No. _____

IN THE

Supreme Court of the United States

JOHN RAY FALK, JR.
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Criminal Appeals of Texas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner John Falk and his codefendant Jerry Martin attempted a prison escape. Martin killed a guard when he drove a pickup truck into the horse she was riding. Petitioner was not in the vehicle.

The Texas "law of parties" permitted Falk to be indicted and convicted for capital murder because the criminal principal, Martin, committed a sufficiently culpable killing. However, because Texas law does not require that an indictment to specify the theory of parties-based liability the State intends to use at trial, the indictment here alleged nothing about Petitioner's own acts or culpability, nor gave him notice of how he could be held vicariously liable for Martin's offense.

During jury selection, Falk abruptly waived counsel and announced his desire to plead guilty. The indictment was the only information about the charge presented to Falk at the plea colloquy. Falk agreed to a stipulation that he had acted "alone or as a party," but nothing in the record suggests that he understood what it meant to be a "party" to a Texas offense. The following questions are presented.

(1) Given that Due Process requires that a guilty plea be "knowing and intelligent," when a *pro se* defendant seeks to plead guilty to a death-eligible homicide charge arising from a killing actually committed by his codefendant, must he be informed of the prosecution's theory of his own criminal liability for the death?

(2) Does the Due Process Clause require special procedural safeguards for a *pro se* defendant who seeks to plead guilty in a capital case?

LIST OF RELATED DECISIONS

Texas Criminal Proceedings

State v. Falk, Cause No. 27,347 (278th Dist. Ct. Walker Co., Tex.) (state trial court proceeding)

In re State ex rel. Weeks, 392 S.W.3d 280 (Tex.App.—Waco, Dec. 12, 2012) (pre-trial mandamus proceeding)

In re State ex rel. Weeks, 391 S.W.3d 117 (Tex. Crim. App. 2013) (pre-trial mandamus proceeding)

Falk v. State, No. AP-77,071, 2021 WL 2008967 (Tex. Crim. App. May 19, 2021) (unpublished) (Texas Court of Criminal Appeals decision on direct appeal)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Falk respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals ("CCA") in his case.

OPINIONS AND ORDERS BELOW

The CCA's decision affirming Petitioner's conviction and death sentence on direct appeal is unpublished and is reprinted in full in the Petition Appendix at pages 1a–48a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The CCA entered its judgment on May 19, 2021. This petition is timely pursuant to Supreme Court Rules 13.3 and 30.1 and this Court's order dated July 19, 2021.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides, in relevant part, that "cruel and unusual punishments [shall not be] inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[no] State shall … deprive any person of life, liberty, or property without due process of law...." U.S. Const. amend. XIV.

STATUTORY PROVISIONS INVOLVED

This case also involves the Texas "Law of Parties" statute, Tex. Pen. Code §§ 7.01 ("Parties to Offenses") & 7.02 ("Criminal Responsibility for Conduct of Another"), which provides, in relevant part:

Pen. § 7.01. PARTIES TO OFFENSES

(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is responsible, or by both.

(b) Each party to an offense may be charged with commission of the offense.

(c) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.

Pen. § 7.02. CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

(a) A person is criminally responsible for an offense committed by the conduct of another if:

(…)

(2) Acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]

(b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the coconspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

INTRODUCTION

Petitioner John Falk was sentenced to die for a murder committed by his codefendant Jerry Martin, who since has been executed for the crime. Falk's conviction rests on his guilty plea to an indictment framed solely in terms of Martin's actions and mental state, as permitted under Texas's broad accomplice liability statute, the "law of parties." As Justice Marshall cautioned, under that provision "every intent element that would normally guard against a capital charge for one who did not kill or intend to kill can be neatly circumvented and substituted with the fiction of vicarious intent." *Stewart v. Texas*, 474 U.S. 866, 869 (1985) (Marshall, J., dissenting from denial of certiorari). Falk was unrepresented by counsel when he entered his guilty plea, and the trial court accepted it without undertaking any explanation of how Falk's actions made him criminally responsible for Martin's conduct.

It is hornbook law that a plea is not knowing and intelligent unless a criminal defendant first receives "'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *E.g., Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). "Normally, the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused." *Henderson v. Morgan*, 426 U.S. 637, 647 (1976). But where – as here – the record contains no such elaboration by the trial judge, and the defendant is proceeding *pro se*, these "normal" assurances are absent. And while in a normal case the indictment might fulfill this "most universally

recognized requirement of due process," here the indictment failed to allege any explicit acts by Falk, or any culpable mental state on his part.

This petition asks the Court to decide how a trial court should ensure that a pro se defendant pleading guilty in a capital case – where state law defines vicarious criminal liability broadly and does not require that the prosecution's intent to rely on such a theory to be alleged in the indictment – possesses the requisite notice and understanding of how he is legally responsible for an offense actually committed by a codefendant. Courts around the country have settled on contradictory answers to these troubling questions, which implicate vital constitutional protections that underlie the very integrity of our judicial system. This Court's guidance is urgently needed to clarify the scope of the fundamental due process protections presented in such circumstances.

STATEMENT OF THE CASE

Petitioner John Falk has twice been tried for capital murder as a party to the death of Texas correctional officer Susan Canfield. *See Ex parte Falk*, 449 S.W.3d 500 (Tex. App.–Waco 2014, pet. ref'd). The principal actor in the crime, Falk's codefendant Jerry Martin, was prosecuted first and convicted of capital murder in 2009. Martin's conviction was affirmed on appeal in 2012; he waived post-conviction review and was executed in 2013.[1]

[1] *See Martin v. State,* No. AP-76,317, 2012 WL 5358862 (Tex. Crim. App. Oct. 31, 2012) (not designated for publication); *Ex parte Martin*, No. WR-79,958-01, 2013 WL 4506166 (Tex. Crim. App. Aug. 21, 2013) (not designated for publication).

The underlying offense occurred on the morning of September 24, 2007, when Falk and Martin, both then inmates at a state prison in Huntsville, Texas, attempted to escape.[2] Falk and Martin were working in an onion field as part of a squad of eighty inmates supervised by four guards on horseback armed with revolvers. A fifth mounted officer, Susan Canfield, patrolled the perimeter as the "high rider"; she was armed with both a rifle and a revolver.

Martin approached one of the officers, distracted him with a ruse, and then – with Falk's help – wrested away the officer's revolver. Martin tossed the revolver to Falk, and the pair fled through a fence and onto the adjacent property, occupied by a City of Huntsville service facility. The guards focused on apprehending Falk because he was armed; Martin ran off in another direction. The guards fired shots at Falk, but he dodged behind cover.

Officer Canfield then advanced on Falk, both firing their revolvers. When Officer Canfield had emptied her revolver and was trying to remove her rifle from its scabbard, Falk ran at her. The two struggled over the rifle as Officer Canfield attempted to turn her horse away from Falk. When Falk pressed his revolver against her ribs, Officer Canfield relented, and Falk took the rifle and backed away.

Meanwhile, during the gunfire, Martin had jumped into a one-ton, flat-bed pickup truck parked at the service facility with the keys inside. Martin accelerated and the truck sped towards Officer Canfield. Just after Petitioner had backed away

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[2] This description of the trial testimony is drawn from *Martin v. State*, No. AP-76,317, 2012 WL 5358862 (Tex. Crim. App. October 31, 2012) (unpublished), and *In re State of Texas ex rel. Weeks*, 391 S.W.3d 117 (Tex. Crim. App. 2013). *See Martin*, 2012 WL 5358862 at *1–*4; *Weeks*, 391 S.W.3d at 119–120.

from Officer Canfield and her horse, Martin's truck collided with the officer's horse. Officer Canfield later died from sustained injuries.

After the collision, Martin stopped the truck. Falk got in the vehicle, and they took off, sparking a chase that eventually led to their arrest a few hours later.

I. Proceedings in the Trial Court.

Falk was initially indicted for capital murder in Walker County, Texas, in March 2008. After venue was transferred to Brazos County, trial began in July 2012 with the Hon. Kenneth H. Keeling presiding. After evidence closed on the merits, the trial judge announced during the charge conference that he saw no evidence to support a jury instruction on a theory of accomplice liability under § 7.02(a)(2) of the Texas Penal Code ("law of parties")[3]:

> [U]nder [section] 7.02 parties, 7.02(a)(2), I do not see any evidence where he – this is talking about [Petitioner] John Falk, Jr. This is the aiding, abetting part of the driving the vehicle into Canfield or her horse. I don't see any evidence where he solicited, encouraged it, directs it, aids it, or

[3] Texas's "law of parties" is contained in sections 7.01 and 7.02 of the Texas Penal Code.

As pertinent here, section 7.02(a) provides that a person is "criminally responsible for an offense committed by the conduct of another … if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." Tex. Penal Code Ann. § 7.02(a)(2). Section 7.02(b) further provides: "If in the attempt to carry out a conspiracy to commit one felony another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of carrying out the conspiracy." Tex. Penal Code § 7.02(b).

The Texas Court of Criminal Appeals has said that "the State is entitled to pursue any available theories of criminal liability to the broadest extent possible under the charging instrument and the evidence," and that "[i]f multiple theories of party liability are supported by the evidence, the trial judge may not arbitrarily limit the State to one of the theories." *In re State ex rel. Weeks*, 391 S.W.3d 117, 119 (Tex. Crim. App. 2013).

> attempts to aid the other person to commit the offense of driving the vehicle into the horse or her. So I don't think you can go under 7.02(a)(2) of the parties statute. The evidence, as I recall it, particularly from Mr. Isaacs – and there was another witness who was under the shed, I can't remember his name, but they testified, as I recall, that Mr. Falk had already gotten the rifle and that he was on down the road at the time of the collision of this vehicle and [Officer] Canfield….

Ex parte Falk, 449 S.W.3d at 508.

After hearing the parties' views, the judge repeated that the prosecutor's request for an accomplice charge under § 7.02(a) "ignore[d] the evidence where [Falk] was already away from [the victim]. He was walking on down the road." *Id.* at 509. The court accordingly refused to instruct the jury on the State's theory of accomplice liability under § 7.02(a)(2) and included an application paragraph in the proposed charge under § 7.02(b) requiring the State to prove that Falk had anticipated the specific manner and means by which Martin killed Officer Canfield. *In re State ex rel. Weeks*, 392 S.W.3d 280, 283 (Tex. App.–Waco 2012, writ granted) ("*Weeks I*").

Objecting to both the trial court's refusal to instruct on § 7.02(a)(2) and the manner-and-means paragraph it included in the § 7.02(b) conspiracy instruction, the State sought mandamus relief. *Weeks I*, 392 S.W.3d at 282–83. The intermediate appellate court sided with the trial judge, *id.*, but the CCA reversed, ordering that the jury be instructed as the State had requested. *In re State ex rel. Weeks*, 391 S.W.3d 117, 126 (Tex. Crim. App. 2013) ("*Weeks II*"); *see also In re State ex rel. Weeks*, 392 S.W.3d 339 (Tex. App.–Waco 2013).

Shortly after the case was returned to Brazos County, the trial court *sua sponte* declared a mistrial. Judge Keeling informed the jury that he had presided over the trial of the principal actor in the offense, Falk's codefendant Jerry Martin, and that

throughout the course of Falk's trial, he had become "increasingly frustrated about the way this case was handled…." Defense Pretrial Exhibit 1, RR 25(C):7, at 8. After the delay resulting from the mandamus proceedings, he continued, justice could not be done because the passage of time – nearly two months since the conclusion of the extensive testimony – undermined the jurors' ability to fairly decide "a very complicated case involving the law of parties." *Id.* at 10–11.

In June 2015, three years after the mistrial, the State reindicted Falk for capital murder in Walker County, the site of the offense. CR 1:9. The indictment specifically alleged:

> [T]hat on or about the 24th day of September, 2007, … JOHN RAY FALK, Jr. did then and there intentionally or knowingly cause the death of an individual, namely, Susan Canfield, by striking her with a motor vehicle or striking the horse she was riding with a motor vehicle, while the defendant was escaping or attempting to escape from a penal institution, to-wit: the Texas Department of Criminal Justice Wynne Unit.

Id.

After skirmishes between newly appointed defense counsel and the State over jurisdiction and venue, the case was ultimately transferred to Angelina County for trial before a new judge. See RR 2:3; 3:5, 32–33; CR 1:19.

Voir dire began in January 2017. RR 5:4. After six days of jury selection, defense counsel advised the trial court that Falk had informed them that he wished to proceed *pro se*. *See* RR 11:133. Questioned by the court about his motivations, Falk said that he had very personal, private reasons for discharging counsel. RR 11:134.

However, defense counsel represented to the trial court: "He just wants to not live in prison for the rest of his life. He just wants to die." RR 11:137.

The trial court then admonished Falk, questioned him about his ability to represent himself, and conducted the *Faretta* colloquy.[4] RR 11:139–54. The court ultimately allowed Falk – who had not only never represented himself, but never stood trial, *see* RR 11:141[5] – to continue *pro se* and appointed standby counsel "in an advisory capacity only," RR 11:155, issuing a detailed written order to limit their participation in the proceedings. CR 5:924-25.[6]

Voir dire resumed on February 13, 2017. RR 14:33. Falk hardly participated, interacting with just five potential jurors and asking only a handful of questions. RR 14:106–07; RR 16:45-46, 161–62; RR 17:54–55; RR 19:23-24. He made no cause challenges, nor did he protest the State's peremptory strikes, the first nine of which were exercised against women and eliminated both qualified Black veniremembers from the panel. *See* RR 14:33–RR 19:106; RR 19:123–27; *see also* Corrected Brief of

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[4] *See Faretta v. California*, 422 U.S. 806 (1975).

[5] Falk had previously been convicted of murder in 1986 at age nineteen. In that case, Falk pleaded guilty and received the prison sentence he was serving at the time of Officer Canfield's death. *See* RR 23:55.

[6] After Falk first raised his request to proceed *pro se*, defense counsel moved the court to determine Falk's competency to do so, submitting an expert's affidavit that purported to identify "significant red flags" concerning Falk's ability and willingness to actively represent himself. RR 12:4; CR 5:765–75. After an *in camera* discussion with counsel for both parties – from most of which Falk was excluded, *see* RR 12:3, 16 – the court appointed its own expert. RR 13:6; CR 5:763. After that expert submitted an affidavit finding no reason to doubt Falk's competency to proceed or to handle his own defense, the court determined that no evidentiary hearing on those issues was necessary. *See* RR 13:7, RR 14:9. On February 13, 2017, the court formally permitted Falk to waive counsel and thereafter proceed *pro se*. *See* RR 14:35; CR 5:909.

Appellant at 76-104, *Falk v. State*, No. AP-77,071 (Tex. Crim. App. Jun. 20, 2019), 2019 WL 2907608 at *76-104. Neither the State nor Falk raised any challenges to the seating of the jury. RR 19:129, 143-49.

Trial began on February 23, 2017. *See* RR 20:1. Immediately before proceedings were about to commence, the trial court determined that Falk, now acting *pro se*, intended to plead guilty when the indictment was read to the jury. RR 20:9. The court and the State agreed it was "more appropriate" to "do the paperwork" for the plea before Falk pleaded guilty in the jury's presence. *See* RR 20:9–10.

The trial court then inquired as follows to confirm Falk's understanding of the nature of the charge against him:

> THE COURT: Do you solemnly swear that the testimony you will give in the Cause on trial will be the truth, the whole truth, and nothing but the truth, so help you God?
>
> FALK: I do, sir.
>
> THE COURT: Thank you, sir. That you are, under oath, making the following statements and waivers, prior to the Court, myself, accepting your plea of guilty. First, that you are mentally competent and *understand the nature of the charges against you*. Do you believe that's the case, sir?
>
> FALK: I do, sir.
>
> THE COURT: And the Court, based on all of the evidence and proceedings in the case, finds that you are mentally competent *and understand the nature of the charge against you*.

RR 20:17 (emphasis supplied).

The jury was then returned to the courtroom and the prosecutor read the indictment aloud; it alleged in pertinent part:

> [O]n or about the 24th day of September, 2007, … in [Walker County], [Petitioner] John Ray Falk, Jr. did then and there intentionally or knowingly cause the death of an individual; namely, Susan Canfield, by striking her with a motor vehicle, or striking the horse she was riding with a motor vehicle, while the Defendant was escaping or attempting to escape from a penal institution, to-wit: The Texas Department of Criminal Justice Wynne Unit, against the peace and dignity of the State.

RR 20:14–15. Asked for his plea, Falk responded, "Your Honor, I plead guilty to the charges." RR 20:15.

The trial court then excused the jury and conducted proceedings to formally accept Falk's guilty plea. RR 20:15–29. Outside the jury's presence, the court presented Falk with a Guilty Plea Memorandum, which the court explained "contains admonishments, statements, stipulations and waivers." RR 20:15. After reviewing with Falk the sections of the Guilty Plea Memorandum containing the admonishments and waivers of constitutional rights, RR 20:16–19, the court read aloud the section of the Guilty Plea Memorandum regarding the "Stipulation of Evidence." After repeating the trial rights that Falk's guilty plea would waive, the court turned to the evidentiary portion of the stipulation:

> THE COURT: Anyway, Stipulation of Evidence …. ["] I hereby agree and confess that all of the acts and allegations in said [guilty] plea are true and correct. I stipulate and admit that on or about the 24th day of September, 2007, in Walker County, Texas, I did then and there, acting alone or as a party, intentionally or knowingly caused the death of an individual; namely, Susan Canfield, by striking her, or the horse she was riding, with a vehicle, and [was] then and there escaping, or attempting to escape from a penal institution, Texas Department of Criminal Justice, Wynne Unit.
>
> Under oath, I swear that the foregoing and all the testimony I give in this case is true.["]
>
> Is that the case, sir?

FALK: Yes, Your Honor, it's true.

THE COURT: At this time I would ask, based on the foregoing, that you sign your name where indicated.

FALK: Done, Your Honor.

THE COURT: Thank you, and yes, ma'am, Ms. Bartee, you may take his sworn signature.

RR 20:19–20.

At this juncture, standby counsel objected, urging the court to "refuse Mr. Falk's plea" and allow his "learned counsel" to "handle his defense [from] beginning [to] end." RR 20:22. The motion was denied. RR 20:23–25. The court then resumed proceedings with respect to Falk's guilty plea, as follows:

THE COURT: Okay, just for the record, you've already made it in front of the jury, but your plea to the indictment again is?

FALK: Guilty, Your Honor.

THE COURT: Any evidence from the State?

MS. STROUD: Judge, the State would offer the written stipulations and waivers that the Court has in front of it that has been signed and initialed by Mr. Falk, as State's Exhibit 1, which contains the Guilty Plea Memorandum and the Stipulation of Evidence, wherein Mr. Falk states that he is, in fact, guilty of the offense of capital murder.

THE COURT: Any other suggested admonishments?

MS. STROUD: No, sir, Your Honor. You've admonished him on the range of punishment, you've admonished him on citizenship and you've admonished him on the Constitutional waivers, which I believe is all that's required.

THE COURT: Okay, Mr. Falk, please stand. Based upon the guilty plea memorandum, the admonishments you've received, the statements you've entered into, the stipulations you've entered into, the waivers

> you've made, the indictment by the State, the presentation of it, your plea to the indictment, that of guilty, all of the matters contained in the memorandum I will accept your plea and find you guilty of capital murder.

RR 20:27.

When trial proceedings resumed, the court advised the jurors that it had conducted proceedings outside their presence "to formalize Mr. Falk recent plea of guilty," and that the court had "found Mr. Falk guilty, accepted his plea, and, in essence, he stands now convicted of capital murder…." RR 20:29. The trial court then commenced the punishment phase. *Id*.

II. Direct Appeal to the Texas Court of Criminal Appeals.

On direct appeal, Falk argued that the record is insufficient to establish that he possessed an adequate understanding of the nature of the charge against him, as required by *Henderson v. Morgan*, 426 U.S. 637 (1976), because the record does not reflect that the law of parties had been explained to him nor that he understood how it applied to the facts of the case. Falk contended that even though a theory of vicarious liability was not a formal element of the charged offense, due process required the record to reflect that he had received an explanation of that aspect of the law, to ensure that he understood how his own conduct made him vicariously liable for the acts of his codefendant.

In response, the State asserted that there is no precedent "that the Constitution require[s] the trial court to explain the law of parties to him and ensure that he understood its application before accepting his guilty plea." State's Brief at

97, *Falk v. State*, No. AP-77,071 (Tex. Crim. App. Dec. 27, 2019), 2019 WL 7493601 at *97.

The CCA affirmed the conviction. It reasoned that the indictment alone was sufficient to provide Falk with "real notice of the true nature of the charge against him," and that no governing law required a trial court to "explain the intricacies of an implicated legal doctrine" – i.e., the law of parties – as part of accepting a defendant's guilty plea:

> Neither the Supreme Court nor this Court has held that due process requires a trial court to explain the intricacies of an implicated legal doctrine to a defendant before the court may accept the defendant's plea. There is "no rule requiring the court to instruct the accused on every aspect of the law pertinent to the case when the accused pleads guilty." *Rose v. State*, 465 S.W.2d 147, 149 (Tex. Crim. App. 1971). It may be incumbent upon defense counsel to explain applicable legal doctrines to a client before the client pleads guilty. *See*, *e.g.*, *Ex parte Lewis*, 537 S.W.3d 917, 922–23 (Tex. Crim. App. 2017). But even so, that requirement arises from the Sixth Amendment right of effective assistance of counsel, not the Fifth or Fourteenth Amendment right to due process. Appellant waived the right to constitutionally effective counsel, and "[i]t is not the court's function to act as legal counsel for the appellant." *Rose*, 465 S.W.2d at 149. The trial court satisfied its duty to ensure that Appellant received "real notice of the true nature of the charge against him," *See Bousley*, 523 U.S. at 618 (citations omitted), by providing Appellant a copy of the indictment. The presumption of voluntariness applies.

Falk v. State, No. AP-77,071, 2021 WL 2008967, at *17 (Tex. Crim. App. May 19, 2021).

In a related point of error, Falk argued that due process forbade the court from accepting Falk's guilty plea absent an affirmative showing that Falk's conduct was sufficient to make him liable as a party for capital murder. Corrected Brief of Appellant at 196-99, *Falk v. State*, No. AP-77,071 (Tex. Crim. App. Jun. 20, 2019),

2019 WL 2907608 at *196–99. Falk argued that while the due process clause generally imposes no requirement that a factual basis be established prior to acceptance of a guilty plea, courts have generally recognized at least one "special circumstance" in which it is necessary: When a defendant wishes to enter a guilty plea but continues to assert his innocence of the charged offense. *Id*. at *197 (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)). Falk argued that the same reliability concerns that animate the recognition of a "special circumstance" in the *Alford* scenario warranted a similar rule in the case of a defendant seeking to enter an uncounseled guilty plea in a capital case, particularly where the trial court was aware that Falk had not actually caused Officer Canfield's death, but was pleading guilty to an indictment "in the absence of any evidence about the specifics of his own conduct" and the trial court was also aware that Falk may have simply been entering the plea in order to be sentenced to death. *Id*. at *197–99.

The CCA summarily rejected Falk's argument, holding that there is "no federal constitutional" ground for requiring a factual basis to be established about Falk's culpability. *Id.* at 20. The CCA further reasoned that even accepting Falk's due process argument, Falk's "judicial confession was evidence" that laid a sufficient factual basis for the conviction. *Id.*

This petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE COURT SHOULD DETERMINE WHETHER DUE PROCESS REQUIRES THAT A *PRO SE* DEFENDANT WHO ENTERS A GUILTY PLEA TO AN OFFENSE ACTUALLY COMMITTED BY A CODEFENDANT BE PROVIDED WITH NOTICE OF, AND UNDERSTAND, THE LAW OF VICARIOUS LIABILITY BY WHICH HE IS DEEMED RESPONSIBLE FOR HIS CODEFENDANT'S ACTS.

Jerry Martin, and not Petitioner John Falk, caused Susan Canfield's death.[7] In three trials related to the offense, the State has never contended otherwise. Thus, Texas's law of vicarious liability – "the law of parties" – was essential to the State's theory of Falk's culpability for capital murder. Yet the record of Falk's plea colloquy is completely devoid of any explanation of that doctrine to Falk – by the trial court, standby counsel, prosecutors, or anyone else. Nor does the record show any inquiry of him, or any statement by him, reflecting that he grasped how the law of parties applied to his own conduct or culpable mental state to make him criminally responsible for Martin's acts. Because it is impossible on this record to conclude that Falk possessed an adequate "understanding of the law in relation to the facts," his

[7] Martin pled guilty to capital murder and publicly accepted "full responsibility" for Canfield's death in his final statement, just before being executed on December 3, 2013: "I would like to tell the Canfield family I'm sorry; sorry for your loss. I wish I could take it back, but I can't. I hope this gives you closure. *I did not murder your loved one, it was an accident. I didn't mean for it to happen. I take full responsibility*." *See* Texas Department of Criminal Justice, Offender Information for Jerry Martin, available at https://www.tdcj.texas.gov/death_row/dr_info/ martinjerrylast.html (emphasis added). Martin's final statement raises questions not only about whether Falk was a party to Martin's offense ("I take full responsibility"), but whether Martin (and thereby Falk) committed a death-eligible offense ("I did not murder your loved one, it was an accident").

plea cannot stand as an intelligent admission of guilt. *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *see also Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *Smith v. O'Grady*, 312 U.S. 329 (1941).

In defending the conviction in the court below, the State argued that there is no precedent "that the Constitution require[s] the trial court to explain the law of parties to him and to ensure that he understood its application before accepting his guilty plea." State's Brief at 97, *Falk v. State*, No. AP-77,071 (Tex. Crim. App. Dec. 27, 2019), 2019 WL 7493601 at *97. And in affirming Falk's conviction, the Texas Court of Criminal Appeals similarly reasoned that "[n]either the Supreme Court nor this Court has held that due process requires a trial court to explain the intricacies of an implicated legal doctrine to a defendant before the court may accept the defendant's plea." *Falk v. State*, No. AP-77,071, 2021 WL 2008967, at *18. The CCA said that while "[i]t may be incumbent upon defense counsel to explain applicable legal doctrines to a client before the client pleads guilty," *id*., Falk had waived his right to effective assistance of counsel, and "[i]t is not the court's function to act as legal counsel for the appellant." *Id*. (quoting *Rose v. State*, 465 S.W.2d at 149).

This Court should grant certiorari to make clear that a *pro se* defendant who enters a guilty plea to an offense committed by a codefendant must be provided with notice, and possess an understanding, of the law of vicarious or "party" liability by which he is deemed responsible for his codefendant's acts.

A. Due Process requires that a defendant be informed of and have a "full understanding" of "the nature of the charge and the elements of the crime" before a guilty plea may be deemed voluntary.

In *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969), this Court held that when a defendant pleads guilty the State shoulders the burden of establishing on the record that the defendant's plea is knowing, voluntary, and intelligent. Specifically, the record must reveal that the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process," *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 344 (1941)), and possessed an understanding of the "law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). "Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this … sense." *Henderson*, 426 U.S. at 645.

In *Henderson*, this Court held that, at a minimum, the record must reflect that the defendant was informed of the "critical" elements of the offense. *Henderson*, 426 U.S. at 646; *id.* at 647 n.18 (because "intent is … a critical element of the offense of second-degree murder … notice of the element is required."); *see also Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("[w]here a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid." (citing *Henderson*, *supra*)).

In more recent cases, this Court has used language indicating that the requisite awareness of "the nature of the charge" includes, but is not limited to, the elements of the offense. *See*, *e.g.*, *Bradshaw*, 545 U.S. at 182–83 ("Stumpf's guilty plea would indeed be invalid if he had not been aware of the nature of the charges against

him, *including* the elements of the aggravated murder charge to which he pleaded guilty") (emphasis added); *id.* at 183 (constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects "that the nature of the charge *and* the elements of the crime" were explained to him) (emphasis added).

B. Accomplice or party liability, though generally not required to be alleged in the indictment, functions as an element of the offense in criminal prosecutions in which it is implicated.

Common law required that an indictment clearly specify whether a defendant acted as a principal or an accessory. As a result, a defendant might escape criminal liability altogether by creating a reasonable doubt as to whether he had been a principal or an accessory.[8] Today, almost all states, including Texas, have abrogated the distinction between principals and accessories to change this rule of pleading and to avoid this potential result.[9]

Notwithstanding the fact that a theory of vicarious or party liability is generally not required to be pled in the indictment today, it is universally recognized that such a theory, when implicated by the facts of the offense, functions as an element of the offense and is subject to the same constitutional requirements –

[8] 1 Wharton's Criminal Law § 34 (15th ed.) ("A person charged in an indictment as a principal could not be convicted on evidence showing that he was merely an accessory; and, conversely, a person charged as an accessory could not be convicted on evidence showing that he was a principal.").

[9] *Id.* ("In most jurisdictions, the common-law distinctions between principals and accessories have largely been abolished, although the pertinent statutes vary in form and substance.").

including notice, a unanimous jury determination, and proof beyond a reasonable doubt – as are the elements of the charged offense.[10]

Indeed, the Texas Court of Criminal Appeals itself has said that when the State proceeds on the "law of parties" to obtain a conviction, "[p]arty liability is as much an element of an offense as the enumerated elements prescribed in a statute that defines a particular crime." *In re State ex rel. Weeks*, 391 S.W.3d 117, 124 (Tex. Crim. App. 2013); *see also Johnson v. State*, 982 S.W.2d 403, 410 (Tex. Crim. App. 1998) ("the law of parties, when implicated, is functionally an element of the offense tried") (Keller, J., concurring). Thus, when a case proceeds to trial, Texas law requires that the jury be instructed on the law of parties and that the State must prove the elements of the theory of party liability beyond a reasonable doubt. *See, e.g.*, *Hanson v. State*, 55 S.W.3d 681, 689 (Tex. App.–Austin, 2001, pet. ref'd) (to convict a defendant under the law of parties, State must prove both that "another person

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[10] *See*, *e.g.*, *State v. Toma*, 364 P.3d 535 (Haw. 2015) (erroneous jury instructions that misstated the law of accomplice liability violated the defendant's statutory and federal constitutional rights "not [to] be convicted of an offense unless each element of the offense and the state of mind required to establish each element of the offense is proved beyond a reasonable doubt"); *State v. Milton*, 821 N.W.2d 789, 805–06 (Minn. 2012) (jury instructions that failed to properly explain the law of accomplice liability "failed to explain a required element of the charged offense"); *State v. Hill,* 974 A.2d 403, 417 (N.J. 2009) ("Here the State had the burden of proving beyond a reasonable doubt that [the defendant] had the requisite knowledge and intent in order to be found guilty of the armed robbery and related offenses based on its accomplice liability theory."); *State v. Teal*, 73 P.3d 402 (Wash. Ct. App. 2003), *aff'd*, 96 P.3d 974 (Wash. 2004) ("Accomplice liability, though not an 'element,' must still be proved by the State beyond a reasonable doubt in order for a jury to convict."); *State ex rel. V.T.*, 5 P.3d 1234, 1236 (Utah Ct. App. 2000) ("As with any other crime, the State must prove the elements of accomplice liability beyond a reasonable doubt"); *Smith v. State*, 795 So.2d 788, 831 (Ala. Crim. App. 2000) (finding no error in jury instructions that required the state to prove beyond a reasonable doubt that the defendant "aid and abet"); *Baker v. State*, 905 P.2d 479, 490 (Alaska Ct. App. 1995) (if the State intends to prove the defendant's guilt of an offense by relying on a theory of accomplice liability, the State must additionally prove the elements of accomplice liability beyond a reasonable doubt).

committed a criminal offense" and that the defendant "had the intent to promote or assist that person" and "solicited, encouraged, directed, aided or attempted to aid that person" in doing so). In the absence of a charge on the law of parties, "a defendant may only be convicted on the basis of his own conduct." *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996); *see also Romo v. State*, 568 S.W.2d 298, 302 (Tex. Crim. App. 1978) (opinion on State's motion for rehearing).

When a theory of vicarious or party liability functions as an element of the offense, a defendant must be informed and have an understanding of the elements of the State's theory of vicarious or party liability before his or her guilty plea to an offense committed by a codefendant is voluntary under *Henderson*.

C. Contrary to the Texas Court of Criminal Appeals' ruling in this case, other courts have invalidated guilty pleas when the record fails to reflect the defendant's awareness and understanding of the elements of the State's theory of vicarious liability.

The CCA expressly adopted the view that defendant's receipt of the indictment creates a presumption of voluntariness that must be affirmatively disproven by the defendant, thus relieving the court of the duty to explain party liability. *Falk v. State*, No. AP-77,071, 2021 WL 2008967, at *18 (Tex. Crim. App. May 19, 2021). But courts in other jurisdictions have concluded to the contrary, finding guilty pleas to be invalid when the record of the plea colloquy fails to reflect the defendant's awareness and understanding of the elements of the State's theory of vicarious liability.

For example, in *Nash v. Israel***,** 707 F.2d 298 (7th Cir. 1983), the Seventh Circuit vacated a guilty plea to a charge of first-degree murder because the trial court had failed to sufficiently "establish on the record that Nash understood the elements

of the charge of party to the crime of first degree murder and that his conduct was sufficient to constitute the offense with which he was charged." *Id*. at 301–03. The Seventh Circuit highlighted the trial court's affirmative duty, pursuant to *Boykin v. Alabama*, to ascertain a defendant's understanding of the nature of the offense. Applying the *Boykin* standard, the Seventh Circuit found inadequate the short exchange between the trial judge and defendant Nash. *Id.* at 301. The court noted that the record "contains no admission by Nash that he intended [the decedent's] death, that he knowingly aided and abetted an intentional murder, or that he entered into a conspiracy to commit the crime of first degree murder." *Id.* at 302–03. Because "the charge of party to the crime of first degree murder is exceedingly complex," the court of appeals held that the trial court "should have included adequate explanation of the elements of aiding and abetting and conspiring to commit the crime, and of how Nash's conduct fell within the purview of one or both of these definitions." *Id*. at 303. In contrast to the decision below, the *Nash* court specifically rejected the suggestion that once a defendant "has received a copy of the charging document setting out the elements of the offense, he cannot claim later that he did not understand the charge to which he pleaded;" instead, an explanation of vicarious liability is required. *Id.* at 302.

Other courts have similarly found guilty pleas to be invalid when the record of the guilty plea colloquy, though more robust than the plea colloquy in Falk's case, failed to establish sufficient facts about the defendant's understanding of the State's theory of vicarious liability, or reflect an understanding about how his own conduct

and culpable mental state rendered him liable for an offense committed by a codefendant.[11]

D. This Court has recognized that any "functional equivalent of an element" of the offense must be subject to the same constitutional requirements as an element of the charged offense.

Not only has Texas (along with other states) explicitly recognized that a theory of vicarious or party liability functions as an element of the offense, but this Court has held in a series of cases that any fact that is the "functional equivalent of an element" of an offense is subject to the same constitutional requirements as a statutory element of the charged offense. *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 577 U.S. 92 (2016).

In *Apprendi*, this Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, regardless of how it is "labeled," is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict," 530 U.S. at 494 n. 19, and is thus subject to the same

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[11] *See*, *e.g.*, *State v. Howell*, 734 N.W.2d 48 (Wis. 2007) (guilty plea invalid where trial court "engaged in only a limited exploration regarding whether Howell understood the nature of his criminal liability as an aider and abettor"); *United States v. Satamian*, 40 Fed. App'x. 405 (9th Cir. 2002) (trial court failed to inform the defendant of, and determine that defendant understands, the nature of the offense where defendant "merely stipulated he 'assisted' the co-defendants in their commission of the crime"); *United States v. Andrades*, 169 F.3d 131 (2d Cir. 1999) (guilty plea invalid where district court failed to determine that defendant understood the nature of the charge to which he was pleading guilty where court did not elicit any information from defendant or prosecution regarding offense, but merely read bare bones conspiracy charge from indictment); *United States v. Fountain*, 777 F.2d 351 (7th Cir. 1985) (guilty plea invalid where government presents evidence establishing guilt of codefendant but makes no attempt to show how defendant is involved in offense and where, when asked to describe in own words what he has done, defendant merely recites indictment).

requirements of the Sixth Amendment as an element of the charged offense. As Justice Thomas noted in his concurrence: "One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element." *Id.* at 501 (Thomas, J., concurring). This understanding – that any factual determination that functions as an element is subject to constitutional requirements – was "reflected [in] the original meaning of the Fifth and Sixth Amendments." *Id.* at 518. Justice Scalia similarly explained that Sixth Amendment protections apply to not only explicit elements of the offense, but to "all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

Although *Jones*, *Apprendi*, *Ring*, and *Hurst* concerned the Sixth Amendment jury trial implications of such findings, this Court should address how the logic of this line of precedent applies to the specific context of a plea colloquy. *Henderson* requires that the trial record reflect that the defendant have notice and a genuine understanding of the charge against him, and that means, at a minimum, notice and understanding of the elements of the offense. This Court's jurisprudence makes clear that no matter what the State calls a functional element, any factual determination essential to the conviction is subject to constitutional protections, especially if it lies at the core of what we understand to be "core criminal offense 'element[s]." *Apprendi*, 530 U.S. at 493. Thus *Jones*, *Apprendi*, *Ring*, and *Hurst* compel the conclusion that

Henderson similarly requires that a defendant have notice and an understanding of the State's theory of vicarious liability when it is a "functional equivalent of an element" of the offense.

E. The presumption that a defendant represented by counsel has been properly informed of the nature and elements of the charge to which he is pleading should not apply to *pro se* defendants.

Ordinarily, the constitutional prerequisites for a valid plea are satisfied when the record contains "either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused." *Henderson*, 426 U.S. at 647. More recently, this Court has held that even without an express representation by counsel, "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of … what he is being asked to admit." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005).

However, when a defendant has waived counsel and is proceeding *pro se* at the time of the plea, as was the case here, no such presumption is appropriate. Instead, the record of the proceedings must reflect that the defendant was adequately informed of the nature and elements of the charge to which he is pleading guilty.

In the present case, the Texas Court of Criminal Appeals refused to recognize an increased responsibility to ensure that a *pro se* defendant understands the nature and elements of his charge before accepting a guilty plea. The CCA held that "[i]t is not the court's function to act as legal counsel for the appellant" where that appellant

waived the Sixth Amendment right to effective assistance of counsel. *Falk v. State*, No. AP-77,071, 2021 WL 2008967, at *17 (Tex. Crim. App. May 19, 2021).

Other state courts, however, have recognized that such circumstances render it necessary for a trial court to thoroughly advise an uncounseled defendant as to the nature and elements of his charge to ensure that their plea is made knowingly and voluntarily. For example, in *Martin v. State,* the Supreme Court of Indiana invalidated a guilty plea where the trial court failed to inform a defendant of a habitual offender penalty associated with that plea when "a competent attorney would have insisted that Petitioner be afforded the opportunity to withdraw his earlier plea because the requisite advisements about the penalty had not been made [but] Petitioner, completely unschooled in the law, could not have been expected to raise such an objection." *Martin v. State*, 453 N.E.2d 199, 202 (Ind. 1983).

Similarly, the Court of Appeals of Minnesota held that a prior conviction obtained by uncounseled plea could not be used to enhance a subsequent charge because the plea filing was insufficient to establish that the defendant understood the nature of his offense. *State v. Lyle,* 409 N.W.2d 549, 552 (Minn. Ct. App. 1987). The Court of Appeals reasoned that: "When a defendant is represented by counsel, it is generally presumed that he has been informed of the nature of the offense and of his alternative.... Where a guilty plea is uncounseled, however, the factual basis requirement is particularly important to show that the defendant has made a voluntary and intelligent plea." *Id.*

Additionally, the Court of Appeal of Louisiana, Second Circuit, vacated a conviction based on an uncounseled defendant's plea because the record failed to establish that the court had fully explained the nature of the charge, holding that "[a] trial court's on-the-record examination, especially of an uncounseled defendant, should include an attempt to satisfy itself that the defendant understands the nature of the charge, the acts sufficient to constitute the offense with which he is charged, and the statutorily permissible range of sentence." *State v. Graham,* 513 So. 2d 419, 421–422 (La. Ct. App. 1987).

While the CCA here dismissed the idea that courts accepting uncounseled guilty pleas possess an increased responsibility to ensure that a *pro se* defendant understands the nature and elements of a charge before pleading guilty, the holdings of other states described above demonstrate that Texas's approach is far from universal. Presuming that an uncounseled defendant pleading guilty understands the nature and elements of his charge is inappropriate unless the record establishes that the trial court adequately explained the charged offense.

F. Because Texas, like most states, does not require that accomplice or party liability be pled in the indictment, the indictment alone is necessarily insufficient to provide a defendant with the requisite notice and understanding of how his conduct and culpable mental state make him liable for an offense actually committed by a codefendant.

The CCA held that by providing Falk with a copy of the indictment the trial court satisfied its duty to ensure that Falk had "real notice of the true nature of the charge against him." *Falk*, 2021 WL 2008967 at *18.

Perhaps in most cases it is true that the indictment will give the defendant sufficient notice of the nature of the charge against him, because the indictment recites the acts the defendant is alleged to have committed that constitute the charged offense.[12] However, it is settled law in Texas, as in most other states, that the State's intent to rely on the law of parties need not be alleged in the indictment. *See Powell v. State*, 194 S.W.3d 503, 506 (Tex. Crim. App. 2006). Thus, the indictment in this case made no mention of it. Moreover, because Texas Penal Code § 7.01(b) allows "[e]ach party to an offense [to] be charged with the commission of the offense," the indictment alleged that Falk "intentionally or knowingly cause[d] the death of an individual, namely, Susan Canfield, by striking her with a motor vehicle or striking the horse she was riding with a motor vehicle," when in fact those allegations indisputably pertained to the acts and culpable mental state of Jerry Martin.

[12] The indictment can only serve that purpose if it is factually precise and sufficiently specific to show "the accused's conduct on the occasion involved was within the ambit of that defined as criminal." *Sassoon v. United States*, 561 F.2d 1154, 1158 (5th Cir. 1973), *cert. denied*, 416 U.S. 916 (1974) (quoting *Jimenez v. United States*, 487 F.2d 212, 213 (5th Cir. 1973), *cert. denied*, 416 U.S. 916 (1974)).

Consequently, while the indictment in this case provided Falk with notice of the elements of the offense committed by Martin, it failed to provide Falk with notice of the critical issue in his case: How his *own* acts and culpable mental state rendered him vicariously liable for an offense committed by Martin.

G. Conclusion.

Here, the law of parties was a critical element of the offense because absent its operation, Falk could not have been convicted of capital murder at all. It is undisputed that Falk did not murder Canfield. Thus, Falk could not have been convicted of a capital offense on the basis of his conduct alone, but only if, by virtue of the law of parties, he was legally responsible for Martin's lethal conduct.[13] And *Jones*, *Apprendi*, *Ring*, and *Hurst* dictate that any determination necessary to subject a defendant to a greater punishment is effectively an element of the offense, and thus subject to the requirements of the Fifth and Sixth Amendments. Because the law of parties was necessary for Falk to be convicted of a death-eligible offense, it is just as much subject to constitutional requirements as the sentencing enhancements and aggravating factors at issue in *Apprendi* and *Ring*.

The CCA's decision is squarely at odds with *Henderson*'s requirement that a defendant must "receive adequate notice of the offense to which he [is pleading] guilty." *Id.* at 64. As a constitutional matter, merely providing Falk a copy of an

[13] In a case that proceeds to trial, "the State is required to properly instruct the jury if it proceeds on a parties theory. *Where there is no charge on the law of parties a defendant may only be convicted on the basis of his own conduct*." *Goff*, 931 S.W.2d at 544.

indictment that alleges nothing but the criminal acts of his codefendant is insufficient to make Falk's guilty plea to that indictment "voluntary." Due process requires that the record reflect that Falk understood exactly what Texas would need to prove before he could be found legally responsible for Martin's acts that caused Canfield's death. As interpreted by the Texas Court of Criminal Appeals and applied in Falk's case, the Texas law of parties functions as an element of the offense. When a defendant seeks to plead guilty to an offense in which his criminal liability depends on the law of parties, it implicates the same constitutional protections as any other element.

This Court has explained how functional elements of a criminal offense implicate constitutional protections. It follows ineluctably from those decisions that a guilty plea is not knowing, voluntary, and intelligent if the defendant has no notice of, nor understands, a functional element of the crime to which he is pleading guilty.

II.

THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE DUE PROCESS CLAUSE REQUIRES SPECIAL PROCEDURAL SAFEGUARDS FOR A *PRO SE* DEFENDANT WHO SEEKS TO PLEAD GUILTY IN A CAPITAL CASE.

In *Brady v. United States*, 397 U.S. 742 (1970), this Court spoke of the "special care" that is required when guilty pleas are entered by defendants proceeding without the benefit of counsel:

> Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, this Court has scrutinized with special care pleas of guilty entered by defendants without the assistance of counsel and without a valid waiver of counsel. *See Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116

(1956); *Von Moltke v. Gillies*, 332 U.S. 708 and 727 (1948) (opinions of Black and Frankfurter, JJ.); *Williams v. Kaiser*, 323 U.S. 471.

Brady, 397 U.S. at 748 n. 6.

Even when a defendant has validly waived counsel, unique concerns arise when a defendant proceeds *pro se*. Particularly in a capital case – where the "punishment is unique in its severity and irrevocability," suitable only to the most extreme crimes and the most irredeemable offenders, *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) – a court must "scrutinize with special care" the proffered guilty plea of a *pro se* defendant. A *pro se* defendant who is acting with the express intention of obtaining a death sentence should not be given the power to choose death when his very death-eligibility is seriously in question. In an unusual situation like the one presented here, a *sua sponte* duty arises for a court to enforce the procedural safeguards that undergird the American adversarial system.

Courts and commentators alike have recognized and wrestled with the unique concerns presented by a defendant who may be seeking to subvert an adversarial determination of his guilt and/or punishment.[14] When a defendant may not be

[14] *See, e.g., Smith v. State*, 686 N.E.2d 1264, 1275 (Ind. 1997) (observing that society has "an interest in executing only [defendants] who meet the statutory requirements and in not allowing the death penalty statute to be used as a means of state-assisted suicide," though ultimately affirming the sentence in that case); *People v. Kinkead*, 660 N.E.2d 852, 861–62 (Ill. 1995) (explaining that the "[d]efendant's request for the death penalty might be viewed as a plea for State-assisted suicide, and we do not believe the Illinois trial courts and juries should be put in a position of granting such requests as a matter of a defendant's stated preference"); *Durocher v. Singletary*, 623 So.2d 482, 485 (Fla. 1993) (Barkett, C.J., concurring) ("[T]he State [interest] in imposing the death sentence transcends the desires of a particular inmate to commit state-assisted suicide"); *State v. Dodd*, 838 P.2d 86, 101 (Wash. 1992) (Utter, J., dissenting) ("To give paramount weight to Mr. Dodd's desires would, in effect, mean that the State is participating in Mr. Dodd's suicide"); *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) (refusing to allow execution of capital defendant

making rational decisions, or may be motivated by remorse to "volunteer" for a death sentence by pleading guilty to an offense of which he is not legally guilty or for which he is not death-eligible, the law must step in.[15] A particular punishment – especially the death penalty – should be imposed "only where necessary to serve the ends of justice, not the ends of a particular individual." *Whitmore v. Arkansas*, 495 U.S. 149, 172–73 (1990) (Marshall, J., dissenting).[16]

It is generally agreed that Due Process does not require a state court to establish the factual basis for a guilty plea absent "special circumstances," such as an "*Alford* plea,"[17] when a defendant pleads guilty and simultaneously proclaims his or her innocence.[18] The rationale for requiring a factual basis in the *Alford* scenario arises

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sentenced under invalid death penalty statute, noting that the defendant's right to waive certain rights "was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially this is so where, as here, to do would result in state aided suicide.").

[15] *See* Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 Am. J. Crim. L. 75 (2002); Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishme*nt, 32 Conn. L. Rev. 615, 617 (2000); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860, 896 (1983).

[16] *See also id.* at 172 ("Because a wrongful execution is an affront to society as a whole, a person may not consent to being executed without appellate review."); *Hammett v. Texas*, 448 U.S. 725, 732 (1990) (Marshall, J., dissenting) ("The defendant has no right to 'state-administered suicide'") (quoting *Lehnard v. Wolff*, 444 U.S. 807, 815 (1979)) (Marshall, J., dissenting).

[17] *North Carolina v. Alford*, 400 U.S. 25 (1970).

[18] *See*, *e.g.*, *Loftis v. Almage*r, 704 F.3d 645, 650 (9th Cir. 2012) ("While *Alford* did not explicitly hold that a factual basis was constitutionally necessary, lower federal courts have drawn from … language [in *Alford*] the requirement that if a defendant pleads guilty while claiming innocence the trial court must find a factual basis"); *United States v. McGlocklin*, 8 F.3d 1037, 1047–48 (6th Cir. 1993) (en banc) ("This circuit has long recognized that, absent special circumstances, 'there is no constitutional requirement that a [state] trial judge inquire into

out of a concern that a defendant who pleads guilty while simultaneously claiming innocence may not be acting freely and voluntarily. *See*, *e.g.*, *Willett v. Georgia*, 608 F.2d 538, 540 (5th Cir. 1979) (noting the "'importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice'") (quoting *Alford*, 400 U.S. at 38 n. 10.) Therefore, when a defendant pleads guilty but protests his innocence, the court resolves the conflict between the defendant's plea and assertion of innocence by determining that there is a factual basis for the plea of guilt.

Cases in which a capital defendant seeks to enter a guilty plea with the express or apparent objective of being sentenced to death present similar concerns. *Alford* pleas have come to be colloquially referred to as "best interest" pleas, because the defendant, though maintaining innocence, is motivated to accept a plea bargain to receive a reduced sentence rather than risk imposition of a higher sentence at trial. Yet precisely because a death sentence is qualitatively different than a sentence of incarceration, there is a unique risk in capital cases that some defendants, notwithstanding substantial questions about culpability or death-eligibility, may

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the factual basis for a plea'"); *Rodriguez v. Ricketts*, 777 F.2d 527, 527–28 (9th Cir. 1985) ("We conclude that the due process clause does not impose on a state court the duty to establish a factual basis for a guilty plea absent special circumstances. We do not address a case where special circumstances exist, for example, a defendant's specific protestation of innocence, which might impose on a state court the constitutional duty to make inquiry and to determine if there is a factual basis for the plea.); *Wallace v. Turner*, 695 F.2d 545, 548 (11th Cir. 1983) ("We join these circuits and hold that the due process clause does not impose a constitutional duty on state trial judges to ascertain a factual basis before accepting a plea of guilty or nolo contendere that is not accompanied by a claim of innocence. Such pleas do not present the issue of voluntariness, the fundamental constitutional consideration when evaluating the validity of a plea, that is raised by pleas coupled with claims of innocence."); *Willett v. Georgia*, 608 F.2d 538, 540 (5th Cir. 1979) (it is constitutional error for a state judge to accept a guilty plea when the defendant protests his innocence without determining that a factual basis for the plea exists).

wish to plead guilty in order to be sentenced to death rather than risk imposition of a life sentence at trial.

Here, the record reflects that the trial court was aware that Falk may have been seeking to enter the plea simply as a way to ensure that he would be sentenced to death. When Falk first expressed the desire to represent himself, his then-counsel represented to the trial court: "He just wants to not live in prison for the rest of his life. He just wants to die." RR 11:137. Then, the day before accepting Falk's guilty plea, the trial court itself acknowledged the following on the record:

> I think it's apparent to all of us [that Falk] is not pursuing a defense in this case. It's apparent that he desires to be found guilty of capital murder and the jury assess the death penalty in this case, so we have the right to self-representation….
>
> It's thought that in order for the State to kill someone legally, to execute someone, take their life, that all of these hurdles would be cleared in a true adversarial, hard fought context. We're not going to have that here…. It is a form of suicide that we're looking at. It's expected that the thought of Mr. Falk is that he would rather be executed than live in Administrative Segregation for the remainder of his life in the Texas Department of Criminal Justice Institutional Division….

RR 19:132–133.

On such facts, due process forbade the court from accepting Falk's guilty plea absent an affirmative showing that Falk's conduct was sufficient to make him liable as a party for the capital murder of Officer Canfield. Fundamental concerns about the reliability of verdicts have led courts to identify the *Alford* plea scenario as a "special circumstance" – and to conclude that due process demands a factual basis before a court may accept a guilty plea from a defendant who is simultaneously claiming innocence. Those same reliability concerns were implicated here, where

Falk was asking the Court to accept his guilty plea to capital murder in the absence of any evidence about the specifics of his own conduct, and where the trial court was aware that Falk had not actually caused Officer Canfield's death and that he may have simply been entering the plea in order to be sentenced to death.

The unusual circumstances of this case placed the trial court on notice that there existed a special need to ascertain an adequate factual basis for Falk's guilty plea. Its failure to do so raises the question whether Falk's resulting conviction and death sentence violate the Due Process Clause. This Court should grant review to decide this important and unresolved question of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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