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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF NATASHA W.,

Respondent,

-against-

NO. 65

NEW YORK STATE OFFICE OF CHILDREN AND  
FAMILY SERVICES, ET AL.,

Appellants.

-----

20 Eagle Street  
Albany, New York  
May 1, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Karen Schiffmiller  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 65, the Matter of  
2 Natasha W. v. New York State Office of Children and Family  
3 Services.

4 Counsel?

5 MR. GRIECO: May it please the court, Matthew  
6 Grieco for OCFS. May I reserve two minutes for rebuttal,  
7 please?

8 CHIEF JUDGE DIFIORE: Yes, sir.

9 MR. GRIECO: OCFS was permitted to uphold an  
10 indicated report of maltreatment based on the in - - -  
11 undisputed facts of this case. The following relevant  
12 considerations supported OCFS's determination: the child's  
13 active involvement in a crime at his parent's direction;  
14 the age of the child; the substantial amount of goods  
15 stolen, which increased the likelihood of a physical  
16 confrontation - - -

17 JUDGE RIVERA: Counsel, there wasn't any  
18 evidence, right? This is all speculative. There wasn't  
19 evidence of an actual impact on the child, correct?

20 MR. GRIECO: We are not relying on actual harm as  
21 a basis for the maltreatment finding. From - - - in every  
22 stage of this proceeding, from the ALJ's determination up  
23 through this court, it has always been the position of the  
24 Agency that maltreatment occurred because the child was  
25 placed in imminent danger of harm.



1 JUDGE RIVERA: But isn't that based on  
2 speculation?

3 MR. GRIECO: It is not. There - - - there is - -  
4 - there's an inherent danger in any physical confrontation;  
5 and under the particular circumstances of this case, given  
6 another consideration which I was about to mention, which  
7 was the substantial amount of goods stolen, as well as - -  
8 -

9 JUDGE WILSON: But how do you - - - how do you -  
10 - - how do you - - -

11 MR. GRIECO: - - - the lack of mitigating  
12 circumstances - - -

13 JUDGE WILSON: I think we're familiar with the  
14 facts. How do you interpret "imminent"?

15 MR. GRIECO: Imminent means that it was a - - - a  
16 - - - it was reasonably foreseeable that it would  
17 imminently follow - - - immediately follow from the - - -  
18 from the petitioner's actions. For example, in - - - in  
19 New York there is a shopkeeper's statute that permits so -  
20 - - some degree of force to be used in a physical  
21 confrontation when someone is attempting to rob from a  
22 store.

23 Now, the - - - the substantial body of case law  
24 that has arisen under that statute, for example,  
25 demonstrates - - -



1                   JUDGE WILSON: But you're sort of - - - you're  
2 answering a different question, I think, which is that  
3 there was - - - at the time of the arrest, there was a  
4 chance of some imminent risk. But isn't the statute asking  
5 about the imminent danger of the child being impaired now,  
6 that is, when OCFS is making its investigation?

7                   MR. GRIECO: No, and that actually brings me to -  
8 - - to a point that is raised in - - - in both the  
9 petitioner's papers and in the - - - in the amici's papers.

10                   Although the maltreatment standard and the  
11 neglected - - - although the maltreatment standard is  
12 defined by reference to the neglect standard, those two  
13 standards arise in proceedings that are asking two  
14 fundamentally different questions. When OCFS is reviewing  
15 a request to amend an "indicated" report of maltreatment to  
16 "unfounded" under Social Services Law 422 - - - that's this  
17 case - - - the question is whether the place - - - the  
18 child was placed in imminent danger by unreasonable pa - -  
19 - parental behavior on a specific occasion.

20                   In a neglect proceeding under Family Court Act  
21 Article 10, the question is whether the child is currently  
22 in imminent danger.

23                   JUDGE FAHEY: Well, does - - - isn't the argument  
24 there that maltreatment and neglect will amount to the same  
25 thing?

1 MR. GRIECO: The standard that is used to  
2 evaluate whether the - - - whether the harm was - - - was  
3 imminent in - - - and - - - and what degree of harm is  
4 required is the same - - - is the same harm. But the  
5 question being asked in the proceedings is whether - - - in  
6 a maltreatment review, whether the child was, at a specific  
7 moment, placed - - -

8 JUDGE FAHEY: Well - - -

9 MR. GRIECO: - - - in imminent danger.

10 JUDGE FAHEY: Well, how - - - this case seems to  
11 me to be about the standard; and so what about a V&T  
12 violation; driving drunk with my child in the car?

13 MR. GRIECO: Would that be maltreatment; is that  
14 the question? Driving drunk with a child in the car would  
15 - - - would in - - - under most circumstances that I can  
16 imagine be maltreatment.

17 JUDGE FAHEY: Speeding?

18 MR. GRIECO: If it - - - if the speed is high  
19 enough. It's always going to be a totality of the  
20 circumstances.

21 JUDGE FAHEY: How about running a stop sign?

22 MR. GRIECO: If it was - - - if - - - under  
23 particular circumstances, it might be. There's - - -  
24 there's no categorical case, but running a stop sign could,  
25 if the - - -



1 JUDGE RIVERA: What - - - what - - -

2 MR. GRIECO: - - - parent - - - if it's - - -

3 JUDGE RIVERA: What if - - -

4 JUDGE FAHEY: So any negligent - - - I'm sorry.

5 Why don't you go ahead?

6 JUDGE RIVERA: No, please, please.

7 JUDGE FAHEY: Any negligent act by a parent can

8 be translated as - - - into maltreatment?

9 MR. GRIECO: It depends - - - it depends on the  
10 totality of the circumstances. There's many kinds of acts  
11 that would qualify as poor judgment.

12 JUDGE FAHEY: Well, does it matter - - - does it  
13 matter - - - we - - - we have case law that talks about a  
14 child used in a bank robbery, as opposed - - - and that's,  
15 of course, a felony charge.

16 MR. GRIECO: Right.

17 JUDGE FAHEY: And here we have a child that was -  
18 - - the way I understand the allegation - - - was used in a  
19 misdemeanor, a petit larceny.

20 MR. GRIECO: Right, and the - - - the difference  
21 - - -

22 JUDGE FAHEY: Does - - - does - - - does that  
23 distinction matter between felony and a misdemeanor?

24 MR. GRIECO: It - - - it matters as one of the  
25 circumstances that affects whether there is a - - - a



1 determination of maltreatment or abuse, and whether the  
2 determination is maltreatment or abuse. The Rashard case,  
3 for example, was - - -

4 JUDGE FAHEY: So - - -

5 MR. GRIECO: - - - was an abuse case, which  
6 requires a finding that the child was in - - - in danger  
7 either of death or of the loss of an organ, so extremely  
8 serious degree of bodily harm, and yet in that particular  
9 case, that Appellate Division found it satisfied - - -

10 JUDGE RIVERA: So then is just sending - - -

11 MR. GRIECO: - - - although there was no  
12 confrontation - - -

13 JUDGE RIVERA: - - - is just sending a message to  
14 the child?

15 MR. GRIECO: Well, you - - -

16 JUDGE RIVERA: Or even expressly saying to the  
17 child that shoplifting is okay, would not constitute  
18 maltreatment?

19 MR. GRIECO: The - - - what you're - - - you're  
20 addressing now the danger of - - - of mental or emotional  
21 harm, and that is - - - that is a separate basis on which  
22 the determination of maltreatment could be upheld in this  
23 particular case. The - - - the - - - this court should  
24 reverse if it finds either - - -

25 JUDGE RIVERA: So - - - so - - - so what - - -



1 what if - - -

2 MR. GRIECO: - - - physical or emotional  
3 satisfied - - -

4 JUDGE RIVERA: - - - I'm a parent; I'm with my  
5 child in the store. The child takes a candy bar, and I - -  
6 - I see the child wants this candy bar. I don't want to  
7 pay for it for whatever reason. I say, well, just put it  
8 in your pocket. Maltreatment?

9 MR. GRIECO: I don't know that that's going to be  
10 maltreatment in every circumstance. If it is the kind of  
11 thing that - - - if it - - - if there are exacerbating  
12 circumstances, it might be maltreatment. At least as to  
13 the physical confrontation - - -

14 JUDGE RIVERA: I don't - - - well, so how is that  
15 different between put on those boots and put on the coats?

16 MR. GRIECO: Well, the - - - the sub - - - the  
17 substantial amount of merchandise that was being stolen in  
18 this case, which as - - - as the ALJ and the dissent below  
19 both noted, was - - - came close to 3,000 dollars. That  
20 was one factor that the OCFS - - -

21 JUDGE FAHEY: So - - - so the factor is really -  
22 - -

23 MR. GRIECO: - - - reasonably considered - - -

24 JUDGE FAHEY: - - - that the child was be - - -  
25 being used in - - - in an organized shoplifting effort,





1           rather than - - -

2                       MR. GRIECO: That is correct. The - - - the  
3           child was not merely a - - - was - - - was not merely  
4           present.

5                       JUDGE FAHEY: You see, I - - - I kind of agree  
6           with that. The problem I'm struggling with is a five-year-  
7           old being used - - - a five-year-old, really? A five-year-  
8           old knows - - - can draw that kind of distinction? Now, if  
9           I was twelve, I could see that. But, you know, these - - -  
10          these rational distinctions are the basis of the law, and -  
11          - - and the application of these standards. So I - - - I'm  
12          wondering, would it be a different standard or - - - or a  
13          different application if the child were older, as opposed  
14          to the child being younger?

15                      MR. GRIECO: The age of the child would always be  
16          a consideration. Here, I don't think OCFS wa - - - acted  
17          unreasonably, including (sic) that five is an  
18          impressionable age.

19                      JUDGE STEIN: So if it was an infant, for  
20          example, who had - - - in this same situation, an infant  
21          and - - - and mother puts diapers in the infant's stroller,  
22          and uses the infant to commit a crime, okay. Is - - - is -  
23          - - is that a same case as - - - as we have here or a  
24          different - - -

25                      MR. GRIECO: Well, at least with respect to - - -



1 to that case, if it's an infant, the child's not going to  
2 understand what's going on, and the dam - - - the danger of  
3 mental and emotional harm is reduced.

4 JUDGE STEIN: So you're - - - you're not asking  
5 for a bright-line rule here.

6 MR. GRIECO: We are not. We are a - - - we are  
7 emphatically asking for the court to - - - to hold only  
8 that the - - - that OCFS was permitted to reach the  
9 determine (sic) that it reached, not that would - - - the  
10 determination needed - - -

11 JUDGE STEIN: What's our standard of review here?

12 MR. GRIECO: The standard of - - - the standard  
13 of review is whether the evidence at the trial was legally  
14 sufficient to permit OCFS to reasonably wo - - - conclude  
15 that - - -

16 JUDGE STEIN: It's not - - -

17 MR. GRIECO: - - - maltreatment occurred.

18 JUDGE STEIN: - - - it's not an Article 78 where  
19 we're looking at whether it's arbitrary and capricious or  
20 irrational?

21 MR. GRIECO: That would - - - yeah - - - yes, the  
22 - - - the - - - the question - - - the question that she  
23 has explicitly raised in her petition is that the ALJ's  
24 decision was affected by an error of law. And our position  
25 is simply that the - - - the decision was not legally



1 erroneous.

2 I want to put the - - -

3 CHIEF JUDGE DIFIORE: Counsel - - - counsel, do  
4 you care to turn to the R&R findings?

5 MR. GRIECO: Yes, that's - - - exactly. So I  
6 want to turn to a problem with how the First Department  
7 framed this case. The - - - the court below said that the  
8 issue is solely whether the petitioner's name should be  
9 maintained on a list that would make it difficult to - - -  
10 for her to obtain a position in childcare. But that is  
11 wrong, because someone who provides evidence of mitigation  
12 or evidence that her conduct will not recur, could avoid an  
13 R&R finding, even for the exact same conduct that the  
14 petitioner acknowledges she engaged in here.

15 And if there is no R&R finding, the existence of  
16 the report cannot be disclosed to employers, even though it  
17 was upheld as indicated. And that is the point - - -

18 JUDGE RIVERA: So just to be clear, what - - -  
19 what are the categories of mitigation evidence you're  
20 thinking of? What if she came forward and said she was  
21 doing something to ensure she never did this again?

22 MR. GRIECO: Right. That - - - that is correct.  
23 The - - - the ALJs in these proceedings are accustomed to  
24 seeing affirmative evidence of mitigation, such as  
25 testimony that they have not - - - that they're - - - that



1 it's not going to recur, how cla - - - people have taken  
2 parenting classes, that kind of thing, and testified to  
3 that.

4 JUDGE RIVERA: In her case, because she has no  
5 record, you - - - I assume your position is that might have  
6 been a viable argument on her part?

7 MR. GRIECO: It - - - if it is the case that her  
8 conduct is not at risk of recurring and had not occurred -  
9 - - and - - - and was - - - had not reoccurred by the time  
10 of the ALJ's hearing, an appropriate thing that an ALJ  
11 would expect someone to say would be this hasn't - - - this  
12 hasn't recurred and - - -

13 CHIEF JUDGE DIFIORE: And she didn't testify,  
14 right?

15 MR. GRIECO: And she didn't test - - - and she -  
16 - - and she was counseled at the fair hearing and made a -  
17 - - made a decision not to testify. And as this court said  
18 in the Denise J. case and other cases, the ALJs are  
19 permitted to - - - to draw a strong negative inference when  
20 someone has engaged in such conduct and chooses not to  
21 explain it. And - - -

22 CHIEF JUDGE DIFIORE: Thank you, Counselor.

23 JUDGE GARCIA: Chief, may I - - - Chief, may I  
24 ask - - -

25 CHIEF JUDGE DIFIORE: Yes, of course.



1 JUDGE GARCIA: I'm sorry. I'm a little confused  
2 and I - - - over of your approach, because on the one hand  
3 you seem to be saying that it's an objective analysis, so  
4 if we look and we see, you know, there's no impact on this  
5 particular child, but look at these circumstances, because  
6 this child was used in this shoplifting incident. But then  
7 when you were asked about an infant, and you said, well,  
8 that it could have no effect on the infant, but why  
9 wouldn't the objective considerations be the same?

10 MR. GRIECO: So - - - so the objective prong of  
11 the maltreatment analysis comes in in one of the two  
12 prongs. The objective prong is whether the parent's act  
13 was objectively unreasonable under the circumstances. We  
14 understand that point - - - that prong to be conceded  
15 before this court, because we raised it in our opening  
16 brief, and the respondent chose not to dispute it.

17 The - - - the question of imminent harm, that's  
18 always going to be a - - - or imminent danger - - - is  
19 always going to be a totality of the circumstances  
20 analysis.

21 JUDGE GARCIA: Right, but okay. So isn't there  
22 some need in that second prong, if the first part is an  
23 objective analysis under your standard, for there to be  
24 some impact demonstrated on the particular child?

25 MR. GRIECO: Well, that would be inconsistent - -



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JUDGE GARCIA: Because why isn't it then just the first prong again?

MR. GRIECO: Well, that would be inconsistent with the - - - with the statute, which - - - which - - - which allows a finding of maltreatment based on either actual harm or imminent - - - imminent danger of - - - of harm. And on the particular facts of this case that I enumerated at the start of my argument, OCFS reviewed the considerations that are relevant to determining whether the danger was imminent as opposed to merely possible.

With the court's permission, I'll reserve the balance of my time.

CHIEF JUDGE DIFIORE: Thank you, counsel.  
Counsel?

MS. SOLOWAY: May it please the court, Audra Soloway from Paul, Weiss, Rifkind, Wharton & Garrison LLP, on behalf of respondent, Natasha W.

Before I jump into what - - - what the State just covered, I want to pause for a moment on the jurisdictional question, because we believe that there is no jurisdiction for this court to hear this appeal. As - - - as the court is no doubt aware, the sole basis for this appeal is under C.P.L.R. 5601(a), which provides that an appeal may be taken as of right only where the dissent - - -

1 JUDGE FAHEY: Let me ask this. What facts would  
2 you say are in dispute?

3 MS. SOLOWAY: So I - - - I - - - I would say that  
4 the record, while it's closed and before this court, is the  
5 record.

6 JUDGE FAHEY: Um-hum.

7 MS. SOLOWAY: The inferences to be drawn from the  
8 various facts and the way that the judge in the dissent  
9 looked at the facts differently and applied the law to the  
10 facts, does not create a question of law, as the statute  
11 requires.

12 JUDGE STEIN: But we did - - - I - - - I thought  
13 in an Article 78 proceeding where - - - it's always a  
14 question of - - - of law, as to whether it - - - whether it  
15 was arbitrary and capricious, irrational, or - - - or an  
16 error of law. Why is this different?

17 MS. SOLOWAY: It's different - - - it's different  
18 for a couple of reasons, and I think the most important one  
19 is that when you decide whether 5601(a) has been satisfied,  
20 the only thing you look at is the dissent below and the  
21 basis for the dissent below. And here, what the dissent  
22 was based on - - - the two-judge dissent - - - was based on  
23 that judge's inferences and the way that judge felt - - -

24 JUDGE STEIN: Or - - - or was it - - -

25 MS. SOLOWAY: - - - that the facts were - - -



1 JUDGE STEIN: - - - based on whether the minimum  
2 standard for making these findings was met.

3 MS. SOLOWAY: Well - - -

4 JUDGE STEIN: Because then there - - - then, even  
5 if we are looking at whether it's a mixed question, it can  
6 be a question of law, right?

7 MS. SOLOWAY: Right. I mean, if you just - - -  
8 if you look at some of the - - - the findings by the  
9 dissent here. Just to give you an example, what the  
10 dissent said is, "I would find that petitioner's  
11 utilization of her five-year-old son to steal two coats and  
12 a pair of boots from Bloomingdale's constituted  
13 maltreatment and was sufficiently egregious so as to create  
14 an imminent risk of physical, mental, and emotional harm."

15 So what - - - what the dissent is saying is the  
16 inferences that I would draw from this behavior, my - - -  
17 my understanding of the facts here, it does meet the legal  
18 - - -

19 JUDGE STEIN: Or it could be that - - - right - -  
20 - or - - - or that under no circumstances does this meet  
21 the, you know, Nicholson standard or whatever.

22 MS. SOLOWAY: But - - - but I think what's  
23 important is that the dissent relied on the exact same  
24 statutes. The dissent relied on the exact same Nicholson  
25 standard. There is no dispute about what the relevant



1 legal standards are here. The dissent just drew - - -

2 JUDGE FAHEY: No, it's more of a - - -

3 MS. SOLOWAY: - - - different inferences.

4 JUDGE FAHEY: - - - more of a legal sufficiency  
5 question.

6 MS. SOLOWAY: Which - - - which I think - - -

7 JUDGE FAHEY: Are - - - are the - - - are these  
8 facts sufficient to meet the standard? That - - - that - -  
9 - and that seems like a - - - a legal question.

10 MS. SOLOWAY: A mixed question of fact and law  
11 under this court's - - -

12 JUDGE FAHEY: I - - - I'm not sure I agree with  
13 that.

14 MS. SOLOWAY: Your Honor, I think - - -

15 JUDGE RIVERA: So on - - - on the merits - - -

16 MS. SOLOWAY: Yes?

17 JUDGE RIVERA: - - - isn't the logical result of  
18 what I thought was the rule you were promoting in your  
19 briefing, that they would always have to present expert  
20 testimony of the impact of in - - - involvement in criminal  
21 behavior would have on the child?

22 MS. SOLOWAY: It is not our argument that the  
23 State would always have to present expert testimony, and  
24 you can think hypothetically in this case of several ways  
25 that the State might have been able to prove its case.



1 We're not arguing that there's no case of shoplifting where  
2 the State could meet the burden that it has to meet.

3 You could imagine - - - we don't know what would  
4 be in the record here, because the State didn't put it in,  
5 but for example, you could imagine a situation where when  
6 the caseworker interviewed the security guard at  
7 Bloomingdales, the security guard may have been asked, how  
8 often does a - - - does a - - - a detention at  
9 Bloomingdale's or a department store, in your experience,  
10 result in a violent altercation or a physical altercation.  
11 Or when they interviewed - - -

12 JUDGE FEINMAN: Well, what if the kid just  
13 started crying when the mother gets arrested and - - - and  
14 - - - and he sees mom leaving and - - - and put in the cage  
15 that they have at the department stores waiting for the  
16 police department?

17 MS. SOLOWAY: I - - - I think - - -

18 JUDGE FEINMAN: Is that a - - - is that a  
19 sufficient impact?

20 MS. SOLOWAY: I - - - I think if the child were  
21 sufficiently distressed that - - - that you were able to,  
22 you know, using some kind of - - - perhaps, a social worker  
23 at the school, for example, could have given an opinion on  
24 whether that kind of distress has presented an imminent  
25 risk of harm to the child. That might be one piece of

1 evidence that, in the totality of the circumstances, could  
2 perhaps, you know, start to push this across the line. But  
3 I think that the important - - -

4 JUDGE STEIN: It seems to me, though, that you're  
5 - - - that in - - - in the examples given, in that one,  
6 it's did - - - did - - - was the child actually harmed,  
7 okay; and in the other one, we're talking about imminent  
8 physical harm. I think the harder one to get at here is  
9 the imminent emotional harm. And - - - and - - - and so,  
10 you know, I'm interested in how one would prove that, in  
11 your view, short of expert testimony.

12 MS. SOLOWAY: Right, well, to be - - - to be  
13 clear, at the - - - at the hearing, hearsay is permitted.  
14 So an interview with a psychologist, an interview with a  
15 school social worker, all of that could come in. So I  
16 think that - - -

17 JUDGE STEIN: But that's like expert testimony,  
18 so - - - right?

19 MS. SOLOWAY: Well, they - - - these interviews  
20 were conducted anyway; and had these questions been asked,  
21 we don't what the answers might have been. I think the  
22 point I'm trying to make is, it wouldn't have been  
23 necessary for the State to go out and retain an expert, to  
24 bring that person in to testify. It would - - - it's a far  
25 lower threshold - - -



1 JUDGE RIVERA: But - - - but doesn't that - - -

2 MS. SOLOWAY: - - - because hearsay is permitted.

3 JUDGE RIVERA: - - - but doesn't that end up  
4 being the battle of experts, and so in one case, where the  
5 exact same conduct occurs, you're going to have a battle of  
6 experts, and it comes out one way, and another case, same  
7 conduct, a - - - it comes out another way?

8 MS. SOLOWAY: Well, I - - - I think the - - - I  
9 think the bottom line is, there has to be some evidence,  
10 and it may be expert or it may be fact evidence, from which  
11 you can conclude that there's been an impairment of the men  
12 - - - of mental or emotional condition. And that  
13 impairment has to be near or impending. It has to be  
14 imminent. It can't just be merely possible.

15 JUDGE WILSON: So what if the grandparents - - -

16 MS. SOLOWAY: And here - - -

17 JUDGE WILSON: What if the grandparents had  
18 instead told the investigator, oh, she does this all the  
19 time?

20 MS. SOLOWAY: Well, I think - - -

21 JUDGE WILSON: Would that - - - would that change  
22 things?

23 MS. SOLOWAY: I think you would still need some  
24 evidence to understand whether, when you expose a child to  
25 repeated instances of shoplifting, that has some, you know,



1 impact on their mental or emotional condition.

2 JUDGE RIVERA: So aren't we back to, you need an  
3 expert?

4 MS. SOLOWAY: But I think that's a very different  
5 case, because here, the proposition that the State advanced  
6 was that a single isolated instance of shoplifting is  
7 enough to push us from merely possible to, you know,  
8 imminent, near, impending.

9 JUDGE FAHEY: But it still comes down to the  
10 standard, which is whether or not there was a failure here  
11 to exercise a minimum degree of care, right?

12 MS. SOLOWAY: Well, I think the standard here is  
13 whether - - -

14 JUDGE FAHEY: Or a maltreated child?

15 MS. SOLOWAY: Well, the standard here that - - -  
16 that we've contested is whether an - - - an imminent risk  
17 of danger has been proven, either physically - - -

18 JUDGE FAHEY: Okay, so Nicholson, then, yeah,  
19 okay.

20 MS. SOLOWAY: - - - emotional.

21 CHIEF JUDGE DIFIIORE: Counsel, does the fact that  
22 the Agency didn't initiate a neglect proceeding in family  
23 court or there were no services that were ordered for the  
24 mom, does that undermine their finding?

25 MS. SOLOWAY: I - - - I don't think there's a - -



1 - I don't think - - - and I know this came up in the  
2 briefs, because there was a - - - an assumption that that  
3 was the conclusion that the First Department here reached.  
4 The First Department looked at all of the evidence,  
5 including whether the - - - whether services had been  
6 recommended, or whether there was a - - - a risk in the  
7 home of any kind, but that's really just taking the  
8 totality of the circumstances and considering it, which is  
9 precisely the inquiry that Nicholson suggests.

10 The fact - - - the mere fact that they didn't,  
11 you know, take any action outside of putting our client on  
12 the registry, that, in and of itself, I think, does not  
13 have legal significance.

14 JUDGE FAHEY: You know, one of the cases in the  
15 spectrum of these kind of cases is Rashard D., which is the  
16 - - - the bank case. You're familiar with it?

17 MS. SOLOWAY: Yes.

18 JUDGE FAHEY: And of course, there, I - - - I  
19 think you could argue that during the act of - - - of  
20 robbery, that the child was in imminent physical danger.  
21 It's a little bit different here, but it's still on that  
22 same continuum. And we're talking about a - - - a  
23 misdemeanor crime, petit larceny, versus a - - - a felony  
24 crime. And it seems that if it meets the elements of - - -  
25 of those crimes, how is that not a danger to the child's



1 future mental or emotional wellbeing?

2 MS. SOLOWAY: Well, I think - - - I think that  
3 the - - - the danger here of relying on - - -

4 JUDGE FAHEY: I'm sorry; I - - - I phrased that a  
5 little poorly. How is it irrational, I guess, is - - - is  
6 - - - to make that conclusion?

7 MS. SOLOWAY: Well, a - - - as Your Honor pointed  
8 out, the Rashard D. case is a very, very different case,  
9 where a twelve-year-old was instructed to walk into a bank  
10 with a note, threatening violence, and there was evidence  
11 that the police would come in - - -

12 JUDGE FAHEY: I think you're right about that.

13 MS. SOLOWAY: - - - with guns drawn, right.

14 JUDGE STEIN: Hasn't maltreatment been found in  
15 cases where there's just sort of a failure to supervise,  
16 and a child wanders off and - - - and no actual harm  
17 occurs, but - - - but there's - - - and as far as I know,  
18 no expert testimony. So to me, that seems to be sort of on  
19 the other end of the spectrum, from the armed robbery. And  
20 - - - and this is somewhere in the middle. So - - -

21 MS. SOLOWAY: I - - -

22 JUDGE STEIN: - - - why doesn't this fall - - -  
23 you know - - -

24 MS. SOLOWAY: Well, I - - - I think that - - - I  
25 think that what's hard about this area of the law is this



1 court has expressly said, and it's done that in several  
2 other decisions, that there's no bright-line rule here.  
3 It's - - - every case is taken on a case-by-case basis  
4 where you look at the specific circumstances. That's what  
5 Nichol - - -

6 JUDGE STEIN: But if just losing track of your  
7 child for a few minutes can lead to a finding of  
8 maltreatment, I - - - I don't understand why this can't  
9 rationally be found to - - - to constitute maltreatment?

10 MS. SOLOWAY: I - - - I don't - - - I don't think  
11 losing track of your child for a few minutes without  
12 extenuating circumstances - - - and obviously it would  
13 depend on the child's age and the situation and the place  
14 that you were located in - - - but I don't think there are  
15 many, if any, cases that they have held that merely doing  
16 that is maltreatment of a child. But - - - but I think  
17 that the - - - the - - - this case would be the first case  
18 that - - - and there's no cases cited in any of the briefs  
19 where an isolated instance of petit larceny or petty - - -  
20 petty crime was - - -

21 JUDGE STEIN: But it's not just the petit  
22 larceny. If she went in with this child, and  
23 surreptitiously, you know, took a few things and put it  
24 under her coat, didn't involve the child at all, we might  
25 very well be looking at a completely different case.



1 MS. SOLOWAY: But that assumes that a - - - that  
2 this five-year-old, based on an isolated instance, where he  
3 was used to shoplift with his mother, appreciated what was  
4 going on, and learned from it. And - - -

5 JUDGE STEIN: How do you know it's an isolated  
6 incident?

7 MS. SOLOWAY: Well, there's - - - there is no  
8 evidence in the record. There was no criminal - - -

9 JUDGE STEIN: Well, that's right.

10 MS. SOLOWAY: - - - there was no criminal  
11 history, no prior ACS history. All four grownups who lived  
12 in the home, her sisters and her parents, both said that  
13 they were aware of no other instance of this.

14 JUDGE STEIN: Maybe he was so calm because - - -  
15 it was because he - - - this had been done several times  
16 before and it was no big deal. And they never got caught.  
17 Isn't - - - that's a possibility; isn't it?

18 MS. SOLOWAY: Well, Your Honor, I would  
19 respectfully submit that that is - - - that does not get us  
20 to near and impending. I mean, I think that's the land of  
21 - - - we're - - - we're sort of speculating. And - - -

22 JUDGE RIVERA: But - - - but your position is, is  
23 absolutely no consequence. That the child in - - - has no  
24 consequence, having not only observed their mother commit a  
25 crime and get arrested, but having been a - - - an

1 absolutely integral part of the attempted crime.

2 MS. SOLOWAY: I - - - I think the problem is that  
3 there's no evidence in the record from which we can  
4 conclude that there was a consequence. He wasn't upset.  
5 His school social worker said he's doing beautifully at  
6 school. The grandparents and the - - - and the aunts all  
7 concurred that he has a happy, healthy home life - - -

8 JUDGE RIVERA: That's what I'm saying. We're now  
9 back to the - - - the - - - the logical end result of your  
10 argument is that they've always got to have expert  
11 testimony, that there's no way around that.

12 MS. SOLOWAY: I don't think they needed an expert  
13 here. If they - - - if they'd asked even just the school  
14 social worker, what's your view when a five-year-old is  
15 used by his mother to shoplift? This - - -

16 JUDGE RIVERA: And then you'd be saying, what  
17 does a social worker know?

18 MS. SOLOWAY: Well, then I'd ha - - - but then at  
19 least, the State would have put in some evidence that an  
20 isolated instance of shoplifting gets them from merely  
21 possible, across the line to impending.

22 JUDGE RIVERA: How about there's some evidence,  
23 not along this vein, but a different - - - different line  
24 of the child when asked, has this happened before, saying  
25 yes, and then no? How about that as re - - - showing

1 recurring conduct?

2 MS. SOLOWAY: Right. I think that - - - I think,  
3 he said yes then no. We don't - - - we - - - none of us  
4 obviously were there. That's in the cold record. I think  
5 the fact that four grownups who live in the home all said  
6 that they weren't aware of any instance of it, the fact  
7 that there's no criminal history - - -

8 JUDGE RIVERA: They're all related to her. They  
9 all have a connection. Do you see the point there, right?

10 MS. SOLOWAY: Well, the fact that there's no  
11 criminal history or prior ACS history, I think that you're  
12 allowed to draw, you know - - - we can draw inferences from  
13 the fact that she didn't testify, but they have to be  
14 reasonably based on the record. And to conclude that this  
15 had happened on numerous other occasions, goes beyond what  
16 the record here can support.

17 CHIEF JUDGE DIFIORE: Thank you, Ms. Soloway.

18 MS. SOLOWAY: Thank you, Your Honor.

19 CHIEF JUDGE DIFIORE: Counsel?

20 MR. GRIECO: My counterpart's focus on the - - -  
21 on how the child is doing at home and the broader  
22 investigation il - - - illustrates how this case is  
23 fundamentally about what role we're going to expect the SCR  
24 to play in New York - - - the Statewide Central Register.  
25 As a matter of longstanding practice as demonstrated by its



1 own past practices and the CPS manual that OCFS distributes  
2 to CPS workers without - - - throughout the state, and the  
3 substantial body of case law, the SCR has always been  
4 understood as a record of specific acts of maltreatment or  
5 abuse.

6 And by contrast, the petition - - - the position  
7 of my adversary and her amici, would result in a world in  
8 which an - - - an entry in the SCR is only appropriate when  
9 there's a determina - - - determination of current  
10 dangerousness to the child or actual harm, as opposed to  
11 imminent danger. That would defeat the purpose of the SCR,  
12 which is to serve as a record of specific past acts, in  
13 which a child was placed in imminent danger by unreasonable  
14 parental behavior, in order to track a caregiver whose past  
15 behavior raises red flags, red - - - red flags that are  
16 useful in at least three instances: in future  
17 investigations involving the same child or the same  
18 caregiver; in instances where a caregiver may be placed in  
19 charge of the children of others; and for statistical  
20 purposes.

21 And turning back briefly to the R - - - the R&R  
22 determination, that is the point in the analysis at which  
23 it is appropriate to consider the - - - the potential  
24 effect on the petitioner, not the earlier determination of  
25 whether there was maltreatment. That is an important error



1 in the First Department's decision that I wanted to  
 2 highlight, that its focus on the effect - - - on the  
 3 petitioner, is misplaced, to the extent that that - - -  
 4 that that concern is - - - is considered during the  
 5 evaluation of the maltreatment issue.

6 That comes into play as one of a number of  
 7 factors in the - - - the R&R determination. And with  
 8 respect to the R&R determination, we - - - we think it's  
 9 extremely important how - - - that this court clarify the -  
 10 - - the - - - the very deep and broad error in the First  
 11 Department's determination on - - - on that issue. It  
 12 essentially adopted a presumption of irregularity in  
 13 administrative proceedings, unless every guideline is  
 14 discussed by name. The - - - the SCR, of course, in its  
 15 initial determination on page 177 of the record, listed  
 16 several factors that it - - - that it took into account at  
 17 its written review. That was then before the ALJ, who  
 18 referenced his earlier discussion and then addressed the  
 19 additional factor of the petitioner's failure to - - -

20 JUDGE RIVERA: So - - - so - - -

21 MR. GRIECO: - - - demonstrate - - -

22 JUDGE RIVERA: - - - your position is, if - - -  
 23 if one could comb through the opinion and identify, without  
 24 the express terminology in the opinion, that I'm now  
 25 addressing this factor, now I'm addressing this factor - -



1 - but if you could comb through and say, well, that goes to  
2 that factor, that addresses that factor, as long as those  
3 factors are relevant, the ALJ has done their job - - -

4 MR. GRIECO: Yeah. I don't think it's - - -

5 JUDGE RIVERA: Am I understanding?

6 MR. GRIECO: I don't think it takes a great deal  
7 of combing in this case, Judge Rivera, because he - - - he  
8 - - - he made it very clear just a - - - a page earlier,  
9 the degree of seriousness that he attached to the act and  
10 his concern about the effect on the child, which - - - both  
11 of which are factors. And then that, plus the fact that  
12 the SCR itself had already enumerated several factors, and  
13 his statement as discussed above, where he incorporated his  
14 earlier decision by reference, that is, under any  
15 reasonable standard of deference to administrative agency  
16 and administrative procedure, correct.

17 JUDGE RIVERA: That's what I'm saying. You're  
18 looking back for some - - - the context of the opinion to  
19 determine that, yes, one could look at this and say that  
20 the factors were taken - - -

21 MR. GRIECO: That's - - -

22 JUDGE RIVERA: - - - into consideration, even if  
23 - - -

24 MR. GRIECO: That's right.

25 JUDGE RIVERA: - - - they're not enumerated



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specifically.

MR. GRIECO: That's right. In - - - in most cases, if - - - if someone were challenging an R&R determination, it would ordinarily be brought as a substantial-evidence challenge. She specifically did not bring a substantial-evidence challenge here. So the R&R determination should only be set aside if she meets the very high bar of showing that it was procedurally irregular, which she has not done.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Natasha W. v. New York State Office of Children and Family Services, et al., No. 65 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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