Application to Expand Appointment in Dependency Case for Habeas Petition

[YOUR NAME]
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Attorney for Appellant [APPELLANT]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

In re S., A PERSON COMING UNDER JUVENILE COURT LAW _____ [NAME] COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT, Plaintiff and Respondent, v. [APPELLANT], Defendant and Appellant. _____/	Case No. C0_____ [COUNTY] County Superior Court No. _____
In re C., et al., PERSONS COMING UNDER JUVENILE COURT LAW _____ [NAME] COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT, Plaintiff and Respondent, v. [APPELLANT], Defendant and Appellant. _____/	Case No. C0 [COUNTY] County Superior Court Nos. _____

APPLICATION TO EXPAND APPOINTMENT OF APPELLATE COUNSEL TO FILE A PETITION FOR WRIT OF HABEAS CORPUS; POINTS & AUTHORITIES; AND SUPPORTING DECLARATIONS

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL:

Appellant [NAME's] appellate counsel, [YOUR NAME], hereby requests that this court expand her appointment so that she may represent her client in a petition for writ of habeas corpus in conjunction with the pending appeal. This application based on the attached declarations of appellate counsel and appellant [APPELLANT'S NAME].

Respectfully submitted,

Dated: _____

_____
[YOUR NAME]
Attorney for Appellant [NAME]

POINTS AND AUTHORITIES

Introduction

Petitioner [APPELLANT] asserts that a petition for writ of habeas corpus is an appropriate vehicle for the appellate court to review her claim that her trial counsel provided ineffective assistance at the hearing held pursuant to Welfare and Institutions Code[1] section 366.26 (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 466-467; *In re Carrie M.* (2001) 90 Cal.App.4th 530; *In re O.S.* (2002) 102

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

Cal.App.4th 1402), and that the limited holding of *Adoption of Alexander S.* (1988) 44 Cal.3d 857, and the Fifth Appellate District's opinion in *In re Meranda P.* (1997) 56 Cal.App.4th 1143, do not bar petitioner's habeas petition. (*In re Darlice C.*, *supra*, 105 Cal.App.4th at p.467.)

1. A Petition for Habeas Corpus Is Generally Recognized As the Appropriate Vehicle for Raising Ineffective Assistance of Counsel Claims.

A claim of ineffective assistance of counsel in a dependency matter is generally cognizable in the Court of Appeal on a petition for writ of habeas corpus. (*In re Kristin H.*(1996) 46 Cal.App.4th 1635, 1658-1659, 1667.) In general, the proper way to raise a claim of ineffective assistance of counsel is by writ of habeas corpus, not appeal. (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, fn 1 citing *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1253; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

A habeas corpus proceeding is the proper vehicle to raise the issue of ineffective assistance of counsel where the factual basis for the claim rests in pertinent part on evidence not contained in the record on appeal. (*Adoption of Michael D.* (1989) 209 Cal.App.3d 122, 136; *In re Jessica Z.* (1990) 225 Cal.App.3d 1089, 1101.) In habeas corpus, trial counsel is afforded the opportunity to explain trial strategy. (*People v. Pope*, *supra*, 23 Cal.3d at p. 426.) The Fourth Appellate District has held that to bring a claim of ineffective

assistance of counsel in a challenge to an order terminating parental rights, the parent in that case needed to introduce documentation outside the record, which he could only do through a writ petition. In such circumstances, a writ petition was appropriate. (*In re O.S.*, *supra*, 102 Cal.App.4th at p. 1406, fn. 2.) This was also the conclusion of [this court] in *In re Darlice C.*, *supra*, 105 Cal.App.4th 459.

Although habeas corpus cannot serve as a second appeal, denial of the right to counsel is a claim which has always been cognizable in habeas corpus whether or not it was raised on appeal. (*In re Hochberg* (1970) 2 Cal.3d 870, 875.) By contrast, although a claim of ineffective assistance of counsel is usually raised by way of a writ of habeas corpus, it may be effectively raised as part of an appeal, at least, "where the appellate record demonstrates 'there simply could be no satisfactory explanation' for trial counsel's action or inaction." (*In re S. D*. (2002) 99 Cal.App.4th 1068, 1077 citing *People v. Pope*, *supra*, 23 Cal.3d 412, 426.)

> A parent in a dependency proceeding has a right to effective assistance of counsel and a right to seek review of claims of incompetence. [Citation.] If counsel was ineffective in connection with the termination order in ways that are not apparent on the record, review by direct appeal is inadequate. (*In re Carrie M.*, *supra*, 90 Cal.App.4th at p. 535.)

When, as here, petitioner in a habeas corpus action requests consolidation of a writ proceeding with a pending appeal, the proper procedure is to grant consolidation and issue an order to show cause. (*People v. Frierson* (1979) 25 Cal.3d 142, 158.)

In this case, petitioner's ineffective assistance of counsel claim rests on facts not part of the record on appeal. The declarations from petitioner and appellate counsel establish that trial counsel was incompetent because he failed to advise petitioner of the sibling relationship exception to adoptability; failed to advocate its application at the section 366.26 hearing (see attached Declaration of Appellant, ¶__); and further because he represented petitioner at J.'s section 366.26 hearing without having any contact with her, without making any attempt to locate her and without knowing her position and issues to argue on her behalf (see attached Declaration of Appellant, ¶__).

Therefore, petitioner's challenge, based on facts outside the record, is appropriately brought in a habeas petition.

2. The Ruling of *Meranda P.* Does Not Apply to This Case, is Unsound and Has Not Been Applied by This Court in *Darlice C.*

[This court] has found that permitting review of a termination order by habeas corpus is consistent with the interests of finality and delay reduction in child dependency proceedings. Because the termination order on appeal is not yet final, habeas corpus review will not delay finality of the termination order. Issuing an order to show cause before the appeals are final will require the juvenile court to adjudicate the habeas claims first. (*In re Darlice C.*, *supra*, 105 Cal.App.4th at 466-467, citing *In re Carrie M.*, *supra*, 90 Cal.App.4th at p. 535, and rejected *Meranda P.*)

In *Meranda P.*, the Fifth Appellate District barred a mother from raising the incompetency of her trial counsel by collaterally attacking, in a petition for writ of habeas corpus, the order terminating her parental rights *and the orders antecedent* to the termination order. (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1146.) The bar against the habeas petition in *Meranda P.* must be seen in the context of that case. The mother did not appeal any of the appealable orders antecedent to the termination of parental rights order, yet claimed that the entire dependency proceeding was defective from its inception because she was deprived of her statutory and constitutional right to counsel at the hearings *leading up to the termination of parental rights hearing*. (*Id*., at p. 1150.) The mother's appeal challenged the "propriety of the orders regarding Meranda made at each of the hearing which preceded the [section 366].26 hearing" (*Id*., at p. 1151), based on denial of representation prior to the 18-month review hearing and incompetent representation at the 18-month review hearing, but not at the section 366.26 hearing. The mother claimed there were several valid arguments an appointed counsel could have made at the hearings where the mother was unrepresented and that her appointed counsel was incompetent at the 18-month review hearing because he did not question the sufficiency of the reunification services she received. (*Id*. at p. 1151.) The mother did not challenge the competency of trial counsel at the section 366.26 hearing where counsel urged the court to select

guardianship over adoption as the permanent plan, based on the mother's recent efforts to rehabilitate herself. (*Id*., at p. 1149.)

Therefore, any statement in *Meranda P*., that a parent cannot use a habeas petition to challenge ineffective assistance of counsel at a section 366.26 hearing, is dictum and not controlling authority. (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297 ["[s]uch dictum, while not controlling authority, carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic"].) *Meranda P*. does not control in this case where petitioner is challenging the incompetency of her new trial counsel *only* at the section 366.26 hearings, and not before when she was represented by another trial counsel. (See *In re Eileen A*., *supra*, 84 Cal.App.4th at p. 1258 [mother did not waive her ineffective assistance claim when no real chance to raise the claim earlier].).

In any event, the holding of *Meranda P.* is unsound.

Meranda P. relied on the Supreme Court's 1988 holding in *Adoption of Alexander S.*, that a "habeas corpus may not be used to collaterally attack a nonmodifiable judgment in an adoption-related action where the trial court had jurisdiction to render the final judgment." (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1161 quoting *Adoption of Alexander S*., *supra*, 44 Cal.3d at pp. 867-868.) However, the holding of *Alexander S*. was expressly limited to its

narrow facts, particularly the "numerous procedural errors" peculiar to that case. (*Adoption of Alexander S.*, *supra*, 44 Cal.3d at p. 865.) The mother did not timely appeal the judgment denying her petition to withdraw consent to a private adoption and did not request habeas relief in her briefs. The Court of Appeal, on its own initiative and without notice to the parties, treated the birth mother's belated appeal as a petition for writ of habeas corpus and denied the request of the prospective adoptive parents to file a return to the writ. (*Adoption of Alexander S.*, *supra*, 44 Cal.3d at p. 865.) *Alexander S.* is "clearly distinguishable" because the present case involves no "creative use of habeas corpus" as did the court in *Alexander S.* (*In re Eileen A.*, *supra* , 84 Cal.App.4th at p. 1256, fn. 7.)

Contrary to *Meranda P.*, which stated that the *Alexander S.* opinion "articulated an unqualified 'bright line' rule prohibiting the use of habeas to challenge final, nonmodifiable adoption-related orders" (*In re Meranda P.*, *supra* , 56 Cal.App. at p. 1165), the Supreme Court in *Alexander S.* held that its "limited holding will not prevent the future application of habeas corpus in adoption cases under slightly different circumstances." (*Adoption of Alexander S.*, *supra*, 44 Cal.3d at p. 867.) Therefore, the *Meranda P.* court improperly extended the narrow holding of *Alexander S.* to a broad set of circumstances.

Meranda P. held that *Alexander S.* applied because an order terminating parental rights is "adoption-related." (*In re Meranda P.*, *supra*, 56 Cal.App.4th at

p. 1146.) However, a section 366.26 hearing is not necessarily an "adoption-related action." While one of the permanent plans the court may order at the section 366.26 hearing is adoption,[2] even in a case where the juvenile court ordered adoption as the permanent plan, the Court of Appeal may find that the child is not adoptable and remand the case to the juvenile court, in which case the matter no longer is an "adoption-related action." (See *In re Jesse W.* (2001) 93 Cal.App.4th 349, 362 [First Appellate District held that habeas petition would be proper to challenge an order from a section 366.26 hearing establishing guardianship as the permanent plan].)

While a habeas cannot serve as *substitute* for an appeal (*Adoption of Alexander S.*, *supra*, 44 Cal.3d at p. 865), the Second Appellate District parted with *Meranda P.* in holding that "a parent is entitled to raise a claim of ineffective assistance of counsel in connection with a parental rights termination order by habeas corpus *petition filed concurrently with an appeal* from the termination order." (*In re Carrie M.*, *supra*, 90 Cal.App.4th 534, *emphasis added*.) The Court

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[2] At the section 366.26 hearing, the juvenile court must make one of four possible alternative permanent plans for a dependent child. The court may terminate parental rights and order adoption; identify adoption as the permanent placement goal without terminating parental rights; order guardianship without terminating parental rights; or order that the child be placed in long-term foster care subject to periodic review of the juvenile court without terminating parental rights. (Sec. 366.26, subd. (b)(1)-(4).) A fifth option for difficult to place children allows the court to identify adoption as the permanent plan without terminating parental rights. (Sec. 366.26, subd. (c)(3).)

of Appeal has both original and appellate jurisdiction. The appellate jurisdiction vested in the Court of Appeal encompasses review by extraordinary writ as well as by direct appeal. (*Id*., at pp. 534-535 [dicta of *Meranda P*., that section 366.26, subd.(i)[3] precluding habeas corpus relief, is unpersuasive]; Cal. Const., art. VI, secs.10-11.) "When a court has jurisdiction to hear a matter, it has jurisdiction to completely dispose of the matter and adopt any suitable mode of proceeding. [Citation.] . . . [A] parental rights termination order may be reversed on appeal or vacated by writ of habeas corpus." (*Id*., at p. 535; see also *In re Jesse W*., *supra*, 93 Cal.App.4th at p. 362 [First Appellate District relies on *Carrie M*., in holding that an appropriate habeas corpus petition for relief from ineffective assistance of counsel at section 366.26 hearing would have to be filed concurrently with an appeal from the termination order, or otherwise before the order became final].)

Moreover, in *Alexander S.*, the order was final because the time for appeal had expired and no timely appeal had been filed. (*In re Carrie M*., *supra*, 90 Cal.App.4th at p. 533 relying on *Adoption of Alexander S*., *supra*, 44 Cal.3d at p. 859. at p. 859).) In this case, petitioner filed a concurrent appeal of the termination

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[3] Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents and upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making the order, the court shall have no power to set aside, change, or modify it, but nothing in this section shall be construed to limit the right to appeal the order. (Sec. 366.26, subd.(i).)

order, therefore, the following rationale expressed in *Carrie M*. applies equally to the case at bar.

> Under the circumstances of this case, permitting review of a termination order by habeas corpus is also consistent with the interests of finality and delay reduction in child dependency proceedings. (*Adoption of Alexander S*., *supra*, 44 Cal.3d at pp. 866, 868.) Because the termination order is on appeal and not yet final, habeas corpus review will not delay finality of the termination order. The habeas corpus petition may be decided during the pendency of the appeal. Because the ineffective assistance of counsel claim relates only to the termination order, review of antecedent final orders is not required. (*In re Carrie M.*, *supra*, 90 Cal.App.4th at p. 535.)

Therefore, this case is distinguishable from *Meranda P*. because petitioner's challenge is only to the section 366.26 hearing and not antecedent orders. In addition, the *Meranda P*. holding is unsound and should not be followed because it broadly expanded the narrow holding of *Alexander S*.

3. <u>This Court Should Follow Those Appellate Districts Which Have Not Adhered to *Meranda P*. and Adopt *Darlice C.*</u>

As can be seen from the above discussion, in allowing a habeas petition filed concurrently with an appeal from a section 366.26 hearing (*In re Darlice C.*, *supra*, 105 Cal.App.4th 459; *In re Carrie M*., *supra*, 90 Cal.App.4th 534; see also *In re Jesse W.*, *supra*, 93 Cal.App.4th at p. 362), appellate courts are finding "cracks" in the holding of *Meranda P*. (*In re Eileen A*., *supra*, 84 Cal.App.4th at p. 1257 [*Meranda P*. still leaves the door open a crack for ineffective assistance challenges in statutorily provided-for appeals from orders terminating parental

rights at the section 366.26 hearing].)

In addition, in a recent case challenging an order terminating parental rights, the Fourth Appellate District granted relief requested in the writ petition and dismissed the appeal as moot.[4] (*In re O.S.*, *supra*, 102 Cal.App.4th 1402, 1405, 1406, fn. 2.) The *O.S.* court distinguished *Meranda P.*, citing the general rule that "an ineffective assistance of counsel claim should be raised by a writ petition." (*In re O.S.*, *supra*, 102 Cal.App.4th at p. 1406, fn. 2.) *Meranda P.* held a writ of habeas corpus "is per se barred . . . in part because the parent there had multiple opportunities to challenge counsel's actions. (*Ibid.*; *Meranda P.*, *supra*, 56 Cal.App.4th at p 1158 [mother "squandered four different opportunities to complain" to the appellate court about ineffective representation].) As in *O.S.*, petitioner here had no such opportunities because her ineffective assistance of counsel claim arose from the section 366.26 hearing and there was no prior opportunity for her to appeal. While a judgment in a proceeding under section 300 may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as an order after judgment (sec. 395), and while in proceedings under section 300, the parent has the right to appeal from any judgment, order, or decree specified in section 395 (Cal. Rules of Court, rule

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[4] In *In re O.S.*, it appears that the petition was filed concurrently with the writ. (*In re O.S.*, *infra*, 102 Cal.App.4th at p. 1405.)

5.585(b)), in this case, "no appealable events occurred between the time" (*In re O.S.*, *supra*, 102 Cal.App.4th at p. 1406, fn. 2) petitioner's new trial counsel, [ATTY-2], was appointed to represent petitioner, and the section 366.26 hearing where he failed to provide her with effective representation.

Thus, the exception in the *Meranda P*. ruling for the instant case is that petitioner is not claiming that her former trial counsel provided her with ineffective assistance and is therefore not asking this court to review orders antecedent to the order terminating her parental rights.

Therefore, petitioner respectfully requests that this court not follow *Meranda P*., and its rule barring habeas petitions for ineffective assistance of counsel claims arising out of the section 366.26 hearings where the petitioner is not challenging the competency of her trial counsel in hearings antecedent to the section 366.26 hearing.

4. Due Process Requires This Court to Consider Petitioner's Habeas Petition.

Regarding appeals, at least, the "waiver rule" [an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order (*In re Meranda P.*, *supra*, 56 Cal.App.4th 1143, 1151)] is the general rule, but not the universal rule. (*In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1190.) One crack left open in the *Meranda P*. opinion was the due process exception to the waiver rule. The "crux

of *Meranda P*." is that "the waiver rule will be enforced unless due process forbids it." (*In re Janee J.* (1999) 74 Cal.App.4th 198, 208.) Under the guidelines offered in *Janee J.* to overcome the waiver rule with "case-specific flexibility" (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208), there must first be "some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole;" the defect "must go beyond mere errors that might have been held reversible had they been properly and timely reviewed;" and, claims of ineffective assistance of counsel must also raise reversible error. (*Id*., at pp. 208-209.) These due process principles should apply equally to filing a habeas petition concurrently with an appeal from an order terminating parental rights, if this Court finds a habeas petition challenging competency of counsel at a section 366.26 hearing is generally not allowed.

The Fourth Appellate District relied on the principles of *Janee J.* in holding that the waiver rule did not apply in an appeal from an order terminating parental rights where the mother raised an ineffective assistance of counsel claim relating to counsel's inaction at the jurisdictional hearing. (*In re S. D*., *supra*, 99 Cal.App.4th 1068, 1079.) While the *S.D.* opinion arose in the context of an appeal from the termination of parental rights hearing, the incompetency of the trial counsel in that case are similar enough to this case to warrant consideration in the

context of a habeas petition.

The *S.D.* court held that trial counsel's failure to object to the jurisdictional allegation was and "entirely legal, and quite fundamental" error. (*Id*. at p. 1080.) The mother's counsel "simply misunderstood the statute and neglected to assert her right to control [the child's] placement, and thus to defeat jurisdiction." (*Ibid*.)

> As pointed out in *In re Eileen A*., *supra*, 84 Cal.App.4th at p. 1258, the parent is hardly in a position to recognize, and independently protest, her attorney's failure to properly analyze the applicable law. If we had some reasonable expectation that parents could do so, we would not need to hire attorneys for them at all. (*In re S. D*., *supra*, 99 Cal.App.4th at p. 1080.)

As in *S.D.*, counsel here "had one job." (*In re S. D*., *supra*, 99 Cal.App.4th at p. 1080.) Whereas in *S.D*., counsel's job was to "defeat jurisdiction," in this case it was to raise all arguable issues that would avoid termination of parental rights. Instead, trial counsel completely failed to investigate the facts of the case and raise the sibling relationship exception to the juvenile court, which would have precluded an adoption finding. Also as in *S.D.*, the law and the evidence are both on petitioner's side (Petition, p. 36-44); "[c]ounsel's failure under the circumstances essentially denied" petitioner the right to assert the sibling relationship exception to adoption and preserve her parental rights; and, there was "not even a hint" in the record that petitioner was ever put on notice that the sibling relationship exception was available to her or that she "had any reason to know of her counsel's error." (*Id*. at pp. 1080-1081; Petition, pp. 55-60.)

Whereas in *S.D.*, the Court of Appeal could not infer that trial counsel had explained the law correctly to his client and had no basis upon which to impute knowledge of the problem to the client (*In re S. D.*, *supra*, 99 Cal.App.4th at p. 1081), in this case, the declarations attached to the habeas petition confirm that trial counsel did not explain the sibling relationship exception to adoption at all to petitioner. (Petition, pp. _____.) And further, as in *S.D.*, "[i]t also appears that none of the other participants recognized the problem at any point in the trial court proceedings." (*Ibid.*)

Therefore, if this Court interprets and follows *Meranda P.* to mean that a parent cannot challenge the competency of trial counsel at the section 366.26 hearing through a habeas petition, then the same due process principles stated in *Meranda P.*, and elaborated on in *Janee J.*, should serve as an exception and allow petitioner's habeas petition.

Conclusion

Petitioner "is entitled to seek review of the termination order by petition for writ of habeas corpus on the ground of ineffective assistance of counsel in connection with the termination order. This court has jurisdiction to hear the habeas corpus petition. The termination order is pending on appeal and not yet final. The claim of ineffective assistance of counsel does not relate to antecedent final orders, but relates only to the termination order." (*In re Carrie M.*, *supra*, 90

Cal.App.4th at p. 536; *In re Darlice C.*, *supra*, 105 Cal.App.4th 459.)

Petitioner has before this court in her appeal an argument that trial counsel failed to competently represent her at the section 366.26 hearing because counsel failed to argue the sibling relationship exception to adoption pursuant to section 366.26, subdivision (c)(1)(E). (Appellant's Opening Brief, pp. ____.) Without the habeas petition, this court will not have before it information about trial counsel's "trial strategy" (*People v. Pope*, *supra*, 23 Cal.3d at p. 426), or lack thereof as it turns out, in that trial counsel failed to advise petitioner of the sibling relationship exception to adoptability; failed to advocate its application at the section 366.26 hearings (see attached Declaration of Appellant, ¶ __); and further because counsel represented petitioner at J.'s section 366.26 hearing without having any contact with petitioner, without making any attempt to locate her and without knowing her position and issues to argue on her behalf (see attached Declaration of Appellant, ¶ __).

Therefore, this court should expand counsel's appointment to present petitioner's habeas petition where petitioner is challenging the incompetency of her trial counsel only at the section 366.26 hearings and where she has filed a concurrent appeal.

Respectfully submitted,

Date: [YOUR NAME]
Attorney for Petitioner

Exhibit A: Declaration of Counsel [YOUR NAME] (Sample)

1. I, [YOUR NAME], am an attorney licensed to practice law in the State of California.

2. I have been appointed by this court, on an [ASSISTED/INDEPENDENT] basis through the Central California Appellate Program, to represent appellant mother, [APPELLANT'S NAME], in her appeal from the order terminating parental rights to her children S. (Case No. C0) and C., M. and J. (Case No. C0). I filed Appellant's Opening Brief in this matter on [DATE]. I am requesting expansion of my appointment to include preparation of a Petition for Writ of Habeas Corpus to address issues of ineffective assistance of trial counsel in conjunction with the pending appeals.

3. I have fully reviewed the record on appeal, drafted and filed Appellant's Opening Brief, consulted with my client and her trial counsel, and obtained a declaration from my client which is attached hereto as Exhibit B.

4. The pending appeal involves four children who are part of a group of seven siblings. The recommended permanent plan for S. was adoption. S. lived with his half-siblings, K and K, who are not subject to the pending appeal and who were under a permanent plan of long-term foster care, not adoption. In a separate placement were C., M. and J. whose recommended permanent plan was adoption in a placement separate

from S. and their other siblings. A seventh child was placed early on in the dependency with his father. A bonding assessment concluded that the children were strongly and primarily bonded to each other and should be placed together. S. age [XX], at least, wanted to live with all his siblings,

5. Appellant was present at the dispositional hearing on November 26, 2001 (CT), when the court set a selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26, for March 25, 2002 and ordered appellant to appear in court on that date. (RT .) At that hearing, the juvenile court advised appellant that if she ever had a problem to call the attorney or the social worker. (RT __.) Also at that time, appellant's court-appointed attorney [ATTY-1] advised appellant that she would no longer be her attorney. (Exhibit B, Declaration of [APPELLANT], ¶5.) Appellant states in her declaration that she was incarcerated from March 10 to April 29, 2002. (Exhibit B, Declaration of [APPELLANT], ¶3.) Appellant has provided a certified copy of the "Inmate Movements History" from the [XX] County Sheriff's Department which confirms that she was incarcerated from March 10 to April 29, 2002. (Exhibit C.) Immediately upon her incarceration, appellant went through the appropriate jail channels to notify the adoptions worker [NAME social worker 2], that she was incarcerated. (Exhibit B, Declaration of [APPELLANT], ¶3.) This attempt to notify the social worker was appropriate in light of the court's advisement and because appellant did not know the name of her new attorney. A new court-appointed attorney, [ATTY-2], appeared on

appellant's behalf at the status report hearing on January 7, 2002. (CT __.) Appellant did not appear at this hearing because the juvenile court had advised her that she did not need to appear. (RT __.) Appellant did not appear at the hearing on March 25, 2002, scheduled as the section 366.26 hearing, because she was incarcerated. (Exhibit B, Declaration of [APPELLANT], ¶3; Exhibit C.) The hearing was continued. (CT __.) On April 17, the court terminated appellant's parental rights to S. (CT __.) Appellant was still incarcerated at that time. Trial counsel made no effort to continue the hearing until appellant could be present. (CT __; RT __.) When appellant was released from custody, she called the court to find out the name of her new attorney. She was told [ATTY-2] was her appointed attorney. Mr. [ATTY-2] would not return her telephone calls. Appellant first had contact with Mr. [ATTY-2] when she appeared at the section 366.26 hearing for C., M. and J. on May 7, 2002. Mr. [ATTY-2] did not have time to talk to her and never informed her of the "sibling relationship" exception to adoptability pursuant to section 366.26, subdivision (c)(1)(E). (Exhibit B, Declaration of [APPELLANT], ¶5.)

6. On September 17, 2002, I spoke to Mr. [ATTY-2] regarding his trial strategy in this case. Mr. [ATTY-2] told me that he did not know that appellant was incarcerated at the time of the section 366.26 hearing held for S. on April 17, 2002. He assumed that appellant had effectively received notice of the section 366.26 hearing for S. through her prior attorney. He believed it was the duty of the social worker to conduct a due diligence search for the client. He did not raise this issue before the

juvenile court. He did not remember the social worker stating in any report that his client was incarcerated. He would have produced his client in court if she was incarcerated. He first had contact with appellant at the court hearing on May 7, 2002. He did not raise the "sibling relationship" adoptability exception because appellant had not appeared and had not participated in the hearings. He further stated that if appellant had wanted him to argue the issue, she should have raised it with him. He also said that his client could not have raised the "sibling relationship" exception because she did not know where the children were placed because the placement was confidential.

7. In my conversation with Mr. [ATTY-2] on September 17, 2002, Mr. [ATTY-2] acknowledged that he was not aware of any report in the juvenile court file which would have informed him that J.'s prior placement had failed due to his behavioral problems.

8. On September 26, 2002, I requested that Mr. [ATTY-2] execute a declaration based on what he had told me or in the alternative to execute a declaration in his own words. To date I have not received a declaration from Mr. [ATTY-2] despite my request that he provide me with one by this date.

9. The above-described facts establish that appellant was denied effective assistance of counsel because her new court-appointed attorney represented her at the section 366.26 hearing for S. without having had any contact with her, without having made any attempt to locate her whereabouts, without knowing that she was in fact incarcerated, and without ascertaining her position and whether there were

arguable issues to argue on her behalf to the juvenile court. She was further denied effective assistance of counsel at the section 366.26 hearing for C., M. and J. when her trial counsel failed to advise her of the sibling exception to adoptability. Had appellant been represented by competent trial counsel, counsel would have argued the "sibling relationship" exception to adoption because the children were strongly and primarily bonded to each other and S. at least had expressed a desire to live with all his siblings. Appellant was not advised of the sibling relationship exception to adoptability by her former trial attorney because the exception was not in effect on November 26, 2001, when the juvenile court set the section 366.26 hearing and when [ATTY-1] informed appellant that she would no longer be representing her. After the sibling relationship exception was effective on January 1, 2002, appellant's trial attorney, [ATTY-2], did not advise her of the new exception.

10. A parent is entitled to raise a claim of ineffective assistance of counsel in connection with a parental rights termination order by habeas corpus petition filed concurrently with an appeal from the termination order. (*In re Carrie M.* (2001) 90 Cal.App.4th 530, 534.) A habeas corpus proceeding is the proper vehicle to raise the issue of ineffective assistance of counsel in a termination of parental rights case where the factual basis for the claim rests in pertinent part on evidence not contained in the record on appeal. (*In re Darlice C.* (2003) 105

Cal.App.4th 459, 467; *Adoption of Michael D.* (1989) 209 Cal.App.3d 122, 136; *In re Jessica Z.* (1990) 225 Cal.App.3d 1089, 1101.) In habeas corpus, trial counsel is afforded the opportunity to explain trial strategy. (*People v. Pope*, *supra*, 23 Cal.3d at p. 426.) In this case, appellant's ineffective assistance of counsel claim partially rests on facts not part of the record on appeal.

11. Therefore, I request that this court expand my appointment so that I may represent appellant in a writ petition addressing the ineffective assistance of trial counsel.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on [DATE], at [CITY], California.

_____

[YOUR NAME], Declarant

Exhibit B: Declaration of [APPELLANT'S NAME] (Sample)

1. I, [NAME], am the appellant in Court of Appeal Case Nos. [#] (*In re S.*) and [#] (*In re C., et al.*). I am the mother of S., C., M. and J..

2. On November 23 or 24, 2001, I entered the [XX] residential treatment safe house. I called the social worker [SW-1], to give him my confidential address. I continued to use [ADDRESS] as my mailing address for the court because I did not want my confidential whereabouts known. I left [XX] a few

days before Christmas and lived with the grandmother of my children, K and K.

3. I was incarcerated from March 10 to April 29, 2002. On my first day in custody, I contacted the social worker [SW-2], through the jail social worker, to let him know that I was in custody. I did not hear a response from him. I did not call social worker [SW-2] on March 24, 2002 to request a visit because I was incarcerated.

4. When I was released from custody I contacted social worker [SW-2] to request visits with my children. At that time, social worker [SW-2] told me I could not have a visit with S. because he was going to be adopted. This is the first time I learned that my parental rights to S. had been terminated.

5. At the court hearing on November 26, 2001, my court-appointed attorney [ATTY-1] told me that she would no longer be my attorney because she was moving out of state. When I was released from custody I called the court to find out the name of my new attorney. I was told [ATTY-2] was my lawyer. I had a hard time getting hold of Mr. [ATTY-2] who would not return my telephone calls. My first contact with [ATTY-2] was at the hearing on May 7, 2002. I gave him paperwork and told him that I had been incarcerated. He said the judge did not want to see the papers because it was irrelevant to my case. He did not have time to talk to me. Mr. [ATTY-2] told me he was going to court for me but was not going to fight for me to get my children back. He was going to argue for

adoption. I was surprised when he argued against adoption. Mr. [ATTY-2] never informed me that one way to avoid adoption is if the children have a bond with their siblings.

6. I have not completely understood the legal proceedings. I do not know how to read and have a problem understanding what has been going on. My appellate attorney, [YOUR NAME], prepared this declaration for me based on what I have told her and has read it to me.

7. I have successfully completed two rehabilitation programs, one inpatient and one outpatient. I am currently in the [XX] outpatient program; attending NA/AA meetings; testing; and working full-time. I have been clean and sober one year. I am currently on a family maintenance plan with my baby N. who was born [DATE].

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____, 2002, at _____, California.

_____
[APPELLANT], Declarant