IN THE

Supreme Court of New Jersey

No. A-116-11 (069,970)

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, *Plaintiff-Respondent,* v. **R.G.** *and* **J.G.,** *Defendants-Respondents.* --- **IN THE MATTER OF THE GUARDIANSHIP OF T.G.,** *Minor-Appellant,* *and* **K.G.,** *Minor-Respondent.*	**CIVIL ACTION** **ON APPEAL AS OF RIGHT FROM A FINAL JUDGMENT OF THE APPELLATE DIVISION** **NO. A-1310-10T1** *Sat Below*: CUFF, P.J.A.D., SAPP-PETERSON, J.A.D., *and* FASCIALE, J.A.D. **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, FAMILY PART, BERGEN COUNTY** **NO. FG-02-70-10.** *Sat Below*: JOHN A. CONTE, J.S.C.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND THE NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE

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July 30, 2012.

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Fullilove v. Klutznick, 448 U.S. 448 (1980)..... 12

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In re Subryan, 187 N.J. 139 (2006)..... 17

Matter of Guardianship of J.C., 129 N.J. 1 (1992)..... 14

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N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261 (2007)..... 17

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N.J. Div. of Youth & Family Servs. v. T.S. and K.G., 417 N.J. Super. 228 (App. Div. 2010) 6, 43

N.J. Div. of Youth and Family Servs. v. I.S., 202 N.J. 145 (2010) 14

Prince v. Massachusetts, 321 U.S. 158 (1944)..... 11

Santosky v. Kramer, 455 U.S. 745 (1982)..... 16, 41

Stanley v. Illinois, 405 U.S. 645 (1972)..... 11, 41

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Washington v. Glucksberg, 521 U.S. 702 (1997)..... 11, 12

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N.J.S.A. 30:4C-15.1(a)(4)..... 5

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Other Authorities

Adela Beckerman, Incarcerated Mothers and Their Children in Foster Care: The Dilemma of Visitation, 11 CHILD. & YOUTH SERVICES REV. 175 (1989) 37

American Bar Association, Adult Criminal Consequences Statute Demonstration Site 32

Ariela Lowenstein, Temporary Single Parenthood-The Case of Prisoners' Families, 35 FAM. REL. 79 (1986) 38

C.F. Hairston & P.M. Hess, Family Ties, Maintaining Child-Parent Bonds is Important, 51 CORRECTIONS TODAY 102 (1989) .. 37

C.F. Hairston, The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships with Their Children, 77 CHILD WELFARE 617 (1998) 37

C.F. Hariston, Family Ties During Imprisonment: Important to Whom and for What? 18 J. OF SOCIOLOGY AND SOCIAL WELFARE 87, 99 (1991) 40

Christina Jose Kampfner, Post-Traumatic Stress Reactions in Children of Imprisoned Mothers 37

Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982).... 35

Correctional Association of New York, Women in Prison Project, When "Free" Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State 36

Creasie Finney Hairston, Jane Addams College of Social Work, University of Illinois at Chicago, Prisoners and Families: Parenting Issues During Incarceration (2001) 38

Creasie Finney Hairston, The Annie E. Casey Foundation, Focus on Children With Incarcerated Parents: An Overview of the Research Literature, 11 (2007) 38

Denise Johnston, Effects of Parental Incarceration, *in* CHILDREN OF INCARCERATED PARENTS (Katherine Gabel & Denise Johnston eds., 1995) 37

Donna C. Hale, The Impact of Mothers' Incarceration on the Family System: Research and Recommendations, 12 MARRIACE & FAM. REV. 143 (1987) 37

Dorothy Driscoll, Mother's Day Once a Month, 47 CORRECTIONS TODAY 18 (1985) 37

eentry Policy Council, Parenting, Even from Prison and Jail, Can Have a Positive Impact on Outcomes for Both Children and Parents 40

Federal Bureau of Prisons Quick Facts About the Bureau of Prisons 34

Florence W. Kaslow, Couples or Family Therapy for Prisoners and Their Significant Others, 15 AM. J. FAM. THERAPY 352 (1987) 38

How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution, 104 Am. J. Soc. 1030 (1999) .. 34

Human Rights Watch, Targeting Blacks: Drug Law Enforcement and Race in the United States 8 (May 5, 2008) 34

James J. Stephan, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 1995 (1997) 30

James J. Stephan, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005 (2008) 30

Jeremy Travis *et al.*, Urban Institute, Prisoner Reentry in New Jersey (2003) 31

Jeremy Travis, Amy L. Solomon & Michelle Waul, The Urban Institute, From Prison to Home: The Dimensions and Consequences of Prisoner Reentry, 39 (2001) 39, 40

Joseph S. Jackson & Lauren G. Fasig, The Parentless Child's Right to A Permanent Family, 46 WAKE FOREST L. REV. 1 (2011) 37

Lauren E. Glaze & Laura M. Maruschak, Bureau of Justice Statistics, Parents in Prison and Their Minor Children (2008) 35

Legal Action Center, After Prison: Roadblocks to Reentry a Report on State Legal Barriers Facing People with Criminal Records (2004) 32

Letter from U.S. Attorney General Eric H. Holder, Jr. to Vermont Attorney General William H. Sorrell 33

Marta Nelson, Perry Deess & Charlotte Allen, The Vera Institute of Justice, The First Month Out: Post-

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Michelle Natividad Rodriguez & Maurice Emsellem, National Employment Law Project, 65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment (2011) 31, 34

Paul Guerino et al., Bureau of Justice Statistics, Prisoners in 2010 (2011) 30

Philip Genty, Damage to Family Relationships as a Collateral Consequence of Parental Incarceration, 30 FORDAM URB. L.J. 1671 (2003) 36, 37

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INTRODUCTION

Amici Curiae American Civil Liberties Union of New Jersey ("ACLU-NJ") and the New Jersey Institute for Social Justice ("NJISJ") respectfully submit this brief in support of Appellant J.G. in the above captioned action.

This case presents the difficult legal and policy issue of how to correctly balance the parental rights of re-entering former offenders with the rights of children to adequate care and a permanent and stable home. Amici believe that the Appellate Division's overly expansive approach — by which it repeatedly ruled "as a matter of law" that the circumstances that inevitably flowed from Appellant J.G.'s prior incarceration justified terminating his parental rights — is inconsistent with the requirements the Due Process Clause of the United States Constitution, and Article I, §1 of the New Jersey Constitution. As a practical matter, Amici are concerned that the approach of the Appellate Division will effectively excuse the Division ("DYFS")[1] of its procedural burden in adducing clear and convincing evidence supporting termination of parental rights,

[1] Under 2012 N.J. Laws c.16 (A3101) (approved June 29, 2012), the New Jersey Department of Children and Families' ("DCF") Division of Youth and Family Services ("DYFS") has been renamed the Division of Child Protection and Permanency. For the sake of clarity and consistency with the previous opinions and briefing herein, this brief will continue to refer to the relevant DCF division as "DYFS."

and in particular of its substantive burden of making reasonable efforts to provide services that would reunify families of former incarcerated parents. For that reason, Amici urge this court to direct DYFS to develop standard procedures by which it shall discharge its obligation to incarcerated or recently incarcerated parents to provide appropriate services aimed toward reunification.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY[2]

Since Amicus does not have access to the confidential record in this case, it relies on the facts as stated in the opinion of the Appellate Division. N.J. Div. of Youth & Family Servs. v. R.G. and J.G., No. A-1310-10T1 (App. Div. 2011) (2011 N.J. Super. Unpub. LEXIS 3141).

J.G. is the biological father of T.G., who was born on February 23, 2004. J.G. was incarcerated when T.G. was six months old, and was released on September 8, 2010.

After her birth, T.G. initially resided with her mother, R.G. DYFS opened an investigation in July 2008, however, when an anonymous caller reported that R.G. was drunk every day and her home was unsuitable for children. DYFS found R.G. to be under the influence and confirmed the home was unsanitary and in disrepair, and removed the children from the home. T.G. and her

[2] Because the facts and procedural history are inextricably intertwined, they are presented as a consolidated in this brief.

older half-brother K.G.[3] were thereupon placed with their grandmother, G.B., with whom they currently reside. R.G. was directed to obtain substance abuse treatment, therapy, psychiatric monitoring and domestic violence counseling. Although R.G. initially complied, she later relapsed.

J.G., at this time still incarcerated, was directed only to attend a psychological evaluation and to provide proof of the prison programs he was attending. J.G. complied with all requests made of him. The DYFS psychologist recommended that J.G. have contact with his children by phone and letters, and indicated that "J.G. will require significant services for reintegration after his release from incarceration. These include vocational rehabilitation, psychological services and parenting skills training."

In October 2009, the trial judge approved a permanency plan of termination of parental rights followed by adoption by G.B. with a concurrent plan of kinship legal guardianship. DYFS brought an action to terminate the parental rights of both J.G. and the children's mother, R.G. Shortly before trial, however, R.G. voluntarily surrendered her parental rights in favor of G.B.

[3] While this appeal was pending before the Appellate Division, K.G. was adopted by G.B.

J.G. was released from Mid-State Correctional Facility on September 8, 2010, which was after the trial, but before the trial judge's written decision. The trial judge thereupon denied termination of J.G.'s parental rights to T.G. He ordered that J.G. be permitted to engage in therapy and participate in a bonding evaluation before he would entertain another application to terminate J.G.'s parental rights.

In denying the petition for termination of J.G.'s parental rights, the trial court addressed each of the four prongs of N.J.S.A. 30:4C-15.1(a), which define the statutory bases for termination. The trial court first found that DYFS had failed to establish that "the child's safety, health or development has been or will continue to be endangered by the parental relationship." N.J.S.A. 30:4C-15.1(a)(1). The trial court noted that there was:

> an insufficient showing that the child was endangered by the incarceration of her father. He did nothing to endanger the child during her first six months of life. When he went into custody, she was safely in the custody of her mother. When the children were removed he did everything he could to continue communicating with the family.

Trial Type Op. at 28.

With regard to the second prong, the trial court found that because J.G. did everything he was told to do while incarcerated and "never has been shown to be unwilling to eliminate any harm resulting from his incarceration," DYFS had failed to prove by

clear and convincing evidence that J.G. "is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm." N.J.S.A. 30:4C-15.1(a)(2).

Thirdly, the trial court found that DYFS had not "made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home." N.J.S.A. 30:4C-15.1(a)(3). In particular, the trial judge faulted the Division for not providing a phone card to J.G. and criticized G.B.'s refusal to accept some collect phone calls and her failure to pass all of J.G.'s letters to T.G.

Finally, addressing the concern that T.G. be able to visit with J.G. and the harm that would be caused by permanently severing the link with her father, the trial court found that DYFS had not yet demonstrated that "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4).

The Law Guardian appealed, and DYFS, R.G. and K.G. support the Law Guardian's position. On appeal, a majority of the Appellate Division reversed the trial court's denial of termination of J.G.'s parental rights. It found that since "the Division proved all four prongs by clear and convincing

evidence, we are constrained to terminate J.G.'s parental rights as a matter of law."

In addressing the first prong, the majority, observing that "[i]mprisonment necessarily limits a person's ability to perform their parental obligations," ruled that "as a matter of law under these facts that J.G.'s incarceration, which lasted from when T.G. was six months old until after her sixth birthday and prevented the formation of a parental bond, constitutes a harm to T.G." Type Op. at 11. The court cited its recent decision in N.J. Div. of Youth & Family Servs. v. T.S. and K.G., 417 N.J. Super. 228 (App. Div. 2010), and found that "the circumstances here appear no different from those in T.S."

The Appellate Division then also overruled the trial court's factual determination on the second prong and concluded "as a matter of law" that J.G. "is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm." Although the court did not refute the trial court's conclusion that J.G. did everything he was told to do while incarcerated and "never has been shown to be unwilling to eliminate any harm resulting from his incarceration," and further acknowledged that J.G. had no current plans to assume care for T.G. and recognized that she should stay with her grandmother, G.B., fthe lower court reasoned that "`harm' under this prong includes the "serious and

enduring emotional or psychological harm" caused to T.G. by the mere future possibility of her separation from G.B., even though such separation was not contemplated by any of the parties or the trial court.

In addressing the third prong, i.e. whether DYFS made reasonable efforts to provide services aimed toward reunification, the Appellate Division acknowledged that "it would have been preferable for the Division and the grandmother to have facilitated contact between [T.G.] and J.G. in every instance." However, it concluded as a matter of law that the many services offered to the mother, R.G., fulfilled DYFS's obligation under the statute, thus apparently rendering unnecessary provision of services to the father. The majority noted that with regard to J.G., "the Division is impeded by the difficulty and likely futility of providing services to a parent in custody."

Finally, as to whether "[t]ermination of parental rights will not do more harm than good," the lower court found, again as a matter of law, that while "harm inevitably occurs when a child loses a biological parent," that harm was necessarily outweighed by the fact that "the children and their grandmother have created a strong and permanent bond." Type Op. 15. While it acknowledged the trial court's concern that T.G. be allowed visits with her biological father, it found that the

"preservation of this household should neither be delayed nor interrupted by what is essentially a request for guaranteed visitation."

Thus, the majority opinion concluded that "[g]iven that the Division proved all four prongs by clear and convincing evidence, we are constrained to terminate J.G.'s parental rights as a matter of law."

Judge Harris dissented. He noted the "double layer of deference" by which the appeal arose: first the ordinary and substantial, deference to which any trial court's fact-finding is entitled, and second, the special deference accorded by the Family Part's particularized jurisdiction in family matters possessed of its acknowledged expertise in the field of domestic relations. Dissent Type Op. 3-4. While acknowledging that the majority had made persuasive arguments, Judge Harris found that "they arrive at their conclusion in the aggregate by engaging in a re-weighing of the evidence, a mission better suited for the trial court. Had the panel been so tasked, its views would indubitably hold sway. However, that is not our role." Dissent Type Op. 3.

Appellant J.G. thereupon brought this appeal as of right due to the dissent in the Appellate Division.

SUMMARY OF ARGUMENT

The grave decision to sever irrevocably the relationship between parent and child can only be constitutionally sustained upon the clearest of evidentiary records that such action is necessary and unavoidable to avoid serious harm to the child. (Part I.) It is not susceptible to gross generalizations or presumptions about the fitness of a previously incarcerated parent, but requires particularized evidence (Part I.A.) that establish by clear and convincing proof that termination of parental rights is necessary (Part I.B.).

By making pronouncements "as a matter of law" on each of the four statutory criteria, the Appellate Division not only improperly substituted its evidentiary findings for that of the trial judge, but effectively announced "rules of law" with regard to incarcerated parents that would effectively relieve DYFS of its procedural burden to produce particularized evidence of harm to the child with regard to such parents. (Part I.C.).

The Appellate Division majority also effectively relieved DYFS of its substantive duty under federal New Jersey statute to make reasonable efforts to provide appropriate services to facilitate reunification before seeking to terminate parental rights. (Part II). DYFS failed to make reasonably diligent efforts to provide J.G. with appropriate services before terminating his parental rights. Under New Jersey law, DYFS's duty to make such efforts applies no less as regards

incarcerated, non-custodial parents than it does as regards other parents (Part II.A.) A robust duty to preserve the family is both legally mandated and sound public policy, as the number of incarcerated parents has increased dramatically over the last three decades leading to devastating consequences for both society and family relationships (Part II.B.) Maintaining the family bond is a doubly beneficial "win-win": children of the incarcerated fare better and their formerly incarcerated parents are more likely to reenter society successfully. (Part II.C.)

The New Jersey Supreme Court last addressed DYFS's duty to incarcerated parents in 1993. Since then, the unprecedented increase in the number of individuals incarcerated suggest that a more particularized statement of reasonable efforts in the context of incarcerated parents is needed, especially in the context of J.G. where DYFS failed to make even minimal efforts to provide a parent with services. Numerous other states have particularized the duties of their versions of DYFS and are illustrative of effective practices that should be required of DYFS. (Part II.D.)

ARGUMENT

I. BY RULING AS A MATTER OF LAW THAT J.G.'S PARENTAL RIGHTS BE TERMINATED, THE APPELLATE DIVISION CONTRAVENED THE CONSTITUTIONALLY REQUIRED BURDEN OF PROOF AND THE APPLICABLE STANDARD OF REVIEW.

"The right to rear one's children is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Moriarty v. Bradt, 177 N.J. 84, 101 (2003) (citations omitted). Accord, In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The Fourteenth Amendment's Due Process Clause thus has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," Washington v. Glucksberg, 521 U.S. 702, 720 (1997), including a parent's fundamental right to make decisions concerning the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57, 66 (2000) (decisions regarding visitation of minor child are presumptively vested in fit parent); Stanley, 405 U.S. at 651 (interest of parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements).

A. In Order to Terminate Parental Rights, the State Must Adduce Particularized Evidence of Harm to the Child that Cannot be Avoided Except by Termination.

"[W]hen the State seeks, by statute, to interfere with family and parental autonomy, a fundamental right is at issue." Moriarty, 177 N.J. at 103. Such a statute "is subject to strict scrutiny and will only pass muster if it is narrowly tailored to serve a compelling state interest." Id. (citing Glucksberg, 521 U.S. at 720-21). And it is axiomatic that "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." E.g., Bernal v. Fainter, 467 U.S. 216, 219 (1984); Fullilove v. Klutznick, 448 U.S. 448, 518 (1980) (government action satisfies strict scrutiny "only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available").

This Court has made clear that before intruding into family autonomy, the state must satisfy "a threshold harm standard that is a constitutional necessity because a parent's right to family privacy and autonomy are at issue." Moriarty v. Bradt, 177 N.J. 84, 118 (2003). As Moriarty explained:

> A significant difference between the child's best interests test and the parental termination or 'exceptional circumstances' standard is that the former does not always require proof of harm to the child. In contrast, the latter always requires proof of serious physical or psychological harm or a substantial likelihood of such harm.

Id. at 113 (emphasis in original, quoting Watkins v. Nelson, 163 N.J. 235, 248 (2000). The polestar in any fact-finding hearing

in which parental rights might be terminated is therefore whether the record sustains, by clear and convincing evidence, "proof of serious physical or psychological harm or a substantial likelihood of such harm."

These same stringent standards are relevant even when the parent's history deviates significantly from the norm of perfection, such as a parent reintegrating into society after incarceration.

> A child's best interests" standard "does not contain within it any idealized lifestyles. It can never mean the better interest of the child. It is not a choice between a home with all the amenities and a simple apartment, or an upbringing with the classics on the bookshelf as opposed to the mass media, or even between parents or providers of vastly unequal skills.

Watkins, 163 N.J. at 254-255 (internal quotation marks and citations omitted). "[I]n an action for guardianship of a child . . . a presumption exists in favor of the surviving biological parent. That presumption can be rebutted by proof of gross misconduct, abandonment, unfitness, or the existence of 'exceptional circumstances,' but never by a simple application of the best interests test." Id. at 237.

Inextricably linked to the required showing of harm is the requirement that the drastic action of terminating parental rights is necessary to avoid that harm. Thus, there must be a causal nexus between avoidance of harm and termination. The burden falls on the State to demonstrate by clear and convincing

evidence that the natural parent has not cured the initial cause of harm and will continue to cause serious and lasting harm to the child. Matter of Guardianship of J.C., 129 N.J. 1, 10 (1992)("the cornerstone of the inquiry is not whether the biological parents are fit but whether they can cease causing their child harm"); see, Santosky, 455 U.S. at 768. DYFS must show that "the parent. . . 'endangered' the child being terminated." N.J. Div. of Youth and Family Servs. v. A.R., 405 N.J. Super. 418, 435 (App. Div. 2009). Thus, it is required that "'the State demonstrate harm to the child by the parent' and that "[h]arm, in this context, involves the endangerment of the child's health and development resulting from the parental relationship." N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 170 (2010) (emphasis in original, quoting In re Guardianship of K.H.O., 161 N.J. 337, 348 (1999)).[4]

The requisite burden upon the state of proving causation takes on a constitutional dimension as well, since without establishing that the remedy is absolutely necessary to avoid the potential harm, the state would fail the third prong of strict scrutiny, i.e. that that removal of a child from a

[4] N.J.S.A. § 30:4c-15(a) statutorily provides several elements related to causation: "(1) The child's health and development have been or will be seriously impaired by the parental relationship; (2) The parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm."

parent's care is the "least restrictive alternative" possible to achieve a compelling state interest. See, e.g., In re C.V.S. Pharm. Wayne, 116 N.J. 490, 501 (1989)("To withstand strict scrutiny, the statute must further a compelling state interest and there must be no less restrictive means of accomplishing that objective.").

Thus, in the context of this case, the element of causation requires that the court find that the termination of J.G.'s parental rights will necessarily alleviate some identified harm that has or is likely to befall T.G. as a result. T.G. is living and being cared for by G.B., her grandmother, in a safe and secure home, and J.G. has expressed no intention to disturb that relationship, nor would the trial court permit it under current circumstances. The only result of terminating J.G.'s parental rights, therefore, would be that the adoption by G.B. to become T.G.'s parent as well as her grandparent would be delayed, and the current circumstances, while perhaps established de facto, would not become "legally permanent." App. Div. Type Op. 13. While permanency and stability are of course vital objectives in any child custody proceeding, those objectives have already been substantially achieved, and the trial court, within exceptionally broad parameters, was entitled to balance any residual harm caused by the lack of formal adoption against the inevitable harm caused by the loss of one's

biological parent as an additional source of nurture and support.

B. Clear and Convincing Evidence is Required for the State to Interfere with Parental Discretion and Family Autonomy.

A vital procedural corollary to the doctrine of strict scrutiny is the requirement that the factual predicates justifying state intervention in family autonomy and parental rights must be established by "clear and convincing evidence." E.g., Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence of neglect to terminate parental rights); N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 511 (2004) (a reviewing court must determine whether a trial court's decision in respect of termination of parental rights was based on clear and convincing evidence supported by the record before the court); V.C. v. M.J.B., 163 N.J. 200 (2000) (requiring clear and convincing evidence of harm to deny psychological parent/third party visitation). The "clear and convincing evidence" test is used generally when a court is considering whether the state is justified in curtailing constitutionally protected rights. See generally, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (requiring clear and convincing evidence in establishing actual malice in libel case); E.B. v. Verniero, 119 F.3d 1097 (3d Cir. 1997) (requiring

clear and convincing evidence of probability of re-offense in Megan's Law notification system).

"[DYFS] bears the burden of proving by clear and convincing evidence that the four statutory criteria are satisfied." N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 280 (2007). "Clear and convincing evidence" is defined as evidence that creates "in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316 (1984). As this Court has stated:

> Evidence is "clear and convincing" when it "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."

In re Jobes, 108 N.J. 394, 407 (1987); accord, In re Subryan, 187 N.J. 139, 144 (2006); In re Seaman, 133 N.J. 67, 74 (1993); State v. Hodge, 95 N.J. 369, 376 (1984).

The considerations involved in determining whether termination of parental rights is warranted "are 'extremely fact sensitive' and require particularized evidence that address the specific circumstance in the given case." M.M., 189 N.J. at 280. Presumptions have no place in this judicial determination of parental fitness. N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 606 (2007). The threat of harm facing a

child must be based on clear and convincing evidence, not speculation. Id. at 608. Moreover, "all doubts must be resolved against termination of parental rights." K.H.O., 161 N.J. at 347.

The requirement of "particularized evidence" that is specific to the case at hand appears analytically inconsistent with the Appellate Division's majority opinion, which repeatedly declared "as a matter of law" that all of the four prongs of N.J.S.A. 30:4C-15.1(a) were satisfied. Simply stated, termination determinations are properly the subject not of conclusions of law, but rather of detailed findings of fact based upon the individualized record in the case. By generalizing the current record such that it was deemed susceptible to resolution by doctrinal rule and legal conclusion, the Appellate Division majority was disregarding the requirement of particularized evidence, and also setting a disturbing legal precedent that would govern not only J.G., but other similarly situated former offenders who are attempting to reintegrate into society.

C. The Appellate Division Did Not Apply the Correct Burden of Proof and Standard of Review to Each of the Four Prongs Necessary to Justify Termination of Parental Rights.

Assessed against the constitutional standards described above, the majority opinion is quite extraordinary, in that it must necessarily have concluded that the trial court, as fact

finder, was wildly off the mark, and that that it must have found the evidence "so clear, direct and weighty and convincing as to enable him to come to a clear conviction, without hesitancy," that the factual underpinnings justifying termination had been established by clear and convincing evidence. The trial court found the basis for such hesitancy, and given the extremely deferential standard of review, that hesitancy should have been respected by the appellate court.

1. The trial court did not err in finding that DYFS had not established harm to the child by clear and convincing evidence.

Regarding the first prong, the Appellate Division rejected as legally irrelevant the trial court's determination that J.G. had not abandoned T.G., but rather had made all reasonable attempts to maintain a relationship because DYFS did not plead abandonment in the complaint and that "dictionary definition of abandonment bears no relevance to the allegation of harm." This legal contention defies understanding, since, in the context of this case, where the parent was incarcerated and clearly presented no affirmative threat to the safety and welfare of the child, the issue of abandonment is substantially coextensive with the issue of whether ""the child's safety, health or development has been or will continue to be endangered by the parental relationship" under N.J.S.A. 30:4C-15.1(a)(1). Quoting this Court's decision in In re Adoption of Children by L.A.S.,

134 N.J. 127, 138-39 (1993), the lower court majority found that "Imprisonment necessarily limits a person's ability to perform their parental obligations. Once imprisoned, a parent has difficulty "performing the 'composite of tasks' associated with parenthood and cannot continue to undertake or to share the daily responsibilities of raising a child[.]" Type Op. at 10.

It is exactly this kind of generalization, which is applicable to the entire class of parents who are incarcerated, that is forbidden by the requirement of particularized evidence based on the specific facts of each case.[5] The Appellate Division, however, essentially has announced a per se rule that the incarceration of a parent during the early years of infancy and childhood amounts to harm under N.J.S.A. 30:4C-15.1(a)(1).

But while it is true that this Court in L.A.S. acknowledged that incarceration of a parent "is a material factor that bears on whether parental rights should be terminated," it was also

[5] The majority found further support for its broad legal conclusion about the inherent harm caused by a parent's incarceration in its recent case of N.J. Div. of Youth & Family Servs. v. T.S. and K.G., 417 N.J. Super. 228 (App. Div. 2010). The decision regarding determination of parental rights is not based upon legal precedent and comparison to other cases with completely different records, however, but is a fact-intensive inquiry based on the unique record of the case present case. It is worth noting that in T.S., the father was apparently still incarcerated and had declined K.G. to attend a mediation session (417 N.J. Super. at 235), and did not participate in the trial proceedings by testifying or presenting any witnesses or documentary evidence. Id. at 240.

careful to note at the same time that "the hearing to decide whether parental rights should be terminated must be based on a broad inquiry into all the circumstances bearing on incarceration and criminality, and must include an assessment of their significance in relation to abandonment or parental unfitness." L.A.S., 134 N.J. at 143. While it perhaps cannot be gainsaid that J.G.'s incarceration -- which lasted from when T.G. was six months old until after her sixth birthday and prevented the formation of a complete parental bond -- constitutes a harm to T.G. as it would in the case of any incarcerated parent, the issue currently before the courts, now that J.G. has been released and is re-entering society, is whether terminating his parental rights will avoid future harm. Per se rules are anathema to proper factual analysis, and the trial court's findings based on the "broad inquiry" required in the case of incarcerated parents should have been respected.

2. The trial court did not err in finding that DYFS had not established by clear and convincing evidence that J.G. was unwilling or unable to eliminate any harm.

The trial court opinion contains an extensive assessment of J.G.'s credibility and motivations for resisting termination of his parental rights.

> The defendant recognizes his daughter is in a safe and stable environment. He knows it is not in her best interests to remove her from her grandmother at this time. He does not want to separate her from her brother. His goal is to be part of her life.

> The testimony of defendant was clear, concise, and inclusive. He answered all the questions on direct examination and cross-examination. He did not hesitate nor attempt to evade any interrogatory. He was forthright, unshaken, and spoke directly to the questions. His testimony was consistent with his prior statements and contradictory to the witnesses against him. His testimony was found to be highly credible throughout the proceedings.

Trial Court Type Op. at 58.

The decision by J.G. not to seek to assume care or custody of his daughter, therefore, was deemed to be an indication of prudence by J.G., and an indicator of his ability to make realistic judgments about his daughter's welfare. This very same attribute, however, was deemed by the Appellate Division as clear and convincing evidence supporting its decision to terminate parental rights "as a matter of law."

Reasonable minds possibly could differ on whether J.G.'s decision not to seek custody of his daughter at this time is evidence of sagacity or parental ambivalence. When reasonable minds can differ, however, it is especially important that appellate judges abide by the limitations upon their role as reviewing courts. The trial court obviously interpreted it as evidence of wisdom, and given the role of the finder of fact in termination proceedings, that finding also should have been given the proper deference by the appellate court.

3. The trial court did not err in finding that DYFS had not established by clear and convincing evidence that it had

made diligent efforts to provide appropriate services to J.G. in an effort towards reunification.

Perhaps the most alarming element of the majority opinion below was its casual treatment of the statutory requirement that DYFS make reasonable efforts to provide services to help the parent correct the circumstances constituting harm to the child before it initiates termination proceedings. In Part II of this brief, Amici describe the nature of DYFS's obligations to provide reunification services. In this section, Amici briefly comment on the Appellate Division's erroneous legal interpretation regarding that obligation.

While the lower court acknowledged that "it would have been preferable for the Division and the grandmother to have facilitated contact between T.G. and J.G. in every instance," the court found that "as a matter of law, the many services offered to the mother fulfilled the Division's obligation." Type Op. at 15. This holding is wrong as a matter of law. The parental rights of one parent are independent of the other parent, and by satisfying its obligation to one parent, DYFS does not ex proprio vigore satisfy its obligation to the other. Were it otherwise, it would almost always be the case that DYFS would have no obligation to provide services to an incarcerated parent to facilitate contact or visitation, so long as it provided services to the custodial parent. Such a broad ruling,

which would permit DYFS to ignore the entire class of incarcerated parents, cannot be countenanced.

The Appellate Division also reasoned that DYFS's efforts at providing services would be "impeded by the difficulty and likely futility of providing services to a parent in custody." That contention is refuted by the majority's own admission that DYFS could have and should have provided a phone card to J.G. and facilitated passing J.G.'s letters to T.G.. Moreover, maximum release dates and parole eligibility dates are matters of public record, and it could not have been a surprise to DYFS when J.G. was released in 2010. The diligence of DYFS's efforts must be judged with reference to knowledge that it must have had that he was likely to be released in the immediate future, and any impediments caused by his incarceration thereby removed.

The Appellate Division's reference to In re Guardianship of D.M.H., 161 N.J. 365 (1999), is misplaced. In D.M.H., this Court found that:

> where one parent has been the custodial parent and takes the primary or dominant role in caring for the children, it is reasonable for DYFS to continue to focus its efforts of family reunification on that custodial parent, so long as DYFS does not ignore or exclude the non-custodial parent. A different approach may be necessary where two biological parents are hostile to one another. Where, however, the parents are cooperative, DYFS's efforts should be considered in terms of the family as a whole in determining whether those efforts have been diligent within the meaning of N.J.S.A. 30:4C-15.1(a)(3).

This case is clearly distinguishable from D.M.H. First, the effect of the Appellate Division's ruling that DYFS was justified focusing its services solely on the mother R.G. and not providing any services, and particularly services to facilitate visitation, to the incarcerated father, amounts to ignoring and excluding the non-custodial parent. Second, the record indicates that the two biological parents, J.G. and R.G., were not cooperating with each other in providing for T.G., and indeed R.G. voluntarily surrendered her parental rights. Lastly, the particular services required by J.G., i.e. facilitating appropriate contact and visitation, were not in dispute in D.M.H.. The parent in D.M.H. was not incarcerated, and in fact DYFS had promptly established bi-monthly visitation and encouraged a continuing parent-child relationship between the father and his children.[6] 161 N.J. at 391. In this case, however, providing services aimed at correcting the care-giving deficiencies of the mother cannot excuse DYFS from providing the visitation and contact services to the incarcerated father,

[6] The services at issue in D.M.H. and required by statute, i.e. (1) consultation and cooperation with the parent in developing a plan for appropriate services, (2) providing services that have been agreed upon, to the family, in order to further the goal of family reunification, (3) informing the parent at appropriate intervals of the child's progress, development and health, concern the conditions in the family home as a unit, and therefore are appropriately addressed primarily to the custodial parent, albeit with the participation of the non-custodial parent.

which services are logically unrelated to, and unaffected by, the services provided to the mother.

4. The trial court did not err in finding that DYFS had not established by clear and convincing evidence that termination of parental rights would not do more harm than good.

The trial court in this case made one crucial factual finding: "In this case there is also a strong bond between father and the child." Trial Type Op. at 51. Defendant J.G. testified, and the trial court credited, that before trial he spoke to his daughter by phone and she said "I love you daddy." He wrote and phoned his daughter regularly, and he "has taken various steps to rehabilitate himself and has nurtured an attachment to his daughter." Id.

It is also important to note that the trial court did not purport to make a final or irrevocable decision denying termination. He merely found that the present record did not sustain DYFS's burden, and ordered the case returned to the FN calendar, required that J.G. undergo therapy through DYFS approved programs, and ordered that a bonding and assessment evaluation be conducted between J.G. and T.G. Id. at 57. Only after all these steps had been completed would the trial court "make the appropriate decision whether or not to terminate parental rights." Id. Thus, the trial court was simply taking the prudent step of gathering more evidence before making a

final decision. As Judge Harris echoed in his dissent, "Perhaps the day will come when the parental rights of J.G. should be terminated, but it is not this day." Dissent Type Op. at 2.

In light of the existing relationship between J.G. and T.G., and further informed by the trial court's intention of gathering further evidence before making a final determination, it is unclear how DYFS could successfully discharge its burden of showing, by clear, convincing and particularized evidence, that terminating parental rights would do more harm than good. It is equally unclear how the Appellate Division could countermand the trial court's prudent course of seeking to procure particularized evidence before making a final decision. Especially since T.G. is safe and secure in the home of her grandmother, the trial court's decision delaying somewhat the formal adoption by G.B. while that crucial evidence is procured can hardly constitute reversible error.

The only proposition that could legitimate the Appellate Division's reversal of the trial court is a blanket rule that the harm of delaying formal and permanent adoption (even though the child is being cared for during the interim) outweighs the harm of terminating the rights of a parent who was incarcerated for substantially all the child's life. Amici do not deny that incarceration is an important factor to be considered, but no

termination determination, not even one involving an parent incarcerated for much of the life of the child, can be susceptible to such blanket rules.

II. DYFS FAILED TO MAKE DILIGENT EFFORTS TO PROVIDE J.G. WITH APPROPRIATE SERVICES, AS REQUIRED BY STATE AND FEDERAL LAW, BEFORE TERMINATING HIS PARENTAL RIGHTS

A. Under New Jersey and Federal Law, DYFS Owes a Duty of Reasonable Efforts to Provide Services to Parents, Including Incarcerated Parents, Before Taking the Momentous Step of Terminating Their Parental Rights

Federal and state laws establish that DYFS has a duty to make "reasonable efforts," through the provision of appropriate services, before seeking to terminate parental rights. While the primary duty for child welfare lies with the individual states, they must comply with Federal requirements and guidelines. These requirements are primarily established under the Adoption and Safe Families Act of 1997, 42 U.S.C. §671 (2010) (Pub. L. No. 105-89, 111 Stat. 2115) ("ASFA"). Under ASFA, the federal government affirmed the duty of reasonable efforts to reunify families with children in foster care. The Act did not define reasonable efforts, leaving that to the states.

New Jersey has incorporated the duty of reasonable efforts into its statute establishing the standard for terminating parental rights. N.J.S.A. 30:4C-15.1(a)(3). Efforts defined as reasonable include, but are not limited to: consultation and

cooperation with the parent in developing a service plan; providing services to the family to pursue the goal of family reunification; informing the parent of the child's progress, development and health; and facilitating visitation. N.J.S.A. 30:4C-15.1(c). The statute does not specify that reasonable efforts must be directed only to the parent who had custody at the time of DYFS involvement. Therefore, any parent, regardless of whether he or she was the custodial parent, must be provided with appropriate services before the State may seek permanently to sever his/her legal relationship with his/her child via termination of parental rights. There is nothing in the statute excluding J.G., as an incarcerated and non-custodial parent, from the requirement that DYFS provide these services.[7]

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[7] Only parents who have committed the following acts or enumerated crimes are excluded from the reasonable efforts mandate: the parent has subjected the child to aggravated circumstances of abuse, neglect, cruelty, or abandonment; the parent has been convicted of murder, aggravated manslaughter, or manslaughter of another child of the parent; aiding or abetting, attempting, conspiring, or soliciting to commit murder, aggravated manslaughter or manslaughter of the child or another child of the parent; committing or attempting to commit an assault that resulted, or could have resulted, in significant bodily injury to the child or another child of the parent; or committing a similarly serious criminal act which resulted, or could have resulted, in the death of or significant bodily injury to the child or another child of the parent; or The rights of the parent to another of the parent's children have been involuntarily terminated. When determining whether reasonable efforts are required to reunify the child with the parent, the health and safety of the child and the child's need for permanency shall be of paramount concern to the court. N.J.S.A. 30:4C-11.3(a)-(b).

B. Terminating the Rights of Incarcerated Parents like J.G. Without Making Reasonable Efforts by Providing Appropriate Services Substantially Exacerbates the Harm Flowing From the Dramatic Increase in Incarceration Over the Past Three Decades

DYFS's failure to make reasonable efforts in the case of an incarcerated parent like J.G. exacerbates the harm from the dramatic increase in incarceration over the past three decades and the resulting consequences for families, particularly communities of color, and society at large.

1. Incarceration Has Increased Dramatically Over the Last Three Decades with Debilitating Effects on Individuals, Families, Communities of Color, and Society

Incarceration has dramatically increased over the past three decades. From 1990 to 2005, the number of prisoners per 100,000 people increased from 263 to 480. James J. Stephan, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 1995 p.4 (1997), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/Csfcf95.pdf (last visited on July 26, 2012); James J. Stephan, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2005 1 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf05.pdf (last visited on July 26, 2012). This amounts to an 82.5% increase. Similarly, in New Jersey, between 1977 and 2010, the total prison population increased from 6,017 to 25,007. See Paul Guerino et al., Bureau of Justice Statistics, Prisoners in 2010 14 (2011), available at

http://www.bjs.gov/content/pub/pdf/p10.pdf; Jeremy Travis *et al.*, Urban Institute, Prisoner Reentry in New Jersey 1 (2003), *available at* http://www.urban.org/UploadedPDF/410899_nj_prisoner_reentry.pdf (last visited on July 26, 2012). This amounts to an alarming 315.6% increase. Today, over 65 million Americans carry the stigma of a criminal record; that is more than one in four adults. Michelle Natividad Rodriguez & Maurice Emsellem, National Employment Law Project, 65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment (2011), available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1 (last visited on July 26, 2012). This increase in the incarceration rate is especially disconcerting given the collateral consequences of criminal convictions.

Individuals with a criminal record face numerous collateral consequences including restrictions in obtaining housing, getting and keeping employment, obtaining or maintaining public benefits, obtaining or maintaining driver's licenses, adopting children, volunteering, and voting.[8] The Department of Justice's

[8] This Court recently recognized the barriers caused by the collateral consequences of a criminal record: "Millions of adults nationwide have criminal records that affect their reentry into society years after their sentence is complete. Criminal records can present barriers to employment, licensing, and housing, among other things." *In re Kollman*, 2012 *WL* 2688767, at *1 (July 9, 2012).

National Institute of Justice has funded a National Study on the Collateral Consequences of Criminal Convictions by the American Bar Association's Criminal Justice Section, which identified over 38,000 statutes imposing collateral consequences on individuals with a criminal record. American Bar Association, Adult Criminal Consequences Statute Demonstration Site, *available at* http://isrweb.isr.temple.edu/projects/accproject/index.cfm (last visited on July 26, 2012). A report on these legal barriers by state ranked New Jersey 44th, meaning it had more statutes creating collateral consequences than all but six states. Legal Action Center, After Prison: Roadblocks to Reentry a Report on State Legal Barriers Facing People with Criminal Records (2004), *available at* http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf (last visited on July 26, 2012). These myriad limitations have the unintended consequence of increasing the risk of recidivism by narrowing the opportunities for people attempting to reenter society honestly and with integrity – to put their past behind them and join the community of law-abiding, taxpaying citizens.

The Federal Government has identified collateral consequences as a threat to public safety. In January 2011, the Obama administration convened a Cabinet-Level Reentry Council to address prisoner reentry issues and the collateral consequences of a criminal record. As part of this national effort, United

States Attorney General Eric H. Holder, Jr., wrote to each state's attorney general to request that they review their state's collateral consequences "to determine whether those that impose burdens on individuals convicted of crimes without increasing public safety should be eliminated." See Letter from U.S. Attorney General Eric H. Holder, Jr. to Vermont Attorney General William H. Sorrell, *available at* http://onlawyering.com/wp-content/uploads/2011/05/VT-Attorney-General-Sorrell.0001-1.pdf (last visited on July 26, 2012). In reviewing a state's collateral consequences, it is essential to consider the particular impact they have on communities of color and families.

Incarceration has a disparate impact on people of color. African-Americans and Hispanics are arrested and incarcerated at higher rates than whites. African-Americans comprise just 13.1% of the U.S. population, (see U.S. Census Bureau, State & County QuickFacts, available at http://quickfacts.census.gov/qfd/states/00000.html (last visited July 26, 2012)) yet they account for 28.3 percent of all arrests in the United States. Natividad Rodriguez & Emsellem, *supra*. Similarly, Hispanics or people of Latino origin, according to the 2010 Census, are 16.7 percent of the U.S. population (see id.), but, as of 2012, accounted for 34.7% of inmates the in the Department of Corrections jurisdiction. Federal Bureau of Prisons Quick Facts About the

Bureau of Prisons, available at http://www.bop.gov/news/quick.jsp (last visited July 26, 2012). By contrast, the arrest rate for whites is disproportionately lower than their representation in the population. Natividad Rodriguez & Emsellem, *supra*. People of color are not only disproportionately represented in the criminal justice system in relation to their proportion of the population; they also are arrested, convicted and incarcerated disproportionately often as compared to their rates of criminality. See, e.g. Human Rights Watch, Targeting Blacks: Drug Law Enforcement and Race in the United States 8 (May 5, 2008), available at http://www.hrw.org/en/node/62236/section/8 (last visited on July 26, 2012).

This unequal distribution of criminal records results in greater collateral consequences for people of color. For example, "[t]he impact [of criminal records on employment] [i]s biggest for African-American men, lowering employment rates between 2.3 and 5.3 percentage points." Natividad Rodriguez & Emsellem, *supra.* In addition, even prior to the current recession, "[o]nce prison inmates are added to the jobless statistics, total joblessness among black men has remained around 40% through recessions and economic recoveries." Bruce Western & Katherine Beckett, How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution, 104 Am. J. Soc. 1030, 1044 (1999).

The Federal Government has sought to address this injustice through national employment policy. The U.S. Equal Employment Opportunity Commission has held that "an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population." The U.S. Equal Employment Opportunity Commission, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982), Feb. 4, 1987.

2. Incarceration Increasingly Affects Families

The growing number of incarcerated people has a significant impact on families. Between 1991 and 2007, the number of parents with minor children held in state and federal prisons increased by 79%, while the number of children with incarcerated parents increased by 80%. Lauren E. Glaze & Laura M. Maruschak, Bureau of Justice Statistics, Parents in Prison and Their Minor Children 1 (2008), available at http://www.bjs.gov/content/pub/pdf/pptmc.pdf (last visited on July 26, 2012). At mid-year 2007, more than half of state and federal inmates were parents with, collectively, an estimated 1.7 million children. Id. at 2. As 92% of incarcerated parents are fathers, this results in

a large number of children in single-parent households led by women. Id.

In addition, families of color are disproportionately affected by incarceration. African-American children are seven times more likely than white children to have a parent incarcerated, while Hispanic children are two and a half times more likely than white children to have a parent in prison. *Id.*

C. Terminating Parental Rights of Incarcerated Parents Without Reasonable Efforts Harms Both the Children and Society

1. Children are harmed by terminating the parental rights of the incarcerated.

Among the most serious collateral consequences of a criminal conviction is family separation. Philip Genty, Damage to Family Relationships as a Collateral Consequence of Parental Incarceration, 30 FORDAM URB. L.J. 1671, 1671 (2003). Unlike other collateral consequences, family separation has an irreversible effect on both parents and children, because the time apart is lost forever. Id. Moreover, terminating parental ties deprives children of the meaningful emotional and psychological support that parents can still provide while imprisoned and after release. See, e.g., Correctional Association of New York, Women in Prison Project, When "Free" Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State, available at

http://www.correctionalassociation.org/wp-content/uploads/2012/05/When_Free_Rpt_Feb_2006.pdf (last visited on July 26, 2012); Joseph S. Jackson & Lauren G. Fasig, The Parentless Child's Right to A Permanent Family, 46 WAKE FOREST L. REV. 1, 27-9 (2011).

"The importance to children of maintaining regular contact with their parents during incarceration is well documented." Genty, 30 FORDHAM URB. L.J. at 1674 (citing Adela Beckerman, Incarcerated Mothers and Their Children in Foster Care: The Dilemma of Visitation, 11 CHILD. & YOUTH SERVICES REV. 175 (1989); Dorothy Driscoll, Mother's Day Once a Month, 47 CORRECTIONS TODAY 18 (1985); C.F. Hairston, The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships with Their Children, 77 CHILD WELFARE 617 (1998); C.F. Hairston & P.M. Hess, Family Ties, Maintaining Child-Parent Bonds is Important, 51 CORRECTIONS TODAY 102 (1989); Donna C. Hale, The Impact of Mothers' Incarceration on the Family System: Research and Recommendations, 12 MARRIACE & FAM. REV. 143 (1987); Denise Johnston, Effects of Parental Incarceration, *in* CHILDREN OF INCARCERATED PARENTS (Katherine Gabel & Denise Johnston eds., 1995); Christina Jose Kampfner, Post-Traumatic Stress Reactions in Children of Imprisoned Mothers, *in* CHILDREN OF INCARCERATED PARENTS, *supra;* Florence W. Kaslow, Couples or Family Therapy for Prisoners and Their

Significant Others, 15 AM. J. FAM. THERAPY 352 (1987); Ariela Lowenstein, Temporary Single Parenthood-The Case of Prisoners' Families, 35 FAM. REL. 79 (1986)).

The majority of families participating in research surveys indicate that children want and need to see their incarcerated parents. Creasie Finney Hairston, The Annie E. Casey Foundation, Focus on Children With Incarcerated Parents: An Overview of the Research Literature, 11 (2007), available at http://www.aecf.org/~/media/Pubs/Topics/Special%20Interest%20Areas/Incarceration%20and%20Reentry/FocusonChildrenwithIncarceratedParentsAnOverv/HAIRSTON.pdf (last visited on July 23, 2012). In fact, "scientific studies point to the positive aspects of children's ongoing involvement with and attachment to adults who care about them and to the negative effects of father absence and family disruption. There are well established practice principles to guide professional decision making and protect children from individual situations that may be harmful to them and a professional obligation to remove prison visiting environments as obstacles to parent child relationships." Creasie Finney Hairston, Jane Addams College of Social Work, University of Illinois at Chicago, Prisoners and Families: Parenting Issues During Incarceration (2001), available at http://aspe.hhs.gov/hsp/prison2home02/Hairston.htm (last visited on July 23, 2012).

Because parents play a central role in the development of their children's lives, "the potential impact of a parent-child separation as a result of incarceration highlights the need to find ways to help families keep in touch during incarceration and reunite upon release." Jeremy Travis, Amy L. Solomon & Michelle Waul, The Urban Institute, From Prison to Home: The Dimensions and Consequences of Prisoner Reentry, 39 (2001), *available at* www.urban.org/pdfs/from_prison_to_home.pdf (last visited on July 23, 2012). Thus, agencies like DYFS must make reasonable efforts to provide services to incarcerated parents to maintain the family relationship and avoid terminating parental rights. Terminating those rights without careful consideration will permanently and irreversibly harm the children of incarcerated parents.

2. Society Is Harmed by Terminating the Parental Rights of the Incarcerated.

Terminating parental rights can also have a harmful effect on society by increasing the recidivism rates of incarcerated parents. Studies have shown that maintaining ties between people in prison and family members can improve reentry opportunities and, as a result, lower crime rates. "[O]ne study found that, overall, prisoners with family ties during the period of incarceration do better when released than those without such ties . . . supportive families were an indicator of

success across the board, correlating with lower drug use, greater likelihood of finding jobs, and reduced criminal activity." Travis, Solomon & Waul, at 39 (citing C.F. Hariston, Family Ties During Imprisonment: Important to Whom and for What? 18 J. OF SOCIOLOGY AND SOCIAL WELFARE 87, 99 (1991); Marta Nelson, Perry Deess & Charlotte Allen, The Vera Institute of Justice, The First Month Out: Post-Incarceration Experiences In New York City (September 1999), available at http://www.vera.org/download?file=219/first_month_out.pdf, (last visited on July 26, 2012)).

Strengthening family connections during incarceration, rather than impeding them, is not only mandatory child welfare policy; it is also sound criminal justice policy.

> Despite the crimes incarcerated mothers and fathers have committed, most -- like other parents -- want to be good parents. Research highlights the importance of programs that facilitate and strengthen family connections during incarceration. These programs have been shown to reduce the strain of parental separation, reduce recidivism rates, and increase the likelihood of successful re-entry. In addition, a recent study found that providing services to the families of prisoners can have benefits for the inmate, including lower rates of physical, mental, and emotional problems and reduced drug use and recidivism.

Reentry Policy Council, Parenting, Even from Prison and Jail, Can Have a Positive Impact on Outcomes for Both Children and Parents, available at http://reentrypolicy.org/Report/

PartII/ChapterII-B/PolicyStatement13/ResearchHighlight13-4 (last visited on July 23, 2012).

D. The Increase in Incarceration Rates, and the Collateral Consequences of that Increase Suggest that DYFS's Obligation to Provide Reasonable Efforts Should be Particularized as it Applies to Incarcerated Parents

This Court last examined termination of parental rights of incarcerated parents in In re Adoption of Children by L.A.S., 134 N.J. 127 (1993). There, the Court reiterated the fundamental nature of the parent-child relationship, its constitutional protections, and the severity of terminating parental rights. *Id.* (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972); Santosky v. Kramer, 455 U.S. 745 (1982)). It also held that incarceration alone (even for a far longer time and as a result of an incomparably more heinous crime than petitioner herein's) is not dispositive of the issue of termination of parental rights, but rather is a material factor that should be considered among other relevant factors. In re L.A.S., 134 N.J. at 932-33.

On remand, this Court directed the trial court to consider incarceration along with other factors, including the parent-child relationship before incarceration, the relationship since incarceration, the effect of visitation and communication on the children, rehabilitation services since incarceration, and the

risk posed to the children based on past acts of criminality. Id. at 143-44.

Since L.A.S., the rise in incarceration rates and an increasing number of children with incarcerated parents in the foster care system (*see* Section B, *supra*) compel a reevaluation of the reasonable efforts mandate in the context of incarcerated parents. Lauren E. Glaze & Laura M. Maruschak, Bureau of Justice Statistics, Parents in Prison and Their Minor Children (2008), available at http://www.bjs.gov/content/pub/pdf/pptmc.pdf (last visited on July 19, 2012) (indicating a rise in incarceration and a rise in the number of children with incarcerated parents in foster care). As incarcerated parents become increasingly common, clarification and interpretations of the reasonable efforts standard, as it applies to this population, is necessary to achieve the best interests of children and promote stable families, family reunification, and successful prisoner reentry.

In this case, DYFS did not provide reasonable efforts to engage J.G. with his daughter before terminating his parental rights. He received only one visit from DYFS and one phone call from the adoption worker. New Jersey Div. of Youth and Family Services v. R.G. and J.G., *N.J. Super.* Docket No. A-1310-10T1, 14 (Harris, J.A.D., dissenting)(*citing* New Jersey Div. of Youth and Family services v. R.B & J.A., N.J. Super Docket No. FG-02-

07-10, Trial Type Op. at 47-48). DYFS never discussed visitation options for his daughter with J.G, did not recommend or suggest any programs to assist him, and did not inform him that telephone calling cards were available to contact his daughter. Id. Further, despite J.G.'s asking DYFS for T.G's school records, it never provided them. Id. New Jersey Div. of Youth and Family Services v R.G. and J.G., N.J. Super. Docket No. A-1310-10T1, Page 14 (Harris, J.A.D., dissenting). Given the lack of reasonable efforts by DYFS to engage J.G. as required by law, it is perverse that he should be punished with the ultimate penalty of severance of his legal relationship with his daughter for not seeking physical reunification with her. Id. at 15.

DYFS's duty of reasonable efforts should be particularized to clearly establish its requirement to provide additional support to parents such as J.G. before seeking to terminate their parental rights. As discussed in Parts II.B. and II.C. *supra*, the increase in incarceration rates and resulting collateral consequences should be considered in clarifying DYFS's duties. A number of other jurisdictions have by law, statute and regulation particularized the duties of their child welfare systems in working with incarcerated parents, including, for example:

- Statutory provisions specific to incarcerated parents including provisions for visitation where appropriate, collect telephone calls, transportation to court proceedings where appropriate and other services, unless deemed to be to the detriment of the child. See CAL. WELF. & INST. CODE § 361.5.
- Statutory provisions that specifically define parent to include incarcerated parents. See N.Y. SOC. SERV. LAW § 384-b(2)(b).
- Statutory provisions that include special exemptions from the presumption that termination of parental rights is appropriate for incarcerated parents whose children have been in foster for 15 out of the last 22 months. COLO. REV. STAT. ANN. § 19-3-604(K)(IV).
- Statutorily authorizing a commission to evaluate current state laws and policies that affect incarcerated parents and their children, with an emphasis on child custody and visitation. MO. ANN. STAT. § 210.875.
- Outlining special provisions to be made to incarcerated parents to promote healthy relationships with their children and avoid permanent separation, including regular visitation at the facility and holding case

conferences and other consultations at the correctional facility. 110 Mass. ADC 1.10.

- Providing examples, specific to the facts of the particular case, delineating what reasonable efforts may entail including: contacting parents and investigating the history and extent of the relationship; assessing the incarcerated parent's strengths and deficiencies; exploring services available to the parent during incarceration and incorporating those services into a service agreement; documenting participation in those services; monitoring parents' progress through corrections counselors or other employees of the jail; investigating whether visitation at the jail is possible and appropriate; comparing a parent's release date with the case timeline and child's particular needs to determine whether reunification is possible within a reasonable time; and inquiring into parent's probable post-release situation and plan. State ex rel. Juvenile Dept. of Cook County v. Williams, 204 Or. App. 496, 507-08 (2006).
- Recognizing that the responsibility to make reasonable efforts lies with the child welfare department, not the incarcerated parent. In re James G., 178 Md. App. 543, 601 (2008).

- Developing and implementing practice memos, operational guidelines and manuals for caseworkers when working with incarcerated parents.[9]
- Implementation of the Children of Incarcerated Parents Program ("CHIPP") by the Administration for Children's

[9] *See, e.g.,* Serving the Incarcerated Parent, Missouri Department of Social Services (July 2012), available at http://dss.mo.gov/cd/info/cwmanual/section4/ch7/sec4ch7attachb.htm (last visited on July 20, 2012); South Carolina Department of Social Services, Human Services Policy and Procedure Manual, available at dss.sc.gov/content/library/ manuals/foster_care.pdf (last visited on July 20, 2012) (caseworker's obligations include locating where the parent is incarcerated, advising incarcerated parents through direct contact when possible of the parent's rights and responsibilities [including requests for support and visitation rights], consulting with the parent and facility staff about available rehabilitation and training programs to assist the parent in assuming their parenting responsibility upon release, and developing treatment plans that include the incarcerated parents); see New York State Office of Children and Family Services, You Don't Have to Stop Being a Parent While You are Incarcerated, available at http://www.ocfs.state.ny.us/main/publications/Pub%205113.1P%20%28Male%29%20You%20dont%20have%20to%20stop%20being%20a%20parent%20while%20you%20are%20Incarcerated%20.pdf. (last visited on July 26, 2012) (where parents have the right to identify an appropriate resource for the child; receive the name and contact information of the caseworker and his/her supervisor; participate in planning for the child; receive information about visiting and other services; visit with the child; receive information about the child's health ; be informed of course proceedings and where the parent is responsible to make regular contact with the case worker; participate in planning for the child's future; complete programs and participate in Family Court Proceedings); see also The Parent Handbook: A Guide for Parents with Children in Foster Care (2010), available at http://www.nyc.gov/html/acs/html/advocacy/office_advocacy_rights.shtml (last visited on July 20, 2012) (under "Parent Handbook" Title) (outlining the rights and responsibilities of parents with children in foster care, including a specific section for incarcerated parents).

> Services of New York City ("ACS"), a program dedicated to supporting caseworkers, ACS offices, criminal justice departments and other agencies and organizations to work with families involved with child welfare and the criminal justice system. Services provided include transportation and support services for child-parent and sibling visits, case conferences at Rikers Island, transportation and support services for parents in State and Federal correctional facilities within the tri-state area, and a collect call line for incarcerated parents. New York City Administration for Children's Services Hosts 10th Anniversary Award Ceremony for the Children of Incarcerated Parents Program (2010), available at http://www.nyc.gov/html/acs/html/pr_archives/pr10_10_01.shtml (last visited on July 20, 2012).

New Jersey, by stark contrast, has no publicly available regulation, practice guide or program particularizing the reasonable efforts mandate in the vastly expanded and enormously important context of incarcerated parents. This Court should therefore direct DYFS, in order to sustain its eventual burden in termination proceedings, to establish standard procedures, based on the experience of the numerous above-cited

jurisdictions, for the meaning of reasonable efforts when parents are incarcerated.

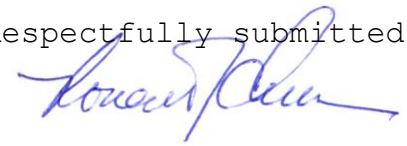
Such regulations should address, at minimum and without limitation, the following: visitation where appropriate; collect telephone calls; transportation to court proceedings where appropriate; evaluating policies that affect incarcerated parents; promoting healthy relationships with children of the incarcerated and avoiding permanent separation; contacting parents and investigating the history and extent of the parent-child relationship; monitoring parents' progress through corrections counselors or other employees of the jail; inquiring into parent's probable post-release situation and plan; developing and implementing practice memos, operational guidelines and manuals for caseworkers when working with incarcerated parents; and an affirmative obligation to inform incarcerated parents of DYFS-involved parents of their rights.

The alternative – leaving this crucial question entirely in the discretion of DYFS, when the stakes could not be higher for both children and parents – flies in the face of clear child welfare law and sound public policy regarding child well-being, family integrity, and society’s interests.

CONCLUSION

For the reasons expressed herein, Amici American Civil Liberties Union of New Jersey and New Jersey Institute for Social Justice respectfully urge this Court to reverse to judgment of the Appellate Division below and remand this matter to the Family Part for further proceedings as originally contemplated by the trial judge. Moreover, Amici urge this Court to direct DYFS to develop appropriate procedures under the parameters described above to provide appropriate services for cases in which a parent is incarcerated, such as exist in other jurisdictions.

Respectfully submitted,



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July 30, 2012.