No. 09-612

In The
Supreme Court of the United States

Ariel King,

Petitioner,

v.

Michael Pfeiffer,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the Commonwealth of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is it a denial of a litigant's due process rights, including her right to challenge subject matter jurisdiction, if in order to obtain *de novo* review of a decision of a state Juvenile and Domestic Relations Court giving sole physical custody of her child to her spouse, she may arrested for having failed to appear at a sentencing hearing for civil contempt previously adjudicated?

2. Have constitutional rights of a child, who is not party to this appeal and who is represented by a guardian *ad litem*, been denied when her mother is barred from contact with the child until after appearing before the court which has found her in contempt and undergoing a psychological evaluation following a finding by the court that the mother had abducted the child (which finding was subsequently confirmed by the mother's pleading guilty to felony child abduction out of state) and that child protective services of a sister state had expressed fear for the child's safety while in custody of the mother?

3. Have constitutional or human rights of a child, who is not party to this appeal and who is represented by a guardian *ad litem*, been denied when her mother is barred from contact with the child until after appearing before the court which has found her in contempt and undergoing a psychological evaluation

following a finding by the court that the mother had abducted the child (which finding was subsequently confirmed by the mother's pleading guilty to felony child abduction out of state) and that child protective services of a sister state had expressed fear for the child's safety while in custody of the mother?

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The opinion of the Virginia Supreme Court dismissing the appeal from the Virginia Court of Appeals is unpublished. (Pet. App. 20). The opinion of the Virginia Court of Appeals denying rehearing is unpublished. (Pet. App. 19). The opinion of the Virginia Court of Appeals dismissing the appeal from the Circuit Court is unpublished. (Pet. App. 18). The opinion of the Circuit Court of Arlington County denying appeal is unpublished. (Pet. App. 15). The two June 6, 2008 orders of the Arlington County Juvenile and Domestic Relations Court are unpublished. (Resp. App. 27, 31).

A series of unpublished orders is also relevant to this action. The April 8, 2008 order of the Arlington County Juvenile and Domestic Relations Court is unpublished. (Resp. App. 20). The two February 21, 2008 orders of the Arlington County Juvenile and Domestic Relations Court are unpublished. (Resp. App. 14, 18). The two February 8, 2008 orders of the Arlington County Juvenile and Domestic Relations Court are unpublished. (Resp. App. 10, 12). The January 17, 2008 order of the Arlington County Juvenile and Domestic Relations Court is unpublished. (Pet. App. 1). The November 8, 2007 order of the Arlington County Juvenile and Domestic Relations Court is unpublished. (Res. App. 8). The two September 5, 2007 orders of the Arlington County Juvenile and Domestic Relations Court are unpublished. (Resp. App. 1, 6).

STATEMENT OF JURISDICTION

The Supreme Court of Virginia issued its opinion on August 18, 2009. This court has jurisdiction under 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

Va. Code §16.1-106, Appeals from courts not of record in civil cases is set forth at Pet. App. 21. Va. Code §17.1-410, governing the jurisdiction of the Virginia Supreme Court to hear appeals from the Virginia Court of Appeals, is set forth at Pet. App. 22. Rule 5A:3(c) of the Rules of the Supreme Court of Virginia governing the timing of filing petitions for appeal is set forth at Resp. App. 53.

STATEMENT OF THE CASE

Petitioner falsely asserts that her experience as an impoverished, *pro se* litigant subjected to arbitrary *ex parte* rulings has exposed constitutional flaws in Virginia's system for handling child custody cases in its Juvenile and Domestic Relations Court (JDR). The record, persistently mischaracterized by petitioner, shows that petitioner was far from impoverished and represented by six lawyers at six hearings in the case below.[1] The allegedly *ex parte* hearing in the JDR Court of which she complains was properly noticed and took place in open court. Petitioner chose not to attend, even though her attendance had been compelled.

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[1] Each of the JDR court orders lists attorneys present who were representing the parties.

Petitioner's failure to obtain plenary appellate review was caused by her failure to meet statutory deadlines. Petitioner raises no salient constitutional issues. Generalized complaints about the alleged mistreatment of *pro se* litigants do not apply in this case where petitioner was so substantially represented by counsel.

While petitioner dismissively characterizes the Juvenile and Domestic Relations Court as "not of record," a voluminous record was created which amply demonstrated that the actions of that court were warranted. The JDR Court held seven hearings. A trained and certified guardian *ad litem*, who was appointed to represent the interests of the child interviewed petitioner, respondent and the child, attended five hearings, and advised the court at each hearing she attended. In addition, an Arlington County probation officer, pursuant to court directive, conducted home visits related to child custody and safety issues and prepared reports. Additional interviews of petitioner, respondent, and child were conducted by a court-appointed psychologist. None of this is hinted at in the Petition. After participating vigorously with counsel in the process, petitioner chose not to attend the critical June 6, 2008 hearing because she faced sentencing for contempt arising from violations of numerous court orders and, of more import, she was that very day absent from the jurisdiction while committing the felony child kidnapping for which she was subsequently convicted.

In fact, the record shows that the court system of which petitioner complains did an admirable job in handling the case of a clearly disturbed litigant

engaging in illegal conduct and egregious forum shopping. In the series of hearings which the petition does not address, the judge, child protection personnel and the guardian *ad litem* all took measured and lawful steps to protect a child placed at risk by her mother. The Virginia court system, and the cognate court system in Maryland, each reached similar decisions concerning petitioner, about whom a Maryland child protective services official testified under oath on June 5, 2008 "This women's behavior concerned me to the point that I felt it, that I need the Court to help me protect this child." Petitioner responded to professional assessments questioning her version of events by avoiding psychological evaluations, attempting to change jurisdictions at least four times, and, eventually, engaging in felony child abduction.

The full record shows how seriously petitioner has mischaracterized the facts at every stage. [2]

I. The JDR Court Holds Extensive Hearings at Which Petitioner Is Represented by Counsel Before Determining Custody.

It is important to recognize how this case came to be in Virginia. On June 16, 2007, Dr. Michael Pfeiffer returned from a short business trip to find his house deserted, most belongings removed, and his wife and daughter gone. He had a number of brief cell phone conversations with the petitioner, who refused to

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[2] Because Supreme Court Rule 15.2 requires that a respondent "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted," this Statement of the Case is necessarily lengthy.

reveal her whereabouts. He was allowed two one hour visits with his daughter. Petitioner filed for a protective order against respondent in the District of Columbia. At the hearing on that order – which was dismissed - petitioner was served with a complaint seeking divorce, custody and support. *Pfeiffer v. King*, Case No.07- DR-B2056, (Superior Ct. DC, Family Division) Petitioner appeared, represented by counsel, at a hearing on August 1, 2007 and stated that she had moved to Virginia and taken a one year lease on an apartment at 4001 North 9th Street, Arlington Virginia. This is a far cry from the "emergency temporary housing" described at Page 4 of the Petition. Petitioner stated under oath that she intended to domicile indefinitely in Virginia. Her counsel told the Superior Court that jurisdiction over custody resided solely in the Arlington Juvenile and Domestic Relations Court.

Petitioner Initially Participates in the JDR Proceedings with Counsel and Does Not Raise Any Jurisdictional Objections. Based on Petitioner's testimony before the District of Columbia court and her July 2007 move to Virginia, respondent filed the underlying case in the Juvenile and Domestic Relations Court for Arlington County, Virginia on August 9, 2008 seeking visitation and other relief. *Pfeiffer v. King*, Case No. J-31848-01 (Arlington County Juvenile and Domestic Relations Court). A hearing was held before the court on September 5, 2007. Petitioner appeared at the hearing, represented by attorney Daniel Dannebaum. At the hearing, the court entered an agreed order providing for primary physical custody with petitioner, granting petitioner temporary child support, and providing respondent with

visitation. (Resp. App. 1). The court ordered a full custody evaluation of the parents and child by a psychologist and selected the psychologist nominated by petitioner's counsel. (Resp. App. 6). Petitioner did not object to the jurisdiction of the Virginia court.

Pursuant to the September 5, 2007 Order, the evaluations by a psychologist were begun on the parents and the child. The court-appointed investigator, probation officer Michelle Woods, who conducted the home study also ordered by the court, requested that a guardian *ad litem* (GAL) be appointed to represent the interests of the child. Deborah Olin was appointed as GAL on or about September 26, 2007.

Petitioner Begins a Pattern of Non Compliance with the JDR Court Orders. As the process of custody evaluation moved forward, petitioner had an initial meeting with Dr. Lane, the court-appointed psychologist. After that meeting she suggested to respondent that he be given more visitation rights and the case be dropped. Respondent replied that he wanted the evaluations to be completed. Petitioner then asked both the court investigator and the GAL to deny the respondent visitation.

When petitioner learned that the investigator and GAL would not make such recommendations, she unilaterally and without notice rented an upscale home in Potomac Maryland on October 16 2007. This violated the September 5, 2007 court order which provided that the child could not be moved out of state unless the other parent consented or the court approved. Petitioner filed a *pro se* complaint for divorce in Maryland on October 19, 2007 claiming she was a

Maryland resident. This was clearly an attempt by petitioner to game the system and get away from the jurisdiction of a court she perceived to be unfriendly.

The court appointed investigator and GAL both conducted a home visit with petitioner and the child in Virginia after October 16, 2007 and were not informed of the Maryland move. At the scheduled November 8, 2007 hearing, petitioner was represented by attorney Raymond Benzinger. The GAL also appeared. The court issued an order continuing the custody hearing until February 8, 2008 because the psychological evaluation of petitioner had not been completed. (Resp. App. 10). Petitioner was ordered not to take the child out of the country. (Resp. App. 8). Neither petitioner nor her counsel disclosed the Maryland house or the Maryland divorce proceeding at this hearing.

On November 20, 2007 and November 30, 2007, petitioner, through attorney Bensinger, filed motions to dismiss the JDR case for lack of jurisdiction. The motions were heard on January 17, 2008. Petitioner was represented by attorney Bensinger at that hearing. Because there was no dispute over the underlying material facts, no testimony was needed or taken. The motions were denied and the court continued to exercise jurisdiction over the matter. (Pet. App. 1). The GAL attended this hearing.

Petitioner Claims that Georgia Should Have Jurisdiction. In late January 2008, petitioner took the child to Atlanta, Georgia in violation of the September 5, 2007 order, allegedly because petitioner's mother was ill. While in Georgia, petitioner retained counsel, who identifying herself as a Georgia guardian

ad litem, made a filing with the Virginia JDR court recommending that Georgia be the jurisdiction in which custody and visitation rights were determined. At the noticed February 8, 2008 hearing, petitioner appeared in court represented by attorneys Michael Miller and Elizabeth Latuseck, having left the child in Georgia. The JDR court issued an order that the mother return the child to Dr. Pfeiffer by February 10, 2008 and ordered that petitioner cooperate with a psychological evaluation. (Resp. App. 10). The JDR court found that petitioner had not cooperated with the GAL who was present at the hearing. The case was continued to April 18, 2008.

Petitioner returned the child to respondent on February 10, 2008 as ordered. Two days later she presented the police in the District of Columbia with the now partially superseded September 5, 2007 temporary custody order to have the police take the child from Dr. Pfeiffer and give her physical custody over the child. Petitioner did not disclose to the police that the court had ordered that she return the child to Dr. Pfeiffer.

The JDR Court Grants Temporary Physical Custody to the Father. At a hearing on February 21, 2008, the JDR issued an order changing temporary physical custody from petitioner to Dr. Pfeiffer. (Resp. App 14). Petitioner was represented by attorney John Drury. The GAL was present. The custody case was continued to April 18, 2008. A rule to show cause was set for April 8, 2008 because petitioner had not complied with previous orders. (Resp. App. 18).

The JDR Court Holds a Lengthy Hearing on Petitioner's Contempt on April 8, 2008. On April 8, 2008, the JDR court held a hearing to determine whether the actions of the petitioner constituted contempt. The petitioner appeared represented by attorney Michael Callahan. The hearing transcript runs 147 pages; petitioner testified at length. The Court found the petitioner in contempt for taking the child to Georgia, for removing the child from the father's custody, and for failing to cooperate with court appointed personnel. After finding the petitioner in contempt, the court continued the case for disposition until it had a chance to review the psychological evaluation. It set a hearing for June 6, 2008. (Resp. App. 20).

Petitioner Improperly Uses an *Ex Parte* Hearing in Maryland to Temporarily Gain Custody, but Loses Custody After a Hearing on the Merits. On June 2, 2008, petitioner, after again taking her child in violation of a Virginia custody order, appeared at the Montgomery County Circuit Court alleging that her daughter had been abused and asking for a Protective Order to keep Dr. Pfeiffer from having custody. Petitioner concealed from the Maryland court the existence of the Virginia case, that a guardian *ad litem* had been appointed to represent the child, the extensive investigations which had been made in Virginia or the reports submitted by the GAL to the Virginia court. [3]

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[3] The failure to make these disclosures was a violation of Maryland Family Law Code §9.5-209, a portion of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act, which requires that the initial pleading,

The Montgomery County Circuit Court issued an *ex parte* temporary protective order granting petitioner custody on June 2, 2008. A motion to vacate was filed and noticed for June 5, 2008. Pursuant to Maryland law, the child was interviewed by Montgomery County Child Protective Services.

At the hearing on June 5, 2008, petitioner, who had filed a response to the motion to vacate, failed to appear. Judge Craven, hearing the case, took testimony from Elizabeth Ann Hoffman, supervisor of the Child Sexual Abuse Investigation Unit for Montgomery County Child Protective Services (CPS). Ms. Hoffman, in addition to noting that interviews with the child showed no indication of abuse, testified as follows about the behavior of the petitioner at her offices near the courthouse on the morning of the scheduled hearing:

> She was extremely inappropriate in the confines of our office and she – to the point of alarming me. Now, Your Honor, I've been doing this work for 13 years and I am not an alarmist. I see lots of bizarre behavior from parents, lots of highly, you know agitated individuals, hostile people, that's what we do.

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or an attached affidavit, in any child custody proceeding state whether the party bringing the action has participated in any other proceeding concerning the custody of or visitation with the child and knows of any other proceeding that could affect the proceeding being filed. To the extent that the June 2, 2008 filing might be deemed a petition for relief from abuse, Maryland Family Law Code §4-504 also requires disclosure of previous and pending actions between the parties.

> This women's behavior concerned me to the point that I felt it, that I need the Court to help me protect this child.
>
> We missed Ms. King by, and when I say we, Ms. Catron and I had decided to intervene and remove, change the location of the child versus the mother. When we, after we made that decisions, she had left the office by, say 90 seconds. She knew she had to be in court this morning and what she told my social worker was that "I'm an adult, I can ---"

Transcript of Hearing, *Ariel R. King v. Michael Pfeiffer*, Case No. 70620-FL (Montgomery Circuit Court. June 5, 2008) p. 13.

After hearing this testimony and similar testimony from Janel Catron, the social worker who interviewed the child, the Court vacated the temporary protective order and dismissed the case. The Court found that petitioner knew about the hearing and that there was reason to believe the testimony she gave to secure the initial temporary order was false.[4]

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[4] In a lengthy footnote (Pet. at 7, fn. 6), petitioner asserts that the June 5, 2008 Montgomery Circuit Court hearing was also defective and that the June 2, 2008 order was "prematurely quashed." It is clear that petitioner set up the initial June 2, 2008 *ex parte* hearing and utilized the "nuclear option" of falsely alleging sexual abuse as a stratagem to derail the June 6, 2008 hearing in Virginia. The testimony of the two Montgomery County Child Protective Service personnel puts to rest any allegations of improper behavior by Dr. Pfeiffer. It also established that petitioner was aware of the June 5, 2008 hearing and chose

Petitioner, Having Abducted Her Child, Chooses Not to Appear at the Scheduled June 6, 2008 Hearing. By the time of the scheduled June 6, 2008 hearing, petitioner had improperly kept the child for five days, in violation of the February 21, 2008 Custody Order. She failed to appear at the hearing. The Petition characterizes the hearing as "ex parte" and without proper notice. Not only was notice of the hearing given at the April 8, 2008 hearing and contained in the order, but petitioner obviously knew about it because she filed a Motion to Continue the hearing on June 3, 2008. (Resp. App. 22). The bases for her motion to continue were a pending mandamus petition to the Virginia Supreme Court and a Maryland investigation into alleged sexual abuse by the father. The first was invalid as mandamus does not lie to contest jurisdiction. The second was found to be without merit by both the Maryland court and the Montgomery County CPS.

The petitioner, who had appeared at six hearings represented by counsel, would have this court believe that her failure to appear before the court on June 6, 2008, when she was scheduled to be sentenced for contempt of court, somehow made the entire JDR process ex *parte* and transformed her into a *pro se* litigant whose rights were abused. The petitioner also asserts that this process victimized her daughter, ignoring the fact that the child – whose needs are properly the focus of a custody dispute – was represented at the June 6, 2008 hearing by the GAL

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not to attend. In fact, she bolted from the CPS facility as soon as she realized that the professionals there had doubts about her fitness to care for the child.

and that the court had, by this time, extensive reports from the court investigator and the GAL.

The Court, reviewing these reports and petitioner's continuing contumacious and erratic behavior, awarded sole custody of the child to Dr. Pfeiffer. The Court issued two orders. In one of them, it found that "[M]other has abducted child and mother exhibits behavior to Montgomery County CPS which made the agency concern for child's safety."[5] (Resp. App. 31). In light of petitioner's behavior, this was a completely reasonable decision. The GAL agreed to the order. The order did not, as the Petition asserts repeatedly, terminate parental rights. It gave Dr. Pfeiffer sole custody and denied petitioner access to the child until petitioner had availed herself to the court, purged herself of her contempt and completed a psychological evaluation.

Petitioner remained a fugitive with the child until June 16, 2008 when she was apprehended in New York. Petitioner's claim that she was merely seeking medical evaluation for her child in New York is without credibility.[6] Taking a purportedly ill child on the road for more than a week rather than immediately

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[5] Petitioner, unaccountably, did not include this order in its appendix, but did include the other order issued that day which does not contain the explanatory material. (Pet. App. 2.)

[6] A complete examination of the child's medical condition and refutation of claims that Dr. Pfeiffer ignored his daughter's medical condition is found in the December 2, 2009 decision of the District of Columbia Superior Court in *King v. Pfeiffer*, DR Case No. 2009 DRB 1167. (Resp. App. 38).

to a medical facility hardly qualifies as being in the interests of the child. Petitioner lived within miles of a half dozen world-class medical institutions where she could have sought evaluation or treatment for the child. Petitioner was fleeing to avoid the existing and prospective rulings of the JDR.[7] If petitioner felt the child needed medical care which was not being provided, she could have raised the issue with either the GAL or the court.

II. Petitioner's Untimely Appeal of the JDR Order Is Rejected By The Circuit Court at a Noticed and Scheduled Hearing.

Throughout the petition, it is properly asserted that the June 6, 2008 order was a "final order." Nearly four months later, on September 26, 2009, petitioner filed a motion for a *de novo* review in the Circuit Court. Va. Code §16.1-296[8] states that such an appeal shall be

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[7] Petitioner claims she was "forced to plead guilty to parental kidnapping." Pet. at 8, fn 6. Petitioner was sentenced on April 6, 2009 for the felony of child abduction out of the state. *State v. King*, Nos. 111333 Crim. and 111512 Crim. She was represented by attorneys Alex Foster, David Helfrey, and Roy Morris. She was asked by the court "Is anybody forcing you or threatening you to plead guilty this afternoon?" She answered "No, sir."

[8] In her brief, petitioner relies on Va. Code §16.1-106, Appeals from court not of record in civil cases. Pet App. 21. The Virginia Supreme Court has held that appeals from JDR court are governed by Va. Code §16.1-296. *Sasson v. Shenar,* 276 Va. 611, 626 fn. 10, 667 S.E.2d 555, 563 (2008). The statute provides "[F]rom any final order or judgment of the juvenile court affecting the rights or interests of any person coming within its jurisdiction, an appeal may be

filed "within **ten days** after such order or judgment." [9] The time for appeal expired on June 16, 2008. The September 2, 2008 motion could not be considered a motion for a new trial or rehearing such that an appeal could trigger a *de novo* review of the June 6, 2008 hearing. Pursuant to Va. Code §16.1-97.1, a new trial of a judgment of a district court must be filed within thirty days of the judgment and ruled on within forty-five days of the judgment.

On receiving the untimely notice of appeal, counsel for Dr. Pfeiffer filed a motion to dismiss on October 10, 2008. (Resp. App. 33). The motion was served on petitioner and set, in accordance with the Rules of the Supreme Court of Virginia, to be heard at the next regular Friday motion's day, which was October 17, 2008.[10] Petitioner chose not to appear. The matter was heard in open court and as the defect in the appeal being facially apparent, the appeal was dismissed.

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taken to the circuit court within 10 days from the entry of a final judgment.." Both provisions require an appeal within ten days.

[9] Petitioner apparently contends that the September 26, 2008 Notice of Appeal was timely because it was filed within ten days of the September 16, 2008 denial (Pet. App. 12) of the September 2, 2008 motion filed by Dr. King. But the time to appeal the June 6, 2008 order had expired on June 16, 2008 and could not be revived by a motion filed seventy-eight days after the order had become final and unappealable.

[10] Motions may be brought before the Circuit Court on seven days written notice. Rule 4:15(b) of the Rules of the Supreme Court of Virginia.

III. Petitioner's Appeals to the Virginia Court of Appeals and Virginia Supreme Court Are Properly Rejected.

Petitioner filed a Notice of Appeal with the Virginia Court of Appeals on October 19, 2008. After the record was received by the appellate court, petitioner received a notice that the filing deadline or the opening brief was February 23, 2009.

Rule 5:A:19(b)(1) of the Rules of the Supreme Court of Virginia requires that opening briefs shall be "filed in the office of the clerk of the Court of Appeals." Rule 5A:3(c) provides that any document required to be filed in the office of the clerk "shall be deemed to be timely filed if it is mailed postage prepaid to the Clerk of the Court of Appeals by registered or certified mail and if the official receipt thereof be exhibited upon the demand of the clerk or any party and it shows mailing within the prescribed time limits." (Resp. App. 53).

Petitioner asserts that she mailed the brief on February 23, 2009 by regular mail, not certified or registered mail. The court received the brief on February 25, 209 and rejected it as untimely in an order dated March 17, 2009. Respondent played no role in the rejection. A petition for rehearing was denied.

The rule is clear and direct. Petitioner did not follow it.

A subsequent appeal was filed with the Virginia Supreme Court. Va. Code §17.1-410(A)(3) generally prohibits appeal to the Virginia Supreme Court of final decisions of the Virginia Court of Appeals in custody cases. The Virginia Supreme Court has the option of

accepting such otherwise unappealable cases if it "involves a substantial constitutional question as a determinative issue or matters of significant precedential value." Va. Code §17.1-410 (B). The dismissal of the petition cites both provisions.

REASONS TO DENY THE PETITION

As the overview of the record presented above makes clear, this is a case involving extraordinarily damaging behavior by the petitioner, including child kidnapping and baseless claims of child sexual abuse. It is not an example of an "epidemic problem" in state family law courts. Nor is this a case in which the state law procedure discriminates against *pro se* parties. Petitioner was represented by a phalanx of lawyers before the JDR court. Her failure to appear for sentencing on contempt did not convert this to a *pro se* case. Furthermore, the so-called lethal combination of court orders terminating parental rights and *capias* orders threatening imprisonment is not a violation of due process. Courts have the right to hold litigants in civil contempt when they have been adjudicated to have violated court orders. The enforcement of contempt orders is a proper judicial function necessary for the administration of justice, not a violation of due process.

A. Petitioner Was Not Denied Equal Protection in Seeking an Appeal.

Petitioner asserts that *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d (1996) stands for the proposition that the state may not unfairly erect barriers to appeal. She claims that because she was *pro*

se and because she was subject to imprisonment for her contempt, constitutionally impermissible barriers were present.

M.L.B. is not relevant to this case. *M.L.B.* dealt with economic barriers. An indigent mother whose parental rights had been terminated was denied an appeal because she could not pay for a required transcript. Her application to appeal *in forma pauperis* was rejected.

The Supreme Court held that where an appeal was allowed, the state could not "cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." 519 U.S. at 111, 17 S.Ct. at 561 quoting *Ross v. Moffitt*, 417 U.S. 600, 607, 94 S.Ct. 2437, 2442, 41 L.Ed.2d 341 (1974). There are no constitutionally infirm economic barriers present here.[11] Unlike M.L.B., petitioner did not seek to be treated *in forma pauperis* or submit to an examination of her finances.

Furthermore, *M.L.B.* dealt with a very specific proceeding, the termination of parental rights, which the court described as "a unique kind of deprivation." 519 U.S. at 118, 117 S.Ct. 565 *quoting Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 650 (1981). But the court carefully distinguished termination of parental rights "from other domestic relations matters such as divorce, paternity, **and child custody**." 519 U.S. at

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[11] In Virginia, *de novo* appeal of most JDR rulings is exempt from the posting of an appeal bond. Va. Code §16.1-296(H).

127, 117 S.Ct at 569. The clear implication is that the equal protection analysis applied in *M.L.B.* would not apply to such cases.

Although petitioner describes the June 6, 2008 JDR order as a "termination" of her parental rights throughout the petition, that is not what occurred. Petitioner lost custody, not her parental rights. The June 8, 2008 order clearly established a regime by which petitioner could regain some access to her child by availing herself of the court, and completing a psychological evaluation.[12] There was no termination of parental rights as occurred in *M.L.B.* Petitioner retains the right to apply for a change in the order based on change in circumstances and, in fact, has done so.

There are no equal protection issues here and *M.L.B.* does not apply. Petitioner was not *pro se*, she had six lawyers. She presented no evidence to any court that she was impoverished. The case did not result in termination of parental rights, but rather an award of custody with justifiable prerequisites to the resumption of visitation rights.

B. Petitioner Was Not Deprived of Due Process Because She Was Facing Penalties for Contempt.

The fact that petitioner was subject to penalties for

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[12] By contrast, the Virginia parental rights termination statute, Va. Code §16.1-283 would provide no avenue of return to custody. After termination, the parent "becomes a legal stranger to the child." *Shank v. Department of Social Services*, 217 Va. 506, 509, 230 S.E.2d 454, 457 (1976).

contempt arising from her repeated violations of court orders does not implicate either equal protection or due process issues. Petitioner describes a "Catch-22" situation because she purportedly could not exercise her rights to a *de novo* appeal because she would have been arrested. But this is a situation which applies to anyone who has been convicted of an offense or held in contempt. Petitioner cites not a single case to support her position that she was deprived of due process because she was subject to arrest.[13]

Petitioner would have the Court believe that because she fled the jurisdiction she should have more rights than if she had appeared at the June 6, 2008 hearing and been sentenced for contempt. The *capias* orders of which petitioner complains simply commanded her appearance before the JDR court, by arrest if necessary. Bench warrants are issued every day by trial courts. They do not deprive litigants of due process. They command the appearance of the absent party at a hearing where they will be accorded due process. The *capias* orders did not impose a sentence on petitioner. Any sentence would have come after the hearing and would have been subject to appeal. The appropriate course when faced with a contempt order with which one disagrees is to comply and appeal. *Leisge v. Leisge*, 224 Va. 303, 307, 296 S.E.2d 538, 540 (1982); *Robertson v. Commonweath*, 181 Va. 20, 25 537 S.E.2d 352, 359 (1943).

The procedure by which petitioner was adjudicated

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[13] In the instant case, petitioner was able to file her Notice of Appeal without being imprisoned. She lost her right to a *de novo* appeal because she made a late filing.

to be in contempt did not violate due process. The key components of due process are notice and an opportunity to be heard. *Moore v. Smith*, 177 Va. 621, 626, 15 S.E.2d 48, 49 (1941). Where a party has the opportunity to present testimony but chooses not to do so, there is no denial of due process. *Venable v. Venable*, 2 Va. App. 178, 182, 342 S.E.2d 646, 649 (1986).

C. The JDR Decision Was Not Arbitrary, Contained Findings of Fact, and Was Based on Substantial Evidence.

By omitting the June 6, 2008 order (Resp. App. 31) in which the JDR court stated that petitioner had abducted her child and the Montgomery County Child Protective Services officials had expressed concern for the child's safety, petitioner makes the claim the JDR order "was arbitrary, without reason or finding of fact" (Petition 18), "was a one line order with no finding of substantial evidence" (Petition 21) and "was without any evidentiary hearing of record." (Petition 21).

The JDR court made findings of fact in the order that petitioner did not place in her appendix. The court had available to it extensive testimony, including testimony by the petitioner while represented by counsel, which had taken place in the six prior hearings. The findings related to abduction were admitted to be correct when petitioner pled guilty to felony child abduction.

D. Petitioner Was Not Denied Any Due Process Rights When Her Untimely Appeal Was Dismissed by the Circuit Court.

The time to appeal the June 6, 2008 order expired on June 16, 2008. Va. Code 16.1-296. The failure to file a timely appeal is jurisdictional. The Circuit Court was therefore without jurisdiction of any kind. *Fairfax County Department of Human Development v. Donald*, 251 Va. 227, 229-230, 467 S.E.2d 803, 804 (1996).

E. The Denial of the Appeal to the Court of Appeals Was Appropriate and Not a Denial of Due Process.

Rule 5A:3(c) could not be more clear. The party filing a brief must send it by certified or registered mail if the document will not be received in the office of the clerk by the deadline. Petitioner, who has a Ph.D., should have been able to understand this language.

The Virginia Court of Appeals has long had a policy of requiring strict adherence to filing deadlines, as do most appellate courts. The Court of Appeals has previously addressed this issue. *Long v. Commonwealth*, 7 Va. App. 503, 506, 375 S.E.2d 368, 369 (1988). ("Since the Rule specifically lists the appropriate mailing methods without mentioning first class mail as an alternative, we must presume that method is intended to be excluded.") *Accord*, *Haywood v. Commonwealth*, 15 Va. App. 297, 298, 4223 S.E.2d 202, 203 (1992)

Other than reference to her suspect *pro se* status, petitioner had given no basis to support the position

that strict application of appellate deadlines is a denial of due process. The rules governing appeal procedures are mandatory and "compliance with them is necessary for the orderly, fair and expeditious administration of justice." *Condrey v. Childress*, 203 Va. 755, 757, 127 S.E.2d 150, 152 (1962) quoting *Lawrence v. Nelson*, 200 Va. 597, 598, 106 S.E.2d 618, 620 (1959).

F. The Rights of the Child Were Respected and Protected.

Petitioner asserts that her six year old child is the "victim" of the alleged constitutional violations and two of the "Questions Presented" relate to purported denials of the child's constitutional rights. The child is, of course, not a party to this appeal and the petitioner never describes in just what context the child's rights are being advanced by this litigation.

The fact is that the child was represented through this process by a guardian *ad litem*. The guardian *ad litem* is required to have training in the roles, responsibilities and duties of that position, and a background demonstrated proficiency in juvenile law. Va. Code §16.1-266. His or her primary duty is "to represent vigorously the infant ... fully protecting that individual's interests and welfare."*Stanley v. Dep't of Social Services*, 10 Va. App. 596, 603, 395 S.E.2d 199, 202-03 (1990), *aff'd by Stanley v. Fairfax County Dept. Of Social Services*, 242 Va. 60, 405 S.E.2d 621 (1991). The GAL participated fully in the case before the JDR and concurred in its ruling.

Both the JDR and the Montgomery County Child Protective Services determined that the mother was

not acting in the best interests of the child. The District of Columbia Superior Count, in Judge Mitchell-Rankin's December 2009 opinion, found that respondent provided the child with excellent medical care and that petitioner's claims of neglect were unfounded. (Resp. App. 50-51).

To the extent that the child has been deprived of access to her mother, it is not because of some constitutional violation. Petitioner has always carried the keys to resolve this matter in her own pocket. She has only to avail herself of the JDR and complete her psychological evaluation. This she steadfastly refuses to do, instead multiplying litigation. There is no constitutional violation,

CONCLUSION

The petitioner was well represented below. Numerous hearings were held. She chose not to attend the critical June 6, 2008 hearing because she was in the process of flouting the JDR court's order while committing felony child abduction. She is not *pro se.* Her parental rights were not terminated. She was not denied the right to appeal. Her appeals were untimely and properly denied. No constitutional issues have been raised. The petition for certiorari should be denied.

Respectfully Submitted,

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