

No. 21-6434

IN THE
Supreme Court of the United States

ROBERT ALAN FRATTA,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Fratta appeals the dismissal of his pro se state habeas application as abusive. Fratta's repeated attempts at hybrid representation beginning on direct appeal and proceeding to this Court have resulted in the default of some of his claims. Presently, he asked this Court to review a claim not only dismissed as abusive by the lower court but that was raised and rejected in federal habeas proceedings which have concluded. Thus, Fratta seeks review of the following questions:

1. Whether the lower court properly dismissed his claim that the law of the parties was improperly "added" to the jury charge when it was filed in an abusive pro se writ.
2. Whether the Constitution is violated by the default of a constitutional claim by Fratta's failure to follow proper procedures.

LIST OF ALL PROCEEDINGS

State v. Fratta, No. 712409 (230th Dist. Court, Harris County, Apr. 23, 1996)

Fratta v. State, No. AP-72,437 (Tex. Crim. App. Jun. 30, 1999).

Fratta v. Texas, No. 99-7129 (Mar. 20, 2000)

Ex parte Fratta, No. WR-31,536-01 (Tex. Crim. App.) (mandamus)

Ex parte Fratta, No. WR-31,536-02 (Tex. Crim. App. Sep. 22, 2004)

Fratta v. Texas, No. 04-8414 (Aug. 22, 2005)

Fratta v. Quarterman, 2007 U.S. Dist. LEXIS 72705 (S.D. Tex. Sep. 28, 2007);

Fratta v. Quarterman, 536 F.3d 485 (5th Cir. 2008).

State v. Fratta, No. 1195044 (230th Dist. Ct., Harris County, Jun. 1, 2009)
(retrial)

Fratta v. State, No. AP-76,188 (Tex. Crim. App. Oct. 5, 2011)

Fratta v. Texas, No. 11-9292 (Jun. 4, 2012)

Ex parte Fratta, No. 31,536-03 (Tex. Crim. App.) (mandamus)

Ex parte Fratta, No. 31,536-04 (Tex. Crim. App. Feb. 12, 2014)

Robert Alan Fratta v. Texas, No. 14-5037 (Oct. 14, 2014) (rehearing denied Dec. 15, 2014)

Fratta v. Davis, No. 4:13-CV-3438 (S.D. Tex, Sep. 18, 2017)

Fratta v. Davis, No. 17-70023 (5th Cir. May 1, 2018)

Fratta v. Davis, No. 18-6928 (Jan. 7, 2019)

Fratta v. Davis, No. 4:13-CV-3438 (U.S.D.C. S.D. Tex, Jan. 21, 2021) (denial of 60(b))

Ex parte Fratta, No. 31,536-05 (Tex. Crim. App. Jun. 30, 2021)

Fratta v. Lumpkin, No. 21-70001 (5th Cir. Jan. 5, 2022) (pet. for rehearing en banc denied Feb. 28, 2022)

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BRIEF IN OPPOSITION

This is an appeal from a state habeas corpus proceeding brought pro se by Petitioner, Robert Alan Fratta, a death-sentenced Texas inmate. Fratta was properly convicted and sentenced to death again after retrial for his participation in the murder-for-hire plot of his estranged wife Farah Fratta. Fratta now seeks a writ of certiorari from the dismissal of his abusive pro se application by the Texas Court of Criminal Appeals (CCA). But Fratta fails to show this case presents a compelling issue for this Court's review.

STATEMENT OF THE CASE

I. Facts of the Crime

Farah Fratta filed for divorce from her husband Robert "Bob" Fratta in 1992. 22 RR 65-66; 91-92. Fratta was angry about their divorce and angry at Farah. 22 RR 69-70; 23 RR 19. Fratta felt the divorce was taking too long and was costing too much money. 22 RR 69. Initially Fratta agreed with Farah having custody of the children but eventually decided he was tired of paying child support. 22 RR 69, 95.

Amidst their divorce proceedings, Fratta asked several people if they knew any hitman and said he wanted Farah murdered. 23 RR 202-03; 24 RR 173-74, 200, 240-41. Fratta also approached several people at the President's and First Lady's Health Spa ("the gym"), where he was a member, told them

he wanted Farah murdered, and asked if they knew someone who would kill her. 24 RR 191-200, 235-43; 25 RR 28-50, 115-21, 180-182.

James Ray Thomas met Fratta at the gym approximately ten years before Farah's death and said he and Fratta were pretty close friends. 25 RR 115-17. Fratta told Thomas he was mad at Farah because she said in a deposition he wanted her to get on top of him and defecate in his mouth and he would eat it. 25 RR 123-24. Fratta asked Thomas if he knew anyone who would kill Farah. 25 RR 126. And Fratta talked about how much it would cost several times and said he should just go over and shoot Farah himself. 25 RR 126. Thomas and Fratta had several conversations about killing Farah and at first Thomas thought it was a joke but then Fratta seemed to get more serious. 25 RR 127. Fratta offered Thomas \$3,000.00 to kill her. 25 RR 128. On one occasion while riding in Fratta's car, Fratta became angry talking about the divorce and pulled out a gun and started waving it around. 25 RR 130-131. Thomas believed Fratta was serious and was afraid something would happen so he told Farah's friend to tell Farah to be careful. 25 RR 133-134. When Thomas heard Fratta talking to other people about killing his wife, he told him to keep his mouth shut; Fratta responded that it was his strategy to tell a lot of people to make them all suspects and cause confusion. 25 RR 136-138.

James Michael Podhorsky worked out six days a week at the gym and had been friends with Fratta for approximately six years. 25 RR 170. On one

occasion, Podhorsky was riding in Fratta's car and saw a gun underneath the driver's seat. 25 RR 179. Podhorsky told Fratta it was not a good idea to have a gun with them because they were on their way to the Trophy Club, an adult entertainment establishment, and they were going to be drinking. Fratta told Podhorsky he carried the gun because if he ever ran into Farah he was going to shoot her himself and make it look like a car-jacking. Podhorsky said Fratta was not laughing or smiling but was serious and Podhorsky found it unnerving. 25 RR 179. Fratta asked Podhorsky numerous times if he knew someone or could find someone who would kill Farah. 25 RR 180-182. Fratta asked Podhorsky if he would kill Farah and tried to talk him into doing it. 25 RR 182. On one such occasion Podhorsky became irritated and asked why Fratta would not do it himself. Fratta replied that he could not do it because he needed to make sure the kids were with him so they would be safe. 25 RR 183.

Fratta told Podhorsky he was going to pay \$1,000.00 up-front to have Farah killed and that he would get the money from three different sources: an overseas account, a settlement from an automobile accident the children were in, and Farah's life insurance policy after it was done. 25 RR 186. Fratta was also going to throw in a Jeep automobile that he owned. 25 RR 188. A few weeks before the murder Fratta showed Podhorsky a piece of paper that noted the time and location of Farah's daily activities. Fratta said he wrote down

Farah's activities to give to someone so they would know how to find her. 25 RR 189-90.

The day of the murder Fratta went to see Podhorsky at work. 25 RR 193-94. Fratta was happy and cheerful and told Podhorsky he could not work out that day because he was taking his children to church. 25 RR 194. The day after the murder Fratta went to see Podhorsky at work and was not upset or sad. 25 RR 197. Fratta asked Podhorsky to step outside and told him if everybody would just keep their mouth shut everything would be okay. 25 RR 197-198. Podhorsky had dinner with Fratta that night and asked him what had happened. Fratta told him that he could not tell him right then but would tell him later. 25 RR 199. Podhorsky later came to believe that Fratta was trying to shift the investigation onto him. 25 RR 204.

Although Fratta asked many different people to help him find someone to kill Farah, Fratta actually hired another man from the gym, Joseph Prystash, who convinced Howard Guidry to kill Farah for money. The evidence of this plot came from Prystash's girlfriend, Mary Gipp. Gipp lived in an apartment in Houston with her brother. 27 RR 4-6. She met Prystash at the gym where they both worked out. 27 RR 6-7. She had been dating Prystash for approximately a year. 27 RR 7-8. Prystash lived with his father but often stayed at her apartment. Prystash had clothes at her house, had a key to her house and came and went as he pleased. 27 RR 8. Gipp gave Prystash a pager.

Prystash drove a four-door silver Nissan with one headlight burned out. 27 RR 10-11.

Both Gipp and Prystash knew Fratta and Farah from the gym. 27 RR 12. Approximately six months prior to the murder, Prystash began meeting Fratta at the gym. 27 RR 14. A week or two before the murder Gipp saw Prystash and Fratta talking at the gym. Fratta also called her house several times the week before the murder to speak to Prystash. 27 RR 15-16. Guidry was Gipp's next-door neighbor. 27 RR 16. Guidry was eighteen years old and lived with his sister. 27 RR 17. Gipp and Guidry's apartments shared a patio. Prystash and Guidry spoke to each other frequently because Prystash went out onto the patio to smoke and Guidry hung out there. 27 RR 20-22. The month of Farah's murder, Gipp saw Prystash and Guidry together on the patio almost daily. 27 RR 23.

In the weeks before the murder Gipp and Prystash had a conversation about Prystash participating in Farah's murder. 27 RR 25. Prystash told Gipp that Farah was going to be murdered on a Wednesday evening. 27 RR 36-37. Prystash told Gipp that he was the middle-man and it was his job to find somebody who would kill Farah. 27 RR 38, 41. Prystash told Gipp that his role during the murder was to be the driver. 27 RR 38. Gipp knew that the Frattas were getting a divorce. 27 RR 42.

On November 9, 1994, Gipp got home from work at approximately 4:30 p.m. 27 RR 45. Guidry was sitting on the stairs that led to their apartments wearing a black shirt and black pants. 27 RR 45-46. Guidry said he was waiting for Prystash. 27 RR 46. Prystash came home approximately half an hour later and left with Guidry at approximately 6:00 p.m. 27 RR 46-48. Prystash wore a black-hooded shirt and dark jeans. 27 RR 47.

While Prystash was away, Gipp saw a news report about Farah's murder. 27 RR 72-73. The news report gave a description of the car involved and Gipp recognized it as Prystash's car: a silver compact Nissan with a headlight out. 27 RR 73. Prystash returned to Gipp's apartment between 8:30 and 9:00 p.m. and Gipp saw Guidry go into his apartment. 27 RR 59-60. Gipp followed Prystash into her bedroom and saw him unload a gun which he placed in a pile of his clothes. 27 RR 60-61. Gipp asked Prystash if they had killed her and he said yes. 27 RR 63, 67. Gipp asked Prystash if he knew whether or not she was dead and he said yes. 27 RR 67-68. When she asked him how he knew Farah was dead he said he saw her in the garage. 27 RR 68. Prystash left the apartment and told Gipp that he was going to the gym to meet Fratta. 27 RR 219-221.

After Prystash left Gipp wrote down the make, model, and serial number of the gun on a piece of paper. 27 RR 71-73; States Exhibit 58. Gipp gave the piece of paper containing the gun's make, model, and serial number to

Sergeant Danny Billingsley. 29 RR 22-23. A couple of days after the murder Prystash told Gipp he gave the gun to Guidry who was supposed to throw it into a body of water. 27 RR 78-79. Prystash changed the headlight on his car the next day and ultimately got rid of the car. 27 RR 79-82. Prystash told Gipp he was to receive a Jeep as payment for his part in the murder. 27 RR 79.

In the days after Farah's murder, Fratta was spotted at the gym talking to Prystash. 24 RR 207-208; 24 RR 255. Even on the day of Farah's murder, Fratta said he was still looking for someone to kill Farah. 25 RR 55. And after Farah's murder, a friend told Fratta to stay out of trouble and Fratta said "what could be worse than capital murder." 25 RR 64.

At about 7:25 p.m. on November 9, 1994, Farah got her hair cut. 23 RR 83-84. Farah left at 7:45 p.m. with her hair wet because she was in a hurry to get home because her kids would be home by 8:00 p.m. 23 RR 84-85. Laura and Daren Hoelscher lived across the street from Farah. 23 RR 92-94, 133-134. The Hoelschers' living room couch sat in front of a large bay window with a view of Farah's garage. 23 RR 95. On the evening of Farah's murder, the Hoelschers were sitting on the couch in their living room at approximately 8:00 p.m. when they heard what Laura described as a pop and Daren described as a gunshot. 23 RR 100, 139. Daren heard a woman scream immediately followed by a second gunshot. 23 RR 139. Farah's garage door was open with the light on

and they could see Farah lying on the ground in her garage. 23 RR 141. Laura called 911. 23 RR 103.

Approximately two minutes after the shooting, the Hoelschers saw a black male dressed in black come from behind a shrub on the left-side of her garage. 23 RR 105-106, 115, 142-43. Then a little silver-gray car came up quickly around the corner and stopped in front of Farah's driveway. 23 RR 131, 145. The black male got into the passenger side of the car and the car took off. 23 RR 111, 145. The car had a burned out headlight. 23 RR 146.

Farah was flown to Hermann Hospital where she was pronounced dead. 23 RR 179; 29 RR 131. Farah suffered two gunshot wounds to her head. 29 RR 94, 119. The first bullet entered the left side of her forehead and exited the left side of her head but was not a fatal injury. 29 RR 102. The medical examiner determined that the gun was a few inches from her left eyebrow when the shot was fired. 29 RR 106. The second bullet wound was to the back of her head. 29 RR 109. The bullet entered her skull in the back and perforated her brain. 29 RR 118-119. The medical examiner determined the gun was in contact with her skin when discharged. 29 RR 107, 118. This was the fatal injury. 29 RR 120.

Deputy Gary Bailey was dispatched to the scene. 23 RR 168-170. Deputy Bailey noted the house was locked and it did not appear as if anyone had gone through Farah's gym bag, wallet, or purse. 23 RR 178-179. Deputy Bailey saw

Fratta arrive at approximately 8:45 p.m. 23 RR 180-181. Deputy Bailey intercepted Fratta as he calmly approached the house and told him he needed to wait to talk to the detectives on the scene. 23 RR 183. Fratta wanted to know if they could expedite matters because he was in a hurry. 23 RR 183. Bailey did not tell Fratta that Farah was dead and Fratta did not ask if his wife was okay or what had happened. 23 RR 183-184. Deputy Bailey noted that Fratta was calm and did not seem surprised nor did he cry or become upset. 23 RR 184-85.

Harris County Sheriff's Detective Bill Valerio responded to the scene on the night of the murder. 24 RR 42-43. When Valerio approached Fratta he was calm, composed, and cooperative. 24 RR 46, 50. Fratta did not seem upset as he told Valerio he wanted to take the children to the hospital to see their dying mother. 24 RR 48. Fratta agreed to go to the homicide office to help Valerio investigate the case and followed Valerio in his own vehicle. 24 RR 51-52.

Valerio and other detectives interviewed Fratta for the next 14 hours. 24 RR 73. Fratta signed a consent form allowing police to search his vehicle. 24 RR 54-56. Valerio searched the car and found a blank white envelope in the glove box containing \$1,050.00 and a handgun. 24 RR 57.

On the night of Farah's murder, the Frattas' oldest child was enrolled in catechism classes that were held on Wednesdays at St. Mary Magdalene Catholic Church. 28 RR 156-158. Jean Johnson, a thirty-year employee of the

church, testified that Bradley Fratta was in class on November 9, 1994, the night Farah died. 28 RR 155-158. Johnson conducted a meeting for the parents at the church from 7:00 p.m. to 8:30 p.m. in association with the catechism class. 28 RR 158-161. Johnson said Fratta attended the meeting on November 9, 1994. Johnson noted that Fratta's beeper went off several times during the meeting. Fratta left the room each time, then returned. 28 RR 159-61.

Debra Schaps was working in the church office on November 9, 1994. 28 RR 186-87. Schaps saw Fratta at the church that evening because he came into the office several times to use the phone. 28 RR 188. Schaps said Fratta came into the office the first time between 7:45 p.m. to 8:00 p.m. and asked to use the telephone because he had been paged. Fratta asked if he could use the church's number as a call-back number. 28 RR 188. Schaps gave him the church's phone number and he paged someone, waited a few minutes and, when the church phone rang, he answered it. 28 RR 188-89. Schaps said that Fratta came back to the office fifteen minutes later and did the same thing. 28 RR 189. Schaps saw Fratta in the office a third time when the program was over. 28 RR 190. After Schaps learned that Farah was murdered, she called the telephone number on the television and told them that they needed to contact the telephone company and request the records. 28 RR 192.

Sergeant Danny Billingsley, who supervised the homicide squad investigating the case, interviewed Schaps and then got the telephone records

for the church for November 9, 1994. 29 RR 6-8, 18. Sergeant Billingsley looked at the outgoing calls and saw one telephone number on the record during that period of time that belonged to Fratta and another that belonged to Gipp. 29 RR 18-20. These telephone records led investigators not only to Gipp but to all the telephone and pager records which revealed the communications used to coordinate the murder.

Gipp testified that in 1994, although cellular telephones were not common, she had one that she kept in the console of her car. 27 RR 49. Gipp said that when Prystash left her apartment on the day Farah was murdered her cell phone was in her car and her car was unlocked. 27 RR 57. Gipp did not use her cell phone that evening. 27 RR 58. The phone records indicated that Gipp's cell phone called Farah's house at 6:36 p.m. the night Farah died. 29 RR 32. Gipp's cell phone called the grocery store pay phones at 6:57 p.m. and 7:08 p.m. 29 RR 32. There were calls from the church phone to Prystash's pager at 7:31 p.m., 7:55 p.m., and 7:56 p.m. 28 RR 250-253 States Exhibit 155. At 7:57 p.m. there was a call from the church phone to Prystash's pager. 28 RR 253; States Exhibit 155. At 8:04 p.m. Gipp's cell phone called the pay phones at the grocery store, and at 8:06 p.m. the Hoelschers called 911 to report the shooting. 28 RR 254; 29 RR 33. Finally at 8:28 p.m. there was a call from the church phone to Prystash's pager. 28 RR 253; States Exhibit 155. The telephone records indicated that Prystash dropped Guidry off at Farah's house and then

waited at the pay phones half a mile away. After Guidry shot Farah he used Gipp's cell phone to call Prystash on the pay phones so Prystash would pick him up. Most chillingly, Fratta repeatedly checked his messages to see if there was a message that Farah was dead.

Fratta is also tied to Farah's murder through the murder weapon. On March 1, 1995, Guidry was arrested for robbing Klein Bank. 28 RR 28. Guidry was carrying a backpack that contained among other things the same gun that Prystash unloaded and left at Gipp's apartment on the night Farah was killed. 27 RR 75; 28 RR 27-33, 39; States Exhibit 58. The gun was placed into a gun line-up which was prepared for and presented to Lex Bacquer, Farah's father. 28 RR 46-50; States Exhibit 58. Bacquer identified the gun recovered from Guidry's backpack as the one that he returned to Fratta. 28 RR 54-55. At trial, Bacquer explained the gun belonged to Fratta and Farah gave it to Bacquer for safe-keeping after she and Fratta separated. 29 RR 133. Bacquer gave the gun back to Fratta at Fratta's request the summer before Farah was murdered. 29 RR 134. Bacquer was one hundred percent sure that the gun he identified was the gun he gave back to Fratta. 29 RR 135, 166. Bacquer said the gun was in a brown case with white lining inside. 29 RR 161. Gipp said Prystash placed the gun he unloaded the night of the murder in a leather case with sheepskin lining. 27 RR 62.

The State presented records from the Bureau of Alcohol Tobacco and Firearms reflecting Fratta was the registered owner of the gun that was recovered from Guidry's backpack, and that was the same gun Gipp saw Prystash unloading the night of Farah's murder. 28 RR 65.

II. Course of State and Federal Proceedings

Fratta was originally convicted of capital murder in 1997 for the murder of his estranged wife Farah Fratta. *Fratta v. State*, No. AP-72,437 (Tex. Crim. App. June 30, 1999). On federal habeas review, the district court granted Fratta relief, and the Fifth Circuit affirmed. *Fratta v. Quarterman*, 2007 U.S. Dist. LEXIS 72705 (S.D. Tex. Sep. 28, 2007); *id.*, 536 F.3d 485 (5th Cir. 2008).

Fratta was retried and resentenced to death in 2009. Fratta appealed to the CCA which affirmed his conviction. *Fratta v. State*, No. AP-76,188 (Tex. Crim. App. 2011); 2011 Tex. Crim. App. Unpub. LEXIS 759. This Court denied certiorari review. *Fratta v. Texas*, 566 U.S. 1036 (2012). Fratta also filed a state habeas application which the CCA also denied. *Ex parte Fratta*, No. 31,536-02, at cover, *cert. denied*, 574 U.S. 936 (2014). Fratta petitioned the federal district court for habeas relief but was denied. *Fratta v. Davis*, No. 4:13-CV-3438 (S.D. Tex., Sep. 18, 2017). Fratta then sought and was denied a COA by the Fifth Circuit. *Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018). And Fratta filed a writ of certiorari in this Court which was also denied. *Fratta v. Davis*, 139 S.Ct. 803 (2019).

Omitting various pro se filings, Fratta through his court-appointed attorneys filed a Rule 60(b) motion before the district court. The district court denied the motion finding it to be an improperly filed successive petition and alternatively denying the merits of Fratta’s motion. *Fratta v. Davis*, No. 4:13-CV-3438 (S.D. Tex., Jan. 21, 2021) (Ord. denying Rule 60(b) relief). Fratta unsuccessfully appealed to the circuit court. *Fratta v. Lumpkin*, No. 21-70001 (5th Cir. Jan. 5, 2022). Fratta filed a petition for rehearing en banc which was denied on February 28, 2022. *Fratta v. Lumpkin*, No. 21-70001, Ord. (5th Cir. 2022).

Presently, Fratta filed his own pro se state habeas writ which the CCA dismissed as an abuse of the writ. *Ex parte Fratta*, No. 31,536-05 (Tex. Crim. App. Jun. 30, 2021). It is from the dismissal of this pro se state writ that Fratta now appeals to this Court.

REASONS FOR DENYING CERTIORARI REVIEW

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for “compelling reasons.” Sup. Ct. R. 10. In the instant case, Fratta fails to advance a compelling reason for this Court to review his case and, indeed, none exists. The opinion issued by the lower court involved only a proper and straightforward application of established constitutional and statutory

principles. Accordingly, the petition presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

Additionally, Fratta appeals from the dismissal of state habeas proceedings but fails to demonstrate that any aspect of those proceedings violated the Constitution. Indeed, Fratta has already had federal review of this claim, and his petition for certiorari is simply an attempt to avoid the restrictions on successive federal habeas proceedings. During the previous federal habeas review, Fratta's claims regarding the sufficiency of the indictment were adjudicated against him. Moreover, any new federal habeas petition would also be impermissibly successive.¹ Fratta's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction, and there is simply no basis for granting certiorari review in this case.

I. Certiorari Review Is Foreclosed by an Independent and Adequate State Procedural Bar.

Article 11.071 Section 5(a) of the Texas Code of Criminal Procedure forbids state courts to consider a prisoner's successive state habeas applications unless:

- (1) the current claims and issues have not been and could not have been presented previously in a timely initial

¹ "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1).

application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

- (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
- (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Here, the CCA dismissed the application as “an abuse of the writ without reviewing the merits.” *Ex parte Fratta*, No. 31,536-05 slip op. at 2 (Tex. Crim. App. Jun. 30, 2021) (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)); Resp Appx. 1. Fratta's claims are therefore unequivocally procedurally barred because the state court's disposition of the claims relies upon an adequate and independent state law ground, i.e., the Texas abuse-of-the-writ statute. *See, e.g., Moore v. Texas*, 535 U.S. 1044, 1047-48 (2002) (Scalia, J., dissenting); *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010) (recognizing that Section 5 is an adequate state law ground for rejecting a claim); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (“Texas’ abuse-of-the-writ rule is ordinarily an ‘adequate and independent’ procedural ground on which to base a procedural default ruling.”); *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004) (“the Texas abuse of the writ doctrine is an adequate ground for considering a

claim procedurally defaulted.”); *Barrientes v. Johnson*, 221 F.3d 741, 758–59 (5th Cir. 2000); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997). This Court has held on numerous occasions that it “will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment” because “[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.” *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). There is no jurisdictional basis for granting certiorari review in this case.

Moreover, Fratta raised his indictment claim in his initial federal habeas petition where it was found to be procedurally defaulted. *Fratta v. Davis*, No. 4:13-CV-3438, Mem. & Ord. at 29 (S.D. Tex., Sep. 20, 2017), Resp Appx 2. As the court noted,

Fratta raised claims one and two in pro se pleadings that the Court of Criminal Appeals refused to consider. In finding that Fratta had not properly presented his pro se arguments, the Court of Criminal Appeals stated: “Throughout these proceedings, [Fratta] has filed pro se pleadings and letters in an attempt to supplement his attorneys’ efforts. [Fratta] is not entitled to hybrid representation. *See Scheanette v. State*, 144 S.W.3d 503, 505 n. 2 (Tex. Crim. App. 2004). Thus, we do not address his pro se points.”

Resp. Appx. 2 at 29 (citing *Fratta [v. State]*, No. AP-76,188 (Tex. Crim. App. 2011))). The court also determined that Texas' prohibition of hybrid representation is an adequate and independent bar to federal habeas review. Resp. Appx. 2 at 30. Thus, Fratta's claim is doubly barred and his petition presents nothing for this Court to consider.

II. Fratta's Parties Claim Is Not Only Defaulted and Foreclosed From Review but Lacks Merit.

Fratta's one substantive issue is without merit. Fratta claims that the trial court improperly gave a law of parties charge which was not supported by the evidence in regards to both the murder for hire charge and the burglary charge. Pet. at 7. But Fratta raised this claim in his federal habeas proceedings and the court rejected it. Resp. Appx. 2 at 46. In federal court, Fratta argued that trial counsel should have objected to the inclusion of a law-of-parties charge because it constructively amended the indictment. And the court noted that, "In essence, Fratta contends that no evidence supported the party-liability theories." Resp. Appx. 2 at 46. But the court deferred to state law finding that,

The Texas Court of Criminal Appeals has held that "[r]egardless of whether it is pl[eaded] in the charging instrument, liability as a party is an available legal theory if it is supported by the evidence." *In re State ex rel. Weeks*, 391 S.W.3d 117, 124 (Tex. Crim. App. 2013); *see also Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005) ("It is well-settled under Texas state law that law of parties need not be set out in the indictment."). The record suggests that the State understood the defense to attack the

relationship between the charge's language and the evidence. While the defense did not specifically use the phrasing "constructively amended the indictment," the thrust of the discussion on the record revolves around Texas' law regarding that concept. Compare Tr. Vol. 29 at 216-17 (the State arguing that a "hypothetically-correct jury charge is one that's authorized by the indictment but accurately tracks the statute") *with Anderson v. State*, 416 S.W.3d 884, 889 (Tex. Crim. App. 2013) ("When reviewing the sufficiency of the evidence, the essential elements of the offense are those of a hypothetically correct jury charge: "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.").

Resp. Appx. 2 at 4-47. The court also found that trial counsel made efforts to remove the law of parties as a basis for Fratta's conviction. *Id.* at 47 (citing Clerk's Record at 250.). Further, the court concluded that "the jury instructions and evidence strongly allowed for Prystash to be the link between Fratta and the gunman Guidry, even if they did not know one another." *Id.* The court also looked to the direct appeal opinion and noted "the extensive evidence showing the connection between the three men in the conspiracy to kill Farah." *Id.*

In short, the prosecution alleged and proved that Fratta hired Prystash and by extension Guidry to murder Farah. As such, Fratta's complaints about the unobjected to jury charge do not rise to the level of a due process violation that had a substantial and injurious effect of the jury verdict. Even reviewing the merits and the related ineffective assistance of counsel claims, the federal habeas courts concluded that Fratta was not deserving of relief. Fratta's

meritless and procedurally defaulted claim fails to present a compelling issue for this Court's review.

III. Fratta Has No Due Process Right to State Collateral Review, and Has Not Been Denied Due Process.

Fratta's second argument is less clear but appears to suggest he has been denied due process by the lower court's dismissal of his state habeas proceedings. But there is no right to such proceedings in the first instance. As Justice O'Connor has stated:

A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem [] that that Constitution requires the States to follow any particular federal role model in these proceedings.

Murray v. Girratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1989) (states have no obligation to provide collateral review of convictions). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Giarratano*, 492 U.S. at 10. Indeed, this Court has explained that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id.*

But more importantly, where “a State allows for post-conviction proceedings, the Federal Constitution [does not] dictate[] the exact form such assistance must assume.” *Finley*, 481 U.S. at 555, 557, 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“federal habeas corpus relief does not lie for errors of state law”) (internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not state a claim for federal habeas relief); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001); *Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir. 2001). Indeed, as the Court has explained, “Federal courts may upset a State’s postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.” *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

As shown above, the CCA’s dismissal of Fratta’s pro se application accords with established law. Moreover, every court to consider the default of Fratta’s indictment claim has also held the default due to hybrid representation to be valid. Yet the CCA addressed his claim even if only on procedural grounds. And Fratta has benefited from representation by counsel who raised a host of claims in every forum and are currently pursuing rehearing from the en banc circuit court. Fratta’s repeated attempts to represent himself without understanding the law result in these harsh

consequences. Yet such consequences do not amount to a denial of due process. Again, Fratta fails to present a compelling claim for certiorari review.

CONCLUSION

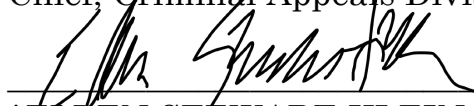
For the foregoing reasons, the Court should deny Fratta's petition for writ of certiorari.

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