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INEFFECTIVE ASSISTANCE OF COUNSEL IN PARENTAL-RIGHTS TERMINATION CASES: THE CHALLENGE FOR APPELLATE COURTS

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I. INTRODUCTION

Appellate courts are increasingly presented with claims of ineffective assistance of counsel in proceedings that involve the termination of parental rights. These claims grow out of the burgeoning number of parental-rights termination petitions filed in the trial courts since the Adoption and Safe Families Act of 1997[1] became law. The ASFA is designed, among other things,

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1. Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5)(E) (available at http://uscode.house.gov). For a concise background of ASFA and a brief history of national child welfare policy, *see* Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. Contemp. Health L. & Policy 243, 248-57 (1999). For additional background on the ASFA's requirement that termination proceedings must be initiated within strict time

to promote the adoption of foster children,[2] and termination proceedings must be initiated in order to free those children for adoption.[3]

In almost every state parents have a right to counsel when the state seeks to terminate their parental rights. The vast majority of parents in termination proceedings are indigent, which often means that their counsel is appointed by the court or provided through a public defender or contract system. The representation of parents by overworked and underpaid attorneys results in claims by parents that their counsel was ineffective.

This article explores both the procedural vehicles and the substantive standards adopted by appellate courts for claims of ineffective assistance when such claims are brought by parents seeking to vacate or reopen judgments terminating their parental rights. I start by briefly describing the process of a typical parental-rights termination case. Next, I discuss the Supreme Court's view of the right to counsel in parental-termination cases and the status of the parent's right to counsel in the various states. I then analyze the procedures used by the courts to review a claim of ineffective assistance, and I suggest the procedure that I believe to be the most productive and efficient given the interests of the parents and the needs of the children. Next, I turn to the substantive standard for determining whether counsel is

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limits, see Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?* 28 Cap U. L. Rev. 97, 100 (1999).

2. O'Flynn, *supra* n. 1, at 246; Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?* 2 U. Pa. J. Const. L. 141, 144 (1999); Evelyn Lundberg Stratton, *Expediting the Adoption Process at the Appellate Level*, 28 Cap. U. L. Rev. 121, 122 (1999); H.R. Rep. No. 105-77, at IA (1997).

3. The number of children in foster care and the number of parental-rights termination proceedings filed in recent years are not negligible. In FY2002 there were 532,000 children in foster care, and parental rights to 79,000 children were terminated. Admin. for Children & Fams., U.S. Dept. of Health & Human Servs., *National Adoption and Foster Care Statistics* (available at http://www.acf.hhs.gov/programs/cb/dis/afcars/publications/afcars.htm) (accessed Apr. 13, 2004; copy on file with Journal of Appellate Practice and Process).

The states were quick to comply with the ASFA: By 1999 all states had enacted legislation that met or exceeded the requirements of ASFA. Employment & Soc. Servs. Policy Studies Div., Ctr. for Best Practices, Natl. Gov. Assn., *A Place to Call Home: State Efforts to Increase Adoptions and Improve Foster Care Placements* 2 (Oct. 26, 2000) (available at http://www.nga.org/cda/files/001026ADOPTIONS.pdf) (accessed Apr. 13, 2004; copy on file with Journal of Appellate Practice and Process).

ineffective, and I summarize some states' experience with the application of the *Strickland*[4] standard to ineffectiveness claims in parental-termination cases. I also describe another ineffectiveness standard, the fundamental-fairness approach, which has been adopted by a few state courts, and I attempt to discern the practical differences between these two standards by examining the facts and outcomes of specific cases. Finally, I suggest a framework that might help appellate courts determine which standard of assessing the performance of lawyers in parental-rights cases is appropriate.

II. THE TYPICAL PROCEEDING FOR TERMINATION OF PARENTAL RIGHTS

Although the specific procedures for terminating parental rights vary widely from state to state, their basic processes are similar.[5] This is partly because the states conform to federal requirements in order to receive federal money for foster care,[6] and partly because the federal government has issued guidelines for use in parental-termination proceedings.[7]

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4. *Strickland v. Wash.*, 466 U.S. 668 (1984).

5. *See* Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 Fordham L. Rev. 2285, 2298-01 (1998) (describing typical steps in New York child-protection matters); Denise M. Faehnrich, *The "Harm" in the Application of the "Harmless Error" Doctrine to the Constitutional Defect in* In re C.V., 44 S.D. L. Rev. 340, 362-66 (1999) (describing South Dakota termination proceedings); Jean M. Johnson & Christa N. Flowers, *You Can Never Go Home Again: The Florida Legislature Adds Incarceration to the List of Statutory Grounds for Termination of Parental Rights*, 25 Fla. St. U. L. Rev. 335, 336-38 (1998) (describing Florida termination procedures); *see also* Natl. Council for Juvenile & Fam. Ct. J., *Adoption & Permanency Guidelines* 29-34 (Termination of Parental Rights Hearings) (available at http://www.pppncjfcj.org/html/adoptguid.html) (accessed Apr. 13, 2004; copy on file with Journal of Appellate Practice and Process) [hereinafter *Adoption Guidelines*].

6. Federal funds are available to the states matching between fifty and eighty percent of the state's expenditures for foster care, depending upon the state's per capita income. Admin. for Children & Families, U.S. Dept. of Health & Human Servs., *Fact Sheet* 1-2 (September 22, 2000) (available at http://www.acf.dhhs.gov/programs/opa/facts/chilwelf.htm) (accessed Apr. 13, 2004; copy on file with Journal of Appellate Practice and Process).

7. Admin. for Children & Fams., U.S. Dept. of Health & Human Servs., *Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children* (1999) (available at http://www.acf.hhs.gov/programs/cb/publications/adopt02/02final.htm) (accessed Apr. 23, 2004; copy

Generally speaking, when a state or local child-welfare agency receives a report of child abuse or neglect, it conducts an investigation. If it determines that the child is in jeopardy and that a custody order is necessary to protect the child, the agency files the necessary documents with the court. The child's parents are entitled to a hearing before the child is removed. These hearings are variously referred to as dependency proceedings, jeopardy proceedings, or child-protection proceedings, and counsel is usually appointed for indigent parents involved in them.

When custody of the child is given to the state, the court often orders the state to provide certain services for the parents or orders the parents to obtain the services. Such services may include psychological counseling, substance-abuse treatment, parenting classes, homemaker assistance, and other services to remedy the problem that led to the child's removal from the home. The purpose of such services is to facilitate the reunification of the family. However, in certain situations, the court may relieve the state from making reasonable efforts to reunify a family.[8] Once a child has been placed in foster care, the court holds periodic reviews with the parties.

By federal mandate, before a child has been in foster care for twelve months, a permanency hearing must be held to determine whether the child will be returned to the parents or the state will proceed with terminating parental rights.[9] Additionally, the state is required to commence proceedings to terminate parental rights when a child has been in foster care under the supervision of the state for fifteen of the most recent twenty-two months.[10]

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on file with Journal of Appellate Practice and Process) [hereinafter *Guidelines for Public Policy*].

8. In order to obtain federal funds, states are required to make reasonable efforts to reunify families. 42 U.S.C. § 671(a)(15) (available at http://uscode.house.gov). The states, however, do not have to make reunification efforts when the parent has subjected the child to "aggravated circumstances" which include abandonment, murder, or manslaughter of another child, aggravated assault upon another child, or the involuntary termination of the parent's rights in another child. *Id.*

9. 42 U.S.C. § 675(5)(C) (available at http://uscode.house.gov).

10. 42 U.S.C. § 675(5)(E) (available at http://uscode.house.gov). There are exceptions to this requirement, such as situations in which the state agency has documented that there is a compelling reason that termination would not be in the best interest of the child. *Id.*

Counsel is usually appointed for the parents, and a guardian ad litem is named for the child. The burden is on the state to prove, by clear and convincing evidence, that termination is warranted.[11] The Supreme Court has noted that the New York termination proceeding resembles a criminal trial in that the state and parents are both represented by counsel and the rules of evidence apply.[12] Unlike criminal trials, however, termination hearings are bench trials in most states.[13] The substantive grounds for termination vary from state to state but typically include the abandonment, murder, or aggravated assault of a child's sibling; severe parental incapacity; and the inability or unwillingness of a parent to change the circumstances that caused the child's abuse or neglect.[14] Other grounds suggested by the federal guidelines include failure of parents to improve; extreme parental indifference; extreme or repeated abuse or neglect; and extended imprisonment.[15]

A judgment terminating parental rights has the effect of legally severing the parent-child relationship. The judgment is appealable, and, in most states, appellate counsel is appointed for indigent parents.[16]

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11. In *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), the Supreme Court held that the Due Process Clause requires the clear and convincing standard of proof for termination of parental rights. However, for cases within the purview of the Indian Child Welfare Act, proof beyond a reasonable doubt is required. 25 U.S.C. § 1912(f) (available at http://uscode.house.gov). New Hampshire requires proof beyond a reasonable doubt in parental-termination cases pursuant to the state constitution. *In re Shannon M.*, 766 A.2d 729, 733 (N.H. 2001) (quoting *In re Sheena B.*, 651 A.2d 7 (N.H. 1994)).

12. *Santosky*, 455 U.S. at 762.

13. Oklahoma and Texas allow jury trials in parental-rights termination proceedings. *See In re A.E.*, 743 P.2d 1041, 1048 (Okla. 1987); *In re J.F.C.*, 96 S.W.3d 256, 259 (Tex. 2002). Wisconsin, by statute, permits a jury trial for the determination of "whether any grounds for the termination of parental rights have been proven." Wis. Stat. Ann. §48.424(3) (1996).

14. *See Adoption Guidelines*, *supra* n. 5, at 32.

15. *See Guidelines for Public Policy*, *supra* n. 7.

16. *See e.g. Vernon S. v. Jerome C. (In re Bryce C.)*, 906 P.2d 1275, 1278 (Cal. 1995); *In re T.M.C.*, 988 P.2d 241, 243-44 (Kan. App. 1999); *State ex rel. Children, Youth & Fams. Dept. v. Alicia P. (In re Jeramy P.)*, 986 P.2d 460, 462 (N.M. App. 1999); *In re T.V.*, 8 S.W.3d 448, 449 (Tex. App. 10th Dist. 1999); *L.C. v. State*, 963 P.2d 761, 763-64 (Utah App. 1998); *Grove v. State (In re Tammy Grove)*, 897 P.2d 1252, 1259 (Wash. 1995).

III. ARE PARENTS BEING DEPRIVED OF EFFECTIVE COUNSEL IN TERMINATION CASES?

Almost every state provides counsel to indigent parents either through public defender offices, a system of appointed counsel, or contracts with groups of attorneys. Lack of funding for public defenders and assigned counsel is a chronic problem.[17] Like defendants in criminal cases, parents who are accused of neglecting or abusing their children are seldom sympathetic figures, and they often have no political power. There is little desire by taxpayers to provide more money for their lawyers.

States have largely modeled their systems for representation of indigent parents on systems for representation of criminal defendants.[18] This generally means that the inadequacies of the criminal defense system are transferred to the representation of parents in termination proceedings. Those inadequacies include underfunding, which translates to low pay for attorneys;[19] caseloads larger than an attorney can conscientiously handle;[20] few resources for investigation of cases and little support staff;[21] and sparse, if any, continuing education or training in the specific aspects of the law of parental-rights termination.[22] California, by court rule, requires the trial courts to have standards of experience and education that attorneys must meet in order to be eligible for court appointment in child-dependency proceedings, but California appears to be an exception.[23] Indeed, there is minimal incentive

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17. *See e.g.* Richard Klein, *The Constitutionalization of* Ineffective *Assistance of Counsel*, 58 Md. L. Rev. 1433 (1999); Margaret H. Lemos, Student Author, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. Rev. 1808 (2000); Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 Am. J. Crim. L. 1 (1999); Student Author, *Gideon's Promise Unfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062 (2000).

18. Bailie, *supra* n. 5, at 2305.

19. *Id.* at 2308-09.

20. Rigg, *supra* n. 17, at 30-41.

21. *Id.*

22. *Bailie*, *supra* n. 5, at 2324-38 (arguing for a state-certification procedure for court-appointed attorneys in dependency and termination proceedings that would require education and training).

23. Cal. R. of Ct., R. 1438(c)(3). This rule requires attorneys to have a minimum of eight hours of education in dependency law or to have demonstrated sufficient experience

for appointed or contract lawyers to participate in continuing legal education in parental-termination law because they will not be paid enough in such cases to make it worthwhile.

Not only is there little monetary incentive for attorneys to accept parental-termination cases in an assigned counsel system, there are usually several factors that provide a disincentive. The cases are sometimes factually difficult and they are often time-consuming. The parents may distrust any authority figure, including their own attorney. The parents, who are usually undereducated, are often unable to assist with preparation of the case. Many parents have little insight into the problems that caused the removal of their children from their homes. Communication with the parents is sometimes difficult because they have no phone or consistent location at which to receive mail, or because they are in and out of jail, treatment centers, or mental institutions. There may be language or other cultural barriers. Attorneys handling termination cases often feel more like social workers than lawyers. Additionally, the cases can be emotionally draining.

Given the lack of funding, the disincentives for accepting termination cases, and the lack of requirements for appointment, it is not surprising that many attorneys who represent parents are inexperienced. Those few experienced attorneys who are willing to suffer the long hours and minimal pay out of a sense of moral or ethical obligation or simply a willingness to serve, often find their cup overflowing, with judges or other court personnel pressuring them to take still more cases.

In those jurisdictions where the public defender represents parents in termination proceedings, excessive caseload is the major problem.[24] Too many cases lead to minimal preparation for trial. Either because of inexperience or excessive caseload

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in dependency proceedings. Every three years the attorneys are to complete eight hours of education in dependency proceedings. *See Santa Clara County Dept. of Fam. & Children's Servs. v. Kimberly I. (In re Kristin H.)*, 54 Cal. Rptr. 2d 722, 738 (1996) (referring to aims and requirements of Rule 1438).

24. For a discussion of funding problems and excessive caseloads of indigent criminal defense programs, see Harold H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 Duke L.J. 783, 788-91 (1996); Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 Temp. L. Rev. 1171, 1172-74 (1988); Rigg, *supra* n. 17, at 24-41. *See also State v. Peart*, 621 So. 2d 780, 784 (La. 1993) (reciting excessive caseload numbers of public defender).

the attorney in a termination case may fail to obtain and review discovery materials; not know what reports, files or other materials are available from the state agency; fail to interview or call witnesses to testify for the parents; fail to develop a defense theory; or fall into one of many of the potential pitfalls awaiting the unprepared or inexperienced lawyer.

Therefore, it is not surprising that ineffective assistance of counsel has been raised as a claim in a number of reported appeals of parental-rights termination orders. Ineffective assistance of counsel has now become the most common ground alleged in proceedings to review criminal convictions,[25] and it is likely that many attorneys who accept court appointments to appeal parental-termination orders also handle appellate or post-conviction criminal cases or, particularly in the case of public defenders, practice law with attorneys who routinely handle criminal matters. Thus, lawyers who prosecute parental-termination appeals are aware, and becoming more aware all the time, of the claim of ineffective assistance of counsel. I did not find any empirical studies of the number of parental-termination cases in which a claim of ineffective assistance of counsel has been made, but a few minutes research using a computer-assisted research service turns up a large number of cases.[26] The ineffectiveness issue was raised in a parental-termination proceeding as early as 1969,[27] but most of the reported cases are from the past decade. The ineffectiveness claim in termination cases is a substantial one that requires an examination of the procedural and substantive law in order to develop the most effective responses and solutions.

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25. John M. Burkoff & Nancy M. Burkoff, *Ineffective Assistance of Counsel* § 1:2(5), at p. 1-4 (West Group 2002).

26. For example, in December, 2004, a search on LEXIS using the terms "(parent! /2 rights /3 terminat!) and ((effective or ineffective) /2 (assistance /2 counsel)) in the database of "highest court, all states" yields 148 cases. When that search is expanded to include intermediate appellate courts by adding the terms "and court (supreme or appe!)" and run in the "state court cases, combined" database, it yields 1211 cases. Although not every case produced by this search includes a claim for ineffective assistance of counsel, most do.

27. *In re Orcutt*, 173 N.W.2d 66 (Iowa 1969).

IV. THE SUPREME COURT AND THE RIGHT TO COUNSEL IN PARENTAL-TERMINATION CASES

The right to counsel in criminal cases is the springboard for the right to counsel in parental-termination cases. It is now well-established that the Sixth Amendment guarantees a right to counsel to any criminal defendant whose conviction will result in a jail sentence.[28] The right applies only to criminal proceedings,[29] however, and the Supreme Court has not extended it to civil cases.[30]

Indeed, the Supreme Court held in *Lassiter v. Department of Social Services*[31] that the federal constitution does not require the states to appoint counsel for parents in every termination proceeding. In this five-to-four decision, Justice Stewart, writing for the majority, noted that in previous cases the right to counsel was found "only where the litigant may lose his physical liberty if he loses the litigation,"[32] and concluded that there is a presumption that the right to appointed counsel attaches only when a person may be deprived of physical liberty.[33] The Court then utilized the three factors enunciated in *Mathews v. Eldridge*[34] to analyze whether due process requires appointed counsel when the loss of parental rights is at stake. The Court weighed the factors against the presumption that there is no right

28. *Scott v. Ill.*, 440 U.S. 367 (1979).

29. U.S. Const. amend. VI ("In all criminal prosecutions the accused shall enjoy the right to. . .have the Assistance of Counsel for his defence.").

30. There is, for example, no Sixth Amendment right to counsel in state post-conviction proceedings, *Pa. v. Finley*, 481 U.S. 551 (1987), and discretionary appeals of criminal convictions, *Ross v. Moffitt*, 417 U.S. 600 (1974). However, the Fourteenth Amendment requires appointment of counsel to an indigent defendant for a first appeal as of right. *Douglas v. Cal.*, 372 U.S. 353 (1963). The Due Process Clause requires the appointment of counsel in parole- and probation-revocation proceedings, but only in certain cases, and the decision is to be made on a case-by-case basis. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The fundamental-fairness concept of the Due Process Clause of the Fourteenth Amendment is the source of the right to counsel and other procedural protections in juvenile matters. *In re Gault*, 387 U.S. 1 (1967).

31. 452 U.S. 18 (1981).

32. *Id.* at 25.

33. *Id.* at 26-27.

34. 424 U.S. 319 (1976) (holding that the Due Process Clause does not require an evidentiary hearing prior to the termination of Social Security disability benefits). The three factors are (1) the private interests at stake; (2) the risk of an erroneous decision; and (3) the government's interest. *Id.* at 335.

to appointed counsel in the absence of a potential deprivation of physical liberty.[35]

With regard to the first *Mathews v. Eldridge* factor, the private interest at stake, the Court reiterated that a parent's interest in her child is "an extremely important one"[36] and the parent's interest in the accuracy of a decision to terminate parental rights is "commanding."[37] Concerning the next factor, the interest of the government, the Court stated that the government has a significant interest in the welfare of the child.[38] Although the state has a financial interest in limiting the expenses of termination proceedings, that interest, while legitimate, is minimal.[39]

As to the remaining *Mathews v. Eldridge* factor—the risk of an erroneous decision—the Court described the North Carolina procedures for parental-termination cases. The Court noted the state's contention that the points of law in Ms. Lassiter's case were not difficult because "the evidentiary problems peculiar to criminal trials are not present" and "the standards for termination are not complicated."[40] Nonetheless, the Court conceded (1) that the issues in a termination hearing could involve medical and psychiatric evidence; (2) that parents often have little education; and (3) that the entire process is "distressing and disorienting" for parents.[41] The Court recognized that for this reason state courts generally require that counsel be appointed.[42]

The Court concluded that it would adopt the standard articulated for parole- and probation-revocation hearings in *Gagnon*,[43] and

> leave the decision whether due process calls for the appointment of counsel for indigent parents in termination

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35. *Lassiter*, 452 U.S. at 31.

36. *Id.*

37. *Id.* at 27.

38. *Id.*

39. *Id.* at 28.

40. *Id.* at 29. A year later, in *Santosky*, 455 U.S. at 762, the Court noted that the standards for terminating parental rights are imprecise and particularly open to influence by the subjective values of judges.

41. *Lassiter*, 452 U.S. at 30.

42. *Id.*

43. 411 U.S. at 778, 788.

> proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.[44]

The reason for this case-by-case holding is that the *Mathews v. Eldridge* factors are not always distributed in the same manner and due process is not so rigid as to require that "informality, flexibility and economy . . . be sacrificed."[45]

Although the majority in *Lassiter* adopted *Gagnon*'s case-by-case approach, it did not reexamine the reasons given in *Gagnon* for that approach. Had the court done so, it would have discovered that the probation-revocation hearings described in *Gagnon* bear little resemblance to parental-rights termination proceedings. In *Gagnon,* the Court characterized the probation-revocation hearings as informal hearings conducted without the rules of evidence.[46] Parental-rights-termination hearings, however, are formal court proceedings, and in many states the rules of evidence are generally applicable,[47] although there may be exceptions to the application of particular evidentiary rules.[48] In many probation revocation matters, according to the Court in *Gagnon*, the probationer has admitted the charges, which means that there is no or little factual dispute.[49] In contrast, there were factual disputes in Ms. Lassiter's case, as there are in many termination proceedings.[50]

In *Gagnon,* the Court was concerned that appointment of counsel would change the very nature of the revocation proceeding: If the probationer was represented by counsel, the

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44. *Lassiter*, 452 U.S. at 31-32.

45. *Id.* at 31 (quoting *Gagnon*, 411 U.S. at 788).

46. *Gagnon*, 411 U.S. at 786-87.

47. *See e.g.* Iowa Code § 232.96(3) (2000) (providing that rules of evidence apply in child-in-need-of-assistance proceedings); Me. Rev. Stat. Ann. tit. 22. § 4007(1) (West 1992) (providing that rules of evidence apply in all child-protection proceedings in Maine, including those that involve the termination of parental rights); W. Va. Code § 49-6-2(c) (1996) (providing that rules of evidence apply in child neglect or abuse proceedings). *Santosky*, 455 U.S. at 762 (stating that formal rules of evidence apply in New York parental-termination proceedings); *In re Shannon M.*, 766 A.2d at 733 (assuming that rules of evidence apply to parental terminal proceedings). *But see State v. Andrew M.*, 622 N.W.2d 697, 702 (Neb. App. 2001) (stating that the rules of evidence do not apply in termination hearings, but only provide a "guidepost").

48. *See e.g.* Me. Rev. Stat. Ann. tit. 22, § 4007(2) (West 1992) (making hearsay statements of children admissible in Maine child-protection and parental-termination proceedings).

49. *Gagnon*, 411 U.S. at 787.

50. *Lassiter*, 452 U.S. at 22-24.

government would also have to be represented by a lawyer,[51] which would cause the government to incur the added financial cost of providing both an attorney for the probationer and an attorney for the state.[52] In parental-termination proceedings, however, the state agency is generally represented by a lawyer,[53] and the proceeding is an adversarial one, whether the parent is represented or not. In *Gagnon,* the Court suggested that the revocation-hearing body would become more like a judge if the probationer and the government were represented by attorneys.[54] This concern seems irrelevant in the termination context, because parental-termination proceedings are presided over by judges.

In *Lassiter*, Justice Blackmun, joined by three dissenters, stated that the *Mathews v. Eldridge* analysis should not be limited to the facts of the case at hand, and should not be applied on a case-by-case basis.[55] He recalled *Betts v. Brady*,[56] in which the Court had said that right to counsel in criminal cases also depended upon a case-by-case analysis, and he pointed out that *Betts* was eventually overruled by *Gideon v. Wainwright*,[57] primarily for the reason that trials can be presumed fair only if counsel is available.[58]

Although Justice Blackmun took issue with the Court's presumption that there is no right to counsel unless incarceration is at stake, his dissent is primarily focused on the "illogical" conclusion that there must be a case-by-case analysis.[59] He

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51. *Gagnon*, 411 U.S. at 787.

52. *Id.* at 788.

53. *See Santosky*, 455 U.S. at 762 (stating that the state is represented by counsel in New York termination proceedings); *but see Lassiter*, 452 U.S. at 29 (noting that the North Carolina Departments of Social Services reported that social workers sometimes represented them at termination hearings when the parents were not represented by counsel).

54. 411 U.S. at 788.

55. *Lassiter*, 452 U.S. at 48-52 (Blackmun, Brennan & Marshall, JJ., dissenting). Another of the dissenters, Justice Stevens, wrote separately to express his opinion that the *Mathews v. Eldridge* analysis works better for property interests than liberty interests, and that the "natural relationship" between parents and children is a liberty interest. *Id.* at 59-60 (Stevens, J., dissenting).

56. 316 U.S. 455 (1942).

57. 372 U.S. 335 (1963).

58. *Lassiter*, 452 U.S. at 36.

59. *Id.* at 49 (Blackmun, J. dissenting). Justice Blackmun also weighed the three *Eldridge* factors differently from the majority. Because of the significant interest in the

argued that a case-by-case approach is unworkable because an appellate court is not able to discern from the record what a lawyer with imagination, who undertook investigation and legal research, would have been able to do with a case in which the parents did not have counsel.[60] Justice Blackmun also pointed out that the case-by-case analysis of *Betts v. Brady* had caused numerous post-conviction challenges.[61]

Even so, the *Lassiter* approach, while not as efficient as a rule that applies to every case, ought at least to mean that in almost every contested case, counsel will be appointed. The circumstances that should favor appointment of counsel[62] are, in fact, present in most parental-termination cases: The state usually presents at least one expert witness; the parents are often undereducated and inarticulate; and the court must typically resolve difficult factual issues.[63]

Lassiter was decided over twenty years ago, and its holding has not been questioned by the Supreme Court. That may be because most states have now moved beyond *Lassiter*, and require appointment of counsel either by state constitution, statute, rule, or case law. Nonetheless, *Lassiter* is still

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family, he found that the first factor weighed heavily in support of appointed counsel. He found that the state's interest in not appointing counsel was limited. With regard to the risk of an erroneous determination, he concluded that the risk was substantial. The procedure utilized for termination proceedings resembles a criminal prosecution; the state marshals considerable expertise and assets in prosecuting the case; and the legal issues are not simple or well-defined. *Id.* at 44-45 (Blackmun, J. dissenting).

60. *Id.* at 51.

61. *Id.* at 51-52. The Alaska Supreme Court, in deciding that the Alaska Constitution requires appointment of counsel for indigent parents in termination proceedings, expressly rejected *Lassiter*'s case-by-case analysis for the same reasons. *In re K.L.J.*, 813 P.2d 276, 282 n. 6 (Alaska 1991). The Alaska court discussed the burdens that the case-by-case approach imposes on the trial court, including the need to develop pretrial procedures to determine in advance whether counsel should be appointed. It noted the difficulty of foretelling accurately whether certain facts were going to be contested or what the nature of the cross-examination would be. It predicted that the pretrial determination of whether counsel should be appointed was likely to delay the proceedings and add time and issues to the appellate process. *Id.*

62. *Lassiter*, 452 U.S. at 30.

63. As a trial judge, I preferred having all parties represented by counsel because the cases proceeded more smoothly and were likely to contain less error, and the presence of counsel made general fact-finding easier. When all parties are represented by counsel, the judge does not have to step outside of the judicial role. As an appellate judge, I can attest to the fact that in many cases pro se appellants are simply unable to articulate what it is they are appealing except to say that the trial judge was wrong.

considered to be a setback by those advocating for the rights of parents. Because the Supreme Court has not declared that the Due Process Clause requires the appointment of counsel in every parental-termination case, the rights of indigent parents remain at risk. States may at any time repeal their statutory authority for counsel or withdraw funding for court-appointed counsel.

Parental-rights cases decided by the Supreme Court after *Lassiter* include *M.L.B. v. S.L.J.*,[64] in which the Court held that an indigent parent whose parental rights were terminated is entitled to a transcript of the proceedings at the state's expense in order to prosecute an appeal. Justice Ginsburg, joined by four other justices, was careful to distinguish *Lassiter,* writing that a the right to counsel was "less encompassing" than the right of access to the courts.[65] The majority performed an equal protection analysis, weighing a mother's fundamental right to a relationship with her children against the state's economic justification for the rules that forced her to pay for a transcript. It concluded that Mississippi's refusal to allow M.L.B.'s appeal deprived her of equal access to the courts.[66]

Another significant post-*Lassiter* decision is *Troxel v. Granville*,[67] in which the Court found unconstitutional a Washington statute that allowed non-parents to seek a court order of visitation. The "sweeping breadth"[68] of the statute was an unconstitutional infringement on the fundamental right of the parents to make decisions concerning the care and custody of their children.[69] In reaching its conclusion, the Court examined its prior cases regarding the rights of parents and concluded that "extensive precedent" indicated that

> it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right

64. 519 U.S. 102 (1996).

65. *Id.* at 113.

66. *Id.* at 120-28. Justice Kennedy, in a concurring opinion, concluded that the Due Process Clause was a sufficient basis for the Court's holding. *Id.* at 129 (Kennedy, J. concurring).

67. 530 U.S. 57 (2000).

68. *Id.* at 73.

69. *Id.*

of parents to make decisions concerning the care, custody, and control of their children.[70]

V. THE STATUS OF PARENTS' RIGHT TO COUNSEL, AND THEIR RIGHT TO EFFECTIVE COUNSEL, IN THE STATE COURTS

A. The Right to Counsel after Lassiter

According to *Lassiter*, thirty-three states and the District of Columbia provided counsel to parents in termination cases by 1981.[71] Twelve of the states that did not then routinely appoint counsel now do so, although in some states the appointment may depend upon the parent's request for counsel.[72] It appears that five of these states do not have a state constitutional provision, statute, or rule requiring appointment of counsel and therefore make a case-by-case determination of whether counsel should be appointed.[73]

Although *Lassiter* requires trial courts in states that do not appoint counsel in every case to perform a *Mathews v. Eldridge* analysis, at least one commentator suggests that these *Lassiter* hearings seldom take place.[74] The denial of counsel is subject to appellate review, according to *Lassiter*,[75] and an appellate court is obligated to review the record and perform a *Mathews v. Eldridge* analysis when the lack of counsel is raised on appeal.

The Tennessee Court of Appeals has done so in several cases, and it has reminded the trial courts of their duty to

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70. *Id.* at 66.

71. *Lassiter*, 452 U.S. at 34.

72. Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to* Lassiter, 14 Touro L. Rev. 247, 260-62 (including discussion of provisions), 275 (containing table) (1997).

73. In 1997 Young identified six states state without a constitutional provision, statute, or rule requiring appointment of counsel. *Id.* at 260, 275, 276. Those states were Delaware, Hawaii, Mississippi, South Carolina, Tennessee, and Wyoming. In 2002, however, Delaware enacted rules requiring appointment of counsel. *See Hughes v. Div. of Fam. Servs.*, 836 A.2d 498, 509 (Del. 2003) (citing Del. Fam. Ct. R. 206, 207), *cert. denied*, 2004 U.S. LEXIS 1973 (March 8, 2004).

74. William Wesley Patton, *Standard 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).

75. *Lassiter*, 452 U.S. at 32.

determine whether a parent is entitled to appointed counsel.[76] In applying the *Mathews v. Eldridge* factors, it has found that the competing interests of the parents and the state are evenly balanced. For that reason, the factor regarding the risk of an erroneous decision is the primary consideration.[77] Furthermore, the Tennessee court, borrowing from *Lassiter* and *Davis v. Page*,[78] has detailed a number of factors that it considers in determining the risk of an erroneous decision.[79]

In contrast, the Mississippi Supreme Court did not perform a *Mathews v. Eldridge* analysis in an appeal in which the mother claimed that her due process rights were violated because she had no attorney.[80] Mississippi has no statute or case law requiring appointment of counsel.[81] The court affirmed the termination of the mother's parental rights, and held that she was not denied due process even though the attorney who had been representing her on a pro bono basis withdrew three days before the termination trial. The court concluded that because the mother had not requested a continuance in order to obtain a lawyer and because the evidence against her was overwhelming, she was not denied due process.[82]

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76. *In re Adoption of J.D.W.*, 2000 WL 1156628 *6 (Tenn. App. Aug. 16, 2000) (citing several cases in which court performed *Lassiter* review).

77. *State ex rel. T.H. v. Min*, 802 S.W.2d 625, 626-27 (Tenn. App. 1990).

78. 640 F.2d 599 (5th Cir. 1981) (*en banc*), *vacated sub nom. Chastain v. Davis*, 458 U.S. 1118 (1982), *on remand*, 714 F.2d 512 (5th Cir. 1984). *Davis*, decided three months before *Lassiter*, held that appointment of counsel was constitutionally required in child-dependency proceedings. The court expressly rejected the case-by-case method. It found that "the complexity of these proceedings always necessitates the offer of counsel." *Id.* at 604.

79. Those factors are: (1) expert medical or psychiatric testimony at the hearing; (2) the difficulty of the parents in dealing with life; (3) the level of distrust and disorientation thrust upon the parents at the hearing; (4) the difficulty and complexity of the issues; (5) the possibility of self-incrimination; (6) the education of the parents; and (7) the permanency of the arrangement proposed by the state. The last factor is relevant only in dependency proceedings. *Min*, 802 S.W.2d at 627.

80. *K.D.G.L.B.P. v. Hinds County Dept. of Human Servs.*, 771 So. 2d 907 (Miss. 2000).

81. *Id.* at 911, ¶ 14.

82. *Id.* The record showed that the children had first been removed from the mother's home in 1995; she was homeless for eighteen months while her children were in foster care; a petition for termination of parental rights was filed in 1996; in 1997 and 1998, custody of the two children was returned to her. In a few months she and her new husband moved to Florida with the children. She notified the Mississippi officials, who agreed that she could stay in Florida pending a home study. Shortly thereafter, the Florida officials removed the children when the mother was arrested for stabbing her husband with a paring

Rhode Island, which has a court rule requiring appointment of counsel, has held that while the rule requires appointment of counsel, it does not require the appointment of substitute counsel if the parent discharges the appointed counsel. In *In re Bryce T.*,[83] the mother appealed the termination order on the ground that she had been denied due process because the trial court refused to appoint substitute counsel after her attorney was allowed to withdraw and she had to represent herself.[84] The court stated that it was

> doubtful that counsel would have affected the outcome here, given [the mother's] chronic substance abuse problem, her failure to successfully complete treatment, and the termination of her parental rights to another child.[85]

The court did not explicitly perform a *Mathews v. Eldridge* analysis, and it apparently assumed that the rights of the mother and the interests of the state were in equipoise, and that the risk of an erroneous determination was minimal because of the mother's history.

B. The Right to Effective Assistance of Counsel

In the criminal context the practical enforcement of the right to effective counsel is dependent upon whether the right to counsel is constitutionally based. In criminal prosecutions in

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knife, and the children were returned to Mississippi. *Id.* at 911-13. The court stated that the record demonstrated that the mother had suffered from deep psychological problems for a number of years; that she was unable to admit that she had been responsible for the removal of the children from her home; and that she refused to accept responsibility for being homeless for eighteen months. *Id.* at 911.

83. 764 A.2d 718 (R.I. 2001).

84. On the day of the termination hearing, the mother's attorney, who was from the legal-services agency, asked to withdraw because the mother wanted to discharge her. After a lengthy discussion between the mother and the trial judge during which he tried to dissuade her from discharging her attorney and explained that the attorney was well-qualified, the court allowed the attorney to withdraw. The court postponed the hearing to allow the mother to obtain another attorney. It denied her request for an appointed attorney on the basis of a memorandum from the chief judge stating that private counsel could be appointed only if the legal services agency or the public defender was unavailable. *Id.* at 720. The appellate court stated: "[W]e believe that any duty to appoint counsel in a termination of parental rights case is discharged if counsel from Legal Services is appointed, provided that the record indicates that the appointed counsel effectively represented the parent." *Id.* at 722.

85. *Id.*

which a defendant has a Sixth Amendment right to counsel, that right extends to the effective representation by counsel.[86] The Supreme Court has declared, however, that unless there is a federal constitutional right to counsel, there is no federal constitutional right to effective assistance of counsel even in those proceedings in which counsel has been appointed by the court.[87]

In the parental-rights context, then, presumably there is a federal constitutional right to effective assistance of counsel in every case in which a *Lassiter* analysis finds a right to counsel.[88] A few states have concluded that there is a state constitutional right to counsel in parental-termination proceedings, and consequently, a constitutional right to effective counsel.[89] Other states have determined or stated in dicta that there is a state constitutional right to counsel in cases in which the issue of effective counsel was not raised.[90]

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86. *U.S. v. Cronic*, 466 U.S. 648 (1984).

87. Because there is no constitutional right to counsel for a discretionary appeal, *Ross v. Moffitt*, 417 U.S. 600 (1974), there is no right to effective assistance of counsel to prosecute a discretionary appeal, *Wainwright v. Torna*, 455 U.S. 586 (1982). Likewise, because states are not required by the federal constitution to appoint counsel for post-conviction matters, there is no constitutional requirement that counsel be effective. *Pa. v. Finley*, 481 U.S. 551 (1987).

88. An example of a case in which the court conducted a *Lassiter* analysis to determine whether the father in a dependency proceeding had a constitutional right to counsel which, in turn, determined whether he had a right to effective counsel, is *San Bernadino County Dept. of Pub. Soc. Servs. v. Ebrahim A. (In re Emilye A.)*, 12 Cal. Rptr. 2d 294, 302-4 (Cal. App. 1992). The court noted that the father had a statutory right to counsel. *Id.* at 300. *See also In re Doe*, 2003 Haw. App. LEXIS 192, at *14 (June 20, 2003) (assuming that appointed counsel must be effective).

89. *See V.F. v. State*, 666 P.2d 42, 45 (Alaska 1983) (holding that due process clause of Alaska Constitution gives parents right to effective assistance of counsel); *Dept. of Soc. Servs. v. Trowbridge (In re Trowbridge)*, 401 N.W.2d 65, 66 (Mich. Ct. App. 1987) (holding that right to counsel is found in equal protection clauses of federal and Michigan Constitutions as well as in statute); *Michael F. v. State ex rel. Dept. of Human Servs. (In re D.D.F.)*, 801 P.2d 703, 706-07 (Okla. 1990) (recognizing previous holding that Fourteenth Amendment guarantees right to counsel, and holding that after *Lassiter*, Oklahoma Constitution requires appointed counsel in all termination cases); *Dept. of Soc. & Health Servs. v. Moseley (In re Moseley)*, 660 P.2d 315, 318 (Wash. App. 1983) (holding that Washington Constitution requires effective assistance of counsel).

90. *See e.g. In re D.B.*, 385 So. 2d 83, 90 (Fla. 1980) (holding that the right to counsel stems from the Due Process Clauses of both the federal and state constitutions); *L.W. v. Dept. of Children & Fams.*, 812 So. 2d 551, 554 (Fla. 1st Dist. App. 2002) (recognizing both state constitutional and statutory right to counsel) *O.A.H. v. R.L.A.*, 712 So. 2d 4, 7 (Fla. 2d Dist. App. 1998) (noting that Florida Supreme Court continues to confirm a state constitutional right to appointed counsel in parental-termination proceedings); *In re A.S.A.*,

Many states have decided that because there is a state statutory provision for the appointment of counsel, that statutory right is meaningless unless it is the effective assistance of counsel to which the parent is entitled.[91] These courts use language such as, "[a] right to counsel is of little value unless there is an expectation that counsel's assistance will be effective,"[92] and "[i]t is axiomatic that the right to counsel includes the right to competent counsel."[93] Most of the states that have grounded an ineffectiveness claim on a statutory right to counsel have ignored the proposition that there is no right to effective counsel unless it is a constitutional right.

The Utah Court of Appeals, for example, made a persuasive statement in support of finding a right to effective counsel. It said that a right to counsel is meaningless unless the

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852 P.2d 127, 129-30 (Mont. 1993) (holding that the Due Process Clause of the Montana Constitution guarantees appointed counsel to an indigent parent in proceedings to terminate parental rights); *In re Lindsey C.*, 473 S.E.2d 110, 122 n. 12 (W. Va. 1995) (suggesting that right to assigned counsel in parental-termination cases comes from West Virginia Constitution, and indicating that appointment of counsel is required in abuse and neglect cases). *See also D.S. v. T.D.K. (In re Adoption of K.A.S.)*, 499 N.W.2d 558, 563 (N.D. 1993) (finding that the Equal Protection Clause of the North Dakota Constitution requires court-appointed counsel in parental-termination proceedings pursuant to the Revised Uniform Adoption Act because the other statutory means of terminating parental rights provide for the appointment of counsel for parents).

91. *In re E.D. v. State Dept. of Human Resources*, 777 So. 2d 113, 115 (Ala. 2000); *In re Appeal in Gila County Juvenile Action No. J-3824*, 637 P.2d 740, 743 (Ariz. 1981) (analyzing guardian ad litem statute); *Kristin H.*, 54 Cal. Rptr. 2d 722, 736-38 (Cal. App. 6th Dist. 1996); *People in re V.A.E.Y.H.D.*, 605 P.2d 916, 919 (Colo. 1980); *L.W.*, 812 So. 2d at 554-55 (listing states that have recognized ineffectiveness claim, and extending it to dependency proceedings); (*Nix v. Dept. of Human Resources*, 225 S.E.2d 306, 307-08 (Ga. 1976); *In re J.P.*, 737 N.E.2d 364, 370 (Ill. App. 2000) (holding that right to effective counsel flows from U.S. Constitution and Illinois statutes); *In re Rushing*, 684 P.2d 445, 448 (Kan. App. 1984); *In re Care and Protection of Stephen*, 514 N.E.2d 1087, 1090-91 (Mass. 1987); *Johnson v. J.K.C. (In re J.C.)*, 781 S.W.2d 226, 228 (Mo. App. 1989) (listing states that have recognized viability of ineffective-assistance claim); *State ex rel. Human Servs. Dept. (In re Termination of Parental Rights of James W.H.)*, 849 P.2d 1079, 1081 (N.M. App. 1993); *In re Erin G.*, 527 N.Y.S.2d 488, 490 (N.Y. App Div. 1988); *In re Oghenekevebe*, 473 S.E.2d 393, 396 (N.C. App. 1996); *Jones v. Lucas County Children Servs. Bd.*, 546 N.E.2d 471, 473 (Ohio App. 6th Dist. 1988); *State ex rel. Juvenile Dept. of Multnomah County v. Geist (In re Geist)*, 796 P.2d 1193, 1200 (Ore. 1990); *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003); *State v. A.H. (In re E.H.)*, 880 P.2d 11, 13 (Utah. App. 1994); *A.S. v. State (In re M.D.(S.))*, 485 N.W.2d 52, 54 (Wis. 1992).

For a discussion of several California Court of Appeal cases that the author terms "inconsistent," *see* Patton, *supra* n. 74, at 230-31.

92. *Care and Protection of Stephen*, 514 N.E.2d at 1090-91 (Mass. 1987).

93. *Trowbridge*, 401 N.W.2d at 66.

right is to effective counsel, and because the court has a duty to interpret state statutes so that they are meaningful, it would interpret the statutory provision as one calling for the effective assistance of counsel.[94] In a similar view, the Texas Supreme Court stated:

> [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.[95]

The Iowa Supreme Court simply assumes that due process means that if there is a statutory right to counsel, that right has to be to effective assistance of counsel.[96] In at least two states there are statutes expressly providing for effective assistance of counsel or competent counsel,[97] but in some jurisdictions there has been no determination as to whether there is a right to effective assistance of counsel.[98] The Vermont Supreme Court has denied an ineffectiveness claim on its merits while stating that it was not deciding whether such a claim could be viable.[99] The Nebraska Court of Appeals has declined to recognize an ineffectiveness claim, stating that such claims are available only in criminal cases.[100]

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94. *A.H.*, 880 P.2d at 13. The rationale used by the New Mexico Court of Appeals is similar. *James W.H.*, 849 P.2d at 1081.

95. *M.S.*, 115 S.W.3d at 544 (quoting *In re K.L.*, 91 S.W.3d 1, 13 (Tex. App. Fort Worth Dist. 2002)).

96. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986) (stating that "due process requires counsel appointed under a statutory directive to provide effective assistance").

97. *See* Cal. Welf. & Inst. Code § 317.5(a) (West 1998) ("All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.")

Minnesota's statute provides for effective assistance of counsel in termination proceedings. Minn. Stat. § 260C.163(3)(a) (West Supp. 2003). The Minnesota Supreme Court makes a distinction between the constitutional right to counsel and a statutory right to counsel in determining the appropriate procedure for a trial court to use when attempting to ensure that a parent's waiver of counsel is knowing and intelligent. *In re G.L.H.*, 614 N.W.2d 718, 722-23 (Minn. 2000).

98. For example, in Maine there is a statutory right to counsel, 22 Me. Rev. Stat. Ann. § 4005(2) (West Supp. 2000), and there is apparently a state constitutional right, *Danforth v. St. Dept. of Health & Welfare*, 303 A.2d 794, 800 (Me. 1973), but there is no reported termination case discussing ineffective assistance of counsel.

99. *In re M.B.*, 647 A.2d 1001, 1003 n. 3 (Vt. 1994) (allowing claim of ineffective assistance to be raised without discussing basis of the claim).

100. *In re Azia B.*, 626 N.W. 2d 602, 612 (Neb. App. 2001).

In summary, many jurisdictions have finessed the constitutional/statutory dichotomy and have taken a logical and common-sense approach. In all but a few states, whether the right to counsel stems from a state constitutional provision or from a statute, it appears that parents have a right to effective assistance of counsel in proceedings to terminate their parental rights.

VI. THE PROCEDURAL VEHICLE FOR RAISING A CLAIM OF INEFFECTIVE ASSISTANCE IN PARENTAL-TERMINATION PROCEEDINGS

The right to effective assistance of counsel is hollow if it cannot be enforced. Although most jurisdictions recognize the right to counsel in parental-termination cases and agree that it is worthy of enforcement, there is no consensus on the proper procedure for bringing an ineffectiveness claim to the attention of a court. In the criminal context the primary procedures for claiming ineffectiveness of counsel are direct appeal and post-conviction review, but the rules vary. A criminal defendant may be required to raise an ineffectiveness claim on direct appeal,[101] allowed in some situations to bring the claim on direct appeal,[102] or required to bring the claim in a post-conviction proceeding.[103] It is little wonder, then, that the states have various approaches to ineffectiveness claims in parental-termination proceedings as well.

While many states have statutory post-conviction procedures, equivalent statutory procedures for the collateral

101. For a thorough discussion of the types of ineffectiveness claims, and conclusions about which of them can be presented on direct appeal, see *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998).

102. *See State v. Litherland*, 12 P.3d 92 (Utah 2000); *see also* Wayne R. LaFave, et al., *Criminal Procedure* § 11.7(e) (West Group 1999) (citing cases).

103. *See Cmmw. v. Grant*, 813 A.2d 726, 735-37 (Pa. 2002) (listing the relevant state statutes and stating that the "overwhelming majority" of states prefer ineffectiveness claims to be raised on collateral review); *see also* Anne M. Voigts, Student Author, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103, 1127 n. 141 (1999) (listing cases in which courts have held that ineffectiveness claims cannot be brought on direct appeal).

review of parental-termination judgments do not exist.[104] The procedures for bringing an ineffectiveness claim in parental-termination cases have been developed by decisional law.[105]

A. Direct Appeal

The most common vehicle for raising an ineffectiveness claim in a parental-termination case is the direct appeal of the termination order. In *State ex rel. Juvenile Department of Multnomah County v. Geist (In re Geist),*[106] the Oregon Supreme Court held that direct appeal is the best method for

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104. At least one state, however, has a statute permitting the reopening of a termination judgment, *see* Conn. Gen. Stat. § 45a-719 (West Supp. 2004).

105. Various court actions are potentially available to a parent who has been deprived of adequate counsel, but a discussion of their relative merits is beyond the scope of this article. Parents can, for example, seek monetary damages from the attorney through a professional malpractice action. Several commentators have explored in detail the difficulties in malpractice actions brought by criminal defendants against their trial or appellate counsel, and parents whose rights have been terminated would likely encounter similar difficulties. *See* Chen, *supra* n. 24; Klein, *supra* n. 24; David A. Sadoff, *The Public Defender as Private Offender: A Retreat from Evolving Malpractice Liability Standards for Public Defenders*, 32 Am. Crim. L. Rev. 883 (1995).

Another type of action to enforce the right to adequate counsel is one for prospective relief that challenges the system of providing counsel for indigent parents. Claims brought on behalf of indigent criminal defendants or the lawyers who represent them have met with varying degrees of success. *See State v. Smith*, 681 P.2d 1374 (Ariz. 1984) (holding that contract system in one county violated right to effective counsel because attorney was so overburdened he could not adequately represent all clients, and concluding that if system continued in existence, ineffectiveness would be presumed in individual cases); *State v. Peart*, 621 So. 2d 780 (La. 1993) (holding that local public defender office was so overworked that ineffectiveness would be presumed); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990) (holding that court-appointment system, as applied, violated state constitutional due process rights of appointed attorneys). *But see Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996) (finding no justiciable controversy because parties made no showing that public defender's clients were actually prejudiced). The procedure utilized in these systematic challenges are direct appeal from a criminal conviction, *Smith*, 681 P.2d at 1376; pre-trial motion in the criminal case, *Peart*, 621 So. 2d at 784; request by attorneys for counsel fees at conclusion of criminal case, *Lynch*, 796 P.2d at 1154; and declaratory judgment action by public defender, *Kennedy*, 522 N.W.2d at 3. For commentary on systematic challenges, see *Gideon's Promise*, *supra* n. 17, at 2069-78; Lemos, *supra* n. 17; Marc L. Miller, *Wise Masters*, 51 Stan. L. Rev. 1751 (1999) (reviewing Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge U. Press 1998)).

106. 796 P.2d 1193 (Or. 1990).

reviewing claims of ineffective assistance of counsel.[107] The court first found that the statutory right to counsel includes a right to effective counsel, but because the legislature had not established a procedure to vindicate the right to adequate counsel, the court determined that it was free to fashion an appropriate procedure.[108] It discussed the need for finality and the amount of time that passes between the filing of the original dependency petition and the granting of the parental-termination order.[109] It noted that protracted litigation is not in the interest of the child, the natural parents, or the prospective adopting parents:

> [A] procedure that allows a terminated parent to make a claim of inadequate counsel only after all direct statutory appeals have been exhausted would only further delay the finality of the termination decisions.[110]

The court suggested that there may be some situations in which a factual hearing in the trial court is appropriate, but it declined to express any views on how the appellate court should handle a remand or how the trial court should handle a factual hearing.[111]

The New Mexico Court of Appeals, relying on the reasons set forth in *Geist*, also held that ineffectiveness claims should be raised on direct appeal.[112] The Pennsylvania Superior Court determined that direct appeal was the appropriate method because it was expeditious and collateral attacks were not authorized.[113] The Georgia Court of Appeals has allowed an ineffectiveness claim to be raised on direct appeal, but remanded for an evidentiary hearing upon determining that the record was

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107. *Id.* at 1201. This is in contrast to the rule in Oregon that ineffectiveness claims in criminal matters are "more properly" resolved in post-conviction proceedings so that an evidentiary record can be made. *State v. Neighbors*, 640 P.2d 643, 645 (Or. App. 1982).

108. *Geist*, 796 P.2d at 1200 ("The statutory right to adequate trial counsel may prove illusory if there is no procedure for review of claims of inadequate counsel").

109. *Id.* at 1201.

110. *Id.*

111. *Id.* at 1204 n. 16.

112. *James W.H.*, 849 P.2d at 1081. In a later case the court held that a remand for an evidentiary hearing would be appropriate. *State ex rel. Children, Youth & Fams. Dept. v. Tammy S.*, 974 P. 2d 158, 163 (N.M. App. 1998).

113. *In re Adoption of T.M.F.*, 573 A.2d 1035, 1043 (Pa. Super. 1990) (en banc). In another case reviewing an ineffectiveness claim in a dependency proceeding, the same court held that such claims must be raised on direct appeal, and set out the standard of review. *In re J.P.*, 573 A.2d 1057, 1066 (Pa. Super. 1990) (en banc).

inadequate.[114] The Missouri Court of Appeals ruled that the claim has to be raised on direct appeal or it is deemed waived.[115] The Iowa Supreme Court, in a case involving the adequacy of representation of a child, rather than a parent, ruled that because there was no procedural equivalent of post-conviction relief for proceedings to terminate parental rights, the issue had to be raised by direct appeal.[116] In a case before the Ohio Court of Appeals, appellate counsel, who also had been trial counsel, raised ineffectiveness on direct appeal.[117] The court said that if the case were a criminal case, it would not permit the issue to be raised on direct appeal because where trial counsel is appellate counsel, it is presumed that appellate counsel is incapable of making the argument for ineffectiveness at the trial level. However, since there was no such thing as post-conviction relief in a termination case, the court "reluctantly" addressed the merits of the claim.[118]

Many courts have allowed ineffectiveness claims in termination proceedings to be raised on direct appeal in cases in which they do not discuss their rationale for this decision.[119] In

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114. *In re A.L.E.*, 546 S.E.2d 319, 325 (Ga. App. 2001).

115. *C.W.B. v. LaFata (In re C.N.W.)*, 26 S.W.3d 386, 393 (Mo. App. 2000). Nonetheless, because of the importance of the proceeding, the court examined the entire record and found that the parent's lawyer was not ineffective. *Id.* By contrast, claims of ineffective assistance of counsel in criminal cases are not cognizable on direct appeal in Missouri. *State v. Taylor*, 1 S.W.3d 610, 612 (Mo. App. 1999).

116. *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). In Iowa, ineffectiveness claims in criminal cases can be raised on post-conviction review, and if they are not raised on direct appeal, the applicant must demonstrate cause for not having raised the issue then. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991).

117. *In re Whiteman*, 1993 WL 241729 *15 (Ohio App. 6th Dist. 1993).

118. *Id.* Ohio requires claims of ineffectiveness in criminal cases, when appellate counsel is the not the same as trial counsel, to be brought on direct appeal. *State v. Cole*, 443 N.E.2d 169 (Ohio 1982).

119. *V.F. v. State*, 666 P.2d 42, 45-46 (Alaska 1983); *Gila County Juvenile Action*, 637 P.2d at 743; *People ex rel. V.A.E.Y.H.D*, 605 P.2d 916, 919 (Colo. 1980); *In re K.M.L.*, 516 S.E.2d 363, 366 (Ga. App. 1999); *State Dept. of Health & Welfare v. Mahoney-Williams (In re M.T.P.)*, 611 P.2d 1065, 1066-67 (Idaho 1980); *People v. K.K. (In re KR.K)*, 631 N.E.2d 449, 454-55 (Ill. App. 2d Dist. 1994); *Bickel v. St. Joseph County Dept. of Pub. Welfare (In re Termination of Parent/Child Relationship of D.T.)*, 547 N.E.2d 278, 281 (Ind. App. 1989); *Rushing*, 684 P.2d at 448; *Trowbridge*, 401 N.W.2d at 66; *In re Erin G.*, 527 N.Y.S.2d 488, 490 (N.Y. App. Div. 1988); *Buncombe County Dept. of Soc. Servs. v. Burks (In re Bishop)*, 375 S.E.2d 676, 678-79 (N.C. App. 1989); *Jones*, 546 N.E.2d at 473; *Michael F. v. State ex rel. Dept. of Human Servs. (In re D.D.F.)*, 801 P.2d 703, 706 (Okla. 1990); *In re M.S.*, 115 S.W.3d 534, 536 (Tex. 2003); *E.H.*, 880 P.2d at 13; *Wright v. Alexandria Div. of Soc. Servs.*, 433 S.E.2d 500, 502-03 (Va. App. 1993); *M.B.*, 647 A.2d at

those cases in which it is determined on direct appeal that the parent was denied effective assistance of counsel, the result has been a remand to the trial court for a new trial.[120] In at least one instance an appellate court set a thirty-day time limit in which the new trial was to take place.[121]

B. Post-Judgment Motions

Some courts do not allow ineffectiveness claims in termination cases to be raised on direct appeal. The Minnesota Court of Appeals, for example, did not permit a parent to raise an ineffectiveness claim on direct appeal: "An appellant is precluded from alleging other error on appeal without first providing the district court an opportunity to correct the error by filing post-trial motions."[122] The Iowa Court of Appeals has also stated that ineffectiveness cannot be raised for the first time on appeal.[123] Other courts, while not stating that direct appeal is unavailable for ineffectiveness claims, have approved the use of post-judgment motions. For example, the Alabama Supreme Court found a motion to set aside a judgment to be an "appropriate" method for raising an ineffectiveness claim, characterizing it as the civil equivalent of the criminal method.[124] The Connecticut Supreme Court held that direct appeal, although sometimes acceptable, was not appropriate in at least one case because of an inadequate record, and suggested several types of post-judgment motions that could be utilized by a parent to raise an ineffectiveness claim.[125] It noted that a Connecticut statute allows the reopening of a parental-rights termination order.[126] It also suggested use of common law

1003; *Moseley*, 660 P.2d at 317; *In re R.J.M.*, 266 S.E.2d 114, 115 (W. Va. 1980).

120. *Gila County Juvenile Action*, 637 P.2d at 746; *State ex rel. State Off. for Servs. to Children & Fams. v. Thomas (In re Stephens)*, 12 P.3d 537, 538 (Or. App. 2000); *State ex rel. State Off. for Servs. to Children & Fams. v. Rogers (In re Eldridge)*, 986 P.2d 726, 731 (Or. App. 1999).

121. *Sheltering Arms Children's Servs. v. Harriet J. (In re Orneika J.)*, 491 N.Y.S.2d 639, 641 (N.Y. App. Div. 1st Dept. 1985).

122. *In re J.M.K.A.*, No. C0-97-1156, 1997 WL 770399 *3 (Minn. App. Dec. 16, 1997).

123. *In re B.P.*, No. 02-0422, 2002 WL 1842966 *2 (Iowa App. Aug. 14, 2002).

124. *In re E.D. v. State Dept. of Human Resources*, 777 So.2d 113, 116 (Ala. 2000).

125. *In re Jonathan M.*, 764 A.2d 739, 754-56 (Conn. 2001).

126. *Id.* at 755; Conn. Gen. Stat. § 45a-719 (West. Supp. 2004).

principles for reopening judgments obtained by fraud or mutual mistake, and it indicated that in some situations a parent could move for a new trial.[127] The Utah Court of Appeals indicated that Rule 60(b)(6) of the Utah Rules of Civil Procedure was an appropriate vehicle for raising an ineffectiveness claim,[128] but the Missouri Court of Appeals has held that ineffectiveness "is not one of the specified reasons for setting aside a judgment under the rule."[129]

At least one Texas appellate court permitted the ineffectiveness claim to be brought on direct appeal, but stated that it should be raised in a post-trial motion below in order to develop the record.[130] In a subsequent Texas Supreme Court case, the court allowed the claim on direct appeal, but remanded the case to the intermediate appellate court for an analysis of whether counsel's errors had caused harm.[131]

One jurisdiction that applies the established procedure for raising ineffectiveness in criminal proceedings to termination cases is Wisconsin.[132] When an ineffectiveness claim is brought in a criminal case, the trial court holds a post-judgment *Machner* hearing[133] in order to develop the evidentiary record regarding the performance of trial counsel. In a parental-rights termination case, the *Machner* hearing is likewise a prerequisite to a claim of ineffective representation: "[T]estimony from petitioners' trial counsel should be elicited to discover the underlying reasons for the trial counsels' actions and inactions."[134] The Michigan Court of Appeals limits the claim of ineffectiveness to the appeal

127. *Jonathan M.*, 764 A.2d at 756. The Connecticut Superior Court has recognized that a petition for a new trial is an available method for raising the ineffectiveness claim. *In re Shanice P.*, 2000 WL 1618292 *1 (Conn. Super. 2000).

128. *R.G. v. State (In re A.G.)*, 27 P.3d 562, 564 n. 3 (Utah App. 2001).

129. *C.N.W.*, 26 S.W.3d at 393.

130. *In re J.M.S.*, 43 S.W.3d 60, 64 (Tex. App. 2001). The court added that if the claim is first brought on direct appeal, the review is limited to the record, which might not be fully developed, and the parent who has failed to raise the issue in a post-trial motion "has a difficult burden to overcome." *Id.*

131. *In re M.S.*, 115 S.W.3d 534, 549-50 (Tex. 2003).

132. *A.S. v. State (In re M.D.(S.))*, 485 N.W.2d 52 (Wis. 1992). *See also Brown County v. Kathy C. (In re Chrissy M.D.)*, 621 N.W.2d 386, ¶ 7 (Wis. App. 2000); *Brown County v. Neung S. (In re Ounkhm S.)*, 2000 Wisc. App. LEXIS 920.

133. *State v. Machner*, 285 N.W.2d 905 (Wis. App. 1979).

134. *M.D.(S.)*, 485 N.W. 2d at 56.

record unless the parent has requested either a new trial or what is known in that jurisdiction as a *Ginther* hearing.[135]

C. Habeas Corpus

Very few cases have discussed the availability of habeas corpus petitions for claims of ineffectiveness, but a Florida Court of Appeal has determined that a habeas action is appropriate.[136] It rejected the use of direct appeal because the appellate attorney is often the trial attorney, and because the record is usually not sufficiently developed for the claim to become apparent; it also noted that habeas corpus had been the traditional means of raising the ineffectiveness claim in criminal cases.[137] It held that a habeas petition had to be filed in the trial court "without unreasonable delay"[138] and suggested that the doctrine of laches could bar the proceeding if there was unnecessary delay.[139] The California courts also allow the use of habeas corpus to raise the ineffectiveness claim.[140]

Other states reject the use of habeas corpus. The Connecticut Supreme Court held that a parent who claimed ineffective assistance of counsel had standing to bring the habeas petition, but that it was not an "appropriate vehicle by which he may assert a claim of ineffective assistance of counsel."[141] The court performed a *Mathews v. Eldridge* analysis in rejecting the parent's argument that he had a due process right to collaterally attack the termination order.[142] It determined that the government's interest in providing the child with a

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135. *Fam. Independence Agency v. Jones (In re S.M.J.)*, 2001 WL 1654780 *9 (Dec. 21, 2001) (referring to *People v. Ginther*, 212 N.W.2d 922 (Mich. 1973)).

136. *L.W. v. Dept. of Children & Fams.*, 812 So. 2d 551, 557 (Fla. 1st Dist. App. 2002). One member of the three-judge panel disagreed with the conclusion that a collateral proceeding should be the exclusive means by which to raise the ineffectiveness claims. *Id.* at 560 (Wolf, J., concurring).

137. *Id.* at 557.

138. *Id.*

139. *Id.* at 557-58.

140. *See e.g. Kristin H.*, 54 Cal. Rptr. 2d 722; *see also Orange County Soc. Serv. Agency v. Olga A. (In re Eileen A.)*, 101 Cal. Rptr. 548, 551-56 (Cal. App. 4th Dist. 2000) (finding ineffective assistance of counsel on direct appeal, and discussing why direct appeal was appropriate even though habeas is preferred method).

141. *Jonathan M.*, 764 A.2d at 744.

142. *Id.* at 752-53.

permanent home outweighed the risk of an erroneous deprivation of parental rights, given the number of procedural alternatives available to the parent.[143]

The Kansas Court of Appeals disallowed the habeas procedure because a parent whose parental rights have been terminated has no right to file a habeas writ.[144] The Utah Court of Appeals suggested that habeas is unacceptable in the parental-rights termination context because of the delay it would cause.[145]

Federal habeas corpus is not an option after *Lehman v. Lycoming County Children's Services Agency*,[146] in which concerns of federalism[147] and a reluctance to expand federal habeas into the area of child custody[148] led the Supreme Court to reject the habeas petition of a mother whose parental rights had been terminated in Pennsylvania.[149] The Court was particularly concerned about the need for finality in child-custody cases and the possibility of lessening a child's chances of adoption if federal habeas were available to challenge termination orders.[150] The Court quoted at length from *Sylvander v. New England Home for Little Wanderers*[151] in which the First Circuit denied the use of habeas in a child-custody case and suggested that there is a sufficient number of other procedural vehicles available to parents hoping to raise constitutional issues,[152] including appeal, certiorari, and the civil-rights statutes.[153]

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143. *Id.* at 753.

144. *Cosgrove v. Kan. St. Dept. of Soc. & Rehab. Servs.*, 786 P.2d 636, 638-39 (Kan. App. 1990).

145. *E.H.*, 880 P.2d at 13 n. 2.

146. 458 U.S. 502 (1982).

147. *Id.* at 512-13.

148. *Id.* at 511.

149. *In re William C.*, 383 A.2d 1227 (Pa. 1978).

150. *Lehman*, 458 U.S. at 513.

151. 584 F.2d 1103 (1st Cir. 1978).

152. *Lehman*, 458 U.S. at 515 (quoting *Sylvander*, 584 F.2d at 1111).

153. *Sylvander*, 584 F.2d at 1111.

VII. A CRITIQUE OF EXISTING PROCEDURES FOR RAISING THE INEFFECTIVENESS CLAIM IN PARENTAL-TERMINATION PROCEEDINGS

It is apparent from the foregoing that most of the courts that have allowed ineffectiveness claims in termination cases have either required or permitted them to be raised on direct appeal. An examination of the advantages and disadvantages of the various means of bringing ineffectiveness claims illustrates why the direct appeal is the best method.

The most persuasive reason in favor of direct appeal is that, in most cases, it will consume the least amount of time. This is particularly important because of the need to stabilize the circumstances of the child. The longer there is uncertainty about whether a termination order will withstand appeal, the longer the child remains in limbo. The longer the child remains in limbo, the greater the possibility of emotional damage to the child; and the longer the child remains in the foster care system, the greater the financial burden upon the state. Furthermore, the longer the uncertainty about the finality of the termination order, the less likely it is that prospective adopting parents will come forward. From the parents' standpoint, the longer an erroneous termination order remains in effect, the more detrimental it is to them and their relationship with the child. This is because, in all likelihood, once the termination order is entered, the parents are not permitted to have contact with the child and the services that they may have been receiving previously from the state agency will have been terminated.

A direct appeal is likely to be faster than either a post-judgment motion or a habeas proceeding in most cases. The direct appeal has the time limits imposed by the statutes and rules governing appeals, and the majority of states have enacted expedited procedures for appeals of termination orders.[154] In

154. Susan C. Wawrose, *"Can We Go Home Now?": Expediting Adoption and Termination of Parental Rights Appeals in Ohio State Courts*, 4 J. App. Prac. & Process 257, 262 (2002) (stating that thirty-eight states expedite appeals in termination proceedings); Stratton, *supra* n. 2, at 123-24.

Examples of rules expediting these appeals include Iowa. R. Ct. 8.21 (West 2004) (notice of appeal to be filed in fifteen days); S.D. R. Civ. App. P. §§ 15-26A-6.1, 15-26A-75 (LEXIS 2003) (shorter periods for filing notice and briefs in termination cases than in other civil matters); and Wis. R. App. P. 809.107 (West 2003). *See In re Estel A.*, 536

contrast, motions under rules equivalent to Fed. R. Civ. P. 60(b)(6) have only a "reasonable" time as the limit.[155] Although one court has held that fourteen months after the termination order was not a reasonable time,[156] it is possible that courts will consider substantial time periods to be reasonable, depending upon the reasons given for the delay. The Connecticut statue that expressly allows a post-judgment motion to reopen or set aside a judgment terminating parental rights, though, sets four months as the time period within which the motion must be filed.[157]

Of course, rules could be promulgated setting fairly short time periods for post-judgment motions, or courts could allow the effectiveness claims to be raised in motions for new trial, which generally have a shorter time period than Rule 60(b) motions.[158] A post-judgment process for effectiveness claims with relatively short time periods would remedy one of the disadvantages to the post-judgment method. Another disadvantage, however, is that post-judgment motions involve additional hearings in the trial court, which also means more time. While it is possible for a court to design and implement a

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N.W.2d 396 (Wis. App. 1995) (holding that court did not have power to enlarge the fifteen-day appeal period). The National Council for Juvenile and Family Court Judges recommends that the time period between the trial court's judgment terminating parental rights and a decision by the appellate court should not exceed 150 days. *Adoption Guidelines*, supra n. 5, at 40.

155. Fed. R. Civ. P. 60(b) (West 2004).

156. *Tiffany N. v. Kareem W. (In re Termination of Parental Rights to Shanay W.)*, 618 N.W.2d 273 (Wis. App. 2000). The court emphasized the need for finality in decisions affecting a child's ability to maintain a stable family relationship, quoting from a Wisconsin Supreme Court case regarding the concern for finality:

> The legislature emphasized that courts should recognize that instability and impermanence in family relationships are contrary to the welfare of children. The legislature also entreated the courts to recognize the importance to children of eliminating unreasonable periods while their parents try to correct the conditions that prevent the child's return to the family.

Id. at *5-*6 (quoting *Waukesha County v. Steven H. (In re Brittany Ann H.)*, 607 N.W.2d 607, 615 (Wis. 2000)).

157. Conn. Gen. Stat. § 52-212(a) (West 1991). *See Jonathan M.*, 764 A.2d at 755-56.

158. Fed. R. Civ. P. 59(b) has a ten-day time period. This shorter time limit may create difficulties for the parent. Trial counsel may still be representing the parent, and therefore, all the problems incurred when trial counsel raises an ineffectiveness claim are present. Even if new counsel has been appointed, it would be difficult for the new counsel to gain enough information about the representation by trial counsel to make a new trial motion on the basis of ineffectiveness. *See* LaFave, *supra* n. 102, at 629-30 (discussing the difficulties of utilizing post-verdict motions to raise Sixth Amendment ineffectiveness claims in criminal cases).

process that includes a trial court hearing for the purpose of factual findings, realistic judges know that it is easier said than done. Furthermore, to the extent that many claims of ineffectiveness will be denied in the trial court and then appealed, this process will be lengthier than one allowing the ineffectiveness claim on appeal.

Nonetheless, in some cases it will be impossible to determine the merits of an ineffectiveness claim from the appeal record. This is probably the most serious disadvantage to raising an ineffectiveness claim on direct appeal. However, in many cases the merits of an ineffectiveness claim may be determined on the appeal record alone. In most of the cases cited in this article in which an appellate court has found ineffective assistance of counsel on appeal, it has done so on the basis of the record before it, without remanding for a hearing.[159] In an Oregon case in which the court found that counsel was inadequate on the basis of the trial record, the transcript contained counsel's admission that he was not prepared for trial and had not read the discovery material.[160] The court was able to conclude that it was not inevitable that the parent's rights would have been terminated with adequate counsel.[161] In another Oregon case the claim of ineffectiveness was the failure of counsel to file a timely notice of appeal, which was apparent on the record, and the court found that counsel was inadequate.[162]

When the record is insufficient for determining the merits of ineffectiveness claims, appellate courts should allow a remand to the trial court for an evidentiary hearing on ineffectiveness. This need not be done in every case, but should be reserved for only those cases in which the parent persuades the court that he or she is likely to prevail. For example, the

159. *Gila County Juvenile Action*, 637 P.2d at 743; *Eileen A.*, 101 Cal. Rptr. 2d at 551-56; *Orcutt*, 173 N.W.2d at 67-71; *Rushing*, 684 P.2d at 449-50; *J.C.*, 781 S.W.2d at 228; *Orneika J.*, 491 N.Y.S.2d at 78-79; *In re McLemore*, 2001 WL 266947 (Ohio App. 10th Dist. Mar. 20, 2001); *State ex rel. St. Office for Servs. to Children & Fams. v. Rogers (In re Eldridge)*, 986 P.2d 726 (Or. App. 1999). *But see Kristin H.*, 54 Cal. Rptr. 2d at 744 (concluding that record demonstrated that performance of attorney was inadequate, but remanding for a hearing in the trial court on whether the performance was prejudicial).

160. *Eldridge*, 986 P.2d at 729.

161. *Id.* at 731.

162. *State ex rel. St. Off. for Servs. to Children & Fams. v. Hammons*, 10 P.3d 310, 313 (Or. App. 1999). The remedy was to allow the untimely appeal. *Id.* at 315.

appellate court could require by rule that when appellate counsel requests a remand in order to make the appropriate record, counsel should do so in a motion[163] that specifically describes which actions or inactions of trial counsel constitute ineffectiveness and include an offer of proof as to the evidence that would be presented on remand. The offer of proof should consist of affidavits from people with knowledge of counsel's performance. For example, if the ineffectiveness consists of trial counsel's failure to call necessary witnesses, the motion should include affidavits from the parent that she requested the attorney to call the witnesses, and affidavits from the witnesses themselves about their proposed testimony. The appellate court could then determine, in an expedited manner, whether the ineffectiveness alleged appears clearly on the record and, if not, whether the offer of proof is such that appellate counsel may be able to establish ineffectiveness.[164] If the appellate court grants the remand request and orders a hearing for factual findings on the ineffectiveness issue, it should retain jurisdiction over the appeal. In this way delay would be minimized.

The other major disadvantage to the direct-appeal approach is that trial counsel may still be representing the parent when the notice of appeal has to be filed. However, this will also be true for any process that must be initiated within a short time of the

163. It is common for appellate rules to contain a provision for the filing of motions. *See e.g.* Fed. R. App. P. 27 (federal); Me. R. App. P. 10 (Maine).

164. In *State ex rel. Children, Youth and Fams. Dept. v. David F.*, 911 P.2d 235 (N.M. App. 1995), the New Mexico Court of Appeals, which hears ineffectiveness claims on direct appeal, held that it does not remand a case to the trial court for an evidentiary hearing unless the record on appeal shows a prima facie case of ineffectiveness. It defines a prima facie case as one in which "(1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible rational strategy or tactic to explain counsel's conduct; and (3) the actions of counsel are prejudicial." *Id.* at 242. In that case, however, after thoroughly examining all of the parents' ineffectiveness contentions and the record, the court concluded that the parents' counsel was not ineffective. In *State ex rel. Children, Youth and Fams. Dept. v. Tammy S.*, 974 P.2d 158 (N.M. App. 1998), the court remanded an ineffectiveness claim for an evidentiary hearing in the trial court where the mother's claim of ineffectiveness stemmed from the joint representation by counsel of the mother and father even though the mother was a victim of the father's domestic violence. The court quoted the prima facie test from *David F.*, but stated: "Alternatively, this Court has utilized the standard that remand for an evidentiary hearing is required where a substantial question is raised concerning issues not adjudicated at the termination hearing." *Id.* at 163.

termination judgment.[165] Whenever it becomes apparent that an ineffectiveness claim is going to be or should be brought, trial counsel should seek to withdraw from the case and new counsel should be appointed at the earliest possible time. It is unrealistic and unworkable to expect trial counsel to raise ineffectiveness. Court rules or statutes that require trial counsel to remain in the case as appellate counsel present a particular problem.[166]

A requirement that the ineffectiveness issue be raised on direct appeal could create the consequence that if it is not raised on appeal, it will be considered waived or barred. However, in the criminal law context, the Supreme Court has held that a federal defendant who could have raised an ineffectiveness claim on direct appeal is not barred from raising the claim in a post-conviction proceeding.[167] A rule that may better fit the termination setting would bar a claim of ineffectiveness if not raised on direct appeal unless the incident of ineffectiveness was unknown to the parents and not reasonably apparent to appellate counsel.

From the perspective of the child, the adoptive parents, and the state agency, the direct appeal is the best route. In spite of the few disadvantages to the direct-appeal approach, the relative speed of the direct appeal, when compared to post-judgment or

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165. Any process with a short time limit will require a parent to decide quickly whether an ineffectiveness claim should be raised. However, most parents will have formed an opinion, by the time they receive the termination decision, as to whether they believe their attorney was effective. A parent may not be able to articulate the claim, but she will know whether her attorney represented her in the manner that she expected and aimed for the result she wanted. For example, a parent will know if the attorney called her witnesses to testify; whether the attorney sought to obtain her side of the story or met her for the first time in the courthouse on the day of the hearing; whether the lawyer reviewed a trial strategy with her; and whether the attorney acted in a professional manner toward her, the court, and the process. The parent will not know the technical aspects to her defense, such as whether the attorney properly made evidentiary objections, and there may be aspects of the parent's case that the attorney should have told her but did not, such as a settlement offer that was not communicated. Nonetheless, in most situations in which an ineffectiveness claim should be brought, the parent will have formed an opinion, in a relatively short time, as to whether the lawyer's representation was adequate.

166. *See e.g.* 22 Me. Rev. Stat. Ann. § 4006 (West Supp. 2003) (requiring attorney in the trial court proceeding to continue representing the client "unless otherwise ordered by the court"); *Brown v. Div. of Fam. Servs.*, 803 A.2d 948, 958 (Del. 2002) (describing Del. S. Ct. R. 26.1 as imposing "a continuing obligation upon the attorney who represented the parents in the Family Court").

167. *Massaro v. U.S.*, 538 U.S. 500, 504 (2003).

habeas proceedings, even with the occasional remand for an evidentiary hearing, outweighs the disadvantages.

Regardless of the procedural vehicle, there should be an absolute time bar for the ineffectiveness issue to be brought forward, and a requirement that in no case may the claim be made after an adoption of the child has been finalized.[168] If prospective adoptive parents knew that an adoption could be jeopardized by a court ruling for a parent on an ineffectiveness claim, the number of people willing to adopt children from families in which an involuntary termination of parental rights had taken place would drop precipitously. Children would remain much longer in the foster care system.

In addition to suggesting that courts adopt the procedure of allowing ineffectiveness claims to be raised on direct appeal with a provision for remand when required, I also suggest that the procedure be set forth in a court rule. A rule allows all parties to know beforehand the appropriate procedure. In addition to promoting certainty, a rule would promote efficiency by reducing disputes about procedure, and the rule-making process also permits input and advice from a wide range of interested people and institutions.

VIII. STANDARDS FOR DETERMINING INEFFECTIVENESS IN PARENTAL-TERMINATION CASES

Once a suitable procedural vehicle has brought the ineffectiveness claim of a parent to a court for resolution, the court must decide upon the appropriate standard for judging the ineffectiveness claim. The criminal arena, the birthplace of the claim, has developed a rigid standard for ineffectiveness based on *Strickland v. Washington*.[169] That standard has been adopted by a number of courts deciding claims of ineffective assistance in parental-termination cases, often without analysis of its applicability in a non-criminal context.

168. The Connecticut statute states that no motion to reopen a judgment terminating parental rights may be granted if a decree of adoption has been finalized. Conn. Gen. Stat. § 45a-719 (West 2004).

169. 466 U.S. 668 (1984).

A. The Strickland *Standard*

The criminal standard was announced in *Strickland*,[170] in which the Supreme Court delineated the two-part test for judging whether counsel in a criminal trial or death sentence proceeding was ineffective:

> First, the defendant must show that counsel's performance was deficient. This requires demonstrating that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must convince the court that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[171]

The shorthand term for the first component is the performance prong, and the second component is known as the prejudice prong.

With regard to the performance prong, the Court held that there is a strong presumption "that counsel's conduct falls within the wide range of reasonable professional assistance,"[172] which presumption the defendant must overcome, and judicial scrutiny of the lawyer's performance is "highly deferential."[173] "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."[174] Furthermore, a defendant who raises an ineffectiveness claim must be specific in identifying the acts or omissions by the attorney that give rise to the claim.[175]

With regard to the prejudice prong, the Court said:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

170. *Id.*
171. *Id.* at 687.
172. *Id.* at 689.
173. *Id.*
174. *Id.* at 688.
175. *Id.* at 690.

> reasonable probability is a probability sufficient to undermine confidence in the outcome.[176]

When a conviction is challenged, this means a reasonable probability that, but for the lawyer's errors, the factfinder would have had a reasonable doubt of the defendant's guilt.[177] The Supreme Court also noted that a court does not have to decide both prongs. If a defendant fails to demonstrate prejudice, for example, a court need look no further.[178] In a small subset of cases, where there has been an actual or constructive denial of counsel, prejudice is presumed.[179]

The *Strickland* standard has been adopted in most jurisdictions for determining ineffectiveness of counsel in termination proceedings.[180] Some courts, however, follow a

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176. *Id.* at 694.

177. *Id.* The Supreme Court has held that when the claim is ineffectiveness at the sentencing stage and the defendant can demonstrate that counsel's error led to even a slight increase in the sentence, the defendant has shown prejudice. *Glover v. U.S.*, 531 U.S. 198, 204 (2001).

178. *Strickland*, 466 U.S. at 697.

179. In *United States v. Cronic*, 466 U.S. 648 (1984), a case decided the same day as *Strickland*, the Court said that in some cases the circumstances were "so likely to prejudice the accused" that prejudice does not have to be proven. *Id.* at 658. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Supreme Court attempted to clarify when prejudice can be presumed. In cases involving "mere 'attorney error,'" *Strickland's* prejudice prong is applicable. *Id.* at 482. In those situations where counsel was denied, either actually or constructively, the adversary process is presumptively unreliable, and, therefore, prejudice is presumed. *Id.* at 483-84. But when the proceeding in question was presumptively reliable, a showing of actual prejudice is required. *Id.* at 484.

180. *People in re V.M.R.*, 768 P.2d 1268, 1270 (Colo. App. 1989); *L.W. v. Dept. of Children & Fams.*, 812 So. 2d 551, 556 (Fla. 1st Dist. App. 2002); *In re A.H.P.*, 500 S.E.2d 418, 422 (Ga. App. 1998); *KR.K.*, 631 N.E.2d 449, 454-55 (holding that *Strickland* applies to ineffectiveness claims in abuse and neglect cases); *People v. Bilyeu (In re D.B.)*, 615 N.E.2d 1336, 1342 (Ill. App. 4th Dist. 1993); *Tavorn v. Marion County Off. of Fam. & Children (In re Involuntary Termination of Parent-Child Relationship of J.T.)*, 750 N.E.2d 1261, 1265 (Ind. App. 2000); *In re D.W.*, 385 N.W.2d 570, 579-80 (Iowa 1986); *Rushing*, 684 P.2d at 449-50 (Kan. App. 1984); *Lenawee County Dept. of Soc. Servs. v. Currier (In re Rogers)*, 409 N.W.2d 486, 488 (Mich. Ct. App. 1987); *In re J.M.K.A.*, 1997 WL 770399 *3 (Minn. App. Dec. 16, 1997); *N.J. Div. of Youth and Fam. Servs. v. V.K. (In re J.K.)*, 565 A.2d 706, 712 (N.J. Super. App. Div. 1989); *In re Colbert*, 2000 WL 1687602 *3 (Ohio App. 11th Dist. Nov. 9, 2000); *Chappell v. State (In re K.L.C.)*, 12 P.3d 478, 480-81 (Okla. Civ. App. 2000); *State v. Christensen (In re C.C.)*, 907 P.2d 241, 245 (Okla. App. 1995); *In re M.S.*, 115 S.W.3d 534, 544, 545 (Tex. 2003) (adopting *Strickland*, and listing other states that have adopted it); *E.H.*, 880 P.2d at 13; *M.B.*, 647 A.2d at 1004; *Brown County Dept. of Human Servs. v. Neung S. (In re Ounkhm S.)*, 2000 WL 1341883 ¶ 10 (Wis. App. 2000). *See D.S.H.S. v. A.S. (In re M.I.S.)*, 95 Wash. App. 1049, *5 n. 1 (Wash. App. May 24, 1999) (applying *Strickland* test without formally adopting it, and listing cases that have adopted *Strickland*).

Strickland standard without mentioning *Strickland.*[181] In almost all of the cases in which *Strickland* is applied, either expressly or impliedly, the courts decline to find ineffectiveness. In some cases this is because the courts do not find that counsel's performance was defective;[182] in other cases it is because the courts do not find that the performance prejudiced the parent;[183] and in some the courts conclude that the parent has met neither prong of the *Strickland* test.[184] In a recent case, in which the Texas Supreme Court adopted the *Strickland* standard, the court concluded that counsel's error may have amounted to ineffective assistance and remanded the case for a determination as to whether the error was unjustified and prejudicial.[185]

There are very few exceptions to the general observation that courts applying *Strickland* usually fail to find ineffectiveness. The exceptions are primarily in those cases in which the courts presume prejudice, either explicitly or implicitly, because of the actual or constructive denial of counsel. For example, in a Kansas case, the court concluded that the attorney's withdrawal from the case in mid-trial constituted a

181. *See Kristin H.*, 54 Cal. Rptr. 2d at 741; *In re Alexander V.*, 613 A.2d 780, 787 (Conn. 1992); *In re V.K.*, 766 A.2d 958, 963-64 (D.C. App. Nov. 2, 2000); *State v. A.W. (In re W.L.W.)*, 702 N.E.2d 606, 609 (Ill. App. 1998); *Bickel v. St. Joseph County Dept. of Pub. Welfare (In re D.T.)*, 547 N.E.2d 278, 282 (Ind. App. 1989); *Care and Protection of Stephen*, 514 N.E.2d at 1091; *Annette F.*, 911 P.2d at 241-42; *In re Oghenekevebe*, 473 S.E.2d 393, 396 (N.C. App. 1989) (citing a criminal case).

182. *See e.g. In re K.M.L.*, 516 S.E.2d 363, 366 (Ga. App. 1999); *Chappell v. State (In re K.L.C.)*, 12 P.3d 478 (Okla. Ct. Civ. App. 2000).

183. *See e.g. In re Matthew S.*, 758 A.2d 459, 461 (Conn. App. 2000); *W.L.W.*, 702 N.E.2d at 609-10; *In re B.N.*, 2001 WL 57987 *2 (Iowa App. Jan. 24, 2001); *James W.H.*, 849 P.2d at 1082; *Colbert*, 2000 WL 1687602 at *3; *E.H.*, 880 P.2d at 14.

184. *See e.g. In re Mariah S.*, 763 A.2d 71, 83 (Conn. App. 2000); *In re A.H.P.*, 500 S.E.2d 418, 422 (Ga. App. 1998); *People v. Denise M. (In re D.M.)*, 631 N.E.2d 341, 345 (Ill. App. 1994); *D.T.*, 547 N.E.2d at 282; *In re K.G.*, 2000 WL 145070 *4, *4-*5 (Iowa App. Feb. 9, 2000); *Rogers*, 409 N.W.2d at 489.

185. *In re M.S.*, 115 S.W.3d 534, 548-49 (Tex. 2003). Trial counsel had failed to move for a new trial, a procedural requisite to preserving the issue of the sufficiency of the evidence. In an interesting *Mathews v. Eldridge* analysis of the issue preservation requirement, the Texas Supreme Court concluded that when counsel failed unjustifiably to follow the established procedure and thereby failed to preserve the issue of the sufficiency of the evidence for appellate review, the risk of erroneous deprivation was too high. *Id.* at 549. The court remanded the matter to the intermediate appellate court to determine whether counsel's defective performance caused harm. *Id.* at 550.

complete denial of counsel.[186] Citing *Strickland* and *Cronic*, the court reversed the termination judgment and ordered a new trial.[187] In a New York case the mother's attorney failed to appear for the termination hearing, and the court implicitly presumed prejudice.[188]

B. The Geist *Fundamental Fairness Standard*

Not all courts employ the *Strickland* standard in parental-rights cases. The leading case articulating a different standard is *State ex rel. Juvenile Dept. of Multnomah County v. Geist (In re Geist),*[189] in which the Oregon Supreme Court expressly rejected application of the *Strickland* standard for determining ineffectiveness.[190] *Geist* is the only case in which a state's highest court has examined the rationale for the *Strickland* standard and explained why it is not appropriate in parental-termination cases.[191] Choosing to apply what is now known as the fundamental-fairness standard, the *Geist* court stated that it was adopting "a standard which seeks to determine whether a

186. *Rushing*, 684 P.2d at 450. The father was not present at the termination hearing, and after the government presented its first two witnesses, both state workers who testified that he was largely unknown to them, the father's attorney believed that there was nothing further he could do. The hearing resumed, and the only evidence of the father's unfitness came from the mother's testimony. The mother testified that the father had not supported the child in two years; that they had been separated; and that he had only sporadic contact with the child. *Id.* at 446-48.

187. *Id.* at 450. In contrast, the Rhode Island Supreme Court held that a mother was not entitled to substitute counsel once she had discharged her appointed attorney, who was "overworked and overburdened" and not representing her effectively. *In re Bryce T.*, 764 A.2d 718, 720 (R.I. 2001). The mother requested that another attorney be appointed, but the trial court refused, and the mother represented herself. The reviewing court also found that the discharged attorney was not ineffective, and that it was doubtful that appointing new counsel would have changed the outcome.

188. *Constance R. v. Erie County Dept. of Soc. Servs. (In re James R.)*, 661 N.Y.S.2d 160, 161 (N.Y. App. Div. 1997). Not only did counsel fail to appear for the hearing, but also failed to clear up a misunderstanding that led the mother to miss the hearing. Furthermore, after the termination order was entered by default, mother's counsel said she would bring a motion to vacate the judgment but did not. *Id.*

189. 796 P.2d 1193 (Or. 1990).

190. *Id.* at 1201-02.

191. Appellate courts in Missouri, Pennsylvania, and Washington have all rejected *Strickland* and applied a different standard. *See J.C.*, 781 S.W.2d at 228; *In re Adoption of T.M.F.*, 573 A.2d 1035 (Pa. Super. 1990); *Moseley*, 660 P.2d 315.

termination proceeding was "fundamentally fair,"[192] and referred to the *Strickland* standard as "more stringent."[193]

In *Geist*, the court first noted that differing substantive and procedural rules have long been applied in civil and criminal cases, and also considered additional factors unique to parental-termination cases.[194] Courts dealing with children function in a parens patriae capacity, and the goal is to act in the best interests of a child.[195] When a parent is unable or unwilling to provide appropriate care, the child's best interests may require the termination of the parent's rights. "To secure a parent's rights in the context of those underlying determinations, courts seek to determine whether the proceedings were fundamentally fair."[196] The court went on to state that the essence of fundamental fairness is the right to be heard at a meaningful time and in a meaningful manner. "The requirements of notice, adequate counsel, confrontation, cross-examination, and standards of proof flow from this emphasis."[197] The court then explained that "although no client has a constitutional or statutory right to a 'perfect' defense, fundamental fairness requires that appointed counsel exercise professional skill and judgment."[198] Tactical decisions, such as the choice to call a witness or to ask particular questions of a witness, or to make a certain argument, will not amount to ineffectiveness of counsel unless a court finds that no responsible attorney in those particular circumstances would have chosen that tactic.[199] Like the *Strickland* standard, the fundamental-fairness standard looks to the "totality of the circumstances" in determining the adequacy of counsel.[200]

The *Geist* approach also requires the party challenging the adequacy of counsel to demonstrate that her lawyer's ineffectiveness prejudiced her case.[201] *Strickland* describes the prejudice prong as requiring "a reasonable probability that, but

192. 796 P.2d at 1201 (citing *McKeiver v. Pa.*, 403 U.S. 528 (1971)).
193. *Id.* at 1203.
194. *Id.* at 1202.
195. *Id.*
196. *Id.* at 1203 (citations omitted).
197. *Id.*
198. *Id.* (citation omitted).
199. *Id.*
200. *Id.*
201. *Id.* at 1204.

for counsel's unprofessional errors, the result of the proceeding would have been different."[202] *Geist* requires a showing that the attorney's performance denied the parent a fair trial and is sufficiently poor to call the trial court's decision "into serious question."[203] Furthermore, the trial court's decision terminating parental rights should not be reversed if the reviewing court is satisfied that even with adequate counsel the result would "inevitably" have been the same.[204]

Applying the fundamental-fairness standard to the facts of the case before it, the court decided that the record did not demonstrate that the mother's attorney was ineffective.[205] The court first determined that the record was adequate to allow it to reach the ineffectiveness issue.[206] The mother claimed that her attorney's trial preparation was inadequate, that the attorney's skills were deficient, and that the attorney based the mother's defense on post-traumatic-stress disorder and battered-woman's syndrome, which theories the mother claimed were untenable.[207] However, at the termination hearing, the mother stated on the record that she was satisfied with the representation provided to her by trial counsel.[208] Upon review of the record, the Oregon Supreme Court found that the mother's counsel

> advocated vigorously for her, sought and obtained discovery, used an investigator, interviewed witnesses, briefed the pertinent legal issues, spent appropriate time and energy preparing for trial, effectively cross-examined the state's witnesses, and called witnesses in support of her theory of the case, which, we find, was tenable.[209]

Two cases from the Oregon Court of Appeals illustrate the practical application of *Geist*'s fundamental-fairness standard. In both, the court found that counsel was inadequate. In *State ex rel. State Office for Services to Children & Families v. Thomas*

202. *Strickland*, 466 U.S. at 694.

203. *Geist*, 796 P.2d at 1204.

204. *Id.*

205. *Id.* at 1204-05.

206. *Id.* at 1204.

207. *Id.* at 1205.

208. *Id.* at 1198-99, 1205.

209. *Id.* The court did not explain how the record demonstrated the interviewing of witnesses by the attorney or the time and energy spent by the attorney in preparation.

(In re Stephens),[210] the father failed to appear for the termination hearing. He was in a residential treatment center at the time of the hearing, and his attorney did not obtain a subpoena for his attendance or notify personnel at the center about the need to have the father at the hearing.[211] Although counsel was present at the hearing, he made no opening statement except to say that his client could be a good father and was in treatment, and he also made no closing argument. He did not call witnesses, offer any exhibits, or cross-examine most of the witnesses.[212] Counsel also admitted that he was not prepared for trial, in part, because of the father's absence.[213] The court concluded that the attorney's lack of preparation and failure to advocate any theory for the father rendered his performance inadequate.[214]

With regard to the prejudice prong of the *Geist* standard, the court noted that the father was undergoing substance-abuse treatment,[215] and it was unwilling to assume a poor prognosis. The court stated:

> Essential to our conclusion is the fact that the trial court was not given the opportunity to judge the credibility of the father's case or his evidence, whatever father's case and evidence may in fact be. . . . In a situation, as here, where father wanted to put on a case, where there is some credible evidence that father could be a resource for child, and where counsel has not effectively advocated *any* theory of father's case, father has not been heard. Accordingly, we will not conclude that the result would have inevitably been the same.[216]

In *State ex rel. State Office for Services to Children & Families v. Rogers (In re Eldridge)*,[217] trial counsel at the commencement of the termination hearing explained to the

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210. 12 P.3d 537 (Or. App. 2000).

211. *Stephens*, 12 P.3d at 541-42. The Court of Appeals noted that there was an indication that the father wanted to attend the hearing, but that if he left the treatment center without being subpoenaed, it was likely that his probation would have been violated. *Id.*

212. *Id.* at 543.

213. *Id.*

214. *Id.* at 543-44.

215. *Id.* at 544 (emphasis in original).

216. *Id.*

217. 986 P.2d 726 (Or. App. 1999).

judge that he was not prepared for the trial; that he had never talked to his client, the children's mother, who lived on the other side of the state; that he had not read the 800-page agency file that had been furnished to him two days earlier; and that he had come to court only to withdraw from the case.[218] Counsel then moved to withdraw or, in the alternative, for a continuance, and the court denied both motions, but allowed a ten-minute recess for the attorney to prepare.[219] The trial court blamed the mother for counsel's lack of preparation because she had failed to keep in touch with him.[220] On appeal, the Oregon Court of Appeals held that the termination proceeding was fundamentally unfair because of counsel's inadequacy.[221]

The state agency argued that there was no prejudice to the mother because she had failed to keep in touch with her lawyer and because there was no indication that she would be any better able to care for these children than she was able to care for another child who was the subject of a prior termination order. The appellate court disagreed, stating that the record showed that the mother, who previously had been homeless and suffering from substance abuse, was at the time of the termination hearing living in a clean home large enough for her two children, and there was no indication of current alcohol or drug problems. The court also said that while the record showed that the mother had not been good at "follow through" with the social workers and her attorney, who were on the other side of the state, their attempts at working with her were "half-hearted, at best."[222]

Missouri has also adopted, for termination cases, what has been termed a more "relaxed" standard[223] or a "lesser" requirement[224] than the *Strickland* standard. In *J.C.*, the Missouri Court of Appeals found that the parents were deprived of adequate counsel, holding that the test of ineffectiveness was whether the attorney was effective in providing a meaningful

218. *Eldridge*, 986 P.2d at 729.

219. *Id.* The mother also requested that the attorney be allowed to withdraw. *Id.*

220. *Id.* at 730-31.

221. *Id.* at 731.

222. *Id.* at 731.

223. *J.C.*, 781 S.W.2d at 228 (quoting *Moseley*, 660 P.2d at 318).

224. *James W.H.*, 849 P.2d at 1082.

hearing.[225] The parents' counsel was passive throughout the termination hearing; he stipulated to the admission of all reports; he called no witnesses, not even the parents. In fact, the parents, who were in the courthouse, were not present in the courtroom during the hearing.[226] The appellate court reversed the termination order, stating that "[t]he right to counsel means nothing if the attorney does not advocate for his client and provide his client with a meaningful and adversarial hearing."[227] The court did not, however, discuss the prejudice to the parents caused by the attorney's performance or explicitly state that it was presuming prejudice.

Statements in the Pennsylvania Superior Court's reported decisions indicate that it uses a fundamental-fairness standard, but its standard appears to be stricter even than *Strickland*.[228] The mother in one Pennsylvania case claimed that her attorney failed to call witnesses who would have testified that she had a possibility of recovering from drug addiction. The court said that

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225. *J.C.*, 781 S.W.2d at 228-29. After citing several cases in which the *Strickland* test was applied, the Missouri court stated: "Other states have relaxed the criminal standard and have held the test of ineffectiveness to be that 'if it appears from the record that an attorney was not effective in providing a meaningful hearing, due process guaranties have not been met.'" *Id.* at 228 (quoting *Moseley*, 660 P.2d at 318).

226. *J.C.*, 781 S.W.2d at 228.

227. *Id.* at 228-29. The *J.C.* court relied on *Moseley*, a pre-*Strickland* case from Washington. "Procedural fairness" is the term used by the court in *Moseley* for the standard it applied to determine the ineffectiveness of counsel in a termination case. *Moseley*, 660 P.2d at 318: "[I]f it appears from the record that an attorney was not effective in providing a meaningful hearing, due process guaranties have not been met." In *Moseley*, the mother claimed ineffective assistance because her counsel did not develop details of an automobile accident that had occurred eleven years earlier. The Court of Appeals, however, concluded that the trial court was aware of the accident and the impact it had on the mother's life, and that counsel's failure to highlight it further did not deprive the mother of a meaningful hearing. *Id.* at 318-19. A more recent Washington appeal in which the court applied the *Strickland* standard is *D.S.H.S. v. A.S. (In re M.I.S.)*, 1999 WL 325442 (Wash. App. May 24, 1999).

228. *In re Adoption of T.M.F.*, 573 A.2d 1035 (Pa. Super. 1990). The court phrased the question in the case as "[I]f the evidence was so convincing and overwhelming that, pursuant to statute, termination of parental rights was mandated, may ineffectiveness of counsel be a basis for setting aside that finding?" *Id.* at 1039. The court stated that ineffectiveness in parental-termination cases is not as serious as in criminal cases because the role of the lawyer in termination cases does not carry the same impact as in criminal cases. *Id.* at 1042. The court concluded that, upon a review of the record as a whole, an appellate court must determine whether the attorney's ineffectiveness was the cause of the termination order. If it is unlikely that the result in the case would have been different in spite of a more perfect representation by the attorney, the termination order must stand. *Id.* at 1044.

such testimony—in light of the overwhelming evidence of drug abuse—would not have been believed.[229] The court concluded that the hearing was fundamentally fair and any ineffectiveness by the attorney "played no part in the result."[230]

C. The Practical Differences between the Strickland *and* Geist *Standards*

Is there an actual and practical difference between the fundamental-fairness standard as articulated in *Geist* and the *Strickland* standard? At least one court has suggested that the standards are essentially the same.[231] Others have suggested that the results under the two standards may not differ.[232] A comparison of cases with similar facts decided under the different standards demonstrates, however, that there is a difference in practical application.

(1) The Performance-of-Counsel Prong

The performance of counsel is the focus of the first prong of both the *Strickland* standard and the fundamental-fairness test. The *Strickland* inquiry is whether counsel's performance was reasonable under all of the circumstances.[233] Under *Geist*, the court looks at the totality of circumstances and determines

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229. *Id.* at 1045.

230. *Id.* One of the judges who wrote a separate opinion stated that ineffectiveness should be more difficult to prove in a termination case than in a criminal case because of the extraordinary need for finality in the termination case. *Id.* at 1055 (Beck, J. concurring). He would require parents to make a "strong showing" of ineffectiveness. *Id.* (Beck, J. concurring). Another separate opinion found essentially no difference between the standard that the majority claimed to be using and the standard in criminal cases. *Id.* at 1046 (Montemuro & Johnson, JJ., concurring and dissenting).

231. *E.H.*, 880 P.2d at 13 n. 2. ("We believe that *Geist* essentially adopts the *Strickland* test in holding that the parent must show inadequate performance by counsel and that the inadequacy prejudiced the parent's case.")

232. *James W.H.*, 849 P.2d 1079 at 1082 (describing Strickland as the majority position, and noting that although "contrary authority appears to provide lesser standards,. . .we are not certain that the result reached would have been different under the criminal law standard."). *See also L.W. v. Dept. of Children & Fams.*, 812 So. 2d 551, 556 (Fla. 1st Dist. App. 2002) (applying *Strickland* and stating that "[i]t is not clear to us how these civil standards of ineffective assistance of counsel differ in practice from the criminal standard announced in *Strickland*")

233. *Strickland*, 466 U.S. at 689.

whether the parent was denied a fair trial because of counsel's performance.[234] With both standards the burden of proof is on the person claiming ineffective assistance of counsel.[235] *Strickland* calls for a "strong" presumption that counsel's performance was adequate, with a "highly deferential" review of the attorney's performance,[236] whereas *Geist* does not mention any presumption of adequacy.

It is likely that in both *Stephens* and *Eldridge*[237] the Oregon court would not have come to the same result on the performance prong if it had applied the *Strickland* standard. The *Stephens* opinion does not state what attempts, if any, the attorney made to assist the father, who was at a substance-abuse treatment center, to obtain permission to leave the center so that he could attend the termination hearing. In *Strickland*, the Court said the reasonableness of an attorney's conduct could be "determined or substantially influenced by the defendant's own statement or actions."[238] A court using the *Strickland* standard would likely determine that it was reasonable for the attorney to expect that the father would appear at the hearing on his own unless he notified the attorney that there was a problem. *Strickland*'s presumption that counsel's performance was adequate would not have been overcome in *Stephens* without a showing that counsel had a duty to ensure the presence of his client at the hearing, or that the attorney's failure to do so was unreasonable.

In *Eldridge* the mother apparently never attempted to make contact with her attorney even though he had been appointed several months earlier. Because counsel had not heard from the mother, he did not prepare for the termination hearing. In a *Strickland* jurisdiction, a court would likely say that the mother's own conduct substantially influenced her counsel's lack of preparation. Given *Strickland*'s presumption of the reasonableness of attorney performance and highly deferential manner of reviewing that performance, it may, then, be reasonable for counsel in a *Strickland* jurisdiction who has not

234. *Geist*, 796 P.2d at 1203.

235. *Strickland*, 466 U.S. at 690; *Geist*, 796 P.2d at 1203.

236. *Strickland*, 466 U.S. at 689.

237. For additional discussion of the facts in these cases, see *supra* at 218-20.

238. *Strickland*, 466 U.S. at 691.

heard from the parent to assume that he does not need to prepare for the hearing.[239]

The Missouri Court of Appeals upheld an ineffectiveness claim in *J.C.*, in which the parents' counsel was passive through the hearing, did not object to any of the reports that composed the state's entire case, and did not bring the parents into the courtroom. The appellate court concluded that the attorney's failure to advocate for the parents deprived them of a meaningful opportunity to be heard.[240] In a *Strickland* jurisdiction, however, the failure to demonstrate what adequate counsel would have presented on behalf of the parents or what documents an effective attorney reasonably would have objected to, and why, would have been fatal to the ineffectiveness claim.

In an Oklahoma case applying *Strickland*,[241] the mother claimed that her attorney was ineffective. She was serving a jail sentence for grand larceny at the time of the termination trial,[242] her lawyer had not been in touch with her for several months, and he did not know that she was incarcerated.[243] At the trial the mother asked that her attorney withdraw from representing her because he was not prepared.[244] The trial court blamed the mother for not keeping in touch with her attorney, and told her to choose between keeping her present attorney and representing herself. She chose the former.[245] The mother's attorney was able to interview some witnesses before they testified because the trial went into a second day.[246] The appellate court, applying *Strickland*, found that the mother had not shown that her counsel was deficient.[247] If this appellate court had applied the standard used by the Oregon court in *Eldridge*, however, it would have focused on the fundamental fairness of the proceeding and concluded that counsel's lack of preparation constituted inadequate performance.

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239. This determination may depend upon the practice in the jurisdiction: Must the court-appointed attorney contact the parent, or is the parent to contact the attorney?

240. *J.C.*, 781 S.W.2d at 228-29.

241. *Chappell v. State (In re K.L.C.)*, 12 P.3d 478 (Okla. Civ. App. 2000).

242. *Id.* at 479.

243. *Id.* at 481.

244. *Id.*

245. *Id.* The court first attempted to reschedule the matter, but was unable to do so. *Id.*

246. *Id.* at 482.

247. *Id.*

A Vermont case[248] also illustrates the practical differences between the two standards. The father had been accused of sexually abusing his two children. The termination hearing, in which the father's attorney zealously represented him during the first few trial days, took seven days, spread over several months.[249] Prior to the fifth day of trial, the attorney learned that the father had been charged with sexually abusing his two stepchildren, and that the allegations were similar to those made by the children who were the subjects of the termination proceeding. The father's attorney then attempted unsuccessfully to withdraw from the case, telling the court that he could no longer represent the father and that he had serious doubts about the father's conduct.[250] Instead of calling the large number of witnesses that the attorney originally planned to present, he called only four, including the father and the foster parents. The direct examination of the witnesses was brief. On appeal, the father argued that counsel's inadequate performance was shown by the motion to withdraw, the attorney's statement to the court that he had serious doubts about the father, the brevity of the father's case in chief and the failure to call the additional witnesses. Applying the *Strickland* standard, the court noted that the father did not specify what additional evidence would have come from the witnesses who were not called, and concluded that the father failed to show that his counsel was inadequate.[251]

It is possible to view this attorney's performance, as the Vermont court implicitly did, as warranted by the strategic or tactical decisions he had to make when the new sexual-abuse allegations came to light. It is also possible to view the case as denying the father a fair trial once the attorney moved to withdraw, because the attorney effectively abandoned the father after that point in the process. If the case is viewed from the latter perspective and the fundamental-fairness standard is applied, the attorney's performance would appear to be inadequate.

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248. *M.B.*, 647 A.2d 1001.

249. *Id.* at 1003.

250. *Id.*

251. *Id.* at 1005. The court also concluded that the father failed to specify the ways in which any incompetence of counsel prejudiced his case to the extent that it could infer a reasonable probability of a different outcome. *Id.*

(2) The Prejudice Prong

Both *Strickland* and *Geist* require a showing of prejudice. Under *Strickland*, this means that the parent must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[252] The *Geist* prejudice test is whether counsel's inadequate performance denied the parent a fair trial, and whether the result would have been the same if the parent had adequate counsel.[253] The prejudice prongs of both standards are articulated in similar fashion, and it is difficult to discern from the words alone whether the results obtained would differ depending upon which standard was used. Both seem to have a "but for" test: a requirement that the parent show that but for the attorney's performance, the parent would have prevailed. Regardless, however, of whether the verbal descriptions of the two prejudice prongs indicate that similar or dissimilar results would be obtained, in practice the results prove to differ.

For example, in *Stephens*,[254] it appears that the court shifted the burden of showing prejudice from the father to the state. The opinion does not recite what testimony the father would have given if he had been at the hearing or if his lawyer had been competent, except that the court reports that the record contained evidence that the father was undergoing substance-abuse treatment, was working on his domestic-violence issues, and was loving and gentle to the child.[255] The court said that it did not know what evidence the father could present about his treatment progress, but it would not assume that his prognosis was poor.[256] Under a *Strickland* standard, the father would have had to come forward with evidence that would have been presented if he had received adequate representation, and that evidence would have had to demonstrate a probability that his parental rights would not have been terminated. Without that evidence, it is difficult to see how he could have prevailed on the *Strickland* prejudice prong. Although the court seems to rely

252. *Strickland*, 466 U.S. at 694.
253. *Geist*, 796 P.2d at 1204.
254. 12 P.3d 537.
255. *Stephens*, 12 P.3d at 540.
256. *Id.* at 544.

on the attorney's lack of a theory of the case, there is no suggestion as to what theory counsel could have presented that would have been likely to result in a different outcome. There is consequently a strong likelihood that *Stephens* would have turned out differently under the *Strickland* prejudice prong.

In *Eldridge*[257] the Oregon court found prejudice despite the state's argument that the termination of the mother's parental rights was inevitable. The record showed that the mother had a home where she could live with the children, and there was no evidence of current substance abuse. The court noted that although the record showed that the mother had been homeless with a serious alcohol problem a few years earlier, she now had a clean home with enough space for her children. She had two prior drug convictions, but there was no evidence of a current drug or alcohol problem. She had not cooperated with the social workers or her attorney, but the record showed that the efforts of the social workers and her attorney were half-hearted. Thus, the court said, it could not find that it was inevitable that her parental rights would be terminated.[258] The court's analysis, however, relies more on what the record doesn't show than it does on any affirmative demonstration by the mother of a reasonable probability that her parental rights would not have been terminated if her attorney had been prepared. *Strickland* requires a greater showing of prejudice than this.

Likewise, in *J.C.*,[259] the failure of the parents to make any demonstration as to what their witnesses would have presented, or what theory or defense would have been made for them by an adequate attorney, goes to the prejudice prong as well as to the performance prong. In a *Strickland* jurisdiction, the court would require some showing that the outcome would have been different unless it were willing to presume prejudice.

It is arguable that a *Strickland* jurisdiction may be willing to presume prejudice in cases with facts similar to those in *Stephens*, *Eldridge*, and *J.C.*[260] A presumption of prejudice is

257. 986 P.2d 726.

258. *Eldridge*, 986 P.2d at 731.

259. 781 S.W.2d 226.

260. *Geist* does not mention a presumption of prejudice or suggest that there are circumstances in which prejudice need not be shown. Given the emphasis in *Geist* on fairness, however, it seems likely that a jurisdiction employing the fundamental-fairness

doubtful, however, because in all three cases there was representation, albeit minimal, by the attorneys. Following the Supreme Court's decision in *Flores-Ortega*,[261] it is not likely that minimal participation by an attorney will lead to a court's presuming prejudice. Instead, courts may view these cases as involving "mere attorney error,"[262] which makes the prejudice prong of *Strickland* applicable, and refuse to presume prejudice. Nonetheless, particularly in *J.C.*, there does appear to have been a failure by trial counsel to subject the state's case to "meaningful adversarial testing," which under *Cronic* would be a sufficient basis on which to presume prejudice.[263]

With regard to both the performance and prejudice prongs, then, these few cases from Oregon, Missouri, Oklahoma, and Vermont illustrate that there can be a real and practical difference in the outcome of ineffectiveness claims between jurisdictions that apply the fundamental-fairness standard of *Geist* and those that have adopted *Strickland.*

IX. A FRAMEWORK FOR DETERMINING THE INEFFECTIVENESS STANDARD IN PARENTAL-RIGHTS TERMINATION CASES

When a court is presented with an ineffectiveness claim as a matter of first impression in a parental-termination case, it must determine which ineffectiveness standard to adopt.[264] Although a court in a jurisdiction that applies the *Strickland* standard in criminal cases may be inclined to adopt *Strickland* for parental-rights cases, that adoption should not be automatic. As the Oregon Supreme Court pointed out in *Geist*, the substantive and procedural rules applicable to criminal cases have differed historically from the rules applicable to cases

standard would presume prejudice when there was an actual or constructive denial of the right to be heard. Nonetheless, the opinions in *Rogers*, *Thomas*, and *J.C.* do not discuss the presumption of prejudice.

261. 528 U.S. 470.

262. *Id.* at 482.

263. *Cronic*, 466 U.S. at 659.

264. While it is possible for a legislature or a rule-making body to prescribe the ineffectiveness standard in a statute or rule, I have found no jurisdiction in which that has been done. It is through decisional law that standards for judging ineffectiveness have been developed.

involving children.[265] Termination proceedings, while formal, do not have all of the procedural safeguards of criminal proceedings. With few exceptions, proof beyond a reasonable doubt is not required in termination cases; the parents are not judged by a jury; and there are often significant exceptions to the application of the rules of evidence. The procedural safeguards protecting a criminal defendant against an erroneous determination of guilt may justify a stricter standard than that necessary in parental-termination hearings where the procedural safeguards are diminished, and so the risk of an erroneous decision is greater than in a criminal case.

Instead of assuming that *Strickland* should apply to termination cases because it applies to criminal cases, courts should focus on the purpose of the requirement for effective counsel in termination cases, and on how a particular ineffectiveness standard will effect that purpose. Courts should also consider whether there are additional purposes to be achieved by the ineffectiveness standard. Finally, courts should examine the standards adopted by other jurisdictions, assess their practical impact, and compare their advantages and disadvantages.

A. The Purpose of Effective Counsel in Parental-Termination Cases

The reason generally given for requiring effective counsel in parental-termination cases is the importance of the fundamental rights at issue.[266] A fair trial is necessary to protect the basic parental interest at stake and to achieve a result upon which everyone can rely. Effective counsel is essential to a fair trial and to reducing the risk of an erroneous deprivation of the parent's rights. Counsel plays a critical role in exposing any weaknesses in the government's evidence and arguments, and in presenting evidence and argument in support of the parent.

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265. *Geist*, 796 P.2d at 1202.

266. *See e.g. V.F. v. State*, 666 P.2d 42, 45 (Alaska 1983); *Danforth v. St. Dept. of Health & Welfare*, 303 A.2d 794, 796-801 (Me. 1973); *In re A.S.A.*, 852 P.2d 127, 129-30 (Mont. 1993); *Michael F. v. State ex rel. Dept. of Human Servs. (In re D.D.F.)*, 801 P.2d 703, 706 (Okla. 1990).

Because the purpose of effective counsel is a fair trial, the ineffectiveness standard must be aimed at ensuring one. If the *sole* purpose of the ineffectiveness standard is to achieve a fair trial, then the standard is simple: If the level of counsel's performance is inadequate, a fair trial has not been achieved, and the judgment should be vacated. In other words, there would be no separate prejudice prong because the prejudice suffered by the parent is the lack of a fair trial.

A court could decide, however, that there are several objectives to be obtained by an ineffectiveness standard, and that the assurance of a fair trial is merely one among them. If so, methods for accomplishing the other objectives will have to be considered in deciding upon the ineffectiveness standard.

Secondary goals play an important role in the *Strickland* standard. While *Strickland* is based on the belief that a fair trial is the basis for the Sixth Amendment's right to counsel,[267] the *Strickland* standard is also aimed at securing at least two additional goals. The first is to discourage the "proliferation of ineffectiveness challenges" by unhappy litigants.[268] Another is to promote the efficiency of the process. Because of the number of ineffectiveness claims in criminal cases, the Court wanted to keep them from overwhelming the judicial system by both discouraging the claims, and by requiring the courts to process them in an efficient manner.

The legitimacy of these secondary goals in the criminal arena cannot be disputed. Undoubtedly, there are a number of criminal defendants who, once incarcerated, occupy their time by attempting to vacate their convictions. The Court was rightly concerned that an easily surmountable ineffectiveness standard would flood the courts with their claims. *Strickland*'s high standard discourages those claims, and also effects the desirable goal of processing them as efficiently as possible.

Limiting claims, efficiently processing claims, and disallowing attacks on the competency of the lawyers who serve the system are all worthwhile objectives of an ineffectiveness standard for parental-termination cases, just as they are for criminal cases. Whether these secondary objectives should

267. *Id.* at 686.
268. *Id.* at 690.

receive such prominence, and whether they distract from the primary goal of a fair trial, however, is open to debate. Also, whether these same objectives should rise to the level of importance in parental-termination proceedings that they have in criminal cases is likewise subject to argument.

The prominence of secondary objectives in parental-termination cases should be considered in light of the procedural safeguards granted to criminal defendants that are not available to parents. The lesser procedural safeguards afforded the parents may make it more important for courts hearing parental-termination claims to avoid reflexively adopting an ineffectiveness standard that discourages claims or dooms most of them to failure.

One secondary objective that a court should consider in the termination arena, however, is finality. Because of the strong societal interest in stabilizing the child's situation and allowing a child who has been abused or neglected to be loved and cared for by adoptive parents, both the finality of the termination order and the speed with which finality is achieved are more important in a termination judgment than they are in a criminal conviction. To the extent that discouraging ineffectiveness claims helps to achieve finality sooner rather than later, then, a court may want to consider adopting mechanisms in the chosen standard that discourage ineffectiveness claims.

B. Assessing Differences Between the Established Standards and Considering Their Individual Advantages

In addition to reviewing the objectives to be achieved by adopting an ineffectiveness standard, a court will also want to assess the practical differences between those it is considering because case outcomes under the *Strickland* standard differ from those under the fundamental-fairness standard. The strong presumption of counsel's adequacy in *Strickland* makes jurisdictions applying it more likely to find an attorney's performance adequate. Although the words used in both the *Strickland* standard and *Geist*'s fundamental-fairness standard to describe the prejudice prong are similar, the fundamental-fairness jurisdictions are more willing to find that the attorney's inadequate performance has prejudiced the parent. Therefore, in

assessing which of these two standards to adopt, a court should expect to face more successful ineffectiveness claims under the fundamental-fairness standard than under the *Strickland* standard. Additionally, courts should consider the advantages and disadvantages of the standards.

1. Advantages of the Strickland *Standard*

The advantages of the *Strickland* standard are several. First, it has been clearly enunciated and refined by the Supreme Court. Second, because it is the standard used in the large number of Sixth Amendment ineffectiveness cases, it is known to both judges and to attorneys who practice in the criminal courts, some of whom also represent parents in termination proceedings. Third, the *Strickland* standard is so often applied that a large body of case law has developed on both its performance and its prejudice prongs.[269] This large body of precedent guides attorneys and judges involved in termination proceedings as to the quality of performance expected from lawyers, and increases the courts' and the parties' ability to predict the result of an ineffectiveness claim.

The *Strickland* standard also has drawbacks. It has been widely criticized[270] for, among other things, encouraging—or at least tolerating—a low level of attorney competence because so little is expected of an attorney under *Strickland.* It is also charged that this low level of competence results in the underfunding of public-defender offices, contract programs, and appointed-counsel systems, for if little is expected of defense attorneys, funds do not have to be expended on attracting highly qualified lawyers to these jobs, upgrading their status, or

269. *See* Burkoff & Burkoff, *supra* n. 25, a treatise devoted to Sixth Amendment ineffectiveness cases.

270. *See e.g.* Martin C. Calhoun, Student Author, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 Geo. L.J. 413 (1988); Richard L. Gabriel, Student Author, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. Pa. L. Rev. 1259 (1986); William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 Am. Crim. L. Rev. 180 (1984); Klein, *supra* n. 17; Michael Patrick O'Brien, student author, *Judicial Jabberwocky or Uniform Constitutional Protection?* Strickland v. Washington *and National Standards for Ineffective Assistance of Counsel Claims*, 1985 Utah L. Rev. 723 (1985).

supporting continuing-education programs that would raise their level of competence. *Strickland's* history also demonstrates that ineffectiveness claims brought where its standards apply are seldom successful. While this may be a secondary purpose of the *Strickland* standard, discouraging claims can be viewed as a disadvantage if it keeps worthwhile claims out of court. *Strickland*'s prejudice prong, for example, excuses the incompetence of an attorney when there is unassailed evidence of the parent's unfitness. This is true even in cases in which the trial record does not demonstrate the defenses to, or the weaknesses of, the government's case because incompetent counsel failed to make that demonstration.

2. Advantages of the Fundamental-Fairness Standard

The advantages and disadvantages of the fundamental-fairness standard are somewhat the opposite of those for the *Strickland* standard. The fundamental-fairness standard has not been articulated by the Supreme Court, and it has been described in slightly varying versions by state courts. It is not widely applied, and is unfamiliar to judges and lawyers. Only a small body of precedent applying it has developed. On the other hand, the fundamental-fairness standard seems likely to raise the level of attorney competence because it makes counsel more responsible for ensuring that the parents receive a fair trial. It can also be seen as more flexible because it is less doctrinaire than the *Strickland* standard.

C. Considering Alternate Standards

In addition to the *Strickland* standard and the fundamental-fairness standard, it may be useful for courts to look at the standards developed by those few jurisdictions that have rejected or modified *Strickland* for criminal cases. These modifications have had the effect of making ineffectiveness claims slightly easier to prove.[271] Commentators have also suggested standards

271. Hawaii rejected *Strickland* as being "unduly restrictive" and almost impossible to meet. *Briones v. State*, 848 P.2d 966, 977 (Haw. 1993). Hawaii requires the criminal defendant to point to specific errors or omissions that show counsel's lack of skill, judgment, or diligence, and to demonstrate that the errors or omissions result "in either the

that they believe would better ensure a fair trial and that have the secondary benefit of raising the level of attorney competence.[272]

A variation of *Strickland* that a court may want to consider is to adopt the performance prong of *Strickland* and to require the parent to make a showing of prejudice, but to place the burden on the state once the parent comes forward with specific examples of substantial errors or omissions by counsel.[273] This would be analogous to the harmless-error rule adopted by the Supreme Court when the error is of constitutional dimension.[274] Utilizing this traditional harmless-error analysis, if a parent demonstrates that her attorney was incompetent, the burden shifts to the government to show that the attorney's errors were harmless.[275] One reason to adopt an ineffectiveness standard that places the burden of showing lack of prejudice on the state is because doing so emphasizes the fair-trial objective over the objective of discouraging claims.

D. Summary

Appellate courts faced with choosing a framework to use when deciding upon an ineffectiveness standard for termination cases should start by considering the purposes they want to achieve. A court should explore the standards adopted by other jurisdictions and determine which will best accomplish the purposes it hopes to achieve. In reviewing other standards, a

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withdrawal or substantial impairment of a potentially meritorious defense." *State v. Antone*, 615 P.2d 101, 104 (Haw. 1980). New York's standard appears less exacting than *Strickland*. Whether the defendant would have obtained a different result but for counsel's error is relevant, but it is not dispositive. *People v. Benevento*, 697 N.E.2d 584, 588 (N.Y. 1998). Alaska's prejudice prong is said to be "significantly less demanding than *Strickland*'s." *State v. Jones*, 759 P.2d 558, 572 (Alaska App. 1988).

272. *See e.g.* Calhoun, *supra* n. 270, at 437-48.

273. *See U.S. v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973) (indicating, before *Strickland* was decided, that once the defendant showed a substantial error by counsel, the state had to prove the absence of prejudice beyond a reasonable doubt).

274. *Chapman v. Cal.*, 386 U.S. 18 (1967). The constitutional error in *Chapman* was the prosecutor's comment on the defendants' failure to testify. Both the majority opinion (written by Justice Black) and Justice Stewart's concurring opinion noted that prior cases had held the right to counsel so fundamental that the denial of the right could never be considered harmless. *Id.* at 827-28, 837 (Stewart, J., concurring).

275. An additional variation on this theme would be to substitute the burden of clear and convincing evidence for the *Chapman* burden of proof beyond a reasonable doubt because the former burden is the one already used for termination cases in most states.

court should look at the ways in which they have been applied and assess actual case outcomes. Comparing the advantages and disadvantages of the standards is also useful. Once a court has made the analysis suggested by this framework and articulated its reasons for choosing a standard, the resulting standard is likely to accomplish both its primary objective—fair trials—and any secondary purposes that the court considers important.

X. CONCLUSION

Because of the large number of cases in which the state seeks to terminate parental rights, and because the parents in such cases are usually represented by inexperienced, underpaid, and overburdened counsel, the number of cases in which a parent claims ineffective assistance of counsel is mounting. To deal with the ineffectiveness claims in parental-termination cases, courts must establish a procedure by which these claims can be brought to their attention. That procedure must balance the needs of the child with the interests of the parent and those of the government.

The three procedures generally considered for this purpose are direct appeal, post-judgment motions, and habeas corpus. Because delay is adverse to the interests of all the parties, and especially to the interests of the child, the procedure likely to generate the least delay is the most advantageous. That procedure will in most jurisdictions be a direct appeal with a mechanism for remand when the appellate court is persuaded that a remand to the trial court for further development of the record is appropriate.

Appellate courts must also determine which standard of ineffectiveness to apply to ineffectiveness claims in parental-rights cases. No court should adopt the *Strickland* standard for parental-termination cases simply because it applies *Strickland* to criminal cases. Both the *Strickland* standard and the fundamental-fairness standard have advantages and disadvantages, all of which should be carefully examined by a court facing its first ineffectiveness claim in a parental-rights termination proceeding.