above, the Clark County District Attorney's Office and the Clark County Department of Family Services respectfully requests this Honorable Court to issue an order affirming the district court's decision to terminate the parental rights of CHRISTOPHER and

AAMIYAH's parents.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionately spaced typeface using Microsoft Word 2000 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 14 points or more and contains 7,035 words; and does not exceed 30 pages.

3. Finally, 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 NRAP 28(e)(1), which required every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 12th day of April, 2016.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify and affirm that I mailed and electronically mailed a copy of the foregoing RESPONDENT'S ANSWERING BRIEF to the attorneys of record listed below on 11th day of April 2016.

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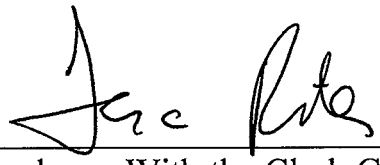

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