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STATE OF WASHINGTON  
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NO. 97731-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE TERMINATION OF PARENTAL RIGHTS TO:

M.B.,  
Minor Child.

N.B. (FATHER),  
Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

Pierce County Cause No. 17-7-02238-5

Court of Appeals No. 52632-8-II

The Honorable Elizabeth P. Martin, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER

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## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

N.B. is the father of M.B., who was born in October 2015. CP 171. The father did not know that he had a son until after the child had already been found dependent and placed in foster care by the Department of Children, Youth, and Families (the department). RP 100-01, 241; Ex. 5, 7.

The mother was eventually determined to have abandoned the child and her parental rights were terminated by default. RP 101; CP 166-70. The father, on the other hand, worked hard to gain custody of his son. *See* RP 241-69.

The father was incarcerated when the child was found dependent but began engaging in services to address his drug addiction as soon as he was released, when the child was five months old. RP 145, 241-42. The father completed intensive outpatient drug treatment as well as other services, during which he was open and engaged. Ex. 80; 86-87; 90, pp. 3-6. He also visited with his son consistently. RP 122. His visits progressed to twelve hours of visitation per week in the father's home. RP 242. The father was a "very capable" parent. RP 216.

But the father continued to struggle with substance abuse and experienced a relapse. His DOSA (Drug Offender Sentencing Alternative) sentence was revoked, sending him back to prison in May 2018 for about eight months. RP 157, 255. The father continued to engage in services

during his time in custody. RP 253-56. But the case proceeded to a termination trial about five months before he would have been released. *See RP generally*, RP 255.

It was difficult for the father's attorney to get in touch with him during his incarceration. RP 8, 232. The father's Department of Corrections (DOC) counselor was not cooperative when counsel tried to contact the father on the phone. RP 8, 232.

Even so, the father consistently stated (through counsel) that he wanted to participate in the termination trial. RP 3, 93, 97. But DOC officials would not let him use the "legal phone" at his facility to appear telephonically for the entire termination trial. RP 4. The father's attorney asked for an order to transport the father to enable him to attend the trial and the court agreed. *See* RP 9-10.

By the next day, DOC had agreed to transport the father for the trial. *See* RP 16. But, when the trial was supposed to begin five days later, he was still not there. RP 35. The court admitted that the father's absence was because of a mistake that the court had made on the order for transport. RP 36. But the judge said that she wanted to go forward and take testimony from the two witnesses who were present that day anyway, which she did. RP 36, 42-83.

On the second day of trial, the father had still not been transported but his attorney provided the court with a letter from DOC, saying that the father could be transported to attend the trial the following week. RP 92; CP 137-38. The father's counsel explained that the delay was because the court's order to transport the father did not say that he should be transported on a certain date or "as soon thereafter as possible." RP 96.

But the court insisted on continuing the trial without the father's participation. RP 97. In all, the state called seven witnesses in the father's total absence. The father was not given any opportunity to confer with his attorney before cross-examination of those witnesses. *See* RP 43-235.

Finally, on the last day of trial, the father was able to appear telephonically in order to present his own testimony. *See* RP 238-78. The father was permitted to remain on the phone for a short portion of his attorney's cross-examination of the department's social worker. *See* RP 279-99. The father was also able to hear the guardian *ad litem*'s testimony, which lasted three minutes. *See* CP 156.

The court entered an order terminating the father's parental rights. CP 171-76. The father timely appealed, arguing that the termination court had violated his right to procedural due process. CP 177; *See* Father's Motion for Accelerated Review and Opening Brief. The Court of Appeals affirmed the termination order and This Court granted review. Ruling

Terminating Review; Order Denying Motion to Modify; Order Granting Review.

## ARGUMENT

### **I. PROCEDURAL DUE PROCESS PROTECTS AN INCARCERATED PARENT’S RIGHT TO MEANINGFULLY PARTICIPATE IN A TRIAL IN WHICH THE STATE SEEKS TERMINATION OF HIS/HER PARENTAL RIGHTS.**

This case requires this Court to determine the bounds of the due process right to meaningful participation in a hearing when the state seeks to terminate the parental rights of an incarcerated Washingtonian. As outlined below, that right must include some meaningful opportunity for a parent to assess and respond to the state’s evidence during trial. The presence of counsel is not enough when the parent has no means to consult with counsel as the trial occurs.

Because the father in this case was not afforded any way to meaningfully participate in his termination trial, the order terminating his parental rights must be reversed.

A parent’s interest in the care, custody, and control of his/her children is “perhaps the oldest of the fundamental liberty interests” recognized under the constitution. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The right is “more precious... than the right of life itself. *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). Accordingly, the integrity of the family unit must be “zealously

guarded by the courts.” *In re Welfare of H.Q.*, 182 Wn. App. 541, 551, 330 P.3d 195 (2014).

Because of the fundamental nature of the liberty interest at stake, the procedures used to terminate the legal relationship between a parent and child must comply with due process. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 574, 257 P.3d 522 (2011); *Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 24–33, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), U.S. Const. Amend. XIV.<sup>1</sup>

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<sup>1</sup> Constitutional issues are reviewed *de novo*. *In re Welfare of J.M.*, 130 Wn. App. 912, 920, 125 P.3d 245 (2005).

Generally, the denial of a motion to continue is reviewed for abuse of discretion. *In re Welfare of R.H.*, 176 Wn. App. 419, 424–25, 309 P.3d 620 (2013). But a trial court abuses its discretion by violating a litigant’s constitutional rights. *State v. Burnam*, 4 Wn. App. 2d 368, 375, 421 P.3d 977 (Wash. Ct. App. 2018), *review denied*, 192 Wn.2d 1003, 430 P.3d 257 (2018) (“This court generally reviews a trial court’s evidentiary rulings for abuse of discretion. But if the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense”); *In re V.R.R.*, 134 Wn. App. 573, 586, 141 P.3d 85 (2006) (denial of motion to continue was an abuse of discretion because it violated parent’s right to counsel); *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 303, 359 P.3d 919 (2015) (trial court abused its discretion by making evidentiary ruling that violated accused person’s right to present a defense). Denial of a motion to continue also constitutes an abuse of discretion if it leaves the juvenile court without all of the information necessary to make an informed decision. *R.H.*, 176 Wn. App. at 429.

Additionally, a court abuses its discretion by applying the wrong legal standard or by making a decision that is unsupported by the record. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). In this case, the denial of the father’s motion to continue constituted an abuse of discretion because it violated the father’s right to procedural due process, was based on application of the incorrect legal standard, was not supported by the record, and left the court without the information necessary to make an informed decision.

The requirements of procedural due process vary from case to case. *Matter of Dependency of E.H.*, 191 Wn.2d 872, 878, 427 P.3d 587 (2018). But, because of the permanent nature of termination of a parent’s rights, parents must be afforded heightened procedural protection at termination proceedings than in dependency proceedings. *R.H.*, 176 Wn. App. at 425.

It is a fundamental requirement of due process that litigants be afforded the right to be heard at a meaningful time and in a meaningful manner. *In re Dependency of R.L.*, 123 Wn. App. 215, 221, 98 P.3d 75 (2004) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

This generally includes the right to be present at a hearing. *In re Welfare of L.R.*, 180 Wn. App. 717, 723–24, 324 P.3d 737 (2014).<sup>2</sup> The “core” of the due process right to be present “is the right to be present when evidence is being presented.” *Matter of Det. of Black*, 187 Wn.2d 148, 153–54, 385 P.3d 765 (2016) (citing *In re Pers. Restraint of Lord*,

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<sup>2</sup> The *L.R.* court state that “there is no absolute right for an incarcerated parent to personally attend a termination proceeding.” *L.R.*, 180 Wn. App. at 723-24. For example, the court noted that the right is not self-executing. In this case, however, there is no claim that the father failed to timely assert his right to be present in the trial court. Additionally, as discussed below, the termination court in *L.R.* provided the incarcerated parent with additional procedural protections, designed to ensure her meaningful participation in the trial, which were not afforded to the father in this case.

123 Wn.2d 296, 306, 868 P.2d 835 (1994); *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)).<sup>3</sup>

Incarcerated people also have a due process right to meaningful access to the courts in civil proceedings.<sup>4</sup> *State ex rel. Taylor v. Dorsey*, 81 Wn. App. 414, 421, 914 P.2d 773 (1996). At a minimum, a court faced with an incarcerated person’s request to personally appear at a civil proceeding must consider eight mandatory factors.<sup>5</sup> *Id.* at 422. Failure to properly consider those factors requires reversal. *Id.* at 423.

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<sup>3</sup> This Court declined to consider whether a criminal defendant’s right to be present at every critical stage of a proceeding extends to someone facing civil commitment in *Black*, 187 Wn.2d at 153–54. The *Black* court noted that the issue “merits serious consideration” but held that it had been waived in that case. *Id.*

Notably, the analysis in this case does not turn on whether the right to be present at every critical stage in a criminal trial extends to cases involving termination of parental rights. Rather, because the father was involuntarily absented from the portion of the trial when *evidence was being presented*, his right to be present – or, at least, to participate in some meaningful way – was protected by due process. *Id.*

<sup>4</sup> Additionally, the legislature has explicitly mandated that a parent’s incarceration should not render termination a foregone conclusion. *See* RCW 13.34.180(1)(f) (delineating circumstances in which termination is inappropriate despite a parent’s incarceration); *See also Matter of K.J.B.*, 187 Wn.2d 592, 598–99, 387 P.3d 1072 (2017) (describing the purpose of SHB 1284 as the protection of the parental rights of incarcerated parents).

<sup>5</sup> The eight factors are as follows:  
(1) the costs and inconvenience of transporting a prisoner; (2) the potential security risk the inmate poses; (3) the substantiality of the matter at issue; (4) the need for an early determination of the issue; (5) the feasibility of delay until the prisoner is released; (6) the probability of success on the merits; (7) the integrity of the correctional system; and (8) the inmate's interest in presenting his testimony in person rather than by deposition.  
*Taylor*, 81 Wn. App. at 422.

Due process also guarantees parents the right to effective assistance of counsel in termination proceedings. *J.M.*, 130 Wn. App. at 922.

Applying the due process requirements delineated above, courts in numerous other states have held that an incarcerated parent's constitutional rights are violated when s/he is denied an opportunity to be present (either physically or telephonically) at a termination trial. *See e.g. Interest of L.N.C.*, 573 S.W.3d 309 (Tex. App. 2019); *T.B. v. Dep't of Children & Families*, 222 So. 3d 646 (Fla. Dist. Ct. App. 2017); *Orville v. Div. of Family Servs.*, 759 A.2d 595 (Del. 2000); *State ex rel. Children, Youth & Families Dep't v. Ruth Anne E.*, 126 N.M. 670, 974 P.2d 164 (N.M. Ct. App. 1999); *In re Baby K.*, 143 N.H. 201, 202, 722 A.2d 470 (1998); *In Interest of C.J.*, 272 Ill. App. 3d 461, 466, 650 N.E.2d 290 (Ill. App. Ct. 1995).

Still other jurisdictions have held that an incarcerated parent's physical absence from a termination trial comports with procedural due process only if s/he is provided with some alternative manner in which to review and respond to the evidence presented against him/her at the hearing. *See e.g. In re C.G.*, 954 N.E.2d 910 (Ind. 2011) (incarcerated parent participated telephonically in the entire hearing, the courtroom was cleared to give her the opportunity to consult privately with her attorney

during trial, and the trial was bifurcated so she could review the state's evidence with counsel before presenting her defense); *In re Adoption/Guardianship No. 6Z980001 in Dist. Court for Montgomery Cty.*, 131 Md. App. 187, 198–99, 748 A.2d 1020 (2000) (incarcerated parent was provided with certified audiotapes of the trial and permitted to draft a written response for the court); *In re Interest of L.V.*, 240 Neb. 404, 417, 482 N.W.2d 250 (1992) (incarcerated parent was provided with a transcript of the testimony taken during the state's case-in-chief and permitted to review it and discuss with counsel before the trial was reconvened; the parent was also present telephonically during the entire second trial session); *In re Juvenile Appeal*, 187 Conn. 431, 436–37, 446 A.2d 808 (1982) (same); *See also In re J.E.*, 45 N.E.3d 1243, 1247 (Ind. Ct. App. 2015) (incarcerated father “attended” the entire hearing telephonically); *Alex H. v. State Dep't of Health & Soc. Servs.*, 389 P.3d 35 (Alaska 2017) (same).

This Court has never considered whether an incarcerated parent's absence from a trial on a petition to terminate his/her parental rights violates due process. The Court of Appeals has addressed the issue twice. *See In Interest of Darrow*, 32 Wn. App. 803, 649 P.2d 858 (1982); *L.R.*, 180 Wn. App. 717.

In *Darrow*, a father was incarcerated out-of-state during the termination trial. *Darrow*, 32 Wn. App. at 805. The state was unwilling to pay the expense of transporting him to Washington to attend the trial and the termination court refused to order the state to do so. *Id.* The court of appeals held that it did not violate due process to hold the termination trial in the father’s absence, under the circumstances of that case. *Id.*

The *Darrow* court found that an incarcerated parent did not have an absolute right to be present at trial but that the court “should assure that the parent is afforded a full and fair opportunity to present evidence or rebut evidence presented against him.” *Id.* at 809. Specifically, the court noted – and the state agreed – that one means of assuring that opportunity would be to continue the case after the state’s case-in-chief in order for the parent to consult with counsel, learn what evidence had been presented against him/her, and assist in preparation of a defense. *Id.*<sup>6</sup>

Thirty-two years later, in *L.R.*, the court of appeals held that an incarcerated mother’s due process rights were not violated by her absence from the first day of a three-day termination trial. *L.R.*, 180 Wn. App. at 722. In that case, the mother only missed the testimony of one witness. *Id.*

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<sup>6</sup> Notably, *Darrow* was decided more than ten years before this Court recognized that procedural due process guarantees the right for a personal appearance even at preliminary hearings in other types of civil cases for detained litigants. See *In re Young*, 122 Wn.2d 1, 46, 857 P.2d 989 (1993) (addressing civil commitment proceedings).

The trial court also provided the mother with recesses after each witness's direct testimony to permit her to consult with her attorney prior to cross-examination. *Id.* at 722. The court also allowed the mother's attorney to re-call the social worker (whose testimony the mother had missed) and conduct another cross-examination with the mother present telephonically. *Id.* Under those circumstances, the court held that the mother had been afforded sufficient procedural protections to enable her to consult with her attorney and to meaningfully participate in the hearing. *Id.* at 727.

Even so, the *L.R.* court found it "troubling" that the mother was unable to appear telephonically for the entire trial. *Id.* The court noted that:

This lack of cooperation and effort could lead to a due process violation when interests as fundamental as those involved in termination proceedings are at stake. Under these circumstances, the better practice may have been to continue the trial to allow the parent to attend telephonically.

*Id.* at 728.

In this case, there was no recess at the end of the state's case-in-chief to permit the father to consult with his attorney and assist in the planning of his defense, as suggested by the *Darrow* court. *Darrow*, 32 Wn. App. at 809.

Nor did the court provide the father with an opportunity to privately consult with counsel before cross-examination of each witness, like in *L.R. L.R.*, 180 Wn. App. at 722. In fact, the father missed the direct-

examination of all of the state's witnesses except one: the guardian *ad litem* who testified for three minutes. CP 156. Also unlike in *L.R.*, the court did not permit the father to recall the witnesses whose testimony he had missed to allow his attorney to re-conduct cross-examination. *Id.*

In short, the father as not provided with any mechanism for meaningful participation in the termination trial. The termination court violated his right to procedural due process. *Mathews*, 424 U.S. at 334; *L.R.*, 180 Wn. App. at 723–24; *Lord*, 123 Wn.2d at 306. As outlined below, proper weighing of the *Mathews* factors compels the same result.

**II. WEIGHING OF THE *MATHEWS* FACTORS CLARIFIES THAT THE FATHER'S RIGHT TO PROCEDURAL DUE PROCESS WAS VIOLATED BY THE DENIAL OF A MEANINGFUL OPPORTUNITY FOR HIM TO PARTICIPATE IN THE TERMINATION HEARING.**

The requirements of procedural due process are analyzed by weighing the three *Mathews* factors: (1) the private interest at stake; (2) the risk of erroneous deprivation of the interest under the process used and the probable value of additional procedural safeguards; and (3) the state's interest. *L.R.*, 180 Wn. App. at 723 (*citing Mathews*, 424 U.S. at 335).

Here, proper weighing of those three factors makes clear that due process required the court to provide the father with a meaningful opportunity to participate in the termination trial, despite his incarceration.

A. The father has a “commanding” interest in having a meaningful opportunity to participate in the termination trial.

“When the State initiates a parental rights termination proceeding, it seeks not merely to infringe a fundamental liberty interest, but to end it.” *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). If the state successfully terminates a parent’s rights “it will have worked a unique kind of deprivation”; “few forms of state action are both so severe and so irreversible.” *Id.* Accordingly, a parent’s interest in the accuracy and justice of a termination proceeding is “a commanding one.” *Id.*

The child shares the parent’s interest in preventing erroneous termination of parental rights. *Id.* at 765. Accordingly, it is “fundamentally mistaken” to assume that the *Mathews* analysis pits the parent’s interests against those of the child. *Id.*

B. The termination court’s failure to permit the father an opportunity to meaningfully participate in the termination trial created a high risk of erroneous deprivation.

The risk of erroneous deprivation of the father’s parental rights by holding almost the entire termination trial in his total absence was significant. The U.S. Supreme Court has noted that the risk of erroneous results in proceedings regarding termination of parental rights is already “magnify[ied]” because such proceedings “employ imprecise substantive standards that leave determinations unusually open to the subjective

values of the judge” and because the court “possesses unusual discretion to underweigh probative facts that may favor the parent.” *Santosky*, 455 U.S. at 762.

The *Santosky* court also points out that the very nature of termination trials leads to the risk of erroneous deprivation based on improper factors such as race or class:

Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups such proceedings are often vulnerable to judgments based on cultural or class bias.

*Id.* at 763. Accordingly, additional procedural protections are appropriate whenever they will “impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered.” *Id.*

The system of justice “functions best” when all parties are present at trial. *State v. Luna*, 193 N.J. 202, 210, 936 A.2d 957 (2007). A litigant’s presence at a hearing also “promotes public confidence in our courts as instruments of justice.” *Id.*

The risk of erroneous deprivation is heightened whenever a parent is not afforded an opportunity to hear and rebut the actual evidence that is presented against him/her at trial. *Orville*, 759 A.2d at 600; *Ruth Anne E.*, 126 N.M. 670; *In re Adoption of Whitney*, 53 Mass. App. Ct. 832, 836,

763 N.E.2d 74 (2002); *In re Adoption of Edmund*, 50 Mass. App. Ct. 526, 529–30, 739 N.E.2d 274 (2000)

Recognizing this risk, numerous other jurisdictions have developed procedures to permit incarcerated parents to review and respond to the state’s evidence during trial, even when those parents are not physically present. Sometimes parents are given the opportunity to review the state’s evidence via audiotape or transcript before the trial is resumed. *See e.g. C.G.*, 954 N.E.2d at 920; *Montgomery Cty.*, 131 Md. App. at 198–99; *L.V.*, 240 Neb. at 417; *Juvenile Appeal*, 187 Conn. at 436–37. Other times, the trial is recessed after each witness’s testimony and the parent is given the chance to learn what evidence was presented and to respond through counsel. *C.G.*, 954 N.E.2d at 920; *L.V.*, 240 Neb. at 417; *Juvenile Appeal*, 187 Conn. at 436–37.

But none of those procedural protections were offered to the father in this case. He had no opportunity to rebut the state’s evidence – or, even, to learn what that evidence had been until well after the trial had ended.<sup>7</sup>

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<sup>7</sup> The court of appeals commissioner relied on the allegation that the father and his attorney were able to speak with each other and pass documents back and forth while the trial was going on. Ruling Terminating Review, p. 7. But there is no evidence to support that claim in the record. To the contrary, the record demonstrates that counsel had a very difficult time getting in touch with the father while he was incarcerated. RP 8, 232.

The court of appeals commissioner also notes that the trial court offered to permit the father to appear in person on 9/27/18 if counsel could confirm that he would be transported by that day. Ruling Terminating Review, p. 8. But that offer only extended to the father’s appearance to provide his own testimony. RP 96. At the same time, the court made clear that

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This Court has held that the risk of erroneous deprivation is too high when a detained person is not permitted to appear at a probable cause hearing in a civil commitment case. *Young*, 122 Wn.2d at 46. The *Young* court concluded that preventing a respondent from personally attending, even when represented by counsel, creates “too great” a risk of an erroneous ruling. *Id.*

Similarly, here, the fact that the father was represented by counsel was insufficient to overcome the risk of erroneous deprivation caused by his absence from trial.<sup>8</sup> See *Whitney*, 53 Mass. App. Ct. at 838–39; *L.N.C.*, 573 S.W.3d at 323. This is because counsel is unable to adequately represent the father’s interests absent input from his/her client regarding strategy, cross-examination, or responding to the state’s evidence. See *L.N.C.*, 573 S.W.3d at 323; *In re Eileen R.*, 79 A.D.3d 1482, 1484, 912 N.Y.S.2d 350 (N.Y. App. Div. 2010). Indeed, the right to counsel has repeatedly been held to protect the right to confer with one’s attorney during trial. See e.g. *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330,

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it intended to go forward with the presentation of the other evidence without the father’s participation. RP 97. The father does not claim that his rights were violated by his own telephonic testimony. The error lies in his inability to meaningfully participate in *the rest* of the trial.

<sup>8</sup> This is true even though the same attorney represented the father during the dependency case. Such representation does not adequately prepare counsel to represent a parent in a termination trial. *V.R.R.*, 134 Wn. App. at 585.

47 L.Ed.2d 592 (1976); *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001), *as amended* (July 6, 2001), *as modified on denial of reh'g*, 33 P.3d 735 (Wash. 2001); *State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d 694 (1981).<sup>9</sup>

This Court has explicitly held that the presence of counsel is not an adequate substitute under the due process clause for the presence of a litigant him/herself. *See State v. Irby*, 170 Wn.2d 874, 883, 246 P.3d 796 (2011).<sup>10</sup> This is because physical presence gives the client the power “to give advice or suggestion or even to supersede his lawyers altogether.” *Id.* at 883 (*quoting Snyder v. Com. of Mass.*, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)).

By contrast, the court of appeals has held that there was no risk of erroneous deprivation when a parent was excluded from the portion of the termination trial when her child testified because the court permitted a lengthy recess for the parent to consult with her attorney between direct-

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<sup>9</sup> Though these right to counsel cases analyze the Sixth Amendment while only the Fourteenth Amendment right applies to this case, that is “a distinction of no consequence.” *In re Dependency of G.G., Jr.*, 185 Wn. App. 813, 826, 344 P.3d 234 (2015) (rights that are inherent in the Sixth Amendment right to counsel are also inherent in the Fourteenth Amendment right in termination cases).

<sup>10</sup> Though *Irby* is a criminal case, it’s reasoning rests on the due process clause of the Fourteenth Amendment, which also governs this case. *Irby*, 170 Wn.2d at 885-86.

and cross-examination of the child. *In re Dependency of A.D.*, 193 Wn. App. 445, 452, 376 P.3d 1140 (2016).

In this case, the father had no opportunity to consult with counsel before cross-examination of any of the state’s witnesses, or confer to with his attorney during trial. The father was not able to “give advice or suggestion or even to supersede his lawyers altogether.” *Irby*, 170 Wn.2d at 883. The presence of the father’s attorney at trial does not cure the risk of erroneous deprivation flowing from the father’s inability to consult with that attorney during trial.

Finally, the fact that the court was required to determine the father’s credibility based only on his telephonic testimony exacerbated the risk of erroneous deprivation. *R.L.*, 123 Wn. App. at 223 (“judging credibility without hearing live testimony can be quite prejudicial in [a dependency or termination case]”).

The risk of erroneous deprivation of the father’s parental rights was very high given his total inability to participate in the majority of the termination trial. The second *Mathews* factor weighs in favor of reversal of the order terminating the father’s parental rights.<sup>11</sup>

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<sup>11</sup> It is unclear whether a separate prejudice analysis is required in this case. Several court of appeals cases simply hold that reversal is required if weighing of the *Mathews* factors determines that due process was violated, without conducting a prejudice analysis. See e.g. *L.R.*, 180 Wn. App. at 726 n.2; *V.R.R.*, 134 Wn. App. 573; *Shantay C.J.*, 121 Wn. App. at 940.

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- C. The state did not have a significant interest in preventing a one-week continuance.

The state has an interest in the child's welfare as well as a fiscal and administrative interest in reducing the cost and burden of proceedings. *Santosky*, 455 U.S. at 766. But the state and child also share the parent's interest in a just and accurate decision in a termination case. *Id.*; *Lassiter*, 452 U.S. at 27. This is because "giving interested parties a meaningful opportunity to present evidence coincides with the best interests of the child." *R.L.*, 123 Wn. App. at 223.

In this case, the state's attorney claimed at trial that the number of continuances was making it difficult to secure attendance of the state's witnesses at trial. RP 95. But the state did not provide any details regarding those alleged difficulties. Indeed, all but one of the state's witnesses after that final motion to continue were employees of the state. RP 98-304. The state had also agreed to the prior continuances, apparently

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Even if a prejudice analysis is required, then it falls to the state to prove beyond a reasonable doubt that the constitutional error was harmless. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013). The state cannot meet that burden in this case for the reasons set forth herein.

A failure of due process also prejudices a parent when the court is left to "only speculate as to what weaknesses in the State's case or strength in [the parent]'s case might have been revealed" if the parent had been afforded due process. *J.M.*, 130 Wn. App. at 925; *In re Dependency of G.A.R.*, 137 Wn. App. 1, 8, 150 P.3d 643 (2007). The father's inability to meaningfully participate in his termination trial leaves This Court with the same problem as that in *J.M.* The state cannot prove harmlessness beyond a reasonable doubt.

recognizing that the state's interest was not significantly damaged by a brief delay. CP 83-86, 103-04.

The state's interest in proceeding without an additional continuance was insufficient to overcome the father's interest in participating in the hearing, given the high risk of erroneous deprivation under the procedures used. The termination court violated the father's right to procedural due process under *Mathews*.

### **CONCLUSION**

The termination court violated the father's right to procedural due process by denying him a meaningful opportunity to participate in the trial. The order terminating the father's parental rights must be reversed.

Respectfully submitted on February 7, 2020,



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of the Supplemental Brief, postage prepaid, to:

N.B. (father)  
(at private mailing address)

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Office of the Attorney General  
shstacappeals@atg.wa.gov  
shsappealnotification@atg.wa.gov

I filed the Supplemental Brief electronically with the Supreme Court through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 7, 2020.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Petitioner

**LAW OFFICE OF SKYLAR BRETT**

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