No. _____

In The

Supreme Court of the United States

ABRAHAM M. FISCH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent,

On Petition for Writ of Certiorari
to the First Court of Appeals of Texas

PETITION FOR WRITT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A Texas intermediate court of appeals has ruled that a criminal defense attorney does not have a superior right to possess attorney's fees that may have been stolen by his client without the attorney's knowledge; that a criminal defense attorney may not challenge a forfeiture of attorney's fees on behalf of his client; and that it is the attorney, rather than the government, who bears the burden of proof. Petitioner poses the following questions, and seeks this Court's review:

(1) What is the appropriate standard of review to be employed when a court orders the forfeiture of attorney's fees to the State?

(2) Does a criminal defense attorney have a superior right to possession of monies tendered to him by a client as attorney's fees, though the client may have stolen the funds without the attorney's knowledge?

(3) May a criminal defense attorney assert his client's Sixth Amendment rights to recoup attorney's fees seized by the State?

(4) Does forfeiture of attorney's fees from a criminal defense attorney violate the Excessive Fines clause of the Eighth Amendment?

LIST OF ALL PARTIES

Pursuant to SUP. CT. R. 14.1(b), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

Mr. R. Scott Shearer -	Attorney for Petitioner
Ms. Regina Bacon Criswell -	Trial counsel for Petitioner
Abraham M. Fisch -	Petitioner.
Ms. Markay Stroud - **Ms. Donna Goode** **Ms. Robyn A. Brown**	Trial counsel for the State of Texas.
Mr. Daniel C. McRory -	Appellate counsel State of Texas.
Ms. Kim Ogg -	Harris County District Attorney.
Vickram Kumar Patel -	Beneficiary of the forfeiture orders.
Hon. Mark Kent Ellis -	Presiding judge of the Trial Court.

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INTRODUCTION TO THE PETITION FOR WRIT OF CERTIORARI

Abraham Fisch, Petitioner, an attorney and interested party in seized monies, petitions for a writ of certiorari to the First Court of Appeals of Texas. This case presents several unsettled questions of national importance with regard to the governmental forfeiture of monies used for attorney's fees and the competing demands of the Sixth Amendment Right to Counsel, as interpreted by this Court.

In the past, this Court has had occasion to examine forfeiture of *tainted* funds after conviction that were intended for payment of attorney's fees. It has also recently had occasion to rule on the forfeiture of *untainted* funds sought to be used as attorney's fees. This Court has not yet had occasion to examine, however, a situation presented by the case at bar. In the present case, approximately five months after receiving a check for attorney's fees, the State of Texas caused a search and seizure warrant to be issued against Petitioner's personal bank account, seizing approximately $80,600.00 in allegedly tainted funds that Petitioner testified represented earned attorney's fees. The State of Texas concedes that the Petitioner had no knowledge of the tainted nature of the funds at the time they were conveyed by the client and continuing up until approximately five months into his representation of his client on multiple state and federal charges. In two separate actions, one pre-trial and one post-plea, Petitioner sought the return of his attorney's fees as a good faith purchaser and innocent owner. The district court denied Petitioner's motions and the

Texas intermediate court affirmed the district court's forfeiture orders. After ordering briefs on the merits, the Texas Supreme Court denied review.

This case of first impression also presents an opportunity for the Court to resolve a split among the States on two questions of fundamental importance to our adversarial system of justice:

> What burden of proof is to be applied to forfeiture actions? and;
>
> May an attorney assert the Sixth Amendment claims of his client to seek return of seized attorney's fees?

These constitutional issues are significant to all participants at all levels of our state and federal criminal justice systems. The opinion of the court below is also of particular interest to the lawyers of this nation. The opinion of the court below represents an unprecedented assault on our system of adversarial justice and a polar shift of the balance of power with regard to the representation of accused citizens.

The case is of significant public interest and the questions presented have been resolved differently by a majority of circuit courts and state courts, leading to confusion of the law. This Court should swiftly grant the petition for writ of certiorari and avert the spread of such extreme governmental overreaching like that recounted in the decision below.

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CITATION TO OPINIONS BELOW

The opinion of the First Court Appeals of Texas is reported at *In re $80,600.00*, 537 S.W.3d 207 (Tex. App. — Houston [1st Dist.] 2017, pet. ref'd). It is included in the appendix to this writ. The opinion may also be found at: *caselaw.findlaw.com/tx-court-of-appeals/1876198.html.*

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STATEMENT OF JURISDICTION

The judgment of the First Court of Appeals of Texas was entered on October 3, 2017. The Texas Supreme Court denied review on September 28, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Sixth Amendment to the United States Constitution reads in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

U. S. CONSTITUTION, Amendment VI.

The Eighth Amendment to the United States Constitution reads in pertinent part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

U. S. CONSTITUTION, Amendment VIII.

The Fourteenth Amendment to the United States Constitution reads in pertinent part:

> "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. CONSTITUTION, Amendment XIV.

Chapter 47 of the TEXAS CODE OF CRIMINAL PROCEDURE invests a Texas trial court where a criminal action is pending with the authority to restore stolen property to the person appearing by the proof to be the rightful owner. Article 47.02 of this chapter provides as follows:

Art. 47.02. RESTORED ON TRIAL.

(a) Upon the trial of any criminal action for theft, or for any other illegal acquisition of property which is by law a penal offense, the court trying the case shall order the property to be restored to the person appearing by the proof to be the owner of the same.

(b) On written consent of the prosecuting attorney, any magistrate having jurisdiction in the county in which a criminal action for theft or any other offense involving the illegal acquisition of property is pending may hold a hearing to determine the right to possession of the property. If it is proved to the satisfaction of the magistrate that any person is a true owner of the property alleged to have been stolen, and the property is under the control of a peace officer, the magistrate may, by written order, direct the property to be restored to that person.

TEX. CRIM. PROC. CODE ANN. art. 47.02.

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STATEMENT OF THE CASE

This appeal stems from two forfeiture orders entered by the presiding judge of the 351st District Court of Harris County, Texas in Cause Numbers 1210228 & 1417446 entitled *State of Texas v. Dennis Joe Pharris*. In a particularly distasteful exercise of prosecutorial power, the Harris County District Attorney's Office caused a search and seizure warrant to be issued for funds held in the personal account of Attorney Abraham M. Fisch, who represented Dennis Joe Pharris. (CR 1417446 Supp. at 39). Attorney Fisch claimed that the money represented lawfully earned attorney's fees accepted in the ordinary course of business and moved the trial court to restore his property. (CR 1417446 Supp. at 10). The trial court overruled Attorney Fisch's motion for the return of the seized money. (CR I at 133) (CR 1417446 Supp. at 53). The Petitioner and interested party Abraham M. Fisch perfected his appeal when he filed a timely notice of appeal on March 4, 2010 in cause number 1210228. (CR I at 134).

After the conclusion of the criminal case of Mr. Pharris, Attorney Fisch filed an Amended Petition for the Release of Seized Property. On May 21, 2014, the trial court denied Attorney Fisch's Amended Petition for Release of Seized Property. (CR 1417446 at 54) (CR 1417446 Supp. at 71). On the same day the trial court ordered the approximately $80,600.00 seized from Attorney Fisch to be turned over to Dr. Vickram Patel, the alleged victim of Mr. Pharris'

theft.[1] (CR 1417446 Supp. at 72). Attorney Fisch again appealed. (CR 1417446 at 66). These matters were the subject of two appeals in the First Court of Appeals of Texas - Cause Nos. 01-14-00424-CV & Cause No. 01-15-00874-CV.

In an opinion delivered October 3, 2017, a panel of the First Court of Appeals of Texas AFFIRMED the two orders of the 351st District Court of Harris County, Texas granting forfeiture of attorney's fees from the bank account of the Petitioner. The panel opinion was ordered published on February 15, 2018 and is reported at *In re Approximately $80,600.00*, 537 S.W.3d 207 (Tex. App. - Houston [1st Dist.] 2017) pet. ref'd) (Appendix A).

Appellant did not file a motion for rehearing. Petitioner's Petition for Review was filed with the Texas Supreme Court on December 18, 2017. By order dated June 1, 2018, the Texas Supreme Court asked Petitioner to file a brief on the merits. Petitioner's brief on the merits was filed July 2, 2018. The Texas Supreme Court denied review on September 28, 2018. (Appendix B). This Petition for Writ of Certiorari is timely filed within 90 days of the entry of the judgment. See SUP. CT. R. 13.1. The federal questions presented by Petitioner in this writ of certiorari were timely and properly raised in the courts below.

[1] As Petitioner understands the evidence, Patel voluntarily gave the money to Pharris to secure a loan and then Pharris diverted it for the purpose of paying Petitioner's attorney's fees without the Petitioner's knowledge. (CR 1417446 at 20).

1. The district court's rulings.

The State conceded that Attorney Fisch was unaware of the alleged stolen nature of the funds at the time the attorney's fees were conveyed by the client Pharris. (CR 1417446 Supp. at 39) (RR 1417446 at 13). The State's theory in the district court was that the $80,600.00 in attorney's fees remained the property of Dr. Vickram Patel because Pharris, without authorization from Patel, diverted the monies to pay Petitioner, an attorney, for representation in multiple state and federal criminal cases. (CR 1417446 at 20). Petitioner, on the other hand, testified that he had earned the fees before transferring the monies out of his Interest on Lawyers Trust Account (IOLTA) and into his personal account. (CR 1417446 Supp. at 10). The trial court overruled Attorney Fisch's motions for the return of the seized money. (CR I at 133) (CR 1417446 at 54) (CR 1417446 Supp. at 53-54, 72).

2. The state court of appeals opinion.

In a published opinion, the First Court of Appeals of Texas held that Petitioner had the burden of proof to show that he was the rightful owner, i.e. that Petitioner had a superior right to possession of the monies:

> The party seeking a change in the status quo is the one who bears the burden. [citations omitted]. In both

> actions, Fisch petitioned the trial court to order the money to be returned to him. Accordingly, because he sought the money to be returned to him, Fisch bore the burden of proving that he was the rightful owner of the money.

(Op. at 8) (Appendix A).

The First Court of Appeals of Texas ultimately held that the evidence was legally and factually sufficient to support the trial court's denial of Petitioner's claim that he had a superior right to possession of the money. (Op. at 12). The court of appeals also held that Petitioner was barred from asserting Pharris' claim that the forfeiture denied Pharris' Sixth Amendment right to be represented by counsel:

> "Sixth Amendment rights are personal. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 1069, 13 L.Ed.2d 923 (1965). Personal rights can only be asserted by the person possessing them; a third party cannot assert them for the third party's benefit. [citations omitted]. Accordingly, Fisch cannot assert his client's Sixth Amendment rights for Fisch's benefit."

(Op. at 13) (Appendix A).

The panel opinion failed to mention that Petitioner Fisch had already expended five [5] months of work on multiple state and federal cases on behalf of Defendant Pharris by the time the State seized the money out of Petitioner's account.

In *Sila Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083; 194 L. Ed. 2d 256 (2016) this Court stated that, "whether property is 'forfeitable' or subject to pretrial restraint . . . is a nuanced inquiry that very much depends on who has the superior interest in the property at issue. Unfortunately, and despite multiple citations to authority, the Texas intermediate court completely ignored and failed to cite precedent from this Court.

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ARGUMENT

The First Court of Appeals of Texas has decided important federal questions in a way that conflicts with the decisions of several circuit courts and other state courts of last resort. The First Court of Appeals of Texas has decided important questions of federal law that have not been, but should be, settled by this Court. The First Court of Appeals of Texas has also decided important federal questions in a way that conflict with relevant decisions of this Court.

(A) THIS COURT SHOULD GRANT REVIEW OF THE FIRST COURT OF APPEALS OF TEXAS' DECISION BECAUSE IT IS INCONSISTENT WITH SUPREME COURT PRECEDENT CONCERNING WHO MAY ASSERT SIXTH AMENDMENT CLAIMS.

The procedural guarantee contained within the Sixth Amendment is a fundamental right applicable to the States via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065 (1965). The Texas intermediate court below, citing *Pointer*, held that Petitioner could not assert the Sixth Amendment rights of his client in the pursuit of the seized funds because, according to the panel opinion, Sixth Amendment rights are "personal" to the defendant. (Op. at 13) (Appendix A).

Petitioner asserts that the panel below misconstrued the meaning of the word "personal" in the context of Pointer's holding. *Pointer* was issued at a time when this Court was tasked with deciding what constitutional rights were incorporated into the 14th Amendment. The word "personal" only appears twice in the opinion and should be fairly described as distinguishing the rights of the individual from property rights and the rights of larger classes. The right to counsel in state proceedings was itself but two years old at the time of *Pointer*. No where in *Pointer* does it say that only a defendant can assert his individual constitutional rights. Furthermore, the lower court's holding in this regard appears to be completely illogical, given that the very reason to hire an attorney is so that the attorney can assert the

client's "personal" rights and the Petitioner in this case sought return of the attorney's fees while he was Pharris' retained counsel.

The First Court of Appeals of Texas also cited *United States v. Johnson*, 267 F.3d 376, 380 (5th Cir. 2001) for the proposition that Petitioner could not assert the sixth amendment rights of his client Pharris. *Johnson* is inopposite. In *Johnson* two co-defendants urged a denial of their own sixth amendment rights to counsel when a co-defendant was barred from speaking with his lawyer. *See Johnson*, 267 F.3d at 380. ("They claim that because of their 'alleged close association with Troy marks in the conspiracy,' any violation of his sixth amendment rights prejudiced their right to a fair trial and due process. The right to the assistance of counsel, however, is a personal right and Pickens and Brown lack standing to urge its violation").

Petitioner also avers that, to the extent that *Pointer* may support the First Court of Appeals' holding, it has been overruled *sub silentio* by more modern cases. In *Sila Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083; 194 L. Ed. 2d 256 (2016), the attorney for *Luis* asserted the "personal" Sixth Amendment rights of his client and actually prevailed.

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(B) THIS COURT SHOULD GRANT REVIEW OF THE FIRST COURT OF APPEALS OF TEXAS' DECISION TO RESOLVE THE CONFLICT BETWEEN THE TEXAS COURT OF LAST RESORT'S DECISION AND THE DECISIONS OF THE CIRCUIT COURTS AND OTHER STATE SUPREME COURTS.

The opinion issued by the First Court of Appeals of Texas in the case at bar is in direct conflict with the opinions of numerous circuit courts and other state court's of last resort. Petitioner raised his objections to the burden of proof employed by the First Court of Appeals of Texas in his filings below. *See* Brief for Appellant at page 17 – "Placing the burden . . ."; *see also* Appellant's Reply to the State's Response to the Appellant's Petition for Review at page 9 – "Petitioner takes issue with the panel opinion's assignment of the burden of proof."

Forfeitures are not favored in law or equity. *State v. Seven Thousand Dollars*, 136 N.J. 223, 238, 642 A.2d 967 (N.J. 1994); *see State ex rel. Frederick City Police Dept. v. One Toyota Pick-Up Truck*, 334 Md. 359, 375, 639 A.2d 641 (Md. 1994) ("forfeitures are not favored in the law and should be avoided whenever possible."). Statutes imposing forfeitures are strictly construed in favor of the persons against whom they are sought to be imposed. *See Baca v. Minier*, 229 Cal.App.3d 1253, 1265; 280 Cal.Rptr. 810 (Cal. 1991); *Cochran v. Harris*, 654 So.2d 969, 971 (Fla. 4th DCA 1995); *In re Prop. Seized for Forfeiture from Williams*, 676 N.W.2d 607, 612 (Iowa 2004); *State ex rel. Maclaughlin v. Treon*, 926 S.W.2d 13, 16 (Mo. App. W.D. 1996) ("Missouri disfavors

forfeitures and such actions are only undertaken if they advance the letter and spirit of the law."); *State v. One House*, 346 N.J.Super. 247, 252, 787 A.2d 905 (N.J. App. Div. 2001) ("strictly construed against the State").

It is vital to the jurisprudence of this nation that appellate courts properly apply the standards of review. Standards of review are, in effect, checks on an appellate court's legitimate use of power because adherence to them restrains their actions and prevents the unfettered exercise of judicial power. In the case at bar, the First Court of Appeals of Texas' opinion described the burden of proof as follows:

> The party seeking a change in the status quo is the one who bears the burden. [citations omitted]. In both actions, Fisch petitioned the trial court to order the money to be returned to him. Accordingly, because he sought the money to be returned to him, Fisch bore the burden of proving that he was the rightful owner of the money. [citations omitted].

(Op. at 8).

The panel below was obviously belaboring under an incorrect burden of proof. The burden of proof in a forfeiture action is placed squarely upon the State. Chapter 47 of the TEXAS CODE OF CRIMINAL PROCEDURE, entitled "Disposition of Stolen Property," does not assign a burden of proof. Chapter 59, another Texas forfeiture statute, does so

provide. Chapter 59, entitled "Forfeiture of Contraband", provides, in pertinent part, as follows:

> All cases under this chapter shall proceed to trial in the same manner as in other civil cases. The state has the burden of proving by a preponderance of the evidence that property is subject to forfeiture.

TEX. CRIM. PROC. CODE ANN. art. 59.05(b).

The Texas Supreme Court has held that the State bears the burden of proof in a Chapter 59 forfeiture case. *State v. One (1) 2004 Lincoln Navigator*, 494 S.W.3d 690, 693 (Tex. 2016) ("[t]he state has the burden of proving by a preponderance of the evidence that property is subject to forfeiture").

The federal courts place the burden of proof in a forfeiture case upon the Government. *See*, *e.g.*, *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998); *United States v. Melrose East Subdivision, et. al.*, 357 F.3d 493 (5th Cir. 2004); 18 U.S.C. §983(c)(1).

The overwhelming majority of states also assign the burden of proof to the Government.[2]

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[2] *See, e.g.*, *Georgia Harris et al., v. State of Alabama*, 821 So.2d 177, 185 (Ala. 2001) (". . . the State had the burden of proving that the currency seized" was in violation of the Alabama Uniform Controlled Substances Act.); *In the Matter of: Two Hundred Fifty Thousand One Hundred One Dollars and Sixty Cents ($250,101.60) in United States Currency Et Al. v. Melissa Rivera*, No. 1 CA-CV 15-0219 Court of Appeals of Arizona, First Division May 3, 2016 (unpublished) ("the state has the burden

of establishing by a preponderance of the evidence that the property is subject to forfeiture . . ."); *In re One 1994 Chevrolet Camaro*, 343 Ark. 751, 756, 37 S.W.3d 613 (Ark. 2001) ("the burden of proof is on the State initially"); *Benson v. County of Mendocino, et al.*, A145389 California Court of Appeals, First District, Second Division February 21, 2018) (unpublished) ("The government bears the burden of proving the property is subject to forfeiture."); *Colorado Dog Fanciers, Inc., v. The City and County of Denver*, 820 P.2d 644, 649 (Colo. 1991) ("Since a forfeiture action is a civil proceeding, the People bear the burden of proving the allegations of the complaint by a preponderance of the evidence."); *State v. One 1993 Black Kenworth*, 41 Conn.App. 779, 679 A.2d 13 (Conn. App. 1996) ("In an asset forfeiture proceeding, the State has the burden of proving all material facts by clear and convincing evidence."); *Serrano v. State*, 946 N.E.2d 1139, 1140 (Ind. 2011) (To obtain the right to dispose of property, use the property, or recover law enforcement costs, the State must demonstrate by a preponderance of the evidence that the property is subject to seizure); *In re Forfeiture of $15,232*, 183 Mich.App. 833, 836; 455 N.W.2d 428 (1990) ("In forfeiture proceedings, the government has the burden of proving its case by a preponderance of the evidence."); *Bryan v. Las Vegas Metropolitan Police Department*, 364 P.3d 592 (Nev. 2015) (the State must "establish proof by clear and convincing evidence that the property is subject to forfeiture."); *State v. Pessetto*, 160 N.H. 813, 8 A.3d 75 (N.H. 2010) ("[T]he state shall have the burden of proving all material facts by a preponderance of the evidence."); *Brown v. A 2001 Dodge*, 2017-50085, 18795-201552 N.Y.S.3d 245, 54 Misc.3d 1210(A) (Supreme Court of New York, Suffolk January 20, 2017) (unpublished) ("No property shall be forfeited . . . unless the [County] produces clear and convincing evidence that the noncriminal defendant engaged in affirmative acts which aided, abetted or facilitated the conduct of the criminal defendant"); *State v. Bracy*, 2018-Ohio-1977 (C.A. No. 17CA011202 Court of Appeals of Ohio, Ninth District, Lorain May 21, 2018) ("The State bears the burden of proving by clear and convincing evidence that property is in whole or part subject to forfeiture."); *Lincoln Interagency Narcotics Team v. John Kitzhaber*, M.D., 341 Or. 496, 145 P.3d 151 (Or. 2006) ("No judgment of forfeiture of property in a civil forfeiture

Many of these employ a bifurcated standard, whereby the state must prove that the forfeiture comes within the statute, and then the burden shifts to the claimant to prove an exception to forfeiture.[3]

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proceeding by the State or any of its political subdivisions shall be allowed or entered until and unless the owner of the property is convicted of a crime . . . and the property is found by clear and convincing evidence to have been instrumental in committing or facilitating the crime or to be proceeds of that crime."); *In re Tennessee Walking Horse Forfeiture Litigation*, (Court of Appeals of Tennessee, Jackson No. W2016-01000-COA-R3-CV, August 31, 2017) ("Thus, the State bears the burden of establishing 'that the property is subject to forfeiture' due to the alleged criminal activity of an owner or interest holder in the property.").

[3] *See, e.g.*, *In the Matter of Holloman - $10, 000 in U.S. Currency*, C.A. No. K17M-01-013 JJC (Superior Court of Delaware, Kent July 24, 2017) ("In a civil forfeiture proceeding, the State has the initial burden of proving probable cause. If the State meets this burden, then the burden shifts to the petitioner to rebut the presumption of forfeiture."); *Spencer, et al., v. District of Columbia*, 615 A.2d 586 (Court of Appeals of The District of Columbia 1992) ("This means that the government's prima facie showing gives rise to a presumption of forfeitability, but that the presumption can be rebutted by the claimant."); *Sanchez v. City of West Palm Beach*, 149 So.3d 92, 95 (Fla.App. 4 Dist. 2014) ("To effectuate a forfeiture under the Act, the seizing agency must engage two stages: a seizure stage and a forfeiture stage."); *Edwards v. State*, 290 Ga.App. 467, 469, 659 S.E.2d 852 (2008) ("Once the State presents a prima facie case for forfeiture in its pleadings, the burden then shifts to the claimant to establish both his standing to contest the forfeiture and his entitlement to a statutory exception."); *State of Hawai'i v. Muavae Tuipuapua*, 925 P.2d 311, 83 Hawai'i 141 (Hawai'i 1996) ("the burden of proof is, in the first instance, on the prosecution to show probable cause that the property is subject to forfeiture and then shifts to the claimant."); *People v. One 2014 GMC Sierra*, (IL App (3d) 170029, 2018) ("If the State satisfies its burden of establishing

Only a small minority of states place the burden on the party resisting forfeiture, as the First Court of Appeals did in this case.[4]

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probable cause, the burden shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture or that one of the exemptions applies"); *In the Matter of property Seized from Herrera*, (Supreme Court of Iowa May 25, 2018) ("If the State proves the property is subject to forfeiture, the claimant has the burden of proving by a preponderance of the evidence that one of the exemptions. . . exists."); *State, ex rel., Shawnee County Sheriff's Office v. $551,985.00*, 235 P.3d 1268 (Kan.App. 2010); ("plaintiff's burden of proof as well as a claimant's burden to show an exemption [is] a preponderance of the evidence"); *Osborne v. Commonwealth*, 839 S.W.2d 281 (Ky.1992) ("If the Commonwealth establishes its prima facie case, the burden is then on the defendant to rebut this presumption by clear and convincing evidence."); *State v. Amboy National Bank*, 447 N.J.Super. 142, 146 A.3d 188 (N.J.Super.A.D. 2016) (Once the State satisfies its evidentiary threshold, "the burden shifts to the person challenging the forfeiture, the 'owner,' to show what portion of the money, if any, the court should ascribe to legitimate uses."); *State v. $3260.00*, 910 N.W.2d 839, 2018 ND 112 (N.D. 2018) ("The plain language also requires the State to first meet its burden, at the hearing, before the burden shifts to the property owner."); *Commonwealth of Pennsylvania v. $301, 360.00 U.S. Currency and One 2011 Lexus*, No. 1229 C.D. 2016 (Commonwealth Court of Pennsylvania April 4, 2018) ("Once the Commonwealth has met its initial burden of establishing a substantial nexus between the seized property and illegal drug activity, the burden of proof shifts to the claimant to prove that he or she is the owner of the property, acquired the property lawfully."); *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 131, 470 S.E.2d 373, 376 (SC 1996) ("If probable cause is shown, the burden then shifts to the owner to prove that he or she 'was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture.' ").

[4] *See Resek v. State*, 706 P.2d 288, 294 (Alaska 1985) (defendant in a forfeiture proceeding carries the burden of

With regard to the panel's review of the evidence, the court disregarded all of the evidence supporting Petitioner's claim of ownership and his superior right to possession in favor of rank speculation and innuendo.[5] This is in direct violation of the correct burden of proof. The panel opinion turns the State's burden on its head. While the trial court is permitted to believe or disbelieve the evidence, it is not permitted to completely *ignore* contrary evidence. Attorney Fisch testified that he earned the fees and the State presented no evidence to challenge this testimony. Pharris made no claim for a refund of unearned fees and no party in the trial

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proof); *State of Idaho, ex rel., Rooney v. One 1977 Suburu and Ten Thousand Three Hundred Dollars*, 114 Idaho 43, 753 P.2d 254 (Idaho 1988) ("Because the district court found that, even accepting claimant's interpretation of the statute, the claimant had not met his burden of proof in rebutting what the claimant thought was a rebuttable presumption created in favor of the state"; *State Ex Rel. Wegge, v. Schrameyer*, 448 S.W.3d 301 (Mo.App. E.D. 2014) (The State is entitled to rely on the statutory presumption of forfeitability. The burden of proof is on the defendant to rebut this presumption.); *State ex rel. Campbell v. Eighteen Thousand Two Hundred Thirty-Five Dollars*, 2008 OK 32, 184 P.3d 1078. (Ok. 2008) ("The person claiming the monies may rebut the presumption by showing that the 'forfeited currency bore no nexus to a violation of the Act.' ").

[5] Disregarding the fact that it was the State's burden and not Petitioner's, one particularly odd reason the panel found to support the trial court's forfeiture orders was that Attorney Fisch did not produce any time records for his work on Pharris' cases at the article 47.02 hearing. (Opinion at 3-4, 10). Had there been a member of the panel below whose background was in criminal law and not civil law, he or she would assuredly have informed his brethren that criminal lawyers, as a general rule, do not keep time records in retained cases.

court filed a grievance with the Texas State Bar claiming that Fisch did not earn his fees. By employing an inappropriate burden of proof, the panel gave short shrift to Petitioner's valid claims of a superior right to possession of the monies. As a result, the panel rendered an improper judgment.

Due to the conflict between the First Court of Appeals of Texas' decision and the holdings of the circuit courts and other state courts of last resort, the issue of the appropriate burden of proof is ripe for review. Courts considering forfeiture actions have been without guidance in this area for too long, causing much confusion. *See*, *e.g*. *United States v. Melrose East Subdivision, et. al.*, 357 F.3d 493 (5th Cir. 2004) ("The hearing transcript shows that the parties and the court were at times uncertain as to the standards and procedures that should be employed in ruling on White's motion"). What is needed is a determination on a national level as to the appropriate burden of proof in a forfeiture action. Petitioner submits that the burden should fall squarely on the government entity seeking forfeiture.

(C) THIS COURT SHOULD GRANT REVIEW OF THE FIRST COURT OF APPEALS OF TEXAS' DECISION BECAUSE THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

1. Sixth Amendment Right to Counsel.

One of the rights we enjoy as citizens in a democratic society is the privilege of seeking the advice of counsel. In *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55 (1932), this Court held the right to be heard carries with it the constitutional baggage of being heard by counsel. The right to counsel secured under the Sixth Amendment includes the right to counsel of choice as one element of this basic guarantee. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006); *See Wheat v. United States*, 486 U.S. 153, 159 (1988); *Powell v. Alabama*, 287 U.S. 45 (1932). The Sixth Amendment right to counsel of choice commands, not that a trial be fair, but that a particular guarantee of fairness be provided - to wit, that the accused be defended by the counsel he believes to be best. *United States v. Gonzales-Lopez*, 399 F.3d 924, 929 (8th Cir. 2005), *aff'd*, 548 U.S. 140 (2006); *see Faretta v. California*, 422 U.S. 806, 819 (1975) ("The Sixth Amendment . . . grants to the accused personally the right to make his defense . . . for it is he who suffers the consequences if the defense fails."). The constitutionally guaranteed right to counsel has been described as, "a right of the highest order." *United States v. Proctor*, 166 F.3d 396, 402 (1st Cir. 1999); *see United States v. Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906, 103 S. Ct. 208 (1982)("The interest in permitting a criminal defendant to retain counsel of his choice is strong, and deserves great respect.").

In *United States v. Mendoza-Salgado*, the Tenth Circuit found that, "Lawyers are not fungible, and often the most important decision a defendant

makes in shaping his defense is his selection of an attorney." *United States v. Mendoza-Salgado*, 964 F.2d 993, 1015 (10th Cir. 1992); *accord United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979). Where a defendant is able to privately retain counsel, "the choice of counsel rests in his hands, not in the hands of the state." *United States v. Collins*, 920 F.2d 619, 625 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 2022 (1991).

Like the denial of the right to self-representation and the denial of the right to counsel, the denial of the right to be represented by one's selected attorney "infects the entire trial process" from "beginning to end." *United States v. Gonzales-Lopez*, 399 F.3d 924, 929 (8th Cir. 2005), *aff'd*, 548 U.S. 140 (2006). The erroneous deprivation of the right to counsel of choice qualifies as structural error, is not subject to harmless-error analysis, and entitles a defendant to automatic reversal on appeal. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). Harm is presumed because it "casts such doubt on the fairness of the trial process, that it can never be considered harmless error." *Penson v. Ohio*, 488 U.S. 75, 88 (1988) (citing *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988).

An accused's right to counsel of choice comes into direct conflict with a government's desire to forfeit property used in the commission of a crime, where that property is needed to retain counsel. *See Caplan & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528); *Sila Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083; 194 L. Ed. 2d 256 (2016). Forfeiture is defined as "'[t]he divestiture of property without compensation.'" *State v. Sprunger*, 458 S.W.3d 482, 492 (Tenn. 2015)

(quoting Black's Law Dictionary 722 (9th ed. 2009)). The "divestiture occurs because of a crime and title to the forfeited property is transferred to the government." *Sprunger*, 458 S.W.3d at 492 (quoting Black's Law Dictionary, at 722). Asset forfeiture has been recognized as, ". . . an extraordinary exercise of the State's police power." *State v. Sprunger*, 458 S.W.3d 482, 492 (Tenn. 2015); *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974).

Grave "constitutional and ethical problems" are raised by the forfeiture of funds used to pay legitimate counsel fees. *See United States v. Badalamenti*, 614 F. Supp. 194, 196 (SDNY 1985); *see also* Morgan Cloud, *Government Intrusions Into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice*, 36 Emory L.J. 817, 832 (1987).[6]

On one side of the equation is the fundamental Sixth Amendment right to assistance of counsel. On the other side is the Government's interest in securing its punishment of choice, as well as the

[6] Such forfeitures also affect the criminal defense bar as a whole. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2667, 2676 (1989) (BLACKMUN, J., dissenting) ("The long-term effects of the fee-forfeiture practice will be to decimate the private criminal-defense bar. As the use of the forfeiture mechanism expands to new categories of federal crimes and spreads to the States, only one class of defendants will be free routinely to retain private counsel: the affluent defendant accused of a crime that generates no economic gain. As the number of private clients diminishes, only the most idealistic and the least skilled of young lawyers will be attracted to the field, while the remainder seek greener pastures elsewhere.").

victim's interest in securing restitution.[7] Unfortunately, forfeiture is now, "widespread and highly profitable," causing "egregious and well-chronicled abuses." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (THOMAS, J., statement respecting denial of certiorari). State and local governments "have strong incentives to pursue forfeiture" in part because "many States permit 100 percent of forfeiture proceeds to flow directly to law enforcement." *Id.* Today, forfeiture law has a distinctive "Alice in Wonderland" flavor, victimizing innocent citizens who have done nothing wrong. *See Zaher El-Ali v. State*, 428 S.W.3d 824, 827, 57 Tex.Sup.Ct.J. 417 (Tex. 2014) (BOYD, J., Concurring).

Forfeitures have become increasingly disfavored under the law. This Court recently held in the case of *Sila Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083; 194 L. Ed. 2d 256 (2016) that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The Court appeared to set a bright line rule that would be used to determine the outcome of future forfeiture disputes:

> The common-law forfeiture tradition provides an administrable rule for the Sixth Amendment's protection: A criminal defendant's untainted assets

[7] The robber's loot belongs to the victim, not to the defendant. *See Telegraph Co. v. Davenport*, 97 U. S. 369, 372 (1878) ("The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires . . . that the property wrongfully transferred or stolen should be restored to its rightful owner").

> are protected from government interference before trial and judgment, but his tainted assets may be seized before trial as contraband or through a separate in rem proceeding.

Sila Luis v. United States, 578 U.S. ___, 136 S. Ct. 1083; 194 L. Ed. 2d 256 (2016).

In *Caplin & Drysdale*, this Court had the opportunity to consider a postconviction forfeiture that took from a convicted defendant funds he would have used to pay his lawyer. This Court held that the forfeiture was constitutional. In doing so, however, the Court emphasized that 21 U.S.C. §853, the federal forfeiture statute at issue, provided for a "vesting" provision providing that any interest in property vests into the hands of the government at the time the illegal act is committed. *Caplan & Drysdale*, 491 U.S. at 627. The federal vesting statute provides as follows:

> All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such

> property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S. Code §853(c). Third Party Transfers.

In *Caplin & Drysdale*, this Court did not have the opportunity to consider a situation in which there was a forfeiture without the application of a vesting statute. Likewise, this Court did not have the opportunity consider the situation where the seizure of attorney's fees occurs after, and not before, they are earned.

In the present case, the framework set forth in *Sila Luis* is unworkable. The allegedly tainted assets in this case were already earned by the time the State of Texas initiated its forfeiture action. According to the State, Attorney Fisch obtained knowledge of the stolen nature of the funds approximately five months after they had been tendered by the client, by virtue of Petitioner's presence at a bond hearing. (RR Supp. II 40-41; CR Supp. 8). Several days after the bond hearing, Attorney Fisch removed the approximately $80,600.00 from his IOLTA account and placed it in his personal account. (RR II Supp. 34). The State claims that this vitiates the normal rule that cash accepted in good faith by an innocent third party is not subject to forfeiture. (State's Brief on Appeal at 15). The flaw in the State's logic is the claim that Fisch lacked good faith when he reduced the IOLTA funds to his possession, because he had since learned that the funds tendered five months earlier may have been stolen. This presupposes that Fisch had

not already earned the funds as attorney fees. The State confuses the issue of ownership and possession. Fisch had a claim of ownership based upon the work he had already performed before he allegedly learned of the stolen nature of the funds. The transfer of possession did not occur until much later. Texas does not have any temporal requirement with regard to the transfer of attorney's fees from a lawyer's IOLTA trust account to a working, operating, or personal account. However, the Texas State Bar Rules do provide that a lawyer is not required to remit any portion of his IOLTA fees to the client when they have been earned, but not yet reduced to the attorney's possession. *See* TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.14. Safekeeping Property, Comment 2. "Lawyers often receive funds from third parties from which the lawyer's fee will be paid. These funds should be deposited into a lawyer's trust account. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid."

Petitioner, an attorney, was a good faith purchaser for value. Attorney Fisch accepted the money from defendant Pharris as payment for attorney's fees in the normal course of business and in good-faith. Mr. Pharris executed a contract for professional services with Attorney Fisch. (CR 1417446 at 47). Mr. Pharris averred in his contract with Attorney Fisch that the monies he paid to Attorney Fisch were not the proceeds of illegal activity. (CR 1417446 at 49, par. 5). Attorney Fisch represented Mr. Pharris, made court appearances, filed motions, and performed legal services on Mr. Pharris' behalf for approximately four (4) years

beginning in February of 2008 and continuing until he was allowed to withdraw on May 21, 2012. (CR II at 276).[8]

In the case at bar, the trial court was unable to resort to the same type of legal fiction this Court employed in *Caplin & Drysdale*. *See Sila Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083; 194 L. Ed. 2d 256 (2016) (". . . for both *Caplin & Drysdale* and *Monsanto* relied critically upon the fact that the property at issue was "tainted," **and that title to the property therefore had passed from the defendant to the Government before the court issued its order freezing [or otherwise disposing of] the assets.**") (emphasis added). Texas has no vesting statute corresponding to that contained within 21 U.S. Code §853(c). On the contrary, Texas case law provides that cash is an exception to the rule that a thief cannot provide good title to personalty. (Op. at 8-9) (Appendix A); *See Sinclair Houston Fed. Credit Union v. Hendricks*, 268 S.W.2d 290, 295 (Tex. Civ. App. – Galveston 1954, writ ref'd n.r.e.) (stating that the one who receives money, as opposed to other personalty, in good faith and for valuable consideration can keep it without liability to him from whom it was stolen). There are obvious reasons for this exception to the general rule. Placing the

[8] Attorney Fisch's inability to recover the money his client paid to him as attorney's fees undoubtedly contributed to his decision to withdraw (CR II at 273) and allow his client to be appointed counsel. (CR II at 279). *See United States v. Badalamenti*, 614 F. Supp. 194, 196 (SDNY 1985) (The "message [to private counsel] is 'Do not represent this defendant or you will lose your fee.' That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation.").

burden of verifying cash money upon the person who receives it would simply be too onerous for our economy to sustain itself. *Sinclair*, 268 S.W.2d at 295; *See Holly v. Missionary Society*, 180 U.S. 284 (1901) *quoting Hatch v. National Bank*, 41 N.E. 403, 147 N.Y. 184 (1896). In order to ensure the free flow of commerce, money must be able to be accepted without inquiry as to the source. *See Id.* ("To permit in every case of the payment of a debt an inquiry as to the source from which the debtor derived the money and a recovery if shown to have been dishonestly acquired would disorganize all business operations and entail an amount of risk and uncertainty which no enterprise could bear."). Because the case at bar falls squarely between *Caplan & Drysdale* and *Sila Luis*, it presents a unique opportunity for this Court to further elucidate the boundaries of state and federal forfeiture law.

In addition to the judicial questions this case presents, public policy concerns militate in favor of granting certiorari. This case has far reaching consequences for the public and for our state and federal systems of adversarial justice. Allowing the state to prevail in this revolting and pernicious assault on the adversary process[9] will only

[9] Chapter 47 is a particularly ill-conceived and poorly drafted statute. It does not provide for a burden of proof, an innocent owner defense, or the right to a jury trial and was likely never intended to apply to forfeitures such as the case at bar. The previous cases involving Chapter 47 bear this out. Before the case at bar, Chapter 47's most notorious forfeitures involved deer antlers, a truck, car parts, and a shotgun. *See Mangum v. State*, 986 S.W.2d 788 (Tex. App. – Amarillo 1999, no pet.); *Four B's Inc. v. State*, 902 S.W.2d 683 (Tex. App. – Austin 1995, pet. denied); *Murphree v. State*, 854 S.W.2d 193 (Tex. App. –

encourage such actions in the future. States will be able to completely upset the balance of power between themselves and the accused such that the accused will be without due process. *See Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973). No criminal defense attorney will consent to be engaged by an accused when he or she has to be concerned that the money that they have already earned will be seized from their personal accounts and forfeited to the government. The scope of the State's argument in the case at bar is virtually limitless. Any attorney retained for a theft, hot check, banking, tax, robbery, burglary, fraud, or other similar crime faces the very real possibility that he will lose whatever fee he may earn in the representation of his client. A particularly vile prosecutor might wait until the client has paid all of the fees to his lawyer before instituting the forfeiture action. Another might wait until the middle of trial to cripple his lawyer financially, causing him to withdraw immediately. Moreover, it is not necessary that the government entity actually prevail in a hearing to determine who was the superior right to possession. The very ability of the government to seize private funds and file such claims against unknowing criminal defense counsel will so chill the practice of criminal law that it will eventually eliminate most retained defense counsel and the

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Houston [1st Dist.] 1993, no pet.); *American Fire and Indemnity v. Jones*, 828 S.W.2d 767 (Tex. App. – Texarkana 1992, pet. denied). It is one thing to take the occasional errant horse or mule to a local magistrate for possession to be determined expeditiously. It is quite another to say that Chapter 47 provides an independent basis for the State to run amok, seizing lawyer bank accounts through the warrant process and keeping the money for themselves.

citizens of this country will be forced to accept court-appointed counsel in the vast majority of cases.

2. The Eighth Amendment Excessive Fines Clause.

The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). At the time of this filing, this Court is in the process of deciding whether the Excessive Fines Clause of the Eighth Amendment applies to the states. *See Tyson Timbs and a 2012 Landrover LR2 v. Indiana*, No. 17-1091. (argued November 28, 2018). In his petition for review to the Texas Supreme Court, Petitioner asserted an Eigth Amendment Excessive Fines point of error in anticipation of the possibility of this Court ruling in Timbs favor. *See* Petitioner's Brief on the Merits p. 60.

The "primary focus" of the Eighth Amendment "was the potential for governmental abuse of its 'prosecutorial' power." *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 266 (1989). The Excessive Fines Clause, in particular, served to "limi[t] the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.* at 267. The main evil addressed by the Excessive Fines Clause - like its precursors in the English Bill of Rights and Magna Carta - is the sovereign impulse to "use[] the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." *See Browning-Ferris Indus.*, 492 U.S. at

275. In civil forfeiture cases involving attorney's fees, such as this one, the Excessive Fines Clause is a vitally important check on the government's impulse to exact punishment from those who would stand in the government's way by representing citizens charged with crimes. All parties agree that Petitioner, a criminal defense attorney, had no knowledge of the tainted nature of the attorney's fees until approximately five months after he received the monies. The State's activities in this respect are particularly egregious given that the person from whom the monies were seized was never charged with an offense. *See* RR 1417446 at 13. ("We're never claiming that Mr. Pharris -- I'm sorry -- that Mr. Fisch was the criminal defendant. Mr. Fisch was the party from whom the funds were seized and the State seized those funds from Mr. Fisch.").

As this Court has stated in the past, once money passes into the hands of an innocent third party, courts will not, "transfer a loss that has already fallen upon one innocent party to another party equally innocent." *Holly v. Missionary Society*, 180 U.S. 284, 295 (1901).

These important questions of federal law have not been, but should be, settled by this Court. This Court should grant review to consider the constitutional issues presented by Petitioner before this type of prosecutorial overreaching becomes *du jour* in our state and federal courts. Accordingly, the decision of the Texas First Court of Appeals should be reversed.

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CONCLUSION

The district court and the First Court of Appeals of Texas erred when they employed an improper standard of review to Petitioner's claims for return of the seized attorney's fees. Any state or federal forfeiture action should require the government, rather than the individual, to bear the burden of proof.

By seizing and forfeiting monies earned as attorney's fees, the State of Texas denied Petitioner's client his Sixth Amendment right to counsel of choice. The court below erred by holding that Petitioner could not assert his client's Sixth Amendment claims seeking return of the monies to Petitioner.

The Texas First Court of Appeals also erred when it concluded Petitioner did not have a superior right to possession of the monies. The seizure and forfeiture of Petitioner's attorney's fees constitute a blatant overreaching by the State of Texas and thus runs afoul of the Eighth Amendment's Excessive Fines Clause. The Texas Supreme Court compounded the error by failing to grant review of this important published decision. In consideration of the foregoing, Petitioner prays that this Petition for Writ of Certiorari will be granted.

Respectfully submitted,

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