

TEXAS COURT OF CRIMINAL APPEALS

Ex parte Ryan Edward Schuller

Ex parte Schuller · No. PD-1153-15 · Decided October 7, 2015

SUMMARY

This document is a Petition for Discretionary Review filed by Ryan Edward Schuller in the Texas Court of Criminal Appeals. It challenges the Fifth Court of Appeals' reversal of habeas corpus relief concerning a warrantless canine sniff at the curtilage of a residence and argues that *Florida v. Jardines* made the search unconstitutional. The filing also contends that the claim could be raised in habeas proceedings because the controlling legal basis was unavailable when Schuller entered his guilty plea.

CASE DETAILS

COURT	Texas Court of Criminal Appeals
JURISDICTION	Texas
DECIDED	October 7, 2015
DOCKET	PD-1153-15
DISPOSITION	other
PROCEDURAL POSTURE	Petition for discretionary review from a memorandum opinion of the Fifth Court of Appeals in Dallas, Texas. The court of appeals reversed the trial court's grant of habeas corpus relief under Texas Code of Criminal Procedure article 11.072 and reinstated the order of deferred adjudication.
STANDARD OF REVIEW	Not stated as a definitive standard by the issuing court in the supplied document. The petition seeks review of the court of appeals' treatment of preservation, waiver, and cognizability of a constitutional search-and-seizure claim in article 11.072 habeas proceedings.
PRECEDENTIAL VALUE	Not determinable from the supplied document; it is a party-filed petition rather than a judicial opinion.
PARTIES	Ryan Edward Schuller v. The State of Texas

TOPICS

appellate procedure habeas corpus fourth amendment search and seizure suppression of evidence

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether an article 11.072 habeas applicant may raise an unlawful-search claim that was not reasonably available at the time of the plea because then-controlling Texas law treated a free-air dog sniff of a residence's curtilage as lawful.
2. Whether the Texas 'right not recognized' exception or related habeas principles permitted Schuller to challenge the search after *Florida v. Jardines* changed the governing Fourth Amendment law.
3. Whether the right to be free from an unreasonable search of one's home is a fundamental or absolute constitutional right that could not be waived by the guilty plea under the circumstances presented.

KEY QUOTATIONS

“The government’s use of trained police dogs to investigate the home and its immediate surroundings is a “search” within the meaning of the Fourth Amendment.” (at 1417-18)

“... an applicant’s failure to raise a claim at trial may be excused if the basis of the claim was not reasonable available at the time of trial.” (at 136)

*“The “right not recognized” exception to the contemporaneous-objection rule relates to a kind of fundamental error that is contrary to a specific act of the legislature, that *Marin* generally eliminated from our jurisprudence. ...” (at 367)*

“Some rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system.” (at 278)

“But when it comes to the Fourth Amendment, the home is first among equals.” (at 19)

FACTUAL BACKGROUND

On June 15, 2011, a Carrollton police officer obtained and executed a search warrant for a residence after a trained narcotics dog alerted during a free-air sniff of the bottom seam of the garage door. Schuller was arrested and indicted for possession of more than four ounces of marijuana. He pleaded guilty on July 20, 2012, when Texas appellate precedent treated such residential free-air dog sniffs as not constituting Fourth Amendment searches. After *Florida v. Jardines* held that use of trained police dogs to investigate a home and its immediate surroundings is a search, Schuller sought article 11.072 habeas relief, which the trial court granted.

PROCEDURAL HISTORY

Schuller pleaded guilty to possession of more than four ounces of marijuana and received three years of deferred community supervision. After *Florida v. Jardines*, he filed an article 11.072 habeas application challenging a warrant based on a narcotics-dog sniff at the garage door of his residence. The trial court granted relief on December 31, 2014. On June 15, 2015, the Fifth Court of Appeals reversed and reinstated deferred adjudication. The supplied document is Schuller's petition for discretionary review; it does not contain the Court of Criminal Appeals' disposition.

DISPOSITION

other

CASES CITED

- Florida v. Jardines, 133 S. Ct. 1409 (2013)
- Ex parte Banks, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989)
- Ex parte Grigsby, 137 S.W.3d 673 (Tex. Crim. App. 2004)
- Ex parte Kirby, 492 S.W.2d 579 (Tex. Crim. App. 1973)
- Ex parte Goodman, 816 S.W.2d 383, 384 n.4 (Tex. Crim. App. 1991)
- Ex parte Maxwell, 424 S.W.3d 66 (Tex. Crim. App. 2014)
- Ex parte Michael Keith Boyd, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001)
- Marin v. State, 851 S.W.2d 275, 278-80 (Tex. Crim. App. 1993)
- Rivas v. State, 411 S.W.3d 920, 921 (Tex. Crim. App. 2013) (per curiam)
- Sanchez v. State, 120 S.W.3d 359, 367 (Tex. Crim. App. 2003)
- Romo v. State, 106 S.W.3d 565, 573 (Tex. App.—Fort Worth 2003, pet. ref'd)
- Rodriguez v. State, 106 S.W.3d 224 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd)
- Porter v. State, 93 S.W.3d 342, 346-47 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (op. on reh'g)
- Cain v. State, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)
- Teague v. Lane
- Silverman v. United States, 365 U.S. 505, 511 (1961)
- Oliver v. United States, 466 U.S. 170, 180, 182 n.12 (1984)
- Brosseau v. Haugen, 543 U.S. 194, 198 n.3 (2004) (per curiam)
- Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (per curiam)
- California v. Caballes
- Penry v. Lynaugh, 492 U.S. 302 (1989)

OPINION

PER CURIAM.

PD-1153-15 IN THE COURT OF CRIMINAL APPEALS OF TEXAS AUSTIN TEXAS

EX PARTE §
RYAN EDWARD SCHULLER, § COURT OF APPEALS Appellant, § NO. 05-15-00064-CR § V.
§ TRIAL COURT DOCKET § NO. WX13-90021-U THE STATE OF TEXAS, § Appellee, §

PETITION
FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FIFTH JUDICIAL
DISTRICT DALLAS, TEXAS

ROBERT W.

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brian.higginbotham@dallascounty.org JUDGE At Time of Plea: The Honorable Susan Hawk
Habeas Proceeding: The Honorable Jennifer Balido Current Judge: The Honorable Stephanie
Mitchell 291st Judicial District Court Dallas County, Texas Page - 2 TABLE OF CONTENTS
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Houston [14th Dist.] 2002, pet ref'd)(op. on reh'g) Rivas v. State, 411 S.W.3d 920, 921 (Tex.
Crim. App 2013)(per curiam) 10 Rodriguez v. State of Texas, 106 S.W.3d 224 9, 18 (Tex.App.–
Houston [1st Dist.]

2003, pet. ref'd) Romo v. State, 106 S.W.3d 565, 573 9, 18 (Tex.App.–Fort Worth 2010, pet. ref'd)
Sanchez v. State, 120 S.W.3d 359, 367 (Tex. Crim. App 2003) 14, 15 Silverman v. United States,
365 U.S. 505, 511 17 Page - 4 STATEMENT REGARDING ORAL ARGUMENT Pursuant to
Texas Rule of Appellate Procedure 39.7, Appellant hereby requests oral argument. Counsel is of
the opinion that oral argument would serve to emphasize and clarify the important legal points
regarding this Petition.

Page - 5 TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS: Under Rule 68 of the Texas Rules of Appellate Procedure, Petitioner, RYAN EDWARD SCHULLER ("Schuller"), in the above cause, through counsel of record Robert W. Buchholz, respectfully submits this Petition for Discretionary Review and in support would show the Court the following: STATEMENT OF THE CASE Appellant and Eliana Saucedo¹ were charged with possession of a controlled substance (marijuana, more than 4 oz.) in cause No. F11-13242-U in the 291st Judicial District Court of Dallas County, Texas, Judge Susan Hawk then presiding.

Appellee pled guilty and waived his right to a direct appeal. The trial court sentenced him to three years deferred community supervision. Later, in the instant Cause No. WX13- 90021-U, the Court, Judge Jennifer Balido then presiding, granted Appellant relief from his final felony conviction under art. 11.072 of the Code of Criminal Procedure.

The State appealed and in a Memorandum Opinion the Fifth Court of Appeals reversed the decision of the trial court and reinstated the order of deferred adjudication. The Court of Appeals reasoned that the right to be free from unreasonable search and seizure in ones home was not a fundamental right guaranteed by the United States Constitution and that Appellant failed to properly preserve its Search and Seizure 1 Eliana Saucedo brought an identical writ application which was also granted by the Trial court, reversed by the Court of Appeals in an identical opinion and which is the subject of a Petition for Discretionary Review with this Court.

Page - 6 complaint for appellate review by entering into a plea bargain and waiving the right of a direct review even though all parties acknowledge that the basis for the Writ of Habeas Corpus was unavailable based on current Texas law at the time of the plea and that if available the evidence was obtained in violation of the protections afforded by the United States Constitution.

This petition challenges that holding and urges this court to determine the right to be free of an illegal search and seizure at ones residence is a fundamental right and to analyze and decide that when a decision of the United States Supreme Court invalidates Texas case law that was so well settled on the issue so that a trial would have been futile that a later writ would be proper to challenge the illegal activities which formed the basis of the indictment.

STATEMENT OF PROCEDURAL HISTORY On December 31, 2014, the 291st District court of Dallas County, Texas in case No. WX13-90021-U entered an Order Granting Habeas Corpus Relief to Appellant. On June 15, 2015, in a memorandum opinion, The Fifth Court of Appeal of Dallas reversed the decision of the trial court and reinstated the Order of Deferred Adjudication.

Ex Parte Ryan Edward Schuller, Appeal No. 05-15-00064-CR, Court of Appeals Fifth District of Texas at Dallas, June 15, 2015. Page - 7 GROUNDS FOR REVIEW POINT OF ERROR 1 The Court of Appeals wrongfully decided that the "Right not Recognized" doctrine had been

eliminated in all situations even one where a fundamental right later interpreted by the United States Supreme Court is at issue.

Because of this reasoning by the Court of Appeals they wrongfully decided that bringing a habeas proceeding on an issue not available at the time of the plea was not proper and wrongfully reversed the decision of the trial court. This is error on the part of the Court of Appeals. POINT OF ERROR 2 The Court of Appeals erred in finding that the bases of Appellant's position was that he was asserting a "Right not Recognized" for the first time in his habeas proceeding and further that the Court of Appeals erred in finding that Appellee did not preserve his complaint of an unlawful search in the trial court when the established law at that time in the State of Texas was that the actions of law enforcement were not a violation of his fundamental right to privacy as guaranteed him by the Fourth Amendment to the United States Constitution.

BACKGROUND FOR ARGUMENT Some background is warranted in order to fully understand the issue before the Court. Page - 8 On June 15, 2011, a Carrollton Texas Police Officer executed a search warrant on 2227 Valley Mill, City of Carrollton, Dallas County, Texas.

The search warrant was issued after an officer presented a probable cause affidavit that contained the following language: On June 13th, 2011, at approximately 1445 hours, your Affiant, Canine Office [sic] J. Sanchez #818, and his canine partner, Bosko, a trained and certified narcotics detecting canine, went to the suspected location (2227 Valley Mills). Canine Bosko conducted a free-air sniff of the suspected location's garage door.

The suspected location's driveway and garage door are located in the rear of the residence, are accessible by a public sidewalk, and are not enclosed by any fencing or barrier that would prevent access by the public. Canine Bosko alerted to the presence of the order of an illegal drug while sniffing the garage door's bottom seam.... Bosko is trained to alert only on Marijuana, Methamphetamine, Heroin, Cocaine, and derivatives thereof.

A search warrant was issued and after the search warrant was executed, Appellant was arrested and thereafter indicted. On July 20, 2012, Appellant entered a guilty plea pursuant to a plea bargain agreement and was sentenced to a term of community supervision. At the time of the plea the controlling law in Texas as found by three Courts of Appeals, all with petitions for discretionary review being refused by this Court, regarding free-air sniffs of the exterior of a person's residence was that a free-air sniff by a narcotics dog trained to detect certain illegal substances in the area surrounding a home known as the curtilage was not a search within the meaning of the Fourth Amendment to the United States Constitution.

See *Romo v. State*, 106 S.W.3d 565, 573 (Tex.App.–Fort Worth 2010, pet. ref'd); *Rodriguez v. State of Texas*, 106 S.W.3d 224 (Tex.App.–Houston [1st Dist.] 2003, pet. ref'd); and *Porter v. State*, 93 S.W.3d 342, Page - 9 346-47 (Tex. App.– Houston [14th Dist.] 2002, pet ref'd)(op. on

reh'g). Nine months later, in *Florida v. Jardines*, 133 S. Ct. 1409 (2013) the United States Supreme Court changed the law on residential dog sniffs.

The Supreme Court described its holding in *Jardines* as follows: The government's use of trained police dogs to investigate the home and its immediate surroundings is a "search" within the meaning of the Fourth Amendment. *Florida v. Jardines*, 133 S. Ct. 1409, at 1417-18. Thereafter in response to *Jardines*, Appellant filed an application for a writ of habeas corpus under art. 11.072 of the Code of Criminal Procedure.

(C.R. 8-15) In his application, Appellant sought relief from his final conviction claiming that, after *Jardines*, the search of his home was unconstitutional based upon the decision in *Jardines*. More specifically, Appellant claimed that the initial dog sniff was a search conducted without a warrant, and it therefore could not support the search of his home.

The State of Texas conceded at the trial court that in a current motion to suppress or in a current direct appeal, a defendant would be successful in excluding evidence obtained as a result of a canine free-air sniff under the circumstances presented in Appellants case.

In fact this Court in *Rivas v. State*, 411 S.W.3d 920, 921 (Tex. Crim. App 2013)(per curiam) vacated and remanded a case in light of *Jardines* an appellate court judgment that affirmed a denial of a motion to suppress evidence obtained as a result of a dog sniff at defendant's front door. Page - 10 POINT OF ERROR 1 The Court of Appeals wrongfully decided that the "Right not Recognized" doctrine had been eliminated in all situations even one where a fundamental right later interpreted by the United States Supreme Court is at issue.

Because of this reasoning by the Court of Appeals they wrongfully decided that bringing a habeas proceeding on an issue not available at the time of the plea was not proper and wrongfully reversed the decision of the trial court. This is error on the part of the Court of Appeals. ARGUMENT The Court of Appeals further stated that the line of cases of "Rights not Recognized" exception have been generally eliminated.

However, generally eliminated is not eliminated and given the facts of the matter before the Court there is no case law eliminating such an exception. This case, if it had been decided at the time of the Appellant's Plea, would have lead to the suppression of the evidence as the sniff by the dog at the bottom of the garage door is clearly within the curtilage of the home of Appellant.

This was conceded to by the State. This search violated Appellant's rights under the Fourth Amendment to the United States Constitution. The State in it's original response filed in the trial court stated the search and seizure issues will not be considered for the first time on habeas and they cite two cases.

However, in a reading of each of these cases the remedy sought in these cases Page - 11 was available at the time of the trial or plea. In *Ex parte Grigsby*, 137 S.W.3d 673 (Tex.Crim.App. 2004) the court stated that the Applicant's challenge to the legality of the search and seizure conducted by law enforcement officers is denied because Applicant forfeited his claim by failing to raise it on direct appeal.

In this case the defendant plead guilty to the felony offense of robbery and no appeal was taken. In reading the case it appears that the legality of the search could have been raised at the time of the plea therefore it was waived.

In *Ex parte Kirby*, 492 S.W.2d 579 (Tex.Crim. 1973) which is another post- conviction habeas corpus proceeding, the Applicant was found guilty after a trial. Testimony was heard about the search in that case and the Court ruled that it was admissible. Any error was not preserved for appeal.

The Court held that it would not be considered for the first time on a writ of habeas corpus because it was not preserved and not presented on appeal. Again, the issue was present at the time of the trial and could have been appealed.

In both of the cases cited by The State the evidence and remedy was available at the time of the plea or trial. This is not the case with Appellant. The law in Texas was firmly established at the time of their pleas that free air dog sniffs were allowed.

The United States Supreme Court later ruled that they were not. The Court of Appeals stated that the cases of *Ex Parte Michael Keith Boyd*, 58 S.W.3rd 134 (Tex.Crim.App. 2001) which clearly states at page 136: Page - 12 "... an applicant's failure to raise a claim at trial may be excused if the basis of the claim was not reasonable available at the time of trial.

Citing *Ex parte Goodman*, 816 S.W.2d 383, 384 n.4 (Tex.Crim.App.1991). And *Ex parte Goodman*, 816 S.W.2d 383 (Tex.Crim.App. 1991) where a person was convicted in 1981 for capital murder and sentenced to death. His conviction and sentence was confirmed on appeal. He later brought a writ based on the Eight and Fourteenth Amendments to the Constitution under a case decided by the United States Supreme Court in 1989.

The Texas Court of Appeals stated in part as follows: Before we address the merits of the Penry claim presented in this writ application, we must first decide whether this issue is cognizable via a writ of habeas corpus where it is presented for the first time.

[3] It is well-settled by this Court that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal. *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex.Cr.App.1989). Traditionally, the writ is available only to review jurisdictional defects or denials of fundamental constitutional rights. *Ex parte Banks*, at 540, and cases cited therein.

The allegation raised by applicant implicates applicant's rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment. See *Penry*, 109 S. Ct. 2934 (issue cognizable via federal writ of habeas corpus). This cause is remarkably similar to the *Penry* case. See *Penry*, 109 S. Ct. at 2941. Applicant's trial attorney timely requested an additional jury instruction regarding the mitigating evidence which was denied by the trial judge.

[4] We hold the allegation is cognizable via a habeas corpus application despite applicant's failure to raise the complaint on direct appeal. Wherein this Court has recognized the so called "Right Not Recognized" exception for a writ of habeas corpus the Court of Appeals says this right is no longer Page - 13 available under the decision in *Sanchez v. State*, 120 S.W.3d 359, 367 (Tex.

Crim. App 2003). A careful review of that case shows this is not the case: *Sanchez*, *id.*, says at p. 367 "The "right not recognized" exception to the contemporaneous-objection rule relates to a kind of fundamental error that is contrary to a specific act of the legislature, that *Marin* (*Marin vs. State*, 851 S.W.2d 275 (Tex.Crim.App. 1993)) generally eliminated from our jurisprudence...." The facts of *Sanchez*, are that the defendant failed to properly object to the language in the charging instrument as required by the Texas Code of Criminal Procedure that was put into effect before his case.

He did not preserve error at the trial Court level in accordance with then applicable law and rules. Thus, he waived his right to bring that issue on appeal for the first time. *Sanchez* is distinguishable from this case as the right to be free from a free air sniff without a warrant was contrary to the clear holdings of Texas Courts. It was a right that was not available to Appellant at the time of his plea and came into existence by the Decision of the United States Supreme Court.

Sanchez does not address such a situation and is inapplicable to Appellant's situation. *Sanchez*, like *Ex parte Grigsby* and *Ex parte Kirby* speaks to acts that were available at the time of the case disposition and appeal, clearly not applicable to the situation before us. They speak of remedies that were available on direct appeal. Page - 14 This line of cases does not in any way speak to the situation where a right clearly was not available at the time of the trial or any direct appeal and was sought later by habeas relief.

Sanchez, *id.*, concerned whether there was a waiver of the right to be charged by an instrument that is free of defects, errors, and omissions. The right to object was present and allowed by law at the time of the trial and the appeal. It was not a right that became available at some future date and which was raised by habeas relief.

The Court of Appeals also relies on *Marin vs. State*, 851 S.W.2d 275 (Tex.Crim.App. 1993). Again, this case speaks to waiver of remedies that were available at trial and on direct appeal. In fact *Marin* was a direct appeal of the issue presented and stated a framework for the review of

waiver of rights during the trial proceeding of a case. It does not in any manner speak to remedies that were not available at the time of trial or any subsequent direct appeal.

It does not in any manner limit habeas relief under the doctrines set forth by *Ex Parte Michael Keith Boyd* and *Ex Parte Goodman* of the ability to bring a petition on items for relief on grounds that clearly were not available or even reasonable at the time the matter was dealt with by the trial court.

For the Court of Appeals to make this blind leap is unreasonable and error. At the time of Appellant's plea the law in Texas was settled and based on the facts presented was a legal search. Since the plea the United States Supreme Court Page - 15 found that such a search is a violation of Appellant's Fourth Amendments Constitutional Rights which are fundamental rights guaranteed to citizens of the United States.

As such, Appellant can raise the validity of the search for the first time by Writ of Habeas Corpus since the remedy was not reasonable available at the time of trial. Further, it has been held that a change in substantive law can be applied retroactively. Substantive law is that part of law which creates, defines, and regulated rights of the people.

The extension of the fourth amendment protection against unreasonable search and seizures at ones home is a substantive change in the law. The Texas Court of Criminal Appeals held in *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. Mar. 12, 2014)(5:3:2) that *Teague v. Lane* a "new rule" applies retroactively in a collateral proceeding only if the rule is substantive or a "watershed" rule of criminal procedure.

New substantive rules apply retroactively because they necessarily carry a significant risk that a defendant would face a punishment that the law cannot impose upon him because of his status or offense. Watershed rules of procedure apply retroactively because they implicate the fundamental fairness and accuracy of the criminal proceeding. But they must be one without which the likelihood of an accurate conviction is seriously diminished.

In this matter before the Court the application of the 4th Amendment to the United States Constitution because the decision implicates the fundamental fairness and accuracy of the criminal proceeding. Page - 16 POINT OF ERROR 2 The Court of Appeals erred in finding that the bases of Appellant's position was that he was asserting a "Right not Recognized" for the first time in his habeas proceeding and further that the Court of Appeals erred in finding that Appellant did not preserve his complaint of an unlawful search in the trial court when the established law in the State of Texas was that the actions of law enforcement were not a violation of his fundamental right to privacy as guaranteed him by the Fourth Amendment to the United States Constitution.

ARGUMENT A fundamental right of a person is his right to privacy to be safe from unreasonable searches in his home: At the Fourth Amendment's "very core" stands "the right of a man to retreat

into his own home and there be free from unreasonable governmental intrusion.” *Silverman v. United States*, 365 U.S. 505, 511.

The area “immediately surrounding and associated with the home”—the curtilage—is “part of the home itself for Fourth Amendment purposes.” *Oliver v. United States*, 466 U.S. 170, 180. The officers entered the curtilage here: The front porch is the classic exemplar of an area “to which the activity of home life extends.” *Id.*, at 182, n. 12. Pp. 4–5. At the time of the plea the controlling law in Texas regarding free-air sniffs of the exterior of a person’s residence was that a free-air sniff by a narcotics dog trained to detect certain illegal substances in the area surrounding a home known as the curtilage was not a search within the meaning of the Fourth Amendment to the United States Constitution.

See *Romo v. State*, 106 S.W.3d 565, 573 (Tex.App.–Fort Worth 2010, pet. ref’d); *Rodriguez v. State of Texas*, 106 S.W.3d 224 (Tex.App.–Houston [1st Dist.] 2003, pet. ref’d); and *Porter v. State*, 93 S.W.3d 342, 346-47 (Tex. App.– Houston [14th Dist.] 2002, pet. ref’d)(op. on reh’g). Note, all of these petitions were refused review by the Texas Court of Criminal Appeals.

Texas further stated this position in the *Amici Curiae* Brief filed in Case No. 11- 564 in the United States Supreme Court case of *Florida vs. Joelis Jardines* that such searches were not a violation of the Fourth Amendment. Texas, joined by 18 additional states, stated in part arguing that a free air sniff was legal: “Summary reversal is appropriate to “correct a clear misapprehension” of federal law, *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam), and when the decision below is “flatly contrary to this Court’s controlling precedent,” *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam).

Amici States submit that this is just such a case. See SUP. CT. R. 16.1; EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* § 5.12(a), (c) (9th ed. 2007). “The Florida Supreme Court’s decision is “flatly contrary” to a number of this Court’s decisions holding that a dog sniff is not a search.

The judgment below is not saved by the court’s creation of a “public spectacle” test. Rather, that test finds no support in this Court’s precedent. Reliance on the “public spectacle” test thus introduced further error. “Summary reversal would allow the Court to reaffirm that a detection dog is an appropriate tool for law enforcement officers to use to establish probable cause during their investigations while conserving the Court’s scarce resources.

This remedy is especially appropriate here, to ensure that other courts do not follow the Florida Supreme Court’s defiance of *Caballes*. Page - 18 The State of Texas held the position that free air sniffs were not only legal under Texas law but Federal law as well.

The Fifth Court of Appeals stated in its opinion that “A voluntary plea of guilty intelligently made in the light of then applicable law does not become vulnerable because later judicial

decisions indicated that the plea rested on a faulty premise.” This is not the case.

The position of the courts of Texas were clear that free air sniffs did not violate Appellee’s fundamental rights. The plea was made based on the clear law as it existed at the time in the State of Texas, an interpretation of the law that this Court three times refused review, and a position that was later proven to be incorrect. It is not the fault of Appellant to act on laws pronounced by the State and decided by Courts of this State that were improperly decided and refused review on three previous occasions.

The Court of Appeals relies on, *Marin vs. State*, 851 S.W.2d 275 (Tex.Crim.App. 1993) which states, at p. 278, “Some rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system.” This Court then assigns Appellee’s right to be free from an unreasonable search of one’s home to a right that is to be implemented upon request.

However, a clear reading of the case law concerning this right shows that the right to be free from unreasonable search, especially of one’s home, should be an absolute requirement and prohibition, not an elective right.

As Justice Scalia stated in *Florida v. Jardines*, 133 Page - 19 S. Ct. 1409 (2013) But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s “very core” stands “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” *Silverman v. United States*, 365 U.S. 505, 511(1961). This right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man’s property to observe his repose from just outside the front window.

This Court should recognize what the clear status of the law in Texas was at the time of the plea and not penalize Appellee for making the only rational choice open to him given the circumstances and the dictates of Judge Hawk and thereby deny him of a fundamental right guaranteed by the United States Constitution to be free from unlawful searches of his home.

The Court of Appeals erred in not finding that the right to be safe from unreasonable searches in one’s residence is an absolute requirement and a prohibition guaranteed by the United States Constitution that cannot be waived at the trial court level under the reasoning in *Marin v. State*, 851 S.W.2d 275, 279-80 (Tex.Crim.App. 1993), overruled on other grounds by *Cain v. State*, 947 S.W.2d 262, 264 (Tex.Crim.App.

1997). This is error on the part of the Court of Appeals. Page - 20 Conclusion The trial court’s decision was proper when it granted Appellee habeas relief from his final felony conviction and this Court should reverse the decision of the Court of Appeals and affirm the trial court’s judgment. Respectfully submitted, The Law Office of Robert W. Buchholz, P.C. /s/ Robert W.

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(214) 754-5500 Fax. (214) 754-9100 CERTIFICATE OF SERVICE This is to certify that on October 5, 2015, a true and correct copy of the above and foregoing document was served on Mr. Brian P. Higginbotham, Assistant District Attorney of Dallas County, Texas, by e-mail to brian.higginbotham@dallascounty.org. /s/ Robert W. Buchholz

Robert W. Buchholz Page - 21 Certificate of Compliance I certify that this brief contains 4,060 words.

This word count includes all necessary parts outlined in Texas Rule of Appellate Procedure 9.4(I)(1), and it was conducted with Word Perfect version X3. /s/ Robert W. Buchholz

Robert W. Buchholz Page - 22 Envelope Details Print this page Case # 05-15-00064-cr Case Information Location Court Of Criminal Appeals Date Filed 10/05/2015 02:22:34 PM Case Number 05-15-00064-cr Case Description Assigned to Judge Attorney Robert Buchholz Firm Name Robert W Buchholz PC Filed By Robert Buchholz Filer Type Not Applicable Fees Convenience Fee \$0.09 Total Court Case Fees \$0.00 Total Court Filing Fees \$0.00 Total Court Service Fees \$0.00 Total Filing & Service Fees \$0.00 Total Service Tax Fees \$0.00 Total Provider Service Fees \$3.00 Total Provider Tax Fees \$0.25 Grand Total \$3.34 Payment Account Name Wells Fargo Transaction Amount \$3.34 Transaction Response Transaction ID 11820199 Order # 007230504-0 Petition for Discretionary Review Filing Type EFile Filing Code Petition for Discretionary Review Petition for Discretionary Review from The Court of Filing Description Appeals Fifth Judicial District Dallas, Texas Reference Number 5038.01 Comments Status Rejected Fees Court Fee \$0.00 Service Fee \$0.00 Rejection Information Rejection Time Rejection Comment Reason 10/07/2015 The petition for discretionary review does not contain a copy of the court of appeals <https://reviewer.efiletexas.gov/EnvelopeDetails.aspx?envelopeguid=4bfe0b6d-b288-4380-b074-cfa9e9986e7f>[10/7/2015 2:48:24 PM] Envelope Details Other 02:46:42 opinion [Rule 68.4(j)].

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