NO. _____

In the
Supreme Court of the United States

AMBER RENEE GUYGER, Petitioner

v.

TEXAS, Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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Date: June 28, 2022

QUESTION PRESENTED

1. Under the legal sufficiency standard of *Jackson v. Virginia*, does a court violate due process by concluding that self-defense and mistake-of-fact are mutually exclusive and cannot be considered simultaneously in a legal sufficiency review if the facts support consideration of both?

PARTIES TO THE PROCEEDING

Amber Renee Guyger, Petitioner

State of Texas, Respondent

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

RELATED CASES

- *Guyger v. State*, ___ S.W.3d. ____, No. PD-0918-21, 2022 Tex.Crim.App.LEXIS 218 (Tex.Crim.App. March 30, 2022, pet. ref.) (Yeary, J. dissenting) (App. 01-11)

- *Guyger v. State*, No. 05-19-01236-CR, 2021 Tex.App.LEXIS 9341 (Tex.App.-Dallas Nov. 17, 2021) (mem. op.) (App. 13-35)

- *State v. Guyger*, No. F18-99737 (204th Dist. Ct. Dallas Co.)

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Amber Renee Guyger respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the Fifth Court of Appeals of Texas:

OPINIONS BELOW

The unpublished memorandum opinion of the Fifth Court of Appeals of Texas ("Opinion") is at App. 13-35. *Guyger v. State*, No. 05-19-01236-CR, 2021 Tex.App.LEXIS 9341 (Tex.App.-Dallas Nov. 17, 2021) (mem. op.). The two-judge published dissent of the Texas Court of Criminal Appeals ("TCCA") is at App. 01-11. *Guyger v. State*, ___ S.W.3d. ____, No. PD-0918-21, 2022 Tex.Crim.App.LEXIS 218 (Tex.Crim.App. March 30, 2022, pet. ref.) (Yeary, J. dissenting).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Opinion per the Court's authority to issue writs of certiorari. 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATURORY PROVISIONS

The Fifth Amendment provides in relevant part: "No person shall be…deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

The Fourteenth Amendment provides in relevant part: "…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 to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Introduction

The facts strongly support the conclusion that Amber Guyger reasonably believed she had entered her apartment instead of Jean's apartment. Before the tragic events of the evening of September 6, 2018, Guyger was a well-regarded police officer with the City of Dallas. After completing a long shift that day, she drove home and entered the parking garage of her apartment building. She drove to the fourth floor of the garage, mistakenly believing that she had driven to the third floor. She walked to what she thought was her apartment. She tried to enter the apartment using her fob, but although the fob did not work, the door to Jean's apartment was not latched or locked due to shoddy installation of the strike plate and the humidity. Like many other tenants who did the same, the surrounding circumstances and setup of the building significantly contributed to these mistakes. Guyger's mistakes were reasonable mistakes of fact. She entered what she thought was her apartment and shot who she thought was an intruder.

Logically, the legal sufficiency analysis under *Jackson v. Virginia* should have allowed her both defenses of self-defense and mistake-of-fact. However, the Court of Appeals and the Texas Court of Criminal Appeals (with the exception of two judges) concluded that self-defense and mistake-of-fact are mutually exclusive and cannot be considered simultaneously in a legal sufficiency review even if the facts support consideration of both. This violated Guyger's due process rights under the Fifth And Fourteenth Amendments.

Procedural History

1. Trial

On October 2, 2019 in *State v. Guyger*, No. F18-99737 (204th Dist. Ct. Dallas Co.), Guyger was convicted of Murder under Tex. Penal Code § 19.02(b)(1) & (2) and sentenced to 10 years in the Texas Department of Criminal Justice ("TDCJ"). (RR15.8; RR16.129; CR.2536-2539).[1]

2. The Judgment of Conviction and sentence are affirmed

On November 17, 2021, the Court of Appeals affirmed the Judgment and sentence. ("Judgment"). *Guyger v. State*, No. 05-19-01236-CR, 2021 Tex.App.LEXIS 9341 (Tex.App.-Dallas Nov. 17, 2021) (mem. op.) (App. 13-35).

3. The Texas Court of Criminal Appeals refuses the petition for discretionary review

On March 30, 2022, the TCCA refused the petition for discretionary review ("PDR"). Two judges of the TCCA issued a published dissent. *Guyger v. State*, ___ S.W.3d. ____, No. PD-0918-21, 2022 Tex.Crim.App.LEXIS 218 (Tex.Crim.App. March 30, 2022, pet. ref.) (Yeary, J. dissenting) ("Dissent"). (App. 01-11)

Facts

1. Southside Flats Apartments

On September 6, 2018, Amber Guyger and Botham Jean both lived at Southside Flats Apartments in Dallas, a four-story building with an attached parking garage. (RR9.90; RR17.SX36). Guyger had lived in apartment 1378 on the third floor

[1]The Clerk's Record is cited as "CR" or "CR-Sealed" followed by the page number. The Reporter's Record is cited as "RR" or "RR-Supp-Xs" (Supplemental Exhibits Volumes) or "RR-Supp-Sealed" (Supplemental Sealed Exhibits Volumes) followed by the volume and page or exhibit number.

for about 56 days. Jean had lived since June 2017 in apartment 1478 on the fourth floor, immediately above Guyger. (RR9.90-91, 188-194; RR12.22; RR17.SX31-SX32, SX34-SX35; SX70-SX86). Apartments 1378 and 1478 had the same floor plan, and the kitchen, countertops, couches, and televisions were in the same places. (RR9.193; RR10.24-26, 29; RR17.SX33; DX32-DX38).

In the garage, the only indicator of the floor were signs in front of the reserved parking signs and small black placards on the inside frames of the elevators. (RR10.30-31, 224-225, 229; RR11.60, 66; RR17.SX68, SX83, SX261). When a person entered the apartment building from the garage, there was no indicators of the floor number. (RR10.31). The garage and hallway on the third and fourth floors are generally the same. (RR10.114-119; RR17.SX261).

The apartment locks open only with radio frequency identification (RFID) fobs. (RR9.210-211, 287). If the lock did not recognize the fob, it blinked red. Otherwise, it blinked green and allowed entry. (RR9.210-211). To enter, one had to turn the passive, lockless door handles. (RR9.276, 285). Once inside, one had to turn the deadbolt to lock it (they did not automatically lock). (RR9.276-277, 285). The regional manager was not aware of issues with the lock or door to apartment 1478. (RR9.214). It was never reported to her that when humidity was high, the Jean's door would not completely shut because of the shoddy installation of the strike plate. (RR9.214-215).

2. Amber Guyger worked as an officer with the Dallas Police Department's Crime Response Team

Guyger worked with the Dallas Police Department's ("DPD") Crime Response Team ("CRT"). Guyger is 5'3" tall and petite. (RR9.284; RR12.76; RR17.SX53-SX56). She began at the academy in November 2013. (RR12.30). DPD officers are trained to shoot suspects in the torso. (RR8.202). While with the CRT, Guyger assisted with drug cases and assisting the DEA and FBI to apprehend fugitives. (RR8.156, RR12.36-37, 55). Guyger was described by her supervisor as highly capable, competent, and qualified. (RR8.161, 198).

Officers like Guyger accumulate overtime because of the work. (RR9.171-172). Overtime was approved by supervisors. (RR.172-173). Between September 3-5, 2018, in addition to her regular eight-hour shift, Guyger worked 6.25 hours of overtime. (RR9.166-168; RR17.SX.19). On September 6, 2018, Guyger left for work at 7:23 a.m. (RR9.289; RR17.SX40, p. 1). She arrived shortly before 7:47 a.m. and undocked her bodycam. (RR9.27; RR17.SX24, p.1, line 8). That day, Guyger assisted SWAT in locating and transporting robbery suspects to DPD headquarters. (RR8.163; RR12.54-59). That day, Guyger worked 5.8 hours of overtime, and 13.8 total hours.

3. The events of September 6, 2018

Guyger left work at 9:33 p.m. (RR9.27, 168; RR10.88; RR17.SX.19, SX24, p.3, line 61). She was sober. A test of her blood drawn at about 3:00 a.m. on September 7, 2018 was negative for drugs and alcohol. (RR9.149-151; RR17.SX16).

Guyger drove her truck to the apartments and entered the garage at 9:46 p.m. Guyger was on her cellphone speaking to Officer Rivera when she pulled into the

garage. (RR12.65). Instead of driving to the third floor, she drove to the fourth floor and parked her truck. (RR10.33; RR12.65-66; RR17.SX170, SX175-SX176).

From where Guyger exited her truck, there was no indicators showing what floor she was on. (RR10.33-34). She walked towards what she thought was the third floor of the apartment building. (RR12.70-71). She was in full police uniform, carrying her vest, lunchbox, and backpack in her left arm because she was taught to always keep free the hand on the side (right) her firearm is holstered. (RR9.257-258; RR12.70-71). Attached to her utility belt was a police radio, two handcuffs, her pistol, a taser, two additional pistol magazines, a knife, oleoresin capsicum spray, and a flashlight. (RR10.219-224; RR11.99-102; RR17.SX53-SX57, SX74-SX76).

The exterior of Jean's apartment (1478) is the same as Guyger's apartment (1378) with exception of a red doormat in front of Jean's apartment. (RR10.40; RR11.135-137; RR17.SX95, SX97, SX267). The apartments are not on the doors or immediately next to the doors, but instead on gold panels about a foot to the left of the doors. (RR9.215; RR10.216, 228, 232; RR17.SX80-SX81, SX95, SX97).

When Guyger arrived to what she thought was her apartment (1378), she placed the fob into the lock and turned it. (RR12.73-74, 79-80). She heard loud shuffling and someone walking inside. (RR12.81). The door was cracked open and her turning the fob caused the door to begin to open. (RR12.80, 82). While holding her equipment in her left arm, she used her left arm to push the door wide open. (RR12.85-86). Guyger was terrified, believing that someone was inside her

apartment. (RR12.82-83). She did not see a light on inside. (RR12.84). she dropped her equipment in front of the door to keep it propped open. (RR12.86).

Guyger saw a silhouette figure standing in the back of the apartment. (RR12.84-85). The distance between the front door to the back of the apartment is about 30 feet. (RR12.87-88). Guyger drew her pistol and yelled, "Let me see your hands. Let me see your hands." (RR12.85, 88). Guyger could not see the figure's hands. (RR12.85). The figure walked towards Guyger at a fast pace, yelling "hey, hey, hey." (RR12.86, 88). Guyger believed she was in danger because of the circumstances and she could not see his hands. (RR12.86). Guyger shot because she thought he was going to kill her. (RR12.89). Her complete attention was on the figure. (RR12.90).

Guyger fired two rounds: one round struck the south wall of the apartment, and the other struck Jean about half an inch above his left nipple. (RR10.174-179, 189, 196; (RR12.89; RR11.73; RR17.SX268-SX270). The location of the shell-casings showed that Guyger was just inside the doorway when she fired. (RR10.65, 237; RR17.SX.106, SX140). Jean fell near the entryway to the bedroom. (RR10.27-28; RR17.DX36). Guyger shot two rounds—a "double tap"—because she was trained to do so. (RR12.118).

Guyger walked to the kitchen counter and realized that she was not in her apartment because she did not have an Ottoman on the floor. (RR12.89-90). She noticed the light from the television. (RR12.90). Guyger did not know the person she had shot. (RR12.90).

Guyger immediately called 9-1-1. (RR9.14-18; RR12.91; RR17.SX4, SX4A, SX5, p. 3, SX20). Using her left hand, Guyger began performing chest-compressions. (RR12.91). She did not know where Jean was shot. (RR12.91). During the call, Guyger told the operator that she is an off-duty DPD officer, repeatedly said that she thought she was in her apartment, she shot a guy because she thought she had entered her apartment and he was inside, she thought she had parked on the third floor. (RR17.SX4. SX4A). Officers were dispatched. (RR9.19).

During the 9-1-1 call, the dispatcher asked Guyger where she was, and Guyger replied that she did not know. (RR12.91). Guyger had to go outside to look at the apartment number. (RR12.91). She went back to Jean and began performing a sternum rub. (RR12.92-93). She wanted Jean to keep breathing. (RR12.93).

At 10:02:25, Guyger sent a text to Officer Rivera, "I need you. Hurry." (RR10.90). At 10:03:03, Guyger sent another text to Rivera, "I fucked up." (RR10.90). Guyger sent these texts because she needed help, and the first person she thought of was her partner Rivera. (RR12.95). When officers arrived, they found Guyger to be upset and very emotional. (RR9.69-70).

Joshua Brown lived in apartment 1437 immediately across from Jean and was the nearest witness. (RR9.223-225, 227, 238). Brown met Jean for the first time earlier that day and they discussed management coming to their doors because they smoked marijuana. (RR9.226-227). Brown explained that he heard "two people meeting each other" as though they were surprised to see each other, then heard two gunshots. (RR9.232-233, 240-241). A few minutes later, Brown looked through his

peephole and saw Guyger on her cellphone crying, saying that she "came into the wrong apartment." (RR9.236). Brown had never seen Guyger before. (RR9.238, 242). Over the four months he had lived in the building, Brown entered the wrong floor "on a few occasions" and one time while on the wrong floor walked to the wrong apartment and inserted his fob into its lock. (RR9.244-245).

4. The investigation

The lead investigator was Texas Ranger David Armstrong. (RR10.18, 21; RR11.65). He had assisted or was lead investigator in many officer-involved shootings. (RR10.20). Ranger Armstrong knew that Guyger had tried to open Jean's door because her keys were dangling from the lock. (RR9.290). There was no forced entry. (RR9.309). During the investigation, Armstrong himself unintentionally parked on the wrong floor of the garage. (RR10.31).

The investigation revealed that the light sources inside Jean's apartment when the incident occurred were from a 50-inch television and a laptop that was on the ottoman. (RR9.306-307). Armstrong discovered that the strikeplate installed on the doorframe of Jean's apartment was bowed out, indicating that when it was installed, its screws were overtorqued, causing it to bow. (RR10.43-44; RR17.DX39-DX43). The overtorqued strikeplate cracked the inside of the doorframe. (RR10.45-46; RR17.SX26, DX40-DX41). Because the bottom of the strikeplate was driven in too far, the gap between the wood and strikeplate was exposed and the screws were torqued to the point that the strikeplate was bowed into the area where the door throw should sweep. (RR10.46).

On September 6, 2018, it had rained, so there was humidity. (RR10.47-49). In an experiment conducted in October 2018 when the weather conditions were similar to September 6, 2018, Armstrong opened the door to Jean's apartment numerous times, and each time it did not completely close and latch. (RR10.47-50; RR17.SX26). The investigation also showed that other residents had problems with their doors latching due to defects. (RR12.166-170).

Further, residents regularly parked on the wrong floor, walked to the wrong apartment, and attempted to enter, or entered the wrong apartment. Ranger Armstrong and his team interviewed 297 of the 349 residents of Southside Flats and discovered that 71 tenants—44% of all tenants—on floors three and four had walked to the wrong apartment on the wrong floor; 23% of tenants on floors three and four had gone to the wrong door and inserted their fobs into the locks; 76 tenants—47% of them—on floors three and four had unintentionally parked on the wrong floor; 93 tenants—32% of all tenants—on all floors had unintentionally parked on the wrong floor; and 15% of all tenants had gone to the wrong door and inserted their fobs into the locks. (RR9.292-293; RR10.41-43).

One tenant, an attorney with Kirkland & Ellis, lived with a roommate on the third floor in apartment 1300, a two-bed, two-bath unit. (RR12.172-173, 181; RR17.DX80). This tenant had never met Guyger or Jean. (RR12.173). The tenant unintentionally parked on the fourth floor 10-12 times. (RR12.173-174). He described the entryway into the apartment building from the parking garage on the third floor being virtually identical to the same position on the fourth floor. (RR12.174-176;

RR17.SX251, DX79). He never noticed the roofline of the apartment building from the fourth-floor garage. (RR12.176). Nor did he recall anything that distinguishes the third floor from the fourth floor. (RR12.177). Once after walking his dog, he used the stairwell, and in error ascended one flight of stairs to the second floor rather than two flights to the third floor. (RR12.180). He walked to what he thought was apartment 1300, but instead walked to apartment 1200, a floor directly beneath his. (RR12.181-182, 188). He had not locked his door before taking his dog for a walk. The door to apartment 1200 was unlocked, so entered, believing it to be his apartment. (RR12.182). He walked past the kitchen counter and saw a purse, so he thought his roommate had a guest. (RR12.183). A woman sitting on the couch looked surprised to see him. (RR12.183-184). It was then that he realized he had walked into the wrong apartment. (RR12.184).

A teacher had lived on the third floor in apartment 1352 for about two years. (RR12.190-191). Several times, she had unintentionally parked on the fourth floor. (RR12.196). She could not differentiate between the third and fourth floors unless she recognized other vehicles as "markers." (RR12.196). Several times, her fob didn't work. (RR12.191-192). One time when she was home, a smelly, toothless man who had a fob entered her apartment. (RR12.193).

5. Dallas Police Department and Texas Rangers policies regarding possible deadly threats inside a home

DPD procedures for responding to a burglary call requires officers to: (1) maintain a perimeter, (2) contain, (3) cover in case the suspect has a weapon, and (4)

concealment, which is to hide behind something and watch for an attempted escape. (RR8.170-175; RR17.SX312-SX313). Officer Lee explained that if he received a call that a burglary may be in progress and he arrives alone, he must take a position of cover and concealment and give the burglar a chance to surrender. (RR9.62-65, 76). However, Lee also explained that if he entered his own home and believed that there was an intruder inside, he would not treat it like a burglary call but would use deadly force if he perceived a deadly threat. (RR9.76). Lee also explained that in his experience living in an apartment, maintenance personnel have never rummaged through his apartment late at night with the lights turned off. (RR9.76-77).

Ranger Adcock explained that when faced with a deadly threat, officers are trained to use their firearms. (RR11.109-110). They are not to use a taser when faced with a deadly situation because tasers are a less-lethal option. (RR11.109). Further, OC spray is not used in a deadly-force situation or in an enclosed area because the spray does not have enough room to disperse. (RR11.110).

DPD Officer Blair explained that officers always call for suspects to show their hands because "hands are what's gonna hurt you." (RR12.206-210). Blair also explained that his mind-set is different while off-duty versus on-duty. (RR12.214). If Blair is dispatched to a possible burglary, he follows operating procedures, has time to formulate a plan with other officers, and seeks cover and concealment unless he confronts the suspect. (RR12.216-217, 222). But if he arrived home and discovers an intruder, he would immediately confront the intruder. (RR12.217). Only if he had not entered his residence would he wait for cover. (RR12.222-223).

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991).

REASONS FOR GRANTING THE WRIT

1. Under the legal sufficiency standard of *Jackson v. Virginia*, a court violates due process by concluding that self-defense and mistake-of-fact are mutually exclusive and cannot be considered simultaneously in a legal sufficiency review if the facts support consideration of both.

As explained in the Introduction, the facts strongly support the conclusion that Guyger reasonably believed she had entered her apartment instead of Jean's apartment. As the Dissent explains, "[T]he evidence plausibly shows that, believing that she was entering her own apartment after a shift at work, Appellant instead entered the apartment of her upstairs neighbor and, thinking him to be an intruder, shot him with the intent (as she admitted) to kill." Dissent, *id*. at 1, App. 02.

The question is whether in a legal sufficiency review, a person's mistake-of-fact as to a set of circumstances may coexist or overlap with a claim of self-defense. Mistake-of-fact is codified in Texas under Tex. Penal Code § 8.02(a). Self-defense is codified under Tex. Penal Code § 9.32(a). In the proceedings below, Guyger argued that the evidence was legally insufficient to prove beyond reasonable doubt that she committed Murder under Tex. Penal Code § 19.02(b)(1) & (2) because: (1) through mistake, Guyger formed a reasonable belief about a matter of fact—that she entered her apartment and there was an intruder inside—and (2) her mistaken belief negated the culpability for Murder because although she intentionally and knowingly caused

Jean's death, she had the right to act in deadly force in self-defense since her belief that deadly force was immediately necessary was reasonable under the circumstances. Thus, Guyger argued that the mistake-of-fact defense may coexist or overlap with a self-defense claim.

The Court of Appeals concluded that because Guyger admitted intent to cause Jean's death, she could not assert the mistake-of-fact defense under Tex. Penal Code § 8.02(a) because her belief about the danger posed did not negate her culpability for intentionally or knowingly causing the death. Further, the Court of Appeals concluded that a mistake-of-fact claim cannot coexist with a self-defense claim.

Guyger's admission that she intended to kill who she believed was an intruder is implied from the facts. *See*, *e.g.*, *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex.Crim.App. 2012) (specific intent to kill may be inferred from the use of a deadly weapon). Had Guyger entered her actual apartment, under Texas law, there would be no question that she had the right to shoot an intruder inside. Guyger's purpose in shooting her pistol was inextricably intertwined with the threat that she objectively perceived existed, which was due to her mistaken belief that she entered her apartment and saw an intruder approaching her. If Guyger had believed that she was anywhere other than insider her apartment, she would not have fired her pistol. She fired believing it necessary to protect herself only because she entered what she reasonably believed was her apartment.

If mistake-of-fact is allowed to coexist or overlap with self-defense, Guyger was not under a duty to retreat. The Dissent raised this possibility, explaining that "a

person who, among other things, had a right to be present at the location where deadly force was used need not show that she first retreated before the fact-finder may credit, as reasonable, her belief that deadly force was 'immediately necessary.'" Dissent, *id*. at 9, App. 09. But an actor "who did not have a right to be present at the location may have to convince the factfinder that it was reasonable for her not to have retreated first." *Id*.

The Dissent further explains that when the trial court applied mistake-of-fact to self-defense, it neglected to mention whether—and if so—how mistake-of-fact might eliminate any duty to retreat that arguably exists when the terms of Tex. Penal Code § 9.32(c) are not satisfied. *Id*. The jury was not told that it could apply mistake-of-fact in deciding whether Guyger had "a right to be present at the location" when she used deadly force. *Id*. The jury might have concluded that any belief Guyger had that she was in her own apartment—however reasonable—was irrelevant to whether she should be expected to retreat before she could use deadly force. *Id*. Because Guyger was not in her own apartment, the factfinder might rationally have regarded her failure to retreat as a sufficient basis to reject the reasonableness of her belief that her use of deadly force was immediately necessary—regardless of the reasonableness of her mistaken belief that she was in her own apartment. *Id*. at 9-10, App. 09-10.

By concluding that it was not proper to apply mistake-of-fact to self-defense, the Court of Appeals rejected discounted the possibility that Guyger need not have retreated based on her mistaken belief that she was in her own apartment. *Id*. at 10,

App. 10. "Otherwise, it arguably might not have rejected her self-defense claim on nothing more than the fact that she 'admitted that she could have taken a position of cover and concealment while she called for backup' rather than immediately using deadly force." *Guyger*, 2021 Tex.App.LEXIS 9341, at *6, App. 16-17. Thus, as the Dissent explains, if mistake-of-fact applies to whether Guyger had "a right to be present at the location" when the shooting occurred, then arguably Guyger need not have retreated first. Dissent, *id*. at 10, App. 10.

Rather, the Court of Appeals adopted in part the reasoning of the plurality opinion in *Celis v. State*, 416 S.W.3d 419, 430-432 (Tex.Crim.App. 2013) (plurality op.), which explains that mistake-of-fact does not apply when the mistake negates only general "culpability" for the commission of the offense. The better explanation of culpability in this case was stated by Judge Cochran in Footnote 4 of her opinion: "culpability" is broader than "culpable mental state," and refers to the general "blameworthiness" or "guilt" of the defendant. *Id*., *citing Evans v. Michigan*, 568 U.S. 313, 322 (2013) (distinguishing between elements of an offense and culpability, as culpability being the "ultimate question of guilt or innocence" and "the touchstone for purposes of an acquittal"); *United States v. Scott*. 437 U.S. 82, 98 (1978) (distinguishing between judicial determinations that go to the defendant's lack of culpability and relate to "the ultimate question of guilt or innocence" and those that deal with procedural error); and Black's Law Dictionary 406 ("culpability" is "Blameworthiness; the quality of being culpable"...).

The Court of Appeals also failed to consider that Murder under Tex. Penal Code § 19.02(b)(1) & (2) is different from the statutes examined in *Celis* (Falsely Holding Oneself Out As a Lawyer under Tex. Penal Code § 38.122); *Beggs v. State*, 597 S.W.2d 375, 378 (Tex.Crim.App. 1980) (Injury to a Child), and *Thompson v. State*, 236 S.W.3d 787, 798-799 (Tex.Crim.App. 2007) (Injury to a Child). All homicide in Texas—Murder, Manslaughter, or Criminally Negligent Homicide—involve the same result, which is the death of another. Tex. Penal Code § 19.02 says nothing about the context of the death. The only actus reus or material element of homicide offenses is the "causing of death." The law recognizes that the degree of criminality or blameworthiness involved in a homicide varies, in contrast to early common law under which all homicides were capital.

The Court of Appeals reasoned that unless *completely* justified by the surrounding circumstances—which is an impossible situation—if an actor shoots a firearm at another, she is guilty of Murder regardless of a mistake-in-fact because at minimum, she knew her conduct was reasonably certain to cause the death of—or serious bodily injury to—the target. *Guyger*, *id*. at 13, 16, 20 (App. 25, 28, 32). This reasoning requires that the actor recognize the nature of the harm involved, which is that another human is reasonably certain to be harmed. Thus, if the actor should reasonably believe that no human is within the line of fire as claimed in *Granger v. State*, 3 S.W.3d 36, 37 (Tex.Crim.App. 1999) or that the target is something other than another individual, her belief may excuse her from liability for Murder even though the shooting was intentional. The reasoning of the Court of Appeals is flawed.

The mistake-of-fact defense provides that in appropriate circumstances, the actor lacks the requisite culpability with respect to a relevant fact as it actually exists. Here, Guyger mistakenly entered Jean's apartment, believing it to be hers, then mistakenly thought the person inside was an intruder because she believed she was in her apartment. This mistaken belief negates the requirement that she retreat. If an actor makes a mistake in assessing the need for self-defensive action, she cannot be guilty of an offense that requires purpose to establish culpability. As explained in Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1014 (1932):

> The modern doctrine of mistake or ignorance of fact is built largely upon Levett's Case (Cro. Car. 538) decided in 1638. In this case the defendant reasonably but erroneously supposing that Frances Freeman, an intruder in his house in the night, was a burglar, killed her with a thrust of his rapier. The court resolved that it was not manslaughter, for the defendant "did it ignorantly without intention of hurt to the said Frances." After this decision courts evolved the important well-recognized doctrine that one acting under a reasonable mistake of fact is not criminally liable if, "had his erroneous supposition been true, he would not have been liable."

This is expressed in Model Penal Code § 2.02(7) (ALI 2017) as: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, *unless he actually believes that it does not exist*." (emphasis added). The explanatory note to Model Penal Code § 2.04(1) (ALI 2017) adds:

> "The matter is conceived *as a function of the culpability otherwise required* for commission of the offense. Such ignorance or mistake is a defense *to the extent that it negatives a required level of culpability* or establishes a state of mind that the law provides is a defense. The effect of this section therefore turns upon the culpability level for each element

> of the offense, established according to its definition and the general principles set forth in Section 2.02." (emphasis added).

Mistake-of-fact under Tex. Penal Code § 8.02 also focuses on whether the mistakes of fact of the actor provides an excuse for her actions, as opposed to claims that negate the illegal character of the conduct, like in justification defenses. There may be a valid explanation to what was done in spite of its harmful character. What appears to be egregiously wrong may not deserve the same conviction as though it was done intentionally or knowingly without a mistake-of-fact. Here, Guyger's act did not satisfy the culpability required for Murder.

An example of such mistake-of-fact occurs where a hunter hears the call of a gobbler and spots in the distance what he thinks is a turkey. The hunter fires his shotgun at the turkey. However, the target is another hunter, camouflaged with his face covered, kneeling, and chirping with his turkey call. The actor had no intent other than to shoot a turkey. He should not be guilty of Murder due to the surrounding circumstances and a tragic mistake-of-fact despite shooting his shotgun at another person.

Another example is where a person enters a restaurant and leaves his umbrella on a rack. On his way out, he takes an umbrella that looks like his but was placed in the rack by another person. His mistake of taking the wrong umbrella—even if negligent—is a defense to a charge requiring proof of intent or knowledge even though he took the wrong umbrella. He should not be held responsible for theft even

though he does not deny committing the overt act, which was intentionally or knowingly taking an umbrella that does not belong to him.

Had Guyger intentionally and knowingly walked into an apartment knowing that it was not hers and opened fire, she would be guilty of Murder. But this is not what occurred. While the loss to Jean and his family are not lessened, the extent of the intent or evil in the mind of the actor must be judged in determining her guilt. Guyger had no evil or criminal intent when she entered what she thought was her apartment. This was clear from when the events of the tragedy began to unfold. Guyger tried to open Jean's door using her fob, believing that it was her apartment. (RR9.290). There was no forced entry. (RR9.309). A person with intent of entering the wrong apartment so she can shoot someone inside does not try to unlock the door with her own keys. The reason why Guyger was able to enter Jean's apartment was because the strikeplate was bowed out due to shoddy installation. (RR10.43-44; RR17.DX39-DX43).

Guyger then mistakenly believed Jean to be an intruder in what she mistakenly believed was her apartment. The Court of Appeals erred in finding the opposite of such belief was conclusively established—so it need not consider whether the State disproved that a reasonable belief was formed. If identification of the person inside the apartment as a dangerous individual had been accurate, then Guyger's shooting her firearm would not have been conduct subject to a conviction for Murder.

Thus, the Court of Appeals erroneously concluded that a mistake-of-fact claim cannot coexist or overlap with a self-defense claim. The latter requires the admission

of all elements of the offense, while the former is a specific challenge to that element. *See Jenkins v. State*, 468 S.W.3d 656, 673-674 (Tex.App.-Houston [14th Dist.] 2015, pet. dism.). A defendant is entitled to rely on inconsistent defenses. *Bowen v. Stat*e, 162 S.W.3d 226, 229-230 (Tex.Crim.App. 2005) ("self-defense's statutorily imposed restrictions do not foreclose necessity's availability). *See also, e.g.*, *People v. Crane*, 554 N.E.2d 1117, 1121 (Ill.App.3d 1990), *affirmed,* 585 N.E.2d 99 (1991) (Crane relied on self-defense as to part of his conduct, but also mistaken belief that the complainant was no longer living when he burned the victim: "Had [Crane] believed the victim was dead when [he] 'committed his acts of burning,' he would have lacked the 'requisite mental state for murder *in connection with those acts*.'") (emphasis added). Upon review, the Illinois Supreme Court added: "it is not sufficient to merely inform the jury of the mental state requirements, but it must also be informed of the validity of the mistake of fact defense" especially "because defendant's whole case rested upon the concepts of self-defense *and* mistake of fact." *People v. Crane*, 585 N.E.2d 99, 102 (Ill. 1991) (emphasis added).

In finding her guilty of Murder, the jury held Guyger to an unreasonable standard beyond what can be expected of the reasonable person due to circumstances beyond her control. Guyger's motives—while misplaced due to her mistake-of-fact—was not evil. Motive is related to blameworthiness. Criminal responsibility is justly applied only for an act that illegitimately poses the threat of harm sought to be prevented. While Guyger was mistaken-in-fact about who she was facing or where she was, there was no conscious disregard of the chance of mistake involved.

Culpability deals with more than a specific mental state or degree of intentionality. It is "fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent." 1 Wayne LaFave, *Substantive Criminal Law* § 5.5(d) at 393 n.51 (2d ed. 2003). *See also, e.g., United States v. Cordoba-Hincapie*, 825 F.Supp. 485, 502 (E.D.N.Y. 1993) ("Section 2.04 of the [Model Penal] Code illustrates how (*mens rea*)...can be adhered to without compromising the practical needs and objectives of the penal law. It states...ignorance or mistake as to a matter of fact or law is a defense if...the ignorance or mistake negatives the purpose, knowledge, belief, recklessness, or negligence required to establish a material element of the offense."). *Cordoba-Hincapie* provides a comprehensive review of how to judge the culpability of mental states and their relation to the ability and duty of the normal individual to choose between good and evil. 485 F.Supp. at 489-513.

In *Granger*, 3 S.W.3d at 40-41, the TCCA explained that although Granger could not justify shooting into a parked vehicle, he may not be guilty of murdering its occupant if he reasonably believed that the car was unoccupied. Without knowledge of another's presence in the car, a jury could decide that Granger could not have intentionally or knowingly caused the death of the victim who was, in fact, inside his vehicle because he could not have harbored the degree of culpability required to find him guilty of murder. *See also, e.g.*, *People v. Russell*, 51 Cal.Rptr.3d 263, 270-271 (Cal.App.6th 2006) ("an honest and reasonable belief in the existence of

circumstances, which, if true, would make the act with which the person is charged an innocent act...is excluded from the class of persons who are capable of committing crimes.").

During her testimony, Guyger described—and the evidence supported—her lack of "the purpose, knowledge, [or] belief...required to establish a material element of the [charged] offense." Model Penal Code § 2.04(1)(a). Because of Guyger's mistake of fact and no requirement that she must retreat, the State failed to prove beyond a reasonable doubt that Guyger committed Murder. If a person is mistaken as to a matter of fact, under the appropriate circumstances she lacks the requisite culpability with respect to the fact as it actually exists. *See* Wayne R. LaFave, *Substantive Criminal Law* § 5.6(b) (3d ed. 2017).

Finally, as the Dissent explains, if the hypothetically correct jury charge applied mistake-of-fact to self-defense and applied it not just to the "reasonable belief" component of self defense but also to the retreat component, then it would have been a mistake for the Court of Appeals to measure sufficiency in the limited way that it did. Dissent, *id*. at 11, App. 11; *see Musacchio v. United States*, 136 S.Ct. 709, 715 (2016) (When a jury instruction sets forth the elements of the charged crime but incorrectly adds an element, a sufficiency challenge should be assessed against the elements of the charged-crime).

The Dissent continues: "…(the jury charge) should not have simply inquired whether the evidence was sufficient on the assumption that retreat is a relevant consideration (there being no question on the record that (Guyger) was not in her own

apartment). It should at least have also inquired whether (Guyger) nonetheless had 'formed a reasonable belief' about that 'matter of fact,' such that her mistake of fact (if any) about the location might have rendered it unnecessary for her to retreat before using deadly force—she having reasonably believed, based on that mistake, that she did have a right to be present at that location, and therefore need not have retreated before using deadly force." Dissent, *id*. at 11, App. 11. These issues may have made a difference to the resolution of the legal sufficiency claim. *Id*.

The failure of the appellate courts in Texas to decide these issues violated Guyger's right to due process. Due process requires that Guyger's conviction be supported by proof beyond a reasonable doubt regarding each essential element of the alleged offense as determined by a rational trier of fact. *Jackson v. Virginia*, 443 U.S. 307, 316-319 (1979); U.S. Const. Amend. V; U.S. Const. Amend. XIV. It is clear that both mistake-of-fact and self-defense apply here.

CONCLUSION

This petition should be granted, and this Court should find that Guyger's rights to due process were violated. This Court should also find that under the legal sufficiency standard of *Jackson v. Virginia*, a court violates due process by concluding that self-defense and mistake-of-fact are mutually exclusive and cannot be considered simultaneously in a legal sufficiency review if the facts support consideration of both.

In the alternative, this case should be remanded to the lower court to determine whether the Court of Appeals erred by discounting mistake-of-fact in its

consideration of the sufficiency of the evidence to support the jury's rejection of Guyger's self-defense claim.

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