IN THE MICHIGAN SUPREME COURT

In re MCBRIDE, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

V

RONALD D. MCBRIDE, JR.,

Respondent-Appellant,

and

SUSAN MCBRIDE,

Respondent.

Lower Court No.: 06-009381
Court of Appeals No.: 282062

Supreme Court No.: 136988

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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The National Association of Counsel for Children ("NACC"), through its attorneys, Honigman Miller Schwartz and Cohn LLP, moves for leave to submit an *amicus curiae* brief pursuant to MCR 7.306(D), and, in support of its Motion says:

I. THE PROPOSED AMICUS

1. The NACC is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. Founded in 1977, the NACC consists of nearly 2,000 professionals from all 50 states and the District of Columbia. Its Board and membership include attorneys who represent children before the family and juvenile courts of the nation, as well as judges and members from the fields of medicine, social work, mental health, education, and law enforcement.

2. The NACC works towards multiple goals, including, among others, improving courts and agencies serving children, and advancing the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program.

3. The NACC has contributed numerous *amicus curiae* briefs to federal and state appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae. Amicus* cases must pass staff and Board of Directors review, which evaluates cases based on the consistency with the mission of the NACC, the widespread impact in the field of children's law, the argument's foundation in existing law or a good faith extension of the law, and the reasonable prospect of prevailing.

II. GROUNDS FOR AMICUS FILING

1. In requesting leave to participate in these proceedings, NACC seeks to advance the interests of its members and the public in ensuring that the procedures in cases involving termination of a parent's fundamental right to make decisions regarding the care, custody, and control of his children. The NACC believes that, in any child protective proceeding, including a proceeding to terminate parental rights, the interests of children are best served through competent legal representation for all parties, including an incarcerated parent. It is only when all parties are adequately represented that family-court judges are presented with full and fair disclosure of all relevant circumstances, and accurate development of viable alternatives to termination.

2. The Court of Appeals' decision in this case, if not reversed, could alter the process by which a parent's fundamental rights are terminated and could create a significant threat to the minimum due process protections afforded indigent and incarcerated parents. By applying a harmless-error analysis to a complete deprivation of counsel, the Court of Appeal's decision permits family courts to pre-judge the merits of a parent's defenses and deny counsel to any parent the court deems unworthy. As this Court has recognized, there is a disturbing pattern in the family courts, where judges and prosecutors simply ignore a parent's due process protections that are mandated by statute, court rule, and the Federal and State Constitutions.

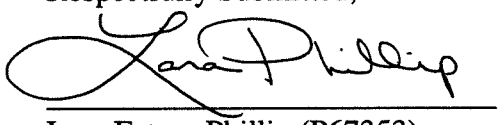
3. NACC believes that its Brief as an *Amicus Curiae* will afford the Court the benefit of arguments that address the issues presented in this case from a perspective different from that of the parties, i.e., the best interests of children in retaining bonds with their natural parents (even when a parent is incarcerated), the importance of exploring alternatives to termination of parental

rights, and the views of commentators and other courts around the country that have addressed similar issues.

III. RELIEF

For the foregoing reasons, as well as those set forth in the accompanying *Amicus Curiae* Brief, the National Association of Counsel for Children requests that this Court grant Respondent-Appellant Ronald McBride's Application for Leave to Appeal and grant NACC leave to submit an *amicus curiae* brief in support of that Application.

Respectfully Submitted,



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Dated: April 24, 2009

IN THE MICHIGAN SUPREME COURT

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

V

RONALD D. MCBRIDE, JR.,

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and

SUSAN MCBRIDE,

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BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court violated MCL 712A.17c and MCR 3.915(B)(1) by denying the respondent-appellant father's request for the appointment of counsel to represent him at the trial on the supplemental petition requesting termination of his parental rights?

Trial Court Says:	No
Court of Appeals Says:	Yes
Respondent-Appellant Says:	Yes
Petitioner-Appellee Says:	Yes, and therefore admits error
NACC Says:	Yes

2. Whether the trial court violated the respondent's due process rights under *Lassiter v Dept of Social Services,* 452 US 18; 101 S Ct 2153; 68 L Ed 2d 640 (1981), by denying the request for counsel?

Trial Court Says:	Not answered
Court of Appeals Says:	Yes
Respondent-Appellant Says:	Yes
Petitioner-Appellee Says:	No
NACC Says:	Yes

3. If the trial court violated MCL 712A.17c, MCR 3.915(B)(1) or the Due Process Clause, whether such an error may be harmless, *In re Clemons*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2008 (Docket No 281004); *Lassiter*, *supra*?

Trial Court Says:	Not answered
Court of Appeals Says:	Yes
Respondent-Appellant Says:	No
Petitioner-Appellee Says:	Yes
NACC Says:	No

4. Whether the Department of Human Services is asserting inconsistent positions regarding the harmlessness of the error in denying counsel in termination of parental rights cases, *cf., e.g., In re Clemons*, *supra*, and the instant case?

Trial Court Says:	Not answered
Court of Appeals Says:	Not answered
Respondent-Appellant Says:	Not answered
Petitioner-Appellee Says:	No
NACC Says:	Yes

5. If a denial of a request for counsel can constitute harmless error, whether the existence of an alternative placement plan or guardianship option, such as those provided for in MCL 712A.19a(7) and MCL 700.5201-5219, can prevent a denial of a request for counsel from being harmless?

Trial Court Says:	Not answered
Court of Appeals Says:	Not answered
Respondent-Appellant Says:	Yes
Petitioner-Appellee Says:	No
NACC Says:	Yes

I. Statement of Interest of *Amicus Curiae* National Association of Counsel for Children

Amicus curiae National Association of Counsel for Children ("NACC") submits this brief in support of Mr. McBride's application for leave to appeal.

STATEMENT OF INTEREST

Founded in 1977, the National Association of Counsel for Children (NACC) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae. Amicus* cases must past staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 2000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The NACC submits this *amicus* brief on behalf of the interests of children in having the best and most appropriate outcomes in child protective proceedings, including termination of parental rights hearings. Competent legal representation for all parties, including an incarcerated parent, assures that the children's best interests are served by a full and fair disclosure of all relevant circumstances, accurate development of the issues, and identification and development of viable alternatives to termination.

In this context, the NACC requests the Court to grant Mr. McBride's application for leave to appeal or enter a peremptory order reversing the order terminating his parental rights and remanding the action to the Bay Circuit Court Family Division for a new trial, at which trial, the court shall appoint counsel for Mr. McBride.

II. Introduction

The right of a parent to make decisions concerning the care, custody, and control of his children is a fundamental right, afforded protection under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. When the state moves to terminate parental rights, it takes the most drastic step possible. If successful, the parent loses all rights to raise, visit, or even communicate with his children. To many, this loss is more devastating than the loss of physical freedom through incarceration. It is complete, permanent and irrevocable.

Nearly three decades ago, the United States Supreme Court held, in *Lassiter v Dept of Social Services,* 452 US 18; 101 S Ct 2153 (1981), that an indigent parent's due process right to counsel in termination of parent rights ("TPR") proceedings is to be determined on a case-by-case basis. The Court did, however, acknowledge that wise public policy may require higher standards, and that greater rights may be afforded through state statutes.[1] Since *Lassiter*, nearly

[1] Indeed, at the time *Lassiter* was decided, the Court noted that "informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel . . . in parental termination proceedings. . . . Most significantly, 33 States and the District of

every court and legislature around the country agrees – higher standards are required. An indigent parent must be granted a right to counsel, appointed by the state, in any proceeding that may result in the termination of parental rights.[2]

The right to counsel becomes even more critical where an indigent parent is incarcerated. Although the Supreme Court has acknowledged that a parent's fundamental rights do not evaporate simply because he has not been a model parent, or because he has lost temporary custody of the child to the state, the realities in TPR proceedings may be very different. An incarcerated parent facing a substantial sentence may be presumed by the state agencies and the court to have no ability to care for his children. Moreover, when he is denied counsel, he is in the worst possible position to oppose the termination of his parental rights: he cannot perform an investigation, gather evidence, interview witnesses, assist his non-incarcerated co-parent in compliance with court-ordered rehabilitation plans, or pursue alternate placement options. In many cases, an incarcerated parent is even denied visitation with his children while they are in temporary state-custody. An incarcerated parent often has no right to be physically present at a TPR hearing, and, while court rules and statutes may authorize his telephonic participation, even that access can be denied by the court (as it was for Mr. McBride for over a year).

The Due Process clause mandates an indigent (and incarcerated) parent's right to notice and opportunity to be heard before his parental rights are terminated. To have any *meaningful* right to be heard, however, the parent must be afforded counsel at every stage of the proceedings. As many legislatures, courts and scholars agree, it is only through the competent representation

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Columbia provide statutorily for the appointment of counsel in termination cases." *Lassiter*, 452 US at 33-34. The *Court's* opinion, it explained, "in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise." *Id.* at 34.

[2] In fact, the Court of Appeals in this case found that Mr. McBride was denied his due process right to counsel at the termination proceeding.

of *all parties* that the best interests of the child are served. It is through counsel that each party has an advocate for its position. It is through counsel that courts are presented with the evidence and arguments on all sides of the issue.

In the criminal law context, complete denial of a right to counsel is a structural error which defies analysis by harmless-error standards. An appellate court cannot, after all, accurately determine what difference, if any, counsel could have made in the trial court. It can only speculate as to what evidence may have been introduced, or what arguments may have been made, if the appellant had an advocate speaking on his behalf. Similarly, in the TPR context, where counsel was not appointed for an incarcerated parent, no one can know what that counsel *may have done* to prevent the drastic step of termination of his parental rights. As in a criminal proceeding, denial of counsel affects the fundamental fairness of the TPR proceeding and leaves the record wholly barren of evidence which may have prevented the termination. In these circumstances, a deprivation of counsel at the termination hearing is a reversible error for which remand for a new trial is the only appropriate remedy.

The harmless-error analysis adopted by the Court of Appeals in this case effectively eviscerates the right to counsel for indigent (and incarcerated) parents recognized in nearly every state. While constitutional protections, statutes and case law *mandate* appointment of counsel, trial courts may simply ignore these mandates when they *pre-determine* that a parent has no likelihood of preventing the termination. Without counsel, the parent will be effectively precluded from developing a record that refutes the State's position. If permitted, an appellate court reviewing a record supporting termination of parental rights, and devoid of evidence in support of the parent, can undoubtedly find the error harmless – after all, nothing *in the record* suggests that counsel could have made a difference.

Even where a parent is incarcerated, termination of parental rights is not the only available permanency-planning alternative. Termination of parental rights frees the children for adoption, which is an appropriate goal in some TPR proceedings. Adoption, however, is not always the best option. Where blood-relatives or other suitable non-kin are available for placement, a guardianship may provide stability for the children without severing ties to the parent. For older children, in particular, this may be a more desirable placement option, as the children are more likely to have developed bonds with their parents and other relatives and family friends, and less likely to be adopted through the foster-care system. If these alternatives have not been fully investigated (as may often be the case when counsel for the parent has not been appointed to advocate for such options), an appellate court simply cannot say that the parent's incarceration made termination inevitable. Even when a state agency claims to have considered all placement options, the agency does not serve as an advocate for the parent (and, in fact, often has competing interests) and a reviewing court is thus unable to say that failure to appoint counsel is harmless.

This action provides the Court with the opportunity to draw a bright-line rule establishing an indigent parent's right to counsel in termination of parental rights proceedings, and declare that harmless-error analysis is not applicable to a deprivation of that right to counsel at the termination hearing. Instead of permitting a trial court to short circuit the statutory and constitutional protections for parents, or pre-judge the merits of a case in deciding whether to appoint counsel, and instead of allowing an appeals court to guess at the value counsel may have provided if properly appointed, this Court should enforce the mandatory protections required by due process, statutes, and court rules, and require appointment of counsel to every indigent parent who requests that right.

III. Statement of Material Facts

The NACC adopts the Statement of Proceedings and Facts in Respondent-Appellant's Application for Leave to Appeal and Supplemental Brief in Support of Application for Leave to Appeal.

IV. Argument

A. The Trial Court Erred in Denying Mr. McBride Counsel Where the Michigan Court Rules, Statutes and Federal and State Constitution Guarantee the Right to Counsel in Termination of Parental Rights Hearings

1. Michigan Statutes and the Michigan Court Rules Mandate Appointment of Counsel in TPR Proceedings

Michigan's legislature mandates appointment of counsel in state-initiated TPR proceedings. Specifically, MCL 712A.17c(4) describes a trial court's obligations:

> In a proceeding under section 2(b) or (c) of this chapter, the court *shall* advise the respondent *at the respondent's first court appearance* of all of the following:
>
> (a) *The right to an attorney at each stage of the proceeding.*
>
> (b) *The right to a court-appointed attorney* if the respondent is financially unable to employ an attorney.
>
> (c) If the respondent is not represented by an attorney, *the right to request and receive a court-appointed attorney at a later proceeding.*"

MCL 712A.17c(4) (emphasis added). Moreover, if it appears to the court that the respondent wants an attorney and is financially unable to retain an attorney, the court *shall appoint an attorney* to represent the respondent. MCL 712A.17c(5).

Through procedural protections in the Michigan Court Rules, the Michigan Supreme Court also recognizes the importance of providing counsel to parents in TPR proceedings. Specifically, MCR 3.915(B) mandates that courts *shall*, at a respondent's first court appearance in a child protective proceeding, advise the respondent of his right to court-appointed counsel at that hearing, and at any later hearing. The rule also mandates that the court *shall appoint counsel*

if the respondent requests appointment of an attorney appears financially unable to retain an attorney. *Id.*

Further acknowledging that incarcerated parents require additional procedural protections, MCR 2.004(B) requires that a party seeking an order regarding a minor child *shall* file a motion with the trial court stating that a telephonic hearing is required by the court rules. MCR 2.004(B)(3). The court, in turn, *shall* issue an order to the facility where the parent is located to allow the incarcerated party to participate in the proceedings by an unmonitored telephone call. MCR 2.004(C). MCR 2.004(E) describes the purpose of the telephone call as determining, among other things:

> (1) whether the incarcerated party has received adequate notice of the proceedings and *has had an opportunity* to respond and *to participate*, [and]
>
> (2) *whether counsel is necessary* in matters allowing for the appointment of counsel *to assure that the incarcerated party's access to the court is protected*[.]

Id. (emphasis added). And MCR 2.004(F) provides that a *court may not grant the relief requested* by the moving party if the incarcerated party has not been offered the opportunity to participate as described in the rule.

In this matter, seven proceedings, occurring over the thirteen months preceding the termination hearing, were held before Mr. McBride was provided the telephonic access mandated by the Michigan Court Rules. When he was finally invited to participate (in the final termination hearing),[3] he immediately requested court-appointed counsel. His request was denied, however, because the trial judge decided it was "a little late" in the process. TR8 at 5. Under the plain language of the Michigan statutes and the Michigan Court Rules, the trial court

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[3] The record demonstrates that Mr. McBride's due process rights to participate in the termination process would have continued to be violated, had a secretary not established the telephonic access required by court rule. At the termination hearing, the judge explained that counsel would not be appointed because Mr. McBride had not requested it sooner, and "[i]n fact,

erred in denying his request for counsel. However harsh and inflexible, the only appropriate remedy, and the remedy dictated by the court rule, is to reverse the order terminating Mr. McBride's parental rights and remand the case to the trial court with an order that the court *shall* afford the procedural protections mandated by the Michigan statutes and court rules, including appointment of counsel.

2. The Trial Court Erred in Denying Mr. McBride's Constitutional Right to Counsel as Guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Michigan Constitution

"The constitutional guarantees of due process and equal protection extend the right to counsel to respondents in child protective proceedings. The right to counsel at termination proceedings is a fundamental constitutional right." *In re Clemons*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2008, 2008 WL 3851592 (Docket No 281004) (internal citations omitted) (**Exhibit 1**).

The United States Supreme Court explained that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v Granville*, 530 US 57, 66; 120 S Ct 2054 (2000). That fundamental right to parent "does not evaporate simply because [a parent has] not been a model parent or [has] lost temporary custody of [his] child to the State." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388 (1982). And although some may consider incarcerated parents to be "morally unworthy," these parents remain entitled to constitutional protections. *Brown v Allen*, 344 US 443, 498; 73 S Ct 397 (1953); *In re AMB*, 248 Mich App 144, 211 ; 640 NW2d 262 (2001) (explaining that even in a case involving "some of

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the only reason we've got you here by telephone today is because the prosecutor's secretary thought that you should be present and set it up." TR8 at 5.

the most disturbing facts imaginable," a parent is entitled to procedural safeguards in child protective proceedings).

Nearly thirty years ago, the United States Supreme Court reviewed the due process requirement for appointment of counsel in TPR proceedings and determined that the Constitution may require counsel, in certain circumstances. *Lassiter*, 452 US at 31-32. While *Lassiter* held that the due process right to counsel in TPR proceedings requires only a case-by-case analysis to determine if a parent's rights were violated, the Supreme Court noted that wise public policy "may require that higher standards be adopted than those minimally tolerable under the Constitution." *Id.* at 33. These heightened standards are none other than "enlightened and wise." *Id.* By 2004, at least 45 states had a constitutional provision, statute or rule requiring appointment of counsel.[4] Judge Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J APP PRAC & PROCESS 179, 193 n 73 (2004). See *id.* at 196-199 (summarizing states that have granted the right to counsel, generally, and the consequential right to effective counsel). While many states have not specifically addressed the constitutional origins of a parent's right to counsel in TPR hearings, and mandate appointment of counsel "only" by statute, the statutory basis does not diminish the importance of the right. Instead, these states may have implicitly accepted the due process rights of parents, and sought statutorily to provide greater protections than those afforded under *Lassiter*.[5]

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[4] Those that appear to permit a case-by-case analysis were Hawaii, Mississippi, South Carolina, Tennessee and Wyoming. *Id.*

[5] The Supreme Court's case-by-case approach to appointment of counsel in a TPR proceeding is patterned upon the right to counsel in probation-revocation hearings, a vastly different process. Probation-revocation hearings are informal, presided over by a non-judicial revocation-hearing body, conducted without the rules of evidence, often involve little or no factual dispute, and the government is not represented by a lawyer. On the other hand, TPR hearings are adversarial, formal court proceedings, presided over by a judge, generally incorporate the rules of evidence, involve substantial factual disputes, and the state agency is represented by an attorney. Judge Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J APP PRAC & PROCESS 179, 189-90

For example, both before and after *Lassiter*, Michigan courts have almost universally recognized a constitutional basis, under both the Michigan and Federal Constitutions, for the right to counsel in TPR proceedings. See, e.g., *In re Clemons*, *supra* at *3 ("Reversal is warranted because the deprivation of respondent's **constitutional right to counsel** seriously affected the fairness, integrity or public reputation of the judicial proceedings that resulted in the termination of respondent's parental rights.") (emphasis added); *In re CR*, 250 Mich App 185, 197-198, 646 NW2d 506, 513 (2002) ("Although the [U.S. and Michigan] constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings."); *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000) ("The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel."); *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986) ("The right to appointed counsel at [TPR proceedings] is a . . . fundamental constitutional

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(2004). Accordingly, while the Supreme Court has held that a case-by-case analysis is the minimum due process standard required by the U.S. Constitution, many states find that a bright-line rule mandating counsel is the only method of ensuring adequate procedural protection for all parents in TPR proceedings.

Other commentators, while recognizing that, in the wake of *Lassiter*, "the right of an indigent parent to appointed counsel continues to be widely recognized," urge reconsideration of *Lassiter* through the adoption of a "civil *Gideon*." See 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 LOYOLA U CHICAGO L J 363 (2005); Vasser, *The Indigent Parent's Right to Counsel in Termination of Parental Rights Proceedings*, 16 J CONTEMP LEGAL ISSUES 329, 331 (2007) ("*Lassiter* should be overturned. Little can be found to distinguish the loss of physical liberty from the loss of any other fundamental liberty interest—including the liberty interests in child raising—that are threatened in proceedings to terminate a parent's rights."); Comment, *Making the Case for Effective Assitance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L REV 193, 213 (2003) (arguing that the rationales for appointment of counsel in *Lassiter* and *Gideon* are irreconcilable). Justice Corrigan, of this Court, also notes, "[i]f anything, the [Supreme] Court's conception of the importance of [parental] rights has evolved since *Lassiter* and *Santosky*. *In re Hudson and Morgan Minors*, ___ Mich ___; ___ NW2d ___; Slip Op at 13 n 11 (Docket No 137362, April 8, 2009) (Corrigan, J., concurring) (**Exhibit 2**).

right guaranteed by the equal protection clause of the United States and Michigan constitutions."); *Doe v Oettle*, 97 Mich App 183, 185; 293 NW2d 760 (1980) ("Michigan does recognize the right to procedural due process before family ties are severed, specifically, the right to counsel and transcripts.") *citing Reist v Bay Circuit Judge*, 396 Mich 326; 241 NW2d 55 (1976) (Levin, J.). See also *Ryan v Ryan*, 260 Mich App 316, 333; 677 NW2d 899 (2004) ("The fundamental liberty interest of parents with regard to their children permeates Michigan laws.").[6]

In *Reist*, a plurality of the Michigan Supreme Court recognized that right to parent is of "basic importance in our society," and that right is encompassed within the meaning of the term 'liberty' as used in the Due Process Clause. *Reist*, 396 Mich at 341-42. Where such fundamental rights are at stake, counsel is essential for "making meaningful the rights to trial," and "denial of 'the guiding hand of counsel' deprives the indigent defendant of a meaningful hearing resulting in deprivation of due process." *Id.* at 339.[7] The *Reist* plurality found that the court rule requiring appointment of counsel in TPR proceedings is "constitutionally based." *Id.* at 346.[8]

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[6] This Court recently eluded to the constitutional origins of the statutory and court-rule procedural protections afforded to parents in TPR proceedings:

> In Michigan, **procedures to ensure due process** to a parent facing removal of his child from the home or termination of his parental rights **are set forth by statute, court rule, DHS policies and procedures, and various federal laws** . . . .

In re Rood, ___ Mich ___; ___ NW2d ___; Slip Op at 20 (Docket No 136849, April 2, 2009) (emphasis added) (**Exhibit 3**).

[7] One commentator explained, "One of the greatest rights individuals have is the constitutionally granted 'opportunity to be heard.' This means a genuine opportunity to be heard, as it is not sufficient to merely pretend to listen to the speaker. **The speaker must be capable of influencing the decision.**" Flynn, *In Search of Greater Procedural Justice: Rethinking Lassiter v Department of Social Services*, 11 WIS WOMEN'S LJ 327, 348-49 (1996-97) (citations omitted, emphasis added). In this matter, Mr. McBride was in no way "capable of influencing the decision." Before he was first granted the opportunity to participate, the judge terminated his visitation (in violation of MCL 712A.13a(11) and MCR 3.965(C)(6)(a), which require visitation for *each parent* unless the court finds it will be harmful to the child), and deprived him of participation in a full year's worth of proceedings. The judge made numerous comments about his inability to care for the children because of his incarceration, and terminated his rights with the conclusory statement that "the father is incarcerated and unavailable." TR8 at

Although *Lassiter*'s case-by-case analysis does not require this court to find a federal constitutional right to counsel in every termination of parental rights case, "[i]n Michigan, both the courts and the Legislature have done more than react to federal mandates in parental rights termination proceedings." *In re Render*, 145 Mich App 344, 348; 377 NW2d 421 (1985). The *Render* court explained:

> [W]e embraced the "clear and convincing evidence" standard long before *Santosky*. Although the Supreme Court held, in *Lassiter*, that the Fourteenth Amendment does not require appointment of counsel for the respondent in every such proceeding, the Michigan courts have reached the opposite conclusion. . . .
>
> Thus, respondent's parental rights constitute a 'liberty' interest entitled to constitutional protection. . . .

Id. at 348-349, and n 1 ("[O]ur decision is [not] based . . . solely upon our conception of what the Fourteenth Amendment dictates, but on the Michigan due process clause as well.) (internal citations omitted).

The right to parent is recognized as a fundamental right protected under the United States and Michigan Constitutions. To afford adequate procedural protections where the State seeks to deprive a parent of that fundamental right, due process dictates that the parent be granted a right to counsel, and that if he cannot afford counsel, one should be appointed for him. As acknowledged by the Court of Appeals in this case, when the trial court denied Mr. McBride's request for counsel at the termination hearing (the only hearing to which he was invited), it violated his constitutional rights to due process.[9]

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245. Evidently, there was nothing the father could have said to alter the judge's pre-conceived belief that his parental rights should be severed.

[8] While *Reist*'s plurality opinion is not binding precedent, numerous Michigan courts have treated it as controlling. See *Brief of Attorney General as Amicus Curiae* filed in this proceeding at 10-11 n 19 (listing at least seven panels of the Court of Appeals that relied on *Reist*.)

[9] Mr. McBride's due process rights may have also been violated by the prosecutor's and the court's failure to establish a telephonic connection to enable his participation in the first

B. The Denial of Counsel in TPR Proceedings Should Not Be Subject to a Harmless-Error Analysis

1. Where a Structural Error, Including Total Deprivation of Counsel, Results in the Violation of Constitutional Rights, Harmless-Error Review Is Inappropriate

Because the merits of the termination hearing were decided without the benefit of counsel, "an unconstitutional line has been drawn between the rich and the poor." *Douglas v California*, 372 US 353, 357; 83 S Ct 814 (1963) (holding that where a right to appeal exists, due process requires that an indigent has a right to appointed counsel).

The United States Supreme Court has divided constitutional errors in criminal proceedings into "trial errors" and "structural errors." Trial errors are those that occur "during the presentation of a case to the jury, and which may therefore be quantitatively addressed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v Fulminante*, 499 US 279, 307-08; 111 S Ct 1246 (1991). When a trial error is considered, the court should apply the harmless-error doctrine in a manner that recognizes the central purpose of determining guilt or innocence, while promoting public respect for the process by focusing "on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id.* at 308.

Structural errors, on the other hand, are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.*[10] Structural errors affect "the entire conduct of the trial from beginning to end," and concern "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* While the structural/trial error differential was originally developed in the criminal-law context,

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seven hearings, which ultimately led to the termination of his parental rights. This Court, however, has not asked for briefing on that violation.

termination of parental rights hearings have been included in the narrow category of civil cases for which courts must afford constitutional protections similar to those in criminal and quasi-criminal matters. *MLB v SLJ*, 519 US 102, 128; 117 S Ct 555 (1996); *In re Cobb*, 130 Mich App 598; 344 NW2d 12 (1983) (extending the analysis of a criminal right to counsel to a TPR proceeding, "involving as it does a due process right to counsel"). [11]

The total deprivation of counsel is a structural error.[12] *Fulminante,* 499 US at 308. The right to counsel is "the means through which the other rights . . . are secured;" and without counsel, "the right to a trial itself would be 'of little avail.'" *United States v Cronic*, 466 US 648, 653-54; 104 S Ct 2039 (1984) ("the right to be represented by counsel is by far the most

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[10] Michigan adopted the structural/nonstructural error classification, with structural errors being subject to automatic reversal. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000)

[11] Commentators also recognize that TPR proceedings are more similar to criminal proceedings than the ordinary civil case:

> While a private party may petition for termination more frequently the state will bring the suit. The state accuses the parents of wrong-doing and the parties then become adversaries, as in a criminal trial. If the state wins, the parents lose their rights and their relationship with their children in much the same way as a criminal defendant loses his liberty. As several cases have discerned, the gravity of the loss for the parents is 'more substantial than mere loss of money.' The implication of a judgment for the state is that the parents are unfit to raise their children – much like the implication in a criminal trial that a defendant is unfit to live in free society. [Note, *MLB v SLJ: Protecting Familial Bonds and Creating a new Right of Access in the Civil Courts*, 76 NC L Rev 621, 646 (1998) (citations omitted).]

[12] Appellee-DHS cites *In re Casey-Martin*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2009 (Docket No 286907) (**Exhibit 4**) to support the contention that a harmless error analysis is required by *Lassiter*'s application of the *Mathews v Eldridge* balancing test. *In re Casey-Martin* did not involve a parent's right to counsel at a TPR hearing, but rather his right to be present at the hearing. The parent had received adequate notice, but was incarcerated and could not attend. Notably, however, he had never appeared at any hearing prior to his incarceration, but was represented by counsel at all the hearings. Because there is no constitutional, statutory, or court rule right to attend a TPR hearing, the *In re Casey-Martin* harmless-error analysis is wholly inapposite to analyzing a deprivation of counsel at a TPR hearing.

pervasive for it affects his ability to assert any other rights he may have.").[13] See also *Lassiter*, 452 US at 51 (Blackmun, Brennan, Marshall, JJ., dissenting) (recognizing that deprivation of counsel "often cut[s] to the essence of the fairness of the trial, and a court's inability to compensate . . . effectively eviscerates the presumption of innocence."). Accordingly, finding harmless error where counsel has been denied in a TPR proceeding, leaves indigent parents without any of the procedural protections afforded by the court rules, statutory schemes, and federal and state constitutions.[14] See *Penson v Ohio*, 488 US 75, 86; 109 S Ct 346 (1988).

In TPR hearings, the State is in a vastly superior litigating position. *Santosky*, 455 US at 763 ("The State's ability to assemble its case almost inevitably dwarfs the parent's ability to mount a defense."). The State has greater economic resources, calls expert witnesses and witnesses employed by the state, and, in many cases, has custody of the children and the accompanying power to shape the events leading to termination. *Santosky*, 455 US at 763. The parent, on the other hand, is often poor, "undereducated and unworldly," and has been placed in

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[13] The Supreme Court noted that "[t]ime has not eroded the force of Justice Sutherland's opinion for the Court in *Powell v Alabama*, 287 US 45; 53 S Ct 55 (1932)." *Cronic*, 466 US at 654 n 8. In *Powell*, Justice Sutherland explained the importance of counsel in *all* cases in which a party has a right to a hearing:

> "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . . **If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, . . . it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.**" [Powell, 287 US at 68-69 (emphasis added)]

[14] While Appellee-DHS suggests there are two different analytical schemes that *require* harmless-error review, neither is applicable to the deprivation of counsel at a TPR hearing. First, DHS applies the "outcome determinative" analysis, under *People v Lukity*, 460 Mich 484, 495-96; 596 NW2d 607 (1999) to find counsel would have made no difference to the outcome. DHS then suggests that "harmless error analysis is required under Michigan law" by MCR 2.613(A). In fact, these two analyses are one and the same. *Lukity* analyzed MCR 2.613(A)'s application to evidence introduced in error and found no "miscarriage of justice" from its introduction.

Contrary to the DHS's analysis, the complete deprivation of counsel at a TPR hearing (regardless of the source of this right) should be found to be a structural error which is

the stressful situation of facing the loss of their children, while being "unfamiliar with the intricacies of the legal proceedings." Baillie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L REV 2285, 2297 (1997-98);[15] *Reist*, 396 Mich at 334 ("even the intelligent and educated layman has small and sometimes no skill in the science of law.") (citing *Powell*, 287 US at 68-69).

Where the State is in such a superior position, and it blatantly disregards the minimum procedural guarantees mandated by the legislature, the court rules, and the United States and Michigan Constitutions, it should not be permitted to deem its own failures "harmless." The denial of counsel in a TPR proceeding is not a "virtually inevitable" and "immaterial" trial error. *Fulminante,* 499 US at 308. It is an intentional deprivation by the trial court, which pervades the entire proceeding. If a parent's defenses or alternatives to termination are not obvious, the indigent parent has only the right to a "meaningless ritual, while the rich man has a meaningful [proceeding]." *Douglas v California*, 372 US at 358. When an indigent must show merit to justify appointment of counsel, while the rich man can retain his own attorney-advocate, the process "does not comport with fair procedure." *Id.*

"inconsistent with substantial justice." Accordingly, under MCR 2.613(A), an appellate court can and should vacate the order terminating parental rights and remand for a new trial.

[15] *Ballie* also cites a quotation from a director of an organization that helps families deal with the child welfare bureaucracy, who states, "[e]verybody [in family court] uses a lot of shorthand, lingo and court terms. By the end of the day, the parents are not really quite clear what has happened." *Baillie, supra* at 2297 n 95 *citing* Nauer, *Guilty Until Proven Innocent*, City Limits, 20, 22 (Nov 1994).

2. Michigan Courts Do Not Perform Harmless-Error Analysis When a Parent Has Been Denied Basic Procedural Protections at a Termination Hearing

When a parent's fundamental rights have been violated in TPR proceedings, Michigan courts generally find the error to be reversible without performing a harmless-error analysis.[16] In the recent *In re Clemons* case, after finding a parent was denied her fundamental right to counsel, the Court of Appeals rejected the harmless-error analysis of *In re Hall*, 188 Mich App 217; 469 NW2d 56 (1991), because the error "affected the fundamental fairness of the proceedings":

> It is axiomatic that it is fundamentally unfair to deprive a parent of their liberty interest in the care and custody of their child when the parent is not represented by counsel at the termination proceedings and has not been advised of their right to counsel or appointed counsel.

In re Clemons, *supra* at *3.

In *In re Powers*, *supra*, the Michigan Court of Appeals found that there was sufficient evidence to terminate the appellant's parental rights. However, the court remanded the case for a determination of whether the trial court's dismissal of his attorney at the termination hearing deprived him of his constitutional entitlement to counsel. The court rejected the harmless-error analysis of *In re Hall*, *supra*, essentially limiting it to its facts.[17] *Powers*, 244 Mich App at 122-23.

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[16] This Honorable Court recently addressed a case that was described as "part of a disturbing and recent pattern of trial courts' failures to appoint counsel and untimely appointment of counsel to represent parents in child protective proceedings." *In re Hudson and Morgan Minors*, *supra* at 12 (Corrigan, J., concurring). Justice Corrigan, joined by Chief Justice Kelly, explained her skepticism about the harmlessness of this error, stating "given the nature of the interest at stake in child protective proceedings, I question whether the failure to appoint counsel to represent respondents throughout such proceedings can ever be harmless error." *Id.*

[17] Appellee-DHS cites six Michigan Court of Appeals cases that it claims support the conclusion that harmless-error analysis is required in this case. Five of the six cases addressed TPR proceedings for which the parent was unrepresented by counsel *only* at a preliminary hearing, not at the final termination hearing, itself. *In re Hall*, *supra*; *In re Gentry*, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2009 (Docket No 287137) (**Exhibit 5**); *In re Coleman*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2009 (Docket No 287191) (**Exhibit 6**); *In re Perri*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2008 (Docket No 280156) (**Exhibit 7**); *In re Shabazz*,

In *In re Keifer*, the deprivation of counsel at two evidentiary hearings involving termination of parental rights was sufficient to warrant reversal of a TPR order. *In re Keifer,* 159 Mich App 288, 293-94; 406 NW2d 217 (1987). The court refused to apply a harmless-error analysis, stating, "[i]n light of our disposition, we find it inappropriate to address the issues of whether sufficient evidence was introduced to support the order terminating respondent's rights." *Id.* at 294.

And where an incarcerated parent was not afforded the opportunity to be present at a dispositional hearing, the Michigan Court of Appeals held the deprivation of the parent's right to be present was a violation of her due process rights.[18] Although her attorney was present at the hearing, and her parental rights were terminated based upon conclusive evidence of her term of imprisonment exceeding two years (thus satisfying the statutory basis for termination), the court refused to apply harmless-error analysis, explaining "**[w]e are not in a position to know whether in fact any prejudice resulted.**" *In re Render*, 145 Mich App at 349 (internal quotation omitted, emphasis added). The court further explained, "[i]t cannot be doubted that, in many

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unpublished opinion per curiam of the Court of Appeals, issued February 10, 2009 (Docket No 286130) (**Exhibit 8**). The harmless-error analysis of *In re Hall* has been limited to deprivation of counsel at an earlier hearing, where the evidence is repeated at a later hearing where counsel is present. See *Powers*, 244 Mich App at 122-23; *In re Clemons*, *supra* at *3; *In re Lyttle*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 2000 (Docket No 222488) (**Exhibit 9**).

In *In re Lyttle*, the court explained that *In re Hall* is distinguishable, and the error "cannot be deemed harmless" where:

> (1) Lyttle was deprived of counsel during the actual termination trial (as opposed to the review hearing in *Hall*), [and]
>
> (2) new evidence [supporting termination] . . . was elicited at the trial while Lyttle was without counsel . . . .

The court reversed termination of Lyttle's parental rights, "because he was deprived of his fundamental right to counsel at half of the termination trial . . . ."

[18] At the time of *Render*, the Michigan statutes required a parent's presence at a termination hearing. A parent may now participate through counsel, *In re Vasquez*, 199 Mich App 44, 49-50; 501 NW2d 231 (1993), or by telephonic hearing if incarcerated. MCR 2.004.

parental rights termination hearings, the presence of the very person whose rights the state aims to take away is of some 'probable value' to the correctness of the result." *Id.* Nor can it be doubted that counsel for a parent whose rights are being terminated provides some "probable value" to the parent and the overall correctness of the proceedings.

3. Other Jurisdictions Also Decline to Perform Harmless-Error Analysis Where the Right to Counsel Has Been Violated in TPR Hearings

Courts around the country routinely decline to perform a harmless-error analysis where a parent has been denied the right to counsel in TPR proceedings. For example, in *In re EJC*, 731 NW2d 402, 404 (Iowa Ct App, 2007), the Iowa Court of Appeals reversed a district court order terminating a mother's parental rights upon finding that the lower court improperly denied the mother's request for legal representation. As in the McBride matter, the mother had received notice of the proceedings informing her of her right to request counsel "immediately." The mother waited until the day before the scheduled hearing to request court-appointed counsel. In denying the mother's request, the judge stated, "It's impractical to try to appoint an attorney on the evening before a trial . . . so it looks like you just waited too long . . . ." *Id.* at 403. The Court of Appeals found no statutory basis for the denial of counsel, stating, "[a]bsent a statutory limitation, we conclude the district court erred when it declined [the mother's] request for court-appointed counsel." *Id.* at 404. Without consideration of actual harm, the court reversed and remanded for rehearing with direction to appoint counsel for the indigent mother. *Id.*

In *AP v Kentucky*, 270 SW3d 418 (Ky App, 2008), the Kentucky Court of Appeals reviewed a TPR order where the mother had been appointed counsel, but her counsel had been unable to attend the first day of the bench trial. While the trial court recognized the importance of the mother's right to counsel, it decided that the witnesses would be inconvenienced if they were required to wait for the mother's counsel to appear. Accordingly, the trial court proceeded with testimony, reserving counsel's opportunity to cross-examine witnesses, and recording the

witness testimony to permit counsel an opportunity to review the proceedings that occurred in his absence. Upon his return, the mother's counsel asked no questions of either witness. On appeal, the mother argued that the trial court's decision to proceed without her attorney present violated her due process rights to a fair hearing. The court of appeals agreed. While recognizing that *Lassiter* permits a case-by-case analysis of appointment of counsel in TPR actions, the court found Kentucky's statutory scheme mandates appointment of counsel in all proceedings. The court noted that, "parents are entitled to a meaningful opportunity to be heard, including the right to consult with counsel." (citation omitted). *Id.* at 421. The court then declined to do a harmless-error analysis, explaining "**[w]e cannot say that the [absence of counsel] . . . made no difference** in the family court termination proceeding." *Id.* (emphasis added). It further emphasized:

> [T]his opinion should not be seen as addressing the merits of whether the mother's parental rights should be terminated. We offer no opinion on that matter. **Rather we emphatically insist that such a serious matter, possible loss of this elemental societal relationship between parent and child, requires complete deference to providing for all the parent's due process rights.**

Id. at 422 (emphasis added).

Appellee-DHS cites Georgia as one of just eight states that purportedly apply a harmless-error analysis to the denial of counsel at a termination hearing. Georgia, however, affirmatively overruled cases permitting harmless-error analysis in these circumstances. *In re JMB*, No A08A2029, ___ SE2d __; 2009 WL 724119 (Ga App, 2009) (**Exhibit 10**). In *In re JMB*, a case remarkably similar to the McBride matter, an incarcerated mother was serving seven years of a ten year sentence. Over the course of nearly two years, the mother attended all the hearings, during some of which she was represented by counsel. At the final termination hearing, the mother was informed of her right to court-appointed counsel. When she requested an attorney, however, the court informed her that because she had previously been served notice of her right

to counsel and had failed to contact the court before the hearing, she would not be provided counsel. On appeal from the termination of her parental rights, the Georgia Court of Appeals found that the mother had not waived her right to counsel, nor had she been warned that the absence of advance notification to the court would be regarded as a voluntary waiver. In reversing the termination, **the court overruled precedent which permitted a harmless-error review**, explaining:

> [W]hen the state is terminating a parent's 'fundamental and fiercely guarded right' to his or her child, although technically done in a civil proceeding, **the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process.**

Id. at *4 (emphasis added).[19]

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[19] Appellee-DHS cites three Arkansas cases to support its application of harmless-error review for deprivation of counsel in TPR hearings. Notably, *Briscoe v Arkansas Dept of Human Services*, 323 Ark 4; 912 SW2d 425 (1996), and *Meza-Cabrera v Arkansas Dept of Human Services*, 2008 WL 376290 (Ct App Ark, 2008) (**Exhibit 11**) both involved cases where counsel was appointed before the final termination hearing, and evidence was repeated at that hearing. *Clark v Arkansas Dept of Human Services*, 90 Ark App 446; 206 SW3d 899 (Ark Ct App, 2005), while purporting to perform a harmless-error review, held that denial of counsel "could have made a difference" because counsel "could have cross-examined the witnesses." *Id.* at 460. Thus, the harmless-error review was cursory, at best.

And while DHS cites a 1993 Florida Court of Appeals case that purportedly endorsed harmless-error analysis, in *In re JB*, 768 So2d 1060 (Fla, 2000), the Florida Supreme Court held that failure to appoint counsel at a TPR adjudicatory hearing "deprived the father of the due process of law guaranteed by the Florida and the federal constitutions." *Id.* at 1068. The court reversed and remanded without harmless-error analysis. *Id.*

In *In re JDF*, yet another case DHS claims performs harmless error review, the North Dakota Supreme Court summarily rejected a step-parent's argument that deprivation of counsel was harmless. The court expressed, "we are skeptical that the denial of counsel to an indigent parent in [a] . . . proceeding which results in the termination of parental rights can ever be harmless, under any standard." *In re JDF*, 761 NW2d 582, 588 (ND, 2009). After explaining that parents without counsel are unable to mount effective defenses in TPR hearings, the court deemed that the denial of counsel was not harmless. *Id.* In *In re IBA*, 748 NW2d 688 (ND, 2008), the same court compared parental termination cases to criminal cases, and found the deprivation of counsel to an incarcerated parent in a TPR hearing was reversible error, without performing harmless-error analysis. *Id.* at 690-91.

Oregon also rejected harmless error analysis in the case cited by DHS: *Hunt v Weiss*, 169 Or App 317; 8 P3d 990 (Or Ct App, 2000). Although Oregon has a statutory "harmless error" provision, requiring that judgment not be reversed unless an error "substantially affect[s] the

Although few courts have addressed the issue directly, other jurisdictions generally hold that the total deprivation of counsel at termination proceedings constitutes reversible error. See, e.g., *In re KLT,* 237 SW3d 607, 607 (Mo Ct App, 2007) ("The trial court failed to appoint counsel or obtain an affirmative waiver of father's right. As such the judgment must be reversed and the case remanded for a new trial."); *In re ASA*, 258 Mont 194, 198; 852 P2d 127 (1993) (holding, "as a growing number of other jurisdictions have concluded," that total deprivation of counsel in TPR hearings violates the Montana Constitution, and is reversible error);[20] *In re*

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rights of a party," the court rejected its application, even where there were conclusive-statutory grounds to terminate parental rights. *Id.* at 322-23. Specifically, the court found the harmless-error argument "meritless." *Id.* Relying on an Oregon Supreme Court decision, the court explained, "it is impossible to know what effect cross-examination might have had on the trial court's decision on the merits." *Id.* at 323 (citing *State v Cole*, 323 Or 30, 36; 912 P2d 907 (1996)). Accordingly, the court **rejected the harmless error argument**. *Id.*

In another case cited by DHS as endorsing harmless-error analysis, in *Walker v Walker*, 892 A2d 1053 (Del, 2006), the Delaware Supreme Court acknowledged that Delaware permits appointment of counsel on a case-by-case basis. *Id.* at 1055. However, even where counsel is not mandated by the state's statutory scheme, the court refused to find a deprivation of counsel harmless where the father was "unable to effectively present his position or examine the witnesses against him" and "there is a real question about whether termination of [the father's] parental rights is the only, or the appropriate, disposition." *Id.* at 1056. The court noted that permanent guardianship with the child's aunt, for example, could prevent the child from losing the relationship with his father. *Id.*

Mississippi, another state DHS claims performs harmless-error review, is also one of just five states in the country that still applies *Lassiter*, and holds counsel is required only on a case-by-case basis. See note *4*, *supra*. Notably, in *KDGLBP v Hinds County Dept of Human Services*, 771 So2d 907 (Miss, 2000), the court noted that Mississippi has no case law or statutes that require appointment of counsel, and the mother never requested counsel and affirmatively indicated she was prepared to proceed without counsel. *Id.* at 911. Accordingly, she was "granted a fair and adequate hearing." *Id.* Thus, the circumstances in *KDGLBP* are of little persuasive value to the McBride matter, where Michigan provides for mandatory appointment of counsel through statutes, court rules, and its constitution, and Mr. McBride never waived his right to counsel.

[20] Appellee-DHS also cites Montana as a state that performs harmless-error analysis when counsel has been denied in a termination case. In *In re PDL*, 324 Mont 327; 102 P3d 1225 (2004), the Montana Supreme Court addressed an appeal from a termination order that was filed over two years late. The parent was convicted of sexual-abuse against his own child – a federally-recognized ground for declining to take reasonable efforts to reunite the family. While the court recognized that "*[F]airness requires* that a parent be represented by counsel . . . because without representation, a parent would not have an equal opportunity to present evidence

Sheffey, 167 Ohio App 3d 141, 147; 854 NE2d 508 (Ct App Ohio, 2006); *Smoke v Alabama*, 378 So2d 1149, 1150 (Ala Civ App, 1979) (finding the denial of counsel to be "dispositive," and an "error requiring reversal of the trial court's order."). See also *In re EFH*, 751 A2d 1186, 1189-90 (Pa Super Ct, 2000) (finding a trial court "although laudably concerned for the welfare of the child, committed a reversible error of law" by failing to appoint counsel for a child in a TPR hearing, as required by Pennsylvania's statutes).

4. Where a Parent Is Deprived of Counsel in TPR Proceedings, He Is Deprived of an Advocate and the Record Is Devoid of Evidence That Would Permit an Appropriate Appellate Review of Possible Harm to the Unrepresented Parent

> *Due process requires not only that the truth be determined and a just result reached, but also that the truth be determined exclusively through the use of fundamentally fair procedures.*

Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM L REV 1298, 1300 (1988).

The appropriate inquiry in harmless-error analysis is not whether, in a trial that occurred without the error, the parental rights would surely have been terminated, but whether the termination in *this trial* was surely unattributable to the error. See *Sullivan v Louisiana*, 508 US 275, 279-80; 113 S Ct 2078 (1993) (citations omitted). Where an appellate court believes that a parental relationship is already weakened, as may often be the case for incarcerated parents, it may be tempted to find the denial of counsel in termination proceedings was harmless. A harmless-error analysis, however, should not be used to deny procedural safeguards on the grounds that the parental relationship has already been effectively terminated, because that is the very issue the TPR hearing is meant to resolve. See *Santosky*, 455 US at 754 n 7.

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and scrutinize the State's evidence," it found the denial harmless "*in this case*" for many reasons, including that he had not alleged his indigence (and need for court-appointed counsel) until he filed his untimely appeal. *Id.* at 332-33 (emphasis added).

"Determining the difference legal representation would have made [at a TPR hearing] becomes possible only through imagination, investigation, and legal research focused on the particular case." *Lassiter,* 452 US at 51 (Blackmun, Brennan, Marshall, JJ., dissenting). Where a parent has been denied counsel, the record from the termination proceeding will have been developed by the prosecutor, alone. Absent an independent investigation, an appellate court cannot rely simply on the record, devoid of evidence in support of the parent's rights, to determine what effect counsel may have had on the termination.

As courts and commentators agree, the judicial system is a system of advocacy – where outcomes are best if each party is represented by counsel engaged to advocate on his or her behalf. See, e.g., *Penson*, 488 US at 84 ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principal that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.") (internal citations omitted); *Cronic*, 466 US at 658 ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect is has on the ability of the accused to receive a fair trial."); *Jones v Barnes*, 463 US 745, 758; 103 S Ct 3308 (1983) (Brennan, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court."); *Ferri v Ackerman*, 444 US 193, 204; 100 S Ct 402, 409 (1979) ("Indeed, an indispensable element of the effective performance of [counsel's] responsibility is the ability to act independently of the Government and to oppose it in adversary litigation."); *Reist*, 396 Mich at 345-46 ("**Counsel for the parent is the one advocate who can be depended on to defend that relationship**") (emphasis added). See also National Counsel of Juvenile and Family Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, 22 (1995) ("[F]amily courts should take active steps to ensure that the parties . . . have access to competent

representation. Attorneys . . . determine, to a large extent, what information is presented to a judge. Each party must be competently and diligently represented in order for . . . family courts to function effectively."); Duquette & Hardin, *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, US Dept of Health and Human Services, VII-1 (1999) (hereinafter, the "*Guidelines*") ("Children's interests are not well served unless *all* parties have good legal representation. . . . Given that attorneys and other advocates often determine what information a judge is presented with, it is vital that all parties in child abuse and neglect cases have adequate access to competent representation so that judges can make informed decisions.") (emphasis in original, internal citations omitted); National Counsel of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, 5 (2000) ("All parties in child welfare proceedings should be adequately represented by well-trained . . . attorneys. . . . Such representation should be available at the earliest opportunity, preferably at the first hearing, but no later than the second hearing after the petition is filed.").

Competent legal representation of all parties, including an incarcerated parent, assures that children's best interests are served by a full and fair disclosure of all relevant circumstances, accurate development of the issues, and perhaps most importantly for incarcerated parents, identification and development of viable alternatives to termination. See *Lassiter,* 452 US at 45-46 (Blackmun, Brennan, Marshall, JJ., dissenting) ("The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses."). Relying on the court, itself, to serve this function is insufficient to protect the interests of an unrepresented party. Cf. *Douglas v California,* 372 US at 354-55 (holding that it is an inadequate procedure for an appellate court to review a record and appoint counsel only if "in their opinion" the assistance of

counsel could be "helpful to the defendant or the court."); *Anders v California*, 386 US 738, 744; 87 S Ct 1396 (1967) (holding that the court of appeal's conclusion that an appellant's position is without merit is not an adequate substitute for counsel "acting in the role of an advocate" for the appellant).[21] Moreover, because the child welfare agency, the children's law guardian, and even the trial judge may have difficulty being objective in a TPR proceeding, a parent's counsel may be the only participant in the process "who is willing to put faith and energy into the outcast parent" and is thus "essential to making her client's circumstances fully known to and understood by the court." *Baillie, supra* at 2312-13 (1997-98).

Where parents are represented by counsel at TPR proceedings, "cases proceed[] more smoothly and [are] likely to contain less error, and the presence of counsel [makes] general fact-finding easier. When all parties are represented by counsel, the judge does not have to step outside of the judicial role." *Calkins, supra* at 191 n 63. Judge Calkins further explained the importance of counsel in TPR proceedings:

> A fair trial is necessary to protect the basic parental interest at stake and to achieve a result upon which everyone can rely. Effective counsel is essential to a fair trial and to reducing the risk of an erroneous deprivation of the parent's rights. **Counsel plays a critical role in exposing any weaknesses in the government's evidence and arguments, and in presenting evidence and argument in support of the parent**. [*Id.* at 229 (emphasis added).]

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[21] In *In re Clemons*, the Michigan Court of Appeals admonished the trial court, explaining that where the parent was not represented, the petitioner was not present, and the trial court questioned the witnesses directly, the court "assumed the role of the accuser" and "essentially functioned as an advocate . . . to establish grounds for terminating respondent's parental rights." *In re Clemons, supra* at *3. The court also noted that "the 'evidence' that the trial court sought to elicit was limited to evidence that would warrant termination of respondent's parental rights." *Id.* at *4. The court's role in questioning respondent and eliciting evidence to support terminate of her rights deprived respondent of an impartial decision maker. *Id.*

In a case where, as here, a parent is wholly deprived of counsel at the termination hearing, the effect is the same – the petitioner asks all questions and elicits only testimony that will support its position. There is no advocate to ask questions, object to evidence, or develop alternatives that might prevent the termination of parental rights. This is especially true where, as here, the judge presumes that termination is appropriate and asks no questions to elicit facts that may support a parent's opposition to termination of his rights.

Counsel's recognized value may explain why the significant majority of New York Family Court judges agreed that where a parent is unrepresented, it is more difficult to conduct a fair hearing (72%), and more difficult to develop the facts (66.7%). *Lassiter*, 452 US at 29 n 5. Michigan courts also recognize that "termination of parental rights occurs less frequently when parents are represented by counsel." *Reist*, 396 Mich at 345.

Under the majority opinion from the Court of Appeals in the McBride matter, a trial court could predetermine that, based on the length of his sentence alone, an incarcerated parent has no theory under which he can retain his parental rights. If the court then denies counsel to the parent, and the record is not developed in a way that would *prevent* termination, the erroneous deprivation of counsel could nearly always be found to be harmless. After all, an appellate court reviewing a record barren of argument in favor of the incarcerated parent can do no more than *speculate* that counsel could have introduced no evidence, posed no cross-examination, called no witnesses, and made no arguments that could have changed the outcome. But the very purpose of the statutes, court rules, and constitutional schemes mandating counsel for all parents in TPR proceedings is to ensure that a parent has a *meaningful opportunity* to make objections to the state's evidence, and develop and present evidence and arguments *in favor* of the retention of his parental rights. Because an incarcerated parent will rarely have the skills or resources to meaningfully oppose the State's case, and where no advocate has done so, the appellate court has no evidence on the record to suggest that a different outcome may have been possible, and the appellate court will be tempted to declare the error harmless. *Penson*, 488 US at 87 ("Mere speculation that counsel would not have made a difference is no substitute for actual . . . advocacy.")

In fact, the precedential value of this outcome would permit prosecutors and trial courts to deny counsel to *any parents* for whom they have pre-judged the outcome and determined

counsel can have no meaningful influence on the matter (and thus the threat of subsequent reversal on appeal is low). See Flynn, *In Search of Greater Procedural Justice: Rethinking Lassiter v Department of Social Services,* 11 WIS WOMEN'S LJ 327, 342-45 and n 97 (1996-97) (illustrating the evidence of bias in the *Lassiter* trial judge and explaining that "[j]udges . . . can be predisposed to determining the case before the presentation of facts and witnesses.") citing Garcia & Batey, *The Roles of Counsel For the Parent in Child Dependency Proceedings*, 22 GA L REV 1079 (1988);[22] Campbell, *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L REV 499, 511-12 (1990) ("the consistent application of a harmless error rule might create an incentive to commit a given type of constitutional error."); Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J CRIM L & CRIMINOLOGY 421, 439 (1980) (When a procedural error, such as deprivation of counsel, is declared harmless, the practical effect is to "encourage[] the prosecutor to use [the] . . . technique in every case.").

As an even greater risk, if a harmless-error analysis were applicable, any incarcerated parent facing a substantial sentence could be denied *any of his procedural protections* at a TPR hearing based solely on the "inevitability" of the termination of his or her rights. If it can be harmless to deny a parent counsel at the termination hearing, is it also harmless to deny that parent a right to participate in the hearing as required under the rules?[23] What level of

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[22] This Honorable Court recently addressed another case in which the handling of the case by the DHS and the trial court created the "impression that termination of respondent's rights was a foregone conclusion." *In re Rood, supra* at 12 n 11.

[23] As mentioned in note 3, *supra*, Mr. McBride was deprived of his due process to participate in seven out of eight hearings in this matter. And his right to participate telephonically in the final termination turned on the prosecutor's secretary establishing the required connection. Based on the minimal participation Mr. McBride was afforded, it is not unreasonable to assume an incarcerated parent could be deprived of access to the entire proceeding.

participation is required – must he be permitted to speak, or even hear the entire proceeding?[24] Is it harmless to deny that parent notice of the hearing, if, after all, his rights would undoubtedly be terminated because of his long incarceration? If a court's knowing deprivation of procedural protections can be deemed harmless, any of these examples becomes possible. To avoid that risk, this Court should establish a bright line rule, sending a signal to prosecutors and trial courts: in TPR proceedings, whether counsel for a parent is required by the court rules, statutes or the state or Federal Constitution, failure to appoint counsel is reversible error and will not be subject to harmless-error review.[25]

C. The Department of Human Services Asserts Conflicting Positions Regarding the Harmlessness of Error in Denying Counsel to an Indigent Parent in a TPR Hearing

The Department of Human Services ("DHS") is the state agency responsible for carrying out the state and federal mandates related to the child welfare and foster-care systems. See MCL 712A.13a(1)(a). Accordingly, the DHS has a direct interest in all termination of parental rights proceedings which may result in the severance of parental rights, and the possible transfer of responsibility for the care, custody, and control of the children to the State.

In *In re Clemons,* a mother was deprived of her right to counsel in a proceeding to terminate her parental rights. *In re Clemons*, *supra* at *2-*3. On appeal, counsel for the mother argued that the failure to inform the mother of her right to counsel violated her "statutory and court rule rights" as well as "her constitutional rights to Due Process and Equal Protection."

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[24] Again, this is not a far-fetched example. Mr. McBride, for example, was advised that the court would allow him to listen, but it "may have to cut [him] off at some point" for a witness to give testimony by telephone. TR8 at 6-7.

[25] While the best interests of children are at stake, and the speed of the process is undoubtedly important, it cannot be used as an excuse to dispense with the legal formalities designed to protect the fundamental interests of the parents (and the children) to retain family unity. Moreover, to the extent that a finding of reversible error "delays" final permanency placement of the children, one must remember that any such delay could be avoided entirely by

Exhibit 12 at 11-12. This deprivation, appellant argued, was a "structural defect in the constitution of trial court mechanism which defies analysis by 'harmless error' standards and warrants automatic reversal." *Id.* at 12. The mother did not argue that a *Lassiter* case-by-case analysis weighs in favor of appointment of counsel, or that the *Clemons* case presented unique facts and circumstances that present particular difficulties for an unrepresented parent. *Id.* The mother's position was simple: the court's failure to provide her with counsel was a structural constitutional error requiring automatic reversal.

The DHS, named as Petitioner-Appellee, filed no brief in opposition. **Exhibit 13**. In light of the appellant-mother's clear argument, the DHS's silence should be construed as acquiescence with the appellant-mother's interpretation of the law. Cf *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989) (finding that where the legislature has failed to modify an act in response to the judiciary's interpretation of that act, the legislature's silence serves as an affirmance of the court's interpretation); *Morrison v Queen City Electric Light & Power Co*, 181 Mich 624; 148 NW 354 (1914) (describing the general rule of acquiescence to include a person who silently permits another to act in a way that adversely affects the first person's interests); *Deming's Appeal*, 77 US 251, 255; 19 L Ed 893 (1869) (holding a litigant's silence after learning his counsel acted contrary to his interests "must be held to amount to acquiescence").

Though the DHS had an interest in the *Clemons* matter, and may have taken custody of the children upon termination of the mother's parental rights, it acquiesced to the position that deprivation of counsel is not subject to harmless-error analysis by declining to counter this argument on appeal. In this case, though the DHS claims it has not taken a position, it has

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forcing prosecutors and trial courts to comply with the parent's basic procedural protections (as plainly required by the court rules and statutes) in the first place.

argued to this Court that deprivation of counsel is subject to harmless-error analysis. This position is undoubtedly contrary to Clemons' position, as silently-affirmed by the DHS.

D. The Existence of an Alternative Placement Plan or Guardianship Option Prevents a Denial of a Request for Counsel at a TPR Proceeding from Being Harmless

> *Termination of parental rights appears to be the most drastic step that the state can take.. . . Therefore, in the context of termination of parental rights, courts must determine if anything short of termination would effectively achieve the compelling state interest of preventing substantial harm to a child.*

Johnson & Flowers, *You Can Never Go Home Again*, 15 FL ST U L REV 335, 344 (1997-1998).

When parental rights are terminated, no matter how old a child or how strong his familial bonds, a child loses not only his rights to maintain contact with his parent, but also any rights to remain part of his extended family, including grandparents, aunts, and cousins. Allard & Lu, *Rebuilding Families, Reclaiming Lives: State Obligations to Children in Foster Care and Their Incarcerated Parents*, Brennan Center for Justice, at iv (2006). In some cases, as in the McBride matter, children from the same family are separated, having little or no contact with each other. Children, however, may benefit from maintaining contact with their birth parents, siblings or other family. *Guidelines*, *supra* at II-3, II-6. For thousands of children, parental rights are terminated and all familial contact is lost, simply because a parent is incarcerated. *Allard & Lu, supra* at vii (noting that in 2003, over 29,000 children, or 6% of foster care children, had been removed from their families as a result of parental incarceration). If incarceration, alone, may serve as grounds for termination of parental rights (without regard to parental fitness), millions of children risk losing their familial bonds. By mid-year 2007, more than half of all prisoners (approximately 809,800) were parents of an estimated 1,706,600 minor children.[26] Glaze &

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[26] Using incarceration, alone, as grounds for termination may violate a parent's due process rights. See *In re Max GW*, 293 Wis 2d 530, 559-560; 716 NW2d 845 (2006) (holding that where incarceration makes a condition of return impossible, use of the incarceration, alone, as grounds for termination of parental rights violates the parent's substantive due process rights

Maruschak, *Bureau of Justice Statistics Special Report: Parents in Prison and Their Minor Children*, U S Dept of Justice, 1 (Aug 2008, revised Jan 8, 2009). Moreover, more than a third of these minor children (over 500,000 children) could be impacted if termination of parental rights were permitted simply because a parent would remain incarcerated past the child's age of majority. *Id.* at 3.

While some may believe incarcerated parents "don't deserve to be parents,"[27] Nell Bernstein, journalist and coordinator of the San Francisco Children of Incarcerated Parents Partnership, explains that *all children deserve parents,* "[w]hat children of incarcerated parents *deserve* is to be treated, wherever possible, as part of a viable, vital, existing family unit whose bonds can be strengthened, rather than severed." *Allard & Lu, supra* at iii (Forward by Nell Bernstein). An incarcerated parent can maintain a meaningful relationship with his children. Notably, more than 60% of state prisoners, and 82% of federal prisoners report having at least monthly contact with their minor children (40% of state, and 65% of federal prisoners report at least weekly contact). *Glaze & Maruschak, supra* at 18, app'x table 10. Children's interactions with an incarcerated parent can help bolster the children's well-being and healthy development, reduce the trauma of separation, reassure children of their parent's love, and increase the likelihood that families can be successfully reunited after the parent's release. *Allard & Lu, supra* at 5-7; Laver, *Incarcerated Parents: What You Should Know When Handling an Abuse or Neglect Case,* 20 ABA CHILD LAW PRACTICE 10, 145, 150-51 (2001). Older children, in

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under both the United States and Wisconsin Constitutions); *Laver, supra* at 152 ("Appellate courts largely agree that incarceration alone is not a ground for TPR.").

[27] The Brennan Center for Justice at NYU School of Law has examined the "Bermuda Triangle" of criminal and child welfare law, into which incarcerated parents and their children are often swept. *Allard & Lu, supra* at iii. Since 1997, when the Adoption and Safe Families Act was passed, states are required to cease family reunification efforts as soon as a child has been in foster care for 15 out of the most recent 22 months. *Id.* As a result, termination proceedings involving incarcerated parents have more than doubled in the last decade. *Id.*

particular, may gain the most from a continued relationship with an incarcerated parent. An older child may be more bonded with a parent, and, through a continued relationship, some older children may relieve guilt or concerns about the birth parent.[28] *Guidelines*, *supra* at II-6; *Johnson & Flowers*, *supra* at 348 ("the older a child and the longer the child has had a relationship with an incarcerated parent, the less likely the court will sever the relationship.").

Under the Adoption Assistance and Child Welfare Act of 1980 ("Child Welfare Act") State agencies are required to make "reasonable efforts" to prevent the removal of children from their families. While there are a few enumerated exceptions defined in the Adoption and Safe Families Act of 1997, parental incarceration is not a sufficient reason for agencies to forego efforts to retain family bonds. See *Allard & Lu*, *supra* at 10-11. The "reasonable efforts" requirement has never been clearly defined, but it "must go beyond an explanation in the case plan that these services were not available." *Id.* at 11.

Unfortunately, despite the evidence that suggests incarcerated parents can maintain meaningful relationships with their minor children, and despite the federal requirement that child welfare agencies use reasonable efforts to maintain familial relationships, agencies are often unable to provide appropriate services for incarcerated parents – and unwilling to pursue alternatives to termination. Bernstein reports:

> When asked, only five child welfare systems nationwide were able even to offer estimates of how many of the children in their care had an incarcerated parent (these estimates ranged between 10 and 30 percent). Only six states had a policy in place to address the needs of children of incarcerated parents, and only two provided their staff any training specific to these children.

Allard & Lu, *supra* at 21 (citation omitted). Family courts can compound the severity of this

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[28] The Model Courts Project in Georgia reported that "[a]ge is a very important consideration in selecting the appropriate permanency option for a child. Typically, the older a child is, the more weight should be given to the child's stated preferences." Key & Dorris, *The Promise of Permanency: A Report from the Permanency Options Workgroup of the Model*

problem in several ways. Many judges remain unaware of their obligations to determine if reasonable efforts to preserve families had been made, and others "routinely rubber stamp[] assertions by social service agencies that reasonable efforts had been made." *Allard & Lu, supra* at 13 (citations omitted). A court may also excuse an agency's failure to make reasonable efforts towards reunification as "futile." *Id.* at 27. Or it may deem the incarcerated parent "at fault" for being in prison, where provision of services towards reunification is more difficult, and thus "impose the additional punishment of family dissolution on both the parent and child." *Id.* at 27-28. These approaches dismiss a family's chances of survival:

> Th[ese] mindset[s] fail[] to consider the need of the child to maintain a relationship with his/her parent and permit[] the child welfare agencies to dismiss families' chances of survival because of parental incarceration without thoroughly investigating the viability of family reunification.

Id. They also fail to consider viable alternatives to parental termination that "can ensure that children have safe and stable homes, while supporting the maintenance of enduring relationships with their incarcerated parents whenever possible." *Id.* at 34-35.

Even where a statutory basis exists under which parental rights could be severed, termination is not the only, and is certainly not always the best option for the children. *Guidelines, supra* at II-1 ("traditional adoption does not meet the needs of all children in public foster care"). When courts terminate parental rights, the children are usually placed into the state's foster-care system with a goal of adoption. See Key & Dorris, *The Promise of Permanency: A Report from the Permanency Options Workgroup of the Model Courts Project,* at 3 (2004) (acknowledging that states often choose the most convenient permanency plan, rather than giving proper consideration to other alternatives). Termination of parental rights, however, does not ensure adoption for the children. *Santosky*, 455 US at 766 n 15 ("Even when a child

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Courts Project, at 20 (2004). Older children are more likely to be "damaged" when placed

eventually finds an adoptive family, he may spend years moving between state institutions and 'temporary' foster placements after his ties to his natural parents have been severed."). Older children are even less likely to be adopted. *Johnson & Flowers*, *supra* at 348 n 112. One study found that with each additional year of age, the rate of exit from foster care to adoption or long-term custody decreased by 22 percent. Zinn & Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, Chicago: Chapin Hall Center for Children at the University of Chicago, 15 (2008). Thus, before severing ties to a parent, courts should consider whether a child will "merely languish" in the foster care system, or whether alternative placements better meet the child's needs. *Santosky*, 455 US at 766 n 15.[29]

Recognizing that adoption is not always the best solution, the *Guidelines* recommend other placement alternatives be considered. For example, with permanent guardianship, consistent with the Adoption and Safe Families Act, guardians have legal custody and control of the children, but birth parents may retain some ongoing rights and contacts. *Guidelines, supra* at II-8-10; 42 USC 675. Planned long term living arrangements may also be a viable alternative for certain older or disabled children. *Guidelines, supra* at II-15. The Michigan legislature authorizes several alternatives to adoption. See, e.g., MCL 712A.19a; MCL 700.5201 *et seq.*

In some states, before a court may terminate parental rights, it must find by clear and convincing evidence that there are "no viable alternatives." See, e.g., *In re ME*, 972 SO2d 89, 101-02 (Ala Civ App, 2004). That legal requirement, says the Alabama Court of Appeals, flows *not* from the statutory language, but from federal due-process concerns. *Id.* The court noted that alternative placements that should be considered include guardianship placement with relatives,

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outside their birth families. *Id.*

[29] In 2006, 72.4% of the children adopted out of Michigan's foster care system had spent over two years in the system. Center for Law and Social Policy, *Child Welfare in Michigan*

foster parents, or group homes, each with the possibility of parental visitation rights. *Id.* And in a recent case where a statutory basis to terminate parental rights had been established by clear and convincing evidence, the Michigan Court of Appeals nonetheless found that the parent had a right to a "best interests" hearing, during which, evidence that termination of parental rights was not in the best interests of the child could be presented. *In re AMAC* 269 Mich App 533, 539; 711 NW2d 426 (2006).[30]

Evidence of viable alternatives, including long term placement with relatives, could demonstrate that, even where termination is authorized by statute, it is not in the best interests of the child. Placement with relatives is preferred because it "preserve[s] the child's existing family ties and . . . recognize[s] the importance of family relationships in our society." *Guidelines, supra* at II-11.[31] See also 42 USC 671(a)(19) (giving preference to an adult relative). Accordingly, during permanency planning, "relatives should be aggressively identified, recruited and assisted in their efforts, if willing to adopt or become guardians." *Guidelines, supra* at II-11.

Regardless of the permanency alternative selected, "[b]irth parents, when given a chance, can be tremendous resources in planning for their children and their participation can have positive outcomes for adoption." *Guidelines, supra* at II-6. In fact, The DHS Children's Foster Care Manual (the "CFF"), which guides the creation and implementation of a service plan as required by 42 USC 671(a)(16) and 42 USC 675(1), "requires" engagement of "all parents" in

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(available at http://www.clasp.org/publications/child_welfare_in_michigan06.pdf, last visited April 8, 2009).

[30] Notably, the Court of Appeals in *In re ME* did not review the denial of a best-interests hearing for harmless error.

[31] The *Guidelines* also recommend that any child aged 12 or older consent to any placement option. *Id.* at II-9; *Johnson & Flowers, supra* at 348 ("The child's wishes, particularly those of older children, may be considered in some cases."). On the date of the termination hearing, the McBride children were 9, 11 and 15. Based on their relatively-advanced ages, the children's preferences relative to their father's parental rights, and placement options with his relatives, should have been given some consideration.

the development of a service plan. CFF 722-6, at 1.[32] "The participation of parents and members of the extended family/relative network is viewed as essential to achieving permanency. . . ." *Id* at 3. Michigan's court rules and statutes also recognize the importance of engaging all parents in the development of a permanency plan. Specifically, MCR 3.965(B)(13) requires a court to "inquire of the parent . . . regarding the identity of relatives of the child who might be able to provide care" and MCR 3.965(E) requires a court to "direct [DHS] to identify, locate, and consult with relatives" to evaluate placement with a relative as an alternative to foster care as required by MCL 722.954a(2).

Alternatives to termination and adoption are plainly authorized by federal and state statutes, and may be preferable to placing children into the foster-care system. Placement with relatives in long-term care arrangements or permanent guardianships may be the most desirable option for older children, as it can provide stability for the children while permitting them to maintain contact with their natural parents. As discussed, state agencies may have too little guidance, and too few resources, to investigate every alternative to TPR and adoption in every case. In these circumstances, the children and the parents forever pay the price when a court severs their familial bonds. However, a parent who is appointed counsel (as required by the court rules, statutes, and constitution) has an advocate who can investigate and propose reasonable available alternatives to TPR. Where the State has not (a) involved a parent in permanency planning, (b) inquired of him regarding the identity of relatives who might provide suitable alternatives to foster-care, (c) investigated placement with relatives or other suitable guardians, (d) appointed counsel to advocate for the parent's rights and alternative placements, or (e) held a "best interests" hearing to evaluate whether suitable alternatives have been

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[32] The CFF is available online at http://www.mfia.state.mi.us/olmweb/ex/html/ (accessed April 9, 2009). Only the current version the document is available online. This Court, however,

adequately investigated, termination of parental rights is not a foregone conclusion–even where statutory grounds supporting termination have been conclusively established.[33]

Even Delaware, one of few states following *Lassiter*'s case-by-case appointment of counsel in TPR hearings, recognizes that the availability of alternatives to termination can prevent a denial of counsel from being harmless. In *Walker v Walker*, the Delaware Supreme Court held that denial of counsel was not harmless where it deprived a parent of his ability to effectively present his position, examine the witnesses against him, and investigate whether an alternative to TPR was a more "appropriate" disposition that could prevent the child from losing his relationship with his parent. *Walker v Walker*, 892 A2d 1053, 1056 (Del, 2006).

As in *Walker*, Mr. McBride was denied basic procedural protections afforded under the state and federal statutory schemes, court rules and DHS policies. The statutes, rules and policies establish an important "point of departure" for determining if Mr. McBride was afforded minimal due process in the termination of his fundamental right to parent his children. *In re Rood*, ___ Mich ___; ___ NW2d ___; Slip Op at 52 (Docket No 136849, April 2, 2009) (**Exhibit 3**). In the proceedings that led to the termination of his parental rights, Mr. McBride was not invited to participate telephonically in the first seven hearings, he was denied counsel, he was denied visitation with his children,[34] and there is no record that he was engaged to aid in the

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recognized its consistency with statutes in effect during these proceedings, and its value when looking at future challenges like the ones presented by this case. *In re Rood*, *supra* at 24 n 31.

[33] Even if a state agency claims to have investigated alternatives to termination, the agency does not serve as the parent's advocate, and its goals may diverge from those of the parent. Thus, unless counsel for a parent has been appointed to investigate and develop alternatives that would permit the parent to retain his rights, it cannot be said that the termination of parental rights was inevitable.

[34] The CFF lists several reasons which permit the DHS to forego making "reasonable efforts" to reunite the family. CFF at 14-15. None of the reasons listed is applicable in the instant case. Thus, the DHS's (and the court's) presumption that Mr. McBride was "unavailable" as a parent, and thus he need not be consulted in the development of a permanency plan, present (by telephone) for the hearings, or afforded legal representation, appear to be

development of a service plan or consulted about the availability of relatives who may be suitable alternatives to foster care. In fact, there is nothing in the record to suggest that the State agencies investigated alternatives to termination, including placement with Mr. McBride's relatives or other suitable non-kin guardians. This Court should find that the DHS and trial court's systemic failure to provide Mr. McBride with basic procedural protections deprived him of his due process rights. And although "conclusive" evidence may have supported termination by statute, the availability of alternative placement options demonstrates that termination was not inevitable, and the total deprivation of counsel at the termination proceeding cannot be deemed to be "harmless error."

V. Relief Requested

In this case, Mr. McBride was denied numerous procedural protections mandated by statute, court rule, and the federal and state constitutions. Importantly, there was no advocate for the father to investigate whether alternatives to termination were in the best interests of the children. Thus, it is impossible to deem this structural failure harmless, as "no one knows" what evidence may have been developed to support his opposition to termination. See *In re Rood*, *supra* at 47. Mr. McBride was not given a "fair opportunity to participate," and was thus denied "minimal procedural due process." *Id.* at 2.

For the foregoing reasons, Amicus Curiae National Association of Counsel for Children respectfully requests that this Court find that failure to appoint counsel in a termination of parental rights hearing is a structural error and can never be harmless; grant leave to appeal or reverse the trial court's decision terminating Appellant's parental rights and remand the matter for a new trial at which the Appellant is provided the assistance of a court-appointed attorney.

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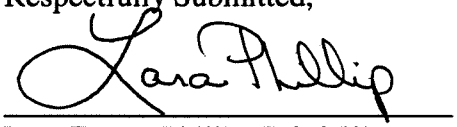
without authority. The DHS and the family courts must afford every parent – even an incarcerated parent – with due process procedural protections before terminating parental rights.

Respectfully Submitted,



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