

No. 22-6021

Supreme Court, U.S.

FILED

OCT 24 2022

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IN THE SUPREME COURT OF UNITED STATES

GEORGE GUO,

PETITIONER,

VS.

STATE OF TEXAS,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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Pro Se

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ORIGINAL

I. Questions Presented

1. Under the Jackson standard and per *Garrett v. U.S.* 471 U.S. 779, 1791, is this conviction of Texas Penalty code §19.03 (a) (2) capital murder a “Void Conviction” because it is impossible to intentionally commit a (completed) murder “in the course of” committing or attempting to commit the predicate felony if the death did not “ensue” until nearly 30 years later and there is no evidence to prove so?
2. Did the trial counsel’s failure at trial to subject any of the prosecution’s witnesses to cross examination or present any defensive evidence amounted to denial of counsel and “structural error” under *U.S. v. Chronic* and *Bell v. Cone*?
3. Did the state courts adjudicated and reviewed the case with a lack of impartiality based on a presumption of guilt standard which conflicted with the due process requirements of Jackson standard and constituted a “structural error”?
4. Did the prosecution of the case as a 30-year delayed death capital murder despite time bar violate the protections of statute of limitations, due process, and ex post facto rights enunciated in *Stogner v. California* and *Rogers v. Tennessee*?
5. Did the retrospective application of the novel construction of the capital murder charge with the novel definition of delayed death homicide in the case violate the fair warning and ex post facto principles of due process enunciated in *Rogers v. Tennessee*, and is the continued use of the novel definition of delayed death homicide with post-acute-hospitalization sequential causation plausible and reasonable?
6. In the context of Texas Penal Code §6.04 (a) and after the abrogation of the “year-and-a-day” rule in *Rogers v. Tennessee*, what criteria would justify prosecution of a death after a remote injury as a delayed death homicide and prevent abusive use of such charge, as in this case and potentially against athletes in CTE (chronic traumatic encephalopathy) and other chronic encephalopathy cases?
7. As under Texas law, expired limitation is a complete defense equivalent to constructive amnesty, and extension of expired limitations is invalid under *Stogner v. California*, should *Blockburg*’s “sameness” test be applicable in determining if a time-barred case can be validly prosecuted under a different charge such as in this case?
8. Should common law doctrines of attenuation and laches have precluded the prosecution of this assaultive case decades later as a homicide, and was the retrospective judicial abridgment of those right a violation of the fair warning, and ex-post facto principles enunciated in *Rogers v. Tennessee*?
9. Did the state courts violate due process’s fair warning and ex post facto principles of *Rogers v. Tennessee* by retrospectively changing the rule of evidence for admission of Rule 404 (b) (2) evidence to allow the state to introduce the extrinsic testimonies of F.M. and K.A.B. against statutory and case law requirements?

10. Did the retrospective judicial abrogation of the common law doctrine of reasonable-hypotheses-of-innocence analytical construct violate fair warning and ex post facto principles of Rogers v. Tenesen, and should the reviewing court in the case have found acquittal based on insufficiency / no evidence, reasonable alternative hypotheses supported by evidence, and invalidity of charge?
11. Did the reviewing court err to not have found the state's proof insufficient under the Jackson standard in lacking precision and certainty where there is no definitive actual or expert testimony on any of the essential elements of the 30 year delayed death capital murder charge and none of the reasonable hypotheses suggested by evidence was ruled out by evidence?
12. Did the prosecution violate due process by knowingly creating the false impression without competent testimony that K.B. was brutally attacked, severely strangle to sustain brain injury, and sexually assaulted in order to argue for the admission of F.M. and K.A.B.'s testimonies as false substitute evidence?
13. Did the prosecution violate due process by falsely and repeatedly declaring the petitioner's guilt by statements such as "we know he did it" and describing the petitioner attacking and strangling K.B.?
14. Was the conviction against the petitioner a false conviction because none of the evidence could logically prove the appellant's culpability, alone or in combination, and the main evidence, F.M. and K.A.B.'s extrinsic testimonies, was false substitute evidence admitted based on the state's misrepresentations of similarities?
15. Did the prosecution violate due process by misrepresenting the similarities of the Rule 404 (b) (2) evidence with the K.B. case in order to obtain admission of F.M. and K.A.B.'s testimonies as false substitute evidence?
16. Did the prosecution violate due process by using false evidence, misrepresenting evidence, and misrepresenting the significance the frivolous exclusion tests?
17. Did the appellate court err to not have acted as due process safeguard to remedy the grave and profuse due process violations, lack of competent evidence, and false and void conviction to find acquittal or reversal?
18. Does Texas Penal Code §6.04 (a) imposes on the jury a mandatory presumption of less than the Jackson standard and did the appellate court err to not have found due process violation in the trial court's denial of the defense's motion for concurrent instruction?

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C.	This Court's intervention is warranted to remedy the deprivation of due process resulting from the lack of impartial trial court and appellate court.	17

D. This Court's ruling is needed to harmonize the protections enunciated in Stogner v. California and Rogers v. Tennessee in so far as retrospective judicial extension of statute of limitations after the expiration of the original limitations so as to prevent the resurrection of a time - barred prosecution decades later by the state's abusive use of a homicide charge.	18
E. The novel capital murder charge with the novel definition of delayed death homicide and unprecedented time gap are each an illogical and pernicious device with great potential for vindictive prosecution, including against NFL players and boxers for causing CTE (chronic traumatic encephalopathy) as in K.B. The decision about the legality of these devices have great public importance and should be made by this Court.	18
F. After Rogers, there is no predictable limit on the use of delayed death homicide charges, and the combination of the post-acute paradigm and Texas Penal Code §6.04 (a) essentially mandates presumption of guilt and subversion of the Jackson standard. Thus, there is a need for this Court to enunciate a constitutional minimum of what criteria would justify the prosecution of a remote injury as a delayed death homicide to prevent abusive use of such charges and obliteration of the distinction between assault and homicide, civil liability and criminal culpability.	22
G. The State's court's ruling on the applicability of no limitations of murder to resurrect this time barred prosecution conflicted with this court's holdings in Habig, Rogers, and Stogner; hence the lower courts need this court's guidance to harmonize the Fifth Amendment due process protections of statute of limitations and double jeopardy by applying the Blockburg test to prevent the state from withdrawing a complete defense of expired limitations at will by using a different charge targeting the same conducts.	24
H. The appellate court's ruling on attenuation, laches, and statute of limitations were illogical and contradicted this court and circuit court's holdings on synonymous issues; they are also internally contradictory. The state courts' errors demonstrated the need for this court's opinion to guide the lower courts' application of these laws, especially for preventing abusive prosecution of extremely remote injuries and time-barred assaultive cases as delayed death homicides.	25
I. This court's intervention is needed to remedy the deprivation of the petitioner's right to a fair trial by the state court's retrospective alteration of the rule of evidence against statutory prohibitions and case law requirements to allow the state to introduce F.M. and K.A.B.'s Rule 404 (b) (2) testimonies as false substitute evidence based on the state's misrepresentation of their similarities to K.B.	27
J. The court's review is needed to determine if the judicial abrogation of the reasonable alternative hypothesis analytical construct in 1991 that was made non-retroactive is applicable to this case, and to remedy the deprivation of the petitioner's due process rights by either the retroactive abrogation or by the appellate court's failure to apply the analysis to find acquittal.	29

K. The conviction in the case demonstrated the state court's lack of impartiality and the pernicious effects of the post-acute delayed death homicide paradigm that resulted in constructive amendment of the indictment and implicit imposition of mandatory presumption of guilt on the jury. This court's intervention is warranted to remedy the arbitrary deprivation of liberty for the petitioner and to uphold the fundamental due process right of freedom from such deprivation for the public. <i>Jackson v. Virginia</i> , 443 U.S. at 314.	31
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IV. PETITION FOR WRIT OF CERTIORARI

George Guo, pro se, an inmate currently incarcerated at Connally Unit of Texas Department of Criminal Justice in Kenedy, Texas, respectfully petitions this court for a writ of certiorari to review the judgment of the Fifth Court of Appeals of Texas.

V. OPINIONS BELOW

The Memorandum of Opinion by the Fifth Court of Appeals of Texas denying the petitioner, hereafter referred to as Guo, is reported at George Guo v. State of Texas, No. 05-19-01178-CR, 2022 Texas. App. LEXIS 574 (Tex. App. Dallas, January 26, 2022). The Memorandum of Opinion is attached in Appendix A.

VI. JURISDICTION

Guo's motion for rehearing to the Texas Court of Criminal appeals was denied on July 27, 2022. Guo invokes this court's jurisdiction under 28 U.S.C. §1257, having filed this petition for a writ of certiorari within ninety days of the Texas Court of Criminal Appeals' judgement. See Appendix C.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Ex Post Facto Clause (United Stated of Constitution Art. 1, §10, C1.1)

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payments of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation or contract, or grant any title nobility.

2. United States Constitutional Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia. When in actual service in time of war, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor

shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

3. United States Constitutional Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

4. United States Constitutional Amendment XIV

(Section 1, c1.2 §Cl.3) All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within the jurisdiction the equal protection of the law

5. Texas Penal Code §2.03 Cd) C.1.003)

If there is reasonable doubt with respect to a defense, the accused must be acquitted.

6. Texas Penal Code § 6.04 (a.)

A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrent with another cause, unless the connect course was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

7. Texas Penal Code §19.02(b)(1) Murder

A Person commits an offense if he intentionally or knowingly causes the death of an individual

8. Texas Penal Code §19.03 (a) (2) Capital murder

The person commits an offense if the person intentionally commits, the murder in the course of committing or attempting to commit aggravated sexual assault.

9. Texas Rule of Evidence Rule 403

Excluding Relevant Evidence for Prejudice, Confusion, or Other Reasons - The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

10. Texas Rule of Evidence Rule 404 (a) (1)

- (a) Character evidence
 - (1) Prohibited uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- 11. Texas Rule of Evidence Rule 404 (b)(1) & (b)(2)
 - (b) Crimes, Wrongs, or Other Acts
 - (1) Prohibited uses. Evidence of a crime; wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
 - (2) Permitted Uses; Notice in Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.

VIII. STATEMENT OF THE CASE

(1) **Due Process Failure.** The case is an inexplicable confluence of lack of impartiality of the state courts, denial of meaningful representation of counsel at trial, and flagrant prosecutorial misconducts that resulted in the false and void conviction based on a 30-year delayed death capital murder charge. The appellate court reviewed the case only to support the conviction and therefore accepted the State's misrepresentations uncritically as factual evidence to affirm the conviction. Then the appellate counsel filed a petition for discretionary review (PDR) raising the exact same issues as in the intermediary court of appeals, which the higher state court has held to be an unacceptable practice; the PDR was refused by Texas Court of Criminal Appeals. The petitioner's Guo's, pro se motion for rehearing was also denied by the court, leading up to this petition.

(2) **June 19, 1988.** The case began on that day when A.B.A., the victim's sister, found K.B. slumped over the edge of her own bed in an odd position. See Appendix E, clues at the scene. K.B. was very cyanotic, cold, and breathing with great difficulty, and barely talking. A.B.A. thought K.B. was "extremely battered" with swollen face. Half an hour or so later when the first responders arrived, K.B. was still very cyanotic, with dilated pupils (prolonged hypoxia), and breathing very

rapidly with labored efforts and shallow depth. But K.B. had clear airway with no injury or obstruction. The first responders thought that K.B. was badly beaten, raped, and strangled. Such speculation was reported to the hospital staff when K.B. was transported there, and beating-rape-strangulation became a part of K.B.'s medical history as the reason for why K.B. was admitted. She was admitted to the care of a surgery/trauma team because she was thought to have severe trauma, but later, it became clear that her main injury was her brain injury.

The first responders' assessment, that she had "too much trauma," was raped, or was strangled to near death, was very quickly proven incorrect at the hospital. Her brain injury could not have been caused by the very minor abrasion on her neck; it was almost certainly caused by the respiratory failure observed at the scene. See Appendix E. In their mistaken belief that they were dealing with a big trauma case, the first responders missed the most important clue of the case, the bottle of medication on K.B.'s dresser that could have revealed why K.B. was having respiratory failure at the scene.

(3) Hospital and Rehab

K. B. slowly recovered at the hospital over next several weeks and displayed signs of severe brain injury. By July, she was able to verbalize, but she was unable to see. She was discharged to a rehab institute in early August and went home from there. During the early years, her family took her out to eat and she was able to order from a menu given to her in yes and no format. She laughed at some jokes, was able to recognize family members, and apparently had very good situational awareness until her death in 2018. Her father tried to train her to walk and she did so unaided for 5-10 feet in a video clip shown at the trial. Her father also took her to a clinic near Houston for treatment of "paranoia."

K.B. said several things when she was at the hospital and rehab that the original investigators thought was relevant to their questions about "Who did this to you":

- “I can’t see. I am scared. What happened to me.”
- “I don’t want to talk about it in front of my father.”
- “Peter did this to me. Peter loves me. I love Peter. He would never try to hurt me intentionally”

Additionally, Dr. Toler, who was a neurology resident in K.B. care in 1988, testified that K.B. also complained about “slime” on her body, “spider” crawling on her, and “fire” on her fingers. Toler thought that these were manifestations of her “visual hallucination.” Toler also thought that K.B. was agitated and combative at times, and displayed hand-spinning movements that Toler thought was K.B.’s reenactment of “fighting off her attacker.” and reliving “the attack.” Toler conceded that she knew about the attack and strangulation only from reading the medical records.

See Appendix E, withdraw

(4) Original Investigations. Facts were murky from the beginning about what happened to K.B. during the pivotal 16-18 hours period when she sustained her brain injury. And police were never able to identify or locate many men connected with K. B., including the “Italian model-looking guy” dinning with K.B. at Lombardis, “Peter,” donors of two sperm DNA stains on K.B.’s bed, owners of various fingerprint from K.B.’s apartment, and David Gull /Gault. There was not enough evidence to prosecute the case and police closed the file in early 1990's.

(5) 2018 Investigation. Despite lack of evidence to possibly have any particularized knowledge for conducting any valid search, the State sent dozens of police agents to arrest Guo after the DNA match so they could fan out to search the Guo’s four properties simultaneously. The prosecution appeared to have been commenced to conduct pretextual searches. The condo unit where Guo lived was thoroughly trampled and trashed; other three properties were also searched with items randomly taken. It's unknown what the police took, partly because of lack of documentation by police and partly because the sites were left unsecured after the searches with

unknown losses. It was not until 90 days later when no evidence of other crime was uncovered that the state filed a vague capital murder indictment against Guo on the K.B.'s case without specifying the means of asphyxiation. Then the State evidently made the strategic choice to exploit the availability of the extrinsic testimonies of F.M. and K.A.B. as false substitute evidence to fill the evidentiary vacuum of the pivotal window. In the second indictment six months later, the State specified strangulation as the means of asphyxiation, even though no actual or expert did or could testify to it; it is a falsity.

(6) **September 2019 Trial.** Reflecting its bias to support a conviction, the trial court denied the defense's motion to dismiss the prosecution for violation of statute of limitations based on the state's argument that the no limitations of murder had been applicable since nearly 30 years before K.B.'s death. The court also ruled before trial that the State could introduce Rule 404(b)(2) evidence of F.M. and KA.B.'s testimonies at any time without the defense doing anything to "open the door" for such admission and without any proof for the existence of distinctive "signature" similarities to prove identity. In admitting the extrinsic evidence, the court contravened law and facts, but reasoned that the "state of the evidence" of the state's lack of evidence to prove Guo's guilt justified the admission. The court officially sanctioned the state's use of propensity/character evidence to help obtain a conviction.

To help set the basis for the use of the extrinsic testimonies, the trial was a theatrical production in which the prosecution employed various tactics to help falsify the appearance that K.B. was badly beaten, raped, and strangled to have the severe brain injury. The prosecutor first offered the first responders to testify about their arrival at the scene and speculation that K.B. was attacked, beaten, raped, and strangled as if they were making expert assessment that they were not qualified to provide. In particular, the main witness among the first responders, C. Stewart, had just finished paramedics training and has been working in the small city with very little violent crimes. He was

definitely not qualified by either education or experience to be a trauma or forensic medicine expert. His and other first responders' opinions about what happened to cause K.B.'s brain injury were mere speculations by non-experts. But the state formulated its theory based on such speculations, and the prosecutor proffered their erroneous opinions as expert assessments. To be sure, no expert attested affirmatively about any key element – brutal assault, severe strangulation as the cause of K.B.'s brain injury, or sexual assault.

Five physicians testified at the trial. Dr. Ramos - Santos, who performed the "rape exam on K.B., did not say anything to suggest that he thought K.B. was raped. The two neurologists on K.B.'s care team, Dr. Greenlee and Dr. Toler, testified about K.B.'s severe brain injury in 1988. Dr. Greenlee also discussed that K.B.'s brain injury involving damage to "deeper structures" could have been caused by drugs and stroke," or "hanging" if it was caused by strangulation. Dr. Toler, a resident at the time, said that she knew about strangulation from reading the medical records. Dr. Martin, a neurologist who never treated K.B., also testified about K.B.'s severe brain injury after reviewing the records, and said that K.B.'s brain injury was caused by asphyxiation that could have been ligature strangulation of some kind. He did not know why "hanging" was mentioned in the records.

Dr. Shelton, the forensic pathologist, who normally would analyze the victim's injuries and evidence from the scene to reconstruct what might have happened in a violent death, did not do so in the case and the prosecutor did not ask him to do so. He testified very little about K.B.'s external injuries and only in response to the prosecutor's direct question. He said only that the "linear transverse abrasion" on K.B.'s right neck could "potentially" be a ligature mark, and that "there may have been 'blunt trauma'" around the right eye. Exactly, his testimony was essentially that K.B. had minor domestic altercation type of injuries, black eye and choking, as K.B. herself had suggested in saying "Peter did it." He testified mostly about the very pathological condition of

K.B.'s brain in the 2018 autopsy and the "other significant conditions" that "could be a result of, but not necessarily..."

Neither Dr. Shelton nor any other M.D. attested definitively about what caused K.B.'s brain injury in 1988, why she was in respiratory distress at the scene without airway obstruction, why the brain injury deteriorated over several decades like a progressive pathology if it was caused by a onetime mechanical assault, or what exactly caused K.B.'s death in 2018.

Instead, the prosecutor was the only person who categorically and repeatedly proclaimed the key elements of the state's theory as if he was an expert witness, narrated the occurrence of a brutal attack as if he was an eyewitness, and pointed to Guo to say "we know he did it" as if he knew about other evidence that was not presented. He also repeatedly flashed slides of K.B.'s individual injuries, injury checklists, and entries of "rape" and "strangulation" in the medical records in between witnesses' testimonies to flood the fact finders minds with these imageries to instill the false impression about proof of the State's theory. But he conspicuously avoided asking any expert any question to confirm or deny any key element of the state's theory. Moreover, when Dr. Greenlee mentioned that drugs and stroke could cause K.B.'s type of brain injury and when C. Stewart said that K.B.'s injuries on left forearm and left ankle could have been caused by the headboard, the prosecutor quickly stopped them from elaborating. Instead, he asked Dr. Greenlee to talk about "hanging" strangulation and C. Stewart to agree that those injuries were "defensive wounds" and "from beating."

While the prosecution engaged in theatric and various shenanigans, neither the defense counsel nor the judge objected. The defense counsel did not cross examine any witness or present any defensive evidence; and the judge sided uncritically with the State. There was a general due process failure.

(7) Fifth Court of Appeals.

On appeal, Guo's issue 1 was that, "The evidence was legally insufficient to prove that Guo committed Capital Murder because the State failed to prove beyond a reasonable doubt that Guo committed aggravated sexual assault against K.B. or even physically harm her." The only evident linking Guo to K.B. was the DNA in the vaginal swab, and that did not prove that Guo sexually assaulted or physically harm K.B. And K.B.'s personal life is very private, so many men connected to K.B. were unknown to those close to her. And because evident did not prove aggravated sexual assault or even simple assault, it is insufficient to prove that Guo committed capital murder. Guo cited Jackson v. Virginia, 443 U.S. 307 (1979); US Constitution Amendment V; US Constitution Amendment XIV. Guo also cited Musacchio v. U.S., 136 S. Ct. 709, 715 (2010) for the issue that an extra element was incorrectly added to the jury charge. The court constructively amended the indictment to add an extra element decades delay in death. The state cases cited Guo was largely based on Jackson and in Re Winship, 397 U.S. 358, for the proposition that mere modicum of evident did not sufficient to support the conviction.

Issue 2 was that, "The evident was legally insufficient to prove beyond a reasonable doubt that Guo committed to capital murder because causal link between the injuries K.B. suffered due to the June 18-19, 1988 attacked and her Feb 22, 2018 death -- 29 years and 8 months later-- was too attenuated." Too many variables and events have occurred for the 1988 attack to be legally sufficient to cause K.B.'s death three decades later. Guo cited Jackson, 443 U.S. 307 and related cases to highlight the fact that the inferences necessary to establish guilt in such a long delay could not meet the Jackson standard. As reference, no other delayed death case in any jurisdiction has a delay of more than four years, even in New York where there is a statutory double jeopardy exception for delayed death. Guo cited the four cases that were prosecuted under that exception to show that the three decades of delay is totally unreasonable and unexpected. And Guo cited Rogers v. Tennessee, 532 U.S. 451, 453 (2001) to show that even after the abolishment of the "year-and-

a day" rule, the issue of sufficient causal link between an event and a delayed death for the purpose of murder prosecution continues to exists. In Texas, the longest differential is less than three years and that case is an involuntary manslaughter in which the intentionality does not have to be proven.

Issue 3 was that, "The trial court erred by allowing 404 (b)(2) evidence regarding K.A.B. and F.M. because: (1). identity was never put at issue by Guo; and (2). no other exception under Rule 404 (b) (2) existed. The state sought the extrinsic evidence to attack Guo's general character because it could not obtain a conviction based on evidence in the K.B. case, and the harm to Guo by the 404 (b)(2) evidence was definite." The trial court admitted the 404 (b)(2) evidence largely because the State did not have clear inculpating evidence against Guo to rule out other reasonable possibilities, such as the two sperm DNA stains on K.B.'s mattress cover. But the pretrial admission ruling was in contravention to state law prohibition against propensity/character evidence, as well as case law requirements of the defense's impeachment of the State's identity evidence and the presence of very highly unusual "signature" similarity.

Besides state cases, Guo cited *Old Chief v. U.S.*, 519 U.S. 172,181 (1997) for the issue of unfair prejudice in that the 404 (b) (2) evidence "weighs too much with the jury and may persuade them to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Further, Guo cited *Payne v. Tennessee*, 501 4.5.808, 825(1991) to state that the admission of this evidence violated Due Process Clause of the Fourteenth Amendment because "it is so unduly prejudicial that it renders the trial fundamentally unfair." In *Payne*, *Darden v. Wainwright*, 479 U.S. 168, 179-183 (1986) was cited as authority regarding due process violation.

Issue 4 was that, "The trial court erred by denying the requested jury charge instruction regarding on concurrent causation under Texas Penal Code §6.04 (a)." Guo pointed out that the law only requires a scintilla of evidence for the instruction, and that the refusal of the court to

include the instruction caused Guo “some harm” that required a new trial. Jury charge must be written, so that the jury returns a verdict based only on conduct constituting the offense, and clearly the minor strangulation in 1988 could not and did not cause K.B.’s death 30 years later. The state did not even prove that Guo strangled K.B.

Issue 5 was that, “The trial court erred by denying Guo’s pretrial motion to dismiss the prosecution for a violation of the statute of limitations because the statute of limitations that should have applied was for Aggravated Sexual Assault which ran on June 19, 1993.” Guo pointed out that in the case relied on by the state and the trial court, *Demouchette v. St.*, 731 S.W. 2d 75, 80 (Tex. Crim. App. 1986), the death occurred at the same time as the predicate felony and, thus, the no limitations of murder was applicable from the beginning. But the death in K.B. was delayed for nearly 30 years, so the no limitations of murder could not have been applicable before the 5-year limitations for Aggravated Sexual Assault expired on June 19, 1993. Guo cited both *Ex Parte Heilman*, 456 S.W.3d 159 (Tex. Crim. App. 2015) and *Phillips v. St.*, 362 S.W. 3d 606 (Tex. Crim. App. 2011) as authorities holding that the extension of statute of limitations is invalid after the expiration of the original limitations. Both Heilman and Phillips relied heavily on *Stogner v. California*, 539 U.S. 607 as authority for the holding. Guo also cited *Ibarra v. St.*, 11 S.W. 3d 189 (Tex. Crim. App. 1999) which relied on *U.S. v. Marion*, 404 U.S. 307; *U.S. v. Lovasco*, 431 U.S. 788; and *U.S. v. Gouveia*, 467 U.S. 180 as authorities regarding statute of limitations as primary assurance against state criminal charges and laches.

The Fifth Court of Appeals overruled each issue that the Guo raised to affirm the conviction. In doing so, the court distorted law and facts, and accepted the prosecutions misrepresentations as factual evidence uncritically. For issue 1, the court claimed the two cases that the state cited justified the finding the DNA evidence alone was sufficient to support a conviction for aggravated sexual assault, ignoring the fact that in those two cases the complainant attested to the occurrence

of the sexual assault, her lack of consent to the defendant, and the defendant's profile. (Opinion, 12). In K.B., the state did not meet its burden of proving the occurrence of sexual assault or K.B.'s lack of consent to Guo to justify the same usage. But the court biasedly and irrationally alluded to the "responding and hospital personnel's" speculation about what happened to K.B., the state's misrepresentations about what happened to K.B., and the F.M. and K.A.B. cases as evidence that K.B. was "beaten and strangled near death" and could not tell anyone that she was sexually assaulted only because the severity of her injuries. (Opinion, 7). The court did not cite any competent evidence or witness that supported its claim about what happened to K.B. or that Guo harmed K.B. in any way. The court dismissed such concern as "focuses on what evidence is not presented." (Opinion, 7). Instead, the court claimed that "combined and cumulative force of the evidence," which in effect is whatever the State say the evidence meant, is sufficient proof. (Opinion, 12).

For Issue 2, the court claimed the length of delay does not diminish the proof because there is no evidence that anything else cause K.B.'s death. (Opinion, 18). That is, lack of evidence of innocence proved guilt. For Issue 3, the court reiterated that the "state of the evidence" that the State did not have "undisputed direct evidence" to prove Guo guilt justified the admission of F.M., and K.A.B.'s testimonies. To justify the admission, the court totally misstated case law to claim that Rule 404 (b) (2) evidence can be admitted without the defense "Opening the Door" by vigorously challenge the state's evidence to put an issue in dispute. The court also repeatedly and implicitly stated that the pattern or propensity proved by the extrinsic cases proved that Guo did not have consensual sex with K.B. and therefore Guo's guilt. (Opinion, 11, 35). Such assertion contradicted the court's own claim that the F.M. and K.A.B.'s testimonies, which lacked any highly unusual signature similarity, was admitted only to prove identity, not the lack of consent.

For Issue 4, the court also claimed that there was no evidence that anything else caused K.B.'s death. (Opinion, 24). The more relevant point should be that there is no competent evidence that Guo harmed K.B. and there are many alternative possibilities that the State did not rule out, including many men involved with K.B., 30 years of unexplained deterioration, and unexplained breathing difficulty at the scene. For Issue 5, the court adopted the same argument that no limitations of murder was applicable since 1988.

(8) Texas Court of Criminal Appeals

For further review, the appellate counsel raised the same five issues with the same arguments, and the PDR was refused by the higher reviewing court. Afterwards, the counsel wrote Guo to say that he was "shocked" that the PDR was refused, that the case is at worst an aggravated sexual assault case, that intentionality of murder cannot be proven, and that the PDR was refused because the court disliked Guo's history.

Guo then filed a pro se motion for rehearing in which many of the issues being raised in this petition were raised within the framework of the five issues in the PDR in which the Rule 404 (b)(2) issue was moved to Issue 1. For that issue, Guo raised the sub-issues that the court of appeals erred to contravene due process and case law, to not find unfair prejudice, to create a new rule of evidence, and to endorse the use of presumption of guilt standard. See Appendix D.

Guo stated that the admission of the Rule 404 (b)(2) evidence violated due process in 4 ways: contravention of case law requirements, based on the state's misrepresentation of similarities and the court's presumption of guilt, and served to prove a falsehood. Guo cited Calderon v. Thompson, 118 S. Ct. 1484 (miscarriage of justice) and Darden v. Wainwright, 106 S. Ct. 2464 (prosecutorial misconduct infected trial with unfairness). Guo also cited numerous case laws to point out that many similar cases with far more proven similarities were reversed for lack of sufficient similarities; and where the defense did not challenge the state's evidence, admission to prove

identity is "foreclosed" and the state's need is "non-existent". Guo also pointed out the court of appeals' misstatement of the cases and creation of the unexpected new rule of evidence.

For the issues of identity and causation, Guo raised the issue of the state courts' presumption of guilt and violation of due process. Guo cited Jackson and Winship, as well as Albright v. Olivier, 114 S. Ct. 807, 813, n.6 for requirements of due process, and Wainwright, *supra*. Guo pointed out the obvious insufficiency of competent evidence which both state courts implicitly acknowledged, and the existence of many reasonable possibilities supported by evidence. Guo also explained the near impossibility that K.B.'s brain injury could have been caused by strangulation or that anyone could legitimately make such determination. The irregularity of the construction of the capital murder charge was raised and the four major breaks of the State's chain of causation were detailed.

Those four major unexplained phenomena in the causal chain were concurrent or alternative causations for the purpose of concurrent causation instruction that the courts should have allowed. For the issue of statute of limitations, Guo again pointed out the illogic that the no limitations of murder could be applicable nearly 30 years before the death of the purported murder victim and that the new application with the irregular construction, if allowed, greatly expanded the potential use of the capital murder charge.

The court of criminal appeals denied the motion for rehearing without issuing an opinion.

IX. REASONS FOR GRANTING WRIT

- A. It is rationally impossible that K.B. was intentionally murdered by a very minor strangulation 30 years before her death in the course of aggravated sexual assault. This false and void conviction was begotten by general due process failure which warrants this Court's intervention to prevent miscarriage of justice and uphold due process floor. Murray v. Carrie, 477 U.S. 478, 485, 495 (Fundamentally unjust incarceration)**

(Reference Question #1). The conviction is false because it was begotten by the State's use of false evidence and misrepresentations, which are elaborated in later subsections. The conviction is void

because the construction of the capital murder charge with the long delay in death is invalid under Texas law. U.S. v. Miller, 471 U.S. at 138 (Any “boarding the possible basic for conviction than which appeared in the indictment” is fatal); Stirone v. U.S., 212, 217. There is no evidence to support key elements of the charge. Jackson v. Virginia, 443 U.S. 307, 314 (“no evidence” doctrine secures the elemental due process right of freedom from arbitrary deprivation of liberty)

(i) Invalid construction

Under Texas Penal Code §19.03 (a) (2) in effect in 1988, a person commits the capital murder if he commits murder in the course of committing or attempting to commit a predicate felony. Fearance v. St., 711 S.W. 2d 486, 493 (Tex. Crim. App. 1988); McGee v. St., 774 S.W. 2d 229, 234 (Tex. Crim. App. 1989); Huffman v. St., 746 S.W. 2d 212, 217 (Tex. Crim. App. 1988); James v. St., 772 S.W. 2d 884 (Tex. Crim. App. 1989). Both the statutory language and case law are clear that the proof of the offense requires proof of a completed murder, not attempted murder or aggravated assault, contemporaneous with the commission or attempted commission of the predicate felony. McGee, 774 S.W. 2d at 234; Huffman, 746 S.W. 2d at 217; Schexnider v. St., 943 S.W. 2d 194, 198-199 (Tex. App. - Beaumont 1997, no. pct.). The predicate felony does not have to be completed to be an aggravating factor, but the murder must be completed during the commission or attempt of the predicate felony. And a murder is committed only when death has ensued. Garrett v. U. S., 471 U.S. 773, 791 (citing Diaz v. U.S., 223 U.S. 442, 448-449) (a homicide is committed only when death has ensued).

Thus, it is impossible to prove under the Jackson standard that a murder was committed during the predicate felony older if the death did not occur until nearly 30 years later. Neither the State nor the state courts cited any §19.03 (a) (2) capital murder case with a long delay in death as authority to show that such construction is valid. Causing eventual death during the commission of a predicate felony is not the capital murder as alleged by the State, and it cannot be the basis of

the conviction even if the conduct is proven. US v. Briggs, 939 F.2d at 228; Ex parte Pearl, 215 S.W. 3d 418, 418-499 (Tex. Crim. App. 2007) (no evidence to support a finding of actual delivery of a controlled substance to an unborn child).

(ii) No evidence of Essential Elements

Moreover, no competent evidence was adduced at trial that could prove any of the essential elements of the charge beyond a reasonable doubt. No actual or expert witness testified unequivocally that K.B. had any serious external injury, that her brain injury was caused by strangulation or mechanical asphyxiation, that she was sexually assaulted, that the death was caused by intentional murder, or that Guo harmed K. B. in any way or was in her apartment. Most importantly, it's impossible to prove intentionality of murder or that a murder was committed contemporaneously with the predicate felony, if the death did not occur until 30 years later.

(iii) Void conviction

The conviction is void by definition under Texas law and under the Jackson standard. Nix v. St., 65 S.W. 3d 664, 673 (Tex. Crim. App. 2001) (void judgment with no evidence); Pearl, 215 S.W. 3d at 419 (no evidence violates due process); Jackson, 443 U.S. 314 ("no evidence" of a crucial element of offense constitutes arbitrary deprivation of liberty). Even if all other allegations of the state's theory were proven, which were not, it is impossible to prove the intentionality of murder or that K.B. was murdered intentionally in the course of an aggravated sexual assault, if the death did not occur until 30 years later

B. This Court's intervention is warranted to remedy the denial of the sixth amendment right of effective assistance at trial in the case that made the adversary process itself presumptively unreliable under U.S. v. Chronic, 466 U.S. 648, 659.

(Reference Question # 2). As observed by the appellate court in its opinion, defense counsel did not cross examine any witness, did not challenge the state's evidence, and did not present any defense witness. (Opinion, 17, 26). Counsel has failed to subject the prosecution's case to

meaningful adversarial testing and the adversary process is presumptively unreliable. *Chronic*, 466 U.S. at 659; *Lockhart v. Fretwell*, 506 U.S. 364, 377. Deprivation of "the right of effective cross examination" is "constitutional error of the first magnitude and no amount of want of prejudice would cure it." *Davis v. Alaska*, 415 U.S. 308, 318. Such error of denial of counsel at a critical stage is a "structural error" not subject to "harmless error" analysis, *Bell v. Cone*, 535 U.S. 685, 695; *Arizona v. Fulminante*, 499 U.S. 279 at 309.

C. This Court's intervention is warranted to remedy the deprivation of due process resulting from the lack of impartial trial court and appellate court.

(Reference Question #3) a criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him. *Edwards v. Balisok*, 520 U.S. 641, 647. Judicial opinion will support an actual bias claim if they reveal favoritism or antagonism such that fair judgment is impossible. *Liteky v. U. S.*, 510 U.S. 540, 550. Even a single incidence of judicial partiality can be sufficient to support a deprivation of due process claim. *Webb v. Texas*, 409 U. S. 95, 97. A fair trial in a fair tribunal is a basic requirement of due process. *Withrow v. Larkin*, 421 U.S. 35, 46. Not only is a based decision maker constitutionally unacceptable, but our system of law has always endeavored to prevent event the probability of unfairness. "Id., at 47. The denial of a fair trial due to the lack of impartiality of the state courts amounted to a "structural error." *Arizona v. Fulminante*, 499 U.S. at 309.

Here, instead of acting as due process safeguard to ensure a fair trial and hold the state to its burden of proof according to the Jackson standard, both the trial court and the appellate court acted with bias based on a presumption of guilt, accepted the prosecution's misrepresentations and misconducts uncritically, ignored exculpating evidence and alternative hypothesis, and distorted facts and law to help support the conviction. (See Appendix F. for elaboration)

D. This Court's ruling is needed to harmonize the protections enunciated in Stogner v. California and Rogers v. Tennessee in so far as retrospective judicial extension of statute of limitations after the expiration of the original limitations so as to prevent the resurrection of a time - barred prosecution decades later by the state's abusive use of a homicide charge.

(Reference Question #4) In Stogner, the Court held that it is well settled that the ex post facto clause forbids resurrection of a time-barred prosecution. 539 U.S. at 636. In Rogers, the court held that “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law.” 532 U.S. at 458 (Quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353).

In this case, all applicable charges for the conducts alleged by the State have expired on June 19, 1993. At worst, the K.B. case is an aggravate assault or aggravate sexual assault case. But the state unscrupulously claimed that the case is a capital murder case and argued that, based on Demouchetle, the no limitations on murder has been applicable since June 19, 1988, 30 years before the K.B.’s death. 731 S.W. 2d at 80.

The construction of the charge is invalid, facts are murky, actual evidence is scant, time-bar and due process should have prevented this overly state and void prosecution. *U.S. v. Lovasco*, 431 U.S. 783, 789. The state court’s allowance of this prosecution amounted to retroactive judicial extension of statues of limitations, and override of the Jackson standard and Texas Penal Code §2.03 (d) (acquitted for reasonable doubt) in violation of due process, fair warning, and ex post facto protections of Jackson, Rogers, and Stogner.

E. The novel capital murder charge with the novel definition of delayed death homicide and unprecedented time gap are each an illogical and pernicious device with great potential for vindictive prosecution, including against NFL players and boxers for causing CTE (chronic traumatic encephalopathy) as in K.B. The decision about the legality of these devices have great public importance and should be made by this Court.

(Reference question #5) The prosecution devised this novel capital murder charge to resurrect the time-barred case without competent evidence to prove it to the Jackson Standard. The only way that anyone can find conviction in the case is to appraise the evidence according to the directions and misrepresentations prescribed by the prosecutor uncritically. But part of the evil of the novel post-acute hospitalization sequential causation delayed homicide paradigm (hereafter post-acute paradigm) of proof is the usurpation of the Jackson Standard by the very nature of the method that accommodates the insufficiency of evidence by catch-all, technical surrounding terms. The paradigm's amorphous requirements for proof affords the prosecution to build the otherwise nonsensical construction of capital murder and delay in death around it. No rational juror could have believed the K.B. was intentionally murdered during a sexual assault nearly 30 years before her death otherwise.

(i) Retroactive Application. None of the three devices used in the prosecution existed prior to 1988. Thus, the trial court's allowance for the prosecution was an "unexpected and indefensible" retroactive judicial alteration of the law by reference to the law which had been expressed prior to the conduct at issue. Rogers, 532 U.S. at 462. The prejudice to Guo by the violation of the rights enunciated in Rogers was the application of the post-acute paradigm that requires only sub-Jackson Standard of proof, resurrection of the time-barred case, and conviction of the void charge. Jackson, 443 U.S. at 315-316 (beyond reasonable doubt proof for criminal conviction).

(ii) Conventional Delayed Death Homicide. In conventional delayed death homicide, coma or vegetative state would occur shortly after the fatal assault, the unconsciousness and institutional care would continue unabated, eventual termination of life support or development of new pathology would foreclose recovery, and death would ensue within four years. Hence, the causal connection between the fatal assault and the death is definite because the impending

occurrence of death was defined since the fatal injury. *Felder v. St.*, 848 S.W. 2d 85, 89 (Tex. Crim. App. 1992) (A person diagnosed as brain dead or in coma is “legally dead.”). The victim never awoke to go home from acute hospitalization in these cases and the fact that the fatal injury was due to a mechanical assault (gunshot, stab, auto accident) is conspicuous at the scene and from the injury itself, so *corpus delicti* for homicide is easily provable.

(iii) Post-Acute Hospitalization Sequential Causation Delayed Death Homicide. In contrast, K.B. went home from institutional care after a few months, was never in coma or on life support, and her asphyxiation brain injury did not result directly from a mechanical assault such as to make *corpus delicti* for homicide easily provable. It is very difficult to determine the cause of an asphyxiation death even with a contemporaneous autopsy, so it is impossible that anyone could have determined that the cause of K.B.’s brain injury was from strangulation by just visual or physical examination of the minor neck abrasion with no airway damage. *Moulton v. St.*, 395 S.W. 3d 804, 806 (Tex. Crim. App. 2013). Neither *corpus delicti* for homicide nor strangulation as the cause of her death was proven beyond a reasonable doubt in K.B.

But by design, the post-acute paradigm of proof is inherently vague and uncertain; it attributes the cause of death to the remote assaultive injury and assault regardless of dissipation of the causal effect by temporal and causal remoteness. The prosecution only has to prove a causal connection, however weak, between the remote assaultive event and death, and the death is presumed to have caused by the assaultive event unless the defense can disprove the prosecution’s claim by proving another causation that is sufficient to cause death.

It is a given that the claimed fatal assault did not cause death immediately or directly, so the jury is not asked to decide if the claimed fatal assault--strangulation in K.B.-- actually caused death. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (Jury instruction of less than reasonable doubt is

invalid). Instead, the jury is asked to decide if the “assaultive event” incited a “chain of events” connected by an “unbroken chain of connection” leading to death.

Because the body is wholly integrated system and death is inevitable, a significant injury necessarily would have a causal connection to other parts of the body and the inevitable death. But the causal connection of an extremely remote assaultive event, even if proven as claimed, to the death unquestionably is not of the degree necessary to constitute “cause” in the sense of criminal culpability. *Jackson*, 443 U.S. at 315 (Proof beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability).

However, amidst the novelty, complexity, and the ill-defined terms of the paradigm, neither common sense nor knowledge could guide the jury to decide or to challenge the sufficiency of the state’s proof. Its very vagueness, uncertainty, and catch-all terms helps it elude cogent appraisal. Accordingly, the judicial approval of the prosecution made in such a paradigm as in *K.B.* implicitly imposes a mandatory presumption of the validity of the State’s sub-*Jackson* standard of proof and shifts the burden of persuasion to the defense to rebut such presumption. *Francis v. Franklin*, 471 U.S. 307, 317 (1985) (Mandatory presumption). The defense can rebut the State’s homicide claims only by proving the existence of another causation that is sufficient to cause death. The paradigm is inherently a scheme of presumption of guilt. The state only has to allege a vague causal connection to claim homicide by the remote assault, but the defense can prove innocence only by specifically proving another identifiable, diagnosable causation, which is not possible when the death is caused by the cumulative effects of multiple insidious and undocumented factors.

The paradigm, the construction of capital murder, and the decades of time gap found in this case are each logically invalid and should not have been allowed here, and should not be allowed to be in use to protect the *Jackson* Standard.

F. After Rogers, there is no predictable limit on the use of delayed death homicide charges, and the combination of the post-acute paradigm and Texas Penal Code §6.04 (a) essentially mandates presumption of guilt and subversion of the Jackson standard. Thus, there is a need for this Court to enunciate a constitutional minimum of what criteria would justify the prosecution of a remote injury as a delayed death homicide to prevent abusive use of such charges and obliteration of the distinction between assault and homicide, civil liability and criminal culpability.

(Reference Question #6) In Texas, the post-acute paradigm and the TPC §6.04 coalesce synergistically to mandate presumption of guilt in a delayed death homicide prosecution and subvert the Jackson standard, especially where the time gap is extremely large, as in K.B. As the appellate court has repeatedly opined, the lack of proof of innocence proved guilt. (Opinion 18, 23, 24, 25). It is oxymoronic that under the scheme, the passage of times and delay in prosecution is a boon to the state because it becomes harder for the defense to prove innocence with the loss of evidence, witnesses, and memories, while the presumption of guilt is unaffected.

From conventional perspective, the cause of death years to decades after an assault unquestionably cannot be that assault, even if proven, because attenuation by the temporal and causal remoteness would severely diminish the causal significance of the distant assault on death. The cumulation of myriad inevitable, insidious, and undocumented pathological factors over time undoubtedly would be the predominant causes of death; otherwise, death would have occurred before these intervening circumstances.

It is plain that if the victim of an assault dies instantaneously, the causation is definite. If the victim dies during the acute hospitalization or becomes comatous, it is valid to presume the death as caused by the assault. But if the victim recovers sufficiently to warrant discharge from the acute hospitalization, then it is invalid to presume that the eventual death is caused by the remote assault.

But the very flawed premise of the post-acute paradigm and TPC §6.04 (a) in a delayed death homicide prosecution is the application of the presumption that would be valid in an acute situation, but out of context when the assault has been proven non-fatal and other complex factors become involved in causing senescence, deterioration, and death. The presumption of causation must end at discharge from acute hospitalization and the presumption of innocence returns. Under Jackson Standard, it is then the state's burden to prove beyond a reasonable doubt that the deterioration and death were caused by the claimed "fatal assault," not just a vague and uncertain outline of a causal link as in K.B. A proof with ill-defined and unattested terms of "strangulation event", "chain of causation," "complications," and "chain of events" is a camouflage for lack of evidence and pretextual cover for presumption of guilt not sufficient to prove criminal culpability.

Jackson, 443 U.S. at 315.

In the other two post-acute paradigm cases cited in the Opinion, Deavila v. St., 2004 Tex. App. LEXIS 3562 (Tex. App.-Dallas 2004) and Martin v. St., 570 S.W. 3d 426 (Tex. App.-Eastland 2019, pet. ref'd), drug use and lifestyle issues might well have been significant factors in causing the pulmonary embolism and sepsis blamed for those death 8 and 15 months after their paralysis from gunshot wound to spine, but those factors are not documented or accounted for. In those case, as in K.B., causation was presumed based on the state's allegations; it is a slippery slope for abuse.

There is a definite need for firm criteria and predictable limit to prevent abusive use of delayed death homicide charges. Possible limit may be some of the following requirements:

(a). presence of coma or vegetative state, or unabated deterioration leading to death, (b). lack of sufficient recovery from acute hospitalization, (c). application of attenuation to account for dissipation of causation, (d). applicability of time bar of the underlying assault to prevent absurdly long time gap.

G. The State's court's ruling on the applicability of no limitations of murder to resurrect this time barred prosecution conflicted with this court's holdings in *Habig, Rogers, and Stogner*; hence the lower courts need this court's guidance to harmonize the Fifth Amendment due process protections of statute of limitations and double jeopardy by applying the *Blockburg* test to prevent the State from withdrawing a complete defense of expired limitations at will by using a different charge targeting the same conducts.

(Reference Question #7). In *Stogner v. California*, this Court held that the Ex Post Facto Clause forbids out of time extension of a limitations by a legislative act. *Id.*, 539 U.S. at 611. The State cannot withdraw a complete defense at will. *Id.*, 539 U.S. at 632.

(i) Retroactive Extension. In K.B., the state did so by using a capital murder charge with invalid construction and argued that the no limitations of murder had been applicable since 30 years before K.B.'s death. The state courts allowance of this prosecution amounted to retroactive and unlawful judicial extension of the statutes of limitations in violation of this court's holdings in *Stogner*, *supra*, and *Rogers v. Tennessee*, 532 U.S. at 462 ("unexpected and indefensible" judicial alteration of the law), as well as *U.S. v. Habig*, 390 U.S. 222, 227 (1968) (statute of limitations is liberally construed in favor of the defendant); *Toussie v. U.S.*, 397 U.S. 115 (The limitation period will normally begin to run when the crime is complete).

(ii) Need for the *Blockburg* Test. Statute of limitations and double jeopardy protections have the similar purpose of limiting punishment to reflect legislative intent by limiting the number of attempts and amount of time for the State to muster the evidence to prosecute the defendant. Thus, the *Blockburg* test should be equally applicable to prevent the State from violating the legislature intent for either protection by using a different charge targeting the same conducts. *Blockburger v. St.*, 284 U.S. 299, 304 (1932). The conducts alleged by the state here, even if proven, is at worst an aggravated sexual assault charge and the limitations expired on June 19, 1993, as did the limitations of other assaultive charges.

If the Texas legislature had intended for time-barred assaultive charges to be prosecuted as homicides, it would have enacted a time-bar exception law similar to New York's double jeopardy exception law to allow homicide prosecution upon the death of the victim despite of time bar. See People v. Latham, 631 N.E. 2d 83 (N.Y. 2d 1994) (CPL §40.2 (2) (d) allows second prosecution for homicide upon the death of a victim of assault). Absent such clear indication from the legislature, state courts should not be allowed to extend the limitations period after a complete defense has accrued for a set of conducts. Whalen v. U.S., 445 U.S. 684, 691-692 (1980).

H. The appellate court's ruling on attenuation, laches, and statute of limitations were illogical and contradicted this court and circuit court's holdings on synonymous issues; they are also internally contradictory. The state courts' errors demonstrated the need for this court's opinion to guide the lower courts' application of these laws, especially for preventing abusive prosecution of extremely remote injuries and time-barred assaultive cases as delayed death homicides.

(Reference Question #8). The state court's rulings on the above issues were illogical in holding that the effect of causation does not diminish after 30 years, that the state was not negligent in failing to prosecute the case during those three decades, and that no limitations of murder had been applicable since 1988. The courts' rulings were internally contradictory in supposing that the K.B. case is a 2018 capital murder for the purpose of assessing causation and the state's negligence, but a 1988 capital murder for the purpose of statute of limitations.

(i). Attenuation. The terminology used in the case's proof of cause of death attested by Dr. Shelton are the same as those used to describe the causal link between the taint of illegality and the fruits of a search in Wong Sun's poison tree doctrine. 371 U.S. 471, 488 (1963). Naturally, attenuation by temporal and causal remoteness, and intervening circumstances should also be accounted for in assessing the significance of a remote causation on the eventual death. On this issue, the appellate court's opinion that "the length of K.B.'s delay death, in and of itself, does not result in insufficient evidence" is a dismissal of the concept of attenuation. (Opinion, 22). And the

only way such a statement can be true is that humans' natural life span is infinite such that a person should never die naturally and only external factors can affect longevity. This means that regardless of whether K.B. had lived to 78, 88, or 98 years old, she still would have died of a homicide unless another cause sufficient to kill her is documented. Such notion is irrationally.

The appellate court's opinion on attenuation is plainly incorrect and contradicted this court and circuit courts' holding that "a direct unbroken chain of causation is necessary but not sufficient to establish the taint of illegality. U.S. v. Lentz, 524 F.3d 501, 522 (4th Cir. 2008) (Citing U.S. v. Ceccolini, 435 U.S. 268, 276 (1978)); U.S. v. Wipf, 397 F.3d 677 (8th Cir. 2005). Whereas this court and other federal courts have held that even an unbroken chain of causation does not establish causal effect of illegality, the state appellate court held the complete opposite view that any causal link proved causal effect of a remote causation in a proof of the cause of delayed death homicide.

(ii) Laches. The State's total lack of diligence for several decades should also have precluded this prosecution as statute of limitations and attenuation should have. In not dismissing the prosecution, the state courts in effect argued the completely opposite positions that there was no violation of statute of limitations because no limitations on murder was applicable since 1988 and there was no laches or attenuation because murder did not exist until 2018. In U.S. v. Gouveia, this court held that the Fifth Amendment requires the dismissal of an indictment even if it was brought within the statute of limitations if delay caused prejudice to the defendant. *Id.*, 467 U.S. 180, 192 (1984). Moreover both lower federal courts and state courts have used the doctrine of laches to dismiss "delayed petitions" for writ of habeas corpus. *Strahan v. Blackburn*, 750 F.2d 438, 441 (5th Cir. 1985) (more than a dozen cases from different circuits cited); *Rideau v. Whitley*, 237 F.3d 472, 482 (5th Cir. 2000); *Ex Parte Perez*, 445 S.W.3d 719 (Tex. Crim. App. 2014). It would be unreasonable if the state is no held to the same standard of diligence as prison pro se petitioners.

I. This court's intervention is needed to remedy the deprivation of the petitioner's right to a fair trial by the state court's retrospective alteration of the rule of evidence against statutory prohibitions and case law requirements to allow the state to introduce F.M. and K.A.B.'s Rule 404 (b) (2) testimonies as false substitute evidence based on the state's misrepresentation of their similarities to K.B.

(Reference Question #9) The state did not have any competent evidence to prove who, what, why, when, or how about K.B.'s brain injury, but presumed the petitioner's guilt to fabricate evidence to support such presumption. The state courts biasedly aided the State by retrospectively changing the rule of evidence to admit F.M. and K.A.B.'s testimonies because the state did not have unambiguous inculpatory evidence. The trial court made the admission decisions before trial against the prohibitions of Rule 404 (a) (1) and (b) (1) and case law requirements of impeachment and signature similarity because there were two other sperm DNA samples that the state could not rule out. The appellate court upheld the admission by arguing that the "state of evidence" or the state's lack of "undisputed direct evidence" justified the admission (Opinion, 28, 29).

The state courts presumed that the state was entitled to obtain a conviction despite the lack of evidence, which both of the courts have acknowledged. Texas Rule of Evidence Rule 404 (a) (1) and (b) (1) clearly prohibits the admission of extraneous testimony to prove propensity, character, and conduct in conformity. Those were exactly the reasons for the admission as the appellate court explained that the Rule 404 (b) (2) testimonies were needed to show that the petitioner had nonconsensual sex with K.B. and asphyxiated her. (Opinion, 35). The petitioner was tried on collateral crime evidence which could not have been probative of facts in K.B. because there has never been any competent evidence to prove what actually happened to K.B. to cause her brain injury to establish any probative value in F.M. and K.A.B.'s testimonies.

In upholding the admission of the extrinsic testimonies, the appellate court flagrantly distorted the holdings of the cases that it has cited and claimed similarities that were not attested by competent witness. No Texas case law supports the court's claim that Rule 404 (b) (2) evidence

can be admitted to prove identity by the “state of evidence itself.” (Opinion, 28). Every case that has addressed the issue, including the cases that the court itself has cited, has very clearly stated that extraneous offense evidence can be admitted to prove identity only when the defense has clearly impeached the State’s identity evidence by cross examination or raising a defense issue of alibi. There must also be very highly unusual, distinctive “signature” similarity (such as “antique silver bow”), not just “generic” similarities for the type of crime, such as strangulation and home invasion.

F.M. and K.A.B.’s testimonies were unquestionably unfairly prejudicial-- they were false substitute evidence admitted based on the State’s misrepresentations. The State otherwise would have no evidence for what happened in K.B., but F.M. and K.A.B. testimonies prove only the circular illogic that the prosecution described K.B. to match the extrinsic testimonies so that they would serve to create the illusion of proof. As such, the trial was three cases rolled into one; both the court and the jury were misled and confused about which fact belongs to which case. The appellate court itself showed such confusion by mixing up facts between the cases, such as totally mislabeling of facts between K.A.B. and F.M. (Opinion, 32), and holding that the extrinsic testimonies were admitted only for proving identity (Opinion, 27) but then claimed that they served to prove intent of nonconsensual sex and asphyxiation. (Opinion, 35).

The appellate court itself has acknowledged that there was no competent evidence that the petitioner attacked K.B. (Opinion, 35), or even that K.B.’s brain injury was caused by strangulation or physical assault. The state’s courts’ retrospective alteration of the rule of evidence to admit the Rule 404 (b) (2) testimonies violated category 4 of Calder and Bull’s ex post facto laws, applicable to courts by the fair warning and ex post facts principles enunciated in Rogers. *Calder v. Bull*, 3 U.S. 386 (1798); *Rogers v. Tennessee*, 532 U.S. at 462. The false substitute evidence made the trial fundamentally unfair. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). K.A.B. and F.M.’s

extrinsic testimonies denied the petitioner a fair opportunity to defend against the charge. *Old Chief v. U.S.*, 519 U.S. 172, 179-181 (1997).

The admission also contradicted various circuit court rulings that Rule 404 (b) evidence must be relevant to a matter in issue, similar enough and close enough in time to be relevant to the matter in issue, and not unfairly prejudicial. *U.S. v. Leahy*, 464 F.3d 773, 393 (7th Cir. 2006); *U.S. v. Peters*, 283 F.3d 300, 312 (5th Cir. 2002); *U.S. v. Chavis*, 429 F.3d 662, 667 (7th Cir. 2005); *U.S. v. Soundingside*, 820 F.2d 1232, 1233 (10th Cir. 1987); *U.S. v. Newton*, 912 F.2d 212, 214 (8th Cir 1990).

J. The court's review is needed to determine if the judicial abrogation of the reasonable alternative hypothesis analytical construct in 1991 that was made non-retroactive is applicable to this case, and to remedy the deprivation of the petitioner's due process rights by either the retroactive abrogation or by the appellate court's failure to apply the analysis to find acquittal.

(Reference Question #10) Until 1991, a conviction a Texas based on circumstantial evidence cannot be sustained if the evidence does not exclude every reasonable hypothesis other than the guilt of the defendant. *Fuller v. St.*, 827 S.W. 2d 919, 931 (Tex. Crim. App. 1992) (Citing *Geesa v. St.*, 820 S.W. 2d 154, 165 (Tex. Crim. App. 1991). In abrogating the common law doctrine, the Texas Court of Criminal Appeals held in *Geesa*, *supra*, that is was not to be applied retroactively. *Ibid.* Even after the abrogation, reviewing courts were still supposed to consider reasonable alternative hypothesis suggested by evidence, and to find acquitted for reasonable doubt with respect to a defense. Texas Penal Code §2.03 (d); *Richardson v. St.*, 973 S.W.2d 384, 387 (Tex. App.-- Dallas 1998).

Yet, the appellate court did not consider or opine about any reasonable alternative hypothesis to baselessly claim that evidence proved the petitioner guilt. To the defense's observation that there was no evidence that the petitioner harmed K.B., despite the sperm DNA evidence, the court dismissively opined that "the State is not required to disprove every innocent

explanation of the evidence.” (Opinion, 7). The three items of evidence mentioned by the court as the proof of guilt-- the sperm DNA, F.M. and K.A.B.’s testimonies, and K.B’s body condition (based on non-experts’ opinion) could not prove guilt but raises only a suspicions. Guidry v. Dretke, 429 F. 3d 154 (5th Cir 2005) (Evidence raising only a suspicion of guilt is insufficient); Jackson v. Virginia, 443 U.S. at 320 (“Modicum of evidence” insufficient).

If the judicial abrogation of the reasonable alternative hypothesis doctrine is applicable to this case, it is retroactive change of rule of evidence in violation of category 4 of Calder v. Bull, 3 U.S. 386 (1798); Procter v. Cockrell, 283 F. 3d 726, 1731 (5th Cir. 2002); Rogers v. Tennessee, 532 U. S. at 462. The change was highly disadvantageous to the petitioner as there were numerous reasonable alternative hypotheses suggested by evidence as to both identity and causation that were not rule out by evidence: **(1). “Peter did it”**-- K.B.’s own utterance should be the most important and relevant evidence, and there was no evidence to disprove it. **(2). Drug Overdose/ withdraw/ Domestic altercation**-- K.B.’s severe “difficulty breathing,” as well as diagnosis, dilated pupils, and stupor, at the scene for at least half an hour could well have been drug effects; she had signs of withdraw, such as agitation, hallucination, and paranoia. See Appendix E. **(3). No “hanging”**-- Dr. Greenlee testified that K.B.’s brain injury with damage to basal ganglia and occipital lobe could have been due to drugs, stroke, or hanging type of strangulations; there was no evidence at all that K.B. suffered hanging. **(4). Numerous men involved with K.B. not found**-- the “Italian guy” at Lombardi’s, “Peter,” donors of two other sperm DNAs, owners of various fingerprints, including on champagne glasses, and David Gault /Gull. **(5) Progressive deterioration**-- the cause of K.B.’s progressive deterioration since 1994 could not have been the “strangulation event”; some other causation was involved. **(6) Respiratory failure at the scene**-- There was no airway injury or obstruction. Whatever caused the cyanosis and severe breathing difficulty for at least half an hour must have been some cause that was internal-- drugs or functional

stroke -- rather than strangulation or assault (7) **Consensual sex**-- there was no evidence of non-consensual sex. K.B. did not have any bruise on hands, arms, legs, or body which suggested resistance or restraint; no expert, especially Dr. Ramos-Santos, even suggested that K.B. was sexually assaulted. (8) **No intent of murder**-- it is impossible for there to have been any evidence that the petitioner intentionally murdered K.B. when there is no competent evidence that the petitioners harmed K.B. in any way or was in her apartment, and the death did not occur until 30 years later. (9) **CTE / chronic encephalopathy**-- K.B.'s brain injury in 1988 became a chronic encephalopathy just like CTE. The original causation is unproven, but regardless of whether it was traumatic, drug induced, or physiological derangement, the progressive deterioration years later obviously was caused by one or more complex, non-assaultive causes. The continued use of the diagnosis of "brain injury" in the medical records was for the purpose of ensuring continuity of care, not for proving a "chain of causation" or continued assaultive causation.

The appellate court erred to have not found acquittal based on Jackson standard, reasonable alternatives hypothesis, TPC §2.03 (d), or invalidity of the charge.

K. The conviction in the case demonstrated the state court's lack of impartiality and the pernicious effects of the post-acute delayed death homicide paradigm that resulted in constructive amendment of the indictment and implicit imposition of mandatory presumption of guilt on the jury. This court's intervention is warranted to remedy the arbitrary deprivation of liberty for the petitioner and to uphold the fundamental due process right of freedom from such deprivation for the public. Jackson v. Virginia, 443 U.S. at 314.

(Reference Question #11). The proof required for the charge is that Guo intentionally caused K.B.'s death by strangulation while committing or attempting aggravated sexual assault. The evidence produced at the trial was that Guo had sexual contact with K.B.; the non-expert paramedics "believed" or speculated that K.B. was severely beaten, strangled, and raped, but no expert (the M.D.'s) concurred; the experts testified about the severe brain injury in 1988, worsened brain injury in 2018 at autopsy, but only theoretically about strangulation; F.M. and K.A.B.'s

testimonies suggested only the possibility that Guo might have acted in conformity with propensity/character. There was no competent testimony that Guo harmed K.B. or how K.B. sustained her brain injury or what exactly caused her death in 2018.

The State's proof was gravely insufficient. The prosecutor was the only person who repeatedly claimed the key elements of the charge. *Carey v. St.*, 507 S.W. 3d 761, 761 (Tex. Crim. App. 2016) (arguments of the parties are not evidence).

But the judicial approval of the prosecution also approved the state's post-acute delayed death homicide paradigm which resulted in constructive amendment of the indictment to accommodate the unalleged fact of 30 years of delay in death, and therefore the capital murder as a "continuing offense" that occurred over 30 years. *Stirone v. U.S.* 361 U.S. 212, 217 (1960) (constructive amendment of indictment by court violated Fifth Amendment's Grand Jury Clause); *Toussie v. U.S.*, 397 U.S. 112, 114 – 115 (1970) (offenses should not be considered continuing unless the explicit language of the statute compels such conclusion).

Further, the judicial approval also resulted in the implicit imposition of mandatory presumption of guilt by endorsing the paradigm that is inherently a sub-Jackson scheme. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (Jury instruction of lesser standard of proof than beyond reasonable doubt unacceptable). The State was able to claimed proof by simply using the vague, unattested, catch-all terms of "strangulation event," "chain of causation," and "complication" to allege the mere possibility that Guo could have "incited a chain of event" to cause K.B.'s death. The burden is then shifted to the defense to prove innocence. *Francis v. Franklin*, 471 U.S. at 325 (Jury instruction shifting burden of proof on intent element to defense unconstitutional).

L. Prosecutorial misconducts were profuse and purposeful, which unquestionably undermined the fairness of the trial and contributed to the miscarriage of justice. *U.S. v. Young*, 470 U.S. 1, 2 (1985). This Court's intervention is needed to correct the false conviction begotten by the denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

(Reference Question #12-16). The prosecution purposely devised improper methods with disregard to prosecutorial due process requirements to produce the false and void conviction. Berger v. U.S., 295 U.S. 78, 88 (1935); Strickler v. Greene, 527 U.S. 263, 280-281 (1989) (prosecutorial due process requirements). The state lacked evidence to prosecute Guo before the time bar in 1993 and after the DNA match in 2018, but work backward to fabricate evidence to obtain the conviction. The lame original indictment alleging that Guo caused K.B.'s death by asphyxiating her without specifying the means reflected the lack of evidence. The second indictment six months later reflected the prosecution's strategic choice to exploit the availability of F.M. and K.A.B.'s testimonies which coincidentally corresponded to the speculation of the "responding and medical personnel" about beating, rape, and strangulation in K.B. Thus, the prosecution designed the proof of the case as a theatrical production to foster the false impression started by the first responders that K.B. was brutally attacked, raped, and strangled to unconsciousness, so as to use the extrinsic testimonies as false substitute evidence. Giglio v. U.S., 405 U.S. 150, 158 (1972) (deliberate deception of the court and juror by the use of known false evidence); Payne v. Tennessee, 501 U.S. at 825 (prejudicial evidence rendered trial fundamentally unfair).

(i) False Theory. The prosecution undoubtedly knew the beating-rape-strangulation theory as the cause of K.B.'s brain injury was false because no expert confirmed any key element unequivocally and the prosecutor conspicuously did not pointedly ask any expert to clearly opined whether he or she was certain that K.B. was severely beaten, raped, or suffered brain injury from strangulation. The prosecutor was the only person who repeatedly asserted these key elements to create the false appearance that the experts were testifying in support of his claims. The prosecutor must have known the falsity of the theory from the lack of support by not only the experts but also K.B. who has never gave credence to the theory or implicated Guo.

(ii) False Evidence. By a careful examination of the evidence from the trial, it is nearly impossible that K.B. was severely beaten, raped, or sustained brain injury from strangulation; her brain injury almost certainly was caused by the respiratory failure observed by A.B.A. and the first responders at the scene and her external injuries were all very superficial and minor, and mostly self-inflicted. (See Appendix E). The prosecutor revealed his guilty knowledge of the falsity of the state's theory when Dr. Greenlee and C. Stewart tried to elaborate on their testimonies that K.B.'s brain injury could have been caused by drugs and stroke (Greenlee) and K.B.'s injuries on left forearm and leg could have been caused by the headboard (Stewart). The prosecutor quickly asked them to move on. The prosecutor needed the brain injury to have been caused by an aggravated assault and strangulation in order to falsely claim proof of identity by F.M. and K.A.B's testimonies. *Miller v. Pate*, 386 U.S. 1, 5-6 (1967) (Conviction begotten by knowing use of false evidence); *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974). F.M. and K.A.B.'s testimonies in fact proved only that the non-expert personnel's speculation and the state's theory described the same type of crime as in the extrinsic testimonies and not facts in K.B.

(iii) “We Know He Did It.” During the trial, the prosecutor would walk up to Guo several time a day, then point and declare that, “We know he did it.” *Young*, 470 U.S. at 18 (prosecutor's expression of personal opinion of defendant's guilt improper); *U.S. v. Haddon*, 927 F. 2d 942, 947 (7th Cir. 1991) (citations omitted, every federal circuit is in agreement that prosecutor's statement of personal belief of the defendant's guilt improper). Two investigators also made the same baseless statement when they testified.

(iv) Misrepresentation of Evidence and Exclusion Tests. The prosecutor made many other misrepresentations of fact and misstatements of the evidence to mislead the jury. *Young*, 470 U.S. at 7. He insinuated Guo attacking and strangulating K.B. He described K.B.'s injuries as defensive wounds, binding wounds, rug burn, from beating, and from strangulation, as if he was an expert

witness himself. He repeatedly mentioned K.B.'s "rape exam" to instill the false impression that K.B. was raped. He went to a great length to mislead the jury that the hair dryer was probably the strangulation weapon that it could not have been-- trace amount of blood almost certainly was from menstrual blood on the cord and negative confirmation test for DNA ruled it out because DNA is very sticky and would not be cleaned off just from soaking in plain water. He described Guo's inclusion in the pubic hair and nail clipping exclusion tests as if they were significant, when both were inconsequential. Nail clipping sample was so small that it could well have been from casual contact; pubic hair fragment could have come from sexual contact or sharing laundry machines. K.B.'s father could well have been included in both, but the included group is so large that it means little to be included.

Most egregiously, the prosecution misrepresented the similarities between K.B. and F.M. /K.A.B. The details in K.B.'s attack is unknown, so any comparison is based on speculation or fabrication. The prosecution falsely alleged not only the details of the cases but also similarities of the women. The women were quite different physically, age-wise, and social situation wise, but the prosecution described them as very similar in each trait. K.B. was more than half a foot shorter, nine years older, and nearly a decade out of high school with different hair color. K.B.'s case occurred two and ten years before K.A.B. and F.M.; the latter was in a different city and occurred during the day. Not only did K.B. said Peter, a romantic partner, did it, to indicate the case as totally different, any alleged similarity described by the State was generic for the type of crime.

M. This Court's intervention is warranted to correct the lower court's decisions that departed greatly from this Court's holdings and to remedy the failure to due process safeguard in the state courts.

(Reference Question #17, 18). In a trial, the judge has the responsibility to maintain decorum, assures its proper conduct, and keep each counsel within proper, accepted bounds. Young, 470 U.S. at 9-10. In K.B., the trial judge failed to maintain such order and uphold due process

requirements. As the result, the prosecution was able to use improper methods to obtain a wrongful conviction, which amounted to miscarriage of justice. *Young*, 470 U.S. at 7-9. In the K.B. trial, the prosecution not only based the state's theory on the erroneous, non-expert first responders and hospital staff's speculation as if it was a fact or expert opinion, the prosecutor himself blatantly misstated evidence, misrepresented facts, and commented extravagantly as if he was a testifying forensic medical expert himself, especially about K.B.'s external injuries and causation of K.B.'s brain injury. The trial court should have ensured that experts were actually experts and expert testimonies did not become conduit for hearsay or transmuted to supported falsities. *Lundy v. U.S.* 809 F.2d 392, 395 (7th Cir. 1987).

But by the trial court's admission of the extrinsic testimonies and denial of the defense's motion to dismiss the prosecution for violation of statute of limitations, the trial court very clearly expressed its biased determination before trial to obtain a conviction. The judge presumed guilt and made biased rulings to obtain the conviction in contravention against the 6th amendment right for the jury, instead of the judge, to determine guilt. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

The judicial approval of the prosecution constructively amended the indictment to encompass the post-acute paradigm and the decades of delay in death, allowed F.M. and K.A.B.'s testimonies as false substitute evidence, and implicitly imposed a mandatory presumption of guilt as the inherent premise *U.S. v. Miller*, 471 U.S. at 138. Thus, despite gross insufficiency of competent evidence, false substitute evidence, and void charge, the state obtain a conviction. The trial court's wrongful allowance of the prosecution despite of time bar and void charge, admission of the extrinsic testimonies based on misrepresentations, and denial of concurrent instruction were instrumental in the conviction.

On review, the appellate court's uncritical acceptance of the trial court's fallacious rulings and the prosecution's misconducts, and distortion of law and facts to support the conviction were similar plain errors. U.S. v. Marcus, 130 S. Ct. 2159, 2164 (2010)

X. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Devy Gao, pro se, 02348097 Connally Unit.

Date: October 17, 2022

XI. APPENDIX INDEX

- A. MEMORANDUM of OPINION from Fifth Court of Appeals**
- B. Refusal of Petition for Discretionary Review by the Court of Criminal Appeals of Texas**
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