No. _____

IN THE

SUPREME COURT

OF THE UNITED STATES OF AMERICA

****

RONALD LEE HOWARD

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

****

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

****

John Bennett
900 S. Polk Street, Suite 206
Amarillo, Texas 79101
Telephone: (806) 282-4455
Fax: (806) 398-1988
AppealsAttorney@gmail.com
Texas State Bar No. 00785691
Attorney for the Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Is procedural due process violated regarding the constitutional requirement of a *meaningful* or *effective* appeal *of right* under *Evitts*, *Griffin* and *Douglas*, where the reviewing court does not address and rule on its merits each dispositive issue raised?

2. Does a State's failure to follow its own appellate rules, as under Issue 1, entail a due process violation cognizable on *direct appeal* where the federal ruling sought will not necessarily imply the invalidity of a conviction, sentence, or length or conditions of confinement?

LIST OF PARTIES TO THE PROCEEDING

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

CORPORATE DISCLOSURE STATEMENT

No corporations are involved in this case.

PROCEEDINGS IN STATE AND FEDERAL COURT

The 222nd State District Court of Deaf Smith County, Texas, entered a judgment of conviction against your petitioner in *State v. Howard*, docket number CR-2020I-108, entered March 31, 2022. Please see appendix to this Petition, Exhibit iv(d).

The Seventh Court of Appeals of Texas affirmed the convictions in cause number 07-22-00323-CR, styled *Howard v. State*, 665 S.W.3d 120 (Tex.App. – Amarillo 2023, pet. ref'd), on October 24, 2023. Appendix, Exhibit i. This is the judgment sought to be reviewed. A motion for rehearing noting the omission from the court of appeals' opinion was denied without opinion on November 27. Appendix, Exhibit iii(c).

The Texas Court of Criminal Appeals subsequently denied discretionary review in cause number PD-856-23, styled *Howard v. State* (unreported) with one judge dissenting, on February 14, 2024. Appendix, Exhibit ii. This petition ensued.

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containing:

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State appellate rule

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CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

Howard v. State, Judgment & Sentence from the 222nd District Court of Deaf Smith County, Texas (unreported) ..... Appendix, Exhibit iv(c)

Howard v. State, 2023 Tex.App.LEXIS 8057, 2023 WL 7006282 (Tex.App. – Amarillo, Oct. 24, 2023,pet. ref'd) (unpublished)..... Appendix, Exhibit i

Howard v. State, unreported refusal of discretionary review in cause number PD-0856-23, on February 14, 2024 ..... Appendix, Exhibit ii

JURISDICTION

1. On October 24, 2023, the Seventh Court of Appeals of Texas affirmed the conviction and sentence (Appendix, Exhibit i) without addressing your petitioner's first and most crucial state-law issue:

> The statute regarding aggravated sexual assault of a disabled person has no explicit scienter requirement regarding the disability. Yet case law concludes that this is a nature-of-conduct offense – one in which the culpable mental state applies to each of the offense's essential elements. Does a guilty verdict require proof that the defendant knew of the complainant's disability?

The Seventh Court of Appeals' opinion is the judgment sought to be reviewed here. On November 2, 2023, your petitioner filed a motion for rehearing noting the omission, (Exhibit iv), which was denied without opinion on November 11, 2023 (Exhibit ii).

3. On December 6, 2023, your petitioner filed a petition for discretionary review to the Texas Court of Criminal Appeals (Appendix, Exhibit iv) and a supplement a week later (Exhibit iv(c), but on February 14, 2024, the petition was refused (Exhibit ii).

4. No motion for extension of time was necessary for 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 2023). Jurisdiction for Question 1 is conferred by the Texas courts' affirmance despite the asserted due process violation under the Fourteenth Amendment to the United States Constitution. Jurisdiction for Question 2 is conferred by *Skinner v. Switzer*, 562 U.S. 521, 532, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2010) ("a state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action"), the cases cited there, and the progeny of *Skinner*.

THE CONSTITUTIONAL PROVISION INVOLVED

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend XIV, § 1 (West 2023).

STATEMENT OF THE CASE

Your petitioner was convicted of two counts of aggravated sexual assault of a disabled person. The first federal question raised herein is whether the Due Process Clause was violated by the Seventh Court of Appeals' refusal to rule on the main dispositive issue your petitioner raised despite its inclusion in an appeal *of right*, even when the omission was pointed out in the motion for rehearing there. Please see Appendix, Exhibits i, iii & iv(a). The issue was then raised as Ground for Review 4 in your petitioner's petition for discretionary review to the Texas Court of Criminal Appeals. Please see Appendix, Exhibit iv(b). But the Court of Criminal Appeals refused discretionary review, although one judge voted to grant it. Please see Appendix, Exhibit ii. The second federal question raised here is whether the principles of *Skinner v. Switzer*, 562 U.S. 521, 532, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2010) (that a state's violation of its own law, after being raised in an action under 42 U.S.C. §1983, can be a violation procedural due process violation) also apply when raised on direct criminal appeal where the federal ruling sought would not necessarily invalidate a conviction, sentence, or length or conditions of imprisonment.

REASONS FOR ALLOWANCE OF THE WRIT

Question 1

A state court has decided "an important federal question in a way that has not been, but should be, settled by this Court." The decision also directly conflicts with one issued by a United States district court and arguably with "relevant decisions of this Court." Sup.Ct.R. 10(c).

States need not provide appeals of right to criminal defendants. *McKane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894). But where a State *does* permit appeals "of right," then "the procedures used in deciding appeals must comport with the demands of the Due Process" Clause. *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), citing *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 100 L.Ed. 891 (1955). *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 813, 91 L.Ed.2d 811 (1963) holds infirm situations in which an "indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal," *id.* at 358, and *Evitts* strongly implies an appeal of right is to be an "'adequate and *effective*' appeal," 469 U.S. at 893 (emphasis added). And most crucially:

> issues of due process are implicated when a defendant is denied an adequate opportunity to pursue his appeal, fails to receive *an adjudication on the merits*, or is treated differently in such a way as to stifle the pursuit of a *meaningful* appeal.

Acosta v. Giambruno, 326 F.Supp.2d 513, 524 (S.D.N.Y. 2004). Your petitioner asserts he was not afforded a true appeal *of right*, because the state court of appeals charged with hearing his appeal refused even to contemplate the first and most critically dispositive issue he raised.

The Court has previously recognized this due process right would be meaningless if indigent defendants can be denied trial transcripts, *Griffin*, 358 U.S. at 13-14, or if they are not afforded constitutionally effective counsel, *Evitts*, 469 U.S. at 393. Due process is similarly denied if a court of appeals, in affirming a conviction or sentence on an appeal *of right*, may do so without addressing each dispositive claim raised, *i.e.*, an adjudication "on the merits" under *Acosta*, 326 F.3d at 524.

Accordingly, the due process guarantee enacted by *Griffin* and *Evitts* should logically be extended to require a decision on the appeal's merits, as *Acosta* has interpreted *Evitts*. The alternative is permitting an appeal of right to be, in the words of *Douglas*, a "meaningless ritual." 372 U.S. at 358.

Question 2

A state court has also decided "an important federal question in a way that has not been, but should be, settled by this Court," in a way that arguably conflicts with this Court's rulings. Sup.Ct.R. 10(c).

At least regarding an action under 42 U.S.C. § 1983, in rare cases a procedural due process claim may be successful due to a State's failure to follow its own laws, particularly where the federal ruling the litigant seeks regarding the *propriety* of a § 1983 action would not by itself impugn any part of the state-court judgment in question;

> If a federal plaintiff "present[s] [an] independent claim," it is not an impediment to the exercise of federal jurisdiction that the "same or a related question" was earlier aired between the parties in state court.
>
> …Skinner does not challenge the adverse CCA decisions themselves; instead, he targets as unconstitutional the Texas statute they authoritatively construed … a state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action. Skinner's federal case falls within the latter category.
>
> …They could proceed under § 1983, the Court held, for they sought no "injunction ordering . . . immediate or speedier release into the community," and "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s],' "

Skinner, 562 U.S. at 532-4 (brackets in original) (int. citations omitted). This principle should apply on direct appeal of criminal cases, as well as

in § 1983 actions. An appeal of right is, after all, more crucial than collateral civil litigation to a defendant convicted in state court – such an appeal may be the sole chance to claim errors of state law and procedure, in addition to raising any constitutional errors.

Your petitioner's petition for discretionary review – please see Appendix, Exhibit iv(b) – was timely filed but ultimately refused by the Texas Court of Criminal Appeals. Your petitioner there and in a timely supplement, Appendix, Exhibit iv(c), raised the precise substance of his Question 1 not only as deprivation of due process but also as the failure to follow the applicable state rule to your petitioner's detriment:

> **Written Opinions**
>
> The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal

Texas Rules of Appellate Procedure 47.1. The federal ruling your petitioner seeks here – mere remand to the Seventh Court of Appeals of Texas so the first dispositive state-law issue raised there can be decided on its merits to fulfill Rule 47.1 – would scarcely impugn the invalidity of your petitioner's conviction, sentence, or length or conditions of confinement, and thus permissible under *Skinner*, 562 U.S. at 534.

PRAYER

Your petitioner Ronald Lee Howard therefore prays, on this the eighth day of May, 2024, that the Court grant certiorari and, on hearing the case, reverse and remand the cause to Texas' Seventh Court of Appeals to address the ignored issue, 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 for the Petitioner

WORD COUNT

The undersigned hereby certifies that this entire Petition contains 2,391 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 Chris Strowd, Esq., Deaf Smith County Assistant District Attorney, and on the Post-Conviction Division of the Office of the Texas Attorney General, both on May 8, 2024.

/s/ *John Bennett*
John Bennett

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00323-CR

RONALD LEE HOWARD, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 222nd District Court
Deaf Smith County, Texas
Trial Court No. CR-2020I-108, Honorable Roland D. Saul, Presiding

October 24, 2023

MEMORANDUM OPINION

Before PARKER and DOSS and YARBROUGH, JJ.

Following a plea of not guilty, Appellant, Ronald Lee Howard, was convicted by a jury of aggravated sexual assault.[1] The jury assessed punishment at life imprisonment. By six issues, Appellant contends: (1) the evidence was legally insufficient because it did not demonstrate *scienter* of the aggravating factor; (2) the jury charge failed to include an instruction on *scienter* of the aggravating factor; (3) because the statute is ambiguous, a

[1] TEX. PENAL CODE ANN. § 22.021.

Exhibit i

scienter requirement should be extended to the aggravating factor; (4) in the alternative, the jury charge required an instruction on *scienter* because the statute is ambiguous and canons of construction and interpretation demonstrate a *scienter* requirement; (5) the jury charge erroneously included culpable mental state instructions for "result of conduct" rather than "nature of conduct"; and (6) because Appellant's trial counsel failed to object to the jury charge error, he suffered from ineffective assistance of counsel. We affirm.

BACKGROUND

Appellant, a local farmer and former truck driver, and the complainant, an intellectually disabled nineteen-year-old, have known each other since the complainant was a toddler. They became familiar with each other through Appellant's stepdaughter, who was in special education classes with the complainant. After not seeing each other for many years, they met in a chance encounter at a Walmart. Appellant extended an invitation to the complainant and her nine-year-old sister to visit his farm and spend the night which they accepted. In the middle of the night, Appellant engaged in sex with the complainant. During interviews with investigators, Appellant claimed the encounter was consensual. The complainant maintained it was nonconsensual. Appellant was charged with two counts of aggravated sexual assault of a disabled person based upon the complainant's statements he performed both vaginal and oral sex with her.

At trial, the jury heard testimony from several people who knew the complainant and her diminished mental capacity establishing she was a "disabled individual." The jury also heard from the complainant and her sister regarding the events of the evening in Appellant's home. Complainant maintained at trial she did not consent to the sexual

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contact. Appellant testified in his defense and stated the encounter was consensual. At the end of trial, the jury found Appellant guilty of two counts of aggravated sexual assault and sentenced him to 99 years in prison for each count. This appeal followed.

APPLICABLE LAW

A person commits the offense of aggravated sexual assault under the following conditions:

> AGGRAVATED SEXUAL ASSAULT. (a) A person commits an offense:
>
> (1) if the person:
>
> (A) intentionally or knowingly:
>
> (i) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent; [or]
>
> (ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; []
>
> ***
>
> (B) . . . ; and
>
> (2) if:
>
> ***
>
> (C) the victim is an elderly individual or a disabled individual.

§ 22.021(a)(1)(A),(2)(C).

"Disabled individual" means a person older than 13 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the

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person's self from harm or to provide food, shelter, or medical care for the person's self. § 22.021(b)(3).

An aggravated sexual assault is without consent if:

> (1) the actor compels the other person to submit or participate by the use of physical force, violence, or coercion;
>
> (2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person or to cause harm to the other person, and the other person believes that the actor has the present ability to execute the threat; [or]
>
> ***
>
> (4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it[.]

§§ 22.021(c); 22.011(b)(1),(2),(4).

STANDARD OF REVIEW

The only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011); *see also Alfaro-Jimenez v. State*, 577 S.W.3d 240, 243–44 (Tex. Crim. App. 2019). We consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014) (citing *Jackson*, 443 U.S. at 318–19). A reviewing court's duty, however, does

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require it to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). If the evidence establishes precisely what the State has alleged, but the acts the State has alleged do not constitute a criminal offense under the totality of the circumstances, then that evidence, as a matter of law, cannot support a conviction. *Id.*

"In some cases, however, legal sufficiency turns upon the meaning of the statute under which the defendant is being prosecuted. We ask if certain conduct actually constitutes an offense under the statute. When we interpret statutes, we look to the literal text of the statute in question and attempt to discern the fair, objective meaning of the text at the time of its enactment. If the plain language is clear and unambiguous, our analysis ends because the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute. Statutory interpretation is a question of law that we review de novo." *Day v. State*, 614 S.W.3d 121, 127 (Tex. Crim. App. 2020) (citations and internal quotations omitted).

ANALYSIS

ISSUE ONE—SCIENTER OF THE AGGRAVATING ELEMENT

Appellant argues in his first issue there is insufficient evidence supporting his conviction for aggravated sexual assault beyond a reasonable doubt. Particularly, he argues, under the statute, the aggravating element of the offense in this case— "victim is [a] disabled individual" —requires proof of *scienter*, i.e., the knowledge the complainant was a disabled person at the time of the offense. *See* § 22.021(a)(2)(C). Because the

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State failed to introduce such evidence, he urges, aggravated sexual assault was not proved beyond a reasonable doubt, and the judgment should be reformed to the lesser included offense of sexual assault.

Appellant does not contest sufficiency of the evidence demonstrating the complainant was a "disabled individual" as defined by statute at the time of the offense, nor does he contest sufficiency of the evidence demonstrating lack of consent. Indeed, he concedes "the complainant and her sister both testified that the sexual act was nonconsensual, which the jury evidently believed, rendering the alternative means of showing lack of consent moot." He also concedes the elements of non-aggravated sexual assault were met. Thus, the only issue before us is one of statutory interpretation: whether the Legislature intended *scienter* as a requirement for the aggravating elements of the offense of aggravated sexual assault.

When interpreting statutes, we look first to the statute's literal text, and "we read words and phrases in context and construe them according to the rules of grammar and usage." *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (citations omitted, quotations original). We must "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Id.* (quotations original). Only if the statutory language is ambiguous or leads to absurd results that the Texas Legislature could not have possibly intended may we consult extra-textual sources. *Id.* Using these principles, we are tasked with analyzing the following language from the statute applicable to this matter:

> [] A person commits an offense (1) if the person[] intentionally or knowingly: (i) causes the penetration of the anus or sexual organ of

Exhibit i

> another person by any means, without that person's consent; [or] causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent;[] **and** (2) if[] the victim is an elderly individual or a disabled individual.

§ 22.021(a)(1)(A), (a)(2)(C) (emphasis added).

Our plain reading of the statute finds two separate clauses: (1) the act of nonconsensual penetration, which must be done intentionally or knowingly; and (2) the aggravating factors based on the harm caused to the victim or the status of the victim as a child, elderly person, or, relevant here, a disabled person. It is clear the "intentionally or knowingly" requirement applies only to section 22.021(a)(1) of the statute concerning the act of "penetration," and is separated from the second part, section 22.021(a)(2), concerning the aggravating factor of the status of the victim. The use of the word "and" after section 22.021(a)(1) also signals the beginning of a new clause under section 22.021(a)(2), in which there is no *mens rea* requirement. "[T]his prescription of a mental state as to one element and not as to others sufficiently demonstrates the Legislature's intent to dispense with a mental state as to those other elements." *Rodriguez v. State*, 538 S.W.3d 623, 628 (Tex. Crim. App. 2018) (quoting *White v. State*, 509 S.W.3d 307, 313 (Tex. Crim. App. 2017)). Because they specifically placed the "intentionally and knowingly" language within section 22.021(a)(1) and neglected to do so in 22.021(a)(2), we conclude the Legislature did not intend for the aggravating factors of the offense to require proof of *scienter*.[2]

[2] Moreover, even if Appellant did not intend to specifically sexually assault a disabled person, he would still be criminally responsible for the act because "the only difference between what actually occurred and what he desired, contemplated, or risked is that [] a different offense was committed[.]" § 6.04(b)(1).

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Appellant would have us read into the statute a *scienter* requirement based on the legislative history of the statute and our own decisions which, up to now, have not expressly excluded a *scienter* requirement for the aggravating factors of the offense. We decline to do so. Appellant's first issue is overruled.

ISSUES TWO, THREE, AND FOUR—SCIENTER INSTRUCTION IN THE JURY CHARGE

Because we find the statutory language of section 22.021 to be unambiguous and because we do not find the statute requires proof of *scienter* with regard to the aggravating factor of "the victim is [a] disabled individual," it was also not necessary for the trial court to include an instruction regarding *scienter*. *Supra*. Accordingly, Appellant's second, third, and fourth issues are overruled.

ISSUE FIVE—JURY CHARGE ERROR

For his fifth issue, Appellant asserts the jury charge during guilt/innocence was erroneous and caused him egregious harm by requiring the jury to consider the effects of the offenses on the complainant rather than the nature of the accusations. The State concedes the charge was erroneous. While we agree the charge is erroneous, we disagree Appellant suffered egregious harm.

Appellate review of claimed jury-charge error involves a two-step process. *See Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); s*ee also Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). A reviewing court must initially determine whether charge error occurred. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). If an appellate court finds charge error, the next step requires the reviewing court

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to analyze that error for harm. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

Charge error requires reversal when a proper objection has been made and a reviewing court finds "some" harm, i.e., error that is calculated to injure the rights of the defendant. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009), *overruled on other grounds by Sandoval v. State*, 665 S.W.3d 496, 537 (Tex. Crim. App. 2022). Where the alleged error is not preserved by objection, an appellant can prevail only if the error caused egregious harm. *Fraser v. State*, 593 S.W.3d 883, 888 (Tex. App.—Amarillo 2019, pet. ref'd). Jury charge error is egregious if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Arteaga v. State*, 521 S.W.3d 329, 338 (Tex. Crim. App. 2017), *superseded in part by* TEX. PENAL CODE ANN. § 22.011(f). The harm must be actual and not theoretical. *Taylor v. State*, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011). Egregious harm is a "high and difficult standard which must be borne out by the trial record." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). Error in the abstract instruction is not egregious where the application paragraph correctly instructs the jury. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999).

The Texas Court of Criminal Appeals has identified aggravated sexual assault is as a "nature-of-conduct" offense. *Metcalf v. State*, 597 S.W.3d 847, 857–58 (Tex. Crim. App. 2020). It criminalizes very specific conduct of several different types. *Vick v. State*, 991 S.W.2d 830, 832 (Tex. Crim. App. 1999). "When 'specific acts are criminalized because of their very nature, [the] culpable mental state must apply to committing the act itself.'" *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015) (quoting *McQueen v.*

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State, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)). "A trial court errs when it fails to limit the language in regard to the applicable culpable mental states to the appropriate conduct element." *Price*, 457 S.W.3d at 441 (citing *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994)).

The State admits the jury charge erroneously gave the "result of conduct" definitions of the "intentionally" and "knowingly" culpable mental states, which dispenses with step one in a charge-error analysis. In the second step of the analysis, we must review the record for egregious harm revealed by the record of the trial as a whole. *See Fraser*, 593 S.W.3d at 888. Also, there is no burden of proof or persuasion in a harm analysis conducted under *Almanza*. *See id.* at 889.

Although the abstract portion of the jury charge defining the culpable mental states was erroneous, the application paragraphs correctly stated the law. The application paragraphs required the jury to convict only upon finding beyond a reasonable doubt Appellant "did then and there intentionally or knowingly cause the penetration of the sexual organ of [the complainant], a person who was then and there a disabled individual, by defendant's sexual organ, without the consent of the complainant[.]"[3] It is clear from the application paragraph the jury was not authorized to convict Appellant without finding beyond a reasonable doubt he "intentionally or knowingly" committed the offense with respect to the "nature of conduct" as oppose to the result of conduct. Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not

[3] The second application paragraph was identical to the first, replacing the words "penetration of the sexual organ" with "penetration of the mouth" to encompass both counts of aggravated sexual assault contained in the indictment.

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egregious. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999); *see also Bolen v. State*, 478 S.W.3d 865, 868–69 (Tex. App.—Amarillo 2015, pet. ref'd). Appellant's fifth issue is overruled.

ISSUE SIX—INEFFECTIVE ASSISTANCE OF COUNSEL

In his final issue, Appellant asserts his counsel's failure to object to the "result of conduct" definitions of "intentionally" and "knowingly" in the jury charge constitutes ineffective assistance of counsel. He asserts, but for the failure to object, he would have had a different outcome and had the benefit of a lower bar of showing "some" harm from the erroneous jury charge as opposed to the higher bar of "egregious harm." He maintains defense counsel's performance was deficient as a matter of law. We disagree.

The right to reasonably effective assistance of counsel in a criminal prosecution is guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 10 of the Texas Constitution. U.S. CONST. amend VI; TEX. CONST. art. 1, § 10. To establish a claim based on ineffective assistance, an appellant must show (1) his counsel's representation fell below the objective standard of reasonableness and (2) there is a reasonable probability that but for counsel's deficiency the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, an appellant must show his trial counsel's performance was deficient and he was prejudiced by the deficiency. *State v. Gutierrez*, 541 S.W.3d 91, 98 (Tex. Crim. App. 2017).

A claim of ineffective assistance of counsel must be firmly demonstrated in the record. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) (citing *Thompson*

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v. State, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999)). "It is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). We must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

Without deciding whether his counsel's conduct fell below the objective standard of reasonableness, we cannot say there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. Ultimately, the case was decided on the credibility of the complainant and Appellant. Appellant's defense, that the sex acts were consented to by the complainant, did not place his mental culpability at issue. He admitted to having sexual contact with the complainant, and the jury only had to determine whether the complainant consented to the act. Thus, even if the jury had been properly instructed, it still could have believed the complainant over Appellant and returned a guilty verdict. *See also* TEX. CODE CRIM. PROC. ANN. art. 38.07 (uncorroborated testimony of victim is sufficient to uphold conviction for sexual assault). Under these circumstances, the erroneous instruction on mental culpability could not have affected the outcome of the trial and did not prejudice Appellant. *See Saldivar v. State*, 783 S.W.2d 265, 268 (Tex. App.—Corpus Christi 1989, no pet.) (noting where no defense is presented directly affecting an assessment of mental culpability, there is no harm in submitting erroneous definitions of intentionally and knowingly).

We conclude Appellant failed to satisfy the second prong of *Strickland*. *Compare with Smith v. State*, No. 07-18-00304-CR, 2019 Tex. App. LEXIS 1349, at *4 (Tex. App.—

Exhibit i

Amarillo Feb. 22, 2019, no pet.) (mem. op., not designated for publication). We overrule Appellant's sixth issue.

CONCLUSION

The judgment is affirmed.

Alex Yarbrough
Justice

Do not publish.

Exhibit i

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Exhibit ii

2/14/2024 **COA Case No. 07-22-00323-CR**
HOWARD, RONALD LEE Tr. Ct. No. CR-2020I-108 **PD-0856-23**

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

Deana Williamson, Clerk

JOHN BENNETT
ATTORNEY AT LAW
2607 WOLFLIN AVENUE #106
AMARILLO, TX 79109
* DELIVERED VIA E-MAIL *

FILE COPY

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

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

(806) 342-2650

November 27, 2023

John Bennett
Panhandle Area Public Defender
900 Polk Street, #206
Amarillo, TX 79101
* DELIVERED VIA E-MAIL *

Chris Strowd
Criminal District Attorney
235 East 3rd Street, Room 401
Hereford, TX 79045
* DELIVERED VIA E-MAIL *

RE: Case Number: 07-22-00323-CR
Trial Court Case Number: CR-2020I-108

Style: Ronald Lee Howard v. The State of Texas

Dear Counsel:

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

Sincerely,

Bobby Ramirez

Bobby Ramirez, Clerk

cc: Honorable Roland D. Saul (DELIVERED VIA E-MAIL)
Elaine Gerber (DELIVERED VIA E-MAIL)

Exhibit iii

NO. 07-22-00323-CR

RONALD LEE HOWARD	§	IN THE SEVENTH COURT
	§	
v.	§	
	§	
STATE OF TEXAS	§	OF APPEALS OF TEXAS

MOTION FOR REHEARING

To the Honorable Justices of the Court of Appeals:

COMES NOW Ronald Lee Howard, appellant, and moves the Court to grant rehearing of its Memorandum Opinion filed in this case on October 24, 2023, showing the Court the following:

I.

The Opinion issued does not address Mr. Howard's nature-of-conduct argument, and the omission infringes an applicable rule of appellate procedure.

The issued Opinion nowhere addresses the first argument Mr. Howard raised: that each element of aggravated sexual assault – an entirely nature-of-conduct offense – bears a scienter requirement in itself. Should the Court analyze the claim and issue a ruling in Mr. Howard's favor, all other issues would be rendered moot. The omission of any such analysis or decision contravenes the rules of appellate procedure:

Exhibit iv(a)

> The court of appeals must hand down a written opinion that is as brief as possible but that *addresses every issue raised and necessary to final disposition* of the appeal.

TEX. R. APP. P. 47.1 (emphasis added).

And the issue is meritorious. As noted in Mr. Howard's Opening Brief (p. 56-7) and Reply Brief (7-8), aggravated sexual assault is a nature-of-conduct offense, to which the Opinion agrees. (p. 10). Nature-of-conduct offenses "generally use different verbs in different subsections, an indication that the Legislature intended to punish distinct types of conduct." *Young v. State*, 341 S.W.3d 417, 423-4 (Tex.Crim.App. 2011). Aggravated sexual assault of a disabled person under § 22.021(a)(1) and § 22.021(a)(2)(C) perfectly fits the description of a nature-of-conduct offense under *Young* – its verb is used in all three possibilities listed in § 22.021(a)(1)(A) but not in § 22.021(a)(2)(C). The latter has no verb but is dependent on the verb in the distant former, indicating that the latter is entirely a nature-of-conduct element. In contrast, "a 'result of conduct' offense generally requires a direct object for the verb to act upon," such as the verb "causes" and "death," which are both contained in TEX. PEN. CODE ANN. 19.02(b)(1) (Vernon supp. 2011), one of the murder statute's specific subsections: the offense occurs where an actor "intentionally or knowingly *causes* the *death* of an individual." *Id.* at 423-4 (emphases added).

Exhibit iv (a)

Moreover, sexual assault of a disabled person is unlawful *due to* the offense's very nature. As the Legislature wrote in the non-aggravated version of the statute regarding disabled persons, sexual assault is committed where the actor knew "that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the *nature* of the act or of resisting it." TEX. PEN. CODE § 22.011(b)(4) (Vernon supp. 2023). "When 'specific acts are criminalized because of their very nature, a culpable mental state must apply to committing the act itself'." *State v. Ross*, 573 S.W.3d 817, 824 (Tex.Crim.App. 2019), quoting *McQueen v. State*, 781 S.W.2d 600, 603 (Tex.Crim.App. 1989).

This is not to say that a result-of-conduct offense cannot have a nature-of-conduct element, and vice-versa. Other cases have noted nature-of-conduct elements within result-of-conduct offenses, and result-of-conduct elements within nature-of-conduct offenses. Aggravated assault by causing bodily injury where a deadly weapon is used or exhibited, for example, is a result-oriented offense which also includes a nature-of-conduct element, namely the defendant's use or exhibition of the deadly weapon." *Johnson v. State*, 271 S.W.3d 756, 761 (Tex.App. – Waco 2008, pet. ref'd). An argument has been made that domestic violence, although a result-of-conduct offense, can be committed via a nature-of-conduct element – that of "applying

Exhibit iv (a)

pressure to the person's throat or neck or by blocking the person's nose or mouth." *Price v. State*, 457 S.W.3d 437, 439 (Tex.Crim.App. 2015). But the Court of Criminal Appeals turned this contention down flat, because "domestic violence is a result-of-conduct offense only." *Id.* Similarly, aggravated sexual assault is a nature-of-conduct offense only, and no authority found suggests otherwise.

Moreover, any suggestion that § 22.021(a)(2)(C) is a result-of-conduct or circumstances-surrounding-the-conduct element would be misplaced. Except for the type of victim involved, the provision's language is identical to § 22.021(a)(2)(B), which has never been found to be anything but nature-of-conduct. Quite the contrary – since the Legislature evidently intended it to be a nature-of-conduct element since it took care to specially exempt a scienter requirement regarding sexual assault of children under 14, which would be utterly unnecessary if that element was a result-of-conduct one. "It is presumed that the legislature intended each word to have a purpose." *Delarosa v. State*, ___ S.W.3d ___, 2023 Tex. Crim. App. LEXIS 668, at *8 (Tex.Crim.App., October 4, 2023). An attempt to describe § 22.021(a)(2)(C) as a result-of-conduct element would be difficult or impossible under *Young*, since the aggravating elements contain no verb such as "cause" – that term is far removed from them in a different subsection.

Exhibit iv(a)

Finally on this point, another court of appeals has extended the scienter requirement in the non-aggravated sexual assault statute to the offense at issue in this case – aggravated sexual assault of a disabled person. Both simple sexual assault and aggravated sexual assault are

> done without consent if "*the actor knows* that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it." *Id.* § 22.011(b)(4). *The same conduct constitutes aggravated sexual assault* if the victim is a "disabled individual," which is "a person older than 13 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self." *Id.* § 22.021(a)(1)(A)(iii), *(a)(2)(C)*, (b)(3).

Hopkins v. State, 615 S.W.3d 530, 539 (Tex.App. – Houston [1st Dist.] 2020, pet. ref'd) (emphases added).

II.

Keeping in mind the explicit dispensation of a culpable mental state in § 22.021(a)(2)(B), *Rodriguez v. State* at least renders § 22.021(a)(2)(C) ambiguous.

The Opinion holds that the culpable mental state in the first subsection of § 22.021(a)(1), does not apply to the aggravating factors in § 22.021(a)(2):

> It is clear the "intentionally or knowingly" requirement applies only to section 22.021(a)(1) of the statute concerning the act of "penetration," and is separated from the second part, section 22.021(a)(2), concerning the aggravating factor of the status of the victim.

(Opinion, p. 7). With all due respect, if this *is* clear, as the Opinion puts it, there would have been little point for the Legislature to have explicitly

Exhibit iv(a)

dispensed with a scienter requirement in § 22.021(a)(2)(B); the dispensation would be superfluous, since under the Opinion's reasoning no culpable mental state would apply anyway. The Opinion's assertion accordingly errs in this; again, courts presume "that the legislature intended each word to have a purpose," *Delarosa*, ___ S.W.3d ___, 2023 Tex. Crim. App. LEXIS 668, at *8. The Opinion agrees: "We must "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim.App. 2011) (Opinion, p. 6). But the Opinion then renders the phrase in question from § 22.021(a)(2)(B) entirely redundant.

And the dispensation in §22.021(a)(2)(B) accordingly makes (a)(2)(C) *at least* ambiguous, triggering the use of other tools of statutory construction; where a statute or provision is ambiguous, a court "may consult extratextual sources to aid in [its] construction..." *Ex parte Lane*, 670 S.W.3d 662, 677 (Tex.Crim.App. 2023), citing TEX. GOV'T. CODE ANN. § 311.023 (Vernon supp. 2023). For guidance the Opinion looks to the holding of *Rodriguez v. State*, 528 S.W.3d 623 (Tex.Crim.App. 2018): "when the Legislature wishes to attach a culpable mental state to a result or circumstance that increases the potential penalty for violation, it knows how to do so." *Id.* at 628. This is the *very crux* of Mr. Howard's fourth issue,

Exhibit iv(a)

which *Rodriguez* strengthens: having explicitly dispensed with a scienter in aggravated sexual assault of a *child* in § 22.021(a)(2)(B), the Legislature – although clearly knowing how to do so – did *not* do the same to § 22.021(a)(2)(B), the provision immediately following. This strongly indicates that under the canon of statutory interpretation *expressio unius est exclusion alterius*, the latter *does* entail a scienter requirement.

In any event, if § 22.021(a)(1) does *not* supply a culpable mental state for § 22.021(a)(2)(C), as the Opinion concludes, then the lack of either a culpable mental state in the latter *or* any dispensation of one there, together prompt the *imposition* of a culpable mental state. "If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." TEX. PEN. CODE ANN. § 6.02(b) (Vernon supp. 2023). Again, then, § 22.021(a)(2)(C) should be regarded as having a scienter requirement, and the case remanded for resentencing on simple sexual assault.

III.

The Opinion's application of TEX. PEN. CODE § 6.04(b)(1) is inapposite.

In a footnote, the Opinion applies § 6.04(b)(1) to the situation at hand, stating that even if Mr. Howard "did not intend to specifically sexually assault

Exhibit iv(a)

a disabled person, he would still be criminally responsible for the act" since "the only difference between what actually occurred and what he desired, contemplated, or risked is that [] a different offense was committed[.]" (Opinion, p. 7, n. 2) (brackets in original).

This suggestion is untenable. § 6.04(b)(1) authorizes the *transfer* of intent from one offense to another, not the wholesale *disregard* of a scienter requirement, as the Opinion postulates. The provision applies where a defendant is convicted, for example, under the law of parties:

> if a defendant intends to promote or assist the commission of one type of sexual assault, but his co-defendant commits a different type of sexual assault, that difference does not shield him from party liability, and he would still be guilty of sexual assault if the other elements of party liability are met.

Teague v. State, 626 S.W.3d 438, 444 (Tex.App. – Amarillo 2021, no pet.). *If* a statutory provision such as an aggravating element has been deemed to have *no* scienter requirement, then § 6.04(b)(1) permits an intent to commit the non-aggravated offense to suffice for the aggravating element. But the Opinion's remark would entirely obliterate the scienter requirement "typically found in criminal statutes." *In re Commitment of Pipkin*, 2023 Tex. App. LEXIS 5195, at *6 (Tex.App. – Amarillo, June 28, 2023, pet. den.), citing *In re Commitment of Fisher*, 164 S.W.3d 637, 649 (Tex. 2005). It would mean that, no matter what a defendant intended or knew, if – for instance – he *recklessly* violated the law, or committed *no* particular act

Exhibit iv (a)

intentionally or knowingly, he would *still* be guilty of an offense that requires intentional or knowing commission.

This conclusion should be altered on rehearing. As a further example, TEX. PEN. CODE ANN. § 22.02 does not require proof of any additional culpable mental state as to the aggravating element of serious bodily injury. Where a defendant intended to cause non-serious bodily injury but happened "to effectuate serious bodily injury, it is not the case that 'the only difference between what actually occurred' and what he intended is that 'a different offense was committed'";

> Instead, based on his intent, it is the very same offense for which he is charged—aggravated assault—that "was committed." The transferred-intent instruction in this case therefore accomplished no more than what Section 22.02 already envisions. Indeed, it is more accurate to say that Rodriguez's intent did not "transfer" at all, because there was no element beyond causing "simple" bodily injury that required any proof of intent.

Rodriguez, 538 S.W.3d at 630. And aggravated assault is a *result*-of-conduct offense, and a "precise act" in such a "result-oriented offense is inconsequential." *Landrian v. State*, 268 S.W.3d 532, 535 (Tex.Crim.App. 2008) (emphasis added). As noted above, aggravated *sexual* assault is a *nature*-of-conduct offense, (Opinion, p. 10), for which a scienter requirement applies to each element except that of sexually assaulting someone under 14, and only because the Legislature wrote that in specially

Exhibit iv (a)

to override, for one aggravating element alone, what is an entirely a nature-of-conduct offense.

IV.

Mr. Howard also objects to the overruling of his third and fifth, since the Opinion's reasoning relies on the mistaken conclusions that § 22.021(a)(2)(C) is unambiguous or contains no scienter requirement.

WHEREFORE, Mr. Howard prays the Court grant rehearing in this cause and issue an opinion reversing the cause under his first issue, or analyzing issues two, three or four on their merits and reversing due to any issue, or granting 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
State Bar Number 00785691
Email: AppealsAttorney@gmail.com
Attorney for the appellant

Exhibit iv (a)

CERTIFICATE OF CONFERENCING

This is to certify that on October 31, 2023, undersigned counsel communicated by email with Chris Strowd, District Attorney for Deaf Smith County, and Mr. Strowd stated he would oppose rehearing.

/s/ John Bennett
John Bennett

CERTIFICATE OF COMPLIANCE

This is to certify that this motion contains a total of 2,247 words.

/s/ John Bennett
John Bennett

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above motion was served on November 1, 2023, via the ECF system, which will serve a copy on Chris Strowd, Esq., and Brian Wolfskill, Esq., counsel for the State.

/s/ John Bennett
John Bennett

Exhibit iv (a)

PD-_____-23

TO THE

COURT OF CRIMINAL APPEALS

OF TEXAS

****

RONALD LEE HOWARD
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

****

PETITION FOR DISCRETIONARY REVIEW IN CAUSE NUMBER 07-22-00323-CR FROM THE SEVENTH COURT OF APPEALS, AND IN CAUSE NUMBER CR-2020I-108 FROM THE 222nd DISTRICT COURT OF DEAF SMITH COUNTY

****

PETITION FOR DISCRETIONARY REVIEW

****

John Bennett
Panhandle Area Public Defender
900 South Polk Street #206
Amarillo, TX 79101
Telephone: (806) 282-4455
AppealsAttorney@gmail.com
State Bar No. 00785691
Attorney for the Petitioner

UNLESS SUMMARY REVERSAL IS GRANTED, ORAL ARGUMENT IS REQUESTED

Exhibit iv(6)

IDENTITY OF JUDGE, PARTIES & COUNSEL

The Honorable Roland Saul, Judge, 222nd District Court of Deaf Smith County, presided over the trial.

Ronald Lee Howard, Appellant

Trial Counsel:	Brooks Barfield, Esq. (State Bar #00783597) Post Office Box 308 Amarillo, Texas 79105 Telephone: (806) 468-9500 barfieldlawfirm@gmail.com
Appellate Counsel:	John Bennett, Esq. (State Bar #00785691) 900 South Polk Street #206 Amarillo, Texas 79101 Telephone: (806) 282-4455 AppealsAttorney@gmail.com

The State of Texas, Appellee

Trial and Appellate Counsel:	Christopher Strowd, Esq. (State Bar # 19425400) Deaf Smith County District Attorney 235 E 3rd Street, Room 401 Hereford, Texas 79045 Telephone: (806) 364-3700 CStrowd@deafsmithcounty.texas.gov

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PD-_____-23

TO THE

COURT OF CRIMINAL APPEALS

OF TEXAS

****

RONALD LEE HOWARD

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

****

PETITION FOR DISCRETIONARY REVIEW IN CAUSE NUMBER 07-22-00323-CR FROM THE SEVENTH COURT OF APPEALS, AND IN CAUSE NUMBER CR-2020I-108 FROM THE 222nd DISTRICT COURT OF DEAF SMITH COUNTY

****

PETITION FOR DISCRETIONARY REVIEW

****

To the Honorable Judges of the Court of Criminal Appeals:

COMES NOW Ronald Lee Howard, petitioner in the above cause, and submits this petition in support of his request for either a new sentencing hearing or remand of this cause to the court of appeals for further analysis.

Exhibit iv(b)

STATEMENT REGARDING ORAL ARGUMENT

So long as summary reversal is not ordered, oral argument is requested. Since each Ground is evidently a question of first impression, the decisional process would be aided by having each side appear and answer any questions the Court may have.

STATEMENT OF THE CASE

Mr. Howard pled not guilty to two counts of aggravated sexual assault of a disabled person, but a jury convicted him and returned a sentencing verdict of two life terms in prison. The trial court ordered that these would run concurrently.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals affirmed the conviction in a Memorandum Opinion on October 24, 2023. Mr. Howard filed a motion for rehearing on November 2, 2023. On November 27, 2023, the court of appeals denied rehearing. Since three new rules of law were announced below, on November 28, 2023, Mr. Howard filed a motion to publish the court of appeals' opinion, but as of this writing, the court of appeals has not decided that motion.

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GROUNDS FOR REVIEW

1. Is scienter required of each element of the nature-of-conduct offense of aggravated sexual assault of a disabled person? [Memorandum Opinion, p. 5-8]

2. Is TEX. PEN. CODE § 22.021 ambiguous regarding such a scienter requirement? [Memorandum Opinion, p. 6-8]

3. Does TEX. PEN. CODE § 6.04(b)(1) entail disregard of scienter where a nature-of-conduct offense has an unanticipated result? [Memorandum Opinion, p. 7, n. 2]

4. Does due process dictate that in an appeal of right the reviewing court address each non-frivolous issue raised? [Memorandum Opinion, p. 1-8]

ARGUMENT FOR GROUND 1

> Is scienter required of each element of the nature-of-conduct offense of aggravated sexual assault of a disabled person? [Memorandum Opinion, p. 5-8]

The first issue raised below was whether, in a case of aggravated sexual assault of a disabled person, the proof must include whether the defendant knew the complainant was disabled to the degree prescribed. At trial the State told the jury at closing argument that no such proof was needed, and the charge did not require it for conviction. (Opinion below, p. 10).

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On appeal Mr. Howard noted that aggravated sexual assault is a *nature-*of-conduct offense:

> Art. 22.021 is a conduct-oriented statute; it uses the conjunctive "or" to distinguish and separate different conduct; and its various sections specifically define sexual conduct in ways that usually require different and distinct acts to commit.

Vick v. State, 991 S.W.2d 830, 833 (Tex.Crim.App. 1999); *Metcalf v. State*, 597 S.W.3d 847, 857 (Tex.Crim.App. 2020) (aggravated sexual assault is nature-of-conduct). The Legislature must have realized this when, four years after *Vick*, it first enacted the provision of aggravated sexual assault of a disabled person in Acts 2003, 78th Leg. Ch. 896, § 1, eff. Sept. 1, 2003. See *e.g. Scott v. State*, 55 S.W.3d 593, 596 (Tex.Crim.App. 2001) ("We presume the Legislature was aware of this caselaw in drafting the provision now before us").

As Mr. Howard's first argument below noted, a scienter requirement accordingly applies to each essential element, including the disability. "When specific acts are criminalized because of their very nature, a culpable mental state must apply to committing the act itself." *Price v. State*, 457 S.W.3d 437, 441 (Tex.Crim.App. 2015). The State thus bore the burden to show the defendant knew the complainant is disabled. But the opinion below did not mention, let alone address, this argument. The case law has been left with an obvious inconsistency: that an entirely nature-of-conduct offense does not require knowledge of each essential element.

Exhibit IV(b)

ARGUMENT FOR GROUND 2

Is TEX. PEN. CODE § 22.021 ambiguous regarding such a scienter requirement? [Memorandum Opinion, p. 6-8]

Below Mr. Howard also raised issues of statutory interpretation. He observed that § 22.021(a)(2)(B) explicitly dispenses with a scienter requirement (aggravated sexual assault is sexual assault on a person under 14 "regardless of whether the person knows the age of the victim"). But § 22.021(a)(2)(C), the provision immediately following it (sexual assault is aggravated if the victim is simply "an elderly individual or a disabled individual") lacks specific language dispensing with a scienter requirement. This results in ambiguity of whether scienter applies to the latter and entails that statutory construction is in order. For this Mr. Howard argued, first, the Legislature's explicit dispensation of scienter in 22.021(a)(2)(B) but not in § 22.021(a)(2)(C) entails that scienter applies to the latter under the maxim *expressio unius est exclusio alterius.* Alternately, he contended, § 22.011(b)(4) (sexual assault is without consent if "*the actor knows* that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it") (emphasis added) and § 22.021(a)(2)(C) (sexual assault of a disabled individual) are *in pari materia*, so the scienter requirement of the former applies to both.

Exhibit iv (b)

But the court of appeals looked to the text of § 22.021 and concluded that the "intentionally or knowingly" requirement early in the statute applies only to "the act of 'penetration'." Thus, says the opinion, the Legislature "did not intend for the aggravating factors of the offense to require proof of scienter," and the statute is *not* ambiguous. (Opinion, p. 7).

Yet under that reasoning one wonders why the Legislature took the trouble to *expressly* dispense with scienter in § 22.021(a)(2)(B). The phrase "regardless of whether the person knows the age of the victim" becomes superfluous. "We must presume that in enacting a statute, the Legislature intends the entire statute to be effective, and did not intend a useless thing." *Leming v. State*, 493 S.W.3d 522, 559 (Tex.Crim.App. 2007). But the opinion below entails that the Legislature enacted the useless statutory phrase "regardless of whether the person knows the age of the victim."

§ 22.021 is accordingly at least *ambiguous* regarding scienter of disability. And the ambiguity prompts the use of tools of statutory construction. "We must give effect to the plain meaning of the statute's language 'unless the statute is ambiguous..." *Delarosa v. State*, __ S.W.3d __, 2023 Tex. Crim. App. LEXIS 668, at 8* (Tex.Crim.App., October 4, 2023).

Exhibit iv (b)

ARGUMENT FOR GROUND 3

> Does TEX. PEN. CODE § 6.04(b)(1) entail disregard of scienter where a nature-of-conduct offense has an unanticipated result? [Memorandum Opinion, p. 7, n. 2]

Texas law holds a defendant responsible for causing a result while committing an offense, even if he only commits an offense he did not desire, contemplate or risk:

> (b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:
>
> (1) a different offense was committed…

TEX. PEN. CODE ANN. § 6.04, "Conduct and Results" (Vernon supp. 2022). This is the "transferred intent" doctrine, but since it applies to TEX. PEN. CODE ANN. § 6.03(a)(intent) *and* (b)(knowledge) (Vernon supp. 2022), as was noted in *Trevino v. State*, 228 S.W.3d 729, 736-7 (Tex.App. – Houston [14th Dist.] 2006, pet. ref'd), "transferred scienter" may be more appropriate.

The opinion below refers to § 6.04, generalizing from it that no scienter requirement applies to whether a complainant is disabled :

> even if Appellant did not intend to specifically sexually assault a disabled person, he would still be criminally responsible for the act because "the only difference between what actually occurred and what he desired, contemplated, or risked is that [] a different offense was committed[.]" § 6.04(b)(1).

Opinion, p. 7, n. 2.

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Yet the result-oriented § 6.04 cannot logically apply to a nature-of-conduct offense, for which *any* result – a desired, contemplated or risked one or not – is irrelevant. *Robinson v. State*, 466 S.W.3d 166, 170 (Tex.Crim.App. 2015) ("Nature-of-conduct offenses are defined by the act or conduct that is punished, regardless of any result that might occur"). Moreover, merely *risking* doing something, to which § 6.04(b) applies, cannot apply to § 22.021, which requires the offense to be committed intentionally or knowingly;

> a person cannot be reckless as to the conduct itself ... a person is reckless with respect to the circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.

Ex parte Rion, 662 S.W.3d 890, 900 (Tex.Crim.App. 2022).

ARGUMENT FOR GROUND 4

> Does due process dictate that in an appeal of right the reviewing court address each non-frivolous issue raised? [Memorandum Opinion, p. 1-8]

TEX. R. APP. P. 47.1. requires courts of appeals to discuss and hopefully resolve all claims on which an appeal's outcome depends:

> The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.

Id. And in an first appeal of right the procedures employed "must comport

Exhibit iv(b)

with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

After all, an indigent criminal defendant has a constitutional right to a free appellate record in a first appeal. *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Were it otherwise, an "appeal of right" would be meaningless. *Id.* The same should apply to appellate *review*. If reviewing courts could simply refuse to decide an issue "raised and necessary to final disposition of the appeal," as occurred below with Mr. Howard's nature-of-conduct argument, an "appeal of right" would be no appeal at all.

PRAYER FOR RELIEF

Mr. Howard prays the Court grant discretionary review and, on summary reversal or after or full briefing, finally remand the case to the court of appeals for fresh analysis, or to the trial court for a new sentencing hearing on non-aggravated sexual assault, or order all relief the Court may deem appropriate.

Exhibit iv(b)

Respectfully submitted,

/s/ John Bennett

John Bennett
900 South Polk Street #206
Amarillo, TX 79101
Telephone: (806) 282-4455
AppealsAttorney@gmail.com
State Bar No. 00785691
Attorney for the Petitioner

CERTIFICATE OF COMPLIANCE

I certify that this entire PDR contains 2,402 words.

/s/ John Bennett
John Bennett

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing PDR has been served by email on Chris Strowd, Esq., Deaf Smith County District Attorney, to him at CStrowd@deafsmithcounty.texas.gov, and on Stacey M. Soule, Esq., State Prosecuting Attorney, to her at information@spa.texas.gov, both on December 6, 2023.

/s/ John Bennett
John Bennett

Exhibit iv (b)

FILE COPY

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

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

(806) 342-2650

November 27, 2023

John Bennett
Panhandle Area Public Defender
900 Polk Street, #206
Amarillo, TX 79101
* DELIVERED VIA E-MAIL *

Chris Strowd
Criminal District Attorney
235 East 3rd Street, Room 401
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RE: Case Number: 07-22-00323-CR
Trial Court Case Number: CR-2020I-108

Style: Ronald Lee Howard v. The State of Texas

Dear Counsel:

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

Sincerely,

Bobby Ramirez

Bobby Ramirez, Clerk

cc: Honorable Roland D. Saul (DELIVERED VIA E-MAIL)
Elaine Gerber (DELIVERED VIA E-MAIL)

Exhibit iv(b)

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00323-CR

RONALD LEE HOWARD, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 222nd District Court
Deaf Smith County, Texas
Trial Court No. CR-2020I-108, Honorable Roland D. Saul, Presiding

October 24, 2023

MEMORANDUM OPINION

Before PARKER and DOSS and YARBROUGH, JJ.

Following a plea of not guilty, Appellant, Ronald Lee Howard, was convicted by a jury of aggravated sexual assault.[1] The jury assessed punishment at life imprisonment. By six issues, Appellant contends: (1) the evidence was legally insufficient because it did not demonstrate *scienter* of the aggravating factor; (2) the jury charge failed to include an instruction on *scienter* of the aggravating factor; (3) because the statute is ambiguous, a

[1] TEX. PENAL CODE ANN. § 22.021.

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scienter requirement should be extended to the aggravating factor; (4) in the alternative, the jury charge required an instruction on *scienter* because the statute is ambiguous and canons of construction and interpretation demonstrate a *scienter* requirement; (5) the jury charge erroneously included culpable mental state instructions for "result of conduct" rather than "nature of conduct"; and (6) because Appellant's trial counsel failed to object to the jury charge error, he suffered from ineffective assistance of counsel. We affirm.

BACKGROUND

Appellant, a local farmer and former truck driver, and the complainant, an intellectually disabled nineteen-year-old, have known each other since the complainant was a toddler. They became familiar with each other through Appellant's stepdaughter, who was in special education classes with the complainant. After not seeing each other for many years, they met in a chance encounter at a Walmart. Appellant extended an invitation to the complainant and her nine-year-old sister to visit his farm and spend the night which they accepted. In the middle of the night, Appellant engaged in sex with the complainant. During interviews with investigators, Appellant claimed the encounter was consensual. The complainant maintained it was nonconsensual. Appellant was charged with two counts of aggravated sexual assault of a disabled person based upon the complainant's statements he performed both vaginal and oral sex with her.

At trial, the jury heard testimony from several people who knew the complainant and her diminished mental capacity establishing she was a "disabled individual." The jury also heard from the complainant and her sister regarding the events of the evening in Appellant's home. Complainant maintained at trial she did not consent to the sexual

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contact. Appellant testified in his defense and stated the encounter was consensual. At the end of trial, the jury found Appellant guilty of two counts of aggravated sexual assault and sentenced him to 99 years in prison for each count. This appeal followed.

APPLICABLE LAW

A person commits the offense of aggravated sexual assault under the following conditions:

> AGGRAVATED SEXUAL ASSAULT. (a) A person commits an offense:
>
> (1) if the person:
>
> (A) intentionally or knowingly:
>
> (i) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent; [or]
>
> (ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; []
>
> ***
>
> (B) . . . ; and
>
> (2) if:
>
> ***
>
> (C) the victim is an elderly individual or a disabled individual.

§ 22.021(a)(1)(A),(2)(C).

"Disabled individual" means a person older than 13 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the

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person's self from harm or to provide food, shelter, or medical care for the person's self. § 22.021(b)(3).

An aggravated sexual assault is without consent if:

> (1) the actor compels the other person to submit or participate by the use of physical force, violence, or coercion;
>
> (2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person or to cause harm to the other person, and the other person believes that the actor has the present ability to execute the threat; [or]
>
> ***
>
> (4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it[.]

§§ 22.021(c); 22.011(b)(1),(2),(4).

STANDARD OF REVIEW

The only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011); *see also Alfaro-Jimenez v. State*, 577 S.W.3d 240, 243–44 (Tex. Crim. App. 2019). We consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014) (citing *Jackson*, 443 U.S. at 318–19). A reviewing court's duty, however, does

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require it to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). If the evidence establishes precisely what the State has alleged, but the acts the State has alleged do not constitute a criminal offense under the totality of the circumstances, then that evidence, as a matter of law, cannot support a conviction. *Id.*

"In some cases, however, legal sufficiency turns upon the meaning of the statute under which the defendant is being prosecuted. We ask if certain conduct actually constitutes an offense under the statute. When we interpret statutes, we look to the literal text of the statute in question and attempt to discern the fair, objective meaning of the text at the time of its enactment. If the plain language is clear and unambiguous, our analysis ends because the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute. Statutory interpretation is a question of law that we review de novo." *Day v. State*, 614 S.W.3d 121, 127 (Tex. Crim. App. 2020) (citations and internal quotations omitted).

ANALYSIS

ISSUE ONE—SCIENTER OF THE AGGRAVATING ELEMENT

Appellant argues in his first issue there is insufficient evidence supporting his conviction for aggravated sexual assault beyond a reasonable doubt. Particularly, he argues, under the statute, the aggravating element of the offense in this case— "victim is [a] disabled individual" —requires proof of *scienter*, i.e., the knowledge the complainant was a disabled person at the time of the offense. *See* § 22.021(a)(2)(C). Because the

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State failed to introduce such evidence, he urges, aggravated sexual assault was not proved beyond a reasonable doubt, and the judgment should be reformed to the lesser included offense of sexual assault.

Appellant does not contest sufficiency of the evidence demonstrating the complainant was a "disabled individual" as defined by statute at the time of the offense, nor does he contest sufficiency of the evidence demonstrating lack of consent. Indeed, he concedes "the complainant and her sister both testified that the sexual act was nonconsensual, which the jury evidently believed, rendering the alternative means of showing lack of consent moot." He also concedes the elements of non-aggravated sexual assault were met. Thus, the only issue before us is one of statutory interpretation: whether the Legislature intended *scienter* as a requirement for the aggravating elements of the offense of aggravated sexual assault.

When interpreting statutes, we look first to the statute's literal text, and "we read words and phrases in context and construe them according to the rules of grammar and usage." *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (citations omitted, quotations original). We must "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Id.* (quotations original). Only if the statutory language is ambiguous or leads to absurd results that the Texas Legislature could not have possibly intended may we consult extra-textual sources. *Id.* Using these principles, we are tasked with analyzing the following language from the statute applicable to this matter:

> [] A person commits an offense (1) if the person[] intentionally or knowingly: (i) causes the penetration of the anus or sexual organ of

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> another person by any means, without that person's consent; [or] causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent;[] **and** (2) if[] the victim is an elderly individual or a disabled individual.

§ 22.021(a)(1)(A), (a)(2)(C) (emphasis added).

Our plain reading of the statute finds two separate clauses: (1) the act of nonconsensual penetration, which must be done intentionally or knowingly; and (2) the aggravating factors based on the harm caused to the victim or the status of the victim as a child, elderly person, or, relevant here, a disabled person. It is clear the "intentionally or knowingly" requirement applies only to section 22.021(a)(1) of the statute concerning the act of "penetration," and is separated from the second part, section 22.021(a)(2), concerning the aggravating factor of the status of the victim. The use of the word "and" after section 22.021(a)(1) also signals the beginning of a new clause under section 22.021(a)(2), in which there is no *mens rea* requirement. "[T]his prescription of a mental state as to one element and not as to others sufficiently demonstrates the Legislature's intent to dispense with a mental state as to those other elements." *Rodriguez v. State*, 538 S.W.3d 623, 628 (Tex. Crim. App. 2018) (quoting *White v. State*, 509 S.W.3d 307, 313 (Tex. Crim. App. 2017)). Because they specifically placed the "intentionally and knowingly" language within section 22.021(a)(1) and neglected to do so in 22.021(a)(2), we conclude the Legislature did not intend for the aggravating factors of the offense to require proof of *scienter*.[2]

---

[2] Moreover, even if Appellant did not intend to specifically sexually assault a disabled person, he would still be criminally responsible for the act because "the only difference between what actually occurred and what he desired, contemplated, or risked is that [] a different offense was committed[.]" § 6.04(b)(1).

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Appellant would have us read into the statute a *scienter* requirement based on the legislative history of the statute and our own decisions which, up to now, have not expressly excluded a *scienter* requirement for the aggravating factors of the offense. We decline to do so. Appellant's first issue is overruled.

ISSUES TWO, THREE, AND FOUR—SCIENTER INSTRUCTION IN THE JURY CHARGE

Because we find the statutory language of section 22.021 to be unambiguous and because we do not find the statute requires proof of *scienter* with regard to the aggravating factor of "the victim is [a] disabled individual," it was also not necessary for the trial court to include an instruction regarding *scienter*. *Supra*. Accordingly, Appellant's second, third, and fourth issues are overruled.

ISSUE FIVE—JURY CHARGE ERROR

For his fifth issue, Appellant asserts the jury charge during guilt/innocence was erroneous and caused him egregious harm by requiring the jury to consider the effects of the offenses on the complainant rather than the nature of the accusations. The State concedes the charge was erroneous. While we agree the charge is erroneous, we disagree Appellant suffered egregious harm.

Appellate review of claimed jury-charge error involves a two-step process. *See Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); s*ee also Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). A reviewing court must initially determine whether charge error occurred. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). If an appellate court finds charge error, the next step requires the reviewing court

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to analyze that error for harm. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

Charge error requires reversal when a proper objection has been made and a reviewing court finds "some" harm, i.e., error that is calculated to injure the rights of the defendant. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009), *overruled on other grounds by Sandoval v. State*, 665 S.W.3d 496, 537 (Tex. Crim. App. 2022). Where the alleged error is not preserved by objection, an appellant can prevail only if the error caused egregious harm. *Fraser v. State*, 593 S.W.3d 883, 888 (Tex. App.—Amarillo 2019, pet. ref'd). Jury charge error is egregious if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Arteaga v. State*, 521 S.W.3d 329, 338 (Tex. Crim. App. 2017), *superseded in part by* TEX. PENAL CODE ANN. § 22.011(f). The harm must be actual and not theoretical. *Taylor v. State*, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011). Egregious harm is a "high and difficult standard which must be borne out by the trial record." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). Error in the abstract instruction is not egregious where the application paragraph correctly instructs the jury. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999).

The Texas Court of Criminal Appeals has identified aggravated sexual assault is as a "nature-of-conduct" offense. *Metcalf v. State*, 597 S.W.3d 847, 857–58 (Tex. Crim. App. 2020). It criminalizes very specific conduct of several different types. *Vick v. State*, 991 S.W.2d 830, 832 (Tex. Crim. App. 1999). "When 'specific acts are criminalized because of their very nature, [the] culpable mental state must apply to committing the act itself.'" *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015) (quoting *McQueen v.*

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State, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)). "A trial court errs when it fails to limit the language in regard to the applicable culpable mental states to the appropriate conduct element." *Price*, 457 S.W.3d at 441 (citing *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994)).

The State admits the jury charge erroneously gave the "result of conduct" definitions of the "intentionally" and "knowingly" culpable mental states, which dispenses with step one in a charge-error analysis. In the second step of the analysis, we must review the record for egregious harm revealed by the record of the trial as a whole. *See Fraser*, 593 S.W.3d at 888. Also, there is no burden of proof or persuasion in a harm analysis conducted under *Almanza*. *See id.* at 889.

Although the abstract portion of the jury charge defining the culpable mental states was erroneous, the application paragraphs correctly stated the law. The application paragraphs required the jury to convict only upon finding beyond a reasonable doubt Appellant "did then and there intentionally or knowingly cause the penetration of the sexual organ of [the complainant], a person who was then and there a disabled individual, by defendant's sexual organ, without the consent of the complainant[.]"[3] It is clear from the application paragraph the jury was not authorized to convict Appellant without finding beyond a reasonable doubt he "intentionally or knowingly" committed the offense with respect to the "nature of conduct" as oppose to the result of conduct. Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not

[3] The second application paragraph was identical to the first, replacing the words "penetration of the sexual organ" with "penetration of the mouth" to encompass both counts of aggravated sexual assault contained in the indictment.

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egregious. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999); *see also Bolen v. State*, 478 S.W.3d 865, 868–69 (Tex. App.—Amarillo 2015, pet. ref'd). Appellant's fifth issue is overruled.

ISSUE SIX—INEFFECTIVE ASSISTANCE OF COUNSEL

In his final issue, Appellant asserts his counsel's failure to object to the "result of conduct" definitions of "intentionally" and "knowingly" in the jury charge constitutes ineffective assistance of counsel. He asserts, but for the failure to object, he would have had a different outcome and had the benefit of a lower bar of showing "some" harm from the erroneous jury charge as opposed to the higher bar of "egregious harm." He maintains defense counsel's performance was deficient as a matter of law. We disagree.

The right to reasonably effective assistance of counsel in a criminal prosecution is guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 10 of the Texas Constitution. U.S. CONST. amend VI; TEX. CONST. art. 1, § 10. To establish a claim based on ineffective assistance, an appellant must show (1) his counsel's representation fell below the objective standard of reasonableness and (2) there is a reasonable probability that but for counsel's deficiency the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, an appellant must show his trial counsel's performance was deficient and he was prejudiced by the deficiency. *State v. Gutierrez*, 541 S.W.3d 91, 98 (Tex. Crim. App. 2017).

A claim of ineffective assistance of counsel must be firmly demonstrated in the record. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) (citing *Thompson*

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v. State, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999)). "It is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). We must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

Without deciding whether his counsel's conduct fell below the objective standard of reasonableness, we cannot say there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. Ultimately, the case was decided on the credibility of the complainant and Appellant. Appellant's defense, that the sex acts were consented to by the complainant, did not place his mental culpability at issue. He admitted to having sexual contact with the complainant, and the jury only had to determine whether the complainant consented to the act. Thus, even if the jury had been properly instructed, it still could have believed the complainant over Appellant and returned a guilty verdict. *See also* TEX. CODE CRIM. PROC. ANN. art. 38.07 (uncorroborated testimony of victim is sufficient to uphold conviction for sexual assault). Under these circumstances, the erroneous instruction on mental culpability could not have affected the outcome of the trial and did not prejudice Appellant. *See Saldivar v. State*, 783 S.W.2d 265, 268 (Tex. App.—Corpus Christi 1989, no pet.) (noting where no defense is presented directly affecting an assessment of mental culpability, there is no harm in submitting erroneous definitions of intentionally and knowingly).

We conclude Appellant failed to satisfy the second prong of *Strickland*. *Compare with Smith v. State*, No. 07-18-00304-CR, 2019 Tex. App. LEXIS 1349, at *4 (Tex. App.—

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Amarillo Feb. 22, 2019, no pet.) (mem. op., not designated for publication). We overrule Appellant's sixth issue.

CONCLUSION

The judgment is affirmed.

Alex Yarbrough
Justice

Do not publish.

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PD-856-23

TO THE

COURT OF CRIMINAL APPEALS

OF TEXAS

****

RONALD LEE HOWARD

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

****

PETITION FOR DISCRETIONARY REVIEW IN CAUSE NUMBER 07-22-00323-CR FROM THE SEVENTH COURT OF APPEALS, AND IN CAUSE NUMBER CR-2020I-108 FROM THE 222nd DISTRICT COURT OF DEAF SMITH COUNTY

****

SUPPLEMENT TO THE PETITION FOR DISCRETIONARY REVIEW

****

John Bennett
Panhandle Area Public Defender
900 South Polk Street #206
Amarillo, TX 79101
Telephone: (806) 282-4455
AppealsAttorney@gmail.com
State Bar No. 00785691
Attorney for the Petitioner

UNLESS SUMMARY REVERSAL IS GRANTED, ORAL ARGUMENT IS REQUESTED

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PD-856-23

TO THE

COURT OF CRIMINAL APPEALS

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****

RONALD LEE HOWARD
Petitioner,

v.

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PETITION FOR DISCRETIONARY REVIEW IN CAUSE NUMBER 07-22-00323-CR FROM THE SEVENTH COURT OF APPEALS, AND IN CAUSE NUMBER CR-2020I-108 FROM THE 222nd DISTRICT COURT OF DEAF SMITH COUNTY

****

SUPPLEMENT TO THE PETITION FOR DISCRETIONARY REVIEW

****

To the Honorable Judges of the Court of Criminal Appeals:

COMES NOW Ronald Lee Howard, petitioner in the above cause, and submits this supplement to his petition for discretionary review in support of his request for remand of this cause to the court of appeals for further analysis or for all relief the Court may deem appropriate.

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STATEMENT OF PROCEDURAL HISTORY

The court of appeals denied rehearing on November 27, 2023. Mr. Howard filed his petition for discretionary review on December 6, 2023, and this Supplement is filed on December 13, 2023, thus well within the time for filing even the initial PDR.

SUPPLEMENTAL GROUND FOR REVIEW

Where an opinion below does not address "every issue raised and necessary to final disposition of the appeal," should remand be ordered under TEX. R. APP. P. 47.1? [Memorandum Opinion, p. 1-8]

ARGUMENT FOR SUPPLEMENTAL GROUND

In Ground 4 of his PDR, Mr. Howard argued for remand since the opinion below does not address the first issue he raised there, which was "necessary to final disposition of the appeal." But in his PDR he made that argument under the federal constitution. Since the Texas Rules of Appellate Procedure also dictate remand in the circumstances presented, Mr. Howard here raises a non-constitutional argument as well.

As noted, courts of appeals are required to discuss and resolve all claims on which an appeal's outcome depends:

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> The court of appeals *must* hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.

TEX. R. APP. P. 47.1 (emphasis added). The rule dictates more than that the court of appeals simply announce a decision on each dispositive claim – although not even an unsupported decision was made below on Mr. Howard's first claim. Rule 47.1

> requires courts to "show their work" such that the opinion tells the parties why a particular argument is or is not successful. When an intermediate court's opinion fails to address a party's argument, the proper remedy is for this Court to vacate the decision and remand the cause to the lower court for consideration of the neglected argument.

State v. Martell, 663 S.W.3d 667, 672 (Tex.Crim.App. 2022) (int. cit. omitted).

Thus the Court has remanded not only *Martell* because the court of appeals did not consider "the State's estoppel theory," *id.* at 673, but also various other cases under Rule 47.1, most with unpublished opinions that cannot be cited, TEX. R. APP. P. 77.3, but which are nonetheless perfectly effective for those individual cases.

PRAYER FOR RELIEF

In addition to the relief previously requested, therefore, Mr. Howard prays the Court grant review on this ground and remand the case for proper analysis of the first claim raised in his Brief for the Appellant.

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Respectfully submitted,

/s/ John Bennett

John Bennett
900 South Polk Street #206
Amarillo, TX 79101
Telephone: (806) 282-4455
AppealsAttorney@gmail.com
State Bar No. 00785691
Attorney for the Petitioner

CERTIFICATE OF COMPLIANCE

I certify that this entire Supplement to the PDR contains 818 words.

/s/ John Bennett
John Bennett

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Supplement has been served by email on Chris Strowd, Esq., Deaf Smith County District Attorney, to him at CStrowd@deafsmithcounty.texas.gov, and on Stacey M. Soule, Esq., State Prosecuting Attorney, to her at information@spa.texas.gov, both on December 13, 2023.

/s/ John Bennett
John Bennett

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Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

John Bennett
Bar No. 00785691
AppealsAttorney@gmail.com
Envelope ID: 82542132
Filing Code Description: Other Document
Filing Description: Supplement to Petition for Discretionary Review
Status as of 12/13/2023 2:44 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.texas.gov	12/13/2023 2:40:02 PM	SENT
Chris Strowd		CStrowd@deafsmithcounty.texas.gov	12/13/2023 2:40:02 PM	SENT

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CASE NO. CR-2020I-108
TRN: 9287375 78X

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	OF DEAF SMITH COUNTY, TEXAS
	§	
RONALD LEE HOWARD	§	222ND JUDICIAL DISTRICT
	§	
STATE ID NO.: TX 01790972	§	

JUDGMENT OF CONVICTION BY JURY

Judge Presiding:	HON. Roland Saul	Date Judgment Entered:	October 6, 2022
Attorney for State:	Chris Strowd	Attorney for Defendant:	Brooks Barfield

Offense for which Defendant Convicted:
Count 1-2: Aggravated Sexual Assault

Charging Instrument: **INDICTMENT**	Statute for Offense: **Counts 1-2: Section 22.021 of the Texas Penal Code**
Date of Offense: **May 15, 2020**	
Degree of Offense: **CT 1-2: 1st degree felony**	Plea to Offense: **Not Guilty**
Verdict of Jury: **CT 1-2: GUILTY**	Findings on Deadly Weapon: **n/a**

Plea to 1st Enhancement Paragraph:	n/a	Plea to 2nd Enhancement/Habitual Paragraph:	n/a
Findings on 1st Enhancement Paragraph:	n/a	Findings on 2nd Enhancement/Habitual Paragraph:	n/a

Punishment Assessed by:	Date Sentence Imposed:	Date Sentence to Commence:
JURY	**October 6, 2022**	**October 6, 2022**

Punishment and Place of Confinement:
CT 1: 99 years TDCJ-Institutional Divison
CT 2: 99 years TDCJ-Institutional Divison

THIS SENTENCE SHALL RUN CONCURRENT.

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR **N/A.**

Fine:	Court Costs:	Restitution:	Restitution Payable to:
CT1:$0 CT 2: $0	**$ 590**	$ 0	☐ **VICTIM** (see below) ☐ **AGENCY/AGENT** (see below)

Sex Offender Registration Requirements to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was 19.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited: **JAIL CREDIT: 3 days** NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in **Deaf Smith** County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

☑ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

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The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its 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.

The Court **FINDS** Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all fines, court costs, and restitution 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 Sheriff of this County to take, safely convey, and deliver Defendant to the Texas Department of Criminal Justice Institutional Division . The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the Deaf Smith County District Clerk's office. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court **ORDERS** Defendant immediately committed to the custody of the Sheriff of Deaf Smith County, Texas on the date the sentence is to commence. Defendant shall be confined in the County Jail for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant shall proceed immediately to the Deaf Smith County Clerk. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY.** The Court **ORDERS** Defendant to proceed immediately to the Office of the **District Clerk, Deaf Smith** County, Texas. Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

☑ The Court **ORDERS** Defendant's sentence **EXECUTED.**

☐ The Court **ORDERS** Defendant's sentence of confinement **SUSPENDED.** The Court **ORDERS** Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Signed and entered on this the 12 of October, 2022.

ROLAND SAUL, JUDGE
222nd Judicial District
Deaf Smith County, Texas

RONALD LEE HOWARD
D.O.B.: 11/2/1954
SS#: 458-06-4048

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Clerk:

FILED in the 222nd District Court under the case/file number as indicated and on the date and time stamped.

ELAINE GERBER
District Clerk, Deaf Smith County, TX
By_____ Deputy

OCT 14 '22 PM3:59

Exhibit iv(d)