IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE D.P., a Person Coming Under the Juvenile Law	Supreme Court Case No. S267429
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent,	Court of Appeal Case Nos. B301135
v.	Superior Court Case No. 19CCJP00973
TWAIN P. Objector and Appellant.	Reply To Answer To Petition For Review

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PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

After the Unpublished Decision of the Court of Appeal,
Second Appellate District, Division Five, Affirming the
Judgment of the Juvenile Court

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Introduction

On May 10, 2020, Respondent was directed to answer to the petition for review by May 17, 2021 and address all issues raised in the petition and Justice Rubin's dissenting opinion below. Petitioner was then permitted to file a reply to the answer by May 21, 2021. In this reply to Respondent's Answer, Twain P., appellant and petitioner, reaffirms all arguments put forward in his Petition For Review and only addresses those points needing explanation or further reply. Failure to address each particular point raised in Respondent's Answer to Petition For Review ("Answer") is not a waiver of those points but to avoid repetition as they have already been adequately explained in the Petition For Review.

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Argument

I.
Respondent Erroneously Argues that The Petition Does not Present A legal Ground For Review Pursuant to Rule 8.500 (b)

A. Respondent Erroneously Argues The Statement of Necessity For Review Is A Misstatement Of The Opinion

Respondent argues that Petitioner misstated what the majority did below because the Majority dismissed the appeal as moot without reaching the merits. (Answer at p. 8.) The alleged "misstatement" is Respondent's claim that the Court of Appeal's dismissal order should not be considered as affirming the decision of the juvenile court. (Answer at pp. 8-9.) Respondent cites no authority for this position. In fact, dismissal of the appeal does operate as an affirmance of the underlying judgement or order. (*In re C.C.* (2009) 172 Cal .App.4th 1481, 1488.) Thus, Respondent's argument about Petitioner's alleged misstatement is without merit.

Respondent then claims that because the Court of Appeal dismissed the appeal without reaching the merits this Court is without power to review that decision. (Answer at p. 9.) This argument assumes that a "decision" to dismiss an appeal as moot is not really a "decision." This argument is again without merit and respondent's reliance on *Leone v. Medical Bd. of Cal.* (2000) 22 Cal.4th 660 is misplaced. *Leone v. Medical Bd. of Cal.*, this Court explained that , "the ordinary and widely accepted

meaning of the term 'appellate jurisdiction' is simply the power of a reviewing court to correct error in a trial court proceeding. By common understanding, a reviewing court may exercise this power in the procedural context of a direct appeal or a writ petition." (*Id*. at p. 660.) *Leone* does not preclude this Court from granting petition to review in a case dismissed by the appellate court as moot.

A decision dismissed as moot does not evade review. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 411.) In *Jasmon O.,* the Court of Appeal dismissed the appeal from the termination judgment as moot. The Department and the minor petitioned for review arguing the Court of Appeal erred in dismissing the appeal from the termination order as moot. This Court agreed and reversed the decision of the Court of Appeal and addressed the merits of the underlying appeal. (*Ibid*.) In this case, as in *Jasmon O*., the decision of the Court of Appeal to dismiss the appeal as moot does not preclude that decision and the underlying merits of the appeal from review.

B. *Respondent Erroneously Argues the Arguments in the Petition For Review Were not Raised By Appellant Below*

Respondent asserts that Petitioner is precluded from arguing that the sustained allegations labeled him a child abuser because Appellant's Letter Brief filed in response to the Court of Appeal's request for briefing on the issue of mootness argued the sustained jurisdictional findings impacted his good moral

character and established a history of being responsible for acts of child abuse. (Answer at pp. 9-10.) Respondent's attempts to distinguish being "labeled a child abuser" from "being responsible for acts of child abuse" as being separate issues. (Answer at pp. 9-10.) Respondent opines that Petitioner should not be allowed to "rephrase" his argument but fails to explain how this "rephrasing" is substantive rather than merely semantic. In fact, there is no substantive distinction between being "labeled" a child abuser and being "responsible for acts of child abuse." Respondent's argument that Petitioner "should not be allowed to rephrase his argument" is a word game and without merit.

Next, Respondent opines that Petitioner should not be permitted to use a legal argument from the Dissent as a legal ground for review "because the Majority did not address these issues." (Answer at pp. 10-11.) Respondent cites no authority for this position. An issue raised by the Court of Appeal for the first time in its opinion is not an "issue that could have been raised in the briefs filed in the Court of Appeal" within the meaning of the rule excluding such issues from permissible appellate arguments. (*People v. Bland* (2002) 28 Cal.4th 313.) Further, the argument that Petitioner should have filed a petition for rehearing is also unavailing as it can be assumed that in conferring about the case and authoring the majority opinion, the justices had a full opportunity to consider the views of Judge Rubin.

Further, Respondent's argument the Dissent should not be considered in the petition for review must also be rejected where

this Court specifically asked Respondent to address the issues raised in Judge Rubin's dissent. (Rule 8.500(c)(1); *Cedars–Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6–7 & fn. 2 [this court has the discretion to consider important issues of law not argued by the parties below]; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn. 3 ["parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy"].)

By arguing that the Petition For Review must be limited to the Majority Opinion, Respondent fails to answer Judge Rubin's question about county counsel's "about-face that would make any staff sergeant proud." Although Respondent's has chosen to ignore their U-turn, Respondent cannot un-ring the bell that county counsel abandoned interest in affirming the findings of the juvenile court. This leaves the question of why Petitioner should be left with the child abuser label when no demonstrated interest of Respondent is served by leaving this judgment intact.

C. Respondent Erroneously Argues This Court Cannot Review The Merits of Appellant's Appeal Because There Is No Decision On The Merits For This Court To Review

Respondent claims there is no decision on the merits for this Court to review because the Court of Appeal did not decide the case on its merits. (Answer at p. 11.) This argument rephrases the same argument made in Respondent's Argument "A" and is without merit. This Court is not precluded from

addressing the underlying merits of an appeal that was erroneously dismissed as moot by the Court of Appeal. (See *In re Jasmon O.*, *supra,* 8 Cal.4th at p. 411.) Further, this Court always has the option to request supplemental briefing on any issue, raised or not raised by the briefs, this Court believes may be dispositive. (*People v. Garcia* (2002) 97 Cal.App.4th 847, 854, *as modified* (Apr. 17, 2002).)

D. Respondent Erroneously Argues That Appellant's Challenge To the Sufficiency Of The Evidence Is Not Cognizable

Respondent claims that Petitioner's challenge to the sufficiency of the evidence is improperly based on the juvenile court's oral findings and should instead be limited to the sustained language of the petition. (Answer at pp. 11-13.) In making this argument Respondent opines that the oral statements of the juvenile court cannot be considered by an appellate court. (Answer at pp. 13—14.) Respondent's reliance on *De Cou V. Howell* (1923) 190 Cal. 741, 751 as authority for this position is misplaced. (Answer at p. 13.)

De Cou was decided before the adoption of the present Rules on Appeal, which expressly authorize the inclusion of any written opinion of the trial court in the record on appeal. It is well established today that the opinion of the trial court may be used to explain the basis of the court's ruling. (California Rules of

Court[1], Rule 8.122, formerly Rule 5, subd.(a); *In re Estate of Bullock* (1955) 133 Cal.App.2d 542, 549; *City of Daly City v. Smith*, 110 Cal.App.2d 524, 529.) It is proper that an appellate court give special consideration to the reasons given by a trial judge in his oral opinion, where such reasons furnish the basis of the court's action. (*Coakley v. Ajuria* (1930) 209 Cal. 745, 749; *Petition of Oster* (1955) 135 Cal.App.2d 769, 775.)

In this case, the statements of the juvenile court provide the basis for the jurisdictional findings that a "deliberate" or "unreasonable" act by the parents was not proven, such language was stricken from the sustained counts, and that there was at most a "perhaps, neglectful" act. (1 RT 121.) Dependency law requires that the juvenile court's jurisdictional findings must be based on a preponderance of the evidence. (See § 355; *In re J.K.* (2009) 174 Cal.App.4th 1426, 1432.) The statements of the juvenile court directly address the issue of sufficiency of the evidence by explaining how the juvenile court arrived at its decision and if the requisite findings were made. (*Carroll v. Puritan Leasing Co.* (1978) 77 Cal.App.3d 481, 491-493.) "Where findings are required and none are made or, if made, are inadequate, a judgment must be reversed." (*Baron v. Baron* (1970) 9 Cal.App.3d 933, 937.) Thus, Respondent's argument is without merit.

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[1] All Rule references to the California Rules Of Court unless otherwise noted.

E. Respondent Erroneously Argues that Appellant's Successful Completion of A Section 360, subdivision (b) Disposition Is Not A Ground For Review

Respondent claims that the issue of whether Petitioner's exemplary cooperation with Respondent compelled the Court of Appeal to consider the appeal on its merits is not grounds for review under rule 8.500 (b), and that there is no legal support for the argument. (Answer at p. 15.) In support of this argument, Respondent does not offer any legal authority but merely recites that Appellant's successful completion of service is what rendered the appeal moot. (Answer at p. 16.) Respondent's Answer fails to address Petitioner's arguments that since the basis for the judgment has disappeared, the appropriate remedy is reversal rather than affirmance of an erroneous judgment. (*In re Rosegarten* (1947) 81 Cal.App.2d 126; *Paul v. Milk Depots* (1964) 62 Cal.2d 129, 134.)

A respondent's failure to address an argument raised by an appellant may, under some circumstances, be interpreted as a concession. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480, 279 [stating that the People "apparently concede" a point made by the defendant to which they did not respond, either in briefing or in oral argument].) In this situation where Respondent was specifically asked by this Court to respond to the three issues raised by Petitioner, and then failed to respond, interpreting this omission as a concession appears appropriate.

F. Respondent Erroneously Argues That Respondent's Letter of Non-Opposition To Reversing The Jurisdictional Findings Should not Be Considered On Review Of Whether Those Findings Should Be Affirmed

Respondent argues that the Non-Opposition to Reversal Letter filed in lieu of a Respondent's Brief prior to arguing the appeal should be dismissed as moot is not grounds for a petition for review. (Answer at p. 16.) In making this argument, Respondent falls back on the defense that the appeal was moot. (Answer at pp. 16-17.) Respondent again fails to address why the change in position from non-opposition of reversal to requesting affirmance of the juvenile court's findings through a dismissal of the appeal as moot. Regardless of the reason, the Non-Opposition letter along with Respondent's decision not to file a Respondent's brief established that Respondent had no interest at stake in having the juvenile court's decision affirmed. In contrast to Respondent's lack of a stated interest, Petitioner has consistently expressed his interest to pursue an appeal to clear his name from the juvenile court's findings.

II.
Respondent Erroneously Argues the Appeal Was Rendered Moot

Respondent argues the appeal was moot and repeats that Petitioner "inappropriately rephrased" his mootness argument. (Answer at p. 17.) Respondent cites no authority for rules

regarding "rephrasing" and the stigma and consequences of being labeled a child abuser or found to have committed an act of child abuse remain one and the same.

In addressing the Dissent's comments on mootness, Respondent claims the Majority was correct because Petitioner's harms from being labeled a child abuser are speculative concerns. (Answer at p. 17-18.) In making this argument, Respondent ignores Justice Rubin's obvious point that "common sense tells us that no parent wants to be branded a child abuser." (Dissenting Opinion at pp. 2-3.) Respondent disregards the "I know it when I see it" component of the Dissent and claims Petitioner should not be allowed to clear his name because "if being labeled a child abuser is all that is required to precent a finding of mootness, no juvenile dependency case could ever be rendered moot." (Answer at p. 18.) Respondent's fear of a floodgate of never ending dependency appeals as justification for precluding review is unavailing.

This case addressed the situation where a parent has been precluded from challenging the jurisdictional findings through no fault of his or her own. The insulation from review through the termination of dependency jurisdiction in cases that raise substantive sufficiency of the evidence issues is a far greater public policy concern than Respondent's speculative floodgates. (See *In re C.V.* (2017) 15 Cal.App.5th 566, 571 [in an abundance of caution and because dismissal of the appeal operates as an

affirmance of the underlying judgment or orders, court of appeal considered the merits of the parent's appeals from the jurisdictional findings].) A similar abundance of caution is warranted in this case.

Respondent then relies on the fact that neither Petitioner nor the Dissent cite to any legal authority directly supporting the position that a parent should be permitted to challenge being labeled a child abuser. (Answer, at p. 18.) But the lack of specific case law on this point is why the petition for review should be granted. The issue of whether harm from being labeled a child abuser is a speculative or specific legal or practical consequence is a significant issue of widespread importance that is in the public interest to decide. (*People v. Randle (2005) 35 Cal.4th 987* [the Supreme Court may decide new issues where those issues are pure questions of law, not turning upon disputed facts, and are pertinent to a proper disposition of the cause or involve matters of particular public importance].)

Stigma and loss of good name is an issue of public importance as it impacts a fundamental liberty. (*People v. Burnick* (1975) 14 Cal.3d 306, 319-321.) An abusive parent is stigmatized as a social pariah (as are criminals) for the act they are accused of performing is characterized as penal in nature and socially reprehensible. As the "good name" of the parent is tarnished, the jurisdictional findings have a serious consequence beyond the mandatory listing of a substantiated child abuse

report in the CACI. (Penal Code §§11165.9, 11169(a).) Further, Respondent's claim that the judgment of the juvenile court does not impact whether or not a child abuse report is "substantiated" is inaccurate. (Answer at p. 19.) This ignores the fact that a juvenile court's jurisdictional finding has the effect of precluding the appellant from seeking a CACI review hearing. (Penal Code §11169, subd. (e); *Humpries v. City of L.A.* (9th Cir 2009) 554 F.3d. 1992.)

Thus, review should be granted to protect parents such as Petitioner who have been precluded through no fault of their own from challenging an erroneous jurisdictional finding on appeal and now bear the stigma of that finding.

Conclusion

For the reasons stated in the Petition to Review and this Reply, Petition respectfully requests that the petition for review should be granted.

Date: May 21, 2021

Respectfully submitted,

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Certificate of Compliance

Counsel of record hereby certifies, the enclosed brief has been produced using 13-point Century Schoolbook and the text of this brief includes 17 pages and 3,504 words, a total below the allotted 8,400 words for computer generated briefs under the rule. Counsel relies on the word count feature of the computer program used to prepare this brief.

Date: May 21, 2021

Respectfully submitted,

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Appeal No. B301135
Juv. Case No.
19CCJP00973

DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of California: I am a resident of the County of Los Angeles, California, over the age of 18 years, not a party to the within action, and I served the foregoing by ***True-filing*** to:

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Appellant: T.P. * (Address on file)

Executed on May 21, 2021 at Los Angeles California: Megan Turkat Schirn
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **IN RE D.P.**
Case Number: **S267429**
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