No. 18-8921

IN THE

SUPREME COURT OF THE UNITED STATES

HECTOR TELLEZ

(PETITIONER)

VS.

LORIE DAVIS ,DIRECTOR

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

(RESPONDENT)

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

EL PASO DIVISION

HECTOR TELLEZ

TEXAS DEPARTMENT OF CRIMINAL JUSTICE IDENTIFICATION No. 1858884

MICHAELS UNIT

2664 FM 2054

TENNESEE COLONY ,TEXAS 75886

UNIT PHONE NUMBER 903-928-2311

QUESTIONS PRESENTED

1. WHAT IS A REASONABLE TIME PERIOD FOR TRIAL COUNSEL TO BE REQUIRED TO BECOME AWARE OF RECENT PRECEDENCE,BEFORE HE/SHE MAY DEEMED INEFFECTIVE FOR FAILING TO UTILIZE A UNITED STATES SUPREME COURT HOLDING THAT WOULD SUBSTANTIALLY EFFECT THE OUTCOME OF A TRIAL THAT HAD NOT YET OCCURED ?

2. IS IT PERMISSIBLE FOR A STATE COURT OF APPEALS TO INSERT ITS' OWN OPINION FOR TRIAL COUNSELS' FAILURE TO FORM AN AN OBJECTION,ABSENT ANY FACTUAL BASIS TO SUPPORT IT'S OWN CONCLUSIONS TO TRIAL COUNSELS' ACTIONS ?

3. THE HOLDING IN Missouri vs. Mcneely,133 S.CT. 1552,185 L.Ed 2d 696 (2013) CLEARLY MANDATES THAT NON-CONSENSUAL BLOOD DRAWS ABSENT A SEARCH WARRANT VIOLATE AN INDIVIDUALS FOURTH AMENDMENT CONSTITUTIONAL PROTECTIONS,EXCEPT UNDER EXTREMELY LIMITED CIRCUMSTANCES.ABSENT THOSE CIRCUMSTANCES ADMISSION OF BLOOD DRAW EVIDENCE AT TRIAL ,OBTAINED WITHOUT A WARRANT WOULD BE DEEMED INADMISSIBLE UNDER THE FOURTH AMENDMENT.HOWEVER,IF A STATE COURT OF CRIMINAL APPEALS DISREGARDS THE MANDATE ISSUED UNDER McNeely,AND INSTEAD ASSUMES TRIAL COUNSEL WAS UNAWARE OF THE RECENT HOLDING, AND THEREFORE IS NOT REQUIRED TO MAKE AN OBJECTION TO THE INTRODUCTION OF BLOOD DRAW EVIDENCE OBTAINED IN CONTRADICTION TO THE RECENT PRECEDENT SET UNDER McNeely,AND CONCLUDES TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MAKE THE

THE APPROPRIATE OBJECTION,CONCLUDING THAT DISPITE THE THE SUPREMECY CLAUSE IMPLICATIONS,THE BLOOD DRAW EVIDENCE WAS ADMISSIBLE,BECAUSE NO OBJECTION WAS MADE.WAS THE RESULT OF THE TEXAS COURT OF CRIMINAL APPEALS CONCLUSIONS CONTRARY TO ESTABLISHED UNITED STATES SUPREME COURT PRECENDENT WHICH REQUIRES TRIAL COUNSEL TO BE AWARE OF THE LAW APPLICABLE TO A CASE,NAD A CLEAR VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION ?

4. UNDER THE SUPREMACY CLAUSE OF THE UNTIED STATES CONSTITUTION,DOES IT PERMIT A DELAY IN ADOPTING UNITED STATES SUPREME COURT PRECEDENTS,OR,DOES IT SPECIFY STATES MUST MAKE THE UNITED STATES SUPREME COURT HOLDINGS IMMEDIATELY AVAILABLE DEFENDANTS WHOSE CONVICTIONS HAVE NOT YET BECOME FINAL ?

5. IF THE TEXAS COURT OF CRIMINAL APPEALS ARE ALLOWED TO EXCUSE TRIAL COUNSELS' LACK OF KNOWLEDGE OF A RECENT UNITED STATES SUPREME COURT PRECEDENT,BECAUSE THE TEXAS COURT OF CRIMINAL APPEALS HAS NOT APPLIED THE RULING TO EXISTING TEXAS LAW,WOULD IT NOT CREATE A LOOPHOLE FOR THE STATE TO DELAY POTENTIAL DEFENSES ,OR ASSERT CONSTITUTIONAL RIGHTS ? ..... FURTHER,WOULD IT NOT ALSO SIMULTANEOUSLY ELIMINATE DEFENSE COUNSELS' DUTY TO STAY APPRISED OF FEDERAL LAW ?

6. Since a new rule of criminal procedure announced by the Supreme Court of The United States is applied retroactively to criminal cases that are not yet final,and on direct appeal,with no exceptions,is it required for trial counsel to be aware of a the new rule of criminal procedure if it is announced only two days before a trial is to begin.Is the issue of trial counsels' ineffective assistance to be considered for failing to object based on the new rule,when, prcedent establishes the new rule of criminal procedure would be available to a defendant,if it occured after trial was complete,but before direct appeal was foreclosed ?

LIST OF PARTIES

ALL PARTIES 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 SUIT IS AS FOLLOWS:

1. HECTOR TELLEZ,TDCJ# 1858884 (PETITIONER)
   MICHAELS UNIT/TDCJ
   2664 FM 2054
   TENNESSEE COLONY ,TEXAS 75886

2. LORIE DAVIS,DIRECTOR (RESPONDENT)
   TEXAS DEPARTMENT OF CRIMINAL JUSTICE
   P.O. BOX 99
   HUNTSVILLE ,TEXAS 77342

3. KEN PAXTON (ATTORNEY FOR RESPONDENT)
   ATTORNEY GENERAL STATE OF TEXAS
   P.O. BOX 12548/CAPITOL STATION
   AUSTIN ,TEXAS 78711-2548

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

ON

PETITION FOR WRIT OF CERTIORARI

PETITIONER RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENTS BELOW.

OPINION BELOW

(a)

THE OPINION OF THE UNITED STATES DISTRICT COURT,FOR THE WESTERN DISTRICT OF TEXAS,EL PASO DIVISION APPEARS AT APPENDIX (A) TO THE PETITION AND IS UNPUBLISHED.

(b)

THE OPINION OF THE HIGHEST STATE COURT TO REVIEW THE MERITS ON COLLATERAL REVIEW APPEARS AT APPENDIX (B) TO THE PETITION AND IS UNPUBLISHED.

(c)

THE OPINION OF THE HIGHEST STATE COURT TO REVIEW THE MERITS ON DIRECT APPEAL APPEARS AT APPENDIX (C) TO THE PETITION AND IS UNPUBLISHED.

(d)

THE OPINION OF THE HIGHEST STATE COURT TO REVIEW THE MERITS AT DISCRETIONARY REVIEW APPEARS AT APPENDIX (D) TO THE PETITION AND IS UNPUBLISHED.

(e)

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT APPEARS AT APPENDIX (E) TO THE PETITION AND IS UNPUBLISHED.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided my case was February 28,2019 and it appears in Appendix (E) of the petition. [No. 18-50240]

The date on which the United States District Court for the Western District of Texas,El Paso Division decided my case was February 28,2018 and it appears in Appendix (A) of the petition. [Case No. 3:17-cv-00126]

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

The date on which the Highest State Court decided my case on direct appeal was September 16,2015 and it appears in Appendix (C) of the petition.[Cause No. 08-13-00141-CR]

The date on which the Highest State Court refused my request for discretionary review was March 2,2016 and it appears in Appendix (D) of the petition.[PD-1342-15]

The date on which the Highest State Court decided my case on collateral review was February 15,2017 and it appears in Appendix (B) of the petition. [WR-96-171-01]

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. FOURTH AMENDMENT UNITED STATES CONSTITUTION.

2. SIXTH AMENDMENT UNITED STATES CONSTITUTION

3. SUPREMACY CLAUSE,UNITED STATES CONSTITUTION,ART.VI.

4. SECTION 724.012(b),TEXAS TRANSPORTATION CODE.

STATEMENT OF CASE

Petitioner,Hector Tellez, is in the custody of the Texas Department of Criminal Justice (TDCJ),pursuant to sentences imposed by the 384th judicial District Court in El Paso County,Texas. [See Appendix F].Tellez was found guilty by a jury on two counts of intoxication manslaughter and one count of aggravated assault with a deadly weapon.Punishment was assessed at fourty years imprisonment and a fine of $10,000 for each count.

The Court of Appeals for the Eight District of Texas,affirmed Tellezs' convictions,Tellez v. State App. Ct. No. 08-13-00141-CR, 2015 WL 5449728 (Tex.App.El Paso,Sept. 16,2015,pet.ref'd)(not designated for publication).The State Appellate Court refused discretionary review on March 2,2016.Tellez v. State,No. PD 1342-15.

On November 29,2016,Tellez filed a state habeas petition, Without conducting any evidentiary process,the Texas Court of Criminal Appeals denied the petition ,without written order on February 15,2017.

On March 28,2017,Tellez filed his original petition seeking habeas relief pursuant 28 U.S.C.§2254.The Court denied the petition following adoption of the Magistrates' report and recommendation. See Appendix A.

Tellez sought Certificate of Appealability from the Fifth Circuit Court of Appeals,which was denied on February 28,2019. See Appendix E.

(a)

BACKGROUND

On July 8,2011,a band called "Ancient of Days" played a concert at the Open gate Church in Northeast El Paso.Mark Anthony Dobbs,Jon Cervoni,Aaron Carrillo, Brandon Beltran,and Austin Ramos were in the band.As Dobbs drove home in his parents' Nissan Sentra,he experienced car trouble and pulled onto the shoulder of Loop 375.Dobbs turned on the vehicle's hazard lights and called Cervoni for help because he did not want to call his parents.Cervoni and Carrillo arrived within ten of fifteen minutes.Cervoni pulled his car in front of Dobbs' car so that the two cars were facing each other,and they attempted to start Dobbs' car with jumper cables but were unsuccessful.Dobbs and Cervoni got in Dobbs' car to call for assistance while Carrillo stood outside on the passenger side.Dobbs has no memory of the accident which subsequently occured,and was informed by his father that Cervoni and Carrillo were dead.

Evadne Atkinson,a registered nurse,was driving home on Loop 375 sometime around 11:00 p.m. when she saw a truck ahead of her that was driving on the shoulder rather than in a lane of traffic.The truck continued to travel on the shoulder and Atkinson saw the truck become airborne and flip.She did not observe the trucks brake lights prior to the accident.She saw a man,which she identified at trial as [Tellez] ,coming from the truck.She asked him if he was okay and he replied that he could not find his cellphone.[Tellez] was staggering and oblivious to everything around him.Atkinson concluded

[Tellez] was intoxicated based on her experience as a registered nurse.At trial Atkinson testified [Tellezs'] staggering ,and incoherent behavior could have been caused from suffering a concussion.

El Paso Police Officer Adrian Armendariz was assigned to the special traffic investigations division and was assigned the investigation.His investigation showed that the Toyota Tundra struck the rear of the Nissan Sentra with such force that the trunk was pushed into the passenger area of the vehicle.Carrillo's body was thrown 79 feet by the force of the collision.Armendariz found no evidence that[Tellez] applied his brakes.An open 30-pack of Budweiser was found next to the Tundra. Several of the cans were open and empty .A civilian witness testified that the inside of the Tundra smelled like alchohol.

El Paso Police Officer Daniel Conway arrived at the scene and asked [Tellez] for identification.[Tellez's] speech was slurred and he ahd a strong odor of alchoholic beverages on his on his breath as he spoke to Conway. [tellez] volunteered to Conway that he had been on his cell phone at the time of the accident.Cell phone records at trial contradicted [Tellez's] use of a cellphone, as no calls had been made from the phone for several hours prior to the accident.Conway placed [Tellez] in handcuffs and transported him to Beaumont Army Hospital. [Tellez] refused to state his name and when asked claimed the cars were in an accident before he arrived at the scene.

Officer Raul Lom was dispatched to the scene of the accident.After conducting a preliminary investigation concluded the accident was caused by an intoxicated driver.Lom proceeded to Beaumont Army Hospital where [Tellez] was being treated .[Tellez] refused to respond Officer Loms' questions.Lom told [Tellez] he was under arrest,read the stautory Miranda warning and requested [Tellez] provide a voluntary blood specimen.[Tellez] did not respond.At Lom's request,a nurse drew a specimen of [Tellez's] blood without his consent.No warrant was obtained to sieze the blood specimen.At trial the blood analysis level was .29.No exigent circumstances were present at the time to necessitate a warrantless blood draw.

(b)

STATEMENT OF CASE

Convictions obtained through illegally obtained evidence have long been held to violate an individuals Constitutional rights.The exclusionary rule excludes not only illegally obtained evidence itself,but also other incriminating evidence derived from the primary evidence.U.S. Runyun,275 F.3d 449.As will be shown,prior to [Tellez's] trial,this Court found that warrantless blooddraws violated Fourth Amendment protections.

The crux of this case lies with the victims and the evidence. Nothing can be more devastating than to lose a child to a drunk driver.Nevertheless,justice demands that a state legally prove elements of a crime,with legally admissible evidence,regardless of the sympathy one may hold for the family of the victims.No

Judge wants the reputation of allowing a criminal to prevail on a technicality,even one as egregious as a violation of the Fourth Amendment.In looking at the justification the Courts' have so far illicited as the reason for denying relief,[Tellez] respectfully requests the Court apply its' holding in Harrington v. Richter, 562 U.S. 86,100-101 (2011) (citing Williams v. Taylor,529 U.S.364, 412(2002) and whether or not that decision was an "unreasonable application" of a Supreme Court rule.

The State Supreme Court decisions at direct appeal concluded that trial counsel was not ineffective for failing to move to suppress the blooddraw evidence based on the Holding in Missouri v. McNeely, 133 S.Ct. 1552,185 L.Ed. 2d 696 (2013),which was decided on April 17,2013,because Tellezs' trial began on April 19,2013,and the Texas Court had not yet addressed the impact of the holding in McNeely, supra,therefore trial counsel could not be deemed ineffective for failing to form an objection based on undecided state law.This asserted justification by the Court was made without conducting any inquiry into trial counsels strategy or his knowledge or lack thereof of the recent Supreme Court ruling. At direct appeal the state appellate court is confined to evidence contained in the record. The record is silent as to counsels reason for not utilizing the holding in McNeely,supra.

[Tellez] contends that trial counsel had a duty to know the applicable law pertaining to his case,including analyzing on his own the potential impact of a recent United States Supreme Court ruling.The state appelate courts' justification just doesn't pass the smell test.Countless other attorneys did form an objection to the introduction of blooddraw evidence,obtained absent a warrant BEFORE,THE Texas Court of Criminal Appeals adjudicated the effects

of McNeely,supra to exisiting Texas State law.SEE Villarreal v. State, 13-13-00253-CR,2014 WL 12571750,(Tx.App.Corpus Christi 2014);Gentry v. State No.12-13-00168-CR,2014 WL 4215544 (Tex.App.Tyler Aug.27, 2014);Aviles v. State,443 S.W.3d 291,293-94,No.13-00224-CR,2014 WL 3865815 (Tx.App.Eastland July 31,2014);Burcie v. State,No.08-13-00212-CR,2015 WL 2342876 (Tx.App.El Paso May 15,2015)..... In the cases above and countless others,the Texas Court of Appeals sustained trial counsels' objections to the introduction of blood-draw evidence obtained in contradiction to the McNeely holding.

A defendant has the burden to establish that he was deprived effective assistance of trial counsel by a preponderance of the evidence .Clark v. Johnson,227 F.3d 273,284 (5th Cir.2000).. In Strickland v. Washington,466 U.S. 668,104 S.Ct.2052 (1989),this Court established a two prong test for reviewing ineffective assistance of trial counsel claims.Under the first prong of Strickland, supra,a defendant must show by a preponderance of the evidence that his trial counsels' performance fell below an objective standard of reasonableness.Clark v. Johnson,227 F.3d 273,283 (5th Cir. 2000).This showing requires a defendant to prove that his counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.Strickland ,supra U.S. at 687. The myriad list of cases above unequivically demonstrate that competent trial counsel,on their own,could discern the impact of McNeely,supra to Texas State law,and moved to suppress the illegaly obtained evidence accordingly.

A reviewing Court " must indulge in a strong presumption that counsels' conduct falls within the widerange of reasonable professional assistance."Galvin v. Cockrell,293 F.3d 760,764 *5th Cir.2002). Additionally,courts " must strongly presume that

trial counsel rendered adequate assistance and the challenged conduct was the product of reasonable trial strategy." Wilkinson v. Collins, 950 F.2d 1054 (5th Cir.1992).Without factually determining trial counsels's strategy for failing to object,which is prohibited by the rules governing direct appeals in Texas,at state habeas the Texas Court of Criminal Appeals denied [Tellez] the opportunity to determine trial counsel's knowledge of McNeely or determine strategy. This Court widely recognized the flaws in Texas' habeas proceedings, Trevino v. Thaler,566 U.S. (2013). The rulings thus far,in the present case demonstrate how Texas Courts take advantage of the flaws.At direct appeal,the Appellate Court invents from thin air a justification for trail counsels' failure to move to suppress, based on McNeely,supra.At state habeas,the Court denies the opportunity to determine from trial counsel if the Appellate Courts justification for trial counsels failure to object was factual.The Texas Court of Criminal Appeals has conveniently remained silent as to how numerous other defense attorneys were able to move to suppress based on McNeely ,supra,when the Texas Court of Criminal Appeals had yet to apply McNeely to existing state law.Even though Texas law was undecided,trial counsel in Villarreal,Gentry,Aviles Burcie .....,all determined that McNeely would benefit their clients position at trial,and suppress evidence that would be used against them.In Ward v. Dretke,420 F.3d 479,488 (5th Cir.2005) "Counsels' failure to move to suppress evidence,when the evidence would have been suppressed if objected to,can constitute deficient performance. The question before this Court,is not whether trial counsel was deficient,that is clearly shown,but,whether that deficient performance is negated by time factors.Nevertheless,the Fifth Circuit Court of Appeals denial of COA was inappropriate.It is clear from the

facts of this case,reasonable jurists would debate counsels performance at trial.

The Fifth Circuit clearly erred in denying Certificate of Appealability.Under the standard for granting COA set by the holding in Miller-El v. Cockrell,537 U.S. 322,336,154 l.Ed.2d 931 (2003), " a claim can be debatable even though every jurist of reason might agree,after the COA has been granted and the case has received full consideration,that [the] petitioner will not prevail." Id. @ 537. At the direct Appeal,the state court inserted its ' own factual basis for determining trial counsels' failure to move to suppress. At state habeas,the trial court,and appellate court,procedurally foreclosed [Tellezs'] opportunity to find out if trial counsel was aware of the McNeely holding,and why he chose not to move to suppress accordingly.At Federal habeas ,the Court merely found the state courts decision was a reasonable.Failing to address the underlying Supremacy Clause violation,or considering counsel's failure to move to suppress based on facts,but rather relied of the Texas Court of Criminal Appeals assertion of a fact.

[Tellez] is unaware of any precedent that permits trial counsel from being required to consider the Supremacy Clause of the United Clause of the United States Constitution and its' application to State law.Additionally,[Tellez] has found no precedent that contradicts his assertion that the holding in McNeely,supra,was available to him at the time of trial,direct appeal,or that trail counsels performance would be deemed effective even if he was unaware of changes in law that were recent.The Supremacy Clause declares primacy of federal law over State constitutional provisions,as well as state common and statuory law.U.S. v. Wagner,940 f.Supp 972,(N.D.Tex.1996).

The State Appellate Court denied relief based on trail counsels failure to object,finding he provided effective assistance,because the holding in McNeely was too recent for trial counsel to beheld accountable.However,"[A] new rule for the conduct of criminal prosecutions must be applied retroactively to all cases,state or federal pending or on direct review or not yet final,with no exceptions for cases in which the new rule constitutes a clear break with the past. U.S. v. Miranda,248 F.3d 434 (C.A.5 2001). The holding in McNelly, supra clearly made a substantial break in Section 724.012(b) of the Transportation Code in Texas,as well as throughout the country. What has traditionally been known as the implied consent law,is no longer permissible.McNeely,supra dictates law enforcement must obtain a warrant ,prior to obtaining non-consensual blood draws.

The application and availability of McNeely,supra was not predicated on trial counsels failure to object.[Tellez] as a clear matter of law was entitled to suppression of the blood draw results at trial.Trial counsels' ignorance of the recent holding is immaterial, however,that ignorance ,if in fact he was unaware,resulted in either intentional,or unintentional ineffective assistance.When the Supreme Court of the United States applies a rule of law to the parties before it,that rule is the controlling interpretation of federal law and must be given full retroactive effect on all cases still open,on direct review and as to all events regardless of whether such events predate or post-date its announcement of the rule.Rodriquez Delgado v. Shell Oil Co.,322 F.Supp 2d 797 (S.D. Tex.2004)

The timing of the McNeely holding is touted by the state as an excuse for trial counsels' failure to object.The issue before the state court,and federal district court,was not limited to trial

counsels knowledge of the McNeely holding,but whether or not the evidence should have been suppressed.The state Appellate Court overlooked thes basic prejudice of illegally admitted evidence, and disregarded its duty under the Supremacy Clause to make the new rule of criminal procedure available in all aspects to [Tellez] at direct appeal."Whether a convicted defendant may find refuge in a rule of criminal procedure newly announced by the Supreme Court depends in large part on timing.If the conviction is not yet final when the Supreme Court announces the rule,then inferior courts must apply the rule to defendants case." Griffin v. Kentucky, 479 U.S.314,322,93 1.Ed 2d 649,107 S.Ct. 708 (1987).

It is clear from the opinions and orders of the lower courts that to date,[Tellez] has not had the benefit of the holding in McNeely, supra available at any stage of his proceedings.

In addressing the second prong of Stricklands' prejudicial inquiry. The prejudicial effect of trial counsels' failure to move to suppress based on McNeely,supra is glaring.First,every other similar case in Texas, where trial counsel moved to suppress based on McNeely the evidence was held to be inadmissible at direct appeal,and subsequently at the trial level.[Tellezs'] trial would likely of been differant,because the state lacked sufficient evidence of driving while intoxicated,absent the blood draw results. The evidence at trial at first blush would point towards intoxication. At cross-examination Evadne Atkinson,a registered nurse,and a witness at the scene admitted [Tellezs] symptoms of disorientation were consistent with symptoms of a concussion.SEE Appendix F pg.4-6 . The evidence of a 'smell of beer' fails to meet the guilt beyond a reasonable doubt threshhold,because the states own

witness,at trial,indicated that a 30 pack of Budweiser was strewn throughout the vehicle and landed outside the cab of the truck, along with numerous cans that burst open. SEE Appendix A,pg.3 _____.The prejudicial effect of trial counsels ineffectiveness for failing to move to suppress based on McNeely,cannot be excused ,because irregardless of trial counsels' knowledge,the legal basis for the suppression became available before the conviction became final.The Court in Jerrigan v. Collins,980 F.2d 292,296 (C.A.5 1992) held " Any deficiencies be counsel must be prejudicial to the defense to be ineffective assistance under the constitution." Strickland ,466 U.S. 687-89, Where defense counsels failure to litigate a Fourth Amendment claim competently is the principle allegation of ineffective assistance of counsel,the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been differant absent the excluded evidence." Kimmelman v. Morrison, 477 U.S. 365,375 (1986).There is little doubt ,the Texas Appellate Courts would have excluded the blood draw evidence ,as they did in the litany of cases previously cited.[In [Tellezs] case the Court deviates from the hoding in McNeely,citing trial counsels' failure to object.

REASONS FOR GRANTING PETITION

This Court in Trevino v. Thaler, 569 U.S. (2013) noted that in Texas " [p]rocedure makes it virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim on direct review." Trevino,569 slip-op at 8 citing, Robinson,16 S.W.3d at 810-811.The case at bar not only demonstrates how difficult it is for a petitioner to bring an ineffective assistance of counsel claim in Texas,but,demonstrates how Texas Courts' procedurally manipulate a petitioners' ability to substantiate a claim at direct review and subsequently at collateral review. At direct review the Texas Appellate Court could only surmise as to trial counsels reasoning for failing to move to suppress blood draw evidence based on the holding in McNeely,supra which occured a mere two days before trial commenced.However,instead of deferring the fact question of counsels' actions,the Court inserted its' own opinion as to why trial counsel failed to move to suppress.At state habeas, the Court denied an evidentiary hearing,and remained silent as to why relief was not granted.

As previously shown,precedent requires that a new rule of criminal procedure be available to a defendant at trial,and direct review.The Texas Courts rationale of the recentness of the McNeely holding defies constitutional authority granted under the Supremacy Clause.If this Court allows the Texas State Court, Federal District Court,and Fifth Circuits decision to stand it will effectively create a loophole that will allow the state

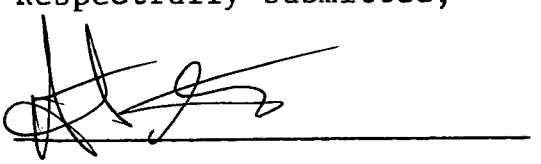
to usurp this Courts' authority under the Supremacy Clause by creating an undeterminate time delay,before the state of Texas is required to recognize federal authority.

The Petitioner has been denied his constitutional protections under the Fourth Amendment as established under McNeely,supra. But for,trial counsels failure to move to suppress,the Texas Appellate Courts would have found the blood draw evidence inadmissible. Applying the State Appellate Courts' holding,trial counsel would no longer be required to consider the effects of United States Supreme Court rulings in conjunction with Texas State law,until the State Appellate Courts first reviewed the Supreme Court ruling. Without granting Certiorari,Texas will create another manipulative procedural bar to deny a defendant access to favorable Federal Court precedent,until Texas applies the rulings to their exisiting law.Further,the issue of ineffective assisatnce of trial counsel would no longer be premised on his actual assistance and knowledge of law,but,only on the law Texas decides counsel should be aware of.

CONCLUSION AND PRAYER

Petitioner, Hector Tellez prays the grant writ of certiorari.

Respectfully submitted,



Hector Tellez

Date: April 4, 2019