No. 22-6476 & 22A603 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT ALAN FRATTA

Petitioner,

v.

STATE OF TEXAS

Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

REPLY BRIEF

****Fratta is scheduled for execution on January 10, 2023 at 6 p.m.****

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REPLY

Mr. Fratta's Subsequent Application for Writ of habeas corpus in the Texas Court of Criminal Appeals and his petition for writ of certiorari to this Court establish serious *Brady* misconduct on behalf of the State: not only did detectives and prosecutors fail to disclose that detectives hypnotized the sole eye witness to the murder, but when Fratta discovered the hypnosis, prosecutors provided false and misleading affidavits about the hypnosis that prevented Fratta from establishing the link between the hypnosis and the change in the witnesses recollection of the murder about the number of perpetrators and the description of the shooter. The State's selective disclosure of *Brady* materials at the time Fratta raised his first *Brady* claim in state habeas proceedings coupled with the State's use of §5(a)(1) to bar his *Brady* claim now that he has discovered evidence of the State's continued suppression has deprived him of a fair opportunity to meaningfully raise his claim.

Texas's brief in opposition compounds its earlier misconduct and fails to address the important question presented by Fratta's case. Texas refuses to even mention the facts that Fratta alleges were suppressed and improperly conflates Fratta's current *Brady* claim with claims based on far less evidence. To this day, Texas has not provided a single piece of information correcting its original misrepresentations that misled Fratta's counsel and prior state and federal courts into believing the State had disclosed all the information it possessed and "held nothing back." *Banks v. Dretke*, 540 U.S. 668, 698 (2004).

Texas also fails to address the serious remedial problem that animates Fratta's Petition. The Texas Court of Criminal Appeals has interpreted its procedural rule for claims whose factual basis was not previously unavailable 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. This Court should find that § 5(a)(1) cannot function as an adequate and independent state bar to prevent this Court's review of *Brady* claims where a petitioner discovers evidence that would have established the materiality of a previously raised and dismissed *Brady* claim, but for the State's continued suppression of that information. In the alternative to this Court reviewing the merits of Fratta's *Brady* claim, this Court should remand the claim to the CCA with instructions that §5(a)(1) does not bar the authorization of this claim for state habeas review.

I. Texas refuses to acknowledge the evidence that Fratta established it suppressed.

Texas ignores the critical facts that formed the basis for Fratta's new *Brady* claim:

- Contrary to the State's 1999 assertion that prosecutors did not know about the hypnosis, the 2022 affidavit of Laura Hoelscher shows a homicide detective and District Attorney investigator were present for the hypnosis session of the lone eyewitness; and

- Contrary to the State's 1999 assertion that the hypnosis session was arranged to extract memories about the getaway car, the 2022 affidavit of Laura Hoelscher shows that the eyewitness was questioned about her memory of what she had previously described as a man in red pants running from the garage after the shooting.

Rather than acknowledging the claim Fratta pled in his Subsequent Application and described in his Petition, Texas suggests that Fratta only alleges suppression of the "fact that [the eyewitnesses] had been hypnotized." BIO 17. That is false. *See* Pet. at i; Subsequent Application at 73-74 (explaining that the Texas Court of Criminal Appeals's "prior determination regarding the discovery of the hypnosis is not preclusive" because Fratta "learned much more about the hypnosis and its concealment").

The entire factual premise of Fratta's claim and question presented is that Fratta initially discovered the fact that the lone eyewitness was hypnotized during his state habeas proceedings after his first trial. But the State selectively admitted to suppression of innocuous facts while concealing the existence of other more damning facts—the facts Texas now chooses to ignore—that bore directly on the materiality of his initial *Brady* claim. Fratta was denied the ability to develop his claim at the time it was initially pled because courts denied Fratta requested discovery and the State's seeming candor induced defense counsel not to investigate the hypnotism further. This whole account goes unaddressed in Texas's brief.

Because Texas refuses to acknowledge the facts Fratta alleges, the BIO fails to acknowledge the distinction between Fratta's newly discovered claim and previously denied claims about the hypnosis. BIO 17-20. According to Texas,

Fratta's claim is "identical" to a *Brady* claim raised by co-defendant Guidry in a federal habeas petition in 2013. BIO 16; *see also id.* 17 ("Guidry raised this exact claim[.]"). While Guidry's claim relied on a previously obtained declaration from Laura Hoelscher, like Fratta's current claim,[1] the similarities stop there.

Hoelscher's 2013 declaration (reproduced below) contained a single conclusory sentence about hypnosis: "The police tried to hypnotize me during their investigation." 2013 Decl. ¶ 7. The Guidry claim did not add any new facts to the allegations Fratta had made in his original *Brady* claim. By the same token, Fratta's earlier federal habeas claim raising counsel's ineffectiveness relied on the same evidence as the Guidry claim and so had the same defects in proof. *See* BIO 20.

By contrast, Hoelscher's 2022 declaration[2] provided an entirely new account: (1) a detective was present *during* the hypnosis, not that they merely "arranged" her hypnosis; (2) a representative from the DA's office was present during the hypnosis, not that prosecutors did not know about the hypnosis; (3) Hoelscher was questioned about seeing the man in red pants flash by during the hypnosis, not just about the car. *See* Nov. 2, 2022 Decl. (Exhibit 28 to Subsequent Application).

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[1] Pet'n for Writ Habeas Corpus at 205, *Guidry v. Stephens*, No. 4:13-cv-1885 (S.D. Tex. June 26, 2013), ECF No. 1.

[2] The State criticizes Fratta's petition for failing to provide a specific date when he discovered the suppressed evidence. BIO 17. Fratta stated the suppressed "information was discovered for the first time in November 2022" (at 8) and cited repeatedly to the November 2, 2022 declaration of Laura Hoelscher which formed the new factual basis (at 4-5).

Texas argues the outcomes of these past claims prove that Fratta's purportedly identical claim is meritless. These results show the opposite.

First, the fact that prior habeas counsel interviewed Ms. Hoelscher yet did not obtain additional details about the hypnosis suggests that counsel's acts or omissions were not the cause for the failure to learn the new information the State had suppressed. Even when counsel spoke with Hoelscher, they reasonably believed that the State had "set the record straight" about the hypnosis when it had earlier responded to Fratta's original *Brady* claim. *Banks*, 540 U.S. at 676. The information Fratta obtained about the hypnosis was "impossible for the defendant to know as a factual matter … before the exculpatory evidence [wa]s disclosed." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 359 (2006). This shows the wisdom of *Banks*'s rejection of a rule that "defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695.

Second, the fact that courts found materiality lacking in these earlier undeveloped *Brady* (and ineffectiveness) is the entire point of the conundrum Fratta's Petition presents: under the TCCA's interpretation of its procedural bar, the State can get away with failing to abide by its *Brady* obligations even after a petitioner raises a *Brady* claim as long as the State continues to suppress evidence that would support the materiality of that claim and that is not discovered until after initial state and federal habeas. The fact that courts previously dismissed claims related to the hypnosis that did not have the benefit of the information in Hoelscher's November 2022 declaration suggests that the additional evidence that

the State continued to suppress could make a difference in the outcome. The new evidence directly undercuts the very reason previous hypnosis claims were denied—that "the hypnosis did not alter the account of events." Fratta is now able to show that the State specifically asked Hoelscher about her memory of seeing a third man at the scene, a fact that she later denied. Because the existence of a third man would upset the State's theory of the murder for hire involving a scheme concocted between just Fratta, Guidry, and Joseph Prystash, it likely would have altered the verdict. *See Kyles*, 514 U.S. at 434.

The record thus does not support Texas's accusation that Fratta's claim of suppression is "beyond disingenuous." BIO 17. Because Texas cannot even once describe the evidence that Fratta has identified as suppressed, its aspersions about the claim's merit—"mere allegation" (at i), "specious plea" (at 21)—should be disregarded.

Fratta's Petition establishes that, if the State had performed its duty to "set the record straight," *Banks*, 540 U.S. at 676, rather than providing false and mislead affidavits, Fratta likely would have received habeas relief from his *Brady* claim raised in initial state habeas proceedings. But because the State continued to suppress the very evidence that would have established the materiality of his claim, and that evidence was not discovered until long after state and federal habeas proceedings, Fratta is now barred from having any Court meaningfully review the impact of the State's misconduct that led to his conviction. Failure to correct this

injustice would allow the State to use suppression of exculpatory evidence as both a sword and a shield against defendants.

Declaration of Laura Hoelscher, Apr. 11, 2013, *Guidry v. Davis*, No. 4:13-cv-1885 (S.D. Tex.), ECF No. 83:

Declaration of Laura Hoelscher

1. My name is Laura Hoelscher, and I am over 18 years old. I live in Conroe, Texas.
2. I was a witness in the case of The State of Texas v. Howard Paul Guidry, Cause No. 1073163, in the 230th District Court of Harris County, Texas.
3. I was never contacted by Howard's trial counsel before trial concerning my anticipated testimony.
4. I saw a young black man who was not very tall on the night of the crime.
5. I could not identify the man at the crime scene as Howard, just as a shorter black male who was stocky with a round head.
6. I could never say that the man I saw at the crime scene was Howard.
7. The police tried to hypnotize me during their investigation.
8. I saw that the getaway driver was smoking a cigarette.
9. I saw that the man waiting by the bush in front of Farah's garage was looking out for a getaway car.

I swear under penalty of perjury that the foregoing is true + correct.

Dated on 04/11/13 at Conroe, Texas.

Laura Hoelscher

Laura Hoelscher

II. Texas's bar for factually unavailable claims, Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), is not an adequate or independent procedural bar to prevent review of a *Brady* claim that is raised after initial state and federal habeas review because of the State's ongoing suppression of the facts.

Texas's response does not address Fratta's arguments on the question presented.

First, Texas ignores the TCCA's own law defining when a factual basis of a claim was not previously available with the exercise of "reasonable diligence." *See* Tex. Code Crim. Proc. art. 11.071 §§ 5(a)(1), 5(e). *See also* Pet. 12-13 (examining TCCA case law). Instead, Texas relies primarily on Fifth Circuit caselaw holding that Article 11.071 is "ordinarily" an adequate procedural ground that is independent of federal law. *See* BIO 10 (quoting *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004)). But this paints state law with too broad a brush.

The question of independence and adequacy of the "factual unavailability" bar of § 5(a)(1) has to be measured according to the federal claim at issue. *Hathorn v. Lovorn,* 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."). Moreover, even Texas's view accepts that Article 11.071, § 5's bar is not always adequate or independent of federal law.

Fratta argues that § 5(a)(1) as applied to the category of *Brady* claims discovered after the conclusion of initial state and federal habeas review are uniquely disfavored under the TCCA's controlling interpretation of the bar, and so the TCCA's application of that bar to Fratta is inadequate. *See Walker v. Martin*, 562 U.S. 307, 321 (2011). Pet. 11-18. The availability of a remedy for a late-

discovered *Brady* violation must be placed in a "different category" from other claims of newly discovered evidence raised in a subsequent habeas application, because the State alone controls the defendant's access to the favorable information. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976); *accord Kyles v. Whitley*, 514 U.S. 419, 439 (1995). Pet. 21-22.

In rebuttal, Texas makes several mistakes of law. Texas appears to contend that *Walker*'s adequacy analysis ought not apply because it arose in the context of federal habeas, 28 U.S.C. § 2254, whereas this case arises on direct review of a state court judgment, 28 U.S.C. § 1257. BIO 11. Yet this Court applies its adequacy case law from these two sources interchangeably.

Texas further argues that Fratta must demonstrate that "Texas courts fail to regularly apply the Section 5 bar" to demonstrate inadequacy. BIO 11. But irregular application of a bar is but one way of showing a state ground is not adequate to support a judgment. This Court has left "unaltered [its] repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Walker*, 562 U.S. at 321. That is Fratta's argument for § 5(a)(1)'s lack of adequacy—one which the BIO misses.

CONCLUSION

The Court should stay Petitioner's execution and grant certiorari to review the judgment of the Texas Court of Criminal Appeals in his case, or grant such other relief as justice requires.

Respectfully submitted,

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