IN THE MICHIGAN SUPREME COURT

IN THE MATTER OF SKYLER LEROY MCBRIDE,
ALEXANDER GARAND MCBRIDE and
SAWYER DALE MCBRIDE, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

V

RONALD D. MCBRIDE, JR.,

Respondent-Appellant,

and

SUSAN MCBRIDE,

Respondent.

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

Supreme Court No.: 136988

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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For the third time this year, this Court is confronted with a juvenile court that violated the basic procedural rights of a parent whose legal relationship with his child was permanently severed. See *In re Rood*, __ Mich __; __ NW2d __; 2009 Mich LEXIS 802 (2009) (reversing TPR because trial court violated statutory rights of father); *In re Hudson Morgan*, __ Mich __; __ NW2d __ (2009) (reversing TPR after finding that trial court failed to advise mother of her right to counsel and failed to timely appoint counsel). The Petitioner correctly concedes that errors occurred in this case, Pet. Supp. Br. at 2, but asks this Court to excuse the numerous errors and deem that the mistakes were harmless. This conclusion, however, is not supported by the jurisprudence in this state or across the country. The cases cited in the Petitioner's Brief do not support the application of a harmless-error analysis where a trial court has completely denied a parent the right to counsel in a termination of parental rights ("TPR") case. Additionally, contrary to the Petitioner's assertions, a trial court's failure to consider alternatives to TPR, such as the placement of children with family members, can constitute the type of prejudice that warrants reversal under any standard. These arguments will be discussed below.

I. HARMLESS-ERROR ANALYSIS IS INAPPROPRIATE WHEN ADDRESSING THE COMPLETE DENIAL OF COUNSEL.

As the Petitioner admits, the trial court erroneously deprived Appellant of his right to counsel for the entirety of the proceeding in violation of MCL 712A.17c, MCR 3.915(B) and MCR 2.004. As such, Appellant was denied the opportunity to participate in the case, as contemplated by MCR 2.004, and reversal is required by the plain language of the rule. MCR 2.004(F) ("A court may not grant relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceeding, as described in this rule."). The Petitioner never addresses this argument in its brief.

Instead, the Petitioner argues that a harmless error analysis is applicable to address the complete deprivation of counsel in TPR cases and selectively cites language from opinions issued by the United States Supreme Court, decisions by out-of-state courts and rulings by the Michigan Court of Appeals to support its argument. A close analysis, however, reveals that these decisions fail to support the Petitioner's argument.

The right to counsel jurisprudence in the United States Supreme Court is clear. The complete deprivation of an individual's right to counsel is a structural defect which requires reversal. See, e.g., *Holloway v Arkansas*, 435 US 475; 98 S Ct 1173; 55 L Ed 2d 426 (1978); *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963); *White v Maryland*, 373 US 59; 83 S Ct 1050; 10 L Ed 2d 193 (1963). The Court has never waivered from the principle that a pervasive denial of counsel casts "so much doubt on the fairness of the trial process that, as a matter of law, [it] can never be considered harmless." *Satterwhite v Texas*, 486 US 249, 256; 108 S Ct 1792; 100 L Ed 2d 284 (1988). 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." *Arizona v Fulminante*, 499 US 279, 310; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

The Court's numerous decisions finding that the complete deprivation of counsel is a structural defect that mandates automatic reversal is rooted not only in the nature of the right at stake but also in the inability of appellate courts to conduct a harmless error analysis after an individual has been completely denied the assistance of an attorney. Typically, errors are analyzed under a harmless error lens because the "scope [of the error] is readily identifiable." *Satterwhite, supra* at 256 (citations omitted). The appellate court "can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially

affected" the case. *Id.* But where, as here, an individual has been totally denied the assistance of an attorney, this type of review is impossible as the erroneous deprivation contaminates the entire record being reviewed by the appellate court. The reviewing court has no mechanism to ensure that all relevant information was presented to the trial court and as a result has no ability to quantify the magnitude of the error due to the high likelihood that the record below was incomplete. As aptly observed by Justice Scalia for the Court in *United States v Cuauhtemoc Gonzalez-Lopez*, 548 US 140; 126 S Ct 2557; 165 L Ed 2d 409 (2006), where a litigant's right to counsel has been completely violated, harmless-error analysis "would be a speculative inquiry into what might have occurred in an alternate universe." *Supra* at 150.

The United States Supreme Court cases cited by the Petitioner which applied a harmless-error analysis are consistent with these holdings as none of the cases involved the complete or pervasive denial of counsel. In *Coleman v Alabama*, 399 US 1; 90 S Ct 1999; 26 L Ed 2d 387 (1970), the trial court erred by failing to appoint a lawyer to represent a criminal defendant at the preliminary hearing. *United States v Morrison*, 449 US 361; 101 S Ct 665; 66 L Ed 2d 564 (1981), involved improper communications between Drug Enforcement Agency officials and a represented party. In *Satterwhite v Texas*, *supra*, the defendant was denied the right to receive advice from his lawyer prior to a psychiatric evaluation. In each of these cases, the Court conducted a harmless-error analysis precisely because the scope of the error could be assessed since the litigants were represented throughout their cases and the record was fully developed. Again, in none of these cases was a litigant totally denied the assistance of counsel. As the Court itself noted in *Satterwhite*, *supra*, in such cases where the "deprivation of the right to counsel affected – and contaminated – the entire" proceeding, automatic reversal is required. *Supra* at 257.

The out-of-state cases cited by the Petitioner are also consistent with the United States Supreme Court case law. In the overwhelming majority of cases cited by the Petitioner, the parent *was represented* by counsel at the TPR hearing but was erroneously denied the assistance of an attorney at an earlier hearing in the case.[1] See *Meza-Cabrera v Arkansas Dep't of Human Services*, __ Ark App __; 2008 WL 376290 (Ct App Ark 2008); *Arthur v Div of Family Services*, 867 A2d 901 (Del 2005); *Hughes v Div of Family Services*, 836 A2d 498 (Del 2003); *Briscoe v Arkansas*, 323 Ark 4; 912 SW2d 425 (1996); *In the Interest of JB*, 624 So 2d 792 (Ct App Fla 1993). Since the parents were represented by counsel at the final TPR hearing in each of these cases, the reviewing courts were in a position to assess the harm incurred by the previous deprivation of counsel. Here, where Appellant was without the assistance of counsel throughout the entire case, this inquiry is impossible and would require pure speculation as to "what might have occurred in an alternate universe." *Cuauhtemoc Gonzalez-Lopez*, *supra* at 150.

The Petitioner does cite three cases in which the TPR decision was reversed because the parent was deprived of the assistance of a lawyer in the entire case including the final termination hearing.[2] *Hunt v Weiss*, 169 Ore App 317; 8 P3d 990 (Ct App Ore 2000); *Walker v*

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[1] The other cases cited by the Petitioner are inapposite. *KDGLBP v Hinds County of Dep't of Human Services*, 771 So 2d 907 (Miss 2000), did not address the appropriate standard of review to evaluate a trial court's erroneous deprivation of counsel to a parent in a TPR case. The court, in that case, determined that the mother's constitutional right to counsel was not violated as she was represented throughout the child protective case and explicitly signified to the court that she intended to represent herself at the final hearing. *KGLBP*, *supra* at 911. *In the Interest of PDW*, __ Ga App __; __ SE2d __, 2009 WL 386411 (Ct App Ga 2009) was implicitly overruled by the Georgia Court of Appeals in *In re JMB*, __ Ga App __; __ SE2d __; 2009 Ga App LEXIS 339 at *10-11 (Ct App Ga, 2009) ("We therefore overrule [prior decisions] to the extent that they require a showing of harmful error after an indigent parent's request for appointed counsel during a termination hearing had been erroneously denied."). Finally, the right to counsel discussion in *In the Matter of PDL*, 324 Mont 327; 102 P3d 1225 (2004) is purely dicta as the court had already determined that the father had no standing to present his claims since he filed his appeal over two years after the filing deadline. *Supra* at 331. ("[W]e conclude the District Court properly denied the . . . motion because it was untimely."); *Robert v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985) ("[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication.").

[2] The Petitioner also cites the case of *Clark v Arkansas*, 90 Ark App 446; 206 SW3d 899 (Ct App Ark 2005), in which the Arkansas Court of Appeals reversed an adjudication of neglect, because the parent was deprived of counsel at the adjudication trial. Although the court characterizes its inquiry as a harmless-error analysis, it did not look at the specific facts of the case before it and instead looked at factors that would be present in every case in

Walker, 892 A2d 1053 (Del 2006); *In the Matter of JDF*, 2009 ND 21; 761 NW2d 582 (ND 2009). In each decision, the appellate court, in finding that reversal was warranted, did not conduct a rigorous analysis of the specific facts, but instead looked at general factors that would be applicable in every TPR case in which a parent was deprived of the assistance of an attorney. For example, in *Hunt v Weiss*, *supra*, the Oregon Court of Appeals noted that because the parent had been erroneously deprived of a lawyer, the court was "unable to determine the outcome of such a hearing, if it had been conducted with assistance of defense counsel to cross examine" witnesses and offer "other relevant evidence." *Supra* at 323. In *Walker v Walker*, *supra*, the Delaware Supreme Court summarily concluded that reversal was required because the father "was unable to effectively present his position or examine the witnesses against him" without a lawyer. *Supra* at 1056. And in *In re JDF*, *supra*, the Supreme Court of North Dakota openly conceded that it was "skeptical that the denial of counsel to an indigent parent . . . can ever be 'harmless' under any standard" because the laws in this area are "complex and demanding" and because parents in TPR proceedings must "execute basic advocacy functions to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross examine witnesses, make objections, and preserve a record for appeal." *Supra* at 22. Without counsel, parents "will be unlikely to mount an effective defense." *Id.* Although the courts in these cases may have used the phrase "harmless error" to describe their analysis, their findings did not hinge on the facts of the specific cases and strongly suggest that the deprivation of counsel at the final TPR hearing can never be harmless.

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which a parent has been erroneously deprived of counsel. The court writes, "Having counsel could have made a difference. Counsel could have cross-examined witnesses. The dependency-neglect adjudication is the first step to termination of parental rights. . . The consequence of the adjudication is that appellant is now a registered child abuser. These factors plainly demonstrate the gravity of the issues presented during the dependency-neglect proceeding and the harm posed by denying appellant's request for appointed counsel." *Clark*, *supra* at 460-461.

The Michigan appellate decisions cited in the Petitioner's brief also accord with this reasoning. The only cases in which the Court of Appeals has applied a harmless-error standard involve situations in which a parent was deprived of legal representation at an earlier review hearing, and not for the entire case including the final TPR hearing. For example, in *In re Hall*, 188 Mich App 217; 469 NW2d 56 (1991), *In re Perri*, unpublished decision per curiam of the Court of Appeals, entered May 8, 2008 (Docket No. 280156), and *In re Gentry*, unpublished decision per curiam of the Court of Appeals, entered February 26, 2009 (Docket No. 287137), the parents were represented throughout the proceedings except for isolated review hearings. In *In re Peterson*, unpublished decision per curiam of the Court of Appeals, entered December 4, 2003 (Docket No. 247424) and *In re Shabazz*, unpublished decision per curiam of the Court of Appeals, entered February 10, 2009 (Docket No. 286130), the incarcerated fathers were appointed lawyers prior to the TPR hearings but not at the outset of the case. Finally, in *In re Coleman*, unpublished decision per curiam of the Court of Appeals, entered February 24, 2009 (Docket No. 287191) counsel was appointed for the father at the second dispositional review hearing and continued to represent him at all subsequent hearings. Harmless-error analysis was appropriate in these cases precisely because there was no pervasive denial of the assistance of counsel and the parents were represented at the TPR hearing. See *Gentry*, *supra* at 3 ("A hearing held without counsel can be harmless error where testimony was taken later at the permanent custody hearing and counsel was present.").

In only two of the Michigan cases cited by the Petitioner -- *In re Lyttle*, unpublished decision per curiam of the Court of Appeals, entered October 6, 2000 (Docket No. 222488) and *In re Clemons*, unpublished decision per curiam of the Court of Appeals, entered August 19, 2008 (Docket No. 281004) -- did the trial court deny the parent the assistance of counsel at the

TPR hearing. Both cases resulted in reversals by the Court of Appeals and although both decisions used the phrase "harmless error" to describe their analysis, in neither was a fact-intensive inquiry conducted to determine the specific harm caused by the trial court's error. Their reasoning instead focused largely on the fact that the deprivation occurred at a critical stage of the proceeding. See *Lyttle*, *supra* at 3 ("[E]rror cannot be deemed harmless . . . because Lyttle was deprived of counsel during the actual termination trial (as opposed to the review hearing.)"); *Clemons*, *supra* at 4 ("[I]t is fundamentally unfair to deprive a parent of their liberty interest in the care and custody of their children 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."). The case law from Michigan and other jurisdictions is consistent with the United States Supreme Court's numerous holdings requiring automatic reversal in situations where an erroneous, pervasive denial of counsel has occurred.

II. THE TRIAL COURT'S FAILURE TO CONSIDER PLACEMENTS OF CHILDREN WITH FAMILY MEMBERS, AS REQUIRED BY STATE AND FEDERAL LAWS, CONSTITUTES THE TYPE OF PREJUDICE THAT WARRANTS REVERSAL UNDER ANY STANDARD.

Regardless of this Court's resolution of the appropriate legal standard to review a trial court's failure to appoint counsel for a parent prior to the termination of his parental rights, reversal is required because the court failed to consider alternatives to termination including the placement of the children with paternal relatives. The Petitioner incorrectly asserts that the existence of alternative placement plans or guardianship options "have no bearing whatsoever upon the termination of a parent's parental rights." Pet. Supp. Br. at 27. This reflects a misunderstanding of Michigan and federal law which provide trial courts with a range of options, other than the termination of parental rights, to provide permanency to children. In this case, the

trial court failed to consider any of these options, which the court would have been forced to address had the Appellant been represented from the outset of the case.

Had the prosecuting attorney and trial court complied with MCR 2.004, the Appellant could have participated at the preliminary hearing via telephone and could have requested the assistance of an attorney, which he eventually did at his first court appearance. MCR 2.004; MCR 3.915(B)(1): MCL 712A.17c(5). The appointment of an attorney could have drastically altered the course of the case. At the preliminary hearing, the attorney could have requested parenting time between the children and the Appellant pursuant to MCL 712A.13a(11), which requires parenting time to occur unless evidence exists that "parenting time, even if supervised, may be harmful" to the children. See also MCR 3.965(C)(6). The statute and court rule contain no exceptions prohibiting parenting time for incarcerated parents. Prior to the case, the children were visiting their father in prison (TR2 at 32; TR8 at 222), but the trial court refused to permit any visitation to continue, simply presuming harm without making an individualized determination. (TR2 at 32).

In addition to helping to maintain the relationship between the children and their father, the attorney could have facilitated the placement of the children with paternal relatives. If children are placed in foster care, the court must place the children "in the most family-like setting available consistent with the child's needs." MCR 3.965(C)(2). Within 30 days, the DHS must "identify, locate, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's . . . needs as an alternative to foster care." MCL 722.954a(2). Not more than 90 days after the child's removal, the DHS must make a placement decision and document in writing the reason for its decision. *Id.* Written notice of the decision and the reasons for the placement decision must be provided to all the parties, their attorneys and

each relative interested in caring for the child. *Id.* If a person disagrees with the recommendation, he or she can request the child's attorney to review the decision to determine if the decision is in the child's best interests. MCL 722.954a(3). If the child's attorney determines the decision is not in the child's best interest, the attorney must petition the court and a hearing must be commenced within 7 days. *Id.* Additionally, the court has the authority to review any placement order . . . and "may modify the orders and plan if it is in the best interest of the child." MCR 3.966(A)(1).

In this case, an attorney for the Appellant could have enforced these provisions, none of which were followed by the trial court. Mr. McBride's sister appeared at the second court hearing and requested placement of the children with her. (TR2 at 25-27, 30, 32). Despite identifying her as a "suitable" caregiver, the trial court summarily denied the request. (TR2 at 30). The DHS never completed a home study of her residence, never provided a written decision articulating why placement was denied and never fully considered her as a placement option. Instead, the children were immediately placed in non-relative foster care where they remained until their parents' rights were terminated. The immediate placement of the children into foster care without fully considering relative placements also violated federal law. See 42 USC 671(a)(19) ("[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.").

Appellant's attorney could have facilitated the placement of the children with family members and could have presented the court with alternative permanency options to the termination of parental rights. See *In re Taurus F*, 415 Mich 512, 536: 330 NW2d 33 (1982) (observing that where a child has been placed in the proper care of a relative, the court cannot

obtain jurisdiction over the child); *In re Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) (noting that "[s]ome parents, however, because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for.") (rev'd on other grounds in *Bowie v Arder*, 441 Mich 23, 47; 490 NW2d 568 (1992). He could have assisted the relative caregiver in filing for a guardianship which would have preserved the legal relationship between the children, their father and their entire paternal side of the family. The Juvenile Code explicitly authorizes trial courts to appoint guardians as part of its dispositional orders and dismiss the child protective petition once the appointment occurs. MCL 712A.18(1)(h). This option was never considered in this case.

At the permanency planning hearing, the attorney could have argued that rather than terminate their father's parental rights, the best option for the children was to be placed with a fit and willing relative or in an "alternative planned permanent living arrangement." MCR 3.976(E). Given the age of the children and the willingness of paternal relatives to care for the children, these options should have been considered by the trial court, but never were. Finally, at the TPR hearing, the attorney could have argued that the termination of parental rights was clearly not in the children's best interest due to the willingness of paternal family members to care for the children while maintaining the parent-child bond. Again, not one of these options was considered by the trial court which only considered one course of action in relation to the Appellant – termination of his parental rights. An attorney could have fully presented these issues before the trial court which could have significantly altered the outcome of the proceedings. Under any standard, the errors cannot be deemed harmless.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons and those set forth in the previous pleadings, Appellant Ronald McBride, Jr. asks that this Honorable Court grant leave to appeal or issue a peremptory reversal of 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.

Respectfully submitted,

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