IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE C. L.,	)	
A Person Coming under	)	
the Juvenile Court Law	)	**CASE S265910**
----------	)	
LOS ANGELES COUNTY	)	
DEPARTMENT OF CHILDREN	)	
AND FAMILY SERVICES,	)	**Case No. B305225**
Petitioner and	)	**Second Appellate**
Respondent,	)	**District, Div. One**
	)	
v.	)	
	)	**Superior Court No.**
C. L.,	)	**17CCJP02800 A&B**
Respondent and	)	**(LOS ANGELES**
Petitioner.	)	**COUNTY)**
----------	)	

ON APPEAL FROM THE SUPERIOR COURT,
LOS ANGELES COUNTY

HONORABLE MARGUERITE DOWNING, JUDGE

BRIEF OF PETITIONER C. L. ON THE MERITS.

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant CARLOS L hereby submits the following as his opening brief on the merits after this Court granted review of a published decision of the Court of Appeal, Second Appellate District, Division One, affirming a decision of the trial court making his children dependents of the juvenile court, and subsequently terminating his parental rights and freeing his two children for adoption. This brief is intended to supplement the points and authorities presented in petitioner's petition for review and efforts

will be made to avoid unnecessary duplication of facts presented therein.

ISSUES PRESENTED.

This case presents a single, but very important issue for review regarding the rights of incarcerated parents, especially parents who are not responsible for the actual events that led a social services agency to intervene into the lives of his/her children, to fully participate in all stages of the dependency proceedings from the very beginning until the time the children are either returned to their parents or are freed for adoption by other families. Specifically, this Court defined the issued to be briefed and argued as follows:

> "Is it structural error, and thus reversible *per se*, for a juvenile court to proceed with jurisdiction and disposition hearings without an incarcerated parent's presence and without appointing the parent an attorney?"

It is petitioner's contention that the appropriate resolution of this question is quite simple. Yes, it is structural error to proceed with a jurisdictional and disposition hearings without the presence of a parent who is incarcerated and without appointing that parent an attorney to represent their interests. Because it is structural error, it is reversible error *per se* that also requires reversal of any subsequent orders that may be entered including orders terminating parental rights.

This is particularly true, where, as here, it is clear that the trial court failed to honor, in any meaningful manner, appel-

lant/petitioner's clearly expressed desires to participate in the dependency proceedings involving his children and where, as here, the social services agency, here respondent Los Angeles County Department of Children and Family Services (DCFS) and its counsel likewise failed to correct the trial court's misapprehension that petitioner did not want to be involved in the proceedings. It has oft been said that there is no "go to prison, lose your child" provision in California law. (***In Re Brittany S.*** (1993) 17 Cal.App.4th 1399, 1402; *see also*, ***In Re James R.*** (2007) 153 Cal.App.4th 413, 430; ***In Re V. F.*** (2007) 157 Cal.App.4th 1234, 1238). The reality of life, however, is that the rights of incarcerated parents are all too often given short shrift in our courts with the ensuing results of avoidable reversals of decisions made by the trial court. (*C.f.*, ***In Re A. J.*** (2019) 44 Cal.App.5th 652 and cases cited therein).

California Statutory Law provides strong protective measures for incarcerated parents facing litigation over the custody and care of their children. Penal Code section 2625 gives a parent incarcerated in a California prison/jail an absolute right to be present at all hearings involving the termination of parental rights and to the jurisdiction/disposition hearings in all dependency cases; it also gives them a right to request to be present at all other hearings involving children, including not just dependency hearings but Family Law hearings regarding child care, custody, visitation, paternity and so on. Section 2625 also encourages trial courts to explore the use of electronic media to enable parents who are incarcerated in non-California facilities to participate in such proceedings.

California Statutory Law also provides an assurance that incarcerated (as well as non-incarcerated) parents will be represented by counsel and by competent counsel at that – Welfare and Institutions Code sections 317 and 317.5 for which the normal remedy is a writ of habeas corpus and an entirely new hearing if the errors of counsel are found to be prejudicial. (*C.f.*, ***In Re A. R.*** (2021) 11 Cal.5th 234 [483 P.3d 881, 276 Cal.Rptr.3d761] (***A. R.***).

It has been assumed that the right to court-appointed counsel and competent counsel is only statutory in California. However, it is also clear that, under certain circumstances, the right to counsel and competent counsel is a matter of due process under the Federal Constitution. (***Lassiter v. Department of Social Services*** (1981) 452 U.S. 18, 31[101 S.Ct. 2153, 68L.Ed.2d 640], hereinafter ***Lassiter***). However, as will be demonstrated, ***Lassiter*** probably is no longer good law and that a majority of the United States Supreme Court would likely find that due process requires appointment of counsel for all indigent parents in dependency proceedings, most especially those facing the possibility of termination of parental rights.

STANDARD OF REVIEW.

The issues that are presented in this case involve principles of statutory/constitutional interpretation and are based on undisputed facts. As such they are issues of pure law and are subject to *de novo* review by this Court with no particular deference being given to the decisions of the trial and lower appellate courts. (***Dawson v. East Side Union High School District*** (1994) 28

Cal.App.4th 998, 1041; ***People v. Taylor*** (1992) 6 Cal.App.4th 1084, 1091).

STATEMENT OF THE CASE AND FACTS.

A petition was filed on December 28, 2017, on behalf of the minors Inez, approximately 10 months old, and the newborn Christopher alleging that they fell within the scope of Welfare and Institutions Code section 300. (I CT 1-3). The mother of both children is one Valerie L. but she is not a party to this appeal and will be discussed only as necessary. Petitioner Carlos L. is the presumed father of both children.[1] However, for a time, one Jaime M., was listed as an alleged father for Christopher.

The petition alleged that Valerie had a substance abuse problem involving methamphetamine and other illegal substances that prevented her from caring for the two very young children; Christopher was born with a positive toxicology for methamphetamine. (I CT 4-5). Carlos, who was listed as being incarcerated at the Sierra Conservation Center in Jamestown, was also alleged to have a similar substance abuse problem; he also was a registered narcotics offender and had an extensive criminal history that allegedly showed he was not able to properly care for these children. (I CT 5-6).

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[1] There was never any dispute about petitioner being the presumed father of the older child, Inez, as he was listed on the birth certificate. As part of the proceedings in the Court of Appeal, the Court of Appeal found that the trial court erred in failing to immediately find that petitioner was also the presumed father of Christopher. Neither respondent DCFS nor the minor seriously contested this issue in the Court of Appeal and neither filed a petition for review on the issue of paternity in this Court.

Both Valerie and petitioner had children by other partners. It was alleged that Valerie's parental rights had been terminated as to them and that they had been adopted by one of Valerie's aunts, a Sylvia W., thus exposing Valerie to the possibility that she might be denied reunification services pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(10) and (11). (I CT 4). Although not alleged in the petition, it was noted in the jurisdiction/disposition report, that petitioner had children who had been removed from his custody and placed with paternal relatives (I CT 207-208); thus making it possible that he, too, could be denied reunification services. (II CT 371-372).

The detention hearing was held on December 29, 2017. None of the three parents, including petitioner, appeared. (RT 12/19/17 p. 1). However, the court noted petitioner was in state custody and a statewide search was ordered for him. No orders were made regarding paternity of either child and those findings were postponed to a later date. (RT 12/19/17 pp. 2-3, I CT 198).

Petitioner acknowledges that respondent DCFS sent him a letter regarding the pendency of these proceedings. In response, petitioner submitted a letter dated February 21, 2018. A copy of that letter was attached to the jurisdiction/disposition report. (II CT 244, 266-268). In that letter, he clearly expressed a desire to participate in these proceedings, preferably via telephone as a personal appearance might interfere with his ability to participate in a fire camp program. (II CT 266). At no time, did he ever waive his right to be present; he did not indicate what he would do if a telephone call might not be possible but he did indicate telephone

calls were sometimes difficult to arrange. (II CT 265). He also indicated a desire for DNA testing but made it clear that he loved his children regardless of the outcome of the tests. (II CT 265). He also wanted his mother to have visitation, if not custody. (II CT 266).

The combined jurisdiction/disposition hearing for both Inez and Christopher was held on March 9, 2018. (II CT 361-364). The detention report as well as the jurisdiction/disposition report were admitted into evidence. (RT 3/9/18 p. 2). Petitioner was not present nor was he represented by counsel. The court sustained the petition and made the children dependents of the court. Petitioner was denied all reunification services. In making her findings, Judge Downing, the bench officer made the following comments:

> "Mr. Lopez is currently incarcerated, and he has not made himself available and not – he's been noticed, **but he's made no contact with the Department.**" (RT 3/9/18 p. 6, lines 6-9, emphasis added).

As noted, this is incorrect, petitioner Carlos L. had responded to the Department and his response was attached to the jurisdiction/disposition report which the trial court stated it had read.

There is no evidence that a formal waiver pursuant to Penal Code section 2625 was filed by or on petitioner's behalf. (RT 3/9/18 pp. 1-3). A copy of the minute orders as to Christopher were mailed to Valerie; no copy was mailed to petitioner despite the fact that he qualified as a presumed parent of Christopher (II CT 364); a copy of the minute orders as to Inez were mailed to him at the Sierra Conservation Center as shown by the request for judicial notices

filed concurrently with the opening brief in the Court of Appeals and which is should now be a part of the record in this court; however, he never received it for whatever reason; quite possibly because he had already been transferred to a fire camp.[2]

The next significant hearing was on September 6, 2018. (II CT 557-558). At that hearing, the court set a permanency planning hearing for both children and asked the LADL-Hayes firm to act as a "Friend of the Court" and contact petitioner.[3] (RT 9/6/18 p. 6). On November 15, 2018, the LADL-Hayes firm, in the person of Ashley Wu, was appointed to represent petitioner with respect to both of his children. (II CT 584, RT 11/15/18 p. 8). The court also found that the Indian Child Welfare Act (ICWA) did not apply to this case. (RT 11/15/18 p. 8).

The permanency planning for both children was set to commence on December 19, 2018.[4] (II CT 606). Petitioner made his

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[2] It also has the wrong CDCR number for petitioner; the notice lists it as "BEU4882" but the correct one is "BE4882." The addition of the "U" may seem trivial but present counsel is very much aware that any mistake in the CDCR number often causes a letter to bounce or otherwise become lost in the system.

[3] "LADL" refers to the Los Angeles Dependency Lawyers, a non-profit agency in Los Angeles County that represents most of the parents in dependency proceedings; it is divided into five separate "law firms" to avoid conflicts of interest in the dependency court. The "Hayes" firm is one of those five firms and is sometimes known as "LADL-Two."

[4] At no time did petitioner's trial counsel ever make an ***Ansley*** [***Ansley v. Superior Court*** (1975) 186 Cal.App.3d 477] motion to correct the problems caused by the earlier failure of the trial court to appoint counsel for appellant or to otherwise adhere to the procedures of Penal Code section 2625. While this discussion was part of the original appeal in the Court of Appeal, the Court felt it was not necessary to reach the issue as

first appearance in this case; he was present only via speaker phone. (RT 12/19/18 p. 12). The hearing began with a request for DNA testing with respect to Christopher, the younger child; the court granted the request and continued the permanency planning hearing with respect to him. There was no dispute about the paternity of Inez – petitioner was declared to be her presumed father. (RT 12/19/18 p. 15). Without any objection or a request for a continuance, the court proceeded to conduct the permanency planning hearing for Inez, the older child. The hearing was perfunctory – the court found Inez to be adoptable and that none of the exceptions for adoption as the preferred permanent plan existed; parental rights were then terminated. (RT 12/19/16 p. 16). The court also gave a perfunctory advisement of appellate rights. (RT 12/19/18 p. 18, lines 10-16). There is no evidence that any appellate proceedings were initiated regarding the termination of petitioner's parental rights as to Inez.[5]

The Court received the DNA results for Christopher on February 13, 2019. (II 608-609). They showed that petitioner was

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it found it unnecessary. Nevertheless, it forms an important part of the backdrop of this case and will be discussed as needed. (*See also*, ***In Re R. A.*** (2021) 61 Cal.App.5th 826 [275 Cal.Rptr.3d 877, 889] holding that, when section 388 is used to challenge orders issued in violation of a parent's constitutional due process rights, there is a presumption that the child's best interests are served when the parents' due process rights are preserved and respected.

[5] The records of the trial court reflect that, as of this date, the adoption of Inez by her foster mother, Sylvia W., has not been finalized or even scheduled although Ms. W. has apparently been approved to adopt both children. (III CT 641)

the biological father of Christopher. On February 26, 2019, the court realized that it was necessary to again notice petitioner of these proceedings and postponed the permanency planning hearing for Christopher; it made no findings as to paternity. (III CT 714).

The permanency planning hearing was ultimately held on March 5, 2020. (III CT 920-922). The matter proceeded solely on the basis of the written reports. (RT 3/5/20 p. 2). Petitioner was present via telephone conference only. (III CT 920). The court found that the minor was adoptable and that none of the exceptions for adoption as the permanent plan were found to exist; parental rights were terminated. (III CT 921, RT 3/5/20 p. 5-6). The minute orders were mailed to petitioner at his place of incarceration. (III CT 922-923). These appellate proceedings followed.

ARGUMENT

I.

THE CONCEPT OF STRUCTURAL ERROR AS IT APPLIES TO DEPENDENCY LAW.

The thrust of this Court's grant of review lies in whether the concept of structural error can apply to dependency law and, if so, how far does it extend and to what sorts of errors. The concept of structural error or that an error can be so fundamental that it offends all concepts of due process and not be amenable to any sort of harmless error analysis was largely developed in criminal law but it has been applied to areas of civil law, including dependency law. These errors typically involve a denial of certain basic rights whether guaranteed by the Federal/State constitutions or by certain statutory enactments by the California Legislature. However,

petitioner does accept that the concept is more apt to be applied to rights that are guaranteed by one or both constitutions.

For example, in civil cases, structural error has been found in a refusal or failure to allow a party to present its entire case before the trier of fact requiring reversal *per se* in ordinary civil cases. (***In Re Marriage of Carlsson*** (2008), 163 Cal.App.4th 281, 292-293; ***Severson and Werson, PC v. Sepehry-Fard*** (2019) 37 Cal.App.5th 938, 950-951). It is also structural error in civil cases to deny a litigant the right to testify if his/her counsel so wishes – ***Kelly v. New West Federal Savings*** (1996) 49 Cal.App.4th 659, 677; ***In Re Waite's Guardianship*** (1939) 14 Cal.2nd 727, 730; and ***Caldwell v. Caldwell*** (1962) 204 Cal.App. 4th 819, 821).

Juvenile dependency cases are different. In most civil cases, the dispute is about the past – who did what and what should be the consequences of a wrongful act, be it a crime, a tort, a breach of contract or whatever. In dependency, the focus is partly on the past – did the parent commit certain acts that require that the child be made a dependent – and partly on the future – what is to become of the child – reunification with the parent, guardianship or adoption. This distinction caused this Court to be cautious in extending the concept of structural error to dependency proceedings. In ***In Re James F.*** (2008) 41 Cal.4th 901, 916-917, this Court stated that:

> "Preliminarily, we observe that juvenile dependency proceedings differ from criminal proceedings in ways that affect the determination of whether an error requires automatic reversal of the resulting judgment. The rights and protections afforded parents in a dependency proceeding are not

> the same as those afforded to the accused in a criminal proceeding...In a criminal prosecution, the contested issues normally involve *historical* facts ...whereas in a dependency proceeding the issues normally involve evaluations of the parents' present willingness and ability to provide appropriate care for the child and the existence and suitability of alternative placements. Finally, the ultimate consideration in a dependency proceeding is the welfare of the child...***These significant differences between criminal proceedings and dependency proceedings provide reason to question whether the structural error doctrine that has been established for certain errors in criminal proceedings should be imported wholesale, or unthinkingly, into the quite different context of dependency cases.*** (*Id.*, at 915-916, citations omitted, emphasis added).

However, this Court, and other courts have recognized that there are situations in which structural error does play a role in dependency proceedings. For example, it is structural error to deny a parent a contested hearing on an issue on which the Department/Agency bears the burden of proof. (***In Re Kelly D.*** (2000) 82 Cal.App.4th 433, 439, fn. 4; ***In Re Josiah S.*** (2002) 102 Cal.App.4th 403, 417-418). The court cannot even require an offer of proof. (***In Re James Q.*** (2000) 81 Cal.App.4th 255, 265-266). Another structural error is the failure to provide the parent with a copy of the petition. (***In Re Andrew M.*** (2020) 46 Cal.App.5th 859, 867, fn. 4). It was structural error for a trial courts to refuse a continuance to parents so they could evaluate a tardy report prepared by social

workers recommending termination of reunification services and/or parental rights. (***Judith P. v. Superior Court*** (2002) 102 Cal.App.4th 535, 548; ***Tracy A. v. Superior Court*** (2004) 117 Cal.App.4th 1309, 1318 – neither case was discussed or disapproved by this Court in ***James F.***, despite having predated that case, *but see*, *contra* ***In Re A. D.*** (2011) 196 Cal.App.4th 1319, 1328).

If a parent wishes to testify at a hearing on issues on which the Department bears the burden of proof, it is arguably structural error not to produce the parent for such testimony presuming, of course, that the trial court has the power to produce the parent for testimony. (***In Re M. M.*** (2015) 236 Cal.App.4th 955, 964-965 – incarcerated parent subject to California Department of Corrections and Rehabilitation had an absolute right to testify at the jurisdiction hearing and the denial of that right deemed cannot really be subject to harmless error analysis as it is too difficult to determine how "credible" client would have been on the stand).

In its discussion of structural error in ***James F.***, this Court discussed the effect of the denial of the right to counsel and to counsel of one's choice noting that, in ***Gonzalez-Lopez v. United States*** (2006) 548 U. S. 140, 150 [126 S.Ct. 2557, 165 L.Ed.2d 409], the United States Supreme Court held that erroneous deprivation of a criminal defendant's Sixth Amendment right to counsel of choice was a structural defect requiring reversal of the conviction without inquiry into prejudice. This Court explained: "It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, includ-

ing those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (***James F.,*** *supra*, 42 Cal.4th at 914). In other words, the presence of the guiding hand of competent counsel is critical in protecting the due process rights of parents in matters in which the state seeks to involuntarily terminate their parental rights and only very rarely, if ever, can it absence ever be considered to be non-prejudicial.

Appellant submits that this Court, by its discussion of ***Gonzalez-Lopez,*** was suggesting, without deciding the issue, that deprivation of the right to counsel and notice might be structural error in dependency proceedings. Certainly, the Court of Appeal, in the case of ***In Re A. J.*** (2019) 44 Cal.App.5th 652, 666, fn 16) so intimated.

In Re Jasmine G. (2005) 127 Cal.App.4th 1109, 1116, a case not mentioned in ***James F.***, the Court of Appeal held that the failure to give proper notice to a parent facing termination of her parental rights was structural error. In that case, the mother had been served with notice at the outset of the case and was actively involved in the case through at least the six months review hearing; then she largely ceased any involvement in the case. The social services agency later recommended termination of parental rights. Even though the agency had some sporadic telephone calls with the mother and even had her address, it made absolutely no attempts to serve her with the statutorily mandated notice for the permanency planning hearing at which her parental rights were at stake.

The Court of Appeal had no hesitation declaring this to be structural error carefully distinguishing two other cases – ***In Re Daniel C.*** (2004) 115 Cal.App.4th 903, 915 (failure to notify temporary conservator of parent not structural error) and ***In Re Angela C.*** (2002) 99 Cal.App.4th 389, 395 (parent properly notified of permanency planning hearing but not notified of continuance of hearing when she failed to show up for the original hearing; held not to be structural error) – and relied on ***In Re DeJohn B.*** (2000) 84 Cal.App.4th 100, 106, 110 (impliedly holding that it was structural error to make no attempt to notify parent of six month review hearing).

Very recently, this Court, considered the concept with respect to the failure of trial counsel to fulfill his/her duty to file a Notice of Appeal (NOA) when requested to do so by his/her client after the trial court terminated the client's parental rights in a dependency proceeding. (***In Re A. R.***, *supra*). This Court held that the failure of trial counsel resulted in the loss of an important statutory, if not constitutional, right – the right to appeal the decision terminating parental rights – did not require an analysis of whether trial counsel's failure to preserve a basic trial right (***In Re Norma M.*** (1975) 53 Cal.App.3d 344, 347 – trial counsel must file a NOA when instructed by the client to do so) was prejudicial in the sense that the appeal was potentially, if not actually, meritorious. The prejudice lay in the fact that the right to an appeal was lost. This Court, without using the term"structural error" effectively held that the loss of the right to an appeal was structural error requiring that the appeal be reinstated upon an appropriate showing that did not

require any showing that the appeal was potentially or actually meritorious. (***In Re A. R.***, *supra*, 483 P.3d at 892).

Thus, it is without dispute that the concepts of structural error clearly apply to dependency law. Certainly, as appellant will acknowledge, it may not apply as extensively in dependency law as it might in criminal law – ***James F.***, *supra* – and, as this Court recently held in ***A. R.***, that concept is particularly apropos in the context of termination of parental rights when a parent is denied not merely the right to effective assistance of counsel but to any counsel at all. Petitioner submits that, in the instance where a parent has been denied the right to any counsel at critical stages of the dependency proceeding, extreme caution must be used in upholding any findings made at such proceedings when a parent has been denied his statutory right to counsel and, particularly where, as here, the trial court bears significant culpability for the failure to provide counsel for the indigent, incarcerated parent.

II.

THE RIGHT TO COUNSEL IN DEPENDENCY/TERMINATION OF PARENTAL RIGHTS CASES.

Not more than a few weeks ago, April 5, 2021, to be precise, this Court emphasized the importance of competent counsel for parents facing the potential of the loss of their parental rights in ***A. R.*** noting that it is an important procedural safeguard against the risk of terminating parental rights in error. (*Id.*, 483 P.3d at 887-888). This Court noted that:

> "Depending on the circumstances of the case, constitutional due process sometimes

> demands the appointment of counsel for a parent facing the termination of rights. (***Lassiter v. Department of Social Services*** (1981) 452 U.S. 18, 32, [101 S.Ct. 2153, 68 L.Ed.2d 640]; ***In Re Sade C.*** (1996) 13 Cal.4th 952, 984). But even when court-appointed counsel may not be constitutionally required, California statutory law has long required the appointment of counsel in connection with parental rights termination proceedings. The right dates back to 1965, when the Legislature granted indigent parents the right to court-appointed counsel in termination hearings. Two decades later, the Legislature expanded that guarantee to any dependency proceeding in which out-of-home placement is at stake. Finally, in 1994, the Legislature added a provision specifying, in unusually explicit terms, that "[a]ll parties who are represented by counsel at dependency proceedings" are "entitled to *competent* counsel." (Welfare and Institutions Code section 317.5, subdivision (a), italics added.) The amendment makes clear that under California law, every parent facing termination of parental rights is entitled to competent representation." (*Id.*, at 889, some citations omitted).

In other words, the right to counsel is critical to the ability of a court to entertain a legal proceeding in which the state seeks to involuntarily terminate the parental rights of one of its citizens. It is so important that there are circumstances under which the due process clause of the Federal [and state] constitution demands it. (***Lassiter****, supra* at 32).

One may well question the ***Lassiter*** Court's conclusion that the due process clause of the Fourteenth Amendment to the Federal Constitution only requires, in some instances, that counsel be appointed for indigent parents in any proceeding at which parental rights are at stake and may be terminated rather than all proceedings in which termination of parental rights is an option that may be sought.

There is more than a hint that the United States Supreme Court was taking a rather practical approach or "harmless error" analysis to the problem. The parent in ***Lassiter*** was serving a long sentence for second-degree murder at the time she sought counsel and the social services agency had filed a lawsuit to terminate parental rights and to place the child for adoption with non-relatives.[6] In other words, the Court clearly saw that it would have been pointless to reverse as there was no possibility of a different outcome. In fact, Chief Justice Burger suggested that the case could have been dismissed as the writ was improvidently granted. (*Id.,* at 34, Burger, C. J., concurring).

But ***Lassiter*** is forty years old and a lot has changed in juvenile dependency law since that time, both at the federal and state levels. It was also only a five-to-four decision. The dissenters, led by Justice Blackmun, would have held that due process requires appointment of counsel in all cases in which a parent faces the

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[6] At the time, North Carolina had a bifurcated procedure for terminating parental rights of dependent children similar to what California had before 1989 when the juvenile courts lacked the power to terminate parental rights but could only authorize that the social services agency bring a lawsuit in Superior Court to terminate parental rights.

potential loss of parental rights, including the loss of all of them. (***Lassiter***, *supra* 452 U.S. at 35, *et seq.*, Blackmun, J., dissenting). Justice Stevens would have gone further suggesting that counsel be appointed in all dependency cases regardless of whether termination of parental rights was at stake. (*Id.*, at 59, Stevens J., dissenting). The majority also noted that 33 states and the District of Columbia provided for counsel in all termination of parental rights cases and strongly approved of that practice. (*Id.*, at 34).

Our concepts of what due process involves in dependency cases has greatly evolved since 1981, a generation ago. Now, all states routinely appoint counsel for indigent parents in dependency cases even when termination of parental rights is not realistically on the table. Would the Supreme Court make the same decision today? [7] Probably not but the question is unlikely to reach the

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[7] The United States Supreme Court has had no real direct opportunity to reconsider its decision in ***Lassiter*** since 1981. Perhaps the closest it came was in ***Turner v. Rogers*** (2011) 564 U. S. 431, 449 [131 S.Ct 2507, 180 L.Ed 2d 452] in which the Court held, while due process may not require the appointment of counsel in cases in which one parent seeks to hold the other parent in civil contempt for failure to pay child support, due process does require some procedural safeguards to assure that the indigent parent will not be unduly incarcerated simply for being indigent. Interestingly, Justice Kruger of this Court, then working for the Solicitor General of the United States, filed an amicus brief on behalf of the Federal Government arguing for the application of the due process clause to such proceedings including the possibility of appointment of counsel. Obviously, the interests at stake in a civil contempt proceeding are far less than they are in proceedings at which parental rights may be terminated but it does show the extent to which, in the forty years since ***Lassiter*** was decided, concepts of due process have evolved and expanded to protect parents in litigation where their rights and responsibilities vis-a-vis their children are at stake.

One may also note the decision in of the Court in ***M. L. B. v. S. L.***

Court any time soon because the problem has largely been solved by legislative action in all of the states. But it is a fair question to ask and this Court may also ask whether or not the "due process" clause of our State Constitution requires it regardless of whether or not the Federal Constitution requires it. However, for purposes of this brief, petitioner will rely upon the most recent pronouncement of the right to counsel in dependency cases, ***A. R.***, which notes that the right, while not always constitutionally mandated, certainly has very strong constitutional implications and which cannot be lightly disregarded and when it is disregarded will very rarely be found to be harmless error.

Petitioner certainly invites this Court to expand ***Lassiter*** using our State Constitution but recognizes that it is not really necessary to do so. Thus, as the Court of Appeal noted in its opinion, the trial court was clearly under a statutory, if not constitutional obligation, to appoint counsel for petitioner at the outset of these proceedings and to initiate the procedures of Penal Code section 2625 to enable him to fully participate in the proceedings.

J. , *infra* 519 U.S. at 124 in which the Supreme Court held that due process required that a parent be provided with a free transcript in any appeal involving a termination of parental rights. The issue of an automatic right of an indigent parent to have court-appointed counsel to handle the appeal was not at issue in that case but one easily see that, if it had been, it would be have been difficult to argue that an indigent parent had a right to a free transcript but not to the skilled assistance of an attorney to handle the appeal. Providing a free transcript without an attorney to write a coherent brief based on that transcript would seem to be an act in utter futility.

III.

THE JURISDICTION AND DISPOSITION HEARINGS AND THE HEARING ON WHETHER TO GRANT OR DENY REUNIFICATION SERVICES ARE CRITICAL PHASES OF THE DEPENDENCY PROCEEDINGS REQUIRING THE APPOINTMENT/PRESENCE OF COMPETENT COUNSEL FOR INDIGENT PARENTS.

In the course of any litigation, there are some hearings and decisions that are more important than others. Some hearings are relatively trivial – perhaps a routine request for a continuance – and others are far more important – the taking of evidence and rendition of a decision. The same is true in dependency. There can be no question but that the guiding hand of counsel is essential when the jurisdiction hearing is held at which it is determined whether the child shall become a dependent of the court. The same is true of the disposition hearing at which the court decides where the child shall be placed – with a parent, a relative, in foster care or even some sort of state institution. Petitioner very much doubts that respondent will have any quarrel with this proposition and will most likely agree with it. Indeed, it would be frivolous for respondent to dispute these propositions.

Likewise, the hearing at which the court decides whether or not a parent shall be granted reunification services or not must be deemed a critical hearing at which the guidance of competent counsel is absolutely required. The consequences of such a ruling are enormous and cannot be understated. If parents are denied services, the likelihood of the loss of parental rights is almost, but not quite, a foregone conclusion. Only the possibility that one or

more of the exceptions to the preference for adoption might exist stands as a barrier to a termination of parental rights and this Court can simply examine the records of the appellate courts in both published and unpublished opinions and learn that it is rare than any of these exceptions are found to exist. A decision to grant them is the first, and most vital, step on the road to reunifying the child with his/her parents.

Again, petitioner does not expect respondent to deny that the decision to deny him any reunification services was a critical decision that is clearly governed by the statutory/constitutional right to counsel and that a denial of this proposition would also be considered frivolous.

The question that this case squarely presents is whether the denial of the right to counsel is structural error under the facts of this case. Petitioner will now turn to that critical question.

IV.

IT IS STRUCTURAL ERROR TO DENY A PRESUMED PARENT WHO IS INCARCERATED IN A CALIFORNIA FACILITY AT ANY HEARING IN WHICH HIS/HER CHILDREN MAY BE MADE DEPENDENTS OF THE COURT WITHOUT EITHER APPOINTING HIM/HER COUNSEL OR OTHERWISE ASSURING HIS PARTICIPATION IN THOSE PROCEEDINGS.

Part "A" – Some Introductory Comments.

As noted, the facts are relatively simple and without dispute in this case. Petitioner was incarcerated in a facility run by the California Department of Corrections and Rehabilitation (CDCR). Respondent knew this and the trial court knew it. Petitioner, as the

appellate court clearly pointed out was the presumed parent of both children and respondent has never really denied that. Respondent fulfilled its initial duties of notifying petitioner that these dependency proceedings had been initiated in sufficient time before the planned jurisdiction/disposition hearing. Petitioner responded and clearly indicated a strong desire to participate in these proceedings including a strongly implied desire for counsel. (*See*, ***In Re A. J.***, *supra*, 44 Cal.App.5th at 669). His response was attached to the reports that were filed with the trial court and which the bench officer stated that it had read.

However, once the hearing commenced, the bench officer stated that petitioner had not responded to the notices sent to him by respondent DCFS. This was not correct. But none of the other persons present at the hearing and who also were charged with having read these reports including counsel for DCFS and counsel for the minors advised the bench officer of its glaring error.

As a consequence, counsel was not appointed for petitioner; the court proceeded to adjudicate the petition in his absence, removed the children from his custody and denied him all reunification services based upon his record and he was never afforded an opportunity to arrange for the care of his children outside of the system.

There is no question but that the denial of counsel in these circumstances was a very grievous error – one of potentially

constitutional dimension.[8] California case law makes it very clearly that petitioner, as an incarcerated, indigent parent, had an absolute right to counsel and the trial court had no discretion to do anything other than appoint counsel for him at the jurisdiction/disposition hearing that was held on March 9, 2018, and respondent DCFS cannot deny it and would be making a frivolous argument were it to do so.

This Court has raised the question of whether the error was structural in nature or whether it is subject to some sort of "harmless error" analysis. The first point petitioner notes is the obvious. In the criminal context, the denial of counsel is structural error *per se* and there is no analysis of whether or not the error might have been harmless. Reversal is mandated.

Petitioner, of course, recognizes that the right to counsel in criminal cases is based on the Fifth and Sixth Amendments to the United States Constitution and that there is only a "limited" due process constitutional right to counsel in cases wherein the state proposes to terminate parental rights. Thus, the two instances are not necessarily on the same plane but the right to appointed counsel is zealously protected in both instances. Denial of the right to

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[8] Indeed, as petitioner notes, this is one of those cases that clearly qualifies under ***Lassiter*** as being one in which due process required the appointment of counsel. As petitioner noted, *infra*, the dissent in ***Lassister*** now likely reflects the prevailing view that due process requires the appointment of counsel for indigent parents in any proceeding in which parental rights may be involuntarily terminated. Petitioner notes that respondent has never argued that this was a case in which the trial court had the discretion, under ***Lassiter,*** not to appoint counsel to represent appellant.

counsel in criminal cases is never tolerated. (***Gideon v. Wainwright*** (1963) 372 U.S. 35 [9 L.Ed.2d 799; 83 S.Ct. 792]). It must not be tolerated in cases that potentially involve the termination of parental rights, a state sanction of extreme severity and which is irreversible – ***M. L. B. v. S. L. J.*** (1996) 519 U.S. 102, 124, 128 [117 S.Ct. 555, 1136 L.Ed.2d 473]). (*Accord,* ***Santosky v. Kramer*** (1982) 455 U.S. 745, 759 [102 S.Ct. 1388; 71 L.Ed.2d 509]; ***Stanley v. Illinois*** (1972) 405 U.S. 645 [92 S.Ct. 745, 31 L.Ed.2d 551]). Thise Court has echoed those sentiments. (***In Re Laura F.*** (1983) 33 Cal.3d 826, 844 calling a "fundamental liberty interest"; ***In Re Carmaleta B.*** (1978) 21 Cal.3d 482, 489 calling it "more precious than life itself). Only the most extreme circumstances can ever justify the refusal to appoint an attorney to represent an indigent, especially an incarcerated, parent when that parent has clearly manifested a desire to participate in the proceedings. Indeed, petitioner submits that there can be no such justification and that the error is of such a fundamental nature as to be structural in nature requiring reversal of all orders entered as a result of that denial.

Part "B" – Penal Code Section 2625 and the Right to Participate in Critical Hearings in the Dependency System.

Penal Code section 2625 guarantees persons who are incarcerated in a California facility (as petitioner was), the absolute right to be present at certain court hearings involving his/her children including jurisdiction/disposition hearings under Welfare and Institutions Code section 300 and any proceedings to terminate

parental rights as well as the right to petition to be present at all other hearings involving their children.

Subdivision (b) of section 2625 provides, in pertinent part:

> "In a proceeding brought under... Section 300 of the Welfare and Institutions Code, if the proceeding seeks to adjudicate the child of a prisoner a dependent child of the court, the superior court of the county in which the proceeding is pending, or a judge thereof, shall order notice of any court proceeding regarding the proceeding transmitted to the prisoner."

Subdivision (d) makes it clear that a court cannot proceed with the adjudication/disposition of a petition brought under section 300 unless certain conditions are met:

> "Upon receipt by the court of a statement from the prisoner or the prisoner's attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. A...petition to adjudge the child of a prisoner a dependent child of the court pursuant to subdivision (a), (b), (c), (d), (e), (f), (i), or (j) of Section 300 of the Welfare and Institutions Code may not be adjudicated without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden, superintendent, or other person in charge of the institution, or a designated representative stating that the prisoner has, by express statement or

> action, indicated an intent not to appear at the proceeding."

These provisions are strictly construed. As a preliminary note, it has been held that a prisoner's request to participate in the hearing may and should be construed as a request for the assistance of counsel even if there is no explicit request for counsel as such. (***In Re A. J.,*** *supra* 44 Cal.App.5th at 669). The length of the parent's sentence is also not a factor to be considered in weighing any prejudice caused by a failure to comply with section 2625; presumably that would also include any analysis of whether the error can or should be structural error in certain circumstances. (***In Re Andrew M.*** (2020) 46 Cal.App.5th 859, 867).

In this case, it is without dispute that the trial court failed to comply with section 2625 due largely to its own failure to carefully read the reports respondent had presented to it which included petitioner's letter requesting to participate in the hearing. It is also without dispute that there was no attorney present at the jurisdiction/disposition hearing to represent petitioner and he certainly never waived/forfeited his rights to appear at the hearing either explicitly or even implicitly. Respondent cannot dispute any of these things.

Petitioner, as an incarcerated parent, had a presumptive right to reunification services and, by inference, under Penal Code section 2625, to be present when that decision to deny or grant services is made at the disposition hearing. Welfare and Institutions Code section 361.5, subdivision (e), makes that perfectly clear and states, in pertinent part:

> "If the parent...is incarcerated...the court ***shall order reunification services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child.***" (Emphasis added).

(*In Re Cicely L.* (1994) 28 Cal.App.4th 1697, 1702; ***Cynthia D. v. Superior Court*** (1993) 5 Cal.4th 242, 248). Petitioner was clearly denied his right to be present when the trial court elected to deny him reunification services and to contest that decision.

Part "C" – *Jesusa V.* Does Not Govern the Outcome of This Case.

Petitioner is acutely aware that this Court has suggested that errors under section 2625 might be reviewed under a "harmless error" analysis – ***In Re Jesusa V.*** (2004) 32 Cal.4th 588. Section 2625 prohibits a trial court from adjudicating a petition filed under Section 300 of the Welfare and Institutions Code against an incarcerated parent with certain exceptions not here relevant unless the parent is physically present or has otherwise validly waived his presence and is represented by counsel. The same is true of any action to involuntarily terminate parental rights. However, section 2625 does not prohibit a dependency court from adjudicating matters not involving the adjudication of issues apart from the truth of the petition filed under section 300 or terminating parental rights. For example, the trial court may hold review hearings in dependency proceedings outside of the parent's presence but trial courts certainly have the power to allow the incarcerated parent to be present or otherwise participate and, certainly, the parent's counsel must be present.

The trial court may also determine ancillary issues such as paternity without the incarcerated parent's presence so long as the parent is represented by counsel or there is a valid waiver under section 2625. That was the situation in ***Jesusa V.*** In that case, there were two candidates for being the presumed father of the minor – the mother's husband, Paul, from whom she had been temporarily separated, and one Heriberto, her former paramour. Heriberto was incarcerated for sexually assaulting the mother. Both men sought status as the presumed father of the minor at issue to the jurisdiction hearing. At that hearing, the trial court first found that both men met the test for presumed fatherhood and then proceeded, at that same hearing, under Family Code section 7612, as it then existed, to determine which claim was "weightier," thus eliminating one man as a presumed father in favor of the other man.[9] The trial court found in favor of Paul on the issue of presumed fatherhood and against Heriberto.

The trial court then made a true finding on the allegations of the petition. However, Heriberto was not present at the hearing at which both of these issues were resolved but was represented by counsel who had fully consulted with his client on all matters. This

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[9] Section 7612 has since been amended to allow a trial court to find that a child, under certain circumstances may have more than two presumed parents but only if it would be a detriment to the child that recognizing only two presumed parents. Given that Heriberto was convicted of sexually assaulting the child's mother and was serving a lengthy prison sentence for that crime, it is highly unlikely that any court would have found that it would have been detrimental to young Jesusa to recognize him as a third presumed parent in addition to her mother and Paul.

Court found that section 2625 did not require Heriberto's presence to adjudicate the paternity issues as he had no absolute right to be present – the court had the discretion to order his presence but he was not entitled to be present. (*Id.*, at 599). Heriberto did, however, have the right to be present for the adjudication aspect of the hearing if he had standing to contest that issue. This Court found the denial of his right to be present to be error but one that was subject to a harmless error analysis. However, the key for this Court was the fact that Heriberto was represented by counsel who had full access to all of the reports; counsel was given an opportunity to obtain an affidavit from Heriberto who declined to sign one as well as several continuances to prepare for the hearing; counsel had the ability to cross-examine all potential witnesses and to call witnesses on Heriberto's behalf. (*Id.*, at 625). In other words, there was a real attempt to comply with the mandate of section 2625.

There is a question of whether this ruling is actually non-binding *dicta* or, to be more precise, did Heriberto actually have standing to contest the jurisdictional findings; if he did not, then section 2625 did not apply to him. After the trial court found in favor of Paul as the presumed father, Heriberto lost any rights he had to contest the jurisdiction and disposition orders as he was no longer Jesusa's presumed father or even an alleged father; he was a legal non-entity in her life with no standing to contest anything including whether she should be a dependent of the court. Thus, it was not necessary to decide if a failure to comply with section 2625's prohibition against rendering a judgment of dependency against an absent, incarcerated parent unless there was a valid waiver of

his/her presence was or was not structural error or otherwise subject to a harmless error analysis and petitioner so submits. Thus, ***Jesusa V.*** is simply not applicable to this case as Heriberto, although incarcerated, lost any parental rights he may have had when the trial court entered its orders favoring Paul as the child's presumed father. It provides no guidance for this Court on whether a total failure to comply with section 2625 is or is not structural error.

Part "D" – Only the Standard of Reversible Error *Per Se* Can Apply to a Total Failure to Appoint Counsel Especially When Combined with a Failure to Comply with Section 2625.

This case, however, presents a very clear case to decide whether and, under what circumstances, a total failure to comply with the duty to appoint counsel for an indigent, incarcerated but presumed parent, especially when combined with a failure to comply with the mandates of section 2625 can constitute reversible error *per se*. Petitioner is the only presumed father of these children; there is no other candidate for that title for either child, Inez or Christopher. Petitioner agrees with the Court of Appeal that only he is their presumed father and neither they, nor respondent DCFS, have disagreed with that proposition.

In this case, petitioner was not given counsel at the outset of these proceedings as he should have been; he was not given copies of the reports and, in general, was left completely in the dark as to the nature of the proceedings and the evidence against him. Here was never any real effort to comply with section 2625; at most, it was given lip service only. The trial court's failure to carefully read

the reports that the social workers prepared, especially the jurisdiction/disposition report, is, at the minimum, very troublesome. It is quite probable that this Court, in ***Jesusa V.***, would have reached a different conclusion if Heriberto had been in the same situation as appellant – bereft of the guiding hand of competent and experienced counsel and bereft of any knowledge whatsoever of the charges against him. In other words, there was a much better record in ***Jesusa V.*** in which to make a harmless error analysis than in this one. The adjudication in this case was precisely the sort of thing the Legislature had in mind when it prohibited any adjudication taking place involving incarcerated parents without their presence, or a valid waiver thereof. An adjudication in which the incarcerated parent had no opportunity to confront any of the evidence against him, no opportunity to cross-examine witnesses, no opportunity to present his own witnesses, no opportunity to present his family as potential caregivers,[10] and other associated evils when a parent is prohibited from participating in the legal proceedings involving his/her children. When a parent has some participation, some knowledge of the proceedings, it may be possible to do a harmless error analysis as in ***Jesusa V.*** However, when the parent has no knowledge and the proceedings occur without any participation from him, a harmless analysis is not appropriate as there is no way to assess the actual prejudice – it gets into the realm of pure specula-

[10] Here is may be noted that his family was taking care of his other children. This suggests that they may have been suitable caregivers for Inez and Christopher.

tion and the only remedy possible is reversal. (***Gonzalez-Lopez v. United States***, *supra*, 548 U. S. at 150).

We do not hold trials without some sort of notice being given to the defendant; notice is the critical element of due process; without it, there can be no due process. ***Mullane v. Central Hanover Bank & Trust Co.*** (1950) 339 U.S. 306 [94 L.Ed. 865, 70 S.Ct. 652]:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations.] The notice must be of such nature as reasonably to convey the required information, [citation], and it must afford a reasonable time for those interested to make their appearance, [citations]." (*Id.*, at p. 314).

In dependency proceedings, notice is both a constitutional and statutory imperative. (***In Re Jasmine G.***, *supra* 127 Cal.App.4th at 1114-1115). Had respondent failed to send any sort of notice to appellant, when it knew where he was, there is no doubt that there would have been structural error requiring reversal. DCFS is not likely to dispute that.

The question is whether the failure to appoint counsel is a structural error or otherwise make any attempt to comply with section 2625 is structural error. Clearly, as this Court found in ***A. R.***, the right to competent counsel is absolutely fundamental in

dependency cases in which termination of parental rights is at stake.

There is no doubt but that the best interests of children are best served when all parties having an interest in the child are present before the court and are represented by competent counsel – ***Ansley v. Superior Court*** (1975) 186 Cal.App.3d 477, 490-491; *see also*, ***In Re R. A.*** (2021) 61 Cal.App.5th 826. That is, of course, the underlying purpose of Penal Code section 2625 – whenever possible, to bring all parties having a legal interest in the child, before the trial court before important decisions with life-long consequences are made about the child[ren] in question.[11]

Incarcerated parents, especially ones who might be incarcerated in a different county from the proceedings and who might be many hundreds of miles away are at a peculiar disadvantage. They likely have no resources to hire an attorney or even to contact one with experience in dependency. They have no ability to go to court. They don't even have the ability to call the court or to make an appearance via the internet using Zoom, BlueJeans or some other application. The incarcerated parent must rely upon the trial court to protect his rights by (1) appointing him counsel when it is obvious that the parent is, in fact, a presumed parent and (2) invoking the

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[11] Yes, there are circumstances in which it may be impossible to bring all of the parties having an interest in the child before the court – ***In Re Justice P.*** (2013) 123 Cal.App.4th 181, 189. However, that is not the case here. Appellant's whereabouts were always known throughout these proceedings and it was always possible to bring him to court or have him participate via the internet during the covid-19 pandemic which was in effect during the end stages of these proceedings and no one has ever contended otherwise.

procedures of Penal Code section 2625 by either bringing the parent to court (in person or electronically) or obtaining a valid waiver of his/her presence. Both aspects must be present.

Here, neither safeguard, much less both of them, was protected by the trial court. The evidence was simply overwhelming, as the appellate court noted, that petitioner was the presumed father of both Inez and Christopher. The trial court somehow overlooked this and respondent's own attorney failed to correct the trial court. As for section 2625, again, it is clear that the trial court also overlooked petitioner's very clear response that he wanted to participate in these proceedings with, of course the failure of respondent's trial counsel to correct the trial court's error about petitioner's response. These two failures resulted in a jurisdiction/disposition hearing that, for petitioner, was the equivalent of a Kangaroo Court. The result was foreordained and petitioner was denied any opportunity have a voice in the future of his children through no fault of his own.

The basic fundamental right of any defendant/respondent in a lawsuit is notice so that he/she can protect his/her interests. Without valid notice there can be no due process and with no due process, there can be no valid judgment. This case may not be strictly about the lack of notice and focuses more on the lack of the constitutional/statutory right to counsel but one can say that the trial court's fundamental error in not acknowledging petitioner's response to the notice that he did receive, has, in effect, resulted in a lack of notice altogether. What is the difference between a lack of notice and the failure of the trial court to acknowledge the defen-

dant's desire to contest the matter after notice has been given? From the standpoint of the defendant parent in a dependency proceeding, there is none.

It may be that, in some rare instances, a lack of counsel might not result in a miscarriage of justice but as Justice Baker, noted in his concurring opinion in ***In Re J. P.*** (2017) 15 Cal.App.5th 789, 804:

> "But for cases in which there is an ***egregious deprivation of the foundational right to counsel***, we should do more thinking. When a counterfactual inquiry appears too difficult to responsibly undertake, or a counterfactual conclusion relies on inferences that really amount to guesswork, the bias should be in favor of reversal." (Emphasis added).

Can there be anything more egregious than a trial court's complete failure to honor the rights of a presumed, incarcerated parent's right to counsel and to ignore his pleas for help and his pleas to participate in the dependency proceedings of his two children? We cannot guess at what skilled counsel would have done in this area – as a minimum, counsel would have explored the possibility that Inez and Christopher could be placed with petitioner's relatives who were already caring for their half-siblings in a legal guardianship and/or explored the rights of counsel for reunification services or visitation. Counsel would have pressed for status as a presumed parent of both children. (*C. f.*, ***In Re S. D.*** (2002) 99 Cal.App.4th 1068, 1077-1079, Welfare and Institutions Code section 361.3). Beyond that, everything becomes guesswork

which, as the United States Supreme Court noted in ***Gonzalez-Lopez***, *supra*, gets in into an alternate universe and we are left wandering around much like Alice facing the rather arbitrary whims of the Queen of Hearts masquerading as "justice."

Certainly we are a long way from justice. We are in a world where it is, indeed, "go to jail, lose your child." Only in the rarest of circumstances may it ever be appropriate to use a "harmless error" analysis in the denial of the right to counsel and never when it involves an incarcerated parent who utterly lacks any resources to respond to the petition perhaps, save, to write a hand-written plea on a yellow pad and send it off to the social workers hoping that, somehow, it finds its way to the judge assigned to the matter.

This is just such a case but here we have the added factor of the trial court's utter failure to not merely to comply with Penal Code section 2625 but to even read the reports that were submitted to her. There can be no other remedy than to reverse the judgment of the trial court making Inez and Christopher dependents of the court and to vacate all subsequent orders entered thereafter, including the orders terminating parental rights.

V.

CONCLUSION.

This Court has a clear opportunity to establish further protection for incarcerated parents and to strengthen the Legislature's very clear preference for full participation by incarcerated parents in the future of their children. Sections 317, 317.5 and 361.5, subdivision (e), of the Welfare and Institutions Code along with section 2625 of the Penal Code are statutory mandates implementing the due process rights of incarcerated parents to participate in the litigation involving their incarcerated parents especially where, as here, the state has intervened to involuntarily remove them from the custody of the parents and to sever all legal times between parent and child and to place the children for adoption.

In a case like this one, where there has been a complete failure to provide the incarcerated parent with counsel, much less competent counsel,[12] and to make even the most minimal efforts to comply with section 2625, the only possible standard of review is to

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[12] In this regard, petitioner notes that he argued, in the Court of Appeal, that his trial counsel, after she was appointed just prior to the permanency planning hearing at which his rights over Inez were terminated, was ineffective for a variety of reasons, including failing to assert his status as a presumed parent and failing to make an ***Ansley*** motion for the failure to comply with section 2625 and other errors. The Court of Appeal, however, declined to rule on these matters as it found no prejudice based upon the failure to comply with section 2625 *ab initio*. The ineffective assistance of counsel was not raised in the petition for review nor is it part of this Court's grant of review. Thus, briefing is not presented on those issues but, should this Court desire briefing, petitioner's counsel will provide it upon request.

declare it to be structural error. Anything else makes a mockery of due process and made the process in this case nothing more than sound and fury signifying nothing. Petitioner and his children deserved better. They deserved a process wherein due process was honored and protected and where all sides were fully involved, at all stages, in the decisions to determine the future of Inez and Christopher. Due process demands no less than a reversal of all orders in this case and a remand back to the jurisdiction/disposition hearing for both children.

Dated: May 20, 2021

CHRISTOPHER BLAKE,
Attorney for Petitioner/Appellant
CARLOS L.

CERTIFICATE OF NUMBER OF WORDS IN BRIEF.

I hereby certify that this brief consists of 10,530 words, including footnotes, as counted in the word count function of WordPerfect , the computer program used to prepare this brief.

Dated: May 20, 2021

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CHRISTOPHER BLAKE

PROOF OF SERVICE

I, CHRISTOPHER BLAKE, declare:

I am a citizen of the United States, over 18 years of age, and not a party to this action. My business address is 4655 Cass Street, #108, San Diego, California 92109. On this date, I served one copy of the attached document, to wit:

Petitioner's Opening Brief on the Merits

on each of the individuals below by placing in the course of Electronic Mail, where indicated, addressed as follows, or in the course of Delivery by United States Mail, first class postage, prepaid, as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California.

Dated: May 20, 2021

_____

Christopher Blake

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S265910**
Lower Court Case Number: **B305225**

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