This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
In the Interest of B.G., C.W., E.W., B.B.W., and J.W., Children.
No. 07-0960.

September 8, 2009.

Appearances:
Brent L. Watkins, Zeleskey Cornelius Hallmark Roper & Hicks, PLLC, Lufkin, TX, for petitioner Lester Williams.
Trevor A. Woodruff, Texas Department of Family and Protective Services, Austin, TX, for respondent Department of Family and Protective Services.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

CONTENTS
ORAL ARGUMENT OF BRENT L. WATKINS ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF TREVOR A. WOODRUFF ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF BRENT L. WATKINS ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: Please be seated. The Court is ready now to hear argument in 07-0960 in the interest of B.G., C.W., E.W., B.B. W., and J.W., children.
MARSHALL: May it please the Court, Mr. Watkins will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF BRENT L. WATKINS ON BEHALF OF THE PETITIONER

ATTORNEY BRENT L. WATKINS: May it please the Court. This case is another one of these cases along the lines of 263.405(i). This case came from the District Court of Angelina County. My client, the petitioner, had his rights terminated, on I believe, August 17 of 2006 and appellate counsel was not appointed until after the 15-day deadline as specified in 263.405.
JUSTICE HARRIET O'NEILL: The statute seems to contemplate that trial counsel will be the one to file the statement of points, would you agree with that? Because it just as a practical matter, is very difficult for appellate counsel to be appointed and be able to have the knowledge to file a statement of points within 15 days.
ATTORNEY BRENT L. WATKINS: I would agree with that, Your Honor. In this case, the petitioner fired his trial counsel during the pendency of the trial and proceeded throughout the rest of the trial by himself and I'm assuming that, there's no indication in the record, but I'm assuming that at the end of trial, he requested appellate counsel.
JUSTICE HARRIET O'NEILL: Well, and that's, I guess that's maybe one of my concerns is if trial counsel had not been fired then trial counsel could have filed the statement of points presumably within the

15-day period.

ATTORNEY BRENT L. WATKINS: That's the presumption, Your Honor.

JUSTICE HARRIET O'NEILL: And so by firing counsel, shouldn't we put the obligation on the pro se then representing themselves to file their own statement of points and should we afford more leeway to a pro se than we would to a lawyer.

ATTORNEY BRENT L. WATKINS: I believe the case law is pretty adamant that pro se attorneys are held to the same standard as licensed attorneys. However, once they request counsel for an appeal, as you stated earlier, it's hard for appellate counsel to come in and step into the shoes of a trial attorney.

JUSTICE HARRIET O'NEILL: I agree with that.

ATTORNEY BRENT L. WATKINS: There's quite a difference between the two, but once they realize their limitations as a pro se plan or a pro se litigant, shouldn't they be and request an attorney appointment? Shouldn't at that point they be afforded extra consideration?

JUSTICE HARRIET O'NEILL: So by firing counsel, you can get an extension of time.

ATTORNEY BRENT L. WATKINS: I believe the Court already dealt with an extension of time for good cause. What if the trial court had appointed counsel immediately that had accepted? I believe the State will, I'm sure the State will address the issue in a moment. The records shows that Attorney Claude Welch was appointed two days later after trial court judgment, but there's nothing in the record that shows that Attorney Welch ever accepted the appointment or ever filed anything on behalf of the petitioner. There's no record of Attorney Welch withdrawing or the Court withdrawing him as well. The next record is my appointment as appellate counsel on August the 9th. So... the Court has addressed a lot of these issues.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you would say or you would agree that if that July 20 appointment of Mr. Welch was effective, then your case goes away or at least the constitutionality of a challenge.

ATTORNEY BRENT L. WATKINS: I don't believe that I can make an ineffective assistance of counsel claim on Mr. Welch. I don't see anything that would indicate that he ever accepted the appointment and I believe there's an agency argument there. I know the State's position is that once the Court appoints an attorney to represent someone, that attorney at that point is duty bound, but I'm not sure that that's necessarily the case and, honestly, I haven't been able to find any case law on the issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: What if, so we just don't know what happened when the notice was faxed to Mr. Welch?

ATTORNEY BRENT L. WATKINS: I talked to Attorney Welch and, once again, there's nothing in the record and Mr. Welch informed me that he does not do appeals. He's a sole practitioner. This is something that he was not versed in and he spoke with Judge Wilson, David Wilson was on the bench at the time and has since retired, and told him he would not accept the appointment.

CHIEF JUSTICE WALLACE B. JEFFERSON: If it's important to know factually whether he was the lawyer or not, would, could we remand this case down for that determination and if he were retained or appointed as Mr. Williams' counsel, then this argument about the inability to file a statement of points on appeal goes away. If he was not, then maybe we have a real case here because he was entitled to, but didn't receive a lawyer.

ATTORNEY BRENT L. WATKINS: I would agree with that, but it would seem to me in the interest of judicial economy if the Court could

remand it and allow the Twelfth, remand it to the Twelfth Court and allow a full record. Then the Twelfth Court could review the petitioner's arguments, evidentiary arguments on appeal and this would lead down one way or the other without having to determine the sufficiency, without having to determine whether Attorney Welch was, indeed, appointed and was counsel for petitioner at that time and then go through the entire process again unless I'm.

JUSTICE PHIL JOHNSON: That'd seem to be the most efficient way, but is the way the statute sets it up? I mean we were writing on a clean slate saying how we think it would ought to happen. I mean it would be one thing, but don't we have to read the statute and see what the legislature says?

ATTORNEY BRENT L. WATKINS: Yes, Your Honor, I would agree with that.

JUSTICE PHIL JOHNSON: And how do we just send it back and order a record if that's it doesn't comply with the statute as I think is the problem we're struggling with.

ATTORNEY BRENT L. WATKINS: If I get your question right, Your Honor.

JUSTICE PHIL JOHNSON: You say you want a full record. We could just remand it, say give him a full record and then the Court of Appeals reconsider it. Does the statute allow us to do that?

ATTORNEY BRENT L. WATKINS: The statute, well, there's another, the issue here is the 30-day hearing by the Court was held outside 30 days. The judge that heard the trial court argument is deceased. There's nothing that points, the points of appeal are to allow the trial court to correct, according to the legislative history, allow the trial court to correct any error that they are that they might be able to correct before sending it to the appellate court. In this case, nobody could do anything on this matter without a record. Judge Andell who finally heard the 30- day hearing, I believe, on September 12, well outside the timeline was not the judge who heard this case in the first place. Nobody could address evidentiary points without a record.

JUSTICE HARRIET O'NEILL: Well, but you don't need a record if the statute is constitutional, right? If the statute is constitutional, then the 15 days bars the appeal and it seemed to me that's what the trial court was thinking when the trial court said no records needed because trial court presumed that the 15-day requirement was constitutional and, therefore, there are no points to review. It's only if the 15 days is unconstitutional as applied to this situation that you would need a record to review the substantive points.

ATTORNEY BRENT L. WATKINS: That is correct, Your Honor, but from with appellate counsel not being trial counsel in this case, I have no way to really review what error was preserved in the trial court without a record, which I can't get until the 30-day hearing if the Court determines that my client is indigent and deserves a record and my appeal is not frivolous. There's no way.

JUSTICE HARRIET O'NEILL: Again, I get back to my question. You get that just by firing your trial counsel. That's my big concern here is firing trial counsel that normally would have, in other words, the father here precluded his own ability to get a statement of points by firing his trial attorney.

ATTORNEY BRENT L. WATKINS: I don't believe that was my client's intent. I mean, obviously, at the time the case law was considerably different than it is at this point and the Court's addressed some of this in MN.

JUSTICE HARRIET O'NEILL: I didn't mean to imply that was your

client's intent.

ATTORNEY BRENT L. WATKINS: No, I understand, Your Honor.

JUSTICE HARRIET O'NEILL: If that could, if we were to rule your way in this case, that could be an effect.

ATTORNEY BRENT L. WATKINS: That could be an effect, but I believe that the Court's addressed some of these issues with the extension of the 15- day deadline in MN that was not available at the time of this case. I believe in this matter, there's no way to review my client's claims of error without a record and that record is not available to him until after the 15-day timeline. I know this issue has been addressed by the Tyler Court and some other courts of appeal and they basically say that it's a circular argument.

JUSTICE NATHAN L. HECHT: Does the record reflect when trial counsel was allowed to withdraw?

ATTORNEY BRENT L. WATKINS: No, Your Honor, it does not.

CHIEF JUSTICE WALLACE B. JEFFERSON: When which trial counsel? The lawyer who tried the case?

JUSTICE NATHAN L. HECHT: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yeah.

ATTORNEY BRENT L. WATKINS: It was during the pendency of the trial, before the rendition of judgment.

JUSTICE HARRIET O'NEILL: I thought it was the morning of trial.

ATTORNEY BRENT L. WATKINS: I do not see anything in the record. I have spoken with Mr. Agnew, but he didn't advise me of the time. But in this case with the judge being deceased, the purpose of the points of appeal was to allow the trial court to correct an error in the trial court. At this point, there was no way to review any error in the trial court except through the record.

CHIEF JUSTICE WALLACE B. JEFFERSON: Did you waive your separation of powers argument?

ATTORNEY BRENT L. WATKINS: Possibly, Your Honor. I would rely on some of the other dicta in the cases that allows a different calibration of the Matthews or Eldridge factors due to the appointment of counsel at a late time in this matter and the client's interest in this case and constitutional issues, I believe, would allow that different calibration of the factors, that combined with the weight that the Court traditionally applies to the parent-child relationship and the risk of erroneous error.

JUSTICE NATHAN L. HECHT: And you're not making an ineffective assistance argument here?

ATTORNEY BRENT L. WATKINS: No, Your Honor, I don't believe that I can do that. I mean, obviously, my petitioner was his own pro se counsel and I see nothing in the record that would state that Mr. Welch ever assumed responsibility for this case and obviously there was there's nothing in the record that shows otherwise, there's nothing in the record that shows why I would have been appointed as a trial counsel a week after the deadline for filing points of appeal. I would point out and I'm sure the Court's already aware that most of the Courts of Appeal are questioning this matter. I'm assuming that I don't need to address the Twelfth Court's issue regarding preservation of constitutional error. That was one of the points in the Twelfth Court of Appeal that constitutional error was not preserved for appeal because it was not brought up at the 30-day hearing. Petitioner's view on that is that it was not ripe until the trial court had ruled that the points were untimely filed and then it was at that point, it was brought up in a motion for reconsideration, I believe complies with 33.1.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask this one point of clarification. The is are we dealing with one Court of Appeals' opinion? I know there's a rehearing, but.

ATTORNEY BRENT L. WATKINS: There was a rehearing that basically stated the same thing.

CHIEF JUSTICE WALLACE B. JEFFERSON: And in the Court of Appeals' opinion, the Court said that Williams' sole issue on appeal was entitlement to a free record under the Constitution. Is that correct?

ATTORNEY BRENT L. WATKINS: I believe that was an oversimplification of the issues. I mean, the primary issue of Mr. Williams is that this statute is unconstitutional in that it blocked his right to appeal. I mean, as I stated in my brief, it may very well be that Mr. Williams doesn't get his parental rights back. That's a question either for either this Court or the Appellate Court, but he deserves, even though this is a statutory right to appeal, he deserves the right to a clear avenue of appeal based on the Eldridge factors to determine that there was no error that erroneously deprived him of his children and I believe that the Twelfth Court oversimplified the position as I discussed earlier. There's no way for anyone to review this case without a record because everybody that was a participant in it, except for the petitioner, is removed. If there are no further questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you very much. Mr. Watchman, the Court will now hear from the respondent.

MARSHALL: May it please the Court, Mr. Woodruff will present the argument for the respondent.

ORAL ARGUMENT OF TREVOR A. WOODRUFF ON BEHALF OF THE RESPONDENT

ATTORNEY TREVOR A. WOODRUFF: May it please the Court, counsel, Your Honors, the issue before the Court today boils down to one simple premise. For the first time, petitioner asked this Court to find a statute unconstitutional for the failure of an attorney. I want to make it very clear at the outset for the Court that this is not an S.K.A. situation. This is not a DM situation. The petitioner in this case had appointed counsel.

JUSTICE DALE WAINWRIGHT: What were those initials?

ATTORNEY TREVOR A. WOODRUFF: S.K.A., Your Honor, DM. In those cases, the Courts of Appeals in S.K.A. was the Texarkana Court and the DM, it was the Waco Court found that 263.405(b) was unconstitutional as applied because the appellant asked for counsel during the 15-day period of 263.405(b) it didn't get and what I argued JOA before this Court last October, that issue came up. [inaudible], I said that may be the situation, but the statute would be unconstitutional supplied in that instance. We don't have that here. Two days after the trial court signed this judgment and as the petitioner can teach in the brief on page 22 immediately after rendition of the judgment, two days after, counsel was appointed.

CHIEF JUSTICE WALLACE B. JEFFERSON: How do we know that?

ATTORNEY TREVOR A. WOODRUFF: Because that's noted on the docket sheet, Your Honor. The clerk's record cite is [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: And is there evidence that Mr. Welch accepted the appointment, that he did anything on behalf of Mr. Williams?

ATTORNEY TREVOR A. WOODRUFF: I don't believe so, Your Honor, and

that was leading into my next point. I think it would be a very dangerous slippery slope for this Court to hold that counsel need accept appointment from the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: How do we even know that he received the facts?

ATTORNEY TREVOR A. WOODRUFF: That's not reflected in the records, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well shouldn't we know that? I mean these are cases involving the relationship between a parent and his child or her child. Shouldn't we know that a lawyer's been appointed to represent that interest?

ATTORNEY TREVOR A. WOODRUFF: Well, Your Honor, I struggle to wonder how would we show that in the record to show that he actually received appointment?

CHIEF JUSTICE WALLACE B. JEFFERSON: Well one way you could is either the lawyer files a motion for new trial or files a statement of points on appeal or files a motion to withdraw, I mean some activity is taken in this case, but it troubles me that we don't know whether from this record whether that lawyer even received this notice and ever began representing Mr. Williams, did the first thing, made a phone call. We just don't know.

ATTORNEY TREVOR A. WOODRUFF: Well I would caution against beginning to speculate as to whether he received that, Your Honor. I think in the JOA case before the Court we see that just because counsel's appointed and they don't do anything doesn't mean that they didn't receive the appointment. I think if you look at criminal law, you look at Texas Code of Criminal Procedure 26.4J makes it very clear that once a trial court makes an appointment, until you go in and ask to be, until you ask and file a motion of withdrawal or until the appeal is exhausted, you're on the hook.

CHIEF JUSTICE WALLACE B. JEFFERSON: If there were a problem with the appointment, who should suffer from that? Should it be the father who is not represented although he believes he is or should it be the lawyer, who according to the argument, would be derelict in not having handled his responsibilities. I mean, where, in looking at all the actors here, assuming and I'm going to speculate here, assuming that this lawyer never even received notice that he was representing this client, who should suffer?

ATTORNEY TREVOR A. WOODRUFF: Well at that instance, Your Honor, I think the parent would ultimately suffer the consequence and if it were in the record that the attorney didn't receive the notice, that may be one thing. However, at the 263.405(d) hearing, the petitioner knew then that he had not filed the timely statement of points. In the record of the D hearing, he said to the trial court, I'm not asking for an extension. Now this court had not handed them down at the time, but still he said I'm not asking for an extension. There's nothing in the D record, after all this has already occurred, that hey, my client didn't have a lawyer appointed.

JUSTICE NATHAN L. HECHT: The hearing was after the deadline.

ATTORNEY TREVOR A. WOODRUFF: Yes, sir.

JUSTICE NATHAN L. HECHT: Did the trial court have authority to conduct the hearing even after the deadline?

ATTORNEY TREVOR A. WOODRUFF: I think so, Your Honor. The only case.

JUSTICE NATHAN L. HECHT: The first deadline is ironclad, but not the second one.

ATTORNEY TREVOR A. WOODRUFF: Well, Your Honor, the only cases

addressing whether the 30-day hearing is jurisdictional say that it is not, and that it can be waived. In fact, the only cases on that point right now say that if the hearing is not held within 30 days, it is the parents' responsibility to mandamus the trial court to hold that hearing. There's also a hearing note, excuse me, a case out of Waco, which says something to the effect that the 36-day deadline of making a finding of indigence extends to trial court's plenary power so that's still being hashed out at this point.

CHIEF JUSTICE WALLACE B. JEFFERSON: Before the end of that 15-day deadline, was the record transcribed?

ATTORNEY TREVOR A. WOODRUFF: No, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well how is a person supposed to file a statement of points for appeal when there's no record?

ATTORNEY TREVOR A. WOODRUFF: I would direct the Court, Your Honor, to the AF case and that cite is 259 S.W. 3d 303. There, the Beaumont Court of Appeals much more artfully than I can, addressed the issue of whether 263.405(i) is unconstitutional because a parent who has a new attorney on appeal doesn't get a free record and the Beaumont Court said it is not unconstitutional. What the Court looked at is the fact that in order to put the trial court on notice and what it is you're going to complain about, it's a relatively low burden. They said it's a low hurdle to put the trial court on notice of what you're complaining about in order to get a record on appeal. They said you're just doing a statement of points. You don't have to file a brief on the merits.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well can you do a statement that says, I believe the evidence is factually insufficient to support termination of parental rights?

ATTORNEY TREVOR A. WOODRUFF: Under "I", you cannot, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well then it has to be particular. I mean, how do you without a record evaluate the evidence that was presented to the judge or the jury?

ATTORNEY TREVOR A. WOODRUFF: Well, in that case, a Beaumont Court said you know you have the opportunity, both in this case and the [inaudible] case prior to this said, you have the opportunity to talk to trial counsel. You have the opportunity to talk to your client.

CHIEF JUSTICE WALLACE B. JEFFERSON: Trial counsel withdrew. The judge is deceased. The client is in jail and you have 15 days and there's no lawyer. How do you do all that without a record? How do you formulate the points on appeal?

ATTORNEY TREVOR A. WOODRUFF: Well, Your Honor, I would go back to what's required. First, it's very clear that in order to preserve error under 405, all you have to do is track the specific language of the statute. Let's say the parent was terminated on O ground for failure to comply with services. All you need to say is the evidence was legally factually sufficient to support O ground. If you're arguing it's the best interests, all you have to say is the evidence is legally and factually insufficient to support best interests. We're not talking.

JUSTICE NATHAN L. HECHT: If the statement of points doesn't mean anything, why are we arguing about the deadline?

ATTORNEY TREVOR A. WOODRUFF: I'm not sure I understand your question.

JUSTICE NATHAN L. HECHT: You say all you have to do is hand the judge a copy of the statute and say that's me, that's what I want, what he said.

ATTORNEY TREVOR A. WOODRUFF: The whole purpose, Your Honor, as my able counsel has pointed out, is to put the trial court on notice of what it is you're complaining about.

JUSTICE NATHAN L. HECHT: Yeah, but you're saying that there's nothing to that, that you might as well just copy the statute.

ATTORNEY TREVOR A. WOODRUFF: Well, in a sense you can, Your Honor. The JOA case out of the Amarillo Court says to file your statement of points "as straightforward procedure." We have lots of cases where a parent says okay, you got me dead to rights on the statute of determination ground. I failed to comply with services. But it was not in my child's best interest that my parental rights be terminated. So in that instance, you need to only make the trial court aware that you're complaining about the best-interests standard. It is more than simply just tracking the statute, but the whole purpose is to put the trial court on notice of what it is your complaining and that is a low burden to do that and the Beaumont Court and AF went through a very lengthy Matthews versus Eldridge analysis and decided at the end we don't have to redraft the statute to create a method by which it makes a procedure, which makes it easier for an appellate counsel to preserve their issues. You know this statute works in a vast majority of cases. I would cite the Court to the Walters v. Natural Association of Radiation Survivors case that is 473 U.S. 305 and that stands for two very important propositions. First, it stands for the proposition that we look at the generality of cases when we're construing the constitutionality of the statute, not the rare acceptance. Number two, it says that a statute doesn't have to be so comprehensive that it avoids all chance of erroneous depravation. If you look at the Santosky case, when the Court weighed the Mathews versus Eldridge factors there, they said you look at all the procedural safeguards provided in the statute. This Court has provided two very important procedural safeguards. First, NMM, you've granted a 15-day extension and in JOA, you granted the right to bring ineffective assistance of counsel. In the MS case, this Court did not find that the Court's requirement for a motion for a new trial after the jury was unconstitutional. They said it was, it violated due process because the ineffective assistance of the counsel claims. You look at this Court's BLD opinion where you said error preservation rules comport with due process, this Court specifically noted at the end of that opinion an ineffective assistance of counsel claim was not brought. To strike the statute down because of Mr. Welch's failure to file a statement of points is not looking at what the statute does. I don't think the question is whether the statute is unconstitutional because it denies a petitioner on appeal. The question is whether it's unconstitutional because without due process in a reasonably, it denies an appeal. I don't think that occurred in this case.

JUSTICE DAVID M. MEDINA: I think you have just an unusual sort of circumstances here. You have the lawyer being fired. You have the appointment, but maybe not notice to the lawyer. Then you have the hearing after 30 days creates this problem that we're trying to resolve.

ATTORNEY TREVOR A. WOODRUFF: Well, Your Honor, I would agree with you, Justice Medina, that there are some issues here which take this out of the norm. However, what we boil it back down to is the fact that we had counsel within the 15 days and the D hearing was held. You know able opposing counsel brings up the issue that we had separate judges at the trial and at the D hearing. The statute, that's not a conflict for the statute. The only thing that's necessary at the D hearing is to put enough evidence on to determine whether the case is frivolous. It doesn't require that the same judge hear it.

JUSTICE NATHAN L. HECHT: How would you do that in this case? How

would you argue to a judge who was not there without a record that there was error in the trial of the case and that's not a frivolous point?

ATTORNEY TREVOR A. WOODRUFF: Well, there are several different ways, Your Honor. The simplest way is for the attorney to stand up and give the trial court judge a rendition of what happened at the evidence. Or excuse me, what happened at the trial. The evidence was there drug usage, failure to pay child support, whatever the issues were. The attorney can put the case worker on the stand who sat through the whole trial and have him or her testify, Your Honor, this was the evidence at trial.

JUSTICE NATHAN L. HECHT: The argument here, I think, is that he was not permitted to call all the witnesses that he wanted to. How would you argue that that that's not frivolous, that if only these other witnesses had testified and said what I'm telling you I think they would have said, the case would have come out differently.

ATTORNEY TREVOR A. WOODRUFF: Well that will be an offer of proof in that situation and I think you would do exactly that. Your client would get on the stand or you would stand up and tell the Court as the attorney, these three witnesses were unable to testify. They were refused the right to testify. They would have said this. It would have changed the outcome in this manner.

JUSTICE NATHAN L. HECHT: And the judge would say, well, I think that's frivolous and then what?

ATTORNEY TREVOR A. WOODRUFF: Well, that's why this statute works, Your Honor. When it goes up on appeal for a frivolous determination, the only thing that's being looked at is the frivolousness and most the time, you have a 30 to 50-page record. If the department doesn't prove [inaudible] that the appeal is frivolous in those 30 to 50 pages, it goes right back for a full record and full briefing on the merits. There is a safeguard. It's not as if the case ends after a frivolous finding unless the frivolous finding is upheld in certain courts, but at any rate, if the trial court was incorrect in making this frivolous finding, which I have several cases where the Courts of Appeals have determined exactly that, the frivolous finding was incorrect. It is remanded back. A full record is prepared and a full briefing on the merits is prepared. There is a safeguard so that if the frivolous finding is erroneous, you get a full record, you get a full appeal.

JUSTICE NATHAN L. HECHT: Do you think in the criminal context, the defendant would be compelled to show that his appeal was not frivolous before he was permitted to take it?

ATTORNEY TREVOR A. WOODRUFF: That could be the case, Your Honor. It is not the case. However, when you're looking at the matter.

JUSTICE NATHAN L. HECHT: Do you think you could constitutionally say it's up to the trial judge to decide whether a criminal defendant can appeal or not because it would just be a frivolous waste of time?

ATTORNEY TREVOR A. WOODRUFF: Well, Your Honor, that may not be the case, but I don't think that's what the statute requires because you have an absolute right to appeal that frivolous finding.

JUSTICE NATHAN L. HECHT: Well, no, I mean say that can this, what I'm asking you is can this procedure fit in the criminal context?

ATTORNEY TREVOR A. WOODRUFF: I believe it could, Your Honor, because when you're looking at the right to appeal and that's discussed in the Beaumont's opinion in AF, we're talking about the legislature's right to regulate appeals. In this Court's opinion.

JUSTICE NATHAN L. HECHT: There's lots of frivolous appeals in criminal cases.

ATTORNEY TREVOR A. WOODRUFF: Yes, sir, there is and the legislature has not chosen to enact that statute there because here we're dealing with in Lassiter, it's recognized in the United States Supreme Court, we're dealing with the permanency of children. In the MS case, this Court cited the MLB case of the United States Supreme Court for the proposition that when the legislature grants a right of appeal, it cannot be granted with "unreasonable" distinctions. There are no unreasonable distinctions here. The statute applies to indigent parents. It applies to parents with money. It applies to department. It applies to children. It applies across the board and, if followed, there's no error in the statute. I guess the department's position in this case is that when you look at the procedure that was supplied to the petitioner, even when you object, excuse me, even when you inject the failure of the attorney, that doesn't render the statute unconstitutional because that's not the standard we're looking at. This Court has never struck down a statute or one of its own rules of procedure for the failure of an attorney. Otherwise, when you begin that route, every procedure statute rule requiring error preservation is subject to a constitutionality attack because of the failure of the attorney.

JUSTICE NATHAN L. HECHT: Well, but the way we avoided it in JOA was to say all right, we're not going to hold it unconstitutional, but you can go ahead and make the argument as if you'd complied. We're just not going to enforce it, right?

ATTORNEY TREVOR A. WOODRUFF: Well, I personally didn't read JOA that broadly, Your Honor.

JUSTICE NATHAN L. HECHT: You can argue ineffective assistance.

ATTORNEY TREVOR A. WOODRUFF: Yes, sir.

JUSTICE NATHAN L. HECHT: Even though you didn't raise it.

ATTORNEY TREVOR A. WOODRUFF: Yes, sir.

JUSTICE NATHAN L. HECHT: And then determine whether it's ineffective or not, you can look at the sufficiency question, right?

ATTORNEY TREVOR A. WOODRUFF: Yes, sir.

JUSTICE NATHAN L. HECHT: And so you get to the merits of the appeal even though the statute was not complied with.

ATTORNEY TREVOR A. WOODRUFF: And the way I interpret that, Your Honor, is that under FM Properties, this Court is required to construe a statute in a manner that renders a constitutional. I think the JOA opinion rendered this statute constitutional. As you point out, Justice Hecht, maybe there's a question as to the actual efficacy of the statute at this point, but to strike it down on constitutional grounds and allow this petitioner to have an appeal when the statute was met, I think it's an improper avenue for this Court to take.

JUSTICE NATHAN L. HECHT: Well could we say it's infirm as applied in this case?

ATTORNEY TREVOR A. WOODRUFF: I'm sorry, Your Honor?

JUSTICE NATHAN L. HECHT: Infirm as applied because of the unique circumstances of this case.

ATTORNEY TREVOR A. WOODRUFF: The Court could certainly do that, Your Honor, but I don't.

JUSTICE NATHAN L. HECHT: Good, Mr. Taylor reminded of that earlier, but I'm more interested in whether you think that would be a good idea.

ATTORNEY TREVOR A. WOODRUFF: I don't think that would be a good idea, Your Honor. I don't think that would be proper because I think that the trial court complied with the statute here. I think to cast the statute aside again is an issue. Justice O'Neill, last time I was

here in JOA, you asked my opposing counsel at what point the exceptions [inaudible]. Perhaps that's already happened, but to remand this case from the statute that's been complied with when it is not the statute the caused erroneous depravation, I think is an incorrect procedure. I don't think the Court should do that. I don't think that's proper.

JUSTICE HARRIET O'NEILL: What significance do you attribute to the fact that he fired his trial counsel, if any?

ATTORNEY TREVOR A. WOODRUFF: I think that plays a significant role, Your Honor. There's a case out of Amarillo Court of Appeals called the JMLW case, which applies the requirement to file a statement of points to a pro se parent. He certainly complicated the process by taking that action. There's a Court of Criminal Appeals case, Beasley versus the State, which says a defendant cannot profit by his own error manipulation. Perhaps that's exactly what happened here. When more and more exceptions are created to sidestep this rule, it becomes more and more possible for parents to do just that, find ways to I'll discharge counsel, we're going to step it aside that way. At the end of the day, two days after the trial court signed its judgment, counsel was appointed. There is nothing in the record at the D hearing to suggest that he did not receive the appointment. He never filed a motion to withdraw. There was in the motion to reconsider. I don't believe it was raised that he never received it and I think to supply a speculation of conjecture would be to ignore the plain language of the statute when that's not in the record.

JUSTICE PHIL JOHNSON: Let me ask a question. He fired his trial counsel. Is there any indication whether this counsel was appointed after trial with his agreement or that he accepted this counsel or and did not want to continue pro se. What does the record reflect about any of that?

ATTORNEY TREVOR A. WOODRUFF: Justice Johnson, I don't believe the record reflects anything and that's why I decided the Code of Criminal Procedure for the Court because the closest thing we have to this is the rules in criminal law. When you're appointed, you have a duty to continue that appointment. We're talking about a court order relationship, not an offer in acceptance. This is very different than if the petitioner walked in the attorney's office and said I'd like you to represent me. This was an order from the Court and when you have an order from the Court, I don't believe that the Court has to wait for you to pick up the phone and say, I will or I will not accept this appointment. It is incumbent upon you, if you have an issue, to approach the trial court and say, I don't have the requisite skill. I have too much work. I don't do this area. I think to hold otherwise would cause serious problems in every facet of civil law in which appointment of counsel is required.

JUSTICE HARRIET O'NEILL: So then if - go ahead.

JUSTICE PHIL JOHNSON: I was just, I was talking about the pro se litigant. He doesn't have to accept the first appointment, second appointment or third appointment. I mean, he has a right to be pro se.

ATTORNEY TREVOR A. WOODRUFF: Yes, sir, he does.

JUSTICE PHIL JOHNSON: And that's what I'm wondering. There's nothing in the record about his action in accepting the new appointment.

ATTORNEY TREVOR A. WOODRUFF: No, sir, there is not.

JUSTICE PHIL JOHNSON: So he decided to go pro se and that's then only, and then at some point, the trial judge appointed a lawyer and that's all that's in the record one way or the other.

ATTORNEY TREVOR A. WOODRUFF: Yes, sir. If the Court takes the

position that the parent must accept the appointment, then he was pro se and as I've cited to the Court, the JMLW case says that it is incumbent on you to file the statute. As able opposing counsel pointed out, every case out there says that if you're pro se, you're held at the same standard as attorney.

JUSTICE NATHAN L. HECHT: But is there anything in the record that he was pro se?

ATTORNEY TREVOR A. WOODRUFF: The only thing the record reflects, Justice Hecht, is that two days after the trial court signed its judgment, an attorney was appointed.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice O'Neill, you had a question.

JUSTICE HARRIET O'NEILL: Well, if we look at that appointment of Welch and say he was appointed counsel and we had no evidence of withdrawal or formal withdrawal of that counsel, then wouldn't it be his failure to file a statement of points would be ineffective assistance?

ATTORNEY TREVOR A. WOODRUFF: It would, Your Honor, and that is not raised, but I think that is what separates this case from JOA, from MS, that issue was never raised before the trial court, the appellate court or this Court. If the Court has no further questions, I have completed.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel.

ATTORNEY TREVOR A. WOODRUFF: Thank you, Your Honor.

REBUTTAL ARGUMENT OF BRENT L. WATKINS ON BEHALF OF PETITIONER

ATTORNEY BRENT L. WATKINS: The State raised the State's back to the argument about Mr. Welch. Once again, there's nothing in the record that shows that Mr. Welch ever did any affirmative act on the part of Mr. Williams, not one single thing. Agency has to be a consensual relationship and that's a mutual agreement between both parties and attorneys usually are perceived to act as agents for their clients.

JUSTICE HARRIET O'NEILL: But as a practical matter, if I'm an attorney and I get an appointment, aren't I appointed until I withdraw? I've never seen an offer and acceptance of an appointment from a Court. It's just you're either appointed and if you don't want to be, you formally withdraw.

ATTORNEY BRENT L. WATKINS: I understand, Your Honor, and in my case, I'm not on a court-appointed docket. I don't know why Judge Wilson picked me or our firm out of the attorneys available in Angelina County.

CHIEF JUSTICE WALLACE B. JEFFERSON: You've done something to offend him.

ATTORNEY BRENT L. WATKINS: We met the other night and he just laughed.

JUSTICE WAINWRIGHT: Or to impress him.

ATTORNEY BRENT L. WATKINS: Well, I don't know about that, but I know he retired shortly thereafter so he avoided it. I do know that appeals of this nature, this appeal's been going on for three years. Our firm is one of the larger firms in Angelina County. We're able to handle something like this and absorb it. Many attorneys, such as Mr. Welch, who are solo practitioners could not devote enough time to this case.

JUSTICE HARRIET O'NEILL: But irrespective, I guess the concern is if the record reflects an appointment on the docket sheet, so and so's appointed, then it would seem that appointment would be effective until

such time as there's a motion to withdraw or some indication on the record that the appointment has not been accepted.

ATTORNEY BRENT L. WATKINS: All due respect to the Court, if that were the case in this situation, Attorney Welch would be standing here or sitting at this table as well or should have the right to do so today. There's nothing in the record that shows why I was appointed on August 9.

JUSTICE DALE WAINWRIGHT: There's no order appointing you?

ATTORNEY BRENT L. WATKINS: There is an order appointing me.

JUSTICE DALE WAINWRIGHT: Was there an order appointing prior counsel?

ATTORNEY BRENT L. WATKINS: There was an order appointing prior counsel.

JUSTICE DALE WAINWRIGHT: It's in the record? It's not just on the docket sheet. There's a signed order.

ATTORNEY BRENT L. WATKINS: There's a signed order.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is there anything that reflects that Welch withdrew?

ATTORNEY BRENT L. WATKINS: No, Your Honor, there is not.

CHIEF JUSTICE WALLACE B. JEFFERSON: Or an order took him off the case?

ATTORNEY BRENT L. WATKINS: There is nothing in the record that shows why Attorney Welch withdrew or why he never accepted the appointment.

CHIEF JUSTICE WALLACE B. JEFFERSON: So the Department's position is that the judge appointed two lawyers to Mr. Williams, one who did nothing and one who's attempting to represent him.

ATTORNEY BRENT L. WATKINS: And I believe that's an illogical conclusion to appoint two appellate lawyers to a case of this nature. I mean, obviously from the record, there's nothing in the record that shows why Attorney Welch is not here now except for the fact that I was appointed subsequent to that date.

JUSTICE HARRIET O'NEILL: But you were appointed after the 15 days.

ATTORNEY BRENT L. WATKINS: Yes, Your Honor, about a week.

JUSTICE HARRIET O'NEILL: So until you were appointed, his attorney of record was Welch?

ATTORNEY BRENT L. WATKINS: I don't agree with that, respectfully, Your Honor. I believe that Attorney Welch spoke with Judge Wilson and declined the appointment and that's why Judge Wilson.

JUSTICE HARRIET O'NEILL: I'm talking about of record, just on the record, he's the appointed attorney.

ATTORNEY BRENT L. WATKINS: As referenced in the record, he was the attorney appointed two days afterwards.

JUSTICE HARRIET O'NEILL: So an argument could be made that by failing to file the statement of points in 15 days, counsel was ineffective.

ATTORNEY BRENT L. WATKINS: If I believed and I'm duty bound as an attorney to present arguments to the Court that I believe are meritorious, not to just present arguments to the Court that might further my client's position. I do not believe that Attorney Welch accepted that appointment. I believe that he shuttled that appointment off either because he doesn't do appeals or is unable to continue with the case of this nature. So I don't believe, I would love to stand here and tell you that I believe that I had an ineffective assistance of counsel claim, but I don't believe in all good conscience I can do that.

JUSTICE DALE WAINWRIGHT: And if we tell you we don't believe

attorneys in the state of Texas have the discretion to not accept a court ordered appointment, then that makes your argument more difficult.

ATTORNEY BRENT L. WATKINS: It makes it considerably more difficult, Your Honor.

JUSTICE PHIL JOHNSON: But on the other hand, does the trial court have the right to overrule an individual's statement to the Court, I want to represent myself or do we presume that that at some point ends because the court appointed a new one? Criminal law, in criminal cases, I mean, we have any number of cases saying you have an absolute right to defend yourself period and go pro se and then once that happens, does the Court have a right? They can appoint standby counsel and we have all of those safeguards, but in this instance, we have simply someone who apparently told the trial court I want to represent myself, nothing else in the record, as I understand other than at some point the Court appoints a lawyer with no indication that the individual himself did not want to continue representing himself. That's the state of the record as I understand it. Am I misconstruing it?

ATTORNEY BRENT L. WATKINS: No, Your Honor, that is the state of the record. I believe the assumption that has to be inferred from the record is that Mr. Williams requested appellate counsel to review the trial court's finding. Likewise, I don't know how else you would be able to glean from the record that Mr. Williams had ceased representing himself as pro se. I mean, the record clearly shows that attorneys, appellate counsel was sought and appellate counsel was sought to be appointed in Mr. Welch, and I believe ultimately appointed with me.

JUSTICE PHIL JOHNSON: The record reflects who sought appellate counsel?

ATTORNEY BRENT L. WATKINS: I'm assuming, well there is no automatic right of appeal. You have to request an appeal and it's statutory then that you can get an appeal in terminations of parental rights. So it's my belief when this, remember, Judge, he's without a record. I don't know what was said on the record because I don't have it and I can't get it. So it's my belief that Mr. Williams made an affirmative statement most likely on the record that he sought appellate counsel.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshall will adjourn the Court.

2009 WL 2972932 (Tex.)