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SUPREME COURT OF THE STATE OF WASHINGTON

In re Welfare of B.P.,

STATE OF WASHINGTON, DSHS,

Respondent,

v.

H.O. (Mother),

Petitioner.

**STATE'S ANSWER TO AMICUS BRIEF OF THE ACLU OF
WASHINGTON, LEGAL VOICE, INCARCERATED PARENTS
PROJECT OF THE SEATTLE UNIVERSITY SCHOOL OF LAW,
AND WASHINGTON DEFENDER ASSOCIATION**

ROBERT W. FERGUSON
Attorney General

Rebecca R. Glasgow, WSBA 32886
Deputy Solicitor General

Amy Soth, WSBA 26181
Assistant Attorney General

OID No. 91087
PO Box 40100
Olympia, WA 98504
360-664-3027

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I. INTRODUCTION

The State provided H.O. with services specifically targeted at repairing the bond with her daughter that H.O. broke when she relapsed and had no contact with her child, B.P., for almost a year. These services involved 22 one-on-one, two-hour visitation sessions with a therapist, which occurred more frequently than B.P. received therapy in her relative placement with her caregivers. Moreover, Ms. Eastep, the visitation therapist, testified to examples of the kind of assistance she was providing to H.O. and B.P. Neither H.O. nor amici show how these services were insufficient or somehow less effective than those provided to B.P. and her relatives.

Moreover, Amici's arguments are misdirected and avoid the facts of this case. No one disputes that H.O. made progress in achieving and maintaining sobriety, albeit in a structured setting, which improved her mental health and potential to parent B.P. But there is substantial evidence in the record to support the trial court's finding that despite this progress, H.O. was still unfit to parent BP at the time of trial and that unfitness could not be remedied in the near future. Critically, H.O. was not yet having unsupervised visitation with B.P., and her treatment providers estimated that it would take one to two years for her to be reliably in remission from substance abuse, and six more months for her to be mentally healthy enough to work on a deeper attachment with B.P.

Finally, these Amici misunderstand the State's arguments in this case. The State does not argue that lack of attachment to a parent at age one establishes parental unfitness or creates a presumption. Nor does the State argue that a parent could be declared unfit solely because the child's out-of-home placement provides a more stable or otherwise more preferable home for the child. Instead, the State argues that substantial evidence supports this trial court's findings that professionals with specialized training in attachment provided services to H.O., that these services were targeted at improving her bond with B.P., and despite these services, the mother was still unable to meet B.P.'s essential needs at the time of trial. In short, the record supports the superior court's findings that appropriate services were provided, H.O. remained unfit to parent B.P., and termination of parental rights was appropriate.

II. ARGUMENT

A parent's right to the care and custody of his or her children is certainly fundamental, and the courts should only intrude upon that right with great care. *See, e.g., In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998); *In re Welfare of A.G.*, 155 Wn. App. 578, 589, 229 P.3d 935 (2010). However, a parent's rights are not absolute. *In re Welfare of A.G.*, 155 Wn. App. at 579 (citing *In re Dependency of A.V.D.*, 62 Wn. App. 562, 567, 815 P.2d 277 (1991)). While family reunification is a priority under RCW 13.34, that goal is balanced against the child's right to "basic nurture, physical and mental health, and safety" and where there is conflict,

ultimately “the rights and safety of the child should prevail.” RCW 13.34.020; *In re Welfare of A.G.*, 155 Wn. App. at 589.

Moreover, even if evidence shows that a parent may eventually be able to correct their deficiencies, termination is still appropriate where deficiencies will not be corrected within the foreseeable future. *In re Welfare of A.G.*, 155 Wn. App. at 590. Washington courts have recognized that where a parent is unfit, the State must avoid leaving the child “in the limbo of foster care for an indefinite period” while the parent continues to work on her deficiencies. *In re Dependency of T.R.*, 108 Wn. App. 149, 167, 29 P.3d 1275 (2001).

A. Attachment and Bonding Services Were Provided to H.O., and It Was Appropriate to Also Provide Therapy and Services to B.P. in Her Current Placement to Help Her Deal with the Separation from her Mother and Avoid Attachment Disorder

Amici argue that the child’s relative caregivers were provided attachment services, but H.O. was not, and therefore all necessary and available services were not provided to H.O. Amici also claim that the services provided to B.P. in her relative placement “worsen[ed] the attachment problem” between H.O. and B.P., although they cite nothing in the record or any authority for this allegation. Amicus Br. at 9. Amici’s arguments, not only mis-read the record, they reflect a fundamental misunderstanding of what children need when they have suffered from broken attachments. And Amici’s arguments reflect a misunderstanding of what is accomplished with child therapy that is focused on attachment.

“[S]tandard practice for working with children with attachment issues is to work with the child’s current caretakers first, and then begin working with the child’s biological parents when the biological parents are transitioning into the role of the child’s primary, reliable caretakers.” See *In re Welfare of KMM*, 187 Wn. App. 545, 555, 349 P.3d 949 (2015) (reciting testimony of child therapist). The focus of the child’s therapy is to teach the child to rely on adult caretakers. *Id.* Once the child learns she can rely on adults and create a secure attachment, then the process of transitioning the child home works on transferring the child’s attachment to the parents and on building trust and attachments between the child and the biological parent. *Id.* Significantly, creating a secure attachment with the current caregiver first facilitates the ability to form other attachments with other adults. *Id.* at 555, 557 (describing testimony of second therapist); VRP at 168 (having a healthy attachment would help transfer attachment to another adult). Thus, work with B.P. and her relative caregivers would have facilitated B.P.’s ability to reattach with her mother.

Amici impliedly argue that no attachment services should be provided that involve any adult other than the parent until the parent has been declared unfit. Amicus Br. at 10-12. But the State must provide for the mental health care of children in foster care. RCW 74.13.031(7). Surely, children should be provided with the therapy and services they need to heal—in this case from a broken attachment and to avert attachment disorder—and a child’s current caregivers should not be deprived of the tools needed to help the child. This is what occurred in this case. VRP at 159

(services provided to B.P. and her caregivers were targeted at “assisting them in meeting [B.P.]’s needs”), 166 (“so I have worked with the relatives to help support [B.P.] in terms of how she can feel more secure in terms of that relationship and how we can minimize her disorganized behavior”).

In addition, Amici are incorrect when they claim that the services provided to B.P. and her primary caregivers were more extensive attachment services than H.O. received from Ms. Eastep. H.O. received assistance from Ms. Eastep more frequently than services were provided to B.P.’s caregivers. *See* VRP at 66, 160 (H.O. twice per week; caregivers every other week). B.P. and her relative caregivers were provided with services targeted at helping B.P.’s caregivers read her cues and avoid disruptions in her schedule, which triggered strong reactions in B.P. VRP at 161, 166. For example, B.P.’s therapist helped her caregivers to figure out what B.P. needed when she demanded to be put down and then panicked when they did so. VRP at 166. B.P.’s therapist also recommended that her caregivers maintain a consistent schedule as much as possible, because B.P.’s difficult behaviors seemed to correlate with even slight disruptions in her routine. VRP at 162-66.

In comparison, Ms. Eastep provided the following services to H.O. during visitations with B.P.:

- Ms. Eastep explained to H.O. what her absence meant for a child of B.P.’s age, and worked with her on how H.O. should expect B.P. to behave towards her. VRP at 62-64, 101.

- Ms. Eastep's treatment goals included assisting H.O. in identifying B.P.'s cues and boundaries related to their physical and emotional contact. VRP at 67.
- Ms. Eastep talked to H.O. about broken attachments and their long-term mental health consequences, (VRP at 72) and about different types of attachments and the progression of attachment, from a social relationship to an emotional relationship. VRP at 67-69.
- Ms. Eastep answered H.O.'s questions and gave her insight into B.P.'s behavior. VRP at 73. She helped H.O. process her experience and develop a deeper understanding of her child. VRP at 94. She talked through issues and strategies with H.O. VRP at 100.
- In order to help B.P. feel more comfortable about her relationships with her relative caregivers and with her mother, and to reduce B.P.'s anxiety and confusion, Ms. Eastep recommended that H.O. spend time with B.P. and her relative caregivers so that B.P. could spend time with all of the adults together. VRP at 78. Then, Ms. Eastep worked with H.O. to establish a relationship with B.P.'s caregivers and helped her develop strategies to earn their trust. VRP at 78-80.
- Ms. Eastep made recommendations on how to work with B.P. and A. together, and identified for H.O. when it was important to spend time with B.P. one-on-one. VRP at 96.

- Ms. Eastep testified that it is important for a parent working on a broken attachment to understand their own mental health and attachment strategies. VRP at 80. And H.O's therapist was a certified attachment therapist who could help her do that. VRP at 134, 150.

Amici's broad claims about inadequate services ignore these details in the record.

H.O. also has not shown, nor could she, that the services Ms. Eastep and Ms. Gorman-Brown provided are significantly different from "attachment services." As one example, a curriculum-based attachment service available in Spokane for toddlers and preschoolers lists its goals as: (1) establish therapeutic rapport so that the parent/caregiver can safely explore her relationship with the child; (2) increase the parent/caregiver's sensitivity and understanding of the child's attachment needs; (3) increase the parent/caregiver's ability to understand the child's obvious and more subtle cues that signal the child's feelings and needs; (4) support the parent/caregiver so that they can reflect on the child's behaviors and their own behaviors, thoughts, and feelings regarding their interactions; and (5) encourage the parent/caregiver to reflect on how their own developmental history affects their caregiving behavior. See Kent T. Hoffman et al., *Changing Toddlers' & Preschoolers' Attachment Classifications: The Circle of Security Intervention*, 74 *J. Consulting & Clinical Psychol.* 1017, 1018 (2006).

This curriculum-based model represents only one example of the type of services that can be considered attachment services, and treatment providers require

flexibility to accomplish these attachment goals in whatever way the providers determine will work best and is reasonably available to a particular parent and child. *See* RCW 13.34.180(1)(d) (requiring that the Department provide “all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future”). But the services Ms. Eastep and Ms. Gorman-Brown were providing to H.O. and B.P. were targeted at the same goals, and they occurred in a one-on-one setting, for two to four hours per week, with the opportunity for the therapist to provide immediate one-on-one feedback to H.O.

H.O. also failed to show at trial that the services that Ms. Eastep and her therapist provided were materially less extensive than the services provided to B.P. and her caregivers. Providing B.P. with services in her current home did not destroy her relationship with her mother as Amici assert without citation. Amicus Br. at 12-13. Instead, as child therapists have explained, learning to trust adults again would help B.P. learn to trust her mother. *See* VRP at 168; *In re Welfare of KMM*, 187 Wn. App. at 555, 557.

Moreover, the services provided to H.O. make this case different from both cases cited by Amici: *In re Welfare of C.S.*, 168 Wn.2d 51, 225 P.3d 93 (2010), and *In re Termination of S.J.*, 162 Wn. App. 873, 256 P.3d 470 (2011). In *C.S.*, the opinion does not reflect that the parent was provided with any services comparable to those the foster parent received to help her address C.S.’s particularly difficult behaviors. *In re Welfare of C.S.*, 168 Wn.2d at 56. And unlike Ms. Eastep, the

visitation therapist in S.J. testified that “she did not have any idea why [the parent] was not progressing in terms of recognizing [the child’s] emotional needs” and “she did not work on bonding and attachment with them.” *In re Termination of S.J.*, 162 Wn. App. at 883. Here, as listed above, Ms. Eastep testified as to examples of how she helped H.O. understand the appropriate progression for reattachment and worked with her on how to help B.P. feel more secure and trusting of H.O.

Finally, H.O.’s therapist, who was certified in attachment, explained that developing a deeper attachment would require H.O. to make more progress in her own mental health and that would take at least another six months of therapy. VRP 145-46, 149-50. Ms. Gorman-Brown explained that she could not conclude H.O. would be emotionally available enough to do the attachment work necessary for B.P.’s healthy development or to parent B.P. long-term. VRP at 147-48; *see also* VRP at 275. In order to make enough progress to work on better attachment with B.P., H.O. would have to address her own history and its impact on her emotional and mental health. *See* VRP at 145-46. Ultimately, Ms. Gorman-Brown’s conclusion that H.O. could not reunify with B.P. was based on H.O.’s current inability to connect with her own feelings and be emotionally available enough to do the attachment work necessary for B.P.’s healthy development. VRP at 140, 145-47.

In sum, contrary to Amici’s assertions, they have not shown on this record that the work that Ms. Eastep did with H.O. and B.P. was any less extensive or

effective than the services provided to B.P. and her caregivers. Moreover, they have not negated the evidence showing that H.O.'s ability to meet B.P.'s special mental health and emotional needs would depend on the mother making further progress in her own mental health treatment. As a result, these Amici have not shown that the trial court erred in finding that the Department provided all necessary services, reasonably available and capable of correcting H.O.'s parental deficiencies in the foreseeable future.

B. Parental Unfitness Is Established by Clear, Cogent, and Convincing Proof That the Parent is Currently Unable to Meet the Child's Physical, Mental Health, or Emotional Needs

1. A parent is unfit when he or she is unable to provide the child with basic nurture, health, and safety, and providing basic nurture includes protecting the child's mental and emotional health

In addition to finding all of the elements in RCW 13.34.180 are met, the trial court must, either expressly or impliedly, find parental unfitness by clear, cogent, and convincing evidence. *In re Welfare of A.B.*, 168 Wn.2d 908, 920, 232 P.3d 1104 (2010); *In re Welfare of A.B.*, 181 Wn. App. 45, 61, 323 P.3d 1062 (2014). This Court has explained that a parent is unfit when "he or she cannot meet a child's basic needs," *In re Custody of B.H.M.*, 179 Wn.2d 224, 236, 315 P.3d 470 (2013), or where he or she "lacks the necessary capacity for giving parental care." *In re Welfare of Aschauer*, 93 Wn.2d 689, 694, 611 P.2d 1245 (1980). Similarly, the Court of Appeals has held that unfitness occurs when a person's parenting deficiencies

prevent the parent from providing the child with “basic nurture, health, or safety.” RCW 13.34.020; *In re Welfare of A.B.*, 181 Wn. App. at 61. The determination of parental unfitness overlaps with the trial court’s determination of whether all of the statutory elements for termination are met under RCW 13.34.180, including subsection (f): that there is little likelihood that conditions will be remedied so that the child can return to the parent in the near future.

This Court has recognized that “past history is a factor that a court may consider in weighing a parent’s current fitness.” *In re Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996). Specifically, where there is a significant history of substance abuse, the Court of Appeals has recognized that a court “was not required to assume her sobriety [will] continue uninterrupted,” in light of a long history of drug addiction and relapse, “however encouraging . . . recent progress” may be. *In re Dependency of A.C.*, 123 Wn. App 244, 249, 98 P.3d 89 (2004).

The Court of Appeals has also explained that difficulty with certain aspects of parenting, without an “immediate or severe risk to the child’s safety are not sufficient to render a parent currently unfit.” *In re Welfare of A.B.*, 181 Wn. App. at 65. But this Court should not limit a trial court’s consideration of parental unfitness only to the dangers or risks to the child’s physical safety. This Court should also permit—and in fact require—consideration of the dangers or risks to a child’s mental, emotional, and developmental health. *See* RCW 13.34.020 (emphasizing a child’s physical *and* mental health). This Court should reiterate that a parent can be

found unfit when his or her parenting deficiencies prevent the parent from providing basic nurture that will safeguard the child's mental and emotional health.

Contrary to Amici's argument, consideration of whether a parent can meet the child's mental and emotional needs would not allow a trial court to find unfitness simply because the trial judge believes the child's out-of-home placement would be preferable to placement with the parent. *See* Amicus Br. at 8. The analysis as set forth above would still require the State to prove the parent is currently unfit to parent this particular child by clear, cogent, and convincing evidence. *In re Welfare of A.B.*, 181 Wn. App. at 61. It requires proof of all the elements in RCW 13.34.180. But it would also require that trial courts, like the court in this case, respond when evidence shows there will be serious harm to the child's mental and emotional health or development.

2. Amici mostly combat arguments the State does not make and would not want this Court to adopt

The State does not argue that a lack of attachment between parent and child at age one presumptively establishes parental unfitness, and the trial court did not so hold. One attachment specialist testified that where a bond is broken during the first year of a child's life, that can be particularly damaging to the child. VRP at 103-06. There is evidence in the record that B.P. did suffer from her mother's disappearance, resulting in long-term damage. CP at 89; VRP at 226-29 (impact on B.P. was "horrifying;" distress and reactive behavior so alarming, caregivers sought medical

care); VRP at 163 (B.P. is currently at risk for developing full blown attachment disorder). But this undisputed testimony simply established that B.P. has special emotional needs, she is at risk of developing attachment disorder, and so her mental health requires that her primary caregiver(s) be particularly reliable. VRP at 162-64; CP at 186-87 (FOF 35). This evidence also supported that if B.P. were returned to her mother's care, and her mother relapsed again, it would be particularly damaging. These are important considerations when considering H.O.'s fitness to parent this particular child.

Nor does the State argue that a parent can be declared unfit solely because foster parents or relative caregivers would provide a more stable or otherwise preferable home. The State agrees that in a termination proceeding, a court must first find that all of the elements of RCW 13.34.180 are met before the court can consider the best interests of the child. *E.g., In re Welfare of A.B.*, 168 Wn.2d at 925 (reiterating Washington's two-step process, which requires the trial court to first focus on whether the parent is unfit by applying the elements of RCW 13.34.180). Here, the trial court appropriately analyzed each element of RCW 13.34.180, found all of those elements were met by clear, cogent, and convincing evidence, and analyzed whether H.O. was currently fit to parent B.P. Only then did the court turn to what would be in B.P.'s best interest. CP at 180-189.

Amici may have misinterpreted the State's evidence that it would be better for B.P. to remain in her current placement than to return to her mother. VRP at 85 (it would not be in B.P.'s best interest to move her out of her current placement), VRP at 164-65 (it would not be in B.P.'s best interest to have another disruption in her care), VRP at 235, 2369 (termination would be in B.P.'s best interest). This evidence, however, addressed B.P.'s best interests because that is relevant in step two of a case for termination. *In re Welfare of A.B.*, 168 Wn.2d at 911. The existence of that testimony does not somehow show that the trial court jumped to the conclusion that H.O. was unfit only because B.P. would benefit from remaining with her relatives rather than returning to her mother. To the contrary, the trial court's order reflects the appropriate progression of findings: first, the State proved all of the elements of RCW 13.34.180 (CP at 181, 185-87); second, H.O. is unfit to parent B.P. (CP at 187-88); and third, termination was in B.P.'s best interest (CP at 188). The trial court did not skip any steps or equate unfitness with a finding that B.P. would be better off remaining with her relatives. CP at 179-89.

3. The State proved by clear, cogent, and convincing evidence that H.O. was currently unfit to parent B.P. at the time of trial

These Amici also overlook how no expert testified that H.O. was ready to have B.P. return to her. H.O. was not even having unsupervised visitation with B.P. by the time of trial. *See* VRP at 75 (discussing visits with Ms. Eastep and at a

visitation facility). While H.O. was fit to continue to parent A. in the structured setting where she was living at the time of trial so long as she remained sober, she remained unfit to parent B.P. on her own.

The trial court's findings thus reflect that H.O. was still early in her recovery and had not yet demonstrated an ability to remain sober in an unstructured setting. VRP at 37 (chemical dependency counselor); 129, 131-32 (child therapist and evaluator); 192-93 (licensed mental health counselor); 235, 245-46 (GAL); 280 (social worker); *see also In re Dependency of J.C.*, 130 Wn.2d at 428 (court can consider past history and patterns of substance abuse when weighing current fitness). This was important because if she relapsed again and B.P. was separated from her a third time, that could cause severe upset and possible mental health problems for B.P. And, the trial court found credible testimony that H.O. had recently missed support group meetings, she was out of compliance with her outpatient treatment, and missing meetings had been one of her prior precursors to relapse. VRP at 172, 256, 281; CP at 182 (FOF 13). H.O.'s failure to demonstrate an ability to remain sober in an unstructured environment rendered her currently unfit to parent B.P.

In addition, H.O. was not healthy enough herself to parent B.P., a child with special emotional needs. H.O. had personality disorder traits that exacerbated her impulsivity and poor decision-making. CP at 183 (unchallenged FOF 16). H.O. was unable to be emotionally available enough to do the attachment work necessary for B.P.'s healthy development because she had failed to address her own trauma.

VRP at 147; *see also* VRP at 275. In order to make enough progress to work on better attachment with B.P., H.O. would have to address her own history and its impact on her emotional and mental health. *See* VRP at 145-46.

Finally, these Amici's arguments ignore the evidence that H.O. showed a lack of understanding of B.P.'s needs. H.O. maintained an adult perspective that "B.P. would love her because she loved B.P. [but] Ms. Eastep indicated this was not realistic." CP at 184-85 (unchallenged FOF 26). B.P.'s GAL did not believe that H.O. was capable of putting B.P.'s needs above her own, where B.P. needed a consistent schedule and an adult who could read her emotional cues. VRP at 233-35. The trial court therefore correctly found that H.O. was currently unfit to parent B.P. CP at 188.

Where a parent remains unfit at the time of the termination trial, but is making progress, the relevant question becomes whether the parent can remedy her deficiencies in the foreseeable future, which for a very young child is a matter of months. *See In re Welfare of Hall*, 99 Wn.2d 842, 850-51, 664 P.2d 1245 (1983). Treatment providers explained that H.O. would need to be substance free for at least another six months *in an independent living situation* before she would be considered in remission. VRP at 129-32, 197-98, 208-09. For an IV drug user who began using as young as H.O. had, a two-year period of sobriety was probably a more accurate measure of when long-term sobriety would become likely. VRP at 198, 283 (mental health and chemical dependency counselor); *see also* CP

at 183 (unchallenged FOF 19). From a mental health perspective, it would take at least another six months of therapy for H.O. to work through her own trauma. VRP at 145-46, 149-50. And it would take hundreds, maybe thousands of further visits for B.P. to develop a secure attachment with H.O. VRP at 77-78. The trial court appropriately found “overwhelming” evidence that, given the mother’s current state, it would take a year or more for H.O. to be ready to parent B.P., and that was too long, given that B.P. had already been out of the mother’s care for 20 months. CP at 186. The additional year or more that H.O. would need to become fit was not in the foreseeable future for a two-and-a-half-year-old who had been in foster care for more than half her life. *See In re Welfare of M.R.H.*, 145 Wn. App. 10, 28, 88 P.3d 510 (2008); *In re Welfare of Hall*, 99 Wn.2d at 844, 850-51; *In re Dependency of P.A.D.*, 58 Wn. App. 18, 27, 792 P.2d 159 (1990).

C. Amici Emphasize Conflicting Evidence in the Record, but in Parental Termination Cases, Appellate Courts Recognize That the Trial Judge Saw the Witnesses Testify and They Do Not Second-Guess Credibility Evaluations or Reweigh Evidence

The State acknowledges that there was conflicting testimony at trial about H.O.’s progress and her mental health at the time of trial. But the trial court had the benefit of seeing all of the witnesses testify. Where there is conflicting testimony in a termination trial, the appellate courts do not reweigh evidence or reevaluate the credibility of witnesses. *In re Welfare of Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). Where substantial evidence in the record supports the trial court’s findings,

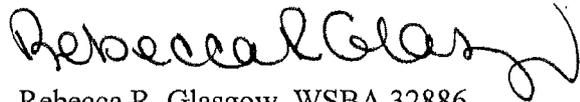
there is conflicting testimony in a termination trial, the appellate courts do not reweigh evidence or reevaluate the credibility of witnesses. *In re Welfare of Sege*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). Where substantial evidence in the record supports the trial court's findings, the existence of some conflicting testimony does not warrant reversal. *See In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 243, 237 P.3d 944 (2010).

III. CONCLUSION

Substantial evidence in the record supports the trial court's findings that H.O. was provided all of the services she was ready for, that despite her progress, H.O. was still unfit to parent BP at the time of trial, and that unfitness could not be remedied in the near future. As a result, this Court should affirm.

RESPECTFULLY SUBMITTED this 21st day of April 2016.

ROBERT W. FERGUSON
Attorney General



Rebecca R. Glasgow, WSBA 32886
Deputy Solicitor General

Amy Soth, WSBA 26181
Assistant Attorney General

OID No. 91087
PO Box 40100
Olympia, WA 98504
360-664-3027

Certificate of Service

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, a true and correct copy of foregoing document, upon the following:

Kristina M. Nichols
Jill Reuter
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
WA.Appeals@gmail.com
Jillreuterlaw@gmail.com

Nancy L. Talner
901 Fifth Ave., #630
Seattle, WA 98164
talner@aclu-wa.org

Sara L. Ainsworth
907 Pine Street, Suite 500
Seattle, Washington 98101
sainsworth@legalvoice.org

Sharon J. Blackford
1100 Dexter Avenue N., Suite 100
Seattle, WA 98109
sharonblackford@gmail.com

Devon Knowles
1215 E. Columbia Street
Seattle, Washington 98122
knowlesd@seattleu.edu

Lillian M. Hewko
110 Prefontaine Place S., Suite 610
Seattle, Washington 98104
lillian@defensenet.org

Joseph A. Rehberger,
Cascadia Law Group PLLC
606 Columbia Street NW, Suite 212
Olympia, WA 98501
jrehberger@cascadialaw.com

Linda Lillevik
Carey & Lillevik, PLLC
1809 7th Avenue, Suite 1609
Seattle, WA 98101-1313
lindalillevik@careylillevik.com

D'Adre Cunningham
Hannah Roman
Tara Urs
The Defender Association Division
King County Department of Public Defense
810 Third Ave., 8th Floor
Seattle, WA 98104
D'Adre.Cunningham@kingcounty.gov
Hannah.Roman@kingcounty.gov
Tara.Urs@kingcounty.gov

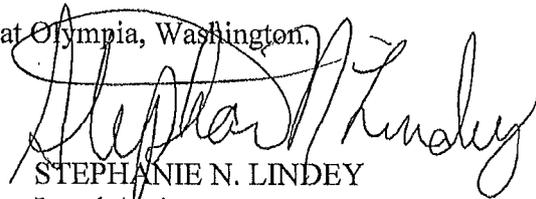
Alena Ciecko
Irina Nikolayev
Society for Counsel Representing the
Accused Division
1401 East Jefferson, Suite 200
Seattle, WA 98122
Alena.ciecko@kingcounty.gov
Irina.Nikolayev@kingcounty.gov

Kathleen McClellan
Northwest Defender Association Division
King County Department of Public Defense
1109 1st Ave., Suite 300
Seattle, WA 98101
kathleen.mcclellan@kingcounty.gov

Kelli Johnson
Associated Counsel for the Accused
Division
King County Department of Public
Defense
110 Prefontaine Place South, Suite 200
Seattle, WA 98104
kelli.johnson@kingcounty.gov

Anita Khandelwal
Director's Office
King County Department of Public Defense
401 Fifth Ave., Suite 213 Seattle, WA 98104
Anita.khandelwal@kingcounty.gov

Dated this 21st day of April 2016, at Olympia, Washington.



STEPHANIE N. LINDEY
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Lindey, Stephanie (ATG)
Cc: 'WA.Appeals@gmail.com'; 'Jillreuterlaw@gmail.com'; Glasgow, Rebecca (ATG); Jensen, Kristin (ATG); Soth, Amy (ATG); 'Nancy Talner'; 'sainsworth@legalvoice.org'; 'sharonblackford@gmail.com'; 'knowlesd@seattleu.edu'; 'lillian@defensenet.org'; 'jrehberger@cascoadialaw.com'; 'lindalillevik@careylillevik.com'; 'D'Adre.Cunningham@kingcounty.gov'; 'Hannah.Roman@kingcounty.gov'; 'Tara.Urs@kingcounty.gov'; 'Alena.ciecko@kingcounty.gov'; 'Irina.Nikolayev@kingcounty.gov'; 'kathleen.mcclellan@kingcounty.gov'; 'kelli.johnson@kingcounty.gov'; 'Anita.khandelwal@kingcounty.gov'
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Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'WA.Appeals@gmail.com' <WA.Appeals@gmail.com>; 'Jillreuterlaw@gmail.com' <Jillreuterlaw@gmail.com>; Glasgow, Rebecca (ATG) <RebeccaG@ATG.WA.GOV>; Jensen, Kristin (ATG) <KristinJ@ATG.WA.GOV>; Soth, Amy (ATG) <AmyM2@ATG.WA.GOV>; 'Nancy Talner' <TALNER@aclu-wa.org>; 'sainsworth@legalvoice.org' <sainsworth@legalvoice.org>; 'sharonblackford@gmail.com' <sharonblackford@gmail.com>; 'knowlesd@seattleu.edu' <knowlesd@seattleu.edu>; 'lillian@defensenet.org' <lillian@defensenet.org>; 'jrehberger@cascoadialaw.com' <jrehberger@cascoadialaw.com>; 'lindalillevik@careylillevik.com' <lindalillevik@careylillevik.com>; 'D'Adre.Cunningham@kingcounty.gov' <D'Adre.Cunningham@kingcounty.gov>; 'Hannah.Roman@kingcounty.gov' <Hannah.Roman@kingcounty.gov>; 'Tara.Urs@kingcounty.gov' <Tara.Urs@kingcounty.gov>; 'Alena.ciecko@kingcounty.gov' <Alena.ciecko@kingcounty.gov>; 'Irina.Nikolayev@kingcounty.gov' <Irina.Nikolayev@kingcounty.gov>; 'kathleen.mcclellan@kingcounty.gov' <kathleen.mcclellan@kingcounty.gov>; 'kelli.johnson@kingcounty.gov' <kelli.johnson@kingcounty.gov>; 'Anita.khandelwal@kingcounty.gov' <Anita.khandelwal@kingcounty.gov>
Subject: In re Welfare of BP; 91925-9; State of Washington's Supplemental Brief

Dear Clerk,

Attached in case number 91925-9, please find the following document:

1. State of Washington's Answer to Amicus Brief of the ACLU of Washington, Legal Voice, Incarcerated Parents Project of the Seattle University School of Law, and Washington Defender Association

Thank you,

Stephanie N. Lindsey
Solicitor General Division
PO Box 40100
Olympia, WA 98504-0100
(360) 586-3114
StephanieL1@atg.wa.gov