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

BRIEF OF *AMICI CURIAE* LEGAL SERVICES ASSOCIATION OF MICHIGAN (LSAM), THE MICHIGAN STATE PLANNING BODY (MSPB), AND THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL (NCCRC)

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QUESTIONS PRESENTED

1. Did the trial court violate the respondent's due process rights?

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

2. Did the Court of Appeals err in applying a harmless error standard after determining that the trial court violated Appellant's statutory and constitutional rights?

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

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People v. Beach, 429 Mich. 450; 418 N.W.2d 861 (1988).....8

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Reynolds v. Blackmond, unpublished opinion of the Court of Appeals, issued Jan. 27, 2004 (Docket No. 243303) WL 136667.....13

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Battishill v. Arkansas Dept. of Human Servs., 78 Ark.App. 68; 82 S.W.3d 178 (2002)...19

Black v. Miami Valley Hosp,. unpublished opinion of the Court of Appeals of Ohio, issued Sept. 22, 1995(Docket No. 15167) 1995 WL 558794.....13

Clark v. Ark. Dept. of Human Servs, 90 Ark.App. 446; 206 S.W.3d 899 (2005).....18,31

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Department of Pub. Welfare v. J. K. B., 379 Mass. 1; 393 N.E.2d 406 (Mass. 1979).....6

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New Jersey Div. of Youth and Family Services v. R.B., unpublished opinion of the
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Pasqua v. Council, 186 N.J. 127; 892 A.2d 663 (2006) 22

*Petitions of Catholic Charitable Bureau of Archdiocese of Boston Inc. to
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State in Interest of Johnson, 465 So.2d 134 (La.App. 1 Cir. 1985) 6

State v. James, 38 Wash.App. 264; 686 P.2d 1097 (1984) 18

State v. Pultz, 206 Wis.2d 112, 556 N.W.2d 708 (Wis. 1996) 17

Wall v. Wall, unpublished opinion of the Court of Appeals of Ohio, issued
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Other Authorities

American Bar Association Regulation 112-A (Aug. 2006) 3

Amicus Brief, American Bar Association at 9, *Lassiter v. Dep't of Soc. Servs.*,
452 U.S. 18 (1980) (No. 79-6423). 22

Besharov, *Terminating Parental Rights: The Indigent Parent's Right to
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Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent
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Brennan, *State Constitutions and the Protection of Individual Rights*,
90 Harv. L. Rev. 489 (Jan. 1977) 7

Child Protective Proceedings Benchbook, A Guide to Abuse and Neglect Cases,

Third Edition (Michigan Judicial Institute, 2008) available at http://courts.michigan.gov/mji/resources/cppbook/cpp2006.htm.....25

Documenting the Justice Gap in America, Second Edition (Legal Services Corporation, June 2007), accessible at http://www.lsc.gov/justicegap.pdf 2

Documenting the Justice Gap in Michigan (State Bar of Michigan, Spring 2006).....2

Eaton, Whalen, and Anderson, *Permanency Planning Mediation Pilot Program: The Michigan Experience*, 10 Michigan Child Welfare Law Journal 2 (Spring 2007) 26

Guidelines for Achieving Permanency in Child Protection Proceedings, Second Ed. (Children's Charter of the Courts of Michigan, 2004) 25

Michigan Department of Human Services, *Children's Foster Care Manual* (CFF), available at http://www.mfia.state.mi.us/olmweb/ex/html/ 25

Michigan Department of Human Services, *Children's Protective Services Manual* (CFP) available at http://www.mfia.state.mi.us/olmweb/ex/html/ 25

Milleman, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 733 (2006).....12

Note, *Child Neglect: Due Process for the Parent*, 70 Colum.L.Rev. 465 (1970).....23

Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 Clearinghouse Rev. 186 (July-August 2006).....13

Patton, *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 Whittier L. Rev. 537 (1991).....43

Patton, *Standards Of Appellate Review For Denial Of Counsel And Ineffective Assistance Of Counsel In Child Protection And Parental Severance Cases*, 27 Loy. U. Chi. L.J. 195 (1996).....16,36

Sankaran and Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why it Matters,* 11 Michigan Child Welfare Law Journal 11 (Fall 2007).....26

Shaughnessy, *Lassiter v. Department Of Social Services: A New Interest Balancing Test For Indigent Civil Litigants*, 32 Cath. U. L. Rev. 261 (Fall 1982) 15,16,17,19

Vasser, *The Indigent Parent's Right to Counsel in Termination of Parental Rights Proceedings*, 16 J. Contemp. Legal Issues 329 (2005).....15

Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 Touro L. Rev. 247 (1997) 6,15,28

STATEMENT OF PROCEEDINGS AND FACTS

Amici adopt and incorporate by reference the Statement of Facts as set forth in Appellant's Supplemental Brief in Support of Application for Leave to Appeal.

STATEMENT OF INTEREST OF *AMICI*

The Legal Services Association of Michigan (LSAM), the Michigan State Planning Body (SPB), and the National Coalition for a Civil Right to Counsel (NCCRC) have requested permission to appear as *amici* in this matter. These organizations — two Michigan organizations and a national coalition — support the Appellant and urge the Court to hold: 1) that there is a right to counsel in termination of parental rights ("TPR") cases under the Michigan Constitution; and 2) that a denial of the constitutional or statutory right to counsel in TPR cases is either a) a structural error that is harmful per se and thus must be reversed; or b) an error that seriously affects the fairness of the proceedings and thus requires reversal as a matter of law.

LSAM is a Michigan nonprofit organization incorporated in 1982. LSAM's members are the thirteen largest civil legal services organizations in Michigan that collectively provide legal services to low-income individuals and families in over 50,000 cases per year.[1] LSAM members have broad experience with all aspects of the child protection system and a deep institutional commitment to ensuring that low-income families — parents and children — are treated fairly in that system. Several LSAM members have contracts to directly represent parents and children in child protection cases. In addition, other LSAM members take such cases for free on a case-by-

[1] LSAM's members are: the Center for Civil Justice, Elder Law of Michigan, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Legal Services of South Central Michigan, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Neighborhood Legal Services, and the University of Michigan Clinical Law Program.

case basis. Almost all LSAM members work daily — e.g., in public benefits, family law, and housing cases — with families that are involved in and impacted by the child protection system. And all LSAM members are institutionally interested in and committed to providing fair and equal access to the courts system for low-income persons.

LSAM's interest in this case is driven by recent studies by the federal Legal Services Corporation and the State Bar of Michigan indicating that for every person who is served by a legal services program in Michigan, another eligible client is denied services because of a lack of resources.[2] The legislature and the courts have recognized that there are some legal proceedings where the rights involved are so fundamental that appointed counsel for low-income litigants is required. TPR proceedings, which involve the complete severance of parents' connection to their children, are one such category of proceedings. Moreover, when such counsel is denied, the matter should be quickly sent back to the trial court without engaging in a complex and mistake-prone analysis on appeal, so as to protect this critically important right.

The Michigan State Planning Body (MSPB) is an unincorporated association of thirty-five individuals — from the legal services community, judiciary, private bar, and community organizations providing services to low-income persons — that acts as a forum for planning and coordination of the state's efforts to deliver civil and criminal legal services to the poor. The MSPB was initially created through a mandate of the federal Legal Services Corporation (LSC). Although LSC no longer requires that states have a formally designated State Planning Body, the Michigan Body has continued to function at the request of the programs and their state funder.

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[2] *Documenting the Justice Gap in America*, Second Edition (Legal Services Corporation, June 2007), accessible at http://www.lsc.gov/justicegap.pdf; *Documenting the Justice Gap in Michigan* (State Bar of Michigan, Spring 2006).

The MSPB has been studying the states' reactions to American Bar Association (ABA) Resolution 112-A (August 2006) urging "federal, state, and territorial governments to provide legal counsel at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake ..." The MSPB urges Michigan policy makers, including this Court, to recognize the impact of key legal proceedings on low-income families and to assure that persons will not face the loss of their parental rights without full and fair proceedings that necessarily include the right to counsel. The MSPB also urges this Court to ensure that the right to counsel is provided in a meaningful way by establishing the procedural safeguards that are necessary to protect it, such as finding that the complete denial of counsel is harmful per se.

Formed in January 2004, the National Coalition for a Civil Right to Counsel (NCCRC) is an unincorporated association that seeks to advance the recognition of a right to counsel in civil cases involving fundamental interests and basic human needs. NCCRC is comprised of over one-hundred-eighty participants from more than thirty-five states, including civil legal services advocates, supporters from public interest law firms, the private bar, academy, state and local bar associations, access to justice commissions, national organizations, and others.

NCCRC has an interest in this appeal because the right to counsel for parents at risk of permanently losing their right to participate in the lives of their children represents a bulwark in the effort to achieve such a right in civil cases involving basic human needs. The right to parent is fundamental in law and, to parents themselves, as precious as life itself. In recognition of this significant interest and the need to protect it, the great majority of states currently provide a statutory right to appointed counsel for indigent parents, and others have found a constitutional right to counsel. The indigent parents that many NCCRC participants represent frequently lack

the educational background or knowledge to be able to present their case before the trial court in any meaningful or effective way without counsel. Moreover, the right, whether statutory or constitutional, is at risk of evisceration if a trial court erroneously deprives parents of the right and the parents are then required to demonstrate on appeal and on a pro se basis exactly how this error impacted their case. As a result of the parents' pro se status, the record developed before the trial court will virtually always be incomplete and skewed, and wholly inadequate for use by the trial court in attempting to determine error. Only a guaranteed automatic reversal and remand for proceedings with counsel can adequately and fairly protect against the unlawful denial of counsel by the trial court.

Amici urge this court to address and resolve the core constitutional issue raised by this case: whether parents in TPR proceedings have a constitutionally protected right to counsel in those proceedings. First, it is impossible to fully address the issues regarding the standard of review without defining the nature of the right that was violated. Second, this issue is one where different panels of the Court of Appeals have reached conflicting decisions.[3] Most importantly, it is critical that the Court provide trial courts and the Court of Appeals clear guidance in this area. *Amicus* LSAM, whose members are involved as counsel in juvenile proceedings across the state on a daily basis, believes that *In re Rood*,[4] *In re Hudson*,[5] *In re Clemons*,[6] and the case at

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[3] Compare *In re Osborne,* 237 Mich.App. 597, 606; 603 N.W.2d 824 (1999) (in TPR case, "it is unclear whether respondent's right to court-appointed counsel is guaranteed by the Michigan Constitution") with *In re Clemons,* unpublished per curiam opinion of the Court of Appeals, issued Aug. 19, 2008 (Docket No. 281004); 2008 WL 3851592 ("The right to counsel at termination proceedings 'is ... a fundamental constitutional right").

[4] *In re Rood,* ___ Mich. ___; 2009 WL 875532 (2009).

[5] *In re Hudson,* ___ Mich ___; 2009 WL 943845 (2009).

[6] *In re Clemons, supra.*

bar are an unfortunate reflection on practices around the state, where caseload pressures and budget concerns often lead Appellee and the trial courts to move to terminate parental rights without compliance with the basic procedural safeguards put in place to assure fair and accurate decisions in these cases. It would be of tremendous benefit to families across the state if this Court clearly stated the importance of these rights and reminded lower courts of their duty to observe and enforce these rights.

ARGUMENT

I. Parents in TPR Proceedings Have a Right to Counsel Under the Michigan Constitution.

A. In *Lassiter*, the Supreme Court Invited States to Provide Greater Protection for Parental Rights, and the States Have Done So *En Masse*.

In *Lassiter v Durham Co Dep't of Social Services,* 452 U.S. 18 (1981), the U.S. Supreme Court determined that the right to counsel in TPR proceedings under the federal constitution is conditional and determined on a case-by-case basis. In reaching this conclusion, however, the Court emphasized that "[a] wise public policy ... may require that higher standards be adopted than those minimally tolerable under the [federal] Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel ... in parental termination proceedings ..." *Id.* at 33-34. The Court concluded that "[t]he Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise." *Id.* at 34.

The *Lassiter* majority also acknowledged that there was nationwide consensus that the right to counsel in TPR cases was essential. It pointed out that "33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases," and also that "courts have generally held that the State must appoint counsel for indigent parents at

termination proceedings." *Id.* at 30, 34. This nationwide consensus has come into even clearer focus since *Lassiter* was decided. As of today, all but six states provide such an absolute right via statute or state constitution, and twelve of the seventeen states that did not provide a right to counsel prior to *Lassiter* chose to provide an absolute right, even though they could have chosen to follow *Lassiter*'s case-by-case approach.[7] But even more relevant to the instant case is the fact that at least eleven jurisdictions that had found a constitutional right to counsel in TPR cases prior to *Lassiter* reaffirmed that holding on state constitutional grounds subsequent to *Lassiter*.[8]

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[7] Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 Touro L. Rev. 247, 260-63 (1997).

[8] *K.P.B. v. D.C.A.*, 685 So.2d 750, 752 (Ala. Civ. App. 1996) (construing *Ex Parte Shuttleworth*, 410 So.2d 896 (Ala. 1981) to require counsel in TPR cases under state constitution); *In Interest of E.H.*, 609 So.2d 1289, 1290 (Fla. 1992) (reaffirming *In re D.B.*, 385 So.2d 83 (Fla. 1980)); *State in Interest of Johnson*, 465 So.2d 134, 138 (La. Ct. App. 1985) (reaffirming *State In Interest of Howard*, 382 So.2d 194 (La. Ct. App. 1980)); *Petitions of Catholic Charitable Bureau of Archdiocese of Boston Inc. to Dispense with Consent to Adoption*, ___ Mass.App. ___; 490 N.E.2d 1207, 1213 n.6 (1986) (relying upon *Department of Pub. Welfare v. J. K. B.*, 379 Mass. 1, 393 N.E.2d 406 (Mass. 1979)); *New Jersey Div. of Youth and Family Services v. R.B.*, unpub opinion Superior Ct New Jersey, Appellate Div, issued Nov. 2, 2005(reaffirming *Crist v. N.J. Div. of Youth & Fam. Servs.*, 128 N.J.Super. 402; 320 A.2d 203 (1974)); *In re Evan F.*, 29 A.D.3d 905, 906; 815 N.Y.S.2d 697 (2006) (reaffirming *In re Ella B.*, 30 N.Y.2d 352; 285 N.E.2d 288 (1972)); *In re Johnson, In re Johnson*, unpublished opinion of the Court of Appeals of Ohio, issued April 28, 1982 (Docket No. C-810516) (relying upon *State, ex rel. Heller, v. Miller*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980), and commenting that *Heller* relied upon Art. I, § 1 of the Ohio Constitution as well as Fourteenth Amendment, and therefore "its impact ... is not diminished, if it might otherwise be thought to be, by the recent decision of the United States Supreme Court in *Lassiter*"); *In re A.S.A.*, 258 Mont. 194, 198; 852 P.2d 127 (1993) (quoting approvingly from *Lassiter* dissent); *In re D.D.F.*, 801 P.2d 703, 706 (Okla. 1990) (reaffirming *In re Chad S.*, 580 P.2d 983, 985 (Okla.1978), and holding that "although the federal constitution does not require that counsel be appointed in all termination proceedings, we believe that the rights at issue are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution, Art. 2, § 7"); *King v. King*, 162 Wash.2d 378, 383 n.3; 174 P.3d 659 (2007) (court might still agree with *In re Luscier*, 84 Wash.2d 135; 524 P.2d 906 (1974)); *In re Welfare of J.M.*, 130 Wash.App. 912, 921; 125 P.3d 245 (2005) (relying upon *Luscier*); *Matter of Lindsey C.*, 196 W.Va. 395, 407; 473 S.E.2d 110 (1995) (reaffirming *State ex rel. LeMaster v. Oakley*, 157 W.Va. 590, 203 S.E.2d 140 (1974) and adding that *Lassiter* did not "relieve[] this State of compliance with one or more of these protections which have been

B. Michigan Has A History of Independent Constitutional Interpretation.

As Supreme Court Justice William Brennan famously recognized, one critically important way in which states safeguard vital rights left unprotected by the federal constitution is to turn to their independent state constitutions, which are "a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[9] Indeed, the due process provisions of state constitutions would serve little purpose if they were always viewed as automatically duplicative of the Fourteenth Amendment.

As this Court has properly noted, "[a]s a matter of simple logic, because the texts [of the federal and state constitutions] were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Sitz v. Department of State Police,* 443 Mich. 744, 762; 506 N.W. 2d 209 (1993). See also *People v. Antkoviak,* 242 Mich.App 424, 435; 619 N.W.2d 18 (2000) (finding right to trial by jury in misdemeanor cases under Michigan Constitution despite lack of similar protection under federal constitution, and commenting that "we do not begin our analysis ... by assuming that the federal analysis applies equally under the 1963 Michigan Constitution.") In *Matter of Render*, the Court of Appeals reasserted Michigan's independence from federal constitutional interpretation of due process, noting that while the balancing factors test set forth in *Mathews v. Eldridge*[10] for due process analysis "provides a helpful tool for analysis of such issues ... our decision is neither based solely on *Mathews* nor

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recognized in West Virginia as constitutionally mandated", because right grounded in Art. III, § 10 of West Virginia Constitution).

[9] Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (Jan. 1977).

[10] 424 U.S. 319, 335 (1976).

solely upon our conception of what the Fourteenth Amendment dictates, but on the Michigan due process clause as well." 145 Mich.App. 344, 349 n.1; 377 N.W.2d 421 (1985).

Michigan has a long history of independent constitutional analysis, particularly with respect to the liberty interest. As this Court has stated, "We have ... afforded greater protection under the Michigan Constitution, or Michigan case law, in many areas." *People v. Bullock*, 440 Mich. 15, 28 n.9; 485 N.W.2d 866 (1992).[11] For instance, this Court in *Sitz* found highway sobriety checkpoints to violate art. 1, § 11 of the Michigan Constitution (searches and seizures), even though such checkpoints do not violate the Fourth Amendment. 443 Mich. at 778-79. As

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[11] As stated in *Bullock*: "Compare, e.g., *People v. Beach*, 429 Mich. 450, 464-465, 418 N.W.2d 861 (1988) (lesser included offense instructions), with *Keeble v. United States*, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973); *Delta Charter Twp. v. Dinolfo*, 419 Mich. 253, 265-278, 351 N.W.2d 831 (1984) (right of unrelated persons to share a house in an area zoned for "single-family residences"), with *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *People v. Cooper*, 398 Mich. 450, 460-461, 247 N.W.2d 866 (1976) (double jeopardy in the context of successive prosecutions by different sovereigns), with *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *People v. Burden*, 395 Mich. 462, 236 N.W.2d 505 (1975) (unanimous jury verdicts in criminal cases), with *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); *People v. Jackson*, 391 Mich. 323, 337-339, 217 N.W.2d 22 (1974) (right to counsel at photographic displays), with *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); *People v. White*, 390 Mich. 245, 255-258, 212 N.W.2d 222 (1973) (adopting the "same transaction" test for double jeopardy in the context of successive prosecutions), with *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990); *People v. Turner*, 390 Mich. 7, 22, 210 N.W.2d 336 (1973) (adopting an objective test for criminal entrapment), with *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 112-113, 54 N.W.2d 268 (1952) (the right to sell goods at prices below the minimum set by "fair trade agreement"), with *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109 (1936); and *People v. Victor*, 287 Mich. 506, 514-518, 283 N.W. 666 (1939) (the right to sell trading stamps), with *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679 (1916). Moreover, this Court has, on occasion, led rather than followed the United States Supreme Court. For example, just one year after the ratification of the federal Fourteenth Amendment in 1868, and eighty-five years before the United States Supreme Court outlawed racial segregation in public schools on the basis of that amendment, this Court, in an opinion by Chief Justice Cooley, held that black children had the right, under Michigan law, to attend the public schools on a free, nonsegregated basis. Compare *People ex rel Workman v. Detroit Bd. of Ed.*, 18 Mich. 400, 408-410 (1869), with *Brown v. Bd. of Ed.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)." *Id.*

the *Sitz* court noted, "[o]ur commitment to the protection of liberty was further demonstrated when the Supreme Court of Michigan adopted an exclusionary rule in 1919, forty-two years before it was mandated by federal law." *Id.* at 775-76. It stated that while it would require a "compelling reason" to reach a different holding on art. 1, § 11 than the U.S. Supreme Court cases involving the Fourth Amendment, "'compelling reason' should not be understood as establishing a conclusive presumption artificially linking state constitutional interpretation to federal law ... a literal application of the term would force us to ignore the jurisprudential history of this Court in favor of the analysis of the United States Supreme Court ..." *Id.* at 758.

Importantly, the court conceded it had previously said that art. 1, § 11 was to "be construed to provide the same protection as the United States Supreme Court's interpretation of the Fourth Amendment." *Id.* at 762. However, *Sitz* held that this did *not* mean that the court was required "to ignore the 'body of state constitutional search and seizure law' created pursuant to the historical general power of this Court to construe the constitutional provision relating to searches and seizures ... our courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so." *Id.* at 762-63 (citation omitted). In the end, the *Sitz* court looked to its own constitutional jurisprudence and essentially found that it had a lower tolerance for suspicionless stops than the U.S. Supreme Court.

This Court has at times extended rights under the state constitution based on a recognition of flawed reasoning in a U.S. Supreme Court decision on the same issue. In *People v. Wright*, 441 Mich. 140, 155; 490 N.W.2d 351 (1992), this Court found that the failure of police to inform a defendant of his counsel's attempts to contact him constituted a violation of his privilege against self-incrimination enshrined in art. 1, § 17. The court noted that the U.S. Supreme Court

had found in *Moran v. Burbine*[12] that an attorney's attempts to contact his client were "irrelevant" to that client's waiver of his privilege against self-incrimination, but the *Wright* court stated "we disagree" and that "[t]he standard enunciated in *Moran* is simply the minimum." *Id.* at 147-48. The court then stated that the critical question (and one essentially ignored by the Supreme Court) was "whether the information withheld by the police would have changed the defendant's appraisal and understanding of the circumstances of the waiver." *Id.* at 151.

With regards to due process in particular, this Court has said that the "compelling reason" requirement for departing from federal constitutional interpretations does not apply to Mich. Const. art. 1, § 17 (which includes the due process clause). In *People v. Bender*, 452 Mich. 594, 613 n.17; 551 N.W.2d 71 (Mich. 1996), this Court declined to require a "compelling reason" in order to interpret art. 1, § 17's self-incrimination component differently from the federal counterpart. The court held that the "compelling reason" requirement only existed for art. 1, § 11 cases because that section was drafted in response to *Mapp v. Ohio,* 367 U.S. 643 (1961) and therefore there was a "direct connection to federal law." *Id.* Although the *Bender* court was addressing the privilege against self-incrimination, it spoke generally about art. 1, § 17 and held that "when interpreting art. 1, § 17, there is an absence of a direct link to federal interpretation of the Fifth Amendment. Thus, it does not logically follow that in interpreting art. 1, § 17, we must find compelling reasons to interpret our constitution more liberally than the federal constitution." *Id.* The court also said that the general statement that art. 1, § 17 provides no greater protection than the Fifth Amendment is "clearly unsupportable." *Id.* See also *Bullock*, 440 Mich. at 29 n.10 (automatically applying "compelling reason" requirement for all constitutional provisions at all times "would conflict with sound principles of judicial federalism.")

[12] 475 U.S. 412 (1986).

Additionally, with respect to TPR cases in particular, "in Michigan, both the courts and the Legislature have done more than react to federal mandates in parental rights termination proceedings." *Matter of Render*, 145 Mich App at 348. *Render* noted that Michigan adopted the "clear and convincing" standard long before *Santosky v. Kramer*, 455 U.S. 745 (1982), and that the Legislature "has acknowledged the state's own interest in an accurate and just decision by requiring that the parents appear at the dispositional hearing 'to show the efforts made by them to reestablish a home for the child' and, upon rehearing, 'to show why the child should not be placed in permanent custody of the court.'" *Id.* (statutory citations omitted). This Court also has a history of independent analysis with respect to the right to counsel, as it has found such a state constitutional right in some civil cases. See *e.g. Artibee v. Cheboygan Circuit Judge*, 397 Mich. 54, 243 N.W.2d 248 (1976) (paternity); *People v. Johnson*, 407 Mich. 134, 148, 283 N.W.2d 632 (1979) (civil contempt for refusing to testify before jury).[13]

For these reasons, this Court is under no obligation to follow *Lassiter* when interpreting the Michigan Constitution, even if its due process clause is textually similar to that of the federal constitution. Instead, "wise public policy", a recognition of the differences in Michigan's TPR procedures from those considered in *Lassiter*, Michigan's history of exercising careful, independent review of its own constitution, Michigan's history of protectiveness of families, and the flawed analysis within *Lassiter* (discussed next) militate in favour of finding an unconditional right to counsel in TPR cases under art. 1, § 17.

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[13] While this Court has said that "[T]here exists no structural differences with regard to the right to assistance of counsel between federal and Michigan provisions", *People v. Reichenbach*, 459 Mich. 109, 119; 587 N.W.2d 1 (1998) (citation omitted), *Reichenbach* was referring specifically to the Sixth Amendment right to counsel and its state constitutional counterpart (art 1, § 20), not to the right to counsel secured via art. 1, § 17's due process clause.

C. *Lassiter*'s Analytical Framework is Flawed and Unworkable, and Has Been Rejected by Many Courts Nationwide.

A person reading *Lassiter*'s summary of its application of the *Mathews* factors would likely conclude that the Court was about to announce a right to counsel in TPR cases:

> The parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

452 U.S. at 31. This analysis suggests the balance strongly *favoured* appointment of counsel because "the private interest [is] weighty, the procedure devised by the State fraught with risks of error, and the countervailing governmental interest insubstantial." *Id.* at 48-49 (Blackmun, J., dissenting). However, the Court inexplicably "pulled back" and created a presumption *against* the right to counsel out of whole cloth, which it set against *Mathews* factors and found to outweigh them. *Id.* at 31. The Court held that its prior case law led it to believe that only litigants facing a loss of physical liberty are presumed to have a right to counsel. *Id.* at 26-27.

In dissent, Justice Blackmun, joined by Justices Brennan and Marshall, stated bluntly, "I do not believe that our cases support the 'presumption' asserted ... the Court today grants an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test." *Id.* at 40 (Blackmun, J., dissenting). As commentators have pointed out, "The Court created this presumption without justifying it ... In the physical liberty cases ... the Court had no occasion to decide whether or not there should be a presumption against the appointment of counsel in state-initiated TPR proceedings."[14]

[14] Milleman, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 733, 741-42 (2006).

In practice, the presumption has also proved confusing to the courts, as some have improperly treated it as the only factor and skipped the *Mathews* analysis entirely. See *e.g. Reynolds v. Blackmond*, unpublished opinion of the Ct of App, issued Jan. 27, 2004(No. 243303) WL 136667 at *2 (in legal malpractice suit, court cites *Lassiter* to hold that right to counsel "is triggered by an indigent party's fundamental interest in physical liberty", and because suit based on monetary damages and not physical liberty, court summarily finds no right to counsel); *Archuleta v. Goldman*, 107 N.M. 547, 553; 761 P.2d 425 (1987) (a defendant's interest in personal freedom "activates" right to appointed counsel; no balancing test analysis); *Black v. Miami Valley Hosp.*, unpub opinion of the Ct of App of Ohio, issued Sept. 22, 1995 (Docket No. 15167)(court's entire analysis of right to counsel is citation to *Lassiter* and statement that "[a]n indigent plaintiff does not have a right to appointed counsel to assist him in pursuing his claim for damages.") See also Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 Clearinghouse Rev. 186, 187 (July-August 2006) (describing courts over-relying on presumption).

The presumption is also very problematic because it severely downplays the parental right at stake. As one commentator put it, "*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child."[15] See also *In re Luscier*, 84 Wash.2d 135, 138-39; 524 P.2d 906 (1974) ("Surely, the reasoning ... which requires the appointment of counsel if there is the possibility of even a 1-day jail sentence, must also extend to a proceeding where a parent may be deprived of a child forever.")

For these reasons, it is not surprising that this Court has already rejected the presumption.

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[15] Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 Fam. L.Q. 205, 219, 221 (1981)

Matter of Sanchez, 422 Mich. 758, 766 n.8; 375 N.W.2d 353 (1985) (court states in context of TPR case that "Michigan precedents do not presume that appointed counsel is required only if physical liberty is at stake ...."). *Sanchez* made this statement immediately after acknowledging "the importance of the right involved" in TPR cases, the fact that that TPR proceedings involve "traditions, emotions and responsibilities which give them a unique cast" and the fact that "this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators." *Id.* at 765-66 (citing *Lassiter*, 452 U.S. at 39, and *Reist v. Bay Circuit Judge*, 396 Mich. 326, 354; 241 N.W.2d 55 (1976)).

Michigan is not alone in disdaining the presumption. *South Carolina Dept. of Social Services v. Vanderhorst*, 287 S.C. 554, 560; 340 S.E.2d 149 (1986) ("under our interpretation of *Lassiter*, cases in which appointment of counsel is *not* required should be the exception"); *Matter of K.L.J.*, 813 P.2d 276, 285 (Alaska 1991) (Alaska courts "do not weigh the factors in a due process analysis against a 'presumption' that appointed counsel is required only if a person's physical liberty is at stake."); *In re Jay R.*, 150 Cal.App.3d 251, 261; 197 Cal.Rptr. 672 (1983) ("The California Supreme Court ... does not weigh [the *Mathews* factors] against a 'presumption' that appointed counsel is required only if a person's physical liberty is at stake ... [it] specifically rejected, as a matter of California law, the contention that appointed counsel is required only when imprisonment is imposed").[16] All of the post-*Lassiter* courts to reaffirm the state constitutional right to counsel in TPR cases declined to adopt this unfounded and ill-advised presumption. See footnote 8, *supra*.

Another flaw in *Lassiter*'s analysis is that it grossly understates the true risk of erroneous deprivation in TPR proceedings, given the unsophistication of most indigent parents and the

[16] See also *McBride v. McBride*, 334 N.C. 124, 129; 431 S.E.2d 14 (1993) (describing *Lassiter*'s presumption as "dictum").

extreme imbalance of power between the parent and an opponent like the state. In dissent, Justice Blackmun pointed out that the state's attorney has access to public records about the family as well as experts on psychology and medicine, and the attorney himself "is an expert in the legal standards and techniques employed at the termination proceeding, including the methods of cross-examination." *Id.* at 43 (Blackmun, J., dissenting). Such a setup, Justice Blackmun concluded, created great risks of error "given the gross disparity in power and resources between the State and the uncounseled indigent parent", and meant that "[t]he parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses." *Id.* at 44, 45-46 (Blackmun, J. dissenting).

While the majority in *Lassiter* conceded that placing such litigation tasks on indigent parents "may combine to overwhelm an uncounseled parent" so as to increase the chance of error, *Id.* at 30, Justice Blackmun rightly pointed out that this was "a profound understatement." *Id.* at 56 (Blackmun, J., dissenting). Even a parent with a meritorious defense "may be unable to establish this fact", *Id.* at 46 (Blackmun, J., dissenting), given that parents will not know to identify legal errors by the state or how to challenge such errors even if they do recognize them. Echoing Justice Blackmun's concerns, a number of commentators have criticized *Lassiter*'s blindness to the serious and substantial risk of erroneous deprivation.[17]

Yet another problem with the *Lassiter* framework is its departure from standard due process jurisprudence to create an untenable individual-case-by-individual-case model. The

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[17] Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: the Continuing Scourge of Lassiter*, 36 Loy. U. Chi. L.J. 363, 366 (2005); Shaughnessy, *Lassiter v. Department Of Social Services: A New Interest Balancing Test For Indigent Civil Litigants*, 32 Cath. U. L. Rev. 261, 283 (1982); Young, 14 Touro L. Rev. at 257-59; Vasser, *The Indigent Parent's Right to Counsel in Termination of Parental Rights Proceedings*, 16 J. Contemp. Legal Issues 329, 331 (2005).

typical approach to due process is to apply the *Mathews* factors to the *category* of case at issue (i.e., TPR cases). Indeed, *Mathews* held that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process *as applied to the generality of cases*, not the rare exceptions." 424 U.S. at 344 (emphasis added). However, after applying its category-by-category *Mathews* analysis to TPR cases and deciding that it was essentially a tie, the *Lassiter* Court chose to apply a *second* case-by-case test to the parent's *individual* case in a way that was wholly inconsistent with its due process prior precedent. As Justice Blackmun aptly noted in his dissent, "The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context." 452 U.S. at 49 (Blackmun, J., dissenting). Furthermore, if the trial court fails to apply this individual case analysis, the appellate court will have no record to review and will have to remand, "providing one more procedural hurdle before the affected children realize finality and permanence."[18]

Ironically, the Supreme Court itself has evinced concern over the problems caused by a case-by-case approach. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court overturned its own unworkable precedent from *Betts v. Brady*, 316 U.S. 455 (1941), to hold defendants in criminal cases have a categorical right to counsel. The *Gideon* Court found that its *Betts* ruling had led to "a continuing source of controversy and litigation in both state and federal courts." 372 U.S. at 338. Indeed, *Betts* "had repeatedly resulted in messy and friction-generating factual inquiries into every case."[19] As a consequence, even before *Gideon* was heard, the Court had

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[18] Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 Loy. U. Chi. L.J. 195, 202 (1996).

[19] Shaughnessy, 32 Cath. U. L. Rev. at 282.

already "beg[u]n to carve out certain exceptions to the *Betts* case-by-case approach."[20]

Unsurprisingly, courts that have carefully looked at *Lassiter* have soundly rejected its individual-case-by-individual-case approach with respect to their own state constitutions. *Matter of K.L.J.*, 813 P.2d at 282 n.6 (for TPR cases stemming from adoption, "we reject the case-by-case approach set out by the Supreme Court in *Lassiter*. Rather, our view comports more with the dissent."); *State v. Pultz*, 206 Wis.2d 112, 122; 556 N.W.2d 708 (1996) (rejecting *Lassiter's* case-by-case approach for civil contempt); *Lavertue v. Niman*, 196 Conn. 403, 413; 493 A.2d 213 (1985) (rejecting Lassiter's case-by-case approach for paternity actions). See also footnote 8 (describing courts that reaffirmed pre-*Lassiter* holdings providing an absolute right to counsel in TPR cases without adding any individual-case-by-individual-case analysis).

Like *Gideon*, this Court has also re-thought and reversed a decision that had established a case-by-case analysis for the right to counsel. In *Sword v. Sword*, 399 Mich. 367, 382; 249 N.W.2d 88 (1976), the court held the right to counsel in civil contempt proceedings for failure to pay child support "does not rise to the level of a guaranteed constitutional right." Instead, courts were invited to appoint counsel only if "special circumstances" led the trial judge to do so. *Id.* at 381. Fourteen years later, this Court reversed *Sword* in *Mead v. Bachlor*, 435 Mich. 480; 460 N.W.2d 493 (Mich. 1990). The *Mead* decision was likely informed by the realities of Circuit Court practice – the high volume of cases; the number of parents facing incarceration – and the court pointed to the increased complexity of the proceedings as a rationale for abandoning the case-by-case approach. *Id.* at 500-502. Thus, *Mead* can be seen as recognizing the unworkability of the case-by-case appointment of counsel procedure suggested by *Sword*.

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[20] Shaughnessy, 32 Cath. U. L. Rev. at 266 (post-*Betts*, "[t]he Court found a per se right to counsel where the defendant was illiterate, mentally handicapped, or a minor, and where the statute or legal question involved was extremely complex.")

The final flaw in *Lassiter* is its use of an "outcome-determinative" test in the individual-case-by-individual-case analysis. After using the newly created negative presumption to trump the *Mathews* factors and hold there was no *categorical* right to counsel in TPR cases, the *Lassiter* Court turned to the question of whether counsel was due to Ms. Lassiter in particular. The Court then concluded Ms. Lassiter was not entitled to counsel because "the presence of counsel for Ms. Lassiter could not have made a determinative difference." *Id.* at 32-33. However, prior to choosing this "determinative difference" test, the Court first correctly acknowledged that "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements, since ... [the] facts and circumstances ... are susceptible of almost infinite variation...." *Id.* at 32 (citation omitted). Thus, the Court's choice of this particular test is not binding on state courts, even in their interpretation of the federal constitution.

The vast majority of jurisdictions to consider a denial of counsel in TPR cases post-*Lassiter* have not chosen to use this test (even for federal constitutional analysis), opting instead to apply the *Mathews v. Eldridge* factors to examine the individual case as well as the categorical case.[21] Moreover, some courts have described "outcome determinative" not as a dispositive test,

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[21] Only nine states appear to have made any use whatsoever of *Lassiter*'s backwards-looking "outcome determinative" test in right-to-counsel cases, and most of these decisions did not involve the state's high court. *J.C.N.F. v. Stone County Dept. of Human Services*, 996 So.2d 762, 770-72 (Miss. 2008); *In re Ronald R.*, 37 Cal.App.4th 1186, 1196; 44 Cal.Rptr.2d 22 (1995); *In re D.D.D.*, 961 So.2d 1216, 1221 (La.App. 1 Cir. 2007); *Clark v. Ark. Dept. of Human Servs.*, 90 Ark.App. 446, 458; 206 S.W.3d 899 (2005); *In re Adoption of K.L.P.*, 316 Ill.App.3d 110, 120; 735 N.E.2d 1071 (2000); *Wall v. Wall*, unpub opinion Ct of App of Ohio, issued Oct. 29, 1999(No.WM-99-006); *Marathon County Dept. of Social Services v. I.H.*, 164 Wis.2d 434; 476 N.W.2d 26 (1991) (only implicitly using the test); *State ex rel. Adult and Family Services Division v. Stoutt*, 57 Or.App. 303, 312; 644 P.2d 1132 (1982); *State v. James*, 38 Wash.App. 264, 273; 686 P.2d 1097 (1984); and *Hughes v. Division of Family Services,* 836 A.2d 498, 509

but as a mere "relevant factor[]." *Battishill v. Arkansas Dept. of Human Servs,* 78 Ark.App. 68, 71; 82 S.W.3d 178 (2002).

The disuse of the outcome-determinative test is unsurprising, given its illogic as a backwards-looking analysis attempted *before the case has even started or there is any record.* In his *Lassiter* dissent, Justice Blackmun expanded upon the difficulty and inefficiency of compelling a court weighing the right to counsel to "determine *in advance* what difference legal representation might make", as it requires the judge to "examine the State's documentary and testimonial evidence *well before the hearing* so as to reach an informed decision about the need for counsel in time to allow adequate preparation of the parent's case." 452 U.S. at 51 n.19 (Blackmun, J., dissenting) (emphasis added). See also *Lavertue v. Niman*, 196 Conn. 403, 413; 493 A.2d 213 (1985) ("[i]t is often difficult to assess the complexities which might arise in a given paternity trial before that trial is held" (citation omitted)).

Commentators have railed against the burdens, confusion, and unfairness that the *Lassiter* approach as a whole engenders:

> A case-by-case approach is [] time consuming and burdensome on the trial court. Not only must it determine in advance the need for counsel, it must develop pretrial procedures and standards in order to determine properly the need for counsel. There is no guarantee that these standards will produce equitable decisions in every case. Additionally, it will not always be possible for the trial court to predict accurately, in advance of the proceedings, what facts will be disputed, the character of cross-examination, or the testimony of various witnesses. These factors increase the possibility that appointment of counsel will be denied erroneously by the trial court.[22]

(Del.Supr. 2003). Some courts that have used "outcome determinative" incorrectly consider it to be interchangeable with "risk of erroneous deprivation". For instance, in *Hughes*, the Delaware Supreme Court noted that the trial court judge "was in the best position to determine whether the appointment of counsel at any stage in the dependency proceedings would have increased the risk of an erroneous result", but then went on to say, "[t]hat judge concluded, in this case, that ... even [with counsel], the result would have been the same ...." *Id.* at 509.

[22] Shaughnessy, 32 Cath. U. L. Rev. at 283.

For all the reasons above, and in recognition of this Court's awareness of the importance of the parental liberty interest, this Court should reject the illogical *Lassiter* framework in order to pursue its own independent analytical path.

D. Applying the *Mathews v. Eldridge* Factors, It is Clear that Parents Have a Right to Counsel in TPR Cases Under the Michigan Constitution.

As this Court articulated in *In re Rood*, "Due process requires fundamental fairness, which is determined in a particular situation first by considering any relevant precedents and then by assessing the several interests that are at stake." ___ Mich ___; 2009 WL 875532 at *8 (Mich. 2009) (citations omitted). *In re Rood* applied the three *Mathews* factors: 1) the private interest affected, 2) the risk of erroneous deprivation; and 3) the government's interest.

On numerous occasions, the U.S. Supreme Court has placed significant emphasis on the strength of a parent's liberty interest. In *Lassiter* itself, the Court pointed to the "unique kind of deprivation" at stake in a TPR case and held that "[a] parent's interest in the accuracy and injustice of the decision to terminate his or her parental status ... [is] a commanding one." 452 U.S. at 27. In *M.L.B. v. S.L.J.*, the Court went a step further, distinguishing cases "involving state controls or intrusions on family relationships" from the "mine run" of other types of civil cases. 519 U.S. 102, 116 (1996). The *M.L.B.* Court noted that in both *Lassiter* and *Santosky*, "the Court was unanimously of the view that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." 519 U.S. at 119 (citation omitted). The Court has also called the right to have children "a basic civil right of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), noted that custody is a right "far more precious ... than property rights," *May v.*

Anderson, 345 U.S. 528, 533 (1953), and said that "[f]ew forms of state action are both so severe and so irreversible." *Santosky*, 455 U.S. at 759.

This Court has already spoken eloquently to the strength and importance of the parental interest in TPR cases. In *Reist*, this Court recognized that the parental interest was "of basic importance in our society", that the parent-child relationship "occupies a basic position in this society's hierarchy of values", that "the integrity of the family unit has been zealously guarded by the courts", and that a TPR proceeding is "one of the most drastic actions the state can take against its inhabitants." 396 Mich. at 340, 342, 344 n.23 (citations omitted). Therefore, "any legal adjustment of their mutual rights and obligations affects a fundamental human relationship." *Id.* at 342. The Court also recognized that the constitutional interest in liberty "denotes not merely freedom from bodily restraint but also the right of the individual to ... establish a home and bring up children." *Id.* at 342-43 (citation omitted).

Most recently, in *In re Rood*, this Court reminded that even though a parent may have been less than the "ideal parent", "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. . . ." 2009 WL 875532 at *7 (quoting *Santosky*, 455 U.S. at 753-754). See also *In re Brock*, 442 Mich. 101, 109; 499 N.W.2d 752 (1993) ("It is well established that parents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process.") Thus, the private interest involved in TPR proceedings is of the highest order.

With respect to the risk of erroneous deprivation, the majority opinion in *Lassiter* itself established precisely the sorts of dangers inherent in TPR proceedings:

> [T]he ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made.

452 U.S. at 30. It was precisely these risks of erroneous deprivation, the Court concluded, that had caused the vast majority of state courts to "generally [hold] that the State must appoint counsel for indigent parents at termination proceedings." *Id.* In its *amicus* brief in *Lassiter*, the American Bar Association argued the risk of erroneous deprivation is high in TPR cases because a parent 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."[23] See also *Pasqua v. Council*, 186 N.J. 127, 145; 892 A.2d 663 (2006) (while child support enforcement proceedings may seem simple to judge or lawyer, "gathering documentary evidence, presenting testimony, marshalling legal arguments, and articulating a defense are probably awesome and perhaps insuperable undertakings to the uninitiated layperson.")

This Court in *Reist* also outlined many of the risks of error involved in pitting an unsophisticated and indigent parent against the vast resources of the state in a TPR case:

> Parents most often involved in neglect and termination proceedings are usually the least equipped, it terms of intellectual and emotional resources, to respond in such proceedings. 'The indigent are frequently the least able to cope with government in its official functions ... The case at bar was routine for the welfare workers and other

[23] Amicus Brief, American Bar Association at 9, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1980) (No. 79-6423).

juvenile court staff. For the indigent mother, however, the entire proceedings were incomprehensible.'

396 Mich. at 345 (citations omitted). The Court also noted that "[s]tudies indicate that termination of parental rights occurs less frequently when parents are represented by counsel." *Id.*, citing Note, *Child Neglect: Due Process for the Parent*, 70 Colum.L.Rev. 465, 476 (1970).

This Court has frequently relied on the complexity of procedures and the implied risk of erroneous deprivation to find a right to counsel. In *Artibee v. Cheboygan Circuit Judge,* 397 Mich. 54, 57; 243 N.W.2d 248 (Mich. 1976), the court commented that "the nature of the proceedings is sufficiently complex so as to require counsel to insure a fair trial." The court noted that paternity cases could involve "sharply disputed factual question[s] concerning the relationship of the parties", and a defendant in a paternity case who might not believe he is the actual father might not know to "file notice of alibi if he intends to rely upon that defense." *Id.* at 57-58. Moreover, the unrepresented defendant may not know of his statutory right to demand blood tests and would likely not know how to determine the legal significance of the results, nor would an unrepresented defendant know how to object to hearsay or other inappropriate testimony. *Id.* These risk factors were key in *Artibee*'s creation of a right to counsel in paternity cases.

In *Mead*, this Court pointed to the complexity of the child support contempt proceedings as greatly increasing the risk of error, and in fact overruled its prior precedent in *Sword* based on an acknowledgment that parents were unlikely to be able to manage without counsel. The Court concluded that, given the liberty interest at stake, "an indigent needs an attorney to advise him about the meaning and requirements of applicable laws and to raise proofs and defenses in his behalf." *Id.* This Court reached a similar conclusion in *People v. Johnson*, 407 Mich. 134, 148; 283 N.W.2d 632 (Mich. 1979), where it found that a litigant held in contempt for failing to

testify before a jury is "unlikely to be capable of understanding the nature of the proceedings, articulating his position or appreciating the options available to him", and such a factor weighed in favor of finding a right to counsel.

Child welfare proceedings in Michigan are very complex, as they are implicated in an extensive list of statutes and court rules: MCL 712A.1 et seq. (Juvenile Code); MCL 722.1101 et seq. (Uniform Child Custody Jurisdiction and Enforcement Act); MCL 722.621 et seq. (Child Protection Law); MCL 722.904 of the Parental Rights Restoration Act (judicial reporting of suspected abuse following hearing on waiver of parental consent for abortion); MCL 333.2640, MCL 333.16281, MCL 333.16648, MCL 333.18117, MCL 333.18237, MCL 330.1748a, MCL 333.6112, MCL 333.6113, and MCL 600.2165 (release of medical, dental counseling, psychological, mental health, substance abuse, and school records); MCL 712.1 et seq. (Safe Delivery of Newborns Law); MCL 722.711 et seq. (Paternity Act); MCL 722.1001 et seq. (Acknowledgement of Paternity Act); MCL 400.1 et seq. (Social Welfare Act, placement and funding of placements); MCL 400.201 et seq. (Michigan Children's Institute); MCL 700.5201 et seq. (appointment of guardians); MCL 722.131 et seq. (Foster Care Review Board); MCL 722.951 et seq. (Foster Care and Adoption Services Act); MCL 722.111 et seq. (Child Care Organizations – rules regarding foster care and other placements); MCL 722.124a(1) (consent for medical treatment of court ward); MCR 3.218(D) (DHS CPS access to Friend of the Court records); MCR 3.901-3.929 (general rules for child protection cases); MCR 3.961-3.978 (rules for child protective cases); MCR 3.980 (American Indian child custody cases); and MCR 3.991-3.993 (reviews, rehearings, and appeals). Already extensive, these statutes and court rules frequently reference others. "The rules in this subchapter, in subchapter 1.100 and MCR 5.113, govern practice and procedure in the family division of the circuit court in all cases filed under

the Juvenile Code." MCR 3.901(A)(1). Additional requirements are found in the federal statutes and regulations. Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620 et seq.; Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 620 and 670 et seq.; Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., and the regulations implementing the Adoption and Safe Families Act, 45 C.F.R. § 1355.10 et seq. Further regulatory policies and procedures are set forth in the Policy and Procedure Manuals of the State of Michigan Department of Human Services, including the Michigan Department of Human Services, *Protective Services Manual* (CFP) and the *Children's Foster Care Manual* (CFF), both available at http://www.mfia.state.mi.us/olmweb/ex/html/.

The Michigan procedure anticipates several categories of hearings in the course of a child welfare case potentially resulting in the termination of parental rights. These are the preliminary hearing, MCR 3.963(A), MCR 3.965; the pretrial hearing, MCR 3.922(D); the adjudicatory hearing, MCR 3.903(a)(26); the dispositional hearing, MCR 3.973(A); the dispositional review hearings, MCR 3.975(A); the permanency planning hearing, MCL 712A.19a(3); and the termination of parental rights hearing, MCR 3.977. It should be noted that the adjudicatory hearing or trial may be heard by a panel of six jurors. MCL 712A.17(2).[24]

The complexity of the Michigan child welfare system has led to a tremendous body of resource materials, considered essential for any attorney practicing in this area. These include the *Michigan Child Welfare Journal*, a publication of the State Bar of Michigan Children's Law Section; *Guidelines for Achieving Permanency in Child Protection Proceedings*, Second Ed. (Children's Charter of the Courts of Michigan, 2004); and the *Child Protective Proceedings Benchbook, A Guide to Abuse and Neglect Cases*, Third Edition (Michigan Judicial Institute,

[24] It is not unusual for experts to be used in TPR proceedings in Michigan. For instance, the state relied on three experts in Mr. and Ms. McBride's case.

2008). Many courts now mandate a minimum level of training before attorneys may be considered for court appointments. The Michigan Child Welfare Law Journal regularly publishes a list of substantive and procedural trainings for advocates in this field. Moreover, this is an ever-changing body of law, as exemplified by the extensive settlement in *Dwayne B v Granholm*, No. 2:06-CV-13548 (E.D. Mich. 2008), and the emergence of permanency planning mediation pilot programs. See Eaton, Whalen, Anderson, *Permanency Planning Mediation Pilot Program: The Michigan Experience*, 10 Michigan Child Welfare Law Journal 2 (Spring 2007).

Attempting to navigate the child welfare system alone, parents are commonly overwhelmed. See Sankaran and Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why it Matters,* 11 Michigan Child Welfare Law Journal 11(Fall 2007). Parents coming into the child welfare system may already be confronting a number of difficulties complicating their ability, capacity or time to adequately engage in the proceedings before them. These may include issues of drug use, mental illness, homelessness, domestic violence, or educational limitations. As referenced in the Brief of Amicus Curiae National Lifers of America, Inc., fewer than half the men entering a Michigan Prison have a high school diploma, GED or better. Over half of the male population in December 2001 had a history of mental health treatment before or during incarceration. (Amicus Brief National Lifers of America, Inc., p.3, referencing Exhibits 3 and 6). These statistics reflect the realities of many of the families finding themselves involved in the child welfare system.

In light of the barriers faced by many indigent families in Michigan and the complexity of the substantive and procedural law, one cannot credibly argue that the risk of erroneous deprivation is low and that an indigent parent can obtain a fair trial without access to counsel.

Compared to today's TPR proceedings, the hearings found "sufficiently complex so as to require counsel to insure a fair trial" in *Artibee* seem procedurally simple and easy to navigate.

With regard to the final prong of *Mathews* (state interest), the complex statutory framework for Michigan TPR cases, the provisions of MCR 2.004, and the statutory guarantee of counsel demonstrate that the state has a keen interest in ensuring that parents (and especially incarcerated parents) participate meaningfully in the TPR process. As *Artibee* concluded with respect to paternity, "The fact that many procedural safeguards attendant to criminal trials have been made applicable to paternity proceedings, and the reality that prosecution is often undertaken at public expense, constitute recognition that the outcome is of great importance both to the defendant *and to the state*" (emphasis added). 397 Mich. at 59.

Michigan statutory law clearly demonstrates a strong state interest in keeping children with their parents unless separation is absolutely necessary. MCL 712A.1(3) of the Juvenile Code explicitly states that "[t]his chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, *preferably in his or her own home*" (emphasis added). Additional statutes that govern proceedings leading up to termination repeatedly place emphasis on keeping the family together and working towards unification.[25] This statutory framework demonstrates a clear intent to preserve the parent-child

[25] If an agency advises the court to remove a child from the home, that agency is required to produce a detailed report to the court describing "what efforts were made to prevent the child's removal from his or her home or the efforts made to rectify the conditions that caused the child's removal from his or her home", as well as what services were provided and what harm would occur if the child were separated from the parent. MCL 712A.18f(1). The case service plan that the agency must develop must "provide for placing the child in the most family-like setting available and in as close proximity to the child's parents' home." MCL 712A.18f(3). The court's order of disposition must "state whether reasonable efforts have been made to prevent the child's removal from his or her home or to rectify the conditions that caused the child's removal from his or her home." MCL 712A.18f(4). If a child is ordered removed temporarily from her home, the review hearing cannot be more than 182 days after the order, in order to minimize the time the

relationship and is consistent with the fact that TPR statutes are "often strictly construed in favor of the parent and the preservation of the parent-child relationship."[26]

Michigan statutory law also is very carefully structured to ensure that a parent's right to counsel in TPR cases is respected, demonstrating the state's concern for protecting that right. For instance, rather than simply stating that parents have a right to counsel if they clearly express such desire, MCL 712A.17c(4) and MCR 3.915(B) place an affirmative obligation upon the court at the outset to inform parents of their right to representation, their right to free representation if necessary, and their right to request counsel at a later date. Furthermore, even if the parent does not clearly express the desire for an attorney, MCL 712A.17c(5) states that the court shall appoint an attorney if it "appears" to the court that the parent wants an attorney and cannot afford one.

Michigan's statutory right to counsel can be contrasted with the approach of other states that require parents to voice the request first and that do not address a parent's right to renew the request later. See *e.g.* Ga. Code Ann., § 15-11-98(b) ("If the parent or parents of the child desire to be represented by counsel but are indigent, the court shall appoint an attorney for such parent or parents ..."); Young, 14 Tour. L. Rev. at 261 (describing how at least six states currently only require counsel if parent requests it). Indeed, Michigan courts have recognized that Michigan's statutory expression of the state's interest in the parent's right to counsel is so clear that the failure to adhere to the notification requirements requires reversal. *Matter of Keifer*, 159 Mich.App 288, 293; 406 N.W.2d 217 (1987) (per curiam).

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children are separated from their parents, MCL 712A.19(2), and at such review hearing the court must ascertain the likely harm if the child continues to be separated from her parents. MCL 712A.19(6)(d). Attempts to place the child for adoption or with a guardian can only be done "concurrently with reasonable efforts to reunify the child and family." MCL 712A.19(13).

[26] Young, 14 Touro L. Rev at 267 (citation omitted).

Finally, in MCR 2.004, the state has expressed a clear intent to jealously protect the right of incarcerated parents to fully participate in TPR proceedings. It requires that all TPR petitions must state that a parent is incarcerated and that a telephonic hearing is required. MCR 2.004(B)(3). The court must then order the facility holding the parent to allow the parent to participate telephonically in the court hearing. MCR 2.004(C). The statute's stated reason for requiring telephonic participation is to "assure that the incarcerated party's access to the court is protected" by providing incarcerated parents sufficient notice and an opportunity to respond and by allowing the judge to determine if the parent needs appointed counsel. MCR 2.004(E).

Another aspect of the state's interest is that it "shares the parent's interest in an accurate and just decision ... accurate and just results are most likely to be obtained through the equal contest of opposed interests ... the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." *Lassiter*, 452 U.S. at 27-28. See also *Matter of K.L.J.*, 813 P.2d at 280 ("The state has no legitimate interest in terminating a parent's relationship with his child if he has not willfully neglected or abandoned that child ...[a]ppointment of counsel will make the fact-finding process more accurate, thereby furthering the state's interest in terminating the rights of parents who do in fact neglect or abandon their children ...". As *K.L.J.* concluded, "the state's interest in its citizens receiving a just determination on such a fundamental issue cannot be open to question." *Id.* While the state also has a fiscal interest, even *Lassiter* recognized that "it is hardly significant enough to overcome private interests as important as those here." 452 U.S. at 28.

Relying upon *Reist,* numerous decisions from the Michigan Court of Appeals and some judges of this Court have held that there is a right to counsel under the Michigan Constitution in

TPR cases.[27] While *Reist* may not be binding precedent due to the split decision, its reasoning was and continues to be sound. The magnitude of the parental interest, the extraordinary risk of erroneous deprivation, and the state's interests that coincide with the parent's place the balance strongly in favour of finding a categorical right to counsel in TPR cases.

II. Appellant's Right to Counsel Under the U.S. Constitution Was Violated.

Amici endorse the analysis of Appellant and the Attorney General that clearly establishes that Appellant was denied his right to counsel under *Lassiter* and the United States Constitution. *Amici* would also note again that, as discussed in I.C *supra*, *Lassiter*'s use of the "outcome-determinative" is not binding upon this Court in its analysis of Appellant's rights under the U.S. Constitution. *Lassiter*, 452 U.S. at 32.

III. Appellant's Constitutional Due Process Rights were Violated when the Trial Judge Arbitrarily Violated Appellant's State Statutory Rights.

Amici endorse the arguments of the Appellant and the Michigan Attorney General that the trial court's failure to involve Appellant in the proceedings and appoint him counsel constituted violations of MCL 712A.17c, MCR 2.004, and MCR 3.915. *Amici* also endorse Appellant's argument that the arbitrary and discriminatory violations of Michigan state statutory law deprived Appellant of his due process rights under the United States Constitution. The

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[27] Such opinions include the appellate decision in the instant case; *In re Clemons*, supra; 2008 WL 3851592 at *3 (Mich. App. 2008) (per curiam); *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2001); *In re Trowbridge*, 155 Mich App 785, 786; 401 N.W.2d 65 (1986) (per curiam); *In re Cobb*, 130 Mich App 598, 600; 344 N.W.2d 12 (1983). In *In re Hudson*, Justices Kelly and Corrigan wrote a separate concurrence referencing the "constitutional right to counsel" recognized by Michigan courts and favorably citing *Reist, Powers and Cobb*. 2009 WL 943845 at *8-9.

statutes and court rules combined are intended to ensure a parent's "meaningful participation" in the proceedings, which is a requirement of basic due process.

IV. The Violation of A Parent's State and Federal Constitutional Rights Is Structural Error Requiring Automatic Reversal.

A. *Lassiter*'s "Outcome Determinative" Language is Irrelevant to the Question of the Proper Reversal Standard.

In its brief, in discussing *Lassiter*'s use of an "outcome determinative" test, Appellee conflates the question of whether a parent is entitled to counsel with the question of whether the improper denial of counsel is subject to a "harmless error" analysis. In *Lassiter*, the Supreme Court determined that Ms. Lassiter did not have the right to counsel. 452 U.S. at 33 ("In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.") There was thus no reason for the Court to articulate a standard of review should error actually occur, nor did the Court say anywhere that it was doing so. The few jurisdictions to utilize the outcome-determinative language have not used it as a reversal standard, but only to determine whether the right to counsel existed in the first instance.[28] Therefore, the "outcome determinative" language used in *Lassiter* is utterly inapposite to the question of the proper reversal standard.

Even courts that *have* used an outcome-determinative test in part to determine whether there is a right to counsel have explained that such a test should not be viewed as a direct equivalent to a harmless-error test. With respect to the former, a parent "need only demonstrate that there is a reasonable likelihood that the outcome *might* have been different", which is "an interest analysis under *Mathews* that looks to whether the error produced an unjustifiable risk of

[28] See *e.g. Clark v. Arkansas Dept. of Human Services,* 90 Ark.App. 446, 458; 206 S.W.3d 899 (2005) ("The right to counsel must be analyzed in light of two major factors: 1) whether or not the case presented any specially troublesome points of law, and 2) whether or not the presence of counsel could have made a determinative difference.").

an erroneous decision." *State ex rel. Children, Youth & Families Dept. v. Maria C.*, 136 N.M. App. 53, 65 n.4; 94 P.3d 796 (2004). This analysis is "different from a harmless error analysis which is an 'outcome-based search for *actual* prejudice.'" *Id.* (emphasis added).

B. This Court Has Held that a Structural Defect Requires Reversal.

In *People v. Carines*, 460 Mich. 750, 774; 597 N.W.2d 130 (1999), this Court provided an Appendix outlining the different standards of reviewing error on appeal. The Appendix, which did not state that it was confined to review of error in criminal cases, held that preserved constitutional errors are subjected to a "harmless beyond a reasonable doubt" standard *unless* the error was a "structural defect that defies analysis." *Id.* The standards in the Appendix reflected this Court's decision in *People v. Anderson*, 446 Mich. 392, 404-05, 521 N.W.2d 538 (1994), which had specifically held that "the complete deprivation of the right to trial counsel" was a structural error. The Michigan Court of Appeals has frequently cited *Carines* and extended its error review standards to civil cases involving TPR proceedings.[29]

C. It is Clearly Established in Criminal Law Jurisprudence that a *Complete* Denial of Appointed Counsel is Structural Error Requiring Automatic Reversal.

Throughout the development of the United States Supreme Court's "harmless error" doctrine, one of the few constants has been the Court's repeated holding that a complete denial

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[29] *In re Hatton*, unpublished opinion of the Court of Appeals, issued Feb. 24, 2005 (Docket Nos.257533) 2005 WL 433621 (court applies "plain error" standard for review of unpreserved error); *In re McKissack*, unpublished per curiam opinion of the Court of Appeals, issued Jan. 24, 2006 (Docket Nos. 262816, 262817) 2006 WL 173174 (same); *In re Anders*, unpublished opinion of the Court of Appeals, issued May 22, 2007 (Docket No. 274226) 2007 WL 1491852 (applying "preserved constitutional issue" standard of "harmless beyond a reasonable doubt"); *In re Guntle*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 12, 2006 (Docket Nos. 269023, 269889); 2006 WL 2918934 (same); *In re Brinkman*, unpublished per curiam opinion of the Court of Appeals, issued May 12, 2005 (Docket Nos. 259377, 259378, 259379, 259383); 2005 WL 1124104 (same).

of counsel for the entire length of criminal proceedings requires automatic reversal because harm or prejudice from the denial is assumed. *United States v. Cronic,* 466 U.S. 648, 658 (1984) (noting that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel."); *Bell v. Cone*, 535 U.S. 685, 695 (2002) (trial is "presumptively unfair ... where the accused is denied the presence of counsel at a critical stage.")

Over time, the Court has scaled back the range of constitutional errors that mandate automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (noting that Court has "adopted the general rule that a constitutional error does not automatically require reversal of a conviction"). However, it has continued to maintain that complete denial of counsel still requires such a reversal. *Hereford v. Warren,* 536 F.3d 523, 529 (6th Cir. 2008) ("[t]he Supreme Court has 'found structural error only in a very limited class of cases' ... [including] total deprivation of the right to counsel ....")[30]

D. One Primary Justification for Applying Automatic Reversal in the Criminal Context When Counsel is Completely Denied is the Impossibility of Determining Error, and This Concern Is Equally Valid in the Civil Context.

The U.S. Supreme Court has held that a complete deprivation of counsel is a kind of "structural error" that "def[ies] analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at

[30] Honoring the Court's repeated concern about fundamental fairness where counsel is denied, the federal courts have overwhelmingly held that a violation of Federal Rule of Criminal Procedure 8(c) (requiring appointment of counsel for evidentiary hearings) also requires automatic reversal. *Graham v. Portuondo*, 506 F.3d 105, 107 (2d Cir. 2007) (per curiam) (noting that all seven federal appellate courts to consider the issue have held that violation of Rule 8(c) "is not subject to harmless error review and requires vacatur or reversal"). The *Graham* court rejected the argument that automatic reversal would cause "a waste of public funds or the curtailment of evidentiary hearings," finding that in fact the appointment of counsel makes hearings *more* effective. *Id.* at 108.

309. In *U.S. v. Gonzalez-Lopez*, where the Court found that the deprivation of the *choice* of particular counsel (arguably a lesser deprivation than complete deprivation) was also a structural error defying analysis, Justice Scalia explained such a deprivation was distinct from ineffective assistance of counsel because for the latter:

> [w]e can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel - in matters ranging from questions asked on voir dire and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently - or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.

548 U.S. 140, 150-51 (2006). To attempt harmless error analysis in this scenario, Justice Scalia concluded, was to engage in "a speculative inquiry into what might have occurred in an alternate universe." *Id.* at 150.

Justice Scalia's reasoning applies with greater force when counsel is absent altogether: it is impossible to determine what an attorney might have been able to discover or argue had such an attorney been involved from the earliest stages. Nor would this determination be any easier simply because a case is civil: the same questions arise about how to determine what might have occurred in the "alternative universe" where counsel would have been present. As the Michigan Court of Appeals put it with respect to a parent being absent (although her attorney was present), the court is "not in a position to know whether in fact any prejudice resulted." *Matter of Render*, 145 Mich. App. at 349 (citation omitted). And as Justice Blackmun explained, an appellate court is not in a good position to review the trial court's denial of counsel for error:

> The [majority opinion in *Lassiter*] assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered an [un]fair disadvantage.

> But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial, and a court's inability to compensate for them effectively eviscerates the presumption of innocence. Because a parent acting pro se is even more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented.

452 U.S. at 50-51 (Blackmun, J., dissenting).

In other words, there is an inherent logic problem with engaging in a post-*hoc* assessment of the likelihood of error where counsel has been denied altogether, regardless of whether the case is criminal or civil. Specifically, while a review of the denial of counsel is de novo,[31] the trial record relied upon by the appellate court for "harmless error" review is biased and incomplete because it is developed without the benefit of counsel representing the parent's interest, often completely eliminating any likelihood that it will reveal *any* merits of the parent's case that might have led to a different outcome. Moreover, even if a parent is fortunate enough to secure counsel for the appeal, counsel will be limited to arguing whatever skeletal evidence was in the trial court record, and will not be able to adduce new evidence.[32]

This situation creates an unavoidable Catch-22: only in situations where a parent has been appointed counsel and thus "afforded an opportunity of developing a record upon which his rights may be intelligently and certainly determined", *Atkins v. Moore*, 218 F.2d 637, 638 (5th

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[31] *Cardinal Mooney High School v. MHSAA*, 437 Mich. 75, 80; 467 N.W.2d 21 (1991); *Sidun v. Wayne Co. Trasurer*, 481 Mich. 503, 508; 751 N.W.2d 453 (2008).

[32] *Amorello v. Monsanto Corp.*, 186 Mich.App. 324, 330; 463 N.W.2d 487 (1990) ("this Court's review is limited to the record presented in the trial court ... Enlargement of the record on appeal is generally not permitted"); MCR 7.210(A) ("Appeals to the Court of Appeals are heard on the original record.")

Cir. 1955) (per curiam) (capital case), can the record have been adequately developed and the risk of error be accurately assessed. Courts have acknowledged this dilemma. *State, ex rel. Adult and Family Services Division v. Stoutt*, 57 Or.App. 303, 312; 644 P.2d 1132 (1982) ("[I]t is circular to look to the record to determine whether counsel could have affected the result, when one of the principal missions of counsel in any litigation is to develop the record."); *J.C.N.F. v. Stone County Dept. of Human Services,* 996 So.2d 762, 771 (Miss. 2008) (conceding that presence of counsel "may have greatly changed the hearing transcript now before this Court"). See also Patton, 27 Loy. U. Chi. L.J. at 203 ("Because one of the prime responsibilities of a zealous advocate is fact investigation, it is impossible to determine what additional evidence might have been presented had counsel been appointed");

As the Supreme Court has said about TPR proceedings, "[g]iven the weight of the private interests at stake, the social cost of even occasional error is sizable." *Santosky*, 455 U.S. at 764. The post-*hoc* search for error when counsel is completely denied involves such rampant speculation that the risk of drawing an errant conclusion about the likelihood of harm rises to the point of unacceptability, especially when considered in light of the parental interests at stake.

E. The Automatic Reversal Standard for Criminal Cases is Appropriate for TPR Cases Because Courts Have Established That the Key Factor in Applying a Criminal Procedural Protection to a Civil Case is the Strength of the Right at Issue, and Not the "Civil" or "Criminal" Case Label.

In examining whether certain procedural protections developed in the criminal law arena are appropriate for civil cases, courts have repeatedly disdained the "civil" and "criminal" labels and focused instead on what right is actually at stake. *Rutherford v. Rutherford*, 296 Md. 347, 361; 464 A.2d 228 (Md. 1983) ("As repeatedly pointed out in criminal and civil cases, it is the fact of incarceration, and not the label placed upon the proceeding, which requires the

appointment of counsel for indigents."); *Banks v. Randle*, 337 Pa.Super. 197, 200; 486 A.2d 974 (Pa. Super. 1984) ("the civil/criminal distinction is unavailing in determining whether counsel is constitutionally required ... A resolution of this question cannot be reached by applying a wooden civil/criminal distinction ... That approach has been abandoned in favor of an emphasis on the nature of the threatened deprivation.") *Lassiter* itself stands for the proposition that, "in determining whether due process requires the appointment of counsel for an indigent litigant in a particular proceeding, a court must first focus on the potential curtailment of the indigent's personal liberty rather than on the 'civil' or 'criminal' label placed on the proceeding." *McBride*, 334 N.C. at 126 (citing to and relying on *Lassiter* to reverse court's own precedent in order to find right to counsel in civil contempt cases).

One type of procedural protection that has been carried over from the criminal to civil context is the right to counsel itself. A majority of courts have found an absolute right to counsel in civil contempt proceedings that parallels the right for criminal contempt by focusing on the strength of the liberty interest and ignoring the "label" of the case. *Colson v. Joyce*, 646 F. Supp. 102, 105 (D. Me. 1986) ("all [federal] Circuit Courts of Appeals that have considered the question have found that there is a right to counsel in civil contempt proceedings at which incarceration can be imposed"), *aff'd*, 816 F.2d 29 (1st Cir. 1987).

In *Sword*, this Court originally held there was no right to counsel in civil contempt cases. In reaching this conclusion, the court focused heavily on the idea that "[t]he entire purpose and thrust of the civil proceedings are different from those of criminal contempt - as is the result." 399 Mich. at 380-83. In overruling *Sword* fourteen years later, *Mead* started by holding that "[t]he right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation

of liberty." 435 Mich. at 495. It acknowledged the growing national trend of looking past the "civil" and "criminal" labels in this fashion, and stated that "to the extent that *Sword* turned on the civil-criminal dichotomy, it might now be regarded as an anomaly." *Id.* at 489, 497-98. Commenting that the civil/criminal distinction was "a fine one, and is rarely as clear as the state would have us believe", *Mead* concluded that, "[i]t would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used." *Id.*

Additionally, in finding that fathers in paternity hearings are entitled to counsel, this Court in *Artibee* focused on the strength of the liberty interest at stake and not the label on the proceedings. *Artibee* recognized that the outcome of paternity proceedings "is of great importance both to the defendant and to the state" and that "many procedural safeguards attendant to criminal trials have been made applicable to [civil] paternity proceedings." 397 Mich. at 59. Thus, the procedural safeguard of requiring counsel was appropriate.[33]

As this Court has said, "Due process requires fundamental fairness, which is determined in a particular situation first by 'considering any relevant precedents and then by assessing the

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[33] Other rights besides personal liberty (i.e., incarceration) have justified the extension of certain criminal procedural protections to civil cases. For instance, recognizing that the basic right to a "fair trial" is no different in the civil context than in the criminal, a number of federal courts have extended the prohibition against shackling of a party in front of a jury to civil cases. In *Lemons v. Skidmore,* 985 F.2d 354, 357 (7th Cir. 1993), the Seventh Circuit held that the trial judge erred in allowing a § 1983 prisoner-plaintiff to be shackled at trial in front of the jury without a prior determination of dangerousness. Pointing out first that "[t]here is a constitutional right to a fair trial in a civil case," the court acknowledged that while shackling prohibitions developed in the criminal context, "the rationale for the rulings is directly relevant to this case. The courts found that the appearance of the defendant in shackles would prejudice the jury ...." *Id.* See also *U.S. v. Zuber*, 118 F.3d 101, 103 (2d Cir. 1997) ("Courts have recognized the danger [of shackling] ... to a party to civil litigation"); *Tyars v. Finner*, 709 F.2d 1274, 1285 (9th Cir. 1983) (noting in civil shackling case that "although the criminal case precedents do not necessarily apply in a civil proceeding, we find them persuasive").

several interests that are at stake.'" *In re Brock*, 442 Mich at 111 (quoting *Lassiter*). In this light, there are numerous examples of courts, including Michigan courts, extending procedural safeguards developed in the criminal context to civil cases due to recognition of a) the important interest at stake; and b) the fact that the danger justifying the protection in the criminal case is just as extant in the civil context. The automatic reversal standard for the complete denial of counsel is one such criminal procedural protection that merits application to the TPR context. And as shall be seen below, courts have already seen fit to extend other procedural protections to TPR cases based on the strength of the right at stake.

F. Based on the Strength of the Parental Interest, Courts Have Already Extended Various Criminal Procedural Protections to TPR Cases in Particular.

As discussed in Section II.D, *supra*, both the United States Supreme Court and this Court have recognized the "commanding" parental interest at stake, and the "drastic" effect that TPR has on that parental right. *Lassiter,* 452 U.S. at 27; *Reist*, 396 U.S. at 344 n.23. In fact, the utter importance of the parental right has led courts to directly compare it in strength to the personal liberty interest at stake in criminal cases. *In re Katrina R.*,unpub opinion of the Ct of App, 4th Dist., CA, issued Dec. 13, 2004 ("As with criminal proceedings, in dependency proceedings the defendants and parents face the deprivation of a fundamental constitutional right via adjudicatory processes. Such adjudicatory processes share similar attributes ... regardless of whether the right to liberty or the right to parent is at stake ..." (citation omitted)); *Judith P. v. Superior Court,* 102 Cal.App.4th 535, 556; 126 Cal.Rptr.2d 14 (2002) ("[t]he bottom line in both criminal and dependency proceedings is that both defendants and parents face the deprivation of a fundamental constitutional right via adjudicatory processes"); *In re Adoption of R.I.*, 455 Pa. 29, 31; 312 A.2d 601 (1973) (while cases establishing right to counsel for deprivation of "substantial

rights" are criminal cases, "the logic behind them is equally applicable to a case involving an indigent parent faced with the loss of her child ... whether the proceeding be labelled 'civil' or 'criminal,' it is fundamentally unfair, and a denial of due process of law" to deny counsel to parent (citation omitted)).

In recognition of the need for elevated protections in TPR proceedings to protect the vital parenting right, there have already been extensions of some criminal law protections to TPR cases. In *Santosky*, the U.S. Supreme Court justified elevating the standard of proof for TPR cases from "preponderance of the evidence" to "clear and convincing" by drawing an analogy to criminal cases, where such heightened proof requirements are "a prime instrument for reducing the risk of convictions resting on factual error." 566 U.S. at 764 (citation omitted). The Court specifically tied the need to reduce error to the importance of the parental interest, commenting that, "given the weight of the private interests at stake, the social cost of even occasional error is sizable." *Id.* The Court opined that the elevated proof requirement would "impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered." *Id.* at 764-65 (citation omitted).

Courts have also extended the "ineffective assistance of counsel" doctrine to TPR proceedings in order to give substance to the right to counsel. The Supreme Court has held that in criminal cases, there is a right to plead ineffective assistance of counsel on appeal because the fact that "a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command ... An accused is entitled to be assisted by an attorney ... who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Looking to *Strickland*, the vast majority of courts have extended this claim to TPR proceedings by noting both the strong liberty in parenting and the

due process need to make the appointment of counsel more than just an "empty formality."[34] The "majority rule" is to apply the exact same "ineffective assistance" test from the criminal context to the civil context, rather than a lesser standard.[35]

The Michigan Court of Appeals has followed suit in extending ineffective assistance claims to child protection cases, relying on the same concern about evisceration of the right to counsel and the subsequent effect on the parental right. *In re E.P.*, 234 Mich App 582, 597-98; 595 N.W.2d 167 (1999) ("[a]lthough the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings"), *overruled on other grounds*, *In re Trejo*, 462 Mich. 341, 612 N.W.2d 407 (2000); *Matter of Trowbridge*, 155 Mich App 785, 786; 401 N.W.2d 65 (1986) (per curiam) (for TPR proceedings, "[i]t is axiomatic that the right to counsel includes the right to competent counsel. We apply by analogy the principles of ineffective assistance of counsel as they have developed in the context of criminal law"); *In re Simon*, 171 Mich App 443, 447; 431 N.W.2d 71 (1988) (per curiam); ("[i]n analyzing claims of ineffective assistance of counsel at termination [of parental rights] hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context.")

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[34] In *In re K.L.*, 91 S.W.3d 1, 12 n.64 (Tex.App. 2002) (listing cases from twenty five different jurisdictions that have recognized the "ineffective assistance of counsel" claim in the TPR context, and commenting that "[i]t would seem a useless gesture on the one hand to recognize the importance of counsel in termination proceedings, as evidenced by the statutory right to appointed counsel, and, on the other hand, not require that counsel perform effectively."); *In re Heston*, 129 Ohio App.3d 825, 827; 719 N.E.2d 93 (1998) (given that TPR proceedings involve "the loss of parents' 'essential' and 'basic' civil rights to raise their children", ineffective assistance test "used in criminal cases is equally applicable to [TPR] actions ...")

[35] *Matter of Termination of Parental Rights of James W.H.*, 115 N.M. 256, 259; 849 P.2d 1079 (N.M. App. 1993).

Michigan courts have also analogized between criminal and TPR cases with respect to waiver of the right to counsel, holding that the criminal standard protecting defendants should apply in civil cases "involving ... a due process right to counsel." *In re Cobb*, 130 Mich. App 598, 601; 344 NW 2d 12 (1983). In *Cobb,* the parent at issue originally waived her right to counsel but later reasserted it prior to the final termination hearing. The lower court refused to reappoint counsel, but the Court of Appeals reversed and relied on the fact that defendants in criminal cases are allowed to withdraw their waiver of counsel at any time provided the withdrawal will not prejudice the "orderly progress of the case. *Id.* at 600. The court concluded that "[w]e believe these same principles should apply in the present case, involving as it does a due process right to counsel ..." *Id.* at 601.

Amici would agree that not *all* criminal procedural protections are automatically applicable to TPR proceedings. *In re Brock*, 442 Mich. at 108 ("the rules applicable in child protective proceedings [] differ from those applicable in criminal cases"). For instance, in *In re Brock*, the court declined to extend the criminal procedural right to confrontation of witnesses to protective proceedings because "the purpose of child protective proceedings is the protection of the child, while criminal cases focus on the determination of the guilt or innocence of the defendant." *Id.* at 119. Moreover, the court concluded, "it is uncertain whether the added procedural safeguard, here the opportunity to cross-examine the child, would aid in the truth-seeking goal of the adjudicative hearing." *Id.* at 112.

However, this Court and others have not hesitated to apply criminal standards to TPR proceedings when the logic behind the protection's existence is equally applicable to TPR and where the protection is necessary to fully protect parental rights or the right to counsel. Moreover, the typical justifications for providing less due process for TPR proceedings do not

apply when considering an appellate review standard.[36] Given that the logic and reasoning behind the Supreme Court's creation of the automatic reversal standard in the criminal context is equally applicable to TPR cases, and given that the parental interest at stake in a TPR case is a "commanding" one, *Lassiter*, it is entirely appropriate to apply this particular procedural protection to the right to counsel in TPR cases, in order to avoid an evisceration of that right.

V. As a Matter of Law, the Complete Failure to Appoint Counsel As Required by Statute Alone Seriously Affects the Fairness of Judicial Proceedings, Making a Reversal Necessary.

In *Carines*, this Court established that unpreserved statutory errors require a party to show that there was plain error that affected substantial rights and "seriously affected the fairness, integrity, or public reputation of judicial proceedings." 460 Mich. at 774. While this case involves preserved constitutional and statutory error, *amici* submit that even if reviewed under the standard for unpreserved statutory error, the complete denial of counsel in a TPR case always will always require reversal because such denial "seriously affects the fairness of judicial proceedings" as a matter of law.

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[36] Patton, *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 Whittier L. Rev. 537, 545-46 (1991) ("First, the need for informal procedures, which has served as the justification for denying fully adversarial trials in hearings to determine parents' rights, lends no support for choosing the harmless error standard for Lassiter error. The need for a non-adversarial atmosphere does not exist on appeal as it might in proceedings pitting the parents against their children at trial; the selection between per se reversal and a harmless error standard is irrelevant to the quality of the future relationship among parents and children. Second, the need for special procedural protections for children in the hearing does not exist. Third, as commentators have demonstrated, the harmless error standard requires more judicial resources than a per se rule and thus does not promote judicial economy. Further, the state's interests in fiscal responsibility is intimately related with its interest in accurate fact finding. This interrelationship between the state's fiscal responsibility and its interest in accurate fact finding arises because if the absence of counsel at the dependency or parental severance trial robs the trial court of critical data which might have led the court to continue the family relationship, the state will be needlessly forced to expend tens of thousands of dollars caring for the child in foster or institutional care until the age of majority.")

A. Automatic Reversal in Criminal Cases is Based on the Recognition that the Complete Denial of Counsel Makes it Impossible as a Matter of Law for a Trial to be "Fair".

One reason the U.S. Supreme Court has given as to why complete deprivation of counsel in a criminal case requires the procedural safeguard of automatic reversal is the impossibility of a "fair trial," particularly worrisome when a fundamental right is at stake. The Court has explained that "[s]ome constitutional violations ... by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). These kinds of violations, like the complete denial of counsel, infringe upon a right "so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman v. California*, 386 U.S. 18, 23 (1967), and they "infect the entire trial process ... and necessarily render a trial fundamentally unfair ..." *Neder v. U.S.*, 527 U.S. 1, 8 (1999) (citations omitted).

Like other courts, Michigan courts have appropriately recognized that the need for a fair trial exists in the civil context as well. As this Court said in a civil case, "[d]ue process of law ... imports the right to a fair trial of the issues involved in the controversy and a determination of disputed questions of fact on the basis of evidence." *Napuche v. Liquor Control Comm.*, 336 Mich. 398, 403; 58 N.W.2d 118 (1953) (citation omitted). See also *Hlifka v. Higgins*, unpub. per curiam opinion of the Ct of App, issued July 1, 2004 (No. 244355) 2004 WL 1485955 (plaintiff in civil case argued trial was unfair because of alleged improper conduct by defense attorney; court notes that essential question is "did an attorney's misconduct deny a party a fair trial").

Courts have recognized the inherent impossibility of fairness in a TPR case where counsel is completely denied.. In *Matter of Adoption of K.A.S.*, ___ N.D. ___; 499 N.W.2d 558, 567 (1993), the court pointed out that it is "an axiom in criminal cases that counsel enables an accused to procure a fair trial ... and the formality of these termination and adoption

proceedings, along with their substantial threat to a fundamental interest of the parent, is not so different from those in a criminal case." *Id.* The court added that it was skeptical that the denial of counsel in a TPR proceeding "can ever be 'harmless,' under any standard." *Id.* Although it declined to reach the question of the proper standard because it found the denial harmful, its basis for finding harm was only that "[a]t several points during the proceedings, [the father] demonstrated his lack of knowledge of the law and his consequent need for assistance from an attorney. The law of adoption and the procedure for terminating parental rights in a contested case are complex and demanding." *Id.* at 567-68. In other words, its finding of error was based entirely on the unsophistication of the parent and the complexity of the procedures, and it found both factors to severely limit the possibility of a fair trial absent counsel. Such a finding is tantamount to holding that such a denial seriously affects the fairness of judicial proceedings as a matter of law.

Michigan courts have also recognized the impossibility of fairness where counsel is completely denied. In *In re Clemons*, a trial court failed to advise a parent of her right to counsel in a TPR proceeding. 2008 WL 3851592 at *3. While the Court of Appeals was required to apply a "harmless error" standard since the parent had failed to preserve the constitutional question for appeal, the court also held that the denial of counsel "alone .... requires reversal because the error affected the fundamental fairness of the proceedings." *Id.* This holding properly recognized the severe impact of the denial of counsel alone on fundamental fairness for TPR proceedings. See also *Mead*, 435 Mich. at 501-02 ("since the state's representative at such a hearing is well versed in the laws relating to child support, fundamental fairness requires that the indigent who faces incarceration should also have qualified representation.")

In *In re Rood*, this Court remanded to the trial court and held that "[r]espondent ,... was denied due process because the proceedings lacked 'fundamental fairness,' which is required before parental rights may be terminated." 2009 WL 875532 at *18 (citation omitted). When counsel is erroneously denied in a TPR case from the outset, the error "infects" the entire trial process and creates as much doubt about the fairness of the trial as does a denial of counsel when personal liberty is at stake. For the same fundamental fairness reasons articulated by the U.S. Supreme Court for criminal cases, the automatic reversal standard should apply to TPR cases because "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id* at *1, quoting *Santosky*, 455 U.S. at 753-754; *see also Matter of Render*, 145 Mich App at 347 (in TPR case, "The requirements of due process in this context are much greater than in the ordinary civil action.")

B. A Number of Jurisdictions Have Automatically Reversed Violations of a Statutory Right to Counsel Because of the Impact on Fundamental Fairness.

Recognizing that the harm caused by the violation of the statutory right to counsel in TPR cases is just as undeniable as a denial of the constitutional right in a criminal case, some courts have already held that the significant interest at stake in TPR cases mandates a "per se harmful" standard for a denial of the statutory right to counsel, and have cited the fundamental unfairness of requiring a parent to proceed without appointed counsel to which they are entitled by right.

In *In re Torrance P., Jr.*, 298 Wis.2d 1, 28; 724 N.W.2d 623 (2006), the Wisconsin Supreme Court noted that "[t]he statutory right to the assistance of counsel in a termination of parental rights proceeding is, according to the Wisconsin legislature, essential to a fair proceeding." The court then observed that in criminal cases, where "counsel is viewed as essential to fair proceedings," reversal for complete deprivation of counsel is automatic. *Id.* It

then concluded that a similar deprivation in a TPR case "deprives the parent of a basic protection without which, according to our legislature, a termination of a parental rights proceeding cannot reliably serve its function" and that "[T]he fairness and integrity of the judicial proceeding that the legislature has established for termination proceedings has been placed in doubt when the statutory right to counsel is denied a parent." *Id.* at 29.

Only a few weeks ago, the Georgia Court of Appeals reversed its own precedent and held that parents denied their statutory right to counsel did not have to demonstrate harmful error. *In re J.M.B.*, ___ Ga.App. ___; 2009 WL 724119 at *4 (2009). In reaching this conclusion, the court held that "when the state is terminating a parent's 'fundamental and fiercely guarded right' to his or her child, although technically done in a civil proceeding, the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process." *Id.* The court also relied on the Georgia Supreme Court's mandate that TPR proceedings "should be attended only by the most stringent procedural safeguards." *Id.* at *2 (citing *Sanchez v. Walker County Dept. of Family and Children Services*, 237 Ga. 406, 411; 229 S.E.2d 66 (1976)).

See also *Williams v. Bentley*, 26 A.D.3d 441, 442; 809 N.Y.S.2d 205 (2006) ("The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position"); *In re Evan F.*; 29 A.D.3d 905, 906; 815 N.Y.S.2d 697 (2006) (same); *Richard v. Michna*, 110 N.C.App. 817, 822; 431 S.E.2d 485 (1993) (where trial court failed to appoint guardian ad litem for mentally disabled mother in TPR proceeding as required by statute, court reversed even though court believed mother was not prejudiced); *In re S.S.*, 90 P.3d 571, 575-76 (Okla. Civ.App. 2004) (in TPR case, parent deprived of counsel for first half of proceedings;

court holds that "the actual or constructive denial of assistance of counsel altogether is *legally presumed to result in prejudice* ...When a defendant is deprived of counsel, it is inappropriate to apply either the prejudice requirement or the harmless error analysis ...").

VI. Requiring Automatic Reversal or Finding That a Complete Denial of Counsel in a TPR Case Always "Seriously Affects the Fairness of Proceedings" Satisfies Michigan's Policy Interest in Preventing Natural Parents from Being Erroneously Separated From Their Children.

Appellee asserts that an automatic reversal rule would "undermine the overriding goal of permanency planning – i.e., to get the child[ren] into a stable and permanent placement as soon as possible." Appellee's Brief at 24. However, "[t]he goal of reunification of the family must not be lost in the laudable attempt to make sure that children are not languishing in foster care while termination proceedings drag on and on." *In re Boursaw*, 239 Mich App 161, 176-77; 607 N.W.2d 408 (1999), *overruled on other grounds*, *In re Trejo*, 462 Mich. at 341. As this Court recently explained in *In re Rood*, there is a complex statutory framework in place that allows parents to maintain contact with their children and that requires DHS to work towards reunification, even after a petition for removal has been filed. 2009 WL 875532 at *9-11. Moreover, "'*natural parents,*' not just custodial parents, have a fundamental liberty interest 'in the care, custody and management of their child' and [] this interest persists although they are not 'model parents' and even if they 'have *lost temporary custody of their child* to the State.'" *Id.* at 18 (citing *Santosky*, 455 U.S. at 753).

The standard urged by Appellee – a "harmless error" review for every denial of counsel – will not hasten the resolution of cases, but will instead extend it. In addition to every constitutional right-to-counsel claim in a TPR case being subjected to a costly and time-consuming analysis of whether such claim meets the *Mathews* factors, such a claim will be

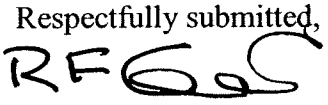
subjected to an additional case-by-case review on appeal as to whether the erroneous denial was harmless (which requires a de novo review of the entire record of the case) instead of an automatic reversal that will quickly resolve the matter. Alternatively, the existence of an automatic reversal standard, like the elevated proof standard, will likely "impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered." *Santosky*, 455 U.S. at 764.

CONCLUSION

While *Lassiter* may have complicated the ability to properly protect parental rights in TPR cases using the *federal* constitution, this Court can rectify the situation and fully protect parents by finding a state constitutional right to counsel in TPR cases in Michigan under art. 1, § 17. Michigan's history of constitutional jurisprudence, its recognition of the vital rights at stake in TPR cases, its extension of other procedural protections to TPR cases, and its prior holding in *Reist* all support such an outcome.

Moreover, because of the sheer impossibility of accurately determining error when counsel is utterly absent and the fundamental unfairness of a complete denial of counsel, the Court should hold that the complete denial of counsel (statutory or constitutional) either warrants automatic reversal or seriously affects the fairness of proceedings as a matter of law when parental rights are at stake. A proceeding with as much at stake as a TPR proceeding simply cannot be "fair" as a matter of law if counsel to which indigent parents are entitled is denied and such parents are forced to fend for themselves.

Respectfully submitted,



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