

NO. 96989-2

Court of Appeals No. 49525-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

MARK GOSSETT

MEMORANDUM OF AMICUS CURIAE WASHINGTON
DEFENDER ASSOCIATION IN SUPPORT OF APPELLANT'S
MOTION FOR DISCRETIONARY REVIEW

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Stafford Creek Corrections Center



Washington Corrections Center
for Women

“Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”

Santosky v. Kramer, 455 U.S. 745, 753-754, 102 S.Ct. 1388, 1395, 71 L.Ed.2d 599 (1982).

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A. INTRODUCTION

Appellant Mark Gossett has filed a motion for discretionary review to this Court from the denial of his personal restraint petition in the Division Two of the Court of Appeals. *See* RAP 13.5A. Because of the significant constitutional questions presented and the need for a definitive ruling by this Court, *amicus curiae* ask this Court to grant that motion. *Amicus* have filed a separate motion for permission to file an *amicus curiae* memorandum in support of the motion for discretionary review.

B. INTEREST OF AMICUS CURIAE

The Washington Defender Association (“WDA”) is a non-profit association of over a 1600 public defenders, criminal defense attorneys, investigators, social workers and children’s civil rights attorneys throughout the state of Washington. WDA and its members are committed to supporting and improving indigent defense and the lives of indigent defendants and their families. A primary purpose of WDA is to improve the administration of justice and stimulate efforts to remedy inadequacies in substantive and procedural law that contribute to injustice. The Washington Defender Association Incarcerated Parents Project (“WDA IPP”) works to reduce child-parent separation caused by parental incarceration in Washington State. WDA and WDA IPP have had

numerous briefs accepted by this and other Washington appellate courts in the past.

C. SUMMARY OF ISSUES TO BE ADDRESSED BY AMICUS

Amicus urge this Court to grant appellant's motion to transfer this case pursuant to RAP 4.4. The issues raised in appellant's case are recurring circumstances that affect parents of minor children sentenced for crimes, in which the victim is also a minor. The issues raised also affect those parents sentenced to prison with concurrent child custody cases in dependency courts. In those situations, as here, under the lower court's ruling, Washington State Department of Corrections ("DOC") would be permitted to categorically deny all forms of contact and/or visitation between an incarcerated parent with his or her own minor children, solely based on the child's minority, and nothing more.

Interpreting this Court's ruling in *In Re Dyer*, 143 Wn.2d 384, 20 P.3d 907 (2001), the lower court determined that incarcerated parents do not have any protected liberty interests under the state or federal constitutions in any form of contact or any form of prison visitation with their own minor children. *In the Matter of Gossett*, 435 P.3d 314, 2019 WL 718856, *6 (2019). The proposition that one's fundamental and constitutionally protected liberty in the care, companionship, and child rearing of one's own minor children vitiates upon receiving a prison

sentence contravenes state and federal constitutional guarantees of due process when facing termination of the child-parent relationship. There is a great need for resolution of the questions, which arise in this case.

D. STATEMENT OF FACTS

This brief relies upon the Appellant's statement of the case supported by the record of the proceedings below. In particular, amicus includes the following facts contained in the record.

E. ARGUMENT

1. Review Is Needed Here Because The Decision Involves a Significant Question of Law Under the Constitution of the State of Washington or of the United States Under RAP 13.4(b)(3).

The lower court ruling permits DOC to deny any parent-child visitation without a lawful basis and without due process, and wrongly infringes upon the fundamental liberty interest in parenting one's child. As appellants raised in his motion for discretionary review, the Due Process Clause protects against the deprivation of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. 1, § 3. Substantive protected liberty interests may arise from the Due Process Clause itself and the laws of the States. *In Re Dyer*, 143 Wn.2d

384, 392, 20 P.3d 907 (2001)(citing *Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (quotations omitted)). The bundle of constitutionally protected fundamental rights conferred upon parents concerning their own minor children, include, but are not limited to, the right to care and companionship with one's own minor children, the right to make all child-rearing decisions, and the right to personal choice in all matters of family life. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982); *In Re Myrick's Welfare*, 85 Wn.2d 252, 253-54, 533 P.2d 841 (1975).

Although the Due Process Clause of the federal constitution does not, of its own force, create a liberty interest in contact visits between an incarcerated person and their spouse, relatives, children, and friends, *Block v. Rutherford*, 468 U.S. 576, 104 S.Ct. 3227 (1984),² state statutes or state regulations can create a due process liberty interest, where none otherwise would have existed. *In Re Dyer*, 143 Wn.2d 384, 392, 20 P.3d 907 (2001)(quotations omitted).

² The Supreme Court of the United States reasoned that pretrial detainees could be categorically denied contact visits with all family:

...we do not in any sense denigrate the importance of visits from family or friends to the detainee. Nor do we intend to suggest that contact visits might not be a factor contributing to the ultimate reintegration of the detainee into society. We hold only that the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility.

Block v. Rutherford, 468 U.S. 576, 589, 104 S.Ct. 322, 782 L.Ed.2d 438 (1984).

This Court has acknowledged in order “to create a liberty interest, the action taken must be an atypical and significant deprivation from the normal incidents of prison life.” *In Re Dyer*, 143 Wn.2d 384, 392-93, 20 P.3d 907 (2001); *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293 (1995). Although the *Dyer* Court held that the incarcerated father did not have a statutorily created liberty interest in extended family visits, the Court did so, in part, because the incarcerated father “still has regular visitation rights to spend time with his wife and children.” *In Re Dyer*, 143 Wn.2d 384, 392-93, 20 P.3d 907 (2001). In *Gossett* below, the lower court wrongly extended this Court’s *Dyer* holding to conclude that incarcerated parents do not have any liberty interest in regular visitation or any other forms of contact with their own minor children.

State infringements on the parent-child relationship as a function of the sentence must be reasonably necessary to meet a compelling interest, cannot be arbitrary, must be narrowly tailored, and must be sensitively imposed. *See State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010); *State v. Corbett*, 158 Wn.App. 576, 598, 242 P.3d 52 (2010); *State v. Berg*, 147 Wn.App. 923, 942, 198 P.3d 529 (2008). DOC’s actions in this case relied on its own directive, and it is overbroad:

An offender's contact with specific individuals *or classes of individuals* may be denied or restricted for reasons

including, but not limited to:...The individual *or class of individuals has been victimized by the offender.*

DOC Policy 450.050 (I)(B)(4)(emphasis added). Under this directive, DOC first determines without guidance whether an applicant has *ever* been victimized by the incarcerated parent. Next, DOC determines whether the minor applicant belongs to a “*class of individuals, who has been victimized by the offender.*” DOC Policy 450.050 (I)(B)(4)(emphasis added). DOC also relied upon its policy governing visits for incarcerated individuals, which makes minors ineligible to visit, as follows: “A minor may be denied due to the nature of the crime of conviction if s/he is profiled as *comparable to that of a victim.*” DOC Policy No. 450.300(III)(A)(1)(b)(emphasis added). This policy, like the directive, does not account for the fundamental interest presented by the child-parent relationship, is not reasonably necessary to assure the child’s safety, and is ultimately overbroad.

The lower court ruling also raises the concern that even when a superior court orders minor child-incarcerated parent contact and/or visitation, DOC can disregard the superior court’s fact-finding simply out of convenience. Even though DOC has chosen to apply an overbroad policy in family situations where parents have been convicted of sexual misconduct, family violence, or child mistreatment, DOC’s policies and

directives do not provide sufficiently fair procedures, and could affect any incarcerated parent regardless of crime of conviction. *See* DOC Policy 450.050 (I)(B)(4); DOC Policy No. 450.300(III)(A)(1)(b). Moreover, the lower court ruling allows DOC to disregard the individualized fact-specific findings and superior court order specifically related to a particular parent's criminal conduct and the protection of their minor child. DOC does so without providing a similarly fair procedure to incarcerated parents in its place. This lower ruling presents a significant constitutional issue of statewide import.

2. Review Is Needed Here Because The Decision Is Far Reaching and Involves an Issue of Substantial Public Interest That Should be Determined By the Supreme Court Justifying Review Under RAP 13.4 (b)(4).

- a. The Lower Court Decision Affects Many Parents and Children & Presents Family Situations That are not Isolated Incidents.

Historically, courts have paid little to no attention to the impact a prison sentence has had on an incarcerated parent and his or her family. Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 (1) J. CRIM. L. & CRIMINOLOGY 77, 80 (2013). The destruction of families experiencing parental incarceration were unexamined, yet profoundly harmful, societal costs of the prison sentence. Between 1980 and 2000, the number of children with a father in prison or jail increased 500%. The Sentencing

Project. *Fact Sheet: Trends in U.S. Corrections 2* (2018).⁴ There are approximately 30,000 people incarcerated in prisons and jails in Washington State, with just under 18,000 people living at DOC facilities. Danielle Kaeble and Mary Cowhig, *Correctional Populations in the United States, 2016 1* (2018).⁶ When last examined, eighty percent (80%) of people in WA State DOC custody reported having an average of 1.91 children. Children and Families of Incarcerated Parents Advisory Comm. Annual Rep., *Report to the Legislature and Governor 5* (2010).⁷ Washington's child welfare agency estimates parental incarceration directly affects approximately 27,000 of the State's children. *Id.* Prison policies negatively affecting parent-child interactions disparately affect children of color because of racialized crime enforcement and disparities in the use of imprisonment against people of color who are convicted of similar crimes to whites. Taskforce on Race & the Criminal Justice System, Research Working Group, *Preliminary Report on Race and Washington's Criminal Justice System 7* (2011).⁹ Many scholars now

⁴ Available at: <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

⁶ Available at: <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

⁷ Available at: https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Children%20and%20Families%20of%20Incarcerated%20Parents%202009_499fc72e-e0e8-4021-b6da-a27bb0f5e063.pdf.

⁹ Available at: <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1101/87WLR001.pdf?sequence=1>

recognize, through nearly two decades of research that there has been serious damage caused by the imposition of so many prison sentences.¹⁰ The destruction of these families cannot remain an unexamined cost of prison sentence. Boudin, *supra*, at 80.

b. The Lower Court Ruling Involves an Issue of Substantial Public Interest.

For far too long, incarceration has led to the permanent destruction of the parent-child relationship; a loss that harms families and communities. However, the Washington State Legislature has provided new policy objectives regarding children and their incarcerated parents, including providing specific protections for children and their incarcerated parents against termination and removing barriers to reunification in dependency proceedings, after considering the mounting social science research.¹¹ RCW 72.09.495; RCW 74.04.800; Substitute H.B. 1284, 63rd

¹⁰ Nat'l Research Council. *The Growth of Incarceration in the United States: Exploring Causes and consequences* 274 (The National Academies Press 2014); Marilyn C. Moses, *Correlating Incarcerated Mothers, Foster Care and Mother-Child Reunification*. 68 (6) *Corrections Today* 98, 98-100 (2006)(incarcerated parents are twice as likely to lose their parental rights), available at: <https://www.ncjrs.gov/pdffiles1/nij/216276.pdf>; Pew Charitable Tr., *Collateral Cost: Incarceration's Effects on Economic Mobility* 10 (2010) (imprisonment, not just arrest and conviction, undermines long-term employment, earning potential, and successful re-entry), available at: https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1.pdf.pdf; David Murphey and P. Mae Cooper. *Parents Behind Bars: What Happens to Their Children?* 2 (Child Trends: 2015)(children with an incarcerated parent are more likely to experience *additional* adverse events), available at: <https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>.

¹¹This research demonstrates that for children, maintaining contact with one's incarcerated parent improves a child's emotional wellbeing, improves a child's ability to

Leg., Reg. Sess. (Wash. 2013). Effective since July 28, 2013, incarcerated parents and their minor children can request case planning services while incarcerated, visitation and other forms of contact while incarcerated, long-term permanency planning with alternatives to termination of the child-parent relationship, and good cause findings that support reunification rather than termination of their child-parent relationships. RCW 13.34.025; RCW 13.34.136 (2)(b)(i)(A); RCW 13.34.145 (5).¹² These legislative enactments represent a fundamental shift in public policy concerning preserving the relationships between incarcerated parents and their minor children. This Court's review is needed to provide direction on this issue.

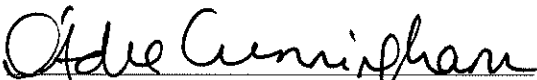
cope with parent-child separation, and supports parent-child attachment. Poehlmann, J. Attachment in infants and children of incarcerated parents. 75 – 100 (J. Poehlmann & J. M. Eddy eds., Urban Institute Press 2010.); Denise Johnston. *Effects of parental incarceration* in CHILDREN OF INCARCERATED PARENTS 59-88 (Katherine Gabel & Denise Johnston Eds., 1995); Bruce E. Compas, *Coping with stress during childhood and adolescence*. 101(3) PSYCHOL. BULL. 393-403 (1987), available at: <http://dx.doi.org/10.1037/0033-2909.101.3.393>; Nancy G. La Vigne et al., *Examining the Effect of Incarceration and In-prison Family Contact on Prisoners' Family Relationships*, 21 (4) J. OF CONTEMP. CRIM. JUST. 314 (2005). Further, it lowers the likelihood of recidivism among incarcerated parents and reduces the risk of intergenerational incarceration. Ryan Shanahan and Sandra Villalobos Agudelo, *The Family and Recidivism*. AM. JAILS. 17 (2012); Margaret diZerega and Sandra Villalobos Agudelo, *Piloting a Tool for Reentry: A Promising Approach to Engaging Family Members* (2011); Lynne Rechman & Debra Rothstein, *A Voice for the Young Child with an Incarcerated Parent* (ABA LITIG. SECT., CHILDREN'S RIGHTS LITIG. 2012), available at: <https://apps.americanbar.org/litigation/committees/childrights/content/articles/winter2012-young-child-incarcerated-parent.html>.

¹² The dependency statutes now mandate, among other things, that case planning services be provided, encourages that visitation take place, and provides for permanency planning options for children with incarcerated parents, which do not rely solely upon termination of the child-parent relationship.

F. CONCLUSION

For the reasons above, *amicus* urge this court to grant the appellant's motion for discretionary review.

Respectfully submitted this 26th day of March 2019.


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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 26, 2019, I caused a true and correct copy of the proposed *amicus curiae* memorandum of Washington Defender Association and Washington Defender Association Incarcerated Parents Project in support of the appellant and the motion for permission to file *amicus curiae* memorandum to be served as follows:

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