No. 18-6298

In the Supreme Court of the United States

ROBERT ALAN FRATTA,
Petitioner-Appellant,

v.

LORIE DAVIS, Director. Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEFFREY C. MATEER
First Assistant Attorney General

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

ELLEN STEWART-KLEIN
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: ellen.stewart-klein@oag.texas.gov

Counsel for Respondent-Appellee

QUESTIONS PRESENTED

Before this Court, Fratta is representing himself pro se. He asks the Court the following sixteen questions. Generously construing his claims, at best four of these claims were properly raised in the Court below.

Is it unconstitutional to execute a person when the evidence is legally insufficient to convict him?

Must an indictment include the name of other parties if a parties charge is given?

May an appellate court add uncharged elements in assessing the sufficiency of the evidence to affirm a conviction?

May a conviction be upheld if there is a fatal variance?

May a conviction be upheld if the indictment was constructively amended?

May a conviction be upheld based on an unpolled verdict where the addition of "and/or" created alternative theories not charged in the indictment?

Did the lower court err in refusing to engage in a sufficiency of the evidence review?

Is it cruel and unusual punishment to execute a person who receives ineffective assistance of counsel?

Does a petitioner have a right to appeal pro se?

Does *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) extend to appellate attorneys?

Should hybrid representation be a right in trial and appeal?

Is it unconstitutional for the federal courts to allow a person to be executed rather than remanding the case back to the state courts?

Should this Court determine the meaning of "new evidence" under *Schlup v. Delo,* 513 U.S. 298 (1995), in light of the circuit split?

Does it violate 28 U.S.C. § 2254 & 2264 for the federal courts to refuse pro se representation?

Is it unconstitutional or a violation of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), to execute a person based on substantial ineffectiveness of trial counsel?

Is the cumulative effect of the above listed errors enough to receive a merits review by this Court?

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BRIEF IN OPPPOSITION

Petitioner Robert Alan Fratta was found guilty and sentenced to death for his part in the murder-for-hire death of his estranged wife, Farah Fratta. Through counsel, Fratta has challenged his conviction in federal and state court. Now pro se, he seeks a writ of certiorari from the Fifth Circuit's denial of a certificate of appealability (COA).

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) summarized the facts of Fratta's crime as follows:

> After several months of searching for someone to murder his estranged wife, Farah Fratta, [Fratta] found Joseph Prystash, who obtained the assistance of a third person, Howard Guidry. On November 9, 1994, the date of the murder, [Fratta] took the couple's three children to Wednesday-evening church classes and attended a parents' meeting at the church. Although the children regularly attended classes there, it was unusual for [Fratta] to stay for the parents' meeting. [Fratta] repeatedly left the meeting to make and receive telephone calls in the church office. Farah was shot and killed in her garage as she arrived home and stepped out of her car, shortly before [Fratta] was scheduled to return the children to her. She died approximately two years after she filed for divorce and less than three weeks before the scheduled divorce and custody trial date.
>
> The state's theory concerning motive was that the prolonged divorce and child custody proceedings formed the underlying basis for [Fratta's] desire to have his wife killed. Several

witnesses testified that initially, [Fratta] did not want the divorce. He complained that sex with Farah was not exciting, but he thought that they could resolve their problems without a divorce if Farah would agree to an "open marriage."

A social worker who was assigned by the family court to evaluate [Fratta] and Farah in connection with the custody proceedings testified that she interviewed [Fratta] in April 1993 and Farah in March 1993. At that time, [Fratta] did not want primary custody of the children, and Farah was in favor of an extended visitation schedule for [Fratta]. However, [Fratta] and Farah were at odds because [Fratta] wanted to restrict Farah's ability to change residences with the children to within a 100-mile radius, while Farah did not want a restriction on her ability to move, and [Fratta] wanted joint managing control over decisions about the children's lives, such as medical and educational decisions, while Farah wanted sole control.

As the divorce proceedings dragged on, [Fratta] grew increasingly bitter and angry toward Farah. He complained to friends that he was broke all the time because he had to pay child support, and he said he wanted primary custody of the children so that Farah would have to pay him. At other times, he said that he would not have to pay child support if he killed her. He complained that Farah would "win" because her parents had money. He regularly called her "the bitch."

During a deposition in December 1993, Farah explained why the divorce petition had been filed on grounds of cruelty. Afterward, [Fratta] told a friend that he was angry about the accusations she made against him, which he said were false, and he did not want other people to hear the things she had said. [Fratta] began actively seeking someone to kill Farah. He solicited many of his friends and acquaintances to kill her or to recommend someone who could kill her. Initially, most of his friends thought that he was joking or blowing off steam,

> but as he continued to talk about it over time, some of them came to believe that he was serious.
>
> Prystash was not part of [Fratta's] regular circle of friends, but on several occasions in the weeks leading up to the offense, the two men were observed speaking privately together at a health club where they were both members. Prystash's girlfriend, Mary Gipp, overheard Prystash communicating with [Fratta] by telephone. In addition, she often saw Prystash talking to her next-door neighbor, Guidry, on the balcony outside her apartment. On the evening that Farah was murdered, Gipp came home from work to find Guidry, dressed in black, sitting on the steps in front of her apartment. Prystash arrived a few minutes later but he soon left again. When he returned to Gipp's apartment that night, Guidry was with him.
>
> The details of the offense were developed primarily through Gipp's testimony describing her observations and her conversations with Prystash, the testimony of some of Farah's neighbors who observed parts of the offense and saw a suspect leaving the scene, witnesses who spoke with and observed [Fratta] around the time of the offense, and law-enforcement officers who investigated the crime scene. Further evidence included telephone and pager records showing the times and locations of communications between [Fratta], Farah, Prystash, and Guidry on the evening of the offense and autopsy and ballistics reports.

Fratta v. State, No. AP-76,188 slip op. at 2-5 (Tex. Crim. App. 2011).

II. Course of State and Federal Proceedings

Fratta was originally convicted of capital murder in 1997 for the murder of his estranged wife Farah Fratta. *Fratta v. State*, No. AP-72,437 (Tex. Crim. App. June 30, 1999). On federal habeas review, the district court granted

Fratta relief and the Court of Appeals affirmed. *Fratta v. Quarterman*, 2007 U.S. Dist. LEXIS 72705 (S.D. Tex. Sep. 28, 2007); *Fratta v. Quarterman*, 536 F.3d 485 (5th Cir. 2008). Fratta was retried and resentenced to death in 2009. 2 CR 612-13.[1] Fratta appealed to the CCA which affirmed his conviction. *Fratta v. State*, No. AP-76,188 (Tex. Crim. App. 2011); 2011 Tex. Crim. App. Unpub. LEXIS 759. Fratta also filed a state habeas application which the court also denied. *Ex parte Fratta*, No. 31,536-04, at cover. Fratta sought federal habeas relief but was denied by the district court. *Fratta v. Davis*, 2017 U.S. Dist. LEXIS 152488 (S.D. Tex., Sept. 18, 2017), Pet. Appx. B. Fratta sought and was denied a COA before the circuit court. *Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018); Pet. Appx. A. Now Fratta seeks certiorari on sixteen issues before this Court.

REASONS FOR DENYING CERTIORARI REVIEW

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. In the instant case, Fratta fails to advance a "compelling reason" for this Court to review his case and, indeed, none exists. The opinion issued by the lower court involved only a proper and

[1] "CR" refers to the clerks record preceded by the volume number and followed by the relevant page number(s). "RR" indicates the reporter record of the transcribed trial proceedings also preceded by the volume number and followed by the page number(s).

straightforward application of established constitutional and statutory principles. Accordingly, the petition presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

In the court of appeals, as a jurisdictional prerequisite to obtaining appellate review of the constitutional claims raised in Fratta's federal habeas petition, he was required to first obtain a COA from the court of appeals. 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Slack*, 529 U.S. at 483. Fratta had to demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *see also Miller-El*, 537 U.S. at 336. Furthermore, the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the deferential scheme set forth in 28 U.S.C. § 2254(d). *Miller-El*, 537 U.S. at 336 (noting that, in making a COA determination, "[w]e look to *the District Court's application of AEDPA* to petitioner's constitutional claims and ask whether *that* resolution was debatable amongst jurists of

reason") (emphasis added). But Fratta did not meet the standards for obtaining a COA because the arguments he advances do not amount to a substantial showing of the denial of a constitutional right. In the court below, Fratta sought a COA but the circuit court found his claims unworthy of debate among jurists of reason as his claims were foreclosed by procedural default. Fundamentally, Fratta cannot show the circuit court's decision to deny COA was in error. Thus, there is no compelling reason for the Court to review this case.

ARGUMENT

I. This Court Should Not Resolve the Thirteen Claims That Were Not Brought in the Court Below.

In Fratta's pro se petition, he asks sixteen separate questions and not one claims that the lower court erred in refusing him a COA. But because Fratta is pro se, the Director will address claims relating to the indictment and sufficiency of the evidence. In any event, the Director asserts that the following thirteen claims were not presented in Fratta's COA application:

> Is it unconstitutional to execute a person when the evidence is legally insufficient to convict him?
>
> Must an indictment include the name of other parties if a parties charge is given?
>
> May an appellate court add uncharged elements in assessing the sufficiency of the evidence to affirm a conviction?
>
> May a conviction be upheld if there is a fatal variance?

> Is it cruel and unusual punishment to execute a person who receives ineffective assistance of counsel?
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> Does a petitioner have a right to appeal pro se?
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> Does *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) extend to appellate attorneys?
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> Should hybrid representation be a right in trial and appeal?
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> Is it unconstitutional for the federal courts to allow a person to be executed rather than remanding the case back to the state courts?
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> Should this Court determine the meaning of "new evidence" under *Schlup v. Delo*, 513 U.S. 298 (1995), in light of the circuit split?
>
> Does it violate 28 U.S.C. § 2254 & 2264 for the federal courts to refuse pro se representation?
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> Is it unconstitutional or a violation of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), to execute a person based on substantial ineffectiveness of trial counsel?
>
> Is the cumulative effect of the above listed errors enough to receive a merits review by this Court?

This Court does not decide issues raised for the first time on petition for certiorari review, and the Court does not decide federal questions not "pressed [in] or passed on" the court below. *United States v. Wells*, 519 U.S. 482, 488 (1997) (citing *United States v. Williams*, 504 U.S. 36, 42 (1992)); *see also e.g., United States v. Jones*, 565 U.S. 400, 413 (2012); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Because Fratta's claims were never raised in the court below, this Court should not consider the merits of them now. Further, none of these issues present compelling issues in need of this Court's resolution. Indeed,

Fratta largely asks for error correction and advocates hybrid representation. Thus, Fratta's claims are not only barred from this Court's review but are unworthy of the Court's attention.

II. This Court Should Not Grant Certiorari on Fratta's Procedurally Defaulted Claims of Insufficient Evidence Where the Lower Court Properly Denied a COA.

In his pro se petition, Fratta asks four questions relating to the sufficiency of the evidence to support his conviction. Specifically, he asks whether it is unconstitutional to execute a person when the evidence is legally insufficient to convict him. He also asks whether an appellate court can add uncharged elements in assessing the sufficiency of the evidence to affirm a conviction. And he asks if the lower court erred in refusing to engage in a sufficiency of the evidence review. Finally, he wishes for this Court to determine the meaning of "new evidence" under *Schlup*, in light of the circuit split. The Director believes that only the third question is properly before this Court, as the circuit court denied Fratta a COA on his procedurally defaulted claim of legally insufficient evidence. But the Director will address all of Fratta's insufficient evidence questions together.

To receive a COA on a procedurally defaulted claim, Fratta had to demonstrate to the lower court that both the application of a procedural bar and the underlying merits of a claim are both debatable among reasoned jurists. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). But Fratta was unable to

overcome the clear default of his insufficiency of the evidence claim. As the district court set out,

> Fratta raised claims one and two in pro se pleadings that the Court of Criminal Appeals refused to consider. In finding that Fratta had not properly presented his pro se arguments, the Court of Criminal Appeals stated:
>
> > Throughout these proceedings, [Fratta] has filed pro se pleadings and letters in an attempt to supplement his attorneys' efforts. [Fratta] is not entitled to hybrid representation. *See Scheanette v. State*, 144 S.W.3d 503, 505 n. 2 (Tex. Crim. App. 2004). Thus, we do not address his pro se points.

Pet. Appx. B at 29. (citation omitted). The court then recognized that Texas courts have long held that inmates are not entitled to hybrid representation. *Id*. at 30. And the court cited to precedent noting that unauthorized pro se pleadings do not satisfy exhaustion requirements. *Id*. For these reasons, the district court properly determined that Fratta's claims were procedurally defaulted. *Id*. The circuit court concluded that the lower court properly applied the default and that Fratta was unable to demonstrate the bar was insufficient. *Fratta*, 889 F.3d at 228.[2]

[2] To the extent that Fratta's arguments about hybrid and pro se representation are attempts to show "cause" to overcome this default, these arguments were also not made in the court below. Further, any such interpretation would require a new rule of law and to be held retroactive to his conviction which is barred by *Teague v. Lane*, 489 U.S. 288, 315 (1989).

The lower court also concluded that Fratta was unable to make a persuasive showing of actual innocence. *Id.* at 233. It is in that review of all the evidence that the Director believes Fratta's claim of "uncharged elements" lies. But as this Court stated in *Schlup*, an actual innocence review constitutes a review of all available evidence. 513 U.S. at 328; *see also House v. Bell*, 547 U.S. 518, 521 (2006). Further, Fratta's claim regarding the meaning of "new evidence" is not properly before this Court. As the lower court noted in their opinion, the issue is not presented in this case because Fratta's evidence is not "new" under either standard. *Fratta*, 889 F.3d at 232. Thus, Fratta's claims of the lower court's failure to review his claim and the inclusion of "uncharged elements" are without merit. His claim regarding "new" evidence is not properly before this Court.

Nevertheless, there can be no doubt that the evidence was legally sufficient to convict Fratta. The standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), governs sufficiency of the evidence review. *Parker v. Matthews*, 567 U.S. 37, 44 (2012) (per curiam). Under *Jackson*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. "[T]he factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable

to the prosecution." *Id*. That is to say, "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). And, in federal habeas, "*Jackson* claims face a high bar . . . because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). But Fratta's complaints about the sufficiency of the evidence all center on the indictment claiming that the State proved neither that he shot Farah nor that Prystash did and that the State could not prove a connection between him and Guidry. He also complains that the lower court improperly considered excluded evidence in assessing the sufficiency of the evidence.

Yet, from the evidence presented at trial there was more than sufficient evidence to show that Fratta contracted with Prystash who solicited Guidry to murder Farah. The involvement of a middleman does not serve to protect Fratta from conviction. The district court found that the application paragraph relating to burglary required the State "to prove that (1) Prystash or Guidry committed a burglary while killing Farah and that (2) Fratta was culpable under the law of parties for "solicit[ing], encourage[ing], direct[ing], aid[ing] or attempt[ing] to aid" Prystash or Guidry in killing her." Pet. Appx. B at 70. The court went on to hold that sufficient evidence was presented that the killer committed a burglary by entering the garage and that Guidry was the killer. *Id*. But Fratta argues this is insufficient as no evidence links Fratta and

Guidry. The district court responded that under the law of the parties Fratta did not show that personal knowledge is required. *Id*. at 71. Fratta's assertion that the trial court excluded all direct evidence of Prystash acting as the middleman is incorrect. *See* 27 RR 38, 41. But even assuming Fratta was correct, it does not foreclose the inference that Prystash acted as such. As the district court found,

> Also, "telephone and pager records show[ed] the times and locations of communications between Fratta, Farah, Prystash, and Guidry on the evening of the offense . . . ." Id. Gipp testified that "Prystash gave Guidry the murder weapon to dispose of . . . ." Fratta's briefing concedes that "the police arrested Guidry . . . and recovered several guns" one of which matched "a slug retrieved from a life-preserver jacket hanging on the wall of the garage in which she was shot." The Court of Criminal Appeals observed on direct appeal that "the murder weapon was found in Guidry's possession when he was arrested . . . ." The evidence sufficiently allowed jurors to conclude that Guidry was the shooter and that he entered Farah's garage to kill her, satisfying the burglary element.

Pet. Appx. B at 71 (citations omitted). The court also held that it presumed correct the state habeas findings that Fratta hired codefendants Prystash and Guidry to kill his estranged wife. *Id*. at 72 (citing SHCR 515). The court further noted that "in light of Gipp's testimony, the evidence was clearly sufficient" to demonstrate that Fratta hired Prystash to kill Farah and that Guidry killed her. Pet. Appx. B at 72. Thus, the district court properly concluded that that "the jury instructions allowed for Fratta's conviction if he employed Prystash or Guidry and one of the two men killed her." *Id*. Accordingly, the court stated

that it would deny Fratta's claim as an alternative to the procedural default. *Id*.

Thus, all of Fratta's contentions about conspiracy law and the lack of proof are belied by the record. Fratta hired Prystash, Prystash solicited Guidry, and Guidry killed Farah. Guidry and Fratta were not only linked by phone records and by Fratta's gun but also because Fratta made no secret of his desire to have his wife killed. It strains all credulity to believe that Guidry, who had never met Farah, randomly killed her with no motivation. The lack of direct evidence of contact between Guidry and Fratta does not defeat Fratta's conviction. The district court reasonably ruled in the alternative. There is no merit to Fratta's underlying claim of insufficient evidence and the lower court properly denied a COA based on the default of his claim.

III. This Court Should Not Grant Certiorari on Fratta's Procedurally Defaulted Claims of a Defective Indictment Where the Lower Court Properly Denied a COA.

In the court below, Fratta raised a procedurally defaulted claim that the indictment had been improperly amended. Just as with his claims above, the circuit court found Fratta's claim to be defaulted because Fratta failed to properly raise these claims in the state courts. *Fratta*, 889 F.3d at 228, 233. Thus, the Court denied a COA. *Id*. Fratta again fails to address the COA denial. And Fratta now asks this Court whether an indictment must include the name of other parties if a parties charge is given. He also asks whether a

conviction should be upheld if there is a fatal variance or if the indictment was constructively amended. Finally, Fratta asks if a conviction should be upheld based on an unpolled verdict where the addition of "and/or" created alternative theories not charged in the indictment. But Fratta fails to show the lower court erred much less why this Court should take his case for mere error correction. A writ of certiorari is not merited.

Fratta asserts that his indictment was defective because an indictment must include the name of other parties if a parties charge is given. In reviewing, Fratta's limited briefing Fratta complains that he was indicted as the sole actor. Pet. at 12 (b). The Director believes Fratta is referencing a claim brought in the lower court and is claiming that the trial court improperly gave a law of parties charge which was not supported by the evidence in regards to both the murder for hire charge and the burglary charge. But the lower court properly denied a COA on this claim as it was procedurally defaulted. *Fratta*, 889 F.3d at 228. Further, Fratta's complaints about the court's instruction on the law of parties are without merit. As the district court held,

> Reliance on the law of parties did not constructively amend the indictment in this case. "[U]nder Texas state law that law of parties need not be set out in the indictment." *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005). "[I]f the evidence supports a charge on the law of parties, the trial judge may include an instruction on the law of parties despite the lack of such an allegation in the indictment." *Coleman v. State*, 2009 WL 4696064, at *10 (Tex. Crim. App. Dec. 9, 2009). Here, Fratta knew from the indictment that the State would prosecute him based on

> his relationship with Prystash, and Prystash's relationship with Guidry. The State made it clear early in the proceedings that it would rely on the law of parties. Fratta has not shown any constitutional error in the relationship between Texas' law of parties and the indictment.

Pet. Appx. B at 73-47 (footnotes omitted). Fratta fails to demonstrate how the court erred in applying state law and he has not cited to a case that holds that Texas must indict on the law of parties. Therefore, his claim is defaulted and without merit. Fratta presents no compelling justification for this Court to review his case.

Fratta next asks this Court to review his case because he claims there is a fatal variance in the indictment. This claim was not raised in the courts below. Further, in reviewing Fratta's briefing, it appears that again Fratta claims the evidence is insufficient to convict him. Pet. at 13 (d). As shown above, Fratta's complaints about the sufficiency of the evidence are without merit. Again, Fratta fails to present a claim preserved for this Court's review much less one that is worthy.

Fratta also claims that his indictment was improperly constructively amended. Pet. 13-14 (e). And Fratta asks if a conviction should be upheld based on an unpolled verdict where the addition of "and/or" created alternative theories not charged in the indictment. Pet. at 14 (f). The Director construes both of these grounds to match the claim raised in the lower court that the trial

court constructively amended the indictment by pleading the mens rea disjunctively thus lowering the required mental state only to the level of acting unlawfully. Again, the lower court denied a COA because Fratta's indictment claims were procedurally defaulted. *Fratta*, 889 F.3d at 228. Fratta does not show the lower court erred in that regard.

Further even if Fratta's claims were not barred, he would have difficulty proving the merits of any such claim because Fratta did not object to the jury charge at trial. Any complaints related about unpreserved jury charge error can only result in relief under a general due process standard. In *Brecht v. Abrahamson*, the Supreme Court held that a federal court may grant habeas relief based on trial error only when that error "'had substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). This Court has explained that this heightened standard for evaluating harmless error on federal habeas review:

> reflects the "presumption of finality and legality" that attaches to a conviction at the conclusion of direct review. [*Brecht*,] 507 U.S. at 633. It protects the State's sovereign interest in punishing offenders and its "good-faith attempts to honor constitutional rights," *id.*, at 635, while ensuring that the extraordinary remedy of habeas corpus is available to those "'whom society has grievously wronged.'" *Id.*, at 634, (quoting *Fay v. Noia*, 372 U.S. 391, 440-441 (1963)).

Calderon v. Coleman, 525 U.S. 141, 145-46 (1998) (per curiam). Fratta fails to demonstrate any merit underlying his claim much less that the jury charge had a substantial and injurious effect.

Fratta's complaint that the jury instruction improperly lowered the required mens rea is also without merit. Fratta argues that the introduction of the term "unlawfully" lowered the mens rea for his crime and constructively amended the indictment. As the district court found, "Texas courts have held that the use of the term "unlawfully" in similar jury instructions 'was mere surplusage.'" Pet. Appx. B at 75 (citing *Green v. State*, 785 S.W.2d 955, 956 (Tex. App. 1990)). The court further found that under Texas law "unlawfully" is not a mental state. Pet. Appx. B at 75. Thus, the court properly concluded,

> Taken as a whole, the jury instructions did not amend the indictment or confuse jurors into believing that they could convict Fratta under a statutorily impermissible mental state. For the reasons described above, the Court would deny Fratta's constructive-amendment-of-the-indictment claim if the merits were fully available for federal review.

Id. Fratta has failed to demonstrate any error occurred at trial or by the Court below. Fratta has failed to produce a compelling claim that warrants this Court's review. For these reasons, certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Fratta's petition for writ of certiorari.

Respectfully submitted,

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

/s/ Ellen Stewart-Klein
*ELLEN STEWART-KLEIN
Assistant Attorney General
Criminal Appeals Division
Texas Bar No. 24028011
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1600
Fax: (512) 320-8132
e-mail address:
ellen.stewart-klein@oag.texas.gov

ATTORNEYS FOR
RESPONDENT–APPELLEE