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,

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

V

RONALD D. MCBRIDE, JR.,

Respondent-Appellant,

Supreme Court No.: 136988

and

SUSAN MCBRIDE,

Respondent.

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

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QUESTIONS PRESENTED

1. Did the trial court violate Appellant's rights when it failed to provide him with the opportunity to participate in the child protective proceeding as provided for in MCR 2.004 and deprived him of a court-appointed attorney during the entire case including the final termination of parental rights hearing?

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

2. Did the trial court, in denying Appellant his right to participate in the child protective proceeding under MCR 2.004 and denying Appellant his right to counsel, violate his due process rights?

   Trial Court Says: Not answered
   Court of Appeals: Yes
   Respondent-Appellant Says: Yes

3. Did the Court of Appeals err in applying a harmless error standard after determining that the trial court erroneously denied Appellant his statutory and constitutional right to counsel?

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

4. If the harmless-error standard is the correct legal standard to evaluate the trial court's errors, did the trial court's failure to enforce federal and state laws requiring the Department of Human Services to explore relative placements and failure to consider a guardianship or alternative placement plan with Appellant's extended family demonstrate that the errors were not harmless beyond a reasonable doubt?

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

STATEMENT OF PROCEEDINGS AND FACTS

The trial court permanently severed the legal relationship between Skyler, Alexander and Sawyer McBride and their father, Appellant Ronald McBride, after failing to provide him with the opportunity to participate in the child protective proceeding as set forth in MCR 2.004 and depriving him of a court-appointed attorney during the entire case including the final termination of parental rights ("TPR") hearing.

On September 14, 2006, the Department of Human Services ("DHS") filed a petition seeking jurisdiction of Skyler, Alexander and Sawyer.[1] The children were ages 13, 11 and 8 respectively at the time the petition was filed. The petition alleged that Mr. McBride was incarcerated.

A referee conducted a preliminary hearing on the day the petition was filed. Although the children's mother, Susan McBride, 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 Mr. McBride had not been provided with notice of the proceeding. (TR1 at 4). Neither the referee nor the prosecutor articulated a specific plan to include Mr. McBride 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 Mr. McBride's address at the Carson City Correctional Facility.

[1] For ease of reference throughout this brief, the transcripts for the 2006 and 2007 hearings will 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).

On September 18, 2006, Mr. McBride 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 2.004 required a telephonic hearing to allow Mr. McBride to participate.

On September 29, 2006, the trial court conducted an adjudication hearing. No arrangements were made for Mr. McBride to participate by telephone and he 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). Mr. McBride's sister, Kelly McBride, appeared at the hearing and expressed interest in caring for the children. Despite appearing to be "suitable," her request was dismissed because she lived "quite a distance away" and the children were instead placed in non-relative foster care. (TR2 at 30). The trial court stated that Kelly McBride would be considered if reunification with the mother was unlikely. (TR2 at 25-27). Kelly McBride informed the court that the children had been regularly visiting their father in prison when transportation was available and requested that such visits continue. (TR2 at 32). The court denied the request and also denied the paternal grandparents the right to visit the children. (TR2 at 32). No home study was ever completed to assess the suitability of the paternal relatives as potential placements for the children.

On November 6, 2006, a dispositional hearing was conducted. No arrangements were made for Mr. McBride to participate by telephone and once again he did not have counsel. The trial court observed that a proof of service reflected service of notice of the hearing on Mr. McBride 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." (TR3 at 18). The court did not refer to MCR 2.004 during the hearing.

No arrangements were made for Mr. McBride to telephonically attend the dispositional review hearings conducted on February 7, 2007, March 26, 2007, and May 7, 2007, or the permanency planning hearing on July 30, 2007. Mr. McBride was not represented by counsel at any of these proceedings.

On August 27, 2007, the prosecutor filed a petition seeking termination of Mr. McBride's parental rights and arranged for personal service of a copy of the petition and notice of the hearing on Mr. McBride.

On September 11, 2007, the prosecutor, for the first time in the case, filed a "Motion For Order To Allow Incarcerated Party To Participate In A Telephonic Proceeding" acknowledging that MCR 2.004 required that Mr. McBride be allowed to participate in the proceeding via telephone. The trial court granted the motion two days later and sent a copy of its order to the Warden of the Carson City Correctional Facility.

Mr. McBride appeared telephonically at the October 10, 2007 TPR hearing and immediately requested that the court appoint him an attorney. (TR8 at 5). The trial court denied the request and stated that "the only reason we've got you here by telephone today is because the prosecutor's secretary thought you should be present and set it up." (TR8 at 5). The court advised Mr. McBride that he could listen to the proceedings and question the witnesses, although the court added that it "may have to cut [him] off at some point" for the testimony of another witness appearing telephonically. (TR8 at 6). Mr. McBride did not deliver an opening statement or closing argument or call or question any witnesses. During the few times he spoke, he expressed confusion about the process and his need to be assisted by a lawyer. For example,

when asked by the trial court if he had anything to add, he only stated that, "[u]m, just that um I didn't know my rights of uh knowing if I was allowed counsel. Um, that's about it." (TR8 at 222). At another point, he stated that he had previously thought that only his children were allowed counsel and "didn't recall seeing anything about myself and my rights." (TR8 at 223). Although Mr. McBride's sister and mother were present at the hearing, neither was called to testify. (TR8 at 74).

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. Mr. McBride 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." (TR8 at 248). The trial court subsequently terminated Mr. McBride's parental rights and a timely appeal was filed. Mr. McBride was determined to be indigent by the trial court and was appointed an attorney for his appeal.

The Michigan Court of Appeals found that Mr. McBride had a statutory and constitutional right to counsel, which the trial court violated. *In re McBride,* unpublished decision per curiam of the Court of Appeals, entered July 15, 2008 (Docket No. 282062) at 3. The Court then determined that the trial court's errors were harmless and affirmed the lower court's decision to terminate Mr. McBride'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 TPR 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 a violation of an indigent parent's 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," *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.

On July 30, 2008, Mr. McBride filed an application for leave to appeal to this Court, which was amended on August 11, 2008. A supplement to the application was filed on September 10, 2008. On February 20, 2009, this Court granted oral argument on the application and ordered supplemental briefing.

ARGUMENT

STANDARD OF REVIEW

In this case, the trial court terminated the legal relationship between Skyler, Alexander and Sawyer McBride and their father without providing Mr. McBride with the opportunity to participate in the child protective proceeding as set forth in MCR 2.004 and the right to receive a court-appointed attorney as required under MCL 712A.17c(5) and MCR 3.915(B)(1). The Court of Appeals, while finding that Mr. McBride's statutory and constitutional rights were violated, affirmed the trial court's ruling, deeming the error to be harmless. Since all the questions before this Court involve questions of law, *de novo* review is appropriate. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

I. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHTS BY FAILING TO PROVIDE HIM WITH THE OPPORTUNITY TO PARTICIPATE IN THE CHILD PROTECTIVE PROCEEDING AS SET FORTH IN MCR 2.004 AND DEPRIVING HIM OF A COURT-APPOINTED ATTORNEY DURING THE ENTIRE CASE INCLUDING THE FINAL TERMINATION OF PARENTAL RIGHTS HEARING

Both this Court and the United States Supreme Court 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 NW2d 353 (1985); *MLB v SLJ*, 519 US 102, 118; 117 S Ct 555; 136 L Ed 3d 473 (1996). 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. 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 P3d 759, 763 (Nev, 2006); *In re KAW*, 133 SW3d 1, 12 (Mo, 2004).

Because of the fundamental rights at stake in such proceedings and the potential for the absolute dissolution of the parent-child relationship, enhanced due process protections are provided to parents facing such actions, pursuant to statutes, court rules and constitutional requirements. One protection that the legislature and the courts have deemed essential to ensuring the integrity of a TPR hearing is a parent's right to counsel. MCL 712A.17c requires a trial court to advise a parent of his right to a court-appointed attorney at his first court appearance and directs the court to appoint an attorney to represent the parent "[i]f it appears to the court . . . that the respondent wants an attorney and is financially unable to retain an attorney." Similarly, MCR 3.915 requires a trial court to appoint counsel for a parent at his first court appearance or any later hearing if "the respondent requests appointment of an attorney," and the court determines that the respondent is "financially unable to retain an attorney." Neither the Legislature nor the Michigan Supreme Court has created any exceptions to deny indigent parents the assistance of court-appointed counsel when counsel is requested.

Additional safeguards exist to protect the parental rights of incarcerated parents whose ability to participate in the court process and assist in the planning for their children is constrained. MCR 2.004 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 in the court hearing 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), MCR 3.915 and MCR 2.004 ensure that incarcerated parents are provided the opportunity to participate in every hearing concerning their children via telephone, are verbally advised by the trial court of their right to obtain a court-appointed attorney and have the right to be represented by that court-appointed attorney at each stage of the proceeding. These provisions clearly envision a process in which an early determination must be made by the trial court as to whether an incarcerated parent is entitled to court-appointed counsel.

Here, the trial court violated Mr. McBride's rights under both the statute and court rule. *McBride*, *supra* at 3. At the outset of the case, the trial court and the parties all knew that Mr. McBride was incarcerated at the Carson City Correctional Facility (TR1 at 4), where he remained during the entire case. Yet despite this knowledge, both the prosecutor and the trial court simply ignored MCR 2.004 at each of the seven hearings between the filing of the initial petition and the final TPR hearing. No motion or petition was ever filed with the court stating that a telephonic hearing was required and no order was ever issued permitting Mr. McBride to appear in the proceedings via telephone. Not surprisingly, Mr. McBride did not appear at any of these hearings. The trial court's complete failure to comply with MCR 2.004 prior to the filing of the TPR petition denied Mr. McBride the ability to participate in the court process which

included the right to be verbally advised of the ability to request court-appointed counsel and to make such a request on the record.

The prosecuting attorney and the trial court only attempted to comply with MCR 2.004 after the TPR petition was filed, over a year into the proceeding. On September 11, 2007, the prosecuting attorney filed a motion for an order permitting Mr. McBride to participate in a telephonic proceeding -- which should have been done at the outset of the case and prior to each hearing -- and the trial court granted the motion two days later. A copy of the order was promptly mailed to the Warden of the Carson City Correctional Facility, as the court rule requires, and a telephonic hearing was arranged.

Mr. McBride's first appearance in court, via telephone, occurred on October 10, 2007, the first day of the TPR hearing. At this first court appearance, Mr. McBride immediately requested the assistance of court-appointed counsel but the trial court summarily denied his request, stating that the request was untimely and therefore waived. (TR8 at 5). The court further explained that "the only reason we've got you here by telephone today is because the prosecutor's secretary thought you should be present and set it up." (TR8 at 5). The court then proceeded to hear evidence on the TPR petition with Mr. McBride on the telephone; he did not question any of the witnesses. Ultimately, in a written decision, the trial court terminated Mr. McBride's parental rights. At no point in the case did he receive the assistance of court-appointed counsel.

The trial court's actions plainly violated both the statute and the court rules. He was denied the ability to access the courts and to have a meaningful opportunity to be heard. His first opportunity to appear in the case occurred over a year after the initial petition had been filed and after seven hearings had already been held. At that point, much of the planning for his children had taken place. The effects of these errors were only exacerbated by the trial court's refusal to

appoint Mr. McBride an attorney at his first court appearance, as the explicit language of MCL 712A.17c and MCR 3.915 require. The trial court's finding that Mr. McBride somehow waived his right to an attorney contravenes the statute and court rules. As correctly 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. Rather, as contemplated by Michigan law, Mr. McBride requested a court-appointed attorney at the first opportunity he was given -- the first time the trial court provided him with the ability to participate via telephone -- and the trial court erred in its arbitrary decision to deny him counsel.

II. THE TRIAL COURT, IN DENYING APPELLANT HIS RIGHT TO PARTICIPATE IN THE CHILD PROTECTIVE PROCEEDING AS SET FORTH IN MCR 2.004 AND DENYING HIM THE RIGHT TO COUNSEL, VIOLATED HIS DUE PROCESS RIGHTS.

The trial court's arbitrary decision to deny Mr. McBride the procedural protections afforded to incarcerated parents under the Juvenile Code and the court rules – as established in Section I – also violated Mr. McBride's federal due process rights. First, it deprived him of a fundamental right without providing him access to the procedural protections the state has deemed is essential when adjudicating these cases. *Boddie v Connecticut*, 401 US 371; 91 S Ct 780; 28 L Ed 2d 113 (1971). Second, it failed to afford him a right – the assistance of court-appointed counsel – that was independently guaranteed by constitutional mandates. *Lassiter v Dep't of Social Services*, 452 US 18; 101 S Ct 2153; 68 LE2d 640 (1981). Each of these arguments is discussed below.

A. **The Arbitrary Denial Of A State-Based Procedural Protection Violates Due Process**.

Prior to depriving an individual of a protected liberty interest, due process requires the state to use "fundamentally fair" procedures, which includes providing each litigant a meaningful opportunity to be heard. *Boddie*, *supra* at 377-378. One strand of due process jurisprudence prevents a state from arbitrarily denying individuals of a state-based right, particularly if that denial limits the individual's ability to participate in the court process. *MLB v SLJ*, *supra*; *Boddie*, *supra*; *Perry v Sinderman*, 408 US 593, 601; 92 S Ct 2694; 33 L Ed 2d 570 (1972); *Board of Regents v Roth*, 408 US 564, 576-578; 92 S Ct 2701; 33 L Ed 2d 548 (1972); *Tomiak v Hamtramck School District*, 426 Mich 678, 700; 397 NW2d 770 (1986); *Bundo v City of Walled Lake*, 395 Mich 679, 688-693; 238 NW2d 154 (1976). Though the Constitution may not require a state to afford a particular entitlement or right to an individual, once it determines that the entitlement should be provided, it cannot then arbitrarily deny the benefit. See, e.g., *Bell v Burson*, 402 US 535, 539; 91 S Ct 1586; 29 L Ed 2d 90 (1971) ("This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement."). In *Williams v Hofley*, 430 Mich 603; 424 NW2d 278 (1988); this Court aptly summarized this principle. "[T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed [rights].'" *Id.* at 612.

The United States Supreme Court has applied this reasoning in a number of contexts. For example, in *Boddie v Connecticut*, *supra*, the Court found that the State's arbitrary refusal to permit poor litigants access to the courts to initiate divorce proceedings violated their due process rights. *Id.* at 374. In reaching this holding, the Court made clear that it was not

requiring the State to establish any particular procedure to resolve these cases. *Id.* at 383. The Due Process Clause only prohibited the State from preempting "the right to dissolve this legal relationship without affording all citizens access to the means *it has prescribed for doing so*." *Id.* (emphasis added). Similarly, in *Bell v Burson*, *supra*, the Court prevented the State from terminating an individual's driver license without a prior hearing to consider the motor's liability, since state law gave individuals a property right to the benefit. *Id.* at 536. The Court found that "[s]ince the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." *Id.* at 541. Finally, in *MLB v SLJ*, *supra,* the Court confronted the question of whether a state could make an indigent litigant pay for transcripts in an appeal of a TPR decision. While observing that the State did not have to provide parents with the right to appeal a termination decision, once that right was provided under state law, it could not be arbitrarily denied. *Id.* at 111. The Court concluded, "[W]e place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'" *Id.* at 124. The rule emerging from these cases is clear. The State may not arbitrarily deprive individuals of rights or entitlements afforded to them under state law, especially when it deprives litigants of meaningful access to the courts.

This type of arbitrary deprivation is exactly what occurred in this case. As explained in Section I, in Michigan, the legislature and the courts have determined that the only way to provide incarcerated parents with a meaningful opportunity to be heard in TPR cases is to impose on trial courts the legal burden to 1) arrange for these parents to participate in court hearings via telephone, 2) verbally advise them of the right to counsel during that appearance, and 3) if requested by an indigent parent, provide them with counsel. MCR 2.004; MCL

712A.17c; MCR 3.915. These provisions must be complied with each time the court seeks to issue an order in a child protective case involving an incarcerated parent. MCR 2.004(A)(2). No exceptions exist under the scheme established by the State. Under state law, every incarcerated parent is entitled to these protections.

Yet here, for no apparent reason, Mr. McBride was denied these state-based protections. The court and the prosecuting attorney failed to arrange for telephonic participation for the first seven hearings in the case, as MCR 2.004 explicitly requires. Then, it denied him the right to receive assistance from a court-appointed attorney after he made the request at his first court appearance, which MCL 712A.17c and MCR 3.915 mandate. Consequently, Mr. McBride was not involved in the judicial proceedings for the first year of the case, nor was he represented during the entire proceeding. The State only sought to comply with the court rule after determining that his parental rights should be terminated, thus precluding any opportunity for him to meaningfully participate in the planning for his children. In committing these errors, the State deprived Mr. McBride of the very protections that it has deemed essential prior to permanently terminating the rights of an incarcerated parent. By unjustifiably denying Mr. McBride of these protections, which prevented him from accessing the court system and being heard in the process, the State violated his due process rights.

B. Appellant Possessed An Independent Constitutional Right To Counsel, Which The Trial Court Violated.

In addition to the right to counsel guaranteed by Michigan statutes and court rules, Mr. McBride also possessed an independent constitutional right to the assistance of counsel prior to the termination of his parental rights. In *Lassiter v Department of Social Services*, *supra*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment

may mandate the appointment of counsel in TPR cases depending on the circumstances of the particular case.[2] *Id.* at 31-32. The Court differentiated TPR proceedings from other civil cases due to the "unique kind of deprivation" sought by the State and found that "[a] parent's interest in the accuracy and injustice of the decision to terminate his or her parental status, is therefore a commanding one." *Id.* at 27. The Court concluded, "If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could be not said . . . that due process did not require the appointment of counsel." *Id.* at 31.

The *Lassiter* Court, however, did not articulate specific factors to guide courts making a decision on when due process required the appointment of counsel, observing that it would be imprudent to do so since the facts and circumstances of each case "are susceptible of almost infinite variation." *Id.* at 32. The Court, however, did address the question in the case before it and found that the Constitution did not mandate the appointment of an attorney to represent Abby Lassiter. *Id.* at 33. It found that her case posed "no specially troublesome points of law,

[2] This Court's precedent suggests that the Michigan State Constitution mandates the appointment of counsel in all TPR proceedings. In *In re Sanchez*, the Court noted that "Michigan precedents do not presume that appointed counsel is required only if physical liberty is a stake," 422 Mich 758, 766 n.8; 375 NW2d 353 (1985), and in *Reist v Bay Circuit Judge,* 396 Mich 326*;* 241 NW2d 55 (1976), a plurality of this Court held that the State Constitution did mandate the appointment of attorneys for parents in TPR cases. *Supra* at 346. Subsequent appellate decisions, including the Court of Appeals' Opinion in the current matter, *McBride*, *supra* at 3-4, have adopted this position. See *In re Clemons*, unpublished decision per curiam of the Court of Appeals, entered on August 19, 2008 (Docket No. 281004) at 3; *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2001); *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986); *In re Cobb*, 130 Mich App 598, 600; 344 NW2d 12 (1983). This view is supported by the fact that this Court has interpreted the State Constitution to provide a broader right to counsel in civil cases than the Federal Constitution. See *Artibee v Cheboygan Circuit Judge*, 397 Mich 54; 243 NW2d 248 (1976) (finding that the State Constitution provided the right to counsel in paternity proceedings). In *Artibee*, the Court used three factors to determine that counsel was required under the Michigan Constitution: 1) whether the proceeding is generally prosecuted by public officials at public expense; 2) whether the interests of the individuals affected are substantial; and 3) whether the nature of the proceeding is sufficiently complex so as to require counsel to ensure a fair trial. *Artibee*, *supra* at 56-59; *Haller v Haller*, 168 Mich App 198, 199-200; 423 NW2d 617 (1988) (describing *Artibee* standard). All of these factors are present in TPR proceedings as the highest courts in other states have found. See, e.g., *In re SAJB*, 679 NW2d 645 (Iowa, 2004); *In re KAS*, 499 NW2d 558 (ND, 1993); *In re ASA*, 258 Mont 194; 852 P2d 127 (1993); *VF v State*, 662 P2d 42 (Alas, 1983) (all holding that the right to counsel in TPR cases was guaranteed by their state constitutions). This Court, however, need not reach the issue in this case because other grounds for reversal exist. See, e.g., *Sanchez*, *supra* at 766 ("[O]ur disposition of this case makes it unnecessary to decide whether the Michigan Constitution requires appointment of counsel.").

either procedural or substantive," *id.* at 32, especially since the alternative placement Ms. Lassiter proposed for the children with her mother had been explicitly rejected by the trial court after thorough consideration. *Id.* at 33. The evidence at trial revealed that the maternal grandmother "said she could not handle another child, and that the social worker's investigation had led to a similar conclusion, and that the grandmother had displayed scant interest in the child once he had been removed from her daughter's custody."[3] *Id.* The Court also based its decision on Ms. Lassiter's indifference to the case. *Id.* She had "expressly declined" to attend a hearing and had not bothered to speak to her retained lawyer after being notified of the termination hearing. *Id.* Her failure to make an effort to contest the termination proceeding was found to be without cause by the trial court. *Id.* These factors persuaded the Court that a court-appointed attorney would not have made a "determinative difference" for Ms. Lassiter. *Id.*

Courts applying *Lassiter* have found that the key factor in determining whether counsel is constitutionally required is the potential risk of an erroneous deprivation. See *In re JA*, 119 Hawaii 28; 193 P3d 1228 (Ct App Hawaii, 2008); *State v Min*, 802 SW2d 625, 626-627 (Ct App Tenn, 1990); *SC Dep't of Social Services v Vanderhorst*, 287 SC 554, 559-560; 340 SE2d 149 (1986). In making this determination, courts have focused on a parent's ability to fully present his or her case without the assistance of an attorney. For example, in *In re JA*, *supra*, the Hawaii Court of Appeals found that the father was constitutionally entitled to counsel because he was of low intelligence and did not graduate from high school, "was marginalized and confused during the proceedings," did not receive proper notice during the case, and was rarely addressed directly by the court. *Id.* at 57-59. Similarly, in *State v Min*, *supra*, the Tennessee Court of Appeals found that the poor education of the parents, their inability to understand basic court procedures,

[3] The Court also noted that Ms. Lassiter's defense in the related criminal case was that her mother – whom she was proposing to raise her son -- had committed the crime for which she had been convicted. *Lassiter*, *supra* at 33 n. 8.

and their uncommon difficulty in dealing with life warranted the appointment of counsel. *Id.* at 627. The court observed that "[w]hile the difficulty and complexity of the issues and procedures may not have been significant to the ordinary lay person, the education, intelligence and personal experiences of the Hs are so minimal that they could barely understand what was going on." *Id.* Finally, in *Watson v Div of Family Services*, 813 A2d 1101 (Del, 2002), the Delaware Supreme Court determined that the mother's substance abuse problems and mental health issues prevented her from adequately representing herself. *Id.* at 1111. The court concluded, "The Mother was in no condition to effectively and intelligently defend herself against the knowledge and experience of the State", *id.*, and thus was constitutionally entitled to a court-appointed attorney. *Id.* at 1112. In addition to analyzing the risk of an erroneous deprivation, courts have also looked at the interests of parents and the State in the proceeding to determine whether counsel is constitutionally required. See, e.g., *In re Shelby R*, 148 NH 237, 240-241 (2002).

Based on the analysis in *Lassiter* and subsequent decisions applying its holding, Mr. McBride was entitled to an attorney pursuant to the Due Process Clause. Michigan case law has established that parents have a strong interest in maintaining their parental rights, *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003), and that TPR proceedings are "unique in the kind, the degree, and the severity of the deprivation they inflict." *In re Sanchez*, *supra* at 766. Parents need not be model parents to preserve their constitutional rights and due process would be offended if a termination decision was premised solely on a finding that it was in the best interests of the child to do so. *In re JK*, *supra* at 210.

The State shares the parent's interest in preventing the erroneous termination of parental rights. See *In re Shelby R*, *supra* at 242 (recognizing that the State had an interest in establishing "a judicial framework to protect the rights of all parties involved in the adjudication of child

abuse or neglect cases."). The Michigan Juvenile Code begins by specifically endorsing the notion that children are best served at home with their parents. MCL 712A.1(3). The statute and court rules protect this interest through rigorous safeguards. Parents have a right to a trial on the allegations made against them before a judge or a jury, MCR 3.912; MCR 3.913, and possess discovery rights to compel the petitioner to disclose information about the case. MCR 3.922. Unlike a number of jurisdictions across the country, including North Carolina at the time of *Lassiter*, Michigan guarantees each indigent parent the right to counsel at the outset of the child protective case, MCL 712A.17c; MCR 3.915(B), and provides incarcerated parents additional protections to ensure that they are able to access the courts and request counsel in a timely manner. MCR 2.004. These provisions, among others, evince the State's strong interest in protecting parental rights from being wrongfully terminated. The statutory scheme and case law reflect a shared interest of both parents and the State to afford procedural protections to parents prior to the termination of parental rights.

In addition to the strong shared interests of parents and the State in safeguarding the procedural rights of parents, counsel was constitutionally required in this case because of the risk of an erroneous deprivation. Mr. McBride had no ability to defend himself or present his case at the termination of parental rights proceeding. For the first year of the case, Mr. McBride was not given the opportunity to participate in the court process as MCR 2.004 plainly required. Seven hearings took place in which decisions were made regarding his children's well-being. Yet at no point did the trial court or the prosecuting attorney seek to allow Mr. McBride to participate via telephone. He was completely absent from these hearings and had no advocate to present his views. The court only complied with the court rule for the final TPR hearing and arranged for him to appear via telephone for that hearing.

Mr. McBride did not actively participate at the hearing. He did not make an opening statement, call or question any witnesses or deliver a closing argument. During the few times he spoke, he expressed confusion about the process. For example, when asked by the trial court if he had anything to add, he only stated that, "[u]m, just that um I didn't know my rights of uh knowing if I was allowed counsel. Um, that's about it." (TR8 at 222). At another point, he stated that he had previously thought that only his children were allowed counsel and "didn't recall seeing anything about myself and my rights." (TR8 at 223). Although he was finally permitted to attend the hearing via telephone, his actions clearly demonstrate that he did not fully understand how to effectively present his position or advocate for himself.

Because Mr. McBride did not have the necessary background or experience and because he lacked counsel, there was no one available to present arguments to the trial court regarding alternatives to the termination of his parental rights, such as a guardianship or an alternative placement plan with paternal family members.[4] See MCL 712A.18(1)(h); MCL 700.1101 *et seq.* Typically, these options are considered for older children who live with relatives. Yet here, no effort was made to explore whether the children could have been placed with Mr. McBride's extended family as required by both federal and Michigan 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."); MCL 722.954a(2) ("[T]he supervising agency shall, within 30 days, identify, locate, and consult with relatives to determine placement with a fit and

[4] Subsequent to the decision in this case, the Michigan Legislature enacted new guardianship provisions for children in foster care that enhance the juvenile court's ability to order permanent guardianships at or after the permanency planning hearing upon a finding that the termination of parental rights is clearly not in the child's best interests. MCL 712A.19a(7). Additionally, new federal legislation signed into law in September 2008 promotes relative guardianships by requiring state agencies to exercise due diligence to identify and provide notice to all adult relatives within 30 days after the child's removal and allowing agencies to use federal funds to subsidize guardianships. 42 USC 671(a)(29); 42 USC 673(d).

appropriate relative. . . Not more than 90 days after the child's removal from his or her home, the supervising agency shall . . . (a) make the placement decision and document in writing the reasons for the decision and (b) provide written notice of the decisions."). Mr. McBride's sister, Kelly, appeared at the adjudication hearing on September 29, 2006, and requested placement of the children with her. (TR2 at 30). Although described by the court as being "suitable", the placement was summarily denied due to her distance from the mother's home. (TR2 at 30). None of the procedures set forth in MCL 722.954a(2) were followed and instead, the trial court stated that Kelly McBride would be considered if reunification with the mother was unlikely. (TR2 at 25-27). The record, however, contains no evidence to suggest that this consideration ever took place. Instead the three children were placed in non-relative foster care where they remained throughout the case until their legal relationship with their father and paternal relatives was terminated. No home study was ever conducted by the DHS and neither Kelly McBride nor Mr. McBride's mother, both of whom were present at the final hearing, was called to testify. As an incarcerated parent who had been deprived of the ability to participate in the first thirteen months of the case, Mr. McBride was unable to advocate for placement of the children with his family, which could have obviated the need to terminate his parental rights.

An attorney appointed to represent Mr. McBride could have made a "determinative difference" in the case by forcing the DHS to consider these issues and to comply with state and federal requirements prioritizing placements of children with their relatives. Considering the age of the children, the prior relationship the children had with their father who they visited in prison, (TR2 at 32; TR8 at 222), and the willingness of paternal relatives to care for the children, a legal guardianship was a viable, but unexplored, possibility. Unlike the case in *Lassiter* where the alternative placement option was fully considered and rejected by the trial court, *Lassiter*, *supra*

at 33, such consideration of the paternal family never occurred in this case. The inability of Mr. McBride to advocate on his own behalf and to present a defense against the permanent deprivation of his parental rights necessitated the appointment of counsel pursuant to the Due Process Clause.

III. THE COURT OF APPEALS ERRED IN APPLYING A HARMLESS ERROR STANDARD AFTER DETERMINING THAT THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT HIS STATUTORY AND CONSTITUTIONAL RIGHT TO COUNSEL

The Court of Appeals correctly held that the trial court violated Mr. McBride's statutory and constitutional rights by denying him the assistance of a court-appointed attorney. *McBride*, *supra* at 3-5. But, the Court erred in employing a harmless error analysis to affirm the trial court's decision. *Id.* at 5. Instead, the Court of Appeals should have automatically reversed the trial court's TPR decision because the failure to appoint counsel constitutes structural error pursuant to the explicit language in the court rules and the Constitution.

For the reasons articulated above, the trial court violated MCR 2.004, MCL 712A.17c and MCR 3.915 when it failed to appoint an attorney for Mr. McBride 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) (emphasis added). As previously stated, Mr. McBride was not offered the opportunity to participate in the proceedings as described in the rule. MCR 2.004 facilitates the participation of incarcerated parents by allowing them to appear via telephone, mandating trial courts to advise them of their right to counsel, and requiring courts to appoint counsel if requested and allowable. MCR 2.004(E).

Here, Mr. McBride was not given the opportunity to fully participate in the hearing as contemplated by the rule because the trial court refused to appoint him a court-appointed attorney as the rule requires. 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 NW2d 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 complete denial of counsel, in violation of statutory and constitutional mandates, constitutes the type of structural error that 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 NW2d 551 (2000). 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. "[A] pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error." *Penson v Ohio*, 488 US 75, 88; 109 S Ct 346; 102 L Ed 2d 300 (1988). As Justice Scalia wrote 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

violated, harmless-error analysis "would be a speculative inquiry into what might have occurred in an alternate universe." *Supra* at 150.

Although the cases cited above address the deprivation of counsel in criminal cases, the underlying reasoning applies in this context. When a trial court completely denies counsel to a parent in a termination of parental rights case in violation of the statutes, court rules and Constitution, the trial is rendered so unreliable and unfair that harmless error analysis is neither appropriate nor possible. Michigan appellate courts have consistently applied this principle and have automatically reversed TPR decisions every time a trial court has erred in failing to appoint counsel for a parent in a TPR 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* at 4. In *Keifer*, the trial court's failure to advise a father of his right to counsel warranted the reversal of the TPR order. *In re Keifer*, 159 Mich App 288, 293-294; 406 NW2d 217 (1987). 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* at 124. The Court of Appeals did not apply a harmless error analysis in any of these cases. These rulings accord with the decisions reached by the overwhelming majority of courts across the country that have automatically reversed TPR decisions without conducting a harmless-error analysis after finding an erroneous deprivation of counsel. See *In re JMB*, __ Ga App __; __ SE2d __; 2009 Ga App LEXIS 339 at *10 (Ct App Ga, 2009) (holding that "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.") (Attachment A); *In re Torrance P*, 298 Wis 2d 1, 29; 724 NW2d 623 (2006) (finding that the denial of the statutory right to counsel constitutes structural error because

without counsel, "a termination of a parental rights proceeding cannot reliably serve its function."); see also *In re SAJB, supra* at 651; *In re ASA, supra* at 198-199; *In re NM and JM*, 240 Neb 690, 696; 484 NW2d 77 (1992); *Wilkins v Georgia*, 255 Ga 230, 235; 337 SE2d 20 (1985) (all automatically reversing TPR where parent was denied counsel).[5]

In this case, the Court of Appeals improperly relied on *In re Hall*, 188 Mich App 217; 469 NW2d 56 (1991), to support its application of the harmless error standard. *McBride*, *supra* at 3. But the facts of *Hall* are clearly distinguishable as no pervasive denial of counsel took place. Rather, the parent in *Hall* was without the assistance of counsel for one review hearing in the child protective case but was otherwise represented throughout the case including the final termination hearing, at which all of the evidence was reintroduced. *Hall*, *supra* at 222-223. The Court of Appeals, which was in a position to evaluate the specific harm caused by counsel's absence at one hearing, deemed that the parent was not prejudiced precisely because she was represented during all critical stages of the case. *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 children 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

[5] State courts of appeal have also uniformly found that improperly denying a parent of his or her right to counsel in a TPR case constitutes reversible error. *In re EJC*, 731 NW2d 402, 404 (Iowa Ct App, 2007); *In re Phillip E*, 306 Wis 2d 127; 740 NW2d 901 (Ct App Wis, 2007); *In re Sheffey*, 167 Ohio App 3d 141, 147; 2006 Ohio 619; 854 NE2d 508 (Ct App Ohio, 2006); *In re SS*, 90 P3d 571, 577 (Ct Civ App Okla, 2004); *In re AJ*, 269 Ga App 580, 581; 604 SE2d 635 (Ct App Ga, 2004); *Daniel Y v Ariz Dep't of Economic Security*, 206 Ariz 257, 260; 77 P3d 55 (Ct App Ariz, 2003); *In re Alyssa C*, 153 Ohio App 3d 10, 19; 790 NE2d 803 (Ct App Ohio, 2003); *In re Welfare of GE*, 116 Wash App 326, 338; 65 P3d 1219 (Ct App Wash, 2003); *In re NS*, 77 SW3d 655, 657-658 (Mo Ct App, 2002); *In re Valle*, 31 SW3d 566, 572 (Ct App Tenn, 2000); *KPB v DCA*, 685 So 2d 750, 751-752 (Ct Civ App Ala, 1996); *State v Doe*, 123 Idaho 562, 566-567; 850 P2d 211 (Ct App Idaho, 1993); *In re Taylor*, 570 NE2d 1333, 1335-1336 (Ct App Ind, 1991); *Smoke v Ala*, 378 So 2d 1149, 1150 (Ct Civ App Ala, 1979). In none of these cases was a harmless-error analysis conducted.

error test in *Hall* is not instructive and the Court of Appeals erred in applying this test. This Court should find that the complete denial of counsel to a parent in a TPR proceeding warrants automatic reversal.

IV. EVEN IF THE HARMLESS-ERROR ANALYSIS IS APPROPRIATE IN THIS CONTEXT, THE TRIAL COURT'S COMPLETE FAILURE TO CONSIDER A GUARDIANSHIP OR ALTERNATIVE PLACEMENT PLAN WITH APPELLANT'S EXTENDED FAMILY DEMONSTRATED THAT THE ERRORS WERE NOT HARMLESS BEYOND A REASONABLE DOUBT.

Even if this Court determines that the complete denial of counsel does not require automatic reversal, reversal is required because the trial court's errors were not harmless beyond a reasonable doubt, the standard that must be met by the beneficiary of the error when analyzing non-structural constitutional errors. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). During the long year that Mr. McBride was denied his right to counsel, a series of wrongful steps were taken by the court which led directly to its ultimate conclusion that terminating Mr. McBride's parental rights was in his children's best interests. But these wrongful steps – which included the failure to seek kinship care in violation of federal and Michigan laws, see 42 USC 671(a)(19); MCL 722.954a(2), and the failure to ensure that Mr. McBride and his children had regular visitation with each other – virtually guaranteed the outcome ultimately reached by the trial court.

This outcome was anything but certain, had these steps been taken in accordance with the law. One of the most important tasks Mr. McBride's lawyer would have been expected to perform – had Mr. McBride been allowed to be represented by an attorney – would have been to work towards locating suitable kinship foster care and to ensure that familial bonds between Mr. McBride and his children were maintained during the children's placement period in foster care.

Here, without the advocacy of an attorney, no effort was made to explore whether the children could have been placed with Mr. McBride's extended family even though Mr. McBride's sister, Kelly, appeared at the adjudication hearing on September 29, 2006 and requested placement of the children with her. (TR2 at 30). She was described by the court as being "suitable" (TR2 at 30), but the record contains no evidence to suggest that she was ever seriously considered as a placement option either before or after the permanency goal was no longer reunification with the mother. Instead the three children were immediately placed in non-relative foster care where they remained throughout the case until their legal relationship with their father and their entire paternal family was permanently ended. No home study was ever conducted by the DHS and neither Kelly McBride nor Mr. McBride's mother, both of whom were present at the final termination hearing, was called to testify. Additionally, the children, who saw their father in prison prior to the initiation of the court case (TR2 at 32; TR8 at 222) were denied the right to see him despite the lack of an individualized assessment that discontinuing the contact was in their best interests. As an incarcerated parent who had been deprived of the ability to participate in the first thirteen months of the case and of the assistance of court-appointed counsel, Mr. McBride was unable to advocate for placement of the children with his family, which could have obviated the need to terminate his parental rights. See, e.g., *Walker v Walker*, 892 A2d 1053, 1056 (Del, 2006) (finding that deprivation of counsel was not harmless when the trial court failed to consider guardianship with a relative for a child of an incarcerated parent.) *In re KAS*, 499 NW2d 558, 567-568 (ND, 1993) (finding no harmless error because incarcerated parent who was denied counsel "demonstrated his lack of knowledge of the law and his consequent need for assistance from an attorney.").

Where a trial court fails to consider options that could have prevented the termination of a parent's rights and does not enforce federal and state laws that mandate the investigation of relatives as possible placements for children, the denial of counsel for a parent -- who could enforce these legal obligations -- cannot be deemed harmless beyond a reasonable doubt.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, 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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