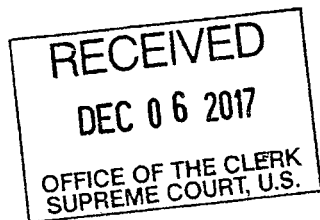


1A363
No. _____

In The

In the Supreme Court of the United States



Richard Bruce DeBenedetto,

Petitioner,

vs.

Texas Department of Family and Protective Services

Respondent,

On Petition for Certiorari to the United States Court
Of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Following an Eldridge Due Process analysis of the various interests in the case at bar and based upon case by case ad hoc analysis as reasoned by this Court in *Lassiter v. DHSS*, 452 U.S. 18 (1981); the following issues are presented for this Court's consideration:

1) Whether, if, after allowing for the admission of probative evidence and competent material witnesses at the Petitioner's subsequent parental rights termination trial, –the parent's fundamental interest in maintaining familial ties, the State's *parens patriae* interest, when weighed against the risk of an erroneous judgement, is insufficient to overcome the presumption that only defendants whose personal freedom is at risk may enjoy constitutional protections afforded by Due Process Clauses of Amendments Five, Six and Fourteen of the U.S.C.: the right to compel favorable witnesses and present material evidence at trial.

2) Whether, upon (Strict Scrutiny of Texas' Family Code 161.004 as-applied to the instant case), the Article's presumptive authority to re-litigate identical issues and claims against the same parties – even following a favorable reversal by any appellate court including the United States Supreme Court - and the Article's arbitrary classification of "parents 'previously denied' termination" of their parental rights; the risk of an erroneous judgement weighed against any reasonable compelling State interest, is insufficient to overcome use of the State's chosen

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TABLE OF CONTENTS

QUESTIONS PRESENTED	i - ii
LIST OF PARTIES	ii - iii
TABLE OF CONTENTS	iii - iv
INDEX TO APPENDICES	iv - v
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2 - 4
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE	4 - 6
STATEMENT OF THE CASE	6 - 14
A. Facts Giving Rise To This Case	
B. The District Court Proceedings	

C. The Appellate Court Proceedings

REASONS WHY CERTIORARI
SHOULD BE GRANTED

15 - 30

INDEX TO APPENDICES

APPENDIX A – Supreme Court of Texas Phase I

APPENDIX B - Fourth Court of Appeals Published Opinion

APPENDIX C - Supreme Court of Texas Phase II

APPENDIX D – Third Court of Appeals Unpublished Memorandum Opinion

APPENDIX E – Omitted

APPENDIX F – Preclusion Doctrine

APPENDIX G – Grounds For Termination (Texas) and Tex. Fam. Code § 161.004

TABLE OF AUTHORITES

CASES	PAGE
<i>Adams v. Robertson</i> , 520 U.S. 83 (1997)	10
<i>Anders v. California</i> , 386 U.S. 738, 744 (1967).	11, 22
<i>August v. Department of Motor Vehicles</i> ,	

(1968) 264 Cal.App.2d 52, 60, 70 Cal.Rptr.	22
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).	9, 26
<i>Coleman v. Thompson</i> ,	11
501 U.S. 722, 754, 111 S. Ct. 2546, 2566, 2567, 115 L.Ed.2d 640 (1991)	
<i>Crane v. Kentucky</i> , 476 U.S. 683, 690, 106 S.	6
Ct. 2142, 90 L.ed.2d 636 (1986).	
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372 U.S. 353, 83 S. Ct. 814 9 L.Ed.2d 811 (1963)	22
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469 U.S. 387, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985)	22
<i>Ex parte Royall</i> , 117 U. S., 241, 251, 6 S. Ct.734,	22
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100 L. Ed. 891, 902, 76 S. Ct. 585, 593 (1956)	12, 30
<i>Heller v. Doe</i> , 509 U.S. 312,	7

125 L.Ed.2d 257, 262, 113 S. Ct. 2637 (1993)	7
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<i>Landmark Communications v. Virginia</i> , 435 U.S. 829 (1978)	30
<i>Lassiter v. DHSS</i> , 452 U.S. 18 (1981)	i, 11, 23, 24, 26, 27
<i>Loving v. Virginia</i> , 388 U.S. 1 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)	18, 19 FN 6
<i>Marbury V. Madison</i> , 5 U.S. 137, 180 (1803)	4
<i>May v. Anderson</i> , 345 U.S. 528, 533 (1953).	15
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 47 L.Ed.2d 18, (1976). 3, 4, 25, 31	i, 3, 4, 22, 29
<i>cf., McCoy v. Louisiana</i> , Docket 16-8255, case pending	11
<i>Meyer v. Nebraska</i> 262 U.S. 390 43 S.Ct. 625 67 L.Ed. 1042 (1923)	18, 19 FN 6
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102, 105, 117 S. Ct. 555, 558, 136 L. Ed. 2d 473 (1996)	12, 14
<i>Moore v. East Cleveland</i> , 431 U.S. 494, 503 97 S.Ct. 1932, 1937-1938, 52 L.Ed.2d 531	20

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<i>Rochin v. California</i> , 342 U.S. 165, 172 72 S. Ct. 205, 209, 96 L.Ed. 183 (1952)	28
<i>Rose v. Lundy</i> , 455 U.S. 509, 518, (1982),	22
<i>Santosky v. Kramer</i> , 455 U.S. 745, 758 (1981)	15, 23, 29
<i>Skinner v. Oklahoma, ex.rel. Williamson</i> , 316 U.S. 535 62 S.Ct. 1110, 86 L.Ed. 1655 (1942);	18, 19 FN 6
<i>Stanley v. Illinois</i> , 405 U.S. 645, 651 (1972)	15, 20, 31
<i>Strickland v. Washington</i> , 466 U.S. 668, 681, 104 S. Ct. 2052, 2061, (1984).	9
<i>Troxel v. Granville</i> , 530 U.S. 57, 65 (2000).	15, 27. 31
<i>United States v. Salerno</i> , 481 U.S. 739, 746 (1987)	29
<i>Washington v. Glucksburg</i> , 521 U.S. 702, (1997).	18, 19 FN 6, 19

Washington v. Texas,

388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) 21

Webb v. Webb, 451 U.S. 493, 495 (1981) 3

TEXAS CASES

In re M.S., 115. S.W.3d 534, 547,549, (2003) 4, 11

In re J.O.A., 262 S.W.3d 7, (Tex. App. – Amarillo 2008) 10

STATUTES AND RULES

Tex Fam. Code ANN. 109.002(b) (West 2015) 10

Fed. R. Civ. P. Rule 26 -

Tex. Fam. Code 161.001

Tex. Fam. Code 161.004

See: Tex. Fam. Code § 107.013(a)(1) 11 - 12

right to counsel to parents opposing State

Tex, Fam. Code §263.405 - appeals of final decisions 25

in such cases are governed by the procedures for accelerated appeals.

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The Input of Placement Stability on Behavioral

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20, 24

OPINIONS BELOW

Trial court proceedings terminating the Petitioner's parental rights to his identical minor children in 2013, and 2016; and are herein referred to as *Phase I* and *Phase II* respectively. The Petitioner last enjoyed possession and control over his four small children six years ago.

Phase I - (2011-2015) - *Appeal*—Supreme Court of Texas

On March 21, 2014, the Texas Supreme Court, without opinion, denied the Texas Department of Family and Protective Services' (TDFPS') (Dept.'s) Petition for Review, reported as *In the Interest of E.D., E.D., I.D., and J.D., Children*, Case No. 14-0020 reprinted in the Appendix hereto as App A (no re'hrg req.).

Phase I - (2011-2015) *Appeal* - Fourth Court of Appeals, San Antonio, Texas

The published opinion of the Fourth Court of Appeals, San Antonio, Texas, REVERSING AND RENDERING the Petitioner's parental-rights termination judgement, filed on November 22, 2013, is reported at *In re E.D.*, 419 S.W.3d 615, 622 (Tex. App.—San Antonio 2013, pet. denied). Reprinted, in the Appendix hereto, App B.

Phase I - (2011-2015) *Trial Court* – County Court at Law, Kerr County, Texas

The judgement of the Kerr County Court at Law (Kerr Co. Ct. at Law), Kerrville, Texas, terminating the Petitioner's parental-rights, filed in April 2013, not reported, styled, *In the Interest of E.D., E.D., I.D., and J.D., Minor Children*, Cause No. 11-1069-C.

Phase II – (2015-present) Appeal – Texas Supreme Court

On April 21, 2017, the Texas Supreme Court denied R.D.'s Petition for Review presented by appointed counsel G. Sherwood.

On July 14, 2017, Texas' highest Court denied the Petitioner's pro se Motion for Rehearing, reprinted in the Appendix hereto as App C.

Phase II – (2015-present) Appeal – Third Court of Appeals, Austin, Texas

The unpublished memorandum opinion of the Third Court of Appeals, Austin, Texas, filed October 26, 2016, is reported at *R. D., Appellant v. Texas Department of Family and Protective Services, Appellee*, NO. 03-16-00311-CV (Tex. App.—Austin 2016, pet. denied), reprinted in the Appendix hereto as App D.

Phase II – (2015-present) – Trial

The judgement of the 53rd Judicial District Court (53rd Dist. Ct.), Travis County, Texas, terminating parental rights, filed on May 2, 2016; styled as *ITIO E.D., E.D., I.D., J.D., Children*, Cause No. D-1-FM-15-004010, not reported.

JURISDICTION

Following are dates of the lower court decisions establishing timeliness of this petition: On April 21, 2017, the Supreme Court of Texas denied without opinion, a Petition for Review filed by appointed counsel; on July 14, 2017, the Texas Supreme Court denied the Petitioner's pro se motion for rehearing (App C) –

commencing the ninety-day period in which to file a Petition with this Court pursuant to Rule 13.3.

An application to extend the time to file a petition for writ of certiorari was timely filed to the United States Court of Appeals for the Fifth Circuit, Justice Samuel Alito Jr., pursuant to Rule 13.5.; which Mr. Justice Samuel Alito Jr. kindly granted, making the petition due on or before December 1, 2017. The petition was returned for corrections by the Clerk of the Supreme Court: the corrected petition due sixty days from December 7, 2017, or, by February 5, 2018.

The following are the “proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised.” *Webb v. Webb*, 451 U.S. 493, 495 (1981) (“specify the stage in the proceedings, ..., the method or manner of raising them and the way in which they were passed upon by the court” (Supreme Court Rule 21.1(h))).

All federal questions raised, were raised by the petitioner in his pro se briefs before the Third Court of Appeals and the Texas Supreme Court.

The Texas Supreme Court has determined, that, where counsel failed to preserve issues for appellate review, under a Due Process analysis (*Mathews v. Eldridge infra*), the unjustified failure may inordinately raise the risk of an erroneous judgement: Due Process considerations may overrule the Courts procedural rules. *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, (1976). See

also: *In re M.S.*, 115. S.W.3d 534, 547,549, (2003); TRCP Rule 324(b)(1) (motion for new trial prerequisite to appellate factual sufficiency review); see also Fed. R.Civ. P. 50(b); see also Tex. R. App. P. 33.1 (preserving error).

This Court has jurisdiction over this case under Article III *Section 2* of the U.S. Constitution which states in relevant part: “In all other Cases..., the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact...under such Regulations as the Congress shall make.” ...Where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution...”

See *Marbury V. Madison*, 5 U.S. 137, 180 (1803) (“Thus, ... the Constitution of the United States confirms ...that a law repugnant to the Constitution is void, and.... The rule must be discharged”).

Because this is an appeal from a Texas Supreme Court denial, jurisdiction is appropriate under 28 U.S.C. § 1257(a) - which states: “Final judgements or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari...”.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. Article III, Section 2 – “...the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact...”.

U.S.C.A. Fifth Amendment Due Process Clause - The Fifth Amendment Clause

states that no one shall be "deprived of life, liberty or property without due process of law."

U.S.C.A. Sixth Amendment – Compulsory Clause - Provides that defendant has the right to a process in obtaining witnesses and evidence in his favor.

U.S.C.A. Fourteenth Amendment - Due Process Clause (1868) uses the same eleven words, to describe a legal obligation of all states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. "

U.S.C.A. Fourteenth Amendment – Right to Effective Assistance of Counsel for Criminal defendants

U.S.C.A. Fourteenth Amendment – Equal Protection Clause (1868)

The Equal Protection Clause, part of the Fourteenth Amendment to the United States Constitution provides that "no state shall ...deny to any person within its jurisdiction "the equal protection of the laws".

28 U.S.C. § 1257(a) - U.S. Code Title 28

Texas Family Code - FAM § 156.101 - Grounds for Modification of Order Establishing Conservatorship or Possession and Access.

TEX. FAM. CODE ANN. § 109.002(b) (West 2015) – right to appeal parental right

terminating judgement.

Texas Family Code - FAM § 161.001

Texas Family Code - FAM § 161.004

STATEMENT OF THE CASE

IF IT MAY PLEASE THE COURT,

The Petitioner (R.D), a physician and school teacher, and the sole parent to four minor children E.K.D., E.G.D., I.D. and J.D.; brings this petition asking the Court to decide whether given the circumstances of this case, process due requires, the right to present favorable witnesses and probative evidence – a right to fair procedures - at a subsequent parental termination trial.

"Whether rooted directly in the Due Process of the Fourteenth Amendment, *Chambers v. Mississippi*... or in the Compulsory Process Clause or Confrontation Clause of the Sixth Amendment, *Washington v. Texas*.... *Davis v. Alaska*.... the Constitution guarantees ... a meaningful opportunity to present a complete defense." Justice O'Connor in *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L.ed.2d 636 (1986).

Lastly, Texas, consistent with all other States, permits the involuntary

termination of parental rights of any parent determined to be unfit under the applicable grounds; whether denied termination in a previous petition or not.

However, the statutory procedures for the termination of parental rights for the two groups differ in many respects. For parents “previously denied termination” the statute Tex. Fam. Code § 161.004 (161.004) has created an unequal statutory standard that appears to “run afoul of the Equal Protection and Substantive Due Process provisions of the Federal Constitution.” See *Heller v. Doe*, 509 U.S. 312, 125 L.Ed.2d 257, 262, 113 S. Ct. 2637 (1993) at 509 U.S. 312 (Classifications involving fundamental rights or proceeding along suspect lines do not run afoul of the Equal Protection Clause if strict scrutiny reveals a compelling governmental purpose.). Tex. Fam Code § 161.004 (161.004)’s arbitrary statutory standard authorizes any Texas court to absolutely bar only “parents previously denied termination” from collaterally attacking a subsequent trial alleging parental unfitness, based upon the doctrines of res judicata and collateral estoppel. See App F – Preclusion Doctrine.

Phase I - Trial No. 1.

In 2013, the petitioner (R.D., appellant, father), was tried, and termination of the father’s parental rights was found by clear and convincing evidence, pursuant to

four grounds: Tex. Fam. Code §§ 161.001(1) (D), (E), (F), (O), (2) (See App G Grounds). In Texas, permanent dissolution of a parent's rights to his children must be found by at least one ground, together with the finding that termination is in the children's best interest. Tex. Fam. Code § 161.001(2) (West Supp. 2013). Both prongs are necessary. This case, like many filed nation-wide, reflects the growing ranks of foster care. *Infra*, see Dilemma at 14. Counsel for R.D. offered material testimony from favorable witnesses and adduced probative evidence. The father appealed.

Appointed counsel filed a motion for new trial thereby preserving factual issues for appellate review. See *Supra*, preserving error at 4.

Appellate Court Proceedings - following Trial No. 1

In a unanimous decision the Fourth Court of Appeals *scrutiny* of the circumstances of the case resulted in a judgement for the petitioner. *Supra*, *In re E.D.*, at 2. Following appellate review of the factual and legal sufficiency of the State's evidence the Third Court reversed and rendered the trial court's judgement permanently dissolving R.D.'s (the father's) parental ties to his four children. The court's analysis stopped short at the "best interest" prong, emphasizing that, termination of the petitioner's parental rights WAS NOT in the children's best interest. Emphasis added.

Phase II - The Second District Court Proceedings

Trial No. 2.

Three years later, in 2016, after failing to restore parental rights or return the R.D.'s children, the trial court terminated R.D.'s parental rights to the same four children again, under four "facially" identical grounds. *ITIO E.D.*, Supra. at 2.

At father's subsequent trial counsel offered no probative evidence outside of her client's testimony and adduced evidence consisted of two photographs of two of R.D.'s four young children offered at the close of trial. The State also failed to present exculpatory witnesses noticed on pretrial discovery. Suppression of evidence favorable to an accused who has requested violates due process where the evidence is material to guilt, irrespective of the good faith or bad faith of the prosecution. See *Brady v. Maryland*, 373 U.S. 83 (1963). At 86-88.

Counsel's last-minute decision to offer two photographs borrowed from her client's Bible at the close of trial may have been strategic: not material or substantial or reasonable. *Strickland v. Washington*, 466 U.S. 668, 681, 104 S. Ct. 2052, 2061, (1984).

At opening voir dire statements, the petitioner's appointed counsel (Cheryl H.) informed the jury of the father's failures to comply with court ordered services. See: at vol. 3, page 193, 22-3; see also App G – Grounds. At trial R.D. testified he completed all services. The father believes his testimony was accurate.

As part of the statutory scheme to ensure the accuracy of decisions about children, the Texas Family Code explicitly authorizes appeals from termination orders. See TEX. FAM. CODE ANN. § 109.002(b) (West 2015). See also : *In re M.S.*, 115. S.W.3d 534, (2003); see *In re J.O.A.*, 262 S.W.3d 7, (Tex. App. – Amarillo 2008): R.D. appealed.

Attorney Cheryl H. filed no post-trial motions and preserved no error for appellate review. In order to preserve factual sufficiency issues for appellate review in parental termination cases in Texas, as well as in the federal courts, issues must be preserved. See *Adams v. Robertson*, 520 U.S. 83 (1997). Texas has determined that the interests of children are best served with the natural parents where possible.

The Appellate Court Proceedings following Trial No. 2.

The Third Court – As the result of the petitioner's concerns regarding due process, the court abated the appeal and dismissed father's court-appointed counsel Cheryl H.; See Appellant's July 2016 Letter to the Third Court.

Counsel refused the petitioner's request for assistance obtaining prior court records at trial and on appeal that would have confirmed the petitioner's consistent compliance with all Dept. requests. See App G Grounds for Termination Prior to ripening of the appeal the father dismissed trial counsel Cheryl H., asking that she

not file appellant's brief on father's behalf (See emails from R.D. to attorney Cheryl H.). Notwithstanding, counsel's statements before the trier of fact – an admission of the father's failure to comply with the Dept. - and his expressed concerns and severance of the attorney-client relationship, attorney Cheryl H. improvidently files a ninth hour, 88-page anders brief indicating to the appellate court the absence of any meritorious non-frivolous argument and degrading her client's case, See *Anders v. California*, 386 U.S. 738, 744 (1967). See attorney Cheryl H.'s improvidently filed anders brief.

Such an autonomous and unilateral decision by counsel violates more than merely ethical standards: it is repugnant to Sixth Amendment constitutional concerns in criminal proceedings of counsel's effectiveness. Compare with oral argument from *cf.*, *McCoy v. Louisiana*, Docket 16-8255, case pending, citation pending, argued January 17, 2018 ("The Constitution prohibits a ... court from permitting the defendant's own lawyer, over the defendant's objection, to tell the jury that he is guilty.") Seth P. Waxman, opening remarks *McCoy Id.* 11-19 at 3.

Admittedly, there is as yet, no constitutionalized right to counsel's effective

assistance at parental rights termination trials: only state guarantees. See: Tex. Fam. Code § 107.013(a)(1) right to counsel to parents opposing State; *In Re M.S.*, 115 S.W.3d 534, 544, (Tex. 2003) (right to counsel at termination trial embodies right to counsel's effective assistance). The Court has extended the right to counsel at a TPR trial on an ad hoc basis. *Lassiter, Infra.*, 542 U.S. 18.

The state may also share in the responsibility for counsel's effective assistance and in the cost of counsel's and its own procedural defaults. See *Coleman v. Thompson*, 501 U.S. 722, 754, 111 S. Ct. 2546, 2566, 2567, 115 L.Ed.2d 640 (1991) 111 S. Ct. at 2567. Counsel's failures are raised solely as a nexus to assist the Court in its understanding of the events. The petitioner leaves to the Court's discretion the weight of counsel's performance on this case and on the Court's interest in child welfare jurisprudence.

Because of the attorney's procedural defaults *Supra*, at 2., Federal and State rules (preserving error)), and the absence of probative evidence and competent, material witness testimony, the petitioner was denied an unhindered appeal of a subsequent judgement forever ending familial bonds. "Although the

Federal Constitution guarantees no right to appellate review, *infra*. 351 U.S. 12 at 18, once a State affords that right, Griffin held, the State may not 'bolt the door to equal justice,' "Infra., 351 U.S. 12, at 24 (Frankfurter, J., concurring in judgment)." *M.L.B. v. S.L.J.*, 519 U.S. 102, 105, 117 S. Ct. 555, 558, 136 L. Ed. 2d 473 (1996) citing *Griffin v. Illinois*, 351 U.S. 12, 24, 100 L. Ed. 891, 902, 76 S. Ct. 585, 593 (1956). The attorney's and the TDFPS' seemingly willful omissions resulted in a compromised trial and appeal, effectively bolting the doors to justice where fundamental, unenumerated rights are threatened.

Rather than passing on R.D.'s Due Process concerns for fair procedures, relying instead upon DISMISSED counsel's improvidently filed Anders brief the Third Court affirmed termination. See: *Anders v. California*, 386 U.S. 738, (1967) at 744 ("The constitutional requirement of substantial equality and fair procedures can only be attained where counsel acts in the role of an advocate in behalf of his client..."). See also *Supra* App H (Appellant's Letter).

Based on 161.004's statutory elements, the right to collaterally attack a determination of unfitness based upon res judicata or collateral estoppel was absolutely bared. See Third Court of Appeals unpublished memorandum opinion App D. at 3. The father offers the colorable claim that in 2013, the evidence was

legally insufficient to support a finding that termination of the petitioner's parental rights to his offspring was in the children's best interest. He also avers that had the courts closely scrutinized the circumstances of the case at the time of the subsequent trial in 2016 that there was still insufficient evidence to support a finding that termination of R.D.'s parental rights was in his children's best interest.

The right to appeal is so "rooted" in the traditions of the nations jurisprudence that where the right to appeal is available the State "May not bolt the doors to equal justice" *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955) *Id* at 351 U.S. 12, at 24 and 100 L. Ed. 891 at 902. See also *M.L.B. v. S.L.J.*, 519 U.S. 102, 110, 117 S. Ct. 555, 560, 136 L. Ed. 2d 473 (1996)

The father appeals to this Court.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Introduction to a Dilemma

If it may please the Court

This Petition Reflects a Looming Problem: The Foster Care Dilemma.

This case does not involve economic risk, but risks rather what is "perhaps the oldest of the liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Protection afforded a parent's right in their child should be greater, magnified, more than the mere case of any "property right." *May v.*

Anderson, 345 U.S. 528, 533 (1953). See also: *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Santosky v. Kramer*, 455 U.S. 745, 758 (1981): therein lies the measure of a “great nation.”

A parent adversarial to the State at a trial to forever end the family relationship is, ipso facto, in a pecuniary position. It is not without great difficulty, emotional and financial toil, that a parent can successfully defend against state intrusion into the family: not once but twice. See *Santosky v. Kramer*, 455 U.S. 745 (1981) (Santosky was initially denied termination of his parental rights, unlike the instant petitioner, his children were returned). *Id.*

Driven in part by economics;¹ the adversarial paradigm pitting the State’s seemingly infinite capacity to litigate against a parent, has intensified in favor of the State. As you read this petition, as I write; notwithstanding unfavorable verdicts ² insinuating that children are being harmed by aggressive state action,

¹ Marin Guggenheim: The Foster Care Dilemma and What To Do About It: Is the Problem that Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care, 2U. PA.J.Const. L. N1 (1999).

² TX: *M.D v. Abbott*, active status, filed March 289, 2011, class certified August 27, 2013. Children languish in care without permanent placement. In Texas fiscal year 2011, 1,202 children in PMC “aged out” of foster care (typically at age 18) without a permanent home, representing 17.5 percent of all children exiting PMC in Texas.

Children's Rights. Org. (<http://www.childrensrights.org/classaction/Texas>)

many children are being swept up into the ranks of the nation's foster care system at an alarming rate.³ Foster care populations continue to swell.⁴ The last three years, thirty-seven states have seen a rise in their foster care numbers. Five states that reported the greatest percent change increase were: Indiana (50%), Montana (45%), Georgia (43%), Alaska (40%) and Minnesota (40%). *Id.* Child welfare authorities agree that children are harmed by prolonged foster care.⁴ the result aggressive state action. The petitioner's children have been harmed.⁵

³ On Sept 30, 2015, there were 427,910 children confined to foster care. That figure has changed little the past three decades. *afcars Report* U.S. Department of Health and Human Services, Administration for Children and Families, Administration on children in foster care suffer a statistically increased risk of harm. Children, Youth and Families, Children's Bureau. <http://www.acf.hhs.gov/programs/cb> The AFCARS REPORT

⁴ The Input of Placement Stability on Behavioral Well-Being For Children In Foster Care, *Pediatric*, 2007; 119, 336 Official Journal of the American Academy of Pediatrics.

⁵ The petitioner's four young children, the subjects of the instant petition, have been in foster care since November 2011. Over the past 6 years have been: locked out; forced to use neighboring toileting facilities; suffered depression; self-harming behaviors; truancy; poor academic performance; illicit drug use; and one child, E.G.D., has been missing since June 2017.

REASONS WHY CERTIORARI SHOULD BE GRANTED

IF IT MAY PLEASE THE COURT,

The Court has recognized and may recognize in the Petitioner, a commanding fundamental, unenumerated right and liberty interest “in the care, custody, and control” of his four children ages seven through sixteen. *Id.*, 530 U.S. 57 at 65. (opinion by Justice O’Connor J.). This Court has, over time, recognized various examples of unenumerated fundamental liberty interests.⁷ Such “unenumerated” substantive rights and interests warrant protection and a due process analysis under *Eldridge* the procedural and substantive Due Process Clauses of the Fifth, and Fourteenth Amendments to the U.S.C.A. when threatened. In *Washington v. Glucksburg*, 521 U.S. 702, the Court stated: “The Court’s

⁷ Unenumerated fundamental liberty interests: the right to marry, *Loving v. Virginia*, 388 U.S. 1 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma, ex.rel. Williamson*, 316 U.S. 535 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and to direct the education and upbringing of one’s children, *Meyer v. Nebraska* 262 U.S. 390 43 S.Ct. 625 67 L.Ed. 1042 (1923); the right of alien juveniles to substantive due process, *Reno v. Flores*, 507 U.S. 292, 315 (Justice O’Connor concurring). See *Washington v. Glucksburg Supra*, 521 U.S. 702, at *720. (1997).

established method of substantive-Due-Process analysis has two primary features: first the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition... E.g., *Moore v. East Cleveland*, 431 U.S. 494, 503 97

S.Ct. 1932, 1937-1938, 52 L.Ed.2d 531 (plurality opinion). Second the Court has required a "careful description" of the asserted fundamental liberty interest." E.g., *Reno v. Flores* 507 U.S. 292, 302 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993).

The petitioner's asserted liberty interest "of a man and the children he has sired and raised," implicates a due process analysis, "and undeniably warrants deference and, absent a powerful countervailing interest protection." 405 U.S. 645, 651 (1972) (quoting *Kovac v. Cooper*, 336 U.S. 77, 95 69 S.Ct. 448, 459 93 L.Ed. 513 (1940) (Frankfurter, J., concurring)).

Today in many countries, humanity is deprived of both property and personal freedom without a "meaningful opportunity to present a defense." Exculpatory Evidence by Edward J. Imwinkelried and Norman M. Garland citing Amnesty International, Amnesty International Report, 1975-1976 and; Westin, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv.L. Rev. 567 (1978). Edward J. Imwinkelried and Norman M. Garland, Exculpatory Evidence (4th ed. 2015)

The right to present a defense as founded in the Fifth Amendment's Due Process Clause or the Sixth Amendment's Compulsory Clause applicable to the States through the U.S.C.A. XIV, protects the rights of individuals accused of a crime. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense... ."

"Just as the accused has the right to confront the prosecution's witnesses, for the purpose of challenging their testimony, he has the right to present his own witnesses.... This right is a fundamental element of due process of law."

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Chief Justice Warren. In *Washington* the court was called upon for the first time, "to decide whether the right of an accused to have compulsory process for obtaining witnesses in his favor...is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." *Id.*, 388 U.S. 14 at 17. The father was denied fair procedures at the subsequent trial. Attorney Cheryl H. and the State had no compelling interest in proceeding through trial withholding exculpatory evidence.

What the Court is being asked here is whether the right of the father to have compulsory process for obtaining witnesses in his favor, guaranteed in criminal trials by the Sixth via the Fourteenth Amendment, is so fundamental and essential to a fair trial that without such right, to proceed (through a TPR trial) is

repugnant to the Due Process Clause of the Constitution. The federal question neither reviewing Texas Court addressed requires resolution from this Court.

“Under our federal system, the federal and state courts [are] equally bound to guard and protect rights secured by the Constitution.’ *Ex parte Royall*, 117

U. S., 241, 251, 6 S. Ct. 734, 740. See also *Rose v. Lundy*, 455 U.S. 509, 518, (1982),

Extending its holding in *Griffin*, 351 U.S. 12, the Court has “consistently held invalid those procedures ‘where the rich man ... enjoys the benefits of counsel’s examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.’ ‘ *Id.*, 386 U.S. 738, (1967) at 741, citing *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 9 L.Ed.2d 811 (1963) at 817. In *Douglas*, the Court established the right to counsel in a defendant’s first criminal appeal and extended that right to include counsel’s effective assistance in *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985), placing the standard under the Fourteenth Amendment, 469 U.S. 387, 396, 830, 83 L.Ed.2d 821, 836.

The court has not expanded this right to compel witnesses in parental termination cases on a case by case basis. Some States have extended such Due Process protections to civil trials. See *August v. Department of Motor Vehicles*, (1968) 264 Cal.App.2d 52, 60, 70 Cal.Rptr. 172 (“A person’s right to cross-

examination and confrontation of witnesses against him in noncriminal proceedings is part of procedural due process guaranteed by the Fifth Amendment and the Fourteenth Amendment of the federal Constitution, where there is a threat to life liberty or property.”).

TERMINATION OF PARENTAL RIGHTS (TPR) PROCEEDINGS LIKE CRIMINAL TRIALS

A mere portion of defendants found guilty of a crime will ever have to face the permanency of penance associated with the complete destruction of the family unit. As the Court in *Santosky* reminds us, “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S. Ct. 1388, 1412, 71 L.Ed.2d 599 (1981).

The method chosen by nearly all states to forever dissolve parental rights “resembles in many respects a criminal prosecution. The termination procedure is distinctly formal and adversarial.” *Lassiter v. Dept. of Soc. Svcs.*, 452 U.S. 18, at 42 (1982) Justice Blackmun dissenting. The State files a petition, serves the parent to appear at a “trial on the merits” (Texas), presided over by a judge or jury, wherein the “hearing is conducted pursuant to the formal rules of evidence and procedure.” *Id.*, at *43. “For the most part, American courts employ the same standards for determining the admissibility of evidence in criminal cases as they use in civil actions.” *Id.*, Edward J. Imwinkelried, 105 § 2A-1.

The State's trial on the merits has an "accusatory and punitive" connotation as the State moves from trying to "preserve the family unit" to marshalling an "array of public resources" aimed at permanently severing the parent-child relationship. At trial, the State is represented by a county or district attorney, or assistant attorney general (Texas) "having access to public records concerning the family" and anyone remotely associated. State hired caseworkers and supervisors are "empowered to investigate the family situation and to testify against the parent." The State may call upon contracted therapists and "experts in family relations, psychology, and medicine" to strengthen their case. The ad litem for the children and the State's attorney are themselves experienced in "the standards and techniques employed at the termination proceeding," and in cross-examining witnesses and adducing evidence. *Id.*, 452 U.S. 18, at 43. At R.D.'s subsequent TPR trial the State's evidence included testimony by twelve witnesses and 17 exhibits. Counsel presented evidence from one witness – the father. Under such circumstances appointed counsel could neither choose not to call on her client to testify nor could the client defer to testify.

Due Process Argument

The father respectfully postulates the following due process analyses of the petitioner's two issues balanced against the Court's two presumptions that: the Sixth Amendment's Compulsory Clause is only for accused defendants facing loss of

personal liberty; and that, Texas' statute 161.004, upon strict scrutiny, presents a valid compelling state interest. See *Mathews v. Eldridge*, 424 U.S. 319, *Supra*.

The Eldridge due process factors discussed below are balanced against the following presumptions that: 1) witness and evidence – The Sixth Amendment Compulsory Clause or in the alternative, the Fourteenth Amendment Due Process Clause, which provides for compelling of favorable witnesses and evidence, exists only for those persons who, accused of a crime, face loss of personal liberty; and, 2) Texas has a compelling state interest in promulgating Tex. Fam. Code § 61.004; and, 3) the Sixth Amendment's guarantee that counsel's assistance be effective exists only for those whose very liberty is threatened at a criminal proceeding.

Analysis

1) Parent's interest in the care and custody of their children is commanding, and has been fairly well-established by this Court's precedent. *Ante.*, at 19. The parent together with the child, share an interest in fair procedures and in a rapid resolution to finality.

2) The State shares with the parent an interest in fair procedure. TPR trials wherein the State presents exculpatory evidence and the parent adduces probative evidence and material testimony by competent witnesses, aligns with the States' interest. Administrative concerns over trial delays which may result from

such allowances are de minimis. The State has no legitimate interest in a proceeding where exculpatory evidence is withheld or in which counsel for petitioner fails to put the State's case to fair adversarial testing by withholding probative evidence or withholding exculpatory evidence. The State in fact is duty-bound not to do so. *Infra., Brady v. Maryland*. The risk of repeat litigation from failure to follow procedural rules adds unnecessarily to the prolongation for the child to finality.³) The risk of an erroneous judgement when probative and exculpatory evidence is withheld for reasons other than good cause is unacceptably high.

Weighing these various interests against the Court's presumption that: as applied to the present case, the right to fair procedures; compelling favorable witnesses and adducing probative evidence, is permitted only in criminal trials where personal freedom is at risk - is not consistent with procedural due process. The risk of an erroneous judgement is unacceptably high. Process due the father and fundamental fairness requires that the instant petitioner be permitted to compel favorable witnesses: anything less is repugnant to the Constitution.

Provision of probative evidence and of additional witnesses besides the petitioner, would not have altered the "adversarial, and formal, and quintessentially legal" character of the states chosen procedure against R.D. 452 U.S. 18, at 43). It would, however, have substantially" diminished the prospect of

an erroneous termination." *Lassiter*, at 44.

2) Tex Fam. Code § 161.004

The parents right to fair procedures when "the State's aim is not simply to influence the parent-child relationship but to extinguish it," 452 U.S., 18, 39, (1981) (Justice Blackmun dissenting) is commanding. *Supra*. Both the parent and the child share in the interest of prompt and fare procedures. The State's *parens patriae* interest is also clearly a commanding one. This Court together with Texas and most other States agree that sound judicial policy in cases involving the welfare of the child turns on decisions ensuring the interest, safety and welfare of the child. See Tex, Fam. Code §263.405 which states in pertinent part "An appeal of a final order rendered under this chapter is governed by the procedures for accelerated appeals..."

The State, however, has little if any interest in the article's overarching opposition to its *parens patriae* interest in protecting the interests of the child if the article prolongs and even denies finality as in the instant case. The case is capable of repetition while evading this courts review. A reversal by the U.S. Supreme Court would not serve to prevent 161.004 from keeping this dispute alive.

The State's chosen procedure for terminating the petitioner's fundamental rights must pass strict scrutiny. *Infra.*, at 34, *Troxel v. Granville*, 530 U.S. 57 at 80 (the plurality appropriately recognized that infringements of parental liberty

interests, strict scrutiny needed to be applied to these types of rights. Justice Thomas, concurring opinion).

Government intrusion that either interferes with rights implicit in the concept of ordered liberty “or interferes with due process in a way which is “shocking to the conscience.” Fails substantive due process review. See *Rochin v. California*, 342 U.S. 165, 172 72 S. Ct. 205, 209, 96 L.Ed. 183 (1952) (see also *Palko v. Connecticut*, 302 U.S. 319, 325-326 58 S. Ct. 149, 152, 82 L.Ed. 288 (1937). While not shocking to the conscience 161.004 appears to interfere with ordered liberty by its constricting effect on a parent’s right to unhindered appeal of a determination of parental unfitness. *Supra.* at 12, *M.L.B.* TPR trials are many in Texas as in other States. The State has an administrative interest in procedures which serve to relieve the State’s burden of cases, preserve judicial resources or offset the foster care dilemma. An opportunity to avoid litigation of cases such as the instant case based upon scrutiny of the circumstances whether based upon claim or issue preclusion or not, is in the States interest.

Furthermore, the State has a significant interest avoiding the added administrative burden of an appeal where the appeal might have been avoided by the application of stare decisis or preclusion doctrine. Admittedly while Tex. Fam. Code § 161,.004 does not per se halt a parent’s right to appeal an adverse judgment it “frustrates” appellate procedures by creating a “revolving door” where the state

with its might, may, if the State chooses, repeatedly attack a previous “denial of termination” merely by garnering the elements of Article 161.004’s requirements again, and again. The parent need commit no new act to repeatedly face the state at trial in defense of his family. Such coercive interference by with a parent’s statutory right to appeal where appeal is allowed and violates Due Process. The parent loses confidence in the nations judiciary.

The statute does not reveal a compelling state interest for its existence, apart from its older brother Tex. Fam. Code § 161.001 (1). All grounds available to the State absent 161.004 are fully available under the alternative 161.001, the states predominant vehicle for involuntary termination of parental rights.

Tex. Fam. Code § 161.004. The element of a “material and substantial change” in some “other” party is vague and its presence upon appellate review may be determined by a scintilla of evidence. Compare with *Santosky v. Kramer*, 455 U.S. 745 (1981) (due process requires at a minimum clear and convincing burden). The State’s chosen procedure “must still be implemented in a fair manner.” *United States v. Salerno*, 481 U.W.739, 746 (1987). In view of 161.004's language and legislative history, controlling principles of statutory construction require the conclusion that the statute applies only to trial court orders denying termination. See also Ground on Preclusion App F.

The Texas article of law denies the affected class sound procedural policy of

importance to this Court's concern for finality and the welfare of children.

Balancing the respective interests against the presumption that the State of Texas has a compelling state interest in maintaining the article in support of its *parens patriae* interest is repugnant to Constitutional due process and unacceptably raises the risk of an erroneous judgement at a trial threatening fundamental rights.

Whether the Texas statute "denies equal protection depends upon whether first it is an arbitrary and unreasonable distinction for the legislature to make." There is nothing in our Constitution that prohibits Texas from creating legislation that bars preclusion doctrine. Applying the Court's broad view respecting States' independence, however, does not permit the State to deny *res judicata* solely to the class of parents previously denied termination. Creating such an unreasoned distinction violates equal protection between those parents previously denied termination of parental rights and all other civil litigants as to their right to an unhindered review of a[ny] judgement (emphasis added) or, as in the instant case, a determination of parental unfitness. Cf. *Griffin v. Illinois*, 351 U.S. 12, 27, 100 L. Ed.891, 903, 76 S. Ct. 585 (1955). A system which so grossly discriminates between classes of litigants cannot "meet the test of fundamental fairness." *Id.*, 351 U.S. 12 at 13. 100 L. Ed.891 at 895,

The statute relied upon by the State to terminate the petitioner's (R.D.s) parental rights at a subsequent trial effects no compelling state interest sufficient

to justify encroachment on father's rights to procedural due process and fair procedures. See also *Landmark Communications v. Virginia*, 435 U.S. 829 (1978) (Encroachment on the First Amendment rights of the petitioner was not being justified on either ground that would undermine state objectives).

CONCLUSION

Due process requires "[A] person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. at 341 U. S. 171-172 (Frankfurter, J., concurring). State procedures must be tailored, "in light of the decision to be made, to 'the ... circumstances of those who are to be heard,' *Goldberg v. Kelly*, 397 U.S. at 397 U. S. 268-269 ... to ensure that they are given a meaningful opportunity to present their case," *Mathews v. Eldridge*, 424 U.S. 319, 348-349 (1976): even if that means challenging state action under preclusion doctrine, this is the essence of due process.

When the state moves to permanently and forever dissolve a parent's fundamental right to "the companionship, care, custody, and management of his ... children" the government must provide fair procedures, and "absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct.

1208 (1972). See also *Troxel v. Granville*, 530 U.S. 57, 80 L.Ed.2d 49, 65, 120 S. Ct. 2054, (2000) (the plurality appropriately recognized that infringements of parental liberty interests, strict scrutiny needed to be applied to these types of rights. Justice Thomas, concurring opinion.).

As the Court stated in *Patterson v. Alabama*, 294 U.S. 600, 607, we have the power "not only to correct error in the judgment under review but to make such disposition of the case as justice requires." See BRENNAN, J., dissenting, ante, at 389. *Dell v. Doe*, 450 U.S. 382, 396, 101 S. Ct. 1495, 67 L. Ed. 2d 312. See BRENNAN, J., dissenting with whom JUSTICE WHITE joins, dissenting.

For the reasons state may this Honorable Court grant the father's petition.

May God bless your work and the cases of the people of the United States together with and any and all reasonable interests in life, liberty and the pursuit of justness. Happiness will follow.

Respectfully,

Richard Bruce DeBenedetto

Petitioner pro se

February 5, 2018

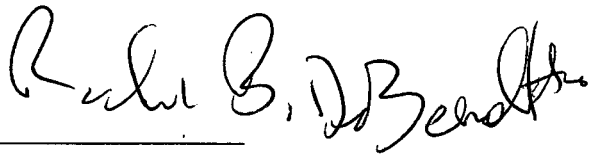
CERTIFICATE OF SERVICE

I CERTIFY THAT:

Pursuant to Rule 29 a copy of this petition has been mailed by regular U.S.P.S.
Delivery to the parties of the case.

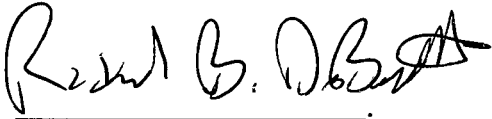
MR. SCOTT TALIAFERRO, DISTRICT ATTORNEY,
ATTORNEY FOR RESPONDENT

MR. GREGORY SHERWOOD,
ATTORNEY

A handwritten signature in black ink, appearing to read "Richard B. DeBenedetto", written over a horizontal line.

Richard B. DeBenedetto

Petitioner pro se

A handwritten signature in black ink, appearing to read "Richard B. DeBenedetto", written over a horizontal line.

Richard B. DeBenedetto

February 5, 2018