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Supreme Court No:
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF Noah R., Minor.	Court of Appeal No. B312001 Superior Court Nos. 20CCJP06523, 20CCJP06523A
Los Angeles Department of Children and Family Services, Petitioner and Respondent, v. O.R., Objector and Appellant.	

PETITION FOR REVIEW

APPEAL FROM AN ORDER BY THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Hon. Martha Matthews, Judge

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By appointment of the Court of Appeal

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Petition for Review

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

O.R. (Father) petitions for review by this Supreme Court following the unpublished decision of the Court of Appeal, Division Five, filed on April 29, 2022. A copy of the opinion is attached to this petition as Appendix A.[1]

[1] This is cited to by the shorthand "Opn" and referred to within text as "The Opinion."

Introduction

Welfare and Institutions Code § 300, subd. (b)(1)[2] authorizes juvenile court jurisdiction based on parental substance abuse that places a child at substantial risk of serious physical harm; the Legislature did not specifically define the term *substance abuse*. Appellate courts have therefore taken it upon themselves to define the term. Some appellate courts have adopted the definition of a "substance abuse disorder" present in the current edition of the uniformly recognized Diagnostic and Statistical Manual of Mental Disorders (DSM). Other courts do not believe the Legislature intended to restrict juvenile courts to the medically recognized definition of substance abuse; these courts often do not provide their own definition beyond the facts in a particular case. The distinction between substance *use* and *abuse* tends to be outcome determinative in cases of young children (like in the present case). This is due to a judicially created doctrine, that does not appear in the statute, declaring a finding of substance abuse alone prima facie evidence of a substantial risk of serious physical harm to the child. Father asserts that this split in authority and overall confusing appellate guidance leads to wide disparity in the treatment of families and unnecessary state intervention and should be resolved by this Court.

In the present case, the petition sustained by the trial court authorizing juvenile court jurisdiction contained a single

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[2] Further statutory references will be to the California Welfare and Institutions Code unless otherwise noted.

allegation which concerned only Father's past recreational use of cocaine. Since his child's birth, Father had only ever used cocaine on the weekends that the child was in the exclusive care of Mother. (The parents amicably shared custody.) Father had never used in the presence of his child, had never allowed his child to have access to any dangerous substance, had never been under the influence of any substance while caring for his child, had no criminal history, no history of violent behavior, and there was no evidence cocaine had ever negatively impacted Father's schooling or employment. Father had also stopped using cocaine as soon as he was confronted by the social worker and had abstained from any substance use for four months by the time of the jurisdiction/disposition hearing.

Nevertheless, the trial court took jurisdiction over this child and went on to remove the child from Father's custody based solely on Father's past recreational use of cocaine outside the child's presence. The Second District, Division Five Court of Appeal then affirmed these findings and orders. Father asserts that the confusion in the case law led to this unjustified infringement on his constitutional parental rights. These orders were premised on subjective moral judgments, not scientifically based objective criteria, and not actual evidence of risk. Father requests review by this Supreme Court to rectify the injustice faced by him and his child and to save other families from unwarranted state intervention.

Issues Presented

1.) Section 300, subdivision (b)(1) authorizes juvenile court jurisdiction based on a substantial risk of serious physical harm posed by parental substance abuse. Concerning the term *substance abuse* did the Legislature intend juvenile courts to utilize the objective and scientifically based definition accepted by the medical and mental health professions? Or did the Legislature intend to adopt a separate and more expansive definition of "substance abuse" not recognized by medical or mental health professionals?

2.) Does recurrent use of an illicit substance qualify as "substance abuse" for the purposes of section 300, subdivision (b)(1) despite no evidence the use has ever negatively impacted the parent's ability to fulfill any major life obligation?

3.) Despite no indication of such in the statute itself, where a child is under the age of six does a finding of parental substance abuse (even if falling short of a medical diagnosis sufficient to warrant treatment) *alone* provide sufficient evidence to warrant juvenile court jurisdiction?

Necessity for Review

As explained, *infra,* Necessity for Review.I., pp. 11-19, granting review would resolve a long-standing split in authority the presence of which undermines the purpose of section 300 in providing objective criteria for state intervention. As explained, *infra,* Necessity for Review.II., pp. 20-27, these are important issue of statewide importance, the resolution of which could spare families from disparate state treatment and could avoid unnecessary expenditures of limited state resources.

I. The Legislature enacted section 300 in its current form to avoid disparate and subjective treatment of children and families and to provide a uniform approach to child welfare. Resolving the present confusion in case law regarding the term "substance abuse" will further this legislative goal.

A. *Drake M.* adopted the objective definition of substance abuse from the DSM. Father asserts this definition is in line with legislative intent and the overall purposes of section 300.

Section 300, subdivision (b)(1) was enacted in 1987, stating in relevant part that a child is within the jurisdiction of the juvenile court if:

> The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of…the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or *substance abuse*.

(Section 300, subdivision (b)(1) [emphasis added].) The Legislature did not specifically define "substance abuse" and "a review of the legislative history surrounding the revisions has revealed no specific discussion of how such term should be defined in practice." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764.)

In 2012, the Second District Division Three Court of Appeal addressed the question of what parental conduct qualifies as "substance abuse." (*In re Drake M., supra,* 211 Cal.App.4th at p.

765.) The *Drake M.* court noted that dependency cases had "varied widely in the kinds of parental actions labeled 'substance abuse.'" (*Ibid.*) Relying on a prior case concerning the termination of reunification services *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, the *Drake M.* court held that a finding of substance abuse for purposes of section 300, subdivision (b)(1), must be based on evidence sufficient to:

> (1) show that the parent had been diagnosed as having a current substance abuse problem by a medical professional, or
> (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the DSM-IV-TR.

(*Drake M., supra,* at p. 766.) The DSM-IV-TR defined substance abuse as manifesting by one or more of the following:

> (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)
> (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)
> (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)
> (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or

> exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights).

(*Id.* at p. 766 [citing DSM-IV-TR, at p. 199].)

The *Drake M.* court went on to find that the father in the instant case was not a substance abuser. (*Drake M., supra,* 211 Cal.App.4th at p. 767.) While the Department in *Drake M.* had been concerned with the father's use of medical marijuana, he had never failed to fulfill a major role obligation, and did not have recurrent substance-related legal problems. (*Ibid.*) There was no evidence the father had ever operated a vehicle under the influence or cared for his child while under the influence. (*Ibid.*) The father had never used less than four hours prior to assuming care of the child. (*Ibid.*) Therefore the court concluded the father was not a substance abuser and therefore jurisdiction was not authorized by section 300, subdivision (b)(1). (*Ibid.*)

Father asserts that the objective scientifically based definition adopted by *Drake M.* was intended by the Legislature and is consistent with the overall purpose of section 300. Section 300 was enacted in 1987 based upon the recommendations of a task force consisting of professionals across disciplines. (Sen. Select Com. on Children & Youth, Rep. on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan. 1988), List of Members [hereinafter "*Task Force*"].) The Task Force report states that section 300 was intended to replace "the current vague language [] with ten specific grounds for declaring a child a dependent of the court." (*Task Force,* p. ii.)

"The task force spent a great deal of time on the wording of each section and several legislative committees reviewed the specified language in lengthy hearings." (*Id.* at p. 4.) In summary, the Task Force intended to clearly define child abuse, clarify areas of uncertainty and prompt a uniform and objective response to allegations of child abuse and neglect. (*Id.* at p. iii.) In accomplishing this goal, it's clear the Task Force members were guided by objective standards and wished to avoid subjective moral judgments. (E.g., *Id.* at pp. 4 ["resolution of these value conflicts and difference in professional judgment, should not be left to the many individual workers"], 5 ["court intervention is not appropriate just because a social worker, teacher or child welfare professional thinks that a parent's behavior is somewhat undesirable"], 11 ["there is substantial clinical evidence…"].) Therefore, it can be presumed that the term "substance abuse" was specifically chosen to align with professional and diagnostic criteria.

In addition, the Legislature was of course aware that social workers would be the ones assessing the safety of children. The Task Force recognized that extensive training was necessary to accomplish its goal of objective and uniform enforcement. (*Task Force*, p. iii.) Social workers are ethically bound to "base practice on recognized knowledge, including empirically based knowledge, relevant to social work and social worker ethics." (National Association of Social Workers Code of Ethics, § 4.01 (Competence) < https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English/Social-Workers-Ethical-

Responsibilities-as-Professionals> [as of June 7, 2022].) Specifically, best practice for social workers in the field of child welfare is to utilize "evidence-based practice" which includes using "the best available scientific knowledge derived from randomized controlled outcome studies and meta-analyses of existing outcome studies." (NASW Standards for Social Work Practice in Child Welfare, pp. 10-11, 20-21 <https://www.socialworkers.org/LinkClick.aspx?fileticket=_FIu_UDcEac%3D&portalid=0#:~:text=A%20social%20worker%20in%20child,the%20NASW%20Code%20of%20Ethics> [as of June 7, 2022].) The task force and Legislature as a whole would have assumed that a trained social worker's assessment of whether a parent's substance use rose to the level of abuse, would align with empirical evidence and professionally recognized criteria.[3]

[3] The DSM-III was in effect at the time specifying Substance abuse to include: (1) compulsion to use a psychoactive drug; (2) loss of control over use of the drug; and (3) continued use despite adverse consequences. (Journal of Psychoactive Drugs, *Addiction Diagnostic Update: DSM-III-R Psychoactive Substance Use Disorders* (January 20, 2012) < https://www.tandfonline.com/doi/abs/10.1080/02791072.1987.10472426?journalCode=ujpd20#:~:text=In%20short%2C%20the%20DSM%2D111,continued%20use%20despite%20adverse%20consequences.> [as of June 7, 2022].)

B. *Christopher R.* disagreed with *Drake M.* holding that juvenile dependency courts are not confined to medically recognized criteria when determining whether a parent's substance use qualifies as abuse. Father asserts that this opinion and others that follow its reasoning contribute to confusion, disparate treatment of families and unnecessary expenditure of state resources.

In 2014, the Second District Division Seven disagreed with the definition of "substance abuse" proposed by *Drake M.* In *Christopher R.* the court noted that the DSM-IV definition recognized by the *Drake M.* court had been replaced by the DSM-V. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219 fn. 6.) The DSM-V continues to be the most common system for diagnosing psychiatric disorders and identifies 11 relevant criteria:

> Including cravings and urges to use the substance; spending a lot of time getting, using, or recovering from use of the substance; giving up important social, occupational or recreational activities because of substance use; and not managing to do what one should at work, home or school because of substance use. The presence of two or three of the 11 specified criteria indicates a mild substance use disorder; four or five indicate a moderate substance use disorder; and six or more a severe substance use disorder.

(*Ibid* [citing American Psychiatric Association, Highlights of Changes from DSM-IV-TR to DSM-5].) Father asserts this change in medical understanding of substance abuse does not in

any way undermine *Drake M.*'s reasoning in adopting the DSM's definition as the Legislature obviously intended for child welfare practice to evolve with scientific understanding. (NASW ethical code, § 4.01, subd. (b) [Social workers should "keep current with emerging knowledge relevant to social work. Social workers should routinely review the professional literature and participate in continuing education relevant to social work practice and social work ethics"].)[4]

The *Christopher R.* court recognized the definition of substance abuse utilized by medical and mental health professions "as a generally useful and workable definition of substance abuse for purposes of section 300, subdivision (b)." (*Christopher R., supra,* 225 Cal.App.4th at p. 1218.) The *Christopher R.* court went on to hold that juvenile courts were not bound by medical consensus though but did not provide an alternative definition beyond the facts of the case before it: cocaine use during pregnancy, past cocaine use, and failure to consistently test or enroll in a drug treatment program. (*Id.* at p. 1219.) The *Christopher R.* court concluded that the parent's conduct fell within the DSM-IV-TR definition but was sufficient to warrant court jurisdiction even if it did not. (*Ibid.*) The *Christopher R.* court identified no legislative material, scientific research or other support for its deviation from the medically accepted definition of substance abuse. The *Christopher R.* court

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[4] As noted, *supra,* fn 3, a separate version of the DSM was in effect at the time section 300 was enacted. Father asserts that Legislature intended Child Welfare practice to evolve with scientific understanding.

also identified no reason for juvenile dependency courts not to follow the DSM and identified no objective criteria for them to follow. (*Ibid.*)

Since *Drake M.* and *Christopher R.*, appellate courts have varied greatly in their treatment of jurisdictional allegations of "substance abuse." Some opinions have agreed with *Drake M.* (E.g., *In re Alexzander C.* (2017) 18 Cal.App.5th 438, 447 [applying the DSM-IV and DSM-V criteria to find that substantial evidence supported a finding that the father had a "methamphetamine abuse disorder"][5]; *In re L.C.* (2019) 38 Cal.App.5th 646, 652 [applying the DSM-IV criteria to find that the legal guardian's recreational methamphetamine use did not qualify as abuse].) Other opinions follow *Christopher R.* and often do not specify a particular definition of substance abuse beyond the facts of a particular case. (E.g., *In re K.B.* (2021) 59 Cal.App.5th 593, 601; *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 725.) Others decline to articulate a definition or identify whether their holding relies on *Drake M.* or *Christopher R.* (E.g., *In re L.W.* (2019) 32 Cal.App.5th 840, 850; *In re J.M.* (2019) 40 Cal.App.5th 913, 922; *In re J.A.* (2020) 47 Cal.App.5th 1036, 1047

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[5] Note that *In re Alexzander C., supra,* 18 Cal.App.5th at p. 447 mistakenly believed that *Christopher R.* had utilized the DSM-V criteria. In fact, *Christopher R.* had rejected the notion that the term "substance abuse" referenced the DSM or any medical definition. (*In re Christopher R., supra,* 225 Cal.App.4th at p. 1219 fn. 6.) Nevertheless, the Second District, Division Eight Court of Appeal found persuasive the notion that a parent's use must satisfy the medical definition of abuse to fall within section 300, subdivision (b)(1).

[recognizing disagreement between *Drake M.* and *Christopher R.* without identifying which definition its holding relied on].)

C. The present case exemplifies the confusion caused by this split in authority.

In the present case, the Opinion does not directly reject *Drake M.* but relies on *Christopher R.* in concluding that Father's recreational weekend use of cocaine qualified as "substance abuse" despite no evidence this use had ever negatively impacted his life or the life of his child. (Opn., p. 11.)[6] Father asserts that the confusion among appellate courts should be resolved to provide social workers and juvenile courts with objective criteria to determine whether parental substance use qualifies as abuse. Father asserts this would have avoided unnecessary court intervention in his case and would do so in future cases like his. If for whatever reason, a parent who uses any legal or illegal substance does not qualify as a substance abuser but poses a risk to his child for a separate reason then the social worker need only articulate that alternative reason.[7]

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[6] The Opinion's exact definition of substance abuse is not entirely clear as it also discusses *In re L.C., supra,* 38 Cal.App.5th 646 which relied on the DSM-V, an approach rejected by *Christopher R.* (Opn., pp. 11-12.)

[7] This reason could be related to substance use not qualifying as *abuse*, such as a parent who leaves dangerous substances within reach or is regularly inebriated in the child's presence. The social worker would simply have to identify the specified risk of harm as the statute requires opposed to relying on the parent's substance use alone. (§ 300, subd. (b)(1).)

II. Clarifying the definition of "substance abuse" is an issue of statewide importance. State intervention, concerning parental use of both legal and illegal substances, based on historically pervasive moral judgments opposed to the scientifically based standards the Legislature intended, has and will continue to subject families to unwarranted state intervention and subject the state to unnecessary expenditure of resources.

A. Historical perceptions of drug use not based in empirical evidence have contributed to the punitive treatment of substance use present within the field of child welfare.

The "War on Drugs" began over fifty years ago. (Korn, *Detoxing the Child Welfare System* (2016) 23 Virg. Journ. of Soc. Pol. & L. 293, 296 (*Detox*).) A presidential decree along with a media outcry set in motion a "trend toward policies that create punitive, enforcement-based anti-drug laws and programs." (*Id.* at p. 296.) Over the years, many critics have questioned the legitimacy of this "war" due to the lack of measured success. (*Id.* at p. 303.) As of 2015, the Drug Policy Alliance estimated "that the amount of money spent annually in the U.S. on the War on Drugs is more than $51 billion, and the number of Americans currently incarcerated in federal, state and local prisons and jails has doubled since 1990, giving the U.S. the highest incarceration rate in the world." (*Ibid.*) "State and federal drug policies disproportionately impact individuals living in poverty and people of color…African Americans serve virtually as much time for a drug offense as whites do for a violent offense." (*Ibid.*)

Incarceration has dramatically increased while drug use and also violence has not dissipated. (*Id.* at pp. 303-304.)

The effects of this "war" can clearly be seen in the field of child welfare across the nation. Also, it's important to note that like in the criminal context while racial bias cannot be definitively proven many experts have expressed concern that unconscious racial bias may lead to selective enforcement. (Cooper, *Racial Bias in American Foster Care: The National Debate* (2013) 97 Marq. L.R. 215, 229-40, 266-77 [discussing the evidence for and against racial bias in child welfare practice].) A dramatic doubling of the number of children entering foster care during the 1980s and 90s mirrored the era's increase in the prison population; the foster care population remains staggeringly high today. (*Detox,* pp. 309, 312.) "During this period, the rationale for increased child removal was largely based upon parental drug use that was seen as contributing to social ills, like sexual deviance, crime and poverty." (*Id.* at p. 308.) This was in keeping with a growing judgment of a stereotyped version of minority drug abusing parents raising their children in sub-par living conditions. (*Detox,* pp. 332-335 [discussing the media's depictions of drug abusing parents].) "[A]s lawmakers created new and harsh crimes for drug use and possession, many state child welfare systems expanded their civil definitions of child abuse and neglect to include substance abuse, escalating the removal of children from drug-using parents." (*Id.* at p. 309.)

In the recent years, many state and federal reforms have been adopted after activists questioned the often-inaccurate assumptions underpinning criminal drug policies. (*Id.* at p. 308.) Unfortunately, the majority of child welfare policy remains founded on outdated research. (*Id.* at p. 308.) These child welfare practices contribute to the unnecessary separation of families of color and those living in poverty, while costing state and federal governments millions of dollars. (*Id.* at p. 308; Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy* (2006) 3 Univ. of St. Thomas L.J. 462, 484-488 [discussing negative impacts from the treatment of poor women of color in child welfare in relation to drug use].)[8]

B. There exists little support for the widespread assumption that substance use or abuse alone places a child at risk of abuse or neglect.

In fact, there exists little support for "the assumption that a parent who uses an illegal drug or [even] who is dependent on

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[8] See also Children in Foster Care California, by Race/Ethnicity, < https://www.kidsdata.org/topic/22/foster-in-care-race/table#fmt=2495&loc=2,127,347,1763,331,348,336,171,321,345,357,332,324,369,358,362,360,337,327,364,356,217,353,328,354,323,352,320,339,334,365,343,330,367,344,355,366,368,265,349,361,4,273,59,370,326,333,322,341,338,350,342,329,325,359,351,363,340,335&tf=108&ch=7,11,8,10,9,44> [as of June 7, 2022]; Black Children Continue to Be Disproportionately Represented in Foster Care, <https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity> [as of June 7, 2022].)

such drugs is likely to abuse or neglect her child." (*Detox,* p. 320.)[9] Researchers have found that the "best evidence to date suggests that substance abusing parents pose no greater risk to their children than do parents of other children taken into child protective custody." (Mark. F. Testa & Brenda Smith, *Prevention and Drug Treatment*, 19 The Future Children 147, 147.) While some correlation may exist, "modern research suggests that concurrent problems such as depression, homelessness, or strained social relationship may be the source of potential neglect, rather than the substance abuse itself. For this reason, some experts question whether substance abuse alone is a legitimate reason for government interference." (Harris, *Child Abuse and Cannabis Use: How a Prima Facie Standard Mischaracterizes Parental Cannabis Consumption as Child Neglect* (2020) 41 Card. L.R. 2761, 2768 [and authorities therein] (*Prima Facie*).)

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[9] "As noted by *amici curiae* in support of Defendant-Petitioner in *New Jersey Division of Youth and Family Services v. A.L.*, the source most often cited for the claim that drug use increases the likelihood of abuse is a self-published report from the National Center on Addiction and Substance Abuse at Columbia University (CASA) entitled "No Safe Haven: Children of Substance-Abusing Parents. The report itself points out that those who were surveyed received grossly inadequate training in issues concerning drug use and addiction. Further, in the appendix, CASA acknowledges that, 'studies are inconsistent in defining whether substance involvement is the primary or causal reason for a parent's involvement with the child welfare system, or whether substance involvement is an ancillary or co-occurring problem." (*Detox,* p. 320.)

C. California stands out by requiring proof of harm beyond a finding of substance abuse alone. Father asserts that nevertheless case law has essentially re-written the statute to allow moral judgment opposed to scientifically based criteria to support unnecessary state intervention.

The majority of states fail to follow scientific understanding and require no nexus between parental drug use and an actual risk of harm to the child. (*Detox*, p. 311.) California stands out in its respect for parental rights and human dignity though, as one of nine states that by statute does require evidence of a nexus between parental substance abuse and actual risk to the child. (*Ibid*.)[10] Despite enactment in 1987, in the midst of the "war on drugs" the Legislature chose not to list substance abuse or substance use alone as a ground for jurisdiction. (§ 300.)

Father asserts that unfortunately in practice though section 300 has been effectively re-written by appellate courts. Father further asserts this twisting of the statute has been guided by historical repugnance for any and all drug use and not empirical or particularized evidence of risk. First, there is a uniformly accepted definition of substance abuse which Father asserts, *supra,* Necessity for Review, I.A., pp. 13-15, is in line with legislative intent. Nevertheless, many courts and practitioners claim that juvenile dependency courts need not be bound by this generalized scientific understanding. (E.g., *Christopher R., supra,* 225 Cal.App.4th at p. 1218.) Therefore, there is great confusion in what drug *use* does qualifies as *abuse*.

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[10] Note this assertion is based on the source material published in 2016 and therefore other states' laws may have changed since.

Father asserts many parents are as a result subjected to unwarranted state intervention based on moral judgments of their substance use and not evidence their conduct in fact poses a risk to their child.

While California stands out by requiring a nexus between substance abuse and potential harm by statute, appellate courts have entirely removed this requirement where the child is under the age of six. (For further discussion, see *infra,* Argument.II.A., pp. 36-38.) Regarding children over six, while cases consistent with the statute do require "more" than substance abuse to justify state intervention, the "more" varies and the entire analysis is complicated without clear guidance on what qualifies as substance abuse in the first place. (E.g., compare *Christopher R., supra,* 225 Cal.App.4th at p. 1217 [drug use while pregnant supports finding of risk]; *In re J.A.* (2020) 47 Cal.App.5th 1036, 1048 [use of medical marijuana while pregnant not evidence of risk]; Compare also *In re J.N.* (2010) 181 Cal.App.4th 1010, 1023 [one DUI which caused injury to the child is not sufficient to prove substance abuse or risk] with *In re M.R.* (2017) 8 Cal.App.5th 101, 108-09 [one DUI was sufficient]; see also *In re L.W., supra,* 32 Cal.App.5th 840 [cocaine use with one DUI arrest was sufficient to support jurisdiction].)

D. This subjective treatment of families contributes to unnecessary state intervention and prevents parents from receiving targeted assistance for the actual reasons their children may be at risk.

This subjective treatment of parents inevitably brings families into the juvenile dependency system that do not belong there. A study analyzing reports of parental substance abuse in juvenile dependency concluded that only one-fourth actually qualified as substance abusers as defined by the DSM-V. (*Detox,* p. 322.) This study is not specific to California but the results can offer guidance. Given that according to many appellate courts, the medical definition of substance abuse need not be utilized in the juvenile dependency context, presumably many parents are subjected to court intervention and court ordered treatment despite their substance use falling outside the definition of a substance abuse disorder.

Beyond unnecessary state intervention, an over-simplified reaction to any parental drug use can mask the actual needs of families. One study that looked specifically at characteristics of mothers in substance abuse treatment found that those who had been involved in the child welfare system had an overall lower level of addiction severity, but had more problems related to economic stability. (*Detox,* pp. 321-22.) For example, a child welfare worker may view a "family's sub-par living condition as being caused primarily by the mother's drug use" and mandate drug treatment when in fact the mother is not dependent on any substance and services tailored to the family's housing needs would more appropriately rectify any issues of neglect. (*Beaten by the system*, p. 485.) Finally, insurance coverage including medi-cal is often utilized to fund substance abuse treatment for parents; it is nonsensical to create a situation where the parent

faces a judicial finding of "substance abuse" that then does not satisfy the criterion for medical necessity in order for insurance to actually cover the costs of court ordered treatment.

As Father asserts, providing a clear scientifically based definition of "substance abuse" in line with legislative intent is an important issue of statewide importance. Mandating use of objective criteria accepted by the medical, mental health, and drug treatment professions will protect children and families against unnecessary state intervention. In addition, a uniform definition of "substance abuse" will ensure the provision of services focused on families' actual needs and avoid distraction by moral judgment of substance use that falls far short of chemical dependence necessitating treatment.

Statement of the Case and Facts

Except as otherwise noted herein, Father adopts for the purposes of this petition only, the background set forth in the Opinion of the Court of Appeal. (Opn., pp. 3-8.) Father notes that there are several omitted material and relevant facts identified by Father in his request for rehearing filed on May 10, 2022. This petition was denied on May 13, 2022. Where relevant Father will identify these within his argument.

Argument

I. The Opinion erred in concluding that Father's weekend use of cocaine outside the presence of this child qualified as substance abuse. Based on objective criteria widely accepted by medical professionals, Father's recreational use of cocaine does not qualify as abuse and does not justify state intervention into the custody of his child.

As explained, *infra,* Argument.I.A., pp. 28-33, the Opinion relied on *Christopher R.*, which holds that juvenile dependency courts are not bound by the DSM, to find that Father's weekend use of cocaine outside the presence of his child qualified as substance abuse. As explained, *infra,* Argument.I.B., pp. 33-35, the Opinion also makes an unreasonable inference that Father's part time (opposed to full time) employment was related to cocaine use despite no evidence in the record to support this conclusion.

A. The Opinion relies on *Christopher R.* which Father asserts was wrongly decided to conclude that his recreational use of cocaine qualified as abuse.

The Opinion relied on *Christopher R.* to conclude that Father's weekend use of cocaine qualified as substance abuse, stating specifically that longstanding use, "with intensive use on at least one known occasion, provides substantial evidence to support the trial court's finding of substance abuse." (Opn., p. 11 [citing *Christopher R., supra,* 225 Cal.App.4th 1210, 1218].) According to the Opinion, a parent need only use a substance consistently and use a lot of it at least once to qualify as *abuse*.

This is without any support in the statute, legislative history, or authority from any professional field.

The DSM-V provides recurrent use as a single criterion which only qualifies as even mild substance abuse disorder if present along with at least one or two other qualifying criterion. (DSM 5 Criteria for Substance Abuse Disorders, <https://www.verywellmind.com/dsm-5-criteria-for-substance-use-disorders-21926> [as of June 7, 2022].) The case of *L.C.* applied the DSM-V criteria to conclude that a legal guardian's methamphetamine use did not qualify as abuse. (*L.C., supra,* 38 Cal.App.5th at p. 654.) The *L.C.* court found that the record only supported that the legal guardian *used* methamphetamine and not that he *abused* methamphetamine where:

> [The legal guardian] used methamphetamine at most seven times between December 2017 and September 2018…he did not crave it and…never purchased it…he dropped [the child] off and picked her up from school every day, accompanied her to her medical and dental appointments, and never appeared under the influence when he undertook these caregiving tasks. Further, [the Department] presented *no* evidence that [the legal guardian] gave up social, occupational, or recreational activities because of his use of methamphetamine.

(*L.C., supra,* at p. 652.) The *L.C.* court went on to reject the Department's argument regarding the fact that the legal guardian initially lied about his methamphetamine use by pointing out that the legal guardian immediately took

responsibility for his use and modified his conduct when faced with losing the child, drug tested and enrolled in a class. (*Id.* at p. 653.)

Here, Father like the legal guardian in *L.C.* initially denied substance abuse. (CT 12.)[11] When confronted with a positive drug test Father explained that he had used cocaine the weekend prior for his birthday. (CT 13.) Father further explained that in the past he used cocaine with friends on the weekends that he did not have the child. (CT 66; see also CT 74.) Father also stated he drank alcohol when the child was not in his care and had used marijuana in the past but not currently. (CT 66.) "It was never serious, never out of control, [Father would] still go to work and school." (CT 66.)

Father never bought cocaine himself. (CT 66.) Father used once or twice every two weeks and stated he did not have an addiction. (CT 66.) Father had no criminal history. (CT 14.) The Department presented no evidence that substance use had ever negatively affected Father's employment. (CT 72.) Father had worked at a barber shop for four years, roughly twenty hours a week, until the COVID-19 pandemic shut down barber shops. (CT 72.) Father then began working at a warehouse in April 2020 and was working twenty hours a week. (CT 72.) In the past, Father had held a job cooking in a kitchen for three years. (CT 73.) Further, there had never been a child abuse referral based on

[11] To be clear, Father only ever denied substance *abuse* and not any use. (CT 12.)

Father's care of the child; there was one past referral and it concerned Mother only. (CT 59-60.)

Additionally, Father immediately stopped using cocaine after the L.A. Department of Children and Family Services (the Department) became involved with the family and Noah was placed in his care. (CT 13.) After being confronted with his positive test, Father "took responsibility for his actions [and stated he] will do what the Department is asking him to do." (CT 13; *see also* CT 74.) Father then tested negative for the Department on multiple occasions, missed only one test which was not made up (and had told the social worker in advance of the second missed test that he was unavailable that day due to work), and provided no further positive results. (CT 158.)[12]

The Department presented no witnesses who had ever seen Father provide less than adequate care for Noah. (See e.g., CT 63-64 [Mother's account], 69 [Maternal Uncle's account].) The Department presented no witnesses or other evidence showing Father had ever become violent under the influence of any substance or acted inappropriately in any way. The Department initially placed Noah in Father's care on November 19, 2020 and did not remove Noah until December 8, 2020. (CT 12-13.) There is no evidence that Father was ever under the influence of any

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[12] "[A] missed drug test, *without adequate justification*, is 'properly considered the equivalent of a positive test result.'" (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384.) Here, Father had specifically told the social worker he could not test Tuesdays, Wednesdays or Thursdays as he was unable to get away from work. Retaining employment in order to provide for one's basic needs is obviously an "adequate justification."

substances at any point during this time and the Department noted absolutely no concerns regarding the care Father provided during these nearly three weeks. (See CT 12-13.) The Department presented no evidence that Father ever presented under the influence at any visitation or any meeting with the social worker. (See e.g., CT 76, 158.) The Department presented no evidence that substance use negatively impacted Father's life in any way.

The Opinion distinguished the present case from *L.C.* because Father used cocaine the weekend prior to accepting custody of the child, he did not disclose his "substantial cocaine usage" and suggested his friends were funding his cocaine habit. (Opn., p. 12.) The Opinion appears to also infer that Father's part-time employment was due to his cocaine use and this amounted a "failure to fulfill major obligations." (Opn., p. 12.)

Father admitted he used cocaine and drank alcohol over the weekend of November 13, 2020. (CT 13.) Four days later, he took custody of the child. Father did not appear inebriated and was able to drive safely within sight of the social worker to his home and engage with her while she inspected the home. (CT 12.) The only reason the social worker became aware of Father's use was because he voluntarily submitted to a drug test. (CT 12.) Father tested positive for cocaine; according to the social worker cocaine can be detected four days later. (CT 78.) Nowhere in the record did the social worker or any party claim that there is any scientific evidence to suggest that a person remains inebriated or compromised in any way four days after use. In *Drake M.*, the

court reversed jurisdiction where the father had not used marijuana within four *hours* of assuming care of the infant; here, Father did not assume care for four *days*. (*In re Drake M., supra,* 211 Cal.App.4th at p. 764; CT 158.)

Regarding Father failing to admit cocaine use to the social worker, it's unclear how this fact distinguishes the present case from *L.C.* given that the legal guardian in *L.C.* also initially lied to the social worker. (*L.C., supra,* 38 Cal.App.5th at p. 653.) The *L.C.* court specifically rejected the Department's argument that the legal guardian's initial deception supported a conclusion he *abused* methamphetamine. (*Ibid.*) Again, like the legal guardian in *L.C.*, upon being confronted with his positive test Father immediately took responsibility, stopped use and cooperated with drug testing. (*Ibid*; CT 99.) The record also contradicts the Opinion's statement that Father relied on friends to financially support his cocaine use; Father clearly stated that he and his friends all "chipped in" for the drugs. (CT 66.)

B. The Opinion made an unreasonable inference that Father's employment status (part time versus full time) was related to his cocaine use despite absolutely no evidence in the record to support such an inference.

The Opinion also appears to make an inference that Father was *unable* to work full time on his own *because* of his cocaine habit. Father respectfully asserts this inference is entirely unsupported by the record and amounts to mere speculation. This theory was never articulated by the Department or any other

party and also not articulated by the trial court. Father explained to the social worker that his cocaine use "was never serious, never out of control, [Father would] still go to work and school." (CT 66.) As explained, *supra,* pp. 21-22, the Opinion's characterization of Father as an "out of work" barber is simply unfair as Father clearly explained to the social worker that he lost his job as a barber when COVID-19 shut down barber shops. (CT 72.) Then the Opinion appears to imply, without any supporting evidence, that Father's part time (opposed to full time) employment was due to his cocaine use. (Opn., p. 12.) There is simply no evidence to support this – there are many reasons that a person may choose to work part time opposed to full time ranging from familial obligations to the availability of work.[13]

"[W]hile substantial evidence may consist of inferences, such inferences must be a product of logic and reason and must rest on the evidence; *inferences that are the result of mere speculation or conjecture cannot support a finding*." (*In re David M.* (2017) 134 Cal.App.4th 822, 828.) Any inference that Father's employment status (part time opposed to full time) amounted to a failure to fulfill life obligations is nothing more than unsupported speculation and conjecture. (Opn., p. 12.) There is no evidence that Father's employer moved him down to part time status due to cocaine use. There is no evidence that Father's cocaine use rendered him incapable of working additional hours. There is no evidence Father even wanted more hours. There is no evidence

[13] It's unclear the exact time line but Father attended college completed barber school during his employment history. (CT 72, 73.)

Father failed to provide financially for his child. Along with countless other individuals, Father lost his job as a barber not due to cocaine use but due to a global pandemic that shuttered businesses requiring face to face contact. (CT 72.) The Opinion also appears to fault Father for living with his mother, something many people do to either support their relatives or to pool resources due to astronomical living costs. (Opn., p. 6 fn. 1.) Working part time or living with a parent into your twenties is not abnormal, and certainly not clear indication of substance *abuse*.

Father asserts that the conflicting, confusing, and entirely unclear direction to lower courts regarding the definition of substance abuse leads to the type of moral judgment present in the Opinion. Father further asserts that review is necessary to resolve this confusion and provide guidance on the utilization of objective and scientifically based criterion.

II. The Opinion erred in concluding that Father's cocaine use posed a substantial risk of serious physical harm to this child. The record is clear that Father never used or was under the influence of any substance while caring for this child.

The Opinion concludes Father's recreational use of cocaine qualifies as *abuse* essentially based on the sole reason that Father had *used* cocaine on multiple occasions. (Opn., p. 11.) Then Father's cocaine *use* that clearly falls outside the medical definition of a substance abuse disorder was used as prima facie evidence that he posed a substantial risk of serious physical

harm. As explained, *infra,* Argument.II.A., pp. 36-38, the Legislature did not intend even substance abuse to be prima facie evidence of risk and certainly did not intend Father's recreational use of cocaine to alleviate the Department from its burden to affirmatively prove his child was at risk in his care. As explained, *infra,* Argument.II.B., pp. 39-42, this record exemplifies the injustice in authorizing state intervention based on moral judgment of substance use opposed to objective scientifically based criteria. There is absolutely no evidence that Father ever posed a risk to his child and jurisdiction was not authorized by section 300, subdivision (b)(1) and the appellate court erred in concluding otherwise.

A. The Opinion's treatment of Father's recreational cocaine use as prima facie evidence that he posed a substantial risk of serious physical harm to his child is not consistent with the plain language of the statute.

Here, as explained *supra,* Argument.I., pp. 26-35, Father asserts that the Opinion erred in concluding that he abused cocaine. The Opinion went on to err in concluding that his use of cocaine posed a substantial risk of serious physical harm to this child. (Opn., pp. 12-13.) The Opinion cited a long-standing judicially created rule that "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (Opn., p. 12 [citing *Christopher R., supra,* 225 Cal.App.4th at p. 1219].)

Father asserts this proposition of "prima facie evidence" rests on a faulty premise both legally and practically. This proposition relied on by the Opinion can be traced back to the 2012 case *Drake M.* where the court relied on a prior case *Rocco M.* for the proposition that substance abuse alone serves as prima facie evidence of risk sufficient to warrant juvenile court jurisdiction. (*In re Drake M., supra,* 211 Cal.App.4th at p. 767.) This notion articulated by the *Drake M.* court is actually in direct conflict with the reasoning of the *Rocco M.* court. The *Rocco M.* court specifically stated that its "conclusion here rests *not on Catherine's apparent* ***dependency on drugs or alcohol***, but on her creation of a home environment providing Rocco with the means, the opportunity, and at least the potential motives to begin abusing drugs himself." (*Ibid* [emphasis added].)

In making this assertion, the *Rocco M.* court favorably cited an earlier case *In re Jeanette S.* (1979) 94 Cal.App.3d 52, 59 fn. 2 which held that "a father's alcoholism and reliance on welfare would not, by themselves, warrant a finding of dependency." (*Ibid.*) The *Rocco M.* court specifically and unequivocally agreed with the *Jeanette S.* holding. (*Ibid* ["we do not disagree with that holding"].) Here, there was no evidence Father ever kept cocaine or any dangerous substance in his home and therefore never posed to this child the type of risk the *Rocco M.* court was concerned with when discussing children of "tender years." Appellate courts have since *Drake M.* repeatedly regurgitated this proposition that no particularized risk need be proven if the parent abuses any substance. (See *Christopher R., supra,* 225

Cal.App.4th at p. 1219; *In re K.B., supra,* 59 Cal.App.5th at p. 603.)

As Father noted in his Opening Brief, there is no directive regarding "prima facie evidence" in section 300 concerning parental substance abuse alone. (§ 300, subdivision (b)(1); AOB, p. 39.) The Legislature is fully capable of providing for a prima facie case when it intends to and the absence of such here suggests the Legislature did not intend for substance abuse alone regardless of the child's age to be "prima facie evidence" for the purpose of jurisdiction. (See e.g., § 366.21, subd. (e)(1); § 366.22, subd. (a)(1); § 355.1, subds. (a),(d); § 364, subd. (c).)

This judicially created doctrine that substance abuse alone poses a substantial risk of serious physical harm to children also has no basis in empirical evidence. As discussed, *supra,* Necessity for Review.II.B., pp. 22-23, there is no scientific support for the notion that parental substance abuse standing alone supports the conclusion that a child is at risk of serious physical harm or illness. Therefore, there is no rational reason to relieve the Department from proving actual risk especially absent any legislative directive. "Considering the parent's constitutional right to raise their child without interference, it is a strong inferential leap to automatically assume neglect if a parent uses drugs." (*Prima Facie*, p. 2769.) This use of a finding of substance abuse as prima facie evidence is severely unfair where, as here, the original determination of substance abuse is based on subjective moral judgments opposed to objective scientifically based criteria.

B. The Department did not prove that Father's weekend use of cocaine outside the presence of this child posed a substantial risk of serious physical harm to this child.

This record shows the fundamental unfairness in infringing on a parent's rights based on substance use alone. The record is devoid of any evidence supporting a conclusion that this child was at substantial risk of serious physical harm in Father's care due to substance use. Father took custody of his child four days after using cocaine when the Department became concerned that Mother was unable to provide a safe home. (CT 66.) While cocaine was still in his system, as evidenced by the positive test (CT 12, 21) the Department provided no proof that Father was in fact inebriated or incapable of providing adequate care on the date he took the child into his custody. Father then cared for the child without incident for nearly three weeks and there is uncontroverted evidence that he had cared for this child on a regular basis without incident.[14]

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[14] It is of note that the Opinion rejects Father's contention that he could schedule drug tests because there is no expert opinion regarding the length of time that cocaine would stay in your system. (Opn., p. 16.) Father apparently is unable to rely on the social worker's assertion. (CT 78.) The record contains no expert testimony establishing that the levels from Father's test are in fact out of the norm or that this alone can support a conclusion that Father would be unable to provide care to a child with that amount still appearing in his urine output.

The Opinion does not mention within its discussion section but included in the background facts a statement by the social worker that mixing cocaine and alcohol creates "cocaethylene" which increases "the addictiveness of each individual substance and the risk of violent behavior, paranoia, anxiety, depression, seizures, intense drug cravings and sudden death." (Opn., p. 7; CT 79.) Out of an abundance of caution, Father addresses this assertion. First, this statement cannot alone serve as substantial evidence. Only Father's cocaine use was alleged in the petition and not alcohol use. (CT 4.) The social worker was never qualified as an expert. The bare assertions of a lay witness pertaining to matters outside their personal observations and knowledge cannot serve as substantial evidence. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1384 ["lay opinion must involve a subject that is 'of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness"; there must be no particular scientific knowledge required].) The social worker also provided no source for this claim. The record contains no information regarding what this assertion is based on; particularly, the Department did not identify the scientific measures utilized and the exact statistical risk being claimed. Finally, there is no discussion of timing and whether the risk is present when the person is no longer inebriated.

Also, section 300, subdivision (b)(1) requires proof not of any *risk* but of a ***substantial*** *risk of serious physical harm*. (§ 300, subd. (b)(1).) The social worker's comment provides no quantification of this supposed risk caused by mixing cocaine and

alcohol. The risk could be nominally higher than the general population which cannot amount to *substantial*.

"Substantial evidence is a deferential standard, but it is not toothless. It is well settled that the standard is not satisfied simply by pointing to 'isolated evidence torn from the context of the whole record.' Rather, the evidence supporting the jurisdictional finding must be considered 'in light of the *whole* record' 'to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value…" (*In re I.C.* (2018) 4 Cal.5th 869, 892.) This single unsupported claim from the social worker cannot be torn from the context of the entire record which is devoid of any evidence that Father's cocaine use (even mixed with alcohol) ever lead to violent behavior, paranoia, anxiety, depression, seizures, intense drug cravings or sudden death. (CT 79.) Father had no criminal history, had gone to school, obtained a professional barber license and worked consistently; there was no evidence that his cocaine use had negatively impacted any aspect of this life. (CT 14, 72-73.) "Children living in poverty, or in households with four or more children, have an increased risk of neglect, but the government does not impose a presumption of neglect upon poor parents or parents with many children." (*Prima Facie*, p. 2769.) Obviously, correlation or a statistical risk alone cannot be sufficient without individualized assessment.

For these reasons, the court erred in finding that Father posed a substantial risk of serious physical harm to this child. The Department and juvenile court's oversimplified reaction to

Father's use of cocaine unjustifiably disrupted this family and resulted in the unnecessary removal of this child from his father's care. Clarifying the definition of "substance abuse" would provide guidance to the Department, trial courts and appellate courts on the necessary evidence to support a finding of "substance abuse" to justify state intervention into the privacy of the family.

Conclusion

For the foregoing reasons, this Court should grant this petition for review. Father was subjected to moral judgment detached from objective and scientifically based criteria, leading to the unjustified interference into his parental rights over this child. Father's child was taken under court jurisdiction based solely on Father's recreational weekend use of cocaine. While perhaps worthy of moral judgment, Father's actions did not place his child at substantial risk of serious physical harm. This unwarranted state intervention was prompted by confusion among appellate and trial courts regarding what parental conduct qualifies as substance abuse and whether the Department has to provide affirmative evidence of risk. Granting review, would rectify the error faced by Father and his child and would save future families from unnecessary state intervention.[15]

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[15] Note that the Department submitted to the appellate court on January 31, 2022 a minute order showing the case has been dismissed. Father has filed a Notice of Appeal from those orders; this Notice of Appeal was submitted to the court by the Department in this case on February 23, 2022. The Department never requested dismissal of the appeal and the appellate court decided the case on the merits. Father asserts that he remains

DATED: June 8, 2022

Respectfully submitted by,

/S/

Sean Burleigh, Attorney for Petitioner

aggrieved by these findings as they continue to serve as the basis for his restricted access to this child pursuant to the family court custody orders issued by the trial court.

CERTIFICATE OF WORD COUNT

The foregoing petition contains 8,337 words (excluding tables, cover information, signature blocks, certificates, proofs of service and any supporting documents). In preparing this certificate, I relied on the word count generated by Microsoft Word for Mac 2011 version 14.6.3.

Executed on June 8, 2022 at Tucson, AZ.

Respectfully submitted by,

/S/

Sean Burleigh, Attorney for Petitioner

PROOF OF SERVICE
IN THE SUPREME COURT OF CALIFORNIA

CASE NAME: *In re Matter of Noah R.*
TRIAL COURT CASE NO.: 20CCJP06523, 20CCJP06523A
APPELLATE COURT CASE NO.: B312001

I, Sean Burleigh, declare and state:

That I am not a party to the within action; that I am an attorney admitted to practice law in the State of California appointed by this Court to represent Petitioner.

That on June 8, 2022, I served the following:

Appellant's Petition for Review

Upon the persons or organizations listed below electronically. I utilized service through the true filing electronic system.

Michael Neu (Mother's trial attorney), neum@ladlinc.org
Samantha Bhuiyan (Minor's attorney), bhuiyans@clcla.org
Office of County Counsel, appellate@counsel.lacounty.gov
CAP-LA, capdocs@lacap.com
Superior Court, JuvJoAppeals@lacourt.org
Appellate Court, through truefiling

Upon the persons or organizations listed below, by placing this document in the mail addressed to:

Oliver Reyes, 5952 Whittier Blvd. Los Angeles, CA 90022

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 8, 2022 at Tucson, Arizona.

/S/
Sean
Burleigh

Exhibit A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re N.R., a Person Coming Under the Juvenile Court Law.

B312001

(Los Angeles County Super. Ct. No. 20CCJP06523A)

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

O.R.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Martha A. Matthews, Judge. Affirmed.

Sean Angele Burleigh, under appointment by the Court of Appeal, for Defendant and Appellant.

Rodrigo A. Castro-Silva, County Counsel, Kim Nemoy, Assistant County Counsel, and Sarah Vesecky, Senior Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court assumed dependency jurisdiction over 17-month-old N.R., the son of S.H. (Mother) and O.R. (Father), after finding he was at substantial risk of serious physical harm from Father's cocaine habit. The court removed N.R. from Father's custody and placed him with Mother. Father asks us to decide whether substantial evidence supports the court's substance-abuse-based jurisdiction finding and the related disposition order removing N.R. from his custody.

I. BACKGROUND

A. The Department Begins Investigating

On November 19, 2020, the Los Angeles County Sheriff's Department executed a search warrant at Mother's home. The primary targets of the warrant were maternal uncle E.P. and maternal grandmother's male companion, J.R. After law enforcement deemed the home safe, a Los Angeles County Department of Children and Family Services (Department) social worker entered and spoke with Mother.

Mother reported she and Father were not currently in a relationship but were cooperatively co-parenting without any custody orders. Mother denied having a substance abuse history. Mother admitted maternal grandmother had a history of drug abuse, which had, in part, led to the removal of one of maternal grandmother's children from her custody. The social worker asked Mother why she allowed maternal grandmother to care for N.R. given her history, and Mother said she had not thought about it as a concern.

The social worker completed a walk-through of the home, which smelled of marijuana. There was a partially consumed bottle of alcohol in Mother's bedroom on a dresser low enough to

be accessible to N.R. There were pots of marijuana plants in the front yard near maternal uncle E.P.'s sleeping area. Mother's car contained empty beer cans and bottles.

Mother agreed to have N.R. stay with Father during the Department's investigation. The social worker spoke to Father when he arrived to pick up N.R., and Father consented to an assessment of his home. During his conversation with the social worker, Father denied abusing any substances and agreed to take a drug test. The social worker then conducted a walk-through of Father's home and left N.R. in Father's care.

Father did submit to a drug test the same day, and the test results later returned positive for cocaine metabolites—with the metabolites registering at a high level. When questioned about the result, Father said he had been scared to tell the social worker he used cocaine. Father said his cocaine use occurred the prior weekend while celebrating his birthday—when he was not expecting to have to take care of N.R. Father claimed he did not know how much cocaine he used and said he was not an active user of cocaine.

The Department subsequently sought, and the juvenile court granted, an order removing N.R. from Father's custody. The child was placed with his maternal uncle.

B. The Petition and Detention Hearing

The Department filed a two-count dependency petition in December 2020. Count one alleged N.R. was at substantial risk of serious physical harm from Mother's decision to permit the maternal grandmother, a known drug abuser, to reside with N.R. and have unlimited access to him. Count two alleged N.R. was at similar risk from Father's past and current drug abuse.

The juvenile court held a detention hearing and continued N.R.'s placement with the maternal uncle. The court ordered the Department to provide appropriate referrals and voluntary drug testing to Mother and Father. They were granted monitored visitation.

C. Further Investigation

A Department social worker interviewed family members in the ensuing months. Mother claimed the maternal grandmother had not used drugs since Mother was thirteen and Father denied knowing the maternal grandmother used drugs at all. Mother had by then moved out of the home she was living in with maternal grandmother and had her own apartment.

As to the allegations about Father's drug use, Mother claimed she was shocked when she learned Father was using cocaine. She said they never lived together (they dated when they were eighteen and stopped when they were nineteen) and she did not even see Father smoke marijuana when the two were dating. Mother reported she had spoken to Father about the cocaine use, Father told Mother he was no longer using, and Mother believed Father was no longer under the influence.

When asked about the allegation regarding his drug use, the Department reported that Father said, "I'm so upset that they caught me! My mom was upset too. She was crying when I told her I tested positive. This cocaine thing is not me! I'm so upset!" Father admitted he first tried cocaine at age 21 or 22 (he was 26 at the time of the dependency proceedings) and he denied

his cocaine use was an addiction.[1] Later during his conversation with the social worker, however, Father acknowledged he had been using cocaine once or twice every two weeks and he said he used to "rave" a lot and would use cocaine with friends at big parties. As to the circumstances leading to the positive cocaine metabolite test result, Father said his birthday was on Wednesday, November 11, and he celebrated from Thursday, November 12 to Sunday, November 15—using cocaine all four days. Father was unsure how much cocaine he consumed (allowing it was "[m]aybe . . . a big amount"), but he claimed he and his friends "pitched in 10 dollars each to get something small and that's it."[2]

Father represented he did not "party" or use cocaine on the weekends when N.R. previously stayed with him pursuant to the custody arrangement with Mother. Father believed Mother knew about his cocaine use. Father admitted he used marijuana in the past, but he denied being a current user. Father expressed a willingness to submit to random drug tests. The social worker asked Father if he wanted to participate in the Child Family Team program, and Father declined, stating he just wanted the

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[1] Father claimed if he were addicted to cocaine he would "be broke." Father lived with his mother and was an out-of-work barber who found a job working in a warehouse for 20 hours a week.

[2] At another point during the same interview, Father said he never paid for cocaine himself and he would just participate when his friends "did it together."

drug testing. Father also said, "It's too much. It's already a big deal I have two kids. I just want it over with."[3]

The Department's jurisdiction and disposition report stated Father's positive test for cocaine metabolite, at the level of 1441 ng/ml, was an "extremely high and rare level even four days after use." The Department found Father's cocaine use—and the amount of use shown by the lab test results—extremely concerning. The jurisdiction report explained the combination of cocaine and alcohol (both of which Father used when "celebrating" his birthday) creates a substance called cocaethylene, which increases the addictiveness of each individual substance and the risk of violent behavior, paranoia, anxiety, depression, seizures, intense drug cravings, and sudden death.

Father submitted to two random drug tests in January 2021 that were both negative. Father missed his next test and told the social worker he missed the test because of work. He asked to only test on Mondays and Fridays to accommodate his work schedule; the social worker responded testing was random and he had to test when his name was called. The social worker set Father up for a makeup test and the sample at that test leaked and could not be tested. Father missed a subsequent test and then appeared and tested negative once in March 2021.

In advance of the jurisdiction and disposition hearing, the Department submitted a report describing, in list form, the reasonable efforts the Department claimed to have made to avoid the need for removing N.R. from the parents' care: emergency

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[3] Father's other child came from a different relationship.

response services; family reunification services; face-to-face contacts; notices for the jurisdiction and disposition hearing; and the Child Family Team program, which both parents declined at the time it was offered.

In the months shortly before the April 2021 jurisdiction hearing, the juvenile court ordered the Department to, among other things, provide a weekly drug and alcohol testing referral for Father. A last minute information report prepared by the Department indicated a social worker verbally referred Father to services on March 23, 2021, and sent him an email listing available services on March 31, 2021.

D. The Jurisdiction and Disposition Hearing

After hearing argument at the jurisdiction and disposition hearing, the juvenile court dismissed the petition count alleging risk of harm from exposure to the maternal grandmother because the Department had not provided any evidence regarding the maternal grandmother's current drug use—such that there was no evidence Mother did anything wrong in allowing the maternal grandmother to care for N.R.

The juvenile court, however, found the Department had shown Father has a substantial drug abuse history and tested positive for a fairly high amount of cocaine metabolites in November of 2020.[4] The court noted both Mother and Father

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[4] The court declined to consider the missed tests as positive results because Father had been testing voluntarily, not pursuant to a court order, and the court believed case law holding a missed test can constitute a positive test applies only after a person has been ordered to test.

admitted Father used alcohol and cocaine. While both Mother and Father claimed Father would not care for N.R. while using cocaine, it was undisputed Father was responsible for taking care of N.R. at the time of the November 2020 positive test. After amendments by interlineation, the petition as sustained by the court stated Father has a history of substance abuse and is a recent abuser of cocaine, rendering him incapable of providing regular care to N.R., who is of such a young age as to require constant care and supervision. As to Mother, the petition stated she failed to protect N.R. when she knew or reasonably should have known about Father's substance abuse but allowed Father to have unlimited access to the child.

Turning to disposition, Father and Mother objected to having N.R. removed from their custody. The Department argued it was necessary to remove N.R. from both parents' custody. Counsel for N.R. contended that under the applicable clear and convincing evidence standard of proof, the Department had demonstrated it was necessary to remove N.R. only from Father's custody, not from Mother's.

The juvenile court agreed with the argument made by counsel for N.R. and found the Department met its burden to order the boy removed from Father's custody (but did not meet its burden as to Mother). The court placed N.R. with Mother and ordered Father to submit to 12 drug tests, with the further condition that Father must participate in a drug treatment program if he missed a test or tested positive for drug use. The court also ordered Father to participate in a parenting course and granted him monitored visitation with N.R.

II. DISCUSSION

Substantial evidence supports the juvenile court's jurisdiction finding. Father's regular cocaine use, which he described as occurring once or twice every other week, combined with the positive test result showing a high level of cocaine metabolites while he was responsible for caring for N.R., were sufficient to demonstrate he abused, not just used, cocaine. Particularly given N.R.'s young age, this was sufficient to establish jurisdiction.

There is also adequate evidence, keeping in mind the heightened standard of proof in the trial court (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005, 1011), to support the juvenile court's disposition order removing N.R. from Father's custody. Father's indifference toward the Department's efforts to intervene (including his rejection of the Child Family Team program because it was "too much" and he wanted it "over with"), his missed drug tests, the evidence of his fairly longstanding and frequent cocaine usage (including the binge around his birthday just before N.R. was in his custody), and his persistent denials that cocaine was a problem for him are substantial evidence that there were no adequate means short of removal to mitigate the substantial danger to N.R.—despite reasonable efforts the Department made to avoid that outcome.

A. The Jurisdiction Finding Is Supported by Substantial Evidence

Welfare and Institutions Code section 300, subdivision (b)(1) authorizes a juvenile court to exercise dependency jurisdiction over a child if the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm

or illness, as a result of the failure or inability of the child's parent . . . to adequately supervise or protect the child . . . ." This statutory basis for jurisdiction "does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction." (*In re I.J.* (2013) 56 Cal.4th 766, 773.) Our review of a juvenile court's determination that this statutory standard is met is for substantial evidence. (*In re R.T.* (2017) 3 Cal.5th 622, 633 [reviewing courts determine whether "'substantial evidence, contradicted or uncontradicted'" supports the juvenile court's order].)

Substantial evidence supports the juvenile court's exercise of jurisdiction over very young N.R. because of Father's abuse of cocaine. After initially denying any substance abuse, Father tested positive for cocaine. And the test result was not just barely positive; the result reflected a high level of cocaine metabolites that was consistent with Father's subsequent admission to have used cocaine (in combination with alcohol) over the course of four days. Father, who was 26 years old at the time of the dependency proceedings, said he first began using cocaine four or five years earlier (when 21 or 22) and he admitted to using it once or twice every two weeks. This rather longstanding cocaine habit, with intensive use on at least one known occasion, provides substantial evidence to support the trial court's finding of substance abuse. (See, e.g., *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218 [finding the mother's repeated use of cocaine, including while pregnant, was indicative of substance abuse] (*Christopher R.*).)

Father, however, argues the evidence demonstrates only that he used substances not that he abused substances. Relying on *In re L.C.* (2019) 38 Cal.App.5th 646 (*L.C.*), he contends his

use of cocaine does not constitute abuse because he believes it has not negatively interfered with his life functions.

In *L.C.*, the juvenile court found evidence the parent used methamphetamine seven times during a period of 10 months insufficient to support allegations of substance abuse. (*L.C.*, *supra*, 38 Cal.App.5th at 652.) Father's situation here is different. He admitted to using cocaine on a bi-weekly basis. And even by Father's own admission, he used enough cocaine the weekend prior to accepting custody of N.R. to still register a positive test at a high reference level. Yet Father did not disclose his substantial cocaine usage to the Department when he was asked if he could take custody of N.R. following the investigation of Mother's home. Father also suggested his friends were funding his cocaine habit while he was less than fully employed (working at most 20 hours a week even when employed as a barber); this too allows an inference that Father's cocaine habit had risen to the level of abuse. (*Christopher R.*, *supra*, 225 Cal.App.4th at 1218 [enumerating factors indicative of abuse, including failure to fulfill major obligations at school or home and the neglect of children or a household].)

Though we accordingly believe the juvenile court had evidence before it that would justify a conclusion that Father was abusing cocaine, a Welfare and Institutions Code section 300, subdivision (b)(1) finding "cannot be based on substance abuse alone; jurisdiction [also] requires a substantial risk of harm to the child arising from the substance abuse. [Citation.]" (*In re J.A.* (2020) 47 Cal.App.5th 1036, 1046.) Where very young children like N.R. are concerned, however, "'the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a

substantial risk of physical harm.' [Citations.]" (*Christopher R.*, supra, 225 Cal.App.4th at 1219; see also *In re K.B.* (2021) 59 Cal.App.5th 593, 603.)

Father's reaction to the Department's discovery of his substance abuse supports the finding that this abuse poses a risk of harm to N.R. Father stated he was "so upset that they caught me[.]" He claimed the "cocaine thing" was "not me" even while admitting he had been using cocaine for approximately four years, and prior to the commencement of dependency proceedings was using once or twice every other week. Further, though Father agreed to submit to random drug tests, he declined to participate in the Child Family Team program the Department offered, saying it was "too much." Father's inability to recognize the problematic nature of his drug abuse and his early declination of additional services indicate there was a risk of harm to N.R.

Father argues he rebutted this prima facie showing at the jurisdiction and disposition hearing by pointing to the passage of time since the last positive drug test and Father's occasional negative tests since that time. While Father's negative tests were a sign that things were moving in a more positive direction, there were only three negative tests in the record, and there was an entire month for which the juvenile court had no data regarding his test results (due to missed or faulty tests). The negative tests alone do not alone suffice to rebut the showing given Father's substantial history with cocaine, his admission of regular use, and his four-day binge prior to accepting custody of N.R.

B. The Disposition Order Is Supported by Substantial Evidence

Welfare and Institutions Code section 361, subdivision (c)(1) provides a dependent child may only be removed from a parent if the dependency court finds "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." The court must also "make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home" and "state the facts on which the decision to remove the minor is based." (Welf. & Inst. Code, § 361, subd. (e).)

""The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. [Citation.] The court may consider a parent's past conduct as well as present circumstances. [Citation]"" (*In re N.M.* (2011) 197 Cal.App.4th 159, 169-170.) Our review is for substantial evidence, although, as already described, we employ a more searching form of that standard of review.

Substantial evidence establishes both that N.R. would be at substantial danger if returned to Father's unsupervised care and there were no reasonable means short of removal to mitigate the danger to N.R.[5] Father had, by his own admission, been

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[5] Particularly when Father raised no objection during the hearing, the juvenile court's on-the-record statement that it

regularly using cocaine for at least four years. His steady pattern of use escalated on at least one known instance around his birthday, and Father at that time took N.R. into his care without a word to the Department that he had just been on a four-day cocaine and alcohol binge that, even then, left him with a high level of cocaine metabolites in his system. This failure to disclose his most recent cocaine abuse was no accident, of course; Father later told a social worker that he was upset that his attempt to hide his cocaine use had been foiled. Once he had been found out, Father still declined to engage with the Department's early efforts to intervene and ameliorate the problem. He refused to participate in a Child Family Team, saying it was too much, and then he failed to consistently participate in the drug testing that he did agree to. Father's behavior—especially his initial effort to conceal his drug use and his steadfast denial that his drug use was a problem—demonstrate he was unable or unwilling to substantively engage with any efforts that might have prevented the need to remove N.R. from his custody so as to mitigate the substantial danger to the very young child from Father's cocaine abuse.

The same evidence demonstrates the Department made reasonable efforts to avoid removal, specifically offering Father an opportunity to participate in the Child Family Team program and to undergo random drug testing. The Department also made other referrals to Father in the weeks leading up to the disposition hearing.

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agreed with the position articulated by counsel for N.R. sufficed to state the facts on which the decision to remove the minor was based.

Father asserts this was not enough. He argues regular drug testing was an available way to ensure N.R.'s safety in Father's care. But Father had previously volunteered to submit to drug testing and then missed tests. Father also contends that if the Department had granted his request to allow him to test on two specific days each week, he could never be under the influence of cocaine when caring for N.R. But the record contains no expert testimony establishing that claim is accurate, and even if true, N.R. could still be in substantial danger for the days before a positive test would first register. Finally, Father argues the court acknowledged he was sober at the time of the dispositional hearing. This misreads the record. Though the juvenile court declined to order Father attend a full drug treatment program, it did so because Father claimed he was not using at the time, not because the court had means to verify Father was, in fact, sober.[6]

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[6] Father also complains he received certain additional referrals for services only a week or two prior to the disposition hearing. He does not, however, point to any evidence indicating he attempted to pursue those referrals prior to the hearing but could not due to the timing of their provision. Under the circumstances, the point does not undermine a conclusion that reasonable efforts were made to prevent or to eliminate the need for removal. (See, e.g., *In re Misako R.* (1991) 2 Cal.App.4th 538, 547 ["The standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances"].)

DISPOSITION

The juvenile court's orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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