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## Ineffective Assistance of Counsel: In re Jamie TT.

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Therefore, *Mitchell* held that state courts can determine whether to apply a state court decision retroactively or prospectively.<sup>1461</sup> Accordingly, since defendant's trial took place prior to the *Antommarchi* decision and that rule is applied prospectively, defendant could not rely on this rule as a basis for his appeal.<sup>1462</sup>

Under federal law, the Supreme Court in *Griffith v. Kentucky*<sup>1463</sup> has held that "a new constitutional rule is to be applied retroactively to all cases pending on direct review."<sup>1464</sup> However, in *Mitchell*, the court pointed out that the *Griffith* rule is not binding on state courts when no constitutional principles are involved.<sup>1465</sup> State courts have the power to determine whether or not a state rule should be applied retroactively.<sup>1466</sup> Accordingly, since state law applied to defendant's claim, the state rule of retroactivity was applicable. Thus, the court affirmed defendant's conviction on both constitutional claims.

*In re Jamie TT.*<sup>1467</sup>  
(decided July 1, 1993)

The Department of Social Services, petitioner in a child abuse proceeding, and the law guardian, claimed that the child's

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trial when defendant was not present but the court upheld that defendant's conviction applying the *Antommarchi* rule prospectively).

1461. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. *Mitchell* applied the rule announced in *People v. Pepper*, 53 N.Y.2d 213, 423 N.E.2d 366, 440 N.Y.S.2d 889, *cert. denied*, 454 U.S. 967 (1981). The rule follows a three part test in determining what effect a rule would have if applied retroactively. The court looks at the purpose of the rule, the extent of reliance on the rule, and the effect its retroactive application would have on administration. *Id.*

1462. The verdict in the instant case was rendered on June 28, 1991.

1463. 479 U.S. 314 (1987) (holding courts must apply rules retroactively).

1464. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993 (citing *Griffith*, 479 U.S. at 314).

1465. *Id.*

1466. *Id.*; *see also* *American Trucking v. Smith*, 496 U.S. 167 (1990) (holding state courts can determine how to apply their own rules as they see fit).

1467. 191 A.D.2d 132, 599 N.Y.S.2d 892 (3d Dep't 1993).

State<sup>1468</sup> and Federal<sup>1469</sup> Constitutional right to due process was violated because the minor child received ineffective assistance of counsel where the law guardian played a passive role and did not make up for deficiencies in the county attorney's presentation.<sup>1470</sup>

The appellate division held that New York statutory law<sup>1471</sup> and the Due Process Clauses of the Federal<sup>1472</sup> and State<sup>1473</sup> Constitutions mandated legal representation of the subject of a child abuse petition and affirmed the constitutional claims for effective assistance of counsel where the child's liberty interests were at stake in an adversarial proceeding.<sup>1474</sup>

Petitioner, Department of Social Services, alleged that Jamie TT., a thirteen year old female, had been sexually abused by the respondent, her adoptive father, who was married to her biological mother.<sup>1475</sup> At a fact-finding hearing held before the Family Court, the county attorney, representing petitioner, called Jamie as the only witness, although there were other witnesses to Jamie's out of court statements, and expressly refused to seek "evidence from an expert witness" to corroborate Jamie's testimony.<sup>1476</sup> The county attorney failed to cross-examine the respondent when he testified that he never abused Jamie.<sup>1477</sup>

Additionally, the law guardian only asked the respondent three questions on cross-examination, none of which addressed his credibility.<sup>1478</sup> As a result, the Family Court could not determine which of the two witnesses was credible, and dismissed the petition on the grounds that the petitioner did not prove the

1468. N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.")

1469. U.S. CONST. amend XIV § 1 ("[N]or shall any state . . . deprive any person of life, liberty, or property, without due process of law . . . .")

1470. *Jamie TT.*, 191 A.D.2d at 137-38, 599 N.Y.S.2d at 895.

1471. N.Y. FAM. CT. ACT § 241 (McKinney 1994).

1472. U.S. CONST. amend. XIV.

1473. N.Y. CONST. art. 1, § 6.

1474. *Jamie TT.*, 191 A.D.2d at 136, 599 N.Y.S.2d at 895.

1475. *Id.* at 133, 599 N.Y.S.2d at 893.

1476. *Id.* at 137, 599 N.Y.S.2d at 895.

1477. *Id.*

1478. *Id.*

allegations by a preponderance of the evidence.<sup>1479</sup> On appeal,<sup>1480</sup> the law guardian claimed that Jamie was denied effective assistance of counsel at the hearing and that a new trial was warranted.<sup>1481</sup>

The appellate division relied upon New York statutory law and the Due Process Clauses of the State and Federal Constitutions to find that the subject of a child abuse petition had a right to effective assistance of counsel.<sup>1482</sup> First, the court noted that a child who is the subject of a Family Court article 10 proceeding<sup>1483</sup> is guaranteed “independent legal representation” in order to help reach factual determinations.<sup>1484</sup>

Next, the court reasoned that the Due Process Clauses of both the State and Federal Constitutions required legal representation of Jamie’s liberty interest.<sup>1485</sup> Since Jamie was returned to the respondent’s custody as a result of the Family Court proceeding, the court found that the respondent had the authority to bring a “person in need of supervision proceeding [against her] if Jamie challenged his authority by . . . running away.”<sup>1486</sup> Therefore, Jamie had a liberty interest in the proceeding, because of its possible outcome, and was entitled to due process protection.<sup>1487</sup>

1479. *Id.* at 134, 599 N.Y.S.2d at 893.

1480. *Id.* at 134 n.1, 599 N.Y.S.2d at 893 n.2. Petitioner filed a notice of appeal but not a brief.

1481. *Id.* at 135, 599 N.Y.S.2d at 893. The Law Guardian also argued that the Family Court abdicated its role as fact-finder because it failed to make a credibility determination. The appellate division disagreed with this point. *Id.* at 134, 599 N.Y.S.2d at 893.

1482. *Id.* at 135, 599 N.Y.S.2d at 893-894.

1483. *Id.* at 135, 599 N.Y.S.2d at 894 (citing N.Y. FAM. CT. ACT § 249 (McKinney 1994)).

1484. *Id.* at 135, 599 N.Y.S.2d at 894.

1485. *Id.*

1486. *Id.* A “person in need of supervision proceeding” (PINS) addresses a claim regarding a “male less than sixteen years of age and a female less than eighteen years of age who does not attend school . . . or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent . . . .” N.Y. FAM. CT. ACT § 712 (McKinney 1994).

1487. *Jamie TT.*, 191 A.D.2d at 136, 599 N.Y.S.2d at 894.

Also, the court found that Jamie had a strong interest in being protected from further abuse by the state.<sup>1488</sup>

The appellate division concluded that “Jamie did not receive the effective [assistance of counsel] to which she was constitutionally entitled . . . .”<sup>1489</sup> The court criticized the failure of both the law guardian and county attorney<sup>1490</sup> to call sufficient witnesses and to conduct adequate cross-examinations.<sup>1491</sup> The court carefully pointed out that the “deficiencies noted cannot be explained as merely losing trial tactics.”<sup>1492</sup>

Applying New York case law, the appellate court reasoned that if inadequate preparation and lack of advocacy skills warranted reversals in criminal cases, then the same result should follow in other adversarial proceedings, such as a child abuse hearing.<sup>1493</sup> For example, in *People v. Daley*,<sup>1494</sup> the Second Department reversed a criminal defendant’s conviction on the ground of ineffective assistance of counsel where the defendant suffered prejudice as a result of his attorney’s ineptitude.<sup>1495</sup> In *Daley*, the defense attorney was unfamiliar with the applicable criminal law, conducted an inadequate cross-examination of the prosecution’s main witness, and failed to address incriminating evidence presented at trial, in his summation.<sup>1496</sup> The *Daley* court carefully distinguished the defense counsel’s apparent

1488. *Id.* In arriving at this conclusion, the court applied the three part analysis enumerated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court of the United States stated that three factors must be considered in order to identify the due process requirements: 1) the private interest at stake; 2) the degree of risk of erroneous deprivation of that interest under current procedures, and 3) the governmental interest, including the burden posed by changing the procedures. *Mathews*, 424 U.S. at 335.

1489. *Jamie TT.*, 191 A.D.2d at 137, 599 N.Y.S.2d at 895.

1490. *Id.* The proper focus should be on the law guardian in determining whether Jamie received adequate representation. *Id.* at 138, n.\*, 599 N.Y.S.2d at 896 n.4 (Casey, J., concurring).

1491. *Id.* at 137, 599 N.Y.S.2d at 895.

1492. *Id.* at 137-38, 599 N.Y.S.2d at 895.

1493. *Id.* at 136-37, 599 N.Y.S.2d at 895.

1494. 172 A.D.2d 619, 568 N.Y.S.2d 157 (2d Dep’t 1991).

1495. *Id.* at 621, 568 N.Y.S.2d at 158-59.

1496. *Id.* at 620, 568 N.Y.S.2d at 158.

absence of a trial strategy from that of a merely inadequate defense strategy.<sup>1497</sup>

In *People v. Echavarria*,<sup>1498</sup> the first department reversed a criminal defendant's conviction on the ground of ineffective assistance of counsel where a defense attorney who used a defense of misidentification and whose client participated in several pre-trial identification procedures, "never requested a *Wade* hearing."<sup>1499</sup> A conclusion of lack of effective representation was supported where the defense attorney had no opening statement, did not cross-examine the prosecution's witnesses, and never, during a week-long trial, never made any objections.<sup>1500</sup> Therefore, instead of finding a matter of unsuccessful trial tactics, the court held that "the representation defendant received was neither adequate nor meaningful."<sup>1501</sup>

Similarly, the second department in *People v. Morales*,<sup>1502</sup> found that a criminal defendant was denied effective assistance of counsel because his attorney waived the right to cross-examine the arresting officers by stipulating to the content of their testimony and because he rested the defense on the fact that the complainant would not testify when, in fact, the complainant did testify.<sup>1503</sup> In *People v. Worthy*,<sup>1504</sup> lack of meaningful representation was found in the defense attorney's inadequate conduct at a *Wade* hearing and his inappropriate summation which was based, in large part, on his "irrelevant personal opinion of the innocence of his client."<sup>1505</sup>

The *Jamie TT*. court noted that reversal was also required because the law guardian took a passive role in the

1497. *Id.* at 621, 568 N.Y.S.2d at 158.

1498. 167 A.D.2d 138, 561 N.Y.S.2d 226 (1st Dep't 1990).

1499. *Id.* at 139, 561 N.Y.S.2d at 226. A *Wade* hearing contests the constitutionality of pre-trial identifications.

1500. *Id.* at 139-140, 561 N.Y.S.2d at 227.

1501. *Id.* at 140, 561 N.Y.S.2d at 227.

1502. 118 A.D.2d 814, 500 N.Y.S.2d 170 (2d Dep't 1986).

1503. *Id.* at 815, 500 N.Y.S.2d at 171.

1504. 112 A.D.2d 454, 492 N.Y.S.2d 423 (2d Dep't 1985).

1505. *Id.* at 456, 492 N.Y.S.2d at 425.

proceedings.<sup>1506</sup> In *In re Elizabeth R.*,<sup>1507</sup> reversal was warranted where, among other deficiencies, the law guardian did not actively participate in the proceedings.<sup>1508</sup>

The appellate division's conclusion that Jamie was entitled to effective assistance of counsel was also based on federal case law.<sup>1509</sup> In *Mathews v. Eldridge*,<sup>1510</sup> the United States Supreme Court determined the constitutional sufficiency of the procedure for terminating disability benefits by examining the private and governmental interests affected, and the risk of erroneous outcome.<sup>1511</sup> Using this same test, the appellate division found that Jamie had a strong interest in being protected from sexual abuse and in receiving psychological services.<sup>1512</sup> The state's interest in the child abuse proceeding was that of *parens patriae*.<sup>1513</sup> Finally, the court found that the presence of an attorney to act on Jamie's behalf was "necessary to avoid an erroneous outcome unfavorable to Jamie . . . ." <sup>1514</sup>

Consistent with state case law, the appellate division in *Jamie TT.* reversed the order which dismissed the petition and remitted to the Family Court for another fact-finding hearing.<sup>1515</sup> Moreover, the court applied the *Mathews* three-fold test to determine Jamie's protected interest of effective counsel. Thus, it is apparent that both the federal and state case law would agree that Jamie's "constitutional . . . rights to be represented by counsel were not satisfied merely by the State's supplying a

1506. *Jamie TT.*, 191 A.D.2d at 138, 599 N.Y.S.2d at 895.

1507. 155 A.D.2d 666, 548 N.Y.S.2d 55 (2d Dep't 1989).

1508. *Id.* at 668, 548 N.Y.S.2d at 57.

1509. *Jamie TT.*, 199 A.D.2d at 136, 599 N.Y.S.2d at 894.

1510. 424 U.S. 319 (1976).

1511. *Id.* at 334-35.

1512. *Jamie TT.*, 191 A.D.2d at 136, 599 N.Y.S.2d at 894.

1513. *Id.* The literal meaning of *parens patriae* is "parent of the country" and refers to the state's role as the guardian of any person who is under a legal disability. See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

1514. *Jamie TT.*, 191 A.D.2d at 136, 599 N.Y.S.2d at 894.

1515. *Id.* at 138, 599 N.Y.S.2d at 895.

lawyer's physical presence in the courtroom; Jamie was entitled to 'adequate' or 'effective' legal assistance."<sup>1516</sup>

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<sup>1516</sup> *Id.* at 136, 599 N.Y.S.2d at 895; *see also* *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).



