

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
3

4 MARIELA EDITH LOPEZ,
5 Appellant,

6 vs.

7 MANUEL DE JESUS SERBELLON
8 PORTILLO,
Respondent.

Supreme Court No. 79549
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District Court Case No. Elizabeth A. Brown
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9 **APPELLANT'S OPENING BRIEF**
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DATED this 3rd day of January 2020.


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1 **JURISDICTIONAL STATEMENT**

2 The District Court's Custody Decree denying special findings for special
3 immigrant juvenile status is a final judgment and is thus appealable under NRAP
4 3A(b)(1).
5

6 **ISSUE PRESENTED FOR REVIEW**

7 Whether reunification between a father and son is viable for purposes of the
8 special immigrant juvenile (SIJ) statutes, 8 U.S.C. § 1101(a)(27)(J), where the
9 District Court found that the father had abandoned the son under Nevada law.
10

11 **STATEMENT OF THE CASE**

12 Special immigrant juvenile (SIJ) status is a form of immigration relief
13 designed to protect minors from (a) further abuse or mistreatment at the hand of a
14 parent; and (b) from being returned to a place where the minor is likely to suffer
15 from abuse or mistreatment. To qualify for SIJ, applicants first need to obtain
16 special findings in state court. Specifically, a state court must find that the juvenile
17 is a resident alien under twenty-one years of age, is unmarried, is dependent on a
18 juvenile court located in the United States, and that it would not be in the juvenile's
19 best interest to be returned to the juvenile's or parent's previous country.
20
21 Additionally – and most importantly for this appeal – the state court must find that
22 reunification with one or both of the juvenile's parents is not viable due to abuse,
23 neglect, abandonment, or a similar basis found under state law. 8 U.S.C. §
24 1101(a)(27)(J)(i).
25

1 The twelve-year-old child at issue in this case, KML, was born in the country
2 of El Salvador in 2007. KML moved from El Salvador to live with his mother in
3 Nevada in 2017. KML had been living with his maternal grandmother in El
4 Salvador before moving to the United States. He moved to the United States because
5 his grandmother could no longer care for him due to a heart illness and because he
6 was being threatened by gangs.
7

8 KML's mother, Mariela Edith Lopez, sought sole legal and physical custody
9 over him. In addition, Mariela sought special findings to support SIJ as part of the
10 custody decree. The District Court granted Mariela sole legal and physical custody
11 and made findings that KML's father, the Defendant in this case, had abandoned
12 him as defined under NRS 128.014. The District Court, however, found that
13 reunification between KML and his father was nevertheless viable. Specifically, the
14 District Court found, "[t]hat this Court is unable to find that reunification is not
15 viable due to abandonment because this Court is unable to predict whether the father
16 will seek to reunify with the child sometime in the future." *See* Custody Decree, ¶
17 10, attached hereto as **Exhibit A**.
18

19 Because the District Court found that reunification between KML and
20 Defendant is viable, KML does not have the requisite special findings to be eligible
21 for SIJ. His mother, Mariela, appeals the District Court's finding under the
22 reunification prong of the SIJ statutes.
23

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STATEMENT OF FACTS

Mariela filed a complaint for custody in the District Court on February 8, 2018. Default was entered against Defendant on May 2, 2019, after Defendant failed to answer the complaint. Defendant lives in El Salvador. Before proceeding with an evidentiary hearing in the case, the Court required that Defendant be personally served with a copy of the complaint but with English and Spanish. Mariela did so.

The District Court held an evidentiary hearing on June 12, 2019. Mariela testified to the following facts under oath. KML, age 12, was born in the country of El Salvador in 2007. KML moved from El Salvador to California in 2017. (See transcript of June 12, 2019 Evidentiary Hearing attached hereto as **Exhibit B**, hereafter “TR” 6:8-9). KML had been living with his maternal grandmother in El Salvador before moving to the United States. TR 6:12-16. He moved to the United States because his grandmother could no longer care for him due to a heart illness and because he was being threatened by gangs. TR 6:14-24.

Defendant Jesus De Manuel Portillo knows about KML but has never met KML. TR 9:7-12. Mariela informed Defendant that KML had been born shortly after KML’s birth. Defendant has never met KML. Defendant has never taken care of KML nor has Defendant ever visited KML. Neither has Defendant ever given KML birthday gifts, provided him with food, clothing, or shelter, or attempted to be a part of KML’s life in any way. TR 9:21-10:19. In short, Defendant has never done anything a father would be expected to do for KML.

1 The District Court questioned Mariela as to whether Defendant could contact
2 KML if he so desired. He could. After questioning and discussion with Mariela's
3 counsel the Court made the following finding:

4 Okay. All right. The Court finds that Dad knew about the
5 child, and has not made any effort to support or have
6 contact with the child, so the Court is finding that there is
7 an abandonment by Dad of this minor child. That presents
8 also the basis for – it's appropriate to grant Mom's request
9 for sole legal custody, and sole physical custody....

10 TR14:9-15.

11 Next, the District Court found that it was in KML's best interests to reside
12 with Mariela. TR15:11-13.

13 Finally, the District Court found that despite Defendant having abandoned
14 KML, reunification between KML and Defendant was nevertheless viable.
15 TR15:14-16:10. The District Court reasoned that sometimes parents and children
16 reunify after the parent has been out of the children's lives for several years.
17 TR15:19-24. The District Court observed, "[a]nd so it [reunification] is a
18 possibility." TR15:23-24. Finally, the District Court reasoned that there was no
19 evidence that reunification was non-viable because the Defendant is not deceased
20 and "there is nothing that would make it impossible." TR 16:3-6.

21 SUMMARY OF ARGUMENT

22 First, the District Court misinterpreted the SIJ statutes to require proof that
23 reunification with the Defendant is impossible instead of, as the SIJ statutes require,
24 "not viable." The plain meaning of "not viable" under the SIJ statutes is lacking
25

1 common sense practical workability. Whether reunification with a parent is viable
2 under the SIJ statutes should be determined viewing the juvenile's relationship with
3 the parent as a whole and taking into consideration conditions in the juvenile's home
4 country. In this case the Defendant-father has never met the juvenile at issue, KML,
5 never cared for him, provided him food, shelter, nor attempted to be in KML's life
6 in any way. Defendant abandoned KML under Nevada law, as the District Court
7 found. Plainly, due to Defendant's abandonment of KML their reunification is not
8 viable.
9

10 Second, the District Court incorrectly applied a heightened evidentiary standard
11 to the reunification prong. The District Court required Mariela to remove all doubt
12 and show that it was impossible for KML and Defendant to reunify. But the
13 generally applicable civil standard of "preponderance of the evidence" should have
14 applied to the reunification prong. Mariela amply satisfied her burden under that
15 standard. Indeed, the Court accepted her testimony that Defendant abandoned KML.
16

17 Third, the District Court interpreted the SIJ statutes in a manner that leads to
18 absurd results, in violation of well-settled Nevada precedent. Congress passed the
19 SIJ statutes to protect juveniles from being forced to return to parents who had
20 abused, neglected, or abandoned them. But the District Court interpreted the SIJ
21 statute to mean that reunification between a juvenile and the parent who abandoned
22 him may nevertheless be viable if the juvenile cannot show that such reunification is
23 impossible. The District Court's misinterpretation should be reversed and its finding
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1 on the reunification prong should be overturned.

2 **STANDARD OF REVIEW**

3 On appeal the Supreme Court reviews questions of law *de novo*. *See, e.g.,*
4 *Davis v. Beling*, 128 Nev. Adv. Op. 28, 278 P.3d 501, 510 (Nev. 2012). A fact-
5 finder's fact-based conclusions of law are entitled to deference and will not be
6 disturbed if supported by substantial evidence. *Id.* (citing *Manwill v. Clark County*,
7 123 Nev. 238, 241, 162 P.3d 876, 879 (Nev. 2007)).

9 **ARGUMENT**

10 **A. Special Immigrant Juvenile Status and Predicate Factual Findings.**

11 Under 8 U.S.C. § 1101(a)(27)(J), an undocumented minor in the United States
12 may acquire lawful permanent residency as a special immigrant juvenile (SIJ). *See*
13 *also* 8 C.F.R. § 204.11 (2018). To obtain SIJ status the applicant must first obtain
14 predicate factual findings from a state court. *Amaya v. Guerrero Rivera*, 135 Nev.
15 Adv. Op. 27, 444 P.3d 450, 451 (Nev. 2019). Second, after the applicant obtains the
16 predicate factual findings from the state court the applicant may petition the United
17 States Citizenship and Immigration Services (USCIS) for SIJ status. *Id.* The state
18 court does not make the determination as to whether the applicant qualifies for SIJ
19 status, but provides the evidentiary record for USCIS to review in ruling on
20 applicant's SIJ application. *Id.* (citing *Benitez v. Doe*, 193 A.3d 134, 138-39 (D.C.
21 2018)).
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1 To be eligible for SIJ status a juvenile must obtain the following factual
2 findings from a state court: (1) the juvenile is dependent on a juvenile court, the
3 juvenile has been placed under the custody of a state agency or department, or the
4 juvenile has been placed under the custody of an individual appointed by the court
5 (dependency or custody prong); (2) due to abandonment, abuse, neglect, or some
6 comparable basis under state law, the juvenile’s reunification with one or both
7 parents is not viable (reunification prong); and (3) it is not in the juvenile’s best
8 interest to be returned to the country of the juvenile’s origin (best interest prong).
9 *Amaya v. Guerrero Rivera*, 135 Nev. Adv. Op. 27, 444 P.3d 450, 452 (Nev. 2019).
10 A custody order satisfies the dependency prong. *Id.* To satisfy the reunification
11 prong requires only that the applicant demonstrate that reunification is not viable
12 with one parent, not both parents. *Id.*

15 Congress in 1990 amended the Immigration and Nationality Act to provide
16 protections “abused, neglected, or abandoned children who, with their families,
17 illegally entered the United States.” *H.S.P. v. J.K.*, 223 N.J. 196, 209, 121 A.3d 849,
18 857 (N.J. 2015)(quoting *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir.
19 2003)). The SIJ provisions have been amended several times, most recently in 2008
20 when Congress enacted the Trafficking Victims Protection Reauthorization Act
21 (TVPRA). The TVPRA amendments were intended to expand SIJS classification to
22 cover minor victims of human trafficking. *H.S.P.*, 121 A.3d at 857. In addition, the
23 TVPRA amendments eliminated the requirement that to be eligible for SIJS the
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1 minor had to be eligible for long-term foster care. *Id.* (citing 8 U.S.C. §
2 1101(a)(27)(J)(i)). Further, the TVPRA added language requiring that the minor not
3 be able to reunify with “1 or both” parents because of “abuse, neglect, abandonment,
4 or a similar basis under state law.” *Id.* As the Nevada Supreme Court has made
5 clear, a minor petitioning for special findings to support SIJ only needs to show that
6 reunification is not viable with one parent. *Amaya v. Guerrero Rivera*, 135 Nev.
7 Adv. Op. 27, 444 P.3d 450, 451 (2019).

9 Accordingly, after the 2008 TVPRA amendments, a “special immigrant
10 juvenile” is a minor:

11 (i) who has been declared dependent on a juvenile court
12 located in the United States or whom such a court has
13 legally committed to, or placed under the custody of, an
14 agency or department of a State, or an individual or entity
15 appointed by a State or juvenile court located in the United
16 States, and whose reunification with 1 or both of the
immigrant’s parents is not viable due to abuse, neglect,
abandonment, or a similar basis found under State law[.]

17 (ii) for whom it has been determined in administrative or
18 judicial proceedings that it would not be in the alien's best
19 interest to be returned to the alien’s or parent’s previous
country of nationality or country of last habitual
residence....

20 8 U.S.C. § 1101(a)(27)(J).

21 The state court, in making predicate factual findings for SIJ is not rendering
22 an immigration decision. *See Eddie E. v. Superior Court*, 234 Cal. App. 4th 329, 332
23 (Cal. 2015). Instead, the role of the state court is simply “to identify abused,
24 neglected or abandoned alien children under its jurisdiction who cannot reunify with
25

1 a parent or be safely returned in their best interests to their home country.” *Id.*

2 Consequently, the state court’s findings, by themselves, do not confer any
3 immigration status upon the minor. Ultimately, the Secretary of Homeland Security
4 must consent to the grant of SIJS and the Secretary’s decision is discretionary.

5 *Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 724 (N.Y. 2013).

6
7 Importantly, when trial courts make special findings in support of SIJ they are
8 not terminating any parental rights. *Romero v. Perez*, 463 Md. 182, 204, 205 A.3d
9 903, 916 (Md. Ct. App. 2019). Instead, trial courts are to consider the practicability
10 of a forced reunification between a parent and a minor. *Id.* This is not a merely
11 academic inquiry; the juveniles at issue are undocumented and face the very real
12 prospect of being returned to their home country.

13
14 **B. The District Court erred in interpreting the reunification prong to mean**
15 **that reunification was impossible instead of “not viable” as the SIJ**
statutes require.

16 The District Court erred in finding that reunification between Defendant and
17 KML was viable. The District Court based its finding on the remote possibility that
18 Defendant may, at some point, attempt to forge a relationship with his son. The
19 uncontroverted testimony at the evidentiary hearing was that Defendant, despite
20 being informed of his son’s birth, never cared nor provided for his son nor attempted
21 to be in his son’s life in any way. The District Court accepted Mariela’s testimony
22 on these points and found that Defendant had abandoned KML as defined under
23 NRS 128.014.
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1 The District Court’s ruling that reunification is viable between Defendant and
2 KML contradicts the plain language of the SIJ statute. In effect, the District Court
3 required Mariela to prove that reunification was impossible instead of “not viable,”
4 as the SIJ statutes require. In *J.U. v. J.C.P.C.*, 176 A.3d 136, 138 (D.C. 2018), the
5 Court of Appeals for the District of Columbia overturned the trial court’s denial of
6 SIJ predicate findings for this very reason. There, a mother seeking the predicate SIJ
7 findings alleged that her child’s reunification with a parent was not viable because
8 the father had abandoned the child. 176 A.3d at 140. The trial court but declined to
9 find that reunification was not viable due to abandonment or neglect. *Id.*

11 The D.C. Court of Appeals, in reversing the trial court, reasoned that
12 determining whether reunification is viable calls for a “realistic look at the facts on
13 the ground in the country of origin and a consideration of the entire history of the
14 relationship between the minor and the parent in the foreign country.” *Id.* Further,
15 the D.C. Court of Appeals noted that the ordinary meaning of the word “viable” is
16 “common-sense practical workability.” *Id.* (citing definitions of “viable” from
17 *Merriam–Webster New International Dictionary* (3d ed. 2002); *American Heritage*
18 *Dictionary of the English Language* (3d ed. 1992); *Random House Dictionary of the*
19 *English Language* (21st ed. 1987).
20
21

22 In overturning the trial court’s finding on the reunification prong, the D.C.
23 Court of Appeals’ reasoning fits this case like a glove.

24 At bottom, what is at issue here is not “reunification” with
25 the father but rather initial “unification” itself. We must

1 conclude that sending a seventeen-year-old boy back to
2 the care of a father who has never fulfilled any day-to-day
3 role in the support, care, and supervision during the boy's
4 lifetime cannot be a "reunification" that is "viable," that is,
5 "practicable; workable," and such a conclusion is due to
6 "abandonment" evidenced by the record here in its relation
7 to the viability of reunification. Given the flexibility of the
8 concept depending on the context for which the
9 determination is being made, here abandonment is judged
10 by the lifelong history of C.J.P.U. with his father and the
11 bearing of that history on the prospects if C.J.P.U. were to
12 be returned to the immediate custody of the father in the
13 home country.

14 176 A.3d 136, 143 (D.C. 2018).

15 As in *J.U.* reunification between Defendant and KML makes no common
16 sense nor is it practical or workable. The uncontroverted evidence in the record is
17 that Defendant has never cared for KML, provided him food or shelter, or took any
18 interest in his son's life whatsoever. If KML were to be returned to El Salvador
19 there is absolutely no reason to believe Defendant would seek to care for KML or
20 even attempt to be in KML's life.

21 The plain language of the term "viable" in the SIJ statute shows that Congress
22 intended that the possibility of reunification be much more than theoretical. Instead,
23 reunification is not viable where it belies common sense, or is not practicable or
24 workable. That is exactly the case here. The District Court's finding that
25 reunification was viable should be overturned.

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1 **C. The District Court erred in applying a heightened standard of proof to**
2 **the reunification prong.**

3 Without expressly saying so, the District Court required Mariela to prove that
4 reunification was not viable by meeting a heightened evidentiary standard instead of
5 the preponderance of the evidence standard. In *Romero v. Perez*, 463 Md. 182, 204,
6 205 A.3d 903, 916 (Md. Ct. App. 2019), the Maryland Court of Appeals overturned
7 the trial court's denial of the reunification prong because the trial court applied the
8 clear and convincing standard. In that case, using a preponderance standard, the trial
9 court determined that the minor seeking SIJ special findings had been neglected by
10 his father in Guatemala. But the trial court applied the clear and convincing standard
11 to the reunification prong and found that the evidence fell short of this heightened
12 standard. In reversing the trial court finding as to reunification, the Court of Appeals
13 of Maryland first clarified that the preponderance of the evidence standard applied
14 to SIJ predicate findings because they are subject to the same standard generally
15 applicable in civil actions. *Romero*, 463 Md. at 197, 205 A.3d at 916. The *Romero*
16 Court held that reunification is not viable because the trial court concluded the
17 minor's parent in his native country had neglected him. *Id.* at 205.

18 Here, the District Court required Mariela to eliminate all doubt as to whether
19 Defendant may at some point seek to form a relationship with KML. In effect, the
20 District Court imposed a heightened evidentiary standard on Mariela instead of the
21 generally applicable standard in civil matters such as this – the preponderance of the
22 evidence standard. As in *Romero*, the District Court's imposition of a heightened
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1 evidentiary standard for the reunification prong constitutes reversible error and
2 should be overturned.

3 **D. In finding that Defendant had abandoned KML but that their**
4 **reunification was nonetheless viable the District Court interpreted the**
5 **SIJ statutes in a manner that leads to absurd results.**

6 The District Court’s contradictory findings that reunification between KML
7 and Defendant is viable despite also finding that Defendant abandoned KML should
8 be overturned. The SIJ statute speaks of a causal relationship between reunification
9 and abandonment. The SIJ statutes define a special immigrant juvenile as a juvenile
10 “whose reunification with 1 or both of the immigrant’s parents is not viable *due to*
11 abuse, neglect, abandonment, or a similar basis found under State law.” 8 U.S.C. §
12 1101(a)(27)(J)(i)(emphasis supplied). Consequently, by definition under the SIJ
13 statutory scheme, where a trial court finds that a parent has abandoned the child
14 under the relevant state law, reunification between that parent and child
15 categorically is not viable.

16 Such an interpretation of the SIJ statute is completely contrary to Congress’
17 intent to protect the children at issue. The Supreme Court of Nevada has made clear
18 that Nevada courts should interpret statutes to avoid absurd results. *J.E. Dunn NW.,*
19 *Inc. v. Corus Const. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (Nev.
20 2011)(where statute is ambiguous, Court examines the legislative history and
21 interprets statute in light of policy and spirit of law and interpretation should avoid
22 absurd results).

1 Congress in 1990 amended the Immigration and Nationality Act to provide
2 protections “abused, neglected, or abandoned children who, with their families,
3 illegally entered the United States.” *H.S.P. v. J.K.*, 223 N.J. 196, 209, 121 A.3d 849,
4 857 (N.J. 2015)(quoting *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir.
5 2003)). The intent behind SIJS is to protect minors from (a) further abuse or
6 mistreatment at the hand of a parent; and (b) from being returned to a place where
7 the minor is likely to suffer from abuse or mistreatment. *Marcelina M.-G. v. Israel*
8 *S.*, 973 N.Y.S.2d 714, 724 (N.Y. 2013)(“...[T]he very reason for the existence of
9 special immigrant juvenile status is to protect the applicant from further abuse or
10 maltreatment by preventing him or her from being returned to a place where he or
11 she is likely to suffer further abuse or neglect”).
12

13
14 Here, interpreting the SIJ statute – a statute Congress intended to protect
15 abandoned children such as KML – to mean that reunification may be viable with
16 the very parent the District Court found abandoned KML cannot be what Congress
17 intended at all. The District Court’s interpretation of the reunification prong of the
18 SIJ statutes leads to absurd results. This Court should reverse the District Court’s
19 finding on the reunification prong.
20

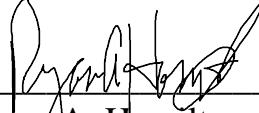
21 CONCLUSION

22 For all of the foregoing reasons, the Court should reverse the District Court’s
23 denial of predicate findings in support of SIJ. Specifically, the Court should overturn
24 the District Court’s finding and hold that reunification between Defendant and KML
25

1 is not viable.

2 DATED this 3rd day of January, 2020.

3 HAMILTON LAW

4 

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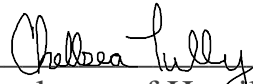
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25(b), I hereby certify that on the 3rd day of January 2020,
3 I caused to be hand delivered a true and correct copy of the foregoing document to
4 the Ward and this document was electronically filed with the Nevada Supreme court
5 e-filing system.
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10 An Employee of Hamilton Law, LLC
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