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Supreme Court of the United States

ABBY GAIL LASSITER,

PETITIONER,

v.

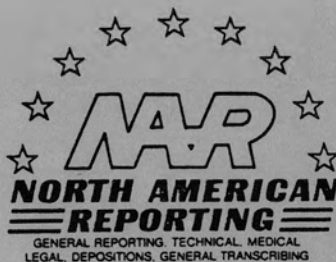
DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH
CAROLINA

No. 79-6423

Washington. D.C.
February 23, 1981

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ORIGINAL



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IN THE SUPREME COURT OF THE UNITED STATES

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 ABBY GAIL LASSITER, :
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 Petitioner, :
 :
 v. : No. 79-6423
 :
 DEPARTMENT OF SOCIAL SERVICES :
 OF DURHAM COUNTY, NORTH :
 CAROLINA :
 ----- :

Washington, D. C.
Monday, February 23, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

LEOWEN EVANS, ESQ., North Central Legal Assistance Program, P.O. Box 2101, 106 West Parrish Street, Durham, North Carolina 27702; on behalf of the Petitioner pro hac vice.

THOMAS RUSSELL ODOM, ESQ., Assistant County Attorney, Durham County, P.O. Box 810, Durham, North Carolina 27704; on behalf of the Respondent.

STEVEN MANSFIELD SHABER, ESQ., Assistant Attorney General of North Carolina, Raleigh, North Carolina; on behalf of North Carolina as amicus curiae.

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MILLERS FALLS
ERASE
COTTON CONTENT

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments
3 next in Lassiter v. the Department of Social Services.

4 Mr. Evans.

5 ORAL ARGUMENT OF LEOWEN EVANS, ESQ.,

6 ON BEHALF OF THE PETITIONER PRO HAC VICE

7 MR. EVANS: Mr. Chief Justice Burger, and may it
8 please the Court:

9 The issue before the Court today is whether
10 appointed counsel is a process that is due indigent parents
11 when the state initiates actions to terminate their parental
12 rights.

13 The State of North Carolina terminated the parental
14 rights of Abby Gail Lassiter, an indigent imprisoned mother,
15 without affording her the assistance of appointed counsel.
16 This contested proceeding was initiated and prosecuted by
17 the State through its authorized official, the Durham County
18 Department of Social Services, the respondent before this
19 honorable court. The respondent was represented by staff
20 attorneys, and by a social worker. In rendering its decision
21 to terminate parental rights, the trial court expressly
22 stated that it relied upon the testimony before the court
23 and the record before the court.

24 The North Carolina Court of Appeals affirmed this
25 decision, holding that the right to family integrity is a

1 constitutionally protected right, that the State has invaded
2 this constitutionally protected right, but that this invasion
3 was not so serious or unreasonable as to compel the Court to
4 hold that appointed counsel was a process that was constitu-
5 tionally due the poor.

6 To the contrary, Mr. Justices, appointed counsel is
7 a process that must be due if indigent parents are to be af-
8 farded an adequate opportunity to be heard in termination
9 proceedings. There is a per se need for appointed counsel
10 because of the inherent risk that exists otherwise.

11 QUESTION: Has this Court ever gone, counsel, ever
12 gone beyond the criminal proceedings in requiring states to
13 appoint counsel in particular proceedings?

14 MR. EVANS: No, Mr. Justice, not a purely civil
15 proceeding. This Court hasn't gone beyond -- hasn't appointed
16 counsel in a purely civil proceeding. This Court has held
17 that in a noncriminal proceeding, such as Gagnon, that the
18 right to appointed counsel may exist.

19 QUESTION: In re Gault is another one, isn't it?

20 MR. EVANS: Pardon?

21 QUESTION: Gault, the Gault case?

22 MR. EVANS: Yes, yes, Your Honor, in Gault.

23 QUESTION: And the State, at least, denominated
24 that a noncriminal proceeding.

25 MR. EVANS: Yes, Mr. Justice. And I -- a plurality

1 of the Court recognized in Vitek v. Jones the need for ap-
2 pointed counsel.

3 QUESTION: Has the Court required appointed counsel
4 in federal habeas corpus proceedings as a constitutional re-
5 quirement?

6 MR. EVANS: I do not know, Mr. Justice.

7 QUESTION: No. The answer is, no.

8 MR. EVANS: All parties involved have a compelling
9 reason to prevent erroneous terminations.

10 QUESTION: Before we leave that, Mr. Evans, is it
11 not inherent in the rationale of the Gault and the other cases
12 that because the juvenile proceeding was so nearly a criminal
13 proceeding, that the criminal safeguards in various respects
14 had to be incorporated? Isn't that the rationale?

15 MR. EVANS: I think, Mr. Justice, that was the
16 rationale for Gault. However, in Vitek v. Jones, the Court
17 was dealing with the transfer of a prisoner to a mental in-
18 stitution involuntarily. There was no question about his
19 right to freedom from bodily restraint being involved there.
20 That right had already been extinguished and the majority of
21 the Court recognized that there was a right to -- I'm sorry
22 -- a plurality of the Court recognized there was a need for
23 appointed counsel in those cases to protect the interests
24 involved.

25 Practical considerations will not mitigate against

1 the indigent parent's compelling need to be heard. Specifi-
2 cally, the case at bench is distinguishable from the vast
3 majority of civil cases. Fiscal and administrative bur-
4 dens involved do not justify the denial of such fundamental
5 right.

6 QUESTION: Well, now, I don't quite follow that.
7 You say that the Constitution protects family integrity?

8 MR. EVANS: Yes, Mr. Justice.

9 QUESTION: And while you may or may not be right,
10 there's certainly nothing in the explicit words of the Con-
11 stitution that do protect that.

12 MR. EVANS: No.

13 QUESTION: But the Constitution explicitly protects
14 a person from being deprived of his property without due pro-
15 cess of law, and that's what happens in the mine-run, run-of-
16 the-mill civil case if the defendant loses. He is deprived
17 of his property, some of his property, if there's a judgment
18 against him for money. And therefore, why doesn't your argu-
19 ment apply in spades to every civil case?

20 MR. EVANS: Well, Mr. Justice, this case is dis-
21 tinguishable from the vast majority of civil cases under --

22 QUESTION: Only in that this one does not involve
23 something explicitly protected by the Constitution.

24 MR. EVANS: Well, this Court has recognized,
25 Mr. Justice, that the right to integrity of the family unit

1 is a constitutionally protected right, a Fourteenth Amendment
2 due process liberty interest.

3 QUESTION: Well, but the -- and that's by judicial
4 decision of this Court, assuming you're correct.

5 MR. EVANS: Yes, Mr. Justice.

6 QUESTION: But the Constitution literally and
7 explicitly protects somebody from losing his property without
8 due process of law.

9 MR. EVANS: Yes, Mr. Justice.

10 QUESTION: So why isn't that an a fortiori case?
11 An ordinary run-of-the-mill civil case?

12 MR. EVANS: Yes, Mr. Justice, but this case is dis-
13 tinguishable from that, Mr. Justice, on the weight of the
14 liberty interest involved.

15 QUESTION: You think that something that this Court
16 has dreamed up is more weighty than something that's in the
17 Constitution itself?

18 MR. EVANS: The right to one's children, the
19 right to keep one's relationship intact with his child is more
20 fundamental than property interests.

21 QUESTION: Well, that has to be your argument, I ex-
22 pect, doesn't it?

23 MR. EVANS: Yes, Mr. Justice. This Court has recog-
24 nized that the right to integrity of the family unit is far
25 more precious than property rights, comes that -- this right

1 comes to the Court with more respect than those liberties
2 arrived from strictly economic arrangements. Lower courts
3 have recognized that the integrity of the parent-child rela-
4 tionship may be more precious than freedom from bodily re-
5 straint. Even some lower courts have recognized that the
6 right to integrity of the parent-child relationship is more
7 precious than the right to life itself.

8 QUESTION: Well, Mr. Evans, the Fourteenth Amendment
9 says that no state shall deprive any person of life, liberty,
10 or property without due process of law. Do you think this
11 Court is free to say that one is more important than the
12 other, when the Constitution has equated them?

13 MR. EVANS: Yes, Mr. Justice, I think that this
14 Court has recognized that liberty interests are more funda-
15 mental than property interests.

16 QUESTION: Didn't Stanley v. Illinois say just that?

17 MR. EVANS: Yes, Mr. Justice.

18 QUESTION: That there was a liberty interest in
19 keeping the family together?

20 MR. EVANS: Yes, Mr. Justice.

21 QUESTION: Stanley said that --

22 MR. EVANS: Right. And Stanley said expressly that
23 the liberty interest involved there was far more precious
24 than property rights, and was more precious than those liberty
25 interests derived from shifting the economic arrangements.

1 The lower courts have recognized a per se need for appointed
2 counsel. They justify this position on the fact that inherent
3 risk cause erroneous terminations in such cases. These
4 inherent risks are that the poor be overborne by the resour-
5 ces of the state, that the final decision terminating parental
6 rights will be based on incompetent and inadmissible evidence.

7 Thirdly, that existing procedural safeguards will
8 be lost, and fourthly, that crucial factual disputes and
9 complex issues will go unresolved.

10 The case at bench is certainly illustrative of each
11 of these inherent risks.

12 QUESTION: Isn't each of those characteristics
13 present in the civil case that Mr. Justice Stewart was put-
14 ting to you? Is that not a potential in every civil case?

15 MR. EVANS: The -- not in every civil case, Mr.
16 Justice. In the majority of civil cases, you have private
17 party initiating and prosecuting the action. However, in the
18 case at bench, we have the state initiating and prosecuting
19 the action.

20 QUESTION: What about a state condemnation action,
21 where the state initiates an action to condemn so much of
22 your property?

23 MR. EVANS: Yes, Mr. Justice. In that situation
24 you do have the state acting. And you may well have to look
25 to other aspects of this case for distinction, distinguishing

1 this case from that case. Now, this case can be distin-
2 guished from the vast majority of civil cases under each
3 prong of the Mathews v. Eldridge analysis.

4 Under the first prong, the --

5 QUESTION: Mr. Evans, let me go back to the prior
6 question. Suppose this case had been instituted by a foster
7 parent, not the state. Would you be here?

8 MR. EVANS: In North Carolina, Mr. Justice, I be-
9 lieve so. The initiation of the action by a private
10 party there would be the only difference between that case
11 and this case. In a foster parent case you would have the
12 state having a substantial interest in the outcome of the
13 litigation. You would have the state having a parens
14 patriae duty to protect the best interests of the child,
15 to protect the integrity of the family, and indeed you would
16 have, if there's an answer filed in that case, if the indigent
17 parent files an answer in that case, you would have the state
18 appointing counsel to represent the child. So in essence you
19 would have a possibility of the very same case here. An at-
20 torney for the child could very well be the adversary to the
21 parent rather than an attorney for the state.

22 In distinguishing this case from the vast majority
23 of civil cases, under each prong of the Mathews v. Eldridge
24 analysis we can distinguish this case. The first prong of
25 the Mathews v. Eldridge analysis is the protectable interest

1 implicated by the governmental action. We've already dis-
2 cussed that this case deals with the government initiating
3 and prosecuting an action. In the vast majority of cases we
4 simply do not have that.

5 This case deals with a basic human right, the right
6 to integrity of the parent-child relationship.

7 QUESTION: Well, suppose, Mr. Evans, you had a pro-
8 fession that required a state license in order to practice,
9 and a proceeding was brought to revoke, by the state, to re-
10 voke the practitioner's license and he were indigent.
11 Would your argument today apply in this case also?

12 MR. EVANS: Yes, Mr. Justice, I think so.

13 QUESTION: You think so?

14 MR. EVANS: I think that my argument that this
15 case would be distinguished from those cases would apply.

16 QUESTION: On what ground would you distinguish it?

17 MR. EVANS: Again, the interest that is implicated.
18 In that case --

19 QUESTION: That certainly would be -- a license,
20 what would it be? A property interest, a liberty interest,
21 or both?

22 MR. EVANS: I would think that it could be either,
23 but it would be distinguishable from this case on the weight
24 of the interest involved. This case deals with perhaps the
25 most basic right known to man.

1 QUESTION: Well, here's a man about to lose his
2 livelihood. He may no longer practice his profession. Isn't
3 that a rather significant interest?

4 MR. EVANS: Yes, Mr. Justice, and perhaps in future
5 cases this Court may weigh the factors involved and decide
6 that that should be protected.

7 QUESTION: Well, then you do concede that if we
8 agree with you in this case, we're not going to be able to
9 contain it out of the principle to this kind of case. We're
10 going to have to face up to it in a lot of other types of
11 cases, aren't we?

12 MR. EVANS: I would certainly think that the Court would
13 have to face up to it but the Court definitely can distinguish
14 this case from those cases. It would not be automatic.

15 QUESTION: Well, surely your rule would require
16 that the child be represented?

17 MR. EVANS: Mr. Justice, certainly I think the
18 child should be represented in these cases. However, I am
19 not sure as to whether this Court --

20 QUESTION: I would think it would be a fortiori.

21 MR. EVANS: Pardon?

22 QUESTION: I would think it would be an a fortiori
23 argument, At least the parent is an adult, and supposedly
24 capable of representing himself. I suppose guardians ad litem
25 are really appointed because the child is a minor. Is that

1 right?

2 MR. EVANS: Yes, Mr. Justice.

3 QUESTION: But your argument, I would think, would
4 require the appointment of a counsel for the child.

5 MR. EVANS: The reason that a public counsel was
6 granted, need to be granted in these cases, is that there's
7 a constitutionally protected liberty interest that has been
8 recognized by the courts, that needs to be protected. Now,
9 I recognize the --

10 QUESTION: But that is a two-way street, the in-
11 tegrity of the parent-child relationship.

12 MR. EVANS: Yes, but this Court has not recognized
13 as of yet, Mr. Justice, that the child has a constitutionally
14 protected right in the integrity of the family. And that is
15 a point of distinction.

16 QUESTION: Mr. Evans, hasn't the State of North
17 Carolina already recognized that and passed a statute giving
18 counsel in juvenile hearings?

19 MR. EVANS: Yes, Mr. Justice. The State of North
20 Carolina does grant --

21 QUESTION: Well, certainly if there was a relinquish-
22 ment proceeding, where the parent was going to relinquish the
23 child to the state, I would suppose your argument would be
24 that the child would have to be represented?

25 QUESTION: Well, isn't that exactly what the statute

1 says on page 20? The new statute? What is the statute in
2 the Joint Appendix? The Joint Appendix at page 20.

3 MR. EVANS: Okay. The new stat.? The Joint
4 Appendix on page 20 or the brief?

5 QUESTION: The Joint Appendix.

6 MR. EVANS: Okay. That statute says, Mr. Justice,
7 that in abuse and neglect and dependency cases, the right to
8 appointed counsel will be granted to indigent parents.

9 QUESTION: So they do recognize that where you're
10 taking children from the parents, in some instances you're
11 entitled to counsel?

12 MR. EVANS: Yes, Mr. Justice, it does.

13 QUESTION: But what effect does that have on this
14 case?

15 MR. EVANS: Well, Mr. Justice, it --

16 QUESTION: If any?

17 MR. EVANS: I think it shows that -- a basic in-
18 consistency. The recognizing of the right to appointed coun-
19 sel for parents, indigent parents, in abuse, neglect, and
20 dependency cases in which the parental rights is faced with
21 a temporary removal, but not recognizing the same right in a
22 case in which the parental rights is faced with a total
23 severance, certainly is inconsistent.

24 QUESTION: And you're making an equal protection
25 argument there? This is the choice of the legislature, to

1 provide counsel in that situation. Now, are you suggesting
2 it's going to have unequal protection, not to supply it here?

3 MR. EVANS: Mr. Justice, I think that there may even
4 be an equal protection argument. We do not reach that today.
5 The argument that we have made today is that the Due Process
6 Clause requires appointment of counsel in these cases.

7 QUESTION: What's the reach of this statute,
8 Mr. Evans? What is a juvenile petition? What's that refer
9 to? A particular kind of proceeding or something?

10 MR. EVANS: Yes, an action that's filed in juvenile
11 court.

12 QUESTION: And which is not this case?

13 MR. EVANS: Yes, I think this --

14 QUESTION: In this case? Was this case brought by
15 something called juvenile petition?

16 MR. EVANS: Yes, the action was filed by a juvenile,
17 or juvenile --

18 QUESTION: Well, if that's so, why doesn't this
19 statute apply then, as my brother Marshall suggested?

20 MR. EVANS: Well, this statute was passed after
21 the case at bench.

22 QUESTION: Well, I know but, why shouldn't we send
23 it back and ask your state courts to look at the case in
24 light of that statute?

25 MR. EVANS: Right. And it applies only in abuse,

1 neglect, and dependency cases. This is a termination case.

2 QUESTION: Oh, I see.

3 MR. EVANS: And it does not apply.

4 QUESTION: So this is limited, then?

5 MR. EVANS: Yes, Mr. Justice.

6 QUESTION: With respect to that statute, Mr. Evans,
7 it reads, "In cases where the juvenile petition alleges that
8 a juvenile is abused, neglected, or dependent, the parent
9 has a right to counsel and to appointed counsel in cases of
10 indigency, unless the parent waives the right."

11 Does that suggest that even a parent who could
12 retain counsel if he were not indigent, or she were not
13 indigent, did not before the enactment of that statute have
14 the right to appear by counsel?

15 MR. EVANS: I'm sorry, Mr. Justice.

16 QUESTION: I mean, at those proceedings before the
17 enactment of the statute, was anybody permitted to have an
18 attorney?

19 MR. EVANS: Yes, Mr. Justice. The right to retain
20 counsel was granted at those proceedings, are granted at those
21 proceedings.

22 All parties involved have a compelling reason to
23 prevent the erroneous deprivations of parental rights. The
24 parent has a compelling interest of preventing a denial of
25 her right to care, custody, and companionship to her child.

1 She has the compelling interest of maintaining the right to
2 transfer cultural or religious and political values to the
3 next generation. The child loses his right to receive care,
4 custody, and companionship and love from his mother, from his
5 brothers and sisters, and from his grandparents. The child
6 also loses the right to receive its cultural, religious, and
7 political heritage, or the cultural, religious, and political
8 heritage of his people.

9 QUESTION: Mr. Evans, you're arguing the right of
10 the child, right now. Was there a guardian ad litem in this
11 case? There was not, was there?

12 MR. EVANS: No, Mr. Justice.

13 QUESTION: Would that also be constitutional error,
14 in your view?

15 MR. EVANS: I think a guardian ad litem should be
16 appointed, Mr. Justice, but I'm not sure --

17 QUESTION: You think the Constitution requires --
18 in other words, is it a necessary consequence of agreeing
19 with you that we should appoint two lawyers in every parental
20 termination case?

21 MR. EVANS: No, Mr. Justice.

22 QUESTION: Well, why not? Because, why isn't the
23 child's interest that you're just arguing now, also entitled
24 to constitutional protection and be sure that there aren't
25 arguments with regard to the child's interest that are

1 possibly conflicting with the parents that might be overlooked
2 in the proceeding?

3 MR. EVANS: I think, Mr. Justice, that the right
4 should certainly be protected, but first the Court would have
5 to recognize that the child's right to integrity of the family
6 unit is a constitutionally protected right, and as of this
7 point the Court hasn't recognized that. Society -- the state
8 has a substantial interest in preventing erroneous depriva-
9 tions also. The state has the parens patriae duty to protect
10 the best interests of the child. The best interests of
11 children simply are not protected by allowing erroneous
12 deprivations of parental rights. The state has a substantial
13 interest in protecting the family unit. The family unit is
14 responsible for transferring sacred societal values such as
15 morals, cultural beliefs, and political values. The state
16 cannot transfer these values and once the child is placed
17 into foster care, then the state is confronted with the
18 problem of, how do we prepare this child for his future obli-
19 gations, such as these sacred values that are needed for a
20 well rounded child in our society?

21 QUESTION: Mr. Evans, when will this woman, the
22 mother, be eligible for parole?

23 MR. EVANS: Next year, Mr. Justice.

24 QUESTION: Next year. I was wondering, you were
25 talking about the family unit. There is no family unit now.

1 MR. EVANS: Well, Mr. Justice, there is the grand-
2 mother in this case, who appeared at the termination of
3 parental rights hearing, stated that she was willing to take
4 this child and take care of the child. She is presently tak-
5 ing care of petitioner's other four children, and certainly
6 the -- if the state had placed this child with the grand-
7 mother, then this child's parent-child relationship could
8 have remained intact. This child's --

9 QUESTION: That's all in the record?

10 MR. EVANS: But this? That is in the trial tran-
11 script.

12 QUESTION: So there is in the transcript, and it's
13 lodged here.

14 MR. EVANS: It is lodged.

15 QUESTION: Thank you.

16 QUESTION: So, who is it that should have the
17 appointed counsel? The grandmother or the mother here?

18 MR. EVANS: The mother, Mr. Justice. The state
19 alleged that the mother did not make a constructive plan for
20 the future of her child. This indigent imprisoned mother
21 made perhaps the only plan. She asked that her child be
22 placed with a member of the extended family. An indigent
23 imprisoned person cannot make any other plans, and must look
24 to the family, its family, to help her. And this plan would
25 have been the most constructive plan for everybody involved.

1 It would have kept the parent-child relationship intact;
2 this lady is getting out in a year; she can come home to her
3 family.

4 QUESTION: Well, now you're addressing the proposi-
5 tion that the decision of the court was wrong. It made a
6 bad and unwise decision.

7 MR. EVANS: Yes.

8 QUESTION: That's not before us, is it?

9 MR. EVANS: Well, Mr. Justice, that aspect of the
10 case is before the Court from the perspective that the
11 parent in this case lost certain procedural due process
12 rights. She lost her right to be able to present favorable
13 evidence. She had favorable defenses to present in this
14 case.

15 QUESTION: And the inference is that had she been
16 represented by counsel those rights would have been preserved
17 and not lost?

18 MR. EVANS: Yes, Mr. Justice.

19 QUESTION: And the decision would have been right
20 and not wrong?

21 MR. EVANS: Yes, Mr. Justice. And there are three
22 basic defenses that she had had that were meritorious, that
23 certainly counsel could have presented for her.

24 QUESTION: Did they allow her -- was she paroled
25 from prison in order to appear in the hearing?

1 MR. EVANS: She was brought to the hearing,
2 Mr. Justice. Yet she was unable to cross-examine the social
3 worker that testified against her. The trial transcript indi-
4 cates that she continually tried to testify while she was
5 supposed to be cross-examining. The juvenile court contin-
6 ually admonished her to stop doing so, and finally she gave
7 up her efforts to cross-examine. In the process she also
8 gave up her right to contest the veracity of this proceedings.

9 MR. JUSTICE: Mr. Justice, I see that I have five minutes. I
10 would like to reserve the rest of my time for rebuttal.

11 MR. CHIEF JUSTICE BURGER: Very well, Mr. Evans.
12 Mr. Odom.

13 ORAL ARGUMENT OF THOMAS RUSSELL ODOM, ESQ.,
14 ON BEHALF OF THE RESPONDENT

15 MR. ODOM: Mr. Chief Justice Burger, and may it
16 please the Court:

17 At the outset I would like to point out to you that
18 under North Carolina law there are two different proceedings
19 by which the Department of Social Services makes an effort
20 to address family problems. The statute provides, the statu-
21 tory scheme provides that the Department of Social Services
22 must investigate and to the extent necessary intervene in
23 those cases where parents can no longer be presumed to be
24 giving proper care and supervision to their children. Those
25 cases I will denominate custody cases which in addressing the

1 statute that was called into question a few minutes ago I will
2 also call abuse, neglect, and dependency proceedings.

3 It is this proceeding which represents the initial
4 intrusion into the family unit, into what Mr. Evans would call
5 the family integrity. The child is still with the parents,
6 the parents are presumed, as they are entitled to, to be pro-
7 viding proper care and supervision. It comes to the attention
8 of the Department of Social Services that they are not, and
9 the Department brings this action to court.

10 Because it is the initial and most, I would argue,
11 significant intrusion into the family unit, the Legislature
12 of North Carolina has provided that both the parent and the
13 child be provided with an attorney if they cannot afford one.
14 That is the purpose of the statute, Mr. Justice Marshall,
15 that you asked about earlier.

16 Now, there is a different statutory scheme in North
17 Carolina for the termination of parental rights. That is a
18 totally separate proceeding from the abuse, neglect, depen-
19 dency custody proceeding.

20 QUESTION: This statute quite definitely does not
21 apply in that proceeding?

22 MR. ODOM: That is correct, Mr. Justice Brennan.
23 At the initial custody hearing, if the court determines that
24 the child is to be removed and placed in the custody of the
25 Department of Social Services, which is what happened in this

1 case in May of 1975, the Department's interest tends to shift
2 very subtly from that of parens patriae to in loco parentis.
3 The court has given the Department of Social Services certain
4 responsibilities in providing for the interests of this indi-
5 vidual child. There are provisions in the law that are being
6 refined constantly by which the court can direct both the
7 parents and the Department of Social Services to work together
8 to try to reunify this family, to put the child back into
9 the home. There are provisions in the law now that require
10 that the custody decision that removed the child be reviewed
11 every six months to make sure that the court's mandate is
12 being followed.

13 Now, that did not happen in this case. That statu-
14 tory provision has been enacted subsequent to this. But what
15 happened in this case was that the family, once the child was
16 removed from the home, the family abandoned this child, in
17 foster care. The mother testified that she had seen him once
18 or twice, she had in fact visited with him once at the request
19 of the social worker, but she had not seen him any other time.
20 And there was a period of more than a year from the time that
21 the child was in fact removed from her custody until she went
22 into prison, at which time or during which time you could pre-
23 sume that she had the freedom to make some contest or some --

24 QUESTION: This was testimony at the hearing?

25 MR. ODOM: Yes, sir.

1 QUESTION: Without a lawyer?

2 MR. ODOM: Yes, sir. It was -- well, this record
3 was before, the initial custody proceeding was tried before
4 this very judge who looked back through the file and made a
5 determination that --

6 QUESTION: Did he have a right to do that?

7 MR. ODOM: Yes, sir. The juvenile --

8 QUESTION: Well, was anybody there to contest whe-
9 ther he had that right?

10 MR. ODOM: He has the right under North Carolina
11 law.

12 QUESTION: Well, I mean -- what did the -- could a
13 lawyer contest that?

14 MR. ODOM: He could have contested it but it would
15 have been a fruitless contest under North Carolina law.

16 QUESTION: Well, then it's your point it wouldn't
17 do them any good to have had a lawyer anyhow. I hope you're
18 not arguing that.

19 MR. ODOM: Well, I'm not going to stand here and
20 argue the ineffectiveness of lawyers, but I'm saying
21 that the statutory scheme on balance would make their effec-
22 tiveness in this kind of proceeding minimal, as compared to
23 the state's interest in not requiring by statute that they
24 be appointed.

25 QUESTION: Well, Mr. Odom, do I understand that

1 presently, under your present law, there could not be a termi-
2 nation proceeding until there had first been a custody pro-
3 ceeding at which the custody was turned over to a state
4 agency?

5 MR. ODOM: The Department of Social Services cannot
6 initiate --

7 QUESTION: Well, that's what I'm talking about.

8 MR. ODOM: Until they had in fact been given cus-
9 tody by a court's --

10 QUESTION: All right. But now, under your present
11 regime, under this new statute, the mother would have had
12 counsel at the custody proceeding -- ?

13 MR. ODOM: That is correct, yes, sir.

14 QUESTION: And, at least she'd have had counsel
15 there?

16 MR. ODOM: Yes, that is correct.

17 QUESTION: And she might have prevailed against the
18 award of custody to the state agency, which would have meant
19 there would never be a termination proceeding. Is that cor-
20 rect?

21 MR. ODOM: That is correct.

22 QUESTION: At least one initiated by the state
23 agency. Is that right?

24 MR. ODOM: That is correct.

25 QUESTION: Well, then, there is some connection

1 between this new statute and this case, isn't there?

2 MR. ODOM: Many judges tend to -- if in fact, this
3 case arose after the effective date of that statute in Janu-
4 ary of 1980, the court will continue the appointment of coun-
5 sel so that if in fact the child is removed at a hearing at
6 which the parent was represented, that the parent will have
7 the benefit of continued --

8 QUESTION: Later in the termination proceeding?

9 MR. ODOM: If in fact it comes up in a termina-
10 tion court --

11 QUESTION: Then, I do suggest there's some rele-
12 vance of this new statute to this case.

13 MR. ODOM: It can be construed in that fashion sub-
14 sequent to the effective date, but of course this all started
15 before then.

16 QUESTION: Well, wouldn't the child have a right to
17 counsel too?

18 MR. ODOM: Mr. Justice Rehnquist, what happened --

19 QUESTION: Under the new statute, that's correct?
20 In a custody proceeding?

21 MR. ODOM: He did under the old statute, and I'll
22 explain why. The Department, as I pointed out, takes on the
23 role of in loco parentis, the parent role to the child, and
24 is therefore presumed to be acting in the best interest of
25 the child. In the majority of these cases in the index to

1 our brief we try to point out some statistics that we were
2 able to find -- that in the majority of these cases the
3 Department has long since exhausted all other alternatives
4 for reuniting the family, and that by the time they bring
5 this action that is a hopeless cause. In only two cases out
6 of 768 did the court find in a termination action that there
7 were no grounds for termination.

8 QUESTION: But in this case there was testimony
9 that the grandmother wanted the child?

10 MR. ODOM: But there was conflicting testimony,
11 Mr. Justice Marshall, to the effect that the grandmother had
12 in fact told the case worker in discussions about that, that
13 she couldn't take care of the child. There was a flat-out
14 contradiction --

15 QUESTION: Well, one thing, as I understand it,
16 is North Carolina says you need two counsel, one for the child
17 and one for the parent in a temporary procedure. But you
18 don't need any for a permanent procedure?

19 MR. ODOM: That is correct. But the distinction
20 here --

21 QUESTION: What else do I need to rule against you
22 than that?

23 MR. ODOM: I think if you could understand what
24 actually happened in practice, you could see why the interest
25 of the state in not doing it is substantial enough to not

1 require it, especially as a matter of constitutional law.

2 What generally happens as a result of the child being removed
3 is that not only as a matter of state law --

4 QUESTION: Well, what can I do generally? I don't
5 have the slightest idea what generally happens in North
6 Carolina, but I do have a record of this case.

7 MR. ODOM: Well, also in this record, Mr. Justice
8 Marshall, is the uncontroverted fact that the woman made no
9 effort to see the child after he was removed and --

10 QUESTION: And it's also in this record, uncontro-
11 verted, that she didn't have counsel who could have told her
12 that.

13 MR. ODOM: When a parent's child, when this woman's
14 child was removed from her, had she -- she didn't even appear
15 at the custody hearing which took the child away from her.
16 That's uncontroverted. She was given two different notices
17 of that hearing.

18 QUESTION: What do you mean, uncontroverted?

19 MR. ODOM: It's uncontested.

20 QUESTION: Well, how can she contest without a
21 lawyer?

22 MR. ODOM: The point I'm making is that it is
23 understood by everyone that she was given notice of the origi-
24 nal hearing.

25 QUESTION: Well, it's not to me, unless you show it

1 to me in the record.

2 MR. ODOM: All right. It's in the trial transcript,
3 the fact that she did not appear and was given notice of the --

4 QUESTION: Well, on page 16 of that same record,
5 Appendix, Narrative of Testimony, "Although Respondent
6 stated to the Court that she had informed officials at the
7 North Carolina Correctional Center for Women, officials at
8 that institution" -- those officials "took no action to
9 help respondent receive the assistance of legal counsel."
10 Is that correct?

11 MR. ODOM: I'm not sure under North Carolina --

12 QUESTION: Is that correct?

13 MR. ODOM: That's what it says; yes, sir.

14 QUESTION: It has your signature on it.

15 QUESTION: I take it that your comment was directed
16 at the earlier hearing?

17 MR. ODOM: Yes, sir, that was the comment --

18 QUESTION: Not at the hearing that's in the tran-
19 script.

20 MR. ODOM: In question now.

21 QUESTION: Well, then you say, at the first hearing
22 she waived this future hearing?

23 MR. ODOM: She waived her right to appear at that
24 hearing and contest the removal of the child from her,
25 Mr. Justice Marshall.

1 QUESTION: Well, it says here she asked for help.

2 MR. ODOM: In this proceeding. She -- well, she
3 didn't ask for help in this proceeding. What she said was,
4 Judge, I've been talking with this lawyer about post-convic-
5 tion proceedings for four months. Give me some time to go
6 talk to him.

7 QUESTION: Did she -- could you read what, hear
8 what I said? She asked the Correctional Center.

9 MR. ODOM: But she didn't ask the court --

10 QUESTION: Well, she wasn't anyplace else but in
11 jail. She wasn't out walking down the street.

12 MR. ODOM: She was brought to the hearing.

13 QUESTION: This doesn't say it here.

14 MR. ODOM: Yes, it does. Keep reading on down.

15 QUESTION: Where does it say she was brought to the
16 hearing on that paragraph? I'm talking about the bottom of
17 the first paragraph, which you agreed is the narrative of the
18 testimony.

19 MR. ODOM: But it says that she stated to the
20 Court -- and she had to be present to the Court to state it --
21 she was in fact brought to the hearing, but she didn't ask --

22 QUESTION: This says that --

23 MR. ODOM: She did not ask for an appointed counsel.
24 She gave testimony --

25 QUESTION: Now, this woman was in jail?

1 MR. ODOM: She was but she was brought to the
2 hearing.

3 QUESTION: Well, was she in custody?

4 MR. ODOM: When she was brought to the hearing, yes,
5 sir.

6 QUESTION: Was she ever out of custody?

7 MR. ODOM: She has not been out of custody since --

8 QUESTION: Well, how could she get a lawyer while
9 she was in custody?

10 MR. ODOM: She had a lawyer.

11 QUESTION: For her criminal affair.

12 MR. ODOM: But she never bothered to mention to it
13 to him. If her right to this child was so fundamental, more
14 precious than the right to life itself, it's inconceivable
15 that she wouldn't have said --

16 QUESTION: Is this a lawyer of her own choice or
17 an appointed lawyer?

18 MR. ODOM: It's retained counsel, Your Honor.

19 QUESTION: Yes. And he was retained for a criminal
20 conviction. Does this lawyer do civil practice?

21 MR. ODOM: Yes, sir.

22 QUESTION: Well, where do I find that?

23 MR. ODOM: It's inconceivable that she could not
24 have at least mentioned the proceeding to him. She --

25 QUESTION: To me it's unimportant whether she

1 mentioned to "Ab-ab." The point was, she mentioned it to the
2 authorities and she couldn't do anything without the permis-
3 sion of those authorities in that prison. She couldn't do
4 anything without their permission. Correct?

5 MR. ODOM: She could write. She could write.

6 QUESTION: Well, how could she get a lawyer by
7 writing?

8 MR. ODOM: She obtained one through her mother
9 who --

10 QUESTION: Well, where is he in this case? He was
11 hired for one deal, not for two.

12 MR. ODOM: But she was communicating with him, and
13 the big issue was that she had -- and the point to be made
14 from this is that if she in fact were so concerned --

15 QUESTION: Did you at the hearing ask her why she
16 didn't say it?

17 MR. ODOM: No, sir, I never did.

18 QUESTION: That's your answer. So I don't know,
19 because you didn't give me the information.

20 MR. ODOM: But she did say that she had never men-
21 tioned this proceeding to him but had been communicating with
22 him throughout.

23 QUESTION: She needed counsel. Don't you agree she
24 needed counsel?

25 MR. ODOM: No, sir, I don't think so.

1 QUESTION: She -- well, who was protecting her
2 rights ?

3 QUESTION: Do you think the state, in respect to
4 this very question, do you think the state could have pre-
5 vented her from having counsel?

6 MR. ODOM: No, sir, and we would not purport to even
7 argue that.

8 QUESTION: Well, I know, but suppose the state did,
9 would it be unconstitutional to keep her retained counsel
10 out of the hearing?

11 MR. ODOM: Yes. I would --

12 QUESTION: Why? She doesn't need counsel.

13 MR. ODOM: I'm not arguing that counsel would not
14 have been effective in perhaps presenting testimony to the
15 court. I am saying that under the facts of the case this deci-
16 sion that was made in the trial court was correct.

17 QUESTION: Well, following up your answer to Mr.
18 Justice White's question, why couldn't the state say that
19 neither retained nor appointed counsel shall represent anybody
20 in these proceedings? It's too destructive of the family
21 relationship to have every incident magnified and made into
22 an adversarial situation, so that we're simply going to con-
23 duct these hearing without any lawyers, because we think law-
24 yers louse up families.

25 MR. ODOM: It's possible, I suppose, that the

1 Legislature could do that, but I think it would fly in the
2 face of an inherent presumption that in any kind of legal
3 action that was in fact brought in a court of law, a person
4 is entitled to appear by retained counsel. Now --

5 QUESTION: Well, that's a presumption fostered by
6 the legal profession, but that doesn't make it constitutional.

7 MR. ODOM: Well, I think it would be one that would
8 be given a great deal of attention.

9 QUESTION: Well, it certainly would because most
10 judges are lawyers.

11 MR. ODOM: What would happen, I think, what would
12 happen, the Legislature could do, in North Carolina, it could
13 create an administrative body to make a determination as to
14 whether or not the Department can make a decision as to whe-
15 ther the woman's rights to the child would be totally and
16 permanently severed. But they chose not to do that.
17 They chose to make it, in fact, a judicial proceeding to take
18 out of the hands of the Department of Social Services the
19 right to make that determination, and they did that because
20 of the recognition of the Legislature of the importance of
21 the family right.

22 QUESTION: Mr. Odom, I just want to be clear.
23 I think you told me earlier, did you not, that under the
24 present regime the custody aspect calls for counsel by stat-
25 ute, now must be provided?

1 MR. ODOM: Yes, sir.

2 QUESTION: If that results in the transfer of cus-
3 tody to a state agency, which then initiates a proceeding to
4 terminate the parental relationship, then counsel as a matter
5 of practice, even though the statute doesn't require it, is
6 provided at the termination hearing also?

7 MR. ODOM: I think as a practical matter the court
8 tends to extend the appointment of counsel --

9 QUESTION: Does the court -- is the practice in
10 fact to do it?

11 MR. ODOM: My experience has been that some judges do
12 and some judges don't. There is some discrepancy from judi-
13 cial district to judicial district.

14 QUESTION: Thank you.

15 QUESTION: Mr. Odom, when a lawyer is appointed
16 pursuant to the new statute and for an indigent, which, as the
17 statute requires, is that lawyer paid by the state?

18 MR. ODOM: Yes, sir.

19 QUESTION: Mr. Odom, let me follow through on one
20 factual thing that disturbs me. Does the record disclose
21 whether between the removal in 1975 and the termination in
22 1978 a Department social worker ever contacted the petitioner
23 or her mother?

24 MR. ODOM: Yes, it does.

25 QUESTION: And what does it show?

1 MR. ODOM: It shows that she contacted the mother
2 and discussed with her the idea of perhaps giving the child
3 up for adoption or terminating her rights or asking her what
4 she wanted to do with the child, and all she said was, I want
5 the child to live with my mother. The social worker then con-
6 tacted the mother and -- at least the transcript -- this
7 particular record does not, but Mr. Evans had the transcript
8 lodged with the court -- shows that the worker says she con-
9 tacted the grandmother on several occasions and was told by
10 the grandmother, I can't take care of the child.

11 QUESTION: On several occasions?

12 MR. ODOM: That's what the transcript says; yes, sir.

13 QUESTION: At least two times you said that she
14 saw -- only two times in the year she saw her son? Was that
15 the time she was in jail?

16 MR. ODOM: No, sir, that was prior to her going to
17 jail.

18 QUESTION: Well, I was reading the transcript and
19 I have great difficulty with it. Go ahead. I'm going to
20 finish reading this transcript.

21 MR. ODOM: I thought you had asked me a question.

22 QUESTION: Yes, that's the question I asked you.
23 She was in jail the year before?

24 MR. ODOM: Immediately preceding. But the first
25 year after the child was removed from her custody, she was

1 not in jail, for in fact, for some 13 or 14 months after he
2 was removed and placed in a foster home, she was not in jail,
3 she was out on the street.

4 QUESTION: But the record says she was in jail.
5 At that time, you said, she didn't see him for the first
6 year. For the last year she only saw him twice.

7 MR. ODOM: What the transcript shows is that she
8 hadn't seen him at all since he had been removed, but two
9 or three times, those occurring when, in fact, she was out
10 on the street.

11 QUESTION: Well, I'll take a look at it and give
12 you the benefit of the doubt.

13 MR. ODOM: In fact, though, the petition was brought
14 on two grounds and the court concluded as a matter of law
15 that she had failed to maintain concern or responsibility as
16 to the child's welfare. And I would submit to the court that
17 the fact that a parent is in prison does not prevent them
18 from maintaining concern or responsibility as to the child's
19 welfare. And she had made no effort to do that. Now, I
20 wouldn't argue that it would have prevented a finding that
21 she had willfully abandoned him, and that was not alleged
22 in this case.

23 I think, in trying to sum up, the obverse of the
24 problem that we're struggling with is, if this Court requires
25 the appointment of counsel in a civil action as a matter of

1 constitutional law, the Court will be hard pressed to limit
2 it and will be placed in the position, from here on, of making
3 a determination as to what right is most fundamental enough
4 to require it, and those that are not fundamental enough to
5 require it.

6 QUESTION: Mr. Odom, you personally, as -- what?
7 The Assistant County Attorney? --

8 MR. ODOM: Yes, sir.

9 QUESTION: -- was assigned to this case and you
10 were there from the beginning to the end?

11 MR. ODOM: Yes, sir.

12 QUESTION: Thank you.

13 MR. ODOM: Thank you.

14 MR. CHIEF JUSTICE BURGER: Mr. Shaber.

15 ORAL ARGUMENT OF STEVEN MANSFIELD SHABER, ESQ.,

16 ON BEHALF OF NORTH CAROLINA AS AMICUS CURIAE

17 MR. SHABER: Mr. Chief Justice, and may it please
18 the Court:

19 Perhaps I might begin, Justice Rehnquist, by fol-
20 lowing up on your question about whether or not the state
21 could dispense with counsel altogether in these hearings. And
22 frankly, sir, I think not, notwithstanding Parham v. J.R.
23 And the reason I think not is that the degree of importance
24 that's attached to the family relationship in Stanley v.
25 Illinois and the other child custody cases is such that the

1 Court would not be able to hold that counsel could be barred
2 from the hearings.

3 Justice Brennan, you asked if counsel that are
4 appointed in neglect cases carry over? Mr. Odom says that
5 in practice they sometimes do. It is not the position of
6 the state that they necessarily are entitled to carry over,
7 although that is the practice of many state district court
8 judges. The question simply has not been addressed in North
9 Carolina law.

10 QUESTION: Has there been any effort to have the
11 Legislature address it? I just wonder, why the distinction
12 between the custody and the termination procedures?

13 MR. SHABER: Your Honor, I can suggest a couple of
14 possible distinctions. I should say more than possible; I
15 think they are the distinctions.

16 First is this, that the intrusion at the time of
17 the neglect hearing is really the more important intrusion
18 because that's what separates a child from the parent and dis-
19 rupts the care and companionship of the child. That's what
20 really sunders the family, and from that point on what the
21 parent has is not an interest in the companionship of the
22 child but the expectation that with the help of the state the
23 child may come back some time in the future. That interest
24 is a much lower interest.

25 The second point is this, that the County Department

1 of Social Services being charged with this obligation to try
2 and restore the family, and having this obligation not only
3 from the time of the neglect hearing on, but prior to the
4 neglect hearing, finds itself in sort of a conflict of inter-
5 est situation. It's supposed to protect the child on one
6 hand and on the other hand it's supposed to try and put the
7 family back together. And one way to keep the County Depart-
8 ment of Social Services out of trouble given this inherent
9 conflict in its responsibilities is to appoint an attorney
10 for the child and an attorney for the parent, and that's
11 what the state does.

12 The third point, I think, is that very often,
13 although not always, the neglect -- sir?

14 QUESTION: May I just interrupt? Why isn't the
15 same conflict present at the termination hearing?

16 MR. SHABER: By the time the termination hearing
17 comes along, Justice Stevens, the County Department of Social
18 Services has made a decision that the child cannot go home
19 and should not go home. It no longer has an obligation to
20 try and restore that family. It is exclusively concerned
21 with trying to protect the best interests of the child
22 throughout the rest of its life. And so it's not divided;
23 it no longer has --

24 QUESTION: It's kind of ironic, because at the first
25 hearing it has a greater interest in the parent's side of the

1 potential controversy and yet the parent has an independent
2 right to counsel. At the second hearing nobody speaks for
3 the parent except a parent who, presumably, sometimes cannot
4 do so effectively.

5 MR. SHABER: Yes, sir, Your Honor, I concede the
6 irony in that, and I would nevertheless suggest that the rea-
7 son is that by the time you get to the termination action,
8 the state's interest is really not readily distinguishable
9 from the interest of any other private person who under the
10 termination statute might also have had standing to bring a
11 termination of parental rights action. Once the state -- it
12 settles in civil cases generally -- the state stands as a
13 private litigant and may bring its resources to bear against
14 its opponent. And when you eliminate that conflict of
15 interest --

16 QUESTION: But there are very few civil situations
17 in which a state sues indigent litigants.

18 MR. SHABER: Your Honor, proportionately, yes, but
19 in fact I think it's not uncommon. Condemnation cases would
20 be a --

21 QUESTION: By hypothesis, somebody who owns a lot
22 of real estate normally is not indigent.

23 MR. SHABER: Your Honor, I do a lot of food stamp
24 law and AFDC law, and I find a lot of people with a small
25 parcel of property who have nothing else, and their prospect

1 would be, mortgage the property. And perhaps they couldn't
2 do that because of flaws in the title and so on,
3 or don't eat. So, I think that there are indigent persons
4 who nonetheless would be subject to a property condemna-
5 tion hearing.

6 QUESTION: Well, I take it, anyway, Mr. Shaber,
7 your Legislature has never expressly addressed the question,
8 why not also counsel at the termination hearing?

9 MR. SHABER: Your Honor, Mr. Odom includes in the
10 appendix to his brief two bills which did go before the
11 General Assembly but which did not pass.

12 QUESTION: I see.

13 MR. SHABER: I ought to tell the Court at this
14 juncture that I have also drafted a bill which I understand
15 will be submitted at this session. It was drafted at the
16 behest of certain members of the General Assembly. Whether
17 or not it will pass I do not know.

18 QUESTION: Is it also true that there are a great
19 many more custody hearings than there are termination hearings?

20 MR. SHABER: Very many more.

21 QUESTION: So the Legislature might have been more
22 aware of the problem there?

23 MR. SHABER: Yes, sir, that is a possibility, but
24 I don't know --

25 QUESTION: And typically, as in this case,

1 a termination proceeding takes place only after there has
2 been a loss by the parent of custody?

3 MR. SHABER: Yes, sir.

4 QUESTION: Although it's not necessarily so in all
5 situations?

6 MR. SHABER: Your Honor, I think, in all instances
7 where the government would -- ~~it is necessarily so.~~

8 QUESTION: Then it is necessarily so?

9 MR. SHABER: It is necessarily so. Because the
10 County Department of Social Services first has to get
11 custody --

12 QUESTION: That was what you said in answer to my
13 brother Brennan earlier.

14 MR. SHABER: Yes.

15 QUESTION: But there are some situations in which
16 there can be a termination hearing without an antecedent
17 custody proceeding.

18 MR. SHABER: Not when they're brought by the
19 County --

20 QUESTION: Not when they're brought --

21 MR. SHABER: Yes, sir; when they're brought by
22 private parties. I'm sorry. That's correct.

23 QUESTION: But they're very rare?

24 MR. SHABER: I would think that they're on the
25 order of 50 or 60 a year. Typically, they involve

1 stepparent adoptions.

2 QUESTION: Right.

3 MR. SHABER: If I might, let me speak very briefly
4 to the prospect that this decision might be held to be retro-
5 active. The state recognizes that it is asking this court
6 to do something which it has only done once before, and that
7 was in *Morrissey v. Brewer*. We are saying that if the
8 petitioner prevails on this case, we would like language in
9 the opinion such as is in *Morrissey* to the effect that it is
10 wholly prospective.

11 Justice Stevens saw fit to speak to the question of
12 retroactive and prospective application in *Caban v. Mohammed*.
13 Justice Frankfurter did the same in his separate opinion in
14 *Griffin v. Illinois*. We think that this is really a unique
15 case. There are children in North Carolina who have been
16 adopted, whose families are settled. They ought not run the risk
17 if this decision, if against us, is retroactive. Likewise,
18 there are children in North Carolina whose parental rights
19 have been terminated and they --

20 MR. CHIEF JUSTICE BURGER: We'll resume there at
21 1 o'clock. You have about three minutes left.

22 (Recess)

23 MR. CHIEF JUSTICE BURGER: You may resume, Mr. Shaber.
24 Mr. Shaber.

25 MR. SHABER: Mr. Chief Justice, and members of

1 the Court:

2 If I may follow up on a question that Justice
3 Brennan posed before lunch, the question about whether or not
4 you can draw lines between categories of cases. Justice
5 Brennan asked, what would happen if perhaps a termination of
6 parental rights action were brought by a private party instead
7 of by a county Department of Social Services? And in fact
8 that case exists. It's being held in abeyance in the Eastern
9 District of North Carolina pending the result in this deci-
10 sion. But there is a husband who is asserting that he has a
11 right to an appointed attorney in a termination of parental
12 rights action which was prosecuted by his wife, without any
13 other government involvement in that.

14 QUESTION: His wife married somebody else? Is that

15 MR. SHABER: Ah, yes, sir.

16 QUESTION: His former wife?

17 MR. SHABER: Yes, sir. His former wife.

18 Similarly, there's a case pending in North
19 Carolina --

20 QUESTION: Did he explain to anyone how if he can't
21 afford a lawyer he's going to support his child?

22 MR. SHABER: No, sir, he doesn't. It is more
23 ironic than that, Justice Burger, because the man prevailed
24 in the termination action. This is a 1983 action on behalf
25 of the winner saying that notwithstanding the fact that I

1 won I should have had an attorney at the earlier case. It's
2 an interesting little case.

3 We've got a case in North Carolina where the question is
4 whether there should be appointed counsel on behalf of the
5 respondent in a child support action which was prosecuted by
6 the county. And you know that in the light of Boddie v.
7 Connecticut, there have been two State Supreme Court cases
8 where the question is, whether or not a respondent in a
9 domestic action has got a right to a court-appointed attorney.

10 Now, this line, between cases involving personal
11 liberty and your physical freedom, and all the other kind
12 of civil cases, is under assault all over the country.
13 I would suggest that the Court needs to consider that very
14 carefully and that if they do they're going to remember that
15 the history of the right to counsel in a criminal case is
16 one which shows that distinctions based on degree, distinc-
17 tions based on the seriousness of the offense, are not dis-
18 tinctions which are going to be able to hold over time, we've
19 moved from Powell to Argersinger and Scott. What
20 happens is --

21 QUESTION: Do you think the American Bar Association
22 has taken the position it does in this litigation because it's
23 looking to the long-run best interest of employment for law-
24 yers?

25 MR. SHABER: Justice Stevens, I think not. I think

1 the Bar Association, and throughout its entire history, has
2 emphasized the importance of counsel and it is strongly com-
3 mitted to provide lawyers for everybody. Look at their posi-
4 tion on law school enrollments, and compare it, perhaps, to
5 the position of the American Medical Association in a similar
6 situation.

7 QUESTION: I suppose this may have an impact on the
8 small claims courts in the states where they preclude any
9 lawyers, along the lines of Mr. Justice Rehnquist's sugges-
10 tion?

11 MR. SHABER: I suggested to Justice Rehnquist that
12 the counsel would have to be provided in those instances -- per-
13 haps not in your hypothetical -- simply because this right to
14 family integrity has been given special treatment by this
15 Court in Stanley and the following cases.

16 Thank you very much.

17 MR. CHIEF JUSTICE BURGER: You have about three
18 minutes remaining, Mr. Evans.

19 MR. EVANS: Thank you, Mr. Justice.

20 ORAL ARGUMENT OF LEOWEN EVANS, ESQ.,

21 ON BEHALF OF THE PETITIONER PRO HAC VICE -- REBUTTAL

22 MR. EVANS: There are several points I wanted to
23 address that the Court raised.

24 The first is, drawing a line. This case is cer-
25 tainly distinguishable from the majority of civil cases.

1 This case is formal and complex; adversarial -- not informal.
2 The full panoply of evidentiary rules apply. The full
3 panoply of procedural safeguards apply. A formal finding of
4 fact and conclusions must be made. It's judicial, not ad-
5 ministrative; governmentally initiated, prosecuted, and
6 financed. The records that are used and the testimony that
7 are used in these cases often involve testimony by a paid
8 state agent and records that have been compiled by a paid
9 state agent. Likewise, you can look to each of the prongs
10 of Mathews to find points of distinction.

11 Under the first point, state-initiated, state-pro-
12 secuted, the fundamentalness of the interests. Under the
13 governmental interest involved we have the government moving
14 as a party, we have the government having a substantial
15 *parens patriae* interest. We just don't have that in other
16 cases.

17 Under the third prong of *Mathews v. Eldridge*
18 we have the government overbearing the indigent parent by his
19 resources and advocacy skills. In the vast majority of civil
20 cases, we simply just do not have that.

21 QUESTION: And yet it's not your contention that
22 this is a criminal prosecution, is it?

23 MR. EVANS: No, Mr. Justice.

24 QUESTION: And that's the line that the Constitution
25 draws, the Sixth Amendment to the Constitution.

1 MR. EVANS: The Sixth Amendment --

2 QUESTION: Which guarantees counsel in all
3 criminal prosecutions?

4 MR. EVANS: The Sixth Amendment does, Justice Stewart.

5 As far as the questions as to what effort this
6 parent -- these -- the family made towards obtaining this
7 child after the child went into foster care, at the very out-
8 set the grandmother asked the Department of Social Services
9 to place the child with her. The mother wanted the child to
10 be placed with her. You can find reference to this request
11 in the trial transcript at page 52.

12 QUESTION: Is there some reference to the notion
13 that she was not able to take care?

14 MR. EVANS: Yes, Mr. Justice. There was an allega-
15 tion by the social worker that she said that she could not
16 take care of the child, that members of her church said that
17 she could not take care of the child. However, at the trial
18 the grandmother testified that she never made such statements
19 and indeed, that she never would make such statements, because
20 these five children involved are her only grandchildren. She
21 has four children. Petitioner is the only child that has
22 children, and she said that this is my only family and there's
23 no way that I would give up that right.

24 Likewise, in reference to Mr. Justice Blackmun's
25 question about diligent effort, the Department of Social

1 Services did not make a diligent effort in this case to try
2 to strengthen the parent-child relationship. The Department
3 made only one visit to this parent during the two years in
4 issue, one visit. This visit was made three months prior to
5 filing a termination of parental rights petition, and the
6 visit was made for the express purpose to ask the parent to
7 give up her parent-child relationship. Two years, one visit,
8 asking the parent to give up the parent-child relationship,
9 certainly cannot be classified as a diligent effort to
10 strengthen the parent-child relationship.

11 In reference to Mr. Justice Brennan's questions
12 about abuse and neglect, abuse and neglect are grounds for
13 termination of parental rights in North Carolina. So that
14 you do not have to have a prior adjudication in which the
15 child is actually put into the custody of DSS, of Department
16 of Social Services, and be any subsequent termination action
17 under certain situations --

18 MR. CHIEF JUSTICE BURGER: Your time has expired
19 now, Mr. Evans.

20 MR. EVANS: Yes. Thank you.

21 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
22 The case is submitted.

23 (Whereupon, at 1:08 o'clock p.m., the case in the
24 above-entitled matter was submitted.)

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CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-6423

ABBY GAIL LASSITER

v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will G. Wilson

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