

No. 15-1317

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In the Supreme Court of the United States



VANESSA G.,

*Petitioner,*

—v—

TENNESSEE DEPARTMENT OF  
CHILDREN'S SERVICES,

*Respondent.*

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On Petition for Writ of Certiorari to the  
Tennessee Supreme Court

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**REPLY BRIEF OF PETITIONER**

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## **REPLY BRIEF OF PETITIONER**

### **TENNESSEE’S INTERPRETATION OF THE FOURTEENTH AMENDMENT DOES NOT MEET CONSTITUTIONAL MUSTER**

In its Response Brief, the State first claims the Tennessee decision was based upon a statutory analysis under Tennessee law rather than a constitutional analysis under the Fourteenth Amendment; therefore, the State claims this case is a “poor candidate for certiorari.” (Opp.Br.4). The State further claims that even if it was based upon a constitutional analysis, the State provides enough safeguards to maintain fundamental fairness. The Petitioner Mother would respectfully disagree with the State’s assessment.

In the case below, the State argued that parents cannot be entitled to effective assistance of counsel based upon a statutory analysis; however, the State conceded that if the Court found the Respondent Mother was constitutionally entitled to appointed counsel, she was also entitled to effective assistance of appointed counsel. (App.58a). Given this concession by the State, the Tennessee Supreme Court was faced with a singular issue—does the constitution require effective assistance as conceded by the State? In order to answer this question, the Tennessee Supreme Court looked to this Court’s analysis of the Fourteenth Amendment as applied to termination of parental rights cases and found that the Constitution does not require effective assistance due to the fact that

enough procedures are in place to protect the parents' rights.

Specifically, the Tennessee Supreme Court stated in the majority opinion "we decline to hold that securing the constitutional right of parents to fundamentally fair procedures requires adoption of an additional procedure, subsequent to or separate from an appeal as of right, by which parents may attack the judgment terminating parental rights based upon ineffective assistance of appointed counsel." (App.72a-73a)(emphasis added). In arriving at this conclusion, the Tennessee Supreme Court first relied upon *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981). Based upon its analysis, the Tennessee Supreme Court concluded "[e]ven assuming *Lassiter* provides Mother with a constitutional right to counsel, nothing in *Lassiter* requires state courts to import criminal law concepts of ineffective assistance of counsel or to assess counsel's performance by standards developed in the criminal law context. Instead, *Lassiter* requires state courts to ensure that parents receive fundamentally fair procedures." (App.60a).

Given this requirement of fundamental fairness, the Tennessee Supreme Court concluded that there already exist a "panoply" of procedures to ensure fundamental fairness; therefore, there is no need to add the requirement of effective assistance of counsel. (App.64a). What the Tennessee Supreme Court failed to address, however, is the question of who will assure these additional procedures are met if parents' attorneys are not required to be effective. This is a question which remains to be answered given the Tennessee Supreme Court's finding.

Next, the Tennessee Supreme Court relied upon this Court's case of *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502 (1982). In its analysis, the Tennessee Supreme Court found "[d]ue process unquestionably requires States to provide parents with fundamentally fair procedures, but it does not require States to ignore the other interests at stake in parental termination proceedings." (App.67a). Based upon this analysis, the Tennessee Supreme Court found that adding a mechanism for challenging effective assistance of counsel in a termination proceeding would only prolong permanency for the child due to further litigation and ultimately the child would suffer the most. (App.68a). Given these implications, the Tennessee Supreme Court found fundamental fairness "can be achieved without compromising the interests of children in permanency and safety." (App.69a).

In making this conclusion, the Tennessee Supreme Court fails to see that providing effective assistance of counsel to the parent would not only assist the parent, but it would assist the entire family as well by assuring that the law is followed. Specifically, effective counsel would assure that the burden of clear and convincing evidence is followed. (App.71a). Effective counsel would assure that arguments regarding best interest of the child are made. (App.71a-72a). Finally, effective counsel would assure that no fundamental argument is fatally waived—something which occurred in the case at bar when appointed counsel waived any argument regarding one of the grounds for termination and therefore waived the issue of whether grounds existed to terminate the mother's parental rights.

In its Response Brief, the State listed many other procedures in place in order to protect the rights of parents. (Opp.Br.8-9). These procedures include (1) notice to parents of grounds and the opportunity to contest those grounds; (2) the statutory right to counsel from trial to appeal; (3) the heightened burden of clear and convincing proof placed upon the petitioner; (4) AND the requirement that a record be complete enough for the appellate court to allow fair appellate consideration. (Opp.Br.8-9). What's most interesting about all of these requirements was that the State assumed in its brief that appointed counsel would assure each of these procedures was met even when appointed counsel was ineffective. Again, as posed in the original petition for certiorari, the question becomes does a warm body with a law license meet *Lassiter's* mandate for fundamental fairness?

Ultimately, the Tennessee Supreme Court found these existing procedures in Tennessee met the constitutional threshold of the Fourteenth Amendment's requirements of due process and fundamental fairness. In its conclusion, the Tennessee Supreme Court stated "[w]e decline to hold that securing the constitutional right of parents to fundamentally fair procedures requires adoption of an additional procedure, subsequent to or separate from an appeal as of right, by which parents may attack the judgment terminating parental rights based upon ineffective assistance of appointed counsel." (App.82a) (emphasis added). Although the State claims in its response brief the lower court's analysis is based upon a statutory analysis, the word "statute" or its equivalent fails to appear at all in the lower court's conclusion. Instead,

the lower court stated the rights at issue were “constitutional rights.”

Given the above, the Petitioner Mother would argue the lower court’s decision was based upon a constitutional analysis of the Fourteenth Amendment and a finding that effective assistance of counsel is not required under the Federal Constitution based upon this Court’s precedents. Therefore, this case remains a very good candidate for certiorari in order to determine this important federal question.

The Petitioner Mother would further argue that the mere appointment of counsel without the requirement of effective representation cannot meet *Lassiter’s* requirement of fundamental fairness. Without effective assistance of counsel, no one will question whether the procedural safeguards mentioned by both the Tennessee Supreme Court and the State in its response brief will be followed. Therefore, Tennessee’s finding that the already existing procedures were enough without the need for effective assistance of appointed counsel must be questioned by this Honorable Court through certiorari.

Finally, the State fails to address one of the primary reasons that this case should be granted certiorari in that Tennessee’s opinion falls into a very small minority of two out of thirty-three states which have addressed the issue of effective assistance in a termination proceeding and which have found effective assistance is not necessary. As a result, there is a split amongst the States regarding an important federal question which ultimately should be answered by this Honorable Court.





## CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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