No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT ALAN FRATTA

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

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

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EMERGENCY APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

****Execution scheduled for Tuesday, January 10, 2023 at 6 p.m.****

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APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Samuel Alito, Associate Justice, and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

INTRODUCTION

Over two decades before his scheduled execution date, Fratta discovered that, prior to his capital murder trial, detectives arranged for the only eyewitness to his wife's murder to be hypnotized and re-questioned about her memory of the event. At the time of this discovery, Fratta had already been convicted and sentenced to death based in part on this eyewitness's testimony, which materially differed from the statement she provided detectives before she was hypnotized. Fratta pursued *Brady* claims about the State's suppression of the hypnosis in both state and federal courts. In denying these claims, every court that reviewed them concluded "that the procedures used during the hypnosis are [] not relevant" because "the hypnosis was not successful and did not alter [the witness's] account of events." *Fratta v. Davis*, No. 4:13-CV-3438, 2017 WL 4169235, at *29 (S.D. Tex. Sept. 18, 2017). These conclusions grew from the affidavits of detectives and trial prosecutors the State obtained in response to Fratta's allegations under *Brady v. Maryland*, 373 U.S. 83 (1963). The affidavits asserted that trial prosecutors did not know the hypnosis occurred, and that questioning of the eyewitness while she was hypnotized was limited to the description of the getaway car and produced no new information.

After Mr. Fratta's execution date had already been set, he learned for the first time that the information the State provided in these affidavits was false and

misleading. Armed with this new evidence, Mr. Fratta filed a subsequent application for writ of habeas corpus under Texas Code of Criminal Procedure Article 11.071, § 5(a)(1). He argued that, though he previously raised *Brady* claims related to the hypnosis, the newly discovered evidence—that would have supported the materiality of his prior *Brady* claims—could not have been discovered earlier because of the State's misleading response to Fratta's prior *Brady* allegations. As such, Fratta argued he was entitled to obtain review of the merits of his claim under § 5(a)(1). The Texas Court of Criminal Appeals disagreed, and dismissed his application as an abuse of writ.

When the State's suppression of the hypnosis of a key eyewitness first came to light, the State had a duty to "set the record straight." *Banks v. Dretke*, 540 U.S. 668, 676 (2004). Instead, the State selectively disclosed some information related to the hypnosis, but continued to bury the evidence that substantiated the materiality of Fratta's claim. Now, the Texas Court of Criminal Appeals has interpreted § 5(a)(1) in a way that rewards the State for its misrepresentations. Because of the State's failure to disclose all exculpatory evidence related to the hypnosis when Fratta first raised *Brady* allegations, Fratta discovered the evidence in a piecemeal fashion. And because Fratta exercised diligence and raised the *Brady* violations as soon as they were discovered and was denied adequate discovery to support those claims, now that he has the necessary evidence to support materiality, his claim is barred.

Mr. Fratta respectfully requests a stay of his execution, currently scheduled for Tuesday, January 10, 2023 at 6.p.m. Central time, pending its disposition of his petition for writ of certiorari. As set out below, this case satisfies each consideration relevant to that determination.

REASONS PETITIONER IS ENTITLED TO A STAY

The standard for granting a stay of execution is well-established. This Court will consider the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). In the present context, there must be "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and "a significant possibility of reversal of the lower court's decision," in addition to irreparable harm. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citation omitted). All of these factors weigh in favor of staying Fratta's execution pending this Court's review of the issues raised in his petition for certiorari.

I. Fratta has not delayed in seeking a stay; any delay is attributable to the State's misconduct.

A consideration for this Court is whether Mr. Fratta's petition is a "last-minute attempt[] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quotation marks and citation omitted). The last-minute nature of the *Brady* claim raised in Fratta's subsequent habeas application below must be attributed to the State—not Mr. Fratta. Indeed, Mr. Fratta discovered the new

evidence showing the State made misrepresentations in November 2022, in response to his prior *Brady* allegations. Mr. Fratta filed a subsequent application for habeas corpus the following month. Because the State withheld the evidence supporting the factual predicate of the claim for nearly 30 years, Mr. Fratta could not have filed this claim any sooner. "[T]he government alone holds the key to ensuring a *Brady* violation does not occur. So the government cannot be heard to complain" of delay in the administration of a death sentence that was "necessitated by its own late disclosure of a *Brady* violation." *Scott v. United States*, 890 F.3d 1239, 1252 (11th Cir. 2018).

The record demonstrates that Mr. Fratta has exceeded reasonable diligence in attempting to obtain information from the State about the hypnosis ever since he first learned it occurred. He raised a *Brady* claim and sought and was denied discovery in state court proceedings. In response to his allegations, the State produced affidavits with false and misleading information that staunched further inquiry by both the courts and defense counsel. Mr. Fratta was entitled to rely on the State's representations and therefore could not have obtained the newly discovered information earlier. *Banks v. Dretke*, 540 U.S. 668, 695 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed.").

II. A reasonable probability exists that the Court will grant certiorari.

There is a reasonable probability the Court will grant certiorari to review the judgment of the TCCA and answer the question presented in this case. A

"reasonable probability" is usually understood as describing a likelihood lower than "more likely than not[.]" *Smith v. Cain*, 565 U.S. 73, 75 (2012) (discussing "reasonable probability" of a different outcome in the context of *Brady* materiality). Thus, to be entitled to a stay of execution until the Court can review his petition in due course, Mr. Fratta need not demonstrate a high likelihood that the Court will decide to hear his case, but only a reasonably good chance of that outcome.

Rule 10(c) identifies as a relevant consideration in the Court's exercise of its certiorari jurisdiction whether "a state court … has decided an important federal question that has not been, but should be, settled by this Court[.]" This case presents this court with an important federal question:

> Whether § 5(a)(1) is an adequate and independent state procedural ground to bar review of a *Brady* claim where the petitioner discovers new exculpatory evidence after the conclusion of initial state and federal habeas review because the State's selective disclosure of information in response to a prior *Brady* allegation concealed the facts that supported the claim's materiality.

The Texas Court of Criminal Appeals interpretation of its procedural bar on subsequent applications strips capital habeas petitioners of any opportunity to have their *Brady* claims meaningfully reviewed when the State's continued suppression of exculpatory evidence forces defendants to adjudicate the *Brady* allegations in a piecemeal fashion. Thus, when a capital defendant finally discovers evidence after initial state and federal proceedings that would have supported the materiality of the *Brady* claim, they are procedurally barred from review. This Court should find that this interpretation of state procedural bars is not adequate to prevent this Court's review. Further, given the underlying facts of Fratta's *Brady* claim—the

State's suppression of hypnosis of the only eyewitness to the murder—there is at least a reasonable probability that four Justices will think review is necessary.

III. Mr. Fratta raises substantial grounds upon which relief may be granted.

In addition to raising important issues worthy of this Court's attention, Mr. Fratta has demonstrated that he is entitled to the relief he seeks. In dismissing Fratta's initial *Brady* claim—which was unsupported by the new recently discovered evidence of materiality— the federal court stated that "Fratta raises serious accusations. . . requiring sober consideration." *Fratta*, 2007 WL 2872698, at *24. That court accepted as true the State's affidavits stating the hypnosis produced no new information about the identity of the shooter and that the questioning of eyewitness Laura Hoelscher was limited to questions about the getaway car. Under these operative facts, Mr. Fratta could not successfully argue that law-enforcement-led hypnosis explained why the witness's testimony about the number of perpetrators present at the scene of the murder substantially deviated from her initial statement the night of the crime.

Recently discovered information, however, provided that missing support. A 2022 declaration from Laura Hoelscher demonstrates that she was in fact questioned about her memory of what she initially described as the shooter in red pants and later testified was an unidentifiable "red flash"—not a person.

Had Hoelscher testified to what her original recollection was *prior to* the hypnosis, Hoelscher's testimony would have undermined, rather than support, the State's case. The State's theory of Mr. Fratta's guilt was built around the presence

of two men at the scene—Howard Guidry and Joseph Prystash as the shooter and getaway driver respectively. Laura Hoelscher's testified that the shooter was a Black man dressed in all black, which matched the description of Guidry on the night of the crime. But Hoelscher's pre-hypnosis description of the shooter was a person in red pants, which did not match the description of Guidry's clothing that night. The suppressed information linking the hypnosis to the change in Hoelscher's recollection would have provided powerful impeachment evidence. Under these circumstances there is at least a reasonable probability that four Justices will think review is necessary.

IV. Fratta will suffer irreparable harm absent a stay.

Irreparable harm is indisputably present when a stay of execution is sought. As this Court has explained, "death is different"—"execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases.").

In this capital case, Fratta's irreparable injury would be a by-product of the State's unconstitutional behavior. Without interference from this Court, "prosecutors can run out the clock and escape any responsibility for all but the most extreme violations." *Bernard v. United States*, 141 S. Ct. 504, 507 (2020) (Sotomayor, J., dissenting from denial of certiorari).

This Court should not allow Mr. Fratta to be executed without affording him the opportunity to have his Brady claim meaningfully heard. Absent intervention from this Court, Mr. Fratta is going to be executed without his right ever being vindicated.

V. The public interest favors granting a stay.

The community as a whole will suffer harm if no stay is granted. Allowing State misconduct to go unremedied will erode the public's confidence that the court system offers a level playing field, providing a forum to redress grievous wrongs.

And there is an "overwhelming public interest" in "preventing unconstitutional executions." *Bronshtein v. Horn*, 404 F.3d 700, 708 (3d Cir. 2005) (citation omitted). A stay of execution, in fact, will serve the strong public interest – an interest the State of Texas shares – in administering capital punishment in a manner consistent with the Constitution. "Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.'" *Banks*, 540 U.S. at 696 (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)) (alterations in original).

CONCLUSION

For these reasons, this Court should enter an order staying Fratta's execution pending resolution of the issues raised in his petition for writ of certiorari.

Respectfully submitted,

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