

IN THE  
INDIANA SUPREME COURT

CASE No.: \_\_\_\_\_



_____	)	Appeal from the Indiana Court of Appeals,
_____	)	_____
Appellant / Respondent below,	)	Appeal from the _____
_____	)	_____
_____	)	Trial Court Cause No. _____
_____	)	_____
Appellee / Petitioner below.	)	The Honorable _____

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RESPONSE TO PETITION FOR TRANSFER

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### **QUESTION PRESENTED ON TRANSFER**

██████ Questions Presented on Transfer differs in material ways from the corresponding issue in the Argument. For this reason, for the aid of this Court as needed, ██████ states what he believes is an accurate corresponding issue:

Whether the Court of Appeals did not err, in affirming the trial court's weighing of the evidence by its Special Findings of Fact, Conclusions of Law, and Judgment, that Petitioner established, by clear and convincing evidence, that biological father was unfit and it was in the best interests of the Children to allow ██████ to adopt?

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## BACKGROUND AND PRIOR TREATMENT OF THE ISSUES ON TRANSFER

██████████ "Background and Prior Treatment of Issues on Transfer" appears argumentative, and, at places incomplete. As such, ██████████ ("Stepfather" and/or "Appellee") provides this factual and procedural background for aid of this Court as needed.

Mother, ██████████ ("Mother") and biological Father ("Father" or "Appellant") have two Children, ██████████ (presently ██████████ years old) and ██████████ (presently ██████████ years old) ("the Children"). Tr. ██████████ Mother and Father divorced in late ██████████ after Father had been involved and convicted in criminal activity and was serving jail time. Tr. ██████████

At that time, the Children were ██████████ and ██████████ years old. Tr. ██████████. However, Father had not seen the Children for some time before he was incarcerated in August of ██████████ prior to Mother filing for divorce. Tr. ██████████

Father has not been a father figure in the Children's lives since the oldest child, ██████████ was ██████████ years old, and was more like an uncle the Children spoke to on the phone. Tr. ██████████ During the parties' marriage Father often went missing for weeks at a time and was involved in drug activity and/or on drugs, resulting in a very unstable and unhealthy relationship with the Children. Tr. ██████████. Father had also previously been incarcerated for a time in ██████████. Tr. ██████████

On ██████████ ██████████ filed his Petition for Adoption of Minor Children by Stepparent ("Petition"). Appellee's App. ██████████ Stepfather sought to adopt ██████████ and ██████████ his stepchildren, who were then ██████████ and ██████████ years old respectively. *Id.* ██████████ also ██████████ wife, filed her consent to the adoption by a stepparent simultaneously with ██████████'s petition, on ██████████ Appellee's App. ██████████

The trial court set this matter for hearing on ██████████ pursuant to the Order of ██████████ Appellee's App. ██████████. ██████████ the Children's biological father ("Father" or

"Appellant"), filed his Verified Motion to Contest Adoption Pursuant to I.C. 31-19-10-1, on [REDACTED] Appellee's App. [REDACTED] Father sought to continue the hearing, and various delays ensued, while attempting to arrange Father's transportation to the hearing due to his incarceration, as Father was in the custody of the US Federal Marshall, and being housed at the [REDACTED] Appellee's App. [REDACTED]

The final hearing occurred on [REDACTED] wherein Father was transported and attended the hearing. Appellee's App. [REDACTED]. The parties each filed proposed Orders on, or about, [REDACTED] Appellee's App. [REDACTED]

The trial court issued its Order and Decree of Adoption on [REDACTED] Appellee's App. [REDACTED]. The trial court granted Stepfather's Petition to Adopt the Children, over Father's objection, finding that the adoption is in the Children's best interests based on unfitness. *Id.* On [REDACTED] [REDACTED] filed his Notice of Appeal. The Court of Appeals affirmed the trial court's adoption decree on [REDACTED]

On [REDACTED] [REDACTED] filed his Petition to Transfer. This is [REDACTED] Response.

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<sup>1</sup> For clarification, the hearing was held in a [REDACTED] courtroom, rather than [REDACTED] to accommodate Father and allow him to be in attendance. Through the cooperation of the [REDACTED] Father was able to be physically present for the hearing, and present his case *with counsel*. Tr. [REDACTED]. Father confirmed on the record that he was treated fairly in these proceedings and was provided a fair opportunity to be represented by counsel, physically present at the hearing, and present his case. [REDACTED] In other words, he was provided due process in these proceedings.

## Argument

### Error of Law

This Response addresses the seventh issue and arguments therein raised by [REDACTED] which appears to reflect [REDACTED]'s position that an error of law was made by the trial court and/or the Court of Appeals.<sup>2</sup> This alleged error is that [REDACTED] consent was improperly dispensed with as a matter of law by his prior convictions under Ind.Code § 31-19-9-9.<sup>3</sup>

This provision of the Code sets forth:

A court shall determine that consent to the adoption is not required from a parent if the: (1) parent is convicted of and incarcerated at the time of filing of a petition for adoption for (A) murder. . .; (B) causing suicide. . .; (C) voluntary manslaughter. . .; (D) an attempt . . . to commit a crime described in clauses (A) through (C); or a crime in another state that is substantially similar to a crime described in clauses (A) through (D); (2) victim of the crime is the child's other parent; and (2) court determines, after notice to the convicted parent and a hearing, that dispensing with the parent's consent to the adoption is in the child's best interests. (internal code cites omitted; spacing different than original)

However, the trial court's special findings did not dispense with [REDACTED]'s consent as a matter of law, nor did the Court of Appeals' decision rely on this provision of the Adoption Act. Stated differently, the trial court's special findings nor the Court of

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<sup>2</sup> [REDACTED]'s first paragraph of argument appears to address material that is proper for the "background and prior treatment of issues" and not argument relevant to the merits of the Petition that [REDACTED] can respond to. (Petition to Transfer [REDACTED]) Paragraph two sets for the standard of review for questions of fact that [REDACTED] agrees with as a general statement. (Petition to Transfer, [REDACTED]) [REDACTED] generally agrees with [REDACTED] statement of the legal theory under which the trial court and Court of Appeals decided the case. (Petition to Transfer, [REDACTED])

<sup>3</sup> [REDACTED] Petition to Transfer cites 31-19-9-9 (a)(1). (Petition to Transfer [REDACTED] set forth in the issue itself]) This provision of the Adoption Act dictates consent is not required if a parent has been *convicted* of certain specific crimes. There is no subsection "(a)(1)."

Appeals decision cite to this statutory provision for determination that [REDACTED] was unfit and it was in the best interests of the Children [REDACTED] adopt them. (Appellee's App. [REDACTED]) Thus, incarceration alone is not reflected in the Record or Special Findings as the sole basis for granting the adoption. This argument as a legal basis or policy for transfer is without merit. Ind.Appellate Rule 57(H).

In paragraph four (of this seventh issue in his Petition to Transfer), [REDACTED] sets forth an argument that is myopic; it focuses on his situation at the time the petition for adoption was filed and when it was heard and granted: his federal incarceration on drug charges. (Petition to Transfer, [REDACTED] [REDACTED] Precisely, [REDACTED] focuses on special findings [REDACTED] set forth as follows:

28. [REDACTED] was indicted on charges of conspiracy to deal Meth and felony possession of a firearm in the [REDACTED], Cause Number [REDACTED] on [REDACTED] and has been incarcerated in [REDACTED] on a Federal Hold, awaiting trial for more than one year.

29. [REDACTED] testified that he is facing zero (0) to twenty (20) years in Federal Prison if convicted. (footnote omitted)

[REDACTED] cites to the *Williams* decision by the Court of Appeals to support his contention that the trial court somehow erred in making these findings at the time of the adoption hearing versus focusing on the earlier date the petition for adoption was filed. *Williams v. Townsend*, 629 N.E.2d 252, 254 (Ind.Ct.App.1994).<sup>4</sup> In this case, the Court of Appeals affirmed and noted prior decisional law that stands for the proposition that incarceration alone cannot serve as the sole basis for termination of a parent's right and allowing an adoption. *Williams*, citing *In re Adoption of Hearman*, 406 N.E.2d 277 (Ind.Ct.App.1980) [REDACTED] agrees with that proposition, and

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<sup>4</sup> The *Williams* decision is cited to as being from Maryland, not Indiana where it is actually a decision of the Court of Appeals. The cite in this Response is correct.

assuming *arguendo* this was the only finding to support unfitness, might require reversal and remand.

However, in paragraphs [REDACTED], [REDACTED] concedes the controlling statute to his objection to the adoption and refusal to consent is Indiana Code 31-19-9-8(a)(11), which is the statute the trial court and Court of Appeals relied upon. This statute requires a trial court look at the totality of evidence in determining (un)fitness. *Id.*

[REDACTED] argument focused on these two findings ultimately fails because of the long-standing rule or standard that “[f]indings [that] are made by the trial court are construed together liberally in support of the judgment and will be deemed sufficient if supported by the evidence of probative value. *Morphew v. Morphew*, 419 N.E.2d 770 (Ind.Ct.App.1981). The trial court made many additional findings, other these two findings [REDACTED] points to, that support unfitness, namely findings [REDACTED] (Appellee’s App. [REDACTED] There is no error in the application of the law as the trial court had extensive factual findings to support the adoption, using the correct statute. *Id.*

#### Constitutional Protections

##### A. Due Process.

[REDACTED] seeks to avoid adoption viz-a-vie appeal and transfer and reversal by advancing certain constitutional protections afforded him that the adoption allegedly violated. (Petition to Transfer, [REDACTED] The first appears to be couched in terms that the trial court and/or [REDACTED] violated [REDACTED] constitutional right to be presumed innocent until proven guilty: “...every criminal defendant is innocent until proven guilty beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).” (Petition to Transfer, [REDACTED] [REDACTED]

This argument fails on two fronts. First, the *Winship* decision stands for the proposition that the due Process Clause of the United States Constitution is applicable to juvenile delinquency hearing, which are effectively criminal in nature. Precisely, this case presented the United States Supreme Court with the narrow question of whether the beyond a reasonable doubt standard is among the essentials of due process and fair treatment required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult. *Id.* at [REDACTED]

Second, [REDACTED] argument fails as under umbrella of protections that apply to a alleged criminal in a criminal case, such as [REDACTED] in federal case; but these criminal rights do not necessarily transfer to constitutional rights in civil litigation. For instance in a recent CHINS appeal, the Court of Appeals held “the privilege against self-incrimination does not prohibit the trier of fact in a civil case from drawing adverse inferences from a witnesses’ refusal to testify. *In Matter of A.G. and A.K. v. Indiana Department of Child Services*, 6 N.E.3d 952, 957 (Ind.Ct.App. 2014)<sup>5</sup>

#### B. Fundamental Right.

That argument failing [REDACTED] next argues that [REDACTED] and/or the courts, presumably by [REDACTED] view of the two controlling and dispositive findings, should not have been allowed to adopt because it impacts his natural right to parent: “biological parents have fundamental interest in directing the care, custody, and upbringing of their children.” (Petition to Transfer, [REDACTED]) This too fails to reach legal merit for transfer or reversal.

Although not stated, this right was delineated by a grandparent custody order reversed by the United States Supreme Court. *Troxel v. Granville*, 570 U.S. 57 (2000) This decision held that

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<sup>5</sup> For clarification, on [REDACTED] of [REDACTED] Petition to Transfer, he cites to this case, the *Adoption of A.M.* but cites same as a case from Maine. [REDACTED]’s citation is correct.

parents' right to freedom to care, control, and maintain custody of their children is a liberty protected by the Due Process Clause of the United States. *Id.*

Notwithstanding, this is not an absolute right and the adoption court need not wait until a child is irreversibly influenced by a deficient lifestyle such that his or her child's physical, mental and social growth is permanently impaired. *Castro v. Office of Family and Children*, 842 N.E.2d 367, 372 (Ind.Ct.App.2006). Thus, the fundamental right of a parent to rear his or her children has limitations.

In balancing [REDACTED]'s rights against the Children's rights the caselaw strikes a balance permissible under *Troxel*, stated as follows: "[a]lthough parental rights have a constitutional dimension, the law allows for their termination when the parties are unable or unwilling to meet their responsibility as parents." *In re S.P.J.*, 806 N.E.2d 874, 880 (Ind.Ct.App.2004). (emphasis and quotes different than original). This is because the State has a strong interest in providing stable homes for children. *B.G. v. H.S.*, 509 N.E.2d 214, 217 (Ind.Ct.App.1987),

The record evidence is replete with a long history of [REDACTED] being unwilling and unable to provide for his children by being there, supporting them, or having consistent contact. Thus, when the intense focus is removed from the findings [REDACTED], the action the trial court took in terminating [REDACTED]'s rights by being unfit, and allowing the adoption, fail. The trial court did not err in application of the law.

#### Technical Violations

In paragraph 5, [REDACTED] argues some technical violation in that "the record does not show that a proper criminal history check required by way of I.C. Sec. 31-19-2-7.5 had occurred." (Petition to Transfer [REDACTED]) There is no cogent argument that [REDACTED] had anything other than a

lifestyle based on illegal activity, notwithstanding he had not been to trial on his federal drug charges.

█████ had felony convictions in several Indiana counties, and had been incarcerated for the majority of the Children's lives. ██████ In fact, it is only where procedural irregularities in such CHINS or adoption proceeding rise to the level of procedural and substantive due process that reversal is warranted. *See generally, A.P. v. Porter County Office of Family & Children*, 734 N.E.2d 1107, 1112-13 (Ind.Ct.App.2000).

As it relates to adoption itself, ██████ argues in his Petition, the caselaw controlling the Adoption of A.M. supports reversal. *In re Adoption of A.M.*, 930 N.E.2d 613 (Ind.Ct.App.2010). In this case ██████ relies upon, the Court of Appeals *held the trial court erred* in not granting maternal grandparents uncontested petition to adopt the child. *Id.* at 621. The Court of Appeals also held under the Adoption Act, it should avoid excessive reliance upon a strict literal meaning or selecting reading of statutory requirements. *Id.* at 620. Distilled to its legal essence, this is what ██████ argues.

Stated differently, the Indiana Supreme Court has held that the best interests of the child is the primary concern in an adoption proceeding. *Adoptive Parents of M.L.V.*, 598 N.E.2d 1054, 1056 (Ind.1992) Further, although the adoption statute is to be strictly construed, the statute is not to be so strictly construed as to defeat its purpose. *Emmons v. Dinelli*, 133 N.E.2d 56, 61 (Ind.1956)

Thus, ██████ argument about technical violations would erode the policy of the State and Adoption Act as it relates to meeting a child's best interests. In short, despite being held in prison on a federal drug charge, ██████ and the trial court arranged for him to be transported to the hearing with his counsel. Tr. p. 5, 210-11. ██████ due process arguments thus fails.

### (Re)weighing the Evidence

In the balance of [REDACTED] petition on [REDACTED] he appears to argues sufficiency or weight of the evidence in total, in addition to the questions of law, constitutional issues, and technical defects in the adoption process: [REDACTED] lack of communication/visitation; [REDACTED] child support and purchasing supplies; [REDACTED] abandonment; [REDACTED] mother acts or omissions; [REDACTED] weighing of the evidence; [REDACTED] other remedies to adoption. (Petition to Transfer, [REDACTED])

These sub-arguments are bald invitations to reweigh the evidence. Clearly, the Special Findings from the evidence and Memorandum Decision support [REDACTED]'s adoption on [REDACTED] unfitness and a variety of other legal bases. Reweighing the evidence is impermissible under the controlling standard of review:

“ . . .this Court neither reweighs the evidence nor judges the credibility of the witnesses. *Bester v. Lake County Office of Family and Children*, 839 N.E.2d 1032, 1035 (Ind.2005). Rather, we will consider only the evidence and reasonable inferences therefrom which are most favorable to the judgment.” *Id.*

Again, [REDACTED]'s argument ([REDACTED]) by these sub-arguments are nothing more than a request to reweigh the evidence.

This noted, it appears that [REDACTED] may confuse or equate the “clear and convincing” evidentiary standard utilized by the trial court in granting the adoption, with that on appeal. *In re Adoption of A.S.*, 912 N.E.2d 840, 949 (Ind.Ct.App.2009). When reviewing an adoption decree, this Court examines the evidence most favorable to the probate court’s decision together with reasonable inferences drawn therefrom to determine whether sufficient evidence exists to sustain the decision. *Id.*

Ultimately, [REDACTED] had the burden of proof, which he did not carry. There is no review of the Record that would have left the Court of Appeals reweighing the evidence because it was firmly convinced that a mistake had been made by the trial court’s entry of the Adoption Decree.

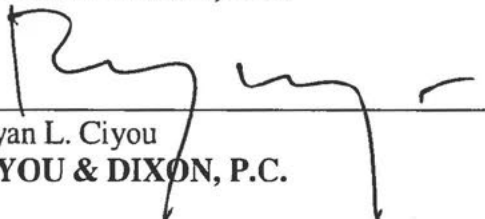
*Ben-Yisrayle v. State*, 729 N.E.2d 102, 106 (Ind.2000). With the correct appellant's burden stated, the Record and Findings are replete with evidence [REDACTED] had due process, was unfit, and it was in the Children's best interests to be adopted.

**Conclusion**

For these reasons, this Court should deny transfer, which allows the Adoption Decree to stand. Due process was afforded to [REDACTED] and the Children now have permanency and stability.

Respectfully submitted,

**CIYOU & DIXON, P.C.**



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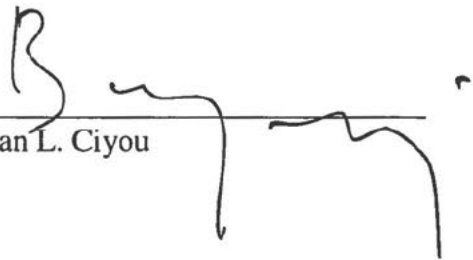
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**WORD COUNT CERTIFICATION**

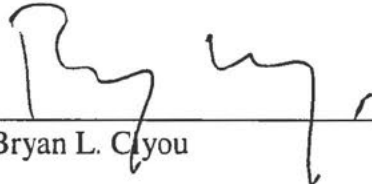
I, Bryan L. Ciyou, verify that this Response to Petition to Transfer contains 3,248 words of the 4,200 allowed under App. Rule 44(E), including those items excluded from page length limits under App. Rule 44(C), as determined by the word counting function of Word 2007.

  
\_\_\_\_\_  
Bryan L. Ciyou

**CERTIFICATE OF SERVICE**

I, Bryan L. Ciyou, certify that a true and accurate copy of the foregoing was served upon the following counsel of record this [REDACTED], by mail, United States, First Class, at the following address:

[REDACTED]

  
Bryan L. Ciyou

<sup>6</sup> This is the address [REDACTED] utilizes in his Petition to Transfer. This varies slightly from a prior addressed utilized. [REDACTED] does not appear to be listed on the FBP directory for offender location.