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Supreme Court of Texas.
In the Interest of J.L., a Child.
No. 04-0307.

November 30, 2004

Appearances:
David Christopher Newell, Fort Bend County Assistant District Attorney, Richmond, TX, for the Texas Department of Protective and Regulatory Services.
Stephen A. Doggett, Richmond, TX, for Betty Chavez.
Teana Viltz Watson, Sugar Land, for Chris Edwards.

Before:

Chief Justice Wallace B. Jefferson, Priscilla R. Owen, Harriet O'Neill, David M. Medina, Paul W. Green, Steven W. Smith, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to hear argument in 04-0307, In the Interest of J.L. a Child.
SPEAKER: May it please the Court. Mr. David Newell to give the argument for the petitioner. [inaudible]

ORAL ARGUMENT OF DAVID CHRISTOPHER NEWELL ON BEHALF OF THE PETITIONER

MR. NEWELL: May it please the Court. My name is David Newell. I'm the Assistant District Attorney of Fort Bend County, Texas, and I'm here today representing the TDFPS. Assisting me is [inaudible] Chadwick who is attorney for TDFPS. I will apologize right now. I just got the news of TDPRS -- so far, I will make every effort to refer to as TDFPS. I refer to CPS, TDPRS, that's what I mean.
With regard to this case, this is obviously a termination proceeding. There are three main areas before us. There're three main issues before this Court. There's a jurisdiction issue. There is the extra record information and a legal sufficiency review issue. And then there's also the remaining points of error that were not addressed. Because of the complexity of the jurisdictional issue and the legal sufficiency review, I'm going to rely on my briefs for the remaining points of error that were not addressed by the lower court and answer some specific questions from this Court and proceed directly with the

jurisdictional issue.

With regard to the Court of Appeals, [inaudible] that there was jurisdiction [inaudible] this case. We submitted -- we argued that there was no jurisdiction and the Court erred because section 263.405 [inaudible] requires that the appeal that must be filed within 20 days.

JUSTICE: And you think the motion for new trial was timely?

MR. NEWELL: Do I think the motion for new trial was timely? I do.

JUSTICE: So, if it had been granted or if within the trial courts plenary power, there had been [inaudible] a legitimate modification of the judgment, that would have restarted the appeals clock?

MR. NEWELL: Well, my argument to the Court is that there is a conflict between 263.405 and the section 329b that allows for that restarting just based on modification. In effect, what that does is, is that rule allows for the use of a close judgment motion to extend the appellate time table in consult with the statute and in that case under the Johnstone case, the statute should prevail and it shouldn't. If, however, the Court was not persuaded by the argument, I do submit that if there were a legitimate modification, unlike in this circumstance, then that could [inaudible] ask to do that.

JUSTICE: Could the Legislature ban motions for new trials [inaudible] these cases are decided within a year?

MR. NEWELL: I would submit that they could - -

JUSTICE: And that's the end of it.

MR. NEWELL: I would submit that they could. So, the Legislature -- [inaudible] Legislature's prerogative. As I mentioned before, though, I do believe that -- or I would submit to this Court the 263.405 is in conflict with rule 329b (h) which allows for any modification because it allows for a post judgment motion to restart the appellate timetable.

In addition, though, even if there is no conflict, even this Court [inaudible] there is no conflict, under the Mackie v. McKenzie [inaudible], it makes very clear that even in situations like Check, 329b (h), those situations and those circumstances that allow for extension based on those modifications if it's clear from the face of the record that the entire reason for submitting this modification was to restart the appellate timetable, then that doesn't extend the appellate timetable.

If this case couldn't be more clear, are there more clear example of the Anderson v. Casebolt and the Mackie v. McKenzie line of cases where you have -- not only do you have respondent arguing before the Court the reason for modifications obviously to extend the appellate timetable but you have the court specifically asking for questions on how to restart the appellate timetable, wanting research specifically on that point. In fact, making changes as superfluous as the first name -- respell the first name of [inaudible] counsel and adding changes that had never even been requested. I would suggest that -- I will submit that that type of change and that type of modification should not act under the Mackie v. McKenzie line of case and Anderson v. Casebolt line of cases and should not operate to extend the appellate timetable.

Respondent, of course, argues that that would create -- that in that situation, he was ineffective for failing to timely file [inaudible] of appeal and I submit the fact is also --

JUSTICE: So, how substantive a change does it have to be?

MR. NEWELL: Well, with regard to -- I would submit that as far as a substantive change is concerned, I don't know that it necessarily has to be terribly substantive. The point was, in Mackie, they recognized

that we have no indication that the purpose of this was -- or the --

JUSTICE: The [inaudible] didn't confess that this was done to try to avoid the appellate deadline, right?

MR. NEWELL: That's true. He did not confess that he did that. He did specifically indicate and [inaudible]. I think that was he was trying to do.

JUSTICE: [inaudible] he asked whether that would be in effect. He didn't say, "That's my intent. I just want to avoid the rules."

MR. NEWELL: I believe the question was: How can I restart the appellate timetable? How can we restart the appellate timetable? But, you're absolutely correct, your Honor, he didn't specifically say, "No, my [inaudible] appellate time table."

JUSTICE: So, the rule you're saying here is exception? How do we write this exception into the law?

MR. NEWELL: Your Honor, I believe that the section already exists in the law. That's --

JUSTICE: So it -- no, but -- if we don't trust the trial judge, we don't think this particular trial judge has an incredibility that we assume that was done or just to restart the timetable.

MR. NEWELL: Well, I would submit when it's clear on the face of the record that that is the purpose for doing it. And I submit that this is pretty clear on the face of the record that that's why he did it, and that's the standard that this Court has set down -- is that it's clear from the face of the record that the purpose was to restart the appellate timetable.

JUSTICE: Are you aware of any other court orders that we've reviewed differently or start the appellate timetables differently because of the intent of the trial judge when he or she signs order?

MR. NEWELL: I'm not, you Honor.

JUSTICE: That opens a whole can of worms, doesn't it?

MR. NEWELL: I understand your concern, your Honor. And I wouldn't be arguing it if it didn't already exist and the can of worms that had already been, in fact, opened.

JUSTICE: With regard to your other position, is it true that the State just sort of took a different approach to the criminal case?

MR. NEWELL: Well, with regard to the legal sufficiency, it is my understanding that we're moving on to the other topic. Yes, your Honor, the State did. The State prosecuting attorney did, handling the case under a different burden of proof, take a different position or approach the case after the medical examiner had been cross-examined by [inaudible] attorneys in family law case.

JUSTICE: How could you win the criminal case if you thought there was no evidence Frank caused [inaudible] the original trauma in Hallie's abdomen? I'm just curious if the State change its position so radically --

MR. NEWELL: Your Honor --

JUSTICE: I'm not clear how they thought they were gonna win the criminal case.

MR. NEWELL: Well, regardless of whether or not they thought they could win the criminal case, it is under a higher burden of proof. It doesn't certainly mean that there's not an employee who'll win the termination proceedings.

JUSTICE: Didn't they win or has the case gone to trial?

MR. NEWELL: The --

JUSTICE: Criminal case.

MR. NEWELL: The criminal case. The criminal case is dismissed and I would caution this further at this point. These are all matters that

are outside the realm that should not even -- it is our position that those matters shouldn't even be considered.

JUSTICE: Well, we could sure consider that the criminal case was dismissed, that's just public record.

MR. NEWELL: Fair enough. If the case is dismissed would the justification for the dismissal which this Court just asked me about and which is the basis for injecting the material before the Court of Appeals should not be considered, absolutely not. In addition, I would submit that if there's a concern about why the case is dismissed, that's gonna be based on several prosecutors communicating based on their own strategies.

JUSTICE: Our opinion in Sparkman v. Maxwell is cited for the proposition that we can take judicial notice of other testimony not in the immediate proceedings where necessary to avoid an unjust judgment.

MR. NEWELL: Fair enough.

JUSTICE: Now, what are the parameters that we should put on that determination? I would presume that in the termination of parental rights context, there is a constitutional import there in terms of when you can take judicial notice about the proceedings. It would strike me that when you have a situation like this where the testimony you're being asked to take judicial notice of is authored by the State and it directly contradicts and undermines the testimony upon which determination was granted, that that might rise to the level of constitutional concern and constitute something we could take judicial notice of.

MR. NEWELL: Well, I would submit that the information that was submitted on the part of the State in regard within the criminal case is very consistent with evidence that was already presented in the formation proceeding from Dr. [inaudible] opinion. I think that when you're talking about what kind of parameters, I think that you're sort of opening up a can of worms pretty much.

JUSTICE: I agree with that but based on your response, would you say that if we were determined that it was inconsistent, that we might then be able to take judicial notice of it?

MR. NEWELL: I think that the concern that I have with [inaudible] judicial notice particularly in these types of cases, inconsistent or not, it's an opinion is what it is. The information is being offered as a opinion testimony. The whole idea behind judicial notice is that it has to be not subject to reasonable dispute. That's not on the [inaudible] ordinance. It's an opinion. And in opinions, you can always get another opinion.

JUSTICE: So could you raise this by motion for new trial based on newly discovered evidence?

MR. NEWELL: I don't believe that you could in the circumstance raise by --

JUSTICE: Because that would run into your jurisdiction [inaudible] that you can't file motions for new trial?

MR. NEWELL: Well I think that you can't - -

JUSTICE: Normally, something like this, that arguably would be in a completely different [inaudible],that takes a completely different position based on which you could raise normally, assume those special timetable by motion for new trial based on newly discovered evidence, right?

MR. NEWELL: Well, the fact that the State takes a completely different position is not newly discovered evidence. It's a change in the theory of the case. It's not evidence as discovered that indicates, you know, that this is--

JUSTICE: State's experts don't take whatever position the prosecuting attorney tells them to take, do they?

MR. NEWELL: No, they shouldn't.

JUSTICE: So this is -- somebody's done an evaluation and reached a conclusion. And that State, obviously, adopted that conclusion because they make that their--

MR. NEWELL: Well, the concern is there -- what this expert did was re-evaluate evidence that already existed. So it's not really newly discovered evidence. It's just an additional interpretation --

JUSTICE: But if somebody else came forward, confessed, "I was the one that did it, not they." Normally, you could raise that by new trial, newly discovered evidence but you can't do that here because of the jurisdictional problem.

MR. NEWELL: Fair enough.

JUSTICE: So you're just stuck?

MR. NEWELL: Fair enough.

JUSTICE: You're just gonna do it and justice take these kids away for good? Why the Legislature?

MR. NEWELL: I believe that the Legislature has to come up with some sort of [inaudible] kind of situation and it is not particularly something that we can sort of crop procedures wherein we're going to do that.

JUSTICE: But if not here? If not in the scenario of [inaudible], when would it ever be necessary to avoid an unjust judgment as we said in Sparkman? We did seem to leave the door open.

MR. NEWELL: I agree that you've -- of course, certainly, did agree to leave the door open but I submit that that is in control of the things where the case itself did not take judicial notice. And I don't believe that this necessarily avoids to manifest injustice where or is designed for manifest injustice, that's not what the basis of [inaudible] was and it is essentially this person's -- this person's opinion is now consistent with [inaudible] opinion [inaudible] opinion was simply -- was already offered and so it's not any different. It's not a new information but the jury did have to consider. The jury had both of those arguments already [inaudible] to make that determination and they were allowed to weigh the probability.

While allowing this kind of thing in this circumstance, you're allowing the case to continue on in perpetuity. I think that, you know, was to keep a situation where the child now says, or if it's something before they were able to introduce evidence that the child said, "I want to stay with mom." Now, they have some indication the child says, "No, I want to go back to my mother."

JUSTICE: How do you reconcile the jury's finding not terminating the relationship with regard to J.C. ?

MR. NEWELL: I think that that's absolutely rational given the testimony that indicates that the father [inaudible] focused his discipline and really, really was much harder and more aggressive with his stepchildren than his biological children, or biological child and the jury clearly resolved that and clearly regarded that as, I have to protect him because he is focused on those two kids. The one that was killed was not his own child and the one that's terminated is not his child. It's the child of another father. So, that is how the [inaudible] are.

JUSTICE: This child J.L. is now with his biological father?

MR. NEWELL: That is correct. I see that I'm out of time.

CHIEF JUSTICE JEFFERSON: Any further questions?

MR. NEWELL: Any further questions?

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the respondent.

ORAL ARGUMENT OF STEPHEN A. DOGGETT ON BEHALF OF THE RESPONDENT

MR. DOGGETT: May it please the Court. I will address, of course, the jurisdictional issue. They briefed it. They argued with it before the Court of Appeals. The [inaudible] Court of Appeals agreed with our argument that there was a timely modification of the judgment and that under this Court's precedence that any change in the judgment operates to restart the appellate deadline.

JUSTICE: Not if it were made just for that purpose.

MR. DOGGETT: Not if he did it -- in the Anderson v. Casebolt decision which was the stance for that proposition, there are two things [inaudible] about that decision. First, it was decided before the amendment of Rule 329b which specifically provided that a change in the judgment will restart the appellate time and that there's some question as to the continued validity of the Anderson v. Casebolt. But, also, Anderson v. Casebolt holds that the change must be done solely for the purpose of restarting the appellate time on this. And in that decision, the two judgments were identical. Except for the dates, they were identical.

The other cases that address that issue that's decided by this Court, the changes in the judgments are very similar to the changes made in this case. There was a change -- in one of them, there was a change in calls number. They're relatively insignificant changes and the opinions are very specific that any change resolves and restarted by the appellate --

JUSTICE: Do you agree that Legislature could say, with respect to the statute that 329b (h) does not apply and it will not control to extend an appellant deadline.

MR. DOGGETT: I think they could attempt to do that. I think in termination of parental rights cases, unless they have a very good reason for doing it, it might run into some constitutional questions because the nature of - -

JUSTICE: Well, they can accelerate the appellate process, right? We may have different rules pertaining to parental termination to try to get the case resolved when it affects children and as opposed to regular car accident case, why couldn't they say, you know that we are going to have oversight on the rules of Civil Procedure and in sum, this does not permit an extension.

MR. DOGGETT: I think they could as long as their efforts are reasonable and [inaudible] due process, I think they could attempt to do that.

JUSTICE: And did they do that here, in effect?

MR. DOGGETT: Well, we have -- I get my termination appeals mixed up 'cause I'm doing about -- I'm doing about five -- I can't remember whether I raised it in this case. Believe it, we have raised some questions about the due process about speeding things up. And certainly, in this case if we [inaudible], the Court of Appeals is wrong and my argument is wrong and we're caught by that accelerated deadline, we sort of [inaudible] position and that's [inaudible] termination case. This is a classic example. This case was pending in the trial court for almost 18 months. It took two years to get the

[inaudible] decision [inaudible] because you're gonna throw the baby out with bath water to shave off some ten days or 30 days or whatever it is to try to speed the day up. I mean, [inaudible].

These cases are complex. There are fundamental rights in question and to the -- I mean, I guess I'm making a legislative argument about why they shouldn't accelerate without, you know -- can they try to do it? Yes. Is it wise to do it? I don't agree that it's wise to do it [inaudible]

The 263.405 does not prohibit the granting of a new trial. Obviously, it's saying something about new trial so obviously, under [inaudible] you have [inaudible] the trial pending. You have to go again and file a notice of appeal and any court might [inaudible] trial which would move the appeal, I guess. And it doesn't say you can't file post-trial motions. All it says is that the filing of the post-trial motion will not extend the deadline. However, as the Court appeals for [inaudible] that he wasn't the filing of the motion [inaudible] extended the deadline so it was the modification of the judgment, the actual modification of judgment that we contend extended the deadlines.

Again, back to this case about accelerating things, and I cited this in my brief. The record in this case, the court reporter's records was not filed in the Appellate Court until 200 days after the date of the original judgment -- the original judgment was signed and some 118 days after the modified judgment was signed. So, I mean, it's not because of the complexity of the case, it's the length of the trial. That's what causes [inaudible] the delay. I don't think it's people sitting around just wasting their time, not vigorously pursuing the post-judgment remedy and in this case [inaudible] and try to get the judgment set aside. And having said all of that, if this Court agrees with the State's argument that we filed another [inaudible], that's got to be an effective assistance of counsel. This Court has found these parents in this termination cases are entitled to effective assistance of counsel. You've adopted the Strickland standard from the criminal cases and missing the appellate deadline. I can't think of anything worse than as far as being ineffective. I hope that's not the ruling and I hate to say it but if I miss the deadline to get this case timely appealed then I was in effect. And there are all kinds of [inaudible] circumstances. The fact that I tried my best in acting in good faith is really irrelevant to the issue of whether I was ineffective if I filed the appeals [inaudible].It's not about me. It about people who are [inaudible] job and was having right to get their cases reviewed on appeal.

JUSTICE: How do you address that? You filed a late appeal, so the Appellate Court doesn't have jurisdiction and you raised it there saying, "Oh, they have an impact of attorney," you do have jurisdiction?

MR. DOGGETT: Well, this is a very interesting question in these termination cases. Because we have no counterpart with habeas corpus which you have in criminal [inaudible] or normally in effect to this appellant, it's a very difficult problem. In this case, we put it mentioned on the record during one of the post-trial hearing the issue about whether or not the State had argued that we filed notice of [inaudible] delay so I was put on notice [inaudible] in the argument and I addressed it.

I said, first of all, I don't think I was too late, but if I was -- I wanna make it plain on the record, it was a mistake. It wasn't part of our strategy so that's in the record. That's normally the book of [inaudible] that kills these ineffective points of the criminal side as

there's no explanation for the trial counsel that why I didn't do so. That's not true in this case. We have a record.

Unfortunately, in other termination cases, I think this is gonna be a real problem of not being able to develop the effective assistance of counsel which --

JUSTICE: Back to my question, if they're out of time, they filed it 21 days after the judgment, appeals court has no jurisdiction. How do we rule that was ineffective assistance?

MR. DOGGETT: I've cited some cases in my brief that address [inaudible]. The remedy in those cases was to remand the case back to the trial court and set a new deadline for filing the appeal based on the fact that counsel was ineffective. Now, I don't know that and I support those cases that seemto say that remedy [inaudible] be.

In this case, I don't know since we've already gone through briefing the --

JUSTICE: Sounds like that. It just takes longer for sure.

MR. DOGGETT: Well, then, it makes sense in this case. It seems to me in this case there ought to be some sort of remedy on the -- if you find that the notice was delayed, the remedy would be, I guess, retroactively grant an out-of-time trial, not erase everything that's already been done. It's a problem, I guess.

JUSTICE: Can the Court grant an out-of-time appeal if the Legislature says it has to be filed within 20 days?

MR. DOGGETT: Well, I think there's got to be a reason for ineffective [inaudible] timely filing a notice of appeal and that's the only thing I can think of. There's got to be some practical remedy to help the party that has been deprived of their appeal and that is what I say is practical remedy.

I wanna turn now to the issue of judicial notice. Rules of Evidence 206(f) says, one is to take judicial notice if appellate decisions have held that includes appellate courts and that they can take judicial notice at any time. I said earlier that a Supreme Court decision said that you can take it although that decision was -- I've said they were reluctant to take judicial notice and certainly can take judicial notice at anytime to avoid unjust results, and that's what happened here.

JUSTICE: Isn't it very dangerous to take this judicial notice of this kind of testimony when you've not seen the witness which ordinarily would be important. You can't evaluate credibility, you could if the other witnesses will testify at the trial. It just seems to me this is the most dangerous kind of thing to take judicial notice of.

MR. DOGGETT: I think it is dangerous -- but it is arguably dangerous. But I think it's up to the Appellate Court to use their discretion in deciding whether or not it's a [inaudible] to do. [inaudible] would be abuse of discretion standard. I don't think -- I believe that the Court of Appeals did not abuse its discretion with effective judicial notice under the circumstances of this case as I have been pointing out. This evidence, this new information -- a state expert -- this information was proper by the statement of this expert.

JUSTICE: They didn't actually use it. And we wonder, well, they didn't use it because after they got it they thought it's not usable. This is not the kind of evidence we're going to win with.

MR. DOGGETT: Well, they didn't live with it, they dismissed the criminal case.

JUSTICE: Right.

MR. DOGGETT: After they heard from their own expert.

JUSTICE: Which happens -- frequently happens that the party will talk to an expert, ask the expert's views and then decided not to use that expert because they can't use it.

MR. DOGGETT: Well, it's true. I mean, they could've made me go and gotten another expert but instead relied on their new expert information, I'd have to presume that was part of the reason why they decided not to pursue with the criminal case.

JUSTICE: But the Court used that evidence in its legal and factual sufficiency review. It didn't use it as an independent basis to determine should there be a new trial --

MR. DOGGETT: I don't [inaudible] --

JUSTICE: Don't you see a distinction --

MR. DOGGETT: I've not sent the information. I didn't know what to do. And the new information [inaudible] filed a motion requesting a remand or an out of town hearing or a motion for new trial. That was my request to the Court of Appeals. I sent the entire transcript. Instead of doing that, they took judicial notice of it. I think the evidence is insufficient and I'm gonna address that now. Even if you throw out Dr. Harry Wilson's testimony, they'll pursue it in any way, but they appear that I have to concede [inaudible] testimony of opinion and they seem to get it -- interweave it with their consideration [inaudible] of the actual trial testimony.

My [inaudible] is it need not be done that way but -- and I think that's the State's big beef, is that they took this new information and factored it into their calculation of whether the evidence was factually sufficient [inaudible]

JUSTICE: If the criminal proceedings have started within [inaudible] and time, then what would the result here be?

MR. DOGGETT: Yes, we've been on the act of criminal proceeding, I mean, that's one or the other --

JUSTICE: Let's say the same thing happened. Let's say, Dr. Wilson, he had his testimony, the State looks at it and decides it's not gonna pursue criminal proceedings.

MR. DOGGETT: Well, I guess I have to speculate about what the [inaudible] I think the end result would be acquittal. Probably a direct verdict--

JUSTICE: If this is really newly discovered evidence that was discovered after the appeal that you say, wouldn't your argument be: I didn't have this evidence available to use either in my case [inaudible] or the cross-examined State's expert. It's significant and I'm entitled to a new trial, and there's no way I could've gotten this evidence.

MR. DOGGETT: That's right.

JUSTICE: Isn't that really what this is about not --

MR. DOGGETT: Well, that's what I ask for it from the Court. There doesn't seem to be a clear-cut remedy when something like this happens. And I said this is an unusual case in my brief but that's what I --

JUSTICE: I thought we did have rules that dealt with newly discovered evidence after the case had left the trial court with no appeal?

MR. DOGGETT: No, but I don't know that we have rules that helps us when something pops up two years later. I mean, I wasn't aware of any -- maybe I'm missing something. I'm not aware of any procedural remedy which allows me to -- unless I can get an out-of-town hearing on a motion for a new trial which is what I asked for but I know of [inaudible]other procedural remedy to give this [inaudible]Court to have them act on it.

JUSTICE: Is it important to your argument that the State came up with Dr. Wilson because surely after every trial a loser could go find a new expert who would perhaps be more convincing and therefore, take -- might have a different argument than [inaudible] lateral in the trial and that's newly discovered evidence, we'd be reopening every judgment.

MR. DOGGETT: I think it is critical to our position that this was an expert who was produced by the State -- absolutely critical --

JUSTICE: But if the State then -- but we don't know whether the State was willing to accept that expert in [inaudible].

MR. DOGGETT: Well, they properly [inaudible] their expert -- a testimony came from a [inaudible] hearing preceding a trial setting in criminal case and you know, I get you -- truly it's outside the record that no one tried to speculate, I guess, about what went on in their minds, about why they decided not to go forward. We did file another request for the Court of Appeals. We sent a certified copy of the dismissal to the Court of Appeals and asked them and to also consider that and in that dismissal, which is in the record, the Assistant District Attorney handling the criminal case cites as one of his reasons for dismissing the case that he cannot prove how or when the abuse occurred and [inaudible] connect it to the defendant [inaudible] the child. He puts that in the dismissal as part of the record. This is the same DA's office that was handling the termination case.

JUSTICE: I haven't look at the record of evidence but the Court of Appeals seems to think that the verdict must have been expert driven, the fact that the testimony weighed fairly heavily in the jury deliberations as opposed to all the other evidences cited in the reply brief about Frank having -- that minding the child and was in control of the child and [inaudible]. What's your view on that?

MR. DOGGETT: Well, I think, they thought -- I think the expert testimony was important but it's a little interesting because as has been pointed out, how do you reconcile with the jury by giving one child back to someone that the State was arguing had murdered -- I mean, that's what they argued in the termination case that Frank Chavez murdered Hallie [inaudible]. That was their argument and they put the medical examiner on, she talked about the force of the blow being the same as a fall from a 20-storey building, all these was [inaudible]

JUSTICE: Well, I mean the position might have something to say [inaudible] speculation what the jury would -- the jury might have said, stepchildren -- children, I mean --

MR. DOGGETT: That's the only possible justification I can come up with but that's inconsistent with what the State is arguing in the termination problem. They argued that that man murdered the child.

JUSTICE: But it seems to me that the Court of Appeals opinion's -- I mean, if we were to send it back with the instruction not to look at evidence outside that record, it seems like the Court of Appeals' opinion was heavily based upon stacking inference upon inference but even if there was a blunt trauma, there's nothing to indicate Frank Chavez administrated the trauma and that would be an independent ground for factually insufficient evidence. It seems to me that was a big piece.

MR. DOGGETT: I agree. I --

JUSTICE: The Court of Appeals' opinion.

MR. DOGGETT: And I think that if you throw out Dr. Wilson's testimony, that evidence is still factually insufficient. I mean, legally insufficient and factually insufficient to support the termination. I didn't cite this case in my brief and I don't have to [inaudible] for a second opinion that there is a case the [inaudible]

Court of Appeals, In re D.P. was presided from November 28, 2001, 07-000567-CV. It's a similar case [inaudible] the child was taken to the emergency room and then they filed some broken bones but didn't inform the parent. And they decided, they analyzed the evidence and they say, in that case the evidence was insufficient. They say that the mother's right should be terminated, I guess. Very similar in [inaudible] to this case, but those cases that are cited in the brief about piling inference. My time is up.

JUSTICE: No further questions, thank you.

REBUTTAL ARGUMENT OF DAVID CHRISTOPHER NEWELL ON BEHALF OF THE PETITIONER

MR. NEWELL: Just briefly, your Honor. There's a number of different points. The respondent raises a bunch -- raises a number of constitutional concerns about, well, if you're filing a due process about change in the deadline. Those concerns are gonna be there regardless of when you change the deadline. You're always gonna change the deadline, you're concerns are always going to be there. If you don't, I mean, if you suggest that these constitutional concerns prevent the Legislature from doing it, the Legislature will never be able to shorten or lengthen deadlines.

So, I submit that those unconstitutional concerns are not persuasive. But more significantly there's some indication that Mackie was decided prior to Anderson case what was decided prior to 329b (h) and it was. But Mackie was decided after 329b (h) was drafted and the Check case that refers to and still recognized the validity of the Anderson v. Casebolt cases; that there has to be some -- that the change in the judgment modification can be based on extended deadlines.

With regard to the point of ineffective assistance, if there is ineffective assistance, if the appeal is untimely then the appeal is untimely. And the Court has no authority to then remand the background on motion for a new trial. That's in the Rules of Appellate Procedure that says that all rules can be suspended except for the one extending deadlines. And in fact, I do think it's significant because he mentions twice the [inaudible] of the contacts the case. He alludes to Jack v. State, which is the First Court of Appeals' idea that you can't -- First Court of Appeals' position to remand to determine the [inaudible] assistance. That case went out to the Court of Criminal Appeals and they determined the State couldn't review or a petition for [inaudible] an authoritative order. But in that opinion, the Court specifically noted that you can't consider [inaudible] the record, you know, which is the basis for these motions for a new trial and that's how [inaudible] trial which is why I don't -- I submit to this Court that the out- of-time motion is always not a [inaudible] remedy. It's based on [inaudible] outside the record.

It requests the Court to make -- it's not a situation where you could determine whether or not the Counsel was appointed or not appointed. It's the situation where the Court is sitting there and having to make a number of different factual determinations, and essentially [inaudible] on a motion of a new trial before they remanded.

JUSTICE: If the CA should not have considered Dr. Wilson's testimony, what is the State's position on what the result here should

be?

MR. NEWELL: If the Court of Appeals should not consider Dr. Wilson's testimony, I would submit that the evidence was legally sufficient.

JUSTICE: Is there a factual sufficiency point raised?

MR. NEWELL: There was a factual sufficiency point raised and I understand that this Court has no jurisdiction [inaudible] factual sufficiency.

JUSTICE: So that would have to go back.

MR. NEWELL: That would have to go back.

JUSTICE: Would you think we should decide the legal sufficiency point excluding Dr. Wilson's testimony?

MR. NEWELL: I do, sir, I [inaudible]. And with all due respect to the inference upon inference, I will submit that the Court got - - even [inaudible] incorrect because they looked at those pieces of evidence in isolation and [inaudible] the inferences is that it would be the alternative inferences that they were trying to rely on were based on [inaudible] not properly considered.

JUSTICE: What happens if there is newly discovered evidence after the case is on appeal? That the State itself failed or the State itself comes up with and the parents had no right getting in at the trial. That would probably mean a significant change to the [inaudible] jury, what should happen in that circumstance?

MR. NEWELL: Well, in that circumstance, I would imagine a bill of review is a possible remedy for them to raise that issue. But I think that more importantly, I think that for that remedy, the Court has to - - the Legislature has to come up with some vehicle, that Legislature create habeas corpus where [inaudible] has to do the same thing.

JUSTICE: So you're saying, let's suppose they had no conviction that was overturned by an appeal. And in the meantime the termination case is on appeal and someone [inaudible], "I killed the child" the third party, and your position is, that's tough, the evidence -- that's what it was in front of jury in the termination proceedings [inaudible]

MR. NEWELL: That is -- I'm sorry to say, your Honor, but I don't believe that that is this case.

JUSTICE: I'm not asking, I'm just asking --

MR. NEWELL: What I'm saying is that under these rules -- that is exactly why we need the Legislature to act because that is the result that you would end up with; is that based on that, there is no vehicle for them for the newly discovered evidence in this case.

CHIEF JUSTICE JEFFERSON: Thank you, Counselor. The cause is submitted and that concludes the argument for today. The Court will adjourn the hearing.

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