Opinion issued July 29, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00345-CV

IN THE INTEREST OF V.V., A MINOR CHILD

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2006-10410J

DISSENTING OPINION

Judges should decide the cases that come before them based upon the facts in evidence and the governing law, not upon their moral preferences, desires, or the dictates of their emotions. The "obvious problem" with "results-oriented judging"

is that "it produces bad results because it guts the rule of law."[1] It subjects litigants not to the Rule of Law, which can be discerned, understood, and applied, but to judicial whim, which is known only to the judges involved. Accordingly, judges should impartially and dispassionately decide the cases that come before them, and, "[i]nstead of worrying about the result in particular cases, judges should follow the rule of law in thousands of cases because doing so leads to better results than not doing so."[2] In contrast, "result–oriented judging . . . produces bad consequences on a system-wide basis."[3]

This Court and the other intermediate appellate courts like it exist to ensure due process of law, the most fundamental and ancient right established in Anglo-American jurisprudence and first articulated in Magna Carta.[4] In doing so, we are to correct the harmful errors of trial courts, including erroneous fact findings. These are solemn duties. When appellate judges fail in fulfilling them, the whole justice system fails.

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1 ORIGINALISM: A QUARTER-CENTURY OF DEBATE 26 (Steven G. Calabresi ed. 2007) [hereinafter ORIGINALISM].

2 ORIGINALISM at 26–27.

3 *Id*. at 27.

4 MAGNA CARTA, 1215, c. 39.

In this case, the assigned panel, exercising judicial restraint,[5] impartially and dispassionately decided the issues presented to this Court based upon the actual facts in evidence and the governing law. The majority, taking upon itself the roles of advocate and policy maker, has now, in suggesting relief neither requested nor argued for by either party, conditionally affirmed the trial court's judgment. Through its en banc opinion, the majority makes new law, changing the rules after the panel unanimously made its decision under the governing law. The stunning effect of the majority's opinion is that it will shut down all claims for the constructive denial of the right to counsel in termination of parental rights cases, regardless of how egregious the inaction of trial counsel.

In overruling the unanimous panel opinion in this case, the majority does not dispassionately state the pertinent background facts. In fact, it, in large part, considers as fact mere allegations, made for the first time on appeal in briefing and in motions, which are not in the appellate record and are in no way supported by the actual five and one-half page, double spaced, trial transcript, which is set out in its entirety below. Moreover, the majority not only misinterprets the well-established governing law, it, inconsistent with that law, creates out of whole cloth, a

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5 In contrast to such restraint, the term "judicial activism" has been defined as a judge "deciding a case on the basis of his [or her] own (usually moral) preferences rather than the governing law." AMERICAN CONSERVATISM: AN ENCYCLOPEDIA 460 (Bruce Frohnen, Jeremy Beer, and Jeffrey O. Nelson eds. 2006).

conditional affirmance—an unnecessary appellate abatement procedure for parents claiming ineffective assistance of trial counsel in termination of parental rights cases to prove up in a trial court what they have already established as a matter of law in an intermediate appellate court.

In reaching for what it considers to be a better result than that compelled by the governing law, the majority sacrifices the fundamental duties that attorneys owe to their clients along with the strict standard of proof necessary to terminate parental rights adopted by the Texas Legislature. The majority has indeed produced a bad consequence on a system-wide basis. Thus, this case reveals a fundamental breakdown in the judicial process in Texas. The majority fails to realize what most Americans, based upon a common experience, have come to understand all too well—government agencies, like all organizations, are capable of "encourag[ing] methods of decision making that make failure even more likely and then inevitable."[6] If allowed to stand, the majority's en banc opinion will not only encourage trial courts to (1) constructively deny parents their statutory right to counsel in parental-rights termination cases and (2) terminate parental rights on less than clear and convincing evidence in summary proceedings, it will make the practices "inevitable."

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6 DIETRICH DÖRNER, THE LOGIC OF FAILURE 10 (Ritz & Robert Kimber trans., Metropolitan Books 1996).

Accordingly, I dissent.

The Issues Presented

Appellant, Joe Lewis Valencia, challenges the trial court's termination of his parental rights to his minor child. In three issues, Valencia contends that his court-appointed attorney's performance at trial "was so patently deficient that [he] was denied any meaningful assistance of counsel altogether" and the evidence presented against him at trial, as revealed in the five and one-half page trial transcript, is legally and factually insufficient to support the trial court's findings that he had "endangered"[7] the child and that termination of his parental rights is in the child's best interest.

In regard to his first issue, the panel in our original opinion,[8] viewing the entire record before us, stated that "we are compelled to hold that Valencia received no meaningful assistance of counsel and was denied an *advocate* for his cause." We noted that his "trial counsel idly sat by, doing nothing to ensure Valencia a fair hearing, and he essentially allowed DFPS to terminate Valencia's parental rights without having to prove its case."

In regard to his second issue, the panel noted that the only evidence offered by

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7 *See* TEX. FAM. CODE ANN. § 161.001(1)(E) (Vernon Supp. 2009).

8 *See Valencia v. Tex. Dep't of Family and Protective Servs.*, No. 01-08-00345-CV, 2010 WL 1240988, at *9 (Tex. App.—Houston [1st Dist.] Mar. 25, 2010, no pet. h.).

DFPS on the issue of "endangerment" consisted of copies, mostly uncertified, of criminal records purportedly showing that Valencia, (1) prior to the child's birth, had been convicted of several misdemeanor and state jail felony offenses; (2) at the time of the child's birth, was in jail pending trial for the offense of aggravated robbery, a case which was later dismissed; and (3) after the child's birth, stood accused by information of the misdemeanor offense of assaulting Sandra Flores, the child's biological mother, who had already agreed to relinquish her parental rights. We also noted that the record conclusively establishes that Valencia had never had possession of the child. Accordingly, we held that the evidence is legally insufficient to support the trial court's finding that Valencia, based on his prior history of incarceration for criminal offenses, actually endangered the child.

The unanimous panel reversed that portion of the decree terminating the parent-child relationship between Valencia and the child and rendered judgment that Valencia's parental rights were not terminated.[9]

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[9] DFPS also petitioned for conservatorship of the child, and the trial court, in its decree terminating Valencia's parental rights, found that appointment of a parent as managing conservator of the child would not be in the best interest of the child because the appointment "would significantly impair the child's physical health or emotional development." *See* TEX. FAM. CODE. ANN. § 153.131 (Vernon 2008). Although Valencia, in the prayer of his brief, asks this Court to "reverse the appointment of DFPS as [the child's] sole managing conservator," he did not assign a separate issue for our review or provide briefing regarding conservatorship. *See* TEX. R. APP. P. 38.1(f), (i). Because Valencia does not separately challenge the trial court's order regarding conservatorship, the panel did not disturb that portion of the trial court's decree. *See In re J.A.J.*, 243 S.W.3d 611, 617 (Tex. 2007)

The Evidence

Facts are stubborn things, and the few facts presented in the paltry record of this case are indeed unyielding.

The clerk's record contains the November 10, 2006 affidavit of DFPS agent C. Heiskill, who testified that DFPS "received a referral alleging the physical abuse" of the child, who was born to Sandra Lynn Flores on November 7, 2006. Both the mother and the child tested positive for opiates, and Flores told Heiskill that Valencia is the father of the child and he was "in jail for robbery." After removing the child from Flores's custody, Heiskill located Valencia in the Harris County Jail, but she could not interview him because he was in quarantine. The State subsequently dismissed the robbery case.

The five and one-half page, double spaced, reporter's record reads more like a proceeding in Star Chamber than a real adversary trial in a Texas courtroom. The transcript of the April 9, 2008 nonjury trial, which under a conservative estimate could not have lasted more than a few minutes, reads, in its entirety, as follows:

> [Trial Court]: 2006-10410J; In the Interest of [the child]. The Court will take judicial notice of the contents of [its] file. Proceed. Okay.

(holding that, because different evidentiary standards apply, parent must separately challenge termination of parental rights and appointment of conservator when DFPS seeks conservatorship under Texas Family Code section 153.131).

[Trial Counsel]: Judge, if I may, on behalf of the father, the father was released, we sent him notice to be here today to come. To bring to your attention, he is out of Harris County and in county jail. We're asking for a couple of weeks.

[Trial Court]: Denied.

[DFPS Counsel]: Call my first witness.

[DFPS Counsel]: State your name for the Court.

[Washington]: Felicia Washington.

[DFPS Counsel]: How are you employed?

[Washington]: Caseworker for DFPS.

[DFPS Counsel]: As such, are you assigned to the Valencia case?

[Washington]: Yes, I am.

[DFPS Counsel]: Tell the Court what the goal is in the case?

[Washington]: The goal is unrelated adoption.

[DFPS Counsel]: Adoption. Okay. Could you please tell the Court how the child came into care?

[Washington]: Back in 2007 --yeah.

[Trial Court]: I will take judicial notice of the contents of its file, that includes the affidavit that describes the reason the child was taken into care.

You may proceed.

[DFPS Counsel]: Where is she currently placed?

[Washington]: Placed in a kinship placement.

[DFPS Counsel]: Is the placement meeting all of the physical and

emotional needs?

[Washington]: Yes.

[DFPS Counsel]: Let's talk about Joe Valencia. Originally, the named father; is that correct?

[Washington]: Yes.

[DFPS Counsel]: Mr. Valencia was in jail when this case first started?

[Washington]: Yes.

[DFPS Counsel]: And personally served in November, 2006?

[Washington]: Yes, he was.

[DFPS Counsel]: When was the first time you had contact with him?

[Washington]: The last hearing that we had.

[DFPS Counsel]: Which was in January of --

[Washington]: 2008.

[DFPS Counsel]: At the last hearing, Mr. Valencia showed up and offered to take a paternity test?

[Washington]: Yes, he did.

[DFPS Counsel]: Do you know the result of the paternity test?

[Washington]: Yes. The result was, he is the father of the child.

[DFPS Counsel]: He knows he is the father, and since then has he made any contact with the Agency?

[Washington]: No, he has not.

[DFPS Counsel]: And has he made any attempts to check on the

welfare of the child?

[Washington]: No, he has hot.

[DFPS Counsel]: And to your knowledge, Mr. Valencia was living with the mother of the child, correct? And this is the mother that tested positive for cocaine at the time of the birth of the child?

[Washington]: Yes.

[DFPS Counsel]: And to your knowledge, does Mr. Valencia have a criminal record?

[Washington]: Yes, he has.

[DFPS Counsel]: And, your Honor, I'm asking for State's Exhibit No.1, Mr. Valencia's criminal record to be admitted.

(Petitioner's Exhibit No.1 offered)

[Child's Ad Litem]: No objections.

[Trial Court]: It's admitted.

(Petitioner's Exhibit No.1 admitted)

[DFPS Counsel]: 749311; burglary of a motor vehicle; DWI; evading arrest; theft; assault; theft; DWI; more unauthorized use of a motor vehicle; and prosecuted as a third defendant for theft and aggravated robbery, which was dismissed due you to a lack school [sic] of witnesses; and also as recent --in jail right now for assault of Sandra Flores the mother, and we would like to mark that.

(Petitioner's Exhibit No.1 offered)

[Trial Court]: Any other exhibit or is that it?

[DFPS Counsel]: That is it right here. These are photos of his assault.

[Trial Counsel]: Judge, object, goes to the criminal side.

[Trial Court]: Overruled.

[Child's Ad Litem]: No objections.

[Trial Court]: They are admitted. [10]

(Petitioner's Exhibit No.1 admitted**)**[11]

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10 Although the trial court overruled the objection "goes to the criminal side," no photographs were marked as exhibits or actually authenticated through the testimony of a witness. Only Petitioner's Exhibit No. 1 was actually admitted into evidence. When this Court ordered the court reporter to supplement the record with "the reporter's record containing all of the recorded testimony and evidence admitted at the trial," the court reporter responded by filing the trial transcript and only one exhibit, Petitioner's Exhibit No. 1, and not any photographs.

11 Petitioners Exhibit No. 1 is a packet of copies, only two of which are certified, of criminal complaints and judgments and sentences purportedly entered against Valencia. As conceded by DFPS, the certified copies of documents contained in Petitioner's Exhibit No. 1 reveal that the case against Valencia for the offense of aggravated robbery was dismissed on March 26, 2007. Moreover, although a certified copy of a criminal information, apparently filed on March 29, 2008, accused Valencia of the misdemeanor offense of "Assault-Family Member," nothing indicated that, as of the date that the trial court entered its decree, he had been convicted of the offense.

Inexplicably, counsel for DFPS merely stated, "[t]hese are photos of his assault" and presented no testimony to prove that Valencia had committed the misdemeanor offense of assault. A criminal information cannot be considered evidence that an accused has committed a criminal offense. *Ex parte Dumas*, 110 Tex. Crim. 1, 2, 7 S.W.2d 90, 90 (1928).

The uncertified copies of criminal complaints and judgments and sentences in Petitioner's Exhibit 1 purport to establish that Valencia was convicted of the following offenses: (1) on April 4, 1997, the offense of unauthorized use of a motor vehicle, punished as a misdemeanor with a sentence of 180 days confinement in the

[Washington]: That's the mother of the child.

[DFPS Counsel]: Has Mr. Joe Valencia been able to show he has any relatives that could care for the child?

[Washington]: No, he does not.

[DFPS Counsel]: Based on the Court of contact that he has been in and out of jail every year for the --at least 10 years, and if he went to jail and the child was placed with him, how would that affect the emotional stability of the child?

[Trial Counsel]: Objection, speculation.

[DFPS Counsel]: So, he has no --

[Washington]: Go ahead. That's okay.

[DFPS Counsel]: Has the child been able to bond with Joe?

[Washington]: With Joe?

Harris County Jail; (2) on November 11, 1997, the offense of theft from a person, punished as a misdemeanor with a sentence of one year confinement in the Harris County Jail; (3) on April 22, 1998, the offense of driving while intoxicated, a misdemeanor, with a sentence of 60 days in the Harris County Jail; (4) on February 14, 2000, the offense of evading arrest, a misdemeanor, with a sentence of 60 days in the Harris County Jail; (5) on May 30, 2000, the offense of assault, a misdemeanor, with a sentence of 90 days in the Harris County Jail; (6) on June 25, 2002, the offense of driving while intoxicated, a misdemeanor, with a sentence of 90 days in the Harris County Jail; (7) on September 19, 2003, the offense of unauthorized use of a motor vehicle, a state jail felony, with a sentence of 180 days in a state jail; and (8) on September 23, 2004, the offense of theft, a state jail felony, with a sentence of 14 months in a state jail.

The punishment for a state jail felony is by confinement in a state jail for any term of not more than two years or less than 180 days and a possible fine not to exceed $10,000. TEX. PENAL CODE ANN. 12.35(a), (b) (Vernon Supp. 2009).

[DFPS Counsel]: With Joe Valencia?

[Washington]: No.

[DFPS Counsel]: How long has the child been placed with its current caregivers?

[Washington]: 14 months.

[DFPS Counsel]: 14 months. And has the child and family bonded?

[Washington]: Yes, very much.

[DFPS Counsel]: Would it be in the best interest of the child for the child to stay with the family?

[Washington]: Yes.

[DFPS Counsel]: And why?

[Washington]: They've had the child since she was four months old, and the child's in a very stable environment, and the child is bonded to the family.

[DFPS Counsel]: And since Joe has an extensive criminal history, including domestic violence, it would not be in the best interest to return the child to him?

[Washington]: No, to return the child.

[DFPS Counsel]: Based on over 10 years of repeated criminal history including assault of the mother, are you asking that Joe Valencia's rights be terminated and he has engaged in conduct that endangers the physical and emotional well-being of the child?

[Washington]: Yes.

[DFPS Counsel]: No further questions.

[Trial Court]: Cross.

[Trial Counsel]: No questions, Judge.

[Child's Ad Litem]: No questions, your Honor.

[Trial Court]: Petition is granted. TDFPS is appointed PMC. Entry of Judgment, today. Review hearing next 10-20-08. Good luck.

Given this brief record, one can easily compare the actual facts established at trial with what the majority, based on the representations of DFPS, asserts as fact in its opinion. Such a comparison reveals that several of the assertions are either not supported by the record or are objectively false:

Majority Assertions:	**What the Record reveals:**
"The record . . . reveals . . . [Valencia's] *wholesale lack of parenting beyond the moment of conception* . . ." *"A lack of all contact* with a child *without any proffered excuse* and *no effort to insure her safety* . . ." ". . . no effort to care for his daughter . . . ." ". . . the father has *not inquired about or supported the child or made any effort to see to her needs*." "The father has *never seen the child, paid support, or made any arrangements to provide her with food, clothing, shelter or care*."	As revealed above, DFPS did not even explore this subject matter in the trial court. It relied *exclusively* upon Valencia's "extensive criminal history" as its proof that he had endangered the child. As revealed above, DFPS merely asked Washington if Valencia, after he had offered to take a paternity test, which revealed that he is the father's child, had "made any contact *with the Agency*" or "made made any attempts *to check on* the welfare of the child?" She merely answered that he had not done either of those two things.
"The father offered no excuse for his	Because Valencia's trial counsel did

Majority Assertions:	**What the Record reveals:**
behavior at trial."	not know how to get him to court, Valencia could not appear at trial to defend himself.
"[He] assaulted the child's mother." "The record . . . reveals *the father's assault on the child's mother* . . . ."	At the time the trial court entered its decree, Valencia had been accused by information of the misdemeanor assault of the child's mother, who had already agreed to relinquish her parental rights. DFPS did not produce any testimony to prove that Valencia had committed the offense of assault.
"The record . . . reveals . . . a child left in the care of the state at birth *because the father was in jail* and the mother had ingested opiates during the pregnancy."	In her affidavit, in regard to "Facts Necessitating Removal of the Child," Heiskill testified that "[DFPS] received a referral alleging the *physical abuse* of [the child] . . . [who had] *tested positive* for Opiates . . . ." Nothing in Heiskill's affidavit testimony in any way implicates Valencia or his conduct regarding the child. Heiskill merely noted that "[Valencia] is in jail for robbery."
". . . four of this father's eight convictions are for *felonies*."	Valencia's criminal history consists of misdemeanors and state jail felony convictions for which he, prior to the child's birth, had served time in either a county or state jail facility.
"The father *has not attempted* to seek . . . reunification with [the child]."	Valencia has never relinquished his parental rights, and he has maintained this appeal for over two years.

As once emphasized by John Adams, "whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence."[12]

Procedural Background

In its November 10, 2006 Original Petition for Protection of a Child, for Conservatorship, and for Termination in a Suit Affecting the Parent-Child Relationship, DFPS alleged that "Rene Flores" was the child's "father," Valencia was the child's "alleged father," and an "unknown" man was the child's alleged father. DFPS sought a determination of Valencia's parentage, and, if "reunification with [Valencia could] not be achieved," the termination of the parent-child relationship, if any existed, between Valencia and the child. On November 16, 2006, Valencia was served with citation in the Harris County Jail, but he did not appear at the adversary hearing later that same day because he was in jail on a charge that was later dismissed.

The trial court, on May 8, 2007, appointed an attorney ad litem for the "unknown father" of the child. On September 6, 2007, Sandra Flores signed an affidavit of voluntary relinquishment of her parental rights with respect to the child. That same day, Valencia's court-appointed attorney (hereinafter "trial counsel"), with the help of counsel for DFPS, filed a written "Unopposed Motion For

12 DAVID MCCULLOUGH, JOHN ADAMS 68 (Simon & Schuster 2001).

Continuance" to bench warrant Valencia to the trial court.[13] On January 3, 2008, trial counsel filed an answer on behalf of Valencia, and Valencia, who appeared in court for the first time, "offered" to take a paternity test, which later established that he is in fact the father of the child.

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[13] The motion, which is typed, reads in pertinent part as follows:

> 1. This Motion is brought by the Harris County Attorney's Office on behalf of the **Department of Family and Protective Services**, who asks the Court, pursuant to Rule 251, Texas Rules of Civil Procedure, to grant a continuance for the trial; of this cause. As grounds for the requested continuance Movant alleges:
>
> 1.1. Additional time is needed to bench warrant the alleged father, Joe Lewis Valencia.
>
> . . . .

The motion contains a signature space, which clearly reads:

> Respectfully submitted,
> MIKE STAFFORD
> HARRIS COUNTY ATTORNEY
> SPN# [. . .]
>
> _____
> Susan Fillion
> Attorney for Petitioner, Department of Family
> and Protective Services
> 2525 Murworth Drive, Suite 300
> Houston, TX 77054-1603
> . . . .

Although not signed by her, the signature space also contains the State Bar number and telephone number of Fillion. Stafford and Fillion's information is lined through, and, next to this information appears, in handwriting, the signature, name, and information of Valencia's trial counsel.

Three months later, the trial court granted DFPS's petition and entered its Decree For Termination solely on the ground that Valencia had "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers pursuant to § 161.001(1)(E) of the Texas Family Code."[14]

On April 24, 2008, Valencia's trial counsel filed a Motion for New Trial and Statement of Appellate Points, a Request for Findings of Fact and Conclusions of Law, and a Notice of Appeal. The record does not contain findings of fact and conclusions of law, nor does it show that trial counsel ever filed a notice of past due findings of fact and conclusions of law.[15] In his new trial motion, trial counsel contended that his "oral motion for continuance to allow [Valencia] to be brought over from the Harris County Jail should have been granted" as Valencia was "within walking distance of the courtroom"; the trial "court could have ordered all parties to mediation to narrow the issues for trial"; a new trial would "not unduly burden" the trial court; a new trial was in the best interest of the child; and justice would not "properly be served" without a new trial.

In his Statement of Appellate Points, Valencia's trial counsel contended that

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[14] *See* TEX. FAM. CODE. ANN. § 161.001(1)(E) (Vernon Supp. 2009) ("The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence . . . that the parent has . . . engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child[.]").

[15] *See* TEX. R. CIV. P. 297.

the trial court had erred in denying Valencia access to the court because, as "an inmate at the Harris County Jail," he was "available upon request of the court"; the evidence is legally and factually insufficient to support the trial court's finding that termination of Valencia's parental rights was in the best interest of the child; the trial of the case, in the absence of Valencia, "deprived him of his due process pursuant to the 5th and 14th Amendments to the U. S. Constitution, and Article 1, Sections 13 and 19 of the Texas Constitution" and "his right to equal protection of the laws pursuant to the 5th and 14th Amendments to the U. S. Constitution, and Article 1, Sections 3, 3a, 13, and 19 of the Texas Constitution"; and his appellate points were not frivolous because termination of Valencia's parental rights affected his "constitutionally protected fundamental right to parent."

The trial court, after a hearing held on May 6, 2008, denied Valencia's new trial motion, appointed Valencia's trial counsel to represent him on appeal, and found Valencia's appeal "frivolous."

Valencia's trial counsel subsequently filed in this Court his appellant's brief, in which he argued, in a single issue, that the trial court erred in "determining [Valencia's] appeal to be frivolous" because Valencia's "fundamental right to parent is constitutionally protected." Because the record was incomplete, this Court ordered the court reporter to prepare a record of the May 6, 2008 hearing. After the court reporter responded that the record of the May 6, 2008 hearing could not be

located, this Court ordered the court reporter to supplement the record with all recorded testimony and evidence admitted at the April 9, 2008 nonjury trial. Upon receipt of the supplemented record, this Court afforded Valencia's trial counsel the opportunity to review it and file an amended brief. Inexplicably, he filed a "Waiver of Opportunity to File a Supplemental Brief."

After reviewing the entire clerk's record and the five and one-half page trial transcript along with Petitioner's Exhibit No. 1, this Court concluded that Valencia's appeal is not frivolous because Valencia had an arguable basis for challenging the legal and factual sufficiency of the evidence supporting the trial court's finding that he had endangered the child and for challenging the effectiveness of his appointed counsel.[16] This Court struck the brief of Valencia's trial counsel, abated the appeal, and remanded the case to the trial court for the appointment of new appellate counsel. We ordered Valencia to file full briefing on the pertinent issues and, if appropriate, an issue challenging the effectiveness of trial counsel's assistance.

Constructive Denial of Counsel

In his first issue, Valencia argues that because his trial counsel's performance "did not simply consist of errors, omissions or poor trial strategy" and "was so patently deficient," Valencia "was denied any meaningful assistance of counsel

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16 *Joe Lewis Valencia v. Dep't of Family and Protective Servs.*, No. 01-08-00345-CV, (Tex. App.—Houston [1st Dist.] May 6, 2009, order) (panel consisting of Justices Jennings, Alcala, and Higley).

altogether" and prejudice to his defense must be "presumed." *See Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984).

The Texas Supreme Court has held that "an ineffective assistance of counsel claim can be raised on appeal despite the failure to include it in a statement of points." *In re J.O.A.*, 283 S.W.3d 336, 339 (Tex. 2009). Thus, Valencia may raise this issue for the first time on appeal notwithstanding the fact that his trial counsel failed to assert it in his statement of appellate points as required by statute. *Id*.; *see* TEX. FAM. CODE ANN. § 263.405(i) (Vernon 2008) ("The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of points on which the party intends to appeal or in a statement combined with a motion for new trial.").

Standard of Review

The Texas Family Code requires the appointment of counsel to represent an indigent parent who responds in opposition to a suit filed by a governmental entity in which termination of the parent-child relationship is requested.[17] TEX. FAM. CODE

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[17] This Court has further recognized that a parent has a constitutional right to counsel in such cases. *Bermea v. Tex. Dep't of Family and Protective Servs.*, 265 S.W.3d 34, 39 (Tex. App.—Houston [1st Dist.] 2008), *pet. denied*, 264 S.W.3d 742 (Tex. 2008) (per curiam); *In re J.M.S.*, 43 S.W.3d 60, 63 (Tex. App.—Houston [1st Dist.] 2001, no pet.). In so doing, we have emphasized

> The United States Supreme Court has unanimously held that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty

ANN. § 107.013(a)(1) (Vernon Supp. 2009). The Texas Supreme Court has held that this statutory right to counsel "embodies the right to effective counsel." *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). In doing so, the supreme court emphasized that "'[i]t would seem a useless gesture on the one hand to recognize the importance of counsel in termination proceedings, as evidenced by the statutory right to appointed counsel, and, on the other hand, not require that counsel perform effectively.'" *Id.* (quoting *In re K.L.*, 91 S.W.3d 1, 13 (Tex. App.—Fort Worth 2002, no pet.)). Accordingly, the court concluded that the appropriate standard of review to apply in evaluating claims of ineffective assistance of counsel in civil parental-rights termination cases is that set forth by the United States Supreme Court for criminal cases in *Strickland v. Washington*. *Id*.

In *Strickland*, the United States Supreme Court, pursuant to the Sixth Amendment, like the Texas Supreme Court, pursuant to Family Code section 107.013(a)(1), expressly recognized:

> interests protected by the Fourteenth Amendment." . . . It also unanimously held that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." . . . For these reasons, the United States Supreme Court places termination of parental rights cases in the same category as criminal cases and analogizes a parent losing parental rights to a "defendant resisting criminal conviction" because both seek "to be spared from the State's devastatingly adverse action."

In re J.M.S., 43 S.W.3d at 63 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 103, 117 S. Ct. 555, 565, 568 (1996)); *see also Bermea*, 265 S.W.3d at 39.

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, *who plays the role necessary to ensure that the trial is fair*.

466 U.S. at 685, 104 S. Ct. at 2063 (emphasis added). The purpose of the guarantee of counsel in our adversary system of justice is "to ensure that a defendant has the assistance necessary ***to justify reliance on the outcome of the proceeding***." *Id*. at 691–92, 104 S. Ct. at 2067 (emphasis added). Thus, to constitute ineffective assistance, any deficiencies in counsel's performance must be prejudicial to the defense. *Id*. Such prejudice, depending upon the context, is either legally presumed or, if not, determined by inquiry. *Id*. at 692, 104 S. Ct. at 2067.

The Supreme Court, **in *Strickland***, expressly explained that in certain contexts, such "**prejudice is *presumed***" and specifically noted:

> **Actual or constructive denial of the assistance of counsel altogether is *legally presumed* to result in prejudice.**

Id. (emphasis added). In these circumstances, "an inquiry into prejudice" is simply unnecessary. *Id*. If the right to counsel in an adversary proceeding has been denied, actually or constructively, how can a court ever justifiably rely on the outcome of the proceeding? As succinctly stated by John Adams, "no [person] in a

free country should be denied the right to counsel and a fair trial."[18]

In the infamous sleeping-lawyer case, the United States Court of Appeals for the Fifth Circuit, sitting en banc, emphasized that there is nothing "new" about the rule of presumed prejudice and the rule is "well-established." *Burdine v. Johnson*, 262 F.3d 336, 348 (5th Cir. 2001). As explained by Judge Patrick Higginbotham:

> We presume prejudice because experience tells us that an occurrence presents both a high probability of prejudice and a difficulty of "proving it" in any finite sense. The law speaks of presumption not to supply a missing ingredient, but rather to recognize *its inevitable presence*. Right to counsel at critical stages is only an example of this principle. We simply will not put a person on trial for his life in the absence of counsel.

Id. at 355 (Higginbotham, J. concurring) (emphasis added).

In *United States v. Cronic*, the Supreme Court expounded upon the principle that prejudice is presumed "if the accused is denied counsel at a critical stage of his trial [or] . . . if counsel *entirely fails* to subject the prosecution's case to *meaningful adversarial testing*." 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984) (emphasis added). The Supreme Court explained:

> The [Sixth] Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." . . . If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's

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18 MCCULLOUGH at 66.

> guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

Id. at 654–55, 104 S. Ct. at 2044 (internal citations omitted). Accordingly, prejudice is presumed in circumstances that make it "unlikely that the defendant could have received the effective assistance of counsel." *See id*. at 666, 104 S. Ct. at 2051. Why? Because the right to counsel has been denied. *See id*. at 654, 104 S. Ct. at 2044.

In cases in which counsel for an accused has *not* entirely failed to subject the prosecution's case to meaningful adversarial testing, but has failed to render adequate legal assistance, prejudice is not legally presumed, and a prejudice inquiry must be conducted. In *Strickland*, the Supreme Court announced a two-prong test for evaluating such claims. 466 U.S. at 687, 104 S. Ct. at 2064. In regard to a criminal defendant's claim of "actual ineffective assistance of counsel" based on the errors and omissions of his attorney, the defendant must show that (1) his attorney's performance was deficient and fell below an objective standard of reasonableness and (2) the deficient performance prejudiced his defense. *Id*. at 684–87, 104 S. Ct. at 2063–64. Of course, if counsel entirely fails to subject a case to "meaningful adversarial testing," there is no performance to evaluate.

In regard to the second prong of the test, "[t]he defendant must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694, 104 S. Ct. at 2068 (emphasis

added); *see also Bell v. Cone*, 535 U.S. 685, 686, 122 S. Ct. 1843, 1846 (2002). The Supreme Court expressly stated that this *does not mean* that a defendant must "show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland* 466 U.S. at 693, 104 S. Ct. at 2068. Rather, the term "reasonable probability," as defined by the Supreme Court, means "a probability sufficient to ***undermine confidence*** in the outcome." *Id*. at 694, 104 S. Ct. at 2068 (emphasis added). Thus,

> The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, ***even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome***.

Id. (emphasis added). The Texas Supreme Court has recently echoed this standard by stating that the focus for the prejudice inquiry is whether counsel's mistakes were "so serious as to deny the defendant a fair and reliable trial." *In re B.G.*, No. 07-0960, 2010 WL 2636050, at *3 (Tex. July 2, 2010) (quoting *In re J.O.A.*, 283 S.W.3d at 344 (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064)). The test for prejudice is not, as the majority and our concurring colleague assert, that a defendant must show that, absent counsel's deficient performance, the outcome of his trial would have been different.[19] Contrary to the majority's claim, *Strickland* simply

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19 The majority asserts, "Following *J.O.A.* and the Texas Supreme Court's holding in *M.S.*, we uphold the requirement announced in the *Strickland's* second prong, and we place the burden on the father to show that the outcome of this trial would have been different had counsel provided him with a good defense." Justice Keyes, in

does not require Valencia to show that his trial "counsel's inadequacy caused the trial court to make the wrong decision."

One can never justify reliance on the outcome of a proceeding in which the right to counsel has been actually or constructively denied. Thus, it makes no sense to further inquire whether there is a reasonable probability, i.e., one sufficient to undermine confidence, that the outcome of such a proceeding would have been different.

Presumed Prejudice

In support of his argument that he received no meaningful assistance of counsel in the trial court and prejudice to his defense must be legally presumed, Valencia emphasizes the shocking brevity of the trial transcript of his parental-rights termination trial and that trial counsel:

1. failed to bench warrant Valencia to trial, and failed to put his motion for continuance, based on his need to secure Valencia's presence at trial, in writing or to verify it;

2. failed to object when the trial court took judicial notice of the contents of DFPS's file;

3. failed to object to the introduction into evidence of Petitioner's Exhibit No. 1, which contained numerous unauthenticated copies of purported criminal records;

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her concurring and dissenting opinion, asserts that the standard is that Valencia's "parental rights would probably not have been terminated but for his counsel's ineffective performance at trial."

4. made the invalid objection "goes to the criminal side";

5. failed to cross-examine Washington or to call any witnesses or offer any evidence on Valencia's behalf; and

6. failed to include in his statement of appellate points a challenge to the legal and factual sufficiency of the evidence supporting the trial court's finding that Valencia had endangered the child.

Based on these fundamental failures to act as an advocate on his behalf at each critical stage of the proceeding below, Valencia asserts that his trial counsel's representation "was so outrageous that it went beyond incompetent and can be rightly characterized as inert."

The record in this case compels the conclusion that Valencia received no meaningful assistance of counsel during the critical pre-trial, trial, and post-trial stages of the parental-rights termination proceeding. Although the trial court below formally appointed a lawyer to represent Valencia, Valencia was constructively denied his right to counsel.

The Fifth Circuit has noted that a "constructive denial of counsel occurs when the defendant is deprived of the guiding hand of counsel." *Childress v. Johnson*, 103 F.3d 1221, 1228 (5th Cir. 1997) (internal citations omitted). The court explained that if "the defendant complain[s] of counsel's errors, omissions, or strategic blunders in the context of an active adversarial representation," then the *Strickland* two-prong deficient performance standard applies. *Id*. at 1229. The "critical question in assessing a . . . right to counsel claim is whether the [defendant]

asserts that he received incompetent counsel, or *none at all*." *Id*. at 1230 (emphasis added). If such an argument is made, the rule is that "a constructive denial of counsel occurs when a criminal defendant must navigate a critical stage of the proceedings against him *without the aid of 'an attorney dedicated to the protection of his client's rights* under our adversarial system of justice,'" or when counsel "[abandons] the defense of his client at a critical stage of the . . . proceedings." *Id*. at 1229 (citing *United States v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991)) (emphasis added).

Like the defendant in *Childress*, Valencia emphasizes that he received no assistance of counsel, that is, "[i]n effect Appellant was not represented by counsel at trial." *See* 103 F.3d at 1230. The defendant in *Childress* also outlined a list of the failures of his counsel noting that his counsel (1) never investigated the facts, (2) never discussed the applicable law with him, and (3) never advised him of the rights he would surrender by pleading guilty. *Id*. at 1223. That Valencia has provided a list of failures does not negate his claim that he received no assistance of counsel. *See id*. Rather, the magnitude of the failures makes his point that he was constructively denied counsel at each critical stage of the proceeding below.

Moreover, presuming prejudice in this case is in no way, as the majority suggests, inconsistent with *Strickland* as adopted by the Texas Supreme Court in *In re M.S.* 115 S.W.3d at 544. Again, the United States Supreme Court, in *Strickland*,

expressly acknowledged that when an accused has been actually or constructively denied the assistance of counsel, prejudice to his defense is "*legally presumed*." 466 U.S. at 692, 104 S. Ct. at 2067 (emphasis added). Not only is the legal presumption of prejudice in this case consistent with *In re M.S.*, it is consistent with common sense. The actual or constructive denial of counsel in and of itself undermines confidence in the outcome of a trial proceeding because the right to counsel has been denied. Only if a defendant has received some meaningful assistance of counsel is a prejudice inquiry necessary.

In the case before us, Valencia's trial counsel, in his new trial motion, affirmatively represented to the trial court that on the date of trial, Valencia was "within walking distance of the courtroom" and his "oral motion for continuance to allow [Valencia] to be brought over from the Harris County Jail should have been granted." Yet, trial counsel's only effort to secure Valencia's presence at a trial, in which his constitutionally protected parental rights were at stake, was to orally state to the trial court, "To bring to your attention, he is out of Harris County and in county jail. We're asking for a couple of weeks."

Although trial counsel, as revealed in his new trial motion, knew that Valencia was in the Harris County Jail, he did not clearly articulate this fact to the trial court on the trial date and did nothing to timely and properly secure Valencia's presence in court by either obtaining a bench warrant prior to trial or filing a written and verified

motion for continuance. *See* TEX. R. CIV. P. 251. In fact, it is apparent from the face of the record that trial counsel did not even know how to secure Valencia's presence for trial. By failing to secure Valencia's presence at trial, trial counsel completely deprived Valencia of his right to testify on his own behalf and to assist trial counsel in presenting a defense, including the ability to assist trial counsel in cross-examining Washington, the only witness presented against Valencia.

Moreover, by idly sitting by and doing nothing, Valencia's trial counsel essentially relieved DFPS of meeting its burden of proof. This is revealed in the sparse five and one-half page, double spaced, trial transcript. When the trial court, sua sponte, took judicial notice of the contents of DFPS's file, trial counsel failed to object or to do anything to require that DFPS present properly admissible evidence to establish its allegation that Valencia had endangered the child. When DFPS offered into evidence Petitioner's Exhibit No. 1, the packet of copies of purported criminal records, trial counsel, again, failed to object. The only properly certified copies concern the aggravated robbery case, which had been dismissed, and the misdemeanor assault case, which was still pending at the time the trial court entered its decree. *See* TEX. GOV'T CODE ANN. § 406.013 (Vernon 2005); TEX. R. EVID. 901(7), 902(4). When counsel for DFPS stated, without any authenticating testimony, "These are photos of [Valencia's] assault," trial counsel apparently could not articulate a proper objection, but rather made the nonsensical objection "goes to

the criminal side." And when given the opportunity to cross-examine Washington, the only witness that DFPS presented at trial, trial counsel responded, "No questions, judge."

Trial counsel's post-trial representation was also essentially inert. Although he went through the formality of filing his Request for Findings of Fact and Conclusions of Law, he failed to timely file a notice of past due findings of fact after the trial court failed to enter any findings. *See* TEX. R. CIV. P. 297. In his Motion for New Trial and Statement of Appellate Points, trial counsel made a number of inexplicable contentions. For example, he contended that the trial court erred in denying his "oral motion for continuance" and the trial court, apparently sua sponte, "could have ordered all parties to mediation."

Although trial counsel contended that the evidence presented at trial is legally and factually insufficient to support the trial court's finding that termination of Valencia's parental rights is in the child's best interest, he failed, after a trial that lasted only a few minutes, to challenge the legal and factual sufficiency of the evidence to support the trial court's findings that Valencia had actually "endangered" the child. This is truly remarkable given that the record conclusively shows that Valencia was not determined to be the child's father until after he had submitted to paternity testing and he had never had possession of the child. It is all the more remarkable given that the only "evidence" offered by DFPS on the issue of

endangerment consisted of copies, mostly uncertified, of criminal records purportedly showing that Valencia, (1) prior to the child's birth, had been convicted of several misdemeanor and state jail felony offenses; (2) at the time of the child's birth, was in jail pending trial for the offense of aggravated robbery, a case which was later dismissed; and (3) after the child's birth, stood accused of the misdemeanor offense of assaulting Flores, who had already agreed to relinquish her parental rights.

DFPS, citing *Strickland*'s two-prong analysis for analyzing deficient-performance claims, argues that because there is no evidence in the record to show trial counsel's strategy or other reasoning behind his acts and omissions, there is no basis upon which to conclude that his representation was ineffective. However, as noted above, the United States Supreme Court, in *Strickland*, expressly explained that the "[a]ctual or constructive denial of the assistance of counsel altogether is *legally presumed* to result in prejudice." 466 U.S. at 692, 104 S. Ct. at 2067 (emphasis added). Here, the sparse record amply demonstrates that trial counsel wholly failed to provide Valencia any meaningful assistance of counsel. In fact, the record clearly reveals that trial counsel did not know how to secure his client's presence in court, made no effort to provide a defense, did not ask a single question of DFPS's only witness, did not know how to preserve error, effectively acquiesced in the termination of Valencia's parental rights based upon scant and

mostly inadmissible evidence, and, post-trial, did not include in the statement of appellate points a challenge to the legal and factual sufficiency of the scant evidence on the issue of endangerment.

Again, "the right to the assistance of counsel . . . envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685, 104 S. Ct. at 2063. The right to counsel, thus, "encompasses the right to have an advocate for one's cause." *Childress*, 103 F.3d at 1228. No prejudice inquiry is necessary "in cases of actual or constructive denial of counsel," "when a defendant can establish that counsel was not merely incompetent but inert[.]" *Id*. Constructive denial, such as when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," is the difference between "shoddy representation" and "no representation at all." *Id*. at 1228–29; *see also Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047; *Gochicoa v. Johnson*, 238 F.3d 278, 284–85 (5th Cir. 2000); *Jackson v. Johnson*, 150 F.3d 520, 525 (5th Cir. 1998).

Thus, the Fifth Circuit presumed prejudice in *Childress* where the court-appointed trial lawyer "never investigated the facts, never discussed the applicable law with [the defendant], and never advised him of the rights he would surrender by pleading guilty." 103 F.3d at 1223. The court presumed prejudice because it found that trial counsel took a "potted plant approach" to representing

Childress; that is, "*counsel's role was essentially passive*." *Id*. at 1226 (emphasis added).

The Fifth Circuit, sitting en banc, also presumed prejudice in the sleeping-lawyer case where defense counsel repeatedly slept in trial while evidence was being introduced against the defendant. *Burdine*, 262 F.3d at 338. The State of Texas argued that "because Burdine [could not] demonstrate precisely when [his lawyer] slept during his trial, he [could] not prove that [the lawyer] slept during critical stages of [the] proceeding." *Id*. at 347. The court rejected this argument, noting that "the State asks more of Burdine than the Supreme Court or this Court has ever asked of a defendant attempting to show the absence of counsel during a critical stage of trial." *Id*. A defendant is "***not required . . . to explain how having counsel would have altered the outcome of his specific case***." *Id*. (emphasis added). Rather, courts are to look to whether "the substantial rights of a defendant may be affected" during that type of proceeding. *Id*. Thus, once the court accepted the fact that Burdine's counsel slept "during portions of [his] trial on the merits, in particular during the guilt innocence phase when the State's solo prosecuting attorney was questioning witnesses and presenting evidence, there [was] no need to attempt to further scrutinize the record." *Id*. at 349. As noted by the court:

> Unconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise

> judgment on behalf of a client. . . . *When we have no basis for assuming that counsel exercised judgment on behalf of his client during critical stages of trial, we have insufficient basis for trusting the fairness of that trial and consequently must presume prejudice*.

Id. (emphasis added). Likewise, in the case before us, there is simply no basis for assuming that trial counsel exercised judgment on behalf of Valencia.

Three of our colleagues, concurring in the en banc opinion, contend that the panel has erred in concluding that Valencia was constructively denied his right to counsel and presuming prejudice "on the facts of this case." They assert that rather than relying upon the Supreme Court's express affirmation **in *Strickland*** that the "**[a]ctual or constructive denial of counsel is legally presumed to result in prejudice**," the panel should have evaluated the case as one concerning deficient performance and prejudice. In support of their position, our colleagues rely upon *Bell*. Their reliance is misplaced.

In *Bell*, the Supreme Court reiterated that a "trial would be presumptively unfair" if defense "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." 535 U.S. at 695–96, 122 S. Ct. at 1851. It again explained that "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing," prejudice to the defendant is presumed. *Id*. at 697, 122 S. Ct. at 1851 (emphasis added). The Court emphasized that the argument of the defendant in *Bell* was "*not* that his counsel failed to oppose the prosecution throughout" the trial, but that he failed to do so only at two "specific points" in the

"sentencing" phase of trial. *Id*. (emphasis added). Thus, it concluded that the two "aspects of counsel's performance" in the sentencing phase that were "challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components." *Id*. at 697–98, 122 S. Ct. at 1851–52. Accordingly, prejudice to the defense was not to be legally presumed. *Id*.

In fact, as emphasized by the Supreme Court, defense counsel in *Bell* did subject the prosecution's case to meaningful adversarial testing. He sought to prove that the defendant was not guilty of capital murder by reason of insanity and presented the expert testimony of (1) a clinical psychologist that the defendant suffered from substance abuse and posttraumatic stress disorders related to his military service in Vietnam and (2) a neuropharmacologist about the defendant's history of illicit drug use, which included consuming "rather horrific" quantities and "caused chronic amphetamine psychosis, hallucinations, and ongoing paranoia, which affected [the defendant's] mental capacity and ability to obey the law. *Id*. at 690, 122 S. Ct. at 1848. Defense counsel also presented the testimony of the defendant's mother, "who spoke of her son coming back from Vietnam in 1969 a changed person, his honorable discharge from service, his graduation with honors from college, and the deaths of his father and fiancée . . . ." *Id*. Counsel was

further "able to elicit through other testimony that [the defendant] had expressed remorse for the killings." *Id.*

In his opening statement to the jury in the punishment phase of the trial, defense counsel "called the jury's attention to the mitigating evidence already before them." *Id*. at 691, 122 S. Ct. at 1848. He suggested that the defendant was "under the influence of extreme mental disturbance or duress, that he was an addict whose drug and other problems stemmed from the stress of his military service, and that he felt remorse." *Id*. Counsel "urged the jury that there was a good reason for preserving his client's life if one looked at 'the whole man'" and "asked for mercy." *Id*. Counsel also brought out that his client had been awarded the Bronze Star in Vietnam and successfully objected to the State's proffer of photographs of the victims' decomposing bodies. *Id*. Defense counsel then strategically waived his final argument to prevent the lead prosecutor, "an extremely effective advocate, from arguing in rebuttal." *Id*. at 692, 122 S. Ct. at 1848.

Here, in stark contrast, the record clearly reveals that Valencia's trial counsel entirely failed to subject DFPS's case to meaningful adversarial testing at each critical stage of the proceeding below. He did not know how to secure his client's presence in court, made no effort to provide a defense at all, did not call any witnesses, did not ask a single question of DFPS's only witness, did not know how to preserve error, and effectively acquiesced in the termination of Valencia's

parental rights based upon scant and mostly inadmissible evidence in a trial that lasted only a few minutes. Moreover, Valencia, unlike the defendant in *Bell*, specifically argues that because his trial counsel's performance "did not simply consist of errors, omissions or poor trial strategy" and "was so patently deficient," Valencia "was denied any meaningful assistance of counsel altogether" and prejudice to his defense must be "presumed."[20] Valencia's point is that trial counsel's wholesale nonperformance before, after, and throughout the entire

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20 Our concurring colleagues assert that the issue of constructive denial of counsel "is not presented by this case." However, Valencia expressly presents this as his first issue in his briefing, and this Court has an obligation to directly address the issue. *See* TEX. R. APP. P. 47.1.

Our colleagues further assert that the panel has conducted a deficient performance and prejudice evaluation and there is "no reason to presume prejudice because the panel found prejudice." The panel did highlight some of the many significant failures of Valencia's trial counsel to act on Valencia's behalf throughout the pre-trial, trial, and post-trial stages of the proceedings below. However, these collective failures demonstrate that Valencia, in contrast to the defendant in *Bell*, received no meaningful assistance of counsel at all. Valencia's trial was "presumptively unfair." *Bell*, 535 U.S. at 695–96, 122 S. Ct. at 1851.

The panel did conclude, as asserted by our concurring colleagues, that the post-trial representation of Valencia by his trial counsel was essentially inert, due in part by his failure to challenge the legal sufficiency of the evidence to support the trial court's finding that Valencia had "endangered" the child. However, the panel, pursuant to Texas Supreme Court authority, addressed the legal sufficiency of the evidence in regard to the trial court's finding of "endangerment" only after concluding that Valencia was constructively denied his right to counsel. *See In re J.O.A.*, 283 S.W.3d at 344–47 (addressing legal sufficiency point not preserved in statement of appellant points as a result of ineffective assistance of counsel).

Thus, the panel addressed the threshold issue of ineffective assistance, and its holding that Valencia was constructively denied his right to counsel was not, as the majority asserts, an "alternative holding."

exceedingly brief proceeding is not of the same "ilk" as the two errors made by the otherwise active trial counsel in *Bell* but makes it "abundantly clear that [trial counsel] failed to render any meaningful assistance." His complaint is not one of "shoddy representation," but that he essentially had "no representation at all." *See Childress*, 103 F.3d at 1228.

A review of the entire record before us compels a holding that Valencia received no meaningful assistance of counsel and was denied an *advocate* for his cause. There can be no reasonable trial strategy that would call for not securing the presence of one's client at trial and then offering no defense for that client when he is faced with termination of his fundamental parental rights based upon scant and mostly inadmissible evidence. *See In re J.O.A.*, 283 S.W.3d at 342 (concluding that parent has fundamental liberty interest in maintaining custody and control of his child). During trial, trial counsel idly sat by, doing nothing to ensure Valencia a fair hearing, and he essentially allowed DFPS to terminate Valencia's parental rights in a summary proceeding without having to produce legally sufficient, clear and convincing evidence to support its case. Post-trial, he failed to include in the statement of appellate points a challenge the legal and factual sufficiency of the trial court's finding on endangerment, despite the scant evidence DFPS adduced on this issue.

The Supreme Court has emphasized that the right to the effective assistance of

counsel "is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656, 104 S. Ct. at 2045. The Supreme Court went on to say, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id*. at 659, 104 S. Ct. at 2047.

Taken as a whole, trial counsel's performance can only be seen as, at best, inert, and, at worst, acquiescing in DFPS's efforts to terminate Valencia's parental rights. Trial counsel utterly failed to subject DFPS's case to any meaningful adversarial testing such that the process itself was presumptively unreliable. Because Valencia received no meaningful assistance of counsel and was effectively denied an advocate for his cause, prejudice to his defense must be presumed as a matter of law. *See id*. Simply put, there is nothing in the record before us which demonstrates that Valencia received the assistance of counsel necessary to justify reliance on the outcome of the summary proceeding. Viewed objectively, a contrary conclusion would be unreasonable.[21]

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21 In accord with the United States Supreme Court's explanation of the second prong of *Strickland* in regard to deficient performance claims, the Texas Supreme Court has recently explained that when counsel fails to file a statement of appellate points, a parent must establish the prejudice prong of *Strickland* by "demonstrate[ing] that he could *prevail on appeal*" on the issues counsel failed to preserve. *In re B.G.*, No. 07-0960, 2010 WL 2636050, at *3 (Tex. July 2, 2010) (emphasis added). Thus, the law does not require Valencia to show that the *outcome at trial* would have been

Accordingly, the panel unanimously sustained Valencia's first issue.[22]

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different. Again, the critical question *on appeal* is whether the appellate court can justifiably rely on the outcome of the proceeding. *Strickland*, 466 U.S. at 691–92, 104 S. Ct. at 2067.

[22] In post-submission briefing, DFPS argues that Valencia cannot bring an ineffective assistance of counsel claim because he had no right to statutorily appointed counsel as he did not "respond in opposition" when he was served on November 16, 2006, file an affidavit of indigency, and seek appointment of counsel. *See* TEX. FAM. CODE ANN. § 107.013 (Vernon Supp. 2009). DFPS asserts that Valencia must have retained his trial counsel.

When trial counsel first acted on behalf of Valencia by filing the September 6, 2007 motion for continuance, he did so using a form provided by DFPS. This fact does not support that Valencia had at that time retained trial counsel as his counsel. An attorney may not unilaterally create an attorney-client relationship with a person; that person must take some express or implied act to retain counsel. *See Span Enter. v. Wood*, 274 S.W.3d 854, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Moreover, in January 2008, trial counsel filed Valencia's answer, in which he stated "NOW COMES the undersigned *duly appointed attorney ad litem* for JOE LEWIS VALENCIA . . . ." (Emphasis added.). Thus, the record clearly reflects that trial counsel was acting as Valencia's court-appointed attorney.

Nevertheless, DFPS, in its second motion for en banc reconsideration, argues that Valencia did not have the right to effective assistance of counsel because "he did not have a right to statutorily appointed counsel" and trial counsel's representation of Valencia was based on trial counsel's (and, apparently, the trial court's) misunderstanding of the scope of his appointment, that is, he had only been appointed to represent the 'unknown father,' a separate party who was entitled to counsel because the unknown father had not filed with the paternity registry and both his identity and location were unknown."

In support of this argument, DFPS relies on *In re V.G.*, No. 04-08-00522-CV, 2009 WL 2767040, at *12 (Tex. App.—San Antonio Aug. 31, 2009, no pet.) (mem. op.) (holding parent who retained counsel in parental rights termination case was not entitled to raise ineffective assistance of counsel claim) and *In re V.N.S.*, No. 13-07-00046-CV, 2008 WL 2744659, at *5 (Tex. App.—Corpus Christi July 3, 2008, no pet.) (mem. op.) (holding right to effective assistance of counsel is limited to "cases where indigent parents are appointed counsel and where parental rights are being wholly terminated").

Legal Sufficiency

Having sustained his first issue, the panel appropriately addressed the merits of Valencia's second issue. *See In re J.O.A.*, 283 S.W.3d at 339 (addressing legal sufficiency point not preserved in statement of appellant points as a result of

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However, as explained by the Fort Worth Court of Appeals,

> Just as the Sixth Amendment recognizes an accused's right to counsel and that counsel is necessary to produce fair and just results, *the statutory guarantee of counsel recognizes a parent's right to counsel* and imports that counsel's skill and knowledge is necessary to accord parents in termination proceedings sufficient opportunity to meet the state's "awesome authority" to terminate their parental rights. Thus, *the State of Texas has recognized the importance of counsel for parents in termination proceedings*. Considering the State's *parens patriae* interest in promoting the welfare of the child, the statutorily granted right to counsel *implies that counsel is necessary to an accurate and just result*.

In re K.L., 91 S.W.3d 1, 10–11 (Tex. App.—Fort Worth 2002, no pet.) (emphasis added). Simply put, a parent who can retain counsel should not be deprived of the right to effective assistance of counsel in a proceeding to terminate his parental rights merely because he can afford to hire a lawyer. Implicit in the Texas Legislature's granting of counsel upon an indigent parent once the State has instituted formal proceedings to terminate his parental rights "is recognition of a parent's *right to counsel* in termination proceedings." *Id*. at 10. Moreover, there is no meaningful cure, in the absence of a right to effective assistance of counsel, for a parent whose parental rights are erroneously terminated due to counsel's deficiencies. *Id*. at 11. A claim for civil malpractice seeking monetary damages is "wholly inadequate" to compensate a parent for the loss of his parental rights in a proceeding where counsel was ineffective. *Id*. A claim for ineffective assistance is the only "meaningful redress" for such a parent, whether counsel was appointed or retained. *See id*. Thus, whether trial counsel was appointed pursuant to the Family Code, simply appointed, or retained, Valencia was entitled to representation necessary to ensure that the trial was fair. *See Strickland*, 466 U.S. at 685, 104 S. Ct. at 2063.

ineffective assistance of counsel). In his second issue, Valencia argues that the evidence is legally and factually insufficient to support termination of his parental rights under section 161.001(1)(E) because there is no evidence in the record that he "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endanger[ed] the physical or emotional well-being of the child." He asserts that "[t]he record is completely silent as to . . . what acts or omissions [he] committed which endangered the child." He notes that although Heiskill, in her affidavit, testified that Flores and the child had tested positive for opiates at the child's birth, nothing in Heiskill's testimony implicated Valencia. He also asserts that the trial court improperly took judicial notice of facts that were subject to dispute and there is no evidence that the "individual(s) identified in the criminal records was actually appellant."

Standard of Review

A parent's right to "the companionship, care, custody, and management" of his children is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388, 1397 (1982) (internal citation omitted). The United States Supreme Court has emphasized that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000). Likewise, the Texas

Supreme Court has also concluded that "[t]his natural parental right" is "essential," "a basic civil right of man," and "far more precious than property rights." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Consequently,

> [T]ermination proceedings should be *strictly scrutinized*, and involuntary termination statutes are *strictly construed in favor of the parent*.

Id. (emphasis added).

Because termination "is complete, final, irrevocable, and divests for all time that natural right . . . , the evidence in support of termination must be clear and convincing before a court may involuntarily terminate a parent's rights." *Id*. (citing *Santosky*, 455 U.S. at 747–48, 102 S. Ct. at 1391–92; *Richardson v. Green*, 677 S.W.2d 497, 500 (Tex. 1984)). Clear and convincing evidence is "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (Vernon 2008); *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Because the standard of proof is "clear and convincing," the Texas Supreme Court has held that the traditional legal and factual standards of review are inadequate. *In re J.F.C.*, 96 S.W.3d at 264–66.

Instead, in conducting a legal sufficiency review in a parental-rights termination case, we must determine whether the evidence, viewed in the light most favorable to the finding, is such that the fact finder could reasonably have formed a

firm belief or conviction about the truth of the matter on which DFPS bore the burden of proof. *See id*. at 266. In viewing the evidence in the light most favorable to the judgment, we "must assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so," and we "should disregard all evidence that a reasonable fact finder could have disbelieved or found to be incredible." *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (citing *In re J.F.C.*, 96 S.W.3d at 266).

However, a fact finder may not, from meager circumstantial evidence, reasonably infer an ultimate fact, none more probable than another. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997). This Court has explained that under the law of evidence, the term "inference" means

> [A] truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved.

Marshall Field Stores, Inc. v. Gardiner, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (quoting BLACK'S LAW DICTIONARY 700 (5th ed. 1979)). Thus, to "infer" a fact, one "must be able to deduce that fact as a logical consequence from other proven facts." *Id.* In other words, there must be a logical and rational connection between the facts in evidence and the fact to be inferred. *United States v. Michelena-Orovio*, 702 F.2d 496, 504 (5th Cir.), *aff'd on reh'g*, 719 F.2d 738 (5th Cir. 1983) (en banc). With regard to the sufficiency of evidence in

circumstantial evidence cases, one inference cannot be based upon another inference to reach a conclusion. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 728 (Tex. 2003). Such stacking is not considered evidence. *Id*.

In proceedings to terminate the parent-child relationship brought under section 161.001, DFPS must establish, by clear and convincing evidence, one or more of the acts or omissions enumerated under subsection (1) of section 161.001 and that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2009). Both elements must be established, and termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

Endangerment

To terminate the parent-child relationship on the ground that a parent has "knowingly engaged in criminal conduct," DFPS must prove that the criminal conduct has resulted in the parent's:

> (i) conviction of an offense; and
>
> (ii) confinement or imprisonment and inability to care for the child for *not less than two years* from the date of [DFPS's] filing [of its] petition.

TEX. FAM. CODE ANN. § 161.001(1)(Q) (Vernon Supp. 2009) (emphasis added). Here, however, DFPS could not ask the trial court to terminate Valencia's parental rights on the ground that he had "knowingly engaged in criminal conduct" because

the most serious criminal offense of which Valencia had been convicted, more than two years prior to the child's birth, was a state jail felony offense. The maximum punishment for a state jail felony is confinement in a state jail for two years. TEX. PENAL CODE ANN. § 12.35(a) (Vernon Supp. 2009).

Thus, based solely upon Valencia's "criminal history," which consisted of several misdemeanor and state jail felony offenses, DFPS asserted, and the trial court found, that Valencia had "engaged in conduct or knowingly placed the child with persons who engaged in conduct which *endanger[ed]* the physical or emotional well-being of the child." *See* TEX. FAM. CODE ANN. § 161.001(1)(E) (Vernon Supp. 2009) (emphasis added). In support of this finding, DFPS relied on Petitioner's Exhibit No. 1, the packet of copies, only two of which are certified, of criminal complaints and judgments and sentences purportedly made and entered against Valencia. DFPS offered no other testimony from its only witness, Washington, or any other evidence upon which the trial court could have reasonably formed a firm belief or conviction that Valencia had actually endangered the child. In sum, the only evidence offered to show that Valencia had endangered the child was that (1) prior to the child's birth, he had been convicted of several misdemeanor and state jail felony offenses; (2) at the time of the child's birth, he was in jail pending trial for the offense of aggravated robbery, a case which was later dismissed; and (3) after the child's birth, he stood accused by information of the

misdemeanor offense of assaulting Flores, who had already agreed to relinquish her parental rights.

Setting aside the statutory requirements of section 161.001(1)(Q) and disregarding the fact that the uncertified criminal history records were inadmissible,[23] intentional criminal activity that exposes a parent to incarceration

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[23] Criminal history records are public records that must be authenticated before they are admissible. *See Hull v. State*, 172 S.W.3d 186, 189–90 (Tex. App.—Dallas 2005, pet. ref'd); *Carlock v. State*, 99 S.W.3d 288, 295 (Tex. App.—Texarkana 2003, no pet.). The requirement of authentication is a "condition precedent to admissibility." TEX R. EVID. 901(a). Authentication of a public record requires evidence that a purported public record is from the public office where items of that nature are kept. TEX. R. EVID. 901(b)(7). A public record can be self-authenticating if the document (1) bears "a seal purporting to be that of . . . any State . . . and a signature purporting to be an attestation or execution" or (2) purports "to bear the signature in the official capacity of an officer or employee of [the State], having no seal, if a public officer having a seal and having official duties in the [State] of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine." TEX. R. EVID. 902(1), (2). In *Carlock*, uncertified copies of existing judgments of the defendant's alleged prior convictions were inadmissible because the defendant's parole officer was unable to provide the proof necessary for authentication that the judgments were from the public office responsible for maintaining those records. 99 S.W.3d at 295.

None of the copies of documents offered by DFPS to prove that Valencia had previously been convicted of several misdemeanors and state jail felonies was authenticated. Washington, like the parole officer in *Carlock*, could not have authenticated the records. *See id.* Thus, the unauthenticated criminal history records were inadmissible. *Id.* However, because trial counsel did not object to their admission, Petitioner's Exhibit No. 1 must be considered in a sufficiency review. *See* TEX. R. EVID. 802 ("Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."); *Tear v. State*, 74 S.W.3d 555, 559 (Tex. App.—Dallas 2002, pet. ref'd) (when reviewing legal sufficiency, courts "look to all the evidence in the record, including admissible and inadmissible evidence, and direct and circumstantial evidence"); *see also Farley v. Farley*, 731 S.W.2d 733, 734 (Tex. App.—Dallas 1987, no writ) (applying rule 802

may be relevant to establish a course of conduct endangering the emotional and physical well being of the parent's children. *See Allred v. Harris County Child Welfare Unit,* 615 S.W.2d 803, 806 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (evidence of father's commission of numerous robberies was relevant). However, to support the trial court's finding, the record must contain clear and convincing legally sufficient evidence that Valencia had engaged in "endangering" conduct. "Endanger" means to "expose to loss or injury" or to "jeopardize"; it consists of conduct that is "more than a threat of metaphysical injury" or the "possible ill effects of a less than ideal family environment"; although, a child need not suffer actual physical injury to constitute endangerment. *Boyd*, 727 S.W.2d at 533. Endangerment can occur through both the acts and omissions of a parent. *See In re R.D.*, 955 S.W.2d 364, 367 (Tex. App.—San Antonio 1997, pet. denied).

Evidence of a parent's past conduct, including a criminal history, may be relevant and admissible if it shows a conscious course of conduct and instability occurring both "before and after" a child's birth. *Avery v. State,* 963 S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no writ). Imprisonment is a "factor to be considered . . . on the issue of endangerment." *Boyd*, 727 S.W.2d at 533. However, the Texas Supreme Court has explained that

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and explaining that unauthenticated judgment of another state's court, which would be hearsay, was not denied probative value when admitted without objection).

> Mere imprisonment will not, *standing alone*, constitute engaging in conduct which endangers the emotional or physical well-being of a child. . . . [I]f the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child, a finding under [section 160.001(1)(E)][24] is supportable.

Id. at 533–34 (emphasis added). For example, a trial court would not err in admitting evidence of a parent's "lengthy criminal record" involving narcotics abuse in a case in which the parent had "not altered her behavior." *Avery*, 963 S.W.2d at 553. However, the termination of parental rights should not be used as punishment in addition to imprisonment for the commission of criminal offenses. *In re C.T.E.*, 95 S.W.3d 462, 466 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

In *Boyd*, the trial court entered a decree terminating Boyd's parental rights based on a finding that he had engaged in conduct or knowingly placed his child with persons who had engaged in conduct that endangered the child. *Boyd*, 727 S.W.2d at 532. The supreme court expressly disapproved of the court of appeals' definition of "danger" and its holding that danger cannot be inferred from parental misconduct. *Id*. at 533. The gist of *Boyd* is that to constitute endangerment, it need not be shown that a parent's conduct was directed at the child or that the child actually suffered an injury. *Id*.

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[24] *Boyd* references section 15.02(1)(E), the predecessor to Texas Family Code section 161.001(1)(E).

The evidence presented at trial showed that Boyd had been arrested and jailed for the then first degree felony offense of burglary two days before the child's birth; after Boyd was paroled, he lived with the child for five months; he intermittently held three different jobs while out on parole; and, within four months, Boyd was again convicted of another burglary offense and sentenced to five years in prison. *Id*. At the time the child was taken by DFPS, he had emotional problems, which included sleep disorders, dietary issues, bed-wetting problems, and temper tantrums. *Id*. The supreme court did not hold, as asserted by the majority, that all "[i]ntentional criminal activity that exposes a parent to incarceration is conduct that endangers the physical and emotional well-being of a child." Nor did the supreme court, as asserted by DFPS, hold that the evidence presented was legally sufficient to support the trial court's finding that Boyd had endangered the child; rather, it remanded the case to the court of appeals to consider the issue. *Id*. at 534. However, the court of appeals did not issue a new opinion on remand.

Here, Washington did testify that Valencia had a "repeated criminal history," but DFPS offered no evidence to establish that Valencia's incarceration for misdemeanors and state jail felonies, none of which involved narcotics, and all of which resulted from offenses committed prior to the child's birth, had the effect of endangering the child. Unlike Boyd, Valencia was not, after the birth of his child, convicted of a first degree felony and sentenced to five years in prison. *See id.* at

533. In fact, Valencia had, at the time of trial, last been convicted of a state jail felony offense on September 23, 2004, more than two years prior to the child's birth. Washington, in response to a leading question, merely stated her conclusion that because he had a "repeated criminal history," Valencia had engaged in conduct that endangered the physical and emotional well-being of the child. DFPS did not adduce any evidence to support Washington's conclusion or explain how Valencia's criminal history had actually endangered the child.

Again, such evidence of incarceration alone will not support a reasonable inference of actual endangerment, i.e., an inference "deduced as a logical consequence from other facts, or a state of facts, already proved." *See Marshall Field*, 859 S.W.2d at 400 (quoting BLACK'S LAW DICTIONARY 700 (5th ed. 1979)); *see also Michelena-Orovio*, 702 F.2d at 504. The panel has not, as asserted by the majority, "discount[ed]" *Boyd*. *Boyd* clearly requires something more than "mere imprisonment" to establish, by clear and convincing evidence, a course of conduct that has the effect of endangering the physical or emotional well-being of a child in violation of section 160.001(1)(E). 727 S.W.2d at 533–34. The majority's contrary reading of *Boyd* is also inconsistent with the Texas Legislature's expressly stated requirements for termination of parental rights for "criminal conduct" listed in Family Code section 161.001(1)(Q).

It is true that Valencia was in the Harris County Jail at the time of the child's

birth. However, the case for which he was being held was, as conceded by DFPS, dismissed. He was not sentenced to prison as was Boyd. Also, Petitioner's Exhibit No. 1 does show that Valencia, on the date of trial, stood accused by information of the misdemeanor offense of assaulting Flores. However, DFPS did not present any testimony to prove that Valencia had assaulted Flores, and nothing in the record indicates that, as of the date the trial court entered its decree, he had been convicted of the offense.[25] It is hornbook law that a criminal information cannot be considered as evidence that an accused has committed a criminal offense. *Ex parte Dumas*, 110 Tex. Crim. 1, 2, 7 S.W.2d 90, 90 (1928); *see also United States v. Cox*, 536 F.2d 65, 72 (5th Cir. 1976) ("[i]t is hornbook law that indictments cannot be considered as evidence"); *McLean v. State*, No. 01-08-00466-CR, 2010 WL 335611, at *5 (Tex. App.—Houston [1st Dist.] Jan. 28, 2010, no pet.) (stating jury charge

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[25] At oral argument, this Court invited briefing on the issues as to whether it could take judicial notice of whether Valencia was or was not subsequently convicted of this offense and whether we could consider any such information in deciding the issues presented. After considering the arguments of the parties, the panel concluded that we may not take judicial notice of a conviction that was not in existence at the time of trial. *See Brown v. Brown*, 236 S.W.3d 343, 349 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In conducting its analysis, an appellate court is bound by the record containing the evidence that was before the trial court at the time it entered its decree. *See Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961). "It is axiomatic that an appellate court reviews the actions of a trial court based on the materials before the trial court at the time it acted." *Hamm v. Millennium Income Fund, L.L.C.*, 178 S.W.3d 256, 272 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (quoting *Methodist Hosps. of Dallas v. Tall*, 972 S.W.2d 894, 898 (Tex. App.—Corpus Christi 1998, no pet.)).

contained appropriate instruction that "criminal information is not evidence of guilt"); *Gonzales v. State*, 977 S.W.2d 189, 190 (Tex. App.—Austin 1998, pet. ref'd) ("[a]n indictment or information is not evidence"). In regard to the reference of DFPS's counsel to "photos of his assault," the record shows that no photographs were marked as exhibits, authenticated through witness testimony, or admitted into evidence. Only Petitioner's Exhibit No. 1 was admitted into evidence, and the record contains no such photographs.

The majority asserts that in the panel's view "evidence of an assault [loses] all legal significance" when the "parental[-rights] termination case comes ahead of the criminal trial" and the panel would require DFPS to prove that Valencia had been "convicted" of the misdemeanor offense of assault before considering any such assault in determining whether Valencia had endangered the child. However, we simply note the well-established law that a copy of a misdemeanor information, even if certified, does not constitute competent evidence of guilt. DFPS failed to produce competent evidence, either through witness testimony or a record of conviction, that Valencia had committed the misdemeanor offense of assault.

DFPS, disregarding the statutory requirements of section 161.001(1)(Q), argues that a history of incarceration for criminal offenses alone can support a finding of endangerment under 161.001(1)(E). In support of its argument, DFPS relies on *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002), *In re M.R.*, 243 S.W.3d 807, 819

(Tex. App.—Fort Worth 2007, no pet.), *In re J.T.G.*, 121 S.W.3d 117, 126–27 (Tex. App.—Fort Worth 2003, no pet.), *In re U.P.*, 105 S.W.3d 222, 236 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), *In re T.D.C.*, 91 S.W.3d 865, 873, 880 (Tex. App.—Fort Worth 2002, pet. denied), and *In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied). However, in cases in which such a criminal history is relied upon to support a finding of endangerment, including the cases relied upon by DFPS, there is always, consistent with *Boyd*, other evidence presented that puts the criminal history in the context of a pattern of endangering conduct. *See In re C.H.*, 89 S.W.3d at 21 (parent testified about extensive criminal history, and psychologist testified ten year prison sentence would impede parent's ability to parent); *Robinson v. Tex. Dep't of Protective and Regulatory Servs.*, 89 S.W.3d 679, 682–83 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (criminal history plus parent's testimony that she had long history of narcotics abuse before and after birth of children and father's testimony that children were afraid of mother); *Allred*, 615 S.W.2d at 805–06 (criminal history plus evidence that father beat mother after he learned she was pregnant and threatened to throw mother down stairs to cause miscarriage); *In re M.R.*, 243 S.W.3d at 819 (criminal history plus testimony that parent used narcotics in front of child and parent's incarceration affected ability to take care of child); *In re J.T.G.*, 121 S.W.3d at 131, 133 (criminal history plus evidence of parent's violence in front of child, abuse as child, and abuse

of narcotics and alcohol); *In re U.P.*, 105 S.W.3d at 231 (criminal history plus expert testimony about impact on child and testimony about parent's use of narcotics); *In re S.F.*, 32 S.W.3d 318, 321 (Tex. App.—San Antonio 2000, no pet.) (extensive criminal history plus caseworker's testimony about parent's marijuana use and discipline problems while incarcerated and the effect this had on child); *In re S.D.*, 980 S.W.2d at 763 (criminal history plus testimony that parent abused narcotics and alcohol and had inability to support family).[26]

These cases illustrate that the mere fact that Valencia had a criminal history prior to the birth of the child does not constitute clear and convincing, legally sufficient evidence, on its own, to support a finding under section 161.001(1)(E). Again, *Boyd* is clear that "*if the evidence, including the imprisonment*, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child, a finding under [section 160.001(1)(E)] is supportable." 727 S.W.2d at 534 (emphasis added).

For example, in *In re J.N.R.*, this Court held that the evidence was legally

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[26] *See also Padilla v. Dep't of Family and Protective Servs.*, No. 01-07-00313-CV, 2008 WL 525750, at *1–2 (Tex. App.—Houston [1st Dist.] Feb. 28, 2008, no pet.) (mem. op.) (criminal history plus testimony as to multiple prior referrals with DFPS); *Callahan v. Brazoria County Children's Protective Servs. Unit*, No. 01-01-00916-CV, 2003 WL 21299952, at *1 (Tex. App.—Houston [1st Dist.] June 5, 2003, no pet.) (mem. op.) (criminal history plus psychiatrist's testimony that father had propensity for violence and anti-social personality disorder, mother's testimony about father's violence towards family, and father's testimony about marijuana use).

sufficient to support the trial court's finding that a father had endangered his child, when, while on parole and participating in a DFPS family service plan, the father, "after knowing his parental rights were in jeopardy, . . . continued to engage in criminal activity that resulted in his being jailed." 982 S.W.2d 137, 142 (Tex. App.—Houston [1st Dist.] 1998, no pet.), *overruled on other grounds, In re C.H.*, 89 S.W.3d 17 (Tex. 2002). After the father was released from prison and placed on parole, he became an active parent in his child's life for five months. *Id*. at 140. The father, working with DFPS, agreed to and signed a family service plan, which "required him to agree to stay out of jail, participate in his parole tasks, develop his relationship with [the child], and maintain his employment." *Id*. The father failed to comply with his agreement when he was arrested on three separate occasions while on parole. *Id*. at 142. At the time of his last arrest, he was outside the area to which he was restricted under the terms of his parole, and his parole officer testified that he was seeking a revocation of the father's parole. *Id*. Accordingly, we concluded that this evidence showed that the father, while on parole and after agreeing to the requirements of the family service plan, "continued to engage in conduct that would endanger the emotional well-being of [the child]."[27] *Id*.

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[27] *See also In re H.G.H.*, No. 14-06-00137-CV, 2007 WL 174371, at *9 (Tex. App.—Houston [14th Dist.] Jan. 25, 2007, no pet.) (mem. op.) (holding "[a]ppellant's repeated incarceration, continuing propensity towards criminal conduct, failure to support [the child], and failure to complete, or make a good-faith

In this case, the record shows that DFPS created a family service plan for Valencia in January 2007 prior to the establishment of his parentage. As per the plan, Washington was to play an active role in assessing Valencia's progress against the plan. However, there is no evidence in the record that Valencia ever received a copy of the plan or even agreed to the plan.[28] Nor is there any evidence that

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effort to complete, the court-ordered family services constitute a course of conduct which endangered the physical or emotional well-being of [the child]").

[28] In its third motion for en banc reconsideration, DFPS, in an argument that it did not make to the trial court, in its briefing to this Court, or in its oral argument to this Court, asserts that Valencia endangered the child by not complying with the court ordered family service plan. DFPS asserts that Valencia had a "responsibility to comply with the terms of the Department's service plan *by court order*," regardless of whether he "agreed" to the plan, and DFPS cites to Texas Family Code section 263.103, which it asserts says "plan may take effect even if Department files it without parent's signature." While section 263.103 provides that the "plan takes effect . . . when the department . . . files the plan without the parents' signatures," DFPS ignores the remainder of the statute. *See* TEX. FAM. CODE. ANN. § 263.103(d) (Vernon 2008). The statute also requires that "the child's parents and the representative of the department . . . shall discuss each term and condition of the plan" and "[i]f the department . . . determines that the child's parents are unable or unwilling to sign the service plan, the department may file the plan without the parents' signatures." *Id*. § 263.103(a), (c). The record contains no evidence that DFPS complied with its statutory requirements before filing the plan. The Family Code does provide for termination of parental rights if a parent "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent." TEX. FAM. CODE. ANN. § 161.001(1)(O) (Vernon Supp. 2009). However, even though the trial court ordered Valencia to comply with the family service plan, the record contains no evidence regarding whether or not Valencia did so. Moreover, DFPS did not even ask the trial court to consider this section as a ground for terminating Valencia's parental rights, and the trial court made no such finding.

Washington engaged Valencia in any way regarding the plan. In fact, the record shows that Washington first met Valencia at a hearing one year later in January 2008 when Valencia first appeared in the case and offered to take a paternity test. Here, unlike in *In re J.N.R.*, there is no additional evidence that Valencia's criminal history constituted a course of endangering conduct.

At trial, DFPS relied solely upon Valencia's criminal history of misdemeanor and state jail felony offenses to support the trial court's finding that Valencia had actually endangered the child. Now, on appeal, DFPS additionally asserts that Valencia engaged in endangering conduct through his failure to take "swift and appropriate actions in support of [the child] during the pendency of the case or to secure reunification," "his apathetic attitude," and "his failure to take any action to check on the child or initiate visits before or after [he took the paternity test]."[29] In

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[29] In its third motion for en banc reconsideration, DFPS asserts that Valencia, after the State, in March 2007, dismissed the case against him for the offense of aggravated robbery, "never took any action to care for or support the child in the full year when he was not subject to incarceration." The majority asserts that Valencia, "when not incarcerated," had not "seen the child, paid support, or made arrangements to provide [the child] with food, clothing, shelter or care" or "inquired about or supported the child or made any effort to see to her needs." However, as noted above, the trial record in no way supports the assertions of DFPS or the majority.

First, the record is unclear as to if, or for how long, Valencia was out of jail after the State dismissed in March 2007 the aggravated robbery case. In fact, during the "full year" that DFPS asserts that Valencia was not incarcerated, the clerk's record shows that DFPS, on September 6, 2007, drafted an "Unopposed Motion for Continuance," which was then offered by Valencia's trial counsel to bench warrant Valencia out of jail.

Second, even if Valencia was out of jail for the "full year," the record is silent as to any of Valencia's actions or omissions in regard to the child prior to January 2008. In her brief testimony, Washington stated that Valencia, "since" January 2008, when "he offered to take a paternity test," which later revealed that he is the father of the child, had not "contact[ed]" DFPS or attempted "to check" on the child. The remainder of the reporter's record does not address any acts or omissions of Valencia in regard to the child from March 2007 to January 2008.

More importantly, DFPS simply did not present any evidence that Valencia "never" cared for the child or failed to act regarding child support or the provision of food, clothing, shelter, or care during the pendency of the case.

Third, contrary to the majority's assertions, the 111-page clerk's record, consisting of the usual pleadings, orders, and docket sheets, contains no evidence regarding any act or omission of Valencia in regard to the child. Heiskill's affidavit testimony regarding why the child was taken from the mother and placed into DFPS's care mentions Valencia only to say that he was in jail pending trial on the robbery case and could not be interviewed because he was in quarantine. And, as discussed above, a family service plan was filed with the trial court, but the record includes no progress reports or any information regarding Valencia's compliance or failure to comply with the plan.

In sum, the majority essentially asserts that the trial court could have inferred that Valencia had engaged in conduct that actually endangered the child from Washington's answer to these two questions (1) "And has he made any attempts to check on the welfare of the child?" Answer: "No" and (2) "Based on over 10 years of repeated criminal history including assault of the mother, are you asking that Joe Valencia's rights be terminated and he has engaged in conduct that endangers the physical and emotional well-being of the child?" Answer: "Yes." This does not constitute clear and convincing evidence that Valencia had actually endangered the child.

As noted above, to "infer" a fact, one "must be able to deduce that fact as a logical consequence of other proven facts." *Marshall Field Stores, Inc. v. Gardiner*, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.). Stated another way, to be legitimate or permissible, an inference must be deduced as a logical consequence of the facts presented in evidence, and there must be a logical and rational connection between the facts in evidence and the fact to be inferred. *United States v. Michelena-Orovio*, 702 F.2d 496, 504 (5th Cir.), *aff'd on reh'g*, 719 F.2d 738 (5th Cir.1983) (en banc). Even if we accord the sparse record with the

support of its position, the majority has seized upon these assertions, which are not supported by the record. However, "[i]t is axiomatic that an appellate court reviews the actions of a trial court based on the materials before the trial court at the time it acted." *Hamm v. Millennium Income Fund, L.L.C.*, 178 S.W.3d 256, 272 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (quoting *Methodist Hosps. of Dallas v. Tall*, 972 S.W.2d 894, 898 (Tex. App.—Corpus Christi 1998, no pet.)).

Valencia was in the Harris County Jail in November 2006 at the time the child was born and when DFPS removed the child from Flores's care two days later and sued Valencia to terminate the parent-child relationship. It is clear that Valencia's incarceration pending trial on a case which was later dismissed does not alone constitute endangering conduct. Valencia had had no contact with the child and, because he was in jail, he could not take "swift and appropriate actions in support of [the child]"[30] or appear in court on November 16, 2006, the date of the first

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meaning gleaned by the majority, Washington's two answers, unsupported by any other evidence in the record, did not give the trial court, as the fact finder, a basis from which it could have reasonably inferred and formed a firm belief or conviction that Valencia had actually "endangered" the child.

30 Contrary to the assertion of the majority, the panel does not "excuse" Valencia's "abandonment" of his child. Texas Family Code section 161.001(1)(N) provides for termination of parental rights if a parent "constructively abandoned the child who has been in the permanent or temporary managing conservatorship of [DFPS] . . . for not less than six months, and . . . the department . . . has made reasonable efforts to return the child to the parent; . . . the parent has not regularly visited or maintained significant contact with the child; and . . . the parent has demonstrated an inability to provide the child with a safe environment[.]" TEX. FAM. CODE. ANN. §

adversary hearing and the date that he was served with DFPS's petition. He simply had no time to retain counsel between the time that he was served, while in jail at 8:40 a.m., and the time of the first adversary hearing at 1:00 p.m. Neither could he appear and request the appointment of counsel.

In sum, the only evidence offered by DFPS on the issue of endangerment consisted of copies, mostly uncertified, of criminal records purportedly showing that Valencia had, (1) prior to the child's birth, been convicted of several misdemeanor and state jail felony offenses; (2) at the time of the child's birth, was in jail pending trial for the offense of aggravated robbery, a case which was later dismissed; and (3) after the child's birth, stood accused by information of the misdemeanor offense of assaulting Flores, who had already agreed to relinquish her parental rights. Moreover, the record conclusively establishes that Valencia had never had possession of the child.

Viewing all of the evidence in the light most favorable to the trial court's finding, the trial court could not have reasonably formed a firm belief or conviction that Valencia had engaged in a course of conduct that endangered the physical and emotional well-being of the child. *See* TEX. FAM. CODE ANN. § 161.001(1)(E). Thus, the panel held that the evidence is legally insufficient to support the trial

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161.001(1)(N) (Vernon Supp. 2009). As revealed in the trial transcript, DFPS did not even ask the trial court to consider "abandonment" as a ground for terminating Valencia's parental rights, and the trial court made no such finding.

court's finding that Valencia, based on his prior history of incarceration for criminal offenses, actually endangered the child. *See Boyd*, 727 S.W.2d at 531.

Accordingly, the panel unanimously sustained Valencia's second issue.

En Banc Reconsideration

Valencia was constructively denied his statutory right to counsel, and his parental rights were terminated in a summary proceeding that lasted only a few minutes. After his court-appointed trial counsel failed to secure Valencia's presence in court so that he could defend himself, trial counsel essentially acquiesced in the termination of Valencia's parental rights. The egregious conduct of counsel and the termination of Valencia's parental rights based on legally insufficient evidence shock the conscience and amount to a gross violation of the Rule of Law.

Accordingly, the panel unanimously reversed that portion of the trial court's decree terminating the parent-child relationship between Valencia and the child and rendered judgment that Valencia's parental rights were not terminated. As demonstrated above, the panel did so thoughtfully and dispassionately, objectively applying the facts in evidence to the governing law after thoroughly reviewing the record and the briefs and hearing the oral arguments of the parties. The panel carefully allowed both sides to thoroughly present their case even through the point of post-submission briefing and a number of motions for rehearing, and the panel

thoroughly addressed the arguments made.

As noted by the Fifth Circuit, there is nothing "new" about the rule of presumed prejudice in cases in which the right to counsel has been constructively denied; it is in fact "well-established." *Burdine*, 262 F.3d at 348. Again, the Supreme Court, **in *Strickland***, specifically noted:

> **Actual or constructive denial of the assistance of counsel altogether is *legally presumed* to result in prejudice.**

466 U.S. at 692, 122 S. Ct. at 2067 (emphasis added). Moreover, in a very recent opinion, the Texas Supreme Court has again emphasized that

> [T]he private interests affected in a parental rights termination case are of the *highest order*. As the [United States] Supreme Court has said, natural parents have a "fundamental liberty interest . . . in the care, custody, and management of their child [*which] does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State*." We have said that "termination cases implicate fundamental liberties" and that "a parent's interest in maintaining custody of and raising his or her child is *paramount*."

In re B.G., No. 07-0960, 2010 WL 2636050, at *4 (Tex. July 2, 2010) (citing *Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 1394–95 (1982), *In re B.L.D.*, 113 S.W.3d 340, 351–352 (Tex. 2003), and *In re M.S.*, 115 S.W.3d at 547)) (emphasis added). Again, termination of parental rights proceedings are to be strictly construed. *Holick*, 685 S.W.2d at 20.

Yet, the majority, disagreeing with the result compelled by the governing law, has taken the case from the assigned panel. It has done so improperly.

Violation of the En Banc Standard

Texas' intermediate courts of appeals "sit in sections as authorized by law," and the "concurrence of a majority of the judges sitting in a section is necessary to decide a case." TEX. CONST. Art. V, § 6. Thus, intermediate appellate judges "sit in panels of three or more, as in the federal circuit courts of appeals." *O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 96 (Tex. 1992).

Unless a court of appeals with more than three justices votes to decide a case en banc, the case "must be assigned for decision to a panel of the court consisting of three justices." TEX. R. APP. P. 41.1(a). The panel's opinion "constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion." *Id*. Thus, the panel acts essentially as a three-judge court, possessing full authority to decide the cases before it on behalf of the entire court. *Thompson v. State*, 89 S.W.3d 843, 856 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (Jennings, J., concurring in denial of en banc consideration).

Accordingly, in Texas, en banc consideration of a case is *disfavored*:

> *En Banc Consideration Disfavored*. En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of a court's decisions or unless extraordinary circumstances require en banc consideration.

TEX. R. APP P. 41.2(c). This standard has been described as "exacting," and the failure to follow it raises "fundamental" issues. *Schindler Elevator Corp. v. Anderson*, 78 S.W.3d 392, 423–24 (Tex. App.—Houston [14th Dist.] 2001, *judgm't*

vacated without reference to the merits due to settlement by the parties, No. 02-0426, 2003 Tex. Lexis 68 (Tex. May 22, 2003) (mem. op.) (Frost, J. concurring in denial of en banc consideration) (denial of en banc consideration "compelled by the exacting standard for en banc review") (Edelman, J. concurring in denial of en banc consideration) (failure to follow en banc standard raises "fundamental" issues of (1) "How important is it to our system of justice that decisions be reached in an impartial manner, i.e., based on the issues, law, and evidence presented rather than other considerations?" and (2) "What could suggest a greater lack of impartiality than to decide a case based on . . . an issue not raised by either party?"). Thus,

> The standard for en banc consideration is not whether a majority of the en banc court may disagree with all or a part of a panel opinion. Neither is an assertion that an issue is "important" sufficient. Rather, when there is no conflict among panel decisions, the existence of "extraordinary circumstances" is required before en banc consideration may be ordered.

Thompson, 89 S.W.3d at 856 (Jennings, J., concurring in denial of en banc consideration). In regard to Federal Rule of Appellate Procedure 35, which concerns en banc review in the federal courts of appeal, the Fifth Circuit has noted:

> A petition for rehearing en banc is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent . . . .

5TH CIR. R. 35 I.O.P. Petition for Rehearing En Banc. Generally, alleged errors regarding the facts of the case, including sufficiency of the evidence challenges, are

"matters for panel rehearing, but not for rehearing en banc." *Id.*

Here, en banc reconsideration was not at all "necessary" to maintain uniformity with prior First Court of Appeals decisions. Moreover, the panel's holdings in regard to the particularly egregious circumstances presented in this case do not in any way amount to an "extraordinary circumstance" which "requires" en banc consideration. The simple fact is that the majority does not like the "well-established" rule of presumed prejudice and the result compelled by the governing law. As noted above, the "obvious problem" with such "results-oriented judging" is that "it produces bad results because it guts the rule of law." [31] When a court, even to reach what it believes to be a more desirable result in a particular case, fails to perform, dispassionately and impartially, its solemn duty to ensure due process of law, the Rule of Law is violated, and, on that rule, society can no longer depend.

The Majority's Errors

Taking upon itself the role of advocate, the majority has considered as fact what DFPS has merely asserted in its briefing. Appellant courts are supposed to be bound by the record containing the evidence that was before the trial court. *See Hamm*, 178 S.W.3d at 272. However, as revealed by the trial transcript above, much of what is asserted by DFPS and the majority as fact is either objectively not

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31 ORIGINALISM at 26.

true or not supported in the record. The majority proceeds to decide the case en banc, conditionally affirming the trial court's judgment. It offers a post-decision abatement, requested by neither party, and it fails to adequately address the actual arguments made by the parties and the pertinent controlling authorities. *See* TEX. R. APP. P. 47.1.

Taking upon itself the role of policy maker, the majority, in derogation of the "well-established" governing law, creates new law. It, on its own initiative, suggests to Valencia that he request an abatement for a hearing on whether his trial counsel's deficient performance harmed him. Again, neither party has asked for such an abatement to be made after the panel has already decided the case and the majority has conditionally done so. It is interesting to note that in criminal cases, this Court, also in an en banc opinion, has specifically precluded criminal defendants from requesting an abatement to restart the appellate timetables to file new trial motions when trial courts untimely appoint appellate counsel after new trial deadlines have expired. *See Benson v. State*, 224 S.W.3d 485, 488 (Tex. App.—Houston [1st Dist.] 2007, no pet.), *overruling*, *Jack v. State*, 64 S.W.3d 694 (Tex. App.—Houston [1st Dist.] 2002, pet. dism'd). More importantly, Valencia simply does not need an abatement to prove up in the trial court the prejudice to his defense that he has already established in this Court as a matter of law. This presents Valencia with no new "opportunity." Rather, in effect, such an abatement

would give DFPS a "do-over" to put in the record what it failed to establish when it tried the case.

In support of their conditional affirmance and "abatement" suggestion, the majority relies on *In re J.O.A.* and *In re M.S.* Neither case supports the majority's position. In neither case did the Texas Supreme Court abate or remand the parent's ineffective assistance of counsel claim to the trial court for a hearing. In *In re J.O.A.*, the supreme court, after disagreeing with the court of appeals' holding that the evidence was legally insufficient to support termination of a father's parental rights, noted that the court of appeals had also held that the evidence was factually insufficient to support termination. 283 S.W.3d at 347. Accordingly, the supreme court "remand[ed] the cause to the trial court for a new trial." *Id*. In *In re M.S.*, after holding that a trial counsel's failure to preserve a factual sufficiency challenge in a termination of parental rights case "may constitute ineffective assistance of counsel," the supreme court remanded the case to the court of appeals to "determine whether counsel's failure to preserve the factual sufficiency issue was not objectively reasonable, and whether this error deprived [the mother] of a fair trial." 115 S.W.3d at 550.

Moreover, the majority mischaracterizes what a defendant must actually establish to meet the second prong of *Strickland*. As expressly explained by the United States Supreme Court in *Strickland*, a defendant need not, as the majority

asserts, show that the outcome of his trial "would have been different had counsel provided him with a good defense" or the errors of counsel determined the outcome of his case. He need not even "show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2068. Rather, he must simply show a "*reasonable probability*" that the outcome of the proceeding would have been different, i.e., one sufficient to undermine confidence in the outcome. *Id*. at 694, 104 S. Ct. at 2068. Again,

> The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, ***even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome***.

Id. (emphasis added). Thus, the majority's bizarre and awkward abatement procedure in not only unnecessary, it is actually pointless.

In regard to the legal sufficiency of the evidence, to the extent that the majority opinion can be read to hold that evidence of Valencia's history of misdemeanor and state jail felony convictions and the fact that he stood accused by information of the misdemeanor assault of Flores is legally sufficient to support the trial court's finding of endangerment, the majority mischaracterizes the Texas Supreme Court's holding in *Boyd*. Also, the majority's conclusion is not consistent with a strict construction of the statute in favor of the parent. *See Holick*, 685 S.W.2d at 20. Moreover, the conclusion is not only inconsistent with well-established law, it renders Family Code section 161.001(1)(Q) meaningless.

If allowed to stand, the majority's opinion will subject literally thousands of similarly situated parents, male and female, in the Houston area to termination of their parental rights as a post-conviction punishment. Under the majority's en banc opinion, a mother with a criminal history of misdemeanor and state jail felony convictions similar to Valencia's could have her parental rights terminated if she is ever accused of the misdemeanor offense of assault by slapping another person with her hand. This is not the law as intended by the Texas Legislature.

Simply put, the majority has not only taken control of the case from the assigned panel in violation of the en banc standard, it has, in an en banc opinion, committed several errors of such importance to the state's jurisprudence that they should be corrected. *See* TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 2004).

Conclusion

In sum, the majority, in disregard of the clearly articulated standard for en banc consideration, has taken control of the case from a unanimous panel that had impartially and dispassionately decided the issues presented to it based upon the facts in the record and the "well-established" governing law. In doing so, and in failing in its duties to ensure due process of law and to correct the erroneous fact finding of the trial court, the majority not only excuses the behavior of Valencia's trial counsel and the errors of the trial court, it actually encourages and promotes them. Thus, the majority, in its en banc opinion, "encourage[s] methods of decision

making that make failure even more likely and then inevitable."[32]

In accord with the governing law, I would reverse that portion of the trial court's judgment terminating Valencia's parental rights to the child and render judgment that his parental rights are not terminated.

The majority's opposition to the governing law is palpable, its errors are profound, and its action in taking control of this case is simply breathtaking.

Terry Jennings
Justice

Justice Bland, joined by Chief Justice Radack, and by Justices Alcala, Hanks, and Massengale, for the en banc court.

Justice Jennings, dissenting, joined by Justice Higley.

Justice Keyes, concurring in part and dissenting in part.

Justice Sharp, dissenting, in an opinion to follow.

Justice Massengale, concurring, joined by Justices Alcala and Hanks.

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32 DÖRNER at 10.