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**SUPREME COURT OF THE STATE OF WASHINGTON**

In re the Welfare of K.J.B.,

a minor child.

**STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES'  
RESPONSE TO AMICUS BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

Amici<sup>1</sup> provide a thorough and eloquent explanation of their view of the policies behind the Legislature's 2013 amendments to child welfare laws regarding incarcerated parents. But those policy concerns are not implicated in this case where the father was incarcerated for only the last two months of a nearly two-year dependency, and the barriers of incarceration neither caused the separation of J.B. from his daughter nor prevented him from addressing his parental deficiencies and establishing a meaningful role in his daughter's life. Instead, the facts here conclusively show that J.B.'s actions and lack of action before being incarcerated led to the termination of his parental rights. In light of the specific facts in this case, the policy concerns raised by Amici only highlight why the error of not explicitly considering the incarcerated parent factors is harmless here.

Amici argue that harmless error should not be applied to any failure to consider incarcerated parent factors, no matter how insignificant a role the incarceration played in the dependency and hearing to terminate parental rights. In doing so, Amici repeat J.B.'s mistake of conflating what a court must "consider" with the element that the court must find proven before terminating parental rights. In examining whether the error here

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<sup>1</sup> Amici Washington Defender Association, Legal Voice, American Civil Liberties Union of Washington, Incarcerated Mothers' Advocacy Project, and Incarcerated Parents Advocacy Clinic filed a joint amicus brief.

was harmless, this Court should determine whether the error had any impact on the trial court's finding that continuation of the parent-child relationship clearly diminished the child's prospects for early integration into a stable and permanent home. RCW 13.34.180(1)(f). The Legislature declined to make the incarcerated parent considerations required findings, instead requiring only that the trial court "consider" them. Because considering those issues would not have made any difference in the ultimate finding of the trial court that terminating J.B.'s parental rights allowed K.J.B. to be integrated into a stable and permanent home, this Court should affirm.

## **II. ARGUMENT AND AUTHORITY**

### **A. The Policy Concerns Identified By Amici Are Not Implicated In This Case, Thus Supporting The Court Of Appeals Conclusion That Any Error Was Harmless**

Nearly all of Amici's brief addresses the policy concerns leading to the Legislature's adoption of the 2013 amendments to child welfare laws concerning incarcerated parents. Amici make only passing reference to how those policies are implicated in this case, and examining those policy concerns in the context of the facts of this case does not support J.B.'s arguments to this Court. To the contrary, Amici's arguments support the conclusion reached by the Court of Appeals of harmless error.

**1. Amici's Generalized Policy Concerns Are Not Implicated Here**

The overarching theme of the policies that Amici identify as animating the legislative amendments is concern over the particular harms and obstacles occurring when a parent's incarceration *causes* family separation. *E.g.*, Amici Br. at 6 ("To address the harm of family separation *due to* incarceration . . . ." (emphasis added)). That concern is inapplicable here, where it is undisputed that the family separation was not caused in any way by J.B.'s incarceration. Rather, the dependency was established and continued due to J.B.'s lack of interest in his daughter's dependency case and his chronic and ongoing methamphetamine use. RP 31-33; CP 11-13 (unchallenged FF 1.10 to 1.18). It is also undisputed that the petition to terminate parental rights, and the initial scheduling of the hearing to terminate parental rights, were not caused by J.B.'s incarceration. Rather, the decision to pursue termination of parental rights was caused primarily by J.B.'s continued methamphetamine abuse and his failure to correct this parental deficiency despite attempts at treatment arranged by the Department. CP 173; CP 11-13. The petition to terminate parental rights, filed well before J.B. was incarcerated, alleged "[t]he father is unable to maintain sobriety and is unable to provide a safe, drug/alcohol free, and stable home environment." CP 173. Even the

unstated premise of Amici's arguments—that there was a family connection to begin with that was severed due to incarceration—is not present here. K.J.B. has never been placed with J.B., has no bond with J.B., does not consider him a parent, and has spent almost her entire life with the same foster family. CP 14 (unchallenged FF 1.25); RP 138; Ex. 3 at 17. The overarching theme of addressing harms from separation *caused by* incarceration is simply inapplicable here, reinforcing the Court of Appeals conclusion that failure to consider the incarcerated parent factors was harmless error.

**2. Amici's Specific Policy Concerns Are Not Implicated Here**

Not only is Amici's overarching theme inapplicable to the facts of this case, but so too are many of the specific policies or examples set out in their brief. For example, Amici argue that among the reasons the Legislature adopted these amendments is that “incarceration should not be the sole reason for termination.” Amici Br. at 9. J.B. has not even argued—nor could he—that incarceration was the sole reason for termination. Amici also argue that the amendments were enacted in part to prevent the Department from assuming that one cannot parent from prison. Amici Br. at 11. There is no indication from the record here, and not even an allegation, that any such assumption was made.

Amici also quote a legislator citing research regarding the profound bond between a parent and child and how it should be maintained if possible, even if a parent is incarcerated. Amici Br. at 11. Here, in an undisputed factual finding, the trial court found that J.B. “does not have a bond” with K.J.B. CP 14 (unchallenged FF 1.22). This finding is amply supported by the facts that K.J.B. has never been placed with J.B., J.B. made no attempts to contact the Department or arrange visits with his daughter during the first eight months of her life, K.J.B. does not consider J.B. a parent, J.B. was “distant” during visits with K.J.B., and K.J.B. has lived with the same foster family for almost her entire life. *See generally* Dep’t’s Suppl. Br. at 2-7. For similar reasons, Amici’s citation to scholars discussing the trauma of a separation caused by incarceration of a parent and encouraging continued contact to alleviate the effects of such trauma are completely inapposite. *E.g.*, Amici Br. at 13 (quoting Lynne Reckman & Debra Rothstein, *A Voice for the Young Child with an Incarcerated Parent*, Vol. 14, No. 2 Child Rts. Litig. 19, 28 (Winter 2012)). Undoubtedly, the incarceration of an otherwise fit parent who has a deep and meaningful relationship with his or her child could cause trauma to the child, and the Legislature apparently sought to counter perceived stereotypes in encouraging continued contact with incarcerated parents. But here, the only possible trauma would come from removing K.J.B. from the

only home she has known, or allowing her to unnecessarily remain in legal limbo rather than being adopted by this family.

Amici also cite research showing that children of incarcerated parents continue to value their relationship with their parent, and that incarcerated parents can continue to meaningfully parent from prison. Amici Br. at 12 (citing, *inter alia*, Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 Berkeley J. Gender L. & Just. 78, 91 (2011)). Again, while this conclusion may be true in some cases, it is demonstrably not so here. And even though no petition for guardianship had been filed, the trial court expressly considered and rejected that possibility. CP 14 (unchallenged FF 1.25).

Amici also complain that terminating parental rights of incarcerated parents often leads to long-term foster care and not to adoption. Amici Br. at 13. Again, Amici ignore the record, which shows that K.J.B.'s long-term foster family has already indicated a desire to adopt her. CP 14 (unchallenged FF 1.25). Only the existence of a legal parent-child relationship between K.J.B. and J.B. stands in the way of adoption.

In summary, the policy concerns raised by Amici are not implicated given the specific facts of this case. Thus, Amici's discussion of the important public policy concerns underlying the legislative amendments only reinforces that while the trial court erred by not

explicitly considering certain points required when a parent is incarcerated at the time of a trial to terminate parental rights, that error is harmless.

**3. The Legislative Amendments Were Not Intended To Put Incarcerated Parents In A Better Position Than If They Had Not Been Incarcerated**

Amici argue persuasively that the legislative amendments were intended to allay perceived disadvantages faced by incarcerated parents in maintaining or establishing family unity. Yet the Department does not read Amici's brief to argue that incarcerated parents should be in a better position to avoid termination of parental rights than if they had never been incarcerated. Indeed, it would be absurd to make such an argument. But that is exactly what would result in this case if this Court reverses the Court of Appeals.

As explained more fully in the Department's Supplemental Brief, it is apparent from the record that had J.B. not been incarcerated at the time of the hearing to terminate parental rights, the result would have been the same. Dep't's Suppl. Br. at 13-18. Thus, failure to make the incarcerated parent considerations was harmless error and this Court should affirm.

**B. Policies Addressing Incarcerated Parents Do Not Trump The Primary Policy in RCW 13.34: The Welfare Of The Child**

In addition to failing to show how incarcerated parent policies are implicated in this case, Amici overlook the other significant legislative

policies enshrined in child welfare statutes. Chief among these policies are the “rights and safety of the child.” RCW 13.34.020. Thus, “[t]he right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.” RCW 13.34.020. As this Court recently reiterated, “‘a child’s welfare is the court’s primary consideration.’ . . . [A]nd the State has an interest in ensuring such a speedy resolution to ensure that children do not remain in legal limbo—with the mental and emotional strain that entails—for any longer than is necessary.” *In re Dependency of M.H.P.*, 184 Wn.2d 741, 762, 364 P.3d 94 (2015) (quoting *In re Welfare of Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973)).

Application of harmless error here will uphold these paramount policies. K.J.B. is entitled to a safe, stable, and permanent home, and to a speedy resolution of this case. Reversing the termination of parental rights based on a trial error that is harmless would interfere with that speedy resolution because it would unnecessarily delay the permanence and stability K.J.B. deserves. Worse, it could subject K.J.B. to the mental and emotional strain from the “legal limbo” that this Court has decried. *Id.* at 762. As testimony at trial demonstrated, failure to allow the permanency of adoption introduces insecurities and risks that would not allow K.J.B. to fully integrate into a stable home. RP 88. This uncertainty of K.J.B. not

necessarily being a part of her permanent family would be “devastating” to her. RP 88.

Conversely, reversing the Court of Appeals will do little, if anything, to uphold the policies addressed by Amici. But it will undoubtedly stymie the most important legislative policies expressed in RCW 13.34.020. Accordingly, this Court should affirm the Court of Appeals, since the error was harmless.

**C. Harmless Error Applies To The Incarcerated Parent Considerations**

Amici assert that application of the harmless error standard is legally incorrect, relying on *In re Dependency of A.M.M.*, 182 Wn. App. 776, 782, 787-90, 332 P.3d 500 (2014), and arguments in J.B.’s supplemental brief. Amici Br. at 19. As explained more fully in the Department’s Supplemental Brief, the *A.M.M.* opinion did not address the harmless error doctrine, and instead applied an inapposite analysis for inferring a missing finding in a proceeding to terminate parental rights. *See* Dep’t’s Suppl. Br. at 19-20. The *A.M.M.* opinion incorrectly applied the “inferred finding” analysis because the statutory requirements at issue do not require the trial court to make any findings at all to justify termination of parental rights; rather, the court must “consider” certain

factors that ultimately are not dispositive facts. RCW 13.34.180(1)(f); *In re Termination of M.J.*, 187 Wn. App. 399, 410 n.5, 348 P.3d 1265 (2015).

Amici assert, without citation to authority, that the trial court was required to make “express findings about the incarcerated parent factors” on the record. Amici Br. at 18. As the Court of Appeals has noted, the Legislature plainly did no such thing. *In re M.J.*, 187 Wn. App. at 409. In addition to determining this from the plain language of the statute, the *M.J.* court noted that the Legislature “had no trouble mandating findings in other portions of the dependency statute when it has wanted to do so.” *Id.* (citing RCW 13.34.110 as mandating written findings of fact).

Amici also appear to rely on the same faulty premise that underlies J.B.’s arguments: that the legislative amendments created a new element that must be proven to justify termination of parental rights. *See* Amici Br. at 18-19. This view ignores the statute’s plain language. The statute is set forth below with prior statutory language italicized and the amendments in normal type. It now requires the Department to allege, and the trial court to find:

*That continuation of the parent and child relationship clearly diminishes the child’s prospects for early integration into a stable and permanent home.* 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 factors identified in RCW 13.34.145(5)(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(5)(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.

RCW 13.34.180(1)(f) (emphasis added); RCW 13.34.190(1)(a)(i). Two significant aspects of this statutory language establish that the incarcerated parent considerations are not a new element that must be proven to justify termination of parental rights. First, the statute does not explicitly require the trial court to make any findings or determinations regarding incarcerated parents to justify a termination of parental rights. *See In re M.J.*, 187 Wn. App. at 409. Instead, the trial court is required to “consider” certain factors. RCW 13.34.180(1)(f). Second, and more importantly, the incarcerated parent considerations are not dispositive facts. *In re M.J.*, 187 Wn. App. at 410 n.5. In other words, even if a trial court determines that a parent maintains a meaningful relationship with his child, the trial court may find that the (1)(f) element has been met. RCW 13.34.180(1)(f). The same is true of the other required considerations. RCW 13.34.180(1)(f).

In contrast, the actual (1)(f) element does require the trial court to make a specific, dispositive finding: that continuation of the parent and child relationship clearly diminishes the child’s prospects for early integration into a stable and permanent home. RCW 13.34.180(1)(f);

RCW 13.34.190(1); *In re Dependency of K.D.S.*, 176 Wn.2d 644, 294 P.3d 695 (2013). The structure of the statutory language makes clear that the incarcerated parent considerations themselves do not determine whether the (1)(f) element has been met, but merely inform the trial court's decision with respect to the actual (1)(f) element. *In re M.J.*, 187 Wn. App. at 409, 410 n.5.

Thus, this case is not like one in which the trial court has failed to make a finding required to justify termination of parental rights, as Amici and J.B. argue. Rather, it is closely analogous to those in which courts have found harmless error where the trial court found the required elements had been met, but erred by failing to follow the required procedures preceding the finding. *E.g.*, *In re Welfare of M.R.H.*, 145 Wn. App. 10, 25, 188 P.3d 510 (2008) (affirming despite Department's failure to provide all services required under RCW 13.34.180(1)(d)), *review denied*, 165 Wn.2d 1009 (2008), *and cert. denied*, 556 U.S. 1158 (2009); *In re Welfare of C.B.*, 134 Wn. App. 336, 347, 139 P.3d 1119 (2006) (affirming despite insufficient evidence to support a finding of fact); *In re Welfare of M.G.*, 148 Wn. App. 781, 790, 201 P.3d 354 (2009) (affirming despite failure of court to consider a social study prior to finding dependency as required by RCW 13.34.110(3)(b)); *see also In re Welfare of Hall*, 99 Wn.2d 842, 664 P.2d 1245 (1983) (affirming despite

failure of Department to provide services sufficient to satisfy then RCW 13.34.180(4) [currently RCW 13.34.180(1)(d)].

**D. Application Of The Harmless Error Doctrine Neither Shifts The Burden Of Proof Nor Undermines The Purpose Of The Legislative Amendments**

Amici also argue that application of harmless error improperly shifts the burden of proof and undermines the purpose of the legislative amendments. Amici Br. at 19. But the burden of proving by clear, cogent, and convincing evidence that continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home remains squarely with the Department. RCW 13.34.180(1)(f); RCW 13.34.190(1)(a)(i). That burden has been met here, and neither J.B. nor Amici make any argument to the contrary.

Amici's objection also either misunderstands the nature of harmless error review or simply calls into question the entire doctrine, without providing any authority to do so. Harmless error review acknowledges that virtually no trial is perfect, and that judgments should not be reversed for errors that do not affect the outcome of a trial. *E.g.*, *United States v. Blevins*, 960 F.2d 1252 (4th Cir. 1992). Courts applying the harmless error doctrine in child welfare cases typically have stated without further elaboration that "prejudice" had not been shown, or that error without prejudice is not grounds for reversal. *E.g.*, *In re Welfare of*

*C.B.*, 134 Wn. App. at 347. But elsewhere, this Court has explained that error does not cause prejudice unless “within reasonable probabilities” had the error not occurred, the result might have been materially different.<sup>2</sup> *State v. Rogers*, 83 Wn.2d 553, 557, 520 P.2d 159 (1974); *see also Maicke v. RDH, Inc.*, 37 Wn. App. 750, 754, 683 P.2d 227 (1984) (applying standard in civil case). Contrary to Amici’s argument, requiring a litigant to establish that an error “within reasonable probabilities” would have changed the result does not shift the burden of proof.

By the same token, affirming a trial court’s decision terminating parental rights where a parent cannot show that consideration of the incarcerated parent factors would have changed the result “within reasonable probabilities” does not undermine the purpose behind the legislative amendments. As enunciated by Amici, the purpose of the amendments generally is to reduce barriers faced by incarcerated parents in reunifying with their children, and to counteract beliefs that parents are

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<sup>2</sup> The Department acknowledges the more stringent standard applicable to constitutional error, in which the Department would have to show that the error was harmless beyond a reasonable doubt. *See, e.g., State v. Coristine*, 177 Wn.2d 370, 300 P.3d 400 (2013). Even this more stringent standard is easily met in this case, so the Court need not decide the applicable standard to affirm. But Amici and J.B. have cited no authority to suggest that the incarcerated parent considerations are constitutionally required, and the Department is aware of none. While termination of parental rights of course involves important constitutional rights of both parents and children, not every aspect of the trial to terminate parental rights is constitutionally mandated, which is why numerous courts have applied a harmless error standard in child welfare cases that requires the party complaining of error to show prejudice. *E.g., In re Welfare of C.B.*, 134 Wn. App. at 347; *In re Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513, *review denied*, 104 Wn.2d 1008 (1985).

incapable of parenting from prison. But if a parent cannot even advance a “reasonable probability” that consideration of the incarcerated parent factors would have changed the result, those purposes are not thwarted in any way by affirming a termination of parental rights.

Nor does application of the harmless error doctrine provide incentives for the Department or the trial court to discount the statutory requirement that if a parent is incarcerated at the time of the hearing to terminate parental rights, certain points must be considered. The Department acknowledges that the statute requires those considerations to be made, even if a parent is only incarcerated for a single day if that day happens to fall on the date of a hearing to terminate parental rights. RCW 13.34.180(1)(f) (“If the parent is incarcerated, the court *shall* consider . . . .” (emphasis added)). The Department submits that there is no reason to suspect that trial courts will ignore this statutory mandate in the hopes that an appellate court will later find the error to be harmless. Similarly, the Department has no incentive to create potential issues on appeal that could lead to reversal of a termination of parental rights and delay the child’s permanency. Nevertheless, as is universally acknowledged, to err is human. And where that error does not, even “within reasonable probabilities,” affect the outcome of a trial, this Court should affirm.

### III. CONCLUSION

Both the letter and spirit of the legislative amendments requiring a trial court to consider certain factors relating to incarcerated parents show that the trial court's error here was harmless. Amici raise the important policy concerns motivating the legislative amendments, but eschew applying any of those policies to the record here. In light of the record, those policy concerns are simply not implicated. Far from showing why harmless error should not be applied, consideration of those policy concerns in combination with the overriding legislative concern expressed in child welfare statutes of a child's right to a safe, stable, and permanent home demonstrates why this Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 11th day of May 2016.

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I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of State Of Washington, Department Of Social And Health Services' Response To Amicus Brief to be served via electronic mail on the following:

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In re Welfare of K.J.B. Cause No. 91921-6

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