

IN THE
Supreme Court of the United States

ROBERT ALAN FRATTA,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

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

**EXECUTION DATE SCHEDULED FOR
TUESDAY, JANUARY 10, 2023**

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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:

1. Pursuant to 28 U.S.C. §§ 1651 and 2101(f), and this Court’s inherent powers, *Nken v. Holder*, 556 U.S. 418, 426 (2009), Robert Alan Fratta respectfully requests this Court stay his execution pending the disposition of his petition for writ of certiorari filed on July 28, 2022. The State of Texas has scheduled Mr. Fratta’s execution for **Tuesday, January 10, 2023**. *See* Exhibits 1 and 2.

2. In a capital habeas corpus proceeding such as this, the first 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). Stays are a form of equitable relief and there is a “strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citation omitted).

3. Mr. Fratta’s petition and this application are neither last-minute nor manipulative. On the contrary, the state trial court set the execution date knowing that it could conflict with this Court’s review of Mr. Fratta’s petition. Further, while the State opposes certiorari, its brief in opposition acknowledges that Mr. Fratta’s

petition presents a question on which the courts of appeals are divided. BIO 1, 6-11.

4. The State urged the trial court to set a date for Mr. Fratta's execution two weeks before his petition was due in this Court. Mr. Fratta timely alerted the trial court that he was litigating his right to relief under Fed. R. Civ. P. 60(b) and would be filing his petition in this Court on July 28, 2022. Mr. Fratta advised the trial court that the earliest this Court would consider his petition would be September 28, 2022.

5. However, Texas then sought an extension of time to file its brief in opposition to certiorari. The State filed its BIO on September 30, 2022. On October 6, 2022, Mr. Fratta advised the trial court that the petition would not be resolved before October 28.

6. Nonetheless, on October 11, 2022, the trial court signed the State's proposed order scheduling Mr. Fratta's execution. Thus, Texas officials, including the trial court, set the execution date knowing that it could conflict with the resolution of the petition pending before this Court. The State therefore cannot legitimately claim any delay on Mr. Fratta's part created the need for a stay.

7. Moreover, the State has not taken any action to postpone the scheduled execution despite its awareness that there is no publicly-known conference date for Mr. Fratta's petition in this Court. On October 19, 2022, this Court distributed the petition for its November 4, 2022 conference. Then, on October 28, 2022, the Court

rescheduled the petition. No new conference date is identified on this Court's on-line public docket. Yet the State has given no indication that it intends to relent on its scheduled January 10, 2023 execution date.

8. In fact, the State has actively opposed a stay of execution in response to Mr. Fratta's *pro se* application for stay of execution, filed in this Court on November 4, 2022, No. 22A486. Mr. Fratta filed that stay application in support of his *pro se* petition for writ of certiorari to the Texas Court of Criminal Appeals, No. 22-5785. In its December 6, 2022 combined brief in opposition to the *pro se* cert petition and stay application, the State acknowledged that the execution is scheduled for January 10, 2023 and opposed the requested relief in that matter.

9. Because Mr. Fratta has been diligent and Texas created the need for a stay after he timely sought review, a stay is warranted if there is: (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

10. “[T]hat irreparable harm will result if a stay is not granted [] is necessarily present in capital cases,” *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Mem.) (Powell, J., concurring), because “execution is the most irremediable ... of penalties,” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.).

11. The next question is whether the cert petition presents “substantial grounds upon which relief may be granted.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). It does.

12. Mr. Fratta’s petition squarely satisfies the criteria for review in Supreme Court Rule 13. Like the State in its BIO, the Fifth Circuit recognized that whether to apply 28 U.S.C. § 2253(c)’s requirement of a certificate of appealability in the circumstances of this case is the subject of a circuit split. App. 5a (*Fratta v. Lumpkin*, No. 21-70001, 2022 WL 44576, at *2 (5th Cir. Jan. 5, 2022) (per curiam)); see Pet. 10-16.

13. Applying the COA requirement, the Fifth Circuit held that Mr. Fratta had not shown reasonable jurists could debate the district court’s holding that his Rule 60(b) motion was a disguised successive petition. *Id.* at *4. This Court has noted that determining whether a motion is successive is a “not-always-easy threshold determination.” *Banister v. Davis*, 140 S. Ct. 1698, 1709 n.7 (2020). Under these circumstances, there is at least a reasonable probability that four Justices will decide review is necessary.

14. There also is a fair prospect of reversal. The Fifth Circuit’s holding that a COA is required to consider the denial of a Rule 60(b) motion squarely conflicts with this Court’s holding that the requirement applies only to “final orders that dispose of the merits of a habeas corpus proceeding—a proceeding challenging the lawfulness of the petitioner’s detention.” *Harbison v. Bell*, 556 U.S. 180, 189 (2009). At a

minimum, this Court's decision in *Banister* calls for more searching review than the Fifth Circuit's *per se* approach to Mr. Fratta's Rule 60(b) motion. In addition, the Fifth Circuit's determination that Mr. Fratta's Rule 60(b) motion constitutes a successive habeas petition is contrary to this Court's precedent. Under either prong of this Court's test in *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005), the motion was a true Rule 60(b) motion because it attacked a defect in the integrity of the federal habeas proceeding and a procedural default ruling that precluded a merits determination. *See* Pet. 18-21.

CONCLUSION

For these reasons, Mr. Fratta respectfully asks this Court to enter an order staying his execution pending resolution of the issues raised in his petition for writ of certiorari.

Respectfully submitted,

/s/ Stanley J. Panikowski

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December 16, 2022

Counsel for Petitioner

EXHIBIT 1

CAUSE NO. 1195044

STATE OF TEXAS § 230th DISTRICT COURT
V. § OF
ROBERT ALAN FRATTA § HARRIS COUNTY, TEXAS

EXECUTION ORDER

This Court, having received the mandate from the Court of Criminal Appeals affirming the Defendant's conviction in the above styled and numbered cause and having received notice that the Court of Criminal Appeals has denied habeas relief in the defendant's initial petition for writ of habeas corpus, cause no. 1195044-A, now enters the following Order:

IT IS HEREBY **ORDERED** that the Defendant, ROBERT ALAN FRATTA, who has been adjudged to be guilty of Capital Murder as charged in the indictment and whose punishment has been assessed at Death by the verdict of the jury and judgment of the Court, shall be kept in custody by the Director of the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas until **TUESDAY, THE 10TH DAY OF JANUARY, 2023**, upon which day, at the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas, at some time after the hour of 6:00 p.m., in a room designated by the Texas Department of Criminal Justice and arranged for the purpose of execution, the said Director, acting by and through the executioner designated by said Director as provided by law, is hereby commanded, ordered and directed to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of the said ROBERT ALAN FRATTA and until the said ROBERT ALAN FRATTA is dead, such execution procedure to be determined and supervised by the said Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.

IT IS HEREBY **ORDERED** that the Clerk of the Court shall send a paper and electronic copy of the Execution Order and Death Warrant in cause no. 1195044 to the following: Mr. James Rytting; Hilder and Associates, 819 Lovett Boulevard., Houston, Texas 77006, james@hilderlaw.com; Mr. Joshua Freiman, Capital Habeas Unit, Federal Public Defender's Office, Western District of Texas, 919 Congress Avenue, Suite 950, Austin, Texas 78701, Joshua_Freiman@fd.org; Mr. Joshua Reiss, Assistant District Attorney, Harris County District Attorney, 500 Jefferson Street, Suite 600, Houston, Texas 77002, reiss_josh@dao.hctx.net; Ms. Farnaz Hutchins, Harris County District Attorney, 500 Jefferson Street, Suite 600, Houston, Texas 77002,

hutchins_farnaz@dao.hctx.net; Mr. Benjamin Wolff, Office of Capital and Forensic Writs, 1700 N. Congress Ave., Suite 460, Austin, Texas 78701, benjamin.wolff@ocfw.texas.gov; and Ms. Ellen Stewart-Klein, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711, ellen.stewart-klein@oag.texas.gov.

IT IS FURTHER **ORDERED** that the Clerk of this Court shall issue and deliver to the Sheriff of Harris County, Texas, a Death Warrant in accordance with this Order, directed to the Director of the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas, commanding him, the said Director, to put into execution the Judgment of Death against the said ROBERT ALAN FRATTA.

IT IS FURTHER **ORDERED** that the Sheriff of Harris County, upon receipt of said Death Warrant, is to deliver said Death Warrant to the Director of the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas and shall take receipt of said Death Warrant and return the receipt to the Clerk of this Court.

SIGNED AND ENTERED this 11th day of October, 2022.



HON. CHRIS MORTO
Presiding Judge
230th District Court
Harris County, Texas

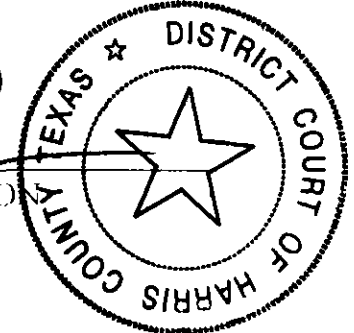


EXHIBIT 2

CAUSE NO. 1195044

DEATH WARRANT

STATE OF TEXAS	§	230th DISTRICT COURT
V.	§	OF
ROBERT ALAN FRATTA	§	HARRIS COUNTY, TEXAS

TO THE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE – CORRECTIONAL INSTITUTIONS DIVISION AND TO THE SHERIFF OF HARRIS COUNTY, TEXAS:

On the 15th day of May, 2009, the above-named defendant, in the above-styled and numbered cause, was convicted of capital murder. On the 1st day of June, 2009, the Court sentenced the above-named defendant to death in accordance with the findings of the jury, pursuant to the Texas Code of Criminal Procedure.

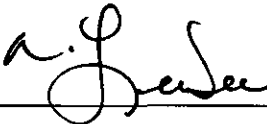
The Court, having received the Court of Criminal Appeals' mandate affirming the above-named defendant's conviction for capital murder and having received notice of the Court of Criminal Appeals' denial of the defendant's initial application for writ of habeas corpus, if such application was timely filed, sentenced the above named defendant to death for the offense of capital murder and **ORDERS** that the execution be had on **TUESDAY, THE 10TH DAY OF JANUARY, 2023**, at any time after the hour of 6:00 p.m. at the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas.

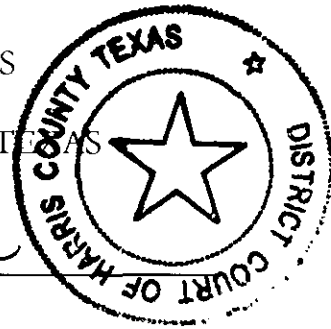
The Sheriff of Harris County, Texas, is hereby commanded to transport the defendant to the Texas Department of Criminal Justice – Correctional Institutions Division and deliver the defendant, if not already in the custody of the Texas Department of Criminal Justice – Correctional Institutions Division, and this warrant to the Director of the Texas Department of Criminal Justice – Correctional Institutions Division for the purpose of executing this warrant, and to take from the Director the proper receipt for the defendant, if not already in the custody of the Texas Department of Criminal Justice – Correctional Institutions Division, and the Sheriff will return the receipt to the office of the District Clerk of Harris County, Texas.

The Director of the Texas Department of Criminal Justice – Correctional Institutions Division is hereby commanded to receive from the Sheriff the defendant and this warrant, and to give his receipt to the Sheriff, and to safely keep the defendant and to execute the sentence of death at any time after the hour of 6:00 p.m. on **TUESDAY, THE 10TH DAY OF JANUARY, 2023**, by causing a substance or substances in a lethal quantity to be intravenously injected into the body of the defendant sufficient to cause death, and the injection of the substance or substances into the body of the defendant to continue until the defendant is deceased, obeying all laws of the State of Texas with reference to such execution.

Witness my hand and seal of the 230th District Court of Harris County, Texas, at my office in the City of Houston, Texas, on the 11th day of October, 2022.

MARILYN BURGESS
DISTRICT CLERK
HARRIS COUNTY, TEXAS


Deputy



RETURN

The Sheriff of Harris County, Texas, received this writ on the _____ day of _____, 2022, at _____ M. and executed the same by delivering the within named defendant in person (if not already in custody at Texas Department of Criminal Justice – Correctional Institutions Division) and this warrant to the Director of the Texas Department of Criminal Justice – Correctional Institutions Division on the _____ day of _____, 2022 and by taking his receipts for the said defendant and this warrant, which receipts are hereto attached do here now make my return on this writ this _____ day of _____, 2022.

SHERIFF
HARRIS COUNTY, TEXAS

DEPUTY

On this the _____ day of _____, 2022, the following papers related to cause number 1195044, styled THE STATE OF TEXAS vs. ROBERT ALAN FRATTA, were received from the Sheriff of Harris County, Texas.

1. One original and one copy of **DEATH WARRANT** to be delivered to the Director of the Texas Department of Criminal Justice – Correctional Institutions Division.
2. Two original, certified Execution Orders.

TDCJ-CID OFFICIAL