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
Court of Criminal Appeals of Texas

REPLY TO THE STATE'S BRIEF IN OPPOSITION

RAOUL D. SCHONEMANN
JAMES W. MARCUS
THEA J. POSEL
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 East Dean Keeton Street
Austin, Texas 78722
(512) 232-9391
rschonemann@law.utexas.edu
Counsel for Petitioner

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I. The question presented is an important issue of federal constitutional law precisely because of the unusual circumstances of this case.

The parties agree that the circumstances presented here are unusual, and that it is "exceedingly rare" for a defendant to waive his right to counsel and then plead guilty to capital murder, exposing himself to the death penalty. Brief in Opposition ("BIO") at 15. But Respondent jumps from that premise to a false conclusion. Observing that, for example, California "doesn't even permit a capital defendant to plead guilty without counsel or the consent of counsel," the State argues that because such cases are rare, and death sentences are declining everywhere, this Court need not intervene to ensure that the constitutional requirements it laid out in *Henderson v. Morgan*[1] are uniformly applied in capital prosecutions of *pro se* defendants. *See* BIO at 15-16.

According to Respondent, because uncounseled guilty pleas in death penalty cases are unusual, "Falk falls far short of showing the type of important question that has an effect on litigants whose last names aren't Falk." BIO at 15. But Respondent is incorrect, both in understating the gravity of the constitutional stakes and in asserting that because similar circumstances arise infrequently, the constitutional questions presented are

[1] 426 U.S. 637 (1976).

unimportant. Indeed, on numerous occasions this Court has granted certiorari on important questions with admittedly limited application.

For example, Respondent quotes *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70 (1955), to remind us that this Court does not review judgments to "satisfy a scholarly interest" or "benefit … the particular litigants" *Id.* at 74. But in *Rice,* this Court wrote to dismiss a writ as improvidently granted after discovering that when certiorari was granted, corrective legislation had already been passed which would afford previously unavailable redress of the petitioner's constitutional claim in state court. *Id.* at 76. In light of the newly available state remedies, an opinion on the suit at bar would have been unnecessary to provide a path to recovery for any similarly situated litigants (and thus "scholarly" only). Not so here.

Indeed, as this Court is aware from its own docket, Texas remains an active death penalty state. Despite Respondent's correct observation that "the number of new death sentences imposed per year has dropped dramatically in the last several decades," BIO at 16, Texas continues to pursue the death penalty even as states across the country abandon it *de jure* or *de facto*.[2]

[2] *See* Death Penalty Information Center, *2021 Death Sentences by State,* (available at https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-year/2021-death-sentences-by-name-race-and-county).

Furthermore, Texas's "law of parties" has a notoriously broad reach,[3] and the unwillingness of Texas's highest criminal court to enforce the basic due process demands delineated in *Henderson* means that this scenario—where a pro se Texas capital defendant seeks to plead guilty and expose himself to the death penalty, and the State is proceeding under a theory of vicarious liability—will likely recur. *See Rice*, 349 U.S. at 74 ("'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.")."

Invoking *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923), where this Court dismissed a writ as improvidently granted, Respondent scolds that it is "very important" that the Court stay out of cases that purportedly involve issues important to the parties but not the public. BIO at 15 (citing *Layne*, 261 U.S. at 393). Perhaps an "ordinary patent case" like *Layne*, concerning potential infringement of proprietary well pump casing mechanisms, has little "importance to the public." *See Layne*, 261 U.S. at 388, 393. But Respondent is mistaken in comparing such a case to the importance of ensuring that our judicial system only accepts the guilty plea of an uncounseled defendant where constitutional safeguards have been observed, particularly when accepting that plea will put the defendant's life in the government's hands to extinguish.

[3] *See*, *e.g.*, *Stewart v. Texas*, 474 U.S. 866, 869 (1985) (Marshall, J., dissenting from denial of certiorari).

Finally, this Court has regularly granted certiorari, and indeed ruled in the petitioner's favor, even while acknowledging that the circumstances in a particular case might be "highly unusual" or even "likely one of a kind." *See*, *e.g., Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019) (Alito, J., concurring);[4] *see also Kyles v. Whitley*, 514 U.S. 419, 420 (1995) (where certiorari was granted "[b]ecause [this Court's] duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"); *id.* at 460 (Thomas, J., dissenting) (describing the case as "intensely fact-specific" and thus the sort of case in which the Court is "most inclined to deny certiorari," but acknowledging that such grants raise "little fear" of interfering with the Court's duty to resolve broader legal questions).

II. Respondent is mistaken in asserting that Falk could not benefit if the Court decides the questions presented in his favor.

When a defendant like Falk seeks to plead guilty to an offense in which his criminal liability depends entirely on the State's proof that he acted in a manner that made him responsible for the conduct of another via the "law of parties," the constitutional protections required by this Court's decision in *Henderson* apply. 426 U.S. at 646, n. 18. This is because due process requires that the record of the plea colloquy demonstrate that Falk understood exactly

[4] In fact, as Justice Thomas noted in his dissent, this Court *twice* granted certiorari in *Flowers*. *Id.,* 139 S. Ct. at 2254 (Thomas, J., dissenting).

what Texas would need to prove before a jury could find him legally responsible for Martin's acts that caused Canfield's death. And as previously interpreted by the Texas Court of Criminal Appeals ("TCCA") and applied in Falk's case, the Texas law of parties was "as much an element of [the] offense as the enumerated elements prescribed in [the] statute that defines" capital murder. *In re State ex rel Weeks*, 391 S.W.3d 117, 124 (Tex. Crim. App. 2013).

Yet Respondent contends that this Court should deny certiorari because it would supposedly "strain credulity" to believe that Falk lacked an understanding of the law of parties. BIO at 17. Respondent asks this Court to credit and rely on extra-record[5] proceedings—namely, the record of a *previous* 2012 trial on the same charge that resulted in a mistrial—that purportedly establish that Falk was "well acquainted with the law of parties' application to his case." *Id.* But Respondent conspicuously fails to mention that the 2012 trial ended with a dispute between the parties *and the trial judge* over whether and how the law of parties applied to Falk's conduct. *See Weeks*, 391 S.W.3d at 125-26; (Pet. App. 03a). Numerous attorneys and judges disagreed on which aspects of the case (if any) supported its application here. Thus, if anything, the

[5] During his appeal below, Falk requested that the record of the 2012 trial be included in the appellate record of this case; the State did not join that request, and the Court of Criminal Appeals denied it. *Falk v. State*, No. AP-77,071, 2018 WL 3570596 at *3, fn. 4 (July 25, 2018) ("The record of proceedings held under a different cause number is not a part of the appellate record in the instant case.").

circumstances under which Falk's first trial concluded *undermine* Respondent's claim that Falk's physical presence there establishes the constitutional validity of his uncounseled guilty plea in a separate proceeding five years later. And regardless, mere "acquaintance" with the State's theory in a separate proceeding does not satisfy the constitutional notice and understanding of "such a critical element" that *Henderson* requires. 426 U.S. at 646, n. 18.

Similarly, the mere fact that Falk received a copy of the indictment and answered affirmatively that he understood the charges against him, BIO at 6, does not establish a record sufficient to demonstrate that Falk understood *the application of the law of parties to his conduct*.[6] And the State's citations to Falk's minimal attempts to conduct voir dire likewise fall short of rescuing the unconstitutional colloquy here. *See* BIO at 8-9, 17-18.

Taken together, this Court's holdings in *Henderson*, *Boykin*, and *Bradshaw v. Stumpf*[7] make clear that the record *of the plea colloquy* must establish in some fashion that the defendant understood the nature of the charge and what the prosecution would have to prove at a trial on the charge

[6] As Respondent notes, Falk waived a reading of the allegations at arraignment. BIO at 6 (citing 2 RR 3-4). And of course the court taking a defendant's guilty plea is responsible for ensuring "a record adequate for any review that may be later sought." *Boykin v. Alabama,* 395 U.S. 238, 244 (1969) (footnote omitted).

[7] 545 U.S. 183 (2005).

to secure a conviction. *See Bradshaw,* 545 U.S. at 183 ("Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty."); *cf. Henderson*, 426 U.S. at 646 ("[defense counsel did not … stipulate to [the requisite intent] … did not explain … that [the plea] would be an admission of [requisite intent]; and [the defendant] *made no factual statement or admission necessarily implying that he had such intent*."(emphasis supplied)).

Because Falk was proceeding pro se, no such assurances from counsel appear on the record. Nor did Falk make any factual statements or admissions during the colloquy indicating that he understood how the law of parties applied to him, or any statements at all other than "It's true" in response to hearing the indictment describe how the actions of his codefendant Jerry Martin caused the victim's death.

"Accordingly, the best that can be said for the judgement of conviction entered against [Falk] is that it rests on strong evidence—never presented to a trier of fact …." *Henderson*, 426 U.S. at 650 (White, J., concurring). And while the concurrence in *Henderson* emphasized that neither "strong evidence" nor "the judgment of his lawyer that he would probably be convicted of [the charge] if he went to trial" served to establish the defendant's factual guilt "in any fashion permitted by the Due Process Clause of the Fourteenth Amendment,"

id., Respondent here cannot even fall back on the judgment of competent defense counsel.

Respondent concludes with the caution that a decision in Falk's favor would "dissuade the rare pro se defendant of pleading guilty when facing a possible death sentence." BIO at 40. But if a pro se defendant facing a possible death sentence is actually dissuaded of pleading guilty by an explanation of the applicable law as applied to his own conduct, the logical conclusion is that a guilty plea in the absence of such an explanation *could not have been* knowing and intelligent, and therefore "could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense." *Henderson*, 426 U.S. at 645. This is precisely the sort of situation that calls for this Court's intervention, and precisely the circumstances that gave rise to Falk's plea in this case. A writ of certiorari should therefore issue so this Court may clarify and reinforce the bedrock constitutional safeguards of due process in the guilty plea context.

III. This Court need not venture into state law to address this issue.

In a strained attempt to frame Falk's claim as turning on an "antecedent issue of state law," BIO at 18, Respondent asserts that this 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." BIO at 20. For several reasons, Respondent is mistaken.

First, contrary to Respondent's intimation, the due process test set forth in *Henderson* is not confined to the "statutory elements" of the offense. Instead, the record must reflect that the defendant received "real notice of the true nature of the charge against him," *Henderson*, 426 U.S. at 645, including an understanding of the "law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). While this Court held in *Henderson* that due process is violated when the defendant is not informed of the "critical" elements of the offense, it has never confined the scope of the test to the formal elements of the substantive criminal offense. In fact, as Falk has pointed out, the Court has more recently suggested that the necessary awareness of the "nature of the charge" includes, but is *not* limited to, elements of the offense. Petition at 18-19 (quoting *Bradshaw v. Stumpf*, 545 U.S. at 182-83). Thus, Respondent's arguments that "party liability" is not an element of the offense and is not required to be pled in the indictment, BIO at 19-20, are inapposite to the question whether his guilty plea satisfied the requisites of due process.

Second, Respondent misleadingly suggests that Falk's claim turns on an "antecedent issue of state law" and that in order to conclude that Falk's plea was constitutionally deficient, this Court would first "have to decide that the TCCA's interpretation of its own state law is incorrect." BIO at 19-20. This is

false. As Falk has pointed out, the Texas Court of Criminal Appeals has said that "[p]arty liability is as much an element of an offense as the enumerated elements prescribed in a statute that defines a particular crime." *Weeks*, 391 S.W.3d at 124; *see also Johnson v. State*, 982 S.W.2d 403, 410 (Tex. Crim. App. 1998) (Keller, J., concurring) ("the law of parties, when implicated, is functionally an element of the offense tried"). Falk maintains that this statement of Texas law—a direct quote from the TCCA *in this case*—is all that's necessary for this Court to conclude that in order for Falk's plea to comport with due process the record must reflect that he had both notice of the "functional element" of party liability and an understanding of its relation to the facts of his case. Thus, Falk does not ask this Court to second-guess or rewrite Texas law, but instead to simply recognize the implications of the TCCA's statement of Texas law for assessing the constitutional validity of his plea.

According to Respondent, the TCCA's acknowledgment that "party liability is as much an element of an offense as the enumerated elements" of a statutorily defined criminal offense is inapplicable to Falk's plea because the TCCA "made this statement in the context of the hypothetically correct jury charge." BIO at 19 (quoting Pet. App. 35a, n. 8). Yet neither Respondent nor the TCCA attempts to explain how parties liability could serve as a "functional

element" in a "hypothetical jury charge" yet cease to function as such in the context of a plea colloquy.

Conspicuously, both Respondent and the TCCA attempt to avoid the implications of the state court's recognition that the law of parties is a "functional element of the offense" by recasting it as simply "an implicated legal doctrine," Pet. App. 35a, or a "*mere* 'alternative means' of criminal responsibility." BIO at 20 (emphasis supplied). These efforts at relabeling are immaterial to this Court's Sixth Amendment analysis. *See*, *e.g.*, *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

Because the law of parties, when implicated, does indeed function as an element of the charge, this Court should grant certiorari to make clear that a *pro se* defendant pleading guilty to an offense committed by a codefendant must be provided with notice, and possess an understanding of, the law of vicarious liability by which he is deemed legally responsible for his codefendant's acts. Providing that simple safeguard would neither "create a new due-process rule for guilty plea admonishment," BIO at 17, nor require this Court to "wade through antecedent issues of state law." *Id*. at 21. Instead, resolving the issue requires only that this Court "enforce and reinforce [*Henderson*] by applying it to the extraordinary facts of this case."[8]

[8] *Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019).

IV. Respondent's attempts to demonstrate that "no true conflict" exists between the decision below and the analyses of other courts considering similar questions are unavailing.

Respondent labors to parse and distinguish the numerous cases cited by Falk where state and federal courts have invalidated guilty pleas because the record similarly failed to reflect that the defendant was aware of and understood the operation of an applicable theory of vicarious liability. *See* BIO 22-30. Ultimately, Respondent asserts that Falk has failed to establish "a genuine conflict" because none of these decisions holds that in the context of an uncounseled plea, "the trial court must act as counsel." BIO at 28-29. But Falk has never contended that "the trial court must act as counsel." Instead, Falk's much more modest claim is merely that, *in the absence* of counsel, the trial court's existing and well-recognized duty to ensure that a pro se capital defendant's guilty plea is truly knowing, intelligent, and voluntary cannot be discharged by relying on the presumption that *counsel* have discharged *their* duties.

By mischaracterizing the error below and exaggerating the scope of redress that Falk seeks here, Respondent attempts to elide the degree to which Texas is an extreme outlier, taking an altogether lackadaisical approach to ensuring that the constitutional prerequisites for a valid plea—long ago established by *Henderson*—are satisfied. In any event, "the absence of a direct conflict is perhaps a reason why certiorari *need* not be granted, but hardly a

reason why it *should* not be." *Bunting v. Mellen,* 541 U.S. 1019, 1026 (2004) (Scalia, J, and Rehnquist, C.J., dissenting from denial of certiorari). Falk has demonstrated that in many other jurisdictions, the colloquy in this case would be deemed insufficient to establish that his guilty plea was voluntary and knowing as required by due process. This Court's intervention is therefore required.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Raoul D. Schonemann
James W. Marcus
Thea J. Posel

Capital Punishment Clinic
University of Texas School of Law
727 East Dean Keeton Street
Austin, Texas 78705
512-232-9391
rschonemann@law.utexas.edu
jmarcus@law.utexas.edu
tposel@law.utexas.edu