

No. _____

IN THE
SUPREME COURT
OF THE UNITED STATES OF AMERICA

KENNETH RAY HOLBERT, SR.
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SEVENTH COURT OF APPEALS OF TEXAS**

John Bennett
2607 Wolflin Avenue #106
Amarillo, Texas 79109
Telephone: (806) 282-4455
Fax: (806) 398-1988
AppealsAttorney@gmail.com
Texas State Bar No. 00785691
Attorney *pro bono* for the Petitioner

QUESTION PRESENTED FOR REVIEW

Where a *Strickland* claim is appropriately raised on direct appeal, may a state court add to the two-pronged *Strickland* test a burden of showing the trial court also abused its discretion? If not, does doing so prompt summary reversal? (Please see Memorandum Opinion below, Exhibit B here, p. 6).

LIST OF PARTIES TO THE PROCEEDING

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

CORPORATE DISCLOSURE STATEMENT

No corporations are involved in this case.

PROCEEDINGS IN STATE AND FEDERAL COURT

The 251st State District Court of Potter County, Texas, entered a judgment of conviction against your petitioner in *State v. Holbert*, docket number 29,644-C, entered March 31, 2022.

The Seventh Court of Appeals of Texas affirmed the convictions in cause number 07-22-00082-CR, styled *Holbert v. State*, 665 S.W.3d 120 (Tex.App. – Amarillo 2023, pet. ref'd), on February 2, 2023. Rehearing was denied without opinion on March 6, 2023.

The Texas Court of Criminal Appeals denied discretionary review without opinion in cause number PD-201-23, styled *Holbert v. State* (unreported), on May 3, 2023. This petition ensued.

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**PETITION FOR WRIT OF CERTIORARI TO THE
SEVENTH COURT OF APPEALS OF TEXAS**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner Kenneth Ray Holbert, Sr., respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Court of Appeals of Texas.

JURISDICTION

1. Your petitioner entered a guilty plea without a plea agreement on March 31, 2022, to a charge of aggravated assault with a deadly weapon resulting in serious bodily injury. On the same day a judge imposed sentence. The petitioner filed a notice of appeal of the sentencing hearing that day, as well as a motion for new trial. The trial court held a hearing on the motion for new trial, at which several witnesses, including trial counsel, testified.

2. On February 2, 2023, the Seventh Court of Appeals of Texas affirmed the sentence. On February 9, 2023, your petitioner filed a motion for rehearing, which was denied on March 6, 2023.

3. On April 6, 2023, your petitioner filed a petition for discretionary review to the Texas Court of Criminal Appeals, but on May 3, 2023, discretionary review was denied.

4. No motion for extension of time was filed to file this Petition.

5. No reliance on Rule 12.5 is made.

6. The Court is empowered to review cases via “writ of certiorari granted upon the petition of any party to any civil or criminal case.” 28 U.S.C.A § 1254(1) (West 2022).

THE CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... and to have the Assistance of Counsel for his defence." U.S. Const., amend VI, § 1 (West 2022).

STATEMENT OF THE CASE

Your petitioner was convicted aggravated assault with a deadly weapon causing serious bodily injury. The federal question raised herein was raised at the Seventh Court of Appeals of Texas as a specific appellate issue, and then at the Texas Court of Criminal Appeals.

REASON FOR GRANTING THE PETITION

The Texas state courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup.Ct.R. 10(b).

Your petitioner's sole issue raised a claim of ineffective assistance of counsel at sentencing, since counsel admitted at the hearing on the motion for new trial that (a) he had not interviewed a prospective witness who also testified at that hearing she would have provided

beneficial testimony, and (b) he had not reviewed all of the State's evidence – indeed, some of it was sent to him only on the day of trial – but did not seek a continuance in order to evaluate it; additionally, a continuance might have meant that, instead of the visiting judge, a the elected, more sympathetic judge would preside. (Exhibit C, p. 6-10).

In describing the standard it would use, the Seventh Court of Appeals first cited *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and its progeny. (Exhibit C, p. 4-5). But the court of appeals also added another burden for the petitioner to meet on top of *Strickland*: that since the claim was raised on direct appeal, the petitioner would also have to show that the trial court had abused its discretion in refusing to grant a new sentencing hearing:

Given that Appellant raised his ineffective assistance claim in a motion for new trial, and evidence was heard at the hearing, we analyze the issue on appeal as a challenge to the trial court's denial of his new trial motion and review it under an abuse of discretion standard. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004); *Rodriguez v. State*, 553 S.W.3d 733, 748–49 (Tex. App.—Amarillo 2018, no pet.). Thus, we reverse only if the trial court's decision to deny the motion for new trial was arbitrary or unreasonable viewing the evidence in the light most favorable to the trial court's ruling. *Id.* at 749.

A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. *Charles*, 146 S.W.3d at 208...

(Exhibit B, attached, p. 6).

Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), is on point. The case involved a defendant sentenced to death; the Virginia Supreme Court “rejected his ineffective-assistance claim” in the belief that *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), “modified” or “supplanted” *Strickland* by requiring “a separate inquiry into fundamental fairness even when” the defendant “is able to show that his lawyer was ineffective and that the ineffectiveness probably affected the outcome of the proceeding.” *Id.* at 391-4. The state-court decision in *Williams* was therefore both “contrary to” and “an unreasonable application” of “clearly established Federal law, as determined by” this Court – a burden the petitioner, since his case is currently still on direct appeal, need not meet anyway.

Summary reversal is appropriate where a lower court’s ruling is “obvious in light of” this Court’s prior precedent. *Gonzales v. Thomas*, 547 U.S. 183, 185, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006). Here, as in *Williams*, the state courts added an additional requirement to the *Strickland* standard that this Court has not required of ineffective-assistance claimants. Since the error is clear from the Seventh Court of Appeals’ opinion, the petitioner respectfully requests that relief.

PRAYER

Petitioner Kenneth Ray Holbert, Sr., therefore prays, on this the 31st day of July 2023, that the Court grant certiorari and, on hearing the case, summarily reverse and remand the cause to the Texas state courts, or order all relief the Court may deem appropriate.

Respectfully submitted,

/s/ John Bennett

John Bennett

2607 Wolflin Avenue #106

Amarillo, Texas 79109

(806) 282-4455

Fax: (806) 398-1988

email: AppealsAttorney@gmail.com

Texas State Bar No. 00785691

Attorney *pro bono* for the Petitioner

WORD COUNT

This is to certify that this entire Petition contains 1,573 words.

/s/ John Bennett

John Bennett

PROOF OF SERVICE

This is to certify that a true and correct copy of the above Petition for Writ of Certiorari was served by email on Justin Rippey, Esq., Randall County Assistant District Attorney, and on the Post-Conviction Division of the Texas Attorney General's office, both on July 31, 2023.

/s/ John Bennett
John Bennett

APPENDIX

Exhibit A

**JUDGMENT & SENTENCE FROM THE
251st STATE DISTRICT COURT
OF POTTER COUNTY, TEXAS**



CASE NO. 29644C

COUNT NO.

INCIDENT NO./TRN: 9287568316

THE STATE OF TEXAS

§

IN THE 251ST DISTRICT COURT

v.

§

COURT

KENNETH RAY HOLBERT, SR.

§

RANDALL COUNTY, TEXAS

STATE ID NO.: TX05616002

§

JUDGMENT OF CONVICTION

Judge Presiding:	Hon. ABE LOPEZ	Date Sentence Imposed:	03/21/2022
Attorney for State:	TRACIE REILLY	Attorney for Defendant:	MICHAEL WARNER
<u>Offense for which Defendant Convicted:</u>			
AGG ASSAULT W/DEADLY WEAPON, ENHANCED			
<u>Charging Instrument:</u>		<u>Statute for Offense:</u>	
INDICTMENT		22.02(a)(2) PC	
<u>Date of Offense:</u>		<u>Plea to Offense:</u>	
06/05/2019		GUILTY	
<u>Degree of Offense:</u>		<u>Findings on Deadly Weapon:</u>	
SECOND DEGREE FELONY		AFFIRMATIVE	
<u>Verdict of Jury:</u>			
GUILTY			
1 st Enhancement Paragraph:	PLED TRUE	Finding on 1 st Enhancement Paragraph:	TRUE
2 nd Enhancement Paragraph:	N/A	Finding on 2 nd Enhancement Paragraph:	N/A
<u>Punished Assessed by:</u>		<u>Date Sentence to Commence:</u> (Date does not apply to confinement served as a condition of community supervision.)	
COURT		03/21/2022	
<u>Punishment and Place of Confinement:</u> 75 YEARS IN THE INSTITUTIONAL DIVISION, TDCJ			
THIS SENTENCE SHALL RUN CONCURRENTLY.			
<input type="checkbox"/> SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A .			
<input type="checkbox"/> Defendant is required to register as sex offender in accordance with Chapter 62, TEX. CODE CRIM. PROC.			
(For sex offender registration purposes only) The age of the victim at the time of the offense was N/A .			
<u>Fines:</u>	<u>Restitution:</u>	<u>Restitution Payable to:</u>	
\$ AS SET FORTH BELOW	\$	(See special finding or order of restitution which is incorporated herein by this reference.)	
<u>Court Costs:</u>	<u>Reimbursement Fees:</u>		
\$ SEE BILL OF COSTS	\$ SEE BILL OF COSTS		
Was the victim impact statement returned to the attorney representing the State? NO			
(FOR STATE JAIL FELONY OFFENSES ONLY) Is Defendant presumptively entitled to diligent participation credit in accordance with Article 42A.559, Tex. Code Crim. Proc?			
Total Jail Time Credit:	If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.		
68 DAYS	N/A DAYS NOTES: N/A		

This cause was called and the parties appeared. The State appeared by her District Attorney as named above.

FILED
March 23, 2022 1:03 PM
JOEL FORBIS DISTRICT CLERK
RANDALL COUNTY, TEXAS
by TR Deputy

Counsel / Waiver of Counsel (select one)

- ☒ Defendant appeared with counsel.
☐ Defendant appeared without counsel and knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.
☐ Defendant was tried in absentia.

Both parties announced ready for trial. It appeared to the Court that Defendant was mentally competent to stand trial. Both parties waived jury. The Court proceeded to hear the case.

The Court heard the evidence submitted and argument of counsel. Upon returning to open court, the Judge delivered his verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and **Ordered** it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

- ☐ **Jury.** Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.
☒ **Court.** Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.
☐ **No Election.** Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

In accordance with the jury's verdict, the Court **ADJUDGES** Defendant **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of Subchapter F, Chapter 42A, TEX. CODE CRIM. PROC.

The Court **ORDERS** Defendant punished in accordance with the jury's verdict or Court's Findings as to the proper punishment as indicated above. After having conducted an inquiry into Defendant's ability to pay, the Court **ORDERS** Defendant to pay the fine, court costs, and restitution, if any, as indicated above.

Punishment Options (select one)

- ☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment. The Court **ORDERS** Defendant remanded to the custody of the County Sheriff until the Sheriff can obey the directions in this paragraph. Upon release from confinement, the Court **ORDERS** Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or make arrangements to pay any fine, court costs, and restitution due.
☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court **ORDERS** Defendant committed to the custody of the County Sheriff immediately or on the date the sentence commences. Defendant shall be confined in the county jail for the period indicated above. Upon release from confinement, the Court **ORDERS** Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fine, court costs, and restitution due.
☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY**. The Court **ORDERS** Defendant to proceed immediately to the District Clerk's office, or an office designated by the Court or the Court's designee, pay or make arrangements to pay the fine, court costs, and restitution ordered by the Court in this cause.
☐ **Confinement as a Condition of Community Supervision.** The Court **ORDERS** Defendant confined _____ days in _____ as a condition of community supervision. The period of confinement as a condition of community supervision starts when Defendant arrives at the designated facility, absent a special order to the contrary.

Execution / Suspension of Sentence (select one)

- ☒ The Court **ORDERS** Defendant's sentence **EXECUTED**. The Court **FINDS** that Defendant is entitled to the jail time credit indicated above. The attorney for the state, attorney for the defendant, the County Sheriff, and any other person having or who had custody of Defendant shall assist the clerk, or person responsible for completing this judgment, in calculating Defendant's credit for time served. All supporting documentation, if any, concerning Defendant's credit for time served is incorporated herein by this reference.

After having conducted an inquiry into Defendant's ability to pay, the Court **ORDERS** Defendant to pay the fines, court costs, reimbursement fees, and restitution as indicated above and further detailed below.

- ☐ General Fine (§12.21, 12.22, 12.23, 12.32, 12.33, 12.34, or 12.35, Penal Code, Transp. Code, or other Code) \$ _____
(not to exceed \$250,000)

Mandatory Fines- (applicable to offense date on or after January 1, 2020, regardless of disposition date, *note exception for DWI traffic fines)

- ☐ Additional Monthly Fine for Certain Sex Offenders (Art.42A.653 Code Crim. Proc.) \$5.00 [applicable to community supervision Penal Code 21.08, 21.11, 21.011, 22.021, 25.02, 43.25, 43.26]
- ☐ Child Abuse Prevention Fine (Art. 102.0186, Code Crim. Proc.) \$100.00 [applicable to community supervision or convictions for Penal Code 21.08, 21.11, 21.011, 22.021, 25.02, 43.25, 43.26]
- ☐ DWI Traffic Fine (§ 709.001 Transp. Code) \$0 [*applicable on final conviction for offenses committed on or after September 1, 2019]
- ☐ EMS, Trauma Fine (Art. 102.0185, Code Crim. Proc.) \$100.00 [applicable to community supervision or convictions for Penal Code Chapter 49 offenses, except public intoxication & "open container"]
- ☐ Family Violence Fine (Art. 42A.504 (b), Code Crim. Proc.) \$100.00 [applicable to "convictions" for Title 5 Penal Code offenses, chapters 19, 20, 20A, 21,22; requires family violence finding]
- ☐ Juvenile Delinquency Prevention Fine (Art. 102.0171(a), Code Crim. Proc.) \$50.00[applicable to community supervision or convictions for graffiti offenses only]
- ☐ State Traffic Fine (§ 542.4031, Transp. Code) \$50.00 [applicable to community supervision or conviction for Subtitle C "Rules of the Road" Transportation Code offenses, passing a school bus if enhanced to a felony, counterfeit airbag or misrepresentation of airbag installation, and failure of a motor vehicle operator to stop or remain at the scene of an accident involving death or injury]
- ☐ Local Traffic Fine (§542.403, Transp. Code) \$3.00 [applicable to community supervision or conviction for class A & B offenses Subtitle C "Rules of the Road"]

Optional Fines- (applicable to offense date on or after January 1, 2020, regardless of disposition date)

- ☐ Children's Advocacy Center Fine - as Cond of CS (Art. 42A.455, Code Crim. Proc.) \$ (not to exceed \$50) [applicable to community supervision Penal Code 21.11 & 22.011(a)(2)]
- ☐ Repayment of Reward Fine (Art. 37.073/42.152, Code Crim. Proc.) \$ (To Be Determined by the Court)
- ☐ Repayment of Reward Fine as Cond of CS (Art. 42A.301 (b) (20), Code Crim. Proc.) \$ (not to exceed \$50) [Crime Stoppers]

Optional Reimbursement Fees- (applicable to offense date on or after January 1, 2020, regardless of disposition date)

- ☒ Attorney's Fees, as applicable (Art.42A.301(b)(11) & 26.05(g), Code Crim. Proc.) **SEE BILL OF COSTS**
- ☐ Compensation to Victims of Crime Account (Art. 42A.301(b)(17) Code Crim. Proc.) \$ [actual expense or misd. up to \$50, or felony up to \$100]
- ☐ Psychological Counseling Victim as Cond CS (Art. 42A.301(b)(19) Code Crim. Proc.) \$ [related to HIV only]
- ☐ Reimbursement of Law Enforcement Expenses as Cond CS (Art. 42A.301(b)(18) Code Crim. Proc.) \$ [CS analysis, blood alcohol/CS analysis]
- ☐ Reimbursement fee for Collecting and Processing Check or Similar Sight Order (Art.102.007 Code Crim. Proc.) \$

Fines and Payments for offense date before January 1, 2020

- ☐ DWI Traffic Fine (§ 709.001 Transp. Code) \$0 [*applicable on final conviction for offenses committed on or after September 1, 2019]
- ☐ State Traffic Fine (§ 542.4031, Transp. Code) \$30.00 [applicable to community supervision or conviction for Subtitle C "Rules of the Road" Transportation Code offenses, passing a school bus if enhanced to a felony, counterfeit airbag or misrepresentation of airbag installation, and failure of a motor vehicle operator to stop or remain at the scene of an accident involving death or injury]
- ☐ Defendant shall be responsible for all costs related to DNA testing required by Art. 102.020 Code Crim. Proc..

Furthermore, the following special findings or orders apply:

☒ **Deadly Weapon.**

The Court **FINDS** Defendant used or exhibited a deadly weapon, namely, a metal bar, during the commission of a felony offense or during immediate flight therefrom or was a party to the offense and knew that a deadly weapon would be used or exhibited. TEX. CODE CRIM. PROC. Art. 42A.054(b).

☒ **Family Violence:**

The Court **FINDS** that Defendant was prosecuted for an offense under Title 5 of the Penal Code that involved family violence. TEX. CODE CRIM. PROC. art. 42.013.

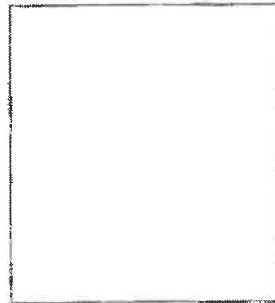
☐ The Court finds that the offense for which Defendant is convicted was committed in, on, or within 1,000 feet of premises of a school or a public or private youth center.

☐ **Special Drivers License for Sex Offender:**

The Court **ORDERS** Defendant to apply for an original or renewed Texas Driver's License or personal identification certificate not later than 30 days after release from confinement or upon receipt of written notice from the Texas Department of Public Safety (DPS). The Court further **ORDERS** Defendant to annually renew the license or certificate. The DPS shall place an indication on the Defendant's driver's license or personal identification certificate that the Defendant is subject to the sex offender registration requirements. The Court **ORDERS** the clerk of the Court to send a copy of this order to the DPS and to Defendant. TEX. CODE CRIM. PROC. art. 42.016.

Signed: 3-22-2022

X Rev. Judge by [signature]
JUDGE PRESIDING



Thumbprint

Exhibit B

**OPINION FROM THE SEVENTH COURT OF APPEALS
OF TEXAS**

665 S.W.3d 120
Court of Appeals of Texas, Amarillo.

Kenneth Ray HOLBERT, Sr., Appellant

v.

The STATE of Texas, Appellee

No. 07-22-00082-CR

|

February 2, 2023

|

Rehearing Denied March 6, 2023

|

Discretionary Review Refused May 03, 2023

Synopsis

Background: Defendant pled guilty in 251st District Court, Randall County, [Ana E. Estevez](#), J., to aggravated assault with a deadly weapon and was sentenced to 75 years in prison. Defendant appealed sentence, alleging ineffective assistance of counsel.

Holdings: The Court of Appeals, [Parker](#), J., held that:

defendant was not prejudiced by counsel's failure to move for continuance;

counsel's decision not to call defendant's mother as a punishment witness was not deficient;

even if decision not to call defendant's mother was deficient, defendant was not prejudiced; and

assessment of attorney's fees was erroneous.

Affirmed as modified.

***122 On Appeal from the 251st District Court, Randall County, Texas, Trial Court No. 29644C, Honorable [Ana Estevez](#), Presiding**

Attorneys and Law Firms

Justin Rippy, for Appellee.

[John Bennett](#), for Appellant.

Before [QUINN](#), C.J., and [PARKER](#) and [DOSS](#), JJ.

OPINION

[Judy C. Parker](#), Justice

Kenneth Ray Holbert, Sr., Appellant, was charged with aggravated assault with a deadly weapon resulting in serious bodily injury.¹ He pleaded guilty without an agreement on sentencing, pleaded true to two prior felonies, and went to the trial court on punishment. A visiting judge presided and imposed a seventy-five-year sentence. Appellant sought a new punishment hearing via motion for new trial but, after a hearing on the motion, the trial court declined to grant relief. In this appeal, Appellant brings four issues: 1) trial counsel was ineffective for not seeking a continuance to review discovery provided the day of trial and to avoid sentencing in front of a visiting judge who trial counsel believed could impose a harsh sentence; 2) trial counsel was ineffective for not seeking out and interviewing Appellant's mother as a prospective punishment witness; 3) the first two grounds of error, if not sufficient on their own to support a new punishment hearing, constitute cumulative error; and 4) the trial court erred in imposing court-appointed attorney fees of \$3,703.80. The State concedes the fourth issue and we grant relief as to that issue. We overrule issues one through three and affirm the sentence and judgment as modified.

Background

The State returned an indictment accusing Appellant of striking his girlfriend with a metal bar resulting in serious bodily injury. Because of his multiple prior felony convictions, he faced an enhanced punishment range of up to ninety-nine years.² Appellant turned down an eight-year plea bargain offer and opted to pursue a strategy wherein he would plead guilty to the trial court and request probation, despite the fact he had already been in prison for two other felony assault convictions—one where the victim was his mother, and the other where the victim was, also, a girlfriend. For those convictions, he received ***123** sentences of eight and ten years, respectively, although they ran concurrently. His probation request was buttressed, in his mind, by his

purported rehabilitation while in county jail awaiting a resolution of the case and his desire to turn his life around.

On the day of the guilty plea, a visiting judge presided and the State upped its previously-declined offer to twenty years. Appellant declined that offer as well. On that day, trial counsel was provided new discovery.³ Counsel did not seek a continuance to review the new discovery, nor did he seek a continuance to present his case to the sitting judge, even though he believed the visiting judge would probably impose a harsher sentence than the sitting judge.

The hearing commenced and Appellant testified on his own behalf. He largely acknowledged his past criminal behavior but indicated he had a troubled childhood. Appellant had been molested by both his uncle and a neighbor and had substance abuse issues from a young age. His sister had been sexually assaulted and his mother, who had worked as a prostitute, was routinely assaulted as well. He also mentioned a prior traumatic brain injury but indicated it only affected his memory. Appellant summarized his request for a ten-year deferred adjudication by essentially taking responsibility for all his prior behavior, indicating it was brought on by substance abuse, assuring the court that he was finished with methamphetamine, and stating that he had a “life plan” to turn his life around. The court disagreed, noting that Appellant was “a pretty violent individual,” and imposed a seventy-five-year sentence.

Appellant's appellate counsel filed a motion for new trial alleging ineffective assistance of counsel for the same reasons argued on appeal. In support of the motion were affidavits from trial counsel and Appellant's mother, Rose Chapman. Chapman's affidavit mentioned Appellant's brain injury, bipolar diagnosis, and substance abuse issues as possible explanations for his criminal behavior. She also indicated she had forgiven him for assaulting her and that she was handicapped and needed Appellant at home to provide her care. But, and adverse to Appellant's sentencing strategy, she stated that the victim in the present case was “a liar” and the case was “based on a lie” and “a setup.” Chapman concluded her affidavit by stating that she “would have [testified] to this if [she] had been called as a witness.”

The sitting judge, who was absent for the sentencing hearing, granted a hearing on the motion for new trial and presided over the hearing. At that hearing, trial counsel and Appellant's mother, among others, testified.⁴ Rejecting the ineffective assistance of counsel claim, the sitting judge denied relief on

the motion for new trial and declined to grant Appellant a new punishment hearing. The order simply denied relief; no reasoning for the trial court's ruling appears from the record and no findings of fact or conclusions of law were requested or provided.

*124 Relevant Law

To succeed on a claim of ineffective assistance, the defendant has the burden to prove that counsel's performance was both deficient and prejudicial to the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). The deficiency prong requires a showing that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. If there is a potentially reasonable strategy behind counsel's decisions, counsel's performance cannot be deficient. See *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005) (“[W]e commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it.”). To establish prejudice from punishment-stage errors, we must find “a reasonable probability that, but for counsel's errors, the sentencing jury would have reached a more favorable verdict.” *Pham v. State*, 639 S.W.3d 708, 713 (Tex. Crim. App. 2022) (citing *Ex parte Rogers*, 369 S.W.3d 858, 863 (Tex. Crim. App. 2012)). The Court of Criminal Appeals has distilled the prejudice inquiry into a question of fairness and reliability:

The ultimate focus of the *Strickland* prejudice standard is the fundamental fairness of the proceeding whose result is being challenged. This requires the reviewing court to examine the totality of the evidence before the judge or jury and ask whether the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018) (internal citations and quotations omitted). A failure to make a showing under either *Strickland* prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). Both prongs need not be examined on review if one cannot be met. *Turner v. State*, 528 S.W.3d 569, 577 (Tex. App.—Texarkana 2016, no pet.) (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052).

Given that Appellant raised his ineffective assistance claim in a motion for new trial, and evidence was heard at the hearing, we analyze the issue on appeal as a challenge to the trial court's denial of his new trial motion and review it under an abuse of discretion standard. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004); *Rodriguez v. State*, 553 S.W.3d 733, 748–49 (Tex. App.—Amarillo 2018, no pet.). Thus, we reverse only if the trial court's decision to deny the motion for new trial was arbitrary or unreasonable viewing the evidence in the light most favorable to the trial court's ruling. *Id.* at 749.

A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. *Charles*, 146 S.W.3d at 208. Further, when as here, the trial court makes no findings of fact regarding the denial of the motion for new trial, we ascribe to the court “implicit factual findings that support that trial judge's ultimate ruling on that motion when such implicit factual findings are both reasonable and supported in the record.” *Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005) (quoting *Charles*, 146 S.W.3d at 213).

Application

Ineffective Assistance of Counsel

Addressing issue one, we first assess the prejudice prong of *Strickland*. *125 In sum, Appellant argues he received ineffective assistance because counsel failed to exploit the new discovery by requesting a continuance, in the hope that the continuance would be long enough to avoid having his plea hearing before the visiting judge. Even assuming the sitting judge would have been more lenient, we find this argument lacking. First, while a continuance would almost certainly have been granted, if requested, we have no assurance that the continuance would have been any longer than it took to review a few photographs. There is nothing in the record to suggest that *if* counsel had requested a continuance, it probably *would have* resulted in the sentencing hearing occurring before the sitting judge. In other words, Appellant has not proven that but for counsel's actions, the outcome would have been different. See *Pham v. State*, 639 S.W.3d at 713. Second, even assuming that a continuance would have landed Appellant back in front of the sitting judge and trial counsel had time to review the photographs, we do not find a reasonable probability that the ultimate outcome—the sentence—would have been different based on the sitting judge's decision after the new trial hearing and the

facts surrounding Appellant's prior criminal history and his pending case. A defendant is not entitled to the judge of his choice. See *Sanchez v. State*, 124 S.W.3d 767, 769 (Tex. App.—Houston [1st Dist.] 2003, no pet.); see also *Sheffer v. State*, No. 02-09-00133-CR, 2009 WL 3943419, at *3, 2009 Tex. App. LEXIS 8992, at *9 (Tex. App.—Fort Worth Nov. 19, 2009, pet. ref'd) (mem. op., not designated for publication) (visiting judge did not abuse his discretion by refusing to allow appellant to withdraw his guilty plea when appellant was not entitled to judge of his choice and had pointed to no specific reason why elected judge would have decided his punishment differently than visiting judge).

Lost in Appellant's argument is that the sitting judge, the judge he believes would have been more lenient had his counsel acted differently, heard the evidence at the motion for new trial hearing. The sitting judge declined to find ineffective assistance of counsel and grant Appellant a new sentencing hearing. She failed to find either deficient performance or prejudice. This supports the notion that if she had been the sentencing judge, the result would have been the same. Also, Appellant has not explained how the outcome would be different if counsel had time to review the photographs. He has not argued the photographs could have been suppressed, excluded, mitigated, or otherwise attacked on cross-examination. Further, trial counsel acknowledged he was aware of the incident itself, although not the photographs. Appellant's trial strategy was to accept responsibility for his prior actions, not disavow or minimize the injuries to his mother. He has not carried his burden to show how he suffered prejudice from trial counsel's failure to move for a continuance as it relates to the photographs or as to the ultimate outcome of sentencing. See *Richardson v. State*, 606 S.W.3d 375, 384 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (counsel was allowed time to review relevant documents before plea hearing; no prejudice shown by counsel's failure to file continuance); see also *Sheffer*, 2009 WL 3943419, at *3, 2009 Tex. App. LEXIS 8992, at *9. We therefore hold that the trial court did not abuse its discretion in denying Appellant's motion for new trial and we overrule issue one.

In his second issue, Appellant argues that his trial counsel was ineffective for failing to seek out and interview Appellant's mother as a prospective punishment witness. The decision to not place a prior victim on the stand so as to avoid damaging testimony can reasonably be construed *126 as trial strategy. See *Burke v. State*, No. 13-13-00520-CR, 2015 WL 1869417, at *3, 2015 Tex. App. LEXIS 4044, at *8-9 (Tex. App.—Corpus Christi Apr. 23, 2015, no pet.) (mem. op.,

not designated for publication) (trial counsel's decision to not call family members to avoid opening the door to damaging testimony constituted reasonable trial strategy).⁵ The obvious danger of a prior felony assault victim's testimony at a punishment hearing is clear: live testimony has the ability to emotionally impact a factfinder. Trial counsel's strategy does not need to be proven correct in hindsight; it just cannot be of the type that falls below an objective standard of reasonableness. The decision to not present a prior victim's testimony at a sentencing hearing for similar conduct does not fall into this category. See *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052.

Even if counsel was deficient for making this decision without first contacting Chapman, her proposed testimony, as set forth in her affidavit, would not have established that the underlying proceedings were unreliable. Her testimony contained several mitigating points but was also squarely at odds with Appellant's trial strategy by directly challenging the victim's credibility and whether the offense for which Appellant pleaded guilty even occurred at all. This would certainly call into question Chapman's credibility, which could directly affect the mitigating impact of her testimony at sentencing. Her testimony, undoubtedly, would have been a double-edged sword. When viewed in the broader context of Appellant's violent criminal history and the facts of the instant offense, we are not convinced that Chapman's testimony would have resulted in a lesser sentence. First, because as previously noted, the trial court heard her testimony at the hearing on the motion for new trial and did not grant relief. Secondly, because as the visiting judge noted, Appellant has a violent history of assault. He was convicted and sent to prison for felony assault on a girlfriend and his own mother. In this case, Appellant pleaded guilty to aggravated assault with a deadly weapon. He admitted to striking his girlfriend in the neck with a metal bar because he could not find his car keys. The girlfriend testified and the State introduced photographs depicting the injury suffered by Appellant's girlfriend in the assault. The possible sentencing range for Appellant's third felony conviction was up to ninety-nine years. Chapman's anticipated testimony, which would have included disparaging views of the victim and her own belief that Appellant was “set up,” would not, in our view, reasonably lead to a more favorable sentencing verdict. See *Bazan v. State*, 403 S.W.3d 8, 15 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (“A different

punishment assessment must not be just conceivable; its likelihood must be substantial.”). The record does not “demonstrate *Strickland* prejudice beyond mere conjecture and speculation.” See *Lampkin v. State*, 470 S.W.3d 876, 919 (Tex. App.—Texarkana 2015, pet. ref'd). Finding the trial court did not abuse its discretion in denying the motion for new trial, we overrule issue two.

Cumulative Error

Because Appellant has not carried his burden as to issues one and two, his argument for cumulative error must also be overruled. If an appellant's individual *127 claims of error lack merit, then there is no possibility of cumulative error. *Rodriguez*, 553 S.W.3d at 752 (citing *Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009)). We overrule issue three.

Attorney's Fees

Finally, we address attorney's fees. Appellant was initially found indigent and counsel was appointed. After trial, and without any other factual inquiry into Appellant's financial status, the court assessed court-appointed attorney's fees of \$3,703.80. As previously noted, the State concedes this was error. We agree with the parties. The record establishes that Appellant was indigent, and the trial court made no determination that he had the financial resources to pay, or was otherwise able to pay, the appointed attorney's fees. Thus, the assessment of fees was erroneous and should be removed. *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013); *Mayer v. State*, 309 S.W.3d 552, 554–56 (Tex. Crim. App. 2010). Therefore, we reform the trial court's judgment to delete the order for payment of court-appointed attorney's fees. See *Cates*, 402 S.W.3d at 252.

Conclusion

Issues one, two, and three are overruled. Issue four is sustained and the judgment is modified to delete the imposition of court-appointed attorney's fees. As modified, the judgment and sentence of the trial court are affirmed.

All Citations

665 S.W.3d 120

Footnotes

- 1 See [Tex. Penal Code Ann. § 22.02\(a\)\(1\)–\(2\)](#).
- 2 See [Tex. Penal Code Ann. § 12.42\(b\)](#).
- 3 While not entirely clear from the record, this new discovery appears to have been photographs of Appellant's mother taken after she was assaulted by Appellant. Trial counsel was aware of the prior extraneous conduct but not aware of the photographs. Trial counsel described the photographs at the motion for new trial hearing as “worse” than he imagined. Appellant does not argue these photographs were exculpatory or mitigating. The photographs were displayed to a witness during the plea hearing, but not formally introduced into evidence.
- 4 The affidavits from trial counsel and from Appellant's mother were not introduced at the hearing, but both witnesses were questioned about matters discussed in their affidavits.
- 5 Trial counsel testified at the hearing on the motion for new trial that Appellant was unable to recall his mother's telephone number. Knowing this, and knowing that Appellant's mother was the victim of a gruesome assault by Appellant, caused counsel to question the propriety of calling her as a witness.

End of Document

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Exhibit C

**LETTER FROM THE SEVENTH COURT OF APPEALS
OF TEXAS DENYING REHEARING**



BRIAN QUINN
Chief Justice

JUDY C. PARKER
Justice

LAWRENCE M. DOSS
Justice

ALEX YARBROUGH
Justice

Court of Appeals

Seventh District of Texas
Potter County Courts Building
501 S. Fillmore, Suite 2-A
Amarillo, Texas 79101-2449
www.txcourts.gov/7thcoa.aspx

BOBBY RAMIREZ
Clerk

MAILING ADDRESS:
P. O. Box 9540
79105-9540

(806) 342-2650

March 6, 2023

John Bennett
Attorney at Law
2607 Wolflin Avenue #106
Amarillo, TX 79107
* DELIVERED VIA E-MAIL *

Justin Rippey
Assistant Criminal District Attorney
2309 Russell Long Boulevard, Suite 120
Canyon, TX 79015
* DELIVERED VIA E-MAIL *

RE: Case Number: 07-22-00082-CR
Trial Court Case Number: 29644C

Style: Kenneth Ray Holbert, Sr. v. The State of Texas

Dear Counsel:

By Order of the Court, Appellant's motion for rehearing is this day denied.

Very truly yours,

Bobby Ramirez

Bobby Ramirez, Clerk

cc: Honorable Ana Estevez (DELIVERED VIA E-MAIL)
Honorable Abe Lopez (DELIVERED VIA E-MAIL)
Joel Forbis (DELIVERED VIA E-MAIL)

Exhibit D

**POSTCARD FROM THE COURT OF CRIMINAL
APPEALS OF TEXAS DENYING
DISCRETIONARY REVIEW**

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

5/3/2023

HOLBERT, KENNETH RAY, SR. Tr. Ct. No. 29644C

COA No. 07-22-00082-CR

PD-0201-23

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

JOHN BENNETT

ATTORNEY AT LAW

2607 WOLFLIN AVENUE #106

AMARILLO, TX 79109

* DELIVERED VIA E-MAIL *