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⌘ Vol. 13, No. 21, June 6, 2005

Case Name: [Michael D. Johnson v. The State of Texas](#)

- OFFENSE: Aggravated Assault
- COUNTY: Lubbock
- COURT OF APPEALS: Amarillo 2003
- C/A CITATION: 120 S.W.3d 10
- C/A RESULT: Conviction Affirmed
- CCA. CASE No. PD-1623-03
- DATE OF OPINION: May 25, 2005
- DISPOSITION: Court of Appeals Affirmed VOTE: 5-4-0
- OPINION: Keller, PJ.
- TRIAL COURT: 140th D/C; Hon. Jim Bob Darnell
- LAWYERS: Paul Mansur (Defense); Wade Jackson (State)

⌘ 124 [Right to Counsel / Ineffective Assistance Claim](#): Appellant was charged with aggravated assault of his girlfriend. The State's evidence included letters and electronically recorded telephone calls from Appellant to the victim while Appellant was in jail. During these conversations, Appellant made comments regarding what happened during the incident. He also tried to get the victim to drop the charges, plead the Fifth Amendment, or change her story. He had also been twice previously convicted of felony offenses, evidence of which the prosecution introduced at punishment. Appellant told his attorney several times that he wanted to testify at trial but counsel replied, "Your priors will kill you." Counsel did not call Appellant to testify. Appellant testified at a hearing on a motion for new trial that, had he known that he could testify against counsel's wishes, he would have done so. On appeal, Appellant contended that he was improperly denied his right to testify. He claimed that such a denial, even through actions of defense counsel, is "structural error," requiring automatic reversal without conducting any sort of harm analysis. Alternatively, he argued for the [Chapman v. California](#) harm standard that the error is reversible unless found to be harmless beyond a reasonable doubt. Finally, he argued that the error is prejudicial under [Strickland v. Washington](#).

Holding: The appropriate standard of harm or prejudice depends upon two questions. First, is the deprivation of a defendant's right to testify, caused by defense counsel, an error that is properly attributable to the trial court? Only if that is true can the error either, one, not be subject to any harm or prejudice analysis or, two, be subject to the [Chapman](#) standard. Otherwise, the [Strickland](#) prejudice analysis applies. Second, is the deprivation of a defendant's right to testify the kind of violation that is properly characterized as a "structural" defect? A more limited prejudice inquiry under [Strickland](#) applies only to errors that are structural. Otherwise, the usual [Strickland](#) prejudice analysis applies. Regarding the first question, the error cannot be attributed to the trial court because the trial court does not have any duty to ensure, sua sponte, that the defendant understands his constitutional right to testify. Regarding

the second question, even though the right to testify has been recognized as “fundamental,” the Supreme Court has never specifically labeled violations of the right as “structural.” And, the deprivation of certain rights, even though they are “fundamental,” is subject to a harm analysis. Consequently, the usual **Strickland** prejudice analysis applies: the defendant must show a reasonable probability that the outcome of the proceeding would have been different had his attorney not precluded him from testifying. In this case, the court of appeals did not err in holding that the prejudice prong of **Strickland** had not been satisfied.

Concurring / Dissenting Opinions: Judges Price, Womack, Johnson and Keasler, concurred without note.