No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JERRY WAYNE SHERRY — PETITIONER
(Your Name)

vs.

LORI DAVIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JERRY WAYNE SHERRY, PROSE,
(Your Name)
TDCJ-ID # 1840022
EASTHAM UNIT
2665 PRISON ROAD # 1
(Address)

LOVELADY, TEXAS 75851
(City, State, Zip Code)

N/A
(Phone Number)

## QUESTION(S) PRESENTED

Whether defense counsel has a duty to object to inadmissible evidence, and, or file a motion to suppress evidence under the Fourth Amendment to preserve error; and, whether new United States Supreme Court precedence applies, retroactively, to cases pending on direct appeal?

## LIST OF PARTIES

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

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

The Director of TDCJ-ID is represented by:

The Attorney General of Texas
Ken Paxton
P.O. Box 12548
Austin, Texas 78711-2548

## TABLE OF CONTENTS

## INDEX TO THE APPENDICIES

## TABLE OF AUTHORITIES CITED

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**PETITION FOR WRIT OF CERTIORARI**

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

## OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix - A to this petition and is unpublished.

The opinion of the United States district court appears at Appendix - B to the petition and is unpublished.

## JURISDICTION

The date on which the United States Court of Appeals decided my case was February 23, 2018. A timely motion for rehearing was denied by the United States Court of Appeals on the following date: March 27, 2018, and a copy of the order denying rehearing appears at Appendix - C.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), provides: "If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i)." Therefore, the Petitioner at this point cites the following Constitutional and Statutory Provisions Involved, along with their place within the appendix attached hereto:

U.S. CONST. AMEND. IV.....D

**STATEMENT OF THE CASE**

Petitioner is in custody pursuant to a judgement and sentence of the 21st judicial District Court of Bastrop County, Texas. Petitioner was convicted of driving while intoxicated third or more habitual and sentenced to fifty years' imprisonment. In his Federal Habeas action, the Petitioner alleged that he was denied the effective assistance of counsel at both trial and on appeal; that the statute under which evidence was collected, Texas Transportation Code § 724.012, is unconstitutional; that he was denied his due process rights, when the court reporter failed to transcribe the substance of a bench conference, and that the prosecution committed multiple instances of misconduct which led to a violation of due process of law. (See, Appendix - B)

The instant case, concerns the Application for a certificate of Appealability pursuant to 28 U.S.C. § 2253, in which the United States Court of Appeals for the Fifth Circuit, misidentified the cause of the instant claims, and denied the

COA. (See, Appendix - A, re. Appendix - 1)

The crux of the instant claim before the court is the application of **Teague v. Lane**, 489 U.S. 288, 300-301 (1989), as the Petitioner's claim was pending on appeal when this Honorable Court handed down **Missouri v. McNeely**, 133 S.Ct. 1552 (2013). Therefore, pursuant to **Teague**, all courts in the instant case were subject to the holdings of **McNeely**, and the Petitioner was denied Due process throughout his case through the non-retroactive application of well determined federal law as determined by this Honorable Court.

Furthermore, this Honorable Court determined a strikingly similar case, wherein this Honorable Court determined the **McNeely** was to be applied retroactive, in a case prior to **McNeely**. See, **Aviles v. Texas**, 134 S.Ct. 902 (2014)(mem.) Wherein, this Honorable Court remanded the matter to the Texas Court of Criminal Appeal, and **Aviles'** case was overturned on the very issues presented within the federal writ application.

**REASONS FOR GRANTING THE PETITION**

Both the United States District Court and the United States Court of Appeals for the Fifth Circuit, along with every State Court in the instant case, has decided an important federal question in a way that directly conflicts with several decisions of this Honorable Court, and their decision has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The issue before the court, in the instant case, is not a Fourth Amendment claim in the traditional sense. Instead, the case before the court is a Sixth Amendment claim of ineffective assistance of counsel in the failure to preserve a claim for review on direct appeal, through a timely objection. (See ~~Docket~~ Entry "DE" 1, Petition for writ of habeas corpus at Ground One, p. 11, and Memorandum of law in Support at pp. 3-8) The United States District Court recognized that the "Petitioner has arguably demonstrated cause for his procedural default of this claim in the state courts, but he has not established prejudice arising from the default. With regard to the issue of cause, at the time of Petitioner's criminal trial the Supreme Court had not issued the **McNeely** decision and, accordingly, the legal basis for the claim could conceivably be found to be reasonably unavailable. However, with regard to prejudice, at the time of Petitioner's trial and appeal the operation of the challenged state statute had not been found to violate a defendant's Fourth Amendment rights. Therefore, Petitioner has not established actual legal prejudice arising from his default of the claim, i.e., that his conviction would have been reversed on appeal absent his procedural error." (DE 21 at p. 15)

The Petitioner/Appellant will begin at the bottom of the statements of the United States District Court.

**First**, as demonstrated above, a criminal appeal in a case a year prior to the instant case was overturned through a decision of the Supreme Court of the United States. See, **Aviles v. State**, 385 S.W.3d 110, 116 (Tex.App. - San Antonio 2012, pet. ref'd); cf. **Aviles v. Texas**, 134 S.Ct. 902 (2014)(mem.), and **Aviles v. State**,

443 S.W.3d 291, 292-93 (Tex.App. - San Antonio 2014, pet ref'd) As the Supreme Court of the United States applied **McNeely** to a case on appeal in 2012, it stands to reason that a case from 2013, as in the instant case, would require the same application of **McNeely**, and the case be reversed minus the procedural bar through the ineffective assistance of counsel in the failure to object, and prejudice ensued.

**Second**, though true, the case in **McNeely** had not been decided prior to the trial in the instant case, the decision in **McNeely**, was decided on April 17, 2013, a mere seventy (70) days after the trial in the instant case, and one-hundred-and-twenty-two (122) or four (4) months prior to the decision of the Third Court of Appeals at Austin, Texas, on August 16, 2013. Thus, had defense counsel objected the issue would have been preserved, and as the decision in **McNeely** applicable to the Petitioner/Appellant's case under well established federal law as determined by the Supreme Court of the United States. See, **Teague v. Lane**, 489 U.S. 288, 300-301 (1989), and **Griffin v. Kentucky**, 479 U.S. 314, 328 (1987), supra. Therefore, prejudice once again is demonstrated again concerning the issue of counsels performance.

**Third**, the United States District Court found "the legal basis for the claim could conceivably be found to be reasonably unavailable." (DE 21, at p. 15) This assertion must fail as well. Obviously the legal basis for the claim in the instant claim was available as early as 2012. Further, the United States District Court, knew about **Aviles v. State**, 385 S.W.3d 110, 116 (Tex.App. - San Antonio 2012, pet ref'd), **Aviles v. Texas**, 134 S.Ct. 902

(2014)(mem.), and **Aviles v. State**, 443 S.W.3d 291, 292-93 (Tex.App. - San Antonio 2014, pet ref'd), prior to the decision in the instant case. (DE 21, at p. 12) As the operative facts in **Aviles** are strikingly similar to the instant case, it can not be said with any degree of certitude that had counsel not failed to object and preserve the error it would have failed on appeal. In fact, the case at bar **Aviles** having been from 2012, and the instant case from 2013, demonstrates just the opposite. That had defense counsel properly objected and/or preserved the Fourth Amendment claim through a timely filed motion to suppress, the Petitioner/Appellant would have prevailed.

**Fourth**, the United States District Court agreed that the Petitioner/Appellant had arguably demonstrated cause in the instant case for the procedural default. This being defense counsel's failure to preserve the Fourth Amendment claim. (DE 21 at p. 15)

**Finally**, as discussed previously, **McNeely** though admittedly handed down after the trial in the instant case, because the original holding in **Aviles** was handed down in 2012, and pending on a Petition for Discretionary review, and finally overturned due to a decision of the Supreme Court of the United States, it cannot be said with any degree of certitude that the claim could conceivably be found to be reasonably unavailable. Obviously, defense counsel in **Aviles** case recognized the argument in 2012, and preserved the issue through a timely objection. It stands to reason that had counsel objected the Petitioner/Appellant would have prevailed on appeal.

The Supreme Court of the United States has shown the debatability among jurist of reason that **McNeely** should have been applied to the Petitioner/Appellant's case, but for counsel's unprofessional errors. Furthermore, there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. **Strickland v. Washington**, 466 U.S. 668, 694 (1984)

Though the Petitioner/Appellant's claim focused on a Fourth Amendment issue, ultimately the issue is one of the Sixth Amendment magnitude. The Petitioner/Appellant recognizes the United States Supreme Court's precedence in **Stone v. Powell**, 428 U.S. 465, 494-495, 96 S.Ct. 3037 (1976), which virtually eliminates review of Fourth Amendment issues when the opportunity for full and fair consideration of the Fourth Amendment claim was provided in state courts. Since ineffective assistance is a violation of the Sixth Amendment, it may be presented in a federal habeas corpus petition even if the principle instance of inadequate representation is counsel's failure to preserve the Fourth Amendment issue. **Kimmelman v. Morrison**, 477 U.S. 365, 377, 382-383, 106 S.Ct. 2574 (1986)(unanimous Court refuses to extend **Stone** to bar federal habeas claim of ineffective assistant of counsel based on counsel's failure to file timely Fourth Amendment suppression motion.) Although a federal habeas corpus court can not directly review a Fourth Amendment claim under **Stone v. Powell**, the merits of the Fourth Amendment issue have to be addressed to determine whether deficient performance of counsel created a probability of a different outcome, which is

necessary for relief in a claim of ineffective assistance. **Strickland v. Washington**, 466 U.S. at 716.

**Stone v. Powell**, does not bar federal relief concerning a Fourth Amendment claim if the Petitioner/Appellant "was denied an opportunity for full and fair litigation" of that claim at trial and on direct appeal. The extent of this exception to the exclusion of the Fourth Amendment claims because of the brief discussion of the point in **Stone** and because the meaning of "full and fair litigation" has not again been addressed by the United States Supreme Court. See, **Shoemaker v. Riley**, 459 U.S. 948, 948, 103 S.Ct. 266 (1982)(White, J. dissenting from denial of certiorari and noting conflicting lower court views)

There is no "full and fair opportunity" to litigate the Fourth Amendment claim if the state process are routine or systematically applied in such a way to prevent the actual litigation of such claims. See, **Riley v. Gray**, 674 F.2d 522, 526 (6th Cir. 1982) cert denied, 459 U.S. 948 (1982); **Williams v. Brown**, 609 F.2d 216, 220 (5th Cir. 1980)

The United States District Court recognized: "Accordingly, this federal habeas claim was denied by the state court based on a procedural bar rather than on the merits of the claim." (DE 21, at p. 14)(Addressing the Constitutionality of Texas Transportation Code § 724.012, at Ground Four to the petition for writ of habeas corpus, DE 1, p. 14) Therefore, as stated by the District Court, there has been no full and fair opportunity to litigate the Fourth Amendment claim due to the failure of defense counsel, and as demonstrated, prejudice ensued.

As such, a Petition for Certificate of Appealability should have been issued by the United States Court of Appeals, and the United States District Court have applied **McNeely**, retroactively in the instant case. As plainly, federal law as determined by this Honorable Court mandated such retroactive application on direct appeal, and preservation of Fourth Amendment claims by defense counsel on direct appeal.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, Pro se,

Jerry Sherry

Jerry Wayne Sherry

Date: June 16, 2018