NO. _____

19-5164

IN THE

SUPREME COURT OF THE UNITED STATES

LAMONT STEWART-PETITIONER

VS.

LORIE DAVIS, RESPONDENT

ON PETITION FOR A WRIT OF CERIORARI FROM THE FIFTH CIRCUIT COURT OF APPEALS FOR NO.18-50025. UNDC NO.6:17-CV-156-RP

PETITION FOR WRIT OF CERTIORARI

LAMONT STEWART Prose
McConnell Unit #1940731
3001 S.Emily Dr.
Beeville, Texas 78102

ORAL ARGUEMNTS REQUESTED

QUESTION(S) PRESENTED

A State Court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

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LIST OF PARTIES

LAMONT STEWART PRO-SE #1940731 — PETITIONER
McConnell Unit
3001 S.Emily Dr.
Beeville,Texas 78102

LORIE DAVIS
DIRECTOR OF TEXAS DEPARTMENT
OF CRIMINAL JUSTICE — RESPONDENT

STATEMENT REGARDING ORAL ARGUMENTS

The Petitioner request Oral Arguments by telephone so that the court can get a great understnding of his issues.

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STATUTE AND RULES

IN THE SUPREME COURT OF THE
UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner,LAMONT STEWART, duly respectfully prays that a Writ of Certiorari duly issue to Review the judgment below.

OPINION BELOW

For cases from Federal Courts.

The Opinion of the United State Court of Appeals Fifth Ciruit opimion.
The opinion of the United States District court in order to make a just decision of why Fifth Circuit denied COA.

JURISDICTION

1. The date on which the United States Court of Appeals for the Fifth Circuit decided this case August 24,2018.

2. Petition for Rehearing was denied on or about10-22-18

STATEMENT OF THE CASE

The United States Court of Appeals Fifth Circuit issued an opinion denying COA which was issued without analysis or explanation, which Petitioner believes has left him in a difficult position to challenge the panel's reasons for denying COA. In good faith, Petitioner raised three grounds in his COA application and resubmitted them here due to the fact that they challenged the district court's resolution of his federal habeas corpus application with respect to those grounds. Specifically, and in order of each claim, the district court unreasonably applied inapplicable circuit law, impermissibly narrowed the application of federal law to exclude his facts, and harmfully misstated the facts in a prejudicial manner. Because of thses errors of law and facts See FED. R.App.Pro. 40 (a)(2). Petitioner ask that this panel grant his the relief that he seeks.

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

LAMONT STEWART-PETITIONER

VS.

LORIE DAVIS- RESPONDENT

PETITION FOR WRIT OF CERTIORARI

LAMONT STEWART #1940723
McConnell Unit
3001 S.Emily Dr.
Beevillw,Texas 78102

REASONS FOR GRANTING THE WRIT

A State court or a United States court of appeals has decided an important question of federal law that has not been,but should be, settled by this Court, or] has decided an important federal question in a way that conflicts with relevant decisions of this court.

In his Certificate of Appealability application in the court below Petitioner presented clear and convincing evidence that the State committed material perjury in gaining and maintaining a conviction against him. Rathaer than addressing the Constitutinal basis of his claim, the court below rejected it on the basis of inapplicable circuit precedent. The panel avoided discussion of the district courts flawed analysis by denying a Certificate of Appealability COA without any explanation as to how or why Petitioner failed to meet the COA reviewing standard that this court set out in Buck V. Davis, 137 S.Ct. 759,773 (2017)(citing Miller-El V. Cockrell, 537 U.S. 322,336 (2003)).

In good faith, Petitioner has shown the Fifth Circuit Court of Appeals that jurists of reason could disagree with the district court's resolution of Petitioner's claim that the State offered perjured trial testimony when an officer swore that Petitioner admitted to selling the twenty-one pills found in his friends apartment.ROA.626,633-34. Not only was the admission(Which constituted the entire

crime as alleged) untrue, it was proven untrue by the actul recording the officer swore at trial was captured on an onscene mic-pack recording.ROA.1453. Petitioner discovered the actual mic-pack recording during State habeas corpus review and showed that the actual comment he made was not an admission by any standard. The State relied on the false admission to deny multiple claims raised on appeal and in his State and federal postconviction applications. See,e.g. ROA.1085,1101,1104,1105,1106 (State's briefing on direct appeal),ROA. 1056, 1063, 1071 (direct appeal opinion),ROA. 1364,-65, (State's State habeas materials),ROA.1474, 1475 (State's proposed habeas findings), ROA.1480 (adopting State's findins), and ROA.229 (Director's brief to the court below),ROA. 287 (District court order).

Despite the State's continued relieance on the false admission, the Director in the court below conceded the falsity of the sworn testimony and argued for the first time (in contravention of the State court findings) that the State corrected it with follow-up testimony at trial. ROA. 628. The court below pointed to circuit precedent holding that inconsistent testimony without more is insufficient to show perjury. ROA.301.("inconsistent testimony does not, by itself, indicate perjury.") (citing Kutzner V. Johnson, 242 F.3d 605,609 (5th Cir.2001)).

In response, in his COA application Petitioner showed that the circuit precedent at issue did not apply, and should not apply, under the distinct facts of the cited cases. Those cases dealt with conflicting testimony

between opposing witnesses and were supported with hard proof.

By the cited case's own language, inconsistent testimony without more is insufficient to show perjury. More,importantly, Petitioner showed that the district court's resolution would set a dangerous precedent in cases where the exposed perjury is shown by clear and convicing evidence. Because the State has continued to rely on the false admission to deny multiple claims in spite of its recent protestations that the falsity was corrected, Petitioner has shown that the perjured testimony has undermined faith in the validity of his conviction and has tainted the validity of his appeals. If the State purportedly corrected the falsity at trial, it should not have used the very same falsity to deny Appellate postconviction claims. This is highly problematice to the integrity of Petitioner's conviction and renders the district court's resolution of the claim debatable in the least. Here the Fifth Circuit denied Petitioner's COA and as shown their are debatable issues and now respectfully ask the United States Supreme Court to determine has the petitioner the standards in which reqires further review due to their Rulings in Buck V. Davis, 137 S.Ct.759,774 (2017)(citing Miller-El V. Cockrell, 537 U.S. 322,327 (2003)).

APPLICABLE LAW:

Perjury is committed when a witness "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion,mistake, or faulty memory." UNited States V. Dunnigan, 507 U.S. 87,94 (1993). "[T]he [Supreme] Court has consistently held that a conviction obatined by the knowing use of perjured testimony

is fundamentally unfair,[] and must be set aside if there is any likelihood that the false testimony could have affected the judgment of the jury.[]" United States V. Agurs,427 U.S. 97,103-104 (1976)(internal citations cases).

In these instances, courts apply a strict standard of materiality," not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." Agurs, 427 U.S. at 104. "Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."Mooney V. Holohan, 294 U.S. 103, 112 (1935). Moreover, the intentional or inadvertent suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material.Brady ,at 87. Whether the prosecution was acting in good faith at the time of non-disclosure is not relevant to constitutional analysis; a showing of materiality, which is interchangeable with prejudice to the defendant, is critical. Cone V. Bell, 556 U.S. 449 (2009). The constitutional determination of materiality for suppressed evidence is made collectively,not item-by-item.Kyles V. Whitley, 514 U.S. 419 (1995).

To staisfy this claim,Petitioner must prove that the witness committed perjury and that the prosecutor knew or should have known about it. In this case it is evident that the State knew, or should have known, about its repeated falsities given its access to the same material as those relied on here including: the Waco Police Department incident report showing that the

scene was manipulated, the mike pack recordings corroborating Mozee's consistent admissions and the facts that Petitioner never admitted possession or delivery of drugs, and the contradictory search warrant and trial testimony of Detective Starr regarding the purported use of confidential informants. It is not credible to suggest that these falsities did not tain the reliability of the verdict. By manipulating the crime scene, suppressing Mozees consistent admissions, controling Petitioners spontaneous observation in an eregiously false manner,and allowing undoucmented and uncorroborated testimony that contradicted a prior sowrn affidavit, the State knowingly corrupted the truth seeking process.

I. The State findings are objectively unreasonable and contrary to establised federal law.

On the State habeas review, without conducting a hearing, the State court adopted the State's proposed findings verbatim, relying on the State's purported review of this case as the basis of its denial. The findings adopted by the State habeas court, however, alternatively fail to address the claims as raised and/or ignore the underlying factual basis supporting the claims. The following findings of fact and conclusions of law involved unreasonable application of the facts, or are contrary to, clearly established federal law.

Finding #2; Applicant asserts, and the State has acknowledged in its answer, that a Waco Police Department investigation and a Grand Jury review cleared Mr.Starr of wrongdoing in regard to the above-referenced matter.

As State habeas counsel argued in her objections to this

finding,Petitioner here never asserted that Detective Starr was cleared of wrong-doing. That is false. To the contrary, dispite a grand jury declining to indict Detective Starr, that in no way negates the fact that he lied in other cases, which the State well knows since they dismissed them. There is a distinct legal difference between "wrong-doing" and satisfying the probable cause standard of a grand jury for criminal indictment. Moreover, this finding does not address the claim, as raised, that Detective Starr falsified testimony in this case, this finding does not address the claim,as arised, that Detective Starr falsified testimony in this case, independent of the grad jury investigation into other cases. This finding is objectively unreasonable.

> **Finding #2:** In response to Mr.Reaves [appellate counsel on direct appeal], the District Attorney's Office conducted a review of the instant case. In its answer, the State has attached a copy of the District Attoreny's Office's internal memorandum documenting the findings of this review. This memorandum bears a date of March 15,2016. The District Attorney's internal review includes an extensive review of the evidence, testimony and proceedings in Applicant's trial. The review concluded that "there is no indication of any false statements, testimony or any other material inconsistency in this case." The State asserts in its answer that Mr.Reaves was advised of the findings of this review. The court finds this assertion worthy of belief.

Besides being self-serving in that the State drafted this finding, a simple review of the actual evidence including the Waco Police Department incident reports and the mike pack recordings renderd this finding contrary to the facts and objectively unreasonable in light of the evidence. It also belies the State's claim that its review was "extensive" since the State had already destroyed the evidence. The report notably does not outline the steps the State

took to corroborate Detective Starr's testimony. By the report's own language, the District Attorney merely reviewed the DA files and the trial transcript and utilized briefing it had already done on direct appeal. If the State in good-faith wanted to effectively review Detective Starr's involvement in this case, it would have to look outside of just the trial transcript proceedings.

Moreover, the scope of appellate counsel's request for review was global,i.e. encompassing the entire case, without any limitation as to any future claims that would be raised in a State habeas application. To that extent, this finding, relying on a prior determination predating the habeas application, does nothing to adrress the claims as raised, unless the State court deemed the internal District Attorney review sufficient to address all future claims,including the claims that go to other State's witnesses.

> **Finding #17:** The record of Mr.Starr's trial testimony reflects that during the course of the undercover investigation, his activities were done under the auspices of the Waco Police Department Drug Enforcement Unit. (RR III-39). The record further reflects that MrStarr's interactions with confidential informants and suspects during the course of the undercover investigation were visually observed and monitored by other police officer members of the Drug Enforcement Unit. (RR IV-60).

The record citation to this finding goes straight to Detective Starr's testimony at trial stating that other officers observed the drug buys with the confidential informants. Starr's own testimony is in no way sufficient to corroborate whether that is true or not. If all the State court did to address Starr's thruthfulness regarding his use of confidential informants was to review Starr's testimony without any indpendent vertification, as is indicared by this finding, this finding is objectively unreasonable.

Findings##21: The trial record specifically reflects that Jeanetta Mozee accompanied Applicant to drug meetings; that Applicant frequented JeanettaMozee's apartment during the course of the investigation; that drug contraband was found in Jeanetta Mozee's apartment: that Jeanetta Mozee was present in her apartment with Applicant; that drug contraband was found in Jeanetta Mozee's apartment in the presence of Applicant and Jeanetta Mozee: and that both Applicant and Jeanetta Mozee asserted claims of possession of drug contraband."
[emphasis added].

The italicized portion of this finding is demonstratbly false, and is therefore objectively unreasonable since it relies on the very same perjured testimony offered at trial, as shown above. The mike pack recording unambiguously refutes that Petitioner ever asserted any claimed possession of drug contraband. Additionally, the first sentence in the finding solely relies on the uncorroboraed testimony of Detective Starr that he observed Petitioner and Mozee together conducting drug buys. However, as indicated in his search warrant affidavit, this information allegedly came from confidential informants telling Starr of this information, similarly uncorroborated. The only way that the "record reflects" that statement, is through the uncorroborated and unvertified testimony of Detective Starr, and, as such, is objectively unreasonable. The middle part of the finding merely states factual observations from the scene of the arrest that do not relate to the claims as raised.

Findings #26: Applicant alleges that Officer Christopher Jones offered perjured testimony at trial; namely that Applicant made a verbal statement claiming possession of Ecstasy tablets. Applicant asserts that perjury is demonstrated in that this point of testimony was not corroborated by other evidence that could have been offcered at trial, such as audio recordings made at the scene. As further support for the proposition of perjury, Applicant asserts that Officer Jones did not note this statement by Applicant in a written report.

Finding #27: On their face, Applicant's assertions do not support a finding that officer Jones'testimony was false; it presents merely an insinuation of perjury on the basis that the testimony was not corroborated by other evidence. Applicant fails to direct the court to any legal rule or principle in support of the porposition that a lack[sic] corroboration equates to a lack of truth. Applicant has further failed to present any fact tending to show actual falsity of Officer Jones' testimony.

Finding #28: On the contrary, the trial record reflects that Applicant's trial counsel cross-examined Officer Jones on this specific point. (RR IV-30-34). In response,Officer Jones specifically testified that the statement of Applicant had been recorded.(RR IV-35). This testimony by Officer Jones directly contradicts the proposition that Applicant's statement was not corroborated by other available evidence; it further challenges the insinuation that Officer Jones lied under oath; finally it shows that the jury was provided Officer Jones direct testimony and Applicant's impeachment thereof in weighing Officer Jones' veracity.

Findings #29: Based on the foregoing findings, the court finds that Applicant has failed to meet his burden to show perjury on the part of Officer Jones in regard to his testimony about Applicant's statement.

In light of Jone's materially false testimony at trial (proven by the mike pack recording), these findings are objectively unreasonable. First, with respect to finding #27, the court distinction between an insinuation of perjury versus an actual showing of perjury ignores counsel's repeated attempts to have a hearing to draw out this very fact. The fact of Jone's actual perjury is contained in the mike pack recording, which the State knew when it drafted this finding. This finding merely perpetuates the State's continued bad faith.

Second, Finding #28, also perpetuates the material falsity of Jone's testimony by falling back on the trial record, which relies on the recorded mike pack recording to bolster the "truth" of Jone's testimony. It is unconscionable that the trial court acceped this at face value, when State habeas counsel alleged

that the mike pack recording in fact was never shown to corroborate Jone's fabrication. Moreover, the fact that trial counsel attempted to impeach this testimony (not having access to the actual recording) was met with further lies by the State regarding the time,place,and content of the recording, which the State knew at trial,having the recording in its possession.

In sum, it is painfully apparent from the State court findings that the District Attorney and the State post-conviction court did not even bother to actually listen to the evidence recorded on the mike pack recordings, that they did not review the Waco Police Department file, and that they utterly refused to corroborate Detective Starr's purposed used of confidential informants, in conjunction with undertaking their respective views. If they had, they should have felt duty-bound to acknowledge the fundamental unfairness of Petitioner's trial in ight of all the falsities.

Petitioner claims that the State presented and failed to correct perjured testimony from two witnesses,Officer Starr and Officer Jones whom were members of the prosecution team.Mooney V.Holohan, 294 U.S. 103,112,55 S.Ct 340 ,79 L.Ed 791 (1935) and Napue V. Illinois, 360 U.S. 264,269, 79 S.Ct 1173,3 L.Ed 1217 (1959);Ex Parte Castellano,683 S.W.2d 476(Tex.Crim.App. 1993).

It has long been established that the knowing use of perjured testimony in obtaining a conviction violates a defendant's due process rights and denies the accused a fair trial.Mooney V. Holohan,294 U.S. 103,112 (1935):Pyles V. Kansas,327 U.S. 213: Giglio V. United States, 405 U.S. 150,153-154(1972)Likewise, the knowledge of Starr and Jones is imputed to the prosecutor for

purpose of making the determination that the perjury was used knowingly.Giglio V. U.S.,405 U.S. 150,154,92 S.Ct 763, 31 L.Ed 2d 104 (1972):Adams V. State, 768 S.W.2d 291 (Tex.Crim.App. 1989).

In Berger V. United States, 295 U.S. 78,88 79 L.Ed 1314, 55 S.Ct 629 (1935), the Supreme Court held:

"The United States attonrey is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is a compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sence the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may srike hard blows, he is not at the liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one.See Donnelly V.DeChristoforo, 416 U.S. 637,40 L.Ed2d 431,94 S.Ct 1968.

As shown a State court or United State Court of Appeals has decided an important question of federal law that has not been,but should be,settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court. Petitioner is entitled to a Certificate of Appealability due to meeting the standard set out in Buck V. Davis, 137 S.Ct 759,773 (2017)(citing Miller-El V.Cockrell,537 U.S. 322,336 (2003)). The Supreme Court should reverse Fifth Curcuit judgment denying COA.

REASONS FOR GRANTING THE WRIT

A State court or a United States court of appeals has decided an imporant question of federal law that has not been, but should be, settled by this Court, or has decided an imporant federal question in a way that conflicts with relevant decisions of this court.

II. Fifth Circuit Court of Appeals denied Petitioner's COA when shown that Petitioner challenged his trial attorney's failure to object to the State's blatant use of pictures depicting Petitioner shackled without evidentiary justification in deprivation of his right to a fair trial. The district court denied the claim on the underlying basis that it could not find a lower federal court case similar holding, which Petitioner alleged was an improper narrowing of established law. The panel rejected the claim without discussion or analysis as to why this claim failed to meet the COA reviewing standard.

"[T]he Fifth and Fourteenth Amendments prohibit the use of physical visible to the jury absent a trial determination, in the execise of its discretion, that they are justified by an interest specific to a particular trial." Deck V.Missouri, 544 U.S. 626,629 (2005): See also Illinois V. Allen,397 U.S. 337,344 (1970) ("the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant..."). This cardinal law is not limited to context, but rather rests on a balancing test between the State's interest and the defendant's right to a fair trial and to the presumption of innocence.

At Petitioner's trial the State admitted photographically depicing Petitioner visbly shackled without any evidentiary justification."Trial counsel did not object. On State habeas review,

State habeas counsel alleged that trial counsel was constitutionally ineffective for failing to object to the photos' admission in violation of his constitutional right to a fair trial and to his presumption of innocence. The State habeas findings rejecting the claim denied the violation under a grotesque assertion that even though it was undisputed that it was Petitioner in both photos, the pictures did not show Petitioner shackled because the first picture hid his face, and the second picture did not show the handcuffs, and that, therefore, counsel was not ineffective in failing to object. ROA. 1477.

The fedral district court rejected the IAC claim asserting that the underlying complaint did not invovle a fedral constitutional issue because it could not find a matching lower federal case. ROA. 304-05. Petitioner argued that the district court impermissibly narrowed the holdings of Deck and Allen, and showed that Texas has long interpreted those cases in the context of video and photographic shackling. See,e.g. Lucas V. State, 791 S.W.2d 35,55 (Tex. Crim.App. 1989). Moreover, placed in the position if having to prove a negative,Petitioner also showed that no federal court has ever rejected such an interpretation of Deck and Allen in response to the district court's assertion that it could not locate another federal court that applied it.

Petitioner argued that a lower federal court applying a foundational constitutional rule is not necessary to demonstrate established federal law; otherwise, a lower federal court could never apply a constitutional rule established by the Supreme Court. There has to be a first application. Reasonable jurists could not debate the district court relied on a logical fallacy to re-

ject the broader IAC claim.

Rather than address Petitioner's arguemnts offered in good faith, the panel denied the claim without discussion. Petitioner asserts that resolution of this claim does not require more than a threshold review of the district court's analysis and now the Petitioner move respectfully to ask this Court in good faith decide why denying a COA is warranted. The lower court erred and resolution does not involve more than a threshold review of the ultimate merits of the broader IAC claim. Buck, 137 S.Ct at 774 (citing Miller-El, 537 U.S. at 327 (2003)).

III. Trail counsel failed to discover valuable impeachment material that was not only excupatory, but also would have exposed numerous instances of perjury at trial. State habeas counsel did not challenge trial counsel's failure to seek such discovery. The District court's rejetion of Petitioner's IATC-IASHC claims on these ground erroneously failed to account for the most egregious omission by trial counsel and misstated the facts in a prejudicial manner. The panel rejected the claim without discussion or correction of the district court's erroneous resolution, leaving Petitioner without explanantion for why district court's erroreous determination was not reasonably debatable.

Petitioner's third claim seeking a review of why the Fifth Circuit court of Appeals denied his COA when he demonstarted the Supreme Court's two prong test arose out of Strickland V. Washington, 466 U.S. 668 (1984). First, Petitioner must demonstrate deficient performance by showing that his attorney's representation fell below an objective standard of reasonableness as judged by prevailing professional norms.Strickland, 466 U.S. At 690. Petitioner bears

the burden to show deficiency.See Strickland, 466 U.S. at 690. Trial counsel's performance is assessed by the totality of the circumstances as they existed at the time of trial and not with the benefit of hindsight. See Strickland, 466 U.S. at 690.

Second, a Petitioner must demonstrate prejudice by establishing that there is a reasonable probability that,but for counsel's errors,the result of the proceeding would have been different. See Strickland,466 U.S. at 694.

This claim (3rd) was unexhausted in State court and so Petitioner availed himself of the Martinez v. Ryan,132 S.Ct.1309/Trevino v.Thaler 133 S.Ct. 524,568 U.S. 184 L.Ed.2d.337(2012) exception for overcoming prodedural default of claims involving IAC challenges of both trial and State habeas counsel. The court below rejected the claim on the weakness of the underlying merits, but notably failed to account for the strongest most egregious ground involving trial counsel's failure to discover the readily available truth behind the perjured and false "admission" Petitioner gave. THe sheer strength to the State of that so-called admission cannot be overstated: it encompassed the entire crime as alleged and was offered through sworn police officer testimony alleged to have been recorded. Standing alone, the fake admission was highly prejudicial. In totality with the other undiscovered evidence, these materials established a pattern of falsities on the State's part that would have detrimentally impacted the witnesse's credibility and severely underminded the State's case against Petitioner. This omission from the IATC calculus by the below court was prejudicial and wrong. At the very least it makes the

court's determination reasonably debatable in which shows that the Fifth Circuit Court of Appeals erred in failing to grant COA.

Rather than re-weigh the IAC calcus factering in all the instances of ineffectiveness the panel denied the claims without explanation or discussion when he has shown that the district court's resolution did not assess Petitioner's strongest evidence to deny his claim which is a debatable issue the Fifth should have granted a COA.

With respect to State habeas counsel's performance the district court incorrectly made the unfounded excuse on behalf of State habeas counsel that instead of attacking trial counsel's failure's, counsel choose to pursue those claims directly. ROA.29 This assertion misstate the facts. State habeas counsel did not directly pursue all of the underlying claims. But even if she had, reasonable jurists could hardly debate that raising a perjury challenge directly is not sufficient to exhaust a discrete IATC claim. O'Sullivan V. Boerckel, 526 U.S. 838-844-48(1999);Picard V.Connor 404 U.S. 270,275-76 (1971):Deters V.Collins,985 F.2d 789,795(5th Cir,1993). Petitioner presented the claims to the Fifth Circuit asking: If the district court's omissions and misstatements in rejecting this claim render its resolution debatable by reasonable jurists.

At trial, the State made a big deal about the fact that Petitioner's keys and the grocery bag he carried into the apartment were sitting on the kitchen counter next to the "baggie" of pills-to the exclusion of anything else.(Vol. 3 PP.59-63). The State elicited testimony from Detective Starr emphasizing the accuracy of the scene where the pills were found.

The significance of this exchange cannot overstated for two

reasons. First, this testimony falsely led the jury to believe that the kitchen counter photos "accurately" and "exactly" depicted the scene prior to anything being "moved, touched, [or] placed anywhere..."(RR Vol. 3 PP.60-62). In fact, Waco Police Department incident reports, gathered in the State post-conviction investigation but unavailable to trial counsel at the time of trial. Unambiguously show that Jeanetta Mozee's cell phone was sitting on the kitchen counter where the pills were found.(see EX-D;Waco Police Department Incident Report 12-25947,Supplement 0002 & 0006).

These reports indicate that officers recovered a Metro PCS cell phone with charger found on the kitchen bar when they entered the residence. The report indicate that this was Jeanetta Mozee's phone because it was playing music and Officer Repp(who did not testify) reported asking Mozee how to unlock the phone.(see EX-E; Supplement 0006). As demonstrated by SX 2,admitted at trial depicting the "exact" placement of the kitchen counter items,the phone was not in the picture; nor was it even mentioned as having been on the counter, This manipulation contaminated the accuracy of the scene in a highly prejudical manner that was kept from jury.

The effect of this blatant mispresentation at trial was to create the State's narrative that the "baggie" of pills was carried into the apartment by Petitioner,negating any contrary showing that Mozee hereself possessed the pills,or that the pills were already there before Petitioner arrived.And was the first note from the jury during deliberations, the jury requested pictures from the apartment, indicating their focus on the scene and where the drugs was found.(CR at 84.). The Fifth Circuit decided an important question of federal law that should be settled by this court.

REASONS FOR GRANTING THE WRIT

A state court or a United State Court of Appeals has decided an imporant question of federal law that has not been, but should be, settled by this court, or has decided an imporant federal question in a way that conflict with relevant decisions of this court. III. Fifth Circuit Court of Appeals denied Petitioner's COA when shown that Petitioner challenged his trial attorney's failure to challenge the constitutional validty of the cell phone search.

In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense."U.S. CONST. Amends. VI,XIV. The Sixth Amendment "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done. Gideon V. Wainright, 372 U. S. 335,343 (1963). (quoting Johnson V.Zerbst, 304 U.S. 458, 462 (1938)). To prevail on an ineffectiveness claim a petitioner must satisfy the two-pronged test set out in Strickland V. Washington, 466 U.S. 668 (1984). First, petitioner must demonstrate deficient performance by showing that his or her attorney's representation fell below an objective standard of reasonableness as judged by prevailing professional norms. Strickland, 466 U.S. at 6901 Petit. Petitioner bears the burden to show deficiency.See Strickland,466 U.S. at 690. Trial counsel's performance is assessed by the totality of the circumstances as they existed at the time of trial and not with the benefit of hindsight.See Strickland, 466 U.S. at 690.

Second, a petitioner must demonstrate prejudice by establishing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.See

Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694.

A. COUNSEL FAILED TO CHALLENGE THE CONSTITUTIONAL VALIDITY OF THE CELL PHONE SEARCH.

The State recovered four cell phones in its investigation of this case. Two phones were recovered from a box in the trunk of one Petitioner's cars parked at his house(an iPhone and a red Metro PCS phone); one was recovered from the kitchen counter at Jeanetta Mozee's apartment(red Metro PCS phone)(See EX-D: incident Report 12-25947,supp. 0002 &EX-I;Incident Report 12-25952,supp. 2005). The State did not obtain a serach warrant to search the contents of these phones, relying instead on the general language contained in the Search Warrant authorizing the seizure of evidence in the no-knock search that included a refrence to cell phones and their contents in a long list of other items standard in general serach warrants (see EX-K; search warranted dated December 6,2013).In the aftermath of Riley V. California, 134 S.Ct 2473 (2014), however, although a general warrant permits seizure of a phone,a particularized warrant is constitutionally required to search it,which was not done in this case.

At trial, the State introduced exhibits of text messages purportedly recovered from Petitioner's phone that contained a one text message dated the month prior to Petitioner's arrest regarding the sale of "tabs" (see EX-L; State's Exhibit 10 at trial). Trial counsel made no objection and did not seek to suppress the introduction of the messages.

Failing to challenge the cellphone search was deficient and

prejudicial. In Riley, the Supreme Court unanimously held that the police must obtain a warrnt before searching a cell phone.Riley, 134 S.Ct at 2495. Emphasizing the massive amounts of personal information contained in a cell phone, the court compared cell phones to homes, the most protected of spaces under the Constitution, and noted the inappropriateness of allowing officers immediate access tocell phones. Riley, 134 S.Ct at 2473. Sine Riley, the issue then became what detail a cell phone search warrant must contain to satisfy the Fourth Amendment's particularity requirement.See e.g.,United States V. Phua, No.2:14-cr-00249-AGP-PAL,2015 WL 1281603, at *7(D. Nev.Mar.20,2015) (The court will not approve a search warrant for electronically stored information that does not contain an appropriate protocol before issuing a warrant); In re Search of the Premises Known as a Nextal Cellular Telephone, No.14-MJ-8005-DJW, 2014 WL 2898262, at *12 (D. Kan. June 26,2014) (ruling that the government's "search protocol" failed to adequately describe with particularity its search methodology). Given the Supreme Court's recognition of the heightened privacy interests in cell phones, cell phone searches without search protocols upset the balance between the government's need to investigate crime and the people's right of privacy.

In this case, a particularized search protocol was necessary because there was no link established at trial be tween the phone number used to arrange drugs buys by the alleged confidential informants and the phone(s) seized in the search, or the text messages introduced at trial. Without this critical link, it was prejudicial to admit the text messages at trial that suggested an arranged meeting to sell "tabs" that the State relied on to show Petitioner's intent to

deliver. Moreover, the mere text does not prove that any purported sale ever took place in the absence of any corroboration. Further, the text message predated by several weeks the date the seized pills were found at Jeanetta Mozee's apartment, and therefore the text could not have been used to show intentto deliver those pills in that transaction.

If counsel had challenged the lack of particularity contained in the warrant, it is likely the State would have been foreclosed from admitting the text messages, particularly since those messages did not contain any corroborating information on the purported drug buys set up by the informants, or show that any actual delivery ever took place in that instance. One would expect there to have been more than one drug transaction found on Petitioner's phone in the five-month investigation that allegedly involved twelve undercover drug buys. Again, there is no evidence to substaniate the fact of any drug buys involving Petitioner. The lack of proof,combined with numberous insinuations and/or the uncorroborated allegations from Detective Starr and Officer Jones's materially false statement discussed in claim one above, all prejudiced Petitioner. And now,because the State destroyed the phones and a CD containing the messages,there is no way to compare the phone number allegedly used by the confidential informants and Petitioner's phone.

A1. THE STATE COURT FINDINGS ARE OBJECTIVELY UNREASONABLE.

The State court findings on this issue are addressed in findings ##30-31. Without citing any authority, the State court in its findins, simply concluded that the general language contained in the search warrant that allowed seizure of the phone was sufficient to allow the subsequent search. Specifically, fidning ##32 states,

The search warrant language authorizes seizure of 'cellular phone to include data and information stored in the cellular phone. Findin #34 is objectively unreasonable.

> **FINDINGS #34: The** court finds that the language of the warrant is sufficiently clear for a person of ordinary understanding to determine its meaning. The warrant plainly authorizes law enforcement to seize cell phones as well as the data and information stored in the cell phone. it cannot be reasonably argued that text messages are not data and information stored in a cell phone.

These findings are objectively unreasonable because they fail to address the claim, as raised,and even support Petitioner's argument that the general warrant authorized seizure of the phones only. The gist of Petitioner's claim is that a more particularized warrant was required post-seizure given the broad wording of the general warrant and the constitutionally protected nature of cell phone content. Without search protocol, the State's broad and unlimited license to fish through the phones gather in the search are not particularized enough to narrow the search in any way to actual, corroborated evidence of completed drug buys by petitioner.

> **FINDING#35;**Had Applicant's trial counsel challenged the admissibility of the text messages stored on Applicant's cell phone on the basis that obtaining the text messages exceeded the scope of the search warrant,such a challenge would likely not have been successful.

This is objectively unreasonable, first,because it references no legal authority to rest that conclusion on. And second, it assumes that the trial court (or any reviewing courtthereafter) would agree. This is not reasonable in light of the direction of the law surrounding technological advances and the strong Fourth Amendment protections incell phone data stemming from Riley. Well-established law surrounding the particlarity requirements of warrants read in conjunction with Riley,require more than just a broad-sweeping general-grant to search a phone and all its contents.Counsel deprived Petitioner of

his rights and deprived the reviewing courts the opportunity to address that very issue.
address that very issue.

Here, the Fifth Circuit Court of Appeals failed to make fact finding of laws like the failure with the Court of Criminal Appeals of Texas.A COA should have been granted and Petitioner ask this court to review his case and make the same determination.

CONCLUSION

Petitioner concludes that the Supreme Court of the United States should grant his Writ of Certiorari being that the lower court ignored all the issues and misconduct by law enforement,the perjury to ineffective assistance of counsel.Petitioner ask the court in the interest of justice for relief.

ON THIS THE 28 DAY OF May ,2019.

Lamont Leonard Stewart
LAMONT STEWART Pro-se

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Honorable Supreme Court rverse the judgment of the Fifth Circuit Court of Appeals and remand the case for further proceedings with allowing him to proceed with a COA so that his issues can be heard.

ON THIS THE 28 DAY OF May, 2019.

RESPECTFUELY SUBMITTED,

Lamont Renard Stewart

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CERTIFICATE OF SERVICE

I, LAMONT R. STEWART, do hereby certify that a true and correct copy of the foregoing Writ of Certiorari was sent to the Clerk of the United States Supreme Court by U.S.mail on this the 28 day of May, 2019.

Lamont Renard Stewart
Petitioner