STATEMENT OF JURISDICTION

This is an amended application for leave to appeal after a decision by the Michigan Court of Appeals. The Appellant filed a pro per application on July 30, 2008, prior to retaining pro bono counsel. This application amends the Appellant's original request by fully setting forth the reasons why this Court should accept this case.

This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2) to review by appeal a case after a decision by the Court of Appeals.

The Court of Appeals issued its opinion in this matter on July 15, 2008. This timely application is being filed within 28 days of the Court of Appeal's decision. MCR 7.302(C)(2).

QUESTIONS PRESENTED

1. Did the trial court violate Appellant's statutory and constitutional right to counsel when it deprived him of a court-appointed attorney at the termination of parental rights hearing?

Trial Court Says:	No
Court of Appeals Says:	Yes
Appellant Says:	Yes

2. Did the Court of Appeals err when it held that the trial court's deprivation of a parent's statutory and constitutional right to counsel at a termination of parental rights hearing constituted harmless error and did not require automatic reversal?

Trial Court Says:	Not answered
Court of Appeals Says:	No
Appellant Father Says:	Yes

JUDGMENT AND ORDER APPEALED FROM AND RELIEF SOUGHT

Appellant Ronald D. McBride Jr. applies for leave to appeal from the Opinion of the Michigan Court of Appeals in *In re McBride Minors,* unpublished decision per curiam of the Court of Appeals, issued July 15, 2008 (Docket No. 282062). Appendix A. Mr. McBride respectfully requests that this Court reverse the decisions of both the trial court and the Court of Appeals which resulted in the termination of his parental rights (TPR) without the assistance of a court-appointed attorney, a right guaranteed by Michigan statutes, court rules and constitutional mandates. Mr. McBride requests that the case be remanded for a new trial at which he is afforded the assistance of a court-appointed attorney.

This case presents issues of profound importance regarding the integrity and fundamental fairness of TPR hearings. TPR decisions have been characterized as the "civil death penalty" due to the importance of the right at stake – the right to care for one's child – and the severity and irrevocability of the decision. The United States Supreme Court has described the decision as working a "unique kind of deprivation," *MLB v SLJ*, 519 US 102, 127; 117 S Ct 555; 136 L Ed 2d 473 (1996), that requires the utmost adherence to procedural safeguards to ensure that the right is zealously protected. *Id.* The Michigan Legislature has protected this right through a statutory mandate that all indigent parents have the right to court-appointed counsel at TPR hearings, MCL 712A.17c(5), a right that Michigan appellate courts have held is both statutory and constitutional in nature. *In re Powers*, 244 Mich App 111; 624 NW 2d 472 (2000); *In re Cobb*, 130 Mich App 598; 344 NW 2d 12 (1983). The uniform application of this right is crucial in ensuring that this statutory and constitutional mandate is enforced. Families must have the utmost confidence that all procedural protections afforded by the law will be provided before the state can permanently extinguish parental rights.

Yet, here, the trial court denied an indigent father, Mr. McBride, of his statutory and constitutional right to counsel and proceeded to terminate his parental rights. The Court of Appeals, while finding that the trial court erred by depriving Mr. McBride of his right to an attorney, affirmed the decision applying a harmless error analysis, essentially determining that the overwhelming weight of the evidence against Mr. McBride excused the trial court's clear legal error. *McBride*, *supra* at 3. The application of the harmless error standard in this situation, however, seriously undermines the importance of the parental right at stake and raises concerns regarding the integrity of the TPR decision-making process. As noted in Judge Gleicher's dissent, "[T]he 'commanding' liberty interests at stake here, in conjunction with the statutory and court rule mandates for appointed counsel, are entirely stripped of meaning if this Court employs a harmless error analysis." *McBride*, *supra*, dissenting opinion at 8. Appendix B. This Court's guidance is necessary to ensure that the statutory and constitutional right to counsel – the core right underlying the concept of due process – is not vitiated.

Additional grounds exist for this Court to hear the matter because the decision directly conflicts with other Court of Appeals' decisions squarely addressing the issue. The Court of Appeals has consistently held that the denial of counsel in TPR cases warrants automatic reversal. *See Powers*, *supra* (remanding case to determine whether parent was denied right to counsel at TPR hearing); *In re Keifer*, 159 Mich App 288, 406 NW 2d 217 (1987) (reversing TPR decision because trial court failed to advise parent of right to court-appointed counsel); *Cobb*, *supra* (reversing TPR decision because the trial court denied parent's request for appointed counsel); *see also In re Hodges*, unpublished decision per curiam of the Court of Appeals, entered on May 2, 2000 (Docket No. 211745) (reversing TPR decision because parent

not represented by counsel at TPR hearing). The harmless error standard has never been applied to excuse the trial court's error in denying court-appointed counsel at a TPR hearing.

The decision in this case involves issues of major significance to the jurisprudence of termination of parental rights cases, was clearly erroneous, and conflicts with other Court of Appeals' decisions. Compelling grounds for jurisdiction exist.

STATEMENT OF PROCEEDINGS AND FACTS

On September 14, 2006, the Department of Human Services (DHS) filed a petition seeking jurisdiction of the three involved minor children.[1] The petition alleged that the Appellant was incarcerated.

A referee conducted a preliminary hearing on the day the petition was filed. Although the mother was incarcerated in the Bay County Jail at the time of the preliminary hearing, she appeared at the hearing with court-appointed counsel. (TR1 at 3). The prosecutor advised the referee that the Appellant had not been provided with notice of the child protective proceedings. (TR1 at 4). Neither the referee nor the prosecutor articulated a specific plan to include the Appellant in future hearings, to determine his interest in the proceedings or to appoint counsel for him. The referee signed an order authorizing the petition and placing the children in foster care (TR1 at 8) and scheduled a September 29, 2006 pretrial hearing. The prosecutor mailed a copy of the referee's September 14, 2006 order and notice of the September 29, 2006 hearing to the Appellant's address at the Carson City Correctional Facility.

On September 18, 2006, the Appellant was sent a copy of the petition by registered mail. The post office delivered it to the Carson City Correctional Facility mailroom, where someone at the prison acknowledged its receipt. A proof of service was filed with the trial court, but no pleading or motion was filed stating that Michigan Court Rule 2.006 required a telephonic hearing that included the Appellant.

On September 29, 2006, the trial court conducted an adjudication hearing. The Appellant

[1] For ease of reference throughout this motion, the transcripts for the 2006 and 2007 hearings shall be referred to as follows: TR1 (Preliminary Hearing, September 14, 2006); TR2 (Adjudication Hearing, September 29, 2006); TR3 (Dispositional Hearing, November 6, 2006); TR4 (Review Hearing, February 7, 2007); TR5 (Review Hearing, March 26, 2007); TR6 (Review Hearing, May 7, 2007); TR7 (Permanency Planning Hearing, July 30, 2007) and TR8 (Termination Hearing, October 10, 2007).

did not attend by telephone and was not represented by counsel. (TR2 at 4,7). The court found that it had jurisdiction over the children and scheduled a dispositional hearing. (TR2 at 16).

The Appellant did not telephonically attend the dispositional review hearing conducted on November 6, 2006, and once again did not have counsel. The trial court observed that a proof of service reflected service of notice of the hearing on the Appellant in prison, but stated "at this point because of the fact that he's going to be in for many more years, we don't need to bring him in—um—for the hearings." *McBride*, *supra*, dissenting opinion at 3.

Appellant did not telephonically attend the dispositional review hearings conducted on February 7, 2007, March 26, 2007, May 7, 2007, or the July 30, 2007 permanency planning hearing. Appellant also did not have counsel for any of those proceedings. On August 27, 2007, the prosecutor filed a petition seeking termination of the Appellant's parental rights and arranged for personal service of a copy of the petition and notice of the hearing on the Appellant. On September 13, 2007, the prosecutor filed a "motion for order to allow incarcerated party to participate in a telephonic proceeding." The trial court granted the motion and sent a copy of its order to the warden of the Carson City Correctional Facility.

Appellant appeared telephonically at the October 10, 2007 termination hearing and immediately requested that the court appoint him an attorney. (TR8 at 5). The trial court denied the request and advised the Appellant that he could listen to the proceedings and question the witnesses, although the court added that it "may have to cut you off at some point" for the testimony of another witness appearing telephonically. *McBride*, *supra*, dissenting opinion at 4.

At the conclusion of the hearing, the trial court stated that it would take its decision "under advisement" and render a bench or written opinion within 28 days. Appellant asked the court if he could obtain a transcript of the hearing, and the court replied,

"[Y]ou would have to pay for the transcripts, unless I do—well, he would have to pay for the transcripts, wouldn't he, at this point, because you don't have court appointed counsel." *Id.* The trial court subsequently terminated the Appellant's parental rights and a timely appeal was filed.

The Michigan Court of Appeals held that the trial court erred in failing to appoint an attorney for the Appellant. *McBride, supra*. The Court found that the Appellant had a right to counsel under MCL 712A.17c and MCR 3.915, supported by constitutional mandates, which the trial court violated. *Id.* at 3. But the Court determined that the error was harmless and affirmed the trial court's decision to terminate Appellant's parental rights. *Id.*

Judge Gleicher concurred in the court's finding that the trial court erred in failing to appoint counsel but dissented in the determination that the error was harmless. *McBride, supra*, dissenting opinion. She determined that the trial court violated MCR 2.004, which defines the procedural rights afforded to incarcerated parents in termination of parental rights hearings, and found that the plain language of the rule rendered the termination of parental rights order void since the rule had been violated. *Id.* at 10.

Additionally, Judge Gleicher found that the appropriate remedy for violating an indigent parent's constitutional right to counsel was automatic reversal because the error constitutes structural error. She wrote that "the United States Supreme Court has never utilized harmless error analysis in the context of a deprivation of the right to counsel derived from the Fourteenth Amendment," *id.* at 9, and concluded that the "'commanding' liberty interests at stake here, in conjunction with the statutory and court rule mandates for appointed counsel, are entirely stripped of meaning if this Court employs a harmless error analysis." *Id.* at 8. "[T]he complete denial of counsel in a child protective proceeding should presumptively result in prejudice,

regardless of a respondent's incarceration", *id.*, because the deprivation affects the framework within which the trial proceeds.

ARGUMENT

Standard of Review

In this case, the trial court denied the Appellant, the birth father of Skyler, Alexander and Sawyer McBride, of his statutory and constitutional right to counsel in a termination of parental rights hearing and proceeded to terminate his rights. The Court of Appeals, while finding that the Appellant's statutory and constitutional rights to counsel were violated, affirmed the trial court's ruling, deeming the error to be harmless. Since both questions before this Court – whether the trial court erred in failing to appoint counsel for the Appellant and whether harmless error analysis is appropriate on appellate review for an absolute denial of counsel in a TPR hearing – involve questions of law, de novo review is appropriate. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW 2d 912 (2001).

I. The Trial Court Violated The Father's Statutory And Constitutional Rights By Depriving Him Of The Assistance Of A Court-Appointed Attorney At A Termination Of Parental Rights Hearing

Both the United States and Michigan Supreme Courts have recognized that cases involving the involuntary, permanent termination of parental rights are "unique in the kind, the degree, and the severity of the deprivation they inflict." *In re Sanchez*, 422 Mich 758, 766; 375 NW 2d 353 (1985); *MLB*, supra. A decision to terminate parental rights is both total and irrevocable, and, unlike other custody proceedings, it leaves the parent, who possesses a constitutional right to direct the upbringing of his or her child, *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982), with no legal right to visit or communicate with the child, to participate in, or even to know about any important decision affecting the child's religious, educational, moral, or physical development. It is not surprising that this forced

dissolution of the parent-child relationship "has been recognized as a punitive sanction by courts, Congress and commentators," *Sanchez, supra* at 766, and has been described by many as the equivalent of a "civil death penalty." *See, e.g., ME v. Shelby County Dep't of Human Resources,* 972 So 2d 89, 102 (Ct Civ App Ala 2007); *In re Tammila G,* 148 P 3d 759, 763 (Nev 2006); *In re KAW,* 133 SW 3d 1, 12 (Mo 2004).

Because of the fundamental rights at stake in such proceedings and the potential for absolute dissolution of the relationship between a parent and his child, enhanced due process protections are provided to parents facing such actions, pursuant to statutes, court rules and constitutional mandates. One protection that the legislature has deemed essential to ensuring the integrity of a TPR hearing is the right to counsel. MCL 712A.17c(5) reads, "If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court *shall* appoint an attorney to represent the respondent." (emphasis added). In MCR 3.915(B)(1)(b), the Michigan Supreme Court reiterated the statutory right to appointed counsel. The court rule requires a trial court to appoint counsel in child protective proceedings if "the respondent requests appointment of an attorney," and the court determines that the respondent is "financially unable to retain an attorney." MCR 3.915(B)(1)(b). Under the rule, the respondent may request a court-appointed attorney at his first court appearance or any later hearing. MCR 3.915(B)(1)(a)(ii). Neither the Legislature nor the Michigan Supreme Court has created any exceptions to denying court-appointed counsel to indigent parents when counsel is requested. Due to the sacrosanct constitutional right implicated by TPR hearings, Michigan appellate courts have held that the

right to counsel is constitutionally mandated on both due process and equal protection grounds.[2] *McBride, supra*; *Powers, supra*; *Cobb, supra*.

Additionally, where the parent is incarcerated, as in this case, the Michigan Court Rules provide enhanced procedures to ensure that the incarcerated parent's right to court-appointed counsel is protected. MCR 2.004 explicitly states that a party seeking an order in an action involving the custody, neglect, or foster care placement of a child or termination of parental rights must serve the petition on the incarcerated parent, and the petition filed with the court must state that a party is incarcerated and that a telephonic hearing is required by the rule. The rule then requires the trial court to issue an order requesting that the department or facility detaining the incarcerated parent allow the party to participate with the court via telephone. MCR 2.004(C). The purpose of the prisoner's participation by telephone, as set forth in the court rule, includes, among other things, a determination "whether counsel is necessary in matters allowing for the appointment of counsel." MCR 2.004(E)(2). This extra protection is taken "to assure that the incarcerated party's access to the court is protected." *Id.* Read together, MCL 712A.17c(5) and MCR 2.004 ensure that incarcerated parents are provided the opportunity to request court-appointed counsel after verbally being advised of that right in open court and the opportunity to meaningfully participate in child protective proceedings affecting their parental rights.

Here, as the Court of Appeals correctly held, the trial court violated the Appellant's statutory and constitutional right to counsel. *McBride*, supra at 3. At the outset of the case, both the prosecutor and the trial court ignored MCR 2.004, and no order was ever issued permitting

[2] This Court has not squarely addressed the issue whether the statutory right to counsel is constitutionally based. In *Reist v. Bay Circuit Judge*, 396 Mich 326; 241 NW 2d 55 (1976), three justices on the Michigan Supreme Court found that the Constitution mandated the appointment of counsel in termination of parental rights cases, *id.* at 346, but the Court has not confronted the issue since that time.

the Appellant to participate in the proceedings via a telephonic hearing. Prior to the TPR hearing, the Appellant was never given the opportunity to participate in the child protective hearings telephonically and the trial court never verbally advised the Appellant of his right to court-appointed counsel, as MCR 2.004 requires. Thus, the Appellant never had a meaningful opportunity to request the appointment of counsel before the commencement of TPR proceedings.

The trial court only attempted to comply with MCR 2.004 after the TPR petition was filed. The Appellant's first appearance in court, via telephone, was on October 10, 2007, the first day of the TPR hearing. At this first court appearance, Appellant immediately requested the assistance of court-appointed counsel but the trial court denied his request, stating that the request was untimely. (TR8 at 5). The court then proceeded to hear evidence on the TPR petition and ultimately terminated the Appellant's parental rights. At no point in the case did the Appellant receive the assistance of counsel.

The trial court's denial of the Appellant's request for counsel was erroneous. The Appellant requested counsel at his first telephonic court appearance, which should have occurred at the outset of the child protection case had the trial court complied with MCR 2.004. The court's failure to comply with the court rule deprived the Appellant of the enhanced procedural protections provided to incarcerated parents and prevented him from meaningfully accessing the courts by requesting counsel at an earlier time. Additionally, the trial court's finding that the Appellant waived his right to counsel contravenes the statute and court rules. As noted in the majority opinion of the Court of Appeals, "To hold that a respondent waives his right to counsel by failing to request a court-appointed attorney before his first court appearance is inconsistent with the plain language of MCL 712A.17c(4) and MCR 3.915(B)(1)(a)." *McBride*, *supra* at 3.

As contemplated by Michigan law, the Appellant requested a court-appointed attorney at the first opportunity he was given - the first time the trial court provided him a telephonic proceeding in the case - and the trial court erred in its decision to deny him counsel.

II. The Court of Appeals Erred By Applying A Harmless Error Standard In Affirming The Trial Court's Decision To Terminate The Appellant's Parental Rights Without The Assistance Of Court-Appointed Counsel

The Court of Appeals correctly held that the trial court violated the Appellant's statutory and constitutional rights by denying him the assistance of a court-appointed attorney. But, the Court erred in employing a harmless error analysis to affirm the trial court's decision. Instead, the Court of Appeals should have automatically reversed the trial court's TPR decision because the failure to appoint counsel constitutes structural error according to the court rules and the Constitution.

For the reasons articulated above, the trial court violated MCR 2.004, MCL 712A.17c(5) and MCR 3.915(B)(1) when it failed to appoint an attorney for the Appellant at his first court appearance. The remedy for the violation, as it relates to incarcerated prisoners, is explicitly set forth in MCR 2.004. The rule states, "A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule." MCR 2.004(F). Mr. McBride was not offered the opportunity to participate in the proceedings, as described in the rule, because the trial court denied his request for a court-appointed attorney and thus the plain language of the court rule requires a finding that the TPR order was presumptively invalid. *See People v Petit*, 466 Mich 624, 627; 648 NW 2d 193 (2002) ("It is well-established that we interpret the words of a court rule in accordance with their 'everyday, plain meaning.'") (citations omitted).

Additionally, reversal is required because the denial of counsel, when required by both the statute and the Constitution, constitutes structural error which warrants automatic reversal. "Structural errors . . . are intrinsically harmful, without regard to their effect on outcome, so as to require automatic reversal. Such an error necessarily renders unfair or unreliable the determining of guilt or innocence." *People v Duncan*, 462 Mich 47, 51; 610 NW 2d 551 (2000). In the criminal law context, the jurisprudence is clear that that the denial of counsel so likely prejudices "the accused that the cost of litigating their affect in a particular case is unjustified." *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Deprivations such as the right to counsel "affect the framework within which the trial proceeds," *Arizona v Fulminante*, 499 US 279, 307, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991), and in the absence of basic due process protections, such as the right to counsel, a "trial cannot reliably serve as a vehicle for determination of guilt or innocence" and the result cannot be viewed as "fundamentally fair." *Id.* at 310. As the United States Supreme Court stated in *Penson v Ohio*, 488 US 75, 88; 109 S Ct 346; 102 L Ed 2d 300 (1988), "[A] pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error."

Although the present case does not involve criminal punishment, it undoubtedly implicates fundamental rights protected by the Constitution. "In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome power of the State to destroy permanently all legal recognition of the parental relationship" working a "unique kind of deprivation" otherwise unseen in civil proceedings. *MLB*, *supra* at 127-128. As such, Michigan appellate courts have consistently held that automatic reversal is the correct remedy when a trial court fails to appoint counsel in a termination of parental rights hearing. In *Cobb*, the Court of Appeals reversed a TPR decision

because the trial court improperly denied the parent's request for court-appointed counsel. *Cobb*, *supra*. In *Keifer*, the trial court's failure to advise a father of his right to counsel warranted the reversal of the TPR order. *Keifer, supra*. And in *Powers*, the Court remanded a case in order for the trial court to make findings as to whether the father was denied the right to counsel. *Powers, supra*. The Court of Appeals did not apply a harmless error analysis in any of these cases. These decisions accord with holdings across the country that the denial of counsel to incarcerated parents constitutes structural error which necessitates the automatic reversal of the TPR order. *See*, *e.g.*, *In re KLT*, 237 SW 3d 605 (Ct App Mo 2007); *In the Matter of Mariah Sheffey*, 167 Ohio App 3d 141; 854 NE 2d 508 (Ct App Oh 2006); *Smoke v. Alabama*, 378 So 2d 1149 (Ct Civ App Ala 1979).

In this case, the Court of Appeals relied on *In re Hall*, 188 Mich App 217; 469 NW 2d 56 (1991), to support its application of the harmless error standard. *McBride*, *supra* at 3. But the facts of that case are clearly distinguishable. The parent in *Hall* was without the assistance of counsel for an earlier review hearing in the child protective case but was later appointed an attorney for the termination proceeding. *Hall*, *supra* at 222-223. The Court of Appeals deemed that the parent was not prejudiced by the absence of counsel at the earlier hearing precisely because she was represented at the termination hearing, where the evidence was repeated. *Hall*, *supra* at 223. Here, the father was denied the assistance of the counsel during the entirety of the proceeding, including the TPR hearing, after which his rights to his child were permanently severed. The Court of Appeals recognized this distinction in *Powers*. S*upra* at 123 ("The possible deprivation of counsel in this case also occurred at the termination hearing, not a dispositional review hearing, a factor the Hall Court found significant in its harmless-error

analysis."). Thus, the application of the harmless error test in *Hall* is not instructive and the Court of Appeals erred in applying this test.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Appellant Ronald McBride, Jr. asks that this Honorable Court grant this leave to appeal and reverse the decision made by the trial court and the Court of Appeals terminating Appellant's parental rights without the assistance of court-appointed counsel. Appellant requests that the case be remanded for a new trial at which the Appellant is provided the assistance of a court-appointed attorney.

Respectfully submitted,

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