No. 21-

IN THE

Supreme Court of the United States

ARCHIE MCCOY,

Petitioner,

v.

STATE OF HAWAI`I DEPARTMENT OF HUMAN SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAI'I

REDACTED PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In proceedings to terminate parental rights, before a court permits constructive service by publication does the Fourteenth Amendment's Due Process Clause require further efforts by the government, beyond a mother's limited reports about the absent father, to locate the father?

2. In proceedings to terminate parental rights, does the Due Process Clause require further efforts by the government when it becomes aware, prior to the termination, that its service of process by publication has failed to provide notice?

3. Does the Due Process Clause require that a court appoint legal counsel to an indigent "unknown" parent facing termination of parental rights?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of the State of Hawai`i included Petitioner herein Archie McCoy, and Respondents herein the State of Hawai`i Department of Human Services ("DHS"), the Court Appointed Special Advocates Program ("CASA"), and the Interveners/Resource Caregivers ("RCGs").

LIST OF ALL PROCEEDINGS

Supreme Court of the State of Hawai`i, No. SCWC-19-0000711, *In the Interest of AA*, judgment entered January 19, 2022.

Intermediate Court of Appeals for the State of Hawai`i, No. CAAP-19-0000711, *In the Interest of AA*, judgment entered October 27, 2020.

Family Court of the First Circuit, State of Hawai`i, FC-S No. 16-00249, *In the Interest of [AA], Born on [00, 00], 2016*, judgment entered November 19, 2019.

Family Court of the First Circuit, State of Hawai`i, FC-P No. [redacted]

Family Court of the First Circuit, State of Hawai`i, FC-A No. 19-1-6097, Petition for Adoption of AA, pending.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Archie McCoy, respectfully petitions for a writ of certiorari to review the opinion and judgment of the Supreme Court of the State of Hawai`i ("SCSH").

OPINIONS BELOW

The order of the SCSH, "Order Denying Motion for Reconsideration", dated December 29, 2021, styled as *In the Interest of AA*, is reproduced at Appendix E. The SCSH's "Opinion of the Court", dated December 15, 2021, styled *In the Interest of AA*, is reproduced at Appendix A ("SCSH Opinion"). The Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawai`i ("ICA"), styled *In the Interest of AA*, dated September 29, 2020, is reproduced at Appendix B. The "Findings of Fact and Conclusions of Law", dated November 19, 2019, styled as *In the Interest of [AA], born on [00, 00] 2016*, is reproduced at Appendix C. The "Decision and Order Regarding the Contested Hearing on (Atty/Father) Archie McCoy's Motion to Set Aside Default Filed June 5, 2019", dated September 20, 2019, styled as *In the interest of [AA], born on [00, 00] 2016*, is reproduced at Appendix D.

JURISDICTION

The SCSH Opinion for which Petitioner seeks review was entered on December 15, 2021. Appendix A, 1a. On December 29, 2021, the SCSH denied Petitioner's timely motion for reconsideration. Appendix E. This petition is timely under United States Supreme Court Rules 13.1 & 13.3 because it is filed within 90 days from the date of the denial of the motion for reconsideration on December 29,

2021. This Court has jurisdiction to review the judgment of the SCSH pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of pertinent constitutional and statutory provisions are set forth in Petitioner's Appendix F.

STATEMENT OF THE CASE

I. Introduction

This case presents two critically important issues under the Due Process Clause concerning the State of Hawai`i's handling of parental termination cases. The first issue concerns service of process by publication; the second concerns the appointment of legal counsel to indigent parents in termination cases.

As to service of process, this Court determined in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), that constructive service by publication is permissible only if it is accomplished in a manner reasonably calculated to give a party defendant adequate notice of the pending judicial proceedings. *Id.* at 313. In the 70 years since *Mullane*, this Court has consistently protected due process notice in cases involving property interests. Moreover, state courts of last resort in termination cases have applied the due process guarantee to vacate judgments where they found inadequate effort to locate the missing parent before terminating parental rights. Despite this Court's consistent decisions that

require a demonstration of due diligence before service by publication may be authorized, here the SCSH has entered a decision in a termination case that permits lower courts to authorize service by publication without demonstration by the state of its effort to find the missing parent.

The case below began in 2016 when a young woman ("Mother") asked the State of Hawai`i to put her newborn ("Child") in foster care. Appendix A, 2a-3a. Under the Hawai`i Child Protective Act ("CPA")[1], DHS acquired temporary and later permanent custody of Child. *Id.* at 4a-6a. Mother told DHS that the father resided on Chuuk in the Federated States of Micronesia. *Id.* at 3a. On March 2, 2017, the lower court authorized service of process by publication on the father concerning a CPA hearing on June 21, 2017. *Id.* at 5a. The notice for the father on Chuuk ran four times in the Honolulu Star-Advertiser. *Id.* The father did not appear at the hearing on June 21, 2017, and was found in default. *Id.* Seven months later, on February 27, 2018, the court terminated his parental rights. *Id.* at 6a.

The second issue asks whether the family court's failure to appoint legal counsel for the absent father, or engage in any determination of the need for court-appointed counsel, violates the due process? The SCSH's failure to vacate the judgment in this regard conflicts with this Court's decision in *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981), with SCSH's own precedent in *In re L.I.*, 149 Hawai`i 118, 482 P.3d 1079 (2021), and the laws of nearly all 50 states.

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1. Hawai`i Revised Statutes ("HRS") § 587A, *et seq.*

Petitioner, a resident of Honolulu, was not aware that he was Child's natural father, and he had no notice of hearings concerning Child. Appendix A, at 16a. Like many Americans he did not read his local newspaper, including the legal notices. *Id.* at 14a. After learning that he could be Child's father in 2018, he took a genetic test that conclusively established his paternity. *Id.* at 7a. Petitioner sought relief from the termination of his parental rights before the Hawai`i family court, then the ICA, but to no avail. *Id.* at 17a-18a, 22a-28a.

Petitioner appealed to the SCSH. *Id.* at 32a. He argued, inter alia, that the service of process by publication and [redacted] violated the Due Process Clause. *Id.* at 35a; SCWC-19-0000711, Dkt. 41. The SCSH disagreed with these arguments. This Petition follows.

II. Relevant Background

Child was born in Honolulu in 2016. Appendix A, 2a. [redacted] RA Dkt. 39 at 73, 340, 343.[2] Child's natural father

2. The lower court record is sealed under HRS § 587A-40, which prohibits public availability of the record unless permitted by court order.

In accord with the manner in which the Record on Appeal ("RA") before the ICA (*In the Interest of AA*, Born on 00/00/2016, CAAP -19-0000711) was electronically filed in the Hawai`i Judiciary's Electronic Filing and Service System ("JEFS"), citation to the record is to the JEFS' docket number and PDF page number(s). A citation to transcripts filed in the ICA is to the date of the transcript, the JEFS' docket number and the page number(s). A citation to the SCSH's docket is to the SCSH case number followed by the JEFS' docket number.

was and is Petitioner, a resident of Hawai'i. *Id.* at 343, 367. At the time of Child's birth in 2016, Petitioner and Mother had been in a long-term relationship [redacted] Appendix A, 16a; RA Dkt. 39 at 512; TR 07/29/2019 Dkt. 36 at 6, 9-10. They already had three minor children together, who were being raised by their maternal grandparents in Chuuk [redacted] *Id.*; RA Dkt. 39 at 68, 344-345, 512. Mother spent half the year in Chuuk caring for the children, [redacted] *Id.*; TR 07/29/2019 Dkt. 36 at 8; *see* RA Dkt. 39 at 343, 512-513.

In March 2016 Mother traveled to Chuuk for seven months not knowing that she was pregnant with her fourth child from Petitioner. RA Dkt. 39 at 512. While in Chuuk she had a sexual encounter with another man she later identified as "John". Appendix A, 15a; RA Dkt. 39 at 512. Learning she was pregnant, she believed John in Chuuk was the only possible father. *Id.* Mother returned to Hawai'i in October 2016 eight months pregnant. RA Dkt. 39 at 512. [redacted] she hid her condition [redacted] *Id.* at 513. She went to the hospital [redacted] and gave birth late in 2016. *Id.* She told the hospital staff [redacted] that she wanted [redacted] Child for [redacted] *Id.* Pressed to explain, she lied and said she was a victim of domestic violence by a [redacted] boyfriend [redacted] who was not Child's father and did not know of her pregnancy. Appendix A, 2a-3a, 15a; RA Dkt. 39 at 49, 73. She also reported that she lived with her sister, or in a car, [redacted] Appendix A, 5a, n.4; RA Dkt. 39 at 49, 99, 134. She repeatedly told DHS that the natural father was in Chuuk. Appendix A, 3a-4a; RA Dkt. 39 at 49, 52, 69, 75,

98, 107. She also reported to DHS that he wanted Child to go into foster care. Appendix 3a; RA Dkt. 39 at 69. [redacted] thus she knew his precise location. TR 07/29/2019 Dkt. 36 at 143. Child was placed in protective custody. Appendix A, 3a.

On December 9, 2016, the court awarded temporary foster custody of Child to DHS. Appendix A, 4a-5a. DHS arranged placement of Child with the RCGs. Appendix A, 3a. [redacted] RA Dkt. 39 at 99. [redacted] *Id.* at 99, 270, 272, 289.

[redacted] *Id.* at 506, 513. She did not disclose pending legal proceedings and that Child was actually in foster care. *Id.* at 506-507, 513. [redacted] *Id.* at 507. In April 2018 Mother told Petitioner that she had been visiting Child and now believed that Petitioner might be the father, given the close physical resemblance. Appendix A, at 17a; RA Dkt. 39 at 507-508. [redacted] RA Dkt. 39 at 508. From May to October, Petitioner repeatedly went to DHS' offices to see the social worker [redacted] RA Dkt. 39 at 508; TR 07/29/2019 Dkt. 36 at 34.

[redacted] (RA Dkt. 39 at 508) [redacted] Appendix C, 96a-97a.[3] [redacted] TR 07/29/2019 Dkt. 36 at 29. [redacted] *Id.* at 30-31.

On October 16, 2018, Petitioner attended a meeting with DHS. Appendix A, 17a. He reported his belief that he could be Child's natural father, [redacted] RA Dkt. 39 at 508. L [redacted] *Id.* DHS advised him to hire an attorney, which he did the following day. Appendix A, 17a. Petitioner took a genetic test that established that was he was Child's natural father. RA Dkt. 39 at 305-306, 315-316, 367-372.

III. Relevant Proceedings Below

A. Family Court.

At a hearing on December 9, 2016, the court awarded DHS temporary foster custody of Child, [redacted] Appendix A, 5a; RA

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3. [redacted] RA Dkt. 39 at 509. [redacted] *Id.*

Dkt. 39 at 55, 58, 88. At a hearing on March 2, 2017, DHS made an oral motion for authorization to serve the father by publication. Appendix A, 5a. Without inquiry or discussion, the court granted the motion. TR 03/02/2017 Dkt. 23 at 4. In April and May 2017, DHS caused to be published on four occasions in the Honolulu Star-Advertiser newspaper notices to parents or guardians in 17 legal cases about a hearing on June 21, 2017 at the Hawai`i family court. RA Dkt. 39 at 115-16. The notice warned that if the parent or guardian failed to appear, "further action shall be taken without further notice to you" and parental rights "may be terminated". *Id.* at 116. In this case, notice was addressed to the "unknown natural father" concerning a male child born to [Mother] on [date] in 2016. *Id.*

On June 21, 2017, the "unknown natural father" failed to appear at the family court. Appendix A, 5a. The court entered an order of default against him, [redacted] Appendix A, 5a; RA Dkt. 39 at 117-118. On February 21, 2018, DHS filed a motion to terminate the parental rights of Mother and the father. Appendix A, 6a. DHS engaged in no further effort to serve process on the father, whether in person, by mail or publication. RA Dkt. 39 at 214. On February 27, 2018, neither Mother nor the father appeared at the hearing. Appendix A, 6a. The court terminated both parents' rights and awarded permanent custody of Child to DHS. Appendix A 6a.

After learning that he could be Child's natural father, Petitioner commenced a paternity case on November 5, 2018. Appendix A, 7a; RA Dkt. 39 at 333. The court ordered that Petitioner undergo a genetic test to

determine paternity. RA Dkt. 39 at 305-306, 315-316. The test established Petitioner's paternity and [redacted] the court acknowledged Petitioner as the "natural father/legal father" of Child. *Id.* at 367-372.

Petitioner moved to intervene on January 28 and February 11, 2019. Appendix A, 7a. All parties to this case at that time – DHS and CASA – stipulated to Petitioner's intervention. Appendix A, at 9a. The court granted intervention at a hearing on April 22, 2019, the Honorable Andrew Park presiding. Appendix A, 9a-10a. However, a month later at a hearing on May 22, 2019, the Honorable Bode Uale presiding, the court set aside the order permitting intervention and ordered that Petitioner first set aside the default from June 21, 2017, before seeking intervention. Appendix A, 11a.

On June 5, 2019, Petitioner filed a Motion to Set Aside Default. Appendix A, 12a, 19a. He argued, inter alia, that the service of process by publication in the Honolulu newspaper violated due process. Appendix A, 14a. Specifically, he argued:

[redacted]

[redacted]

RA Dkt. 39 at 502.

In his declaration in support, Petitioner noted that he did not read the newspaper on a regular basis, let alone the legal notices, and that he had no business or legal reason to check such notices at that time. Appendix A, 14a; RA Dkt. 39 at 507. [redacted] RA Dkt. 39 at 507.

On July 29 and August 27, 2019, the family court held contested hearings on the Motion to Set Aside Default, even though DHS supported Petitioner's motion [redacted] RA Dkt. 39 at 560. Petitioner testified: about his lack of knowledge of Mother's pregnancy in 2016; [redacted] and that he had been paying court-ordered child support since May 2019. Appendix A, 16a-17a; TR 07/29/2019 Dkt. 36 at 13-14, 18, 29, 39, 49. Mother testified: about her encounter with John in Chuuk, [redacted] her initial belief that he was the father of Child; that she lied about the domestic violence

in her household with Petitioner. Appendix A, 15a; RA Dkt. 39 at 128-129, 143.

On September 20, 2019, the family court entered the Decision and Order denying the Motions to Set Aside Default and to Intervene. *See* Appendix A, 17a; Appendix D. On November 19, 2019, the court entered its Findings of Fact and Conclusions of Law denying Petitioner's Motion to Set Aside Default and his Motions to Intervene. *See* Appendix A, 18a; Appendix C. As to service by publication, the court found that "based upon Mother's failure/refusal to provide any information regarding the identity of [Child's] father, DHS published notice to the unknown natural father of [Child]". Appendix C, 93a. Therefore, the court concluded, Petitioner was "duly noticed and served by this publication and the entry of default and subsequent termination of his parental rights upon his failure to appear based upon this notice was appropriate." *Id.* at 110a.

B. The Hawai`i Appellate Courts.

Petitioner appealed. Appendix A, 22a. He argued inter alia that the service of process by publication violated the Due Process Clauses of the United States and Hawai`i Constitutions, and Hawai`i law, therefore the family court did not acquire personal jurisdiction over him and the default and the default judgment terminating parental rights were void. *See* Appendix A, 22a-24a; Appendix B at 59a. The ICA disagreed and concluded that service by publication was proper. Appendix A, 29a-30a; Appendix B, 66a.

Petitioner timely filed an application for a writ of certiorari before the SCSH, which the Court accepted.

Appendix A, 32a. Petitioner argued inter alia that the ICA erred in concluding that service of process by publication was proper. Appendix A, 37a. In addition, [redacted] SCWC-19-0000711, Dkt. 41.

On December 15, 2021, the SCSH entered its opinion affirming in part and denying in part the opinion of the ICA. Appendix A, 48a. Relevant to this petition, the Court found that the ICA did not err in concluding that service by publication was proper. Appendix A, 36a-38a. Essentially the Court laid the blame on Mother for failing to "provide DHS with the identifying information or any way to contact the potential father", and found that publication was necessary given the circumstances of the CPA proceeding. Appendix A, 38a. As to all other remaining arguments, the Court found that they "lack merit." Appendix A, 2a. On December 20, 2021, Petitioner filed a motion to reconsider, which the SCSH denied on December 29, 2021. Appendix E. The Court [redacted] January 19, 2022. SCWC-19-0000711 Dkt. 64.

REASONS TO GRANT THE PETITION

I. The SCSH's Decision That Service of Process by Publication Did Not Violate the Petitioner's Due Process Rights Conflicts with Relevant Decisions of this Court and State Courts of Last Resort.

A. Constitutional Dimensions

A parent's right to the care and custody of his child is among the oldest recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. *13 Troxel v. Granville*, 530 U.S. 57, 65 (2000); Appendix F, 122a-123a. Parental rights, however, are not absolute. As *parens patriae*, the state has a special duty to protect minors and the authority to interfere with parenting when necessary to prevent serious harm to a child. *Santosky v. Kramer*, 455 U.S. 745, 747 (1982). "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.* at 759. Few consequences of judicial action are so grave as the severance of natural family ties. *Id.* Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of severing forever all legal rights and obligations of the parent. *Id.* at 759, 761. In light of the interests and consequences at stake, parents are constitutionally entitled to fundamentally fair procedures in termination proceedings. *Id.* at 754. Before a deprivation of a parent's liberty interest in the care and custody of his child, the Due Process Clause requires notice and an opportunity for a hearing appropriate to the nature of the case. *See Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

The use of a small notice in the classified section of a local newspaper for service of process has been an accepted method of substituted service for 145 years. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714, 727 (1877). In *Mullane* this Court clarified that while personal service is "always adequate in any type of proceeding", constructive service by publication is permissible but only if it is accomplished in a manner reasonably calculated to give a party adequate notice of the pending judicial proceedings. 339 U.S. at 313. In a case involving notice to beneficiaries of a trust, the Court in *Mullane* refused to require personal service in all circumstances, explaining "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Id.* at 313-14. Nevertheless, "when notice is a person's due, process which is a mere gesture is not due process." *Id.* at 315.

The Court highlighted problems with service by publication:

> "It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that

> the information will never reach him are large indeed . . . ."

Id.

For missing or unknown persons, service by this "probably futile" means – publication – does not raise due process concerns. *Id.* at 317. But for known parties, notice by publication is constitutionally defective because it is not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314, 318. Since *Mullane* this Court has expanded the due process protection in property rights cases where the absent party's location was unclear or unknown. *See e.g. Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983)(where the mortgagee's identity was known and the address could have been reasonably ascertained through diligent efforts, constructive notice did not satisfy the mandate of *Mullane*); *Jones v. Flowers*, 547 U.S. 220 (2006)(when mailed notice of a tax sale was returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.)

B. State Courts of Last Resort

In parental termination cases, state courts of last resort have applied *Mullane* or its rationale. Like here, in these cases state authorities or the opposing party had less than perfect information concerning the absent parent. The Supreme Court of Texas considered a case where the state did not know the mother's location but knew her identity, was in regular contact with her, and

had at least one in-person meeting with her after it sued to terminate her legal rights to her children. *In re E.R.*, 385 S.W.3d 552 (Tex. 2012). Given these circumstances, the Court concluded that substituted service in a newspaper advertisement "poor, hopeless, and unjustifiable under these circumstances." *Id.* at 555.

The Iowa Supreme Court reviewed a case where the state knew the father's identity but not his address, and resorted to notice by publication. *In the Interest of S.P.*, 672 N.W.2d 842 (Iowa 2003). The Court found that an investigator failed to exhaust all reasonable means to discover the father's whereabouts to ensure that he received notice of the termination proceeding. *Id.* at 848. The Court held that in determining whether a search is diligent, courts must examine the methods employed to locate the missing person to see if they were made through channels expected to supply the missing identity. *Id.* at 846. The court found that the father did not have an opportunity to be heard, and vacated the order terminating parental rights. *Id.* at 848.

The Nebraska Supreme Court reviewed a case in which the mother's identity was known, but her location was not. *In re Interest of A.W.*, 401 N.W.2d 477 (Neb. 1987). Under these circumstances service by publication was not justified even though the mother had said that she was going "underground" because the police were looking for her. *Id.* at 479. A search that made no effort to determine the last known address of the mother, and whether she she was still there, could not be considered reasonably diligent. *Id.* The Court vacated the termination order and remanded the case for further proceedings. *Id.*

The Supreme Court of Tennessee reviewed a case in which the mother was known, her location was unknown, and the father resorted to service by publication. *Turner v. Turner*, 473 S.W.3d 257 (Tenn. 2015). "Suffice it to say that the diligent efforts standard requires more than attempting to serve a defendant with process at a location where the plaintiff knows the defendant will not be found." *Id.* at 276. The Court found a lack of diligent effort to locate the mother, thus the constructive service on her was ineffective, and the judgment terminating her parental rights was void for lack of personal jurisdiction. *Id.*

The Supreme Court of Kansas remanded a case to the lower court with directions that a hearing be held to determine whether the state exercised due diligence in its attempts to locate the known father prior to seeking service by publication. *Woodard, In Interest of*, 646 P.2d 1105 (Kan. 1982). The Court held that, "in a severance proceeding it must be affirmatively shown that the party seeking such service exercised due diligence in attempting to identify and locate the parent upon whom such service is desired." *Id.* at 1113.

Cases from other state appellate courts concerning notice in termination or juvenile cases are in accord. *In Re Beebe*, 115 Cal.Rptr. 322 (Cal.App.1974); *In re the Petition of C.L.S.*, 252 P.3d 556 (Colo.App.2011); *One Minor Child, In re*, 411 A.2d 951 (Del.1980); *In the Interest of: J. B.*, 231 S.E.2d 821 (GA.App.1976); *In Interest of T. B.*, 382 N.E.2d 1292 (Ill.App.1978); *In re Adoption of D.C.*, 887 N.E.2d 950 (Ind.App.2008); *Adoption of Hugh*, 619 N.E.2d 979 (Mass. App. 1993); *Lutheran Social Services of N. J. v. Doe*, 411 A.2d 1183 (N.J.Super.1979); *In re Adoption of Knipper*, 507 N.E.2d 436 (OhioApp.1986); *Tammie v. Rodriquez,*

570 P.2d 332 (Okl.1977); *Marriage of McDaniel, Matter of*, 634 P.2d 822 (Or.App.1981); *accord, Kickapoo Tribe of Oklahoma v. Rader*, 822 F.2d 1493 (10th Cir.1987).

C. Hawai`i Law

In Hawai`i constructive service of process may only be utilized where authorized by statute, and the law requires strict compliance with such statutes. *Murphy v. Murphy*, 55 Hawai`i 34, 35, 514 P.2d 865, 867 (1973). For service of process in a CPA termination case, HRS § 587A-13(c) applies:

> "(c) The sheriff or other authorized person shall serve the summons by personally delivering a certified copy to the person or legal entity being summoned. A return on the summons shall be filed, showing the date and time and to whom service was made; provided that:
>
> (1) If the party to be served does not reside in the State, service shall be made by registered or certified mail addressed to the party's last known address; or
>
> (2) If the court finds that it is impracticable to personally serve the summons, the court may order service by registered or certified mail addressed to the party's last known address, or by publication, or both. When publication is used, the summons shall be published once a week for four consecutive weeks in a newspaper of general circulation in the county in which the party was last known to have resided. In the

> order for publication of the summons, the court shall designate the publishing newspaper and shall set the date of the last publication at no less than twenty-one days before the return date. Such publication shall have the same force and effect as personal service of the summons."

Appendix F, 125a-126a (underscoring added).

D. Discussion

When interpreting statutes, the fundamental starting point is the language of the statute itself. *Randall v. Loftsgaarden*, 478 U.S. 647, 656 (1986). Where statutory language is plain and unambiguous, the court's sole duty is to give effect to its plain and obvious meaning. *Id.* Here, the plain, unambiguous terms of HRS § 587A-13(c)(2) required: a finding of impracticability before the court permitted service of process by publication; that the order identify the publishing newspaper; that the selected newspaper be one of general circulation in the county where the party was last known to have resided.

As of March 2, 2017, when the family court authorized publication, the record contained at least five reports that the father lived in Chuuk, Micronesia:

1) December 7, 2016, *Petition for Temporary Foster Custody*, [redacted] (RA Dkt. 39 at 49);

2) December 7, 2016, *Safe Family Home Report*, [redacted] (*id.* at 69);

3) December 7, 2016, *Safe Family Home Report*, [redacted] (*id.* at 75),

4) February 16, 2017, *Report to the Court*, [redacted] (*id.* at 98);

5) [redacted] – (*id.* at 107).

[redacted] *Id.* at 52. [redacted] RA Dkt. 39 at 68, 77, 98. And she reported that the father wanted Child to go into foster care (Appendix A, 3a) – clearly showing that she was in contact with him and she knew the identity of the father.[4] The father was "known" – not "unknown".

The record also showed that DHS had multiple opportunities to question Mother and her family members about the Chuukese father. [redacted] Mother was present during the court hearing on December 9, 2016. RA Dkt. 39 at

4. In contrast, the record shows one instance in which Mother's legal counsel – not Mother – stated that Mother did not know the identity of Child's father. Appendix A, 3a, n.1.

55, 75, 77, 98. [redacted] *Id.* at 49, 99.[5] DHS knew Mother had three other children (Appendix A, 13a, 16a) and could have reviewed medical/ birth records, which would have led them to the Petitioner. DHS knew Mother was a resident of Honolulu, had access to her birth date, and could have checked public records for an alternative address.

At the hearing on March 2, 2017, both DHS and the court ignored due process and HRS § 587A-13(c). [redacted]

5. In addition to failing to make a diligent inquiry as to the missing father, DHS' omission violated HRS § 587A-10 that requires "reasonable efforts to identify and notify all relatives of" Child within 30 days of assuming foster custody. Appendix F, 124a.

And see 42 U.S.C. § 671(a)(29): "within 30 days after the removal of a child from the custody of the parent or parents of the child, the State shall exercise due diligence to identify and provide notice to the following relatives: . . . all parents of a sibling of the child, where such parent has legal custody of such sibling, . . . and other adult relatives of the child . . . subject to exceptions due to family or domestic violence . . . "

[redacted]

TR 03/02/2017 Dkt. 23 at 4. [redacted] RA Dkt. 39 at 95.

The SCSH faulted Mother for failing to provide DHS with sufficient information, and for her inconsistent contact with DHS. Appendix A, 38a. However, [redacted] RA Dkt. 39 at 502. Morever, Mother's behavior did not suspend the state's responsibility to use the diligent effort standard mandated in *Mullane* and regularly applied in state courts of last resort. *See, e.g., Turner,* 473 S.W.3d at 276; *In re Interest of A.W.*, 401 N.W.2d at 479; *In the Interest of S.P.*, 672 N.W.2d at 846; *In re E.R.*, 385 S.W.3d at 555.

Further, the court's in-hearing ruling failed to follow the statutory mandate that required a finding of impracticability. HRS § 587A-13(c)(2). The written order failed to identify the publishing newspaper, which, had to be one of general circulation in the county where the party was last known to live. *Id.* Had the court followed the statute, at minimum the father's location in Chuuk would have been established and provided a basis to decide whether publication in the Honolulu Star-Advertiser passed due process analysis.

A notice's adequacy is assessed by balancing the state's interest against "the individual interest sought to be protected by the Fourteenth Amendment." *Mullane*, 339 U.S. at 314. In this termination case, it is self-evident that publication in a Hawai`i-based newspaper meant to provide constructive notice to the father in Chuuk was an unconstitutional "mere gesture" not reasonably calculated under any circumstances to apprise the father of the pending action in Hawai`i and afford him an opportunity to respond. *Id.* at 315.

The SCSH discussed the ICA's conclusion that publication in Honolulu was not defective because Petitioner, a resident of Honolulu, was later determined to be Child's natural father. Appendix A, 29a-30a. This conclusion ignores the Due Process Clause and HRS § 587A-13(c)(2)'s "last known to have resided" mandate. When the court authorized publication on March 2, 2017, the record clearly showed that the father was in Chuuk. Discovery two years later that a Honolulu resident was Child's biological father is immaterial to the court's failure to follow § 587A-13(c)(2) and, by implication, the Due Process Clause. Due process must ensure the "essential fairness of state-ordered proceedings anterior to adverse state action." *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (underlining added). Here, we have a lack of due process followed by a devastating adverse action – termination of parental rights – which action cannot be mitigated by future-discovered facts. Whether the father was in Chuuk or Honolulu, his parental rights were permanently terminated.

Moreover, basic principles of statutory interpretation call for a rational, sensible reading over inconsistency and

illogicality. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012). Here, the due process rationale requires that § 587-13(c)(2)'s "last known to have resided" refers to location information available at the time the publication was sought.

II. The SCSH's Decision Conflicts with *Jones v. Flowers* where this Court Held That Due Process Requires Further Efforts When the Government Becomes Aware, Prior to a Proceeding, That its Constructive Service of Process Failed to Provide Notice to the Absent Party.

A. Constitutional Dimensions

The SCSH's Opinion conflicts with this Court's holding in *Jones v. Flowers*, 547 U.S. 220 (2006). *Jones* involved the tax sale of residential property. Applying *Mullane*, the Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225. The Court found that the government violated due process by failing to take such reasonable steps as sending notice by regular mail or posting notice on the property. *Id.* at 234-35. This case concerns parental rights, "an interest far more precious than any property right." *Santosky*, 455 U.S. at 758-59, *quoting Lassiter*, 452 U.S. at 27.

B. Discussion

In its Opinion the SCSH's found that:

> "[W]hen Father was defaulted for his failure to appear after service by publication on June 21,

> 2017, DHS remained unaware of any additional information regarding [Child's] father. Without further information to identify Child's father and without the ability to consistently contact Mother, DHS was unable to determine the identity of, and personally serve, Child's father with the exercise of reasonable diligence. Therefore, service by publication did not violate Father's due process rights because service by publication was necessary given the circumstances of the CPA proceeding."

Appendix A, 38a (quotation marks omitted; underlining added).

The record, however, clearly shows that after the June 21, 2017 hearing, DHS had consistent contact with Mother and, therefore, opportunities to gain information about the Child's father. Mother attended hearings on September 11 and [redacted] 2017, with her legal counsel. TR 09/11/2017 Dkt. 26 at 1-2 [redacted] TR 11/09/2017 Dkt. 27 at 1-2 [redacted] At the September 11, 2017 hearing, [redacted] TR 09/11/2017 Dkt. 26 at 3. [redacted] *Id.* [redacted] *Id.*

[redacted] RA Dkt. 39 at 49,

99; TR 09/11/2017 Dkt. 26 at 3-4; TR 11/09/2017 Dkt. 27 at 4-5. [redacted]

TR 11/09/2017 at 4 (underlining added).

Mullane directs that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U. S. at 315. In *Jones* the Court applied this mandate and concluded, "that someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done." *Jones*, 547 U.S. at 238.

Applying *Jones* here, when the attempted notice by publication proved ineffective and father did not appear at the June 21, 2017 hearing, DHS could have done much more to contact the father. From August to [redacted] 2017 the record shows that DHS had at least three contacts with Mother, who had previously reported being in communication with the father (RA Dkt. 39 at 69) and thus knew how to reach him. [redacted] Surely during its meetings with Mother and Sister DHS could have asked for contact information for the father and pursued the lead. But DHS took no reasonable steps to gain more information about the father, even though it knew that the notice by publication failed. Instead, on February 21, 2018, DHS filed a motion to terminate the parental rights of Mother and the father, which the court granted due to default for both parties on February 27,

2018. Appendix A, 6a. Like the state tax commissioner in *Jones*, DHS' lack of effort to do more from August to November 2017 to contact the father was manifestly insufficient to satisfy the demands of the Due Process Clause.

III. The SCSH's Decision, that the Family Court's Failure to Appoint Legal Counsel for the "Unknown" Father Lacked Merit, Conflicts with this Court's Settled Law, SCSH's Precedent, and the Laws of Nearly Every State.

A. Constitutional Dimensions.

Forty-one years ago, in a five-to-four decision, this Court held that the due process does not necessarily require court-appointed counsel for indigent parents in termination actions. *Lassiter*, 452 U.S. at 24. Due process should be understood as expressing the requirement of fundamental fairness. *Id.* Deciding what constitutes fundamental fairness in a particular situation, is "an uncertain enterprise" that may be accomplished "by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* at 24–25.

Regarding the right to appointed counsel and fundamental fairness, the Court in *Lassiter* concluded that its prior decisions had established "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26–27. The Court used the three factors enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) – (1) the private interests at stake; (2) the risk of an erroneous decision; and (3) the government's interest – to

analyze whether due process requires appointed counsel when parental rights are at stake. *Lassiter*, 452 U.S. at 31.

The Court concluded that the weight of the parent's interests, the government's interests, and the risk of erroneous deprivation was insufficient to find that the Due Process Clause requires the appointment of counsel as a matter of course when a state seeks to terminate an indigent's parent's rights. *Id.* The appointment of counsel must be answered on a case-by-case basis. *Id.* at 32. Appointment of counsel is constitutionally required in termination cases only where the trial court's assessment of such factors as the complexity of the proceeding and the capacity of the uncounseled parent indicates an appointment is necessary. *Id.* at 27–32.

The Court has not revisited the question of appointed counsel in parental termination proceedings since deciding *Lassiter*. One commentator suggests this is because almost all states now provide appointed counsel in parental termination cases by constitutional provision, statute or court rule, and do not condition the appointment on the case-by-case balancing test adopted in *Lassiter*. *See* Susan Calkins, *Ineffective Assistance of Counsel in Parental–Rights Termination Cases: The Challenge for Appellate Courts*, 6 J.App. Prac. & Process 179, 193 (2004); *and see* Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 Loy. Univ. Of Chicago L.J. 363, 367 (2005).

B. Hawai`i Law

In 2021, the SCSH clarified its prior opinion *In re T.M.* and held that family courts must appoint counsel for indigent parents when DHS files a petition for family supervision because at that point, "parental rights are substantially affected as foster custody can be ordered by the court at a subsequent hearing", and that failure to timely appoint counsel is structural error requiring vacatur without proving harmful error. *In re L.I.*, 149 Hawai`i at 122, 482 P.3d at 1083-84 (*citing In re Interest of T.M.*, 131 Hawai'i 419, 319 P.3d 338 (2014)). Seven years earlier in *In re Interest of T.M.*, the SCSH had indicated that family courts must appoint counsel for indigent parents only "upon the granting of a petition to DHS for temporary foster custody". 131 Hawai`i at 436, 319 P.3d at 355.

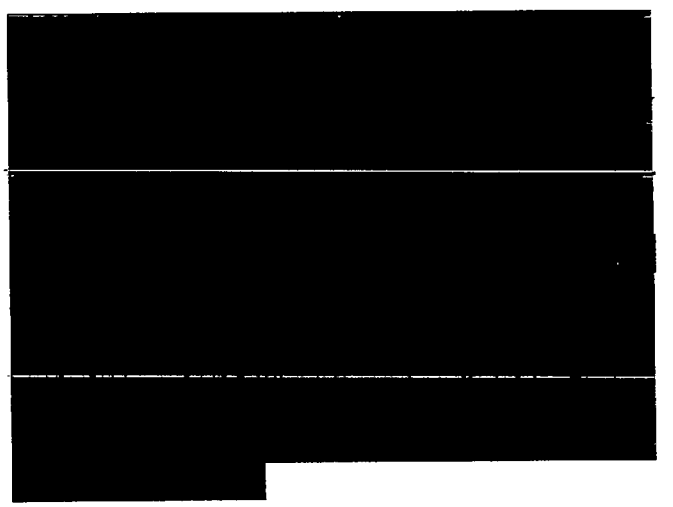
C. Discussion.

The first entry in the lower court record is DHS' Petition for Temporary Foster Custody, filed December 7, 2016. RA Dkt. 39 at 48. [redacted] Child was already placed in temporary foster custody on December 2, 2016, [redacted] *Id.* at 50.

On December 13, 2016, [redacted] RA Dkt. 39 at 88. Without explanation, the court did not appoint legal counsel for the absent father, who

remained without legal counsel through and including the termination of his parental rights on February 27, 2018. *See* TR 12/09/2016 Dkt. 22, 1-13.

[redacted], while the case was pending in the SCSH, [redacted] SCWC-19-0000711 Dkt. 41. [redacted], on October 28, 2021 (*id.* at Dkt. 56), the SCSH [redacted]



Id. at Dkt. 41 (paragraph break omitted).

In its Opinion, the SCSH tersely determined that the argument, "lack[ed] merit." Appendix A, 2a. That decision ignored SCSH's mandate in *In re L.I.* that failure to appoint counsel to an indigent parent when DHS files a petition asserting custody over a child is structural error.

In re L.I., 149 Hawai`i at 123, 482 P.3d at 1084. As well, the decision conflicts with *Lassiter* where this Court held that appointment of counsel must be answered on a case-by-case basis using the *Eldridge* factors. *Lassiter*, 452 U.S. at 32. Here, the transcript of the December 9, 2016 hearing where Mother first appears with legal counsel [redacted] including application of the *Eldridge* factors, [redacted] *See* TR 12/09/2016 Dkt. 22.

Further, the SCSH's decision conflicts with the laws in nearly every state that require the appointment of counsel for indigent parents in supervision or termination proceedings. At the time this Court decided *Lassiter* in 1981, 33 states and the District of Columbia had passed legislation requiring the appointment of counsel in termination cases. *Lassiter*, 452 U.S. at 34. Of the remaining 17, as of 2004 another 12 states required routine appointment of counsel in termination cases. *See* Calkins, 6 J.App. Prac. & Process at 193.

IV. THIS CASE RAISES IMPORTANT DUE PROCESS ISSUES IN TERMINATION OF PARENTAL RIGHTS CASES.

Concerning service of process through publication, there is little doubt this case presents an instance of a "state court of last resort . . . decid[ing] an important federal question in a way that conflicts with the decision of another state court of last resort", and that "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R.10(b) & (c).

At stake is whether the Due Process Clause allows courts in termination cases to permit constructive notice by publication without a showing of diligent effort to acquire information about the absent parent to enable personal service. The related issue is whether due process demands that states undertake diligent effort not only before a court permits constructive notice, but as well after the state has learned that constructive notice has failed and termination is imminent. There is no logical reason why this Court should not extend the due process analysis in *Jones* – finding that where a mailed notice of a tax sale was returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property (*Jones*, 547 U.S. at 225) – to this termination case concerning notice by publication. If this Court is willing to protect Jones' property interest and require that the state take additional steps when it knows its original notice was ineffective, it follows that this Court must safeguard the "unknown" parent in this case whose protected interest is "far more precious than any property right." *Santosky*, 455 U.S. at 758-59.

If left unanswered and the SCSH's decision goes unchecked, each year thousands of American parents will continue to lose their parental rights because they did not read a small advertisement printed at the back of a newspaper that may or may not be published in the state where that parent resides.[6] Moreover, thousands

6. As of 2012, according to the Pew Research Center only 23% of Americans read a print newspaper. *See* https://www.pewresearch.org/fact-tank/2012/10/11/number-of-americans-who-read-print-newspapers-continues-decline/

of American children will lose their connection to their biological parent. Thus, in addition to the liberty interest of the parent, at stake is the welfare of the child who stands to permanently lose the protection, care and companionship of his biological parent, and by implication his biological family.

Concerning appointment of legal counsel, in light of the interests and consequences at stake in termination proceedings – where this Court has repeatedly recognized the need to preserve rather than severe the familial bond, *Santosky*, 455 U.S. at 766-67, and that parents are constitutionally entitled to fundamental fair procedures, *M.L.B.*, 519 U.S. at 120 – there is no doubt that SCSH's terse "lack merit" decision warrants this Court's review. The decision violates the Due Process Clause, Hawai`i precedent, and the laws of nearly all the states.

V. THIS IS AN EXCELLENT CASE TO RESOLVE THE ISSUES PRESENTED.

This case offers an opportunity for this Court to provide a clear answer to the critical due process issues at stake in termination cases that will continue to affect parents and children across America. As to constructive notice, Petitioner is one of the thousands of biological parents that each year are expected to read an advertisement at the back of a newspaper, the failure of which will result in the loss of parental rights. For the father who is unaware of the child or his relationship to the child, and is subject to the state's unwillingness and inability to investigate his identity and location before termination, the lack of fair play is even more egregious. A majority of state courts of last resort have decided

that due process in termination cases requires a showing of due diligence to find the "unknown" parent before a court authorizes service by publication. Moreover, this Court's consideration of due process notice with respect to property interests, as seen in *Mullane* and *Jones*, should now extend to termination cases.

Concerning appointment of counsel, here the unknown father permanently lost his parental rights without ever having the benefit of counsel. The SCSH failed to act, notwithstanding its own recent precedent meant to ensure that indigent parents' due process is protected in termination cases. The decision is all the more troubling in light of the laws enacted or decided in nearly every state that require appointment of counsel for indigent parents in termination cases. Finally, the decision conflicts with *Lassiter*, which requires courts to at least perform an *Eldridge* analysis. *Lassiter*, 452 U.S. at 31-32. Only a response from this Court will rectify the situation.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the Petition for a Writ of Certiorari to review the judgment and opinion of the SCSH.

Dated:

Respectfully submitted,

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