

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TESSA CHILDRESS, a/k/a TESSA RANI RAYBOURNE GIBSON
CARLISLE CHILDRESS, filed as TESSA RANI RAYBOURNE
GIBSON CARLISLE CHILDRESS, PETITIONER,

v.

CITY OF CHARLESTON POLICE DEPARTMENT; LIEUTENANT
CHITO T. WALKER; OFFICER SANDERS; OFFICER KOEGLER;
SERGEANT RATLIFF; D-O FNU WILSON; D-O FNU;
D-O FNU GANT, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ineffectiveness of Appointed Counsel In a Civil Proceeding Present a Unique Opportunity for the Court to Require a Civil Gideon, and that Counsel's Performance Must Be Effective?

2. Whether counsel's shortcomings, and erroneous information, before a settlement conference deprived Petitioner of a meaningful opportunity to be heard, and therefore violated her right to due process of law under this Court's holdings in *Santosky v. Kramer*, 455 U.S. 745 (1982); and *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

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OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals, *Childress v. City of Charleston Police Department, et al.*, No. 17-2118 (4th Cir. Dec. 21, 2017) (Appendix A), is unreported. The District Court's Order of Dismissal with Prejudice, *Childress v. City of Charleston Police Department, et al.*, Civil Action No. 2:13-cv-01225-DCN (D.SC Sept. 22, 2017). (Appendix B)

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

JURISDICTIONAL STATEMENT

Tessa Childress, a/k/a Tessa Rani Raybourne Gibson Carlisle Childress (“Petitioner”), filed suit against the Respondents for excessive force, and other civil rights violations. The case proceeded to a settlement conference, after which the United States District Court for the District of South Carolina issued an Order of Dismissal with Prejudice on September 22, 2017 (Appendix B). Petitioner filed a timely appeal to the Fourth Circuit Court of Appeals from that Order.

The judgment of the Fourth Circuit Court of Appeals affirming the district court’s decision was entered on December 21, 2017 (Appendix A). Petitioner did not file a petition for rehearing from that judgment. A petition for writ of certiorari was due in this Court on or before March 21, 2018; however, March 15, 2018, the Honorable John G. Roberts Jr., Chief Justice, extended that deadline until on or before April 20, 2018 (Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner filed suit in the United States District Court for the District of South Carolina alleging that her constitutional rights were violated on April 16, 2013, by the Respondents, employees of the City of Charleston Police Department. Petitioner alleged that the named

Respondents detained her, questioned her about her medical history and forced her into medical. Petitioner also alleged that the officers committed assault and battery and threats of harm.

After nearly four years of litigation, the case proceeded to a contested, on Petitioner's part, settlement conference. At the conference's conclusion, the District Court issued an Order dismissing the case with prejudice. (Appendix B).

Appointed counsel abandoned Petitioner, so Petitioner filed a Pro Se appeal of that order, alleging ineffective assistance of counsel and other violations, to the Fourth Circuit Court of Appeals, and that Court affirmed.

A. Developments Prior to the Settlement Conference

Before the Settlement Conference, a conflict had developed between Petitioner and counsel, and Petitioner was having some severe reservations about settling the case without a trial by jury. At one point, Petitioner and counsel exchanged emails depicting problems in reaching a united front. For instance, on September 14, 2017, the following exchanges occurred:

Ms. Childress,

As you agreed earlier today, we made a demand of \$15,000. In response, the Defendants have increased their offer to \$10,000. At this point, we have two options. (1) we can accept the offer; of (2) we counter the demand and ask for more. As we discussed earlier today, Jennifer and I both think this is a very good result in this case, and recommend that you accept. Please let me know as soon as possible if you accept. The Defense counsel is in my office right now. Just as a reminder, this agreement would need to be signed by you, and would be between you and the police department, not Sgt. Ratliffe.

Please let me know by email or by phone....

(EM: 9/14/17 3:13 PM).¹ However, Petitioner was still hesitating, but counsel was able to overshadow her reluctance to some extent: "I accept the, \$10,000, because you recommended that I

¹ Reference to "EM" refers to email communications between Petitioner and Christopher Jaros, Esquire.

accept.” (EM: 09/14/17 5:10 PM). Yet, Petitioner still had questions: (1) “[W]ill anyone be able to further benefit from this case[,]” and (2) “Is \$10,000.00 considered a bribe?” *Id.*

Counsel again tried to address Petitioner’s concerns:

I will inform the defendants that you accept. We will also notify the Court so that they can remove us from the Jury Selection date and from the trial calendar. Defendants will draft a release for you to sign, and then we will most likely need to go to the Court on Wednesday so that the Court can enter the settlement and dismiss the case....

....

As for your questions: once you dismiss this case, you will not be able to bring additional claims against the named defendants for actions stemming from this incident on April 16, 2013. It will not affect any claims you have against anyone else or events that occurred after that date. Second, this is not considered a bribe; it is a settlement of a claim that you filed.

(EM: 09/14/17 5:36 PM). Counsel stated that Petitioner would be required to sign the agreement before the matter could proceed. However, Petitioner rejected the agreement and refused to sign it.

Despite Petitioner’s reluctance, and refusal to sign the settlement agreement, vis-a-vis, the Full and Final Release, the case proceeded to a settlement conference anyway. At that point, Petitioner directly informed counsel that she was not satisfied with counsel’s performance.

B. The Settlement Conference

On September 19, 2017, the District Court held a Settlement Conference, Petitioner as represented at the Conference by Mr. Jaros and Jennifer Thiem, for their part, Petitioner’s counsels offered the contested, unagreed to, terms of settlement to the court and the following transpired:

THE COURT: Y'all have something you want to put on the record, Mr. Jaros?

MR. JAROS: Good morning, Your Honor, Christopher Jaros here on behalf of Miss Tessa Childress, the plaintiff in this action. I would like to provide an update and see how we can proceed this morning.

First, with respect to settlement, Your Honor, as we had shared with chambers, we believe -- I believe that we had agreed on a voluntary sum with respect to settlement.

However, with respect to the terms of that agreement there was some concern expressed by our client, Miss Childress. We were trying to work through those issues, and those issues, at this point, have not been precisely resolved.

However, in speaking with Mr. Dorsel this morning, we were hoping that perhaps we may be able to use a different strategy, perhaps, simply dismissing the case with prejudice, in return for entering some information on the record with respect to what the obligations of the defendant in this action would be, if dismissal with prejudice was taken.

I'm not sure if, at this point, that is acceptable to the defendant....(SC.2).²

....

MR. JAROS: Second, with respect to our representation of Miss Childress in this action, during our discussion of these terms of settlement, Miss Childress has expressed some substantial concerns with respect to our representation, and has, in fact, requested that we no longer represent her. So, I would like to share that with Your Honor. I was hoping that we may be able to, notwithstanding that request, still consummate settlement today, before the case moves forward and anything further substantive.

(SC.3). The District Court, however, overlooked the latter remarks and proceeded:

THE COURT: Okay. So, can you tell me what the hang up is right now? I mean, so we can talk about it maybe?

MR. JAROS: A release, release agreement was provided by Mr. Dorsel, under which Miss Childress would agree to release claims that she had with respect to the allegations that were filed in the complaint, and would agree to release state, federal and constitutional claims, is what it stated in the release, with respect to the allegations in the complaint.

We have been unable to have a meeting of the minds between myself and Miss Childress regarding precisely what aspects of the agreement that she finds troublesome. But we have a copy of the most recent proposed release that we brought with us, if Your Honor would like to review it.

And that's where we stand, Your Honor.

² Reference to "SC" refers to excerpts of the Settlement Conference held on September 9, 2017.

THE COURT: Okay. Mr. Dorsel, the release language, I mean, if, in fact, the case is settled and the case is dismissed, I know this is standard practice to have a release, but this case is four years old, five years old. If, in fact, it was dismissed, could not be rebrought because of the statute of limitations would have run anyway, so I mean, is that a hang up for your client? I know that's normal practice you get a release just to cover everybody, but does your client insist upon a release, or is that satisfactory protection for you?

MR. DORSEL: The two other alternatives we discussed is either incorporating the release into the court record as an exhibit, or putting the terms of the settlement on the record, with a stipulation of dismissal with prejudice.

THE COURT: So if we put a settlement on the record with regard to payment of the money and in exchange for dismissal with prejudice, without a release, is that still -- that still takes care of the case, I understand, wouldn't it?

MR. DORSEL: I would believe so, yes, sir.

THE COURT: So we've gotten over the release aspect of it.

MR. JAROS: Yes. Although I would recommend to our client that that was a way to move forward, although of course ultimately it would be her decision, and I'm not sure what her position is at this moment.

THE COURT: You said she wanted to say something; I'll be glad to hear from Miss Childress. Yes, ma'am. You don't want to say anything?

(Plaintiff shakes head negatively.)

THE COURT: So do you want to just -- Miss Childress, you brought this lawsuit a long time ago, and I know you've had -- put a lot of time and energy and thought into this, this situation, and it's been -- I'm sure it's been preying on your mind for several years. Would that be a fair statement?

MS. CHILDRESS: Yes.

THE COURT: And one of the best things that happens when you resolve a situation that's preying on your mind, is that you get release, you get free from all that worry. Is that what you want to do? Because the only two things that can happen is the case continues and goes on and on and on, or the case is over with. So would you like the case to be over with and get that off your mind right now?

MS. CHILDRESS: Just a minute. I want to take the advice of the attorneys that are currently representing me. I want to do what they think is in the best interest of the case, and me as their client right now.

THE COURT: Okay. I think that is a very wise decision, okay? You've got excellent lawyers. As a matter of fact, I don't know whether they told you, I picked them.

Okay? And I picked them because they are excellent lawyers and they do excellent jobs for their clients. And they volunteer -- kind of volunteer, kind of been drafted. But the reason they got drafted is so that they could protect your rights, and I think they've done everything they can to protect your rights, and have. You know, they had another motion for summary judgment which they defeated.

And so if you want to go forward with what your lawyer recommends, we can do that right now, I think.

MS. CHILDRESS: I think that's in my best interests right now.

THE COURT: I think you're probably right. All this second thoughts and third thoughts, but once you get this issue behind you, then you can go forward rather than looking back. You've been looking back for a long time.

MS. CHILDRESS: Thank you.

THE COURT: Is that what you want to do?

MS. CHILDRESS: I'm going to go forward with what Attorney Jaros has to say.

THE COURT: Good.

MS. CHILDRESS: Thank you.

THE COURT: So do you just want to put what the settlement is, and we'll put it on the record, and then I'll do an order and dismissal with prejudice, and then we can all, as they say, look forward rather than back. (SC.3-6).

....

THE COURT: And, Mr. Dorsel, we had a hang up on the release and signing of the release....

MR. DORSEL: It will be. And also the payment by the City of Charleston and a release of all the named defendants.

MR. JAROS: Just to be clear, just so we have this on the record, although the City of Charleston police department was the named defendant, that is actually not an entity, it is the City of Charleston who is the real entity in interest. So it is not that we are placing a new defendant into the release, it's simply that we are correctly naming the party who is being released.

THE COURT: So why don't you go ahead and prepare that paperwork and I'll sign it and we'll dismiss it.

And again, you can look forward and not back. Okay, Miss Childress?

MS. CHILDRESS: Thank you.

....

THE COURT: Great. Thank you very much. I appreciate it. And I know everybody wants to put this behind them, okay? Thank you.

MR. JAROS: Thank you, Your Honor.

(SC.7-8).

C. Appeal of the District Order of Dismissal with Prejudice

Petitioner filed a timely appeal to the Fourth Circuit Court of Appeals, essentially alleging that: (1) she had not approved, or signed, the settlement agreement prior to the Settlement Conference; (2) that counsel did not adequately prepare her for the Conference; (3) that counsel refused to represent her in all areas of the case; (4) that counsel intimidated, and mislead, her when counsel claimed that a jury would not examine the original pleadings and documents Petitioner had filed throughout the case; and (5) that counsel intimidated, and coerced, Petitioner into accepting a monetary bribe that derived from ongoing public corruption, and to surrender her existing Constitutional rights.

Petitioner also complained that the District Court continued to proceed, and elicited oral acknowledgments from Petitioner, after counsel alerted that court that a conflict existed, and that Petitioner no longer wanted counsel to represent her.

The Fourth Circuit affirmed the District Court's Order of Dismissal with Prejudice, finding that, despite Petitioner's claims of ineffective assistance of appointed counsel, the Sixth Amendment's guarantee of effective assistance of counsel, does not apply to civil actions, (citing *Turner v. Rogers*, 564 U.S. 431, 441 (2011)); and that Petitioner's remedy for any inadequate representation by counsel lies in a malpractice action against counsel, not a reversal of the district court's judgment. (citing *Taylor v. Dickel*, 293 F.3d 427, 431 (8th Cir. 2002); *Stanciel v. Gramley*, 267 F.3d 575, 581 (7th Cir. 2001); *Sanchez v. United States Postal Service*, 785 F.2d 1236, 1237 (5th Cir. 1986) (per curiam)).

Finally, as for Petitioner's contention that was coerced or compelled by the district court **and a Defendant** (sic) into accepting the settlement agreement, the Fourth Circuit stated that Petitioner pointed to nothing in the record supporting those contentions. (Appendix A).

REASONS FOR GRANTING THE PETITION

This case concerns the caliber of appointed counsel's representation in a civil proceeding, and when counsel performance is so egregious that it deprives Petitioner of a meaningful opportunity to be heard and prejudice results therefrom. Until now, the Sixth Amendment's guarantee of effective assistance of counsel has not been made applicable to civil actions, see *Turner*, 564 U.S. at 441, neither has the Court required a civil *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), counsel, in a case-by-case basis, and commanded that counsel's performance be effective under non- *Strickland v. Washington*, 466 U.S. 668, 686 (1984), (2011), standards. This case presents the Court with the unique opportunity to correct that imbalance.

ARGUMENT

1. THIS CASE PRESENT A UNIQUE OPPORTUNITY FOR THE COURT TO REQUIRE A CIVIL GIDEON, AND THAT, IF APPOINTED, COUNSEL PERFORMANCE MUST BE EFFECTIVE

This case presents the Court with the opportunity to require civil *Gideon*, 372 U.S. at 344, counsel in a case-by-case basis, and for that counsel's performance to be effective under non-*Strickland*, 466 U.S. at 686, standards. In affirming the District Court's Order of Dismissal with Prejudice, the Fourth Circuit relied on this Court's holding in *Turner*, 564 U.S. at 441. (Appendix A). *Turner*, however, is factually/legally inapposite. First, the main question in *Turner* was whether a "right to counsel" existed in civil contempt proceedings enforcing child support orders, a question this Court answered in the negative. *Turner*, supra (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993)) (the Sixth Amendment right to counsel does govern civil cases). Second, the *Turner* Court declined to address the question of "what due process requires in usually complex cases where a defendant 'can fairly be represented only by a trained advocate'". (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973)).

In *Gideon*, 372 U.S. at 344, Justice Black concluded that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems . . . to be an obvious truth." In the end, *Gideon* allowed the Court to overrule *Betts v. Brady*, 316 U.S. 455 (1942), which held that the due process guarantees of the Fifth and Fourteenth Amendments did not necessarily require the state to provide attorneys to criminal defendants who could not afford them. 372 U.S. at 471. One basic tenant of *Betts* was the Court's realization that "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Gideon*, 372 U.S. at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). The *Betts* Court recognized that the logic in favor of a per se right to

counsel is the same in the civil context as in the criminal context, and that, if accepted, *Betts*' argument would have required the appointment of counsel not only in criminal cases, but in civil cases too." *Betts*, 316 U.S. at 473.

Pre-*Gideon*, this Court recognized that, in the criminal context, when a defendant was entitled to appointed counsel, he also had a right to effective assistance of counsel. See *Powell*, 287 U.S. at 56, 71. Post-*Gideon*, the Court voiced its concern about effectiveness of counsel in a line of cases addressing government interference with the ability of lawyers to mount effective defenses. Then, in 1984, it addressed the standard for "actual ineffectiveness," noting that it occurs when counsel "[deprives] a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'" *Strickland*, 466 U.S. at 686.

Strickland established a two-prong test for evaluating ineffective assistance of counsel, with the burden of proof for both elements resting on the defendant. 466 U.S. at 687. First, the defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The standard for measuring this "performance" prong is "reasonableness under prevailing professional norms." *Id.* at 688. However, the Court did not stop there; it also established a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Second, the Court established a "prejudice" prong, requiring the defendant to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Court acknowledged that the *Strickland* test is "highly deferential" in order to prevent postconviction second-guessing in the interest of finality. *Id.* at 689-90. With respect to the facts in *Strickland*, the Court held that the attorney's conduct was within the "range of professionally reasonable judgments," and even if counsel had

more effectively presented mitigating factors, the resulting sentence would have remained the same because of the overwhelming aggravating factors against Washington. *Id.* at 699-700 (deciding against the defendant on both prongs).

Unlike the ineffectiveness claim brought in *Strickland*, Petitioner implores the Court not to evaluate Petitioner's contentions under the Sixth Amendment. As a side note, under normal circumstances, where civil counsel is not appointed, a malpractice suit is the only remedy available to a civil litigant who believes that a lawyer's negligence resulted in an adverse judgment. See *Link v. Wabash Railroad Company*, 370 U.S. 626, 634 n.10 (1962) ("[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice."). Applying this concept to Petitioner's case, the Fourth Circuit applied an incorrect, non-appointed, counsel scenario. In other words, imputing counsel's ineffective representation to Petitioner, is not appropriate when an indigent litigant, like Petitioner, did not freely select her attorney but rather counsel was appointed by the court.

Instead, applying this Court's current right-to-counsel jurisprudence, Petitioner asked the Court to analyze her ineffective assistance of counsel contentions under the premise that "the right to counsel is the right to the effective assistance of counsel," *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), even when counsel is appointed in the civil context, as counsel was appointed for Petitioner.

Counsel in this case was far from effective. Counsel was aware of Petitioner's disagreements/concerns with the settlement agreement, that Petitioner refused to sign the agreement, and that Petitioner was very unhappy with counsel's performance, especially after counsel mistakenly told Petitioner that a jury would never get a chance to see and/or consider the various pleadings/exhibits Petitioner had filed throughout the case's nearly four-year history.

Most important, counsel then allowed the settlement conference to commence with the above in mind, and provided the District Court with enough self-serving information to aid it in overcoming Petitioner's reluctance; and thereby enabling Petitioner to forgo existing constitutional protections and safeguards.

Had counsel taken a different approach, been truthful in the information conveyed to Petitioner, and not allowed the case to move forward with several disagreements, unanswered questions, and unresolved issues of distrust/dissatisfaction with counsel's performance, the settlement conference would have been rejected, and the case would have been decided by trial by jury – an outcome Petitioner desired.

It follows that, if the District Court used the case-by-case balance of the *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976), factors, under *Lassiter v. Department of Social Services*, 452 U.S. 18, 31 (1981), and felt compelled to appoint counsel, “presumably there [existed] a federal constitutional right to [the] effective assistance of counsel.” See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 254-56 (E.D.N.Y. 2002) (holding that when mothers in dependency hearings are entitled to counsel according to *Lassiter's* application of the *Mathews* factors, ineffective assistance of counsel violates their constitutional rights).

Petitioner therefore asks the Court to expand, and include, that rationale to effective counsel in Petitioner's civil case.

2. COUNSEL'S CONDUCT DENIED PETITIONER A MEANINGFUL OPPORTUNITY TO BE HEARD AT THE SETTLEMENT CONFERENCE, AND THEREFORE VIOLATED HER RIGHT TO DUE PROCESS OF LAW UNDER THIS COURT'S HOLDINGS IN *Santosky v. Kramer*, 455 U.S. 745 (1982); and *Mathews v. Eldridge*, 424 U.S. 319 (1976)

Petitioner requests not to have this case analyzed under the Sixth Amendment because, under the aegis of the court, the role of counsel in the civil content, while important, does not carry

the deleterious impact of ineffectiveness that may occur in criminal proceedings. Nevertheless, even though this Court's *Strickland* analysis concerned Sixth Amendment consideration, *Strickland* did not rely on the Sixth Amendment to the exclusion of due process concerns, but recognized that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial guarantee[d] through the Due Process Clauses." *Strickland*, 466 U.S. at 684-85. Thus, in cases like this, as in criminal cases, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696; see also *Lassiter*, 452 U.S. at 24-25 (due process resists precise definition but "expresses the requirement of 'fundamental fairness'"). The touchstone of due process under the Constitution is fundamental fairness. See *State v. Melendez*, 172 Ariz. 68, 71, 834 P.2d 154, 157 (1992).

Under the facts of this case, there are due process grounds for recognizing appointed counsel's ineffectiveness. See, e.g., *Nicholson*, supra, a class action upholding a preliminary injunction against a city child-services administration for its conduct in dependency cases. In *Nicholson*, the United States District Court for the Eastern District of New York concluded that New York violated the Due Process Clause by providing mothers ineffective counsel in supposed compliance with a state statutory right to counsel. *Id.* at 165, 256-57 ("Offering counsel to a mother accused of neglect, and then hamstringing that counsel in such a way that the mother is likely to receive inadequate representation impairs the litigant's Sixth Amendment right to effective counsel."). The court reasoned that when New York "undertake[s] the role of good Samaritan in providing counsel to the needy, inducing their reliance and preventing others from assisting, the State and City must carry out the role they have assumed with propriety." *Id.* at 257. The court found that the provision of counsel for abused mothers was "largely a sham" because it

cruelly supplies attorneys who cannot, and do not, properly represent [them]. They do not investigate. They do not consult with their client. They

are not available for consultation. Their very existence delays hearings and proper prompt resolution of cases in Family Court, resulting in unnecessary separation of mothers and children and in unnecessarily prolonging those separations. The result is a practice and policy by the State and City of New York violating the substantive and procedural constitutional rights of many abused mothers and their children.

Id. at 253-54. 144. In short, the court surmised that the right to counsel also provides that such counsel must be effective.

The Due Process Clauses of the Fifth and Fourteenth Amendments protect “liberty” interests with two separate guarantees - “procedural due process” and “substantive due process” - both of which may be implicated in civil cases with indigent litigants. When “governmental decisions . . . deprive individuals of ‘liberty’ or ‘property’ interests,” procedural due process places limitations on the process the government may use in order to ensure individuals have the “opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews*, 424 U.S. at 332-33 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Hence, the argument that indigent defendants are denied due process of law when they forfeit important rights in civil cases because of the absence of counsel’s diligent performance fits well within the language of procedural due process. On the other hand, substantive due process, which inquiries into whether the government has sufficient justification to take away an individual’s “fundamental rights,” may also be implicated. For example, this Court has recognized that a parent’s “‘care, custody, and management of his or her children’” is a fundamental right for the purposes of the Due Process Clause. *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (quoting *Lassiter*, 452 U.S. at 27).

However, when, as in this case, counsel is appointed, this Court’s concerns in *Lassiter*, 452 U.S. at 31 (holding that due process does not require “the appointment of counsel in every parental

termination proceeding”), are not implicated. What remains is Petitioner’s right to both procedural and substantive due process constitutional protection, and the duty counsel owed Petitioner.

Counsel’s dereliction caused Petitioner to be deprived of an adequate opportunity to be meaningfully heard at the Settlement Conference. To reiterate, counsel was aware of Petitioner’s disagreements/concerns with the settlement agreement, that Petitioner refused to sign the agreement, and that Petitioner was very unhappy with counsel’s performance, especially after counsel mistakenly told Petitioner that a jury would never get a chance to see and/or consider the various pleadings/exhibits Petitioner had filed throughout the case’s nearly four-year history.

Most important, counsel then allowed the settlement conference to commence with the above in mind, and provided the District Court with enough self-serving information to aid it in overcoming Petitioner’s reluctance. These events were severely prejudicial because Petitioner was duped into a settlement she did not want, not able to have her case tried by a jury, and compelled forgo existing constitutional protections and safeguards, conduct that violates both due process and fundamental fairness.

Granted, in *Lassiter*, this Court held that the Due Process Clause does not require the appointment of counsel for a civil litigant. However, *Lassiter* did not address the question whether the ineffective assistance of appointed counsel justify reversal of the outcome of a civil proceeding and, if it does, under what circumstances?

Petitioner has not been able to find a case where, in the civil context, reversal was warranted on the sole ground of ineffective assistance of counsel, based on the record on appeal. Yet, in civil-related cases like *In re Pima County Juv. Action No. S-919*, 132 Ariz. 377, 646 P.2d 262 (1982), reversal was warranted because of the juvenile court’s failure to appoint guardian ad litem for the mother as required by statute; and the appointment of counsel did not constitute substantial

compliance with statute where counsel was ineffectual. Other states have reached varying conclusions about whether ineffective assistance of counsel in civil-related cases provide a ground for relief and, if so, the appropriate means of evaluating such a claim. Compare, e.g., *S.B. v. Department of Children & Families*, 851 So.2d 689 (Fla.2003) (ineffective assistance claim recognized in appeal of termination order, where right to counsel grounded in state constitution, but not dependency order, where right to counsel only statutory); *In re Heather R.*, 269 Neb. 653, 694 N.W.2d 659, 664-65 (2005) (no ineffective assistance of counsel claim in civil juvenile proceeding; allegation of inadequate representation assessed as due process claim to fundamentally fair procedure); *In re N.D.O.*, 121 Nev. 379, 115 P.3d 223, 224-25 (2005) (“no ineffective-assistance-of-counsel claim will lie” where counsel not constitutionally required under *Lassiter*; *Strickland* standard), with *In re M.S.*, 115 S.W.3d 534, 544-45 (Tex.2003) (statutory right to counsel includes right to effective counsel; *Strickland* standard); *In re Geist*, 310 Or. 176, 796 P.2d 1193, 1200-01 (1990) (statutory right to counsel “may prove illusory” without remedy for ineffective assistance; “fundamental fairness” standard) – an existing state of unclarity Petitioner asks the Court to resolve.

All things considered, Petitioner asks the Court to expand, and include, the Due Process Clause’s corollary right to effective counsel in Petitioner’s civil case.

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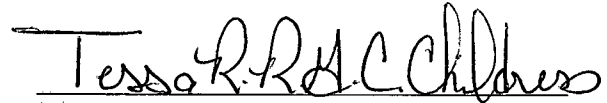
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CONCLUSION

Petitioner's Petition for a Writ of Certiorari should be granted. In doing so, the Court may wish to consider the possibility of summary reversal. If not, as an alternative, the Court should grant plenary review, appoint counsel, and set the case for briefing and oral argument.

Respectfully submitted this 14th day of April 2018.

A handwritten signature in black ink, reading "Tessa R.R.G.C. Childress". The signature is written in a cursive style with a horizontal line above the first name.

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