

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

<p>IN RE C. L., A Person Coming under the Juvenile Court Law</p>
<p>LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent</p>
<p>v.</p>
<p>C. L., Respondent and Petitioner.</p>

Supreme Court Case No.:  
S265910

Court of Appeal, Second  
Appellate District, Division  
One, Case No.: B305225

Los Angeles County Superior  
Court, case No:  
17CCJP02800 A&B

ON APPEAL FROM THE SUPERIOR COURT,  
LOS ANGELES COUNTY  
HONORABLE MARGUERITE DOWNING, JUDGE

<p><b>APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED BRIEF IN SUPPORT OF RESPONDENT AND PETITIONER, C.L.</b></p>
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**IN THE SUPREME COURT  
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LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent  v.  C. L., Respondent and Petitioner.	Court of Appeal, Second Appellate District, Division One, Case No.: B305225  Los Angeles County Superior Court, case No: 17CCJP02800 A&B

**APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE**

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

California Appellate Defense Counsel (hereafter “CADC”) hereby requests leave to file the attached brief as amicus curiae in support of respondent and petitioner in this matter, C.L. (Calif. Rules of Court, Rule 8.520(f).) This application is timely made as it is within 30 days of the date Respondent and Petitioner filed his Reply Brief, on July 28, 2021. (Calif. Rules of Court, Rule 8.520(f)(2).)

## IDENTITY OF AMICUS CURIAE

California Appellate Defense Counsel is a statewide non-profit organization comprised of approximately 400 appellate attorneys who regularly represent indigent appellants in criminal, juvenile, dependency, and civil commitment matters in the California Supreme Court and Courts of Appeal. Our members handle a significant majority of the state's appointed non-capital criminal, dependency, and civil commitment appeals in every Appellate District in the state. CADC is administered by a Board of Directors, made up of appointed appellate counsel practicing within the state of California. CADC promotes quality representation of children and adults by providing training and education for attorneys. It also runs an Amicus Curiae Program through which the organization participates in Supreme Court cases and appellate cases of particular importance to appointed appellate counsel.

Members who handle appeals from dependency hearings participate in CADC's forums and chapters devoted to the discussion of issues important in the dependency law field. CADC members focus on identifying and arguing errors occurring in bench and jury trials to ensure the due process rights of indigent parties. Appeals play an important role in maintaining the legitimacy of the court system by ensuring accurate findings are made in the trial courts.

The time the authors spent on this case was donated on a pro bono basis. The individuals who authored the proposed brief are Suzanne M. Nicholson, a member of the CADC Board of

Directors and Dependency Committee, and Nicholas J. Mazanec, member of the CADC Dependency Committee.

### INTEREST OF AMICUS CURIAE

CADC's members are appointed counsel for indigent appellants. As such, the members and the organization have an interest in any issue that may prevent appellants from receiving competent and timely representation in the juvenile court, particularly issues that are structural error.

In the current case, the incarcerated parent was not present during the jurisdiction and disposition hearings. Unfortunately, this is a frequent occurrence due to transportation challenges, conditions of confinement, and other factors that prevent parents from exercising their right to be present under Penal Code section 2625. However, in this case, the juvenile court did not appoint an attorney for the incarcerated parent. Even when not present, an incarcerated parent at least has minimal due process protections if appointed counsel in the juvenile court. (Welf. & Inst. Code, §§ 317 and 317.5.) Without his appearance in juvenile court or competent and timely representation, the incarcerated parent was denied reunification services in the present case. This undermines the constitutional and statutory scheme of procedural protections to prevent unwarranted removal of children and termination of parental rights. (See, *In re Marilyn H.* (1993) 5 Cal.4th 295; *In re Henry V.* (2004) 119 Cal.App.4th 522; *In re Caden C.* (2021) 11 Cal.5th 614.)

The necessity of appointed counsel to ensure due process rights of indigent parties, and the structural error that occurs should counsel not be appointed for an absent incarcerated parent who did not file a waiver, is of the utmost interest to CADC members and their clients.

## CONCLUSION

CADC therefore respectfully requests leave to file the attached PROPOSED BRIEF as amicus curiae in this matter.

Respectfully submitted,

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C. L., Respondent and Petitioner.	

**PROPOSED BRIEF IN SUPPORT OF RESPONDENT AND  
PETITIONER, C.L.**

INTRODUCTION

Amicus curiae California Appellate Defense Counsel (CADC) submit this brief in support of petitioner C.L. Our Legislature has enacted an extensive statutory scheme for dependency proceedings that provides numerous procedural protections above and beyond those required by the federal constitution. Among those is the indigent parent’s right to court-appointed counsel. Without counsel, a parent simply cannot effectively navigate the proceedings in which they find themselves and will inevitably be overwhelmed by the resources

available to the State (which include county counsel to represent its interests). Failure to provide counsel to an indigent parent at all stages of a case which may result in the termination of their fundamental parental rights is an error that renders the proceedings fundamentally unfair and is therefore “structural” in nature.

## ARGUMENT

### **I. CALIFORNIA PROVIDES GREATER DUE PROCESS PROTECTIONS TO INDIGENT PARENTS FACING THE TERMINATION OF THEIR PARENTAL RIGHTS THAN DOES THE FEDERAL CONSTITUTION.**

As petitioner has acknowledged in his briefs on the merits, the United States Supreme Court in *Lassiter v. Dep’t of Social Services* ((1981) 452 U.S. 18) narrowly held that whether due process requires the appointment of counsel for parents facing the termination of their parental rights may be decided on a case-by-case basis, under a “harmless error” type of analysis. Of course, *Lassiter* addressed the scope of due process afforded under the federal constitution. California has an extensive statutory scheme governing dependency proceedings that contain innumerable due process protections for parents, including a right to counsel for indigent parents whose children have been removed, and a separate right to competent counsel where counsel is provided.

An understanding of those protections, and why the right to counsel is critical to effectuate their purpose, is essential to understanding why the failure to appoint counsel should be

considered a “structural error” rather than one amenable to a harmless error standard of review.

**A. When a child is removed from parental custody, California’s dependency statutes provide significant procedural protections to parents in order to preserve their fundamental right to raise their own family and to prevent the erroneous termination of parental rights.**

It is well settled that dependency proceedings implicate fundamental constitutional rights. This Court has repeatedly recognized the importance of protecting the rights of parents to raise their own children. In the *Guardianship of Ann S.*, this Court quoted the United States Supreme Court:

‘The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child.... Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution [i.e., termination] of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.’ (*Santosky v. Kramer* [1982] 455 U.S. [745,] 753; see *In re Sade C.* (1996) 13 Cal.4th 952, 987–988.)”

(*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1135.)

California’s dependency statutes take the critical need for those procedural protections seriously. Dependency proceedings may ultimately result in the deprivation of a parent’s constitutional right to parent their children. (*Judith P. v. Superior Court* (2002) 102 Cal.App.4<sup>th</sup> 535, 545 [citing *Cynthia D.*

*v. Superior Court* (1993) 5 Cal.4<sup>th</sup> 242, 255].) But up until the time a case is set for permanency planning, reunification of the family is the primary objective of our dependency system. (*Ibid.*) Throughout the statutory framework for dependency proceedings, there are a vast array of “significant safeguards” designed to preserve the parent-child relationship and prevent the erroneous termination of parental rights. (*Ibid.*)

When a child is removed from parental custody, a petition to declare the child a dependent of the court must be filed and a detention hearing held within three days. (Welf. & Inst. Code, §§ 313, 315.) The child welfare agency bears the burden of demonstrating the need for detention and the juvenile court must determine whether reasonable efforts have been made to prevent the need to remove the child from parental custody. (Welf. & Inst. Code, § 319.) If removal is ordered, then reunification services must be provided “as soon as possible[.]” (*Ibid.*)

At the jurisdiction hearing the juvenile court must determine, by a preponderance of the evidence, whether the allegations of the petition are true. (Welf. & Inst. Code, § 355.) If the court takes jurisdiction over the child, then a disposition hearing will be held. There, the juvenile court may declare the child a dependent of the court but it cannot order removal of the child from parental custody unless it finds *by clear and convincing evidence* that removal is necessary to protect the child’s physical or emotional well-being, that the parent is unwilling to retain custody of the child, or, in the case of an incarcerated parent, that the child has been left without any

provision for support and the incarcerated parent cannot arrange for the child's care. (Welf. & Inst. Code, § 361, subd. (c).)

Again, if removal is ordered, reunification services are mandatory, absent *clear and convincing evidence* that certain statutorily-enumerated circumstances exist in which case reunification services may – or sometimes “shall” – be bypassed. (Welf. & Inst. Code, § 361.5, subds. (a), (b), (c).) Even if circumstances warranting a bypass of services exist, the parent can avoid a bypass of services by presenting clear and convincing evidence that reunification is in the best interest of the child. (Welf. & Inst. Code, § 361.5, subd. (c).) Incarcerated parents are also entitled to services unless there is clear and convincing evidence that services would be detrimental to the child. (Welf. & Inst. Code, § 361.5, subd. (e).) Those services can include phone calls, visitations, and even services to family members who might provide care for the child. (*Ibid.*)

Following disposition, if a child has been removed and services ordered, the juvenile court must hold review hearings every six months. (Welf. & Inst. Code, §§ 366.21, 366.22.) At each review hearing, there is a presumption the child will be returned to parental custody unless the child welfare agency is able to prove that return would be detrimental to the child and reasonable reunification services have been provided. (Welf. & Inst. Code, §§ 366.21, subds. (e) & (f), 366.22, subd. (a).) The social worker must file and provide parents with a report detailing services provided, progress made, the prognosis for the child's return, the agency's recommendations, and if return is not

recommended the specific reasons why return would be detrimental to the child. (Welf. & Inst. Code, § 366.21.)

Ultimately, if the child cannot be returned within the statutory time frames (typically six months for children under the age of three and twelve months for older children), then the juvenile court must terminate reunification services and set a hearing under section 366.26 to implement the child's permanent plan. (Welf. & Inst. Code, §§ 361.5, subd. (f); 366.21, subds. (e), (g); 366.22, subd. (a).)

Only at this point does the goal of the proceedings shift from reunification of the family to providing permanency and stability for the child. (*In re A.S.* (2018) 28 Cal.App.5<sup>th</sup> 131, 143.) The statutory preference is to terminate parental rights and order the child be placed for adoption. (Welf. & Inst. Code, § 366.26, subd. (b)(1).) The court must find, by clear and convincing evidence, that the child is likely to be adopted to terminate parental rights. (Welf. & Inst. Code, § 366.26, subd. (c).) If the child is adoptable, then the burden is on the parent to establish that the termination of parental rights would be detrimental to the child, based on one of only a few statutory exceptions. (*Ibid.*)

All of these safeguards, along with the parent's right to notice at each stage of the proceedings, serve to "constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents." (*Cynthia D.*, *supra*, 5 Cal.4<sup>th</sup> at p. 256.)

**B. The rights of an indigent parent to appointed counsel is fundamental to ensuring the parent obtains the benefit of the procedural protections put in place by our Legislature.**

Underlying all of the foregoing procedural safeguards is a parent's right to counsel. Absent a knowing and intelligent waiver of that right, parents who cannot afford an attorney are entitled to court-appointed counsel to represent them "at the initial detention hearing and at all subsequent proceedings...."<sup>1</sup> (Welf. & Inst. Code, § 317, subs. (b), (d).)

The availability of counsel at all stages of the dependency proceedings is critical to ensuring that the foregoing procedural protections are not hollow ones. "California dependency statutes strive to give parents 'a more level playing field' by requiring appointment of counsel when out-of-home care is recommended and at all subsequent hearings. [Citation.]" (*In re Kristin H.* (1996) 46 Cal.App.4<sup>th</sup> 1635, 1662.) The "gross disparity in power and resources" available to a parent confronting the removal of their child in relation to that of the State agency exercising the power of removal cannot be understated. (See *Lassiter v. Dep't of Social Services* (1981) 452 U.S. 18, 44, (dis. opn. of Blackmun, J.)) Even the majority in *Lassiter v. Dep't of Social Services* ((1981) 452 U.S. 18) recognized this basic truth. "The parents are likely to be people with little education, who have had uncommon difficult in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors

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<sup>1</sup> The child is also entitled to counsel to represent their interests. (Welf & Inst. Code, § 317, subd. (e).)

may combine to overwhelm an uncounseled parent is evident.... [Citations.] Thus, courts have generally held that the State must appoint counsel for indigent parents at termination proceedings. [Citations.]” (*Lassiter* at p. 30.)

In his dissenting opinion, Justice Blackmun went further and emphasized that the State not only has a wide array of public resources available to it, it always has counsel representing its interests. (*Id.* at p. 43, (dis. opn. of Blackmun, J.)) That attorney “has access to public records concerning the family and to professional social workers who are empowered to investigate the family situation and testify against the parent. [They] may also call upon experts.... And, of course, [they are] an expert in the legal standards and techniques employed” in such proceedings, including the examination of witnesses. (*Ibid.*) “Faced with a formal accusatory adjudication, with an adversary – the State – that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State’s ‘expertise,’ the defendant parent plainly is outstripped if he or she is without the assistance of “the guiding hand of counsel.” [Citations.]” (*Id.* at p. 46.) Without the aid of counsel “errors of fact or law in the State’s case may go unchallenged and uncorrected.” (*Ibid.*)

California not only mandates the appointment of counsel for indigent parents, it also specifically guarantees parents the right to *competent* counsel. (Welf. & Inst. Code, § 317.5.) Competent counsel must have adequate knowledge of the



statutory scheme governing dependency proceedings and complete a minimum amount of training in the area of juvenile dependency. (See Cal. Rules of Court, Rule 5.660(d); Cal. Rules of Prof. Conduct, Rule 3-110(B), (C).) The American Bar Association recommends counsel appointed for parents also be familiar with a number of other laws, including the Adoption and Safe Families Act, the Child Abuse Prevention Treatment Act, the Indian Child Welfare Act, the Interstate Compact on Placement of Children, and others. (See Seiser & Kumli, *Seiser & Kumli on California Juvenile Courts Practice and Procedure*, § 2.61[1][b] (Matthew Bender 2021).)

This right to competent counsel comes with a right to appellate review of claims of ineffective assistance of counsel. (*In re Kristin H.*, *supra*, 46 Cal.App.4<sup>th</sup> at pp. 1663-1664.) Parents may seek review by direct appeal or, more commonly, through a petition for a writ of habeas corpus. Review is essential because the denial of competent counsel can result in hearings that are fundamentally “unfair.” (See *Kristin H.* at p. 1662 [right to counsel ensures “fair and accurate adjudication[]”]; *Lassiter*, *supra*, 452 U.S. at p. 28 [“accurate and just results are most likely to be obtained through the equal contest of opposed interests....”].) Without the effective assistance of competent counsel, the right to counsel is a hollow one. (*Kristin H.* at p. 1659.)

**II. THE FAILURE TO APPOINT COUNSEL TO REPRESENT AN INDIGENT PARENT AT THE JURISDICTION AND DISPOSITION HEARINGS IS AN INHERENTLY PREJUDICIAL DUE PROCESS VIOLATION THAT IS NOT AMENABLE TO A HARMLESS ERROR ANALYSIS; THE ERROR IS STRUCTURAL.**

California has seen fit to require the appointment of counsel for indigent parents whose children have been detained and are subject to dependency proceedings in the juvenile court. (Welf. & Inst. Code, § 317.) As such, even if the United States Supreme Court has held that whether federal due process requires the appointment of counsel may be determined on a case-by-case, this Court is not constrained by that analysis. Given California's statutory mandate for the provision of counsel, and the goals underlying our dependency system, the better approach to a juvenile court's failure to abide by that directive is that posited by the dissent in *Lassiter*. The failure to provide counsel should be viewed as structural error because the error is prejudicial per se.

Counsel is essential to ensure that the proceedings are "fundamentally fair" and that parents are not overwhelmed by the grossly disproportionate resources (including counsel) of the State. The presence of counsel for the parent minimizes the risk of erroneous factual and legal findings that can lead to the termination of the parent's fundamental right to the care and custody of their child.

The failure to provide counsel at all is a fundamentally different type of error than the provision of *ineffective* assistance

by counsel. Once counsel is provided, it is well-settled that a parent must demonstrate not only that counsel failed to act competently, but that their ineffective assistance resulted in prejudice. It must be “reasonably probable” that the parent would have obtained a more favorable result had counsel provided competent representation. (*Kristin H., supra*, 46 Cal.App.4<sup>th</sup> at pp. 1667-1668, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) However, when no counsel is present at all, the inquiry into prejudice is necessarily a speculative one.

Notably, a parent seeking review of the representation provided by appointed counsel may do so by a petition for a writ of habeas corpus, in which the parent may present evidence *outside the record* to demonstrate not just that there was no satisfactory explanation for counsel’s failures, but how those failures likely prejudiced their case. (*In re Darlice C.* (2003) 105 Cal.App.4<sup>th</sup> 459, 463.) But where counsel has not been provided at all, there is not only no record of any “failures” of counsel, there is an inability to go outside the record to obtain evidence of how some hypothetical attorney might or might not have chosen to present the parent’s case. What counsel might or might not have done, and the reasons why, are pure speculation. Whether it is “reasonably probable” that any speculative actions or decisions of counsel would have led to a more favorable result is impossible to evaluate. If counsel is not appointed to represent the indigent parent’s interests, reviewing courts will be confronted with grossly lopsided records, reflecting fundamentally unfair proceedings, from which they will be unable to determine

whether the factual findings and legal conclusions made below were the correct ones.

CADC cannot possibly summarize all the possible ways a parent will be prejudiced by the absence of counsel. But of particular note are findings required to be made by clear and convincing evidence. The first hearing at which such evidence is required is the disposition hearing, where the juvenile court cannot order a child removed unless it finds clear and convincing evidence that removal is necessary to protect the child's physical or emotional well-being, or, as here, that an incarcerated parent cannot arrange for the care of his child. (Welf. & Inst. Code, § 361, subds. (c) and (d).) If the parent is deprived of counsel and the ability to critically evaluate the State's evidence, to present their own evidence, to cross-examine the State's witnesses, or to subpoena their own witnesses, then the State is not truly put to its burden; the State's evidence is the only evidence and it will be found to be "clear and convincing" not by any balancing of evidence or fact-finding exercise of the court, but by default. This particular removal finding (at disposition) has import far beyond that particular hearing, as subsequent review hearings only require a finding that return will be detrimental to the child by a preponderance of the evidence. (Welf. & Inst. Code, §§ 366.21, 366.22.)

The clear and convincing evidence required for a removal finding at disposition is a critical safeguard for parents who may end up facing termination of their parental rights. It is the first finding of detriment by clear and convincing evidence that is

constitutionally required to show a parent is “unfit” such that termination of parental rights may be considered. (*Cynthia D.*, *supra*, 5 Cal.4<sup>th</sup> at pp. 254-256.)

Another critical safeguard against the erroneous termination of parental rights is the requirement that reunification services be provided. As discussed above, to bypass services the juvenile court must find clear and convincing evidence that one of the statutory exceptions apply. (Welf. & Inst. Code, § 361.5, subs. (a), (b), (c).) But even if an exception is established, parents have an opportunity to demonstrate that reunification services would still be in the child’s best interests. (Welf. & Inst. Code, § 361.5, subd. (c).) Counsel is essential to help a parent navigate this procedure with its shifting burdens of proof, and ensure a fair hearing and accurate findings with respect to the provision of services

Petitioner has noted in his briefs on the merits that courts have applied structural error to statutory notice failures, failures to provide a parent with a copy of the dependency petition, the failure to provide a parent with a review hearing report, the failure to allow a parent a contested hearing, and most recently (with some limitations) the failure of counsel to timely file a notice of appeal. (See Brief of Petitioner on the Merits at 20-24.)

Where the courts have applied a structural error analysis, the parent was *entirely deprived* of the particular right at issue. For example, in *In re DeJohn B.* ((2000) 84 Cal.App.4<sup>th</sup> 100), the agency’s complete failure “even to make an effort” to provide mother with notice of the jurisdiction / disposition and six-month

review hearings denied her an essential procedural safeguard and required reversal of an order terminating parental rights. (*DeJohn B.* at pp. 103-104, 110.) *In re Jasmine G.* (2005) 127 Cal.App.4<sup>th</sup> 1109 explicitly held that a lack of notice affects “the framework within which the trial proceeds” and that where there is no attempt to provide notice at all, the error is structural in nature and requires reversal. (*Jasmine G.* at pp. 115-116.) The court in *Judith P. v. Superior Court* ((2002) 102 Cal.App.4<sup>th</sup> 535) reached the same conclusion where the agency failed to serve mother or her counsel with its twelve-month review report until the morning of the hearing and mother was denied a continuance. The court held this basic procedural protection (provision of the report which contained the agency’s evidence and recommendations) was essential to ensure that parent and counsel had time to prepare for a contested hearing and that the trier of fact be able to reliably make the required factual determinations. (*Judith P.* at pp. 548, 556-558.)

CADC recognize that the California constitution allows for reversals on appeal only where there has been a “miscarriage of justice.” (Cal. Const., art. VI, § 13.) Typically, this requires a harmless error standard of review on appeal. However, where there is a *complete loss* of a fundamental procedural protection that is essential to a fair hearing – as opposed to some deficiency in the procedure provided – it should be said that the error is “structural” in nature because it is prejudicial per se.

## CONCLUSION

If counsel is not appointed to an indigent parent who requests it, the proceedings are fundamentally unfair, and prejudice must be presumed. The error is a “structural” one. A harmless error analysis on a case-by-case basis not only renders the right to counsel “a hollow one,” it necessarily invites speculation and presents an unacceptable risk that parental rights may ultimately be erroneously terminated.

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to California Rules of Court, rules 8.520(c), 8.412(a)(2), and 8.204(c)(1), I certify that this brief contains 3459 words, excluding the application, cover, tables, and certificates, based on the word-count feature of Microsoft Word, my word-processing program.

Date: August 27, 2021

Respectfully submitted,  
/s/ Suzanne M. Nicholson  
Suzanne M. Nicholson



STATE OF CALIFORNIA  
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA  
Supreme Court of CaliforniaCase Name: **IN RE CHRISTOPHER L.**Case Number: **S265910**Lower Court Case Number: **B305225**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/27/2021

Date

/s/Nicholas Mazanec

Signature

Mazanec, Nicholas (235462)

Last Name, First Name (PNum)

Mazanec Law

Law Firm