**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

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| **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

# REPLY BRIEF OF PETITIONER C. L. ON THE MERITS.

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CAP- LA Independent Case System)

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ON APPEAL FROM THE SUPERIOR COURT,
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REPLY BRIEF OF PETITIONER C. L. ON THE MERITS.

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

Petitioner/Appellant CARLOS L hereby submits the following as reply brief on the merits and incorporates, as though fully set forth, his opening brief on the merits as well as his briefing in the Court of Appeals in this matter. The fact that petitioner may not respond to all of the points raised by respondent in its briefing is not a concession that respondent is correct as to those points but merely an indication that appellant is satisfied with the briefing he

presented on those issues in the opening brief on the merits as well as other briefing in this Court.

**INTRODUCTORY COMMENTS.**

In granting review in this case, 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?"

At page 25 of its brief, respondent acknowledges that this is the issue in this case. However, on the very next page, respondent attempts to "reframe" the issue to suit its own agenda. It states that:

> "The issue in the case at bar concerns what standard should be applied to assessing a juvenile court's error with respect to Penal Code section 2625 during a combined jurisdiction/disposition hearing." (Respondent's Brief on the Merits (RBM) at p. 26).

While section 2625 of the Penal Code plays an important role in this case, it is not the central focus of the case. Rather, the central focus of the case is the petitioner's right to due process in these dependency proceedings which ultimately resulted in his loss of his parental rights over two of his children – Christopher and his older sister Inez.[1] Due Process, both as understood by the Federal

[1] Contrary to respondent's assertion that this case only involves Christopher and not Inez, this Court identified the basic issue as to whether structural error occurred when the trial court denied appellant

Constitution and by the Constitution of this state, is at the heart of this case and section 2625 is but one part of it, albeit an important part.

Section 2625 is but one part of the California's Legislature efforts to assure that parents in dependency proceedings, especially those such as the one herein, where it is clear that termination of parental rights was going to be vigorously pursued by respondent, will be accorded due process. The notion that prisoners have no rights under the due process clause with respect to losing parental rights has long since been put to rest. There is no "go to prison, lose your child" provision in California law – respondent may devoutly wish that there was such a provision but there is none. (***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 medieval concept of civil death has long since been vanquished in California. (***DeLancie v. Superior Court*** (1983) 31 Cal.3d 865, 870). Prisoners retain all of their civil rights including the rights to participate in the lives of their children and to raise them as productive citizens of the state.

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his rights to the assistance and effective assistance of counsel at the jurisdiction and disposition hearing held in this case and at which the trial court made both of his children dependents of the court and refused him reunification services for his children largely based on its own error that appellant had failed to respond to the notice sent him by respondent DCFS that his children had been taken into custody. As noted at many, many points in his briefing, appellant/petitioner did respond to this notice and insisted he wanted to participate in the proceedings but it was the trial court that failed, for whatever reason, to honor his request. The error that this Court identified in its grant of review clearly affected both children, so both children are subjects of this proceeding.

## STANDARD OF REVIEW.

Both appellant/petitioner and respondent agree that 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; *see also,* ***Jose O. v. Superior Court*** (2008) 169 Cal.App.4th 703, 706). This Court recently affirmed this principle in ***People v. Lewis*** (2021) Cal.5th , S260598, Decided July 26, 2021, (Slip Opinion p. 7), This is extremely important in this case as it is so abundantly clear that there was error in this case – a failure to honor appellant's statutory and constitutional right to the assistance and the effective assistance of counsel in a proceeding at which the state seeks to terminate his parental rights over his children. The only issue is whether it was structural error. If it was structural error, and it was, then there is no dispute as to the appropriate resolution of the case – reversal and remand for appropriate proceedings.

## ARGUMENT

### I.

### THE CORE FACTS OF THIS CASE ARE UNDISPUTED.

Although respondent devotes much of its brief to a recitation of the facts, most of its recitation is simply irrelevant to the core issue identified by this Court – namely whether the trial court's

failure to appoint counsel for this incarcerated parent[2] and to proceed to adjudicate both his children as dependents of the court and to deny him all reunification services constitutes structural error requiring reversal of these orders and all subsequent orders including those terminating parental rights.

The essential facts of this case are worth setting forth again. The other facts, while interesting, are not particularly relevant to a proper resolution of the issues identified by this Court in its grant of review. These facts are:

(1) Petitioner's children were taken into custody largely as the result of the failure of their mother to properly care for them;

(2) At the time the children were taken into custody, respondent knew that appellant was incarcerated and always had the ability to track his location within the California Department of Corrections and Rehabilitation (CDCR);

(3) Respondent sent appellant a letter to appellant which he received advising him that dependency proceedings had been initiated regarding his children, Inez and Christopher;[3]

(4) Appellant/Petitioner timely responded to that letter and told respondent he objected to the proceedings and wanted to participate in them and, further, that any reasonable interpretation

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[2] Here, petitioner states that he is no longer in state prison but on parole. Respondent has been advised of this for some time and does not dispute that this is the case as well. Hence, it is not a subject for dispute.

[3] The actual letter was never made a part of the record but, for purposes of this appeal, appellant will presume that it advised appellant in a sufficiently clear manner of the nature of these proceedings and what they entailed.

of the letter would be that it included a request for the appointment of counsel to represent him (*C.f.*, ***In Re A. J.*** (2019) 44 Cal.App.5th 652 and cases cited therein);

(5) Respondent attached a copy petitioner's letter to the jurisdictional/disposition report that was filed with the court for the March 9, 2018, hearing as an exhibit, and made references to that letter at several points in the body of the report;

(6) The trial court stated it had read and considered this report at the combined jurisdiction/disposition hearing held on March 9, 2018, and stated the following:

> "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).

This was incorrect;

(7) Neither counsel for respondent DCFS nor counsel for the minors, both of whom were charged with the responsibility of reading the report corrected the trial court or otherwise pointed out that appellant had made contact with the Department;

(8) The trial court then adjudicated the petition, finding it to be true and proceeded to the disposition phase, making both Inez and Christopher dependents of the court and placing them in the custody and care of respondent;

(9) In that same hearing, the trial court denied appellant (and the mother of the children) all reunification services under various provisions of Welfare and Institutions Code section 361.5; and

(10) At no time, was appellant/petitioner ever represented by counsel (or anyone else for that matter) and at no time did he ever waive his right to counsel or his right to be present at the combined adjudication/disposition hearing.

The subsequent "appointment of counsel" on the eve of the hearing terminating appellant's parental rights, that counsel's failure to point out the failures cited above and the actual termination of parental rights over both children, while certainly interesting and important, do not absolve, in any fashion, the basic error of the trial court's decision to hold the adjudication/disposition hearing in derogation of appellant's due process rights to a fair hearing in these dependency/termination of parental rights proceedings.

## II.

## CERTAIN CORE LEGAL PRINCIPLES APPLICABLE TO THIS CASE ARE WITHOUT ANY POSSIBLE DISPUTE.

In addition to the undisputed facts discussed, *supra*, there are several legal principles that are beyond dispute in this case. First, and foremost, is that parents who face the loss of their children in dependency/termination of parental rights cases have rights under the due process clauses of both the Federal and State Constitutions to a fair hearing.

There can be little doubt that the Federal Constitution guarantees that the state cannot terminate a person's parental rights against their will without adhering to basic concepts of due process and fair play as guaranteed by the Fourteenth Amendment to the Constitution. This is the lesson of ***Stanley v. Illinois*** (1972)

405 U.S. 645 [92 S.Ct. 745, 31 L.Ed.2d 551]) – unmarried fathers are not presumptively unfit to raise a child. This is what ***Santosky v. Kramer*** (1982) 455 U.S. 745, 759 [102 S.Ct. 1388; 71 L.Ed.2d 509] has taught us – clear and convincing proof of parental unfitness must be adduced before rights can be terminated. (*See also*., ***In Re Angelia P.*** (1981) 28 Cal.3d 908, 919; *c.f.*, ***Cynthia D. v. Superior Court*** (1993) 5 Cal.4th 242, 257, *cert. denied sub nom.* ***Dobles v. San Diego County Department of Social Services*** (19940 510 U. S. 1178 [127 L.Ed.2d 567; 115 S.Ct. 122]).

These lessons have been reinforced by ***Lassiter v. Department of Social Services*** (1981) 452 U.S. 18, 31[101 S.Ct. 2153, 68L.Ed.2d 640] – due process requires appointment of counsel in termination cases in many, if not most, circumstances. Another case reinforcing this lesson is ***M. L. B. v. S. L. J.*** (1996) 519 U.S. 102, 124, 128 [117 S.Ct. 555, 1136 L.Ed.2d 473]) – indigent parents appealing the termination of their parental rights have the right to a free transcript on appeal.

Decisions of this Court applying the concepts of due process, both as understood under the Federal Constitution and this State's Constitution, are, perhaps, too numerous to mention. Just a few are ***In Re Laura F.*** (1983) 33 Cal.3d 826, 844; ***In Re Carmeleta B.*** (1978) 21 Cal.3d 482, 489; ***In Re Marilyn H.*** (1993) 5 Cal.4th 295, 303; and ***In Re A. R.*** (2021) 11 Cal.5th 234, 247 – right to the effective assistance of counsel.

Respondent does not deny, cannot deny, and petitioner suspects, will emphatically agree with these principles. It will not deny that, as a minimum, petitioner had a statutory right, if not a

constitutional right to the effective assistance of counsel in this case. Certainly, it may argue that ***Lassiter*** may not have mandated appointment of counsel in all termination cases but it does not and cannot deny that both Federal and State law now require the appointment of counsel as a matter of public policy in all such cases.[4]

Due process essentially has three very basic components in any case in which the State chooses to proceed against its citizens (or persons subject to its jurisdiction) and deprive them of certain very basic rights such as the right to life or liberty or other basic right that is protected by the constitution, and the right to raise one's children and maintain and protect one's family is one of those rights – ***Moore v. East Cleveland*** (1977) 431 U.S. 494, 499 [97 S.Ct. 1932, 1935, 52 L.Ed.2d 531]; ***Pierce v. Society of Sisters*** (1925) 268 U.S. 510, 534–535 [45 S.Ct. 571; 69 L.Ed. 670].

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[4] The reason may not be hard to fathom. While ***Lassiter*** may not have "required" appointment of counsel in all cases involving termination of parental rights, it clearly stated that appointment was required in some cases. What ***Lassiter*** did not do is try and draw a bright line as to when appointment of counsel was required and when it was merely "discretionary." In a rare burst of common sense, both the California Legislature and the Federal Congress agreed that drawing that bright line was an extremely difficult task (and would lead to a great deal of unnecessary litigation as to where it should exist) and that the better course of action was simply to mandate the appointment of counsel in all such cases as a matter of sound public policy. Appellant, in his opening brief, suggested that modern concepts of due process would elevate this common sense policy to the level of a constitutional mandate. Appellant remains convinced that this is correct even if respondent disagrees but respondent cannot deny that public policy mandates the appointment of counsel in all dependency cases, especially those that potentially involve the termination of parental rights.

The first of these is the right to notice of the proceedings. (***Mullane v. Central Hanover Bank & Trust Co.*** (1950) 339 U.S. 306 [94 L.Ed. 865, 70 S.Ct. 652]; ***In Re Andrew M.*** (2020) 46 Cal.App.5th 859, 867, fn. 4). Second is the right to confront the case that the State presents against you with the concomitant right to present one's own evidence. (***In Re Marriage of Carlsson*** (2008), 163 Cal.App.4th 281, 292-293; ***Kelly v. New West Federal Savings*** (1996) 49 Cal.App.4th 659, 677; ***In Re Kelly D.*** (2000) 82 Cal.App. 4th 433, 439, fn. 4; ***In Re James Q.*** (2000) 81 Cal.App.4th 255, 265-266). Third is the right to counsel and the effective assistance of counsel at all critical stages of the proceedings. (***In Re Kristin H.*** (1996) 46 Cal.App.4th 1635, 1660; ***In Re A. R.*** (2021) 11 Cal.5th 234 (***A. R.***); Welfare and Institutions Code section 317.5).

These three are like the three legs of a milking stool. If any one of the three legs is missing (or even loose), the milker cannot maintain his/her balance and will fall, usually knocking over the milk pail and the cow/goat or other animal will protest and usually give the milker a quick kick with her foot. The whole milking procedure will collapse. So, too, will the fairness of any procedure when the three legs of the due process stool are missing.

It is painfully obvious that one of the three legs of the due process milking stool was missing – the statutory, if not constitutional, right to counsel and the effective assistance of counsel. Respondent clearly does not dispute this. It only says, "So what? The process was still fair."

But, in reality, the other two legs were missing as well. In one sense, appellant/petitioner did receive notice of these proceedings.

Petitioner does not dispute that. But, even more indisputable is that the trial court ignored his response that he objected to the proceedings and wanted to participate in them. What good is notice if the trial court is going to ignore the response thereto? When the trial court ignores the clear response of the defendant and the complainant (here DCFS) does nothing to correct the trial court's ignorance/error, the leg of notice goes missing in action. When a trial court proceeds as though the respondent (here petitioner Lopez) had failed to respond to the notice given him even though that response is sitting on the judge's bench in plain sight, it is as though notice was never given.

Or, to put it another way, when the court and DCFS failed to acknowledge appellant's response to the notice sent him by DCFS, that negated the effect of the notice and the appellate court should proceed as though no notice had ever been given.[5]

This is a critical failure of the response of DCFS to this case. It never really acknowledged the trial court's egregious error in failing to read the report that it had diligently prepared. DCFS also

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[5] Appellant is quite aware that there are circumstances in which we may have to rely on a kind of fictitious notice such as publication in an obscure newspaper read by only a handful of people. It is not always possible to secure personal service on respondent parents in dependency cases. (*C.f.*, ***In Re Justice P.*** (2013) 123 Cal.App.4th 181, 189). Thus, it is sometimes necessary to rely upon a fictitious kind of notice such as publication. In this case, it is without dispute that respondent DCFS always knew where appellant was incarcerated so there was never any need to resort to fictions and it was always possible to have all parties before the court before decisions needed to be made regarding the future of Inez and Christopher. (*See*, *e.g.*, ***Ansley v. Superior Court*** (1975) 186 Cal.App.3d 477, 490-491 (***Ansley***); *see also*, ***In Re R. A.*** (2021) 61 Cal.App.5th 826.

has ignored its own failure. It failed to advise the trial court that petitioner Lopez's response was attached to the very report it had just prepared and with which it was charged with having the full knowledge of its contents. It is as though DCFS had kicked the notice leg out from underneath the due process milking stool.

The third leg is missing as well. Without notice, without the skilled assistance of competent counsel, petitioner had no way to defend against these allegations. Respondent DCFS may well argue he had no defense. It may well be that Clarence Gideon had no defense to the charges against him but that does not mean that he did not have the right to put the prosecution to proving the case against him – witnesses die, become unavailable, critical evidence is lost and the case disappears. Respondent cannot and will not deny that could be the case here.

Furthermore, to say there is no defense ignores the often uncanny ability of skilled defense counsel to find that defense. DCFS is stepping into the realm of mediums, fakirs and false prophets when it argues that there was no possible defense. It is nothing more than a "speculative inquiry into what might have occurred in an alternate universe." (***Gonzalez-Lopez v. United States*** (2006) 548 U. S. 140, 150 [126 S.Ct. 2557, 165 L.Ed.2d 409]; *see also*, ***In Re James F.*** (2008) 41 Cal.4th 901, 914 (***James F.***).).

Two other considerations are also worthy of note. While there were allegations in the petition filed by DCFS against Mr. Lopez, those allegations, in and of themselves, would not have justified any intervention by DCFS in this case; these children were taken into custody because of the misconduct of Valerie, their mother, and

appellant's wife. Had she properly taken care of the children, DCFS would not have intervened and DCFS cannot argue otherwise. The allegations against appellant were old; whether they were sufficiently stale as be without merit cannot be stated with any confidence as we lack any information about what petitioner's defense would have been. If he could demonstrate that these allegations were either baseless or stale, petitioner could argue that he was a non-offending but incarcerated parent and availed himself of ***In Re Isayah C.*** (2004) 118 Cal.App.4th 684, 700, holding that an incarcerated, non-offending presumed parent can take custody for the limited purpose of placing the child with a suitable relative or other person thus completely obviating the need for dependency proceedings altogether. If he could show he was a non-offending parent, there may have been other ways to defeat a forthcoming termination of parental rights. In any event, he could also argue that he had relatives who were suitable caregivers for Inez and Christopher; in fact, his relatives were caring for his other children under proceedings initiated by DCFS so we know he had family members who were suitable caregivers.[6] (***In Re S. D.*** (2002) 99 Cal.App.4th 1068, 1077-1079; Welfare and Institutions Code section 361.3). To put in bluntly, there is simply no way to determine what would have happened had the trial court honored appellant's statu-

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[6] Whether they might have been the choice of DCFS is not relevant. If they had the capability and willingness to do so, then they would have been suitable. The people caring for appellant's other children, even if they were unable to care for Inez and Christopher, may have been able to identify other relatives or non-related extended family members (NREFM) who could care for the two children.

tory/constitutional right[7] to the effective assistance of counsel rather than totally disregard it. In such cases, the only possible remedy is to deem the error to be structural in nature.

## III.

## THIS COURT'S FORAYS INTO THE CONCEPT OF STRUCTURAL ERROR AS IT APPLIES TO DEPENDENCY CASES SUPPORTS EXTENSION OF THE CONCEPT TO CASES SUCH AS THIS ONE WHERE THE TRIAL COURT FAILED TO HONOR APPELLANT'S RIGHT TO COUNSEL AND CONDUCTED THE ADJUDICATION AND DISPOSITION HEARINGS OUTSIDE OF HIS PRESENCE AND WITHOUT AN ATTORNEY.

This now brings the discussion to why this Court's three important forays into the concept of structural error as it applies to dependency proceedings strongly support its application to cases such as this one.[8]

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[7] Here, petitioner notes that DCFS really makes no effort to argue that ***Lassiter*** would not have required that counsel be appointed in this case. This is so for two basic reasons – first, as appellant noted in his opening brief on the merits, there is a real question of whether ***Lassiter*** correctly interpreted the due process clause and, two, more importantly, ***Lassiter*** has effectively been overruled by both the United States Congress and by the California Legislature when they passed laws mandating the appointment of counsel in all cases involving the possible termination of parental rights and/or dependency cases.

[8] As appellant noted in his opening brief, a number of decisions of the various District Courts of Appeal also found certain procedural errors in dependency appeals to be structural in nature or, rather simply reversed the findings of the trial court without any real discussion of whether the error was "prejudicial" or not. Some of these included ***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 – denying a parent a contested hearing on an issue on which the agency bore the burden of proof – or even requiring an offer of proof of same – ***In Re James Q.*** (2000) 81 Cal.App.4th 255,

In his opening brief, appellant lightly touched on two of them noting that there were very significant procedural differences between them and the instant case. Those cases were ***James F.***, *supra*, and ***In Re Celine R.*** (2003) 31 Cal.4th 45. Respondent relies heavily upon them so it is incumbent upon appellant to discuss them in further detail. What is important to note is that neither case involved a complete or total failure of the application of due process to the facts of those cases.

***James F.*** involved a situation in which there was a substantial doubt about the ability of the father of the minor to participate in the proceedings due to mental instability/illness. However, the

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265-266. Another example is ***In Re M. M.*** (2015) 236 Cal.App.4th 955, 964-965 – denying a parent the right to testify. Most of the time the appellate courts did not use the term "structural error" but simply reversed without demanding a showing of prejudice. DCFS makes much of the appellate court's failure to use the magic words, "structural error," but what else can one call it when the appellate court reverses the trial court for procedural errors without any discussion of prejudice? Structural error is the only term that comes to mind. Or, as an English poet of some minor consequence noted, "a rose by any other name would smell as sweet."

Appellant also cited a number of true civil cases in which the concept of structural error was applied in substance if not in actual name. Appellant believes his original discussion of those cases in both the petition for review and the opening brief on the merits was sufficient and nothing more need be added. Appellant will, however, make a correction. One case he did cite was ***Caldwell v. Caldwell*** (1962) 204 Cal.App.2d 819, 821, in which the denial of a wife's right to testify about the educational needs of her minor daughter in a child support case was deemed reversible without a showing of prejudice. Counsel gave an incorrect cite stating it appeared at "204 Cal.App.4th 819." The cite above is the correct one. Present counsel apologizes for the error but notes that, with a little imagination, opposing counsel could have easily found the case.

father was personally present throughout the proceedings and represented by counsel throughout the proceedings as well. It was without dispute that the procedures used to appoint a guardian *ad litem* for the father were deeply flawed – indeed counsel for the minor openly questioned them in the trial court. (*Id.* at 905-906).

This Court was understandably reluctant to declare the errors in the appointment of the guardian *ad litem* to be structural error and cautioned against the wholesale importation of that concept, developed originally for criminal law, into dependency law noting the considerable differences between the two. However, as appellant noted in his opening brief on the merits, this Court never said that the concept could or should not be applied to dependency proceedings in an appropriate case.

What is important to note is that the parent in ***James F.*** was present for all of the proceedings; he was represented by counsel throughout the proceedings; other parties (notably minor's counsel) were keenly aware of the errors and sought to prevent them and the error did not seriously impact the ability of the parent's counsel to confront the evidence against his client or to present relevant evidence on behalf of his client. In other words, there was nothing resembling a complete breakdown of due process in that case such as occurred in this case.

In this case, appellant was not present for the adjudication/disposition hearing at which his children were made dependents and he was deprived of any opportunity to reunify with them; he was not represented by counsel; he had no opportunity to challenge the evidence against him or present evidence on his own

behalf. As noted, the trial court blithely ignored his response and no one else stood up for him to question the legitimacy of the proceedings. In this case, there was a complete breakdown of the system and due process was totally lacking from the adjudication and disposition hearing thus irreparably tainting all subsequent proceedings.

In other words, in ***James F.***, there were solid and substantial efforts to provide the parent with all of the elements of due process and those efforts largely succeeded even though there were fairly substantial errors. In this case, there were no efforts to provide appellant with due process and the errors were not just substantial, they went to the very heart of due process – the right to be heard, the right to counsel, the right to confront adverse evidence and to present favorable evidence, and even the right to be present.

***Celine R.*** did not involve the due process rights of the parents; rather, it involved the due process rights of the minors. While the minors are parties to the dependency law suit – Welfare and Institutions Code 317.5, subdivision (b) – they are also the subject of the lawsuit and their welfare is the principal goal. The issue in that case was whether the minors, who were half siblings, were entitled to separate counsel as a matter of due process in the same manner that co-defendants in a criminal case (or even parents in a dependency case) were automatically entitled to separate counsel.

This Court carefully noted that, in dependency cases, the interests of the minors (even if they are half-siblings) are almost always congruent. (***In Re Celine R.***, 31 Cal.4th at 54-55). In

contrast, it is to be expected that the interests of co-defendants in a criminal case as well as parents in a dependency case are almost always not congruent. It is to be expected that one parent will likely throw the other parent "under the bus" and then drive the bus several times over the other parent's supine body which is why due process automatically requires different counsel for the parents as well as different counsel for co-defendants in criminal cases.

In contrast, the interests of siblings in a dependency case are very frequently congruent and the appointment of separate attorneys for each minor would usually result in unwarranted delays, duplication of effort, waste of scarce public resources and so on. (*Id.,* at 55-56). In any event, the minors in that case did have counsel. Furthermore, it appears as though the trial court (and the other parties, including the parents) were aware of the potential for conflicts between the interests of the minor and went to take great pains to avoid any problems or to resolve them in a fair manner for all of the minors concerned. At no time does it appear that the minors (or any of them) were unrepresented or that their views were not presented to the trial court; they were all able to respond to the evidence and to present their own evidence. Again, ***Celine R.*** is an example of where very significant efforts were made to preserve all of the due process rights of the participants to the proceedings; error may have occurred (and this Court really did not find that there was any error but merely assumed, *arguendo*, that there was error), but with all of the other efforts to assure due process, the error could be considered harmless.

These two cases involve instances in which there was a strong and concerted effort to comply with due process; both involved situations where the parents/parties did have counsel, were present for the hearings, had the ability to challenge adverse evidence and present their own evidence. In this case, those efforts were sadly lacking and undermined by both the trial court and the attorneys for the other parties, especially respondent. Comparing ***Celine R.*** and ***James F.*** to this case is not comparing apples and oranges but, more likely, trying to compare apples to potatoes.

The third case that respondent DCFS tries to employ to "bolster" its position is ***In Re Jesusa V.*** (2004) 32 Cal.4th 588. Appellant/petitioner discussed this case at length in his opening brief on the merits as well as his petition for review. It would be unduly repetitious to repeat that analyis again. ***Jesusa V.*** is currently this Court's most comprehensive discussion of Penal Code section 2625 governing the rights of incarcerated parents to participate in dependency/termination of parental rights hearings. Respondent DCFS may think section 2625 is only a "statutory" enactment with no constitutional basis; however, it is wrong. Rather, it is a statutory embodiment of certain basic constitutional rights and provides a framework for their implementation.[9]

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[9] In one sense, it is not unlike Penal Code section 1538.5. That is a statutory embodiment of a constitutional right to suppress evidence seized in violation of the Fourth Amendment rights against unlawful search and seizure. No one would seriously argue that it lacks a firm foundation in the Fourth Amendment. So, too, no one can argue that section 2625 lacks a firm foundation in the due process clause of the Fourteenth Amendment. The fact that a statute is written to protect and implement a constitutional right does not reduce the right to a mere

But the key element of the ***Jesusa V.*** case is that it was a dispute between two men regarding paternity – one was incarcerated and one was not. Appellant/petitioner readily conceded that the incarcerated "father" did not have a right to be personally present at the proceedings involving the resolution of his paternity status but only the right to be represented which, of course, he was. Once he lost his status as a "presumed father" of the minor in question, he had no rights whatsoever to participate in any further proceedings involving the minor as he was no longer her father in any legal sense of the term.[10]

In its discussion of ***Jesusa V.***, DCFS pointedly glides over the fact that much of the discussion of section 2625 in that case was unnecessary dicta. More importantly, it failed to acknowledge that there was a real attempt to comply with due process in that case – the incarcerated parent clearly had notice, the trial court and the social services agency honored the response of the incarcerated parent, the parent had the assistance (and effective asssistance at that) of counsel, who fully argued the case and who had full access to all of the evidence being marshaled against his client and had full opportunity to bring any and all evidence favorable to the incarcerated parent's position.

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statutory right but emphasizes just how important the constitutional right at stake is.

[10] A right to appeal, yes. But that is fundamentally different from a right to insist in participation in further proceedings in the trial court absent a ruling from the appellate courts that the decision depriving him of his status as a "presumed father" was erroneous.

In other words, ***Jesusa V.*** involved a situation where appellant was accorded many, if not almost all, of the commonly recognized attributes of due process.[11] In this case, appellant was accorded none of them when the court made his children dependents of the court and denied him all reunification services. He was denied the right to counsel; he was denied the right to confront the evidence against him; he was denied the opportunity to present his own evidence. Again, the portrait that is presented in ***Jesusa V.*** is one that shows a strong and conscientious attempt to meet the exacting standards of due process in stark contrast to this case where there was none.

Again, appellant is not stating that all failures to comply with section 2625 will necessarily constitute structural error. It will largely depend on what else occurred – were there other errors?

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[11] Enmeshed in DCFS's discussion of ***Jesusa V.*** is a discussion of ***In Re Marcos G.*** (2010) 182 Cal.App.4th 369. That case is clearly distinguishable from the case at bar, as it, too, largely involved a paternity hearing that was ancillary to the dependency proceedings. But far more importantly and something respondent does not acknowledge but which was quite important to the Court of Appeal, was that there was a very long history of efforts made by the social workers to contact the incarcerated father and send him notices of the pendency of the hearing and he declined to respond to at least four or five such notices including faxes sent to the prison and letters/notices sent to him. (*Id.*, at 388-389). Respondent sent only one notice to appellant **and he replied but was ignored** not only by DCFS but by the trial court as well. That makes all the difference. As the Court in ***Marcos G.***, noted, there was a long history of attempts made by the social workers in that case to locate the father but he steadfastly refused to cooperate until the very end. Here, appellant replied to the notice, requested to be present but was grandly ignored in much the same fashion as haughty French Waiters reportedly ignore American tourists. ***Marcos G.*** is simply not applicable to this case.

What role did respondent play in the fiasco in the trial court – passive witness to a train wreck or active participant in throwing the switch? Here, respondent knew that appellant wanted to participate in the adjudication and disposition hearings – not only had it sent him notice of the hearings but had received a positive response from him and included that response in its report. Yet it kept silent in the face of the trial court's egregious error in refusing to acknowledge the response. DCFS had the duty to assure that due process occurred in this case; it was asleep and cannot now complain that it should be excused from its own errors.

Obviously, the trial court's role in this fiasco must be considered. DCFS basically tap dances around the trial court's failures; it acknowledges them only grudgingly yet they play a role that is center stage in this case. No analysis of due process in this case is complete without a full appreciation of the trial court's error in not reading the report that sat on its desk and which contained appellant's response. There can be no justification or explanation for the trial court's error. It resulted in a total collapse of due process at the adjudication and disposition hearings in this case and irreparably tainted all future proceedings in this case. DCFS makes no attempt to justify or defend the court's actions; they are indefensible. All that can be done is to make amends for them and start this case all over again with full attention being paid to the concepts of due process throughout the proceedings.

## IV.

## THIS COURT'S RECENT DECISIONS EMPHASIZE THE NEED FOR STRICT COMPLIANCE WITH FEDERAL AND STATE NOTIONS OF DUE PROCESS IN ALL DEPENDENCY PROCEEDINGS.

In recent months, this Court has shown how very important it is to comply with the concept of due process in dependency cases and to protect both the rights of the child ***and their parents.*** The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (***Troxel v. Granville*** (2000) 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49).

Nearly forty years ago, the Court of Appeal, in ***Ansley*** commented that:

> "[I]t is implicit in the juvenile dependency statutes that **it is always in the best interests of a minor to have a dependency adjudication based upon all material facts and circumstances and the participation of all interested parties entitled to notice.**" (*Id.* at 490-491, emphasis added).

(*Accord,* ***In Re R. A.***, *supra*, 61 Cal.App.5th at 837). In other words, every effort must be made to assure the presence and participation of the parents in any dependency proceeding especially the crucial decisions of whether to make the child a dependent *ab initio* and whether to provide the parents reunification services. DCFS has made no attempt to justify, excuse or explain away the failures to have appellant participate in these critical decisions.

In ***A. R.***, *supra* 11 Cal.5th at 234, this Court discussed the importance of competent counsel and the duties of counsel in perfecting an appeal of adverse decisions in a dependency court. This Court determined that due process required giving parents an opportunity to have their appeals heard on the merits if their counsel failed to follow orders to timely seek appellate review provided the parent moved in a timely manner to correct the oversight by trial counsel. However much respondent may quibble that ***A. R.*** is not applicable to this case, it cannot deny that this Court found that concepts of due process clearly govern the role that counsel (and competent counsel) play in dependency proceedings. Very often, errors in not appointing counsel (or delaying the appointment of counsel) are evaluated without consideration being given to the actual merits of the case. (***In Re J. P.*** (2017) 15 Cal.App.5th 789, 805, Baker J., concurring).

***In Re Caden C.*** (2021) 11 Cal.5th 614 also emphasizes the importance of due process, particularly in the selection of a permanent plan for the minor by emphasizing the child's rights to have his/her relationship with his parents properly evaluated in light of all circumstances and not to place undue emphasis on the fact that the parent and child will never be reunited as that may violate the rights of due process of both parent and child. (*See also,* ***In Re B. D.*** (2021) Cal.App.5th , D078014, Ordered Published 7/27/21).

Another case in which this Court has recently granted review, ***In Re D. P.***, Review Granted May 26, 2021, as S267429, also illustrates the critical role of due process in dependency proceedings. In that case this court will consider whether a parent has a due

process right to challenge a jurisdictional finding that might be technically moot when such finding will likely (and unnecessarily) stigmatize the parent in the future or be improperly placed on the Child Abuse Central Index. (Docket S267429). Again, while the issues in ***D. P.*** are considerably different from those involved in this case, both cases involve the importance of due process as it relates to dependency proceedings.

In this case, 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 children especially where, as here, the state has intervened to involuntarily remove them from the custody of the parents and seeks to sever all legal times between parent and child and to place the children for adoption.

Due process is an integral part of the dependency scheme and structural error is a critical component of due process. It may be that structural error will operate in a different manner in dependency cases than it does in criminal cases. (***James F.***, *supra*). But it still has a critical role to play there will be times that the concept must be invoked. This is one such time when there has been a total failure to comply with appellant's rights to counsel, his right to effective counsel and the right to present his evidence and to challenge the state's evidence.

## V.

## CONCLUSION.

Appellant recognizes that he is not entitled to a "perfect" trial as such an animal does not exist – he is entitled to a "fair trial." (***McDonough Power Equipment, Inc., v. Greenwood*** (1984) 464 U.S. 548, 553 [104 S.Ct. 845; 78 L.Ed2d 663]; ***People v. Woodruff*** (2018) 5 Cal.5th 697, 768). But this case, there was a complete breakdown in the process. Appellant was denied the right to counsel at critical phases of the proceedings; he was denied his right to be present at these critical phases of the proceedings; the trial court totally ignored his response and objections to the proceedings and his desire to participate in the proceedings.[12]

There was not even the semblance of any attempt at the early, critical stages of these proceedings to accord appellant due process and fair play. It was marred by a clear instance of judicial negligence in failing to read a critical report that included a letter from appellant asserting his rights. That failure, that negligence under-

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[12] Respondent DCFS tries to suggest that appellant's "participation" in the late stages of these proceedings and that he had counsel by his side somehow excuses the earlier errors. They do not; they completely ignore the fact that appellant argued, at length, in the Court of Appeal, that counsel's performance was woefully incompetent and well below the standards to be expected. The Court of Appeal chose not to rule on those issues finding them to be unnecessary once it determined that the errors that are the subject of this petition were "harmless." Appellant does not wish to rehash counsel's deficiencies as they are well set forth in the pleadings in the Court of Appeal. More importantly, it is appellant's position that the errors that are the subject of this appeal are sufficiently grave that they require reversal *per se* and require reversal of all subsequent orders including those terminating parental rights over both children.

mined whatever authority the trial court had in this case and no amount of complaints about the "need for permanency" can change that. Both these children and appellant have a right to expect that important decisions such as the ones made in this case will be made in a manner that was not only fair in actuality but fair in appearance. Decisions made without any effort to have the parent represented by competent counsel and without his presence and greatly aggravated by trial court misconduct can only be governed by one standard of error – the standard of reversible *per se*.

One expects that a total failure to comply with section 2625 of the Penal Code, especially when combined with clear judicial misconduct/negligence in ignoring a parent's request to participate in the proceedings will be rare but they will happen. This case will stand as a reminder to all bench officers to be very careful in dealing with the rights of incarcerated parents and to carefully examine all documents and reports before them. That is an important lesson that needs to be taught and learned. 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: July 28, 2021

CHRISTOPHER BLAKE,
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**CERTIFICATE OF NUMBER OF WORDS IN BRIEF.**

I hereby certify that this brief consists of 7,728 words, including footnotes, as counted in the word count function of WordPerfect , the computer program used to prepare this brief.

Dated: July 28, 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

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Executed at San Diego, California.

Dated: July 28, 2021

_____

Christopher Blake

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**STATE OF CALIFORNIA**
Supreme Court of California

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