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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF PARKER J.

NO. 85

20 Eagle Street
Albany, New York
October 14, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Matter of Parker J.

3 MR. ROTHSCHILD: Good morning, Your Honors. May
4 it please the court. Excuse me. Good afternoon, Your
5 Honors. May it please the court. Bill Rothschild, Hiscock
6 Legal Aid, on behalf of - - - behalf of Appellant Beth F.
7 Parents in family court - - -

8 CHIEF JUDGE WILSON: Do you wish to reserve any
9 time for rebuttal?

10 MR. ROTHSCHILD: Yes. Three minutes, please.

11 CHIEF JUDGE WILSON: Yup.

12 MR. ROTHSCHILD: In family court, the parent's
13 right to counsel is guaranteed by case law, statute, and
14 the constitutions of both New York and the United States.
15 This presumes that counsel is effective, is more than just
16 the pro forma appointment of - - -

17 JUDGE TROUTMAN: Now, it's been said that with
18 respect to rights in criminal cases, there is a right to
19 effective counsel. Has that been decided the same way for
20 family court?

21 MR. ROTHSCHILD: Yes. I believe it has, Your
22 Honor, that the right is essentially equivalent for - - -
23 for family court and - - -

24 JUDGE TROUTMAN: And what does that encompass, to
25 be an effective attorney?

1 MR. ROTHSCHILD: I think it depends upon the
2 context and the circumstances.

3 JUDGE TROUTMAN: And here, what was not
4 effective?

5 MR. ROTHSCHILD: Well, the context here is that
6 counsel did not meet with - - - that there's strong proof
7 counsel did not meet with the client for - - - in the seven
8 weeks that this case had been pending.

9 JUDGE TROUTMAN: What about the fact that the
10 record is silent as to whether it was because counsel
11 couldn't contact her or because she was in counseling?
12 What are we to do about that?

13 MR. ROTHSCHILD: I think that, you know, if we
14 can all agree that the right to counsel is paramount, this
15 court's obligation is to - - - basically, it's the
16 searching inquiry that really has to be done. Any - - - in
17 Faretta and all these other cases - - -

18 JUDGE CANNATARO: I'm sorry. Are you saying that
19 the court here failed to do some sort of inquiry that it
20 was supposed to do?

21 MR. ROTHSCHILD: I believe it did some sort of
22 inquiry.

23 JUDGE CANNATARO: With regard to what? Not the
24 decision to go without counsel? There was an inquiry made
25 on that, right?

1 MR. ROTHSCHILD: There was an inquiry, Your
2 Honor. However, I believe that, as this court has said,
3 and other courts have said, the waiver requires a searching
4 inquiry. And that is dependent upon the circumstances.
5 You must show that the party understands the stakes and
6 nature of the case. Obviously, the stakes are very high.
7 The nature of the case involves many different factors.
8 The procedure is - - -

9 JUDGE TROUTMAN: So is the ineffective and the
10 waiver one and the same? Or are they separate questions?

11 MR. ROTHSCHILD: I think that ineffective
12 assistance of counsel, I - - - I think that when the court
13 is on notice of something, I think it has an obligation to
14 inquire. Given the fundamental right to counsel, the court
15 has to do a - - - an inquiry which is based upon what
16 occurred below. And what occurred below here was - - -

17 JUDGE RIVERA: But to be clear, I thought your
18 position was that based on the record as it stands, counsel
19 was ineffective.

20 MR. ROTHSCHILD: I think that - - -

21 JUDGE RIVERA: Number one, you've already said,
22 in response to Judge Troutman, because I think you said
23 approximately seven weeks hadn't met with the client. But
24 I thought you had other grounds.

25 MR. ROTHSCHILD: Yes. There were other points.



1 So the fact that it - - - it's pretty clear that counsel
2 had not reviewed the papers that had been subpoenaed.
3 That's our argument. Obviously, there was no inquiry by
4 the court. There should have been inquiry by the court as
5 to that.

6 But most importantly, when counsel said this,
7 counsel also said, well, because I haven't had a chance to
8 meet with her, I would like to remain mute. Now in the
9 terms of the waiver of counsel, I think that's a very
10 important - - - that's kind of a - - -

11 JUDGE CANNATARO: But counsel - - - the lawyer
12 there was told by the court in no uncertain terms that that
13 wasn't an option.

14 MR. ROTHSCHILD: Yes. And - - -

15 JUDGE CANNATARO: Remaining mute is not the right
16 thing to do.

17 MR. ROTHSCHILD: Absolutely.

18 JUDGE CANNATARO: So then, where - - - what was
19 the ineffective act once counsel was advised that they were
20 going forward.

21 MR. ROTHSCHILD: I think the problem was - - -
22 what the court said was, basically, it doesn't matter.
23 This case is going forward.

24 JUDGE TROUTMAN: But let us focus - - -

25 MR. ROTHSCHILD: Yes.



1 JUDGE TROUTMAN: We're asking you, separate out
2 effect - - - ineffective versus the waiver. Can you be
3 ineffective regardless of the waiver being valid?

4 MR. ROTHSCHILD: I believe you can.

5 JUDGE TROUTMAN: And in this particular instance,
6 what was ineffective on the part of the attorney? Not what
7 the court did or did not ask with respect to the waiver.
8 Let's wait for that. What was ineffective here?

9 MR. ROTHSCHILD: Failing to meet with the client,
10 not reading the papers, not moving for an adjournment, not
11 joining in the motion for adjournment by co-respondent's
12 counsel, and then saying, I'm going to remain mute. All -
13 - -

14 JUDGE HALLIGAN: I wanted to ask you about the
15 adjournment. Do you think if counsel had either joined or
16 sought an adjournment or continuance that would have
17 obviated any freestanding claim of ineffective assistance?

18 MR. ROTHSCHILD: I think that would have given
19 counsel an opportunity to talk with - - - with Beth in this
20 case, because here, there was not even that opportunity,
21 even when they got to court, because this was - - -

22 JUDGE HALLIGAN: And so would a claim for
23 ineffective assistance still lie in that event?

24 MR. ROTHSCHILD: I think it's definitely a
25 violation - - - it's arguably a violation of the rules of

1 professional conduct. That's the type of behavior that can
2 get you sanctioned, grieved - - -

3 JUDGE HALLIGAN: Right. But - - - but - - -

4 MR. ROTHSCHILD: - - - and possibly disbarred.

5 JUDGE HALLIGAN: Okay.

6 JUDGE CANNATARO: And - - - and - - -

7 JUDGE HALLIGAN: Suffice it to say, maybe a
8 significantly less compelling claim of ineffective
9 assistance, if - - - if the lawyer had either joined in or
10 sought the adjournment?

11 MR. ROTHSCHILD: Yes. I believe so. But - - -

12 JUDGE SINGAS: And is that the judge's
13 responsibility to sua sponte ask - - - make a determination
14 about ineffectiveness? Because I don't believe the client
15 here ever expressed dissatisfaction with counsel, right?

16 MR. ROTHSCHILD: I believe the court said, what
17 is the problem exactly? And she said, well, I have - - -
18 I'm exercising my right. But I think there's a couple
19 factors that go into this to show the context behind it
20 vis-a-vis the waiver. Basically, this judge made it very
21 clear, this case is going forward regardless of whether
22 you've spoken to your client or not.

23 JUDGE SINGAS: No, but is the rule that you're
24 asking for that the judges on their own have to make a
25 determination about ineffectiveness and then do a further

1 inquiry?

2 MR. ROTHSCHILD: No. I believe that that inquiry
3 has to come when there is a - - - when the person says I'm
4 going to waive counsel because that is the searching
5 inquiry.

6 JUDGE SINGAS: And what kind of inquiry? Must
7 there be an inquiry that says, look, you can get another
8 attorney?

9 MR. ROTHSCHILD: Yes.

10 JUDGE SINGAS: So you're asking for a rule that
11 says every time.

12 MR. ROTHSCHILD: No. No. It's - - - it's you
13 know, it's not - - - it's not a formal catechism. It's - -
14 - it's - - -

15 JUDGE TROUTMAN: Then how is that workable?

16 MR. ROTHSCHILD: I believe - - -

17 JUDGE TROUTMAN: There - - - there can be courts
18 - - - trial courts have great discretion. And there are
19 times when one person will ask for multiple attorneys as a
20 delaying tactic. So we're trying to - - -

21 MR. ROTHSCHILD: Which was not the case here.

22 JUDGE TROUTMAN: - - - figure out how this is
23 going to work. If I have to tell you, well, you can get a
24 better attorney, or are you saying she - - - the court had
25 to sua sponte say, you know you're entitled to a competent

1 attorney, when we're not clear here that she was
2 complaining as to the lawyer's competency?

3 MR. ROTHSCHILD: Well, I think that the whole
4 question of the waiver is you have to understand what
5 you're giving up. And here, she was never informed of
6 that.

7 JUDGE TROUTMAN: So are you suggesting that
8 because of the circumstances here, the request was infected
9 by the fact that the attorney was ineffective in the first
10 instance?

11 MR. ROTHSCHILD: I think clearly so. In this
12 case, Beth didn't know that she had the right - - - and
13 when she subsequently asked for it, she said, I didn't
14 know. I didn't know that I wouldn't be able to consult
15 with an attorney. I didn't know. I didn't know what a
16 dispositional hearing was. I think under the facts of this
17 case, and I think as a matter of public - - -

18 JUDGE CANNATARO: And that would be an error by
19 the court, according to your argument, right? Essentially,
20 you're saying the court erred in - - - if I understand you
21 correctly, the way the court addressed the ineffective
22 assistance of counsel was to entertain the request to go
23 without counsel, but in the process, failed to advise Beth
24 that she could have another lawyer, possibly a better
25 lawyer?

1 MR. ROTHSCHILD: Two questions, Your Honor, that
2 could have solved this very easily. The court could have
3 said, are you doing this because you want to represent
4 yourself, or is it because you have an issue with counsel?
5 If she says, I want to represent myself, that's it. If she
6 says, I have an issue with counsel, then, as in the Deon M.
7 case, as in the David W. case, basically, you know, it's -
8 - -

9 JUDGE SINGAS: Yeah, but how would a court know
10 to ask that question if a client never raises that that
11 they have an issue with counsel? So I go back to, so
12 you're asking for a rule that says in every one of these
13 cases, you'd say, or do you have a problem with counsel?
14 There was no hint that there was a problem with counsel on
15 her part.

16 MR. ROTHSCHILD: Well, I think that anyone - - -
17 any judge looking at this would say there's an issue here.
18 There's a real problem because this attorney - - -

19 JUDGE SINGAS: Do you think this judge would have
20 said that?

21 MR. ROTHSCHILD: I think - - - no. I think this
22 judge - - -

23 JUDGE SINGAS: Okay. So - - -

24 MR. ROTHSCHILD: - - - would not have said that.

25 JUDGE SINGAS: So now we're back to square one,

1 then.

2 MR. ROTHSCHILD: But I I think that the
3 importance of the waiver is because New York is committed
4 to preserving families whenever safely possible.

5 JUDGE TROUTMAN: So are you suggesting, on this
6 record, this judge should have done more because the record
7 exists that the way - - - the way it does?

8 MR. ROTHSCHILD: Yes, Your Honor.

9 JUDGE TROUTMAN: And what is an argument for not
10 speaking to someone until after direct examination has
11 occurred? How do we justify that as effective?

12 MR. ROTHSCHILD: Well, not speaking to someone
13 until after direct examination has occurred? You mean what
14 occurred here is she - - -

15 JUDGE TROUTMAN: Correct.

16 MR. ROTHSCHILD: She was not given an opportunity
17 to even speak with counsel until - - -

18 JUDGE TROUTMAN: And how does that affect
19 counsel's ability to represent as an effective attorney if
20 they didn't speak to the client before that - - - even that
21 direct exam?

22 MR. ROTHSCHILD: Under the rules of professional
23 conduct, you have to diligently make efforts to meet with
24 your client. How do you know what your client's wishes are
25 if you've never even spoken to your client?

1 JUDGE TROUTMAN: So it was counsel's
2 responsibility to put on the record if in fact those
3 diligent efforts had occurred?

4 MR. ROTHSCHILD: I think that - - -

5 JUDGE TROUTMAN: Or attempts?

6 MR. ROTHSCHILD: I think, given - - - under this
7 court's ruling in Medina, the People v. Medina, there's an
8 obligation of the court to be solicitous of defendants' and
9 family court litigants' constitutional rights. I believe -
10 - -

11 JUDGE HALLIGAN: So why is it so clear here in
12 your view that the judge had to do more with respect to the
13 waiver?

14 MR. ROTHSCHILD: I think the statement that I
15 intend to stand mute, when I saw - - -

16 JUDGE HALLIGAN: That's coming from - - - that's
17 coming from counsel, though.

18 MR. ROTHSCHILD: Counsel.

19 JUDGE HALLIGAN: But with respect to the waiver
20 question, why is it clear that the court had to do more?

21 MR. ROTHSCHILD: Because normally, when you see
22 something like that, I don't know about you, but first
23 thing I'm thinking is, I'm probably better off representing
24 myself. And the question is, does she know in fact - - -

25 JUDGE RIVERA: But - - - but, Counsel - - -

1 JUDGE TROUTMAN: So you think - - -

2 JUDGE RIVERA: But Counsel, you said, first of
3 all, there's not a formal catechism, right? You can - - -

4 MR. ROTHSCHILD: Yes.

5 JUDGE RIVERA: You can address these things in
6 different ways. And then you said, well, he didn't ask her
7 why. But I've got the transcript in front of me. The
8 court says, after she says, "I want to represent myself.
9 That's my right", and he says - - - or the judge says,
10 "Well, you don't get to ask me questions, ma'am. But what
11 is the problem exactly?"

12 Why isn't that good enough for her to say, well,
13 this lawyer's terrible, or this lawyer's not representing
14 me well, or the lawyer's not working on my behalf, or I'm
15 unhappy with my lawyer?

16 MR. ROTHSCHILD: Because the court really has to
17 look at all the factors here. The viability - - -

18 JUDGE RIVERA: No, no. I'm just asking about
19 this question.

20 MR. ROTHSCHILD: Yeah. In this question - - -

21 JUDGE RIVERA: What is the problem exactly?
22 Doesn't that open - - - or allow for the opportunity for
23 her to say, I'm unhappy with my lawyer?

24 MR. ROTHSCHILD: That assumes and presumes that
25 she knows that she has the right to a different lawyer.

1 JUDGE CANNATARO: Why does it presume that?

2 JUDGE RIVERA: No. It just - - - he's asking,
3 why do you want to represent yourself? She could have
4 said, because the lawyer's doing me a disservice. I'm not
5 - - -

6 MR. ROTHSCHILD: I think - - -

7 JUDGE TROUTMAN: - - - happy with that lawyer.
8 I'd rather just represent myself.

9 MR. ROTHSCHILD: I think to expect that of - - -
10 of litigants in cases where we have a judge who's clearly
11 moving the proceedings along very - - - at a very rapid
12 rate - - -

13 JUDGE TROUTMAN: But this client says, it's my
14 right to represent myself. So why isn't Judge Rivera
15 correct that that was the opening to offer as to a
16 rationale?

17 MR. ROTHSCHILD: Because I think that presumes
18 knowledge on the part of - - - of Beth, which - - -

19 JUDGE TROUTMAN: But she asserted her knowledge.

20 MR. ROTHSCHILD: Yes. She - - -

21 JUDGE TROUTMAN: She says, it's my right to
22 represent myself.

23 MR. ROTHSCHILD: She asserted her knowledge as to
24 that. But the question is, did she know that she was
25 giving up her right - - - you know, clearly when - - - when

1 the inquiry went on, as far as her later request to - - -
2 to have other representation, she said, I didn't know, I
3 didn't know. And the court, at that point, basically cut
4 her off - - -

5 JUDGE CANNATARO: Did she think - - -

6 MR. ROTHSCHILD: - - - didn't want to know.

7 JUDGE CANNATARO: I just want to clarify one
8 issue.

9 MR. ROTHSCHILD: Yeah.

10 JUDGE CANNATARO: You've repeatedly said during
11 your presentation that the court didn't provide an
12 opportunity to confer with counsel. And I thought the
13 record was different. And please correct me. On the day
14 of the fact finding, when counsel disclosed that he hadn't
15 had an opportunity to speak with his client, there was some
16 discussion. I think there was some talk about a surrender.
17 Maybe she was going to agree to that.

18 And then there was a break. And I thought the
19 court said, if you want to confer with counsel - - - and I
20 think it's by Zoom - - -

21 MR. ROTHSCHILD: I - - -

22 JUDGE CANNATARO: - - - we're going to take a
23 break and you can go do that.

24 MR. ROTHSCHILD: I think it probably would have
25 to have been by phone.

1 JUDGE CANNATARO: Okay.

2 MR. ROTHSCHILD: Because I think - - - you know,
3 there was talk about that. I don't believe that it was
4 actually shown because the - - - the first - - - my
5 understanding is the first time she actually had a chance
6 to speak to her attorney was during the break. And right
7 after that, he announced that she intended - - - she wanted
8 to represent herself. That's my understanding.

9 JUDGE CANNATARO: So you're saying there was no
10 discussion?

11 MR. ROTHSCHILD: I - - -

12 JUDGE CANNATARO: But the court allowed it. And
13 I guess that's - - - that's an important issue. I mean,
14 counsel could have come back and said, thank you very much
15 for giving us the opportunity to confer. We weren't able
16 to do that. So I'd like an adjournment, I guess, or
17 something like that? Is that what - - - is that something
18 that could have happened here?

19 MR. ROTHSCHILD: I think a lot of things - - - it
20 could have happened. But obviously, there was no request
21 for adjournment by counsel.

22 JUDGE CANNATARO: Well, we don't know because
23 none of this is really in the record.

24 MR. ROTHSCHILD: Yes.

25 JUDGE CANNATARO: And that's such a huge problem

1 in this case. How do you judge the ineffectiveness of
2 counsel when we're all speculating as to what that
3 ineffectiveness even was or what the client wanted?

4 MR. ROTHSCHILD: But isn't it also incumbent upon
5 the court to make the searching inquiry in order to make
6 the record to show - - -

7 JUDGE CANNATARO: Well, you just had Judge Rivera
8 give you an example. The court asked a question, what's
9 the problem here?

10 MR. ROTHSCHILD: And she said, I have the right
11 to represent myself. And I don't believe that that is
12 sufficient under the facts of this case, given what had
13 occurred and given what was said. And I see that my time
14 is up.

15 CHIEF JUDGE WILSON: Thank you.

16 MS. CUOMO: Good afternoon. Attorney Lisa Sapino
17 Cuomo on behalf of the county attorney, Onondaga County. I
18 would respectfully submit that she, the appellant here,
19 unequivocally asserted her right to - - -

20 JUDGE RIVERA: Well, before we get to that, why
21 isn't he correct about the actions or inactions that
22 counsel took or didn't take enough to establish that
23 counsel was ineffective?

24 MS. CUOMO: Well, as may - - - the court may
25 recall, she did not appear on the first appearance. She

1 did not appear after having been sub-served on the second
2 appearance. And the court took - - -

3 JUDGE RIVERA: She wasn't served on the first - -
4 -

5 MS. CUOMO: - - - note - - - note of that.

6 JUDGE RIVERA: - - - if I'm remembering
7 correctly.

8 MS. CUOMO: She was not served on the first.

9 JUDGE RIVERA: Okay.

10 MS. CUOMO: Sub-served, they requested substitute
11 service.

12 JUDGE RIVERA: Right.

13 MS. CUOMO: She was sub-served on the second.
14 She did not appear. And then, you see on the record that
15 she then was notified. The caseworker was able to notify
16 her. Somehow, they found her. And she appeared having
17 checked herself into a drug rehabilitation - - -

18 JUDGE RIVERA: But what does that have to do with
19 the counsel saying, I haven't met with her?

20 MS. CUOMO: Well, so what I guess I'm getting at
21 is, how would he meet with her?

22 JUDGE RIVERA: And the counsel not showing up
23 himself or - - -

24 MS. CUOMO: He was excused - - -

25 JUDGE RIVERA: - - - at the hearing also.

1 MS. CUOMO: Well, no. He was excused from the
2 January appearance. It was specific on the record that he
3 was excused that day for that specific appearance. And - -
4 -

5 JUDGE TROUTMAN: Let's separate out effective
6 assistance of counsel from the waiver.

7 MS. CUOMO: And I agree with that.

8 JUDGE TROUTMAN: What did he do - - - in this
9 instance, and what's on the record to show what the reason
10 or the lack of contact?

11 MS. CUOMO: There's nothing in the record. It's
12 pure speculation.

13 JUDGE TROUTMAN: And isn't that a problem?

14 JUDGE RIVERA: And doesn't that fall on the
15 shoulders - - - I mean, it - - - it's an odd argument, I
16 think, you're trying to make there, that the fact that the
17 lawyer may have been ineffective for failing to make a
18 record to explain why they had not met with their client,
19 makes it impossible for any court to decide that the lawyer
20 has been ineffective.

21 MS. CUOMO: However, he did request to speak to
22 her after the direct examin - - -

23 JUDGE RIVERA: No, no, no. We're still on this
24 first one.

25 MS. CUOMO: Okay.

1 JUDGE RIVERA: Before you get about asking to
2 speak to her.

3 MS. CUOMO: By him - - -

4 JUDGE RIVERA: I mean, isn't it the day of the
5 trial?

6 MS. CUOMO: By him not making the record, I think
7 it was clear that she appeared - - -

8 JUDGE RIVERA: Yeah, it's a startling thing to
9 say, that weeks have passed, and I haven't met with my
10 client.

11 MS. CUOMO: But I think - - - it was noted on the
12 record that she had checked into a drug rehabilitation
13 center.

14 JUDGE TROUTMAN: But again, that involves
15 speculation as to it was her as opposed to him. Is - - -
16 is that what we're supposed to be doing?

17 MS. CUOMO: Well, it's absolutely unclear.

18 JUDGE TROUTMAN: And most lawyers - - - it was my
19 experience as a trial judge - - - if you impugn them with
20 respect to not being effective, not meeting with the
21 client, they have a - - - they're ready with an answer as
22 to what, if any, obstacles prevented it. But here, we have
23 none.

24 MS. CUOMO: But at that time, she never
25 complained about her representation.

1 CHIEF JUDGE WILSON: So let me - - - let me - - -

2 MS. CUOMO: In fact, when she invoked her right
3 to counsel - - - excuse me, her right to waive counsel, the
4 judge specifically asked her, what is the problem?

5 JUDGE RIVERA: Well, it is possible that someone
6 who is not steeped in the law may not understand - - -

7 MS. CUOMO: But she was savvy - - -

8 JUDGE RIVERA: - - - may not understand that
9 their lawyer's actions or inactions rise to the level of
10 ineffectiveness, may not understand that they can raise
11 that complaint with a judge.

12 MS. CUOMO: Well, she was savvy enough in a
13 subsequent appearance - - -

14 JUDGE RIVERA: But even if she didn't know - - -
15 can you find your way to perhaps agree with me that even if
16 she didn't understand that as a matter of law, that
17 nevertheless, the lawyer could have been ineffective as a
18 matter of law.

19 MS. CUOMO: Well, I would argue that he would be
20 ineffective if he hadn't contacted her for two months and
21 they had - - -

22 JUDGE RIVERA: What about the rest of it?

23 MS. CUOMO: - - - no meaningful conversation.

24 JUDGE RIVERA: But that was not the only basis
25 that counsel has argued.

1 MS. CUOMO: Well, we have to remember that he did
2 make objections. He asked that the records be redacted as
3 hearsay.

4 JUDGE TROUTMAN: Okay. But let's go back to - -
5 - you seem to not disagree with the fact that he did not
6 have an opportunity to speak to her prior to the completion
7 of direct examination; is that accurate?

8 MS. CUOMO: Yes.

9 JUDGE TROUTMAN: How do you effectively represent
10 your client if you don't know what the strategy is while
11 that person's testifying, before that person testifies?

12 MS. CUOMO: Well, I think the county bears the
13 burden of proof and indicating whether her rights should be
14 terminated - - -

15 JUDGE TROUTMAN: But to represent your client - -
16 -

17 MS. CUOMO: No, I understand what you're saying.
18 The problem is the record

19 JUDGE TROUTMAN: How is that effective assistance
20 of counsel to not speak to your client before a witness is
21 called, to know what the defense strategy is?

22 MS. CUOMO: He specifically said to the judge, I
23 have not had an opportunity to talk to her. And that's
24 when the court adjourned so that he could - - -

25 CHIEF JUDGE WILSON: So - - -

1 MS. CUOMO: - - - have a conversation with her.

2 JUDGE TROUTMAN: No, no, no. He said, before, he
3 hadn't. Later on - - - he didn't ask for an adjournment -
4 - - he didn't ask for an adjournment until after there was
5 direct testimony. You're saying that's proper
6 representation of your client to wait until witnesses have
7 been called and then ask for an opportunity?

8 MS. CUOMO: Well, I think it's noteworthy that
9 the other counsel asked for an adjournment - - -

10 JUDGE TROUTMAN: They did.

11 MS. CUOMO: - - - and the court denied - - -

12 JUDGE TROUTMAN: And normally, that's the cue for
13 the other attorney to say, I join in that motion, even if
14 they have forgotten. And that was not done here.

15 MS. CUOMO: Well, I think he took into
16 consideration when he used this idea of standing mute - - -

17 JUDGE TROUTMAN: But again, you're - - -

18 MS. CUOMO: - - - that the court had already - -
19 -

20 JUDGE TROUTMAN: - - - you're assuming. You said
21 you think, because the problem is the record, right?

22 MS. CUOMO: But the court had already made a
23 finding prior to that. And then she said, now that she's
24 here, in a virtual appearance, then I'll let her
25 participate.

1 CHIEF JUDGE WILSON: So let me try hypotheticals
2 instead of the facts of this case for a minute. So suppose
3 a lawyer shows up in court and says, I've never met with
4 the client, never spoken with her. I don't know what this
5 case is about. There's a bunch of documents to produce
6 that I haven't looked at at all. I'm not ready to try this
7 case. And so if you ask me to go forward, I really can't
8 effectively represent whoever this person is who's on the
9 TV screen. And the court says, doesn't matter, you're
10 going forward anyway. Is that a deprivation of the right
11 to counsel?

12 MS. CUOMO: Yes.

13 JUDGE GARCIA: Counsel, can I ask a different
14 question? This lawyer is appointed?

15 MS. CUOMO: Correct.

16 JUDGE GARCIA: Off of a panel?

17 MS. CUOMO: Yes. So Onondaga County has a panel
18 of lawyers that they - - -

19 JUDGE GARCIA: Uh-huh.

20 MS. CUOMO: - - - select and assign.

21 JUDGE GARCIA: And - - - and - - -

22 MS. CUOMO: He has been on many cases in Onondaga
23 - - -

24 JUDGE GARCIA: And hypothetically, not this
25 lawyer, not this case. But if you had a case where there

1 was a finding by a court that there was ineffective
2 assistance provided by one of the panel lawyers, what would
3 the county do?

4 MS. CUOMO: The county or the county panel?

5 JUDGE GARCIA: Would you take the lawyer off the
6 panel?

7 MS. CUOMO: I would imagine that there would be
8 severe repercussions as a result of that.

9 JUDGE GARCIA: Have you ever seen that?

10 MS. CUOMO: No. I would also note that there
11 have - - - we have very few lawyers in Onondaga County who
12 are actually taking these type of cases. But I think we're
13 losing sight of the fact that she unequivocally invoked her
14 constitutional right to represent herself, and she never
15 complained about - - -

16 JUDGE RIVERA: But are you saying that - - -

17 JUDGE TROUTMAN: But how does that - - -

18 JUDGE RIVERA: - - - somehow that - - - that
19 erases or makes up the fact that the lawyer, let's just say
20 for one moment, was ineffective?

21 MS. CUOMO: Well, what I'm saying is - - -

22 JUDGE RIVERA: Why does that matter?

23 MS. CUOMO: - - - counsel is saying that she did
24 that as a result of his ineffectiveness.

25 JUDGE RIVERA: Well, she may have. But - - -



1 MS. CUOMO: But - - -

2 JUDGE RIVERA: - - - if he's ineffective, aren't
3 we done?

4 MS. CUOMO: Well, then - - -

5 JUDGE RIVERA: If he's ineffective as a matter of
6 law, aren't we done? It doesn't matter if she says, I want
7 to represent myself.

8 MS. CUOMO: But is he ineffective as a matter of
9 law? The court would have to say - - -

10 JUDGE RIVERA: Well, I'm asking you.

11 MS. CUOMO: Then a finding - - -

12 JUDGE RIVERA: Let's assume that the court
13 reaches that conclusion. Do you agree then - - -

14 MS. CUOMO: Okay. No.

15 JUDGE RIVERA: - - - the issue about the waiver -
16 - -

17 MS. CUOMO: No. We wouldn't get to that.

18 JUDGE RIVERA: - - - we never get to it?

19 MS. CUOMO: Correct. You would never get to it.
20 However, if you're going to say that he's ineffective as a
21 matter of law, then you would have to delineate - - -
22 specifically make a finding that he never contacted her,
23 that he knew where she was, he knew what she was doing.
24 She moved on to - - -

25 JUDGE TROUTMAN: What about the record clearly



1 saying never talked to her, never spoke to her, and a
2 witness has testified. Or even considering - - - you - - -
3 you did say, the Chief's hypothetical, you agreed if those
4 were the facts, that's ineffective, correct?

5 MS. CUOMO: I would - - -

6 JUDGE TROUTMAN: How is this case different?

7 MS. CUOMO: Because he requested, during the
8 direct examination - - - the direct examination was not
9 concluded.

10 JUDGE TROUTMAN: So it's okay for a lawyer to
11 never speak to a client before a hearing starts or a trial
12 starts. That's effective assistance of counsel?

13 MS. CUOMO: But then you have to take into
14 consideration what - - -

15 JUDGE TROUTMAN: No. It's a yes or no. Is it
16 effective assistance of counsel to go forward with
17 representing someone without having spoken to them or not
18 even being clear as to what your trial strategy is or
19 having reviewed documents that you may or may not have
20 subpoenaed?

21 MS. CUOMO: I would say yes.

22 JUDGE TROUTMAN: It's effective?

23 MS. CUOMO: It's not effective.

24 JUDGE TROUTMAN: Okay. Thank you.

25 MS. MARRIS: Good afternoon, Your Honors. May it

1 please the court. Susan Marris, attorney for the children,
2 who are five-and-a-half-year-old twin girls who left Beth's
3 care when they were six months old and have never returned.
4 Getting to the issue of effective assistance - - -

5 JUDGE GARCIA: Counsel, before you leave that
6 point, one thing I struggle with in cases like this, you
7 make a compelling case for the children and how long
8 they've been in care and also how long these proceedings
9 take and they've continued in care and this delays things
10 further, how are we to factor what you just said into our
11 analysis of the ineffective assistance issue?

12 MS. MARRIS: Because children have rights. The
13 statute 384-B and this court's interpretation of that
14 statute say that children are entitled to a safe, permanent
15 home. And when a biological parent can't provide that,
16 these children need to be freed for adoption.

17 CHIEF JUDGE WILSON: So let me follow up on Judge
18 Garcia's question. Supposing what happened here instead
19 was the court told the mother, we're not providing you
20 counsel. I'm sorry. You have no right to counsel. You
21 have to proceed on your own. And there was no lawyer there
22 or anything like that. You would still say the same thing,
23 that is, the children have been five years out of the
24 mother's care, and therefore, it doesn't matter that her
25 right to counsel was denied?

1 MS. MARRIS: So I think it depends on the facts
2 of the case.

3 CHIEF JUDGE WILSON: I've given you a - - -

4 MS. MARRIS: In your hypothetical - - -

5 CHIEF JUDGE WILSON: Yeah. Uh-huh.

6 MS. MARRIS: - - - it's a harder decision to
7 make.

8 CHIEF JUDGE WILSON: But so you might - - - you
9 might still say that even in that circumstance, there's a
10 complete denial of the right to counsel, the amount of time
11 that passes could vitiate that?

12 MS. MARRIS: I think it can, because this parent
13 has never made progress. She testified that I have an
14 addiction. I cannot provide a safe home for my children.

15 JUDGE RIVERA: That's the point. All of that is
16 potentially, arguably, done without having had the benefit
17 of counsel to present her in the best light.

18 MS. MARRIS: And I don't think those are the
19 facts of this case. So getting back to the - - -

20 JUDGE TROUTMAN: In a termination of parental
21 rights, does a parent have the right to effective counsel?

22 MS. MARRIS: So I don't think this court has
23 addressed that. But all - - -

24 JUDGE TROUTMAN: I'm asking you the question.

25 MS. MARRIS: They do. I think they do. And the

1 Appellate Division said they do. I think they absolutely
2 have a right. But it's their burden to prove ineffective
3 assistance of counsel.

4 JUDGE HALLIGAN: But aren't you putting your
5 finger, I think, on what's so difficult about these cases?
6 If there is that right and it is violated in some
7 hypothetical case, don't we have to do something in
8 response to that like we would in the context where a
9 criminal defendant's right to counsel is violated?

10 And I'm not sure how we balance that against the
11 very compelling concern you are advancing, which is the
12 passage of time and the effect on the children. But can we
13 say that the right has no traction and can be violated with
14 no consequence simply because of the passage of time? It
15 seems like a very tough conundrum that the courts are in,
16 in that circumstance.

17 MS. MARRIS: And I think, Your Honor, it depends
18 on the facts of the case. I have another case.

19 JUDGE CANNATARO: So are you saying the - - - I'm
20 sorry, maybe you were just going to do the - - - they're
21 not egregious enough in this case? Is that your argument?

22 MS. MARRIS: The - - - it is egregious in this
23 case because this parent - - -

24 JUDGE CANNATARO: So they're so egregious that
25 even though the mother may have been deprived of the

1 assistance of effective counsel here, the children's
2 interests supersede that legal error?

3 MS. MARRIS: Absolutely. And I think, again, the
4 statute 384-B provides for that. It's in this court's
5 interpretation.

6 JUDGE HALLIGAN: But it's a constitutional right
7 that's at play, right? So how does that - - - how can that
8 overcome whatever a statute would set forth?

9 MS. MARRIS: Well, again, it is a constitutional
10 right to the effective assistance of counsel, but in this
11 case - - -

12 JUDGE RIVERA: No. It's a constitutional right
13 also to the care and custody of your child.

14 MS. MARRIS: Correct, Your Honor.

15 JUDGE RIVERA: That's a little double whammy
16 here, right?

17 MS. MARRIS: So it's a balancing. I don't know.

18 CHIEF JUDGE WILSON: Those are on the same side.

19 MS. MARRIS: Oh, I'm sorry.

20 JUDGE CANNATARO: No, no, no. She lost her
21 children.

22 MS. MARRIS: I misheard you. I misheard you.
23 But this - - - the statute and this court have said the
24 child's right to permanency in a safe home take priority
25 over the goal of returning a child to the biological

1 parent. That's well-settled law.

2 JUDGE TROUTMAN: But isn't that - - - the
3 assumption there is there is a process. There's
4 representation on both sides. And then there's a
5 determination based on a record supporting that
6 determination. I didn't hear you say that that assumes
7 that the right to effective assistance of counsel can be
8 dispensed with. You did not say that.

9 MS. MARRIS: What I'm saying is, I think it's a
10 case-by-case factual determination. And in this case - - -

11 JUDGE TROUTMAN: It's a case-by-case factual
12 determination as to whether you're entitled to effective
13 assistance - - -

14 MS. MARRIS: No. You're entitled. Whether you
15 receive effective assistance - - -

16 JUDGE CANNATARO: So then where do you stand on
17 this question that we've been, you know, looking at, which
18 is in a case where assigned counsel does not speak to their
19 client or has no communication with their client for
20 approximately a month before an appearance in court, and
21 then comes in and apprises the court of that fact, whether
22 - - - whether that is ineffective as a matter of law or
23 not?

24 MS. MARRIS: So it is the person claiming
25 ineffective assistance of counsel to prove it. They have

1 to - - - it's their burden of proof. So you have to look
2 at the record as a whole. And maybe this attorney had a
3 legitimate - - -

4 JUDGE RIVERA: Okay. So was it ineffective or
5 not - - - it's like kind of a yes or no - - - as a matter
6 of law on this record?

7 MS. MARRIS: On this record, no.

8 JUDGE RIVERA: Why not?

9 MS. MARRIS: Because he may have had a legitimate
10 explanation - - -

11 JUDGE RIVERA: Let's say you're right about the
12 failure to meet with her.

13 MS. MARRIS: Okay.

14 JUDGE RIVERA: What about everything else that
15 has been described as alleged failures?

16 MS. MARRIS: It's all speculation. There's no
17 evidence in the record to support that he - - -

18 JUDGE RIVERA: You mean the failure to ask for an
19 adjournment is not clear from the record?

20 MS. MARRIS: So you look at - - -

21 JUDGE RIVERA: Proceeding - - -

22 MS. MARRIS: That's - - - that - - -

23 JUDGE RIVERA: - - - with a witness with - - -

24 MS. MARRIS: You know, she's entitled to
25 effective assistance, but that's not perfect

1 representation. Okay, that may be one error. But the
2 judge already denied other counsel's request for an
3 adjournment. I'm not saying he shouldn't have asked. But
4 it's one error. When you look at the totality - - -

5 JUDGE RIVERA: Well, we just had - - - we just
6 went through two. He also - - -

7 MS. MARRIS: What - - -

8 JUDGE RIVERA: He also mentioned the - - - the -
9 - -

10 MS. MARRIS: The - - -

11 JUDGE RIVERA: - - - the lack of familiarity with
12 the documents.

13 MS. MARRIS: We don't know that. He made a
14 statement that said, do we have those records? It's 500
15 pages of case notes.

16 JUDGE TROUTMAN: Did - - -

17 JUDGE RIVERA: Well, it did seem that there's
18 enough of this from your side trying to kind of explain it
19 all away. At some point, at some point, you just can't.
20 There are just too many things that appear to suggest that
21 the lawyer was not prepared in this case.

22 MS. MARRIS: I think that's speculative, Your
23 Honor.

24 JUDGE RIVERA: Why is it speculative in the other
25 direction? Why is it speculative - - -

1 MS. MARRIS: It is.

2 JUDGE RIVERA: - - - on your side to say it was
3 effective?

4 MS. MARRIS: It is. But the burden of proof is
5 on the applicant - - -

6 JUDGE RIVERA: But again, see, you're making the
7 same - - - what I said was the odd argument of counsel,
8 that the fact that the lawyer may have been so ineffective
9 that they failed to provide the kind of record that we
10 could actually review to say they have or have not been
11 effective is what renders this case troubling.

12 MS. MARRIS: Well, so what's troubling - - -

13 JUDGE RIVERA: Why should she pay the price for
14 that? She's not a lawyer.

15 MS. MARRIS: - - - is that he didn't get a chance
16 to present, you know, a - - - her defense because she got
17 rid of him in the middle of the first witness. So that's
18 why it's speculative. When you look at the - - -

19 JUDGE RIVERA: He didn't seem to have any defense
20 because he hadn't talked to her.

21 MS. MARRIS: I don't know that we know - - - we -
22 - - well, he didn't talk to her. That, we know. But he
23 did - - - he went on the phone, and they spoke. We don't
24 know what they said. And then they come back.

25 JUDGE RIVERA: I think most clients would feel

1 uncomfortable moving forward with a trial after a few
2 minutes on the phone with a lawyer.

3 MS. MARRIS: But that's not the lawyer's doing.
4 It's possible she was in rehab. And in fact, the agency
5 couldn't serve her personally because she was in rehab.

6 JUDGE TROUTMAN: Let's just say for the - - -
7 Chief, could I have one?

8 CHIEF JUDGE WILSON: Of course.

9 JUDGE TROUTMAN: The judge said you get five
10 minutes. Let's just say for the sake of argument that
11 you're correct, that there was a self-correction after.
12 It's like, we're not going forward. I'm going to give you
13 the chance to speak to him. Five minutes? That's enough
14 time to figure out a defense and everything, to you?

15 MS. MARRIS: No. I - - - well, he may have
16 figured out a defense. We don't know that.

17 JUDGE TROUTMAN: And reviewed those 500 rec - - -
18 pages of records that you just described?

19 MS. MARRIS: Well, and again, I don't - - -
20 they're - - - they're case notes.

21 JUDGE TROUTMAN: Therein lies the problem.

22 MS. MARRIS: Well, I don't - - - I think, again,
23 when you look at the children's rights, they take - - - in
24 this case, based upon the facts, the children's right to a
25 permanent home with the foster parents who've had them

1 since they were one and a half years old, who want to adopt
2 them - - -

3 JUDGE TROUTMAN: There is no question that it is
4 very important and imperative that these cases be resolved
5 in a speedy fashion. But we cannot throw the Constitution
6 in the garbage with respect to people's rights in order to
7 get there. That is the concern that I'm hearing here.

8 MS. MARRIS: Thank you, Your Honor.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. ROTHSCHILD: Just to jump off of Judge
11 Troutman's last comment. Best interest, we submit does not
12 submit - - - does not trump the right to counsel. There's
13 no presumption that termination is in the child's best
14 interest. The Supreme Court said that in Santosky v.
15 Kramer.

16 The right to counsel also serves the fundamental
17 interests of children facing the possible permanent loss of
18 their parents. Given that, New York's commitment to
19 preserving families whenever safely possible is meaningful
20 only if this court instructs family courts in their
21 responsibility to ensure robust representation of parents
22 in termination proceedings.

23 CHIEF JUDGE WILSON: So were we to reverse, I
24 assume that the state could still start a termination
25 proceeding based on current evidence and the adoptive

1 parents - - - foster parents might end up adopting their
2 children?

3 MR. ROTHSCHILD: Absolutely. Absolutely, Your
4 Honor. This - - - the right to counsel is so crucial. And
5 we would submit that it was not - - - had the court simply
6 engaged in the proper inquiry, saying we don't have a
7 record or - - - of course, we don't have a record because
8 the court was not interested - - - was not solicitous of
9 Beth's constitutional rights when, you know, when - - -

10 JUDGE RIVERA: But your first argument is that
11 before the court is even engaged in any inquiry, that in
12 those first few minutes, it's obvious - - -

13 MR. ROTHSCHILD: It's - - -

14 JUDGE RIVERA: That's your argument.

15 MR. ROTHSCHILD: Yes.

16 JUDGE RIVERA: It's obvious that this counsel was
17 ineffective?

18 JUDGE CANNATARO: Counsel, can I get your
19 perspective on this issue of 5 minutes, 10 minutes, 15
20 minutes? Can a - - - can a highly experienced panel
21 attorney who's apparently, from what I heard, you know,
22 done many of these cases, could they spend five, ten,
23 fifteen minutes talking to the client before the hearing
24 begins and get enough information to begin the process of
25 conducting the hearing?

1 MR. ROTHSCHILD: I wouldn't want someone
2 representing me doing that.

3 JUDGE CANNATARO: No. That is suboptimal. I
4 think we can all agree to that. But is it - - - is it
5 ineffective assistance as a matter of law if there's only
6 ten minutes of conversation?

7 MR. ROTHSCHILD: I believe what the judge says, I
8 have time to get a cup of coffee, and we just presume
9 that's five minutes.

10 JUDGE CANNATARO: I think I'm asking because - -
11 - excuse me - - - you know, the brief amount of time I
12 spent in family court, far, far away from Onondaga County,
13 that happened a lot. Counsel were assigned. They were
14 given a few minutes to start the hearing, not necessarily
15 finish the hearing. But you know, there wasn't a huge
16 amount of time prior to the counsel having to come into
17 court and perform. And I'm just wondering whether that is
18 - - - that was just legal error that was happening every
19 day in the family courts of New York City.

20 MR. ROTHSCHILD: Well, I mean, in this case, it
21 was, I believe, 11 weeks that - - -

22 JUDGE CANNATARO: That's how much time he had.

23 MR. ROTHSCHILD: Yeah.

24 JUDGE CANNATARO: And he could've, and he didn't.
25 I'll give you that. But I'm talking about this brief

1 opportunity that the court gave counsel to speak with the
2 client. And I don't think it's very clear whether or not
3 he spoke with her or didn't. But if he did, would - - -
4 could that be sufficient to say that that's not ineffective
5 as a matter of law?

6 MR. ROTHSCHILD: I would submit, no, Your Honor,
7 because of the stakes involved here, because of Beth's
8 history, because of, you know, her lack of legal knowledge
9 of this, and the scope and the complexity of the case. As
10 the amicus people wrote in the amicus brief, it's an
11 extremely complex matter, which requires, I think, more
12 than five minutes to sit down and talk to your client about
13 it.

14 JUDGE GARCIA: Counsel, just to go back to my
15 original point, and it's been talked about, I know, but - -
16 - so we have, in this case, an alleged constitutional
17 violation. We have a best interest of the children
18 argument. It seems to me in a criminal case, very serious,
19 you can undo a trial, and the People have to go back and
20 put this show on again, and a lot of resources will be
21 spent. But you don't have a child waiting for adoption.
22 So that seems a little bit different to me.

23 So my question to you is, is there any way, in
24 any case, of constitutional violation or a different error,
25 that you can factor in the best interest of the child and

1 what's going on with the child's status in, I think, what
2 they described as limbo in a termination proceeding?

3 MR. ROTHSCHILD: I think the problem is, as - - -
4 as I said, there's no presumption that termination is in
5 the best interest. The other problem is you can't really -
6 - -

7 JUDGE GARCIA: Let's say they make out that case
8 that it is.

9 MR. ROTHSCHILD: The problem is when you don't
10 have effective assistance of counsel, can you really - - -

11 JUDGE GARCIA: But what about a different error?
12 Can we factor in a different error in the termination
13 proceeding?

14 MR. ROTHSCHILD: I think - - - I would submit
15 under the facts of this case - - -

16 JUDGE GARCIA: But you don't - - - you're not
17 asking for an all-size rule.

18 MR. ROTHSCHILD: No. I'm not asking for an all-
19 size rule. I'm asking basically that this court enforce
20 the rule as it is regarding the inquiry, the waiver
21 inquiry, also regarding the request for new counsel
22 inquiry, where the court basically shut it off entirely.
23 And I submit that more is needed. Thank you.

24 CHIEF JUDGE WILSON: Thank you.

25 (Court is adjourned)

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

I, Joey Oliveros, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Parker J., No. 85 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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