

No. _____ (CAPITAL CASE)

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**

**UNOPPOSED APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

JAMES R. RYTTING
819 Lovett Boulevard
Houston, Texas 77006

MAUREEN FRANCO
Federal Public Defender
Western District of Texas
TIVON SCHARDL
Chief, Capital Habeas Unit
JOSHUA FREIMAN*
Assistant Federal Public Defender
919 Congress Avenue, Suite 950
Austin, Texas 78701
737-207-3007 (tel.)
512-499-1584 (fax)
Joshua_Freiman@fd.org

** Counsel of Record*

**UNOPPOSED APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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. On January 5, 2022, a panel of the Fifth Circuit issued an opinion denying a certificate of appealability on the district court's final order dismissing Mr. Fratta's motion to reopen the federal habeas judgment under Federal Rule of Civil Procedure 60(b). *Fratta v. Lumpkin*, No. 21-70001, 2022 WL 44576 (5th Cir. Jan. 5, 2022) (per curiam) (Ex. A). Mr. Fratta timely petitioned for rehearing en banc, which the Fifth Circuit denied on February 28, 2022 after ordering the Director to respond. Ex. B. This Court has jurisdiction over the petition for writ of certiorari under 28 U.S.C. § 1254(1).
2. Mr. Fratta has until May 31, 2022 to file a petition for a writ of certiorari seeking review of the Fifth Circuit's decision. *See* Sup. Ct. R. 13.1. Counsel has begun the process of researching and preparing a petition for writ of certiorari. Counsel requires additional time in light of recent work on multiple capital cases under warrant of execution and to allow *pro bono* counsel, who have recently volunteered their assistance with the petition for a writ of certiorari, the opportunity to become familiar with the voluminous record and complex history of this case.

3. Under Rule 13.5 and Rule 30.3, Mr. Fratta requests an extension of fifty-nine (59) days under the circumstances, up to and including Friday, July 29, 2022. Rule 30.2 requires such requests to be made at least 10 days before the filing date; Mr. Fratta makes this request 14 days prior to the current deadline to file.
4. Counsel has contacted counsel for Respondent in this matter, and she is not opposed to the requested extension of time.
5. The extension is necessary because the issues to be presented in Mr. Fratta's capital case are complex and significant. The Fifth Circuit held that Mr. Fratta was required to obtain a certificate of appealability (COA) to appeal the dismissal of his Rule 60(b) motion. *Fratta*, 2022 WL 44576 at *2. In doing so, the panel recognized that whether to apply 28 U.S.C. 2253(c)'s COA requirement in these circumstances was the subject of a circuit split. *See id.* (citing *United States v. McRae*, 793 F.3d 392, 400 (4th Cir. 2015)). Applying the COA requirement, the panel 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). Mr. Fratta's petition will present these important issues that have divided courts of appeals.

6. Mr. Fratta respectfully requests additional time to file his petition for writ of certiorari. First, counsel from the Capital Habeas Unit of the Office of the Federal Public Defender for the Western District of Texas (CHU) serves as counsel of record in this case. CHU counsel have represented two clients under warrants of execution, Michael Gonzales (execution warrant issued on Sept. 1, 2021 and stay of execution granted Mar. 3, 2022) and Melissa Lucio (execution warrant issued on Jan. 18, 2022 and stay of execution granted Apr. 25, 2022). Counsel requires additional time given the extraordinary time and resources CHU counsel were required to devote to those matters.
7. Second, an attorney who had been working on Mr. Fratta's case left the CHU in December 2021, and a new attorney replaced the outgoing attorney in late April. Co-counsel James Rytting has had to attend to urgent family matters that have taken him away from the case.
8. Third, counsel has recently obtained the assistance of an international law firm, DLA Piper, to act *pro bono* on the petition for a writ of certiorari. *Pro bono* counsel require additional time to become familiar with the complex procedural history of this post-judgment habeas proceeding and the voluminous trial and state court record, which are necessary to prepare the petition.

CONCLUSION

For these reasons, Mr. Fratta respectfully requests that the time to file a

petition for a writ of certiorari be extended fifty-nine days, up to and including July 29, 2022.

Respectfully submitted,

Maureen Franco
Federal Public Defender
Western District of Texas
Tivon Schardl
Chief, Capital Habeas Unit

/s/ Joshua Freiman
Joshua Freiman
Assistant Federal Public Defender
919 Congress Ave., Suite 950
Austin, Texas 78701
(737) 207-3007 (tel.)
(512) 499-1584 (fax)
Joshua_Freiman@fd.org

JAMES R. RYTTING
819 Lovett Boulevard
Houston, Texas 77006

Counsel for Petitioner

May 17, 2022