Florida Dep't of Children & Families v. H.D.

SC07-2127

>> PLEASE RISE.
HEAR YE HEAR YE HEAR YE.
SUPREME COURT OF FLORIDA IS NOW IN SESSION.
ALL WHO HAVE CAUSE PLEASE DRAW NEAR.
GIVE ATTENTION.
AND YOU SHALL BE HEARD.
GOD SAVE THE UNITED STATES.
THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> GOOD MORNING, FRIENDS AND WELCOME TO THE FLORIDA SUPREME COURT.
FOR THE ORAL ARGUMENT CALENDAR FOR JUNE 9th.
FIRST LET ME TAKE THE OPPORTUNITY TO WELCOME -- ME TAKE THE OPPORTUNITY TO WELCOME THE UNDERGRADUATE PROGRAM, THE FSU SUMMER LAW SCHOOL, INTEGRATION PROGRAM AND THEY

EXPOSE YOU TO WHAT IS GOING ON WITH THE LAW AND ENCOURAGE YOU TO BE PART OF THE GREAT SYSTEM.
SO WE WELCOME YOU AND YOUR FACULTY AND ADVISORS AND ALL OF YOU, THIS MORNING.
WE'RE GLAD YOU ARE HERE.
A FEW HOUSEKEEPING THINGS, JUSTICE ANSTEAD WILL PARTICIPATE IN THE CASE AND CONSIDER THE CASE AND THE ARGUMENTS, GAVEL-TO-GAVEL AND JUSTICE CANTERO IS AVAILABLE TO CONSIDER THE CASE IF NECESSARY, AND AGAIN, THROUGH GAVEL-TO-GAVEL WOULD BE THE MANNER IN WHICH -- THE ARGUMENTS AND SOME OF THE QUESTIONS THEY HAVE HAD PASSED ALONG TO THEM -- TO THE MEMBERS OF THE COURT.

SO WITH THAT LET'S GO AHEAD AND PROCEED WITH OUR FIRST CASE.
THE DEPARTMENT OF CHILDREN FAMILIES VERSUS H. D..
>> MAY IT PLEASE THE COURT, GOOD MORNING, ANTENNA MUSTO ON BEHALF

OF DCF AND I'M JOINED BY JEFFREY GILLEM AND YOUR HONORS THE PRESENTATION REQUIREMENT IS THE CORNERSTONE OF THE APPELLATE PROCESS.
AND WITHOUT IT --
>> THIS IS WHAT I WOULD LIKE TO KNOW, AND I GUESS, JUMPING RIGHTED TO THE QUESTION ABOUT TRYING TO BALANCE WHETHER THERE SHOULD BE AN OBJECTION, VERSUS WHEN SOMETHING IS FUNDAMENTAL AND SEEMS LIKE THE GAL. AND DCF HAVE CONCEDED THERE COULD BE CERTAIN TYPES OF STRUCTURAL OR OTHER MISSING ELEMENTS THAT WOULD IN FACT BE THE TYPE OF THING THE APPELLATE COURTS -- COULD YOU EXPLAIN OR DELINEATE THOSE TYPES AUTOMOTIVE THINGS, OTHERWISE SAYING THERE IS NOT EVIDENCE OF CHILD ABUSE WHICH SEEMS TO ME TO BE THE WHOLE ISSUE IN THE CASE AND I'M STILL STRUGGLING WITH THE ISSUE HOW YOU PRESERVE SOMETHING WHEN THAT

HAS BEEN THE THING YOU ARE ARGUING ABOUT ALL ALONG, CHILD ABUSE.
>> I WOULD AGREE WITH YOU WE -- IT IS OUR POSITION THAT EVEN WITH A PRESERVATION REQUIREMENT THERE CAN BE SITUATIONS IN WHICH FUNDAMENTAL ERROR DOES OCCUR, AND A PERFECT EXAMPLE OF THAT WOULD BE REFLECTED IN YOUR RECENT OPINION IN THE JACKSON CASE, CAME OUT A WEEK OR TWO AGO WHERE YOU SAID THE OATH TOTAL DENIAL OF COUNSEL IS FUNDAMENTAL AIR -- ERROR AND WHERE REFUSES TO APPOINTS COUNSEL, OR WHATEVER THAT WOULD BE AND THE OTHER WOULD BE TO CRIMINAL CASES AND IN CRIMINAL CASES TWO EXCEPTIONS TO THE PRESERVATION REQUIREMENT

AND ONE IS DEATH PENALTY CASES
WHICH HAS NO --
>> THE QUESTION AS I UNDERSTAND
JUSTICE PARIENTE IS ASKING, THIS
IS REALLY NOT YOUR TYPICAL
PRESERVATION AS IF YOU DIDN'T

RAISE AN OBJECTION TO THE --
ADMISSIBILITY OF EVIDENCE.
THIS IS THE WHOLE CASE AND THE
QUESTION IS, IN A NONJURY
SETTING, I THINK, THE 4th
DISTRICT SETS OUT, WHETHER THE
WHOLE THING IS WHETHER AS A
MATTER OF LAW THERE IS A CASE.
>> WELL, THERE IS NO QUESTION
THAT IT IS NOT TYPICAL IN THE
SENSE AS YOU INDICATED OF AN
EVIDENTIARY OBJECTION OR
SOMETHING ALONG THOSE LINES.
IT IS TYPICAL, HOWEVER, IN
ANALOGIZING TO, FOR INSTANCE A
MOTION FOR JUDGMENT OF ACQUITTAL
IN A CRIMINAL CASE OR
SIMILAR-TIME MOTION IN A
JUVENILE DELINQUENCY CASE, YET
IN BOTH OF THOSE CASES YOU MUST
PRESERVE THE ISSUES --
>> REPEATEDLY, HELD IN THIS
COURT, IN CAPITAL CASES, THAT
WE'RE GOING TO LOOK AT THE
SUFFICIENCY OF THE EVIDENCE.
AND WE -- AND EVERYBODY KNOWS

WHETHER IT IS -- THERE IS A
MOTION BELOW OR NOT, THAT WE
LOOK IN A CAPITAL CASE AT THE
SUFFICIENCY OF THE EVIDENCE.
CORRECT.
>> ABSOLUTELY.
>> ISN'T THAT THE SAME THING.
>> NO, IT'S NOT THE SAME THING
AT ALL.
AS THIS COURT AND VIRTUALLY
EVERY COURT THAT CONSIDERED
CAPITAL CASES HAS HELD, DEATH IS
DIFFERENT AND THERE IS SPECIFIC
REQUIREMENTS THAT YOU CONSIDER
THE SUFFICIENCY OF THE EVIDENCE,
REGARDLESS OF WHETHER IT IS
RAISED AND EVEN IF IT'S NOT
RAISED ON APPEAL IN A CAPITAL
CASE.
>> WHERE DOES THAT REQUIREMENT

COME FROM.
>> THIS COURT HAS ESTABLISHED THAT REQUIREMENT, IN ITS CASE LAW AND I THINK --
>> THE TYPE OF CASE THAT IS SO IMPORTANT AND WE WEREN'T TALKING

ABOUT TAKING CHILDREN AWAY FROM THEIR APPARENTLY.
ISN'T THIS THE KIND OF CASE WHERE WE REALLY SHOULD BE SCRUTINIZING, CLOSELY, WHAT IS BEING DONE IN THE TRIAL COURT WHERE WE TAKE AWAY THE -- WHICH IS A FUNDAMENTAL RIGHT TO THE PARENTS.
SO SHOULDN'T WE HAVE SOME KIND OF MOVE TO SCRUTINIZE ALL THE EVIDENCE --
>> YOU ABSOLUTELY SHOULD SCRUTINIZE ALL THE EVIDENCE AND THAT IS EXACTLY ONE OF THE REASONS WHY THERE NEEDS TO BE A PRESERVATION REQUIREMENT.
BECAUSE, IN MANY INSTANCES, DCF MAY HAVE FAILED TO PRESENT EVIDENCE AS TO ELEMENT AND THE ISSUE IS RAISED IN AN APPROPRIATE MOTION, DCF SEEKS TO REOPEN THE CASE.
>> MAYBE, LET ME COME BACK THEN.
WHERE WOULD IT BE DCF WOULD INADVERTENTLY FAIL TO PUT ON

EVIDENCE OF SOME ELEMENT.
WHAT WOULD THAT BE, LET'S GET TO REAL LIFE -- TO THE CASE, ALL RIGHT?
WHAT IS IT DCF FORGETS TO DO THAT --
>> I'LL GIVE YOU AN EXAMPLE.
I'LL GIVE YOU AN EXAMPLE.
IN THESE CASES AND MOST CASES, THE HEARING TURNS USUALLY ON ONE PARTICULAR ISSUE THAT IS BEING DISPUTED AND LET'S SAY A PARENT IS GIVEN 99 YEARS IN JAIL.
ON A CRIMINAL CHARGE.
AND DCF SEEKS TO TERMINATE ON THE GROUNDS HE'LL BE INCARCERATED FOR A SUBSTANTIAL PERIOD OF THE CHILD'S MINORITY AND WE GO TO THE HEARING AND THE PARENT DEFENDS ON THE GROUNDS IT

IS NOT MANIFEST BEST INTEREST
BECAUSE I HAVE RELATIVES TO
BRING THE CHILD TO THE PRISON
AND MONEY TO SUPPORT THE CHILD
AND THAT IS WHAT THEY LITIGATE
AND BECAUSE THAT THIS IS E TO

CUSS OF THE HEARING, DCF FOR
WHATEVER REASON DOESN'T BRING
OUT THAT IT IS A IT YEAR
SENTENCE, GOES UP ON APPEAL AND
A FINE APPELLATE LAWYER LOOKS
THROUGH THE RECORDS AND SAYS,,
THERE IS NO EVIDENCE AS TO THE
LENT OF THE SENTENCE AND IF THE
ISSUE IS RAISED IN THE TRIAL
COURT, DCF REOPENS THE CASE AND
SAYS, HERE'S THE JUDGMENT OR
WHATEVER --
>> THAT IS NOT -- NOW YOU HAVE
GIVEN AN EXAMPLE OF WHERE IT IS
ALL MOST LIKE A FAILURE TO
PRESERVE SOMETHING OF AN
EVIDENTIARY NATURE AND IT WOULD
BE RIDICULOUS FOR IT TO GO BACK,
IN THAT SITUATION, YOU WOULD SAY
--
>> I WOULD SAY IT IS WAIVED,
FAILING TO PRESERVE.
>> HERE NOW, THIS IS THE HARD
THING ABOUT THE CASE BECAUSE AS
-- AS I'M UNDERSTANDING IT,
MR. TRUKOWSKY DOESN'T ARGUE THAT

WAS INSUFFICIENT EVIDENCE, LIKE
A PIE IN THE SKY KIND OF THING
AND I AM UNDERSTANDING, WE ARE
TERMINATING PARENTAL RIGHTS, WE
ALSO HAVE A CHILD THAT -- WHO IS
IN LIMBO POTENTIALLY FOR YEARS
AND CAN'T HAVE THAT, EITHER AND
IN THIS CASE, WHAT WAS -- WHAT
ARE WE SAYING WOULD HAVE BEEN
PRESERVED BY THE MOTION FOR
JUDGMENT OF ACQUITTAL THAT THE
4th DISTRICT SHOULD NOT HAVE
REVIEWED?
>> WHAT IS IT?
>> WELL, I THINK THAT THE
ARGUMENTS THAT WERE RAISED BELOW
HAD TO DO WITH WHETHER THE
MOTHER HERE WAS AN ONGOING --
POSED AN ONGOING DANGER TO THE
CHILD'S WELL BEING AND WHETHER

SHE COMPLIED WITH THE CASE PLAN.
>> ISN'T THAT, THOUGH -- THE DCF PUTS ON THAT SHE IS A DANGER.
I WOULD ASSUME THAT THE LAWYER FOR THE PARENTS JUST SAYS NO, THAT SHE'S NOT.

ALL RIGHT.
THAT IS WHAT WAS OFFENSIVE.
SHE'S NOT.
IT GOES UP ON APPEAL.
ARE YOU SAYING THAT THE 4th DISTRICT ONE LOOK AT WHETHER THERE WAS SUFFICIENT EVIDENCE THAT SHE IS AN ONGOING DANGER?
>> I'M SAYING THAT THAT ISSUE AND ANY OTHER HAS TO BE PRESERVED.
JUST AS IT HAS TO BE PRESERVED IN CRIMINAL CASES AND I GO BACK TO YOUR INITIAL QUESTION, WHERE YOU ASKED ME FOR EXAMPLES AND I WOULD DRAW ANALOGY TO THE CRIMINAL CASES, IN ADDITION TO THE DEATH PENALTY CASES, THE -- JUSTICE WELLS TALKED ABOUT THERE IS A -- A PROVISION THAT, WHERE THE EVIDENCE SHOWS THAT NO CRIME AT ALL OCCURRED, THEN THAT IS FUNDAMENTAL ERROR, IF YOU HAVE A SITUATION HERE, WHERE JUST WHATEVER THE GROUNDS IS, THAT THE TRIAL COURT RELIED ON

CLEARLY DID NOT OCCUR, THAT IS GOING TO BE FUNDAMENTAL ERROR AND --
>> LET ME ASK YOU TO ANSWER THE QUESTION ON FOLLOW-UP HERE.
IT APPEARS THAT THE CONFLICT CASE, IN TERMS OF A MOTION TO DISMISS OR OTHERWISE.
>> OTHERWISE, CORRECT.
>> NOW ARE YOU ASSERTING IT IS ONLY A MOTION TO DISMISS, THAT SATISFIES THE PROCEDURAL REQUIREMENT.
>> NOT AT ALL.
>> WHY WOULDN'T -- AS JUSTICE PARIENTE INQUIRED, JUSTICE WELLS HAS INQUIRED AND I THINK WHY WOULDN'T THE PRESENTATION, -- AS I UNDERSTAND IS AN INDIVIDUAL, AND MAY HAVE RETARDATION

QUESTIONS, THE MOTHER, THESE KINDS OF ISSUE, WHY WOULD THAT NOT FALL WITHIN OR OTHERWISE, BECAUSE THEY DID THE, AS I UNDERSTAND, MAYBE NOT THE LENGTHS POSSIBLE, BUT CERTAINLY

WERE MENTIONED WITH REGARD TO THE LACK OF EVIDENCE, TO SUPPORT THE [INAUDIBLE] WHY WOULD NOT [INAUDIBLE] FULLY ARGUE, MADE THE POINT TO THE JUDGE, JUDGE, THERE IS NOT ENOUGH EVIDENCE HERE BECAUSE THE LADY AS I UNDERSTAND IT, DID NOT HAVE TIME, TO COMPLY WITH THIS PLAN. IT IS UNCONSCIONABLE, WHY WOULDN'T IT FALL UNDER THE OTHERWISE, IF YOU AGREE IT WAS OTHERWISE PART OF THE RULE.
>> CERTAINLY, "OR OTHERWISE" IS APPROPRIATE AND DON'T HAVE TO NEWS MAGIC WORDS, MOTION TO DISMISS UNDER THE RULE.
>> LET'S GO BACK, TO USE THE ARGUMENT,.
>> WELL, THAT IS A DIFFERENT SITUATION, CLOSING ARGUMENT. THE FIRST DISTRICT OPINION --
>> OR OTHERWISE -- I GUESS, WHAT FALLS IN THE "OR OTHERWISE".
>> IN THE -- FIRST OF ALL, THE MOTION NEEDS TO BE MADE TIMELY

WHICH WOULD BE AT THE CLOSE OF THE EVIDENCE.
NOT DURING ARGUMENT.
OR, OTHERWISE COULD INCLUDE, WE MOVED FOR A JUDGMENTS OF ACQUITTAL.
>> ARGUMENT AND -- [INAUDIBLE] IT IS [INAUDIBLE] CASE IS CLOSED.
>> WELL, ONCE THE EVIDENCE IS COMPLETED, AND THEN WE GO TO CLOSING ARGUMENT AND, SOMETIMES THE CLOSING ARGUMENT IS NOT EVEN ON THE SAME DAY AND SOMETIMES IS SET FOR ANOTHER DAY AND THAT SORT OF THING.
ONE OF THE PRIMARY PURPOSES OF A PRESERVATION REQUIREMENT IS AN OPPORTUNITY TO ASSESS AND REDRESS AN ERROR IF IT OCCURS

AND IF YOU WAIT UNTIL CLOSING ARGUMENT, CHANCES ARE THE WITNESS HAVE ALL BEEN DISCHARGED AND SENT ON THEIR WAY AND MAY NOT BE THERE.
THE POINT OF THIS IS THAT IF YOU

HAVE THE 99-YEAR SENTENCE THAT YOU DIDN'T BRING OUT OR THERE IS A CLAIM, DCF DIDN'T PROVIDE SUFFICIENT SERVICES AND REALLY DID, YOU CAN CURE THAT, YOU CAN DEAL WITH IT.
IF YOU WAIT --
>> I DON'T UNDERSTAND WHY THIS ISN'T THE EQUIVALENT OF WHERE YOU ARE IN A -- IN A TRIAL AND THE STATE OR THE DEFENSE IS ABOUT INTRODUCE EVIDENCE AND THERE IS AN OBJECTION MADE AND THERE IS A DISCUSSION ABOUT I WHY -- AND YOU DON'T HAVE TO AT THIS END OF THAT SAY, NOW I MOVE, YOU KNOW, JUDGE EVIDENCE WAS IMPROPERLY ADMITTED.
IF WE HAVE A DISCUSSION, THROUGH A TRIAL AND IN THIS SITUATION, WHERE THE ISSUE REALLY WAS BEING ADJUDICATED, THEY ARE SAYING ONE THING, DCF SAYING ONE THING AN PARENTS SAYING SOMETHING ELSE, WHY DO YOU NEED THEN AT THE END, TO READ -- SAYING WE WANT A

MOTION TO DISMISS WHEN YOU HAVE ALREADY SAID TO THE COURT, YOU KNOW, ALREADY DISCUSSED THE ISSUES.
THAT SEEMS TO ME TO BE OTHERWISE.
THAT JUST LOSE IS TALKING ABOUT.
>> -- JUSTICE LEWIS IS TALKING ABOUT.
>> I DON'T THINK, GENERALLY SPEAK UNDERSTANDING WILL RAISE THE ISSUES PRIOR TO THE CLOSE OF EVIDENCE AND WILL CROSS EXAMINE AND PRESENT WITNESSES.
>> AND SO YOU ARE TELLING HIM -- YOU ARE MAKING A CASE, THE OPPOSITE FROM WHAT THE -- IS -- THE DEPARTMENT IS MAKING.
WHY DO YOU THEN NEED TO, AT THE END, SAY, SOMETHING ELSE.

>> WELL, YOU CAN -- IF YOU ACCEPT THIS RATIONALE THAT WOULD APPLY TO MOTIONS FOR JUDGMENT OF ACQUITTAL IN CRIMINAL CASES AN APPLY TO MOTIONS FOR DIRECTED VERDICT IN CIVIL CASES, AND

WOULD APPLY TO MOTIONS FOR DISMISSAL IN JUVENILE DELINQUENCY CASES BUT IN ALL THOSE CASES YOU HAVE TO PRESERVE THE SUFFICIENCY.
AND THOSE RIGHTS --
>> NOT IN CIVIL CASES, [INAUDIBLE].
>> IN CIVIL JURY CASES.
>> [INAUDIBLE].
>> BUT THE DISTINCTION WITH CIVIL BENCH TRIALS IS THAT THE LACK OF NECESSITY FOR THAT IS AUTHORIZED SPECIFICALLY BY RULE.
AND THAT PROVIDES AN EXCEPTION TO THE GENERAL PRINCIPLE, THERE IS NO JUVENILE RULE AUTHORIZING THAT.
>> YOU ARE MOVING INTO YOUR REBUTTAL.
I WOULD LIKE TO GIVE YOU ONE MORE CHANCE, DESCRIBE FOR US, WHAT IS INCLUDED IN "OR OTHERWISE".
>> BY "OR OTHERWISE I THINK WHAT WAS MEANT BY THAT IS THERE IS

NOT MAGIC WORDS AND DON'T HAVE TO SAY THE WORDS, MOTION TO DISMISS, YOU HAVE TO TIMELY RAISE THE ISSUE, JUST AS YOU DO IN CRIMINAL CASES, JUST AS YOU DO IN DELINQUENCY CASE, IF YOU USE THE WORDS, JUDGMENT OF ACQUITTAL, INSTEAD OF DISMISS THAT FINES AND IF YOU USE THE WORD, DIRECTED VERDICT, THAT IS FINE.
AND THERE IS EVEN ONE DELINQUENCY CASE I CITE WHERE THEY SAY, YOUR HONOR, IT'S OUR POSITION THEY FAILED TO PROVE A PRIMA FACIE CASE, AND THE POINT IS RAISE THE ISSUE SO THE TRIAL COURT WILL RULE ON IT AN DCF HAS THE OPPORTUNITY TO CORRECT ANY DEFICIENCIES THAT MAY BE

IDENTIFIED.
THOSE ARE THE PURPOSES OF THE RULE, AND ONE LAST POINT ON THAT, IS THAT IT ALSO, IF YOU DON'T HAVE THAT RULE, THEN A PARENT'S ATTORNEY WHO SEES THIS

IT-YEAR PROVISION DIDN'T COME IN WILL ALWAYS REMAIN SILENT KNOWING I EITHER WENT ON MY MANIFEST BEST INTEREST ARGUMENT OR GOT A LOCKED REVERSAL AND IF YOU LOOK AT THE FB DECISION, DELINQUENCY THOSE ARE THE THINGS THIS COURT STRESSED THE IMPORTANCE OF CORRECT THE ERROR AND NOT ALLOWING IT TO BE USED FOR STRATEGIC ADVANTAGE.
>> YOU ARE REALLY TALKING ABOUT EVIDENCE WHERE THERE IS REALLY AN OMISSION OF -- AS OPPOSED TO A CONTRADICTORY --
>> CONTRADICTORY EVIDENCE WILL NOT FORM A BASIS FOR SUCCESS ON APPEAL ANYWAY BECAUSE IT WILL BE VIEWED IN A LIGHT MOST FAVORABLE TO SUSTAINING THE JUDGMENT AND I DON'T KNOW THAT THAT WOULD ACTUALLY COME INTO PLAY BUT I'M TALK ABOUT WHERE THERE IS AN ARGUMENT DCF DIDN'T PROVE AN ELEMENT OF THE CHARGE AND WHAT I'M SAYING IS THAT HAS TO BE

RAISED AND WE HAVE TO HAVE AN OPPORTUNITY TO CORRECT THAT AND IT SHOULD NOT BE ALLOWED TO BE USED FOR STRATEGIC PURPOSES.
ONE MORE THING HAD THE RISK OF EATING UP MY REBUTTAL TIME, LOOK AT THIS FROM THE PERSPECTIVE OF THE TRIAL COURT, IN THE IT-YEAR SCENARIO WHAT IS THE TRIAL COURT SUPPOSED TO DO, SUA SPONTE GRANTS A MOTION TO DISMISS WHEN IT KNOWS THE DETERMINATION IS IMPROPER AND LEAVE IT ALONE, KNOWING IT WILL GET RE-- REVERSED ON APPEAL OR DEPART FROM ITS ROLE AS A NEUTRAL AND DETACHED MAGISTRATE?
NONE ARE ACCEPTABLE ALTERNATIVES.
THANK YOU.

>> GOOD MORNING, YOUR HONORS, MAY IT PLEASE THE REPORT, RYAN TRUSKOWSKY FOR THE RESPONDENT H.D..
>> LET'S GO AND GIVE US THE POINT...

>> [INAUDIBLE].
>> THERE IS TIME ON YOUR SIDE, THE QUESTION IS HOW YOU WILL DIVIDE IT.
>> I WAS GOING TO DO FIVE MINUTES... [INAUDIBLE].
>> YOU HAVE A COUPLE MINUTES.
>> SURE.
.
THANK YOU.
>> I APOLOGIZE FOR THAT CONFUSION.
MATE PLEASE THE COURT --
>> [INAUDIBLE].
>> MAY IT PLEASE THE COURT, TOM YOUNG AND I'M APPEARING TODAY FOR THE GUARDIAN AD LITEM PROGRAM.
THIS IS NOT ABOUT SNEAKING THROUGH A TERM -- TERMINATION NOT SUPPORTED BY THE EVIDENCE IT IS ABOUT REDUCING THE NUMBER OF UNNECESSARY APPEALS BECAUSE APPEALS DELAY PERMANENCY, THE OLDEST CHILD INVOLVED IN THIS CASE IS ALMOST SEVEN YEARS OLD.

HAS NOT LIVED WITH HIS MOTHER SINCE HE WAS FIVE MONTHS OLD.
AND HE STILL DOES NOT HAVE A PERMANENT LAST NAME.
THAT IS WHAT THIS CASE IS ABOUT.
>> WASN'T THAT -- [INAUDIBLE] AS YOU DO IN CAPITAL CASES, THE TERMINATION -- [INAUDIBLE].
>> YOUR HONOR, IF YOU DO THAT, YOU CAN DO THAT AND IT CERTAINLY GIVES THE MAXIMUM DUE PROCESS.
BUT, IF YOU DO THAT, WHAT THE COURT IS DOING IS INVITING MORE APPEALS, AND MORE DELAY.
>> WHAT IS THIS PERCENTAGE OF TERMINATION PARENTAL RIGHTS CASES APPEALED BY THE PARENTS' ATTORNEYS, DO YOU HAVE NUMBERS?
>> YOUR HONOR, I DO NOT.
>> THE POINT ABOUT THAT IS IF WE

WENT -- ANOTHER REASON AND A
STRONG TREES SAY THAT IT IS
SUFFICIENCY OF THE EVIDENCE CAN
JUST BE RAISED EVEN IF IT WASN'T
RAISED BELOW, IS THAT H THAT
WOULD ESSENTIALLY GIVE, SAY,

EVERYONE SHOULD APPEAL.
>> IT CERTAINLY WILL INCREASE
THE NUMBER OF CASES THAT ARE
BRIEFED ON THE MERITS.
UNDER THE COURT'S NSH DECISION
FROM 2003 WHAT HAPPENS IS WHEN
AN A-- APPELLATE ATTORNEY
REVIEWS THE RECORD AND IF THAT
ATTORNEY DETERMINES THAT THE --
THERE IS NO APPEALABLE ISSUE THE
ATTORNEY ADVISES THE APPELLATE
COURT IT HAS CONDUCT AID
CONSCIENTIOUS REVIEW OF THE
RECORD AND THERE IS NO
APPEALABLE ISSUE.
IF THE COURT PROPS OPEN THE DOOR
AND SAYS, ARGUE THESE
SUFFICIENCY CLAIMS THAT MEANS
THAT YOU ARE GOING TO GET MORE
BRIEFS ON THE MERITS --
>> THE OTHER WAY, BECAUSE THEN
THERE IS A COMPELLING ARGUMENT
THAT THERE SHOULD BE INEFFECTIVE
ASSISTANCE -- ASSISTANCE OF
COUNSEL CLAIMS IF SOMEBODY
DOESN'T MOVE FOR THE -- TO FILE

A MOTION WHICH IS PLAIN TO TEST
SUFFICIENCY OF THIS EVIDENCE
WITH YOU ILL THAT HE HAVE CLAIM
IN A DIFFERENT FORM.
>> WELL --
YOUR HONOR, THE -- UNDER THE 4th
DISTRICT CASE LAW, THE LAW OF
FLORIDA, CURRENTLY, INEFFECTIVE
ASSISTANCE OF COUNSEL CAN BE
ASSERTED ON DIRECT APPEAL AND IF
THE APPELLATE ATTORNEY FEELS THE
OUTCOME WOULD HAVE BEEN
DIFFERENT BECAUSE OF
INSUFFICIENT PERFORMANCE THEY
CAN ASSERT THAT.
>> IT SEEMS TO ME THAT THIS
CASE, THOUGH, AGAIN, TRYING TO
LOOK AT THIS CASE, THE 4th
DISTRICT SAYS THOUGH HD'S
COUNSEL ARGUED THE SUFFICIENCY

OF THE EVIDENCE IN HER CLOSING ARGUMENT, SHE DID NOT MOVE FOR A JUDGMENT OF ACQUITTAL.
SO WHY GOING BACK TO THIS AGAIN, FROM THE GAL'S VIEWPOINT AND JUSTICE LEWIS WAS ASKING, WHY

ISN'T RAISING IT IN CLOSING ARGUMENT IN A NONJURY TRIAL ESSENTIALLY PRESERVING IT?
>> YOUR HONOR, TWO RESPONSES TO THAT.
NUMBER ONE, BECAUSE IF YOU DO IT AT THE CLOSING ARGUMENT STAGE, THE TRIAL JUDGE DOES NOT HAVE AN OPPORTUNITY TO ALLOW THE DEPARTMENT TO REOPEN --
>> WHY NOT.
>> IF IT WANTS TO.
>> WHY NOT.
A NONJURY TRIAL.
I MEAN, IF A TRIAL JUDGE AT THAT POINT SAYS, WAIT YOU A SECOND. I'M NOT GOING IN -- AND ALLOW, AND IN THE 99 YEAR ARGUMENT, HEY I'VE GOT YOU, THE JUDGE DOESN'T HAVE THE DISCRETION AND LET DCF PUT END OF THE?
THAT WOULD BE THE HEIGHT OF INEFFICIENCY AND, YOU KNOW, THE ANTITHESIS OF COMMON SENSE.
>> I THINK IF THIS COURT SIGNALED THAT THAT WAS

APPROPRIATE, THEN THAT MIGHT OCCUR.
BASED ON MY OWN EXPERIENCE, I HAVE NEVER KNOWN A TRIAL JUDGE TO ALLOW SOMETHING TO BE REOPENED, IF THE CLOSING ARGUMENTS -- THE OTHER THING I WOULD ADD TO THAT, YOU WERE READING FROM THE 4th DISTRICT OPINION, IF YOU -- I BELIEVE IF YOU JUXTAPOSE WHAT THE 4th DISTRICT WROTE AGAINST WHAT THE RECORD ACTUALLY REFLECTS, THE ATTORNEY NEVER ASSERTED IN CLOSING ARGUMENT THAT THE EVIDENCE WAS INSUFFICIENT AND WHAT SHE WAS ARGUING WAS THAT IT SHOULD BE WEIGHED A CERTAIN WAY. THAT THE COURT SHOULD CONSTRUE THE CONFLICTING EVIDENCE A

CERTAIN WAY AND THAT IS NOT, I WOULD SUBMIT, ARGUING THAT THERE WAS IN SUFFICIENT EVIDENCE AND THAT SIMPLY IS ARGUING THE TRIAL COURT SHOULD EXERCISE DISCRETION IN A PARTICULAR MANNER.

>> THIS EVIDENCE -- THE ARGUMENT ARE NOT ALWAYS ARGUMENT THAT THERE IS A TOTAL LACK OF EVIDENCE OR -- ON ANY PARTICULAR POINT, OFTEN SUFFICIENCY OF THE EVIDENCE ISSUES REALLY DON'T SAY THERE IS NOTHING ON THIS POINT, BUT THE FACT THAT THAT EVIDENCE IS INSUFFICIENT.
TO REALLY SHOW BEYOND A REASONABLE DOUBT, SO, I'M HAVING A LITTLE PROBLEM WITH THE ARGUMENT ON YOUR SIDE THAT -- TALKING ABOUT A TOTAL LACK OF EVIDENCE IN THE A PARTICULAR ISSUE AND OF COURSE THAT WOULD BE ERROR AND ONE EVEN HAVE THE ISSUE BEFORE US.
SO, REALLY, SUFFICIENCY OF THE EVIDENCE, CLAIMS ARE REALLY -- [INAUDIBLE].
>> WELL, YOUR HONOR, I AM -- I BELIEVE I'M OUT OF TIME, BUT THE...
>> SUFFICIENCY OF THE CLAIM, ARE CORRECT, IS NOT FUNDAMENTAL

ERROR BECAUSE THERE IS EVIDENCE. THE QUESTION I SUPPOSE FOR THE APPELLATE COURT WOULD BE SIMPLY WHETHER THE APPELLATE COURT FEELS THAT IT WAS CLEAR AND CONVINCING EVIDENCE, WHICH REALLY BORDERS ON REWEIGHING THE EVIDENCE THAT WAS BEFORE THE TRIAL JUDGE.
SO, LET ME CONCLUDED BY COMMENTS AT THIS POINT.
BUT, THANK YOU.
>> RYAN TRUSKOWSKY BACK FOR HD AND THE TERMINATION OF PARENTAL RIGHTS THIS IS PARENTAL DEATH PENALTY.
>> LET ME ASK YOU, A MOTION TO SUBMIT ON SUFFICIENCY OF EVIDENCE, WHEN IT IS MADE AND RAISED BEFORE THE TRIAL JUDGE,

WHAT -- HOW DOES THE TRIAL JUDGE LOOK AT THE EVIDENCE THAT HAS BEEN PRESENTED?
IN WHAT LIGHT?
>> WELL, VIEWED IN MOST -- LIGHT MOST FAVORABLE TO THE

DEPARTMENT.
>> AND IF THAT MOTION IS NOT MADE AS IN THIS CASE, BELOW, YOU SIMPLY HAVE AN ARGUMENT THAT -- A DISPUTE OVER HOW THE TRIER OF FACT SHOULD LOOK AT THE EVIDENCE.
AREN'T THEY TWO DIFFERENT STANDARDS.
>> I THINK WHAT YOU -- MOTION FOR JUDGMENT OF DISMISSAL IS ONE, WHERE THE DEPARTMENT GETS THE INFERENCES, AND NUMBER -- THE SECOND PART WOULD BE CLOSING ARGUMENT AND THE FINAL DECISION WHETHER THERE WAS CLEAR AND CONVINCING EVIDENCE.
AND THEN, THE TRIAL COURT WOULD MAKE CREDIBILITY DETERMINATIONS, WHETHER HE'S FREE TO MAKE CREDIBILITY DETERMINATIONS, AT THE END OF EVERYTHING.
AND THAT IS EXACTLY WHERE YOU ARE GOING....
>> YOU LOOK AT THE EVIDENCE DIFFERENTLY.

WHEN YOU -- YOU PUT THE COURT ON NOTICE THAT YOU ARE MAKING SUFFICIENCY IN THE EVIDENCE CLAIMS, BECAUSE ONCE YOU MAKE THAT STATEMENT, AT THE END OF THE DAY, IN RELATION TO EVIDENCE, [INAUDIBLE].
>> CORRECT.
>> HOWEVER, IF YOU NEVER MAKE THAT [INAUDIBLE].
>> IT IS A DIFFERENT THING.
>> LET'S GO -- WHAT I WOULD LIKE TO KNOW, I THINK IT IS CLARIFIED SINCE WE HAVE A LAW STUDENT OR -- OUT HERE.
THE TRIAL JUDGE IN THIS CASE ENTERED AND 11 PAGE DETAILED ORDER AND ONE OF THE THINGS, WE MAKE SURE WE KNOW WHERE THE DELAY WAS, AND THE OLDER CHILD

AT THE TIME OF THE ORDER
TERMINATING THE PARENTAL RIGHTS,
FIVE YEARS OF AGE, BECAUSE THE
COURT AS THE 4th DISTRICT
EXPEDITES THE CASES, AND THE
REASON THAT IT WAS THIS LONG IN

THE SYSTEM IS TO THE CREDIT OF
DCF AND THE GAL. BECAUSE THEY
TRIED TO WORK WITH THE MOTHER.
IS THAT CORRECT.
>> THAT IS CORRECT.
>> ALL RIGHT.
SO WE UNDERSTAND, EVERYBODY WAS
TRYING NOT TO TERMINATE, WASN'T
AS IF DCF ONE DAY AFTER THE
CHILD IS BORN LET'S TERMINATE
RIGHTS.
>> CORRECT.
>> IN THIS CASE WHAT WAS THE
ARGUMENT THAT THE DEFENSE LAWYER
OR THE PARENTS' LAWYER I GUESS
MADE IN THE 4th DISTRICT LEVEL
THAT THEY SHOULDN'T HAVE BEEN
ALLOWED TO MAKE?
WHAT WAS THE ARGUMENT?
>> I'M SORRY WHAT WERE THE
ARGUMENT JUST FOR THE SUBMISSION
OF THE EVIDENCE.
>> YES.
>> WELL, THE -- BASICALLY
ATTACKED MORE OR LESS ALL FACETS
OF THE CASE.

>> AND YOU ARE SAYING HERE, AS
AN OFFICER OF THIS COURT, THERE
IS NO BASIS THIS THERE IS
SUFFICIENT EVIDENCE, CORRECT?
>> CORRECT.
>> WE ARE REALLY HERE, THIS IS
WHY I'M HAVING TROUBLE, ABOUT
EVEN MAYBE WHETHER WE SHOULD
EVEN TAKE THE CASE, ALTHOUGH IT
HAS -- CERTIFIED CONFLICT.
WHAT -- YOU KNOW, THE SYSTEM,
YOU KNOW, I'M NOT SURE -- YOU
WERE NOT THE LAWYER AT THE 4th
DISTRICT.
>> CORRECT.
>> SO YOU HAVE IN GOOD FAITH,
ARE TELLING US THAT THERE WASN'T
A BASIS TO ATTACK THE
SUFFICIENCY OF THE EVIDENCE.
CORRECT?

>> IF I WAS THE -- BASICALLY I AGREE WITH THE OPINIONS ON THE MERITS.
>> WHY ARE WE -- AND AGAIN I KNOW YOU ARE A BIG BELIEVER THAT WE HAVE TO HAVE INEFFECTIVE

ASSISTANCE OF COUNSEL PROCEDURE. WHY IS IT NOT INCUMBENT ON A LAWYER THAT IF THEY FEEL THE EVIDENCE IS INSUFFICIENT, TO BRING THAT TO THE ATTENTION OF THE TRIAL JUDGE AT THE FIRST OPPORTUNITY?
ISN'T THAT THE BETTER PROCEDURE?
>> THAT IS THE IDEAL PROCEDURE.
--
>> RIGHT.
AND IN THE CASES WHERE IT IS CLEARLY INSUFFICIENT BUT THE TRIAL JUDGE EVEN DESPITE 11 PAGES, JUST GONE OFF THE DEEP END, THE APPELLATE COURT, AS THEY ARE WANT TO DO, STILL HAS THE POWER TO SAY, THIS IS THE CASE WHERE IT IS NOT JUST CONFLICTING EVIDENCE, THIS IS REALLY ONE WHERE IT JUST IS A TOTAL FAILURE AND EVEN THOUGH THE TRIAL JUDGE WASN'T PUT ON NOTICE, WE ARE GOING TO ESSENTIALLY FIND THERE WAS INEFFECTIVE ASSISTANCE AND

REVERSE THE JUDGMENT WHICH IS HOW THE FOURTH DISTRICT IS NOW APPROACHING IT, CRICKET?
>> I MEAN, THEY ARE SAYING, THEY'LL LOOK AT IT AND SEE IF THERE IS REALLY SOMETHING THE TRIAL LAWYER DIDN'T DO.
>> CORRECT.
BUT THERE IS STILL GOING -- OTHER COURTS ARE NOT GOING TO DO IT UNTIL THIS COURT GIVES THEM THE AUTHORITY TO DO IT.
>> WE DON'T KNOW WHAT "OR OTHERWISE" MEANS WHEN THE FIRST DISTRICT SAID, "OR OTHERWISE" THIS IS A DOESN'T -- ONE PARAGRAPH OPINION.
>> CONCLUSORY BUT THE REASON YOU ASKED ABOUT THE IDEAL SITUATION AS THE TRIAL ATTORNEY, OF

COURSE, MAKING THE PROPER
ARGUMENT, THE PROBLEM IS IT
DOESN'T ALWAYS HAPPEN AND THIS
PARENT SHOULDN'T BE HELD
RESPONSIBLE FOR THAT.
>> THIS CASE, WE ONLY HAVE THIS

CASE BEFORE US RIGHT NOW AND IN
THIS CASE, THE LAWYER APPARENTLY
FOR THE PARENTS ARGUED WHAT SHE
THOUGHT SHOULD BE ARGUED AND SHE
MAY BE IN GOOD FAITH -- MAYBE IN
GOOD FAITH FELT THERE WAS
SUFFICIENT EVIDENCE THAT SHE
DIDN'T MOVE FOR A JUDGMENT OF
THE -- BECAUSE THERE WASN'T A
BASIS TO DO THAT.
>> THAT IS -- THAT'S WHAT
HAPPENED IN THIS CASE.
THE PROBLEM IS, THAT IF THIS
COURT IS GOING DECLARE THIS
MOOT, THE ISSUE, CAPABLE OF
REPETITION, YET ABATE -- EVADE
APPELLATE REVIEW AND THERE WILL
STILL BE A CONFLICT AND WOULD
ASK THE COURT TO APPLY THAT
DOCTRINE.
>> AREN'T WE LOOKING AT WHETHER
THE RULE ITSELF LIKE THIS RULE
OF JUVENILE PROCEDURE PROVIDES
FOR WHAT IS PROVIDED FOR IN
CIVIL NONJURY CASES, AND WHAT IS
PROVIDED FOR IN DEATH PENALTY

CASES, AND ISN'T THE ANSWER HERE
THAT IF -- UNLESS THERE IS SOME
GREAT INJUSTICE OUT THERE, THAT
I'M NOT SEEING, RIGHT AT THIS
MOMENT, THEN THE REMEDY IS TO GO
BACK TO THE RULES OF JUVENILE
PROCEDURE COMMITTEE, AND MAKE
THE PASSIONATE ARGUMENT THAT WE
SHOULD HAVE AN ANALOGOUS RULE TO
CIVIL AND LET IT GO THROUGH THIS
PROCESS.
ISN'T THAT -- AS OPPOSED TO JUST
EITHER INTERPRETING THE RULE, IN
A WAY THAT IS INCONSISTENT WITH
THE PLAIN LANGUAGE, OR, YOU
KNOW, DECIDING THAT WE'RE GOING
TO ELEVATE PARENTAL RIGHTS ABOVE
JUVENILE CASES?
>> WELL, I THINK THE COURT
SHOULD MAKE THE SUBSTANTIVE

HOLDING AND THEM ASK THEM TO PERFORM THE RULE AND AS THE COURT TAKES THE LEAD ON THE SUBSTANTIVE ISSUE.
>> WHY?
I MEAN, WHY IF THE PROBLEM MAY

BE WHAT WE'RE GOING TO GET, THEN, IS A -- AN APPEAL, AND THEN, AN APPELLATE LAWYER WILL SAY, GEE, THOUGH IT WASN'T PRESERVED, NOW THAT I CAN RAISE IT I WILL HAVE TO FILE THE APPEAL BECAUSE THAT IS -- YOU KNOW, MAYBE THERE IS ONE IN A MILLION SHOT, AND WHY NOT DO IT?
>> WELL, THE DELAYS THAT THE GAL. PROGRAM HAVE TALKED ABOUT, WHATEVER THIS COURT DECIDES ON THE ISSUE IS NOT GOING TO AFFECT THE NUMBER OF NOTICES OF APPEAL BEING FILED.
I MEAN, IT IS NOT GOING TO AFFECT --
>> HOW DO WE KNOW THAT?
>> BECAUSE THE PARENT DOESN'T CARE ABOUT THE ISSUE.
THE PARENT THINKS IT WAS A CLOSE CASE AND WANTS TO APPEAL.
AND THEY WILL APPEAL.
>> NOW A LAWYER CAN SAY, LISTEN, THERE IS SUFFICIENT EVIDENCE AND WE DISCUSSED THIS BELOW, NOW IF

THE RULE WERE CHANGED, WITHOUT THE RULES PROCESS HAVING BEEN FOLLOWED, THEN THE PARENTS A ATTORNEY WOULD HAVE TO SAY, WELL, EVEN THOUGH WE DIDN'T RAISE IT AND THOUGH WE DON'T THINK, WE THINK THERE IS SUFFICIENT EVIDENCE I CAN GO AHEAD AND ALLOW THE APPELLATE COURT TO DO IT BECAUSE THEY ARE GOING TO REVIEW THE SUFFICIENCY OF THE EVIDENCE AND -- IN EVERY CASE.
>> SHUNTS HAPPEN, IT IS UNETHICAL THAT AND ATTORNEY SHOULDN'T BE DOING THAT.
IF HE DOESN'T THINK THERE IS A GOOD FAITH BASIS ON THAT ISSUE HE SHOULDN'T BE RAISING IT.
HE'S NOT GOING TO -- NOT GOING

TO DO IT BECAUSE HE'S ALLOWED
TO, THERE HAS TO BE A BASIS ON
THE RECORD FOR IT.
>> [INAUDIBLE] FUNDAMENTAL ERROR
RULE, SIR.
THERE IS NO EVIDENCE ON A

PARTICULAR PART OF THE CASE.
MAY BE FUNDAMENTAL ERROR, WHY
DOESN'T THAT TAKE CARE OF THE
PROBLEMS YOU SEE --
>> BECAUSE APPELLATE COURTS ARE
TOO LIMITING IN THEIR
APPLICATION OF IT AND SOME MIGHT
VIEW IT AS DISCRETIONARY --
>> IN THEIR APPLICATION OF
FUNDAMENTAL ERROR?
>> YES.
I MEAN, IF IT WERE -- WE'RE
GOING TO GO THAT ROUTE THE COURT
NEEDS TO MAKE IT CLEAR THEY ARE
REQUIRED TO REVIEW IT AS
FUNDAMENTAL ERROR AND THE
PROBLEM IS ARE THEY GOING TO
APPLY A PENALTY TO THE PARENT?
SOME KIND OF DIFFERENCE
DIFFERENT STANDARD OF REVIEW
WHEN IT GETS TO FUNDAMENTAL
ERROR?
AS PREPARED TO PRESERVE AIR --
PRESERVED ERROR?
AND IF THERE IS ANY KIND OF
PENALTY, THEN IT DOESN'T,

DOESN'T FLY.
IT IS JUST CONTRARY TO --
>> ARE YOU ARGUING, BASICALLY,
THAT ANY TERMINATION CASES THAT
YOU CAN RAISE ANY [INAUDIBLE]
THAT YOU WANT TO, WHETHER IT'S
-- BECAUSE SUFFICIENCY OF THE
EVIDENCE IN THE -- IS TOTALLY
DIFFERENT FROM THE LACK OF
EVIDENCE ON ANY PARTICULAR
POINT.
HOW DOES THAT CHANGE?
WOULD YOU THEN BE ARGUING
ANYTHING YOU WANT TO RAISE ON
APPEAL YOU CAN RAISE.
>> NO, ONLY ARGUING THAT
ARGUMENTS CAN BE MADE ON APPEAL
REGARDING THE ELEMENTS OF THE
DEPARTMENT'S CASE, THE ELEMENTS
OF THE DEPARTMENT'S CASE.

>> WHAT YOU ARE ARGUING AS I UNDERSTAND IT IS THAT WE SHOULD APPLY THE RULE WHICH IS IN THE CIVIL PROCEDURE TO PARENTAL TERMINATION.
>> CORRECT.

-- PROCEDURE TO PARENTAL TERMINATION.
>> CIVIL PROCEEDINGS WITH A BENCH TRIAL.
WE DON'T WANT TO IMPORT CRIMINAL REQUIREMENTS ON THE ISSUE BECAUSE IT WILL DO MORE HARM THAN GOOD.
>> BUT YOU WOULDN'T EXPAND OUR RULING ANY FURTHER THAN THE RULE OF CIVIL PROCEDURE?
>> CORRECT.
NO REASON TO.
>> LET'S GO OVER WHAT THE ELEMENTS ARE LET'S TAKE MR. MUSTO'S EXAMPLE OF THE 99-YEAR SITUATION.
SHOULD THAT BE SOMETHING THAT COULD BE RAISED FOR THE FIRST TIME ON APPEAL?
>> YES.
.
BECAUSE THAT IS AN ELEMENT OF PROOF, ONE OF THE STATUTORY GROUNDS FOR TERMINATION, 39.806.
>> YOU KNOW, IT IS INADVERTENT

AND EVERY -- AND EVERYONE KNOWS THAT THE PERSON WAS SERVING A IT-YEAR SENTENCE.
YOU ARE SAYING THAT IT SHOULD GO THROUGH THE APPELLATE PROCESS AND GET THE COMPLETE RECORD ON APPEAL AND THEN HAVE IT GO BACK TO THE TRIAL COURT, SO THAT DCF CAN PUT THAT INTO EVIDENCE.
>> IT IS DOUBTFUL NO ONE WOULD KNOW ABOUT THE ISSUE OR EVERYONE KNOWS ABOUT THE ISSUE, RATHER, BECAUSE ALL THEY NEED IS -- HAVE TESTIMONY FROM A CASE WORKER AND WOULD BE THAT, OR THE JUDGMENT
-- OR --
>> YOU ARE SAYING IT ONLY SHOULD APPLY TO ELEMENTS.
WHAT ELEMENTS DID THE APPELLATE LAWYER ARGUED WASN'T MET IN THE

CASE?
I DIDN'T SEE THE CASE AS BEING ONE WHERE THERE WASN'T AN LEM AND SAYS WE NOW ADDRESS THE MERITS OF APPELLATE'S ARGUMENT THERE WAS NO SUBSTANTIAL

COMPETENT EVIDENCE TO -- FOR EITHER OF THE TRIAL COURT'S GROUNDS FOR TERMINATING THIS APPELLATE'S PARENTAL RIGHTS AND THAT THIS IS WHOLE THING, THEY ARE SAYING THERE WASN'T ENOUGH EVIDENCE.
AND THEY ARE SAYING THERE WASN'T ENOUGH EVIDENCE OF A PARTICULAR ELEMENT.
>> THEY ARE SAYING WASN'T ENOUGH EVIDENCE OF ALL OF IT.
>> BUT NOW YOU ARE TAKING -- REALLY, LET'S UNDERSTAND THEN, WHEN JUSTICE QUINCE WAS SAYING ISN'T THERE A DIFFERENCE BETWEEN WHETHER THERE IS SUBSTANTIAL EVIDENCE OR A LACK OF EVIDENCE, AND YOU SAY, WELL, I'M ONLY GOING TO SAY IT SHOULD APPLY TO THE ELEMENTS.
AND NOW YOU ARE SAYING, ARGUING THAT THERE WAS JUST NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S RULING AND THAT COULD BE RAISED EVEN THOUGH

IT WASN'T PRESERVED BELOW.
>> YES.
THAT IS WHAT I'M ARGUING.
>> THE REASON TO TREAT THESE PROCEEDINGS DIFFERENT IS BECAUSE OF -- IF THERE ARE CHILDREN INVOLVED.
AND THERE NEEDS TO BE A REMEDY TO PARENTS IF THEY ARE GOING TO SOMEHOW GET HELD TO A HIGHER STANDARD OF REVIEW OR SOMEHOW PENALIZED OVER THIS.
>> REALLY, [INAUDIBLE] IN THE OTHER CASE.
PRESERVE THE ISSUE, RAISED THE ISSUE, ON APPEAL, AND THE VAST MAJORITY OF CASES, AND, YOU KNOW, I AM WONDERING WHY WE HAVE A RULE FOR NONJURY TRIAL CIVIL CASES.

WHY IN THE WORLD SHOULDN'T THEY HAVE....
>> WELL, HERE IT IS DIFFERENT BECAUSE THERE IS CONSTITUTIONAL RIGHTS.
OF PARENTS AT ISSUE.

>> GEE, I'M WONDERING HOW A CRIMINAL DEFENDANT, SERVING A 50 YEAR TERM FEELS ABOUT THE -- TERM IN PRISON FEELS ABOUT THE RULE.
>> 3.850, BASED ON THIS FAILURE, OR A PARENT NOW CAN.
>> SUFFICIENCY -- THE SUFFICIENCY OF EVIDENCE, HAVE YOU EVER SEEN A SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT THERE REALLY WAS INSUFFICIENT EVIDENCE TO -- AND THAT THE -- SHOULD HAVE BEEN PRESERVED BY A MOTION FOR JUDGMENT OF THE COURT.
>> THERE ARE A COUPLE.
THERE ARE A COUPLE.
THERE IS.
IT HAPPENS.
AND THE PROBLEM IS, IF YOU ARE NOT GOING AGREE WITH PARENTS ON THIS ISSUE, WHAT IS THIS ALTERNATIVE?
I MEAN, WHAT IS THE RELIEF FOR THE PARENT AND NOW, IT SEEMS

THAT IT IS GOING TO BE A COLLATERAL ATTACK, WHETHER WILL COME BACK IN THE TRIAL COURT -- THE TRIAL COURT WILL NOT REVERSE ITS OWN JUDGMENT, SITTING IN A PSEUDO APPELLATE REVIEW OF ITSELF.
SO THEN, WILL GO ON APPEAL AGAIN.
>> [INAUDIBLE] TOTAL LACK OF EVIDENCE, OF THAT PARTICULAR ISSUE.
WHICH YOU COULD HAVE RAISED AS A FUNDAMENTAL ERROR ISSUE INITIALLY.
>> NO, BECAUSE YOU WOULD ARGUE THAT -- IT'S POSSIBLE IT COULD BE THE CASE BUT YOU COULD ARGUE THERE WASN'T CLEAR AND CONVINCING EVIDENCE.

THAT IS THE STANDARD.
>> YOU HAVE BEEN TO THE RIGHT ABOUT IN THIS CASE THERE IS SUBSTANTIAL -- COMPETENT SUBSTANTIAL EVIDENCE AND I'M CONCERNED IN THIS CASE,

DEPENDING ON WHAT THE COURT DOES, COULD BE A FEW MONTHS, THE STATUS OF THESE CHILDREN STILL IN LIMBO.
>> NO.
I DID NOT ASK THE MANDATE -- I'M SORRY.
LET ME --
>> I WANT TO MAKE SURE.
>> THERE ARE --
>> WHEN WE LEAVE THIS COURTROOM, THAT YOU WILL MAKE SURE THAT YOU TALKED TO THE GAL. AND DCF TO ENSURE THAT THESE CHILDREN ARE PLACED IN PERMANENT SITUATIONS.
>> I WILL AND IN THIS REGARD, I PURPOSELY DID NOT FILE A MOTION TO STAY THIS MANDATE IN THE 4th BECAUSE IT DOESN'T HAVE ANY EFFECT.
JUST TO LET THIS -- THE KIDS GO AND WHAT PARENTS IN GENERAL ARE CONCERNED ABOUT ARE FUTURE CASES.
AND THAT IS WHAT I WAS TALKING ABOUT EXCEPTION TO MOOTNESS.

AND IF THERE ARE ANY OTHER QUESTIONS, OTHERWISE I DON'T HAVE ANYTHING FURTHER.
THANK YOU.
>> YOU HAVE USED UP YOUR TIME, YOU GET A COUPLE MINUTES.
>> APPRECIATE THAT.
LET ME MAKE WHAT I THINK THIS IS MOST -- TWO BASIC POINTS I THINK ARE THE MOST BASIC.
ALL OF THE CONCERNS THAT THE COURT HAS EXPRESSED ARE TRUE IN CRIMINAL AND DELINQUENCY CASES BUT THE LAW REQUIRES AN APPROPRIATE MOTION IN THOSE CASES.
>> BUT WE DO HAVE A SITUATION IN THOSE CASES OF AN ABILITY TO BRING A 3.850.
AND THAT -- WE HAVE BEEN

REMINDED ALTHOUGH WE UNDERSTAND
THAT WE ARE DEALING WITH
FUNDAMENTAL RIGHTS HERE, IN THE
-- THE RULES COMMITTEE STILL HAS
NOT DETERMINED HOW WE DEAL WITH
NOT THIS CASE, BUT THE

EXCEPTIONAL CASE WHERE THERE HAS
BEEN A MISCARRIAGE OF JUSTICE,
AND WHERE WE CAN DO THAT, THE
REASON THIS COURT DIDN'T GO
AHEAD, AND WANTED TO SEE HOW IT
COULD BE DONE WHERE THERE WOULD
BE NO DELAY, FOR THE CHILD.
SO, CAN YOU, AGAIN, AS AN
OFFICER OF THE COURT, TELL US,
ARE YOU GOING TO -- DCF GOING TO
WORK WITH THE RULES COMMITTEE TO
TRY TO COME UP WITH --
>> MY UNDERSTANDING IS THAT DCF
HAS WORKED WITH THE RULES
COMMITTEE.
DCF IS IN FAVOR OF CONSIDERING
WHETHER THERE NEEDS TO BE
CHANGES TO THE CURRENT PROCESS.
WE DO BELIEVE THAT THERE IS A
PROCEDURE IN PLACE.
CONTRARY TO WHAT ED, THE 4th
DISTRICT ET DEAD.
-- SAID, WE BELIEVE A CLAIM OF
THIS NATURE AND DON'T THINK IT
IS INEFFECTIVE ASSISTANCE,
BECAUSE IT COMES OUT OF THE 4th

AMENDMENT BUT WHATEVER YOU
DETERMINE THERE IS A PROCESS IN
PLACE AND IS A MOTION TOR
REHEARING UNDER RULE 8.265.
NOW THAT MAY NOT BE THE IDEAL
PROCESS AND IS YOU A SHORT
TIMEFRAME AND MAY NEED TO BE
TWEAKED AND SO ON AND WE WOULD
SUPPORT WORKING TO TWEAK IT AND
SO ON BUT THERE IS A PROCESS.
WE SUGGEST THE IMPORTANT THINGS
ARE THAT ONCE THE APPEAL IS
DECIDED, THAT IS THE END OF THE
MATTER.
>> AND DON'T YOU -- I LOOKED AT
JUDGE LEVIN'S ORDER AND IF THERE
IS SOMETHING INCORRECT IN HIS
ORDER, I WAS THINKING IT SHOULD
HAVE BEEN BROUGHT YOUR TO JUDGE
LEVIN'S ATTENTION, BECAUSE IT IS

COMING AFTER A WRITTEN ORDER AS OPPOSED TO SOMETHING THAT IS -- THE LAWYER MIGHT KNOW BEFOREHAND.
>> PRECISELY AND THAT -- OUR POSITION IS THAT PROCESS EXISTS

AND THERE ARE PROBLEMS WITH THAT, I UNDERSTAND AND PERHAPS IT CAN BE MODIFIED AND PERHAPS A BETTER PROCESS CAN BE IN PLACE BUT IT'S THERE NOW AND THERE IS A PROCEDURE THAT ALLOWS THE MATTER TO BE DETERMINED WITHIN THE CONTEXT OF THE APPEAL, AND WITHOUT SIGNIFICANTLY DELAYING THE APPEAL AND THAT HAS TO BE THE OVERALL GOAL, AND DCF IS COMMITTED TOWARDS WORKING TOWARDS THAT GOAL.
THANK YOU.
>> THANK YOU VERY MUCH.
WE'LL TAKE THE CASE UNDER ADVISEMENT.