IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

# APPEALS COURT

[redacted] COUNTY NO. [redacted]

[redacted]

ADOPTION OF [redacted]

ON APPEAL FROM AN ADJUDICATION OF
THE [redacted] JUVENILE COURT

## REPLY BRIEF FOR THE APPELLANT FATHER

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**I. The wrongful incarceration of Father for over twenty months prior to, during and after the termination trial – due to State malfeasance – was structural error or, at minimum, a severe deprivation of due process which resulted in tremendous prejudice.**

Child properly states that "structural errors are fundamental defects in a trial." Commonwealth v. Hampton, 457 Mass. 152, 163 (2010). They are errors that render a trial "fundamentally unfair." Id. Father was incarcerated for well over a year prior to and during the most important judicial proceeding of Father's life, that in which his parental rights were at stake. Father was wrongfully incarcerated, due solely to State malfeasance.[1] (See Father's Brief ("FB"), pp. 13-14, 16-17). This deprivation of Father's liberty constitutes a fundamental defect in the termination trial.

Clearly, the Juvenile Court did not and could not know at the time of the [redacted] trial that Father's criminal sentence would be vacated seven months later, in [redacted]. (A.219). But the fact that the sentence was vacated means that *Father should not have*

[1] Annie Dookhan was an employee of a Department of Public Health laboratory. (A.218).

*been incarcerated from* [redacted] *through and after the termination trial in* [redacted]. The impact on Father's ability to access services, visit with his Child, and make plans to provide a home for Child were all severely impacted by his incarceration. (See FB, pp. 17-19). This is a fundamental defect in the termination trial.

Child relies on the Court's assertion that "the health and safety of the child have been of paramount concern..." to bolster Child's argument that Father's incarceration was not a significant basis for the Court's termination decision. (CH, pp. 41-42). The Court's boilerplate language does not negate the undisputable fact that the Juvenile Court's termination of Father's parental rights relied extensively on Father's incarceration at the time of trial (A.16/F.61), his incarceration for much of the Child's life (A.16/F.61, 63; A.21/¶2; A.23/factor (ii); A.25/factor (xiii)), his "minimal" visitation with the Child (A.13/F.36, 37, 39, 51, 52; A.23/factor (iii)), his inability to provide a home for the Child at the time of trial due to such incarceration (A.16/F.61, 62, 70, 75; A.21/¶4; A.23/factor (ii); A.24/factor (vi); A.25/factor (xiii)), and his

inability to access services (A.16/F.68, 70; A.24/factor (v)) or participate in foster care reviews (A.13/F.41). While the Juvenile Court did properly consider other facts, such as the [redacted] stroller/bicycle incident (A.8/F.4), the alleged physical abuse in [redacted] (A.11/F.20), and domestic violence concerns (A.11/F.20; A.18/F.77 (1st sentence)), Father had no ability to address the concerns arising from these isolated incidents as he had no access to relevant services due to his incarceration. (A.16/F.68). All of the most germane unfitness findings, therefore, were directly affected by the fact that Father was incarcerated when he should not have been.

DCF's claim that the structural error claim is waived because it was not raised at trial (DCF, p. 37, n. 4) defies logic. The fact that Father was wrongfully incarcerated at the time of the termination trial was not determined until after trial. (A.42-58, 70-75, 219). Father cannot possibly have waived an issue he did not have knowledge of at the time of trial. Father sought to raise the issue with the trial court as soon as the issue was known to him, by moving the Appeals Court to stay the appeal so that he

could file a Rule 60(b) motion (A.42-58, 70-75, 219), but the Single Justice of the Appeals Court repeatedly denied Father the opportunity to do so. (A.69, 86).

DCF also takes issue with Father's use of the phrase "wrongful" in relation to his incarceration and conviction. (DCF, p. 35, n. 3). In fact, the incarceration was wrongful and Father has retained counsel who is pursuing a wrongful incarceration claim for him against the Commonwealth of Massachusetts. (See SA.1).

It is proper and just to conclude, under these circumstances, that Father's wrongful incarceration for over 14 months prior to and during the termination trial (as well as several months thereafter) "infringe[d] on [his] right to the basic components of a fair trial." Commonwealth v. Johnson, 80 Mass. App. Ct. 505, 511 (2011). A structural error "can never be considered harmless," even if the likelihood of a different outcome is low; structural error requires a new trial. Id., at 511, 514. The termination trial was "infected with prejudicial constitutional error." Id., at 514.

However, even if this Court does not deem the circumstances of this case to be structural error,

Father was undoubtedly deprived of his due process right to participate "in a meaningful manner" in the case, and was severely prejudiced by that deprivation. Adoption of Eugene, 415 Mass. 431, 435 (1993).

The mere fact that Father was present at trial and represented by counsel does not vitiate in any way the harsh reality that Father was denied the ability to "meaningfully" participate in the proceedings against him throughout the course of the case – not just at trial – as a direct result of his wrongful incarceration. Due to egregious government misconduct (see FB, pp. 13-14, 16-17), Father was wrongfully incarcerated and thereby denied the ability to participate in relevant services; to have regular visitation; and to provide a home for his Child. (See FB, pp. 7-13). In short, Father was denied "a meaningful opportunity to rebut the adverse evidence against him, despite having an attorney who participated at his trial. The father was denied his due process rights." Adoption of Eugene, 415 Mass. at 719.

Father's inability to rebut the evidence against him caused him extreme prejudice in the termination trial. (See FB, pp. 17-20).

II. **The Single Justice abused her discretion in denying Father's motion to reconsider a stay to file a Rule 60(b) motion where the applicable factors favored granting a stay, the Child's situation would remain unchanged as DCF would not finalize an adoption pending appeal, and the Single Justice gave no reasons for the denial.**

Child claims the merits of Father's 60(b) motion are irrelevant. (CH, pp. 46-47). DCF relies on an inapposite case pertaining to a stay of judgment pending appeal[2]. (DCF, p. 39-40, citing Commonwealth v. Allen, 378 Mass. 489, 498 (1979). Neither appellee is correct. Generally, the issue presented with respect to a motion for a stay of the appeal is

> "...whether the interests of fairness, balanced with the interests of judicial economy, best will be served by giving priority to a trial court resolution of the defendant's new trial motion."

Commonwealth v. Montgomery, 53 Mass. App. Ct. 350, 354 (2001). Several factors favor the grant of stays:

> "the possibility that the motion for a new trial will be allowed; the economy of consolidating an appeal from the denial of a motion for a new trial with the direct appeal [...]; the advantages to the defendant of such consolidated review of a motion for a new trial over postappeal review; and the general systemic benefits of earlier retrials in cases in which a motion for a new trial is allowed."

[2] Father sought a stay of the *appeal* in order to file a Rule 60(b) motion for relief from judgment; the issue is not about a stay of *judgment*. (A.42-45, 70).

Id. (citations omitted). Among the reasons for a denial of a request for a stay are

> "the similarities of issues raised in the motion for a new trial and in the direct appeal, and a reluctance to delay appellate review when briefing has been completed and the case has been, or is ready to be, scheduled for oral argument."

Id. We will apply these factors: Given the egregiousness of the state actions in the criminal case, and the indisputable impact it had on Father in the termination case, there is a reasonable possibility that the judge would have allowed the motion, at least to grant a new trial. If the motion had been denied, the appeal would simply have been consolidated with the direct appeal, properly preserving Father's right to pursue the issue. If the motion had been allowed, of course, the merits would have been addressed sooner than if there is ultimately a remand after the appeal.

On the other hand, two of the issues in the 60(b) motion - that the vacated criminal sentence constitutes newly discovered evidence, as well as "extraordinary circumstances" justifying relief (A.70-83) - are clearly different from the issues in the direct appeal - sufficiency of the evidence, and abuse

of discretion. (Only the due process issue is similar.) No briefs had yet been filed when Father first requested a stay. (A.42). Application of the factors thus clearly favors granting the stay.

Where the applicable considerations favor granting a stay, where appeals are routinely stayed to allow parties to pursue such motions, where the Child would not be affected by the slight delay as DCF will not finalize the adoption pending appeal (A.41), and where the single justice gave no reasons for the denial (A.69, 86), the denial was arbitrary, was not guided by "sound legal principles," Long v. Wickett Sr., 50 Mass. App. Ct. 380, 386 n.8 (2000), and therefore constituted an abuse of discretion.

Child argues that motions to vacate termination decrees based upon post-judgment changes are permitted only rarely. (CH, p. 48). This is not the typical "post-trial change of circumstances" case, such as those Child relies upon, e.g., when a preadoptive placement disrupts and a parent obtains sobriety after trial. The post-trial changes in this case are truly extraordinary; they arise as a result of gross malfeasance by the Commonwealth, and the State's wrongdoing taints every finding that is in any way

impacted by Father's deprivation of liberty. We must not forget: **Father was wrongfully incarcerated at the time of trial and had been for over fourteen months.** This affected his ability to visit the Child, to access services, to participate in foster care reviews, and to provide care for the Child. (See, e.g., Findings 36, 37, 39, 41, 51, 52, 61, 62, 68, 70, 75). Father deserves the right to have his fitness judged without the prejudices inflicted upon him by that wrongful incarceration.

**III. Even if the findings are not deemed erroneous, the evidence of Father's current unfitness is not clear and convincing, especially in light of Father's complete lack of access to services to address DCF's concerns.**

Overall, the findings related to Father represent an "aggressively negative interpretation of the facts." Adoption of Chase, 74 Mass. App. Ct. 1112 (2009) (Rule 1:28 decision, attached). The findings are "grounded in an exaggerated interpretation of the record; some are contradictory; and others find no support in the record whatsoever." Adoption of Abby, 62 Mass. App. Ct. 816, 822 (2005).

Even if the findings are not deemed erroneous, the primary evidence of unfitness, aside from those findings specifically affected by Father's wrongful

incarceration, is an allegation involving an intoxicated man riding into the Child's stroller (A.8/F.4); a hearsay allegation of an unexplained mark on the Child's face, which the Court attributed to Father, and a broken window (A.11/F.20; A.21/¶4; A.22/¶5); and Father's criminal record (A.21-22/¶5; A.22/¶¶4-5; A.25). For the reasons discussed in Father's primary brief, this evidence is insufficient to take the "drastic step" of severing Father's relationship with his only child.

Father responds to appellees' arguments regarding the specific findings as follows:

**Procedural Background:** DCF concedes that the "information" in the Court's findings claiming that Father was not present at the [redacted] pretrial hearing (A.6) is incorrect, but argues this was not a "finding." (DCF, 22). Father is not bound by the Juvenile Court's labels in its decision. See, Huikari v. Eastman, 362 Mass. 867 (1972) (despite their label, several of defendant's "requests for rulings"- were actually requests for findings of fact).

**Finding 2:** DCF concedes that the Court's cited support for Finding 2 - Ex. 2 - does not contain a

reference to a "knife," but argues that Finding 2 is not erroneous because Mother reported to the Court Investigator (Ex.1) that Father had a knife during the altercation. (DCF, 23). While Mother's hearsay statements in the Court Investigator's report are admissible, Custody of Michel, 28 Mass. App. Ct. 260, 266 (1990), (A.8/F.4/n.2), Mother only stated to the Court Investigator that Father carried a knife for protection (A.8/F.4; A.96).

The only evidence of a knife being drawn by Father during this incident was Mother's statement in the 51B investigation, which the Court *sua sponte* limited and did not admit against Father. (A.8/F.3/n.1). Child argues that because the exhibits were agreed upon (A.91), the 51B investigations were admitted for their truth. (CH 32-33). Child "cites no case standing for the proposition that a judge is precluded, in the absence of an objection and in the exercise of discretion, from" limiting the evidence. Commonwealth v. Gellers, 74 Mass. App. Ct. 1105 (2009) (Rule 1:28 decision, attached).

In any event, even if the judge had decided to admit Mother's statements in the 51B investigation, the statements demonstrate Father's ability to

exercise restraint in a terrifying situation that threatened his family's well-being: Mother told the DCF social worker that the intoxicated man was agitated, threatened to kill everyone around him, got in Father's face, and gestured as though he wanted to fight Father. (A.114). Father responded by taking the knife out and placing it on the ground, to show the man he would not use a weapon. (A.114). Mother was then able to take the knife and the baby away from the scene. (A.114).

The Court's mischaracterization that Father "pulled a knife on the man" (A.7/F.2), completely unsupported by the facts, is far from "picayune," as Child argues (CH, p. 33); in fact, this entirely inaccurate portrayal highlights the Court's "aggressively negative interpretation of the facts." Adoption of Chase, supra.

**Findings 3, 16, and 43:** While the findings regarding charges which were brought against Father (Findings 3, 16, and 43) are not erroneous – and Father did not claim that they were– they should be deemed a "mistake" as the findings completely ignore the fact that **those charges were dismissed.** (FB, 33–35).

Appellees argue that even if the charges were dismissed, the evidence is still relevant. (DCF, 23-24; CH, 34-35). While that is true, the Court's omission of the key positive facts – that all of these charges were dismissed – should be troubling to the reviewing Court. Although the Court is vested with considerable discretion, these cases require a decision "based on *all* of the relevant facts." Adoption of Stuart, 39 Mass. App. Ct. 380, 382 (1995) (emphasis added). "Troublesome facts … are to be faced rather than ignored. … Only then is the judge's conclusion entitled to the great respect traditionally given to discretionary decisions." Id. (citation omitted).

**Finding 24:** DCF properly admits that this finding did not reflect, and should have reflected, the correct reason that the 51A report was screened out – that there simply was "no indication … that father is having contact with this child." (DCF, p. 25; A.173). Thus, the finding is clearly erroneous.

Yet DCF inexplicably argues that the Court's decision "not to credit Mr. M.'s evidence does not constitute error" because a 51A report 24 days later alleged Father was at Mother's home when the child was

there. (DCF, p. 25). First, the unsupported 51A report is not *Father's* evidence; it is a DCF document and DCF's own unsupport conclusion. (A.173). Second, the existence of a subsequent 51A report as set forth in Finding *25* has no bearing on whether Finding *24* is erroneous. (A.11/F.24-25).

This finding demonstrates yet again the Court's failure to consider all of the facts, and its "aggressively negative" interpretation of the facts.

**Finding 45:** For the reasons discussed as to Finding 2, this finding is also erroneous. *Sua sponte*, the Court decided it would not consider Mother's statements to the DCF social workers as evidence against Father. (A.8/F.3/n.1; A.10/F.19/n.3). Given the Court's own prior ruling, Mother's statements to social worker Maxwell, similarly, should not be admissible against Father.

**Findings 51 and 52:** These findings are contradictory as noted in Father's original brief.

**Finding 63 and COL summary:** Child concedes that these are partially erroneous as stated in Father's original brief. (CH, p. 36).

**Finding 77:** DCF misreads Father's objection to this finding. (DCF, pp. 29-30). The first sentence

is admissible. The *second sentence* of the finding is from a statement by Mother to a DCF social worker, not to the Court Investigator. For the same reasons stated with regard to Finding 45, the second sentence of the finding is not supported by admissible evidence.

**Factors (ii), (v), and (vi):** Child claims that Father fails to provide record cites to support his claim that he was not offered services. (CH, p. 37). This is inaccurate. (FB, pp. 12-13, 36-37).

DCF claims the only evidence regarding Father's lack of services while incarcerated was through his own testimony. (DCF, p. 31). The Court expressly found that Father did not have access to parenting classes or domestic violence treatment while incarcerated, thereby crediting Father's testimony. (A.16/F.68).

The only Service Plan in evidence refers to services which DCF felt were "relevant" - parenting classes, recovery services[3], and batterer's programs - that Father was to work on while incarcerated. (A.191). Thus, appellees' focus on the time Father

[3] Father's undisputed testimony was that he did not have a substance abuse problem. (Tr.199).

was in the community is a diversion from the true issue here: while incarcerated, Father was, in fact, not offered any of the services DCF felt Father needed. No parenting, substance abuse, or domestic violence programs were offered to or available to Father while he was incarcerated. (A.16/F.68: Tr.125).

DCF claims that Father's failure to provide DCF with contact information "kept the Department from being able to provide services." (DCF, p. 31). DCF cites to no record support for that assertion. Such a practice is expressly forbidden by the Massachusetts Rules of Appellate Procedure. "No statement of a fact of the case shall be made in any part of the brief without an appropriate and accurate record reference." M.R.A.P. 16(e).

DCF has the burden of proof. Adoption of Larry, 434 Mass. 456, 470 (2001). The burden never shifts to the parents. Id. (emphasis added). DCF produced no evidence that it offered Father *any* services "intended to correct the circumstances," G.L. c. 210, § 3(c)(ii), (v), and (vi), i.e., substance abuse, parenting, or domestic violence services; accordingly, the Court's findings that Factors (ii), (v), and (vi)

apply are clearly erroneous. Factors (ii), (v), and (vi) can *only* apply, and Father's inability to engage in services is *only* relevant, if services are offered. G.L. c. 210, § 3(c)(ii), (v), and (vi).

Finally, the so-called "history of violating restraining orders" that Child relies upon (CH, p. 23) is an embellishment. The 51A allegation that Father was having contact with Mother and Child on [redacted] was screened out, and DCF concluded that there was "no indication" that Father was having contact with Child. (A.173). The mere fact that on [redacted] Father committed a technical violation of a restraining order (A.11/F.25) does not demonstrate any violence or actual parenting flaw on Father's part. Mother was pressured by DCF to obtain the restraining order, despite Mother's assertion that she was not afraid of Father. (A.95, 98-99) On the date in question, Father thought the order had expired, and Mother had let Father into the home to pick up his belongings. (A.97, 177).

> "A judge's findings, when viewed in the aggregate, even when supported by an evidentiary basis, may not constitute clear and convincing evidence of a parent's unfitness at the time of trial. This may be so even when those findings are not deemed to be clearly erroneous."

Adoption of Chase, supra. That is the case here.

## CONCLUSION

For all the reasons set forth above and in Father's primary brief, this Honorable Court should reverse the termination decree, vacate the unfitness adjudication below, and remand for further proceedings as to Father's current fitness.

Respectfully submitted,

[redacted]

By his attorney,

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## RULE 16(k) CERTIFICATION

The undersigned hereby certifies that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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**ADDENDUM**

Adoption of Chase, 74 Mass. App. Ct. 1112 (2009) (Rule 1:28 decision)

Commonwealth v. Gellers, 74 Mass. App. Ct. 1105 (2009) (Rule 1:28 decision)