

No. 78426-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Dependency of A.K., M. H-O., and Y.H.,
Appellants.

**BRIEF OF AMICI CURIAE COLUMBIA LEGAL SERVICES,
NATIONAL CENTER FOR YOUTH LAW, TEAMCHILD AND
UNIVERSITY OF WASHINGTON SCHOOL OF LAW CHILDREN
& YOUTH ADVOCACY CLINIC**

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I. INTRODUCTION

Amici urge this Court to review the Court of Appeals' decision in *In re Dependency of A.K., et al.*, 130 Wn.App. 862, 125 P.3d 220 (2005). The Court of Appeals decision, if allowed to stand, permits courts to punish dependent children who run away from foster placements by imposing determinate jail sentences of arbitrary lengths for the "good" of the child. Although benevolent in purpose, the orders to incarcerate these children fail to address the underlying causes of a child's runaway behavior, the deficiencies within Washington State's foster care system, and more effective proven means of protecting the safety and welfare of foster children. The unbridled inherent contempt powers upheld by the Court of Appeals thus violate the due process rights of troubled foster children who, like petitioners, are in desperate need of empathy, compassion and individualized treatment, not punishment in jail.

As observed by the United States Supreme Court in the seminal juvenile rights case, *In Re Gault*,

unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts. The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures.

Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.

In re Gault, 386 U.S. 1, 18 (1967).

The ruling of the Court of Appeals should also be reviewed because it violates the separation of powers doctrine in that it allows courts to make public policy decisions about the incarceration and treatment of status offenders that are within the sole province of the Legislature.

Amici respectfully request that the court accept review pursuant to RAP 13.4(b)(4) because: the Court of Appeals decision conflicts with precedent promulgated by this Court regarding due process and the separation of powers doctrine; the matter involves significant questions of law under both the United States and Washington Constitutions; and the treatment and incarceration of foster children is of substantial public interest.

II. IDENTITY AND INTEREST OF AMICI

The identity and interest of Amici in the current matter is set forth in Amici's Motion for Leave to File Amici Curiae Memorandum, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Petitioners' Petition for Review.

IV. ARGUMENT

A. **THE DEPENDENCY COURT'S INHERENT CONTEMPT ORDERS VIOLATED DUE PROCESS BECAUSE THEY WERE ARBITRARY AND CAPRICIOUS AND WERE NOT SO NARROWLY TAILORED AS TO JUSTIFY INFRINGING UPON THE FOSTER CHILDREN'S LIBERTY INTERESTS**

A child who has run away from home or is out of parental control is clearly a child in distress, a child in conflict with his family and his society. But nobody contends he is a criminal. A runaway child or a child out of control, as an addict or an insane person, may be confined for treatment or for the protection of society, but to put such a child in a jail – *any jail* – with its criminal stigma constitutes punishment and is a violation of that child's due process rights under the Fourteenth Amendment to the United States Constitution.

D.B. v. Tewksbury, 545 F. Supp. 896, 906 (D. Or. 1982). Further, juvenile proceedings that result in confinement must bear the essentials of fair treatment. *In re Winship*, 397 U.S. 358, 359 (1970); *Gault*, 387 U.S. at 18.

The incarceration of petitioners for running away from foster care violates due process in two ways: (1) the dependency court's decision to incarcerate them was made in an arbitrary and capricious manner, and (2) the dependency court's interest in incarcerating them was not narrowly tailored and therefore unduly infringed upon their liberty interests.

1. **The decision to incarcerate these foster children was arbitrary and capricious**

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Action is arbitrary and capricious if it is "willful and

unreasoning action, *without consideration and in disregard of facts and circumstances.*” *Pierce Co. Sheriff v. Civil Serv. Comm’n*, 98 Wn.2d 690, 695 (1983) (emphasis added).

Here, the dependency court’s decision to incarcerate petitioners was made without consideration of several critical facts and circumstances. First, the dependency court failed to inquire as to whether the assumption that foster children would be better off in jail was valid. Second, the dependency court ignored the historical and ongoing failure of the Washington Department of Social and Health Services (“DSHS” or the “Department”) to provide basic services to foster children. Third, the dependency court failed to consider more effective responses to running than incarceration. Finally, he imposed an arbitrary term of detention, the strictest possible punishment, without reference to any standards. By ignoring these issues, the dependency court made a decision that was arbitrary and capricious, in violation of due process.

(a) The dependency court failed to consider extensive evidence that incarceration is not beneficial, and is potentially harmful

In determining that incarceration was in petitioners’ best interest, the dependency court failed to consider essential facts and circumstances underlying their runaway behavior. *See A.K.*, 130 Wn. App. at 870-77. The reasons why foster youth run away have been analyzed in extensive

social science research.¹ Nowhere in that body of research is detention recommended as an appropriate response to runaway behavior. Nor is there any evidence that incarceration will prevent future runaway behavior.² Studies show that factors that may lead to runaway behavior include failure to provide mental health services, high mobility, multiple placements, separation trauma, and deficient services.³ It has also been found that children are often simply trying to assert some control over their chaotic lives in the foster care system by running.⁴ The very reason

¹ See Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165 (2004); Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 CATH. U.L. REV. 271 (1993); Caren Kaplan, Child Welfare League of America, *Children Missing from Care* (2004); Mark Courtney et. al, *Youth Who Run Away From Substitute Care*, Chapin Hall Working Paper (2005); Marni Finkelstein et al, Vera Institute of Justice, *Youth Who Chronically AWOL From Foster Care: Why They Run, Where They Go, and What Can Be Done* (August 2004); Matt Moe, Office of Children's Administration Research, Washington DSHS, *Children Running Away from Placement: A Summary of Research and Facts* (2004).

² Courts in other jurisdictions have recognized that treating status offenders as criminals is not beneficial to at-risk children or society at large. See, e.g., *In re Interest of S.S.*, 842 A.2d 904, 908 (N.J. Super. Ct. App. Div. 2004), *aff'd*, 183 N.J. 20, 21 (2005); *Com. V. Florence*, 429 Mass. 523, 527 (1999); *In re Interest of Tasseing H.*, 281 Pa. Super. 400, 414 (1980), *accord. In re Interest of R.B.*, 424 Pa. Super. 57, 65 (1993); *State ex rel. Harris v. Calendine*, 160 W. Va. 172, 182, 189-90 (1977) (status offenders "must be helped and not punished"), *accord. State v. Damian R.*, 214 W. Va. 610, 615 n.4 (2003).

³ See Ryan, *supra* note 1 at 279-85; Kaplan, *supra* note 1 at 27-30.

⁴ See Kaplan, *supra* note 1 at 27.

these youth were placed into foster care in the first place – a history of abuse and neglect – makes them more likely to run from a foster care placement.⁵ Incarceration does nothing to alter those circumstances. As such, incarcerating foster children who run away is, at best, ineffectual.

At worst, incarceration can be extremely harmful to foster children. Secure detention is particularly damaging to adolescents with mental health problems. Incarceration keeps youth away from community mental health services, may further alienate them from family and friends who could support them, and may result in their learning institutional behaviors that “create barriers to engagement in mental health services and treatment.”⁶ That alienation can lead to a further deterioration of the child’s mental health. *See, e.g., infra* § III.A.1(c)(i).

Girls – like petitioners – are particularly vulnerable to the harms of imprisonment. When girls are channeled into the juvenile justice system as a result of their runaway behavior, their abuse does not always end; “from the moment of arrest and as they move through the juvenile justice system, girls report being vulnerable to a range of physical abuses or incursions into their bodily privacy” while in custody.⁷ A focus on

⁵ Samuel J. Fasulo, *Adolescent Runaway Behavior in Specialized Foster Care*, 24 CHILDREN & YOUTH SERV. REV. 623, 630 (2002).

⁶ Heather Barr, Center on Crime, Communities & Culture, *Prisons and Jails: Hospitals of Last Resort* (1999) p. 17-18.

⁷ Humphrey, *supra* note 1 at 7.

