No. 21-6073

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 Texas Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

1. Does the Due Process Clause require a new rule of guilty plea admonishment in the unusual, and unlikely to be repeated, situation where a defendant faces a possible death sentence, validly waives his right to counsel, and is, factually, a party to the offense?

2. Should the Court create a discrete, and almost singular, constitutional rule that pro se defendants who have validly waived their Sixth Amendment right to counsel and are, factually, parties to a capital murder in which the State seeks death, cannot plead guilty absent the trial court's ascertainment of a factual basis supporting the offense?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner John Ray Falk, Jr., is an unusual criminal defendant. Falk was charged in 2008 along with his co-defendant, Jerry Martin, for the capital murder of Texas Department of Criminal Justice (TDCJ) Officer Susan Canfield while escaping a penal institution. Falk initially went to trial in 2012, but after both the State and the defense presented the entirety of their guilt-phase cases, the trial ended in a mistrial. Falk was then re-indicted in 2015. Two weeks into voir dire, however, Falk exercised his constitutional right to represent himself and waived the assistance of counsel. Now pro se, Falk sat through and at times participated in another week of voir dire before ultimately deciding to plead guilty. A jury subsequently sentenced Falk to death. The Texas Court of Criminal Appeals (CCA) affirmed Falk's conviction and sentence in an unpublished opinion on direct appeal.

Falk now comes to this Court regretting his decision to represent himself and seeking certiorari review of the CCA's decision on two issues. First, he asks this Court to hold that the Due Process Clause requires that a capital pro se defendant be admonished during his guilty plea colloquy on the precise way that the law of parties applies to his case. Second, he asks this Court to hold that a trial court must ascertain the factual basis of a capital pro se defendant's guilty plea when such defendant may be seeking to hasten a death sentence.

This Court should not grant certiorari review of the questions Falk presents. Falk fails to demonstrate that either question is an important or recurring issue in light of the unusual circumstances of his case. Further, Falk's case presents a poor vehicle to review the first question presented because it turns on an antecedent issue of state law and raises arguments that were not raised in the court below. Importantly, Falk's allegation that a split exists between the CCA and other state high courts or federal courts of appeal on the first question presented is spurious, and he fails to allege any conflict whatsoever on the second question presented. Finally, the CCA's decision on both of Falk's claims was correct. Certiorari should thus be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

On September 24, 2007, Falk and fellow inmate Jerry Martin were assigned to work on a field outside the prison's main perimeter fence but adjacent to the City of Huntsville Service Center (Service Center). 20 RR 103–07, 125–26, 134. Falk and Martin, who were friends that usually worked together on the field, were part of a squad that Officer Joe Jeffcoat oversaw. 20 RR 112, 133–34. Officer Susan Canfield, another one of seven officers present on the field that day, was known as the "high rider," a guard on horseback that was the "last line of defense" in the event of an escape attempt. 20 RR 81, 108,

133, 136. The high rider carried a .357 revolver with six bullets, but additionally carried a .223 rifle with four rounds. 20 RR 84, 136.

After working on the fields for a bit, Martin approached Officer Jeffcoat, under the guise of asking Officer Jeffcoat to hold his broken watch. 20 RR 136–37. As Martin approached, Officer Jeffcoat heard something to his left, and he turned to see Falk walking towards him. 20 RR 138–39. When Officer Jeffcoat turned back towards Martin, Martin was at his side reaching for his revolver. 20 RR 139. Martin and Officer Jeffcoat struggled over the revolver. *Id*. Falk then grabbed Officer Jeffcoat's left foot and threw him out of his saddle towards Martin. *Id*. Martin succeeded in relieving Officer Jeffcoat of his revolver. *Id*. Officer Jeffcoat then began to wrestle with Martin, but Falk approached and Martin tossed the revolver to him. 20 RR 139–40. Falk pointed the revolver at Officer Jeffcoat's head. 20 RR 140. Officer Jeffcoat heard his superior, Sergeant Larry Grissom, yell for him to get down, so he did. *Id*.

Martin and Falk then fled through the barbed-wire fence that separated the Service Center from prison property, and Officer Jeffcoat heard gunshots. 20 RR 101–02, 140, 147. Officer Canfield fired at Falk, and Falk aimed the revolver and fired back at Officer Canfield. 20 RR 114–115, 140–41. Officer Jeffcoat then observed Falk at Officer Canfield's side, trying to take her rifle from her. 20 RR 115. Falk shoved the pistol into Officer Canfield's ribs, at which point Officer Canfield stopped struggling with Falk over the rifle,

allowing Falk to get the rifle from the scabbard on Officer Canfield's saddle. 20 RR 141. As Falk backed away, Officer Jeffcoat heard an engine revving at high speed and saw a truck strike Officer Canfield and her horse. 20 RR 116–142; 21 RR 46. The truck was a one-ton, flat-bed pick-up truck with toolboxes on the side parked outside the Service Center. 21 RR 28, 62–64, 76. Martin was driving the truck. 21 RR 28, 76.

Officer Canfield and the horse went up onto the hood of the truck, and her head struck the truck's roof while her body hit the windshield. 20 RR 142; 21 RR 15. Officer Canfield was then launched into the air and landed on her head and shoulders. 20 RR 142. It was determined that Officer Canfield died from a significant impact that caused an unsurvivable hinge fracture to her skull from ear to ear. 22 RR 31–34, 41. Officer Canfield also sustained a depressed skull fracture as well as external injuries including bruising and lacerations to her head, hands, arms, trunk, and legs. 22 RR 27–28. A necropsy performed on Officer Canfield's horse, which had to be euthanized, revealed that the horse had extensive injuries from a bullet wound, plus trauma to its left hip, scrapes on its hips and hock, and a swollen joint on its front leg from the impact. 22 RR 165–67, 100. Ballistics expert testimony established that a comparison of the bullet retrieved from the horse showed that it came from the revolver fired by Falk (Officer Jeffcoat's revolver). 22 RR 184–87.

After striking Officer Canfield and her horse, Martin stopped the truck, and Falk got in on the passenger's side before leaving the city property. 20 RR 143–45; 21 RR 47–48. After a chase of the two inmates ensued, 21 RR 74–79, the inmates switched vehicles at a nearby bank, 21 RR 91–92, 96. Falk and Martin ran up to a red pickup truck that was in the bank drive-thru lane, and Falk pointed a rifle at the female driver, taking her hostage and stealing her vehicle. 21 RR 96–98. Falk and Martin were then pursued by police until they exited the highway onto a grassy field and fled from the vehicle on foot amidst an exchange of gunfire. 21 RR 100–01, 103–32. Falk was eventually found behind a Walmart on the other side of the wooded area. 21 RR 147–49. Martin was discovered hiding in a tree, wearing only his underwear. 21 RR 154–55.

II. Falk's First Trial in 2012

Falk was originally indicted on March 25, 2008, in Walker County, Texas, but venue was transferred to Brazos County. 2 CR 192, 221.[1] Both the State and the defense presented the entirety of their guilt-phase cases. *See Ex parte Falk*, 449 S.W.3d 500, 508–09 (Tex. App.—Waco 2014, pet. ref'd). During the charge conference, the court refused to submit to the jury a parties

[1] "CR" refers to the Clerk's Record in the present case, preceded by volume number and followed by page number. Where the clerk's record is a supplemental record, such is denoted with "CR.Supp." and followed with the filing date. "RR" refers to the Reporter's Record of transcribed proceedings in the present case, preceded by volume number and followed by page number.

instruction under Texas Penal Code § 7.02(a) because it did not believe there was evidence to support such an instruction. *In re State ex rel. Weeks*, 391 S.W.3d 117, 120 (Tex. Crim. App. 2013). The court also overruled the State's objection to its proposed conspiracy-theory parties instruction under Texas Penal Code § 7.02(b), an instruction which would have required the State to prove that Falk anticipated the specific manner and means by which Martin killed Officer Canfield, i.e., with a truck or by the horse she was riding being struck by a truck. *Id*. at 120–21.

The State then successfully sought mandamus relief. *In re State ex rel. Weeks*, 391 S.W.3d at 126. But after the trial proceedings resumed—fifty-five days later—the court ordered a mistrial. *See Ex parte Falk*, 449 S.W.3d at 503.

III. Falk's 2017 Trial Prior to His Guilty Plea

Falk was re-indicted in Walker County, Texas, for capital murder on June 25, 2015. Pet. App. 49a; 3 RR 4. At his arraignment, Falk affirmed that he "[a]bsolutely" understood the charges against him and waived a reading of the allegations. 2 RR 3–4. A copy of the new indictment was provided to Falk upon his request. 2 RR 4. The trial court gave Falk an opportunity to review it, after which Falk's then-counsel stated that Falk didn't "have any objection to this particular indictment[.]" *Id*. Falk pled not guilty. 3 RR 4.

Voir dire began on January 17, 2017. 5 RR 1. The Court began with a general voir dire, indicating that the law of parties may be a relevant issue in

this case, and read the indictment to the jury. 5 RR 84. During the State's general voir dire, it extensively discussed the law of parties. 5 RR 99–102. The State explained its burden as follows:

> These are the things that the State is going to have to prove to you; that on or about September 24th, 2007, John Falk, Jr, either acting alone, or as a party to the offense, intentionally or knowingly caused the death of Susan Canfield, by striking her, or the horse that was she was riding, with a truck, while escaping form a penal institution; to wit: The Wynne Unit, which is a penal institution located in Walker County, so when you get the Charge from the Judge, those are the things that we, on behalf of the [S]tate of Texas, are going to be required to prove to you. That's the list.

5 RR 102. The State also discussed Texas's anti-parties punishment special issue, a special issue that is only submitted to the jury when a defendant is convicted as a party. *See* 5 RR 113–15; Tex. Code Crim. Pro. 37.071 § 2(b)(2) ("in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."). Defense counsel also discussed the law of parties. *See* 5 RR 123–24.

The parties then conducted individual voir dire, during which both parties, including Falk's then-counsel, further discussed the law of parties. *See, e.g.*, 6 RR 18–24, 45–47, 85–88, 107–08. But two weeks into jury selection, Falk indicated that he wished to waive counsel and represent himself. 11 RR

132–33. The Court conducted a hearing under *Faretta v. California*, 422 U.S. 806 (1975). 11 RR 137–50. At Falk's request, 11 RR 141, the Court appointed Falk's then-current counsel as standby counsel, 11 RR 155. The Court found that Falk knowingly and voluntarily waived his right to counsel. 11 RR 155.

But the next morning Falk's attorneys argued that the court should order an examination to assess whether Falk was competent under *Indiana v. Edwards*, 554 U.S. 164 (2008). 12 RR 4–5, 13–14, 24, 27–28, 37; 5 CR 763–64. In support, counsel presented an affidavit from defense mitigation expert Dr. Jolie Brams, who opined that Falk must undergo a competency evaluation. 12 RR 19; 5 CR 765–774. Over Falk's objection, the Court appointed independent expert Dr. Mary Conroy to examine Falk. 12 RR 40, 56–57; 5 CR 776–77. Dr. Conroy found that Falk was competent to stand trial and to represent himself. CR.Supp. (filed Aug. 22, 2018) 13; 14 RR 9. The Court accepted Falk's waiver of counsel and allowed him to proceed to pro se. 14 RR 9; 5 CR 909–10.

Voir dire then resumed. During Falk's pro se voir dire, Falk personally questioned several veniremembers about law of parties or the anti-parties special issue. Notably, Falk asked veniremember Gray the following:

> MR. FALK: Ms. Gray, I'm John Falk, and the prosecutors have explained the law of parties to you, but what you're telling the prosecutors is that you wouldn't follow the law, that you would go with your own opinion about the law, or—
>
> PROSPECTIVE JUROR: A person has to go with the law of the land, okay, and if selected for a jury, I would have to go with how

> I feel then. Okay, guilty by association, but not charged with the same crime as person who actually pulled the trigger, or whatever—however the situation was. That's the way I feel.
>
> MR. FALK: So you would hold it the same standard as guilt? In your mind it wouldn't be the same standard as guilt—even though we all participated in the same crime, in your mind you wouldn't hold the same level of guilt, so you couldn't apply the law equally to all of the parties of the crime, but that you would hold the one who's actually the killer in the case, more accountable than the one who was just actually participating?
>
> PROSPECTIVE JUROR: That's exactly what I'm saying, and if I may say, if [District Attorney David] Weeks actually pulled the trigger, yes, he's guilty of capital murder; okay? The map drawer is guilty but to a lesser charge, so is the getaway driver.

16 RR 45–46. Following this, Falk and the State agreed to excuse Gray. 16 RR 46. Falk also questioned veniremembers Nerren, Walker, and Crager about their understanding of the anti-parties special issue. *See* 17 RR 54–55, 194–95; 19 RR 23–24. Voir dire then ended on February 21, 2017. 19 RR 143.

IV. Falk's Guilty Plea and Sentence

On what was expected to be the first day of the State's case in chief, Falk indicated his desire to plead guilty. 20 RR 9. In the jury's presence, the State read the indictment, and Falk pleaded guilty. Pet. App. 55a–56a; 20 RR 14–15. Out of the presence of the jury, the Court admonished Falk on the charges against him and the maximum range of punishment associated with capital murder. Pet. App. 57a. The Court questioned Falk under oath about whether he was mentally competent and understood the nature of the charges against

him; Falk affirmed that he did. *Id*. at 58a. The Court found that "based on all of the evidence and proceedings in this case," Falk was "mentally competent and [understood] the nature of the charges against [him]." *Id*. at 54a, 58a.

Importantly, Falk confessed both orally and in writing to the indictment. *Id*. at 53a, 60a–61a. What's more, Falk also stipulated both orally and in writing to the following:

> . . . I hereby agree and confess that all of the acts and allegations in said 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 [sic] the death of an individual; namely, Susan Canfield, by striking her, or the horse she was riding, with a vehicle, and the Defendant was then and there escaping, or attempting to escape from a penal institution, Texas Department of Criminal Justice, Wynne Unit.

Pet. App. 53a (emphasis added), 61a. The State offered as evidence supporting his plea Falk's signed and initialed stipulations and waivers. *Id*. at 68a.

The Court accepted Falk's guilty plea and found Falk guilty of capital murder. Pet. App. 68a. The State then presented its punishment case to the jury. 23 RR 99. On March 1, 2017, the jury answered the special issues in such a way that death was imposed. 24 RR 41–43; 6 CR 940–42.

V. Falk's Appeal

Falk's appealed his conviction and sentence to the CCA. He raised, as relevant here, three points of error relating to the propriety of his guilty plea. First, he argued that his guilty plea was constitutionally invalid because he

was not admonished on the application of the law of parties to his case. *See* Pet. App. 33a–36a. Second, he argued in two intertwined points of error that there was an insufficient factual basis for his plea, and that such violated both Texas statute and federal due process. *Id*. at 36a.

The CCA rejected all three points of error. As to the involuntary-plea contention, it held that, because Falk received a copy of the indictment before pleading guilty, a rebuttable presumption of voluntariness applied. *Id*. at 33a–35a. The CCA rejected the notion that a trial court must "explain the intricacies of an implicated legal doctrine to a defendant before the court may accept the defendant's plea," holding that neither it nor this Court had ever so held. *Id*. at 34a. The CCA also specifically rejected Falk's argument that party liability was an element of capital murder, noting that it had "never held that, for a guilty plea to comport with due process, the trial court must provide notice of the charge that resembles what would appear in the hypothetically correct jury charge." *Id*. at 35a, n.8. The CCA concluded that Falk failed to rebut the presumption of voluntariness because he marshalled no affirmative evidence of ignorance, pointing instead to alleged omissions by the trial court. *Id*. at 36a.

As to the factual-basis contentions, the CCA turned first to the state-law issue, finding that Falk's written stipulation was a sufficient factual basis under Texas statute because it embraced every constituent element of capital murder under Texas Penal Code § 19.03(a)(4). Pet. App. 37a–38a. Turning

then to Falk's constitutional argument, the CCA noted at the outset that the requirement that trial courts ascertain the factual basis of a guilty plea before acceptance "is purely a creature of state law" and "has no federal constitutional grounding." *Id*. at 38a. The CCA nonetheless rejected Falk's constitutional argument, holding that his judicial confession to the offense as either principal or party was evidence to support his guilty plea even if such were constitutionally required. *Id*. at 39a. The CCA distinguished Falk's case from *North Carolina v. Alford*, 400 U.S. 25 (1970), upon which Falk relied, finding that, unlike *Alford*, there was no "factual and legal dispute between [Falk] and the State." Pet. App. 39a (quoting *Alford*, 400 U.S. at 32).

Falk then petitioned this Court for certiorari review, asking the Court to fill in alleged gaps in federal constitutional law. This proceeding follows.

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied On the First Question Presented.

Falk asks this Court "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 posses an understanding, of the law of vicarious or 'party' liability by which he is deemed responsible for his codefendant's acts." Pet. Writ Cert. 17. But Falk provides no compelling reason to expend limited judicial resources on this case, *see* Sup. Ct. R. 10(a)–(c), and his petition should be denied.

A. The question presented is not an important, recurring issue because of the unusual circumstances of Falk's case.

Falk argues that this Court should determine, for the first time, that due process requires that a pro se defendant pleading guilty to an offense in which he is factually a party must be admonished about how the law of parties applies to his case. Pet. Writ Cert. 16. Falk's only attempt to establish that this question is important is to argue in his introduction that the Court's "guidance is urgently needed." *See* Pet. Writ Cert. 4. He never again attempts to establish the importance of this issue—he entirely fails to show how the rule he seeks would impact the states or the federal courts, he fails to show that his rule would affect any other litigants aside from Falk, and he fails to demonstrate that this issue is a recurring one.

Indeed, Falk cites no case that holds that a capital pro se defendant pleading guilty must be admonished on the application of the law of parties to his case. He instead points to an array of disparate cases consisting of unpublished opinions and opinions from intermediate courts of appeals. *See, e.g.*, Pet. Writ Cert. 20 n.10 (citing *State v. Toma*, 364 P.3d 535, 2015 WL 9303983 (Haw. 2015) (unpublished); *State v. Teal*, 73 P.3d 402 (Wash. Ct. App. 2003); *State ex rel. V.T.*, 5 P.3d 1234 (Utah Ct. App. 2000); *Smith v. State*, 795 So.2d 788 (Ala. Crim. App. 2000); *Baker v. State*, 905 P.2d 479 (Alaska Ct. App. 1995)); *id.* at 23 n.11 (citing *United States v. Satamian*, 40 F. App'x 405 (9th

Cir. 2002) (unpublished)); *id.* at 26–27 (citing *State v. Lyle*, 409 N.W.2d 549 (Minn. Ct. App. 1987); *State v. Graham*, 513 So.2d 419 (La. Ct. App. 1987)). To be sure, the fact that Falk marshals so many intermediate appellate and unpublished opinions shows that the issue *hasn't* become important enough for state or federal courts to address it. This is further highlighted by the fact that not a single case Falk cites in his brief was even decided in the last decade. *See generally* Pet. Writ Cert.

Falk likely cites no case holding that pro se, capital defendants pleading guilty must be admonished on the law of parties because there is none, and in that he fails to establish the importance of the question presented in another regard: the rule he seeks would affect few other litigants besides Falk. Indeed, Falk twice characterizes his case as "unusual." *See* Pet. Writ Cert. 31 ("In an unusual situation like the one presented here . . ."), 35 ("The unusual circumstances of this case placed the trial court on notice . . ."). And he's right about that for several reasons.

First, unlike the overwhelming majority of guilty plea defendants, Falk sat through the entirety of the guilt phase presentation—in which both the State *and* the defense presented their cases in chief—in a prior trial before he pled guilty to the same offense. *See* Statement of the Case II, *supra*. It's this very fact which permits Falk to reverse logic his way into limiting the theories of liability applicable to his case, an argument he in turn uses to elevate party

liability to the status of an element of capital murder requiring notice at the guilty plea stage. Second, Falk is a capital defendant who validly exercised his right to represent himself at trial in a death penalty case, another rarity. Third, Falk is a capital defendant who validly waived counsel before pleading guilty to capital murder. This too is exceedingly rare.[2] Fourth, Falk is a capital defendant who validly waived counsel before pleading guilty to a capital murder in which he was, factually, a party, yet another rarity.

Given these "unusual" circumstances, Falk falls far short of showing the type of important question that has an effect on litigants whose last names aren't Falk. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("[T]his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (holding that it is "very important" that certiorari not be granted when a petition involves issues important to the "parties" but not "of importance to the public"); *see also* Chief Justice William H. Rehnquist, *The Supreme Court* 234 (2d ed. 2001) ("Another important factor is the perception of one or more justices that the lower-court

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[2] Indeed, the State of California doesn't even permit a capital defendant to plead guilty without counsel or the consent of counsel. *See People v. Frederickson*, 457 P.3d 1, 21 (Cal. 2020) (rejecting the notion that California Penal Code § 1018, which prohibits a plea of guilty to an offense for which the maximum punishment is death from a defendant who appears without counsel or lacks the consent of counsel, could be complied with if the defendant validly waives counsel under *Faretta*). This further undermines any argument that the issue Falk presents is likely to reoccur.

decision may well be . . . of general importance beyond its effect on these particular litigants."). And the unique circumstances of Falk's case also make it unlikely the question he presents will be a recurring issue. *See Clay v. United States*, 537 U.S. 522, 524 (2003) (granting certiorari review based on a "recurring question"); *Rice*, 349 U.S. at 74 ("'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.").

Falk's unique case also occurs against another background fact undermining the likelihood of recurrence: the number of new death sentences imposed per year has dropped dramatically in the last several decades. *See* Death Penalty Information Center, *Facts about the Death Penalty* 3, https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf (last updated Jan. 3, 2022) (223 new death sentences were imposed in 2000 compared to just 18 in 2021). In Texas, only four people—including Falk—were sentenced to death in 2017, only six in 2018, five in 2019, two in 2020, and three in 2021. *See* Tex. Dep't Crim. Justice, *Inmates on Death Row*, Death Row Information, https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html (last updated Jan. 6, 2022). Given the dearth of analogous cases, the "unusual" circumstances of Falk's case, and the decreasing number of death penalty cases, Falk essentially asks the Court for a rule personal to him. The Court should not expend resources on such a singular request.

B. The question is not important because Falk's rule would not benefit even him.

Not only would Falk's proposed rule apply to few litigants besides him, it wouldn't even benefit him. Indeed, Falk's request that the Court create a new due-process rule for guilty plea admonishment entirely ignores that, on the record in this case, it would strain credulity to believe that Falk did not have an understanding of the law of parties.

Namely, Falk sat through the entirety of the State's guilt-phase presentation in 2012, a presentation which, as Falk argued in the court below, "clearly established" that "the State was proceeding on a theory that Mr. Falk did not actually cause the death of Officer Canfield but was instead legal[ly] responsible under the law of parties for acts committed by" Martin. Corrected Br. of Appellant (Appellant's Br.) 184, *Falk v. State*, No. AP-77,071, 2021 WL 2008967 (Tex. Crim. App. May 19, 2021). Falk was thus well acquainted with the law of parties' application to his case based on his first trial alone.

But even if the first trial was insufficient to establish Falk's knowledge, the second trial provides ample evidence. During his arraignment, Falk was provided with the 2015 re-indictment after he indicated that he "[a]bsolutely" understood the charges against him. *See* Statement of the Case III, *supra*. He then sat through thirteen days of voir dire in which the judge, the State, and his own counsel repeatedly discussed the law of parties. *See id*. Crucially, Falk

asked four different veniremembers about their understanding of law of parties and the anti-parties special issue—a special issue which again comes into play *only* when a defendant is convicted as a party. *See id*. (citing 16 RR 45–46; 17 RR 54–55, 194–95; 19 RR 23–24). In the face of this direct evidence of Falk's understanding of the law of parties, it blinks reality to believe that Falk didn't understand it, even if such an understanding were constitutionally required. This Court should not grant certiorari when the question on which Falk seeks review is not even important in his case.

C. His case is a poor vehicle to address the question presented because it turns on an antecedent issue of state law.

The foundation of Falk's argument that due process requires admonishment on the law of parties is that the law of parties "functions as an element of the offense in criminal prosecutions in which it is implicated." Pet. Writ Cert. 19. Falk argues that it is "universally recognized" that party liability is the functional equivalent of an element and is therefore subject to the constitutional requirements of notice, unanimous jury determination, and proof beyond a reasonable doubt. *Id*. at 19–20. Falk believes that the CCA 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.'" *Id*. at 20 (quoting *In re State ex rel. Weeks*, 391 S.W.3d at 124).

But the CCA rejected Falk's argument, holding "*Weeks* made this statement in the context of the hypothetically correct jury charge, and [it has] never held that, for a guilty plea to comport with due process, the trial court must provide notice of the charge that resembles what would appear in the hypothetically correct jury charge." Pet. App. 35a, n.8. This holding reflects a precept that Falk acknowledges—party liability "is generally not required to be pled in the indictment." *See* Pet. Writ Cert. 19. That's because, contrary to Falk's argument, party liability is "not the penal provision[] that define[s] the offense of capital murder; [it does] not identify the elements or gravamen of that offense." *See Leza v. State*, 351 S.W.3d 344, 357 (Tex. Crim. App. 2011). Rather, party liability "describe[s] alternative means by which an accused may be held accountable for the conduct of another who has committed the constituent elements of a criminal offense." *Id*.

Thus, before the Court can decide whether the Constitution requires any special treatment in guilty plea admonishments, it would have to decide that the CCA's interpretation of its own state law is incorrect. Stated differently, the Court would have to determine that, as a matter of Texas state law, party liability is an element of capital murder where the facts of a case *might* implicate it,[3] even when the State has been relieved of its burden to put on its

[3] The State here notes an inherent difficulty in making this determination. Falk's case is unusual in that, despite party liability not being pled in the indictment,

case and evidence by a defendant's guilty plea. The Court would effectively have to rewrite Texas's penal code from the bench, elevating mere "alternative means" of criminal responsibility to the status of statutory element of a crime.

The Court should decline Falk's invitation to constitutionalize party liability. The States have a "paramount role . . . in setting 'standards of criminal responsibility.'" *See Kahler v. Kansas*, 140 S.Ct. 1021, 1028 (2020) (quoting *Powell v. Texas*, 392 U.S. 514 (1968)). The Court acknowledged that in *Powell*, it upheld Texas's decision not to "recognize 'chronic alcoholism' as a defense to the crime of public drunkenness" because it "refus[ed] to impose 'a constitutional doctrine' defining those standards." *Id.* (quoting *Powell*, 392 U.S. at 517, 535–36). "'[D]octrine[s] of criminal responsibility' must remain 'the province of the States.'" *Id.* (quoting *Powell*, 392 U.S. at 534, 536). Applying *Powell*, the Court declined to require Kansas to "adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong," as "[t]hat choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds." *Id.* at 1037. This applies equally to Falk's claim that Texas must consider party liability an element of capital murder. The

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Falk was aware of the State's theory of the case because he sat through an entire trial in which the State presented that exact theory. But Texas, like many other states, does not require party liability to be pled in an indictment; thus, it cannot be said that the State's case would be so obvious at the guilty plea stage in the usual case.

Court should not grant certiorari where it would have to wade through antecedent issues of state law to reach the result Falk wants.

D. This case suffers a vehicle problem because it raises an argument that Falk did not present to the court below.

Falk's case is a poor vehicle to address the question presented for a second reason—it raises arguments that were not raised below. Specifically, Falk argues that his rule is compelled by the logic of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. Pet. Writ Pet. 23–25 (citing *Apprendi* and *Jones v. United States*, 526 U.S. 227 (1999); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Hurst v. Florida*, 577 U.S. 92 (2016)). He argues that these cases "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." *Id.* at 29. "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*." *Id.*

Not only is this argument wrong, *see* Argument I.F, *infra*, it was never presented to the CCA. Indeed, not once in his 330 total pages of briefing in the lower court did Falk cite to *Jones*, *Apprendi*, *Ring*, or *Hurst*. *See generally* Appellant's Br., *Falk v. State*, No. AP-77,071, 2021 WL 2008967 (Tex. Crim. App. May 19, 2021); Reply Br. of Appellant, *Falk v. State*, No. AP-77,071, 2021

WL 2008967 (Tex. Crim. App. May 19, 2021); Appellant's Resp. to State's Supp. Authorities and Post-Argument Br., *Falk v. State*, No. AP-77,071, 2021 WL 2008967 (Tex. Crim. App. May 19, 2021). He didn't ever ask the CCA to "address how the logic of this line of [Sixth Amendment jury trial] precedent applies to the specific context of a plea colloquy." Pet. Writ Cert. 24. And he certainly didn't argue that these cases "compel the conclusion" that a defendant must have notice and understanding of the State's theory of party liability because it is analogous to "the sentencing enhancements and aggravating factors at issue in *Apprendi* and *Ring*." *Id*. at 29. Because the court below was not presented with, and did not pass upon, Falk's argument, this case presents a poor vehicle for reviewing the question that Falk presents.

E. Falk's allegation of a split is illusory.

Falk purports to identify a split between the CCA and other state courts of last resort or between the CCA and federal courts of appeals. *See* Pet. Writ Cert. 21. Lacking any singular case that holds that the Constitution requires that a capital pro se defendant pleading guilty must be admonished on law of parties, he points to three disparate groups of cases that, when combined, he believes could demonstrate a conflict between the CCA and other jurisdictions. First, he argues that, unlike the CCA, other courts have recognized that law of parties is an element subject to the constitutional requirement of notice. *See id*. at 19–20, 20 n.10. Second, he argues that, unlike the CCA, other courts

have concluded that a guilty plea is 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." *Id.* at 21–23, 23 n.11. Third, he argues that, unlike the CCA, other state courts have recognized a responsibility of the "trial court to thoroughly advise an uncounseled defendant as to the nature and elements of his charge." *Id.* at 26–27.

But even a cursory inspection of the cases Falk cites demonstrates that Falk's supposed conflict is illusory. Initially, many of the cases Falk relies on are either unpublished or are not final cases from a state court of last resort. *See* Argument I.A, *supra*; *see* Supp. Ct. R. 10(b) (the Court may choose to exercise its discretion to grant certiorari review where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of *another state court of last resort* or of a United States court of appeals" (emphasis added)). Regardless, Falk presents no true conflict.

1. Cases related to whether law of parties is an element

None of the cases Falk cites holds that party liability must be pled in an indictment or that it constitutes an element that must be noticed in an indictment. To the contrary, of the seven cases Falk cites, four hold otherwise. *See Toma*, 2015 WL 9303983, at *8 ("[A]ssault as a principal and assault as an accomplice are not separate offenses but different theories of liability for the same offense. Accomplice liability does not need to be charged to comply with

notice requirements because it is not a crime but a theory of culpability."); *Teal*, 73 P.3d at 407 (holding "elements of the crime are the same for both a principal and an accomplice" and "charging the accused as a principal is adequate notice"); *Smith*, 795 So.2d at 824 (holding "one charged as a principal may be convicted as an accomplice" even if not noticed in the indictment); *Baker*, 905 P.2d at 488 (defendant on notice that can be convicted as accomplice when charged as principal). The CCA has similarly held. *See Marable v. State*, 85 S.W.3d 287, 287 (Tex. Crim. App. 2002) (en banc) (rejecting claim that appellant lacked sufficient notice because State did not allege in indictment that it would rely on law of parties).

The rest are inapposite, dealing primarily with jury-instruction-error and insufficient-evidence claims. *See State v. Milton*, 821 N.W.3d 789, 806 (Minn. 2012) (holding trial court erred in failing to give accomplice liability instruction where defendant was charged as an accomplice); *State v. Hill*, 974 A.2d 403, 416–17 (N.J. 2009) (holding jury charge, known as "*Clawans* charge," which permitted jury to draw a negative inference from defendant's failure to call an accomplice as a witness, was improper where trial "centered on a factual dispute between the State and [the defendant] over an element of the crime, namely whether the State could prove that [the defendant] had the requisite *mens rea* to be convicted of robbery"); *State ex rel. V.T.*, 5 P.3d 1234, 1236 (Utah 2000) (finding insufficient evidence to support finding that defendant was an

accomplice to theft). On these issues, the CCA and other courts are also aligned. *See, e.g.*, *Weeks*, 391 S.W.3d at 124 (granting mandamus where State pursued party liability theory at trial, thus becoming an element of the offense such that State was entitled to jury instruction on that theory).

Thus, Falk's supposed "conflict" actually presents two things on which the CCA is in agreement with other courts: 1) law of parties need not be pled in an indictment; and 2) once raised at trial, a jury must be instructed on the State's burden to prove its theory of criminal liability. What Falk fails to show is any case that draws the necessary nexus between those two principles, i.e., that *because* party liability may become a "functional element" *at trial*, it becomes an element for purposes of an indictment and must, therefore, be included therein. Without that, it cannot be said that the CCA's reliance on the indictment in this case as creating a presumption of voluntariness is in conflict with any other state court of last resort's decision.

2. Cases related to whether a plea colloquy must establish a defendant's understanding of law of parties

In a second group of cases Falk proffers as another link in a daisy chain of illogic, Falk cites five cases in which other courts have allegedly found guilty pleas to be invalid when the record of the plea colloquy fails to establish the defendant's understanding of party liability. *See* Pet. Writ Cert. 21–23, 23 n.11. But not one case holds that a trial court is constitutionally required to explain

the law of parties to a defendant pleading guilty as a matter of course. And not one case rebuts the CCA's holding that a guilty plea is presumed voluntary when a defendant receives a copy of or is read the indictment. *See id*. at 21.

Three of the cases Falk cites do not address constitutional issues at all. Rather, they analyze the propriety of a guilty plea proceeding under Federal Rule of Criminal Procedure 11, which this Court has previously held not "to be constitutionally mandated." *See McCarthy v. United States*, 394 U.S. 459, 465 (1969); *Satamian*, 40 F. App'x at 406 (analyzing claim under Rule 11); *United States v. Andrades*, 169 F.3d 131, 134–35 (2d Cir. 1999) (same); *United States v. Fountain*, 777 F.2d 351, 352 (7th Cir. 1985) (same). Since these cases addressed matters of federal criminal procedure and not federal constitutional law, they cannot be in conflict with the CCA's decision.

Falk's citation to *State v. Howell*, 734 N.W.2d 48 (Wis. 2007), similarly present no conflict because it was decided primarily under state law, and it did not even conclusively determine that the defendant's plea was involuntary. *See* Pet. Writ Cert. 23 n.11. In *Howell*, the Wisconsin Supreme Court noted that the only issue "on review is limited to whether the circuit court erred in failing to hold an evidentiary hearing on Howell's motion to withdraw his plea," and it was "not asked to decide, and do[es] not decide, whether the [lower court] should ultimately grant or deny Howell's motion to withdraw his guilty plea." *See Howell*, 734 N.W.2d at 360. It then applied a somewhat complicated area

of state law regarding a defendant's entitlement to an evidentiary hearing when seeking to withdraw his plea, holding that Howell made the prima facie showing required to entitle him to such a hearing where he alleged a lack of understanding about how party liability applied to his case. *See id.* at 53–69.

But this decision turned mostly on prior Wisconsin law that imposed heightened requirements on trial courts to comply with Wisconsin Rule of Criminal Procedure § 971.08(1)(a). *State v. Bangert*, 389 N.W.2d 12, 23 (Wis. 1986). The *Bangert* Court made it "mandatory upon the trial judge to determine a defendant's understanding of the nature of the charge at the plea hearing by following" one or more specified methods, depending on "the circumstances of a particular case, including the level of education of the defendant and the complexity of the charge." *Id.* First, the trial court may summarize the elements of the crime "by reading from the appropriate jury instructions" or applicable statute. *Id.* Second, the trial court may ask defendant's counsel whether he explained the nature of the charge and ask him to summarize the explanation at the plea hearing. *Id.* Third, the judge may refer on the record to other evidence "of the defendant's knowledge of the nature of the charge established prior to the plea hearing." *Id.*

The *Bangert* Court emphasized that it was recognizing the "statutory duty placed on the trial courts" to ascertain the extent of a defendant's understanding of the charge and that it was going "beyond that duty." *Id.* at

24. It is against that state law backdrop that the *Howell* Court found an evidentiary hearing was warranted. Thus, *Howell* does not demonstrate that a conflict exists between the CCA and the Wisconsin Supreme Court on the issue of whether the *Constitution* requires that a defendant be admonished on, and understand, the law of parties.

Nor does *Nash v. Israel*, 707 F.2d 298 (7th Cir. 1983), present a true conflict because it turns on distinguishable facts. *See* Pet. Writ Cert. 21–22. Indeed, Falk wholly fails to discuss a key fact underlying that opinion—Nash explicitly stated at his plea colloquy that he *did not understand the charge*. *Nash*, 707 F.2d at 301. The Seventh Circuit acknowledged the "unusual circumstances of this case," *id*. at 303, when it rejected the State's attempts to demonstrate that Nash in fact understood the charge:

> [T]he State, simply put, is arguing a case that is not before us. The factors relied upon by the State to establish Nash's understanding of the intent element would be relevant in a case in which the defendant stated at a guilty plea proceeding *that he fully understood the charge, but later claimed that he had not*. However, we are presented with a case in which the intent element was not explained to Nash after he explicitly stated that he did not understand the charge.

Id. at 302–03 (emphasis added). In other words, the Seventh Circuit expressly stated that it was *not* dealing with the circumstances of Falk's case—where Falk stated at his guilty plea proceeding that he understood the charge but is now claiming that he did not. Still, to the extent the Seventh Circuit held that

Nash lacked an understanding of law of parties, its pre-AEDPA review of a state court decision is otherwise unexplained—the circuit court does not explain why Nash was required to understand the law of parties, particularly where the court also explicitly acknowledged that the trial judge "made no attempt to ascertain specifically which element of the charge Nash did not understand." *See id*. at 303. In sum, Falk's alleged split on the issue of whether courts have held that it is constitutionally required that a trial court admonish a defendant on the law of parties as a matter of course is spurious.

3. Cases related to uncounseled guilty pleas

Falk finally alleges that there is a split regarding the CCA's refusal "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." Pet. Writ Cert. 25–26. Falk cites three cases from the 1980s, two of which are state intermediate appellate court opinions and therefore cannot establish a conflict under Rule 10. *See id*. (citing *Lyle*, 409 N.W.2d at 549, and *Graham*, 513 So.2d at 419). And the remaining case fails to present a conflict because it turns on a distinguishable fact—the defendant pled guilty when he was "never represented by counsel," despite having requested one. *Martin v. State*, 453 N.E.2d 199, 200–01 (Ind. 1983). None of the three cases hold what Falk claims they do—that where a defendant has validly exercised his constitutional right to represent himself, the trial court must act as counsel.

In short, Falk fails to establish a genuine conflict on any of the three sub-issues on which he purports there is one, much less on the greater question involved in this case—whether the Constitution requires that a capital pro se defendant pleading guilty must be admonished on the application of law of parties to his case for his plea to be considered voluntary.

F. The CCA's decision was nevertheless correct.

Falk does not directly argue that the CCA erred in finding his guilty plea voluntary; instead, in arguing that this Court should make clear as a prospective matter that due process requires admonishments on, and understanding of, law of parties, *see* Pet. Writ Cert. 17, he at least implicitly admits that the CCA was correct to find that precedent did not require that the legal intricacies of an applicable legal doctrine be explained to a defendant before a court may accept that defendant's plea. Pet. App. 35a.

Absent that requirement, it cannot be said that the CCA's conclusion that Falk received "real notice of the true nature of the charge against him" when he received a copy of his indictment was incorrect and constitutionally unsound. *Id*. (quoting *Bousley v. United States*, 523 U.S. 614, 618 (1998) (where defendant was "provided with a copy of his indictment," "[s]uch circumstances, standing alone, give rise to a presumption that the defendant was informed of the nature of the charge against him")). To be sure, "the Constitution, in respect to a defendant's awareness of the relevant circumstances, does not

require *complete* knowledge of the relevant circumstances." *United States v. Ruiz*, 536 U.S. 622, 630 (2002) (holding trial-related rights to exculpatory and mitigating information do not extend to plea bargaining) (emphasis added). And while "the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision and the wiser he will likely be," "the Constitution does not require the prosecutor to share all useful information with the defendant." *Id*. at 629. Rather, "the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it." *Id*.; *see also Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). The indictment in this case satisfies those constitutional concerns.

Falk resists this conclusion by arguing that he didn't receive adequate notice of, or understand, the law of parties, which he views as an element of the offense. A necessary corollary to Falk's argument is that an indictment must contain "the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). Putting these arguments together, Falk's

convoluted argument rises and falls on whether party liability is an element of capital murder warranting inclusion in the indictment and, in turn, admonishment on, and understanding of, that legal theory during a guilty plea. *See* Pet. Writ Cert. 18 (citing *Henderson v. Morgan*, 426 U.S. 637 (1976), and *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), for proposition that adequate notice of the charge requires, "at a minimum, [that] the record must reflect that the defendant was informed of the 'critical' elements of the offense").[4]

But Falk's argument falls apart at the outset. The CCA, like most other jurisdictions, has determined that party liability is not an element of capital murder that must be pled in the indictment; to the contrary, courts across the country have held that a party is on notice that he may convicted as either principal or party when charged as a principal. *See* Argument I.E.1, *supra*; *see also Toma*, 2015 WL 9303983, at *8–9 (collecting cases from state and federal jurisdictions holding that "a defendant who is indicted as a principal to an

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[4] *Henderson* did not specifically hold that a defendant must be informed of the "critical" elements of the offense. *See* Pet. Writ Cert. 18. Rather, this Court agreed that the test for voluntariness does not require that "a ritualistic litany of the formal legal elements of an offense" be read to a defendant. *Henderson*, 426 U.S. at 644. It held that even under the test espoused by the petitioner, i.e., "that a court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused," the guilty plea was defective. *Id.* But the Court noted that there was no need to decide "whether notice of the true nature, or substance, of a charge *always* requires a description of every technical element of the offense[.]" *Id.* at 647 n.18. In fact, it assumed "it does not." *Id.* It nonetheless held that, where a charge of second-degree murder "was never formally made" to the defendant, he was not informed on the "critical element" of the mens rea necessary for that offense. *Id.* at 645, 647 n.8.

offense may be properly convicted as an accomplice). Falk offers no reason, save for general protestations of unfairness, why this principle should change simply because a defendant has chosen to forego a trial.

Indeed, Falk fails to appreciate one of the fundamental tenets of trial: the State's choices—beginning with the charging instrument itself—necessarily inform what law is applicable to a case. *See Weeks*, 391 S.W.3d at 124. "It [is] the State's prosecution, so it [is] the State's choice." *Id.* Here, the State did not choose to limit the theory of liability applicable to Falk's case in his indictment, as they were permitted to do under Texas law—an issue that Falk fails to show is in controversy in other states.

And absent having gone to trial and forcing the State to choose one theory of criminal liability over another, party liability did *not* become an element of Falk's capital murder offense in this case. That's because what is true for trial is not necessarily true for a guilty plea, and Falk fails to appreciate that difference as well. *Cf. Ex parte Palmberg*, 491 S.W.3d 804, 812 (Tex. Crim. App. 2016) ("Because the trial is the main event of our criminal justice system, due process puts a premium on the fairness of the proceeding by which a factfinder assesses guilt or innocence. In the plea bargain context, due process focuses not on the fairness of trial but on the integrity of the process by which the defendant is persuaded to *forego* trial."). To constitutionally require the State to forecast every aspect of its case at the

guilty plea stage "could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Ruiz*, 536 U.S. at 631. The CCA's determination that the indictment was enough was correct.

Falk's only other attempt to elevate party liability to element-of-an-offense status is to rely on *Apprendi* and its progeny. *See* Pet. Writ Cert. 23–25. But *Apprendi* and *Ring* stand for the proposition that the Sixth Amendment requires that those facts that would increase the maximum punishment applicable to a defendant under the state statutory scheme must be found by a jury. *Apprendi*, 530 U.S. at 490; *Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Under Texas law, the "aggravating factors" sufficient to increase the maximum possible punishment a defendant can receive to "death" are established when the jury finds a defendant guilty of capital murder. Tex. Penal Code §§ 12.31(a) (a defendant found guilty of a capital felony can be punished by life imprisonment or by death), 19.03(a)–(b) (enumerating ten specific circumstances which constitute a capital felony).

Falk argues that so too was party liability "necessary for Falk to be convicted of a death-eligible offense[.]" Pet Writ Cert. 29. But again, the CCA has made clear that party liability is not an element of capital murder. *See*

Leza, 351 S.W.3d at 357 (party liability does "not identify the elements or gravamen of" capital murder). And whether a defendant committed a capital murder as a principal or a party does not subject him to increased punishment. That is, if the State were unable to prove that Falk committed the murder under *either* theory of criminal responsibility, then Falk would be *acquitted* of capital murder, not ineligible for it.[5] *Apprendi* and *Ring* are simply inapposite.[6]

The CCA declined to allow Falk to shift the blame for his unwise decision to represent himself to the trial court by retroactively imposing an affirmative duty on that court to act as the very counsel that Falk jettisoned. This decision was correct under existing case law, and Falk's arguments for changing the rules guiding that decision are unavailing. The Court should not grant certiorari review of Falk's question presented.

II. Certiorari Should be Denied on the Second Question Presented.

Falk asks this Court to decide that due process requires "special procedural safeguards"—specifically, that trial courts must ascertain an

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[5] Falk insinuates that there may be another reason that Falk is ineligible for the death penalty, namely, that he believes there are "questions" about whether Falk's codefendant possessed the requisite intent. *See* Pet. Writ Cert. 16 n.7. But Falk never pressed an argument in the lower court, within the context of his guilty plea or otherwise, that was predicated on the sufficiency of the evidence supporting *Martin*'s conviction. This makes Falk's case a poor vehicle to address this question.

[6] *Apprendi* is inapposite for another reason: its holding is based on the Sixth Amendment right to a jury, which Falk waived when he pled guilty. *Apprendi*, 530 U.S. at 477, 490.

offense's factual basis—when a pro se defendant pleads guilty. Pet. Writ Cert. 30–35. It takes Falk several steps to make this argument. First, he says that the Court has scrutinized "with special care" guilty pleas entered without the benefit of counsel or a waiver of such. *Id.* at 30–31. Falk then argues that his plea requires such scrutiny because he was pro se and facing a death sentence, which is irrevocable and suitable for only the worst crimes and offenders. *Id.* at 31. From there, he suggests such scrutiny is necessary because a capital pro se defendant may be irrationally seeking state-assisted suicide. *Id.* at 31–32. This concern, Falk claims, requires trial courts to determine there is a factual basis for the plea, just like some courts do when a defendant pleads guilty while maintaining his innocence. *Id.* at 32–33. Applied to him, Falk argues that the trial court should have determined if his "conduct was sufficient to make him liable as a party" for Officer Canfield's murder. *Id.* at 34.

But Falk again provide no compelling reason to expend limited judicial resources on this question. Indeed, on this issue Falk makes no allegation of circuit or state-court-of-last-resort conflict and no allegation of direct conflict between the state court and this one. *See* Sup. Ct. R. 10(a)–(b). Instead, he cursorily argues that this question is important. Pet. Writ Cert. 35 (stating this is an "important and unresolved question"). But just like Falk's involuntary-plea contention, his daisy-chained, circuitous factual-basis argument is essentially a rule for one—him. *See* Argument I.A, *supra*. It would apply only

to a pro se, capital defendant pleading guilty in a case where he is, factually, a party to the offense and where there may be a concern about whether he favors a death sentence over life imprisonment. In Falk's words, it is "an unusual situation." Pet. Writ Cert. 31. Thus, for the same reasons his involuntary-plea contention isn't important, i.e., that it would affect few others besides Falk and there's little chance of repetition, so too is his factual basis contention unimportant. And on top of that, his argument simply does not hold up.

First, Falk's "special care" standard comes from a footnote in *Brady v. United States*, a case decided less than a decade after the right to counsel became a watershed rule of criminal procedure. Pet. Writ Cert. 30–31 (quoting *Brady*, 397 U.S. at 742 n.6). Setting aside that the Court was hardly creating a special type of review for certain guilty pleas in a footnote, it is unsurprising that in the wake of *Gideon*, the Court noted that it utilized "special care" when reviewing guilty pleas in cases where defendants didn't have a right to counsel. More important, soon after *Brady*, the Court held that the right to counsel was waivable, and that a defendant proceeding on a waiver receives no special benefits. *Faretta*, 422 U.S. at 835 ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel."). That's likely why Falk cites only a case from the intervening years between *Gideon* and *Faretta*, as the latter proves that he gains nothing after he waived his right to counsel.

Second, Falk's attempt to obtain more rigorous review of his guilty plea because he is a capital defendant is, although somewhat unspoken, predicated on the Eighth Amendment's heightened-reliability cases. *See* Pet. Writ Cert. 31 (citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)). But such cases concern themselves with the capital *sentencing* process, not the guilt-innocence process. *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 6–7 (1994). Falk is attempting to superimpose capital sentencing cases onto the guilty-plea process, something that the Eighth Amendment doesn't speak to.

Third, Falk's concern about capital defendants pleading guilty to receive a death sentence is something that would normally be weeded out by the guilty plea process. In other words, a truly suicidal defendant would likely fall short of being able to make a voluntary, knowing, and intelligent decision. But what Falk ignores is that a defendant may take into account that death is more preferable to life imprisonment and that may be a rational consideration motivating a guilty plea. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) ("Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration."); *cf. People v. Silagy*, 461 N.E.2d 415, 180 (Ill. 1984) (finding waiver of counsel valid where the reasons the defendant expressed for waiving and desiring a death sentence "were not irrational (he feared [his attorney's] ethical duty prevented them from carrying out his wishes to be given a death sentence, and he wished to be sentenced to death

because of feelings of guilt and remorse, a desire to spare his parents from further agony because of his conduct, his dread of confinement in the penitentiary, and a desire to die with grace and dignity)"). What Falk really seeks is a paternalistic rule prohibiting guilty pleas in death penalty cases, but such a viewpoint is not constitutionally supported.

Fourth, Falk's argument that courts must ascertain a factual basis in cases where a defendant maintains innocence, what he calls a "special circumstance," is not constitutionally compelled. Indeed, "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Alford*, 400 U.S. at 37. And *Alford* held that the trial judge did not commit error in accepting Alford's plea despite his protestations of innocence, not that it was constitutionally mandated that a judge must ascertain a factual bases before accepting such a plea. *Id.* at 38. As Judge Easterbrook has noted:

> Judges must guard against the assumption that whatever is familiar is also essential. Putting a factual basis for the plea on the record has become familiar as a result of statutes and rules, not as a result of constitutional compulsion. The Constitution's standard "was and remains whether the plea represents a voluntary and intelligent choice."

Higgason v. Clark, 984 F.2d 203, 207–08 (7th Cir. 1993) (quoting *Alford*, 400 U.S. at 31). Thus, the underpinning of Falk's argument—that the Constitution sometimes requires a factual basis—is faulty.

Moreover, the CCA correctly held that, even if due process required a court to ascertain the factual basis of a guilty plea in the circumstances of Falk's case, those concerns were satisfied here by Falk's judicial confession to the offense as principal or party. Pet. App. 39a (citing *Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009)). To be sure, the CCA correctly noted that, unlike *Alford*, Falk "pleaded guilty, did not object when the State offered evidence in support of that plea, and did not assert his innocence." *Id*. (citing *Alford*, 400 U.S. at 32). Falk offers no compelling reasons demonstrating that the CCA erred in so holding.

Ultimately, Falk's argument is an amalgamation of cherry-picked parts of cases to create a rule to dissuade the rare pro se defendant of pleading guilty when facing a possible death sentence. But when even the lightest scrutiny is applied to those foundations, they crumble. A writ of certiorari should not issue for a rule with such shaky foundations.

CONCLUSION

For all the reasons discussed above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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