Filed 6/14/21 In re Joshua S. CA5
Review denied 9/29/21; reposted with Supreme Court order and statement.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JOSHUA S., a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. C.S., Defendant and Appellant.	F082100 (Super. Ct. No. JVDP-20-000181) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Boze, County Counsel, and Angela J. Cobb, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Franson, Acting P.J., Peña, J. and De Santos, J.

Juvenile dependency proceedings were initiated on behalf of then nine-month-old Joshua S. and his three siblings.[1] Prior to disposition, C.S. (mother) was arrested for and charged with several felonies and remained in custody awaiting trial. At the combined jurisdictional/dispositional hearing, Joshua and his siblings were adjudged dependents of the court and ordered removed from mother's custody. The juvenile court ordered mother not to receive reunification services pursuant to Welfare and Institutions Code[2] section 361.5, subdivision (e)(1) (§ 361.5(e)(1)) because, though mother was incarcerated, clear and convincing evidence demonstrated services would be detrimental to Joshua and his siblings. Mother appeals from the juvenile court's dispositional findings and orders, contending "incarcerated" within the meaning of section 361.5(e)(1) refers only to incarceration resulting from being convicted of and sentenced for a crime. As such, mother contends the juvenile court erred, as a matter of law, by applying section 361.5(e)(1) to her because she was in custody awaiting trial and had not been convicted of or sentenced for a crime. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On or about August 29, 2020, mother was stopped by law enforcement while driving because Joshua and his two-year-old sibling, M.S., were not in car seats. Upon law enforcement's contact with mother, mother arranged for her friend to care for the children. Upon driving mother back to her residence, mother's friend observed the front door of the residence open, old food on the floor, spoiled milk, dirty diapers with feces in the bathroom sink within reach of M.S., minimal food, and a strong odor. Mother's friend also observed mother was acting strangely and may have been under the influence of methamphetamine. The friend called law enforcement to report the condition of the

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1 This appeal only pertains to Joshua.

2 All further undesignated statutory references are to the Welfare and Institutions Code.

home. When law enforcement responded, they made a referral to the Stanislaus County Community Services Agency (agency) based on their observations of the condition of the home and that mother appeared to be under the influence of methamphetamine.

Two days later, the emergency response social worker visited mother's home and observed it to be clean with no visible hazardous conditions, though the couch was on the public sidewalk outside of the home, and mother had abrasions on her forehead, open wounds on her lips, and severe bruising near both of her calves. The social worker observed that mother appeared to be under the influence of methamphetamine and seemed to be more concerned about her traffic ticket than with the safety of the children. Mother told the social worker she had been in a car accident because she was on Vicodin. Mother agreed to drug test, but after 10 minutes, stated she could not urinate because of her car accident. Mother called the maternal grandfather, who subsequently went to the residence and agreed to be interviewed.

The maternal grandfather told the social worker he was concerned about the children being in mother's care and suspected she was using drugs again. He reported mother does well for a short period of time but then goes back to her "old ways," which he described as drug use, bad choices in men, and poor decisionmaking. A few days prior, he had given mother supplies, which she in turn sold for "dope," and was not able to hold a coherent conversation with him. He stated that mother self-medicated with methamphetamine and did not take her bipolar medication.

Mother did not sign the safety plan that was created, which stated the children would stay with her friend until the Team Decision Making (TDM) meeting, but did agree to participate in the TDM meeting.

The social worker went to the home of Joshua's older half siblings, where they lived with a relative caregiver. Fifteen-year-old Matthew B. reported mother would not "recover" and 11-year-old M.B. reported mother was "better off homeless" because she took advantage of the home where she lived. M.B. expressed she wanted a stay away

order from mother. Matthew reported not feeling safe unless they were removed from mother by the agency.

At the TDM meeting on September 1, 2020, it was observed that mother lacked insight and minimized the agency's safety concerns. Mother "presented with an inability to emotionally regulate and continued to interrupt, had labile mood swings, and did not sound entirely coherent throughout the meeting." Mother also blurted out random statements and appeared to be having conversations with herself. The social worker noted it was "difficult to have a meaningful discussion regarding the safety of her children."

Later that day, the social worker spoke with Joshua's father who reported mother had relapsed on methamphetamine and admitted he had pushed her a few days prior and that they had a history with domestic violence. Joshua's father reported mother had told him two to three months prior that she had crushed an adult melatonin pill, dissolved it in water, and forced Joshua to drink it because he was not sleeping.

The children were placed into protective custody.

On September 3, 2020, the agency filed a petition on behalf of Joshua, along with his siblings, Matthew, M.B., and M.S., contending he came within the juvenile court's jurisdiction under section 300, subdivisions (b)(1) (failure to protect) and (j) (abuse of siblings). Under section 300, subdivision (b)(1), it was alleged Joshua was at substantial risk of suffering serious physical harm or illness as a result of mother's inability to protect him due to substance abuse issues, mental health issues, domestic violence issues with Joshua's father, and failure to provide an appropriate home. Under section 300, subdivision (j), it was alleged mother had a prior dependency case involving M.S. from December 2018 through August 2019 due to substance abuse history, mental health issues, and an arrest for outstanding warrants that left M.S. without a caregiver. Mother had successfully reunified with M.S. and jurisdiction was terminated.

At the detention hearing on September 4, 2020, the juvenile court ordered Joshua and his siblings detained from mother. That day, the social worker provided mother with referrals for parenting, individual counseling, and clinical assessments for mental health and medication and substance use disorders.

Mother did not attempt to engage with the referred services and did not schedule visitation with the children subsequent to the detention hearing. On October 1, 2020, mother was arrested and placed into custody.

The agency's combined jurisdiction/disposition report dated October 19, 2020, recommended denial of reunification services pursuant to section 361.5(e)(1). The report indicated that mother remained in custody following her arrest and her next criminal court hearing was November 12, 2020. Mother's bail was set at $220,000. Mother's charges included two counts of felony assault with a deadly weapon, one count of felony false imprisonment, one count of felony elder abuse, and one count of misdemeanor vandalism. The district attorney had informed the social worker that mother had been offered a plea agreement with a sentence of two years in state prison. If mother did not accept the offer, she faced up to six years in prison. Because mother's potential prison exposure was longer than the six- and 12-month reunification periods, and because Matthew and M.B. had expressed they did not want to live with mother, the social worker recommended mother not receive reunification services.

The agency prepared an addendum report dated November 17, 2020, indicating mother remained in custody with a pretrial hearing set for December 11, 2020. A new charge of vehicle theft had been added to mother's charges. The report further indicated mother would only be eligible for instructor-led courses once sentenced and housed at a different facility. The district attorney had informed the social worker that because mother was on probation when she was arrested, it was unlikely she would be released without a prison sentence.

The addendum report also indicated that M.S. and Joshua had been placed with the same caregivers M.S. lived with during his previous dependency case, and the caregivers noticed a marked difference in M.S. The caregivers reported M.S. shook when his diaper was changed, panicked when adult males were near or when anyone left the room, and frequently flinched. The social worker also noticed a difference in M.S. The social worker observed both M.S. and Joshua cried when they were looked at or if they looked at the social worker. Matthew and M.B. reported they were happy with their current caregivers and expressed negative feelings toward their mother.

At the contested jurisdictional/dispositional hearing on November 19, 2020, counsel for the agency made an offer of proof that the social worker would testify she spoke to the district attorney the day before and had no new information to provide. Counsel for the children supported the agency's recommendation. Mother's counsel requested the court take judicial notice of the sheriff's department website indicating bail was set for her initial charges at $220,000 and her additional Vehicle Code violation at $50,000. Father submitted on the agency's recommendation.

Mother's counsel argued the "legal question" before the court was "can you bypass an innocent person simply because she is poor?" Mother's counsel asserted mother was innocent and was only incarcerated because she could not make bail. Counsel for the agency argued there did not appear to be a "legal question" and pointed out there were no facts in evidence as to why mother was not released on bail. Counsel for the agency went on to argue it would be detrimental to offer reunification services to mother based on the older children's relationship with mother and the apparent trauma demonstrated by the behavior of Joshua and M.S. Counsel for the agency also noted that all the children had been placed in the same home.

The juvenile court asserted jurisdiction over Joshua and his siblings and adjudged them dependents of the court. Joshua's father was ordered to receive reunification services, and mother was denied services pursuant to section 361.5(e)(1). The court

noted section 361.5, subdivision (e) did not require a conviction, and because mother was incarcerated, albeit without a known release date, section 361.5, subdivision (e) applied to mother. The court went on to explain it would be detrimental to the children for mother to receive services. The court noted Matthew and M.B. did not want a relationship with mother and that none of the children appeared to have a strong bond with her. The court noted the length of mother's sentence was unknown and the nature of the charges were concerning. The court went on to say there did not appear to be any detriment to the children if services were not offered to mother as Joshua and M.S., based on their actions, appeared to have been "severely traumatized" and the older children did not want to see mother. The court held there had been no evidence shown that providing reunification services to mother would be in the children's best interest. Mother appealed the dispositional order denying her services.

DISCUSSION

I. "Incarcerated" within the Meaning of Section 361.5(e)(1)

Mother's sole contention on appeal is that the court erred by applying section 361.5(e)(1) because, as a matter of law, mother was not "incarcerated" within the meaning of section 361.5(e)(1). Mother contends the provision only applies to incarcerated individuals who have also been convicted of and sentenced for a crime, not those incarcerated awaiting trial, as she was in the present case. Mother's argument has been rejected by *Edgar O. v. Superior Court* (2000) 84 Cal.App.4th 13 (*Edgar O.*); she acknowledges this rejection but contends *Edgar O.* was incorrectly decided and asks us not to follow it. We are not persuaded by mother's contention.

Section 361.5(e)(1) provides the juvenile court must order that reasonable services be provided to a parent who is "incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to the parent's … country of origin" unless the court determines by clear and convincing evidence those services would be detrimental to the child. In determining detriment, the court must consider:

(1) the age of the child; (2) the degree of parent-child bonding; (3) the length of the sentence; (4) the length and nature of the treatment; (5) the nature of the crime or illness; (6) the degree of detriment to the child if services are not offered, and, for children 10 years of age or older, the child's attitude toward the implementation of services; (7) the likelihood of the parent's discharge from incarceration, institutionalization, or detention without the reunification time limitations set forth by statute; and (8) any other appropriate factors. (§ 361.5(e)(1).)

"We review questions of statutory construction de novo." (*In re B.H.* (2016) 243 Cal.App.4th 729, 736.) We first look to the words of the statute "to determine legislative intent and to fulfill the purpose of the law." (*Ibid.*) " 'If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls.' " (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214.) We also "interpret the language in the context of the entire statute and the overarching statutory scheme, and we give significance to every word, phrase, sentence and part of an act in discerning the legislative purpose." (*In re B.H.*, at p. 736.) "We must also give the statute a reasonable and commonsense interpretation consistent with the apparent purpose and intent of the lawmakers and resulting in wise policy rather than mischief or absurdity." (*Ibid.*) "[I]f the statutory language may reasonably be given more than one interpretation, courts may employ various extrinsic aids, including a consideration of the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Conservatorship of Whitley*, at p. 845.)

In looking to the words of section 361.5(e)(1), the *Edgar O.* court pointed out the plain meaning of the word "incarcerated" is "jailed." (*Edgar O., supra,* 84 Cal.App.4th at p. 17.) We agree, as suggested by *Edgar O.*, that as the plain meaning of the word "incarceration" does not denote the incarceration must be the result of a conviction, it

follows, based on the words of the statute, that the statute was not intended to require a conviction and sentence.

Mother concedes the dictionary definition of "incarcerated" is "confined in a jail or prison," but argues the context of the statute requires us to interpret incarcerated as "convicted and sentenced" because one of the factors the juvenile court is required to consider is the "length of the sentence," which presupposes a conviction. In our view, mother's exact argument has been adequately and persuasively resolved by the court in *Edgar O*.

The *Edgar O*. court stated: "While 'length of sentence' presupposes a conviction or plea bargain, it does not follow that section 361.5, subdivision (e)(1) is inapplicable to a parent who, while incarcerated, has not been convicted and sentenced. Section 361.5, subdivision (e)(1) does not require that each listed factor exist in any particular case, nor does it specify how much weight is to be given to a factor bearing on detriment, listed or not." (*Edgar O*., *supra*, 84 Cal.App.4th at pp. 17–18.) We agree with the *Edgar O*. court's analysis and add that another factor listed in section 361.5(e)(1)—"the length and nature of the treatment"—would similarly not necessarily apply to every case. We also note the existence of the "length of the sentence" factor does not preclude the juvenile court to consider when making its detriment finding that an incarcerated individual awaiting trial has an "unknown" sentence and may not be convicted and put whatever weight upon that factor it deems necessary.

We further agree with the *Edgar O*. court that pursuant to logic and the canons of statutory construction, we are not free to add "convicted and sentenced" to the statute where it has been omitted. (*Edgar O*., *supra*, 84 Cal.App.4th at p. 18.) In addition, like the *Edgar O*. court, "[w]e presume that the Legislature deliberately distinguished between 'incarceration,' 'conviction,' and 'sentence' in section 361.5." (*Ibid*.) "That presumption is supported by subdivision (b)(11) of section 361.5, which lists among the circumstances in which the court may decline to offer reunification services

'convict[tion] of a violent felony.' Had the Legislature intended section 361.5, subdivision (e)(1) only to apply to incarcerated parents following their conviction of a crime, it would have so stated." (*Ibid.*)

Finally, the purpose of section 361.5(e)(1) does not require us to read "convicted and sentenced" into the statute. As stated in *Edgar O.*, "the obvious purpose of section 361.5, subdivision (e)(1) … is to address reunification services in cases where parents are not at liberty to come and go or to schedule activities as they please." (*Edgar O.*, *supra*, 84 Cal.App.4th at p. 18.) The subdivision applies not only to incarcerated parents but to those who are institutionalized and detained by the United States Department of Homeland Security, two situations where the parent may not have done anything criminal or wrong. As the *Edgar O.* court points out, what these groups have in common is that they are "confined." (*Ibid.*) The type of confinement described by section 361.5(e)(1) has practical effects on the ability to provide services to parents, as specifically expressed within section 361.5(e)(1): "In determining the content of reasonable services, the court shall consider *the particular barriers* to an incarcerated, institutionalized, detained, or deported parent's access to those court-mandated services and ability to maintain contact with the child…." (Italics added.)[3] Because it is clear the purpose of section 361.5(e)(1) is to address reunification services to confined or similarly unavailable individuals who by way of that confinement may experience difficulty in accessing services and contact with the child, the underlying reason for the confinement is irrelevant.

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3 The "particular barriers" to an "incarcerated, institutionalized, detained, or deported" parent's access to services and ability to maintain contact with the child is recognized and must be considered by the juvenile court throughout the statutory scheme. (See, e.g., §§ 366.21, subds. (e)(1) & (f)(1)(C) [evaluating a parent's progress with services at status review hearings]; 366.215 [in evaluating whether a § 366.26 hearing should be set at a six-month review hearing for a child under three years of age].)

In sum, all canons of statutory construction require us to read incarcerated simply as "jailed" and reject mother's interpretation that "incarcerated" necessarily also means "convicted and sentenced." We find *Edgar O.* well-reasoned and persuasive; as such, we reject mother's argument that it should not be followed because the "horrible" and distinguishable facts of the case "must have driven the thinking of the [*Edgar O.*] court."

We find the additional arguments mother raises, which were not directly considered by the *Edgar O.* court, meritless. First, mother contends section 361.5(e)(1) must be read to apply only to incarcerated individuals who have been convicted of and sentenced for a crime because to read the statute otherwise leads to "absurd results." To support her contention, mother provides hypothetical scenarios where a parent could be incarcerated the day of the dispositional hearing, be denied reunification services pursuant to the bypass provision within section 361.5(e)(1), and released shortly thereafter.

Mother's argument suggests inaccurately that bypassing an incarcerated parent for services is automatic, and she ignores that section 361.5(e)(1) expressly *requires* a court to grant reunification services to incarcerated parents *unless* detriment is proven by clear and convincing evidence. Thus, the structure of the subdivision disallows a court from bypassing a parent for services based on the mere fact he or she is incarcerated. Mother also ignores that before making a detriment finding under the subdivision, the court must consider the length of sentence (which in the case of a parent awaiting trial may be inapplicable or unknown) and the likelihood a parent will be released from incarceration before reunification time limits expire. (§ 361.5(e)(1).) In considering these factors, the court necessarily must consider whether a parent has been convicted of or sentenced for a crime. The court also must consider the evidence before it regarding those factors, which would include not only any evidence presented by the agency of what the parent's custody time exposure might be, but any evidence presented by a parent in rebuttal to the

agency's evidence relevant to his or her release date.[4] Because of these safeguards written into the statute, which protect the incarcerated parent, we reject mother's argument that the *Edgar O*. interpretation of the subdivision produces absurd results.

Mother also contends we must interpret "incarcerated" as "convicted, sentenced, and incarcerated" because parents who are unable to make bail are unfairly or absurdly affected by the statute. To support this contention, mother states that "parental poverty cannot serve as a basis for juvenile court rulings," citing *In re G.S.R.* (2008) 159 Cal.App.4th 1202.

In re G.S.R. stands for the proposition that poverty cannot be the sole ground of a detriment finding precluding return of a child to a parent (*In re G.S.R.*, *supra*, 159 Cal.App.4th at p. 1215) and does not assist mother. Again, because section 361.5(e)(1) expressly *requires* a court to order an incarcerated parent to receive services absent a detriment finding, the statute, contrary to mother's suggestion, disallows reunification services to be denied based solely on the bare fact that a parent is incarcerated. This necessarily encompasses those who are incarcerated because they cannot afford to make bail and thus are incarcerated, as mother puts, on the basis of poverty. In other words, because the bypass provision requires the court to make a finding of detriment *separate from* the mere fact the parent is incarcerated, a parent could not be bypassed under the statute for the sole reason they could not afford to make bail, and such an order would likely not withstand appellate review. We note, though mother makes no constitutional argument, a section 361.5(e)(1) detriment finding must be made by the heightened clear and convincing standard, which comports with due process requirements. (See *In re*

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[4] Notably, in the present case, mother presented no such evidence regarding how long she would be incarcerated. She only argued below she could not afford bail and was innocent of the crime with which she was charged; she did not argue below that it would not be detrimental for mother to receive services and does not challenge the court's detriment finding on appeal.

Joshua M. (1998) 66 Cal.App.4th 458, 476–477 [bypass provisions do not violate due process because they incorporate the constitutional standard of clear and convincing proof].) We accordingly reject mother's argument that the *Edgar O.* interpretation of the subdivision unfairly or absurdly treats parents who are incarcerated because they cannot make bail.

The juvenile court correctly interpreted section 361.5(e)(1) by holding it applied to mother because she was incarcerated, despite the fact she had not been convicted of or sentenced for a crime. We find no error.

II. Motion for Leave to Produce Additional Evidence and Request for Judicial Notice

On May 17, 2021, while this appeal was pending, mother filed a motion for leave to produce additional evidence on appeal establishing she was no longer incarcerated. Specifically, she requested we consider as part of the record on appeal a letter from her criminal defense attorney indicating she pled no contest to a nonstrike felony for credit for time served pursuant to a plea agreement and was released from custody on April 30, 2021. Mother argued we should allow her to introduce this evidence on appeal "because the bypass of family reunification was based upon the notion [mother] would be incarcerated for a long time and that condition no longer exists."

On the same day, mother filed a request for this court to take judicial notice of a minute order from her criminal case dated April 30, 2021, indicating mother pled no contest to a felony violation of Penal Code section 236 (false imprisonment), and was granted probation and released from custody. In her request for judicial notice, mother contends her release from custody is relevant to the issue on appeal because her release from custody "*highlights the abuse of discretion exercised by the court* in finding that a temporary jail stay supported the drastic step of bypassing family reunification services." (Italics in original.)

The event mother wishes us to consider on appeal—her release from custody—is simply not relevant to our analysis of the issue on appeal. Mother's only issue on appeal, according to mother's opening brief, "is solely an interpretation of the meaning of a statute"; she does not contend the juvenile court erred with respect to the specific facts of the case or that the court's detriment finding was not supported by sufficient evidence. Mother's suggestion that the event "highlights" the court's "abuse of discretion" in her request for judicial notice is particularly puzzling as the phrase "abuse of discretion" is not mentioned once in mother's original briefing. The facts in mother's case have no bearing on our analysis of the issue she raises regarding the interpretation of section 361.5(e)(1). Because the documents mother wishes us to consider are not relevant, they are not appropriate for us to consider as part of the record on appeal. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1 [judicial notice should be taken only of relevant matters].)

Even if mother had challenged the juvenile court's factual finding of detriment, our consideration of the documents she proffers would still be inappropriate. "[A]n appellate court should not consider postjudgment evidence going to the merits of an appeal and introduced for the purposes of attacking the trial court's judgment." (*In re Josiah Z.* (2005) 36 Cal.4th 664, 1138–1139.) Consideration of postjudgment evidence generally should only be considered in context of motions to dismiss. (*See ibid*.)

Mother's motion for leave to produce additional evidence and request for judicial notice are denied.

DISPOSITION

The juvenile court's dispositional findings and orders are affirmed.

Filed 9/29/21

Court of Appeal, Fifth Appellate District - No. F082100

S269868

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOSHUA S., a Person Coming Under the Juvenile Court Law.

STANISLAUS COOUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent,

v.

C.S., Defendant and Appellant.

The petition for review is denied.

_____/s/_____
Chief Justice

In re JOSHUA S.

S269868

Concurring Statement by Justice Liu

When a child is removed from a parent's or guardian's custody, Welfare and Institutions Code section 361.5, subdivision (a)(1) says the juvenile court "shall" order that the parent or guardian receive reunification services. (All statutory references are to the Welfare and Institutions Code.) These services are intended " 'to eliminate the conditions leading to the loss of custody' " and to further " 'the goal of preservation of family, whenever possible.' " (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.) The goal of reunification extends beyond the parent's interest in "actual physical custody" and includes "exploring ways of protecting the 'parent['s] interest in the companionship, care, custody, and management of his [or her] children.' " (*In re Monica C.* (1995) 31 Cal.App.4th 296, 308, 309.)

The mandate to provide reunification services is subject to a few caveats. First, section 361.5, subdivision (a)(1) contains three exceptions relating to when the parent or guardian is uninterested in reunification services or when reunification services have already been terminated under the juvenile court's delinquency jurisdiction.

Second, section 361.5, subdivision (b) provides a separate list of 17 statutory bypass provisions under which the juvenile court "need not" order reunification services. Some of these exceptions are premised on a finding of criminal wrongdoing, including where "the parent or guardian of the child has been convicted of a violent felony," "the parent or guardian has been

required by the court to be registered on a sex offender registry," or "the parent or guardian knowingly participated in, or permitted, the sexual exploitation . . . of the child." (§ 361.5, subd. (b)(12), (16) & (17).)

Third, section 361.5, subdivision (e) contains a bypass procedure for a parent or guardian who is "incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to the parent's or guardian's country of origin." (§ 361.5, subd. (e)(1).) For these parents and guardians, the juvenile court is authorized to deny reunification services if it finds by "clear and convincing evidence" that "those services would be detrimental to the child." (*Ibid.*) In making that determination, the juvenile court "shall consider" factors such as "the length of the sentence," "the nature of the crime," and "the likelihood of the parent's discharge from incarceration . . . ." (*Ibid.*)

Here, C.S. (hereafter Mother) faced several criminal charges at the time of the disposition hearing, and she was in custody pending trial due to an inability to post bail. None of the charges appears to fall within the 17 bypass provisions set forth in section 361.5, subdivision (b). Because she was in custody, however, the juvenile court deemed Mother to be an "incarcerated" parent under section 361.5, subdivision (e)(1). After considering the age of the children, the relationship between the children and Mother, and the nature of the charges, the court determined that reunification services would be detrimental to her children and denied Mother all reunification services.

Mother's petition raises a question of statutory interpretation. She argues that the term "incarcerated" in section 361.5, subdivision (e)(1) should include only those who

have been convicted and sentenced to a period of incarceration. The Court of Appeal rejected this argument, relying on *Edgar O. v. Superior Court* (2000) 84 Cal.App.4th 13. The court in *Edgar O.* explained that the term "incarcerated" plainly means "jailed" (*id.* at p. 17) and that "the obvious purpose of section 361.5, subdivision (e)(1) . . . is to address reunification services in cases where parents are not at liberty to come and go or to schedule activities as they please" (*id.* at p. 18).

Our denial of review today expresses no view on the proper reading of the statute. I write to call attention to a separate issue not directly raised by Mother's petition: whether the statutory scheme, as construed by the Court of Appeal, violates principles of equal protection.

Under the scheme, there are at least two ways in which parents who cannot post bail are treated differently from those who can. First, only parents who are in custody pending trial are subject to a "detriment" analysis (§ 361.5, subd. (e)(1)) that could potentially result in the denial of all reunification services. By contrast, assuming none of the other statutory exceptions apply, a parent who faces the exact same charges but is able to post bail remains entitled to the provision of reunification services under section 361.5, subdivision (a)(1).

Second, only parents who are in custody pending trial are subject to the juvenile court's consideration of their moral culpability based on unadjudicated criminal charges. Once the door to a "detriment" analysis is opened, the juvenile court is directed to consider factors like "the nature of the crime" and "the likelihood of the parent's discharge from incarceration." (§ 361.5, subd. (e)(1).) The listing of these factors invites the juvenile court to consider the parent's culpability or likelihood of guilt when determining if reunification services should be

provided at all. This door can be opened solely by dint of a parent's inability to afford bail, whereas it would stay shut if he or she could post bail.

In other words, for a parent who is able to afford bail, "the nature of the crime" or "the length of the sentence" cannot serve as reasons for denying reunification services; there is no exception from section 361.5, subdivision (a)(1)'s mandate of reunification services that authorizes such consideration. (See *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 587 [where "the Legislature provided express exceptions" in a statute, " ' "we may not imply additional exemptions unless there is a clear legislative intent to the contrary" ' "].) At most, those factors can inform what types of services may be appropriate. By contrast, for a parent who faces the exact same charges but cannot afford bail, a juvenile court may consider the nature of the charges and the parent's potential culpability in deciding not only what types of services may be appropriate but also whether to deny reunification services altogether.

Mother's case demonstrates how this statutory scheme can operate to deny parents or guardians reunification services altogether. The fact that Mother was in custody pending trial prompted an inquiry into whether reunification services would be "detrimental to the child." (§ 361.5, subd. (e)(1).) The juvenile court pursued this inquiry by considering the factors stated in the statute and, expressly noting that the "[n]ature of the crime [was] concerning," denied Mother all reunification services. If Mother had been able to post bail, the nature of the charges could only have informed what kind of reunification services she would be provided, not whether she would be provided any services at all.

Although some Courts of Appeal have rejected equal protection challenges to this statutory scheme, those decisions have not addressed the specific forms of discrimination described above. The courts have reasoned that any disparate treatment is rationally related to the government's legitimate interest in finding permanent placements for children within a limited timeframe, which is made more difficult when a parent is confined. (See *In re J.M.* (May 22, 2015, A142654) [nonpub. opn.]; *In re T.M.* (July 8, 2015, A142643) [nonpub. opn.].) But even if factors such as "the nature of the crime" and "the length of the sentence" facing the parent are rational considerations in determining the best placement for a child, I find it troubling that a court could consider such factors in denying reunification services altogether in the case of a parent who cannot afford bail, when the court could not deny reunification services based on such factors in the case of a parent who faces the exact same charges but can afford bail.

"The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional," and "[t]he disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound." (*In re Humphrey* (2021) 11 Cal.5th 135, 143, 147.) Such disadvantages include the possible termination of parental rights. Whether principles of equal protection permit disparate treatment in the provision of reunification services to parents who can afford bail and those who cannot is an issue that courts may need to resolve. Alternatively, the Legislature may wish to reconsider the statute in light of the potential unfairness it creates. Among other options, the statute could be amended to ensure that parents and guardians facing criminal charges are treated the same, regardless of whether they can afford bail.

More specifically, the Legislature could make clear that in the case of parents in pretrial custody solely because of an inability to afford bail, juvenile courts may consider the factors specified in section 361.5, subdivision (e)(1) to decide what types of reunification services are appropriate, but may not consider such factors to deny reunification services altogether.

LIU, J.

I Concur:
CUÉLLAR, J.