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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Welfare of:

M.B.,

Minor Child.

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**SUPPLEMENTAL BRIEF OF RESPONDENT DEPARTMENT OF  
CHILDREN, YOUTH, AND FAMILIES**

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## I. INTRODUCTION

M.B. is a four-year-old boy who tested positive for methamphetamine and marijuana at birth. He has lived with the same foster family since he was days old, and they wish to adopt him. His father, N.B., was incarcerated when M.B. was born, has a severe opiate and amphetamine addiction, and was incarcerated six times during M.B.'s dependency case due to drug-related violations. He was also incarcerated during the termination of parental rights trial at issue here.

N.B.'s due process challenge to the order terminating his parental rights fails under a *Mathews v. Eldridge* analysis. The trial court correctly balanced the *Mathews* factors when it decided to proceed in his absence. He received a meaningful opportunity to be heard in the hearing on the petition to terminate his parental rights. He was represented by counsel, testified by phone, appeared telephonically at times, had the option to confer with his counsel between days of trial, and the ability to recall witnesses. Any opportunities he did not take advantage of must be attributed to legitimate trial strategy. There is no evidence that a fourth continuance or his presence during more of the trial would have changed the outcome of his case. This Court should affirm and permit M.B. to achieve permanency in the only home he has ever known.

## II. STATEMENT OF THE ISSUE

Where N.B. has identified no prejudice, did the trial court violate his due process rights when he testified by phone, was represented by the same counsel who represented him for years in the underlying dependency, had an opportunity to confer with his attorney between trial days, and had the ability to recall witnesses?

## III. STATEMENT OF THE CASE

Four-year-old M.B. was born on October 18, 2015, with methamphetamine and marijuana in his system. Exs. 1-3; RP 100. The Department of Social and Health Services<sup>1</sup> filed a dependency petition and placed him with a foster family where he has lived since he was days old; his foster parents hope to adopt him. Exs. 1-3, 5, 7; RP 139, 300-01.

M.B.'s biological father, N.B., has a severe addiction to opiates and amphetamines. RP 48, 51. He was incarcerated when M.B. was born. Exs. 2, 14. During the dependency case, N.B. was serving a Drug Offender Special Alternative (DOSA) sentence as a result of convictions in 2015. RP 157, 162; Exs. 66, 71. He violated the conditions of this sentence sixteen times and went to jail six different times for these violations during the

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<sup>1</sup> On July 1, 2018, the Department of Children, Youth, and Families assumed all powers, duties, and functions of the Department of Social and Health Services pertaining to child welfare services. RCW 43.216.906; *see also* Laws of 2017, ch.6. To avoid confusion, this brief refers simply to the "Department."

dependency case. RP 166; *see* RP 171-74. In June 2018, the Department of Corrections (DOC) revoked his DOSA status because correctional officers found needles and tinfoil in his bedroom and foil, a scale, and a bottle of urine in his car the month prior. RP 129, 136, 173. He also admitted that he had been using methamphetamine. RP 135-36. Consequently, N.B. went to prison and was expected to be released in February 2019. RP 169, 255.

Because of N.B.'s inability to remedy his parenting deficiencies, the Department filed a petition to terminate N.B.'s parental rights on October 31, 2017. CP 1-4. The trial date was continued four times between April 25, 2018, and September 5, 2018, by agreement of the parties due to attorney conflicts, a potential change in permanency plan, and the need to obtain records for trial. CP 42-43, 83-86, 103-104.

When the termination trial began on September 5, 2018, N.B. was incarcerated in the Larch Corrections Center near Vancouver, Washington. RP 1, 3-4. He was not present at trial, but was represented by the same attorney who had represented him in the underlying dependency case for about two years. *See generally* RP; *see* Exs. 13, 17, 18, and 19. N.B. could not appear by telephone because the "legal phone" at Larch Corrections Center was not operational. *See* RP 3-4, 7. Because no other phone at the facility was available for more than a couple of hours due to DOC employee resources and caseload issues, he could not appear by phone for the entire

trial. *See* RP 3-5. N.B., through counsel, requested and was granted a 24-hour continuance to prepare an order for transport, which the court entered the same day it was presented. *See* RP 3, 10-13; CP 127-28. The trial court noted that it could not force DOC to transport N.B. for the trial, as it lacked jurisdiction over DOC in the termination case. RP 11.

At the hearing the next day, the parties expected N.B. to be transported to court by September 11, 2018, and the court granted another continuance to accommodate N.B. *See* RP 16-18. Unfortunately, N.B. was not present in court on September 11. N.B.'s trial counsel had learned that neither DOC nor the Pierce County Sheriff would transport N.B. due to the language in the September 5 order for transport. RP 36-37; CP 127-28. Thus, N.B.'s counsel requested and the trial court entered an amended order requiring N.B.'s presence in court by September 17, with trial resuming on September 18.<sup>2</sup> RP 36; CP 131-34. Two of the Department's witnesses, a chemical dependency professional and a dual chemical dependency and mental health professional, were present and ready to testify on September 11. RP 35. N.B.'s counsel agreed on the record that these two witnesses could testify that day despite N.B.'s absence. RP 42-83. Their testimony,

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<sup>2</sup> The court signed two orders on September 11, 2018. The only differences between the two orders are the dates of the transfer. *Compare* CP 131-32 *with* CP 133-34.

including cross-examination by N.B.'s attorney, is at RP 35-83. The court gave N.B. the option to recall these witnesses later. RP 37.

To accommodate N.B.'s presence, the trial court told the parties that it would make time for the trial to proceed the following week. RP 38-40. It also informed them of the need to finish the trial by September 20 because of scheduling conflicts. RP 40-41, 86.

When court resumed on September 18, N.B. again was not present in court, even though the trial court had signed multiple orders directing his transport to court for trial. RP 91; CP 131-36. N.B.'s attorney was present and informed the court that she had received correspondence stating that the earliest N.B. could be transported from prison to court was September 27, but it was not clear from the correspondence whether N.B. actually would be in court that day, or only in the process of being transported. RP 92-93; CP 137-38. The Department's attorney told the court that the multiple continuances granted since September 5 had begun to compromise the Department's ability to have witnesses available for trial, potentially jeopardizing its ability to achieve timely permanency for M.B. RP 94-95.

The trial court balanced the interests of the parties, specifically including that of M.B. in achieving permanency, and directed the parties to proceed with trial. RP 95. The court also gave N.B.'s attorney two additional alternatives. First, if she could confirm that N.B. would be

present for the trial on September 27, the court would consider allowing him to appear for trial and provide testimony that day. RP 95-96. Second, the court would accommodate N.B.'s testimony by phone, if possible. *See* RP 96. N.B.'s attorney never confirmed that N.B. would be physically present on September 27. The court then heard testimony of three DOC community corrections officers, a psychologist, and the Department social worker, including cross-examination by N.B.'s counsel. RP 98-233.

The next day, September 19, N.B. appeared by telephone and testified. RP 238-79. He remained on the phone for the rest of the Department social worker's cross-examination and the entirety of the guardian ad litem's testimony. RP 278-305. After the Department rested, N.B. called no additional witnesses. RP 304.

On September 20, the trial court issued an oral ruling granting the petition to terminate N.B.'s parental rights. RP 336-54. N.B.'s counsel thanked the court for its efforts in trying to get N.B. transported to court. RP 354. On October 12, 2018, the trial court entered written findings after considering proposed findings from both parties. CP 162-65, 171-76. N.B.'s proposed findings did not address his trial participation. CP 162-63. N.B. filed nothing more until his notice of appeal on November 9, 2018. CP 177. The Court of Appeals affirmed the order terminating N.B.'s parental rights. This Court granted review.

#### IV. ARGUMENT

##### A. Application of the *Mathews* Factors Shows That a Fourth Continuance of the Termination Trial Was Not Required to Afford N.B. Due Process

“Due process is a flexible concept, but at a minimum it requires the right to notice and an opportunity to be heard.” *In re A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015). Article I, section 3 of the Washington Constitution does not afford greater due process protections than the United States Constitution. *A.W.*, 182 Wn.2d at 701-02; *see also Matter of Dependency of E.H.*, 191 Wn.2d 872, 884-87, 427 P.3d 587 (2018). N.B. has not claimed otherwise. Constitutional challenges are reviewed de novo. *A.W.*, 182 Wn.2d at 701.

In determining whether a parent received adequate due process in a dependency or termination trial, courts employ the *Mathews v. Eldridge* balancing test. 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *E.H.*, 191 Wn.2d at 891-92 (“[T]he *Mathews* test is adequate to ensure procedural due process protections under both the state and federal constitutions.); *State v. Parvin*, 184 Wn.2d 741, 758–63, 364 P.3d 94 (2015) (applying *Mathews* to conclude that applying GR 15 in parental termination cases would not violate parents’ due process rights). This test weighs three factors: (1) the private interests affected, (2) the risk of erroneous deprivation created by the procedures used, and the probable value of

additional safeguards, and (3) the government's interest. *Mathews* at 335. Here, application of the *Mathews* factors demonstrates that N.B. received a meaningful opportunity to defend against the termination petition and that he was afforded due process.

**1. When M.B.'s right to a safe, stable, permanent home, and a speedy resolution of the proceeding conflicts with N.B.'s legal rights, M.B.'s right prevails**

The first and third factors are the private interests affected and the government's interests. *Id.* With respect to the first factor, N.B. has a fundamental liberty interest in the care and custody of M.B. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 652, 294 P.3d 695 (2013).

Four-year-old M.B. also has a fundamental liberty interest at stake in a termination of parental rights proceeding. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012). He has the right to "basic nurture, physical and mental health, and safety," including "a safe, stable, and permanent home," and a "speedy resolution" of dependency and termination proceedings. RCW 13.34.020. And in this case, he has an interest in terminating parental rights that prevent his adoption into the only home he has ever known and inhibit establishing secure, stable, long-term, continuous relationships. *See In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011) (citing *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 513, 102 S. Ct. 3231, 73 L. Ed. 2d 928 (1982)).

M.B.'s interests fall under the third *Mathews* factor in this case, under which the state has “an urgent interest” in M.B.'s welfare. *M.S.R.*, 174 Wn.2d at 18 (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)). The state has an interest in ensuring a speedy resolution of dependency and termination proceedings “to ensure that children do not remain in legal limbo—with the mental and emotional strain that entails—for any longer than is necessary.” *Parvin*, 184 Wn.2d at 762.<sup>3</sup>

The state also has fiscal and administrative interests. *Mathews*, 424 U.S. at 335. In the context of facilitating an incarcerated parent's personal or telephonic appearance, these interests include the cost and staffing requirements of transporting the parent, the infrastructure of the prison facility, maintaining adequate inmate supervision, and safety. *See* RP 4-5 (describing the prison's inability to facilitate N.B.'s telephonic appearance).

When evaluating the sometimes competing private interests between a child and his parent, “[i]t is with the welfare of the child[ ] in

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<sup>3</sup> The longer a child remains in foster care, the lower the chances are that the child will achieve permanency and the greater the risk the child will experience more changes in placement. H. Ringeisen et al., No. 19: *Risk of Long-Term Foster Care Placement Among Children Involved with the Child Welfare System*, (Sept. 17, 2013), <https://www.acf.hhs.gov/opre/resource/nscaw-no-19-risk-of-long-term-foster-care-report>; (last visited Jan. 29, 2020); *see also* Henry S. Maas & Richard E. Engler, *Children in Need of Parents*. New York: Columbia University Press (1959). Instability in where and with whom a child lives has a significant negative impact on the behavioral well-being of the child. David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care* 119:2 *Pediatrics* 336-44 (Feb. 2007).

mind that the rights of the parent[ ] are examined.” *In re Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973). When the welfare of the child and the legal rights of the parent conflict, the welfare of the child must prevail. *Id.*; RCW 13.34.020. The risk of erroneous deprivation must be high in order to outweigh M.B.’s and the state’s shared interest in his safe and stable permanency, and a speedy resolution of the dependency and termination proceedings. As explained below, the risk of erroneous deprivation for N.B. is low in this case, and the *Mathews* factors weigh in favor of affirming the trial court’s order.

**2. The risk to N.B. of erroneous deprivation is low because he had a meaningful opportunity to be heard**

The second *Mathews* factor is the risk of erroneous deprivation and the probable value of additional procedural safeguards. *Mathews*, 424 U.S. at 335. The trial procedures available to N.B. provided him meaningful opportunities to be heard—some of which he took advantage of, and some of which he did not. Because his rights are not self-executing, and because he has shown no identifiable prejudice or demonstrated how his personal or telephonic appearance would have reduced the risk of error, this factor does not outweigh M.B.’s prevailing interest in a speedy resolution of the proceeding. N.B. received due process, and this Court should affirm the order terminating his parental rights so M.B. can achieve permanency.

**a. Multiple procedural safeguards afforded N.B. an opportunity to be heard**

N.B. has a right to a meaningful opportunity to be heard in the termination proceeding. *Mathews*, 424 U.S. at 333. The procedures available here provided him a multitude of safeguards to do so, one of which was experienced appointed counsel who had represented him for about two years. N.B. has not claimed that his counsel was ineffective, and thus, any procedural opportunities he did not pursue must be attributed to legitimate trial strategy. *See Strickland v. Wash.*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (courts begin their analysis with a presumption that counsel was effective); *In re Welfare of J.M.*, 130 Wn. App. 912, 920, 125 P.3d 245 (2005) (same).<sup>4</sup> *See also Matter of Rich*, 1979 OK 173, 604 P.2d 1248, 1253 (Okla. 1979) (absence of deposition testimony in an incarcerated father's termination of parental rights trial ascribed to "deliberate strategy choices of counsel acting in the best interest of their client's cause").

Although not solely a determinative factor, the ability to defend through counsel reduces the risk of error. *In re Welfare of L.R.*,

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<sup>4</sup> No Washington court has defined the applicable standard to evaluate ineffective assistance of counsel in parental rights cases, and courts have declined to differentiate between the "fair" hearing standard adopted in *Strickland* and the "meaningful" hearing standard adopted in the pre-*Strickland* termination of parental rights case, *In re Moseley*, 34 Wn. App. 179, 660 P.2d 315 (1983). Because N.B. has not claimed ineffective assistance of counsel, any distinction between these standards is without consequence here.

180 Wn. App. 717, 725, 324 P.3d 737 (2014). N.B. argues that the risk of error in proceeding with only his attorney present was “very high,” but his argument rests on his repeated but mistaken representation throughout this appeal that his trial counsel “was not assigned to the case during the lengthy dependency phase” and had “never spoken to [him] until less than a week before the trial began.” Pet.’s Mot. for Discretionary Rev. (Mot.) at 10. The record shows the opposite. N.B. and his termination trial counsel (or her designee) were present together for review hearings for about two years in the dependency case. Exs. 13, 17-19. His counsel communicated with him and sent him documents to review prior to the trial. RP 8; *see* RP 92-93 (advocating for N.B.’s stated interests). These facts reduced the risk of error in proceeding in his absence.

N.B. also provided live telephonic testimony, which further reduced the risk of error. *See* RP 240-78. Courts in many states have found that a parent’s opportunity to provide testimony, even by deposition, combined with representation by counsel are the two key components required in a due process analysis of an incarcerated parent who is not physically in attendance in a termination of parental rights proceeding. *See, e.g., People in Interest of C.G.*, 885 P.2d 355, 357 (Colo. App. 1994); *In Interest of Baby Doe*, 130 Idaho 47, 51-52, 936 P.2d 690 (Idaho Ct. App. 1997); *In Interest of F.H.*, 283 N.W.2d 202, 209 (N.D. 1979); *Matter of Rich*, 1979 OK 173,

604 P.2d 1248, 1253 (Okla. 1979); *In Interest of S.K.S.*, 648 S.W.2d 402, 405 (Tex. App. 1983).

Here, the risk of error was further reduced by additional opportunities for N.B. to meaningfully participate in the termination proceeding. In addition to his own testimony, N.B. telephonically appeared for the guardian ad litem's testimony and part of his attorney's cross-examination of the Department social worker. RP 278-305. Because witnesses testified on three separate days during an eight-day period, N.B. had an opportunity to talk to his attorney between days of trial and prepare.<sup>5</sup> And because a court reporter was present during the trial, trial transcripts were readily available if N.B. needed them. *See* RP 239.

Borrowing the rationale from a Nebraska Supreme Court opinion upon which N.B. relies, these available advantages, combined with the option from the trial court to recall witnesses later in the case (RP 37), afforded N.B. an opportunity greater than that available to many parents who personally attend trial and are required to cross-examine a witness contemporaneously with the witness's direct examination. *See In re Interest*

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<sup>5</sup> Two witnesses testified on September 11, 2018 (RP 42-83), five witnesses testified on September 18 (RP 98-231), and three witnesses (including N.B. and cross examination of the Department's social worker) testified on September 19 (RP 238-305).

of *L.V.*, 240 Neb. 404, 417, 482 N.W.2d 250 (Neb. 1992).<sup>6</sup> Other states have found these types of available safeguards provide similarly situated parents sufficient due process. *See, e.g., In re A.M.*, 2012 ME 118, 55 A.3d 463 (Me. 2012); *State ex rel. Juvenile Dep't of Lane County*, 100 Or. App. 481, 786 P.2d 1296 (Or. Ct. App. 1990). *See also In re Eileen R.*, 79 A.D.3d 1482, 1483, 912 N.Y.S.2d 350 (2010) (describing alternative means of participation that can afford incarcerated parents due process).

To the extent N.B. argues the risk of error increased when the trial court heard testimony from the first two witnesses in his absence, this argument is without merit for three reasons. *See Mot.* at 5, 10-15. First, as explained above, N.B. had the opportunity to recall these witnesses, mitigating any risk of error. RP 37. Second, contrary to N.B.'s characterization that "the judge said that she wanted to go forward and take testimony from the two witnesses who were present that day anyway," his attorney expressly agreed to proceed with the witnesses' testimony despite N.B.'s absence. *Compare Mot.* at 5 *with* RP 36-37 ("I am fine with going with the two [witnesses] who are here now."). Third, N.B.'s attorney cross-examined these witnesses on his behalf. RP 52-54, 69-83.

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<sup>6</sup> The Nebraska Supreme Court found that the procedures used in that case "surpassed the requirements of procedural due process" while also cautioning that the case "should not be construed as *the* standard to determine procedural due process for one who has a constitutional right to be heard in a proceeding." *L.V.*, 240 Neb. 404 at 417 (emphasis in original).

Available alternative means for N.B. to offer additional evidence during or after the trial are also relevant procedural safeguards that further reduced the risk of error. *See A.M.*, 55 A.3d 463 at 470-71. For example, N.B. could have sought to reopen the judgment to take additional testimony pursuant to CR 59(g) or filed a motion for a new trial under CR 59(a). He could have filed a motion for relief of judgment, explaining what information he should have been allowed to provide. CR 60. These available avenues further reduced the risk of error, and N.B.'s failure to pursue them must be attributed to legitimate trial strategy.

**b. Neither a fourth continuance nor N.B.'s personal or telephonic appearance for the entire trial would have reduced the risk of error**

In addition to examining the procedural safeguards that were available, the second *Mathews* factor also addresses “the probable value, if any, of additional or substitute procedural safeguards.” *Mathews*, 424 U.S. at 335. Here, neither a fourth continuance nor N.B.'s personal or telephonic appearance would have further reduced any risk of error, for two reasons.

First, N.B.'s claim is predicated on an assumption that is not supported by the record: N.B. would have been able to personally attend the trial if it had been continued “only a week.” Mot. at 11; *see also* Mot. at 5, 7. For this assertion, N.B. relies on a fax that says the “soonest” he could be transported was September 27, 2018, but it does not establish that he would

have been transported on that day. CP 138.<sup>7</sup> After explaining its confusion about whether N.B. would appear in court on September 27 or whether he would be transported that day, the court stated that if N.B.'s attorney could "confirm that he actually would physically be here on the 27th, I can look then and evaluate what we do about completing the trial on the 27th." RP 93, 96. N.B.'s attorney never updated the court that N.B. would in fact be physically present on September 27. Thus, no evidence in the record establishes that N.B. would have been able to personally attend the trial had it been continued a fourth time.

Second, N.B. has not articulated how his personal or telephonic presence for the entire trial would have reduced the risk of erroneous deprivation. Instead, he compares his case to that of the parent in *In re Welfare of L.R.*, arguing that the parent in *L.R.* had the opportunity to attend more days of trial than he did and that he "was not afforded any of the protections relied upon in *L.R.*" Mot. at 11-13. But the record shows that, like the parent in *L.R.*, N.B. also had the opportunity to recall witnesses for cross-examination. RP 37; 180 Wn. App. at 722. Unlike the parent in *L.R.*, N.B. did not take advantage of this opportunity, which further

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<sup>7</sup> The fax stated: "The soonest WCC can facilitate a transport to Pierce County Jail is September 27<sup>th</sup>, 2018. He has to go from Larch [sic] to WCC. Larch only transports on Friday's [sic] to WCC. WCC has a training day for transport teams on September 25<sup>th</sup>, so there is not transport that day." CP 138.

demonstrates that N.B.'s presence was not significant for any of the witnesses' cross-examination. *See id.*; *see also Matter of Adoption of K.M.T.*, 195 Wn. App. 548, 568, 381 P.3d 1210 (2016) (father's decision not to recall witness who testified before he was present suggests his presence was not significant for the witness's cross-examination). He has not shown a "probable value" of a fourth continuance or of his physical or telephonic appearance for the entire trial. *See Mathews*, 424 U.S. at 335.

**3. The *Mathews* factors weigh in favor of proceeding in N.B.'s absence**

An application of the *Mathews* factors to the facts here leads to the conclusion that N.B.'s due process rights were not violated when the court proceeded with trial rather than grant a fourth continuance. Although N.B.'s private interests are significant, multiple procedural safeguards were available to N.B. to protect his due process rights, reducing the risk of error. He has not demonstrated any specific prejudice. In contrast, multiple continuances had begun to compromise the Department's ability to arrange witnesses, and as a result its ability to obtain permanency for M.B. *See* RP 95; RCW 13.34.020. Any additional decisional accuracy that would have been afforded had the trial court required his presence was minimal and does not outweigh M.B.'s interests in permanency and a speedy resolution, and the Department's interest in achieving permanency for M.B.

The trial court's balancing of the *Mathews* factors was correct on these facts and should not be disturbed. *See* RP 95-96.

**B. The Alleged Error Does Not Warrant Reversal**

N.B. cites *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013), a criminal case challenging a violation of a defendant's Sixth Amendment right to control his defense, as support for his argument that "[d]ue process violations during a termination proceeding require reversal unless the state can prove beyond a reasonable doubt that the error did not affect the outcome." Mot. at 15. This decision has never been cited as authority in a civil matter such as this one, and N.B. has not claimed a Sixth Amendment violation here. In assessing constitutional error in termination of parental rights cases, the Court of Appeals has stated that "[d]enial of a motion to continue violates due process if the parent can show either prejudice by the denial or the result of the trial would have likely been different if the continuance was granted." *In re Welfare of R.H.*, 176 Wn. App. 419, 425, 309 P.3d 620 (2013) (quoting *Dependency of V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006)).

The more stringent standard advocated by N.B. is easily met in this case, so the Court need not decide the applicable standard to affirm. There is simply no evidence in the record demonstrating that a fourth continuance or N.B.'s telephonic or physical presence for the entirety of the trial would

have affected the outcome. N.B. attempts to analogize his case to *Welfare of J.M.*, 130 Wn. App. 912, 125 P.3d 245 (2005), where the court reversed the order terminating the mother's parental rights because she received ineffective assistance of counsel. Mot. at 14-16. This case is inapposite. N.B. has not claimed ineffective assistance of counsel, and the beyond a reasonable doubt standard does not apply in such a challenge. *See J.M.*, 130 Wn. App. at 920-25. Furthermore, when taken to its logical conclusion, N.B.'s argument—that the Department cannot demonstrate the alleged error was harmless because one can do no more than speculate about what evidence would have been revealed—would swallow the rule, rendering it impossible to find a violation harmless. *See Mot.* at 15-16.

Here, no evidence supports an argument that the alleged error impacted the hearing. Despite having the opportunity to do so, N.B. did not recall any witnesses, provide an offer of proof indicating what additional relevant information might have been provided to the court, or ask any questions of the trial court when invited to do so at the oral ruling (RP 353-54). His proposed order on the Department's petition to terminate his parental rights contains no findings related to his trial court participation or lack thereof. CP 162-63. Without any evidence to support his claim, and in light of the procedural safeguards that were available to N.B., the harmless beyond a reasonable doubt standard is satisfied.

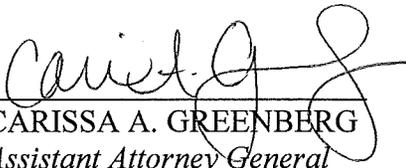
If this Court determines that N.B.'s constitutional right to due process was violated and prejudiced him, reversal of the order terminating his parental rights is not required. The alleged error can be remedied by a remand to the trial court, affording N.B. the opportunity he says he was denied. *See Orville v. Division of Family Services*, 759 A.2d 595, 600 (Del. 2000); *see also In re Dependency of A.M.M.*, 182 Wn. App. 776, 780, 332 P.3d 500 (2014). However, because the cost of a remand will be borne by M.B. in the form of further delay to his ability to achieve permanency, the Court should prescribe this remedy only if absolutely required to ensure N.B. is afforded due process.

#### V. CONCLUSION

This Court should affirm and permit M.B. to achieve permanency in the only home he has ever known.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of February, 2020.

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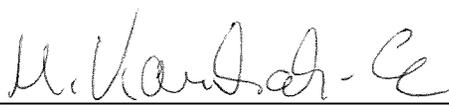
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7<sup>th</sup> day of February, 2020, at Olympia, WA.

  
\_\_\_\_\_  
Ursula Konschak-Grover, Legal Assistant

**SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE**

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