

21-6293  
No. \_\_\_\_\_

ORIGINAL

Supreme Court, U.S.  
FILED

NOV 10 2021

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ROY BOLINGER — PETITIONER  
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FOURTEENTH DISTRICT COURT OF APPEALS OF TEXAS  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROY BOLINGER  
(Your Name)

3060 F.M. 3514  
(Address)

BEAUMONT, TEXAS 77705  
(City, State, Zip Code)

N/A  
(Phone Number)

**QUESTION(S) PRESENTED**

1. Bolinger raised an ineffective assistance of counsel claim on direct appeal. The Texas court of appeals concluded that, without counsel's explanations, the record was insufficient to determine if Bolinger's trial counsel rendered ineffective assistance. Even though the record showed counsel's beliefs and actions. Did the court of appeals violate Bolinger's right to due process by forcing him to raise his claim on collateral attack without the benefit of counsel?
2. Bolinger was forced to listen to a victim allocution not authorized by statute—just moments after receiving life without parole. Was Bolinger subjected to cruel and unusual punishment under the Eighth Amendment of the United States Constitution?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

- State of Texas v. Roy Bolinger, No. 1337329 (174th Dist. Ct., Harris County, Tex. Sep. 28, 2018). Judgment entered Sep. 28, 2018.
- Bolinger v. State, No. 14-18-00931-CR, 2021 Tex. App. LEXIS 628 (Tex. App.—Houston [14th Dist.] Jan. 28, 2021, pet. ref'd) (mem. op., not designated for publication). Judgment entered Jan. 28, 2021.

## **TABLE OF CONTENTS**

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	6
CONCLUSION.....	15

## **INDEX TO APPENDICES**

APPENDIX A	Decision of the Fourteenth District Court of Appeals of Texas.
APPENDIX B	Decision of the Court of Criminal Appeals of Texas Refusing Petition for Discretionary Review.
APPENDIX C	Decision of the Court of Criminal Appeals of Texas Denying Rehearing.
APPENDIX D	
APPENDIX E	
APPENDIX F	

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Evitts v. Lucey, 469 U.S. 387 (1985).....	6
Furman v. Georgia, 408 U.S. 238 (1972)(per curiam).....	12
Gideon v. Wainwright, 372 U.S. 335 (1963).....	6
Pa. v. Finley, 481 U.S. 551 (1987).....	6
Payne v. Tennessee, 501 U.S. 808 (1991).....	14
Ross v. Moffitt, 417 U.S. 600 (1974).....	6
Strickland v. Washington, 466 U.S. 668 (1984).....	11
United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980)...	9
United States v. Mahone, 537 F.2d 922 (7th Cir. 1976).....	9
United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978).....	9

## STATUTES AND RULES

Tex. Code Crim. Pro. art. 42.03.....	13
Tex. R. Evid. 105.....	10

## OTHER

Theus v. State, 845 S.W.2d 874 (Tex. Crim. App. 1992)(en banc).....	8, 9
Thompson v. State, 9 S.W.3d 808 (Tex. Crim. App. 1999).....	6, 7

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 08/25/2021. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: 10/06/2021, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. amend. VI
- U.S. Const. amend. VIII
- U.S. Const. amend. XIV, § 1

## STATEMENT OF THE CASE

The petitioner, Roy Bolinger, was convicted for continuous sexual abuse of a child (Tex. Penal Code § 21.02). The trial court declared a mistrial by hung jury. Bolinger was retried and convicted for continuous sexual abuse of a child, and sentenced to life without parole. State of Texas v. Roy Bolinger, No. 1337329 (174th Dist. Ct., Harris County, Tex. Sep. 28, 2018). He raised three issues on appeal.

In his first issue, he contended that his trial counsel rendered ineffective assistance for failing to: (1) obtain a ruling on a motion in limine, (2) file and argue a Theus<sup>1</sup> motion, (3) object to the State's use of his prior convictions used to impeach his credibility, and (4) request a limiting instruction on the jury's use of his prior convictions. In his second issue, he argued that the trial court erred in denying his motion to quash his indictment based on the denial of his right to a grand jury indictment under the Texas Constitution.<sup>2</sup> And in his third issue, he also argued that he was subjected to cruel and unusual punishment when he was forced to listen to a victim allocution not authorized by statute just moments after receiving life without parole. The Fourteenth District Court of Appeals of Texas affirmed the trial court's judgment. Bolinger

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1. Theus v. State, 845 S.W.2d 874 (Tex.Crim.App. 1992)(en banc).

2. This issue is not a subject of this writ of certiorari.

v. State, No. 14-18-00931-CR, 2021 Tex. App. LEXIS 628 (Tex. App.—Houston [14th Dist.] Jan. 28, 2021, pet. ref'd) (mem. op., not designated for publication).

Bolinger filed a petition for discretionary review with the Court of Criminal Appeals of Texas (PD-0289-21), and asked if the Fourteenth District Court of Appeals of Texas erred in concluding that the record did not contain sufficient evidence to evaluate his ineffective assistance issue (App. A, at 17).

In his petition, Bolinger also asked if the Fourteenth District Court of Appeals erred in their reliance on Payne v. Tennessee<sup>3</sup> when they assessed his cruel and unusual punishment claim (App. A., at 21).

The Court of Criminal Appeals summarily refused Bolinger's petition for discretionary review (App. B, at 1). He then filed a motion for rehearing, which was denied (App. C, at 1).

Bolinger seeks certiorari of this Court to determine if the Texas courts violated his Sixth and Fourteenth Amendment rights. By forcing him to raise an important constitutional issue on collateral review without the assistance of counsel. And if the Fourteenth District Court of Appeals erred in their reliance on Payne in their assessment of his cruel and unusual punishment claim.

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3. 501 U.S. 808, 824–25 (1991).

## REASONS FOR GRANTING THE PETITION

- I. Did the court of appeals violate Bolinger's right to due process by forcing him to raise his claim on collateral attack without the benefit of counsel?
  - A. Texas courts cause disadvantages to indigent appellants who raise ineffective assistance of counsel claims on direct appeal.

This Court has held that due process requires effective assistance of counsel during first appeal as of right. See Evitts v. Lucey, 469 U.S. 387, 396 (1985); see also Pa. v. Finley, 481 U.S. 551, 555 (1987)(right of counsel applies only to first appeals as of right). And this right applies to the states through the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335, 342 (1963). This right, however, does not extend to collateral attacks. Finley, 481 U.S. at 555. Nor to discretionary appeals. Ross v. Moffitt, 417 U.S. 600, 610 (1974).

When an appellant, who has been convicted in a criminal court, raises an ineffective assistance of counsel claim on direct appeal, Texas courts refuse to address these claims unless the error is a matter of law. Which has been a practice that has been accepted by the state's high court. See, e.g., Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

This practice, however, causes serious disadvantages to indigent appellants. Because of this, not all state-appellate judges have agreed with this practice. For example, in Thompson, Judge Meyers criticized this practice in his dissent, in which

Price and Johnson, JJ. joined. See Thompson, 9 S.W.3d at 815-17 (Meyers, J., dissenting).

When the record demonstrates trial counsel's errors, that are not matters of law, Texas appellate courts contend that the record is undeveloped because it fails to show counsel's reasoning for their actions or omissions. Although having counsel's statement would be helpful to the courts to determine whether counsel's actions or omissions were of sound trial strategy. As Meyers suggested in his dissent: it should not be a prerequisite to an analysis of whether the error complained of met an objective standard of reasonableness. Thompson, 9 S.W.3d at 815.

Forcing an appellant, especially one who is indigent, to raise their ineffective assistance of counsel claim on collateral attack raises serious due process issues. First, the appellant is forced to raise an important constitutional issue without assistance of counsel. And in most cases, without a free copy of the record. Both being available to the appellant on direct appeal. And second, most appellants do not have adequate knowledge of state or federal law. Therefore, they are not trained to properly research and interpret case law that would be relevant to support their ineffective assistance of counsel claim. Thus leaving the appellant at a serious disadvantage. And at a higher risk of having their claim thrown out of court on collateral attack.

The petitioner, Roy Bolinger, is one of these appellants who have been put at this disadvantage by a Texas appellate court.

B. The Texas court of appeals determined that the record does not contain sufficient evidence to evaluate Bolinger's ineffective assistance of counsel issue.

The Fourteenth District Court of Appeals of Texas concluded that, without further development of the record, it could not evaluate whether Bolinger's trial counsel rendered ineffective assistance for failing to: (1) obtain a ruling on his motion in limine, (2) file a Theus<sup>4</sup> motion, (3) object to the State's use of prior convictions used to impeach Bolinger's credibility, and (4) request a contemporaneous limiting instruction on the jury's use of Bolinger's prior convictions (App. A, at 4-17).

**1. Trial counsel did not obtain a written ruling on his motion in limine and did not file a Theus motion.**

The State gave trial counsel notice of its intent to use Bolinger's prior convictions for impeachment purposes before trial (R. at 296). Trial counsel filed a motion in limine before trial (R. at 310), but the record does not reflect a written ruling on his motion (R. at 313).

Although trial counsel did mention that the trial court heard his motion off-the-record: giving reference to the scientific-studies portion of his motion (R. at 311; Trial Tr. vol. 11, 3). The record does not show that counsel made any argument regarding the State's intent to use Bolinger's prior convictions for impeachment purposes.

In addition, trial counsel failed to file and argue a Theus

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4. Theus v. State, 845 S.W.2d 874 (Tex.Crim.App. 1992(en banc)).

motion. In Theus, the Court of Criminal Appeals of Texas adopted the five non-exclusive factors to determine the admissibility of prior convictions from the federal court of appeals. See Theus v. State, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992)(en banc); see also United States v. Mahone, 537 F.2d 922, 929 (7th Cir.), cert. denied, 429 U.S. 1025, 97 S. Ct. 646, 50 L. Ed. 2d 627 (1976).

Having Bolinger's prior convictions assessed under these factors would have shown that his 2010-assault-of-a-family-member conviction was dispositive under the first and third factors: as being a crime of violence with no impeachment value and similar to the charged offense. See Theus, 845 S.W.2d at 881; see also United States v. Jackson, 627 F.2d 1198, 1210 (D.C. Cir. 1980). And therefore highly prejudicial. This conviction was mentioned on three occasions (Trial Tr. vol. 14, 104; vol. 14, 124; vol. 14, 175). The third time was during the State's rebuttal closing argument—being one of the last things the jury heard before retiring to deliberate (Trial Tr. vol. 14, 175).

Although the trial court has a wide discretion in admitting prior convictions. See United States v. Oaxaca, 569 F.2d 518, 526 (9th Cir.), cert. denied, 439 U.S. 926, 99 S. Ct. 310, 58 L. Ed. 2d 319 (1978). Counsel did not challenge the admissibility of Bolinger's prior convictions. And allowed Bolinger's prior convictions to be presented before the jury uncontested.

2. Trial counsel did not object and did not request a contemporaneous limiting instruction on the jury's use of Bolinger's prior convictions.

After being turned over for cross-examination, the State impeached Bolinger's credibility by using five prior convictions (Trial Tr. vol. 14, 103–104). Trial counsel neither objected, nor requested a contemporaneous limiting instruction on the jury's use of Bolinger's prior convictions (id.).<sup>5</sup>

In Texas, if a court admits evidence that is admissible against a party or for a purpose, a court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly. See Tex. R. Evid. 105.

Trial counsel's failure to request a contemporaneous limiting instruction allowed Bolinger's prior convictions to be admitted into the trial as general evidence. And to be used for all purposes, rather than to their proper scope of assessing Bolinger's credibility. Therefore, trial counsel allowed the jury to use Bolinger's prior convictions to assess guilt; especially Bolinger's 2010-assault-of-a-family-member conviction.

3. Trial counsel's omissions are firmly founded in the record and were not an objective standard of reasonableness.

The Fourteenth District Court of Appeals of Texas concluded that since Bolinger's trial counsel had not been afforded the opportunity to explain his actions, and the record did not

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5. The trial court, *sua sponte*, included a limiting instruction in the jury charge.

demonstrate the alleged ineffectiveness as a matter of law, the record is insufficient to evaluate Bolinger's ineffective assistance of counsel issue (App. A, at 17).

The record, however, shows that Bolinger's trial counsel:

- (1) believed Bolinger's case was based on credibility (Trial Tr. vol. 12, 12; vol. 14, 144);
- (2) did not obtain a written ruling on his motion in limine (R. at 313);
- (3) did not file and argue a Theus motion;
- (4) did not object to the State's use of Bolinger's prior convictions used to impeach Bolinger's credibility (Trial Tr. vol. 14, 103-104); and
- (5) allowed Bolinger's prior convictions to be admitted into the trial for all purposes by not requesting a contemporaneous limiting instruction on the jury's use of Bolinger's prior convictions (Trial Tr. vol. 14, 103-104).

The record should therefore contain sufficient evidence to determine whether trial counsel rendered ineffective assistance under the two-prong analysis set out in this Court's Strickland v. Washington, 466 U.S. 668, 687 (1984).

#### C. Violation of the Sixth and Fourteenth Amendments of the United States Constitution.

There are many cases similar to Bolinger's case. Where state appellate courts force indigent appellant's to raise their ineffective assistance of counsel claims on collateral attack. These appellate courts are aware if a person has been deemed indigent and had been given permission to proceed in forma pauperis on appeal. And therefore aware that having to raise such a claim on collateral attack, the indigent appellant will

not able to adequately represent themselves and properly argue their important constitutional claim. Which can be seen as a tactic by the State of Texas to keep convictions upheld—even though trial counsel was constitutionally ineffective for not protecting their client's best interest. There is no due process in this practice. And this practice goes against the Sixth and Fourteenth Amendments of the United States Constitution.

Bolinger therefore asks this Court, "Did the court of appeals violate Bolinger's right to due process by forcing him to raise his claim on collateral attack without the benefit of counsel?"

II. Was Bolinger subjected to cruel and unusual punishment under the Eighth Amendment of the United States Constitution?

A. The trial court allowed an improper victim allocution.

This Court defined "cruel and unusual punishment" as not only pertaining to physical suffering, but also to severe mental pain, which rises to the level of "degrading the dignity of human beings." U.S. Const. amend. 8. Furman v. Georgia, 408 U.S. 238, 271 (1972)(Brennan, J., concurring)(per curiam).

After the jury sentenced the petitioner, Roy Bolinger, to life without parole, the State announced that it had two victim impact statements (Trial Tr. vol. 15, 38). Defense counsel objected because (1) the complainant was capable of giving a statement herself, and (2) that it would be cruel and unusual to allow the complainant's mother, Bolinger's ex-wife, to give a

statement—especially just moments after Bolinger received life without parole (Trial Tr. vol. 15, 38–39). The trial court allowed the complainant's mother to give a victim impact statement; reasoning that the complainant was a minor at the time of the alleged offense (Trial Tr. vol. 15, 39).

Article 42.03 of the Texas Code of Criminal Procedure provides that the trial court shall allow a victim, close relative of a deceased victim, or guardian of a victim to give a victim impact statement to the court and to the defendant of the person's views about the offense, the defendant, and the effect of the offense on the victim after sentence as been pronounced. See Tex. Code Crim. Pro. art. 42.03.<sup>6</sup>

On appeal, Bolinger argued that he had been subjected to cruel and unusual punishment by the trial court for allowing Bolinger's ex-wife to give a victim impact statement—especially just moments after Bolinger received life without parole.

Bolinger argued that his ex-wife was neither the victim of the offense, nor the victim's legal guardian at the time of trial. The complainant was 18 years old at the time of trial, and resided with her foster mother (Trial Tr. vol. 12, 13; vol. 12, 15).

This issue was overruled by the Fourteenth District Court of Appeals of Texas.

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6. Acts 2017, 85th Leg., ch. 324 (S.B. 1488, § 23.002, eff. Sept. 1, 2017).

B. Bolinger's issue is distinguished from Payne.

The Fourteenth District Court of Appeals relied on Payne v. Tennessee, 501 U.S. 808, 824-25 (1991), stating that "a victim impact statement is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question," and that "the Supreme Court concluded that the Eighth Amendment presents no per se bar to presentation of a victim impact statement prior to sentencing the defendant (App. A, at 21). Bolinger's issue, however, is distinguished from Payne.

In Payne, the victim impact statement was given before sentencing, by a close relative of the deceased victims, to determine if Payne should be sentenced to death. In Bolinger's case, his sentence had already been pronounced. And after he received life without parole, the trial court allowed a person who was not authorized by statute to give a victim impact statement.

C. Ex-wife's victim impact statement was degrading to Bolinger's dignity and caused him severe emotional pain.

During trial, Bolinger contended that his ex-wife had improperly influenced her daughter to make a false accusation against him, after he went against his ex-wife in a child custody case involving their son—the complainant's younger half-brother (Trial Tr. vol. 14, 95-96; vol. 14, 98-101).

Giving the fact that Bolinger had to hear his ex-wife give a victim impact statement after their contentious child custody

battle—which is what Bolinger contended during trial that lead to the charge in which he was convicted of—was degrading to his dignity as a human being, and caused him severe emotional pain. There was nothing to attain in allowing his ex-wife to give such a statement, other than for her having the last word in a degrading manner.

Was Bolinger subjected to cruel and unusual punishment under the Eighth Amendment of the United States Constitution?

### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

R. E. Bol

Date: November 8, 2021