

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

E.T. v. State of Florida

SC06-1396

THE NEXT CASE ON THIS
MORNING'S CALENDAR IS E.T.
v. STATE OF FLORIDA.

>> WITH THE MULTIPLE
PARTICIPANTS ARE, WE ABLE TO
PROPORTION OUR CLOCK,
MR. MARSHALL?
YOU CAN APPORTION THE
CLOCKS.

I WOULD URGE YOU TO PLEASE
WATCH YOUR TIME AS YOU ARE
SHARING THAT.

>> THANK YOU.

GOOD MORNING, IF IT MAY
PLEASE THE COURT, MY NAME'S
VAL RODRIGUEZ.

WE GIVE YOU A BRIEF
BACKGROUND --

>> BEFORE WE GET ME TO THE
BACKGROUND.

WHAT ARE YOU SEEKING IN THIS
CASE?

IN OTHER WORDS, THE, THE
CHILDREN WHO HAVE BEEN
ADOPTED THEY WERE ADOPTED IN
2004.

>> RIGHT.

>> ISN'T IT MOOT IN THIS
CASE, IN OTHER WORDS WHAT --
WHAT IF WE SAY, YEAH, YOU
KNOW, IN SOME GENERAL CASE
SOMETIME DOWN THE ROAD THERE
COULD BE SOMETHING BROUGHT.
THE REMEDY I WOULD ASSUME BE
TO, TO STOP THE PROCEEDINGS
TO STOP THE FINALITY BUT
YOU'RE ASKING THAT THESE
CHILDREN BE UNADOPTED, ARE
YOU?

>> I'M ASKING THE COURT TO
REMAPD BACK TO THE TRIAL
COURT FOR THE EVIDENTIARY

HEARING.

>> WELL I'M SAYING LET'S JUST ASSUME EVIDENTIARY HEARING AND FINDING THEY MEET WHATEVER STANDARD WHAT'S THE REMEDY IN THIS CASE?

>> THE REMEDY IS THERE IS A NEW, IF, IF IN -- INEFFECTIVE ASSISTANCE OF COUNSEL IS PROVEN OR SHOWN UNDER STRICKLAND STANDARD OR WHATEVER STANDARD SHOWS IS TERMINATION OF PARENTAL RIGHTS HERE.

>> YOURKER ASKING THE REMEDY WOULD BE TO SET ASIDE A FINAL JUDGMENT OF ADOPTION THAT OCCURRED IN 2004?

>> YES. THAT IS THE ONLY REMEDY THAT CAN OCCUR.

>> DID YOU AT ANY TIME WHEN YOU WERE NOTIFIED THAT THE ADOPTION WAS ABOUT TO BE FINAL, DID YOU MOVE FOR A STAY OF THE ADOPTION PROCEEDINGS?

>> NO. WHAT WE DID INSTEAD IN THE TRIAL COURT SO YOU WOULD UNDERSTAND -- AS A MATTER OF FACT, WE WERE GIVEN NO, I WASN'T GIVEN NOTICE. PETITIONER WAW WAS ALLEGEDLY GIVEN NOTICE OF THE ADOPTION.

WE HAD APPEALED THIS ON AN EMERGENCY BASIS TO THE FOURTH DCA.

YOU NEED TO UNDERSTAND THE PROCEDURAL HISTORY HERE AND WHY I'M ASKING FOR THAT REMEDY.

I AGREE THAT IS AN EXTRAORDINARY REMEDY IN THIS CASE AND IT'S EXTRAORDINARY BECAUSE OF THE FACT THAT THESE CHILDREN HAVE BEEN ADOPTED FOR, FOR ALMOST THREE YEARS.

IN EVERY ARGUMENT MADE THAT'S GOING TO BE MADE TO YOU AND HAS BEEN MADE IN THE

BRIEFS BY THE OPPOSING
COUNSEL ARE REASONABLE
ARGUMENTS IS HOW WE NEED TO
SOLVE THE PROBLEM.

THE PROBLEM IS THE CASE IN
CONTROVERSY HERE REGARDING
THE PETITIONER INVOLVES
MANIFEST INJUSTICE BY THE
LACK OF ATTENTION TO HIS
CLAIM.

HE FILED HIS INEFFECTIVE
COUNSEL OF ASSISTANCE WRIT
BEFORE THE CHILDREN WERE
ADOPTED WITHIN SIX MONTHS OF
THE FINAL ORDER OF
TERMINATION AND WHILE THE
DIRECT APPEAL WAS PENDING,
HE ATTEMPTED TO GET THE
FOURTH DCA TO RECOGNIZE THE
INEFFECTIVE COUNSEL
ASSISTANCE BE AND.

>> WHICH BRINGS ME TO
ANOTHER ISSUE THE PCA, BOTH
THE APPEAL AND THE
INEFFECTIVE ASSISTANCE CLAIM
WHY ISN'T IT BARRED BECAUSE
THEY WERE ALREADY AFFIRMED
ON THIS BASIS.

>> BECAUSE EVERY COURT IN
THIS COUNTRY HAS RECOGNIZED
THAT THE INEFFECTIVE
ASSISTANCE CLAIM IS NOT
COGNIZABLE ON THE DIRECT
APPEAL BECAUSE THE NATURE OF
THIS --

>> ALMOST EVERY STATE THAT'S
LOOKED AT IT HAS RECOGNIZED
THAT IF IT'S GOING TO BE
DONE AT ANY POINT, IT'S GOT
TO BE DONE DURING THE DIRECT
APPEAL AND THEN IF THERE IS
ANYTHING THAT IS SET FORTH
THAT WOULD SET A CLAIM FOR
RELEACH AND IMMEDIATE
EVIDENTIARY HEARING NOT TO
WAIT UNTIL AFTER THE APPEAL.

>> CORRECT.

AS A MATTER OF FACT IN THIS
CASE THE PETITION WAS SENT
TO THE FOURTH DCA HAS PART
OF A SUPPLEMENTAL BRIEF.
THE FOURTH DCA STRUCK THE
PETITION CLAIMING IT WAS NOT
RELATED TO THE DIRECT

APPEAL.

THE ISSUE RAISED ON DIRECT APPEAL REGARDING INFECTIVE ASSISTANCE WAS JUST PART OF HOW THE -- AS THIS COURT KNOWS YOU CAN ONLY RAISE SO MUCH.

MANY TIMES IT'S ERRORS OF OMISSION.

THIS WAS A CASE OF ERROR OF OMISSION.

THE COUNSEL BELOW REPRESENTED THE PETITIONER DID NOTHING.

HIS WITNESS LIST AND EXHIBIT LIST WERE STRICKEN DAY OF TRIAL.

>> LET ME GET TO WHAT APPEARS TO ME TO BE THE MOST TROUBLING ASPECT OF THIS. OF THIS SITUATION.

YOU KNOW WE JUST HEARD WHAT YOU WERE IN HERE THERE FOR A CAPITAL CASE IN WHICH THE COURT BY REASON THAT DEATH IS DIFFERENCE HAS SET UP A SYSTEM OF POST CONVICTION RELIEF AND HIRED COUNSEL THAT ARE APPOINTED.

AND THAT MURDER IN THAT CASE TOOK PLACE IN 1979.

AND WHAT I AM CONCERNED ABOUT IS THAT WHAT YOU'RE ADVOCATING IS TO SET UP ANOTHER SYSTEM WHICH OUR EXPERIENCE IS THAT MOST CHILDREN WILL ALREADY HAVE REACHED THEIR MAJORITY BY THE TIME THE COURT SYSTEM IS DONE WITH ADJUDICATING THEIR CASE.

AND IT SEEMS TO ME THAT'S TERRIBLE DILEMMA.

AND, AND RECOGNIZING YOUR CLIENT'S RIGHTS OR PRECIOUS TO YOUR CLIENT, WE'VE GOT TO BE CONCERNED ABOUT THESE CHILDREN, DON'T WE?

>> ABSOLUTELY.

AND I AM NOT SUGGESTING WE SET UP ANY.KIND OF 3.80 SCHEME EVEN IN CASES -- WHATEVER THE RULE MAY BE ON THAT PARTICULAR -- I AM NOT

ADVOCATING THAT.

AS A MATTER OF FACT, I AM
ADVOCATING, AND I AGREE WITH
WHAT THE SUGGESTIONS ARE BY
OPPOSING COUNSEL AS TO
SETTING UP A SCHEME ON
DIRECT APPEALS SO THAT THERE
IS A PROCEDURE FOR REMAND
AND THERE'S EXPEDITED
PROCEDURES.

ALL OF THAT NEEDS TO BE DONE
IN A SITUATION.

>> WELL IF YOU ARE -- IF YOU
ARE SAYING IT NEEDS TO BE
DONE ON DIRECT REPEAL AND
THEN REMANDED, SNTS IT
EASIER JUST TO SAY THAT YOU
HAVE TO FILE A HABEAS CORPUS
PETITION DURING THE PENDENCY
OF THE APPEAL RATHER THAN
GET THAT EXTRA STEP OF
FILING DURING THE APPEAL AND
REMANDING?

>> I AGREE.

OUR DILEMMA WAS THIS AT THE
TIME WE WERE FACED WITH THIS
PROBLEM.

>> YOU DIDN'T HAVE LOSS.

>> WE HAD NO LAWS.

>> BUT LOOKING FORWARD IT
SEEMS TO ME --

>> THE HABEAS IN MY OPINION
IS THE BEST WAY.

OUR SCHEME NOW UNDER 3.850.
THE SCHEME NOW WHERE YOU
ATTACH DEPOSITION
TRANSCRIPTS YOU GET THE
EVIDENCE YOU HAVE TO DO A
PRIMA FACIE CASE.

THE SCHEME ITSELF I BELIEVE
IS APPROPRIATE.

THE TIME FRAMES ARE NOT
APPROPRIATE.

THE WAY WE HAVE THEM UNDER
CRIMINAL CASES.

>> AND LET ME ASK YOU THIS
BECAUSE THERE IS ANOTHER
ISSUE WE HAVE TO DEAL WITH
IF THERE IS SUCH A RIGHT TO
POST CONVICTION RELIEF.

IT'S NOT CONVICTION BUT FOR
OUR PURPOSES WE CAN CALL IT
THAT.

WHAT IS THE STANDARD?

DOES IT HAVE TO BE ASTRUCK
STRICKLAND TIME STANDARD
WHERE OUR -- ON THE OUTLINE
IS UNDERMINED?

YOU KNOW BECAUSE I BELIEVE
WE'RE ALSO DEALING WITH THE
RIGHT OF CHILDREN TO
FINALITY AND, AND OF THE
PARENTS TO FINALITY AND THAT
HAS TO COME INTO PLAY SO
SHOULDN'T THE STANDARD BE
MORE STRICT IN THESE TYPES
OF CASES THAN THEY ARE IN
CRIMINAL CASES, MORE LIKE
NEWLY DISCOVERED EVIDENCE
STANDARD WHERE YOU HAVE TO
PROVE THAT THE RESULT
WOULD'VE BEEN DIFFERENT?

>> WE HAVE NO PROBLEM WITH
THAT.

HEIGHTENED STANDARD.

STRICKLAND IS TOUGH ENOUGH,
BUT GIVEN THE NEEDS OF THE
CHILDREN, AND THE SPECIAL
NEEDS HERE IN TIME BEING OF
THE ESSENCE AND PERMANENCY
AND EVERYTHING YOU ARE GOING
TO HEAR FROM THIS SIDE, WE
AGREE HIGHENED STANDARD
ABOVE STRICTLAND.

>> WELL IT HAS TO BE ONE IS
BECAUSE THE ONLY REASON
THERE IS COUNCIL IS UNDER
THE DUE PROCESS CLAUSE.
SO IT SEEMS TO ME THAT THE
ALLEGATIONS THAT ARE THE
THRESHOLD ALLEGATIONS THAT
HAVE TO BE MADE IS THAT
THERE WAS A DENIAL OF DUE
PROCESS TO SUCH AN EXTENT
THAT IT DIRECTLY AFFECTED
THE FUNDAMENTAL FAIRNESS OF
THE PROCEEDING, AND MY
CONCERN IS THIS: I CAN SEE
THE ONE EXTREME WHERE YOU'VE
GOT A LOIR LAWYER THAT JUST
DOESN'T EVEN SHOW YOU.
NOW YOU SAY THAT'S ABOUT
WHAT YOU HAVE HERE.

>> CORRECT.

>> WELL, THE JUDGE WHO'S THE
JUDGE WHO'S THE FACT FIND
FINDER, IT WOULD SEEM TO ME
WHEN THAT LAWYER DOESN'T

SHOW UP SKPET CLIENT IS THERE, -- AND THE CLIENT IS THERE, AT THAT POINT THE JUDGE IS IN A POSITION TO SAY WHERE IS MR. SO-AND-SO. YOU KNOW, DO WE HAVE JUDGES THAT DECIDE, YOU KNOW, WHAT? LET'S GET A SUBSTITUTE COUNCIL.

LET'S FIX IT BEFORE THIS THING STARTS AND MY CONCERN ABOUT FOCUSING ON, YOU KNOW, NOW THE PERSON'S LOST AND THEY DON'T CARE, FRANKLY. MAYBE -- NOT YOUR CLIENT. THEY DON'T REALLY CARE ABOUT WHETHER THAT CHILD GETS FINALITY OR NOT.

THEY HAVE GOT THEIR LAWYER. THEY HAVE GOT THIS.

LET'S JUST BLOW THE PROCEEDING AND THEY FILE SOMETHING AND THEY JUST SAY ALL SORTS OF THINGS.

NOW WE TAKE IT THAT WE'RE EXPECTING OUR JUDGES WHO ARE TRYING AS HARD AS WE CAN TO GET THEM TO MOVE ALONG GET THESE APPEALS TO ALL OF A SUDDEN EVALUATE SOMETHING THAT MAY BE OCCURRED TWO OR THREE MONTHS AGO.

I AM CONCERNED THAT THE -- THAT THE BREADTH OF THAT -- THAT IS, OF CREATING THIS RIGHT WITHOUT UNDERSTANDING THE PARAMETERS OF WHAT THE ALLEGATIONS WOULD HAVE TO BE COULD SERIOUSLY UNDERMINE THE FUNCTIONING OF OUR SYSTEM OF PDEPENDENCY AND TERMINATION OF PARENTAL RIGHTS IN FLORIDA.

SO WE ARE BALANCING SOMETHING.

IT'S GOT TO BE MORE THAN STRICK LND BUT JUST THE MERE FACT OF ALLEGING SOMETHING GET YOU A RIGHT TO HAVE AN EVIDENTIARY HEARING BEFORE A JUDGE?

>> WE BELIEVE IT WOULD RISE TO THE STANDARD WHERE YOU HAVE TO ALLEGE THAT THE

PROCEEDING WAS FUNDAMENTALLY UNFAIR.

>> BUT THEN THE OTHER THING THAT, THAT JUST GETS ME IN THIS CASE, THE JUDGE WHO HEARD THIS CASE, JUDGE BAKER, WHO WRITES A 30-PAGE ORDER, MAKE AS COMMENT TO SAY, WELL I THOUGHT THIS LAWYER WAS EFFECTIVE.

WELL, HE'S GOING TO -- IF ANYONE IS GOING TO KNOW WHETHER HE IS OR NOT. WHAT HANDS HAPSONS YOU MOVE TO RECUSE HIM AND RECUSES HIMSELF.

SO NOW ARE WE GOING TO SAY ANOTHER LAWYER IS GOING TO DECIDE WHETHER HE'S EFFECTIVE OR NOT.

>> THE REASON HE WAS RECUSED IS HE MADE A DECISION WITHOUT HOEDING -- HOLD AGHEARING BUT MORE -- HE SIMPLY COMMENTED WITHOUT GIVEN THE TWO SIDES AN OPPORTUNITY TO TELL THE JUDGE OR EXPLAIN TO THE JUDGE WHY.

BUT IN THIS CASE --

>> BUT DON'T YOU THINK THAT'S THE JUDGE THAT KNOWS. IN OTHER WORDS, JUDGES ARE THERE SEEING LAWYERS ALL THE TIME AND YOU KNOW FRANKLY I'M CONCERNED THAT NOT ALL THE LAWYERS THAT ARE REPRESENTING PARENTS ARE, YOU KNOW, DOING EVERYTHING THEY CAN.

BECAUSE YOU PAY ON A CONTRACT BASIS AND WHO'S REALLY GOING TO BE DOING THESE BASES AND -- CASES AND I APPRECIATE THAT YOU KNOW YOU'RE DOING THIS BECAUSE I KNOW YOU ARE ONE OF THE -- YOU KNOW, YOU'RE AN EXCELLENT LAWYER, BUT WE ARE ALREADY DEALING WITH A SYSTEM THAT YOU KNOW,.

>> YOU REMEMBER FROM LAW SCHOOL RIGHT BAD FACTS MAKE BAD CASES.

THE PROBLEM HERE IS, I WOULD BE DERELICT TO NOT RECUSE THE JUDGE ON THE COMMENT HE WAS MADE.

THE RECUSEAL WAS REQUIRED AND HE RECUSED HIMSELF.

IN A PERFECT CASE HE SHOULD'VE REMAINED TO MAKE THE DETERMINATION.

WE DID EVERYTHING HUMANLY POSSIBLE IN THIS CASE TO MUCHK IT ALONG.

WE REMINDED THE TRIAL COURT THERE'S A PENDING MOTION, A WRIT, PENDING.

>> WHY SHOULDN'T THOUGH THE FIRST REQUIREMENT BE LIKE IN NELSON THAT THE, THE INDIVIDUAL INDIVIDUAL IS REPRESENTING.

THIS ISN'T A CRIMINAL CASE.

LAWYERS THERE TO ASSIST.

SAY JUDGE I HAVE A PROBLEM.

MY LAWYER HASN'T LISTENED TO ME.

THEY HAVEN'T RETURNED PHONE CALLS.

THEY HAVEN'T DONE THIS.

LIKE IS DONE ALL THE TIME IN CRIMINAL CASES AND BRING IT TO THE JUDGE'S ATTENTION.

IF THEY DON'T DO THAT.

>> CORRECT.

>> THEY'RE PRECLUDED IN OTHER WORDS THAT THAT'S THE FIRST STEP.

>> AND THAT IN THE PERFECT WORLD IS THE WAY IT SHOULD BE DONE BUT YOU HAVE TO LOOK AT THE FACTS OF THIS CASE.

THE DAY OF THE HEARING, THE WITNESS AND EXHIBIT LIST ARE STRICKEN SO HOW WOULD YOU AS A PETITIONER KNOW TO ALERT THE JUDGE THAT YOUR LAWYER'S BAD IF YOU GET TO TRIAL AND YOU ARE UNABLE TO PRESENT --

>> WEIR RR SPENDING AN AWFUL LOT OF TIME AND THESE ARE ALL VALID HOW ABOUT YOU'RE DOWN NOW TO JUST SEVEN MINUTES LEFT.

MAKE YOUR PITCH TO US OF THE WHAT YOU BELIEVE THE PERFECT

SYSTEM WOULD BE?

OKAY.

YOU TELL US.

>> SURE.

>> YOU KNOW, THAT'S --

>> AND I ALLUDED TO IT IN MY BRIEFS IF YOU WOULD PLEASE READ THEM.

LAW REVIEW ARTICLE BY THE MAIN SUPREME COURT JUSTICE EXCELLENT.

SHE MAKES A LOT OF GOOD SUGGESTIONS.

I BELIEVE DIRECT APPEAL WITH A HABEAS COMPONENT WHERE YOU PREPARE A PETITION LIKE YOU DO FOR A WRIT OF HABEAS CORPUS.

YOU ASK FOR LEAVE.

YOU FILE THAT WITH THE TRIAL COURT YOU HAVE A TIME PERIOD.

SOME STATES GIVE YOU FOUR MONTHS.

SOME STATES GIVE YOU 30 DAYS.

A TIME PERIOD THAT'S SHORT IN TIME.

>> WHO DOES THIS?

IS IT PROSE?

>> IT COULD BE DONE PROSE, IT COULD BE DONE BY A LAWYER.

>> THERE'S NO CONSTITUTIONAL RIGHT TO DO THIS?

>> WELL I'M ARGUE THAT THERE WOULD BE?

>> YOU HAVE THE RIGHT TO COUNSEL THEMSELVES, I HAVEN'T DRIESED THAT ISSUE BUT YOU DO IN THE CRIMINAL CONTEXT AND THERE'S DISCRETIONARY.

I DON'T BELIEVE YOU DO IN THIS SITUATION.

I BELIEVE THAT WE ARE JUST HINGING ON THE RIGHT TO HAVE THE HEARING.

NOT NECESSARILY TO THE COUNSEL.

BUT PLY SUGGESTION IS ON A -- DURING THE DIRECT APPEAL, THAT YOU ASK TO COME BACK, A WRIT HAS TO BE FILED LIKE WE

DO IN A 3.850 WHERE IT'S
VERY SPECIFIC AND THE REVIEW
IS LIKE A 3.850 BUT WITH A
HEIGHTENED STANDARD AS
JUSTICE PARRIENTY SUGGESTED.
FACTUALLY WE DID A LOT MORE
IN THIS CASE.
WE DID ANYTHING TO GET
KBAEGS.

>> WHAT DID YOU DO IN THE
ADOPTION PREDING --
PROCEEDING TO STAY -- TRY TO
STAY THAT PENDENCY OF
APPEAL?

>> WELL RIGHT BEFORE THE
PAPPEAL THEY THE JUDGE
QUASHED THERE IS A COMMENT I
AM NOT GOING TO GO FORWARD.
WE BELIEVE WE DID WHAT WE
HAD TO DO TO CONVINCING THIS
JUDGE THAT WE MADE ARGUMENT
AFTER -- RIGHT.

>> WELL ONCE THE ADOPTION
WAS DONE, DID YOU FILE A
MOTION TO STAY, A MOTION FOR
RELIEF OR ANYTHING?
HERE'S MY CONCERNED.
THESE CHILDREN WERE PICKED
UP WHEN THEY WERE 2 AND 3 OR
7 AND 8 AT THIS TIME AND
THERE IS AN INTEREST WE
REALLY HAVEN'T TALKED ABOUT
THEIR INTERESTS BUT WE HAVE
VERY YOUNG CHILDREN 2 AND 3
WHO HAVE BEEN AWAY FROM THIS
GENTLEMAN 4.5 YEARS.

>> YES.
IT'S NOT A GOOD SITUATION.
IT'S A CATCH-22 BECAUSE
WHAS A PETITIONER TO DO IN
A SITUATION WHERE EITHER
THEY ARE GOING TO BE ADOPTED
OR REMAIN IN FOSTER CARE?
WELL I CAN SUGGEST TO YOU
THAT PROBABLY ANYONE WOULD
WANT THEIR CHILDREN TO BE IN
AN ADOPTED ENVIRONMENT.

>> SO DO YOU AGREE THAT IF
WE WERE TO CONSIDER YOUR
PROCEEDING THAT A KEY
COMPONENT OF THAT WOULD BE
THE RIGHTS AND INTERESTS OF
THE CHILDREN, THE IMPACT OF
ANY CHANGE IN --

>> YES.

>> DECISION ON THE CHILDREN.

>> I BELIEVE THAT'S
IMPORTANT.

I'VE LOOKED AT OTHER STATES
WHERE THEY LOOKED AT WHETHER
YOU FILED YOUR PETITION
BEFORE THE ADOPTION OR NOT.
WE FILED OURS BEFORE THE
DOPTION, A GOOD SEVEN MONTHS
BEFORE THE ADOPTION
PROCEDURE WE HAD IT GOING WE
HAD EVERYTHING WE COULD TO
GET IT MOVED ALONG BUT I
THINK A COMPONENT THIS COURT
NEEDS TO LOOK AT IS FINALITY
OF ADOPTION.

AND COME UP WITH A RULE AND
I WOULD LIKE TO BE ABLE TO
RESPOND IF YOU DON'T MIND.

>> THANK YOU.

>> MAY THE PLEASE THE COURT
I'M JULIE LITTKY-RUBIN
WE REPRESENT THE LITTLE BOYS
WE ARE GOING TO HANDLE THE
ISSUES TO RIGHT TO COUNSEL.
MR. YOUNG IS GOING TO HANDLE
THE ISSUES ABOUT THE FUTURE
PROCEDURES AND I AM GOING TO
HANDLE THE CASE SPECIFIC
FACTUAL ISSUES.

I WOULD SUGGEST TO THE COURT,
AND, ECHOING SOME OF THE
QUESTIONS THAT HAVE BEEN
ASKED OF COUNSEL THAT THIS
IRONICALLY HAPPENS TO BE AN
EXAMPLE OF A CASE WHERE THE
SYSTEM WORKED.

THESE CHILDREN WERE TAKEN
AFTER TWO INCIDENCES WHEN
THEY WERE TWO AND 3 YEARS
OLD WALKING AROUND ALONE AND
WADING IN THE OCEAN AND
WHATEVER THE WITNESSES MAY
HAVE TESTIFIED TO HOW LONG
THAT WAS OR HOW HARD THE
FATHER LOOKED FOR HIM THE
POINT IS THAT THESE -- THE
PARENTAL RIGHTS WERE
TERMINATED AND IN A 33-PAIRJ
PAGE ORDER AS JUSTICE
PAIRIENT A.

JUSTICE SAID RETURNING THEM
TO THEIR CHILDREN WOULD DOOM

THEM TO HORROR, MISERY,
AND/OR DEATH SO THAT WAS HE
IS FINDING.

>> WELL LET MEET ASK YOU
THIS.

IT SEEMS TO ME THAT THIS IS
A CASE WHERE AT LEAST THE
ALLEGATION IS THAT THE
ATTORNEY WITNESS LIST AND
ALL OF THIS WAS STRICKEN ON
THE DAY OF THE HEARING THAT
THE ATTORNEY ATTORNEY DID
NOT VISIT WITH THE CLIENT.

WAS HE IN JAIL?

FOR SOME PERIOD.

HE WAS IN JAIL AT THE TIME
THE HEARING TOOK PLACE,
CORRECT?

THAT ON HIS CRIMINAL CHARGES
HE WAS ACTUALLY FOUND NOT
GUILTY BECAUSE THERE WERE
WITNESSES WHO SAID THAT HE
ACTUALLY WENT AND LOOKED FOR
THE CHILDREN AND THAT HE WAS
NOT PAZ R PASSED OUT DRUNK
WHT THE POLICE ARRIVED AND
ALL THIS KIND OF.

YET WAS ANY OF THIS KIND OF
INFORMATION PRESENTED AT THE
HEARING FOR THE TERMINATION
OF PARENTAL RIGHTS?

I UNDERSTAND THAT THERE IS
THIS COMPREHENSIVE ORDER BUT
IF THE ATTORNEY WHO WAS
REPRESENTING THE FATHER
DIDN'T BRIDGE ANY OF THIS
INFORMATION BEFORE THE COURT,
HOW CAN WE REALLY SAY THAT
THE ATTORNEY WAS REALLY
ACTING AS AN ATTORNEY ON
THIS -- AND HIS CLIENT'S
BEST INTERESTS.

>> YOUR HONOR, WE PROCEEDED
UNDER THIS CASE SECTION
39806F..

THE STANDARD IN THE CRIMINAL
CASE HAD TO SHOW AN INTENT
OR WILLFULNESS.

IN OUR CASE WE ONLY HAD TO
SHOW EGREGIOUS CONDUCT.

WHEN THIS PROCEEDING WENT
FORWARD MR. McCONTHLED
ATTORNEY FOR THE PETITIONER
AT THE TIME HE

CROSS-EXAMINED WITNESSES, HE PRESENTED EVIDENCE.

IT IS TRUE THAT THE WINS LIST --

>> WHAT EVIDENCE DID HE PRESENT?

ARE YOU TALKING ABOUT THE FATHER'S ATTORNEY?

WHAT DID HE PRESENT?

>> WELL HE PRIMARILY CROSS-EXAMINED AND POKED HOLES IN THE CASE AND SHOWED THAT THE FATHER WAS NOT SUCH AS BAD FATHER.

THE POINT IS -- 92 CAN I ASK A QUESTION JUST ON THAT?

WAS THE FATHER THERE AT THE HEARING.

WE SAY HE'S IN JAIL WAS HE PHYSICALLY AT THE HEARING AT THE TIME?

>> OKAY SO HE WASN'T -- WHAT IS THE ISSUE ABOUT HIM TESTIFYING?

DID HE ELECT NOT TO TESTIFY?

>> HE DID NOT TESTIFY BECAUSE HIS CRIMINAL PROCEEDING WAS, WAS ONGOING BUT HE WAS, BUT, AND COUNSEL FOR THE FOSTER CHILDREN'S PROJECT COMMENTED THAT HE DID NOT TESTIFY TO THE JUDGE.

THERE WAS NO JURY.

I THINK THE VERY CRUCIAL THING --

>> THERE IS NOTHING THAT STOPPED HIM IF HE WANTED TO TESTIFY FROM TESTIFYING.

IT'S NOT AS IF THIS THING WENT FORWARD WITHOUT HIM BEING HERE.

>> SO I THINK ONE THING THAT IS CRUCIAL IN IN FINDING NOT ONLY THAT THE DIRECT APPEAL WAS PRERNLALLY CORRECT BUT ALSO THAT THE, THAT THE ON THIS RECORD THIS MAN WAS GIVEN ALL OF HIS APPELLATE RIGHTS.

HE HAD A FULL DIRECT APPEAL. AND IF WE LOOK AT THE EVIDENCE PRESENTED BY MR. RODRIGUEZ IT WAS THINGS

LIKE HE CAME TO THE DAY CARE
TIMELY AND HE WAS NOT DRUNK
AND HE WAS CLEAN AND THE
CHILDREN WERE THERE.
BUT NONE OF THOSE THINGS GO
TO WHAT THE EGREGIOUS
CONDUCT WAS ALLEGED.
HE MAY HAVE BEEN HOLED UP IN
A HOTEL ROOM LOOKING FOR A
CURE FOR CANCER BUT THE
POINT IS HIS TWO AND
3-YEAR-OLD ONE OF WHOM WAS
NAKED THE OTHER OF WHOM WAS
WEARING A DIAPER WERE WADING
IN THE OCEAN OFF SINGER
ISLAND.

>> I'M STILL NOT ON YOUR
POSITION ON THE LEM ISSUE
BEFORE US WHICH IS SHOULD
THERE BE A RIGHT TO, FOR
LACK OF A BETTER TERM, POST
CONVICTION RELIEF IN
TERMINATION OF PARENTAL
RIGHTS PROCEEDINGS?

>> YOUR HONOR, OUR POSITION
IS IS THAT IN THE FUCH THERE
ARE DOES NEED TO BE
SOMETHING THAT ADDRESSES
THIS -- THAT THIS COURT
NEEDS TO ADDRESS THROUGH
RULES COMMITTEE OR THROUGH A
DECISION THAT THERE MUST BE
SOME PROCEDURE TO AVOID WHAT
IS HAPPENING HERE.

>> I UNDERSTAND BUT I WANT
TO FIRST GET TO YOUR
POSITION.
IS THERE A RIGHT TO IT OR
NOT?

>> THERE IS, IS THERE A
RIGHT TO EFFECTIVE COUNSEL
--

>> IS THERE A RIGHT TO
EFFECTIVE COUNSEL THAT YOU
CAN THEN ENFORCE IF YOU
DON'T HAVE IT THROUGH A POST
TERMINATION PROCEEDING?

>> WELL MR. GILL IS GOING TO
ADDRESS THOSE SPECIFICALLY.

>> I WANT TO KNOW YOUR
POSITION.

>> MY POSITION IS THAT THERE
IS A NOT A CLEAR LEGAL RIGHT
TO THE RIGHT TO EFFECTIVE

COUNSEL.

>> THERE IS A CONSTITUTIONAL
RIGHT TO COUNSEL IN
TERMINATION OF PARENTAL
RIGHTS PROCEEDINGS?

>> THAT ISSUE HAS NEVER
ACTUALLY BEEN ADDRESSED IN A
DEPENDENCY PROCEEDING IT HAS
BEEN ADDRESSED.

>> I THOUGHT -- NO MY
QUESTION IS THERE A RIGHT TO
COUNSEL IN TERMINATION OF
PARENTAL RIGHTS PROCEEDINGS.

>> YES.

>> OKAY AND HAVEN'T WE SAID
IN OTHER CONTEXTS OR HAVEN'T
THE U.S. SUPREME COURT SAID
THAT THE RIGHT TO COUNSEL
IMPLY AS RIGHT TO EFFECTIVE
COUNSEL?

>> YES, YOUR HONOR.

>> SO WOULDN'T THAT IMPLY
THAT IF THERE WAS A RIGHT TO
COUNSEL IN TERMINATION OF
PARENTAL RIGHT PROCEEDINGS
THEN THERE IS AN EFFECTIVE
RIGHT COUNSEL.

>> THERE'S AN INFERENCE THAT
CERTAINLY COULD BE DRAWN
FROM THAT.

AND THERE'S A PRERNL THAT
WHETHER WE PERSONALLY
BELIEVE IT SHOULD BE SOME
TYPE OF REMAND WITHIN THE
CONTEXT OF THIS APPEAL.

WHAT I WANT THIS COURT TO BE
ABLE TO TAKE COMFORT IN IS
THAT THIS MAN'S RIGHTS WERE
EFFECTIVELY ADDRESSED AND
PROTECTED IN THIS
PROCEEDING.

>> WELL HOW -- I MEAN --
WAIT, WAIT, WAIT.

HOW WERE THEY PROTECTED IF
THEY STRUCK ALL OF HIS
WITNESSES, DIDN'T TESTIFY,
DO WE KNOW WHETHER HIS
ATTORNEY TOLD HIM NOT TO
TESTIFY BECAUSE THE CRIMINAL
CASE IS PENDING?

PRETTY BROAD STATEMENT.

YOU'VE OUTLINED THE SKPEFDS
MAYBE IT'S COMPELLING.

BUT TO SAY THAT HE'S FULLY

PROTECT I MEAN THAT'S TO
IGNORE THAT HE DIDN'T HAVE
EFFECTIVE COUNSEL IF WE
ACCEPT THAT ALLEGATION,
ISN'T THAT CORRECT.

>> YOUR HONOR, I STAND
CORRECTED.

HIS RIGHTS WERE NOT FULLY
PROTECTED HIS RIGHTS CANNOT
TAKE PRECEDENCE WHATEVER
LITTLE RIGHTS THAT HE WAS
NOT POSSIBLY AFFORDED CANNOT
OVERCOME THE PARAMOUNT
RIGHTS OF THESE TWO
CHILDREN.

>> DO YOU AGREE WITH THE
STANDARD OF DUE PROCESS?

>> I'M SORRY.

>> GO AHEAD.

>> WOULD YOUR ARGUMENT BE
THE SAME IF THESE CHILDREN
HAD NOT BEEN ADOPTED.

IF AT THIS POINT IN TIME THE
CHILDREN WERE NOT
ADOPTED?

WOULD YOUR ARGUMENT STILL BE THE
SAME?

YOUR HONOR, AS OUR ARGUMENT
WOULD STILL BE THE SAME BUT
THE FACT THAT THEY HAVE
BEEN ADOPTED AND AS I SAID
THIS IS THE SYSTEM WORKING.
THEY HAVE BEEN WITH THE SAME
FAMILY FOR 2 AND A HALF
YEARS AND THERE WAS NEVER A
MOTION TO STAY THE ADOPTION
WHEN THEY SAID IT WAS GOING TO
GO FORWARD THAT MIGHT
MAKE IT DISTINGUISHABLE BUT
YES OUR POSITION WOULD BE
THE SAME.

>> DO WE HAVE ENOUGH ON THIS
RECORD TO DETERMINE THEN
THAT IN THIS CASE WITHOUT AN
EVIDENTIARY HEARING THAT
THERE WAS NOT A DENIAL OF
DUE PROCESS BY DIRECTLY
AFFECTING THE FUNDAMENTAL
FAIRNESS OF THE
PROCEEDING.

>> THAT IS PRECISELY OUR
POSITION AND THE GIS CASE,
THE OREGON SUPREME COURT
THERE WAS NO HEARING THERE.

THE SUPREME COURT FOUND THAT THE RIGHTS WERE PROTECT SAID ENOUGH.

>> AND I WILL ALLOW MY CO-COUNSEL TO COMPLETE THE ARGUMENT.

>> THANK YOU VERY MUCH.

>> GOOD MORNING, MAY IT PLEASE THE COURT MY NAME IS JEFFREY GALIN.

>> DOES THE DEPARTMENT FEEL THEY HAVE KBHAE OBLIGATION, WHEN THEY SAY -- YOU KNOW WHEN THEY SEEK COUNSEL IN KASDS STARTING WITH THE DEPENDENCY CASE AND YOU KNOW THERE ARE COUNSEL AND THERE ARE COUNSEL AND YOU HAVE SOMEBODY THAT'S, MAYBE NOT SHOWING UP.

DOES THE COUNSEL -- DOES THE DEPARTMENT EVER POINT OUT ANYTHING LIKE THAT TO THE COURT?

IS THERE ANY OBLIGATION WITH REGARD TO THIS ON THE PART OF DCF IN.

>> YOUR HONOR.

>> NOT A LEGAL OBLIGATION BUT JUST TO --

>> I CAN TELL YOU THAT FROM MY PERSONAL EXPERIENCE WE HAVE HAD OPPORTUNITIES AND WE HAVE HAD SITUATIONS IN WHICH WE HAVE BROUGHT TO THE COURT'S ATTENTION PROBLEMS NOT NECESSARILY RELATED TO ACTS OR OMISSIONS BY DEFENSE COUNSEL BUT PROBLEMS THAT INVOLVE THE PROCEDURES THAT WE HANDLE IN CHAPTER 39 CASES.

>> WHAT IS THAT?

>> WELL, WHAT I MEAN IS, FOR EXAMPLE, IF, IF A PARENT IS HAVING A -- CLAIMS TO BE HAVE AGDIFFICULT TIME CONTACTING, CONTACTING HIS OR HER IRLO, COURT-APPOINTED LAWYER WE DO BRING THAT TO THE COURT'S ATTENTION.

>> WELL WHAT'S IN THE RECORD IN THIS CASE ABOUT WHY THE DEFENSE LAWYER PARENT DIDN'T

FILE HIS WITNESS LIST ON
TIME?

ONLY FILED IT ONE DAY
BEFORE?

IS THERE ANYTHING
EXPLANATION -- YOU KNOW
THERE MUST'VE BEEN A MOTION
TO STRIKE THE WITNESS LIST.

>> THERE WAS.

>> AND WHAT WAS THE DEFENSE
LAWYER'S EXPLANATION?

>> I DON'T BELIEVE THAT HE
HAD AN ADEQUATE EXPLANATION,
YOUR HONOR.

>> ALL RIGHT.

NOW MY CONCERN AS WE LOOK
PROSPECTIVELY AS THIS, WE'VE
ALREADY SAID THERE'S NO
RIGHT TO COUNSEL IN THE
DEPENDENCY PROCEEDINGS SO
THERE'S NO RIGHT TO
EFFECTIVE ASSISTANCE IN THE
DEPENDENCY PROCEEDING BUT IN
FLORIDA WE'VE GOT NOW THIS
IDEA YOU APPOINT COUNSEL FOR
DEPENDENCY PROCEDURE AND
STAY ON THROUGH TERMINATION.
MY CONCERN IS THAT IF
SOMEBODY'S NOT FUNCTIONING
VERY WELL AS COUNCIL, THAT'S
SOMETHING THAT NEEDS TO BE
BROUGHT TO THE COURT AT ITS
EARLIEST OPPORTUNITY.

HAVE WE CREATED SOMETHING BY
SAYING THERE'S NO RIGHT TO
EFFECTIVE ASSISTANCE FOR THE
DEPENDENCY THAT IS GOING TO
ENCOURAGE THOSE THAT WANTED
TO LAY THESE PROCEEDINGS BY
WAITING UNTIL WHATEVER IS
THE LATEST POINT WE WOULD
SET LIKE THE APPEAL.

TO FIRST BRING THIS TO THE
COURT'S ATTENTION AND IS
THERE ANYTHING THAT THE, THE
DEPARTMENT CAN SUGGEST ABOUT
HOW THERE WOULD BE A
PROCEDURE THAD WOULD
EFFECTIVELY ADDRESS THE
PROBLEM WHEN IT FIRST
OCCURS.

THAT IS A LAWYER THAT IS
REALLY NOT DOING HIS OR HER
JOB AND IS JUST GETTING PAID

AND GOING THROUGH THE
MOTIONS OR EVEN LESS?

>> I UNDERSTAND THE
QUESTION.
YOUR HONOR.

AND I CAN REPRESENT TO THIS
COURT THAT IN MY EXPERIENCE
IN REPRESENTING THE
DEPARTMENTANE NUMBER OF
COUNTIES IN THE STATE THAT
THAT ALREADY EXISTED.
THAT SITUATION, THAT
MECHANISM ALREADY SKPIS
EXISTS.

IT IS NOT AT ALL UNCOMFRN A
PARENT TO COMPLAIN ABOUT HIS
OR HER COUNSEL AND FOR
WHATEVER REASON ASK FOR
NEWLY APPOINTED COUNSEL T.
HAPPENS DAILY.

THAT HAPPENS ALL OF THE
TIME.

BUT WITH RESPECT TO THE
ISSUE OF HOW YOU HANDTLE
ONCE YOU GET TO TERMINATION
OF PARENTAL RIGHTS STAGE, WE
BELIEVE THAT DEPARTMENT
BELIEVES THAT THE THE COURT
MADE IT VERY CLEAR THAT
THERE IS NO RIGHT TO A
COLLATERAL PROCEEDING TO
CHALLENGE EFFECTIVENESS OF
COUNSEL.

AND THAT'S CLEARLY --

>> THAT WAS SAID IN
DEPENDENCY.

>> ABSOLUTELY RIGHT.

>> BUT WE NEVER SAID THAT IN
TERMINATION OF PARENTAL
RIGHTS CONTEXT.

>> NO, YOU DID NOT.

>> SO WHY ISN'T THERE -- IF
THERE IS TO BE COUNSEL
THERE'S GOT TO BE SOME KIND
OF MEANINGFUL COUNSEL.

IF YOU TAKE THE EXTREME
EXAMPLE IN FIRST DISTRICT 15,
20 YEARS AGO WHERE SOMEBODY
JUST DOESN'T SHOW UP F. THEY
DON'T SHOW UP.

>> THAT WAS THE MR CASE, AND
WHEN THE LAWYER JUST DOESN'T
SHOW UP AS IN THIS CASE, THE
APPROPRIATE WAY IN WHICH TO

HANDLE THAT IT SEEMS TO ME
AND COULD'VE BEEN DONE BY
THE FIRST DISTRICT WOULD
SIMPLY HAVE BEEN TO RELY ON
THE DB CASE AND SAY THE
LAWYER DIDN'T SHOW UP
THEREFORE IS NOT -- IT'S NOT
A QUESTION OF INEFFECTIVE
ASSISTANCE OF COUNSELATORS
QUESTION OF NO COUNSEL.

>> WELL IN THE FIRST
DISTRICT THEY DECIDED THAT
IT WOULD GO BY HABEAS.
WHAT HAS BEEN GOING ON IN
THE FIRT DISTRICT SINCE THAT
CASE OUM CAME OUT?
ARE THERE CASE WHERES
LAWYERS ARE BEING CHALLENGED
FOR LACK OF EFFECTIVENESS.

>> NOT TO MY KNOWLEDGE, YOUR
HONOR.

I'M JUST CONCERNED AND
EVERYONE SAYS LET'S COME UP
WITH A PROCEDURE.

I'M CONCERNED WE COME UP
WITH A PROCEDURE AND YOU
KNOW THE PROVERBIAL FLOOD
GATES ARE OPENED.

WE'RE STILL TRYING TO GET
LAWYERS FOR CHILDREN GET
FULL REPRESENTATION FOR
GUARDIANS AD LITEM SO WE CAN
GET THESE PROCEEDINGS AND
ALL OF A SUDDEN WE ARE GOING
TO START TO FOCUS ON
SOMETHING HERETOFORE DOESN'T
SEEM LIKE IT'S BEEN A REALLY
BIG PROBLEM ON THIS STATE.

>> THAT'S TRUE.

THAT'S TRUE.

MY COMMENT WOULD BE RIN NOT
A REALLY -- IT'S NOT REALLY
BIG PROBLEM IN THIS STATE.

>> HOW DO WE KNOW IT'S A BIG
PROBLEM.

I DON'T SEE HOW WE WOULD
KNOW IF IT IS A PROBLEM.

BECAUSE THERE ARE COUNSEL
NOT ADEQUATELY REPRESENTING
PARENTS IN TERMINATION OF
RIGHTS PROCEEDINGS AND THEN
WE GET SENTENCING ORDERS
LIKE THIS ONE SAYING WELL
THEY, THE RESPONDENCEANT IS

A HORRIBLE GUY OF COURSE YOU ARE GOING TO GET THAT BECAUSE HE WASN'T REPRESENTED AND THAT'S APPEALED AND AFFIRMED HOW ARE WE TO KNOW HISTORICALLY THAT THEY ARE GETTING GOOD REPRESENTATION.

>> BECAUSE I RESPONDED IN AN EARLIER QUESTION ON A DAILY BAIZE LAWYERS ARE CHANGED IN THESE KASS.

IF THE PARENT DOESN'T FEEL AS IF FOR WHATEVER REASON THEY'RE HITTING IT OFF WITH THE LAWYER OR IF THEY FEEL AS IF THE LAWYER IS NOT REPRESENTING THEM ADEQUATELY, THEY DO COME TO COURT AND DON'T HESITATE TO DO IT AND ASK THE JUDGE FOR A NEW LAWYER.

>> THAT HAPPENS IN CRIMINAL PROCEEDINGS AS WELL. AND WE CHANGE -- AND WE STILL HAVE LOT OF POST CONVICTION RELIEF BECAUSE OF INADEQUATE COUNSEL.

>> OF COURSE.

AND AS A MATTER OF FACT.

>> SO THAT ISN'T -- IT DOESN'T SEEM TO BE THE SOLUTION FOR ALL CASES. IT MAY NOT BE THE SOLUTION FOR ALL CASES BUT IN A CRIMINAL CASE AS THIS COURT WELL KNOWS THE FOCUS IS ENTIRELY DIFFERENT THAN IT IS ON ANY CHAPTER 39 PROCEEDING WHETHER IT BE DEPENDENCY OR FOR TERMINATION OF PARENTAL RIGHTS AND A NUMBER OF JUSTICES HAVE POINTED THAT OUT IN THIS ORAL ARGUMENT. THE FOCUS HAS TO BE AND IT HAS BEEN EVER SINCE THE PAGEANT DECISION.

FOCUS HAS TO BE THE PARAMOUNT INTEREST THE BEST INTEREST OF THE CHILDREN OVER AND ABOVE THE ADMITTEDLY FUNDAMENTAL RIGHTS TO THE PARENTS TO THE

CARE AND --

>> YOU WOULD AGREE THAT EVERY STATE WOULD HAVE THAT SAME KIND OF INTEREST THAT THE INTRTS OF THE CHILD IS PARAMOUNT HOWEVER THE MAJORITY OF THE STATES THAT HAVE LOOKED AT THIS ISSUE HAVE HELD THAT, THAT THERE IS A RIGHT TO POST TERMINATION PROCEEDINGS. I THINK ONLY ONE HAS HELD THAT THERE IS NOT.

SO THEY SEEM TO HAVE FOUND A BALANCE IN SOME KIND OF EXPEDITED FORM OF POST-TERMINATION PROCEEDING.

>> WELL, YOUR HONOR, THAT'S CLEARLY TRUE.

LET ME POINT OUT ONE BRIEF OBSERVATION WITH EXTENT TO THAT.

I THINK THE EXTENT TO WHICH OTHER COURTS AND OTHER STATES HAVE COME TO THE CONCLUSION THAT BECAUSE THERE IS A CONSTITUTIONAL RIGHT TO COUNSEL WHICH IS CREATED AND IT RISES OUT OF THE DUE PROCESS CLAUSES AS IT DOES IN THIS STATE OF THE FEDERAL AND STATE CONSTITUTION, IT IS A, WHILE IT MAY NOT BE ILLOGICAL AND IT MAY BE A COMMON SENSE APPROACH AS THOSE COURTS HAVE TOUTED IT, IT IS NOT JURES PRUDENTIALY LOGICAL TO TRANSPORT IF YOU WILL FROM THE CRIMINAL SETTING TO THE CHAPTER 39 CIVIL SETTING THE PHILOSOPHY AND THE THEORIES OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSIST SNONS I'VE GOT A QUESTION WITH REGARD TO THAT.

THOSE ARE -- THESE ARE THE FOLKATIZE SEEMS TO ME, THE PARENTS, THE LEAST EDUCATED OUT OF ALL SOCIETY. THE MOST KMSHGLY DISADVANTAGED OF ALL SOCIETY.

YOU DON'T FIND A
PROFESSIONAL FOLKS IN THERE
THAT OFTEN IN THIS
PROCEEDING SO WE ARE DEALING
WITH THE FOLKS THAT HAVE THE
MOST DIFFICULTY AND I'M
HAVING TROUBLE UNDERSTANDING
AN APPROACH THAT IS SAYS
WELL RETS HARD TO DO IT SO
THEREFORE WE ARE NOT GOING
TO DO ANYTHING AND AT THE
SAME TIME RECOGNIZING THAT
THERE MAY BE A NEED FROM
TIME TO TIME AND THIS IS, I
MEAN, THE DIFFICULTY IT
SEEMS TO ME OF DOING IT
OUGHT NOT OVERCOME OR
OVERSHADOW WHAT'S RIGHT AND
WHAUTHS RR A FAIR SYSTEM.

>> I UNDERSTAND, YOUR HONOR,
AND LET ME JUST VERY BRIEFLY
BECAUSE I SEE I AM RUNNING
OVER, LET ME JUST VERY
BRIEFLY SUGGEST TO YOUR
HONOR, TO THE ENTIRE COURT,
THAT THERE IS ALREADY IN
PLACE A PROCEDURAL MECHANISM
BY WHICH THIS COULD BE
ADDRESSED IF THE COURT
DETERMINES THAT IT IS
APPROPRIATE TO DO SO.

IF AN INEFFECTIVE ASSISTANCE
OF COUNSEL TYPE CLAIM IS TO
BE RAISED IN A CHAPTER 39
PROCEEDING IN A TERMINATION
OF PARENTAL RIGHTS CHAPTER
39 PROCEEDING RULE 8.--
JUVENILE RULE 8.265 A
ALREADY PROVIDES SIX GROUNDS,
SIX SITUATIONS IN WHICH A
REHEARING CAN BE GRANTED.
ONE OF THOSE 6 SAYS THAT IF
THE PARENT BELIEVES THEY
HAVE RECEIVED -- HAVE NOT
RECEIVE ADFAIR OR IMPARTIAL
HEARING, THEY'RE INTITE
TOLED A REHEARING.
NOW 8.265 REQUIRES THAT THE
MOTION BE FILED WITHIN TEN
DAYS OF THE EARLIER OF THE
ORAL ANNOUNCEMENT OF TPR --
WELL NO LATER THAN TEN DAYS
OF RENDITION OF AN ORDER SO
IN THE COURT --

>> MY PROBLEM WITH THAT KIND OF SITUATION IS AND MOST OF THESE CASES YOU'RE GOING TO HAVE THE SAME ATTORNEY WHO'S GOING TO FILE AN APPEAL, FILE ANY KIND OF POST-CONVICTION MOTION THAT IS THE ONE THAT THE -- IS GOING TO BE INEFFECTIVE. IS HE GOING TO FILE A MOTION THAT HE'S BEEN INEFFECTIVE.

>> NO. AND OBVIOUSLY A VALID POINT. MY SUGGESTION WOULD BE -- THE DEPARTMENT'S SUGGESTION WITH RESPECT TO TOTALITY ISSUE WOULD BE THIS IS.

LET THAT WE UTILIZE FOR PURPOSES OF TERMINATION OF PARENTAL RIGHTS CASES ONLY 8.265 MOTIONS AND REQUIRE THE TRIAL COURTS TO IMMEDIATELY APPOINT NEW AND DIFFERENT COUNSEL OR REPRESENTATION PURPOSES DUAL REPRESENTATION PURPOSES FOR EITHER APPELLATE REVIEW OF THE TERMINATION OF PARENTAL RIGHTS PROCEEDING ON DIRECT APPEAL OR AND/OR, REALLY, AND FOR THE FILING OF AN 8.265 MOTION CLAIMED BASED ON CLAIM THAT ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL.

AGAIN THE EXISTING RULE WOULD REQUIRE THAT THE FILE WITHIN TEN DAYS OF RENDITION BUT THE NEWLY APPOINTED LAWYER DIFFERENT FROM THAT REPRESENTED THE PARENT DURING THE TERMINATION PROCEEDINGS COULD THEN FILE THE APPEAL NOTICE IN A TIMELY FASHION AS WELL AS IF NECESSARY OBTAIN A JURISDICTION ORDER FROM THE DISTRICT COURT OF APPEAL WHICH, WHICH, BY WHICH THE CIRCUIT COURT WOULD BE ENABLED TO RESOLVE ANY ISSUES UNDER THE 8.265.

>> WE HAVE A SYSTEM LIKE

THAT.
WE HAVE GOT LAWYERS LIKE
THAT.

IT'S CALLED CAPITAL
COLLATERAL.

>> I KNOW, YOUR HONOR, AND
RIR THEY'RE NOT VERY WELL
FUNDED.

WHO'S GOING TO FUND THIS?

>> YOUR HONOR, THAT'S A VERY
DIFFICULT QUESTION AND I'M
NOT SURE I'M COMPETENT TO
ANSWER THAT TO BE PERFECTLY
CANDID ABOUT THAT.

THANK YOU.

>> MR. YOUNG?

>> THANK YOU, YOUR HONOR,
MAY IT PLEASE THE COURT TOM
YOUNG FOR THE STATE GUARDIAN
AD LITEM PROGRAM.

BECAUSE PARENTAL
RESPONSIBILITIES ARE THE
COROLLARY TO PARENTAL RIGHTS,
THE STATEWIDE GUARDIAN AD
LITEM PROGRAM CONTENDS THAT
THE RESPONSIBILITY FOR
EXPEDITING ANY RIGHT THAT
THIS COURT MIGHT FIND EXISTS
MUST BE PLACED SQUARELY ON
THE SHOULDERS OF THE PARENTS
BECAUSE TO DO OTHERWISE WILL
SHIFT THE FOCUS FROM THE
CHILDREN TO THE PARENTS AND
TURN THE HISTORICAL FOCUS ON
ITS HEAD.

>> AND SO HOW DO YOU SUGGEST
THAT THE PARENTS SHOULD DO
THAT?

>> YOUR HONOR, A PARENT
REGARDLESS OF THEIR
EDUCATIONAL BACKGROUND OR
I.Q., KNOWS WHETHER THEY
BELIEVE THEY HAVE BEEN
ADEQUATELY REPRESENTED.
AND AS JUSTICE COCKENS
STATES IN HER ARTICLE, IF
THERE IS A CLEAR RULE IN
PLACE THAT CONSTRUCTIVELY
PUTS ALL CITIZENS ON NOTES
AND ALL TAERNDS ON NOTICE OF
WHAT THE PROCEDURE IS, IT
THEN BECOMES COUNSEL'S
OBLIGATION TO ADVISE THE
CLIENT AND THE CLIENT HAS

THE ABILITY TO PPL FIND THE
RULE.

>> WELL HOW DOES THAT -- HOW
IS, AS A PRACTICAL MATTER,
ONCE YOU CREATE OO RIGHT AND
IT'S CERTAINLY THE CASE WITH
POST-CONVICTION, IT'S FOR
THOSE WHO HAVE A MOTIVATION
OF -- NOT IN THE INTEREST OF
CHILDREN.

VERY LOVING PARENTS OR
MR. -- PARENT HERE WHO
CLEARLY HAD A SEVERE ALCOHOL
PROBLEM.

HOW DO YOU PREVENT IT FROM
JUST, YOU KNOW, BEING THE
FLOOD GATES.

IN OTHER WORDS, WHO IS THE
GATEKEEPER IN DETERMINING
WHETHER THERE'S -THERE'S --
YOU KNOW A THRESHOLD
ALLEGATION THAT RISES
AGAINST THE LEVEL OF DUE
PROCESS VIMGS, THAT THAT
PERB'S DUE PROCESS RIGHTS
HAVE BEEN VIOLATED BY THE
ACTIONS OF HIS OR HER
ATTORNEY.

HOW IS THAT DUB?

HOW WOULD YOU PROPOSE THAT
BE DONE?

>> YOUR HONOR, IT'S NOT EASY
BUT I BELIEVE THE STATEWIDE
PROGRAM BELIEVES THAT IF WE
CAN FIND THIS RIGHT, IF THE
COURT DETERMINES THERE IS A
RIGHT, THAT WE CAN FIND IT
TO THE DIRECT APPEAL.

>> YOU SEE THE PROBLEM I SEE
IN THE CASES WHEN JUSTICE
CONVINCE AND JUSTICE LEWIS
ARE ASKING ABOUT, WELL, YOU
KNOW HOW IS THISTHAL FATHER
GOING TO KNOW THIS, HE'S,
THE CASE GOES UP ON DIRECT
APPEAL.

THERE IS A FIVE-DAY HAERG.
ALL RIGHT, YOU GOT -- I
DON'T KNOW -- I'M NOT SURE I
UNDERSTAND HOW EFFECTIVELY
YOU UNDERSTAND UP WHILE
THAT'S GOING ON NOW YOU
START ANOTHER PROCEEDING IN
THE TRIAL COURT AND THAT

PROCEEDING'S GUT TO BE
EXPEDIATED EVEN OVER ALL
THE OTHER THINGS THAT ARE
GOING ON BECAUSE WE GOT --
WE DON'T WANT THE APPEAL TO
TAKE THEM LONGER.

NOW -OF A SUDDEN YOU HAVE
GOT TWO APPEALS GOING ON.
MAYBE THE QUESTION I HAVE IS
WHAT STATE IS IT, YOU KNOW
ALL A LOT OF THESE STATES
ARE TALKING ABOUT THINGS.
THEY ARE NOT FLORIDA.
WE HAVE OUR OWN UNIQUE
ISSUES.

IS THERE A STATE WHERE THIS
IS WORKING IN A WAY THAT
REALLY VINDICATES DUE
PROCESS RIGHTS WHILE NOT,
YOU KNOW, LOSING SIGHT OF
WHAT THE PROCEEDINGS ARE
ABOUT?

HAVE YOU DONE ANY RESEARCH
ON THAT?

>> YOUR HONOR, THE RESEARCH
I HAVE DONE DID NOT TURN UP
ANY IMPERICAL STUDIES ON
WHAT'S WORKING AND WHAT
ISN'T WORKING.

>> THITATE OF MAINE DOESN'T
EVEVEN AN APPELLATE COURT.
IT IS A WONDERFUL STATE BUT
IT IS A TEENY STATE COMPARED
TO WHAT WE'VE GOT AS FAR AS
THE NUMBERS OF OUR CHILDREN
THAT ARE AWAITING ADOPTION.
SO IS THE GUARDIAN AD LITEM
IN A POSITION IF THE COURT
REQUESTS OR WITH DCF TO
ACTUALLY CHECK OBWHAT'S
GOING ON IN THE GROUND IN
THESE OTHER STATES AS FAR AS
WHAT IS WORKING?

>> THAT IS CERTAINLY
SOMETHING YOUR HONOR THAT
THE GUARDIAN AD LITEM
PROGRAM IS WILLING TO DO.
WE HAVE NOT FOUND ANY
RESEARCH THAT IS CURRENT BAELY
--CURRENTLY EXISTING.

>> WERE YOU THE GUARDIAN AD
LITEM IN THIS PROCEEDING?
DID THE CHILDREN HAVE
REPRESENTATION AT THIS

TERMINATION PARENTAL RIGHTS?

>> YOUR HONOR THIS CASE
AROSE BEFORE THE STATEWIDE
OFFICE WAS CREATED BUT YES
THERE WERE TWO GUARDIAN
VOLUNTEERS.

THERE WAS A GUARDIAN AD
LITEM ATTORNEY SO THE
CHILDREN WERE REPRESENTED IN
THE TRIAL COURT, YES.

AL WE BELIEVE THAT THE BEST
SYSTEM, AND THERE IS NO
PERFECT ANSWER, BUT THE BEST
ANSWER IF YOU FIND THAT
THERE IS A RIGHT TO
EFFECTIVE ASSISTANCE IS TO
CONFINE IT TO A DIRECT
APPEAL AND TO HAVE VERY
CLEAR PROCEDURES IN PLACE
AND I SEE I'M ABOUT OUT OF
TIME.

>> GO AHEAD AND FINISH WITH
YOUR SUGGESTION.

>> I WOULD SUGGEST THAT THE
COURT PERHAPS REFER TO THIS
TO THE APPELLATE COURT RULES
COMMITTEE, MAYBE THE
JUVENILE COURT RULES
COMMITTEE ON A FAST TRACK
BASIS SO THAT IF THE COURT
FINDS THERE IS A RIGHT TO
EFFECTIVE ASSISTANCE OF
COUNCIL AND THAT THAT RIGHT
CAN BE CHALLENGED,
SUBSEQUENCEQUENTLY, THAT WE
COULD HAVE MORE INPUT INTO
WHAT THIS IMPERFECT SYSTEM.

>> WHAT ABOUT THIS CASE?
I MEAN WE'RE HERE REALLY WE
ARE TALKING ABOUT
HYPOTHETICAL.

IF WE FIND THAT THERE IS A
RIGHT, WHAT HAPPENS TO THE
CHILDREN IN THIS CASE?

>> YOUR HONOR, IN, IN TWO
RESPONSES.

NUMBER 1, THE FATHER
CHALLENGED EFFECTIVENESS ON
DIRECT APPEAL AND IT WAS
AFFIRMED.

SO THE ISSUE IS MOOT IN THIS
CASE.

THE OTHER ASPECT IS EVEN IF
THE COURT REACHED BACK TO

THE EH CASE AND APPROACHED IT FROM A HABEAS STANDPOINT, THE EQUITIES FAVOR THE CHILDREN IN AN OVERRIDING MANNER EN THIS CASE AND SO EVEN UNDER EXISTING PRECEDENT THE FOURTH DISTRICT'S OUTCOME SHOULD BE AFFIRMED.

>> THANK YOU VERY MUCH.

>> THANK YOU.

>> [INAUDIBLE]

>> I'M NOT SURE ITS REBUTTAL. IT SEEMS AS THOUGH WE ARE WE ARE ALL TRYING TO FIND A SOLUTION.

>> FOOTNOTE TALKS ABOUT THE OREGON SUPREME COURT'S SUGGESTION ABOUT DIRECT APPEAL.

THAT MAY BE AN IDEA BUT I WANT TO ADDRESS ONE ISSUE YOU SECOND JUSTICE PARRIENT AI.

WHETHER ON THE RECORD THERE'S FUNDAMENTAL FAIRNESS WAS ACHIEVED IN THE CASE.

I SUBMIT NO.

-- HE WAS NOT GIVEN THE RIGHT OF A FUNDAMENTALLY FAIR PROCEEDING.

NOT ONLY WAS THE EXHIBIT LIST STRICKEN, THE WITNESS LIST STRICKEN HE ALLEGE HE WAS NOT INTOXICATED AS IT WAS ALLEGED BY THE POLICE. THIS WAS A REASON WE WERE ABLE TO WIN THE CRIMINAL TRIAL.

WE TOOK THE DEPOSITIONS, THE TRANSCRIPT OF THE CRIMINAL TRIAL, THE EVIDENCE AND PUT IT THERE, AND I WOULD SUGGEST TO YOU THE FIRST INCIDENT WHERE HE GOT DRUNK, THAT CAME IN AS WILLIAMS RULE EVIDENCE IN THE CRIMINAL TRIAL.

>> WHAT HAPPENED?

HE WAS PRESENT AT THIS HEARING.

>> AT THE TERMINATION. HE ALLEGED HIS LAWYER SAID NOTHING TO HIM, DIDN'T EVEN

ADVISE HIM HE HAD THE RIGHT TO TESTIFY OR NOT TESTIFY. THAT'S IN HIS PETITION. THAT THE THEY PLAY ADTAPE, THADS THAT HE HAD CONFESSED BUT THERE WAS EVIDENCE HE HAD IN FACT.

WE PUT IN THE POSITION THAT THERE WAS HIS TAPED CONFESSION NOT IN FRONT OF THE TERMINATION JUDGE.

>> WERE YOU HIS CRIMINAL LAWYER IN.

>> YES.

>> WHY DID YOU KNOW THE TERMINATION OF PARENTAL RIGHTS CASE WAS COMING SNUP YES, WE DID AND WE DID EVERYTHING POSSIBLE WITH JUDGE BAKER TO GET HIM TO HOLD OFF SO WE COULD GET THE CRIMINAL TRIAL DONE AND THIS RECORD DEVELOPED.

>> WHAT WAS THE TIME FRAME BETWEEN WHEN THIS INCIDENT OCCURRED AND THE DEPENDENCY AND THE TPR IN RELATIONSHIP TO THE JURY TRIAL AND THE CRIMINAL TRIAL.

>> THE INCIDENT WAS IN JUNE 2002, JANUARY 2003 THE TERMINATION ORDER WAS SIGNED.

>> WHEN WAS THE URY TRIAL?

>> JUNE 2003.

>> SO IT HAD BEEN A YEAR LATER, FIVE MONTHS LATER FROM THE TERMINATION PROCEEDING, ONE YEAR FROM THE INCIDENT, AND THEY TRIED THIS --

>> WERE YOU APPOINTED COUNSEL IF THE CRIMINAL CASE.

>> I REPRESENTED HIM IN THE CRIMINAL CASE AND DID THIS PRO BONO.

>> SO YOU WERE RETAINED BY HIM IN THE CRIMINAL CASE.

>> IN THE CRIMINAL CASE.

>> SO WHY THEN DIDN'T HE RETAIN YOU.

>> WELL I WASN'T RETAINED BY HIM I WAS RETAINED BY A

PROJECT TO REPRESENT HIM IN THE CRIMINAL CASE AND I REPRESENT HIM PRO BONO IN THIS CASE AND HE HAD INDIGGANT COUNSEL IN TERMINATION PROCEEDING MOST IMPORTANT THING I NEED YOU TO UNDERSTAND IS THAT THERE WAS IMPORTANT EVIDENCE THAT HIS LAWYER WAS INEFFECTIVE IN GATHERING.

THEY ALLEGED HE CONFESSED AND SAID THAT HE WAS DRUNK AND HIS KIDS GOT AWAY FROM HIM.

THE TAPE WHEN THFS FINALLY FOUND FROM THE REV ERA BEACH POLICE DEPARTMENT SHOWED NOT ONLY DID HE NOT CONFESS BUT HE EXPLAINED IN DETAIL WHAT HAPPENED.

WHICH WOULD'VE LED THE TERMINATION JUDGE TO REALIZE THIS FATHER INSTEAD OF NEGLECTING HIS CHILDREN WAS TRYING TO FIND HIS CHILDREN.

>> THE PROBLEM THAT YOU'RE PRESENTING TO US IS SORT OF THE CLASSIC PROBLEM OF TRYING TO HAVE THE ADVERSARY SYSTEM.

WORK IN A SITUATION LIKE THIS.

YOU'RE DOING A VERY GOOD JOB IN A CRIMINAL CASE OF MAKE AGPLEA TO THIS COURT. BUT IT'S OBVIOUS THAT WE CAN'T JUST SPRAIMPOSE OCAY, THE POST-CONVICTION PROCEEDINGS, EVEN IN THE HABEAS, IN A SITUATION HERE WHERE TRIAL IS -- TIME IS SO CRITICAL SO I AM CONCERNED THAT NOBODY HAS COME UP WITH A SUGGESTION THAT THE COURT ITSELF BE MORE PROACTIVE IN TERMS OF DELVING WITH THIS ISSUE.

IS THERE ANY REASON WHY HAVING THE TRIAL COURT HAVE SOME OBLIGATION TO ADDRESS THIS ISSUE IN, IN PREEMPT IT THAT THE, AT THE VERY BEGINNING WOULD NOT BE A

BETTER ALTERNATIVE THAN THE
LET ALL OF THIS ADVERSARIAL
SYSTEM MODELS WORK IN THIS
CASE?

>> WELL, I THINK THE
ADVERSARIAL SYSTEM IS
REQUIRED FOR A PROPER IAC
CLAIM.

WE ALL KNOW YOU HAVE TO BE
ABLE TO PROCESS SKPEFDS EVEN
IAC CLAIMS SO I DON'T
BELIEVE IT CAN HAPPEN EARLY
ENOUGH INTO THE TRIAL COURT.
PLUS THESE TRIAL COURTS ARE
SO BUSY AS IT IS.

I BELIEVE HOWEVER IF YOU GET
THE PROPER CLAIM BEFORE THE
TRIAL COURT AND GET IT
REMANDED BACK LIKE WE
ATTEMPTED TO DO --

>> BUT THE REASON THAT I'M
HAVING TROUBLE SEEING HOW
THE ADVERSARY SYSTEM REALLY
IN THE COURT SYSTEM IS
REALLY EQIMED TO -- EQUIPPED
TO DEAL WITH THIS IS BECAUSE
YOU TALK IN TERMS OF
FUNDAMENTAL FAIRNESS AS FAR
AS YOUR CLIENT IS CONCERNED.
I'M CONCERNED ABOUT THE
FUNDAMENTAL FAIRNESS AS FAR
AS THESE CHILDREN ARE
CONCERNED.

I'M CONCERNED ABOUT THE
IMPACT THAT UNRAVELING AN
ADOPTION WOULD HAVE ON ALL
OTHER PROSPECTIVE ADOPTIVE
PARENTS.

>> COMPLETELY --

>> THAT'S WHAT FAIRNESS.

>> THAT IS EXACTLY WHAT
FAIRNESS IS ABOUT.

TRUST ME, THE FATHER IN THIS
CASE HAD NO INTEREST IN THIS
THING GOING OUT BECAUSE FOR
EVERY DAY THAT WENT BY THAT
HIS CLAIM WAS NOT ADDRESSED,
HIS CHILDREN WERE IN ANOTHER
HOUSEHOLD LEARNING OTHER
PARENTS, LEARNING TO GET
WITH OTHER PARENTS AND
GETTING THAT MUCH FURTHER
AWAY FROM HIM.

THAT IS WHY WE TOOK A

PROACTIVE APPR WE
ASKED THE TRIAL COURT MANY
TIMES TO ADDRESS THIS ISSUE.
I FILED THIS EMERGENCY WRIT
WITH TCA, FOR SOME REASON,
THEY RECLASSIFIED IT AS
REGULAR APPEAL, DURING THAT
ORAL ARGUMENT, THEY COULD
NOT FIGURE OUT WHY THEY DID
THAT.

IT TOOK TWO YEARS LAST MAY.
I DON'T KNOW.

I THINK THE SYSTEM FAILED
EVERYWHERE ALONG THE WAY,
BUT THE PROBLEM IS, I HAVE A
FATHER WHO HAS THE RIGHT TO
AT LEAST EFFECTIVE
ASSISTANCE OF COUNSEL WHEN
TWO CHILDREN WERE TAKEN
AWAY.

HE MADE A PRIME MA FACIA
CASE ON THE RECORD.

READ THE AFFIDAVIT.

ON THE RECORD, IT SHOWS NO
FUNDAMENTAL FAIRNESS IN THE
HEARING BECAUSE EVERYTHING
WAS STRIPED FROM HIM.

SURE.

HIS LAWYER WAS ABLE TO
CROSS-EXAMINE THEIR
WITNESSES.

THAT WAS IT.

>> MR. RODRIGUEZ, WITH OUR
ASSISTANCE, WE HAVE USED OUR
TIME.

LET ME ON BEHALF OF THE
COURT THANK ALL OF YOU FOR
PUTTING FORTH SUCH WONDERFUL
EFFORT ON AN ISSUE THAT IS A
CONCERN AND IT IS A CONCERN
OF THE FLORIDA FAMILIES, TO
ALL OF US, WE'LL TAKE IT
UNDER ADVISEMENT, HOPE WE
HAVE THE WISDOM TO DEAL WITH
IT PROPERLY.

>> THANK YOU.

>> WE'LL TAKE OUR MORNING
RESOURCE SES.

>> PLEASE RISE