No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MARC TRACE WYATT — PETITIONER
(Your Name)

vs.

LORIE DAVIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT, FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARC TRACE WYATT
(Your Name)

264 FM 3478
(Address)

HUNVILLE, TEXAS 77320
(City, State, Zip Code)

NA
(Phone Number)

QUESTIONS PRESENTED

QUESTION ONE:

IF THE RECORD IS VOID OF MARC TRACE WYATT BEING LEGALLY APPOINTED COUNSEL, DID THE FIFTH CIRCUIT ERR IN DETERMINING THAT HIS CODE OF CRIMINAL PROCEDURE ARTICLE 15.17 HEARING WAS THE APPOINTMENT OF COUNSEL?

QUESTION TWO:

WAS THE CONSTITUTIONAL RIGHT TO SELF_REPRESENTATION BY MARC TRACE WYATT VIOLATED BY THE DISTRICT COURT IN DENYING HIS REQUEST TO DO SO WITHOUT FIRST HOLDING A HEARING TO DETERMINE IF HE WAS ABLE TO DO SO?

QUESTION THREE:

WAS THE CONVICTION OF MARC TRACE WYATT OBTAINED ILLEGALLY BY ALLOWING THE DISTRICT COURT TO USE REPLACEMENT COST WHEN THE STATE ADMITS IT DID NOT ASCERTAIN THE FAIR MARKET VALUE OF THE DESTROYED PROPERTY?

LIST OF PARTIES

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

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Lorie Davis, Director of the Texas Department of Criminal Justice.

Greg Gosper, attorney representing the state

RELATED CASES

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TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OTHER

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

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[x] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.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 November 26, 2019.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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 April 24, 2020 (date) on January 30, 2020 (date) in Application No. 19 A 855.

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

STATEMENT OF THE CASE

Marc Trace wyatt was arrested on May 15, 2012 in Matagorda County, Texas. He was transfered to the Lee County jail on the same day. On May 16, 2012, Mr. Wyatt was taken before a Magistrate judge and informed that he was being arrested on a felony warrent, number 1223. His bond was set at $100,000 and he was given his Miranda warnings. Mr. Wyatt requested the assistance of counsel, but was not appointed counsel at this appearence.

In June of that same year, Mr. wyatt was transfered to Bastrop Texas to face unrelated charges. He was represented by Kathleen Anderson, a court appointed attorney, on these charges. At a court appearence on August 3,2012, Mr. Wyatt requested to represent himself in the Bastrop case (No hearing was held because the case was dismissed), Mr. Wyatt also requested to represent himself in the criminal mischief charges pending in Lee County Texas. Judge Dugan stated "That's not gonna happen" and pointed to an attorney and stated "That's your attorney right there". Mr. Wyatt was transfered back to Lee county on or about October 15, 2012.

Mr. Wyatt never had counsel appointed to him prior to or at his trial. The Fifth Circuit agrees that the record is void of any appointment of counsel.

Mr. Wyatt was convicted of criminal mischief over $20,000. The State failed to give evidence of the fair market value of the destroyed property. The State admits it did not give evidence that the fair market could not be ascertained. The State contends that Mr. Wyatt had a duty to ascertain the fair market value of the

destroyed property. The Fifth Circuit agrees with the district court. It Futher agreed with the State that the description of destroyed property can be used to show fair amrket value, even if the owner never offers a value of the property at the time of the destruction.

Mr. Wyatt files this writ of certiorari in hopes that this Court of last resort will overrule the illegal conviction he has been made to suffer.

REASONS FOR GRANTING THIS WRIT

Question one:

If the record is void of Marc Trace Wyatt being legally appointed counsel, did the Fifth Circuit err in determining that his Code of Criminal Procedure Article 15.17 hearing was the appointment of counsel?

Marc Wyatt puts before the Supreme Court the question of appointment of counsel during the article 15.17 hearing in Texas. It is long understood that Texas and six(6) other states, (Alabama, Colorado, Kansas, Okaloma, South Carolina, and Virgina) do not appoint counsel at the article 15.17 hearing. These states have been denying the appointment of counsel on the heels of the first appearence, and Texas did not deviate from this pratice in the instance case as the Fifth Circuit now holds. The Fifth Circuit offers no reasonable explanation for the minority pratice of denying appointed counselat or shortly after an article 15.17 hearing.

The Fifth Circuit does not expand on its ruling other than to state it is relying on the perponderence of the evidence to reach its conclusion. The evidence relied upon by the Fifth Circuit is that of two attorney's names that appear on the appeal brief. Both of which were never legally appointed by the court. Mr. Wyatt contends that the record is void of this appointment because he had filed a motion in the County Court in Bastrop Texas to represent himself in this cause. (See question two). This motion was denied without a hearing. It is because of this motion, that the courts failed to properly appoint counsel to Mr. Wyatt. Without the app-

ointment of counsel, Mr. Wyatt had no legal representation at his trial.

The Fifth Circuit relies on **ROTHGERY V. GILLESPIE COUNTY, TEXAS**, 128 S.Ct. 2578, 552 U.S. 1061, 169 L. Ed 2d 552 to reach its decision that Mr. Wyatt was in fact appointed counsel at his article 15.17 hearing. In Texas, as stated above, it is a fact that counsel is not appointed at or on the heels of the article 15.17 hearing. Defendants are told that counsel will be appointed when they go to there first court appearence. For the Fifth Circuit to now claim that because the record is void of a legally appointed counsel, one must have been appointed at the article 15.17 hearing is in conflict with the rulings in **MICHIGAN V. JACKSON**, 475 U.S. 625(n.3), 106 S.Ct. 1404, 89 L. Ed.2d 631; **BREWER V. WILLIAMS**, 430 U.S. 387, 97 S.Ct. 1232 in which the right to counsel attaches at the article 15.17 hearing, not the appointment of counsel.

The Supreme Court has twice held that the right to counsel attaches at the inicial appearence before a judicial officer at which a defendant is told of the formal charge against him and restrictions imposed on his liberty. In **ROTHGERY SUPRA**, his hearing was an inicial appearence; he was taken before a magistrate; informed of the formal accusation against him, and sent to jail until he posted bail. This is where Mr. Wyatt's case differs from that of Rothgery. Mr. WYatt was taken before a magistrate, bail was set at $100,000, but Mr. Wyatt was only told that he was arrested on a warrent.(WR 1223). This cannot be considered a formal charge. Mr. Wyatt was sent to jail until trial because he could not post the high bail. Mr. Wyatt was not informed of the formal charge

against him until his indictment was returned on June 8,2012. This indictment was the first formal charge given to Mr. Wyatt. Because no formal charge was given to Mr. Wyatt at his 15.17 hearing, no attachment to the right to counsel had occurred. This supports Mr. Wyatt's contention that no counsel was appointed at his 15.17 hearing because no right to counsel had attached.

Because Mr. Wyatt was not informed of the formal charge against him, and the right to counsel had not attached, the Fifth Circuit cannot say counsel was appointed at the article 15.17 hearing if the right did not exist. Mr. Wyatt's article 15.17 hearing did not meet the criteria to be considered an adversarial proceeding to trigger the right to counsel.

KIRBY V. ILLINOIS, 406 U.S. 682, 92 S.Ct. 1877, states that the right to counsel attaches when the government has "committed itself to prosecute". But what counts as such a commitment is an issue of federal law unaffected by allocations of power amoung state officials under state law. MORAN V. BURBINE, 475 U.S. 412, (n.3); 106 S.Ct. 1135, and under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment's to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty, See e.g., Kirby Supra, at 689, 92 S.Ct. 1877 The only record that exist indicationg that some form of counsel claimed to represent Mr. Wyat is contained in the docket sheet of the court's records. The attorney who filed motions on the behalf of Mr. Wyatt, was Laurence Dunn. His appointment was said to have occured in Bastrop County by a district judge Dugan. Judge Dugan was not authorized by the Code of Criminal procedure 26.04, 1.051.

The so called appointment is void under this statue. No Notification was transmitted to the court or the court's designee authorized under C.C.P. 26.04. There are no records of the required forms requesting counsel, affidavit of indigency or a paupers affidavit.

The sixth AMendment of the Constitution of the United States and Article 1, §10, of the Texas Constitution, guarantee that in "all criminal proceedings" the accused shall have "the assistance of counsel for his defense", and "the right of being heard by himself or counsel or both". The prevsiling Code of criminal Procedure art. 16.01 states, "that in a proper case, the magistrate may appoint counsel to represent an accused in such examining trial only...,". This portion supports the contention of Mr. Wyatt because his 15. 17 hearing was not an examining trial.

Because Mr. Wyatt was not legally appointed counsel by the trial court, and the record is void of any such appointment, this Court should consider if Mr. Wyatt was indeed appointed counsel at his Article 15.17 hearing, an whether or not the appointment of counsel should have been appointed prior to the article 15.17 hearing. The Supreme Court should make the decision if the request for the assistance for counsel amounts to the actual appointment of said counsel if the request occures at the Miranda warnings or the Article 15.17 hearing. Because Texas deny's the appointment of counsel until the first court appearence, a decision by this court to bring the Fifth Circuit into the majority of those who appoint counsel at or on the heels of the article 15.17 hearing is needed to insure arrestee's are appointed counsel at the earliest time to insure a fair and proper trial. Because Mr. Wyatt was

not appointed counsel, a video Mr. Wyatt claims exonerates him for this crime was lost. Surely an appointed counsel at the Article 15.17 hearing would have requested it from the gas station. Mr. Wyatt was futher denied his right to an examining trial due to not being appointed counsel. Again, an appointed attorney at the article 15.17 hearing would have requested such a hearing due to the state of the evidence used against Mr. Wyatt at trial. The Supreme Court should require attorney Laurence Dunn and Randy Stewart to give statement's as to how and why their names appear as counsel for Mr. Wyatt when the record is void that they were ever appointed by the courts. To not hear this case on its merits will allow Texas and the remaining other six states to now claim that counsel is appointed at the time of the article 15.17 hearing if an arrestee simply request the assistance of counsel.

The sixth Amendment as made applicable to the States by the fourteenth guarantees that a defendant in a state criminal trial has an independant constitutional right of self-representation and that he may proceed to defend himself without counsel when he volentarily and intelligently elects to do so, and in this case the state courts errer in forcing Mr. Wyatt against his will to accept a state-appointed public defender and in denying his request to conduct his own defense. See **FARETTA V. CALIFORNIA**, 422 U.S. 806, 95 S.Ct. 2525(1975) The Supreme Court has held that a State may not force an attorney upon a defendant and not in some manner violate the Constitution. Even if the state argues that a "stand-by" counsel was appointed at some point, it would still violate the Constitutional rights of Mr. Wyatt in the respect that "stand-by" counsel took complete charge of the trial. Mr.

Wyatt was never informed that, if appointed, counsel was indeed a stand-by counsel. Mr. Wyatt desired to represent himself due to knowing that any appointed counsel would not have been as well versed in the field of airconditioning and heating as himself. Prior to the date of trial, Mr. Wyatt performed research pertaining to the damaged of destroyed portion of his indictment handed down on June 8,2012. Mr. Wyatt had prepared a solid defense for trial, but was forced to forego his defense because the court refused to hear his motion to represent himself. This alone violated the Constitutional right of Mr. Wyatt to be heard in his own defense. The Fifth Circuit refused to question the fact that Mr. Wyatt sought self-representation. The courts ruling goes against the president cases decided by this cout that a defendant has a Constitutional right to represent himself. Faretta, Supra.

If we examine the several cases that have been heard before the courts, it is well established that the court must consider the defendant's age (Mr. Wyatt was 46), and education (Mr.Wyatt had a GED and some college),MIXON V. UNITED STATES, 608 F.2d 588 (5th Cir. 1979), and other background, experience, and conduct (Mr. Wyatt, a career criminal cannot be said to be ignoant of the law and the workings of the court). JOHNSON V. ZERBST,304 U.S. 458, 58 S.Ct. 1019; MIDDLEBROOKS V. UNITED STATES, 457 F.2d 657 (5th Cir.1972). The court must ensure that the waiver is not the result of coercion or mistreatment of the defendant, BLASINGAME V. ESTELLE , 604 F.2d 893 (5th Cir. 1979), and must be satisfied that the accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right he is waiving. BRADY V. UNITED STATES, 397 U.S. 742, 90 S.Ct. 1463, (1970); RAULERSON V. WAINWRIGHT, 732 F.2d 803(11th Cir.) McQUEEN

V. BLACKBURN, 755 F.2d 1174,1177 (5th Cir.), 106 S.Ct. 152(1985) Applying these factors, there is no doubt that Mr. Wyatt's waiver was knowingly, intelligently, and voluntarily made. It was his apparent and stated intent before arraignment. It was his obvious intent before trial. See UNITED STATES V. MARTIN, 790 F.2d 1215, (1986).

The Supreme Court should hear this case because the Fifth Circuit has changed the meaning of the Constitutional right of self representation. Its decision now makes it possible to force the defendant to take the appointment of counsel over his desired want of self representation, without a hearing, and no record of counsel being appointed. A huge miscarriage of justice has occured in this case. It has been ignored by the lower courts, and now relies on the 'Court of last resort' to decide the matter if counsel can represent a defendant without being appointed by the court, and the need for a hearing prior to the denial of self-representation is no longer the holding by this court.

The Supreme Court should seek the affidavit of Laurence Dunn, and Randy Stewart, inquiring as to how and when they were appointed to Mr. Wyatt. If the record is void of appointment, clearification sould be sought to reach a decision on the merits of this case. The lower courts never sought to seek affidavits prior to reaching its conclusion that Mr. Wyatt was appointed counsel at his article 15.17 hearing. The lower courts have gotten it wrong and now Mr. Wyatt relies on thgis court to make it right in the intrest of justice.

Question two:

Was the Constitutional right to self representation by Marc Trace Wyatt violated by the district court in denying his request to do so without first holding a hearing to determine if he was able to do so?

Mr. Wyatt argues that his right to self representation was violated by the district court, and the Fifth Circuit by holding that no hearing is required to determine if an accused can represent himself. An Appellate court reviews de novo the constitutional permissibilty of a defendant's attempt to represent himself. An impermissable denial of self representation cannot be harmless.

Assertion of the right to self representation proceeds in two steps. First, a defendant is unequivocally informing the court of the desire to represent himself, second, the court must hold a hearing known as a "Faretta" hearing. See **FARETTA V. CALIFORNIA**, 422 U.S. 806, 95 S.Ct. 2525(1975). This hearing is to determine if the defendant is knowingly and intelligently forgoing his right to appointed counsel and whether, by post-invocation action, he has waived the request.

There is a list of factors to be considered in determining whether a defendant's motion to proceed pro-se has been knowingly and intelligently made. A court must consider the defendant's age and education, and other background experience, and conduct. The court must ensure that the waiver is not the result of coercionor mistreatment of the defendant, and must be satisfied that the accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right he is waiving.

Those factors indicate that a district court must conduct a meaningfull investigation into a defendant's constitutionally protested request to represent himself. Defendant's have a constitutional right to represent themselves in federal court, or in the district court of the state. Faretta, supra. An inpermissable denial of self-representatiopn "cannot be harmless". McKASKIE V. WIGGINS, 45 U.S. 168, 104 S.Ct. 944 (1994). The waiver must be "clear and unequivocal". UNITED STATES V. MARTIN, 790 F.2d 1215, 1218 (5th Cir. 1986). The trial court "must caution the defendant about the dangers of such a course of action so that the record will establish that 'he knows what he is doing and his choice is made with eyes wide open'.

Mr. Wyatt was denied his right to represent himself by the district court when he requested to do so in leau of the appointment of counsel. Mr. Wyatt was told by the district judge Dugan of Bastrop Texas when he made his request on or about the 3, of August 2012, "thats not gonna happen, that's your attorney right there". Although he was not authorized under Code of Criminal Procedure 26.04, 1.051, Judge Dugan nevertheless attempted to simply point out an attorney in the court room and say "thats your attorney", Now the Fifth Circuit claims that this exchange never took place, nor did the appointment occure. Mr.Wyatt agrees. Even after invoking the right top counselaas Mr. Waytt did, he may relinquish this right through a knowing and intelligent waiver, even if the requested attorney has been appointed to represent him. See CHAPMAN V. CALIFORNIA, 386 U.S. 18, 87 S.Ct. 824 (1967); MASSINGILL V. STATE, 8 S.W.3d 733 (Tex. Crim. App. 1999); Montejo v. louisana, 566 U.S. 778, 129 S.Ct. 2079 (2009). When a defendant elects to be self-represented in a criminal matter, the presiding judge must

determine whether the defendant understands the dangers of self-representation, and whether the defendant is capable of voluntarily waiving his or her right to counsel.

It is inproper for the court to force the defendant to accept legal counsel at trial if the defendant is capable of making a valid waiver of the right to counsel. Faretta supra, at 422 U.S. 835. Because the district judge Dugan forced counsel upon Mr. Wyatt in violation of Code of Criminal Procedure 26.04, 1.051. Mr Wyatt had a constitutionally protected right to represent himself. Mr. Wyatt was never given the oppertunity to argue his desire to represent himself before the courts. To the district court, the right top represent oneself is not a constitutionally protected right. The Fifth Circuit determined that the request of self representation was forfitted because an attorney was appointed to Mr. Wyatt , performed the duties of an attorney without objection. Mr. Wyatt argues that the district court ruled on his motion and denied his request in open court. An attorney knows that if a motion is denieds, it is pointless to refile the same motion over and over. At what point a request is abandoned is not known except on a case by case basis. In the instant case, the Fifth Circuit now claims that counselp was appointed at the article 15.17 hearing, the appeallant court argues that the appointment occured on August 3, 2012 in Bastrop County court. Mr Wyatt argues that no counsel was appointed and that his right to represent himself before the court is the reason no appointment of counsel occured in the district court. A district judge outside of his jurisdiction can no more appoint counsel in another district unless he has taken the oath of office in that county. Judge Dugan has taken no such oath, thus making

determine whether the defendant understands the dangers of self-representation, and whether the defendant is capable of voluntarily waiving his or her right to counsel.

It is improper for the court to force the defendant to accept legal counsel at trial if the defendant is capable of making a valid waiver of the right to counsel. Faretta Supra at 422 U.S. 835. Because the district judge Dugan forced counsel upon Mr. Wyatt in violatioon of Code of Criminal Procedure 26.04, 1.051. Mr. Wyatt had a constitutionally protected right to represent himself. Mr. Wyatt was never given the oppertunity to argue his desire to represent himself before the courts. To the district court, the right to represent oneself is not a constitutionally protected right. The Fifth Circuit determined that the request of self representation was forfitted because an attorney was appointed to Mr. Wyatt, performed the duties of an attorney without objection. Mr. Wyatt argues that the district court ruled on his motion and denied his request in open court. An attorney knows that if a motion is denied, it is pointless to refile the same motion over and over. At what point a request is abandoned is not known except on a case by case basis. In the instant case, the Fifth now claims that counsel was appointed at the article 15.17 hearing, the appeallant court argues that the appointment occured on August 3rd,2012 in Bastrop County Court. Mr. Wyatt argues that no counsel was appointed and that his right to represent himself before the court is the reason no appointment of counsel occured in the district court. A district outside of his jurisdiction can no more appoint counsel in another district unless he has taken the oath of office in that county. Judge Dugan has taken no such oath, thus making his unusual appointment void. No court records

exist in the district court appointing either Mr. Dunn or Mr. Stewart. Records show that an investigator was appointed to Mr. Wyatt by the court. This is the only appointment of any legal assistance for Mr. Wyatt. The Fifth Circuit agrees with Mr. Wyatt that the record is void of an attorney being appointed, and that the request to represent himself was denied without a hearing. Thus the Fifth Circuit must be in error to deem that counsel was appointed over the request of self representation by Mr. Wyatt. The Fifth Circuit is wanting a double bite of the apple. It states that Mr. Wyatt was appointed counsel on May 16,2012 and therefore could not request a motion to represent himself. This violates the holding in Chapman supra, and Massingill supra.

The Supreme Court should hear this writ on its merits to determine when and if Mr. Wyatt waived his right to self representation by allowing an attorney illegally appointed represent him. At what point does the relinquishment take place? Mr. Wyatt admits that he was confused by the representation of two seperate attorney's at his trial. During the appeal process, it was discovered that both attorney's were never appointed by the courts. Mr Wyatt ask the Supreme Court to determine if the appointment of counsel by a non-district judge was legal when the record is void of any such appointment. If the record is relied upon, then it is as Mr. Wyatt states, he had no counsel at all.

Question three:

WAS THE CONVICTION OF MARC TRACE WYATTOBTAINED ILLEGALLY BY ALLOWING THE DISTRICT COURT TO USE REPLACEMENT COST WHEN THE STATE ADMITS IT DID NOT ASCERTAIN THE FAIR MARKET VALUE OF THE DESTROYED PROPERTY?

Since the inceptionof the Constitution of the United States, it has been understood that a defendant is innocent until proven guilty. In the instant case, the State urges this court to have Mr. Wyatt prove his innocence. The State explains to the lower courts that since it did not ascertain that the fair market value of the destroyed property could not have been discovered, it was the failure of Mr. Wyatt to complain at trial of the States failure to prove the fair market value. Mr. Wyatt could have put up no defense and simply relied on the State to prove their case. TEXAS PENAL CODE, SECTION 28.06(a) and (b), reads as follows;

"(a) The amount of pecuniary loss under this chapter, is

"(b) The amount of pecuniary loss under this chapter, if the property is damaged, is the cost of repairing or restoring the damaged property within a reasonable time after the damage occurred.

(1) the fair market of the property at the time and place of the destruction; or

(2) if the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the destruction.

In light of the verdict finding Mr. Wyatt guilty of the felony

offense of criminal mischief, it can be infered that the jury found that Mr. Wyatt destroyed the property (rather than damaged) since the only evidence of pecuniary loss in excess of $20,000 was the testimony of what the owners paid to replace the airconditioning units. To consider replacement cost in determining pecuniary loss requires the property to have been destroyed. Section 28.06 (a)(2) supra.

The State relies on the owner's description of the destroyed property as proof of pecuniary loss. Yet it admits that it failed to establish that the fair market value could not have been ascertained by their witnesses. This violates the holding of this court and all president cases involved. See **DEAS V. STATE OF TEXAS**, 752 S.W.2d 573 (Ct. Crim App. 1988); **MORENO V. STATE**, 961 S.W.512 (Tex. App. 1997); and **PHILLIPS V. STATE**, 672 S.W.2d 885(Tex. App. Dallas 1984).

The State relies on **SULLIVAN V. STATE**, 701 S.W.2d 905 (Tex. Crim. App 1986) and **SEPULVEDA V. STATE**, 751 S.W.2d 667. In sullivan, the court interpreted the theft statue of the penal code, section 31.08, which uses a simular definition of pecuniary loss as that contained in section 28.06 Id at 906. The court held that an owner of personal property may testify to the property's value, and "the presumption must be...that the owner is testifying to as estimation of the fair market value." Id at 909. Moreover, Sullivan provided a basis for two court's of appeals to hold that a property owner's testimony of replacement cost of destroyed property sufficiently supports a conviction of criminal mischief. **COLLINS V. STATE**, 740 S.W.2d 534. After Deas, Sepulveda and Collins cannot be said to be accurate interpretations of pecuniary

loss in criminal mischief cases.

Sepulveda and Collins both relied on Sullivan's interpretation of pecuniary loss under the theft statue. In Sullivan, as in most theft prosecutions, the owner/witness testified to the value of the stolen item, a pistol. Sullivan at 907. The owner/witness did not testify to the ammount paid for a replacement pistol, but rather the value of the pistol stolen. As sullivan correctly analyzes, it can be presumed that the owner/witness based this amount on commonly understood terms that reflect the value of his property at the time it was stolen. Id at 909. The court futher held that that the presumption arises reguardless of whether the owner testifies about the purchase price or the replavement value. Id. However, in Deas and the present case, the owner/witness sought to testify too the cost of replacing the destroyed item, not the cost of the item destroyed. The record offers no evidence of the value of the airconditioning units destroyed by Mr. wyatt. It appears that the requirement that the State offer evidence of fair market value guards against a prosecution based on inflated replacement cost testimony. For this reason, Sullivan does not controll.

The Supreme Court held that unless the State gives evidence that the fair market value of the destroyed property cannot be ascertained, then aconviction based on replacement cost cannot be upheld.

Futhermore, the only evidence in the record to support a felony conviction was evidence of the replacement value. Before replacement cost can be used to determine the pecuniary loss, evidence must demonstrate thatthe fair market value cannot be ascertained. Section 28.06(a)(2), supra. The only evidence presented by the State as to fair market value came from David Rose, the owner,o

that it cost Bingham Construction over $28,000 to replace the airconditioning units. The prosecution never attempted to elicit testimony from Mr. Rose concerning the fair market value of his property as required by Texas Penal Code 28.06(a)(2) supra. See IN THE MATTER OF M.T.B., 567 S.W.2d 46 (Tex.App.El paso 1978).

The State states that because the defense did not question the proof of pecuniary loss offered by the state, it must have agreed the replacement cost and the description (basically new units, utilized the latest technology, and were a year and a half old) to be sufficient evidence of pecuniary loss. Mr. Wyatt disagrees with that asessment. It is not the defense's job to help prove the States case. In fact, Mr. Wyatt need not put up any defense at all. If the State fails to prove its case, as it did here, a directed virdict based on the States failure to give evidence that the fair market value could not be ascertained prior to using replacement cost, could have been sought.

Mr. Wyatt basis his entire argument on the ruling in PHILLIPS V. STATE, supra. In this case, the court held that there must be proof of the fair market value of the property before destruction, or proof that the fair market value could not be ascertained. Only then will replacement cost be competent evidence of pecuniary loss. No witnesses called by the state testified that the fair market value could not be ascertained. Therefore, replacement cost can not be considered as evidence of pecuniary loss. Phillips was ordered acquitted as was required for insuffucuency of evidence. BURKS V. UNITED STATES, 437 U.S. 1, 98 S. Ct. 2141 (1978); GREEN V. MASSEY, 437 U.S.19, 98 S.Ct. 2152 (1973). The State and the Fifth Circuit now seek to overturn these holdings by asking the

Supreme Court to allow a conviction for criminal mischief to be upheld even after the State admits it did not seek to offer evidence that the fair market value could not have been ascertained through the testimony of its several expert witnesses, or that of Mike Stephens of York Industries. The State asks the Supreme Court to overturn the proceeding cases to allow the conviction of Mr. Wyatt to be upheld. The ruling of the Fifth Circuit and the lower courts go against the statues, Supreme Court rulings, and the Constitution of the United States.

Mr. Wyatt now seeks the wisdom of the Supreme Court to decide if in fact the State is correct in determining that Mr. Wyatt failed to help prosecute himself and aid the State in ascertaining the fair market value of the destroyed property. If the Supreme Court rules in the favor of the State, it must overturn every past ruling it has handed down since Deas. If this court rules in favor of Mr. Wyatt, it must hand down as order of acquittal as required by law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: APRIL 12, 2020