

No. _____

In the
Supreme Court of the United States

EDGAR DALE DILLON,

Petitioner,
v.

**WESTMORELAND DEPARTMENT
OF SOCIAL SERVICES,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Virginia Supreme Court correctly applied due process rights of *Lassister* to the Habeas Petition relief alleging ineffective assistance of counsel in a child removal proceeding?
2. Does a parent have a Due Process right to counsel in situations where state action severely interferes with the parental child relationship but is less than full termination of parental rights?

PARTIES TO THE PROCEEDING

Petitioner is Edgar Dale Dillon, an individual residing in the Commonwealth of Virginia.

Respondent is the Westmoreland Department of Social Services, a Virginia state agency.

CORPORATE DISCLOSURE STATEMENT

Not applicable

STATEMENT OF RELATED PROCEEDINGS

Pursuant to Rule 14.1(b)(iii) the Petitioner is not aware of any related proceedings.

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PETITION FOR WRIT OF CERTIORARI

There are not many things more serious than the state divesting a parent of their parental rights and removing children. Because of this, this Court set guidelines for lower courts to determine when parents facing termination of parental rights have constitutional Due Process rights to counsel in the case of *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). This Court did not create a bright line rule on when constitutional rights to counsel apply, however adopted factors for lower courts to decide. Since *Lassiter* inconsistent rulings between states have occurred, and in this case where the Virginia Supreme Court interpreted *Lassiter* can only be applied in termination of parental rights cases. Different states have produced opposite results since *Lassiter* of when parents are entitled to due process rights to counsel petitioner believes a clear rule needs to be established by this Court that when a parent is facing serious interference with the parents parental rights by state actions, that parent is entitled to counsel as a foundational issue of Due Process protections found in the Fourteenth Amendment.

OPINIONS BELOW

The Virginia Supreme Court's opinion is attached to this Writ as Appendix A. (App.1a-6a)

JURISDICTION

The Virginia Supreme Court issues its opinion on October 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

None. The Fourteenth Amendment of the United States Constitution is invoked in this Writ.

STATEMENT OF CASE

A. Legal Framework and Factual Background

On January 5, 2022, the Juvenile and Domestic Relations Court for Westmoreland County Virginia (“DSS”) entered identical adjudication orders for abuse or neglect cases involving minor children, C.S. and G.D. (“abuse orders”). The orders are foundational orders involving extreme prejudice to Edgar Dale Dillon. In October 2022, the Petitioner was charged with criminal show cause for contacting his children in violation of a foster care placement order. To resolve the criminal violation with dismissal of charges, the Appellant’s counsel acting as criminal counsel for the Petitioner, brokered a no-contact deal with DSS for the entry of a permanent child protective order until both children turn 18 years old and agreed to a modified Permanency Planning Order changing the concurrent goal of “return home” to the Petitioner to “adoption”. These orders were never appealed. The Petitioner has had all visitation to his children severed and his parental rights have been *de facto* terminated. The Petitioner has had no contact with his children in any manner since October 2022. All orders are final and the Petitioner will never see his children again until the no-contact orders expire on each child’s 18th birthday. (App. 2a) The Petitioner complained to the Virginia Supreme Court under Habeas Corpus relief of ineffective assistance of counsel. This was an original proceeding in the Virginia Supreme Court. The Virginia Supreme

Court dismissed the Habeas Corpus petition finding that the Petitioner had no right to counsel at any of the proceedings and therefore had no right to effective assistance of counsel. (App.4a.)

B. Proceedings Below.

The Petitioner avers he was provided ineffective assistance of counsel by his attorney and filed a Habeas Corpus Proceeding to the Virginia Supreme Court as allowed by Virginia law as an original proceeding. The Respondent filed a Motion to Dismiss and the Virginia Supreme Court dismissed the action finding that *Lassiter* only applies in parental termination cases. By reaching the decision, the Virginia Supreme Court opined that because the Petitioner had no right to counsel he had no right to effective assistance of counsel. The Virginia Supreme Court failed to address any of the merits of the Petitioners claims of ineffective assistance of counsel.

REASONS FOR GRANTING THE PETITION

I. The Virginia Supreme Court erred in finding the Petitioner had no right to counsel in a child removal proceeding.

A. A historical review of the *Lassiter* decision.

This is a case of government power *de facto* terminating the parental rights of the Petitioner to his children in a Department of Social Services Removal initiated removal proceeding. The Supreme Court of the United States has long recognized “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.). As such, parental rights are a valid Constitutionally recognized right.

This Court's decision in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), established that there is not an absolute constitutional right to counsel in parental termination cases, but rather, the need for appointed counsel must be determined on a case-by-case basis, considering the specifics of each case. This nuanced approach has influenced subsequent cases across various jurisdictions, reflecting on how courts apply the *Lassiter* holding to situations where parental rights are significantly restricted by the state. While this Court has not explicitly found that a parent has a constitutional right to counsel in child removal proceedings initiated by agencies like Child Protective Services, *Lassiter* established a framework for determining the necessity of appointed counsel in parental rights termination cases, which are a specific subset of child removal proceedings. In *Lassiter*, this Court concluded that there is not an automatic constitutional right to appointed counsel for indigent parents in termination of parental rights proceedings. Instead, the decision to appoint counsel should be made on a case-by-case basis, considering the specifics of each case.

This Court's decision in *Lassiter* was grounded in the application of the three factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) the private interests at stake, (2) the government's interest, and (3) the risk of erroneous decisions. This Court reasoned that only where the balance of these factors demonstrates that the absence of counsel could lead to fundamentally unfair proceedings would a due process violation be found. The Virginia Supreme Court interpreted *Lassiter* in the narrowest context finding that if there is not a parental termination case then the Court has no duty to apply the nuanced

approach of *Lassiter*. This is the error that requires this Court to expand *Lassiter* to cases that are less than actual termination of parental rights but still state action that severely limits parental rights such as removal proceedings and the issuance of no-contact orders between parent and child.

II. *Lassiter* needs to be redefined and expanded, and this is an excellent vehicle to resolve this exceptionally important Constitutional issue.

A. Parental rights require Due Process in every case when the state is severely limiting the parent child relationship.

The net result of the instant case is the Petitioner will never see his children again, as children, through state action of removal proceedings. A state removal process and the issuance of a permanent child protective order prohibiting all contact until the children are adults is in place. The Petitioner petitioned the Virginia Supreme Court to review the actions of his retained counsel under Habeas Corpus Relief complaining of Due Process violations of ineffective assistance of counsel. The Virginia Supreme Court did not address the question, instead finding that, pursuant to *Lassiter*, the Petitioner has no right to counsel since this was not a termination of parental rights case. While *Lassiter* itself does not directly address the broader context of all child removal proceedings, its principles have influenced how courts approach the question of appointing counsel for indigent parents in several types of child welfare cases. The case-by-case approach mandated by *Lassiter* requires courts to consider the specific circumstances of each case, including the potential

consequences for the parent's rights and the likelihood of an erroneous deprivation of those rights in the absence of counsel. *In re C.M.*, 163 N.H. 768 (NH 2012), *In re E.K.S.*, 387 P.3d 1032 (UT 2016).

Since *Lassiter*, Court's across the country are all over the place on how and when to appoint counsel. What is patently unfair in this process is a parent may have greater Due Process rights in one state than the other. A look at how some Courts have ruled on whether a litigant is entitled to counsel in non-criminal cases, pursuant to the Fourteenth Amendment Due Process Clause are discussed below.

The Eldridge factors, originating from *Mathews v. Eldridge*, 424 U.S. 319 (1976) was the foundation of *Lassiter* in determining the necessity of appointing counsel for indigent parents in child removal proceedings. The *Mathews* factors include: (1) the private interest at stake, (2) the government's interest, and (3) the risk of erroneous decisions. The application of these factors ensures a balanced consideration of the due process rights of indigent parents against the backdrop of state interests and procedural fairness.

In *Watson v. Division of Family Services*, 813 A.2d 1101 (Del 2002) the Delaware Supreme Court underscored the importance of these factors in child removal proceedings. The court emphasized that the due process clause requires a trial judge to weigh the presumption against the right to counsel, except where personal liberty is at stake, against the Eldridge factors. This balancing act is pivotal in deciding whether the failure to appoint counsel violates a parent's due process rights. The court further elaborated that in cases where the analysis

does not clearly favor one side, the judge should err on the side of appointing counsel to uphold the due process right to fundamental fairness in judicial proceedings. This approach aligns with the Supreme Court's directive in *Lassiter* where it held that the appointment of counsel in parental rights termination proceedings is not an absolute right but should be determined on a case-by-case basis, considering the specific circumstances of each case. The *Lassiter* decision also introduced an exception that the standard presumption against the right to appointed counsel if the parent's interests are at their strongest, the state's interests are at their weakest, and the risks of error are at their peak.

Similarly, the case of *In re A.F.-C.*, 307 Mont. 358 (Mont. 2001) from Montana highlighted that due process requires the appointment of counsel at the proceeding to terminate parental rights and did not preclude the appointment of counsel during earlier stages of child protective proceedings if due process so requires. This suggests a recognition of the critical nature of parental rights and the potential for significant impact on those rights in child removal proceedings.

The case of *In Interest of A.M.H.*, 516 N.W.2d 867 (IA 1994) further supports the notion that parents have due process rights in proceedings that could affect their relationship with their children. The Iowa Supreme Court acknowledged that state intervention to terminate the relationship between a parent and a child must be accomplished by procedures meeting the requisites of the Due Process Clause, underscoring the importance of procedural protections in such cases.

These cases collectively indicate a judicial recognition of the constitutional right to due process for parents in child removal proceedings. Courts have applied a nuanced approach, often requiring a case-by-case analysis to determine whether the appointment of counsel is necessary to ensure the fairness of the proceedings and protect the parent's due process rights. This approach reflects an understanding of the profound implications of child removal proceedings on parental rights and the necessity of due process protections in such contexts. Additional cases include:

The application of the *Eldridge* factors in child removal proceedings reflects a nuanced understanding of the due process rights of indigent parents. It acknowledges the profound impact such proceedings can have on parental rights and the importance of ensuring a fair and just process. By requiring courts to conduct a case-by-case analysis, considering the private and government interests involved as well as the risk of erroneous deprivation of parental rights, the *Eldridge* factors serve as a critical tool in safeguarding the constitutional rights of parents facing the removal of their children by the state. The Virginia Supreme Court in its final order completely disregarded the *Eldridge Factors* and how many of the cases cited previously in other states have interpreted *Lassiter* to mean that constitutional Due Process rights apply to many cases including child removal proceedings.

Courts across the nation have also found constitutional rights to counsel in other types of non-criminal cases applying the *Lassiter* factors. The Supreme Court of Utah in *L.E.S. v. C.D.M. (In re K.A.S.)*, 390 P.3d 278 (UT 2016), applied *Lassiter* to

conclude that the presumption against the right to appointed counsel in civil cases, including parental-rights termination proceedings, can be overcome when the parent's interest in appointed counsel is strong, the state's interest is weak, and the risks of error are high. *In re Emilye A.*, Cal. Ct. App., 9 Cal.App.4th 1695 (CA 1992) the court acknowledged that an indigent parent may have a constitutional right to counsel in dependency proceedings, particularly where the petition contained an allegation of sexual abuse, which could result in criminal charges against the parent. The court noted that dependency proceedings could be the first step toward the permanent severance of parental ties, which may invoke due process concerns like those in termination proceedings. Similarly, in *Christine P., in re*, Cal. Ct. App., 277 Cal. Rptr. 290 (CA 1991) the court discussed the application of the *Lassiter* analysis to child dependency proceedings, recognizing that such proceedings may also result in a unique kind of deprivation and may be the first step on the road to permanent severance of parental ties. The court suggested that the *Lassiter* analysis, which involves balancing the private interests at stake, the government's interest, and the risk of erroneous decisions, could apply to dependency proceedings as well.

In summary, while the U.S. Supreme Court has not directly ruled that parents have a constitutional right to counsel in all child removal proceedings, the *Lassiter* decision provides a legal framework for evaluating when appointed counsel may be necessary to protect a parent's due process rights in proceedings that could lead to the termination of parental rights. This framework requires a careful balancing of

interests and risks, with a focus on ensuring fairness in the legal process. While the cases provided do not explicitly establish a constitutional right to counsel in non-termination parental rights cases by citing *Lassiter*, there is an indication that the principles from *Lassiter* have been considered in other types of proceedings involving parental rights, such as dependency proceedings and removal proceedings and Courts have found that parents are entitled to counsel in other proceedings when state action substantially interferes with the parent/child relationship. Courts across the country have applied the *Lassiter* balancing test in these contexts to determine whether due process requires the appointment of counsel for indigent parents. However, while some state courts have interpreted *Lassiter* more liberally and expanded Due Process rights to a variety of “less-than” termination of parental rights cases, other states like Virginia are holding the position that *Lassiter* only applies to termination of parental rights cases. Petitioner avers that due to the conflicting nature of state courts throughout the country, that *Lassiter* needs to be revisited and clarified to make clear that the when the state is severely impacting the parental relationship, that the Fourteenth Amendment to Due Process applies which includes the right to effective counsel. If this exact same fact pattern occurred in Virginia or Montanna, once Supreme Court says there is no right to counsel in a removal proceeding and the other finds that there is. This means that the Petitioner may have had a chance at seeing his kids again in Montana but does not in Virginia. That is irreconcilable. Because this issue is a bedrock issue of parental rights, and a real and present conflict exists,

this Court should intervene to clarify *Lassiter* and expand the Constitutional Rights to parents involving actions by the state that severely impact their children.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Certiorari.

Respectfully Submitted,

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