

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA26-71

Filed 19 August 2026

Henderson County, Nos. 24JA000027-440, 24JA000028-440, 24JA000029-440

IN RE: M.A.F., B.W.F., I.J.F.

Appeal by respondent-mother from order entered 20 October 2025 by Judge Abe Hudson in District Court, Henderson County. Heard in the Court of Appeals 21 July 2026.

Henderson County, by Assistant County Attorney Susan F. Davis, for petitioner-appellee Henderson County Department of Social Services.

Administrative Office of the Courts, by GAL Staff Attorney Brittany T. McKinney, for guardian ad litem.

Parent Defender Annick Lenoir-Peek, by Assistant Parent Defender Benjamin J. Kull, for respondent-appellant-mother.

STROUD, Judge.

Respondent Mother appeals from an order terminating her parental rights¹ to her three minor children: Mario, Benicio, and Inez.² She argues that the “record on appeal does not contain enough facts” to review her ineffective assistance of counsel claim. So she asks us to remand for the trial court to find those facts. We remand.

¹ The children’s father is not a party to this appeal.

² We use pseudonyms throughout this opinion to protect the children’s identities.

Neither the record nor transcript explains why Mother missed the termination hearing or why her counsel, though present, did nothing on her behalf during it. Without those facts, we cannot analyze her claim.

I. Background

On 11 March 2024, the Henderson County Department of Social Services (HCDSS) filed a juvenile petition alleging Mario, Benicio, and Inez were neglected. All three children entered HCDSS's nonsecure custody that day. The petition detailed repeated domestic violence between Mother and father, substance abuse, housing instability, and failures to provide the children medical care. It recounted "nearly ten . . . CPS reports on the family in less than a year," as well as Mother's disclosure that father had threatened to take her to a wooded area in South Carolina, "stab her 55 times in the face," and bury her there. HCDSS "substantiated for domestic violence." The petition also noted the children had earlier been in Transylvania County's DSS custody, beginning in July 2021, for "improper supervision, substance use, and injurious environment," until that trial court, finding insufficient evidence to adjudicate, returned them to their parents.

At a hearing on 18 March 2024, which Mother attended, the trial court concluded grounds existed to continue the children's nonsecure custody. Mother did not attend the follow-up hearing on 18 April 2024.

The trial court held an initial adjudication and disposition hearing on 16 May 2024. Mother did not attend; her lawyer reported he "had not spoken to" her "before

the adjudication hearing and had no position.” On 14 June 2024, the court entered an order adjudicating the children as neglected and, the same day, entered a disposition order continuing their custody with HCDSS and setting reunification requirements for Mother.

Mother did not attend a permanency planning hearing on 15 August 2024.³ Her attorney stated that he “had not had recent contact with his client and was unable to take a position on the matter.” The resulting order, entered 12 September 2024, found that Mother “had not completed the [c]ourt’s requirements as prerequisites to reunification.” Reunification thus remained contrary to the children’s best interests. The court set reunification as the children’s primary permanent plan, with adoption as their secondary plan.

Mother did not attend a second permanency planning hearing on 20 March 2025. And she did not “contact her attorney, the clerk’s office, or HCDSS prior to court to explain her absence.” On 31 March 2025, the court entered a second permanency planning order, which found that Mother had “made no progress on her reunification requirements,” and changed the children’s primary plan to adoption, with reunification as their secondary plan.

That order also made extensive findings about father’s control over Mother. “On multiple occasions,” Mother said that “she trie[d] not to upset” father because

³ Before this hearing, HCDSS moved to sanction the children’s placement. The trial court held a hearing on that matter on 8 August 2024, which Mother attended.

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upsetting him brought “consequences.” Father would not “allow her to work because she need[ed] to be monitored.” HCDSS staff had “observed . . . father searching her purse after multiple supervised visitations” and “heard [him] yelling at [Mother] during phone calls.” Mother repeatedly asked the social worker not to call or text because it “wasn’t safe”—father “always ha[d] [her] phone.” And when HCDSS helped Mother separate from father in January 2025—calling shelters on her behalf, buying her a phone and service plan, offering hotel placement and gas vouchers—the court found that father “actively stalk[ed]” the hotel where he believed she was staying, walked there on foot, and called the manager to have her removed. He later “snatched” a friend from a truck for helping her hide. The court further found that Mother could not meet with the social worker alone “because . . . father would get mad,” and that father had deleted the contacts from her phone.

The same order addressed Mother’s relationship with the children. The court found she had “consistently show[ed] up for visits,” albeit often ten to twenty minutes late, and without transportation of her own. It also found she “ha[d] a good bond with the juveniles, and they call[ed] her ‘mom.’” The record reflects that social workers could generally reach Mother, and that she had attended a large share of her permitted visits, though her cooperation with HCDSS was otherwise inconsistent.

On 9 May 2025, HCDSS moved to terminate Mother’s parental rights on three grounds: neglect; willfully leaving the children in foster care for more than twelve months without showing reasonable progress in correcting the conditions that led to

their removal; and willfully failing, for the six months preceding the filing, to pay a reasonable portion of the children's cost of care despite being able to do so. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3) (2025). HCDSS served Mother that day with the motion and a notice that it sought to terminate her rights. It later served Mother with a notice setting the hearing date for 21 August 2025.

The trial court held a termination hearing on that date. HCDSS's attorney noted on the record that Mother did not appear but was represented by counsel. Counsel did not advise the court of any attempt to contact Mother, move to continue the hearing, object to any evidence, cross-examine HCDSS's witnesses, or present evidence or argument on Mother's behalf.

On 20 October 2025, the trial court entered an order terminating Mother's parental rights. The order contained additional findings about father's control over Mother's participation in the case. The court found that father took Mother's phone and kept her from communicating with others, that he had refused to cooperate with HCDSS and at times prevented Mother from cooperating as well, and that Mother had repeatedly said she wanted to leave him—only to change her mind, explaining that father was sick, she needed to stay through the holidays, or she was afraid to leave. The court also found that three days before the hearing, Mother had texted the social worker that she wanted to leave and asked him to “come and get [her] please, [father] is here.” Offered police assistance, she declined, stating “don't send the police, they won't let me take my cats.” She feared father would “hurt them.” The

order recounted a similar call on 24 January 2025, when Mother phoned “very frantic” and, offered a meeting at the house with police, said: “No, don’t do that. Please don’t do that. I will meet you at DSS. Please don’t call or text me. I will call you when it is safe to do so.”

The trial court concluded HCDSS had proven all three grounds it had alleged in its termination motion. *See id.* It found that the “likelihood of the juveniles being adopted [wa]s high.” And it determined that termination was in Mario, Benicio, and Inez’s best interests.

Mother timely appealed.

II. Jurisdiction

This Court has jurisdiction under North Carolina General Statute Section 7B-1001(a)(7). *See* N.C. Gen. Stat. § 7B-1001(a)(7) (2025) (“[T]he following final orders may be appealed directly to the Court of Appeals: . . . [a]ny order that terminates parental rights or denies a petition or motion to terminate parental rights.”).

III. Discussion

Mother asserts that “the record on appeal does not contain enough facts to properly conclude whether [her] attorney provided ineffective assistance of counsel.” Relying mainly on our decision in *In re C.D.H.*, 265 N.C. App. 609, 829 S.E.2d 690 (2019), she asks us to remand so the trial court can “find those facts.” *Id.* at 614, 829 S.E.2d at 693. Because neither the record nor transcript contain enough information to allow us to review Mother’s claim, we remand.

“When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures, which in North Carolina has been achieved in part through statutory provisions that ensure a parent’s right to counsel[.]” *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007) (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 7B-1101.1(a) (2025) (“The parent has the right to counsel . . . unless the parent waives the right.”). That right, we have explained, “includes the right to effective assistance of counsel,” *In re C.D.H.*, 265 N.C. App. at 612, 829 S.E.2d at 692 (citation omitted), for “the alternative would render any statutory right to counsel potentially meaningless,” *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 32 (2020) (citation omitted). To prevail on an ineffective assistance of counsel claim, the respondent “must show that counsel’s performance was deficient and the deficiency was so serious as to deprive her of a fair hearing.” *Id.* at 854, 851 S.E.2d at 33 (citation omitted).

Sometimes, though, the record and transcripts do not permit an appellate court to answer either question—whether counsel’s performance was deficient, or whether any deficiency deprived the parent of a fair hearing. When the record leaves those questions open, we do not guess. We remand. The right to counsel is among the “procedural safeguards” that “must be followed to ensure the ‘fundamental fairness’ of termination proceedings,” *In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010), and this Court has “consistently vacated or remanded [termination] orders when questions of ‘fundamental fairness’ have arisen due to failures to follow” such

safeguards, *In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 441 (2015) (citation omitted). Two of our decisions control here: *S.N.W.* and *C.D.H.*, which followed it.

We start with *S.N.W.* There, the respondent father did not appear at his termination hearing. *In re S.N.W.*, 204 N.C. App. at 557, 698 S.E.2d at 77. His appointed lawyer reported that his only contact with his client had been a single phone message, which counsel tried—unsuccessfully—to return. *Id.* at 557, 698 S.E.2d at 77. The trial court made no further inquiry into counsel’s efforts to communicate with his client. *Id.* at 558, 698 S.E.2d at 78. It instead allowed counsel to remain in the case but “not to participate.” *Id.* The fifteen-minute hearing proceeded with no participation by counsel on the father’s behalf. *Id.*

On that record, we were “unable to determine” that counsel “made adequate efforts to communicate and/or consult with” his client. *Id.* at 559, 698 S.E.2d at 78. Nothing showed how many calls counsel placed, whether he sent any written communication, or whether he sought help reaching his client through another party, such as the county’s department of social services (department or DSS)—which had itself managed to meet with the father before the hearing. *Id.* at 559–60, 698 S.E.2d at 78. Nor did the record explain the father’s absence: the hearing had been continued several times and the court assigned him more than one lawyer, so we thought it “not inconceivable” that he “may have been confused about what was required of him . . . or when he needed to appear in court.” *Id.* at 560, 698 S.E.2d at 78. Under the case’s “unique factual circumstances,” we held that the trial court “should have inquired

further” into counsel’s efforts to contact the father, protect his rights, and ably represent him. *Id.* at 559, 698 S.E.2d at 78.

None of this meant the father’s claim would succeed. This Court recognized a “lawyer cannot properly represent a client with whom he has no contact,” and a finding of ineffective assistance “will generally not be made where the purported shortcomings of counsel were caused by the party.” *Id.* at 561, 698 S.E.2d at 79 (citations omitted). We also noted the record was “replete with evidence” casting doubt on the father’s “ability to parent.” *Id.* Even still, the absence of any information about counsel’s attempts to contact his client, along with counsel’s silence at the fifteen-minute hearing, barred “us from determining whether [the father] received effective assistance of counsel, and if he was denied a fair hearing.” *Id.* at 560, 698 S.E.2d at 79. We remanded for the trial court to determine what efforts counsel had made to contact and represent the father, and whether he was entitled to appointed counsel in a new proceeding. *Id.* at 561, 698 S.E.2d at 79 (citation omitted).

C.D.H. applied *S.N.W.* to facts much like these. In that case, the respondent mother did not appear at her termination hearing, and neither her counsel nor the trial court addressed her absence. *In re C.D.H.*, 265 N.C. App. at 612, 829 S.E.2d at 693. Counsel remained in the courtroom, but she did not object during the department’s testimony, did not cross-examine its witnesses, and did not present evidence. *Id.* And at the close of both the adjudication and dispositional stages, she declined to argue on her client’s behalf. *Id.* The record was “silent on the reasons

why counsel acted as she did.” *Id.* It offered “very limited evidence” on the mother’s “relationship with her counsel”: she had attended one hearing in the case and none after; the same lawyer had represented her throughout; and apart from two motions to continue, nothing showed why she was absent or what counsel had communicated to her about appearing. *Id.* at 613, 829 S.E.2d at 693.

Because the record was “silent on the reasons for [the] [m]other’s absence from the hearing and from [her] counsel’s justifications for her actions during the . . . hearing,” this Court remanded for the trial court to “find those facts.” *Id.* at 609, 613–14, 829 S.E.2d at 691, 693–94 (relying on *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79). At the same time, we acknowledged that the mother “may have waived her right to effective counsel through her own actions.” *Id.* at 613, 829 S.E.2d at 693 (citations omitted). “Perhaps,” we surmised, her “cooperation with her counsel was no better than her cooperation with her case plan.” *Id.* But “the record d[id] not compel that conclusion.” *Id.* So we could not decide whether she “waived her right to representation or undermined her counsel’s ability to advocate for her.” *Id.*

And we refused to presume counsel’s “failure to advocate” for the mother “necessarily . . . indicat[ed]” ineffective assistance of counsel. *Id.* Counsel had said nothing negative about her client, and “resourceful preparation” may have “reveal[ed] nothing positive to be said for” the mother. *Id.* (citation omitted). But again, we could not “make any determination from th[e] record.” *Id.* We could only “speculat[e] on the reasons why counsel did not advocate.” *Id.*

This case is of a piece. Mother did not appear at her termination hearing. Her counsel stayed in the courtroom but did nothing on her behalf: he did not object to HCDSS's evidence, cross-examine its witnesses, or present evidence, and he made no argument at either the adjudication or disposition stage. He did not move to continue, and he did not tell the court of any effort to reach his client. No one addressed why Mother was absent or why counsel said nothing. The record and transcript are silent too. Yet HCDSS's own evidence and the findings in the permanency planning orders raise the question whether anyone could reach Mother before the hearing—and whether father prevented her from attending. His pattern of abuse, threats, stalking, and control was well documented.

To be sure, Mother's own conduct might defeat her claim. Her continued refusal to separate from father despite ongoing domestic violence could itself support termination. *See In re T.B.*, 380 N.C. 807, 817–18, 870 S.E.2d 119, 126–27 (2022) (holding that the mother's failure to “immediately end [her] relationship” and “separate from” the child's abusive father, “despite continued domestic violence,” supported the trial court's “determination that there [wa]s a likelihood of repetition of neglect”). And by missing several hearings, Mother “may have waived her right to effective counsel.” *In re C.D.H.*, 265 N.C. App. at 613, 829 S.E.2d at 693 (citation omitted). She attended only two in this case. She did not “contact her attorney, the clerk's office, or HCDSS . . . to explain her absence” from the second permanency planning hearing. Counsel, for his part, twice reported losing touch with her: before

the adjudication hearing, he had “not spoken to” Mother and “had no position”; before the first permanency planning hearing, he “had not had recent contact with his client.” Her cooperation with counsel, then, may have been “no better than her cooperation” with her reunification requirements. *Id.*

But neither the record nor transcript “compel that conclusion.” *Id.* They do not explain why Mother missed the hearings or what counsel told her about appearing. What the record does show cuts the other way: Mother stayed in contact with HCDSS through the weeks before the termination hearing, and many of the difficulties in reaching her traced to father’s threats and interference. The record in *C.D.H.* included comparable findings—silent on the mother’s reasons for her absence and on counsel’s communications with her, yet showing that she “generally stayed in contact with [the department] and engaged in visits” with her child. *Id.* Here, as there, we cannot say whether Mother “waived her right to representation or undermined her counsel’s ability to advocate for her.” *Id.*

On counsel’s side, the record and transcript are no more revealing. They do not show what he did to reach Mother: how many times he called, whether he wrote, or whether he sought help through HCDSS. *See In re S.N.W.*, 204 N.C. App. at 559, 698 S.E.2d at 78. His reports, quoted above, show only that their contact had lapsed—not why, and not what he did about it. Nor do the record and transcript explain his silence once the hearing began. That silence is “not necessarily an indication of ineffective assistance of counsel,” *In re C.D.H.*, 265 N.C. App. at 613, 829

S.E.2d at 693 (citation omitted), because “resourceful preparation” may have “reveal[ed] nothing positive to be said for” Mother, *id.* (citation omitted). But whether that explains counsel’s silence here, we cannot tell. Without knowing what counsel did or why he did nothing, we can no more assess his performance than we could in *S.N.W.* or *C.D.H.* So, as in those cases, remand is the appropriate course.

HCDSS and the guardian *ad litem* (GAL), however, resist this conclusion. They contend that Mother cannot show that “she was prejudiced and, but for errors by her attorney, there would have been a different result,” so remand is unwarranted. But *C.D.H.* considered—and rejected—this same argument. *See In re C.D.H.*, 265 N.C. App. at 614, 829 S.E.2d at 694. There, the department and the GAL likewise urged that counsel’s “total lack of advocacy throughout the termination hearing” was “immaterial, because even the most compelling advocacy would not have changed the outcome.” *Id.* But that was “not a conclusion we c[ould] reach from the sparse record,” and we would not “speculate about what trial counsel ‘could have’ argued below or how it would have affected the outcome, without being privy to counsel’s knowledge of the underlying facts.” *Id.* We decline to speculate here too. If a prejudice determination proves necessary, the trial court should make it—after receiving evidence about counsel’s conduct, Mother’s participation in the case, and the other relevant circumstances. *See id.*

The two-stage structure of a termination proceeding underscores the point. Even after adjudicating grounds for termination, the trial court must still decide

whether termination is in the children’s best interests. N.C. Gen. Stat. § 7B-1110(a) (2025). Again, the court found that Mother had a good relationship with the children and her visitation had been mostly consistent. So even if her presence could not have altered the adjudication, the disposition rests in the trial court’s discretion—and on this record, counsel’s advocacy or Mother’s presence might have made a difference there.

Unconvinced, HCDSS and the GAL urge us to ignore *C.D.H.* In their view, later cases of our Supreme Court have displaced it; this Court’s decision to remand in *C.D.H.* is, as HCDSS puts it, “not the standard” that Court now applies. Though no case has expressly overruled or limited *C.D.H.*, they argue that it has at least been overruled *sub silentio*. Between them, they point to four decisions. We take each in turn.

We begin with *T.N.C.*, 375 N.C. 849, 851 S.E.2d 29 (2020). That case does not help HCDSS, which quotes it only for the unremarkable proposition that a respondent “must show that counsel’s performance was deficient and the deficiency was so serious as to deprive her of a fair hearing.” *Id.* at 854, 851 S.E.2d at 33. Unlike this case, the mother in *T.N.C.* attended her termination hearing, and her counsel cross-examined the department’s witness and delivered closing arguments at both stages. *Id.* at 849, 851–53, 851 S.E.2d at 30, 31–32. On appeal, she argued that her counsel’s actions, among other things, “highlighted [her] weaknesses,” and that his

“tempered representation” amounted to “no representation at all.” *Id.* at 854, 851 S.E.2d at 33 (citation omitted).

Because the transcript preserved what counsel had said, the Court could evaluate his advocacy directly. He had noted the mother’s progress on her case plan, her bond with her children, and her wish to keep her rights. *Id.* at 856, 851 S.E.2d at 33–34. He had also asked the court to rule in her favor. *Id.* That was “not ‘altogether lacking in positive advocacy,’ ” so the Court held that the mother “failed to show deficient performance.” *Id.* at 856–57, 851 S.E.2d at 33–34. It could reach that holding because the record showed what counsel had done. This one does not.

In re B.S. is still further afield. 378 N.C. 1, 859 S.E.2d 159 (2021). The respondent father there raised an ineffective-assistance claim, faulting his counsel for failing to advise or assist him in establishing legal paternity before DSS filed the motion to terminate his parental rights. *Id.* at 6, 859 S.E.2d at 162. The Supreme Court rejected that claim on a legal ground, not a factual one: ignorance of an inherent parental duty, the Court said, does not excuse a parent’s failure to perform it, and so counsel’s failure to advise about such a duty “c[ould] [not] be prejudicial.” *Id.* at 7, 859 S.E.2d at 162 (citation omitted). No further fact-finding could have altered that conclusion. Whatever counsel had or had not told the father, the omission was immaterial as a matter of law. *See id.* at 7, 859 S.E.2d at 162–63.

Mother’s claim is different. Whether her counsel’s silence deprived her of a fair hearing depends on facts that, as we have already observed, this record and

transcript do not supply. The claim in *B.S.* failed no matter what those facts might have shown. Mother's cannot be resolved until they are known.

In re G.G.M., which the GAL alone cites, fares no better. 377 N.C. 29, 855 S.E.2d 478 (2021). The respondent father there attended his termination hearing and, on appeal, faulted his counsel for failing to object to a temporary custody order and for failing to raise hearsay objections during the children's therapist's testimony. *Id.* at 41, 855 S.E.2d at 487. The Court rejected that claim. The father made "no showing that he was prejudiced": he did not prove that his counsel's "alleged deficiencies, . . . taken alone or collectively, would have resulted in a different outcome." *Id.* at 42, 855 S.E.2d at 487.

That holding rests on something this case lacks. Because the father pointed to two discrete omissions, the Court could see what his counsel had failed to challenge—the custody order and the therapist's testimony—and assess whether challenging them would have mattered. Mother's counsel here made no objections at all. To weigh prejudice here, we would have to imagine the entire case he might have presented—every question, every exhibit, every argument. We cannot, "without being privy to counsel's knowledge of the underlying facts." *In re C.D.H.*, 265 N.C. App. at 614, 829 S.E.2d at 694. Nor does Mother's burden change the analysis: as explained above, *C.D.H.* refused to resolve a claim on prejudice where the record could not first show whether counsel's performance was deficient. *See id.* Until the trial court finds why counsel did nothing, no court can resolve the claim. That is why

remand is proper. *See id.* at 613, 829 S.E.2d at 693; *see also In re S.N.W.*, 204 N.C. App. at 560–61, 698 S.E.2d at 78–79.

That leaves *In re Z.M.T.*, 379 N.C. 44, 864 S.E.2d 250 (2021). It is the strongest authority HCDSS and the GAL present, but it is also distinguishable. There too the mother missed her termination hearing, and there too her counsel did not cross-examine the department’s witnesses, offer evidence, or make a closing argument. *Id.* at 47, 864 S.E.2d at 252–53. The Court presumed, without deciding, this performance was deficient and affirmed because the mother had “failed to demonstrate that she was prejudiced by any alleged deficiency” in her counsel’s performance. *Id.* at 48, 864 S.E.2d at 253.

Z.M.T. differs from this case in two ways. First, the record there left no room for a different outcome. In *Z.M.T.*, only one parent, the mother, was involved with DSS. There were no allegations of domestic violence and no record of a partner preventing her from participating with DSS. Her failures to comply with the trial court’s requirements were her own doing. For example, before DSS filed the termination motion, officers arrested the mother on several charges, among them drug offenses near a school, robbery with a deadly weapon, and assault with a deadly weapon inflicting serious injury. *Id.* at 46–47, 864 S.E.2d at 252. For months, she “did not make any effort to visit” her child. *Id.* at 47, 864 S.E.2d at 252. And in the disposition portion of the termination order, the court found that the child shared a strong bond with her foster parents but only an “attenuated relationship” with the

mother. *Id.* at 47–48, 864 S.E.2d at 253. Nothing in *Z.M.T* suggested any possibility of a different outcome at either phase of the termination proceeding.

Second, the record in *Z.M.T.* spoke where this one is silent: counsel’s efforts to reach her client. Counsel told the trial court she had sent the mother notice of the hearing and the mother was “generally present in court for such hearing[s].” *Id.* at 47, 864 S.E.2d at 252. She also moved to continue the hearing. *Id.* Counsel thus acted on her absent client’s behalf and gave the court an account of her efforts. Mother’s counsel here did neither.

IV. Conclusion

For the reasons explained above, we remand for the trial court “to determine whether counsel’s actions were deficient, and, if so, whether counsel’s deficiencies deprived [Mother] of a fair hearing,” and for any further proceedings its determination requires. *In re C.D.H.*, 265 N.C. App. at 615, 829 S.E.2d at 694 (citation omitted).

REMANDED.

Judge WOOD concurs.

Judge TYSON concurs by separate opinion.

No. COA26-72– In re: M.A.F., B.W.F, I.J.F.

TYSON, Judge, concurring.

I fully concur with the Court’s decision to remand. I write separately to set out the standards and issues before the trial court upon remand.

I. Strickland v. Washington

In *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), the Supreme Court of the United States set forth the criteria to establish a Sixth Amendment ineffective assistance of counsel (“IAC”) claim. In that case the defendant, David Washington, had pleaded guilty to three capital murders in a Florida state court. Against his lawyer’s advice, Washington waived a jury for his sentencing hearing before a trial judge. At sentencing, his attorney did not seek out character witnesses or request a psychiatric evaluation to mitigate his sentence. The trial court sentenced Washington to death after finding no mitigating circumstances existed to rule otherwise.

The defendant argued his Sixth Amendment right was violated because he had received ineffective assistance of counsel at the sentencing hearing. *Id.* at 675, 80 L. Ed. 2d at 685-86. The issue before the Supreme Court was what showing and standard should be applied to determine whether Washington’s Sixth Amendment right to counsel has been violated to compel reversal of a triple capital murder convictions or to set aside a death sentence.

The Supreme Court held: (1) counsel’s performance must be deficient; and, (2) the deficient performance must have prejudiced the defense so as to deprive the

defendant of a fair trial. To show deficient performance, the defendant must demonstrate counsel's representation fell below an "objective standard of reasonableness." The Court also noted that to show prejudice, the defendant must show there is a "reasonable probability" that, but for counsel's unprofessional errors, the result would have been different. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 80 L. Ed. 2d at 693.

The Court reasoned and concluded Washington's counsel's representation was not unreasonable. The Court also concluded, even if counsel's assistance was unreasonable, counsel's conduct did not cause sufficient prejudice to Washington to warrant setting aside his death sentence. *Id.* The Sixth Amendment test for IAC in *Strickland* was quickly adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). This test has been further applied to termination of parental rights proceedings. *In re G.G.M.*, 377 N.C. 29, 41-42, 855 S.E.2d 478, 487 (2021).

"[T]his Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted). Our Supreme Court also stated it "ordinarily do[es] not consider it to be the function of an appellate court to

second-guess counsel's tactical decisions[.]” *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

At bar and upon remand, Respondent carries the burden and must meet both prongs. Counsel's silence is “not necessarily an indication of ineffective assistance of counsel,” *In re C.D.H.*, 265 N.C. App. 609, 613, 829 S.E.2d 690, 693 (2019). Counsel's “resourceful preparation” may have “reveal[ed] nothing positive to be said for” Mother. *Id.*