NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Richard Allen Masterson, Petitioner

VS.

The State of Texas, Respondent

CAPITAL CASE
MR. MASTERSON'S EXECUTION IS SCHEDULED FOR JANUARY 20, 2016, at 6:00 pm CST

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

Whether it is the responsibility of the trial counsel or the trial court to ensure it is in place, does the absence of a lesser-included jury instruction for felony murder deny Mr. Masterson due process under *Beck v. Alabama,* 447 U.S. 625 (1980)?

LIST OF PARTIES

PETITIONER:

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Attorney of Record:

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Richard Allen Masterson, Petitioner

VS.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS (TCCA)

Petitioner respectfully prays that a writ of certiorari issue to review the TCCA's denial of his writ of prohibition.

OPINION BELOW

TCCA's denial of petitioner's writ of prohibition appears at Appendix A.

JURISDICITON

The TCCA has explicitly established that it maintains exclusive jurisdiction over a capital conviction and sentence of death. *State ex rel. Holmes v. Third Court of Appeals,* 885 S.W.2d 389, 395-96 (Tex. Crim. App. 1994). However, that court has refused to consider petitioner's claims through a writ of prohibition, leaving petitioner with no other option for state court review. This petition is timely. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution: "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."

STATEMENT OF THE CASE

Petitioner was found guilty of capital murder and sentenced to death. Petitioner filed a writ of prohibition alleging, among other things, that petitioner's federal due process rights were violated because the trial court and the trial counsel failed to request or put in a jury charge on a lesser included of felony murder [the unintended killing of a person during the intentional commission of another felony other than manslaughter under Texas Penal Code Section 19.02 (b)3.] for the panel to consider.

REASONS FOR GRANTING THE PETITION

The trial counselors admittedly did not request an instruction for felony murder, though they did request other lesser-included offenses. The trial court granted the requests on manslaughter, murder, aggravated assault, and robbery. While these were in front of the jury, felony murder was not. The appellate counsel for Mr. Masterson also acknowledges that she could have attacked such an absence either on

direct appeal via a jury charge argument or a claim of ineffective assistance. [See attached Affidavit, Appendix B].

Beck does not specify upon whose shoulders the responsibility for ensuring procedural safeguards must fall; regardless of where this Court decides to place it, those protections were absent in this case and should merit relief and a stay. *Beck* also does not suggest that the granting of one lesser ends the inquiry; it is the absence of a particular charge, not the presence of another, that matters. *See Beck v. Alabama,* 447 U.S. 625 (1980). Under Supreme Court Rule 10, this question would affect potentially thousands of death row inmates across the country, and would settle an important question of federal law.

Due process

Masterson's execution date is set for January 20th, 2016. He has no adequate remedy at law left except to this Court. What he does have is a clear United States Constitutional right to be heard under the Due Process Clause of the 14th Amendment. *See LaChance v. Erickson*, 552 U.S. 753, 118 S.Ct. 753, 139 L.Ed.2d 695 (1998) (core of due process is right to notice and meaningful opportunity to be heard); *see also Richards v. Jefferson County. Alabama*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) (opportunity to be heard is essential requisite of due process of law in judicial proceedings); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)(right to a hearing under due process clause does not depend on a demonstration of certain success).

Under *Beck v. Alabama*, this Court has made it clear that it is a violation of due process to refuse to provide a lesser included offense instruction to the jury.

> As MR. JUSTICE BRENNAN explained in his opinion for the Court in *Keeble v. United States*, providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard:
>
> "Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction— in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault— could not have resulted in a different verdict. Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions."

Beck, 447 U.S. at 635, 100 S. Ct. at 2388, 65 L. Ed. 2d 392 [internal quotes omitted]

This was the original practical consideration of why an instruction should be provided to the jury. Note that under neither *Keeble,* nor *Beck,* is the duty to provide such an instruction limited to the defense; it is just as clearly a duty of the trial court to provide such an instruction where appropriate, and even more so in a death penalty case.

Both state and federal courts have always acknowledged that the death penalty is unique. "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida,* 430 U. S. 349, 357-358, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393 (1977) (opinion of STEVENS, J.).

Note the concern here and in *Beck* are on procedural safeguards. However, where intent was always in contention at guilt in this case, and the evidence could have supported multiple criminal allegations, it becomes all the more crucial to have all possibly correct instructions in front of a capital jury. The appellate counsel in this matter has made it clear that this was something she missed as well. She could have raised this on direct appeal or on a motion for new trial. That she is willing to

acknowledge the mistake does her credit and the profession honor. It should not be ignored.

There is logically a duty imposed both on the trial lawyers to seek proper instructions and the trial court to give the correct law to the jury. This Court can, but does not have to decide who bears the authority on the jury instructions – it can simply hold that the absence of such an instruction is a violation and let states decide whom the responsible part is going to be. However, if it should decide, then it should place the burden on the trial court, as they are in the position to grant such matters and have the best vantage point from which to see the evidence unfold. More, it should be the trial court's responsibility as the matter, under *Keeble*, has always been theirs to provide the instructions and law to the jury, and for the jury to decide the facts and resolve the questions of guilt or innocence. The presence of other instructions is irrelevant; rejection by some jurors as to some issues does not change the need for an arguably correct lesser charge that may have made sense to another juror.

Should the Court determine that it is the trial counsel's responsibility, then in this case, the appellate lawyer could have raised this challenge and did not. The appellate attorney has candidly acknowledged that she failed to bring this issue to the Court of Criminal Appeals when she had the chance, and unlike in *Trevino,* she actually did have the chance to bring this prior to habeas. If one needs to examine the right to an effective advocate under the Sixth Amendment and the Fourteenth's equal

protection provisions, one need look no further than *Strickland v. Washington,* 466 U.S. 668 (1984) and *Evitts v. Lucey* 469 U.S. 387 (1985) to conclude that the right to effective counsel applies on direct appeal, and most certainly in a capital setting. Under a *Trevino v. Thaler,* 133 S.Ct 1911 (2013) analysis, the procedural default of failure to bring such a claim can be excused and the lawyer's failure becomes a gateway for the court to consider such a claim on the merits. Here the appellate counsel has acknowledged such a failure and this qualifies for *Trevino* consideration of the merits of the issue – i.e., was the jury entitled to get such an instruction? If yes then this Honorable Court should grant cert and issue a stay so that the case may be sent back for reconsideration by the Court of Criminal Appeals.

CONCLUSION

For the reasons stated above, this Court should grant petitioner's writ of certiorari.

Respectfully submitted,

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Appendix A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-59,481-04 and WR-59,481-05

In Re RICHARD ALLEN MASTERSON, Relator

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF PROHIBITION AND PETITIONS FOR WRITS OF PROHIBITION IN CAUSE NO. 867834 IN THE 176TH JUDICIAL DISTRICT COURT HARRIS COUNTY

***Per curiam*. ALCALA, J., filed a concurring statement.**

O R D E R

We have before us two motions for leave to file petitions for writs of prohibition and two writs of prohibition. In April 2002, a jury found relator guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set relator's punishment at death. This Court affirmed relator's conviction and sentence on direct appeal. *Masterson v. State*, 155 S.W.3d 167 (Tex. Crim. App. 2005). This Court denied relief on relator's initial post-conviction application for a writ of habeas corpus, and it

later dismissed relator's first subsequent writ application. *Ex parte Masterson*, No. WR-59,481-01 (Tex. Crim. App. Aug. 20, 2008)(not designated for publication) and *Ex parte Masterson*, No. WR-59,481-02 (Tex. Crim. App. Dec. 19, 2012)(not designated for publication). On December 29, 2015, relator filed in the trial court his second subsequent application for a writ of habeas corpus and a motion to stay his execution. This Court dismissed the writ application and denied the motion for a stay. *Ex parte Masterson*, No. WR-59,481-03 (Tex. Crim. App. Jan. 11, 2016)(not designated for publication).

On January 12, 2016, relator filed the above-referenced pleadings in this Court. After reviewing relator's pleadings, we deny leave to file in both cases.

IT IS SO ORDERED THIS THE 15th DAY OF JANUARY, 2016.

Do Not Publish

Appendix B

Cause No. _____

In re Richard Masterson

County of Harris
State of Texas

ON THIS DAY the 11th of January, 2016, the undersigned affiant did appear before me and swear and subscribe to the truth of the following:

"My name is Janet Morrow. I was admitted to the Texas bar in 1977 and have been a licensed attorney in good standing since that time. I am over eighteen and competent to make this affidavit. After the jury convicted Mr. Richard Masterson of capital murder in the above case the Trial Judge, the Hon. Brian Rains appointed me to represent Mr. Masterson on direct appeal only. I was not appointed in, or involved in his trial at any point. He was represented at trial by two appointed lawyers. I have not discussed Mr. Masterson's case with either of them at any time before during or after his trial and post-conviction proceedings (including this one). At the time Judge Rains appointed me on direct appeal I was on the then-existing Harris list of attorneys certified to handle death cases on direct appeal and I had over twenty years of experience as defense counsel in capital appeals.

I have recently reviewed my brief in Mr. Masterson's case, and state the following with regard to the fact that I did not present a point of error asking the Court of Criminal Appeals to reverse Mr. Masterson's conviction and death sentence on the ground that the jury was not given an instruction allowing them to convict him of felony murder, which was a lesser offense included in the indictment and raised by the evidence:

1) I do believe that there is merit to the substantive argument that felony murder was a lesser included offense in the abstract, based on the law and the allegations in the capital murder indictment. furthermore, the offense of felony murder was raised by the evidence at trial from which the jury could conclude Mr. Masterson had committed the act alleged in the indictment which was "an act clearly dangerous to human life that caused the Complainant's death." The fact that I did not present that felony murder argument on direct appeal was *not* because I thought it was without substantive merit. I certainly did not consider it frivolous as a matter of substantive law.

2) That substantive error was not preserved for appeal under Texas law. In the lesser included offense Point of Error I did present in the brief, alleging that the Texas Court of Criminal Appeals reverse the conviction because the jury had not been given the instruction allowing them to convict Mr. Masterson of criminally negligent homicide, I was able to challenge the Trial Court's *ruling*, refusing Trial Counsel's *proper procedural request for that instruction*. That request and refusal preserved the argument for appellate review as a state statutory matter and as a matter of state and federal constitutional law. There was no such request, and no such ruling regarding the submission of a felony murder instruction to the jury.

3) If the record had shown that Trial Counsel had preserved error of the felony murder instructional issue, as they did on the negligent homicide issue, I would certainly have presented the absence of a felony murder option as a point of error as I presented the absence of the negligent homicide option, using the same substantive arguments and the same arguments that the absence of the instruction could not be found harmless, based on the constitutional principles found in the U.S. Supreme Court opinion in *Beck v. Alabama* (see argument in Mr. Masterson's brief)

4) This being a direct appeal, addressing only facts contained in the record, I did not interview either trial lawyer to ask whether they might want me to look for a particular issue in the record, nor did I ask if they had made a strategic decision not to ask for a felony murder option. The record had not yet been prepared. I did not file a motion for new trial.

5) Given my view that the felony murder issue had substantive merit and that I would have raised it had it been preserved for appeal, I cannot think of a reasonable trial strategy that would justify effective trial counsel in failing to ask for the instruction. Counsel obviously knew how to request an instruction on a lesser included offense and obtain a ruling; they asked for at least two such instructions; they got one that they wanted and preserved error on the one they didn't get.

6) Given my view that there could have been no reasonable trial strategy in failing to request the felony murder instruction, I could have, and should have raised that issue on direct appeal by means of an ineffective assistance claim. As a naked point of error the absence of a felony murder instruction was unpreserved and thus entitled to no consideration from the Court on its merits. But in considering the matter as the basis of an ineffective assistance claim the Court would have had to consider whether trial counsel had failed to request an instruction that had substantive merit, before the Court could decide the failure could be excused on some basis of strategy.

7) In retrospect, I believe the State could have, and would have made a strong argument against such an ineffective assistance allegation, but then they always can and always do; that has never deterred me from raising any ground I can legitimately craft from the law and the facts. It can be seen from the many briefs I have filed that I do not shrink from presenting a ground of ineffective assistance based solely on the record on direct appeal, when there appears to be no possible tactical reason for counsel's failure to take particular action and/or obtain the Trial Court's ruling on an issue that has arguable substantive merit.

8) In conclusion, I state that I didn't present the substantive felony murder instruction issue on direct appeal as an independent point of error because it wasn't preserved for appeal.

I didn't present the substantive felony murder instruction issue on direct appeal by means of an IAC point of error. That was not a matter of appellate strategy. I can only conclude that I failed to consider it at all, that I "missed it". Upon consideration now, I believe that I could have and should have raised it, and I wish I had raised it.

It continues to be my strong professional opinion that Mr. Masterson was not proven guilty of capital murder, that he did not act with the required knowledge and intent with respect to the result of his conduct. It is even more alarming that now there is a serious question whether Mr. Hunnicut's death was the result of Mr. Masterson's conduct.

I swear that my above statement is true and correct."

AFFIANT: [signature]

DATE: 9/11/2014

NOTARY PUBLIC FOR THE STATE OF TEXAS: Paula McConnell

PAULA M MCCONNELL
Notary Public, State of Texas
Comm. Expires 04-17-2017
Notary ID 7265010