

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Aug 31, 2015, 1:48 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

Supreme Court No. 91921-6
Court of Appeals No. 32490-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE WELFARE OF K.J.B.,

STATE OF WASHINGTON/DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent,

: v.

J.B. (Father),

Petitioner.

Filed 
Washington State Supreme Court

SEP - 9 2015
Ronald R. Carpenter
Clerk 

AMICI CURIAE MEMORANDUM OF
WASHINGTON DEFENDER ASSOCIATION AND LEGAL VOICE

LILLIAN HEWKO, WSBA #44915
Washington Defender Association
110 Prefontaine Place S.
Suite 610
Seattle, WA 98104
(206) 623-4321

DAVID WARD, WSBA #28707
Legal Voice
907 Pine St.
Suite 500
Seattle, WA 98101
(206) 682-9552, ext. 112

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY AND INTEREST OF *AMICI CURIAE*..... 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT..... 2

 A. A Trial Court’s Failure to Apply the
 Requirements of SHB 1284 Is Not Harmless
 Error.....2

 B. The Court of Appeals’ Harmless Error Analysis
 Misapprehends the Requirements of SHB 1284.....5

 C. This Case Raises Important Public Policy
 Concerns Regarding Incarcerated Parents and
 Their Children.....8

V. CONCLUSION.....10

TABLE OF AUTHORITIES

CASES

<i>In re Dependency of A.M.M.</i> , 182 Wn. App. 776, 332 P.3d 500 (2014).....	5, 7
---	------

OTHER SECONDARY RESOURCES

Drug Policy Alliance, <i>Fact Sheet: The Drug War, Mass Incarceration and Race</i> (2015).....	8
Joenne Harray <i>et al.</i> , <i>Children and Families of Incarcerated Parents Advisory Committee Annual Report</i> (2009).....	8
Lynne Reckman & Debra Rothstein, <i>A Voice for the Young Child with an Incarcerated Parent</i> , ABA Litigation Section, Children's Rights Litigation, Jan. 9, 2012 .	9
Marilyn C. Moses, <i>Correlating Incarcerated Mothers, Foster Care and Mother-Child Reunification</i> , <i>Corrections Today</i> (2006).	9
Miriam L. Bearse, Wash. Dep't of Soc. & Health Servs., <i>Children and Families of Incarcerated Parents: Understanding the Challenges and Addressing the Needs</i> (2008).....	8
Nancy G. La Vigne <i>et al.</i> , <i>Examining the effect of incarceration and in-prison family contact on prisoners' family relationships</i> , 21 <i>J. Contemp. Crim. Justice</i> 314 (2005)	9

RULES AND STATUTES

RCW 13.34.145	3-4
RCW 13.34.180	3-4, 6-7
Substitute H.B. 1284, 63rd Leg., Reg. Sess. (Wash 2013).....	<i>passim</i>

I. INTRODUCTION

Amici Washington Defender Association and Legal Voice respectfully request that the Court grant the Motion for Discretionary Review filed by Mr. J.B. This case raises significant questions about whether the State and trial courts may ignore the requirements of SHB 1284, a law passed by the Legislature in 2013 to help preserve parent-child relationships when a parent is incarcerated.

By passing SHB 1284, the Legislature plainly required that when a parent is incarcerated, his or her parental rights may not be terminated unless the trial court has considered mandatory factors established by the Legislature. The trial court here failed to comply with the Legislature's mandate, a point that the Court of Appeals recognized.

Nonetheless, the Court of Appeals held that the trial court's failure to consider mandatory requirements of SHB 1284 in terminating Mr. J.B.'s parental rights amounted to harmless error. The published opinion in this case sets a dangerous precedent and is in conflict with a prior published decision of the Court of Appeals for Division I. When the Court of Appeals found this deprivation of Mr. J.B.'s statutory right to be harmless error, it dismissed the protections afforded to incarcerated parents and their children by the Washington Legislature, contravening law and policy. Because the errors and the issues presented in this case are substantial and raise fundamental questions about the interpretation of a recently enacted statute designed to preserve the relationships of

incarcerated parents and their children, *Amici* urge the Supreme Court to accept this case for review.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The identity and interest of *Amici* are set forth in the motion for leave to file an amicus brief, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt and incorporate by reference the Statement of the Case set forth in the Motion for Discretionary Review at 1-4, previously filed with the Court.

IV. ARGUMENT

A. A Trial Court's Failure to Apply the Requirements of SHB 1284 Is Not Harmless Error.

In the 2013 legislative session, the Washington Legislature passed SHB 1284, a bill that made substantial changes to Washington's dependency and termination statutes with regard to incarcerated parents, including long-term incarcerated parents. *See* Substitute H.B. 1284, 63rd Leg., Reg. Sess. (Wash. 2013). This legislation became effective July 28, 2013, well before the termination trial in this case. *Amici* were involved with advocating for passage of the legislation.

SHB 1284 included many provisions to help preserve the relationships of incarcerated parents and their children. For example, SHB 1284 provided:

- Incarcerated parents must have the opportunity to participate in dependency case conferences through telephone or video conferences.

- Permanency plans for children of incarcerated parents must provide for visitation opportunities, unless visitation is not in the best interests of the child.
- A parent's incarceration is a good cause exception for a court to defer ordering the state to file a termination petition.

But of particular significance to this case, SHB 1284 substantially amended RCW 13.34.180(1)(f), which is one of the six factors that the State must prove by clear, cogent, and convincing evidence in order to terminate a parent's rights.

Before the enactment of SHB 1284, RCW 13.34.180(1)(f) provided only that the State was required to prove "[t]hat continuation of the parent and children relationship clearly diminishe[d] the child's prospects for early integration into a stable and permanent home." RCW 13.34.180 (2009). SHB 1284 added the following new requirements to RCW 13.34.180(1)(f) in cases where a parent is incarcerated:

If the parent is incarcerated, the court **shall** consider whether a parent maintains a meaningful role in his or her child's life based on the factors identified in RCW 13.34.145(4)(b); whether the department or supervising agency made reasonable efforts as defined in this chapter; and whether particular barriers existed as described in RCW 13.34.145(4)(b) including, but not limited to, delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child.

Laws of 2013, ch. 173, § 4 (emphasis added).

These new provisions mean that if a parent is incarcerated, a trial court that is determining whether to terminate a parent-child relationship *must* consider: (1) whether the incarcerated parent has maintained a

meaningful role in their child's life, based on specific statutory factors; (2) whether the department made reasonable efforts as defined in RCW 13.34 to preserve the family; and (3) whether barriers existed for the parent, including barriers in accessing visitation or other meaningful contact with the child. On their face, the amendments to RCW 13.34.180(1)(f) add mandatory factors that trial courts must consider in deciding whether to terminate the relationship between an incarcerated parent and his or her children.¹

The statute's mandatory language that the court "shall consider" the factors added to RCW 13.34.180(1)(f) by SHB 1284 does not give the trial court discretion to omit consideration of these requirements. Nor does it excuse the State from its burden of proving each added provision.

Division I has previously held that reversal is required if the State and the trial court fail to follow the requirements of RCW 13.34.180(1)(f) that were added by SHB 1284. In a case involving a similar failure of the State and the trial court to follow the requirements of RCW 13.34.180(1)(f) with respect to incarcerated parents, Division I held that

¹ RCW 13.34.145(4)(b) states: "The court's assessment of whether a parent who is incarcerated maintains a meaningful role in the child's life may include consideration of the following: (i) the parent's expressions or acts of manifesting concern for the child, such as letters, telephone calls, visits, and other forms of communication with the child; (ii) the parent's efforts to communicate and work with the department or supervising agency or other individuals for the purpose of complying with the service plan and repairing, maintaining, or building the parent-child relationship; (iii) a positive response by the parent to the reasonable efforts of the department or the supervising agency; (iv) information provided by individuals or agencies in a reasonable position to assist the court in making this assessment, including but not limited to the parent's attorney, correctional and mental health personnel, or other individuals providing services to the parent."

“[t]he Department was required to satisfy its burden of proof as to all of the termination factors, and the trial court was required to apply the law in effect at the time of its ruling.” *In re Dependency of A.M.M.*, 182 Wn. App. 776, 789-90, 332 P.3d 500 (2014). Because “[n]either did as was required,” the Court of Appeals reversed the termination ruling and remanded for further proceedings. *Id.* at 790. The Court in *A.M.M.* did not suggest that a harmless error analysis could excuse the failure of the State or the trial court to follow the law’s requirements.

By contrast, the Court of Appeals for Division III in this case held that “a failure to weight the required considerations will not require reversal if the State’s case is strong or if the factors are not contested.” Slip. Op. at 26. This assertion is inconsistent with Division I’s holding in *A.M.M.*, a point that the Court of Appeals recognized in this case when it stated that “unlike *A.M.M.*, we conclude that the trial court’s failure to weigh the required considerations was harmless error, which does not require reversal.” *Id.* at 27 (emphasis added).

B. The Court of Appeals’ Harmless Error Analysis Misapprehends the Requirements of SHB 1284.

The Court of Appeals’ harmless error analysis in this case consisted of one paragraph. *See* Slip. Op. at 26-27. The Court’s brief harmless error analysis misapprehends key requirements of the new law.

In explaining its harmless error determination, the Court stated that “once incarcerated, J.B. made no effort to play a meaningful role in his daughter’s life.” Slip Op. at 26. However, this statement ignores evidence

that the State made no effort to help Mr. J.B. maintain a role in K.J.B.'s life. The record shows that Mr. J.B. regularly visited with K.J.B. before he was incarcerated in January 2014. Slip. Op. at 4. Evidence at trial appears to indicate that Mr. J.B.'s DSHS social worker Sonny Laform made no effort to maintain contact with Mr. J.B. or to help facilitate continued contact between Mr. J.B. and K.J.B. following incarceration. Mr. Laform testified that he does not accept collect calls, did not provide Mr. J.B. with preaddressed stamped envelopes so that Mr. J.B. could communicate with him, and "assumed" that Mr. J.B. had his address available to him while incarcerated. Slip. Op. at 9.

SHB 1284 requires a trial court to consider "whether the department or supervising agency made reasonable efforts as defined in this chapter" in determining whether to terminate an incarcerated parent's rights. RCW 13.34.180(1)(f). It also requires a trial court to consider "delays or barriers experienced in keeping the agency apprised of his or her location and in accessing visitation or other meaningful contact with the child." *Id.* Here, the evidence that Mr. J.B.'s DSHS social worker made no effort to maintain contact with Mr. J.B. or to facilitate contact between Mr. J.B. and K.J.B. after his incarceration raises important questions about these mandatory considerations. The trial court's failure to consider the difficulties Mr. J.B. experienced in maintaining a meaningful role in K.J.B.'s life when he was incarcerated cannot be

dismissed as harmless error. Rather, these are core considerations that the Legislature required trial courts to consider in enacting SHB 1284.

The Court of Appeals also explained its harmless error decision by stating “there is no evidence that barriers of incarceration impacted J.B.’s ability to maintain meaningful contact with his daughter nor is there evidence that barriers of incarceration impacted J.B.’s required assessments, services, or his ability to participate in court proceedings.” Slip. Op. at 27. This statement overlooks the fact that Mr. J.B.’s incarceration necessarily impacted his ability to maintain meaningful contact with K.J.B., as well as his ability to access services – a key reason why SHB 1284 was adopted in the first place. It also appears to suggest that it was Mr. J.B.’s burden to offer additional evidence on these factors, which would effectively shift the burden of proof on mandatory factors in a termination trial from the State to the parent. As Division I noted in *A.M.M.*, “[t]he Department was required to satisfy its burden of proof as to all of the termination factors,” including the factors added to RCW 13.34.180(1)(f) by SHB 1284. *A.M.M.*, 182 Wn. App. at 789-90.

By adopting SHB 1284, the Legislature recognized that incarcerated parents and children face barriers in maintaining relationships, and required the State and courts to take additional steps to consider and address such barriers before terminating the parent-child relationship. The State and the trial court failed to follow the requirements of the statute here. This error cannot be dismissed as harmless by

effectively faulting the parent for failing to overcome on his own the barriers he faced due to incarceration.

C. This Case Raises Important Public Policy Concerns Regarding Incarcerated Parents and Their Children.

Too often, incarceration results in the permanent loss of parent-child relationships, a loss that harms families and communities. The impact of these losses has grown because the prison population in Washington State has increased rapidly in recent years. Miriam L. Bearse, Wash. Dep't of Soc. & Health Servs., *Children and Families of Incarcerated Parents: Understanding the Challenges and Addressing the Needs* 19-21 (2008).² In Washington State facilities alone, 15,000 of the 18,000 offenders who are in confinement are parents, which leaves approximately 29,000 dependent children. Joenne Harray *et al.*, *Children and Families of Incarcerated Parents Advisory Committee Annual Report 2* (2009).³ Many are children of color, because of racial disparities in the criminal justice system. Drug Policy Alliance, *Fact Sheet: The Drug War, Mass Incarceration and Race* (2015).⁴

We lack the data to know the exact number of families who have been separated due to incarceration in Washington. However, a study in

² Available at https://www.prisonlegalnews.org/media/publications/children_and_families_of_incarcerated_parents_report_miriam_bearse_2008.pdf

³ Available at <https://www.k12.wa.us/Incarceratedparents/pubdocs/CFIP2008CommitteeReport.pdf>

⁴ Available at http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf

Illinois showed that incarcerated parents in the child welfare system are now losing their children at twice the rate of those parents not involved in the criminal justice system. Marilyn C. Moses, *Correlating Incarcerated Mothers, Foster Care and Mother-Child Reunification*, *Corrections Today* (2006).⁵

SHB 1284 was enacted in response to significant evidence that maintaining contact with one's incarcerated parent improves a child's emotional response to their parent's incarceration and supports parent-child attachment, while lowering the likelihood of recidivism among incarcerated parents and reducing chances of intergenerational incarceration. *See e.g.*, Nancy G. La Vigne *et al.*, *Examining the effect of incarceration and in-prison family contact on prisoners' family relationships*, 21 *J. Contemp. Crim. Justice* 314 (2005). Further, there is evidence that preserving and strengthening the relationship between child and parent while a parent is incarcerated promotes permanency and reduces the potentially damaging effects of separation. Lynne Reckman & Debra Rothstein, *A Voice for the Young Child with an Incarcerated Parent*, ABA Litigation Section, *Children's Rights Litigation*, Jan. 9, 2012.⁶

The legal system recognizes the fundamental right to parent. But without proactive legislative changes or policies, the destruction of the

⁵ Available at <https://www.ncjrs.gov/pdffiles1/nij/216276.pdf>

⁶ Available at <https://apps.americanbar.org/litigation/committees/childrights/content/articles/winter2012-young-child-incarcerated-parent.html>

family unit has become a common collateral consequence of incarceration. It was for these very reasons that SHB 1284 was enacted by the Washington Legislature. It is important that the Court review this case to provide the necessary guidance that will ensure that SHB 1284 is applied and interpreted consistent with the Legislature's intent.

V. CONCLUSION

Given the significant public interests at stake, *Amici* respectfully request that the Court grant Mr. J.B.'s Motion for Discretionary Review and hold that the trial court's failure to follow the requirements of SHB 1284 in deciding to terminate Mr. J.B.'s parental rights is not harmless error.

DATED this 31st day of August, 2015.

Respectfully submitted,

WASHINGTON DEFENDER
ASSOCIATION

By  for Lillian Hewko
Lillian Hewko, WSBA #44915 *per curiam letter*
lillian@defensenet.org

LEGAL VOICE

By 
David Ward, WSBA #28707
dward@legalvoice.org

Attorneys for *Amici Curiae*