

NO. _____ (CAPITAL CASE)
IN THE SUPREME COURT OF THE UNITED STATES

ROBERT ALAN FRATTA,
Petitioner,

vs.

LORIE DAVIS, 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 A 60-DAY EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

/s/ James Rytting*

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** Counsel of Record
Counsel for Petitioner*

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

1. This is a capital habeas corpus proceeding.
2. On May 1, 2018, a panel of the Fifth Circuit issued an opinion, in *Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018), affirming the final order of a district court denying Mr. Fratta's application for a certificate of appealability. Exhibit 1 (attached). Mr. Fratta filed a timely petition for rehearing, which was denied on June 5, 2018.
3. Presently, Mr. Fratta has until September 3, 2016 to file a petition for a writ of certiorari seeking review of the Fifth Circuit's decision. *See* U.S.S.Ct.R. 13.1.
4. Under Rule 13.5 and Rule 30.3, this Court may extend the time for seeking certiorari for up to sixty (60) additional days. Your Honor should grant an extension of 60 (days) under the circumstances, up to and including November 2, 2018, for the following reasons.
5. While counsel has been able to begin the process of researching and preparing a petition for writ of certiorari, counsel will require additional time to do so, given his obligations other capital cases, and no-capital cases.
6. Counsel for the respondent does not oppose the requested extension of time.

7. The issues to be presented in Mr. Fratta's capital case are significant.

8. First, the Fifth Circuit's, May 1, 2018, acknowledged that Courts of Appeals have split over the critical, recurring issue of whether evidence of innocence, although available to trial counsel, counts new evidence under *Schlup v. Delo*, 513 U.S. 298 (1995), provided that evidence was not presented to the jury.

9. Second, Mr. Fratta case raises the important question as to whether Texas' rule regarding "hybrid representation" on appeal qualifies as an adequate and independent state law ground for disposing procedurally of constitutional claims although midlevel state appellate courts permit represented appellants to raise claims similar to Fratta's insufficiency of the evidence and constructive amendment claims in *pro se* pleadings.

10. Counsel for Mr. Fratta currently represents several other inmates on death row in the following cases: *Ex parte Larry Ray Swearingen*, no. 99-11-06435-CR, in the 9th District Court, Montgomery County, Texas; *Ex parte Albert James Turner*, no. 10-DCR-054233, in the 268th District Court, Ft. Bend County, Texas, *Prible v. Davis*, no. 4:09-CV-01896, in the United States District Court for the Southern District of Texas; *Landor v Davis*, no., no. 4:16-cv-03384, in the

United States District Court for the Southern District of Texas; *Broxton v. Davis*, , in the United States District Court for the Southern District of Texas, and *Green v. Davis*, no. H-13-1899, in United States District Court for the Southern District of Texas.

11. The foregoing death penalty cases are active.

12. In the period since the Fifth Circuit denied rehearing, undersigned counsel has completed discovery granted in *Prible*, replied to Respondent's motion for summary judgment, and completed a motion for an evidentiary hearing in that case.

13. In *Green*, counsel is presently preparing for an evidentiary hearing scheduled for October 9, 2018, organizing discovery, and competing depositions, with final deposition of a psychological expert and witness scheduled for August 17, 2018, out of town.

14. In the *Broxton* and *Landor* cases, the United States District Court granted leave to pursue DNA based claims and to exhaust claims under *Rhines v. Weber*, 544 U.S. 269 (2005), respectively. Both cases are in transition between state and federal systems, and require briefing of procedurally complex issues, along with important substantive ones.

15. In addition to death penalty cases, undersigned counsel is involved significantly in his Firm's white collar criminal defense practice and *Qui Tam* litigation.

CONCLUSION

For the foregoing reasons, undersigned counsel respectfully requests a sixty (60) day extension of time, until November 2, 2018, to file a petition for writ of certiorari.

Respectfully submitted,

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