

>> THE FIRST CASE, J.B. VERSUS
DEPARTMENT OF CHILDREN AND
FAMILIES.

JUSTICE POLSTON IS RECUSED FROM
THAT CASE.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

I'M MIKE DONAVAN WITH LEGAL
SERVICES OF NORTH FLORIDA.

WE'RE HERE TODAY FOR A CASE
INVOLVING TERMINATION OF
PARENTAL RIGHTS OF A MOTHER LEON
COUNTY CASE.

IT--

>> DID YOU REPRESENT THE MOTHER
BELOW?

>> I DID NOT.

>> IS THERE STANDARD PRACTICE
THAT THERE IS A DIFFERENT LAWYER
THAT HANDLES THE APPELLATE CASE?

>> IT VARIES A LOT.

IT VARIES BY CIRCUIT.

IT VARIES BY CASE.

I HAVE HAD A NUMBER OF CASES
WHERE I WAS THE TRIAL ATTORNEY
AND ALSO THE APPELLATE ATTORNEY.
I'VE HAD A NUMBER OF CASES WHERE
I WAS ONE OR THE OTHER.

>> WHAT IS MODEL OF
REPRESENTATION OF PARENTS?

IS IT, I SEE, YOU'RE LEGAL
SERVICES BUT IT IS FUNDING BY
THE STATE, CORRECT.

>> YES.

IF THE PARENT IS INDIGENT, WHICH
IS MORE THAN 95% OF THE TIME,
THEN COUNSEL AP APPOINTED.

NOW THE FIRST COUNSEL APPOINTED
IS REGIONAL COUNSEL IF YOU MAY
RECALL.

THEY GET ALL PARENTS FIRST.

ASSUMING THERE IS ANOTHER PARENT
OR THEY HAVE A CONFLICT, THEY
WERE THERE IS A LIST OF
APPOINTED COUNSEL.

AND THOSE ARE PRIVATE ATTORNEYS.
SOMETIMES US AS LEGAL SERVICES.
BUT IT VARIES.

I WANT TO, WHILE IT IS FRESH IN
YOUR MIND I WANT TO EMPHASIZE

THE LAST CASE YOU JUST HEARD IS A PRIME EXAMPLE OF WHY THE STRICKLAND CASE BEING ARGUED BY THE DEPARTMENT SHOULD NOT BE APPLIED AND CAN NOT FIT A TERMINATION OF PARENTAL RIGHTS CASE.

I DON'T KNOW THE DETAILS OF THAT LAST CASE.

I'M SITTING HERE LISTENING BUT THE INITIAL INCIDENT OCCURRED IN 1993 IN THAT CASE.

IF THAT WAS THIS CASE, THE CHILD WOULD BE SOMEWHERE AROUND 24 YEARS OLD.

AND WOULD HAVE BEEN ADOPTED, PROBABLY 18 TO 20 YEARS AGO. NOT APPROACHING A REMEDY.

>> WE ALL UNDERSTAND THAT.

I MEAN, THIS HAS BEEN NOTORIOUS SINCE I FIRST CAME TO THE COURT AND HASN'T CHANGED MUCH SINCE. BUT THERE HAS GOT TO BE SOME WAY THAT PEOPLE CAN BE PROTECTED, IN A SENSIBLE WAY, IN A SENSIBLE SYSTEM AND A SENSIBLE PROCESS THAT PROTECTS IN A RATIONAL WAY BOTH THE INTERESTS OF CHILDREN AND THOSE OF PARENTS.

>> YES, THAT IS WHAT WE'RE ASKING.

>> YOU THROW OUT STRICKLAND AND BECAUSE AND BECAUSE THAT PROCESS GONE ASTRAY FROM THE DETAIL IT HAS GONE INTO, THIS SEEMS TO BE AN AREA YOU AND THOSE FROM THE DEPARTMENT OUGHT TO BE WORKING ON TO COME TO SOME COMMON GROUND, NOT BUTTING HEADS BUT FINDING A WAY TO PROTECT EVERYBODY THAT IS CONCERNED. MY MEAN THAT IS WHAT SYSTEM IS SUPPOSED TO BE IN THAT AREA, ISN'T IT?

>> YES, SIR.

IF YOU LOOK IN THE BRIEFS THERE IS A LOT OF AGREEMENT BETWEEN OUR POSITION AND THE DEPARTMENT'S POSITION. ONE AREA OF DISAGREEMENT IS WHAT

STANDARD TO APPLY.

GO.

>> GO AHEAD.

>> HOW ARE THE TWO STANDARDS DIFFERENT?

I UNDERSTAND THEY'RE DESCRIBED DIFFERENTLY BUT SUBSTANTIVE HOW ARE THEY REALLY--

>> YOUR HONOR, WE BELIEVE THERE ARE AT LEAST THREE POSSIBLE STANDARDS PLUS SOMETHING ELSE YOU MAY WANT TO COME UP WITH. THE STRICKLAND STANDARD AS I UNDERSTAND IT IS, THERE IS A RULE THAT SAYS YOU CAN RAISE IT WITHIN TWO YEARS OR LONGER IF YOU HAVE JUSTIFICATION FOR LONGER.

>> THAT IS NOT THE STANDARD. THE PROCESS.

>> BUT THE STANDARD-- LET ME, THE STANDARD IS--

>> LET ME ASK YOU THIS QUESTION DIFFERENTLY IF I COULD.

THIS IS NOT GOING OFF IN THE DIRECTION THAT I THINK WILL BE PRODUCTIVE FOR US BECAUSE WE KNOW WHAT THE STRICKLAND STANDARD IS.

>> OKAY.

>> WHAT'S WRONG WITH THE STRICKLAND STANDARD?

FORGET ABOUT THE TIME FRAMES. WE UNDERSTAND THAT IN THIS CONTEXT THE TIME FRAMES HAVE TO BE DIFFERENT, OKAY?

PUT THAT ASIDE.

BUT WHEN YOU GET TO THE TWO PRONGS OF THE STRICKLAND STANDARD, WHAT'S WRONG WITH THAT IN THIS CONTEXT?

>> YOUR HONOR, I DON'T KNOW IF I CAN SKIP TIME FRAMES BECAUSE--

>> I ASKED YOU TO.

PLEASE DO.

>> OKAY.

THE ABILITY--

>> IS THAT THE ONLY THING THEN.

>> IT IS NOT ONLY THING.

IT IS THE BIGGEST.

>> THAT IS THE BIGGEST THING.
IS THERE ANYTHING ELSE THAT IS
WORTH MENTIONING HERE?
BECAUSE I AGREE WITH YOU ABOUT
THE TIME FRAME.
I MEAN I CAN'T SPEAK FOR MY
COLLEAGUES BUT I THINK THAT KIND
OF CRIES OUT FOR DIFFERENT
TREATMENT IN THIS CONTEXT.
>> UNDER TRICKS LAND YOU GO, AS
I UNDERSTAND IT, I'M NOT A
CRIMINAL ATTORNEY, YOU GO LINE
BY LINE, WHAT DID THE COUNSEL DO
WRONG, WAS THERE JUSTIFICATION
FOR IT OR WASN'T THERE.
IF YOU LOOK AT THE OREGON
STANDARD UNDER GUIST, YOU LOOK
AT TOTALITY OF THE
CIRCUMSTANCES.
>> ULTIMATELY IN STRICKLAND WE
HAVE GOT THE TWO PRONGS.
SO YOU HAVE GOT TO LOOK AT THE
PREJUDICE.
OBVIOUSLY WE HAVE LOTS OF
SITUATIONS WHERE COUNSEL IS
DEFICIENT BUT THERE IS NO RELIEF
BECAUSE THE DEFICIENCY MADE NO
DIFFERENCE.
IT DOES NOT, THERE IS NO
PREJUDICE.
OUR CONFIDENCE IN THE RESULT IS
NOT AFFECTED.
SO, TELL ME WHAT IS WRONG WITH
THE STANDARD HERE.
>> I GUESS THE, WELL IF I COULD
QUOTE THE STANDARD IN GUIST
WOULD THE RESULT INEVITABLY BEEN
THE SAME?
WHILE I'M SAYING THAT I THINK
ANOTHER DIFFERENCE WITH
STRICKLAND AND WHY NOT TO USE IT
IS IN A CRIMINAL CASE THE BURDEN
OF PROOF THAT THE DEFENSE
ATTORNEY IS SHOWING IS THAT IT'S
A VERY HIGH BURDEN AND SO
THEREFORE TRYING TO SHOW
STRICKLAND IS EASIER.
THAT THE RESULT WOULD HAVE BEEN
DIFFERENT.
>> I'M HAVING, THIS IS WHAT I

WANT TO UNDERSTAND FROM YOU AS REPRESENTING THE PARENT BUT THERE IS INDICATIONS THAT EVERYBODY HERE REALLY CARES ABOUT THE CHILD AND THE CHILD'S BEST INTERESTS WHICH IS TOTALLY DIFFERENT THAN IN A CRIMINAL CONTEXT.

HOWEVER, ARE YOU THINKING THAT IT IS HARDER TO UPSET THE UNDERLYING JUDGMENT, IF YOU USE STRICKLAND OR FUNDAMENTAL FAIRNESS?

BECAUSE WHAT WE'RE LOOKING FOR IS NOT NITPICKING LIKE HAS HAPPENED IN THE APPLICATION OF STRICKLAND BUT WHETHER THE STRICKLAND STANDARD, WHICH SAYS THERE HAS GOT TO BE A REASONABLE PROBABILITY OF A DIFFERENT RESULT WHICH SEEMS TO ME TO BE THE CORE HERE IS THAT, IF EVERYTHING THAT, IF THERE WAS A CONTINUANCE IN THIS CASE, WHAT WOULD HAVE BEEN DIFFERENT? AND NOBODY'S, THERE IS SORT OF THESE VAGUE ALLEGATIONS AND WHAT I WANT TO MAKE SURE ABOUT IS WHATEVER STANDARD WE WOULD ADOPT, THAT WE DO NOT GO INTO THE NITPICKING THAT OF COURSE HAS TO HAPPEN IN A DEATH PENALTY CRIMINAL CASE BECAUSE WE'VE GOT SO, CAN YOU EXPLAIN THAT? WHAT IS IT THAT YOU'RE SEEKING ON BEHALF OF PARENTS AND ALSO CHILDREN AS TO WHAT A COURT WOULD LOOK AT, WHETHER IT IS THE APPELLATE COURT, THE TRIAL COURT, AS TO THE NATURE OF THE PROCEEDING?

>> LET ME SAY FIRST THE BOTTOM LINE WE'RE LOOKING FOR IS COMPETENT COUNSEL AND, I KNOW YOU UNDERSTAND THAT.

>> MAYBE THERE IS ANOTHER WAY TO LOOK AT IT BECAUSE CHILDREN'S FIRST SAYS NONE OF THE COUNSEL THAT IS REPRESENTING PARENTS ARE COMPETENT THESE DAYS AND WE

DON'T HAVE ANYTHING IN THE RECORD TO EVEN REMOTELY SUPPORT THAT.

SO, WHAT IS, WE ALL WANT COMPETENT COUNSEL.

SO WHAT IS THE, THAT'S A GOAL BUT WHAT ABOUT WHEN THERE HAS BEEN A FULL TERMINATION TRIAL AND IT HAS GONE UP ON APPEAL, WHAT IS IT THAT WOULD UPSET THAT FINAL JUDGMENT TO REQUIRE ANOTHER TERMINATION OF PARENTAL RIGHTS PROCEEDING?

>> WE BELIEVE, WHEN THE TRIAL COUNSEL HAS BEEN SO INEFFECTIVE THAT THE TRIAL WAS NOT FAIR AND A SHOWING THAT IT WAS NOT A FAIRNESS THERE AND THEREFORE--

>> THEREFORE THERE WOULD HAVE BEEN A DIFFERENT RESULT?

>> THAT'S THE STANDARD IN STRICKLAND.

>> WELL WHAT, ARE YOU SAYING THERE SHOULDN'T BE A PREJUDICE STANDARD UNDER DUE PROCESS?

>> YOUR HONOR, I BELIEVE A FUNDAMENTAL FAIRNESS STANDARD IS MUCH MORE APPROPRIATE TO THESE TYPE OF CASES.

>> THAT IS JUST A MOUTHFUL OF COTTON.

THAT IS DIFFERENT FOR ANYBODY, WHOEVER WANTS TO PUT A SPIN ON WHAT THAT MEANS.

DON'T WE NEED TO HAVE SOMETHING THAT IS OBJECTIVE, THAT IS, THAT YOU CAN LOOK TO AND SAY, SO, THESE ARE THE SAME?

IN MIAMI A FUNDAMENTAL FAIRNESS MAY BE TOTALLY DIFFERENT.

TO ME THAT IS JUST TALKING ON WORDS.

WE NEED TO GET AWAY FROM AND GET TO SOME CONCRETE CONCEPTS IF YOU'RE GOING TO HAVE ANY MEANINGFUL REFORM IN THIS.

>> YOUR HONOR, I THINK WHAT GETS YOU TO THAT IS THE HARMLESS ERROR STANDARD THAT HAS BEEN USED IN THIS STATE FOR A HUNDRED

YEARS.

IT HAS CLEAR CASE LAW.

>> WHAT YOU'RE SAYING, IF THE,
THE CRIMINAL HARMLESS ERROR
STANDARD, TO BE APPLIED HERE.
SO IF THERE IS, IF THERE IS A
POSSIBILITY THAT THE ERROR
AFFECTED THE RESULT, THEN--

>> WE GO BACK TO THE TRIAL
COURT.

AND THAT HARMLESS ERROR TEST IS
NOT JUST USED IN CRIMINAL.

IT IS ALSO USED IN CIVIL CASES
AND THERE--

>> IF YOU USE THAT STANDARD, IT
SEEMS TO ME THAT MAKES IT EASIER
FOR A PARENT TO OVERTURN WHAT
WENT ON IN THE TRIAL COURT
VERSUS THE STRICKLAND STANDARD
WHERE YOU HAVE GOT TO SHOW THAT
COUNSEL WAS SO DEFICIENT THAT IT
UNDERMINES OUR CONFIDENCE AND
THERE WAS REASONABLE PROBABILITY
IT SEEMS TO ME YOU COULD

EASILY DO THAT AND
UNDERMINE ALL OF THESE ORDERS
THAT ARE ENTERED IN TERMINATION.

>> WELL, YOUR HONOR, I WOULDN'T
CHARACTERIZE IT AS EASY AT ALL.

>> WELL, THE STANDARD SINCE YOU
SAY YOU'RE-- IS THE EASIEST
STANDARD TO GET A REVERSAL.

SO WE WOULD BE APPLYING A
STANDARD THAT YOU'RE SAYING THAT
REQUIRES IN CIVIL AND CRIMINAL
CASES AN OBJECTION, AND THEN YOU
LOOK AT WHETHER IT HAD, THERE'S
ANY CHANCE IT AFFECTED THE
VERDICT.

THAT'S, I MEAN, I'M NOT SURE WHY
YOU AS THE PARENTS' ATTORNEY IS
ADVOCATING THIS IN THIS CASE.

SO LET ME ASK YOU THIS QUESTION.
THIS CASE, THE FIRST DISTRICT
LOOKED AT THE CASE AND SAID
WHETHER YOU APPLY STRICKLAND OR
FUNDAMENTAL FAIRNESS, THAT THIS
WAS-- FAIRNESS, THAT THIS WAS,
THERE WAS NO DENIAL OF DUE
PROCESS TO THE MOM IN THIS CASE.

AND I DON'T SEE ANYTHING IN THE BRIEF THAT SHOWS THAT IF THIS WERE, SAY, TO GO BACK TO JUDGE GEEVERS OR THAT SHE ABUSED HER DISCRETION IN NOT GRANTING A CONTINUANCE, THAT IT WOULD GO BACK AND HAVE A DIFFERENT OUTCOME, THAT THIS MOTHER'S RIGHTS WOULD NOT BE TERMINATED.

>> YEAH.

AND WE BELIEVE THAT DEPENDS-- WELL, WE BELIEVE WE CAN MEET THE STANDARD REGARDLESS IF IT IS SENT BACK AND THAT WE CAN MEET IT UNDER STRICKLAND BY HAVING SOME EVIDENCE BEING ABLE TO BE BROUGHT FORWARD THAT WE'RE NOT ABLE TO BRING FORWARD ON AN APPEAL OR JUST BY LOOKING AT ALL THE DEFICIENCIES OF COUNSEL IN THIS CASE.

BUT REGARDLESS OF THAT, IT DEPENDS ON WHAT STANDARD YOU USE AS TO WHERE WE ARE ON THAT.

IN ANY STANDARD, THE BURDEN IS ON THE PARENT TO SHOW THAT COUNSEL WAS INEFFECTIVE.

IT'S NOT AS SIMPLE AS JUST SHOWING THERE WAS ONE OBJECTION THAT SHOULD HAVE BEEN MADE.

>> WE LOOK AT THIS RECORD AND SAY, LISTEN, IN TERMINATION CASES YOU'VE GOT TO-- A JUDGE WHO'S BEEN WITH THE CHILD, BEEN THROUGH DEPENDENCY.

THIS WAS TWO YEARS IN THE MAKING, NUMEROUS CASE PLANS, AND NOW WE'RE GOING TO, WHAT, ARE WE GOING TO GET A DIFFERENT COUNSEL FOR-- WE'RE GOING TO PAY FOR, THE STATE'S GOING TO PAY FOR FURTHER COUNSEL FOR THE PARENT TO VINDICATE THE PARENT'S INTEREST AT THE EXPENSE OF THE CHILD WHOSE BEST INTERESTS SHOULD BE THE CENTER OF THE CASE?

AND HERE WE DIDN'T EVEN HAVE A GUARDIAN AD LITEM APPEARING AT TRIAL FOR THE CHILD?

>> THERE WAS A GUARDIAN AD LITEM
IN THIS CASE.

>> BUT I HEARD-- I THOUGHT THEY
DIDN'T APPEAR AT TRIAL.

>> THEY APPEARED AT TRIAL.
THEY DID NOT APPEAR-- THEY HAVE
NOT PRESENTED A BRIEF AT THE
APPELLATE LEVEL.

STEPHANIE MORRIS WAS THE
GUARDIAN AD LITEM, I'M ALMOST
FOR SURE SHE TESTIFIED.
SO THERE WAS THAT.

>> IF THERE'S ANY REQUIREMENT OF
PREJUDICE OF ANY SORT, I DON'T
SEE HOW IN YOUR BRIEF OTHER THAN
MAKING CONCLUSORY SUGGESTIONS
THAT THERE WAS PREJUDICE, YOU
HAVE SHOWN HOW ANYTHING THAT
HAPPENED HERE ACTUALLY CAUSED
THE, YOUR CLIENT PREJUDICE.
I MEAN, IT'S JUST ALL THIS KIND
OF AMORPHOUS.

THERE'S NO ACTUAL ALLEGATION OF
WHAT YOU WOULD SHOW THAT WOULD
CHANGE THE RESULT.

IS THERE?

>> YOUR HONOR, THAT WAS THE
CONCLUSION THE FIRST DCA
REACHED.

I KIND OF WISHED THEY'D
EXPLAINED IT A LITTLE BETTER,
THAT THEY THOUGHT THAT COUNSEL
WAS INEFFECTIVE THAT THERE MAY
NOT HAVE BEEN PREJUDICE.

THAT'S WHERE THE TIME FRAME
COMES BACK IN, DO WE HAVE TIME
TO GO AND FIND THESE WITNESSES
TO SEE WHAT THEY WOULD HAVE
SAID?

WOULD THEY HAVE SAID SOMETHING
THAT WOULD HAVE CHANGED IT?
WAS THERE INFORMATION THAT COULD
HAVE BEEN BROUGHT FORWARD?

>> THE JUDGE ALLOWED EVEN THOUGH
THERE WASN'T A WITNESS LIST, THE
JUDGE ALLOWED THE WITNESSES TO
TESTIFY.

>> THE JUDGE ALLOWED--

>> THE JUDGE, WHO'S THE FACT
FINDER AND ALSO THERE TO PROTECT

THE INTERESTS OF THE CHILD, MADE SURE THAT THIS WAS A FAIR TRIAL. SHOULDN'T WE BE LOOKING AT THAT, AS FAR AS HOW THE JUDGE CONDUCTED THE PROCEEDINGS TO MAKE SURE THAT THE PARENT'S RIGHTS AND THE CHILD'S INTERESTS WERE PROTECTED?

I MEAN, IT'S A DIFFERENT ROLE THAN IN, YOU KNOW, IN A CRIMINAL CASE, FOR SURE.

>> THE JUDGE ALLOWED TWO OF THE-- THE MOTHER BROUGHT WITNESSES, THE JUDGE ALLOWED TWO OF THEM TO TESTIFY.

THE MOTHER'S COUNSEL OBJECTED TO ONE OF THE WITNESSES TESTIFYING. I DON'T KNOW WHAT THAT WITNESS WOULD HAVE SAID.

>> THE JUDGE--

>> THERE'S NO WAY TO KNOW FROM THE RECORD.

>> BUT THE COUNSEL, YOU KNOW, MAYBE THE MOM WAS PUTTING ON SOMEBODY THAT WAS GOING TO BE DETRIMENTAL TO HER.

>> POSSIBLY.

WE DON'T KNOW.

>> YOU'RE ASKING THAT THAT WOULD BE EXAMINED, THAT WHETHER A WITNESS IS CALLED OR NOT, THAT WE'D GO BACK AND EXAMINE IF THE PARENT WANTED TO CALL A WITNESS AND THE COUNSEL DID NOT?

>> [INAUDIBLE]

>> YOUR HONOR, MY TIME JUST RAN OUT.

VERY QUICKLY, IT WOULD GIVE US THE TIME TO GO TALK TO THAT WITNESS TO SEE IS THAT SOMEONE--

>> DO BUT DIDN'T THE PARENT END UP AGREEING WITH THE ATTORNEY NOT TO CALL THAT WITNESS?

>> AND THAT'S ONE OF THE BIGGEST THINGS I WANT TO EMPHASIZE, IS YOU REALLY CAN'T RELY ON A PARENT TO MAKE DECISIONS--

>> THAT'S WHY YOU HAVE AN ATTORNEY.

YOU HAVE AN ATTORNEY--

>> EXACTLY.

>>-- TO HELP YOU MAKE THOSE
KIND OF DECISIONS.

WHEN THEY TALKED ABOUT IT, SHE
AGREED WITH HER ATTORNEY.

>> AND WHEN YOU HAVE AN
INEFFECTIVE ATTORNEY WHO IS
GIVING THAT PERSON ADVICE,
THAT'S THE PROBLEM WE'RE FACING.
WHAT DID HE DO.

THANK YOU.

>> MAY IT PLEASE THE COURT, I'M
ROBIN ROSENBERG WITH FLORIDA'S
CHILDREN FIRST HERE ON BEHALF OF
MY ORGANIZATION AND THE
UNIVERSITY OF MIAMI CHILDREN
YOUTH LAW CLINIC.

WE THANK THE APPELLATE FOR THE
TIME.

30,000 CHILDREN COME THROUGH
FLORIDA'S CHILD WELFARE SYSTEM,
HALF OF THEM WILL GO HOME.
AND WHETHER AND HOW FAST THEY GO
HOME AND WHETHER THEY GO HOME
SAFELY CAN HIGHLY DEPEND ON THE
QUALITY OF THEIR ATTORNEYS.
AND IF WE GET TO THE PLACE WHERE
WE'RE AT HAVING TO--

>> YOU'RE TALKING ABOUT THE
QUALITY OF THE CHILDREN'S
ATTORNEY OR THE PARENTS'
ATTORNEY?

>> THE PARENTS' ATTORNEY, AND
NOW THAT SOME CHILDREN HAVE A
RIGHT TO A LAWYER, THE
CHILDREN'S LAWYER AS WELL.
WE SEE THEM AS INEXTRICABLY
INTERTWINED.

>> SEE, THAT'S A STRANGE
POSITION.

I MEAN, AGAIN, NOT YOUR
CHILDREN'S FIRST POSITION, BUT
AS I UNDERSTAND IT, AN ATTORNEY
FOR THE PARENT NEEDS TO ADVOCATE
NOT FOR WHAT'S IN THE BEST
INTERESTS OF THE CHILD, BUT FOR
THE PARENT'S WISHES--

>> RIGHT.

>> WHICH IS NOT TO HAVE THE

RIGHTS TERMINATED EVEN IF
THEY'VE GONE THROUGH CASE PLAN
AND FAILED AND GONE THROUGH TWO
YEARS.

SO HOW IS IT THAT THE PARENTS'
INTEREST ALIGNS WITH THE CHILD'S
BEST INTEREST?

DOESN'T THE ATTORNEY HAVE TO
ADVOCATE FOR--

>> THE CHILD'S ATTORNEY IS
ADVOCATING FOR THE--

>> WELL, THE CHILD'S ATTORNEY IN
MOST CASES, AS WE KNOW--

>> THEY DON'T HAVE ONE.

>> THEY DON'T HAVE AN ATTORNEY.

>> RIGHT.

>> THEY HAVE MAYBE A GUARDIAN AD
LITEM, IF THEY'RE LUCKY.

>> I THINK YOUR QUESTION PRESUME
THAT IS THE CHILDREN AND THE
PARENTS HAVE VAT INTERESTS--
SEPARATE INTERESTS.

>> OKAY.

BUT WHAT YOU SAID IS BETTER
REPRESENTATION FOR THE PARENT
WILL INURE TO THE CHILD, AND
AGAIN, IN THE ISSUE OF BETTER
REPRESENTATION, IS THAT REALLY
BEFORE US?

>> I THINK FINISH WELL, THE
ISSUE BEFORE YOU, CLEARLY, ARE
THE TWO CERTIFIED QUESTIONS.
THE INTERESTS OF CHILDREN ARE
HARMED IF ALL YOU DO IS ANSWER
THOSE CERTIFIED QUESTIONS, IT
WILL BE HELPED BECAUSE THE
UNCERTAINTY IS VERY DETRIMENTAL
TO HAVE THE SYSTEM.

AND WHATEVER STANDARD YOU PICK
AS LONG AS THERE IS A MECHANISM,
THAT WILL PROPEL US FORWARD
GREATLY.

BUT WE ASK YOU TO USE THIS
OPPORTUNITY IN LOOKING AT THE
SYSTEM-- AND I AGREE, I DON'T
HAVE FACTS BEFORE YOU, AND I
DON'T HAVE 26 VOLUMES LIKE THE
PUBLIC DEFENDER DID IN THE 11TH
CIRCUIT TO SHOW YOU THAT THERE'S
A SYSTEMIC FAILURE.

BUT INSTEAD OF TAKING THREE YEARS AND A VAST AMOUNT OF LITIGATION FUNDING, THAT'S WHY WE'RE ASKING THE COURT TO CONVENE THE RELEVANT PLAYERS, CONVENE YOUR COLLEAGUES TO SEE REPRESENTATION EVERY DAY, THE REGIONAL COUNSEL AND THE PRIVATE ATTORNEYS SWEAT THE CHILDREN'S LAWYERS AND ADVOCATES TO LOOK AT OUR SYSTEM AND HAVE WE CREATED A SYSTEM NOT JUST BETTER, BUT COMPETENT.

>> THAT DOESN'T HAPPEN THROUGH-- I MEAN, WE'VE HAD-- LET'S JUST SAY IT'S A STRICKLAND STANDARD.

THE REASON THAT THERE'S BEEN BETTER REPRESENTATION OF DEFENDANTS IS BECAUSE WE PUT IN PLACE REQUIREMENTS AND THAT. NOW, THAT'S NOT BEFORE US RIGHT NOW.

SO I HAVE NOT SEEN THAT THE STRICKLAND STANDARD, YOU KNOW, IN THE SMALL PERCENTAGE OF CASES WHERE WE FIND THAT COUNSEL IS FUNCTIONING AT A LEVEL THAT'S SO AFFECTED THE FAIRNESS OF THE PROCEEDINGS THAT YOU CAN'T GET A RELIABLE RESULT, THAT THAT'S REALLY HELPED-- THAT IT'S THAT THAT'S HELPED THE OVERALL SYSTEM.

SO YOU'RE REALLY TALKING, TO ME, ABOUT TWO DIFFERENT THINGS. AND MY CONCERN IS THAT WHATEVER WE PUT IN PLACE DOES NOT DELAY THE UNDERLYING RIGHTS OF THE CHILD AND, SECOND OF ALL, THAT WE DON'T GET INTO THE KIND OF NITPICKING THAT WE DO SEE UNDERSTANDABLY IN A DEATH CASE WHICH IS WHY DIDN'T YOU CALL THAT WITNESS, WHY DIDN'T YOU LOOK FOR THE FATHERS, WHY DIDN'T-- ARE YOU ENVISIONING THAT THAT WOULD BE THE WAY, THE INQUIRY THAT THE JUDGE WOULD MAKE?

>> I'M ENVISIONING THAT IF WE DON'T ADDRESS THAT FIRST PART OF COUNSEL UP TO THE POINT OF PARENT TRIAL THAT WE WILL GET MORE OF THE INEFFECTIVE ASSISTANCE CLAIMS WHEN A STANDARD IS GRANTED.

AND I DON'T THINK THERE'S A DIFFERENCE, ULTIMATELY, WHETHER IT'S A--

[INAUDIBLE]

STANDARD OR A STRICKLAND STANDARD.

BUT I THINK CHILDREN LOSE WHEN IT GETS TO THAT POINT, BECAUSE THE EFFECTIVENESS AT THE TIME OF SHELTER AND THROUGHOUT AND HELPING THAT PARENT--

>> DID I JUST HEAR YOU ARGUE FOR SOMETHING THAT, YOU KNOW, WE HAVE IN FLORIDA COUNSEL FOR DEPENDENCY BUT NOT BY THE CONSTITUTION, BUT BY THE LEGISLATURE HAVING DONE THAT, CORRECT?

>> RIGHT.

>> AND THERE IS NO, AND THE QUESTION OF NO RIGHT TO EFFECTIVE ASSISTANCE. SO YOU'RE TALKING ABOUT, LIKE, A MOTION FOR SUBSTITUTION OF COUNSEL--

>> YES.

>>-- THAT COULD BE FILED. BUT THAT'S NOT, I MEAN, THE PROBLEM IS YOU'RE ASKING FOR THINGS THAT CANNOT BE BEFORE US IN THIS CASE OR CONTROVERSY.

>> THEY ARE BEFORE YOU AS THE ULTIMATE --

AND THE RESPONSIBLE PARTIES AND FOR THE ADMINISTRATION OF JUSTICE FOR CHILDREN AND FOR THEIR PARENTS. AND IT IS ANCILLARY TO THE DIRECT QUESTIONS THAT ARE IN FRONT OF YOU, AND THAT'S WHY WE'RE HERE AS AMICUS, BECAUSE WE'RE NOT A PARTY TO THE CASE. WHEN YOU'RE MAKING YOUR

DECISIONS ABOUT CERTIFIED QUESTIONS, WE ABSOLUTELY ASK YOU CREATE A PROCESS AND PICK A STANDARD BUT LOOK MORE TO THE BIGGER PICTURE AND WHETHER IT'S THROUGH THIS FORUM OR IN SOME OTHER FORM OF A REQUEST FOR RELIEF TO DO MORE THAN THAT. BECAUSE THE DAY YOUR CHILD IS TAKEN INTO SHELTER, YOU ARE TOLD IF YOU DON'T COMPLY WITH THE CASE PLAN, YOU COULD LOSE THE RIGHTS TO YOUR CHILD.

SO THE MAGIC FILING OF A TPR DOESN'T REALLY CHANGE THE NATURE OF WHAT THE ATTORNEY SHOULD BE DOING AT THE OUTSET.

AND THIS IS THE RULES OF PROFESSIONAL CONDUCT.

THIS IS NOT NITPICKING A DECISION TO CALL THIS WITNESS OR THAT WITNESS.

THIS IS INVESTIGATING AND REPRESENTING YOUR KID--

>> YOUR TIME IS UP.

>> THANK YOU, YOUR HONOR.

WE WANT THE COURTS TO BE ANTIBIOTIC TO RELY-- TO BE ABLE TO RELY ON ALL OF THE ATTORNEYS THAT ARE IN FRONT OF THEM SO THAT THEY CAN MAKE GOOD DECISIONS.

>> MAY IT PLEASE THE COURT, STEPHANIE ZIMMERMAN.

WE REPRESENT THE STATE OF FLORIDA, DEPARTMENT OF CHILDREN AND FAMILIES.

TO ADDRESS SOME OF THE CONCERNS RAISED TODAY, I'D LIKE TO START WITH WHAT IS RIGHT ABOUT THE STRICKLAND TEST.

THE STRICKLAND TEST IS THE TEST FOR DETERMINING WHETHER A PARTY HAD EFFECTIVE ASSISTANCE OF COUNSEL.

IT IS NOT A TEST THAT IS TIED TO A CRIMINAL PROCEEDING NECESSARILY.

WHEN THE STRICKLAND COURT DEVELOPED THE TEST, THEY DIDN'T

LOOK AT THE BURDENS OF PROOF,
THEY DIDN'T LOOK AT THE NATURE
OF CRIMINAL PROCEEDINGS.

THEY LOOKED AT WHAT DOES COUNSEL
NEED TO DO TO EFFECTIVELY ASSIST
THEIR CLIENT.

THAT'S THE SAME FOUNDATION OF
ANY TEST THAT THIS COURT CREATES
TODAY.

WHAT SHOULD A PARENT'S COUNSEL
DO TO EFFECTIVELY ASSIST THE
PARENT?

>> DOESN'T THAT INEVITABLY, AND
THIS IS-- I APPRECIATE THAT WE
KNOW WHAT STRICKLAND SAYS.
BUT MY CONCERN IS, AND IT'S
REALLY SORT OF MORE HELPFUL, A
FRIENDLIER QUESTION TO THE
DEPARTMENT, IS THAT WHAT
INEVITABLY HAS HAPPENED-- AND,
AGAIN, AND MR. DONOVAN HAS SORT
OF FALLEN INTO THAT TRAP-- IS
THAT ALL OF A SUDDEN SOMEBODY,
SEPARATE COUNSEL, AND YOU'RE
PROPOSING THERE BE SEPARATE
COUNSEL AND PAY FOR THAT
SEPARATE COUNSEL, BUT STARTS TO
SAY, WELL, THEY SHOULD HAVE
CALLED THESE ADDITIONAL
WITNESSES.

AND ALL OF A SUDDEN AFTER THE
TERMINATION JUDGMENT, WE GO BACK
AND WE HAVE A LITTLE MINI
RETRIAL IN A 30-DAY PERIOD?
SO THE-- I THINK IN LOOKING AT
WHAT NEW JERSEY HAS DONE WITH
THE STRICKLAND STANDARD, WHAT
INDIANA DID WITH DUE PROCESS IN
GEIST, IT DOESN'T APPEAR THAT IN
ANY OF THOSE CASES THAT THEY'RE
REALLY GIVING THE PARENTS THE
KIND OF RIGHTS YOU'D HAVE IN A
CRIMINAL CASE WHICH WOULD BE TO
SCRUTINIZE EVERYTHING ABOUT THE
TRIAL AND GO BACK AND FLY SPECK.
SO HOW DO WE, KNOWING THAT, HOW
DO WE THEN SAY WE SAY WE
SAY IT'S THE STRICKLAND
STANDARD.

DO WE HAVE TO SAY BUT WE'RE NOT

SAYING THAT THE KINDS OF CLAIMS THAT YOU'VE BEEN ABLE TO BRING UNDER STRICKLAND IN THE U.S. SUPREME COURT CASES THAT YOU GOTTA INVESTIGATE PRIOR FILES AND DO ALL THAT WILL APPLY IN A TERMINATION CASE?

HAVE YOU THOUGHT ABOUT THOSE INHERENT PROBLEMS BY JUST INVOKING THE WORD "STRICKLAND," THAT PEOPLE START TO THINK THEY'VE GOT TO DO KINDS OF THINGS THAT ARE DONE IN DEATH CASES?

>> WELL, I THINK THAT IN OUR CASE WE DON'T HAVE ALL OF THE, UM, CHALLENGES THAT EXIST IN DEATH PENALTY CASES, PER SE. WHILE TERMINATION IS THE DEATH PENALTY IN A PARENT'S PROCEEDING, WE STILL-- IF WE ADOPT STRICKLAND, WE'LL LOOK AT THE TOTALITY OF THE CIRCUMSTANCES.

AND IT'S REALLY HARD TO SAY THAT WE'LL NEVER GET TO THAT NITPICKING STAGE IF THIS COURT ADOPTS STRICKLAND.

BUT I THINK WHAT WE SHOULD DO IS BRING IN THE CASE LAW THIS COURT HAS ALREADY DEVELOPED.

THERE ARE AT LEAST 560 CASES--

>> IN STRICKLAND?

YOU WOULD WANT-- THAT'S REALLY WHERE MY PROBLEM IS BECAUSE WHAT WE'VE DEVELOPED IN DEATH CASES--

>> UH-HUH.

>>-- IS UNIQUELY BECAUSE OF DEATH CASES, THE VAST MAJORITY OF POSTCONVICTION CASES BROUGHT IN THIS STATE, THE DEFENDANT DOES NOT HAVE COUNSEL.

THEY'RE BROUGHT PRO SE.

AND YET YOU'RE SUGGESTING THAT WE WOULD IMPORT DEATH PENALTY STRICKLAND HAW--

>> UH-HUH.

>>-- INTO A TERMINATION AND, THEREFORE, APPOINT COUNSEL, COME

UP WITH THE PROCEDURES THAT WOULD BE TO GO OVER THIS. AND THAT'S WHAT I'M, THAT'S WHERE I'M HAVING TROUBLE, BECAUSE I HAVEN'T SEEN IN ANY OF THESE OTHER STATES WHERE THEY'VE ACTUALLY GIVEN RELIEF, YOU KNOW, THEY'VE SAID THERE'S THIS RIGHT, AND I DON'T KNOW EVEN WHAT THE PROCEDURES ARE IN THESE OTHER STATES.

CAN YOU ILLUMINATE THAT? IN OTHER WORDS, IN THOSE OTHER STATES ARE THEY HAVING EVIDENTIARY HEARINGS, ARE THEY GOING BACK AND LOOKING AT OTHER WITNESSES THAT SHOULD HAVE BEEN CALLED?

>> YES.

LET ME ANSWER--

>> YES, THEY'RE DOING THAT?

>> YES, THEY ARE.

FOR INSTANCE, THIS COLORADO WHEN THEY DETERMINE THAT THE RECORD ESTABLISHES THAT THERE'S A SUBSTANTIAL CLAIM THAT THERE WAS DEFICIENT PERFORMANCE, THEY REMAND FOR A 0-DAY EVIDENTIARY HEARING.

IN NEW JERSEY THEY REMAND FOR A 14-DAY EVIDENTIARY HEARING.

CONNECTICUT ALLOWS FOR AN EVIDENTIARY HEARING WITHIN A FOUR MONTH PERIOD OF TIME, AND IN OKLAHOMA THEY ALSO FOLLOW A 30-DAY HEARING.

SO THERE ARE OTHER COURTS THAT HAVE TAKEN UP THIS VERY SAME ISSUE AND HAVE CONTEMPLATED THERE WILL BE EVIDENTIARY HEARINGS.

>> AND YOU WOULD ANTICIPATE THERE'D BE COUNSEL REPRESENTING THE PARENTS?

SEPARATE COUNSEL?

>> YES.

WE WOULD.

BECAUSE IF THERE IS COUNSEL WHO IS CLAIMED TO BE DEFICIENT, WE BELIEVE THERE WOULD BE A

CONFLICT OF INTEREST IF THAT
COUNSEL WOULD CONTINUE TO
REPRESENT THE PARENT.

>> MS. ROSENBERG HAS TALKED
ABOUT THIS TERRIBLE PROBLEM WITH
APPOINTED COUNSEL THAT STARTS IN
THE DEPENDENCY STAGE.

DO YOU FEEL THE DEPARTMENT HAS
ANY OBLIGATION IN THIS AREA TO
INSURE THAT PARENTS' ATTORNEYS
ARE GETTING COMPETENT COUNSEL
THAT ARE PROPERLY TRAINED, THAT
IN THIS CASE BEFORE US WHERE THE
COUNSEL SAID HE WAS SO TIRED, HE
HAD WORKED 80 HOURS, THAT MAYBE
THE JUDGE SHOULD HAVE GIVEN A
ONE WEEK CONTINUANCE TO SOLVE?

I MEAN, IS THE DEPARTMENT--
SINCE WE'RE ALL HERE SORT OF AS
A TEAM FOR TEAM CHILD, DOES THE
DEPARTMENT BEAR ANY
RESPONSIBILITY OTHER THAN SAYING
THERE SHOULD BE A
POSTTERMINATION NEW PROCEEDING
TO SOLVE THESE PROBLEMS?

>> WHETHER WE HAVE A MANDATED
RESPONSIBILITY OR NOT, THE
DEPARTMENT ALREADY IS DOING
THOSE THINGS.

>> WHAT DO THEY DO?

>> I CAN TELL YOU PERSONALLY
THAT I'VE WORKED WITH ROBIN
ROSENBERG, AS HAS THE DIRECTOR
TO DEVELOP TRAININGS THAT WE CAN
COMBINE BENEFIT FROM.

WE ALSO HAVE THE DEPENDENCY
SUMMIT EVERY YEAR WHERE PARENTS'
COUNSEL ATTENDS.

WE GO OVER THE CASE LAW--

>> SO WHY DO WE HAVE THIS
TERRIBLE PROBLEM OF ALL THESE
COUNSEL THAT APPARENTLY CLAIM
MS. ROSENBERG ARE MISSING
HEARINGS OR, YOU KNOW, ARE NOT
ABLE TO REALLY REPRESENT-- I
MEAN, WHERE, WHAT'S, WHERE'S THE
PROBLEM?

IS IT WITH HAVING THE REGIONAL
COUNSEL REPRESENTING PARENTS'
ATTORNEYS?

IS THAT THE PROBLEM?

>> I HATE TO SAY IT, BUT I THINK IT'S THE NATURE OF THE JOB. THESE PROCEEDINGS ARE NOT EASY. SOMEBODY NEEDS TO HAVE THICK SKIN TO DEAL WITH THE SITUATION--

>> SO SHOULDN'T WE INVEST THE MONEY IN LETTING THE PARENTS' ATTORNEY HAVE TWO LAWYERS LIKE WE DO IN DEATH CASES SO WE CAN GET THE RELIABLE RESULT FIRST RATHER THAN WORRY ABOUT IT AFTER-- YOU KNOW, IN OTHER WORDS, AREN'T YOU CONCERNED ABOUT THE CHILD'S RIGHTS BEING IN LIMBO A LONGER PERIOD OF TIME?

>> I AM ABSOLUTELY CONCERNED WITH THAT.

>> HOW OLD WAS THIS CHILD HERE?

>> THIS CHILD IS 5 YEARS OLD RIGHT NOW, AND THIS CHILD HAS BEEN IN OUR CUSTODY SINCE THE AGE OF ONE AND A HALF. AND THAT'S WHY WE HAVE ADVOCATED FOR ANY KIND OF PROCEDURE THAT GOES INTO EFFECT IF THAT PROCEDURE CONSIDER THE EXPEDIENCY OF THE PROCEEDINGS FIRST AND FOREMOST.

WE WANT TO MAKE SURE THAT--

>> [INAUDIBLE]

>> YES.

>> I WANT YOU TO GO BACK A BIT. YOU WERE TALKING ABOUT LAWYERS NEED TO HAVE A THICK SKIN--

>> UH-HUH.

>>-- TO DEAL WITH THESE TYPE OF CASES.

HOW IS IT THAT THESE CASES DIFFER FROM, SAY, A PUBLIC DEFENDER OR A COURT-APPOINTED COUNSEL REPRESENTING SOMEBODY CHARGED WITH MURDER OR ANY OTHER TYPES OF CRIMES?

HOW-- WHAT IS, WHAT IS, WHY IS IT NECESSITATED WITH THICK SKIN?

>> I PERSONALLY HAVE NEVER BEEN A PUBLIC DEFENDER, BUT THE CASES

I'VE SEEN SINCE I JOINED THE DEPARTMENT ARE SOME OF THE WORST THINGS I'VE SEEN IN MY ENTIRE LIFE.

CHILDREN, ESPECIALLY, EVERYBODY HAS A SOFT SPOT FOR, AND SOME OF THE THINGS THAT WE SEE IN THE LEVELS OF ABUSE THAT ARE COMMITTED ON CHILDREN, THEY'RE NOT EASY TO DEAL WITH.

AND SO WE ACTUALLY, YOU KNOW, OUR OWN ATTORNEYS STRUGGLE WITH THOSE SITUATIONS ALL THE TIME. SO WE'VE GOT A SITUATION WHERE YOU'RE DEALING WITH A HARD SUBJECT, LOTS OF CASES, YOU'RE PAID NOT SO WELL.

YOU COMBINE THOSE THINGS TOGETHER, AND WE DON'T HAVE AN AREA OF THE LAW THAT PEOPLE ARE FLOODING TO, YOU KNOW?

WE STRUGGLE AS THE DEPARTMENT TO EVEN GET ATTORNEYS TO JOIN OUR CAUSE WHICH IS WHY THE PARENTS ALSO STRUGGLE.

WE WANT TO HAVE TRAININGS, WE WANT TO RAISE THE BAR, AND WE THINK WE CAN DO THAT WITH A STRICKLAND STANDARD AND WITH A SHORT PROCEDURE THAT ALLOWS FOR THESE CLAIMS TO BE BROUGHT BECAUSE IN SOME WAY WE DO NEED FOR INEFFECTIVE ASSISTANCE OF COUNSEL TO BE ADDRESSED.

>> WOULDN'T THE, WOULDN'T SOME OF THIS PROBLEM BE SOLVED IF THE CHILD HAD AN ATTORNEY?

I MEAN, IN OTHER WORDS, WE'RE TALKING ABOUT THE CENTRAL ISSUE-- ALTHOUGH THE PARENT GETS AN ATTORNEY BECAUSE THEIR RIGHTS IN THE CHILD ARE BEING TERMINATED, SORT OF ALMOST LIKE A DUE PROCESS RIGHT TO YOUR CHILD.

>> UH-HUH.

>> AND YET THIS IS A, THIS IS ANOTHER SAD CASE BECAUSE THIS MOM WAS A FOSTER TEENAGER. AND SO WE HAVE NOW THE

GENERATION TO GENERATION.
AND SO THAT'S IN ITSELF A VERY
SAD THING.
BUT IN TERMS OF THIS, IN TERMS
OF THE PARENT, THE DCF IS SAYING
IN THIS CASE WAS THERE-- IS
THERE ANYTHING THAT NEEDS TO GO
BACK FOR AN EVIDENTIARY HEARING
IN THIS CASE?

NOT GOING FORWARD WHAT NEEDS TO
HAPPEN, BUT IN THIS CASE IS
THERE SOMETHING THAT ON THE
RECORD AND IF IT'S NOT ON THE
RECORD, THAT EVEN IF THERE'S
THESE ALLEGATIONS THAT YOU GO
BACK FOR THEM TO MAKE, BE ABLE
TO MAKE THESE ALLEGATIONS?

>> NO.

THE DEPARTMENT'S POSITION IS
THAT THE FIRST DCA CORRECTLY
FOUND THAT THE TEN GROUNDS
ENUMERATED FOR INEFFECTIVE
ASSISTANCE OF COUNSEL WERE
PROPERLY NOT GROUNDS RAISED HERE
EITHER BECAUSE THEY WERE NOT
DEFICIENT PERFORMANCE OR BECAUSE
THERE WAS NO PREJUDICE.

SO, THEREFORE, THIS COURT FOR
THE REASONS I'VE ARTICULATED IN
OUR ANSWER BRIEF ASKED THAT WE
AFFIRM THIS CASE.

BUT WE ALSO ASK THAT WE USE THIS
CASE AS THE PLATFORM IN WHICH WE
CAN ESTABLISH THE STANDARD BY
WHICH EFFECTIVE ASSISTANCE IS
JUDGED.

AND TO USE THIS CASE TO DEVELOP
A PROCEDURE.

OUR FLORIDA COURTS HAVE BEEN
WRESTLING WITH THIS FOR MORE
THAN A DECADE.

THE FIRST, THE SECOND, THE
FOURTH AND THE FIFTH DCAs HAVE
ALL CERTIFIED QUESTIONS SIMILAR
TO THE LENS OF THIS COURT, AND
THEY ARE STRUGGLING BECAUSE ALL
FOUR OF THOSE DCAs HAVE
EXPRESSLY FOUND THAT THE RIGHT
TO COUNSEL IS THE RIGHT TO
EFFECTIVE ASSISTANCE OF COUNSEL.

BUT THEY STRUGGLE BECAUSE WHILE ACKNOWLEDGING THAT RIGHT, NO REMEDY FOR THAT RIGHT NOW. THERE'S NO REMEDY FOR THAT RIGHT NOW.

INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT APPARENT ON THE FACE OF THE RECORD, THERE'S NO RELIEF.

>> LET ME ASK YOU ABOUT WHEN APPEALS ARE DONE AND THERE IS SOME-- WHAT PERCENTAGE WOULD YOU SAY OF TERMINATION OF PARENTAL RIGHTS CASES ARE APPEALED?

>> I WOULD SAY A LARGE PORTION. I CAN TELL YOU THAT IF I HAD TO GUESS I WOULD SAY PROBABLY-- OF THOSE CONTESTED HEARINGS, PROBABLY 85-90% OF--

>> AND OF THOSE HOW MANY ARE, DO YOU EVER SEE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS?

>> I'D HAVE TO SAY THAT WE-- WE DO SEE IT OCCASIONALLY. AS THE DIRECTOR OF APPEALS FOR CHILDREN'S LEGAL SERVICES, I HAVE SEEN OVER THE COURSE OF THE TWO YEARS THAT I'VE BEEN WITH THE DEPARTMENT AT LEAST A HANDFUL OF CASES THAT HAVE RAISED IT.

BUT I THINK THE REASON I DON'T SEE MORE IS BECAUSE THERE IS NOW A PLETHORA OF CASE LAW THAT SAYS YOU CAN'T RAISE THERE FOR THE FIRST TIME ON APPEAL.

>> I THINK THE PROBLEM IS, AND HERE'S WHAT I'M CONCERNED ABOUT, THERE'S NO DISINCENTIVE FOR A PARENT'S ATTORNEY TO APPEAL BECAUSE THEY HAVE A RIGHT TO APPEAL, AND THEY GET AN ATTORNEY.

SO WE, AND IS WE'VE SPENT A LOT OF-- AND WE'VE SPENT A LOT OF TIME IN TRYING TO MAKE SURE THE TIME ON APPEAL HAS BEEN REDUCED. SO NOW WHAT WE WOULD CREATE-- AND THIS, AGAIN, MAYBE IT'S MY

CONCERN AND THERE'S, WE STILL HAVE TO BITE THE BULLET-- THAT WE CREATE AND SAY, OF COURSE, YOU HAVE THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, BUT IT'S THE EFFECTIVE ASSISTANCE OF COUNSEL IS DOES THIS PROCEEDING LOOK FUNDAMENTALLY FAIR, AND IS THERE ANY CHANCE THAT THERE WOULD HAVE BEEN A DIFFERENT RESULT WITH COUNSEL HAVING GOTTEN THIS ONE WEEK CONTINUANCE?

NOW, THOUGH, BECAUSE THERE'S A PROCEDURE AND IF YOU SAY THAT WE SHOULD HAVE A LAWYER FOR THAT PERSON, THERE'S NO DISINCENTIVE FOR A PARENT THAT WANTS TO KEEP THE CHILD AT ALL COSTS.

>> UH-HUH.

>> TO DO BOTH THINGS, TO APPEAL IN THE 85-90% OF THE CASES AND IN 85-90% OF THE CASES RAISE THAT THERE WAS SOMETHING THAT THEIR ATTORNEY SHOULD HAVE DONE DIFFERENTLY.

AND ARE YOU NOT CONCERNED AS SOMEBODY WHO'S THE DEPARTMENT'S THERE TO REPRESENT THE BEST INTERESTS OF THE CHILD THAT THIS IS GOING TO WORK OUT TO THE DETRIMENT OF THE CHILD?

>> I'M ABSOLUTELY CONCERNED. AND THAT'S WHY I ASK FOR TWO DIFFERENT THINGS.

I ASK, FIRST, THAT WE ADOPT STRICKLAND BECAUSE STRICKLAND DOESN'T SAY THAT IT WOULD HAVE ANY EFFECT ON THE CHILD. STRICKLAND RAISES IT BEYOND THAT.

THE STRICKLAND COURT EXPRESSLY REJECTED THAT THE STANDARD BE, THAT IT HAVE ANY EFFECT. IT HAS TO BE A REASONABLE RESPONSIBILITY OR PROBABILITY THAT IT HAD AN IMPACT ON THE TRIAL.

THE SECOND COMPONENT THAT WE'RE ASKING FOR IS THAT ANY PROCEDURE

THAT'S DEVELOPED BE DEVELOPED SO THAT IT IS DEALT WITHIN THE SAME COURSE AND THE SAME TIME FRAME AS THE APPEAL, NOT BE TACKED ON LATER LIKE IN CRIMINAL PROCEEDINGS.

>> BUT WHAT HAPPENS, WE HAVE NEWLY-DISCOVERED EVIDENCE CLAIMS IN CRIMINAL CASES.

WHAT IF THE PARENT SAYS AFTER THE TERMINATION JUDGMENT, OH, I-- HERE'S NEWLY-DISCOVERED EVIDENCE?

ARE THOSE CLAIMS ALLOWED?

>> YES, THEY ARE.

THEY'RE ALLOWED UNDER 8.270. AND NEWLY-DISCOVERED EVIDENCE CLAIMS ARE ALLOWED UP TO ONE YEAR AFTER THE JUDGMENT.

WE'RE TRYING TO NOT HAVE SUCH A BROAD TIME FRAME FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BY TRYING TO FASHION IT WITHIN THE TIME FRAME OF A DIRECT--

>> BECAUSE I'VE NEVER SEEN A NEWLY-DISCOVERED EVIDENCE CLAIM-- WHICH IT IS PERMITTED UNDER 8.270.

>> AND THEY'RE BROUGHT?

>> THEY ARE BROUGHT.

I HAVE TO SAY THEY ARE RARE BECAUSE OUR PROCEEDINGS, IT'S NOT LIKE WHERE WE HAVE A SPEEDY TRIAL, AND WE RUN FORWARD.

OUR CASES TYPICALLY TAKE A YEAR AT LEAST TO DEVELOP.

WE'VE GOT CASE PLANS, WE'VE GOT PEOPLE WORKING THIS.

SO FOR THERE TO BE NEWLY-DISCOVERED EVIDENCE IN OUR CASE IS RARE.

>> COULD YOU HELP ME WITH ONE? YOU'RE ATTEMPTING OR AT LEAST YOU'RE ARGUING OR SUGGESTING THAT WE OUGHT TO HAVE A PROCEDURE THAT IS COMPRESSED INTO THE SAME APPELLATE PERIOD WHILE THE APPEAL IS PENDING. WELL, THAT'S BEEN SUGGESTED IN CRIMINAL CASES, AND IT JUST

CAN'T WORK BECAUSE YOU'VE GOT
PRIVILEGED INFORMATION,
CONFIDENTIAL INFORMATION.
YOU CAN'T GET TO FILES THAT YOU
MAY OTHERWISE BE AUTHORIZED TO
ENTER AFTER THE CASE IS OVER.
DOES THAT HAVE SOMETHING-- I
MEAN, LIKE IN THIS CASE THERE
MAY BE SOMETHING IN THE TRIAL
LAWYER'S FILE THAT MAYBE OUGHT
NOT BE DISCOVERED AT THIS POINT
IN THE PROCEEDING.

SO WHAT'S-- HOW DOES THAT--
BECAUSE THAT'S A TERRIBLE
PROBLEM FOR THE CRIMINAL CASES
TO TRY TO COME PRESS THEM.
ARE WE COMMUNICATING MY
QUESTION?

>> YES, I UNDERSTAND YOUR
QUESTION.

>> OKAY.

>> WE DON'T FACE THOSE SAME
CHALLENGES PAUSE OUR CASES, OUR
RECORD IS FIRMLY DEVELOPED, AND
EVERYTHING THAT WE RELY UPON IN
A TERMINATION PROCEEDING AND
EVERYTHING THAT SHOULD BE
INVESTIGATED IS IN THE RECORD ON
APPEAL.

>> WELL, HOW DO WE KNOW?
WE DON'T HAVE THE LAWYER'S FILE
JUST THROWN IN THE RECORD, DO
WE?

>> WE DON'T HAVE THE LAWYER'S
FILE--

>> SEE, THAT'S WHAT I'M
CONCERNED ABOUT, PRIVILEGED OR
CONFIDENTIAL INFORMATION THAT
THEY WANT TO KEEP FROM YOU.

>> UH-HUH.

>> THEY DON'T WANT YOUR TO SEE
IT AND ONCE YOU GO INTO THAT,
IT'S-- THAT'S HOW I WONDER HOW
WE HANDLE THAT ISSUE IN THIS
OVERALL WHATEVER IT'S CALLED.

>> UH-HUH.

WELL, I THINK WHEN IT COMES TO
TERMINATION OF PARENTAL RIGHTS
PROCEEDINGS, WE HAVE TWO KINDS
OF ERRORS GENERALLY COMPLAINED

ABOUT IN INEFFECTIVE ASSISTANCE
OF COUNSEL CLAIMS.

FIRST IS THE PARENT CLAIMING
THAT A PARTICULAR WITNESS WAS
NOT CALLED, A PARTICULAR THEORY
WAS NOT PURSUED.

AND THOSE ARE THE TYPES OF CLAIM
THAT IS THE PARENT KNOWS ABOUT
RIGHT WHILE THEY'RE STILL
SITTING IN THE TRIAL.

THOSE CAN DEFINITELY BE BROUGHT
WITHIN A 30-DAYTIME PERIOD IN A
MOTION.

>> HOW DO YOU PROVE IT WITHOUT
ACCESS TO THE-- YOU MAY NEED
ACCESS TO THE LAWYER'S FILE
THOUGH TO REFUTE IT EVEN.

>> YOU MIGHT NEED ACCESS TO
REFUTE THAT-- I GUESS YOU MIGHT
NEED ACCESS TO REFUTE THAT THEY
DIDN'T INVESTIGATE, BUT IF A
PARENT HAS SPECIFICALLY
REQUESTED THAT THEIR COUNSEL
CALL A WITNESS LIKE IN THIS CASE
MOTHER ASKED THAT A PARTICULAR
WITNESS BE CALLED, SHE
SUBSEQUENTLY AGREED THAT SHE
SHOULD NOT BE CALLED, BUT THAT
WOULDN'T REQUIRE ANY FURTHER
KIND OF DEVELOPMENT OR LOOKING
INTO ATTORNEY'S FILES--

>> I'M NOT SAYING THAT EVERY ONE
WOULD.

>> RIGHT.

>> BUT IF WE HAVE-- ARE THE
LAWYERS' FILES PRIVILEGED AND
CONFIDENTIAL AS THEY GO THROUGH
THE APPEAL PROCESS?

>> THEY WOULD BE, YES.

>> SO THAT'S WHAT MY CONCERN IS.
AND ARE YOU ENVISIONING A
PROCESS WHERE SOMEBODY WOULD
HAVE ACCESS TO THAT LAWYER'S
FILES?

>> YEAH, I WOULD, BECAUSE JUST
LIKE IN A CRIMINAL--

>> HOW CAN YOU DO THAT IF THE
CASE IS STILL UNDER ACTIVE
LITIGATION IF THERE'S
CONFIDENTIAL AND PRIVILEGED

MATERIAL THAT YOU'RE NOT GOING TO HAVE?

>> WELL, WHAT WE'RE ENVISIONING IS THAT IF THERE IS AN APPEAL THAT IS COMMENSURATE WITH THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, THAT THE APPEAL IS NO LONGER BEING HANDLED BY THE ATTORNEY THAT IS--

>> I UNDERSTAND.

BUT THAT ATTORNEY MAY WANT ACCESS TO SOMEONE ELSE'S FILE.

>> RIGHT.

BUT SOMEONE ELSE'S FILES WOULD NO LONGER BECOME PRIVILEGED BECAUSE THE PARENT AS PART OF THE RELATIONSHIP CAN NOW WAIVE THAT PRIVILEGE AND GET ACCESS TO THE PREVIOUS COUNSEL'S FILES.

>> DO THEY HAVE TO WAIVE ANY CONFIDENTIALITY, ANY PRIVILEGE, ANY ATTORNEY/CLIENT PRIVILEGES TO ENTER THE--

>> TO THEIR, TO THEIR ATTORNEY IN ORDER FOR THEIR ATTORNEY TO BRING THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, YES.

BUT I DON'T BELIEVE THAT THAT PRIVILEGE GETS WAIVED AS TO THE DEPARTMENT.

I DON'T BELIEVE THAT WE'RE GOING TO NOW I HAVE THE OPPORTUNITY TO GO INTO THOSE INVESTIGATIVE FILES AND USE SOMETHING IN THEM TO DEFEND OUR APPEAL.

>> WHY NOT?

>> WELL, BECAUSE--

>> IT HAPPENS IN THE CRIMINAL, IN THE STRICKLAND PROCESS--

>> UH-HUH.

>>-- THAT HAPPENS.

>> BUT NOT AS THE APPEAL BASED UPON THE MERITS OF THE DETERMINATION.

>> THAT HAPPENS AS SOON AS THE PROCESS IS INITIATED.

>> WELL, CAN--

>> STATE ATTORNEY'S FILE IS GIVEN TO THE DEFENSE LAWYER.

>> CONSIDERING-- WELL, THE

STATE ATTORNEY'S FILE IS GIVEN
TO THE DEFENSE LAWYER.

OKAY.

WELL, CONSIDERING THAT THE
TERMINATION OF PARENTAL RIGHTS
PROCEEDINGS WOULD HAVE TO BE
JUDGE BASED UPON THE RECORD THAT
IS BELOW, I GUESS I'M NOT
UNDERSTANDING HOW WE, THE
DEPARTMENT--

>> THE STATE KNOWS THERE'S A
WITNESS THAT COULD HELP THE
PARENT--

>> UH-HUH.

>>-- AND THEY JUST DON'T
DISCLOSE IT, A BRADY TYPE
PROBLEM IN A CRIMINAL CASE, I
WOULD ASSUME THAT WOULD BE
SOMETHING THAT YOU COULD ADDRESS
IN THIS WHATEVER YOU CALL
SUBSEQUENT PROCEEDING.

CAN YOU DO THAT?

IN THIS SUBSEQUENT WHATEVER YOU
CALL IT?

>> YOU KNOW, IN ALL HONESTY
WE'VE NEVER HAD A SITUATION I'M
AWARE OF IN ANY OF OUR CASE LAW
WHERE WE'VE HAD A BRADY-LIKE
VIOLATION WHERE WE HAVEN'T
DISCLOSED EVERYBODY BECAUSE IN
OUR RECORDS--

>> WELL, THANK YOU FOR HAVING
THE HOLIER THAN THOU DEPARTMENT
THEN.

>> I DIDN'T MEAN TO TAKE THAT
KIND OF POSITION, IF THAT--

>> WELL, I MEAN, THIS HAPPENS.
THIS IS REAL WORLD STUFF.

>> I UNDERSTAND.

>> AND YOU LAWYERS ARE MORE
COMPETITIVE THAN ANYTHING I'VE
SEEN IN MY BACKGROUND.

AND SO I'M JUST WONDERING
HOW WE PUT THIS ALL
TOGETHER IF IT'S ALL AT
THE SAME TIME, YOU KNOW?

>> WELL--

>> YOU CAN CREATE MORE PROBLEMS
THAN YOU CAN CREATE SOLUTIONS IF
YOU JUST HAUL OFF AND DO

SOMETHING WITHOUT KNOWING WHAT YOU'RE DOING.

>> WELL, ANY PROCEDURE THAT WE WOULD ASK THAT THIS COURT ADOPT OR WOULD SUGGEST TO THE RULES COMMITTEE, WE WOULD ANTICIPATE THE APPEAL BE PUT ON HOLD UNTIL RESOLUTION OF THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. BECAUSE THERE WOULD BE NO NEED FOR THE APPEAL TO GO FORWARD IF THERE IS ANY MERIT TO THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, BUT WE ASK THAT THAT BE PUT ON HOLD FOR A VERY SHORT, LIMITED PERIOD OF TIME. THE COURT THAT I MENTIONED DID 30 DAYS, THE NEW JERSEY COURT DID 14 DAYS.

SO WE'RE ASKING FOR A VERY SHORT TIME FRAME.

>> SO YOU WOULD THEN IF YOU GOT THE ATTORNEY'S FILE-- YOU, THE DEPARTMENT-- ARE YOU SAYING THAT WOULD END UP BEING PART OF THE RECORD ON APPEAL SO YOU COULD SHOW THAT THE MOTHER, SHOW AFTER THE EVIDENTIARY HEARING THAT THE MOTHER OR THE FATHER WERE ACTUALLY WORSE, HAD A WORSE DRUG PROBLEM THAN YOU REALIZED AT THE TIME?

>> I DON'T THINK WE CAN RELY ON THOSE THINGS, NO. BECAUSE--

>> WOULDN'T IT BE PART OF THE RECORD BY THEN?

>> IT'S NOT WHETHER SOMETHING IS PART OF THE RECORD ON APPEAL, IT IS WHAT IS THE RECORD BEFORE THE TRIAL COURT.

AND THE TRIAL COURT FOUND CLEAR AND CONVINCING EVIDENCE BASED UPON THESE THINGS THAT THE DEPARTMENT PRESENTED. WE HAVE TO STAND ON THOSE THINGS IN ORDER TO GET THE AFFIRMANCE. WE ARE NOT GIVEN THE OPPORTUNITY TO LATER SUPPLEMENT THE RECORD WITH NEW EVIDENCE, THEREFORE, WE

WOULD NOT BE RELYING ON ANYTHING
GAINED FROM ANY FILES.

>> THANK YOU.

YOUR TIME IS UP.

>> IF I COULD MAKE TWO QUICK
POINTS.

FIRST, THIS COURT HAS NEVER
ADDRESSED WHETHER COUNSEL--
WHETHER PARENTS HAVE THE RIGHT
TO EFFECTIVE COUNSEL.

THE DCAs HAVE SAID YES,
THERE'S AGREEMENT THAT THERE IS
YES AMONG THE PARTIES.

WE ASK THAT IN YOUR OPINION YOU
SAY, YES, THERE IS A RIGHT TO
EFFECTIVE ASSISTANCE OF COUNSEL,
WHATEVER THAT MEANS.

TWO, I THINK IT ADDRESSED THE
PROCEDURE.

THERE IS NO PROCEDURE CURRENT--
NO PROCEDURE CURRENTLY, WHATEVER
PROCEDURE IS APPROPRIATE.

WE NEED ONE.

THERE IS NOTHING RIGHT NOW.

ALL THERE IS IS DIRECT APPEAL,
AND THERE'S CASE LAW GALORE
SAYING NOT THE BEST WAY TO DO
IT.

WE AGREE.

I'M HERE BECAUSE THAT'S THE ONLY
OPTION WE HAVE.

DO WE ACTUALLY SET A PROCEDURE?
OBVIOUSLY, WE WOULD PREFER A
FORUM ON TIME PERIOD THAT
CONNECTICUT HAS VERSUS A
15-DAYTIME PERIOD LIKE NEW
JERSEY, BUT SOME PROCEDURE'S
NEEDED.

TRY TO GET BACK TO, JUSTICE
CANADY, YOUR QUESTION.

ONE ISSUE WITH STRICKLAND IS THE
CASE LAW COMES WITH A VERY HEAVY
PRESUMPTION THAT COUNSEL IS
CORRECT.

IF YOU REMOVE THAT PRESUMPTION
FOR THESE TYPE OF CASES, THAT AT
LEAST IS A HELP AND MAKES IT--

>> BUT WHY SHOULD-- NOW YOU'RE
SAYING IT SHOULD BE EASIER TO
SHOW INEFFECTIVE ASSISTANCE OF

COUNSEL IN A TERMINATION OF PARENTAL RIGHTS THAN IT IS IN A DEATH CASE.

IS THAT WHAT YOU'RE, IS THAT WHAT YOU'RE SAYING?

>> NO, YOUR HONOR.

AND, AGAIN, I DON'T KNOW HOW TO AVOID JUSTICE CANADY'S REQUEST BY NOT GETTING INTO TIME FRAMES. BUT BECAUSE OF THE TIME FRAMES, IT IS NOWHERE NEAR ANYWHERE APPROACHING EASIER.

I THINK--

>> [INAUDIBLE]

>> MY NUMBER ONE CONCERN--

>> REALLY OUGHT TO BE A HARMLESS ERROR STANDARD.

THAT'S DEFINITELY EASIER.

>> YES.

AND GIVEN THE TIME FRAMES, GIVEN THE TIME FRAMES WITH WHATEVER YOU ADOPT, IF WE HAVE THE FIRST DCA PROPOSAL IS APPELLATE COUNSEL WOULD HAVE 20 DAYS TO REVIEW THE RECORD, SEE IF THERE'S ANY WITNESSES, GET A MOTION AND GET IT HEARD, THAT'S AN INCREDIBLY SHORT TIME PERIOD COMPARED TO A CRIMINAL CASE THAT THE LAST ONE YOU HAD OCCURRED 22 YEARS AGO.

THAT'S A MASSIVE CONCERN.

>> TIME IS UP, COUNSEL.

>> WHEN OKAY, THANK YOU.

>> ACTUALLY, YOU HAD NO TIME FOR REBUTTAL.

>> OH, OKAY.

>> THANK YOU.

WE'RE IN RECESS FOR TEN MINUTES.

>> ALL RISE.

>> THE

SUPREME COURT OF FLORIDA IS NOW IN SESSION.

PLEASE BE SEATED.

>> OKAY.

>> OKAY.