Supreme Court, U.S.
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No. 18A232

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Alan Fratta — PETITIONER
(Your Name)

vs.

Lorie Davis — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the 5th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Alan Fratta
(Your Name)
Polunsky Unit, #999189
3872 FM 350 South
(Address)
Livingston, TX 77351
(City, State, Zip Code)
936/967-8082
(Phone Number)

QUESTION PRESENTED

***** CAPITAL CASE *****

IS IT UNCONSTITUTIONAL FOR A U.S. COURT OF APPEALS TO ACCEPT, SANCTION OR MAKE DECISIONS THAT: ALLOW STATE COURTS TO REFUSE TO ACCEPT MERITORIOUS ISSUES A PERSON **HAD** TO FILE PRO SE BECAUSE HIS ATTORNEYS REFUSED TO AND THE COURTS WOULDN'T APPOINT DIFFERENT ATTORNEYS; &/OR: ALLOW THE FEDERAL DISTRICT COURT TO ALSO REFUSE TO ACCEPT NECESSARY PRO SE/HYBRID PLEADINGS AND IMPROPERLY CLAIM THE STATE PRO SE ISSUES WERE UNEXHAUSTED/BARRED INSTEAD OF ACCEPTABLE UNDER U.S. CODES YET NOT **REMAND** THEM BACK TO STATE COURTS FOR EXHAUSTION BUT RATHER DENY THE MERITS OF THE ISSUES THRU UNLAWFUL &/OR UNCONSTITUTIONAL MEANS SUCH AS - FINDING IT OKAY THE JURY CHARGE ADDED OTHER ACTORS AND A LAW OF PARTIES SCHEME TO AN INDICTMENT COUNT WHICH CHARGED **ONLY** THAT **ONE** PERSON AS A **SOLE ACTOR**, OKAY FOR A FATAL/MATERIAL VARIANCE, OKAY FOR A CONSTRUCTIVE AMENDMENT, OKAY THE CAPITAL MURDER CONVICTION WAS AN UNPOLLED GENERAL VERDICT INVOLVING "&/OR" SCENARIOS WITH MULTIPLE PEOPLE AND INVALID ALTERNATIVE THEORIES OF GUILT **NOT** EQUATING TO CAPITAL MURDER, AND OKAY THE DISTRICT JUDGE ALSO THREW IN AN UNCHARGED UNPRESENTED ELEMENT - **ALL** TO **WRONGFULLY** AFFIRM THE SUFFICIENCY AND CONVICTION; THEN THEMSELVES: DIRECTLY FAIL TO APPLY PERTINENT U.S. CODES, MISAPPLY **A CIRCUIT SPLIT OF** SCHLUP, AND REFUSE TO CONDUCT A JACKSON REVIEW OF THE SUFFICIENCY OF THE EVIDENCE FILED BY THE PERSON'S ATTORNEY - WHEREBY **ALLOWING** THE PERSON TO BE **EXECUTED** EVEN THO HE DID EVERYTHING HE COULD TO GET HIS CLAIMS HEARD AND PROVE HIS **INNOCENCE** EVEN BEYOND THE **INSUFFICIENCY OF THE EVIDENCE** ISSUES THAT TRIAL COUNSEL ALSO REFUSED TO ARGUE AND WHICH **WARRANT ACQUITTAL** NOW ON APPEAL; &/OR DOES THIS CUMULATIVE EFFECT NOT EQUATE TO A **MISCARRIAGE OF JUSTICE** MERITING IMMEDIATE DETERMINATION IN THIS COURT **BEFORE IMMINENT EXECUTION OCCURS?**

SUBSIDIARY QUESTIONS FAIRLY INCLUDED THEREIN THE QUESTION - PER RULE 14.1(a)

(a) Is it unconstitutional to execute a person when the evidence was legally insufficient to have convicted him?

(b) Is it violations of Notice &/or Due Process to indict a person as being the sole or only actor of a crime but then add other actors into a jury charge under a law of parties scheme, or must the indictment count charge that other actors/"parties" (even unnamed) are also somehow involved in the first place?

(c) Is it unconstitutional (&/or in violation of Chiarella &/or Dunn) for appellate courts to add uncharged unpresented elements into assessing the sufficiency of the evidence to affirm a person's conviction?

(d) Is it unconstitutional to uphold a conviction when there was a fatal/material variance?

(e) Is it unconstitutional to uphold a conviction when there was a constructive amendment?

(f) Is it unconstitutional to uphold a conviction based on an unpolled general verdict where the additions of "and/or" and multiple persons created invalid alternative theories not charged in the indictment and constituted different uncharged offenses - making it unknown what or how to appeal the conviction?

(g) Is it unconstitutional (&/or in violation of Jackson v. VA.) for Circuit Courts to refuse to make a Jackson determination on the sufficiency of the evidence requested by the appellant's attorney?

(h) Is it cruel and unusual punishment &/or violations of Due Process &/or the Right to Petition the Government for Redress of Grievances to execute persons who get strapped with ineffective or even sabotaging attorneys and exercise all due diligence trying everything they could to prove their innocence &/or get meritorious claims heard, but the Circuit, federal and State Courts

refused to appoint new attorneys or accept their filings solely because they were made pro se?

(i) Should it be a Right to proceed pro se in direct appeal?

(j) In light of McCoy v. LA., should that ruling extend to appellate attorneys who refuse to file their clients' lawful choices for the objectives of their appeals; especially in direct appeal, and death penalty cases?

(k) Should hybrid representation be a Right in trial and appeal?

(l) Is it unconstitutional (&/or in violation of Rhines v. Weber) for Circuit and federal district courts to allow a person to be executed (or remain imprisoned) rather than remanding meritorious issues back to State Courts for rulings/exhaustion?

(m) Because **Circuit Courts are split** in their applications of **Schlup v. Delo**, should this Court now make the determination of whether "new evidence" means "newly presented" or "newly discovered", or either?

(n) Is it in violation of U.S. Codes 2254(a), 2254(b)(1)(B)(i) & (ii), 2254(e)(2)(B), and 2264(a)(1) that the federal district and Circuit Courts refused to accept meritorious pro se issues timely filed &/or fairly presented in State Courts?

(o) Is it unconstitutional (&/or in violation of Martinez/Trevino) to execute a person rather than granting a new trial based upon the substantial trial ineffective assistance of counsel for not making the insufficiency, unlawful/unconstitutional law of parties addition, fatal/material variance, and constructive amendment arguments at trial?

(p) Is the cumulative effect of all the above in this matter of life or death case not unconstitutional &/or a fundamental miscarriage of justice that merits review by this Court before imminent execution occurs?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 17-70023; Fratta v. Davis, 889 F3d 225; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 4:13-cv-03438; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 1st, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 5th, 2018, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. 1st Amendment: Right to Petition the Government for Redress of Grievances

U.S. 5th Amendment: Right to be held to answer to a capital indictment (properly worded; not a constructively amended jury charge)

U.S. 6th Amendment: Rights to Notice, and effective assistance of counsel

U.S. 8th Amendment: Right to be free and protected from cruel and unusual punishment

U.S. 14th Amendment: Right to Due Process of law

Texas Constitution Article 1 § 10: See Appendix I

Texas Code of Criminal Procedure Article 1.05: See Appendix I

Texas Penal Code 7.02: See Appendix F Exhibit 2 p.3

Texas Penal Code 15.02: See Appendix I

Texas Penal Code 19.03: See Appendix I

STATEMENT OF THE CASE

I was a police officer, firefighter and emergency care attendant for 10 years up until this case. I was a model citizen and not even accused of ever having committed any act of violence my entire life; including in this case. I'm completely innocent of my wife Farah's death, and being framed by Farah's wealthy and highly influencial father - Syed "Lex" Baquer (Iranian birth name: Hussein Baquer Syed) and his friends in the system (See Appendix E & Appendix H Exhibits 4 & 5). The evidence was also legally insufficient (App. G Ex. 5 & App. F Ex. 1 & 2). Yet here I sit on Texas Death Row awaiting execution unless this Court intervenes.

During pretrial arraignment I requested the appointment of attorney Katherine Scardino (who I'd been corresponding with, was on the CJA list, and wanted to be appointed to my trial), and to be heard along with her under Texas laws. But Judge Belinda Hill (who left the bench to become acting D.A. then 1st Assistant D.A.) denied my requests and strapped me with attorneys Randy McDonald and Vivian King (current Chief of Staff for the D.A., Kim Ogg), both of whom got paid double the standard capital murder rates for my trial (See records for all this). Two "co-defendants" are also charged in my case; Joseph Prystash and Howard Guidry. My indictment has 4 counts, all of which say I shot Farah. Count 1 states I shot Farah "and" employed Prystash to kill her. Count 2 states I shot Farah and employed Guidry to do it. Count 3 states the same as 2 but with a different form of remuneration. Count 4 states I acted **alone** in killing Farah during a burglary of my own garage (App. F Ex. 1). The State's evidence showed I never met Guidry or knew of his existence. The State even concedes this throughout appeal (App. A p.71, et al). They claimed I (actor "A") solicited Prystash (actor "B") but that he then solicited Guidry (actor "C") and that Guidry is who killed Farah during a burglary while I was

at church with my children. I told my attorneys that evidence was an unlawful fatal/material variance from my indictment, and unlawful to convict me of capital murder on an "A" to "C" theory that doesn't even constitute capital murder under the Texas statute for capital murder (App. I or Penal Code 19.03). For the jury charge, Judge Hill rightly threw out indictment count 3 due to insufficient evidence. So the jury charge has 3 counts, each with 2 parts. The 1st part of each repeats the indictment wording verbatim, then has "or", and adds a law of parties part (App. F Ex. 2). I told my attorneys **no** law of parties part can be added to the last count because I'm indicted as the **only/sole** actor and that's an unlawful amendment. Pretrial I'd given my attorneys 2 written confessions Prystash and Guidry voluntarily made to me on Death Row - explaining who killed Farah and why (App. H Ex. 5), and I told my attorneys I'd given copies to my sons and friends and wanted to testify about it all, as could my sons and friends. I also told them Prystash had met with my 1st trial attorney, Michael Charlton, and told Charlton in front of his attorney that I had nothing to do with Farah's death (See Charlton's affidavit in App. E Ex. 1), and that Prystash turned down a deal to testify against me (See records). I also pointed out from my 1st trial - that the State's main witness, Prystash's girlfriend Mary Gipp, was going to testify under oath that **she's guilty** of capital murder and there's nothing in the record showing the State gave her immunity from capital murder; only for something like tampering with evidence, and that Gipp needs to be "attacked" and **charged** with capital murder **before** she testified (App. J Ex. 1 p.1). But both attorneys refused to introduce the Prystash and Guidry confessions, didn't attack Gipp, didn't call Charlton to testify, didn't tell jurors Prystash turned down a deal, and didn't argue that no law of parties could be added to the last count and that the evidence was insufficient - as I'd insisted. (See McCoy v. LA.).

In direct appeal I again instructed my court appointed attorney to file the legal insufficiency, etc, and explained it in my letters. Former Texas Office of Capital Writs ("OCW") Director Brad Levenson and staff attorney Daniel Lenhoff even wrote a 7 page memo agreeing with me on the legal insufficiency issues and sent the memo to my direct and State habeas attorneys. But they all refused to file my issues, so I filed complaints and requested new counsel (App. G Ex. 1), then filed the issues myself pro se; first in a brief to either supplement my attorney's, or to withdraw his brief and accept mine instead (App. G Ex. 2). The State realized my claims warranted an acquittal, so they filed a motion to strike my pro se brief - and I filed a response to make clear my request to be pro se only (App. G Ex. 3 & 4). Brad Levenson visited me again and gave me more suggestions to file another brief, which I did, to **substitute** for my attorney's - but allow the CCA to use my attorney's as a supplement to mine if they wanted. I filed that 2nd brief along with a motion asserting/invoking my Right to file pro se (App. G Ex. 5). I continued to file motions complaining about my attorney's ineffectiveness, requested new counsel, and requested the CCA to accept my pro se brief under **"any means"** (App. G Ex. 6 & 7). But the CCA denied some motions and ignored others (App. G Ex. 9, & records). In its Opinion denying my attorney's deficient brief, the CCA noted I made such pro se pleadings, then had the **audacity** to state: "Appellant does **not** challenge the sufficiency of the evidence of guilt" - **knowing** full well that I, the "Appellant", most certainly **did!** (App. D p.2). I then filed 3 motions for reconsideration (App. G Ex. 8), but the CCA denied and ignored them too. Notice the CCA **did accept** and rule on **select** filings of mine, including **after** their Opinion (App. G Ex. 10), but not my briefs which they knew had full merit for **acquittal.**

In State habeas, my attorneys filed a grossly deficient writ which cited

only 4 issues; 3 punishment phase and 1 generic grand jury issue (See records). I again had to file complaints about my attorneys and for their writ to be dismissed as a non-application for not challenging the conviction, etc, and to appont the OCW to investigate and file a new and proper writ (App. H Ex. 1, 2, & 3). I then filed motions citing over 90 issues my attorneys refused to investigate and cite in the innocence-guilt phase to prove my innocence, and I included the Prystash and Guidry confessions and Guidry's affidavit for his (App. H Ex. 4, 5, & 6). Again I got no justice and ignored, so I had **no choice** but to go thru hell to dismiss my ineffective attorneys and be designated as pro se only - in thinking the courts would have to hear my issues, and that the D.A. would have to give me withheld evidence proving my innocence (App. L). During a hearing on 8/22/13 I was ruled as pro se and immediately handed the court another motion to dismiss my attorneys' writ and allow **me** to file a new one, and a motion for a hearing on the legal insufficiency - for which the State filed Replies, but the judge denied my motions (App. H Ex. 7 & 8). He ordered me to file the proposed findings of fact and conclusions of law ("PFFCL") and threatened to set me an execution date if I didn't file it like an attorney would, affording me no leniency whatsoever (See transcripts). Having never filed or even seen a PFFCL before, I notified the federal district clerk of the trial judge's threat and that if assigned a date I wanted counsel appointed (See federal 4:13-cv-03438 Dkt. 1). Federal District Judge Melinda Harmon appointed James Rytting and Philip Hilder even tho my State habeas was not yet denied (See pgs. appended to IFP motion herein, or Dkts. 3, 4 & 5). Determined to prove my innocence, and because the FBI and USDOJ had denied my numerous requests of them to investigate my case, I motioned for the trial court to get the FBI and Congressional Innocence Committee to investigate (App. H Ex. 9). Then in my PFFCL I again showed my attorneys' filing was a

non-application, needed to be dismissed and the OCW appointed to investigate and file anew (App. H Ex. 10). But the judge adopted the State's PFFCL verbatim (See records). I motioned for the CCA to remedy miscarriages of justice committed by the trial court (App. H Ex. 11), but the CCA denied my attorneys' writ while very erroneously stating the: "validity of the conviction" was challenged - when there was **no** challenge to the **conviction** (App. H Ex. 12) as I pointed out in my motion for the CCA to reconsider (App. H Ex. 13).

I then filed certiorari where I specifically questioned this Court about my legal insufficiency issues not being heard in State courts (See my 2014 petition, Question 6). The State's brief in opposition - written by Asst. A.G. Ellen Stewart-Klein specifically argued: "The **Relief** Fratta Seeks **Can Be Had In Federal Habeas** Corpus Litigation" (See p. 6 "I" of their brief).

In federal habeas I informed James Rytting of all the above and to please raise all my legal insufficiency, etc, issues as the very first ones. He said he would but filed an original petition citing **none** of them (Dkt. 15). Fully fed up with being subverted by attorneys, I had a stern conversation with Rytting which ended up with his agreeing to file an amended petition citing my issues (Dkts. 51 & 52). But he made errors and failed to cite important points, so I had to file a letter to Judge Harmon citing the trial IAC issue about Mary Gipp being guilty of capital murder, plus attached pages of Rytting's petition where I noted corrections, changes and additions needed and asked Judge Harmon to get them addressed "in the interest of justice" (App. J Ex. 1 for select pages, & Dkt. 53 for all pages). I also started submitting copies of my letters to Rytting to be scanned into my records so Harmon could see what **needed** to be cited (App. J Ex. 2). But Harmon ordered me to stop making pro se filings rather than ordering Rytting to file the issues for me. Then in the State's motion for summary judgment and brief in support - which was

written by the **same** Ellen Stewart-Klein who told **this Court** that my relief **"can be had** in federal habeas", it's important to note she then incredibly told the federal district & Circuit Courts that the same relief I was seeking can **not** be had because they were procedurally defaulted/barred (Dkt. 67). In Rytting's Reply (Dkts. 76 & 77) to the State's brief, he again made errors and omissions I asked him to correct. I again filed a copy of a 5/20/17 letter I'd written Rytting about it all (App. J Ex. 3, or Dkt. 78). But Harmon ignored my pleadings and denied Rytting's petition with a horrendous ruling (App. B. - Hereby "M&O"). She repeatedly demonstrated her contempt for me as made obvious in her tirade referring to me as "obstreperous" (M&O p.43) and also by refusing to read my pro se direct appeal briefs attached by Rytting as his Exhibits 1 & 2 in Dkt. 52, or any of the other pleadings I made to her - instead of recognizing the merits of my pleadings and how I've been strapped with IAC **she'd** certainly **never** put up with in my shoes. She duly noted the discussion about the law of parties addition to the last count and that a jury charge wording **must** "be authorized by the indictment" (M&O pgs. 46-47), yet deemed it okay to add other actors and a law of parties to my indictment count that charges only me as acting alone and therefore does **not** authorize such additions. She then used **that** jury charge count, and even **threw in conspiracy** just to affirm my conviction (M&O pgs. 69-72) even tho I'm **not** charged with conspiracy, nor was it presented to the jury as a lesser included offense. I then filed an FRCP 60(b) motion citing various issues Rytting failed to cite, and an amendment to it. Again, instead of recognizing its merits and need for her to correct her injustices, Harmon showed her inability to be a fair and impartial judge by issuing an order admonishing me and instructing the Clerk to **strike** those pleadings from the record! (App. J Ex. 4, or Dkts. 87-90).

Rytting then filed his brief for COA to the 5th Circuit (See records in

17-70023). I then had to make FRAP 28(j) filings to supplement authorities to Rytting's brief, but the 5th Circuit also refused to accept my pro se filings even tho I am the "party"; not Rytting (App. K Ex. 1, & records). On 2/12/18 I then filed certiorari to this Court under Rule 11. Things got messed up on that filing, and my friends and I have been unable to ascertain what's happened with the 2nd certiorari I mailed/filed on 4/2/18 (See your records and all my letters to Clerk Harris). Meanwhile the 5th Circuit denied COA (App. A) and Rytting's motion for hearing en banc (App. C). The denial ruling is riddled with errors that violated my Rights. They refused to address the insufficiency and constructive amendment issues by claiming they were procedurally defaulted because Texas Courts don't have to accept hybrid filings, but didn't apply any pertinent U.S. Codes or take my multiple motions to be pro se only and the CCA's denials into consideration, nor conduct a Jackson analysis as Rytting had requested. They were extremely selective in which inadmissible evidence they used to deny me, didn't take my Prystash and Guidry confessions into consideration at all, and applied Schlup in a way that differs from other Circuits - and which I argue is incorrect.

I now stand to be executed if this Court doesn't intervene.

Thus arises this petition.

REASONS FOR GRANTING THE PETITION

(LETTERED IN DIRECT CORROLATION WITH THE SUBSIDIARY QUESTIONS ON PAGES ii & iii)

(a) The evidence was fully legally insufficient. The reason the jurors were instructed to find me guilty under the law of parties addition in the last jury charge count, and that federal judge Melinda Harmon specifically used it in her assessment of the sufficiency to uphold my conviction (App. B pgs. 69-72) - is because I'm **innocent** of **everything** the **indictment** charges me of in all 4 counts, and innocent of any **authorized and properly worded** law of parties additions to a jury charge. Not only was the law of parties addition to the last count unconstitutional (See "b" below), but it also used an unauthorized and improperly worded addition of the words "and/or" between Prystash and Guidry - which was intentionally done to confuse jurors &/or allow them to dream up any or no specific scenario just to say I'm guilty. But there are **no** capital murder elements to satisfy what the State alleges occurred - even using the bastardized law of parties language of that last count no matter what "and/or" scenario is dreamed up. The State concedes, and Judge Harmon and the 5th Circuit duly noted I never knew of Guidry's existence (App. B p.71, & App. A p.2, et al), so the evidence presented claims I promised to pay/solicited/employed Prystash to commit murder, but **instead,** he promised to pay/solicited/employed Guidry to commit murder, who instead supposedly committed capital murder. But there are **no** such elements for capital murder under Texas Penal Code 19.03 (See App. I). And even under PC 7.02(a)(2) "law of parties" (See App. F Ex. 2 p.3), just as with PC 19.03, there **must** be a **direct** person to person connection when multiple actors are involved in order to satisy being held "criminally responsible for the conduct of another" person. Even with no proper defense presented by my trial attorneys to prove my total innocence, the State's evidence was legally

insufficient - and specifically **proves** I'm **not** guilty of capital murder. Under Texas law, I must be acquitted and not retried. Please read my pro se direct appeal brief in Appendix G, Exhibit 5, and my other pro se pleadings in Appendices J & K, plus federal 4:13-cv-03438 Dockets 51, 52, 76, 77, and my attorney's requests for COA and rehearing under No. 17-70023 for more details and arguments. The 5th Circuit **refused** to assess the sufficiency (App. A p.3) even under a Jackson review filed by my attorney. I argue allowing me to be executed when the evidence was legally insufficient is unconstitutional.

(b) The 4th and last count of my indictment is the 3rd and last count of my jury charge (App. F Ex. 1 & 2). It's the only count that charges **only me** as a **sole actor** of a capital murder. The jury charge has 2 parts to all 3 counts; - the indictment count verbatim, then a law of parties addition as an alternative choice. I argue that **no** law of parties can be added to the last count because I was **indicted** as a **sole** actor. No other actors are charged or alluded to. To add other actors into a jury charge violates Notice and Due Process. And again, the law of parties part of that last count is what jurors were instructed to find me guilty of, and the federal court affirmed my conviction on (App. B pgs. 69-72). This practice by Texas and other States that apply a law of parties - must be put to an end by this Court.

(c) In addition to using that unconstitutional law of parties addition, Judge Harmon also cited a federal conspiracy case and applied a broadening scheme of "conspiracy" into her sufficiency assessment just to affirm my conviction (App. B pgs 71-72). Because the State concedes I never knew of Guidry, it's essentially Prystash they're "charging" with the "criminal responsibility for Guidry's conduct". So in order to **intentionally** affirm my conviction, Harmon took it upon herself to assess that I "scheme[d]" with Prystash and he with

Guidry, **clearly** making the 3 of us "conspirators" regardless that she substitutes scheming for conspiring (See Texas PC 15.02 in Appendix I for Conspiracy). And conspiracy is a totally **separate** and **lesser** offense than capital murder. Furthermore, I'm neither charged with conspiracy - nor was it a lesser included offense in the jury charge. For Harmon to affirm my conviction and subsequent death sentence on the basis of a theory, especially a lesser offense theory not submitted to the jury, is a blatant miscarriage of justice that completely violated the laws and my Due Process (See Chiarella v. U.S. & Dunn v. U.S.). And the 5th Circuit **allowed** this travesty.

(d) A fatal/material variance occurred from the statutory language of my indictment charging me as the shooter in all 4 counts, including being a sole burglar and shooter in the 4th count, but the evidence showed me being at church and someone else, Guidry, to be the shooter and sole burglar - and that I never knew of his existence. In Texas, a fatal/material variance is a legal insufficiency of the evidence and grounds for acquittal now on appeal. This occurrence at trial and allowance by the federal Courts is unconstitutional. (See "a" & "b" above for more details and arguments).

(e) The jury charge constructively amended my indictment by adding law of parties wordings to the counts; especially the last count which authorized me to be convicted on a completely different theory not alleged in my indictment, and which included unauthorized "and/or" wording not even equating to capital murder. How did a grand jury indict **me** as the shooter in all 4 counts, and as the **only actor** of a burglary and murder when the State knew all along at trial they were going to tell the jurors I was at church and **Guidry** was the shooter and burglar - just like they claimed in my 1st trial? The State knew I didn't know of Guidry and had nothing to do with his actions. They therefore secured

a properly worded capital murder indictment but **knew** all along the jury charge would **need** to be constructively amended to broaden the possible bases in order to confuse the jurors to convict me. Trial judge Belinda Hill gladly complied and federal Judge Harmon and the 5th Circuit gladly upheld it all. Texas law has a remedy for such constructive amendment injustices. As I argued in my pro se filings, a "hypothetically **correct** jury charge" **must** be applied when assessing the sufficiency of the evidence on appeal. Such correction means **omitting** the law of parties from the last count. But my federal attorney refused to argue that application, Judge Harmon failed to apply one, and the 5th Circuit refused to assess the sufficiency altogether. All this is unconstitutional. (See "a" & "b" above for more details and arguments).

(f) Judge Harmon explained I was convicted on a general verdict where "about 25" different ways could have been chosen by the jurors. Altho Harmon **correctly** narrowed my conviction down to having been **only** the last count law of parties part and duly noted: "The prosecution encouraged jurors to rely on the murder-in-the-course-of-a-burglary theory" (App. B p.69, & App. F pgs. 5-6), since the jurors weren't polled, how would I know **which** "and/or" scenario within that burglary murder count they found me guilty of - to know what or how to appeal it if this Court also allows that law of parties addition to stand? Such allowance of this unpolled general verdict in itself is unconstitutional.

(g) Surely the 5th Circuit saw how Judge Harmon bent over backwards to claim the evidence was sufficient, especially since I made pro se filings to make them aware (See my pro se filings in Appendices K & J). They not only allowed that travesty, they created another by refusing to conduct a Jackson v. VA. determination of their own - which was requested by my federal attorney. After seeing how Judge Harmon violated me, such deliberate avoidance to conduct

a Jackson review that's grounds for my acquittal, and **allow** me to be **executed** is surely unconstitutional.

(h) From trial I've been strapped with court appointed attorneys who flat out sabotage me by refusing to perform my lawful objectives, and even intentionally do the opposite. I've done everything I could think of to prove my innocence in trial and appeal and get my insufficiency and other meritorious claims heard on appeal, including filing for new attorneys to be appointed to file the claims for me. But instead of the federal Courts protecting my Rights and correcting those miscarriages of justice, they too must be wanting me executed. Why else would every Court not appoint new attorneys and not accept my meritorious pro se pleadings in the interest of justice? I firmly believe all the Courts know the evidence was insufficient and that I must be acquitted, but none want to be the one to acquit me; especially because I'm on Death Row, filed it all pro se, and have judges and politicians wanting me executed (See App. E Ex. 2 & 3). I can't control my attorneys' actions or lack thereof. As things stand, I can only exercise due diligence over my own actions to get claims filed myself since my attorneys refused. Surely it's cruel and unusual punishment &/or violations of Due Process &/or the Right to Petition the Government for Redress of my Grievances for all the Courts to refuse to appoint new attorneys &/or ignore and deny my meritorious issues and **allow me to be executed** simply because I **had** to file them pro se. (See my pro se filings in Appendices G, H, J & K, & my letters to the D.A.s in Appendix L in support). Certainly **many** prisoners, especially non-Death Row, have similar dilemmas.

(i) Since having a trial is a Right, as is being pro se in trial; shouldn't it also be a Right to be pro se in direct appeal? I argue yes. I asserted/ invoked my Right to be pro se in direct appeal but got denied (App. G Ex. 5 &

9, et al). That denial should be unconstitutional.

(j) In the recent McCoy v. LA. decision, this Court ruled it fundamental that clients are masters of their defense; that the attorneys are in fact assistants who cannot usurp the autonomous Right and fundamental choices and lawful objectives of the clients. Whereas McCoy dealt with his trial, I argue that same ruling should extend thru direct appeal as of Right. I additionally argue it should extend thru any appeal where the appointment of counsel is a State or federal Right, and that this should be retroactive to people like myself who have made pro se filings in State and federal Courts because our attorneys went against or refused our lawful objectives.

(k) For this Court to recognize the word "assistance" means the attorney is **an assistant** and the client is the "master" (See McCoy v. LA.), I argue that denotes a **"hybrid"** status of **both** the client and attorney(s) having say-so in trial - just like I requested during my arraignment but got denied in violation of Texas Constitution Article 1 § 10 and CCP Article 1.05 (See App. I for both). As in "j" above, I also argue hybrid status should be an automatic Right under the 6th Amendment in trial **and appeals**, and **anytime** an attorney-client privilege is established, and made retroactive.

(l) The federal and Circuit Courts ruled the meritorious issues I filed pro se in State Courts were unexhausted/barred. I argue it's unconstitutional and violates Rhines v. Weber to allow me to be executed rather than at the very least remanding my issues back to State Courts for rulings/exhaustion.

(m) **Circuit Courts are split** on how to apply **Schlup v. Delo**. In my case the 5th Circuit claimed they didn't need to weigh in on the split of new evidence being "newly presented" or "newly discovered", but is clearly against newly

presented (App. A pgs. 8-11). I argue this Court should rule it be **"newly presented"**, as did the 3rd Circuit in the 7/25/18 ruling of Reeves v. PA., No. 17-1043 - where they referenced the 5th Circuit's ruling of **my case** several times, calling the "contrary approach" of how the 5th Circuit applied Schlup to me as "unpersuasive" (See Reeves part "B." & footnotes 6 & 10). I ask this Court to please **read** Reeves in support of my arguments. My trial (& appellate) attorneys were ineffective for having "wrongly excluded" (quoting Schlup at 328) the very exculpatory Prystash and Guidry confessions in trial (& appeal). The Prystash and Guidry statements are highly reliable **non**-custodial confessions made voluntarily on their own initiatives over numerous unpressured encounters while on Death Row, including where we were separated by steel mesh screens. They give tremendous details I had no way of knowing, explaining who killed my wife and why; name people I never met or knew existed, and match all the evidence the State turned over, including the only eye witness's account the night of the incident - of seeing 2 people at the scene rather than 1 as the State is claiming at trial (See the 2 confessions & Guidry's affidavit in Appendix H Ex. 5). It's undoubtedly "more likely than not that no reasonable juror would have convicted [me] in the light of [that] new evidence" (quoting Schlup at 327). And that evidence is a separate claim from the Schlup claim raised by my attorney (See 4:13-cv-03438 Dkts. 51, 76, 77, and his rehearing filings under 17-70023 for his claim). To allow only newly discovered evidence punishes us applicants for our attorneys' ineffectiveness, and twice so for applicants like myself who have **tried** to get the new evidence presented in trial and appeal - but our attorneys usurped our lawful objectives and the Courts refused to accept us as pro se or hybrid. I argue that's unfair, unconstitutional, and needs a decisive ruling from this Court by granting and hearing this petition.

(n) The federal district and Circuit Courts failed to apply U.S. Codes they are governed by as grounds to accept the meritorious issues I **had** to file pro se in State Courts. I made timely filings and fairly presented them to the highest State Court (See App. K Ex. 2 for uneven applications of State procedures). I argue now, and my State filings showed: I am "in custody in violation of the Constitution or laws...of the United States." Therefore 2254(a) gave the federal Courts grounds to accept my pro se issues. Being that the State Courts refused to appoint me new attorneys to file my issues, and refused to accept and rule on their merits when I filed them pro se, there was either: "an absence of available State corrective process", or, "circumstances exist that render such process ineffective to protect the rights of the applicant", or both. Therefore 2254(b)(1)(B)(i) &/or (ii) gave the federal Courts grounds to accept my pro se issues. I proved the facts underlying my legal insufficiency, fatal/material variance, and constructive amendment claims very sufficiently established by clear and convincing evidence that no reasonable factfinder would have found me guilty of capital murder except for the Constitutional errors of Notice and Due Process violations. Therefore 2254(e)(2)(B) gave the federal Courts grounds to accept my pro se issues. The State's refusal to decide my pro se issues on their merits, which all Courts are claiming were not raised "properly" **solely** because my attorneys didn't raise them for me as I'd **insisted**, "is the result of State action in violation of the Constitution or laws of the United States." I'm guaranteed the Right to **effective** assistance of counsel thru direct appeal. I duly notified the CCA of ineffectiveness and requested new counsel - but got ignored and denied. (See App. G). Therefore 2264(a)(1) gave the federal Courts grounds to accept my pro se issues. My federal attorney didn't raise any of this, so I did pro se but got refused as usual. I argue all this is unconstitutional.

(o) Because I instructed my trial attorneys to argue the insufficiency, variance and constructive amendment issues then - but they didn't, at the very least the federal Courts should have applied Martinez/Trevino to remand me back to State Courts due to that substantial trial IAC. I do **not** want this "indirect" deciding of my issues because the result would be a reversal rather than acquittal. I'm entitled to an acquittal now on appeal by a **direct** review of the sufficiency of the evidence I've filed pro se since direct appeal, and **that's** what I'm requesting. I simply need to point out to this Court that as things stand, I'll be executed. Surely that's unconstitutional when the federal Courts **could** at least have remanded me on Martinez/Trevino. Again this proves they all **want** me to be executed rather than uphold Constitutional Rights and apply U.S. Codes and Supreme Court case laws.

(p) The cumulative effect of all the above - certainly equates to a severe fundamental miscarriage of justice - which would be made worse if this Court denies this petition without review. It's not my fault my attorneys refused to file the issues I then **had** to file pro se and the Courts refused to accept them or appoint attorneys to file them for me. I repeat, I'm innocent and the evidence was legally insufficient. I need this Court's intervention now so I'm not executed.

Lastly I ask this Court to also **read Appendix M** in support and as further reasons for granting this petition.

CONCLUSION

I will be executed - unless this Court intervenes now. I am not an attorney and have never wanted to do my trial or appeals fully pro se. I only went pro se late in State habeas and made and make requests and filings out of **necessity**, such as with this petition. My case at hand, with all its subsidiary questions herein, is not only a matter of life or death for me; but is of vital importance to all John Q. Public who ever got or get strapped with ineffective attorneys and had or will have to make filings themselves, pro se.

This apparently is my last resort before I'm executed, and I (and others in my situation or unlawfully imprisoned) **need** this petition for writ of certiorari to please be **granted.**

Respectfully submitted,

Robert Alan Fratta

Date: 8/22/18