No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT ALAN FRATTA

Petitioner,

v.

STATE OF TEXAS

Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

****Fratta is scheduled for execution on January 10, 2023 at 6 p.m.****

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

* Counsel of Record

CAPITAL CASE

QUESTION PRESENTED

At Robert Fratta's first trial, the State concealed the fact that police had interviewed under hypnosis the lone eyewitness to the murder for which Fratta was convicted. The night of the murder, that eyewitness reported observing a shooter in red pants who fled the garage where the victim was shot, a man in all black waiting by the garage, and a getaway driver who arrived minutes after the shooting. After the hypnosis, the eyewitness ceased to recall a third man wearing red pants. The State's theory at Fratta's trial was that there were only two men present.

In post-conviction proceedings after the first trial, Fratta discovered that fact the hypnosis had been suppressed and raised a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The State responded by disclosing some facts about the hypnosis while concealing others—including that police were present during the hypnosis and that the eyewitness was asked about her recollection of what she previously described as a shooter dressed in red pants.

Fratta was retried, and the eyewitness testified again and still maintained her post-hypnotic version of the murder. After completing state and federal habeas proceedings, Fratta learned of the concealed information and raised the new *Brady* claim in a subsequent application. The Texas Court of Criminal Appeals dismissed the claim under a rule that bars review when a factual basis could have been discovered at the time of a prior habeas application through the exercise of reasonable diligence. Tex. Code Crim. Proc. art. 11.071, §§ 5(a)(1), § 5(e).

The question presented is:

> Whether § 5(a)(1) is an adequate and independent state procedural ground to bar review of a *Brady* claim where the petitioner discovers new exculpatory evidence after the conclusion of initial state and federal habeas review because the State's selective disclosure of information in response to a prior *Brady* allegation concealed the facts that supported a finding of materiality.

PARTIES TO THE PROCEEDING

Robert Alan Fratta was the applicant in the post-conviction proceedings below.

The State of Texas was the respondent in the proceedings below.

RELATED PROCEEDINGS

Ex parte Fratta, No. WR-31,536-07 (Tex. Crim. App. Jan. 4, 2023) (dismissing successive writ of habeas corpus)

Ruiz v. Texas Dep't of Criminal Justice, et al, D-1-GN-22-007149 (419th Dist. Ct., Travis Cnty., Tex.) (petitioner-intervenor in *ultra vires* lawsuit alleging violations of state law)

Fratta v. Texas, No. 22-94 & 22A543 (U.S.) (pending petition and stay application from denial of certificate of appealability in Fed. R. Civ. P. 60(b) proceeding)

Fratta v. Texas, No. 22-5785 & 22A486 (U.S.) (pending *pro se* petition and stay application from dismissal of *pro se* state subsequent application)

Fratta v. Davis, No. 21-70001 (5th Cir. Jan. 5, 2022) (denying certificate of appealability of denial of Rule 60(b) motion)

Ex parte Fratta, No. WR-31,536-06 (Tex. Crim. App. May 25, 2022) (dismissing pro se successive writ of habeas corpus)

Fratta v. Texas, No. 21-6434, 142 S. Ct. 1448 (April 4, 2022) (denying petition of writ of certiorari arising from successive state habeas proceeding)

Ex parte Fratta, No. WR-31,536-05 (Tex. Crim. App. June 30, 2021) (dismissing application of successive writ of habeas corpus)

Fratta v. Lumpkin, No. 21-70001 (5th Cir. Jan. 5, 2022) (denying COA to appeal denial of Rule 60(b) proceeding)

Fratta v. Davis, No. 20-70003 (5th Cir. Mar. 18, 2020) (granting unopposed motion to dismiss appeal)

Fratta v. Davis, No. 18-6298, 139 S. Ct. 803 (Jan. 7, 2019) (denying petition for writ of certiorari arising from federal habeas proceeding)

Fratta v. Davis, No. 4:13-CV-3438 (S.D. Tex. Sept. 18, 2017) (denying federal habeas petition)

Fratta v. Texas, No. 14-5037, 574 U.S. 936 (Oct. 14, 2014) (denying petition for writ of certiorari arising from initial state habeas proceeding)

Ex Parte Fratta, No. WR-31,536-04 (Tex. Crim. App. Feb. 12, 2014) (denying initial state habeas application for writ of habeas corpus)

Fratta v. Texas, No. 11-9292, 566 U.S. 1036 (June 4, 2012) (denying petition for writ of certiorari arising from direct appeal)

Fratta v. State, No. AP-76,188 (Tex. Crim. App. Oct. 5, 2011) (denying direct appeal)

State of Texas v. Fratta, No. 1195044 (230th Dist. Ct., Harris Cnty., Tex. June 1, 2009) (retrial resulting in conviction and death sentence)

Fratta v. Quarterman, No. 07-70040, 536 F.3d 485 (5th Cir. 2008) (affirming district court's ruling on federal habeas petition)

Fratta v. Quarterman, No. CIV.A. H-05-3392 (S.D. Tex. Sept. 28, 2007) (granting in part federal habeas petition and vacating conviction)

Fratta v. Texas, No. 04-8414, 545 U.S. 1105 (June 6, 2005) (denying petition for writ of certiorari arising from state habeas)

Ex parte Fratta, No. 31,536-02 (Tex. Crim. App. Sept. 22, 2004) (denying state habeas application from first conviction)

Fratta v. State, No. AP-72,437 (Tex. Crim. App. June 30, 1999) (denying direct appeal)

State of Texas v. Fratta, No. 712409 (230th Dist. Ct., Harris Cnty., Tex. Apr. 23, 1996) (trial)

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes and Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Alan Fratta respectfully petitions this Court for a writ of certiorari to review judgment of the Texas Court of Criminal Appeals (TCCA) in this case.

OPINIONS BELOW

The Texas Court of Criminal Appeals decision dismissing Fratta's application for writ of habeas corpus is not reported. App. A.

JURISDICTION

The Texas Court of Criminal Appeals entered judgment on January 4, 2023. Fratta has filed a timely petition for certiorari under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, U.S. Const. amend. XIV, provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Robert Alan Fratta was convicted of capital murder and sentenced to death in 2009 for his alleged role in the murder-for-hire of his wife Farah, who was shot in the garage of her home on November 9, 1994.

At his first trial in 1996, the State substantially relied on incriminating statements from Fratta's co-defendants, Howard Guidry and Joseph Prystash. The Fifth Circuit determined Guidry's confession was coerced as a result of police misconduct and vacated Guidry's conviction. *Guidry v. Dretke*, 397 F.3d 306, 329

(5th Cir. 2005). A federal district court then vacated Fratta's conviction because the introduction of Guidry and Prystash's statements violated Fratta's right to confrontation. *Fratta v. Quarterman*, No. CIV.A. H-05-3392, 2007 WL 2872698, at *10 (S.D. Tex. Sept. 28, 2007), *aff'd,* 536 F.3d 485 (5th Cir. 2008).

At Fratta's second trial, the State's theory remained that Fratta hired Joseph Prystash to find a hitman, who in turn hired Howard Guidry to shoot Farah, while Prystash served as the getaway driver. Prystash's girlfriend, Mary Gipp, who was an accomplice to the murder and who had been given immunity in exchange for her testimony, supplied the prosecution's critical evidence regarding the murder-for-hire scheme.

A. A next-door neighbor sees two men in the garage at the time of the murder.

On the evening of the murder, neighbor Laura Hoelscher, her husband Daren, and a houseguest Elizabeth Campbell were in a living room across the street from the garage where Farah was killed. Laura Hoelscher was a uniquely important witness because she had a clear view into the garage when the victim was shot and was the only eyewitness to the murder. She told police she "observed [Farah] fall to the ground beside the white vehicle and someone wearing red pants run from inside the garage exiting through the garage's walkway door." Subsequent Amended Application, at 5. Hoelscher did not get a good look at the person in the

red pants—"[she] just saw his pants," Laura Hoelscher 911 Call—Audio at 5:59, [1] so she "c[ould]n't give a description of the guy." *Id.* at 6:26.

Immediately after the shooting, while the perpetrators were still at the scene, Laura Hoelscher called 911. Her call clearly indicated she saw two people at the scene *before* the arrival of the getaway car. After seeing the shooter in red pants run from the garage, she said she had seen "another" man walk away. 911 call at 1:28. She was able to get a better look at the second man, whom she saw for the first time when he was standing by a bush next to the garage. 23 RR-R 110.[2] She described him as a Black man, "dressed in all black." *Id.* She was also able to provide a description of this man, unlike the shooter in red, including his height, *id.* at 113, build, *id.* at 112, and the shape of his head, *id.* A minute later, Hoelscher observed a third man pull up in a silver car. *Id.* 2:43. And the black man left in it. *Id.* 3:15. Hoelscher told her husband not to go over to the garage even after the man dressed in had black left. *Id.* 5:02.

When she described the events to the 911 operator, she said that "It looked like he was either in her garage waiting for her, or, **I just saw his pants and then I saw a black man**… and he was waiting and he jumped into a car…." *Id.* 5:59. "[Q:] "Did y'all see who did it? A. **No. All I saw was the pants. And then I saw the gentleman, but I can't give a description of the guy**." *Id.* 6:26. Mrs. Hoelscher

---

[1] The 911 audio tape is Exhibit 4 to Fratta's amended subsequent habeas application and is a part of the record before the TCCA.

[2] Fratta refers to the trial transcript (reporter's record) of the 2009 retrial as [Vol] RR-R [page].

worried that "**these people** saw inside my house" while her lights were on (though she had turned them off before the arrival of the getaway driver). *Id.* 6:46.

After the police arrived, Hoelscher gave an account of the incident to detectives that mirrored what she told 911 operators. Supplemental Report of Det. Reynolds, Nov. 9, 1994. In a second statement made to officers the next day, Hoelscher reported that after she saw Farah Fratta fall to the ground, she "notice[d] something like a pair of red or maroon colored pants just flash by." Statement of Laura Hoelscher, Nov. 10, 1994. Hoelscher suspected that "the pants were on the person who did the shooting...." *Id.* According to Hoelscher, the person in the red pants was distinct from the person she saw who was dressed in black.

B. The State hypnotizes the neighbors before Fratta's first trial.

Police and prosecutors arranged to subject Laura Hoelscher and her husband to "forensic hypnosis" and re-interview them: "Sometime after I gave my written statement, a detective asked me and my husband to be interviewed while under hypnosis.… I knew him to be Detective Billingsley." Declaration of Laura Hoelscher ¶ 5.[3]

Hoelscher and her husband were interviewed separately. *Id.* ¶ 7. Hoelscher was "skeptical and not comfortable with the idea of being hypnotized" and asked to have someone present for the interview. *Id.* ¶ 6. Detective Billingsley told her, "No, I'll be there." *Id.*

[3] Laura Hoelscher's November 2, 2022 declaration is Exhibit 28 to Fratta's amended subsequent application.

The interview occurred at a downtown office, where a woman placed Hoelscher under hypnosis. *Id.* ¶ 8.

Two investigators were present: Detective Billingsley and a District Attorney investigator. *Id.* When the hypnotist placed Hoelscher under hypnosis, Hoelscher was asked to "place [herself] in the living room at the time of the shooting." *Id.* ¶ 9. The hypnotist explicitly asked her to recall the "red flash" that she saw. *Id.*

Hoelscher spoke with the prosecutors before the first trial. She believes "[t]here is no way [Assistant District Attorney] Kelly Siegler did not know about the hypnosis." *Id.* ¶ 10.

At the first trial, Laura Hoelscher's recollection of the incident differed markedly from her statements on the 911 call and to the police. She no longer stated that she saw three different perpetrators at the crime scene. Instead, she testified that she saw just two people. When asked about what she previously described as a person in red pants, she stated she merely saw an unidentifiably "red flash, which prosecutors argued was a muzzle fire from the gun.

C. The State withholds critical information about the hypnosis after Fratta's state habeas counsel discovers the hypnosis occurred.

After trial, Fratta's state habeas counsel learned that Hoelscher and her husband had been hypnotized by the police and pled this "on information and belief" that the impeachment information had been suppressed. Fratta argued that the hypnosis altered their recollection of critical details of the crime, including the number of perpetrators present at the scene of the murder.

The State admitted that it had failed to disclose the fact that the police hypnotized Laura and Daren Hoelscher after she gave her in initial statement to police. The State argued, however, that the hypnotic statements could not be material because they "produced no new information and produced no identification." App. 11a; *see also* 7a. The State attached four affidavits in support—two from detectives and two from prosecutors on the case. *See* App. 12-13a (Affidavit of Det. William Valerio, June 30, 1999); App 14a (Affidavit of Det. G. R. Roberts, June 14, 1999); App 17-18a (Affidavit of Kelly Siegler, June 7, 1999); App. 15-16a (Affidavit of Casey O'Brien, June 8, 1999).[4]

Detective Valerio admitted he "arranged for the Hoelschers to be hypnotized." He said the purpose was to obtain "more information … about the car that they saw at the scene of the offense, in particular the license number of the car." App. 12a. Valerio said he "was not present during the hypnosis" and was only "informed afterwards" that "no new information was produced." *Id.* Valerio believed "to the best of [his] recollection" that he documented the hypnosis, but he never located any documentation about the hypnosis. *Id.* Fratta was not provided any record of *who* conducted the interviews, *when* the hypnotized statements were taken, *what* the statements said, or *how* the hypnotic procedure occurred.

[4] The State's amended answer to the *Brady* claim and the affidavits are made Appendix B.

D. In post-conviction proceedings, Fratta requests and is denied discovery on the suppression of the hypnosis evidence.

In state habeas, Fratta requested "[a]ny and all information concerning the hypnosis of Laura Hoelscher, including notes or reports by the hypnotist, any record (electronic or otherwise) of the hypnotic sessions, and any statement concerning the purpose of the hypnotic interviews." SHCR-02 at 386. The habeas court denied discovery and the TCCA denied this undeveloped hypnosis claim for lack of materiality. *Ex parte Fratta*, No. WR-31,536-02 (Tex. Crim. App. Sept. 22, 2004); Clerk's Record, WR-31,536-02, at 796 ¶ 21 (state habeas court's recommended findings and conclusions). The federal courts likewise denied the claim based on the lack of materiality, but granted relief and vacated the conviction on other grounds. *Fratta*, 2007 WL 2872698, at *24 ("Fratta raises serious accusations, such as his claims under *Brady v. Maryland*, 373 U.S. 83 (1963), . . . which, while requiring sober consideration, did not materially affect the outcome of his trial.").

E. The lone eyewitness testifies at Fratta's second trial.

Laura Hoelscher was called to testify at Fratta's second trial. No member of the defense team spoke with Hoelscher prior to her testimony. Hoelscher Decl. ¶ 11. Prosecutors disclosed no additional information about the hypnosis.

Hoelscher confirmed she saw a black man dressed in all black clothing. 23 RR-R 112-13. Hoelscher was asked about seeing a red "flash." She said, "I saw like a flash of—I would say like a Dr. Pepper maroon-color flash." 23 RR-R 101. "[I]t was all happening very, very quickly and things were going through my mind, so I can't exactly say what that was." 23 RR-R 102. The State implied that the flash could

have been "a muzzle flash or anything that resulted from a gun being fired." 23 RR-R 102.

Defense counsel cross-examined Hoelscher about her previous description of seeing red pants. Hoelscher would not say she saw a person, just a "flash." *See* 23 RR-R 117, 120, 122. At most, Hoelscher said, "Did I think two people [were there]? Possibly." 23 RR-R 123.

Neither the defense nor prosecution questioned the Hoelschers about their hypnosis. After the trial, no member of the Fratta defense interviewed Laura Hoelscher. Hoelscher Decl. ¶ 11.

F. Fratta discovers previously withheld information about the hypnosis after the conclusion of initial habeas proceedings.

After the conclusion of initial state and federal habeas proceedings, Fratta uncovered new evidence (without assistance of the State) regarding the hypnosis of the lone eyewitness to the shooting. This information was discovered for the first time in November 2022.The State had concealed this evidence throughout all prior proceedings.

G. The Texas Court of Criminal Appeals dismisses the claim under Tex. Code Crim. Proc. art. 11.071, § 5(a)(1).

Fratta filed a subsequent habeas application in which he raised the *Brady* claim based on the new evidence, along with several other claims for relief.[5] Fratta

[5] Fratta amended the application on instructions of the TCCA in order to comply with newly instituted word limits for subsequent habeas applications in death penalty cases. *See* Tex. R. App. P. 9.4(i). Fratta filed a redacted and unredacted version of his application in order to protect grand jury information that formed the basis for claims not at issue here.

maintained that the evidence he sought was newly discovered and was not previously available through his exercise of reasonable diligence. *See* Subsequent Application at 151.

Fratta asked the TCCA to authorize review of the claim on the merits under Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), which bars a state court from considering a claim in a subsequent application unless "the factual or legal basis for the claim was unavailable on the date the applicant filed the previous [petition]." "For purposes of [§ 5(a)(1)], a factual basis of a claim is unavailable . . . if the factual basis was not ascertainable through the exercise of reasonable diligence on or before" the date the prior [petition] was filed. *Id.*, § 5(e).

The TCCA concluded that Fratta "failed to show that he satisfies the requirements of Article 11.071 § 5" and dismissed the application. App. 3a. The court stated it did so without reviewing the merits of any claim. *Id.*

REASONS FOR GRANTING THE WRIT

This Court will decline to hear a federal claim where a state-court judgment "rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

The TCCA's application of § 5(a)(1) to Fratta's *Brady* claim was neither adequate nor independent. The TCCA applied a gloss of "reasonable diligence" that rewarded the State's suppression by deceit. By answering Fratta's bare *Brady* allegation after his first trial with a selective disclosure of innocuous (but false) information about the hypnosis, the State perpetuated the misleading impression

that the hypnosis session had not affected the lone eyewitness's testimony on the critical question of whether a third man was present. Like the prosecutors' misrepresentations in *Banks v. Dretke*, 540 U.S. 668 (2004), and *Strickler v. Greene*, 527 U.S. 263 (1999), the State's descriptions derailed Fratta's diligent search for the information in initial habeas proceedings prior to his retrial, and it caused counsel at the retrial and thereafter to assume the State had "set the record straight." In fact, the State had withheld the very information that would have enabled Fratta to demonstrate the materiality of the State's suppression of the hypnotically induced interview.

The TCCA rule disfavors *Brady* applicants who acquire information after initial habeas proceedings are over as a result of the State's suppression. Contrary to the dictates of *Brady* and due process, applicants are required to second-guess every representation made by the State and raise fruitless conclusory allegations of yet-unknown suppressed evidence. Because the application of this generally sound rule discriminates against the most compelling kinds of *Brady* claims—those that the State has not only suppressed after trial, but continues to suppress until after initial habeas proceedings are completed—this Court cannot countenance the bar.

Fratta has raised a meritorious *Brady* claim that demands review from some court. The evidence that the State concealed and that Fratta uncovered fundamentally undermines the State's theory of the case. The State should not be permitted to deny Fratta access to his constitutional privilege of habeas corpus.

Finally, review is especially warranted to vindicate the essential protection of *Brady*. Unique in our adversarial system, *Brady* requires the State to honor an affirmative duty to disclose evidence in their exclusive possession and knowledge. When the State does not uphold that duty or does not timely disclose exculpatory information before the conclusion of guaranteed post-conviction review, a remedy must be available. This is especially necessary here, where police and prosecutors have demonstrated a pattern of unconstitutional conduct, and where the State has still not disclosed any additional information about the hypnosis that is within its knowledge and control.

A. The TCCA's application of its "reasonable diligence" bar discriminates against *Brady* claims that are suppressed by the State until after the conclusion of initial state and federal habeas review.

This Court has "repeated[ly]" recognized that state procedural rules are not adequate if they "operate to discriminate against claims of federal rights." *Walker v. Martin*, 562 U.S. 307, 321 (2011). Likewise, state procedural rules may not raise "an insuperable barrier to one making claim to federal rights" and deny any "reasonable opportunity to have the issue as to the claimed right heard and determined by the State court," *Michel v. Louisiana*, 350 U.S. 91, 93 (1955). This principle ensures that states cannot adopt procedural rules to "produce a result which the State could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

1. Texas's procedural rule is inconsistent with *Brady*'s standard for diligence.

Texas's application of the § 5(a)(1) bar goes well beyond the rule's proper purpose in maintaining "the orderly administration of [Texas's] criminal courts,"

Johnson v. Lee, 578 U.S. 605, 612 (2016) (citation and quotation marks omitted). The TCCA's interpretation of the "reasonable diligence" rule disfavors enforcement of the *Brady* right by applying a standard that contravenes the constitutional standard used by *Brady* and its progeny.

In *Banks v. Dretke*, 540 U.S. 668 (2004), this Court stated, "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Id.* at 675-76. As in this case, the diligence question in *Banks* was whether the defendant "should have asked to interview" a witness who could have furnished the exculpatory evidence the prosecutor did not disclose. *Id.* at 688. This Court rejected that requirement: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696.

Texas has interpreted "reasonable diligence" to mean that the applicant or his counsel have made "at least some kind of inquiry . . . into the matter at issue." *Ex parte Lemke*, 13 S.W.3d 791, 794 (Tex. Crim. App. 2000), *overruled on other grounds by Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013). For example, in *Ex parte Storey*, 584 S.W.3d 437 (Tex. Crim. App. 2019), a capital habeas applicant discovered that prosecutors had hidden the opinions of the victim's family regarding the imposition of the death penalty and made a false argument to the jury that the victim's family wanted the defendant to be sentenced to death. *Id.* at 438. The TCCA found the applicant had not shown reasonable diligence because he

had no proof that his deceased initial habeas counsel had acted diligently and learned of the hidden information. *Id.* at 439.

Writing in dissent, Judge Yeary stated: "The United States Supreme Court has made clear that due process will not tolerate the imposition of a diligence requirement upon a habeas applicant who claims deliberate and persistent prosecutorial misconduct." *Id.* at 444 (Yeary, J., dissenting) (citing *Banks*, 540 U.S. at 675-76). He contended, "it is at least arguable that these same bedrock due process principles should be considered when we construe the meaning of 'reasonable diligence' for purposes of making the determination whether Applicant's present arguments were 'available' at the time when he filed his original post-conviction application for writ of habeas corpus in this case." *Id.*

The TCCA rule discriminates against *Brady* claims and produces a result that the State could not command directly, that is, that the State may hide and the defense must seek.

2. The procedural rule produces unfair and arbitrary outcomes.

Comparison with this Court's decisions in *Banks* and *Strickler* illustrates the arbitrariness of the State's procedural rule. The TCCA's application of its bar punishes applicants like Fratta who have had the misfortune of discovering suppressed information that the State caused the applicant not to look for or find until it was too late. In *Banks*, as here, the petitioner began by raising an undeveloped *Brady* claim in state court. The State gave a general denial that anything had been "kept secret," denied the existence of deals for two witnesses and failed to address whether a deal had been offered to one witness. *Banks*, 540 U.S. at

683. A federal court granted discovery, and, after Banks obtained declarations from two of the witnesses, ordered an evidentiary hearing. *Id.* at 684-86.

Unlike *Banks*, the State's response admitting the hypnosis occurred gave a false impression that the State had "set the record straight." *Id.* at 676. Instead, the State had omitted critical facts—namely, the presence of law enforcement—and misled the court about the scope of the interview—especially, regarding the presence of an additional person at the crime scene.

The State's gamesmanship in Fratta's case was even more likely to induce reasonable counsel to accept the State's representations. In *Strickler*, the prosecutor gave a general assurance that the prosecution's file was open. *Strickler*, 527 U.S. at 284. In *Banks*, the prosecutor responded in state post-conviction proceedings to conclusory allegations of *Brady* by making general denials that two witnesses had been offered deals, but not addressing a third. *Banks*, 540 U.S. at 683. In Fratta's case, however, the State's response and four attached affidavits from members of the prosecution team gave the misleading appearance of candor in response to Fratta's allegations. Fratta's counsel in that initial habeas proceeding (and all proceedings since) were entitled to presume the State had diligently searched for and disclosed all favorable information about the hypnosis, and "held nothing back." *Id.* at 698.[6] Once the prosecutor made these submissions, "[i]t was not incumbent on [Fratta] to prove these representations false; rather, [he] was entitled to treat the

[6] After Fratta's first trial, all subsequent attorneys for the State still had an ongoing duty to disclose favorable information about the hypnosis. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

prosecutor's submissions as truthful." *Id. See also Strickler*, 527 U.S. at 284 (noting it was "reasonable for trial counsel" and post-conviction counsel "to rely on … the implicit representation that [*Brady*] materials would be included in the open files tendered to defense counsel for their examination.").

Moreover, Fratta's counsel, like in *Banks*, exceeded reasonable diligence in attempting to obtain more information to substantiate the undeveloped suppression claim despite the State's misleading assurances. Unlike in *Banks*, however, Fratta was denied the opportunity in state or federal court to develop that claim through discovery or a hearing. In other words, in Fratta's case, the State's representations not only induced reliance from Fratta's counsel; it stanched further inquiry from the state courts.

In *Strickler* and *Banks*, the petitioners were able to develop and present their evidence before the close of initial federal habeas review, and so were able to secure review on the merits of their claims. Even though their claims had not been raised in state courts, the Court found "cause" and "prejudice" to enable review precisely because of the suppression of the evidence and the presumption that the State had complied with its obligations. *See Strickler*, 527 U.S. at 284-289; *Banks*, 540 U.S. 692-94.

By contrast, because Fratta's counsel in his retrial and later post-conviction proceedings relied on the fact that the State had already "come clean," Fratta did not discover the critical exculpatory information about the hypnosis until *after* initial state and federal habeas review had concluded. In other words, but for an

accident of timing and the forgivable mistake of having trusting counsel, Fratta would have been in the same position as the federal habeas petitioners in *Strickler* and *Banks*. He would have been able to show cause to excuse a procedural default and he would have been entitled to merits review of his newly-discovered evidence of suppression.

But because Fratta discovered the exculpatory information after federal habeas (without the aid of the prosecution), Fratta was subject to a Texas's § 5(a)(1) bar, which purported to allow claims whose facts were not ascertainable through the exercise of reasonable diligence but which, in effect, fact foreclosed merits review of *Brady* claims.

3. There is no legitimate state interest in denying a capital habeas petitioner one full and fair opportunity to raise a *Brady* violation.

No state interest is served by putting an applicant to death without consideration of his *Brady* claim when the State suppressed the factual basis of that claim until after the conclusion of applicant's initial habeas review in state and federal court. The "entire [Texas capital habeas] statute is built upon the premise that a death row inmate *does* have one full and fair opportunity to present his constitutional or jurisdictional claims in accordance with the procedures of the statute." *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002). "Enforcement of the [§ 5(a)(1)] rule here would serve no substantial state interest." *Henry v. Mississippi*, 379 U.S. 443, 449 (1965).

Finding the § 5(a)(1) rule inadequate to prevent review in Fratta's case would also not intrude on States' discretion more generally to shape their post-conviction

review systems. Where a State elects to provide a remedy for subsequent habeas applications for claims whose factual bases were previously unavailable, it cannot discriminate against applicants who raise *Brady* claims after initial state and federal habeas review due to the State's ongoing suppression of the factual predicate.

Moreover, a state's ordinary interest in finality is substantially weaker when the cause of the delay is the prosecution's failure to comply with its affirmative constitutional duty to disclose exculpatory evidence before trial. "[T]he government alone holds the key to ensuring a *Brady* violation does not occur. So the government cannot be heard to complain of trial prejudice from a new trial necessitated by its own late disclosure of a *Brady* violation, since it is solely responsible for inflicting any such prejudice on itself in such circumstances." *Scott v. United States*, 890 F.3d 1239, 1252 (11th Cir. 2018).

To the contrary, the TCCA's rule rewards prosecutors who hide (or choose not to learn of) exculpatory evidence until after a habeas petitioner has completed his initial state and federal post-conviction review. Fratta had no choice but to resort to Texas court to raise his *Brady* claim. Federal habeas corpus was closed to any *Brady* claim except one that could meet the extraordinary innocence requirement of 28 U.S.C. § 2244(b)(2)(B)(ii). *See Blackman v. Davis*, 909 F.3d 772, 779 (5th Cir. 2018).[7] Therefore, under Texas's application of § 5(a)(1), "prosecutors can run out

[7] The Fifth Circuit has also held that a *Brady* claim raised in a second-in-time petition must meet the requirements of 28 U.S.C. § 2244(b), even if the information was discovered after initial habeas proceedings due to the ongoing suppression of the evidence by the State. *Id.* at 778.

the clock and escape any responsibility for all but the most extreme violations." *Bernard v. United States*, 141 S. Ct. 504, 507 (2020) (Sotomayor, J., dissenting from denial of certiorari). *See also, e.g.*, *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015) ("[P]rosecutors may have an incentive to refrain from disclosing *Brady* violations related to prisoners who have not yet sought collateral review").

Finally, States have an interest in promoting efficiency and professionalism. Yet "[r]equiring habeas counsel to question the statements of the prosecutor will . . . add needless and counterproductive grit into our system of criminal justice. . . . While our system is an adversarial one, it works in most cases because the parties trust that the other side is playing by the same rules." *Storey*, 584 S.W.3d at 462 (Walker, J., dissenting).

B. Section 5(a)(1)'s diligence requirement is not independent of *Brady*'s suppression element.

Section 5(a)(1) is also not an independent state law ground because the unavailability analysis is linked with *Brady*'s suppression element.

In *Strickler*, this Court explained that the question of cause for failure to raise a claim in the state court "parallel[s]" the *Brady* element of suppression. *See* 527 U.S. at 282.[8] This is true regardless of whether the TCCA recognizes the holdings of this Court. Due process compelled application of *Banks* and *Strickler*'s

[8] "Petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received 'everything known to the government.'" *Id.* at 296.

holdings to §§ 5(a)(1) & 5(e)'s "reasonable diligence" rule. *See Storey* 584 S.W.3d at 444 (Yeary, J.). Alternatively, current TCCA law imposes a "reasonable diligence" requirement not just in assessing whether a claim raised in a subsequent habeas application could have been raised in an earlier state habeas application, but also in evaluating the *Brady* right itself. *See Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011) (The State is not required to disclose exculpatory evidence that the defendant "could have accessed [] from other sources.").

Either way, however, the TCCA decision was tethered to the underlying constitutional right.[9]

II. Fratta has raised a meritorious *Brady* claim that deserves review in some forum.

The evidence that the State withheld is precisely the evidence that would have established materiality on Fratta's claim.

A. The information Fratta recently discovered despite the State's suppression would have undermined the State's theory of the case.

The State's theory of the case was built around two men, Howard Guidry and Joseph Prystash, acting in a murder-for-hire scheme as the shooter and getaway driver respectively. At trial, Laura Hoelscher's testimony was that Guidry was the only person present, which implied that he must have been the shooter. This

[9] A final possibility is that the TCCA conducted a threshold review of the merits. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) (finding that, to satisfy § 5(a)(1), an applicant must show "the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence"). This is unlikely because the Court expressly disclaimed reviewing the merits of any claim. This would plainly mean the procedural ground was not independent of federal law.

matched the testimony of Mary Gipp, the accomplice to the murder who was offered immunity in exchange for her testimony and who was the linchpin of the State's case.

Had Hoelscher testified to what her original recollection was *prior to* the hypnosis the jury would have heard that a third man in red pants, whose description did not fit the man in all black (whom the State argued was Guidry), fled from the garage immediately after the shooting and was the likely shooter. This would have undermined the State's case, which depended on just two men committing the act and depended on linking Fratta to both.

This suppressed information also would have provided powerful impeachment not only of Hoelscher's testimony, but of the State's detectives Valerio and Billingsley, who testified at trial. The information finally would have allowed competent counsel to impeach the investigation conducted by the police—pointing out that detectives had sought information on the potential shooter in red pants only to apparently abandon that lead.

Had the late-acquired evidence been available, competent defense counsel would have also explained why Hoelscher's original recollection was more trustworthy than her post-hypnotic recall.

B. Fratta must have some forum for the review of this substantial claim.

Because of the State's misconduct, Fratta stands to lose his one opportunity to raise this substantial *Brady* claim. Because no adequate and independent state procedural ground impedes this Court's review, this Court could hear Fratta's claim on the merits. In the alternative, this Court should remand Fratta's case with

instructions to allow Fratta to receive consideration on the merits of his claim in a Texas court consistent with Tex. Code Crim. Proc. art. 11.071.

The prospect that Fratta would receive no review on this meritorious claim threatens to suspend Fratta's privilege of habeas corpus. *See* U.S. Const. art. I, § 9.

III. The question presented is exceptionally important to the integrity of the American criminal justice system

Brady is central to the guarantee of a fair trial, but its enforcement has been notoriously elusive. *United States v. Tavera*, 719 F.3d 705, 708 & n.1 (6th Cir. 2013) (noting "nondisclosure of *Brady* material is still a perennial problem" and collecting articles). Allowing prisoners to vindicate the *Brady* right in collateral proceedings where government misconduct made it impossible to raise them in an initial application for post-conviction relief is critical to "ensuring the integrity of our criminal justice system." *See California v. Trombetta*, 467 U.S. 479, 485 (1984).

The nature of *Brady* claimsthat they involve evidence that was not properly disclosed by the State prior to trial—means that even diligent prisoners often cannot discover them unless the government belatedly discloses the evidence.

The obligation to disclose rests solely in the prosecution's hands and is entrusted to their prudence and care. *See Kyles v. Whitley*, 514 U.S. 419, 439 (1995). It is nearly "impossible" to know when a prosecutor has not met that responsibility: "In the case of a *Brady* claim, it is impossible for the defendant to know as a factual matter that a violation has occurred before the exculpatory evidence is disclosed." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 359 (2006).

This asymmetry makes enforcement of *Brady* information categorically different from other kinds of information that might be newly discovered in post-conviction proceedings. "[T]he fact that such [exculpatory] evidence was *available to the prosecutor and not submitted to the defense* places it in *a different category* than if it had simply been discovered from a neutral source after trial." *United States v. Agurs*, 427 U.S. 97, 110-11 (1976) (emphasis added).

The concern that State actors will evade review of their misconduct is especially present in this case. The Fifth Circuit already identified police misconduct in the State obtaining the confession of one of Fratta's co-defendants. *Guidry*, 397 F.3d at 329. Two of the prosecutors involved in charging and trying Fratta have also been found to have violated *Brady* in other cases, including one case of actual innocence. Kelly Siegler tried Fratta's co-defendants and Fratta's first trial. She also was integral to the development of the case against him. Although Siegler denied knowledge of the hypnosis, witness Laura Hoelscher doubts that Siegler's account was accurate. *See* Hoelscher Decl. ¶ 10. In *Ex parte Temple*, No. WR-78,545-02, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016), the TCCA granted relief for several violations of *Brady* in a murder case involving Kelly Siegler. Siegler had stated—incorrectly—that "she was not required to turn over favorable evidence if she did not believe it to be relevant, inconsistent, or credible." *Id.* at *3.

Assistant District Attorney Dan Rizzo was involved in Fratta's case at the time the State was preparing to take Fratta's case before a grand jury. In *Ex parte*

Brown, No. WR-68,876-01, 2014 WL 5745499 (Tex. Crim. App. Nov. 5, 2014), the TCCA concluded that prosecutor Dan Rizzo had withheld material exculpatory evidence corroborating the petitioner's alibi in violation of *Brady*. *Id.* at *1. The victim of the *Brady* violation was later determined to be actually innocent and a new district attorney referred Rizzo for professional discipline after evidence suggested he had intentionally withheld the information. *In re Brown*, 614 S.W.3d 712, 713-16 (Tex. 2020); St. John Barned-Smith & Keri Blakinger, *DA: Former Prosecutor Withheld Key Email in Death Row Case*, Hous. Chron. (Mar. 3, 2018, 7:09 AM), https://www.chron.com/news/houston-texas/article/DA-Former-prosecutor-lied-about-exculpatory-12724038.php. These constitutional violations underscore the need for a remedy for Fratta's serious allegations of suppression.

CONCLUSION

The Court should stay Petitioner's execution and grant certiorari to review the judgment of the Texas Court of Criminal Appeals in his case, or grant such other relief as justice requires.

Respectfully submitted,

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

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

Counsel for Petitioner

January 6, 2023