No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PHILLIP BOYD CASHION

PETITIONER,

- VS -

STATE OF TEXAS

RESPONDENT

Petition for Writ of Certiorari to the
Court of Criminal Appeals of the State of Texas

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the 6th Texas Court of Appeals and the Court of Criminal Appeals of the State of Texas.

QUESTION PRESENTED FOR REVIEW

Should the Petitioner's trial structure have been free from the fundamental unfairness of having the prosecutor tell the jury on two occasions that *"you have not heard from him"* (Petitioner) and *"he* (Petitioner) *did not testify"* and as the effect this had on the jury may be hard to measure?

PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

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LIST OF ALL PRIOR PROCEEDINGS IN STATE AND APPELLATE COURT THAT ARE DIRECTLY RELATED TO THE CASE IN THIS COURT

The Petitioner was indicted on July 12, 2018 by the grand jury in Lamar County, Texas for the felony offenses of Theft of Material Aluminum less than $20,000.00 (STATE OF TEXAS v. PHILLIP BOYD CASHION) *(D0CKET NUMBER 27916)* and possession of a Controlled Substance, namely, Meth of less than one ounce (STATE OF TEXAS v. PHILLIP BOYD CASHION) *(DOCKET NUMBER 28167).* In 2019 on April the 4th,, the Petitioner was tried on both counts in the 6th District Court of Lamar County, Texas with the Honorable Will Biard presiding. On April 4th of 2019, the Petitioner was convicted and judgment entered. The Petitioner gave notice of appeal to the 6th Texas Court of Appeals at Texarkana on April 4, 2019.

The Petitioner perfected an appeal by filing a docketing statement on May 3, 2019 in case numbers *06-19-00087-CR and 06-19-0088-CR.* (STATE OF TEXAS v PHILLIP BOYD CASHION). On June 10, 2019, Petitioner filed his appellate brief with the 6th Texas Court of Appeals at Texarkana. After moving for and being granted two motions for an extension of time to file their brief, the State of Texas filed their brief on

August the 8th of 2019. On August the 12th, 2019 the 6th Texas Court of Appeals at Texarkana set the case to be heard on briefs and on August the 28th of 2019 the Petitioner filed a reply brief with the 6th Texas Court of Appeals at Texarkana. On September the 3rd of 2019, the cases were formally submitted to the 6th Texas Court of Appeals at Texarkana. One day later on September the 4th of 2019, the 6th Texas Court of Appeals at Texarkana issued a Memorandum opinion and judgment affirming the Petitioner convictions and sentences from the 6th District Court of Lamar County, Texas. On September the 27th of 2019, the Petitioner filed a Petition for Discretionary Review with respect to both cases *(PD-1011-19 and PD-1012-19*), (STATE OF TEXAS v. PHILLIP BOYD CASHION) with the Court of Criminal Appeals of Texas. On October the 23rd of 2019, the Court of Criminals of Texas filed an order refusing to hear the Petitioner's Petition for Discretionary Review in both *PD-1011-19 and PD-1012-19.* (STATE OF TEXAS v. PHILLIP BOYD CASHION).

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TABLE OF CITED AUTHORITIES

Cases

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APPENDICES "A--H"

OPINIONS BELOW

There are no citations official or unofficial reports of the opinions or orders entered by the 6th Texas Court of Appeals at Texarkana and the Texas Court of Criminal Appeals. However their memorandum opinions and refusals for as discretionary review are attached. See App. A-H.

BASIS FOR JURISDICTION

The opinion and judgment of the 6th Texas Court of Appeals at Texarkana was entered on September 4, 2019.The order of refusal for a Petition for Discretionary Review by Court of Criminal Appeals of Texas was entered on October 23, 2019 and a mandate was issued on November 23, 2019.This order is a final order within the meaning of 28 U.S.C. 1257,See generally, *Bullington v. Missouri*, 451 U.S. 430, 437, n. 8 1857 n. 8 (1981); *Abney v. United States*, 4231 U.S. 651 (1977), therefore the jurisdiction of this Court is invoked pursuant to 28 U.S. C. section 1257(a).This is a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas. Under Rule 12.4 both judgments (cases) are sought to be reviewed as they involve an identical question (or closely related). Both cases

were tried in the same trial at the same time; therefore, certiorari is sought covering both judgments to the same court.

The United States Supreme Court had jurisdiction pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal's case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV

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.

STATEMENT OF THE CASE

B. Statement of Facts

The Petitioner was arrested on June 11, 2018 on Highway 271 at a residence Highway 271 North of Paris in Lamar County, Texas. He was alleged to have violated *two* Texas Criminal Statutes. One was section 31.01 e (4) (F), that is theft of material aluminum with a value of less than $20,000 and the second was Possession of a Controlled Substance of less than one ounce under section 481.115(b) of the Texas Health and Safety Code. The Petitioner pled not guilty and after a jury trial was held on both charges together. The Petitioner was found guilty on both charges. The Petitioner chose for the Court to access punishment. The Court accessed punishment for a state jail felony with the Petitioner receiving a sentence of eighteen (18) months in the Texas Department of Criminal Justice, State Jail

Division. At trial, the defense was represented by Timothy Haney who raised and completed the requirements for a necessary defense. The trial judge denied the request.

In closing argument before the jury, the prosecutor told the jury the following: "And remember he told you--you heard. *You didn't hear from him*. But you heard that he told the deputies when he was up there the bottom fell out, so then he had to go and-----. (See Appendix G) (Reporters Record, Volume 3, Page 148 lines 13-16). At another point in the prosecutor's argument to the jury the prosecutor stated, "Okay. Defendant told you that--through the deputies again, *he didn't testify*--that he drove there alone. (Appendix G) (Reporters Record, Volume 3, Page 149 lines 6-8).

These statements by the prosecutor would seem to be a clear violation of the Petitioner's 5th amendment right not to be a witness against himself. Here the prosecutor told the jury emphatically that *you did not hear from him* (Petitioner) and that *he* (Petitioner) *did not testify*. There was no objections to the words of the prosecutor in telling the jury that *you did not hear from him* (Petitioner) and the Petitioner *did not testify*.

The Petitioner in filing his reply brief with the 6th Texas Court of Appeals in his cases that are numbered 06-19-00087-CR and 06-19-00088-CR (Page 13-14)

(See Appendix H) raised the issue of the prosecutor telling the jury *"that you have not heard from"* and *"he did not testify"* to level of being a structural error. (See the following quote from the Petitioner's quote from the Petitioner's reply brief in the 6th Texas Court of Appeals at Texarkana.) (Appendix H)

The state made the argument in their brief that there should have been an objection to the argument made by the prosecutor with respect to the fact the appellant did not testify as set out above. This reference to the fact that the appellant did not testify is so egregious that it is tantamount to a structural error, and no objection may be necessary. The fact that there was not an objection is such that this failure could well raise the failure to object to the level of ineffective assistance of counsel, thus raising the possibility of the appellant filing a writ of habeas corpus at a later time.(Appendix H) (Petitioner's Reply Brief**,** pages13-14 in the 6th Texas Court of Appeals at Texarkana.)

The 6th Texas Court of Appeals did not rule on the issue of *structure* in their memorandum opinion (See Appendix A and C) and the Court of Criminal Appeals of Texas failed to take up the issue by refusing to hear to Petitioner's Petition for Discretionary Review. (See Appendix E and F).

On April 4th of 2019, the Petitioner was convicted and on April 4th,2019 the Petitioner gave notice of appeal to the 6th Texas Court of Appeals at Texarkana. The Petitioner perfected an appeal by filing a docketing statement on May 3, 2019. On June 10, 2019, Petitioner filed his appellate brief with the 6th Texas Court of Appeals at Texarkana. After moving for and being rated two motions for an extension of time to file their brief, the State of Texas filed their brief on August the 8th of 2019. On

August the 12th, 2019, the 6th Texas Court of Appeals at Texarkana set the case to be heard on briefs. On August 28th of 2019 the Petitioner filed a reply brief with the 6th Texas Court of Appeals at Texarkana. On September the 3rd of 2019, the cases were formally submitted to the 6th Texas Court of Appeals at Texarkana. One day later on September the 4th of 2019, the 6th Texas Court of Appeals at Texarkana issued a Memorandum opinion affirming the Petitioner conviction and sentence from the 6th District Court of Lamar County, Texas. On September the 27th of 2019, the Petitioner filed a Petition for Discretionary Review with the Court of Criminal Appeals of Texas. On October the 23rd of 2019, the Court of Criminals of Texas filed an order refusing to hear the Petitioners' Petition for Discretionary Review.

REASON FOR GRANTING THE WRIT

For a prosecutor to argue to the jury that the Petitioner has not testified or been heard from goes beyond a trial error that should be preserved by objection or having to rely on "ineffective assistance" of counsel. Such prosecutorial statements are in violation of the 5th amendment and go to the very crux of fairness and the structure of the trial itself. The Petitioner will attempt to show why these un-objected to words violate the structure of the trial itself.

One can look at the words of the prosecutor: "And remember he told you--you heard. *You didn't hear from him*. But you heard that he told the deputies when

he was up there the bottom fell out, so then he had to go and-----."(Appendix G) (Reporters Record, Volume 3, Page 148 lines 13-16). In addition one can also another point in the prosecutor's argument to the jury, where the prosecutor stated: "Okay. Defendant told you that--through the deputies again, *he didn't testify*--that he drove there alone. (Appendix G) (Reporters Record, Page 149 lines 6-8), The Prosecutor did not just allude to the fact that the Petitioner did not challenge the evidence in some way but as set out in *United States v. Hasting*, 461 U.S. 499 (1983) and thus distinguishable. Here the prosecutor told the jury emphatically that *you did not hear from him* (Petitioner) and that *he* (Petitioner) *did not testify*. There was no objections to the words of the prosecutor in telling the jury that *you did not hear from him* (Petitioner) and the Petitioner *did not testify*. Because there was no objection, the 6th Texas Court of Appeals at Texarkana said the error was waived and the Court of Criminal Appeals of Texas refused to grant discretionary review thus upholding the ruling of the 6th Texas Court of Appeals at Texarkana. The rulings of the 6th Texas Court of Appeals at Texarkana and the Court of Criminal Appeals of Texas could be construed as correct if the error was a "trial error" as set out in *Arizona v. Fulminante*,499 U.S. 279 (1991) as the first class of error. Petitioner's relief might be judged under *Chapman v.California*,386 U.S. 18 (1967), and if his complaint survived such an analysis then he could go to *Strickland v. Washington*,

466 U.S. 668, 691-696 (1984) for relief under the "ineffective assistance" of counsel doctrine. However, this is not the situation in the case the Petitioner brings to this court. Petitioner says that the conduct set out *supra*. is such that it fits into the second class of constitutional error set out in *Fulmmante, supra*. thus being a "structural defect. Does the fact that the prosecutor told the jury on two occasions that the Petitioner had not been heard from and did not testify thus violating the 5th amendment mean that such an error is unquantifiable or indeterminate? Such an error could simply be such an error that it is subject to harmless-error analysis as set out in *Chapman, supra.* In *Arizona v.Fulminante, supra*., this court held that constitutional errors are divided into two classes. The *first* error is "trial error" because the error "occurred" during the presentation of the case to the jury and their quantitatively effect may be assessed in the context of other evidence. The *second* class of constitutional error is called *"structural defects".* These "defy analysis by 'harmless-error' standards because they affect the framework within which the trial proceeds," and are not "simply an error in the trial process itself."

In *Neder v. United States*, 527 U.S. 1 (1999) at note 8, this Court summarized cases where they had found an error to be "structural," and thus subject to automatic reversal, only in as "very limited class of cases" They are *Johnson v. United States,* 520 U.S. 461, 468 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963),

(complete denial of counsel), *Tumey v. Ohio*, 273 U.S. 510 (1927) (bias trial judge): *Vasquez v. Hillery*, 474 U.S. 354 (1986) (racial discrimination in selection of grand jury), *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); and *Sullivan v. Louisiana*, 508 U.S 275 (1993)(defective reasonable-doubt instruction).

The Petitioner brings forth this Court's holding in *Kentel Myrone Weaver v. Massachusetts*, __ U.S.__ , 137 S.Ct. 1899 (2017) where this Court said, "An error has been deemed structural if the error always results in fundamental unfairness." For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable doubt instruction, the resulting trial is always a fundamentally unfair one. *See Gideon v. Wainright, supra.* and *Sullivan, supra*. These categories are not rigid. In a particular case, more than one of the rationales may be part of the explanation for why an error is deemed to be structural. See *e.g. id*, at 280-282. For these purposes, however, one point is critical. An error can count as structural even if the error does not lead to fundamental unfairness in every case. See *United States v. Gonzales-Lopez*, 548 U.S. 140 at 149 *n.*4. (rejecting as inconsistent with the reasoning of our precedents" the idea that structural errors "always or necessarily render a trial fundamentally unfair and unreliable.")

Because of the severity and prejudicial effect of the prosecutor's statements

as they relate to the trial structure, they transcend the normal analysis under *Chapman, supra*. as being harmless and the necessity of the application of *Strickland, supra*. This case before the Court fits into the purview of *Kentel Myrone Weaver, supra*., in the following way. An error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney *Gideon, supra.* or if the judge fails to give a reasonable doubt instruction *Sullivan, supra.* ,the resulting trial is always an unfair one. Also, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise "effect of the violation cannot be ascertained." *Gonzales-Lopez, supra.* (quoting from *Vasquez v. Hillery,* 474 U.S. 254, 263 (1986). The reason being the government will, as a result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt." *Chapman, supra.*

CONCLUSION

In summary, the *Kentel Myrone* and *Gonzales-Lopez* decisions and their application to Phillip Boyd Cashion raise an important question relating to the implementation of the 5th amendment and the Petitioner's right not to be forced by the state of Texas to be a witness against himself and being prejudiced before the jury for not being a witness against himself.

PRAYER FOR RELIEF

For the reasons herein and upon the authority herein the Petitioner, Phillip Boyd Cashion requests that this Court grant a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

Respectfully submitted,

/s/Charles E. Perry
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CERTIFICATE OF COMPLANACE WITH SUPREME COURT RULES

Relying on Microsoft Word' word count feature use the create Petitioner's Petition For a Writ of Certiorari, I certify that the number of words contained in this Petition is 3538 and the font used is 14 font.

/s/ Charles E. Perry

CERTIFICATE OF SERVICE

I Charles E. Perry, attorney for Petitioner have deposited in the US Mail postpaid a copy of the forgoing Petition for this court to grant a WRIT OF CERTIORARI to the Court of Criminal appeals of the State of Texas on the 29th day of January, 2020.

/s/ Charles E. Perry
Attorney for Petitioner