No. 22A543

In the Supreme Court of the United States

ROBERT ALAN FRATTA,
Applicant,

v.

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

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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INTRODUCTION

Petitioner Robert Alan Fratta hired a hitman to kill his estranged wife in 1994. Fratta was tried, convicted of capital murder, granted habeas relief by a federal court, retried, and convicted again. He was sentenced to death (for the second time) in 2009. Fratta's conviction became final in 2012 when this Court denied certiorari on direct appeal. Represented by counsel, Fratta sought state habeas relief and then took his full and fair opportunity for federal habeas review, which came to an end in 2019 when this Court denied certiorari from the denial of his habeas petition. All the while, Fratta was filing pro se petitions and motions in both state and federal court. Even now, he has yet another successive habeas application pending in state court and two different petitions for certiorari pending in this Court. In this one (No. 22-94), Fratta seeks this Court's review so he may pursue a motion for relief from judgment that both the district court and Fifth Circuit correctly concluded was an unauthorized second or successive habeas application under *Gonzalez v. Crosby*, 545 U.S. 524 (2005). That motion sought a second chance to litigate the merits of habeas claims that the lower courts considered and rejected long ago.

Equity does not favor a stay. If a State must wait to carry out a capital sentence until the murderer stops pursuing successive habeas petitions, then no sentence would ever be carried out. This Court should deny Fratta's application.

STATEMENT

As explained in respondent's brief in opposition (at 2-4) to this petition for writ of certiorari (No. 22-94), Fratta hired two hitmen to kill his estranged wife while he attended church activities with the couple's children. A masked man shot Farah Fratta in the head as she stepped out of her car in the garage of the family home, where she had just returned to collect the children. Then he shot her again. The gunman used a handgun registered to Fratta. Moments later, a getaway car pulled up and whisked the shooter away. Notwithstanding the alibi that Fratta—a former police officer—had deliberately fabricated, investigators eventually connected Fratta to the crime using phone records and the witnesses those records revealed.

Fratta was convicted of his heinous crime twice. After Fratta's first trial in 1997, where the jury found Fratta guilty of capital murder and he was sentenced to death, a federal district court granted Fratta habeas relief based on a Confrontation Clause violation. *Fratta v. Quarterman*, No. H-05-3392, 2007 WL 2872698 (S.D. Tex. Sep. 28, 2007), *aff'd*, 536 F.3d 485 (5th Cir. 2008).

The State re-tried him in 2009. The second jury again heard evidence that Fratta solicited an acquaintance from the gym to murder his estranged wife, and that acquaintance then recruited an accomplice to be the triggerman while he drove the getaway car. The second jury again convicted Fratta of capital murder. He was again sentenced to death.

Direct appeal, state habeas, and federal habeas review all followed, as Respondent has described in more detail in the brief in opposition (at 5-6). This

Court denied Fratta's petition for a writ of certiorari from the denied of his initial federal habeas petition on January 7, 2019. *Fratta v. Davis*, 139 S. Ct. 803 (2019).

A year and ten months later, Fratta's counsel filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). ROA.1297-1319. The district court denied the motion on two alternative grounds: *first*, applying *Gonzalez v. Crosby*, the district court found the motion to be an improperly filed successive habeas petition. Pet. App. 11a-18a; *see* 28 U.S.C. § 2244(b). *Second*, the district court concluded Fratta could not show the extraordinary circumstances necessary for relief from judgment under Rule 60(b). Pet. App. 18a-23a.

The district court and the Fifth Circuit denied a certificate of appealability. Pet. App. 2a-10a. Fratta's petition for certiorari asks this Court to review their conclusion that his habeas claims are not deserving of encouragement to proceed further.

REASONS TO DENY A STAY

A Court sitting in "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). A stay of execution "is not available as a matter of right." *Id.* As "[t]he party requesting a stay," Fratta "bears the burden of showing that the circumstances justify an exercise of [judicial]

discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Before doing so, the Court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citation omitted) (internal quotation marks omitted).

I. FRATTA CANNOT MAKE A STRONG SHOWING HE IS LIKELY TO SUCCEED ON THE MERITS.

Fratta has not met his burden of showing entitlement to a stay because he has not shown a likelihood of success on the merits. Whether the Court looks at the question with reference to the merits of his underlying habeas petition or to the merits of the questions presented in his petition for certiorari, he is not likely to succeed. That makes Fratta ineligible for a stay of execution. *See McDonough*, 547 U.S. at 584.

A. Fratta's underlying habeas claims are meritless.

Even if Fratta were correct about the procedural questions raised in his petition (and he is not), equity does not favor a stay because Fratta cannot prevail on the merits of either of the claims in his underlying habeas petition. Though the stay application implies that the courts below denied Fratta's petition purely on legal technicalities of Rule 60(b), the district court also "reviewed the merits of [Fratta's] claims" and rejected them. Pet. App. 90a; *see* Pet. App. 119a-134a. The Fifth Circuit, too, denied Fratta's request for a certificate of appealability because it concluded his Rule 60(b) motion "fail[ed]

to state 'a valid claim of the denial of a constitutional right.'" Pet. App. 10a (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Indeed, Fratta's petition makes no attempt to argue his underlying claims entitle him to federal habeas relief. And he is not. Because Fratta's habeas claims lack merit, there is no call for this Court to exercise its equitable discretion in his favor.

The lower courts correctly determined that Fratta's habeas claims do not "deserve encouragement to proceed further." *Slack*, 529 U.S. at 484. As summarized by the Fifth Circuit, "Fratta argue[s] that (1) there was insufficient evidence to support a capital conviction and (2) the jury instructions used to convict Fratta strayed from his grand jury indictment by allowing his conviction if he was a party to the murder rather than the person who pulled the trigger." Pet. App. 3a. Both claims are meritless.

1. Fratta's first constitutional claim, based on the due process clause of the Fourteenth Amendment, required him to show that "the evidence was [not] constitutionally sufficient to convict [him] of the crime charged" under *Jackson v. Virginia*, 443 U.S. 307 (1979). Pet. App.125a. As the district court explained at length, Fratta made no such showing. Pet. App. 123a-130a. "The jury instructions allowed for Fratta's conviction if Fratta employed *either*" the getaway driver or the shooter, and Fratta has not even contested that "[s]ufficient evidence showed that Fratta solicited [the getaway driver] to kill his wife." Pet. App. 129a. He contends only that there is insufficient evidence he also solicited the shooter because Fratta did not personally know the shooter or know that the hitman he solicited (the getaway driver) would recruit

yet another hitman to assist him with the murder. *See* ROA.818-20, 836-37, 1313-14.

As the district court explained, "Fratta has not shown that Texas' law of parties requires that, in acting together, [ ] each culpable individual know each other or directly oversee each other's actions." Pet. App.129a. Fratta does not dispute this conclusion or contend that Texas law is constitutionally infirm. Consequently, Fratta cannot make a strong showing he is likely to succeed on his sufficiency-of-the-evidence due process claim.

2. Fratta's second claim is that his Sixth Amendment rights were violated when, he argues, "the State constructively amended the indictment against him by relying on Texas'[s] law of parties." Pet. App. 130a. Under Texas law, the law of parties provides that a person is criminally culpable for the conduct of another if "at the time of the offense the parties were acting together, each contributing some part towards the execution of their common purpose." *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986). Fratta's constructive-amendment theory is meritless.

As the district court explained, "[t]he Sixth Amendment requires only that a 'reasonable construction of the indictment would charge the offense for which the defendant has been convicted.'" Pet. App. 131a (quoting *McKay v. Collins*, 12 F.3d 66, 69 (5th Cir. 1994)). As Fratta does not dispute, under Texas's law of parties "[t]he State may secure a conviction if the conduct of the principal actor results in the commission of an offense, and another party solicited that conduct." *Id.* at 129a (citing *Boyer v. State*, 801 S.W.2d 897, 899

(Tex. Crim. App. 1991)). Here, as the district court explained, the indictment, reasonably construed, put Fratta on notice "that the State would prosecute him based on his relationship with [the getaway driver], and [the driver's] relationship with [the shooter]." Pet. App. 131a-32a. The district court correctly rejected Fratta's claim on its merits. Pet. App. 131a-134a.

Fratta is not entitled to habeas relief on the underlying claims, even considered de novo—let alone under AEDPA. He therefore cannot make a strong showing he will succeed on the merits even if the Court were to agree with him on the procedural questions presented.

B. Fratta has not made a strong showing that he is likely to succeed in obtaining this Court's review, much less that he is likely to prevail on the questions presented.

Fratta has not shown a strong likelihood of success on the merits of the questions presented in his petition—or even that the Court will grant review. That is always a difficult showing to make. *See Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) (describing a case satisfying this factor as "exceptional"). This too makes Fratta ineligible for the equitable relief of a stay. *McDonough*, 547 U.S. at 584.

1. Fratta's first question presented involves a stale circuit split that vehicle problems would prevent the Court from resolving.

Fratta's first question presented is whether a COA is necessary when a district court denies a motion for relief from judgment under Rule 60(b) because the motion is an unauthorized second-or-successive habeas petition

under *Gonzalez v. Crosby*. *See* Pet. at i. For at least two independent reasons, the Court should not stay Fratta's execution to consider whether it should take up that question.

A. Fratta has not shown a strong likelihood the Court *will* consider the question. The State has acknowledged that there is a split on an aspect of this question. BIO at 6. But as it has explained in greater detail (at 7-11), that split is narrow and stale: the Fifth Circuit has maintained its position for many years, its rule requiring a certificate of appealability aligns with the majority of the courts of appeals, and only a single court of appeals takes the opposite position—and has done so since 2015 without garnering any additional support.

And even if the split might warrant this Court's review, Fratta's petition is a poor vehicle for taking up the question. Fratta's motion was both untimely and improper under Rule 60(b). This Court held last term that Rule 60(b)(1) is the proper vehicle for seeking to correct errors of law in a district court's decision. *Kemp v. United States*, 142 S. Ct. 1856, 1861-65 (2022). Fratta's motion was based on an alleged legal error, but it was filed well outside Rule 60(b)(1)'s one-year time limit. As discussed further in the brief in opposition (at 12-13), that independent ground for denial makes his case a poor one for addressing whether a COA is required by section 2253(c) when a Rule 60(b) motion is found to be an unauthorized second-or-successive habeas petition. Fratta's delay in pursuing the alleged constitutional violations also cuts

against his request for the extraordinary relief of a stay of execution. *See McDonough*, 547 U.S. at 584.

Even if his motion had been timely, Fratta did not make the extraordinary showing necessary for relief from judgment under Rule 60(b), so his motion's denial would have been affirmed even if no COA were required. In addition to rejecting Fratta's claims on their merits, *see supra* at 4-7, the district court correctly found them procedurally defaulted because "the state court had refused to consider the sufficiency and jury-charge claims on procedural grounds," namely, because "Fratta had raised them in pro se filings despite being represented by counsel." Pet. App. 3a-4a. Under Texas law, a criminal defendant or habeas applicant may proceed pro se—as is his constitutional right—but if he accepts counsel, he is not entitled to also represent himself. *See Landers v. State*, 550 S.W.2d 272, 279-80 (Tex. Crim. App. 1977). The Fifth Circuit has long held that Texas's no-hybrid-representation rule is an adequate and independent state law ground for denying a habeas petition. *See* Pet. App. 7a.

Pointing to *Garza v. Idaho*, 139 S. Ct. 738 (2019), and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), Fratta's Rule 60(b) motion "argued that recent Supreme Court precedent undermined the rule against hybrid representation that the state court relied on in dismissing [Fratta's] pro se claims, so extraordinary circumstances warranted reconsideration of his habeas petition." Pet. App. 4a. That argument is meritless for at least two reasons.

First, as the Fifth Circuit correctly explained, *McCoy* and *Garza* do not undermine Texas's procedural rule. Both "bolstered the criminal defendant's right 'to make [] fundamental choices about his own defense;" specifically, whether to assert innocence at trial or file an appeal. Pet. App. 8a n.2 (quoting *McCoy*, 138 S. Ct. at 1511). But in doing so, both *McCoy* and *Garza* "clarified that these rights do 'not displace counsel's, or the court's, respective trial management roles' and reiterated that many strategic decisions do not require the defendant's consent." Pet. App. 8a n.2 (quoting *McCoy*, 138 S. Ct. at 1509; citing *Garza*, 139 S. Ct. at 746). Which claims to raise on appeal or in collateral review is a decision that lies with counsel under this Court's longstanding precedent. *See, e.g.*, *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) ("Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed."); *cf. Faretta v. California*, 422 U.S. 806, 820 (1975) ("[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas."). A movant is not entitled to relief under Rule 60(b) unless he can show "a good claim or defense." 11 Charles Alan Wright & Arthur A. Miller, Federal Practice & Procedure § 2857 (3d ed.). Fratta cannot, as *McCoy* and *Garza* do not undermine Texas's no-hybrid-representation rule.

Second, even if it were timely, Fratta's motion lacked the extraordinary circumstances necessary for relief from judgment under Rule 60(b)(6). This Court has emphasized that "[s]uch circumstances will rarely occur in the

habeas context." *Gonzalez*, 545 U.S. at 535. And the district court's decision is reviewed for abuse of discretion, with an eye towards "preserv[ing]" "the finality of judgments." *Id.* As the Fifth Circuit explained, "changes in decisional law" like the ones Fratta cited "will rarely qualify as extraordinary circumstances justifying Rule 60(b) relief." Pet. App. 8a n.3. Fratta's motion was not the rare case, the Fifth Circuit concluded, so his motion would not have been granted even if the COA requirement did not apply. Pet. App. 8a n.3.

The Fifth Circuit was correct. In *Gonzalez*, the Court expressly held that a change in decisional law (there, this Court's interpretation of AEDPA's statute of limitations) did not constitute extraordinary circumstances, even though the petitioner's initial federal habeas petition had been barred under now-superseded circuit precedent. 545 U.S. at 536. And this Court held as much even though the nature of that change in decisional law meant the motion "attack[ed] . . . some defect in the integrity of the federal habeas proceedings," and was therefore not an impermissible second-or-successive habeas petition. *Id.* at 532. Here, it is hardly extraordinary that this Court has issued decisions about the Sixth Amendment's requirements for representation by counsel. Any Sixth Amendment decision could have a tangential relationship to Texas's procedural rule regarding hybrid representation, but that is the most Fratta can say of *McCoy* and *Garza*, neither of which—in contrast to the new precedent in *Gonzalez*—squarely rejected any rule applied in his case. As the

Fifth circuit correctly observed, neither *McCoy* nor *Garza* addressed a hybrid-representation rule. Pet. App. 8a.

Fratta cannot make a strong showing that he is likely to succeed on the merits because there are multiple, independently sufficient reasons for rejecting his motion for relief from judgment.

B. And even if the Court granted Fratta's petition, he has not shown the Court is likely to rule in his favor. The Fifth Circuit has long held that a COA is required to appeal the dismissal or denial of a Rule 60(b) motion. That rule aligns with this Court's precedent and the majority of the courts of appeals that have addressed the question.

A filing contains a habeas "claim" even if it is not denominated a petition if that filing "asserts" "that there exist . . . grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Gonzalez*, 545 U.S. at 532 n.4. As the Court explained in *Gonzalez*, "[w]hen a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim." *Id.* And a petitioner may not use Rule 60(b) "to present new claims for relief from a state court's judgment of conviction" and thereby "circumvent[] AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531 (citing 28 U.S.C. § 2244(b)(2)). The same principle prevents a federal habeas petitioner from using a Rule 60(b) motion to "present[] new evidence in support of a claim

already litigated," *id.*, or contend "that the court erred in denying habeas relief on the merits," *id.* at 532.

Even when this Court decided *Gonzalez* in 2005, "[m]any courts of appeals ha[d] construed 28 U.S.C. § 2253 to impose an additional limitation on appellate review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b) motion." *Id.* at 535 & n.7. The Court expressed approval for this reading of the statute. *Id.* In 2007, the Fifth Circuit, too, held that a certificate of appealability is required to appeal the denial of a Rule 60(b) motion in all but the narrowest circumstances (not applicable here, even by Fratta's telling). *Ochoa Canales v. Quarterman*, 507 F.3d 884, 887-88 (5th Cir. 2007) (per curiam). Since then, the Third, Ninth, and Eleventh Circuits all have agreed that dismissal or denial of a Rule 60(b) motion is "the final order in a habeas corpus proceeding," 28 U.S.C. § 2253(c)(1)(A), and therefore requires a COA. *See Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 282-83 (3d Cir. 2021); *United States v. Winkles*, 795 F.3d 1134, 1141-42 (9th Cir. 2015); *Hamilton v. Sec'y, Florida Dep't of Corr.*, 793 F.3d 1261, 1265-66 (11th Cir. 2015) (per curiam).

In the seventeen years since *Gonzalez*, only a single circuit has disagreed, and only in a limited subset of circumstances. The Fourth Circuit held in *United States v. McRae*, 793 F.3d 392 (4th Cir. 2015), that a COA is not required if a Rule 60(b) motion is dismissed as an unauthorized second-or-successive habeas petition under *Gonzalez*, though even the Fourth Circuit requires a COA if the Rule 60(b) motion is deemed proper under *Gonzalez* but

denied. *Id.* at 398–99. The Fourth Circuit's view has never been adopted by any other Circuit—making the split stale and unlikely to warrant review.

And as discussed in respondent's brief in opposition (at 8-11), the Fourth Circuit's reasoning is unpersuasive as a matter of text and precedent. Among other things, Fratta does not dispute that an order dismissing an independently filed second-or-successive habeas petition under section 2244(b) would require a COA. There is no sound reason section 2253(c)'s text would apply differently to a second-or-successive habeas application that is filed in the guise of a Rule 60(b) motion. Just like claims filed in their own action, habeas claims contained in a Rule 60(b) motion seek "habeas corpus relief." *Gonzalez*, 545 U.S. at 532 n.4. Treating one but not the other as "the final order in a habeas corpus proceeding," 28 U.S.C. § 2253(c), would allow petitioners to use strategic filings to avoid AEDPA's strictures. The Fourth Circuit was wrong to conclude otherwise, but this circuit split should be resolved by the en banc Fourth Circuit in an appropriate case; it does not call for this Court's intervention.

Fratta suggests the COA requirement for Rule 60(b) motions turns on whether the lower court correctly identified a second-or-successive habeas petition. *See* Pet. for Cert. Reply at 5. Nothing in section 2253(c)'s text suggests the COA requirement is to be so tied to the basis for the decision under review. Outside of post-judgment filings, the COA requirement applies to both merits-based denials of habeas relief and procedural rulings foreclosing habeas relief without regard to the merits. Fratta offers no

justification for treating them differently when it comes to Rule 60(b) motions. Indeed, here the district court did both—it concluded the motion contained habeas claims, but also rejected it for failure to show exceptional circumstances. Fratta does not explain how his proposed rule would apply to such a decision. Fratta cannot make a strong showing he is likely to succeed on the merits of the first question presented.

2. Fratta's second question presented argues (incorrectly) that the lower courts misapplied a properly stated rule of law.

Fratta's effort to obtain a stay based on his second question presented suffers from the same problems. *First*, the question is not cert-worthy because it alleges "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Fratta's petition for certiorari argues (at 18-19) that he filed a proper Rule 60(b) motion and not a successive habeas petition. The district court and the Fifth Circuit disagreed. Pet. App. 6a-9a, 13a-18a. But even if both lower courts were wrong, Fratta does not dispute that *Gonzalez* provides the rule of decision for whether a purported Rule 60(b) filing is subject to section 2244(b)'s gatekeeping requirements. This Court ordinarily does not grant certiorari to correct "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This case is no different.

Second, as discussed further in respondent's brief in opposition (at 15-18), the lower courts applied *Gonzalez* faithfully. *Gonzalez* distinguishes between Rule 60(b) motions containing habeas claims—a habeas claim being any argument that the petitioner is entitled to habeas relief "on the merits"—and

Rule 60(b) motions attacking a procedural ruling that "precluded a merits determination." 545 U.S. at 532 & n.4. Fratta's Rule 60(b) motion not only argued the district court erred in its finding of procedural default, but also sought a second chance to litigate the merits. Pet. App. 5a-7a. Indeed, Fratta's Rule 60(b) motion expressly asked the district court to "reopen the judgment" to revisit his claims on the merits. ROA.1312-13. The lower courts were correct to treat Fratta's Rule 60(b) motion as an unauthorized second-or-successive habeas petition.

Third, Fratta's motion implicated another unresolved issue, which he never raised below: what to do with "mixed" Rule 60(b) motions under section 2244(b). That is, Fratta's Rule 60(b) motion both argued the district court erred in its finding of procedural default, and expressly asked the district court to "reopen the judgment" to revisit his claims on the merits. ROA.1312-13. The Fifth Circuit treated it as an impermissible second-or-successive habeas petition. Pet. App. 5a-7a; *Will v. Lumpkin*, 978 F.3d 933, 939 & n.28 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 579 (2021). But as discussed further in the brief in opposition (at 14-15), some courts presented with mixed Rule 60(b) filings have allowed the district court to consider the procedural aspects of the motion while transferring the habeas claims to the court of appeals for authorization under section 2244(b)(3). Even the Fifth Circuit has done so at least once before. *See United States v. McDaniels*, 907 F.3d 366, 370 (5th Cir. 2018). So Fratta might have obtained review of the procedural portion of his motion, even if not his request to revisit the merits, if he had asked. But he did not.

The correct approach to a mixed motion is an independent, unresolved question on a threshold issue of law that stands in the way of Fratta's petition. But he never asked to address that question—not even here. That omission, and the vehicle problems it would cause, renders Fratta unable to show a likelihood that this Court will both grant review and agree with him on the merits. As a result, he is not entitled to a stay of execution.

II. THE EQUITIES DO NOT SUPPORT FRATTA'S REQUEST FOR A STAY.

Fratta is also not entitled to a stay of execution because 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.'" *McDonough*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650). Fratta contends (at 1-3) that this consideration favors him because his counsel informed the state court about the petition for certiorari before that court issued the warrant for Fratta's execution. But Fratta acknowledges he knew the State was seeking a warrant at least two weeks before he filed his petition for certiorari on July 28 (at 2), and he had already obtained a 60-day extension to file his petition. Yet he never sought to expedite this Court's consideration of his cert petition—or even objected to the State's request for an extension to respond to that petition—until December 16. That was just 25 days before his long-set execution date. Standing alone, that delay counts against Fratta's current request.

And regardless of Fratta's petition's timing relative to the January 10 execution date, the equities disfavor Fratta because he raised the underlying

habeas claims in a second-or-successive petition, which the district court was required to dismiss. 28 U.S.C. § 2244(b). If Fratta had properly presented his claims during state habeas review and his initial federal habeas petition, this Court could have assessed them in 2019 before it rejected his petition for certiorari from the denial of his initial federal habeas petition. Indeed, if Fratta had properly raised these claims, the Court would never have had to address the questions presented at all.

Nor can Fratta avoid the conclusion by insinuating (at 2-3) that the fault lies with everybody but himself. The district attorney had no obligation to wait to seek a warrant or to "postpone the scheduled execution," as Fratta suggests (at 2), until Fratta's latest collateral attacks are resolved. Texas law requires the completion of direct appeal and initial state habeas before an execution date can be set, *see* Tex. Code Crim. Pro. art. 43.141, but those conditions were met back in 2014. Indeed, even Fratta's federal habeas proceedings ended in 2019, but the district attorney waited another three years to request a warrant. And the state court "has a ministerial duty to carry out a sentence imposed," *In re State ex rel. Ogg*, No. WR-93,812-01, 2022 WL 2344100, at *2 (Tex. Crim. App. June 29, 2022), and no constitutional obligation to await complete resolution of Fratta's latest successive habeas petitions. In this Court, Fratta can hardly criticize the State for taking a 30-day extension of time to file its brief in opposition to his petition for certiorari where Fratta himself had already obtained a 60-day extension of the deadline to file the petition.

Mrs. Fratta was murdered in 1994, and Fratta was convicted and sentenced to death in 2009. He is now on his fourth and fifth cert petitions and his seventh state habeas petition. His past conduct suggests that he will continue filing successive habeas petitions indefinitely. The State is not—and cannot be—precluded from carrying out its lawful sentence to allow him more time to do so.

III. The Public Interest Favors Enforcing Fratta's Valid—and Repeatedly Upheld—Sentence.

A habeas petitioner seeking a stay of execution "must satisfy all of the requirements for a stay." *McDonough*, 547 U.S. at 584. That includes showing that a stay would be in the public interest. *Nken*, 556 U.S. at 434. Here, it is not. "[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *McDonough*, 547 U.S. at 584 (citing *Nelson*, 541 U.S. at 649-50). Fratta's is the sort of "[r]epetitive" and "piecemeal litigation" that should not be encouraged by equitable relief. *Id.* at 585. As this Court has recognized time and again, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id.* The Court should do so here.

Enjoining the State from carrying out its sentence would be contrary to the public interest. It has been nearly 30 years since Fratta's hitmen shot Mrs. Fratta twice in the head while she was waiting for her children to come home from church. And this is just the latest in Fratta's barrage of collateral attacks. Worse, the federal interference Fratta seeks is premised on constitutional

claims that could have been properly raised to the state courts years ago, and, in any event, have been considered and rejected on their merits by the federal courts.

CONCLUSION

The application should be denied.

Respectfully submitted.

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December 2022