

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**

**REPLY IN SUPPORT OF
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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**REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION
PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI**

1. The State’s opposition to Mr. Fratta’s stay application fails at the threshold because the State applies the wrong legal standard. To obtain a stay of execution pending disposition of a petition for certiorari, “[i]t is well established that there must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court’s decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

2. But the State instead cites the traditional four-factor test for stays pending appeal and then applies a hybridized version of the two standards. *See* Stay Opp. at 4 (citing *Nken v. Holder*, 556 U.S. 418, 433-34 (2009)); *id.* at 4-20. Further, even though irreparable harm is part of both standards, the State ignores the irreparable harm inherent in extinguishing the petitioner’s life before the petition for certiorari is decided. *Id.* at 17-20. The State presumably declined to address this prong because it has no colorable argument that executing Mr. Fratta before his petition is decided will not constitute irreparable harm. The State also incorrectly suggests there is uncertainty about the proper focus of the Court’s likelihood of success inquiry. *Id.* at 4. The “underlying issue[s]” relevant to this Court’s determination of whether to grant a stay due to a pending petition for certiorari are simply the issues presented in the petition for certiorari. *Barefoot*, 463 U.S. at 895.

Here, Mr. Fratta’s petition presents two important questions of civil procedure relating to whether a certificate of appealability (COA) is required for the denial of a Rule 60(b) motion and the proper standard for determining whether a Rule 60(b) motion is actually a successive habeas petition. Accordingly, the State’s discussion of the merits of Mr. Fratta’s underlying habeas petition is irrelevant. *See* Stay Opp. at 4-7.

3. The State likewise misses the point in asserting that “Fratta’s petition makes no attempt to argue his underlying claims entitle him to federal habeas relief.” Stay Opp. at 5. Again, Mr. Fratta’s petition raises purely civil procedural questions concerning the availability of Rule 60(b) relief from procedural defects in the initial habeas judgment. Those issues are the only relevant focus here. *See Barefoot*, 463 U.S. at 895. Indeed, the State’s misguided attempt to redirect that focus underscores precisely why certiorari is warranted here. The fact that Mr. Fratta’s petition does not argue his underlying federal habeas claims confirms the unsuitability of the COA requirement—which requires a threshold evaluation of the merits of the underlying habeas claims, 28 U.S.C. § 2253(c)—to Rule 60(b) motions. That is the first question presented. And the absence of any discussion of the underlying merits of the claims confirms that his Rule 60(b) motion was not a successive habeas application. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (holding that a Rule 60(b) motion must be treated as a successive habeas application “if it attacks the federal court’s previous resolution of a claim *on the merits*”). That is the second question presented.

4. The State’s labeling of the acknowledged circuit split on the first question presented as “stale” also confirms the appropriateness of certiorari here. *See* Stay Opp. at 8. The State’s assertions that “the Fifth Circuit has maintained its position for many years” and the Fourth Circuit “has done so since 2015” show that the split is entrenched and thus especially in need of this Court’s resolution. As for the alleged narrowness of the split, the State is unable to rationalize the persistence of starkly different answers to a fundamental question of national civil procedure based solely on geography.

5. The State’s assertion of “vehicle” problems on the first question also lacks merit. Stay Opp. at 8-12. The Fifth Circuit held that a COA was required before Mr. Fratta could appeal the denial of his Rule 60(b) motion (and then refused to grant a COA). Mr. Fratta argues that a COA was not required at all. Nothing prevents this Court from reaching and deciding that issue here. Further, the presence of an “alternate” merits review below does not obviate the question of what threshold procedural rules apply. *See* Petition for a Writ of Certiorari at 7; Reply in Support of Petition for Writ of Certiorari at 6-8. Conducting an “alternate” merits review after having concluded that a motion or appeal is jurisdictionally barred is no substitute for exercising jurisdiction and confronting the relevant issues directly. *See Wellons v. Hall*, 558 U.S. 220, 222 (2010). At a minimum, this “alternate” approach should not be allowed to thwart this Court’s resolution of important and broadly-applicable threshold procedural questions like those presented here. In addition, the State abandoned its timeliness objection to the Rule 60(b) motion at the Fifth Circuit, and

that objection is meritless anyway. *See* Reply in Support of Petition for Writ of Certiorari at 6-7.

6. The State also repeats its misguided attack on the merits of the Fourth Circuit’s decision that undergirds one side of split. Stay Opp. at 12-15. As previously explained in the Reply in Support of Petition for Writ of Certiorari (at 3-6), the State’s position is inconsistent with the text of AEDPA and this Court’s decisions in *Harbison v. Bell*, 556 U.S. 180 (2009), and *Gonzalez*, 545 U.S. 524.

7. As for the second question presented, the State is wrong to dismiss it as the mere alleged misapplication of properly-stated law. *See* Stay Opp. at 15-16. Rather, the question concerns the scope of the *Gonzalez* standard, and the Fifth Circuit decided the question in a way that conflicts with this Court’s precedent. *See* Petition for a Writ of Certiorari at 18-20. Further, as explained in the Reply in Support of Petition for Writ of Certiorari (at 7-8), the State’s arguments about the purportedly “mixed” nature of the Rule 60(b) motion merely elevate the need for review. *See* Stay Opp. at 16-17. The State admits that “[t]he correct approach to a mixed motion is an independent, unresolved question on a threshold issue of law,” but gets it exactly backward in asserting that question “stands in the way of Fratta’s petition.” Stay Opp. at 17. Whether Mr. Fratta’s attack on both (1) the procedural-default ruling and (2) the procedural defect that prevented him from correcting the district court’s alternate merits analysis using Rule 59(e) renders his Rule 60(b) motion a successive habeas application is squarely posed by the second question presented. *See* Reply in Support of Petition for Writ of Certiorari at 7.

8. Finally, the State's assessment of the equities lacks merit. *See Stay Opp.* at 17-20. Neither equity nor the public interest supports mooting the pending petition for certiorari by carrying out the execution before the petition is decided. *See Stay Application* at 3. The State's quibbles about the timing of the stay application also lack merit and do not alter the equities here. The state trial court did not enter its execution order until October 11, 2022. It was entirely appropriate for Mr. Fratta to apply for a stay after it had become apparent that there was a significant risk that the petition for certiorari might not be decided before the scheduled execution date. *See Stay Application* at 2-3; *see also* this Court's public on-line docket (reflecting that the petition was distributed for the January 6, 2023 conference after Mr. Fratta filed his stay application). The State gives no legitimate reason for its assertion that it offended equity to apply for a stay at that time. The State instead confirms the emptiness of its position on that subject when it criticizes Mr. Fratta for extending the courtesy of not opposing a 30-day extension for its BIO that the State had requested before the execution was scheduled. *Stay Opp.* at 17. The State's "heads we win, tails you lose" approach to timing should be rejected.

9. Contrary to the State's assertion (at 18), Mr. Fratta also did not wait to raise the issues he presented in his Rule 60(b) motion. He raised the constitutional claims in his initial federal habeas proceeding, only to have them defaulted based on a state procedural bar. He tried to present those claims to this Court in his *pro se* petition for certiorari from his initial federal habeas proceeding. *See Petition for Writ of Certiorari* at 11-16, *Fratta v. Davis*, No. 18-6298 (Aug. 29, 2018). Mr. Fratta also

raised the effect of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), on the application of the procedural bar at the first available opportunity (*i.e.*, in his *pro se* petition for certiorari from his initial federal habeas proceeding). *See* Petition for Writ of Certiorari at 16, *Fratta v. Davis*, No. 18-6298 (Aug. 29, 2018).

10. For the reasons given in the application and this reply, Mr. Fratta is entitled to a stay of execution pending disposition of his petition for writ of certiorari.

Respectfully submitted,

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