Nos. 22-6476 & 22A603

In the Supreme Court of the United States

ROBERT ALAN FRATTA,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

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QUESTION PRESENTED

Whether a mere allegation of a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), sufficiently undermines long-standing precedent that Tex. Code Crim. Proc. art. 11.071, § 5(a)(1) is an adequate and independent state procedural ground to bar review.

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BRIEF IN OPPPOSITION

Petitioner Robert Alan Fratta was found guilty and sentenced to death for his part in the murder-for-hire death of his estranged wife, Farah Fratta. Fratta has unsuccessfully challenged his conviction and death sentence in both state and federal court multiple times. Fratta now seeks a writ of certiorari from the dismissal of his third abusive state writ application by the Texas Court of Criminal Appeals (CCA). But the Court lacks jurisdiction to consider Fratta's appeal. Alternatively, Fratta fails to show this case presents a compelling issue for this Court's review. The Court should, therefore, deny Fratta's petition for a writ of certiorari and application for a stay of execution.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the facts of Fratta's crime as follows:

After several months of searching for someone to murder his estranged wife, Farah Fratta, [Fratta] found Joseph Prystash, who obtained the assistance of a third person, Howard Guidry. On November 9, 1994, the date of the murder, [Fratta] took the couple's three children to Wednesday-evening church classes and attended a parents' meeting at the church. Although the children regularly attended classes there, it was unusual for [Fratta] to stay for the parents' meeting. [Fratta] repeatedly

left the meeting to make and receive telephone calls in the church office. Farah was shot and killed in her garage as she arrived home and stepped out of her car, shortly before [Fratta] was scheduled to return the children to her. She died approximately two years after she filed for divorce and less than three weeks before the scheduled divorce and custody trial date.

The state's theory concerning motive was that the prolonged divorce and child custody proceedings formed the underlying basis for [Fratta's] desire to have his wife killed. Several witnesses testified that initially, [Fratta] did not want the divorce. He complained that sex with Farah was not exciting, but he thought that they could resolve their problems without a divorce if Farah would agree to an "open marriage."

A social worker who was assigned by the family court to evaluate [Fratta] and Farah in connection with the custody proceedings testified that she interviewed [Fratta] in April 1993 and Farah in March 1993. At that time, [Fratta] did not want primary custody of the children, and Farah was in favor of an extended visitation schedule for [Fratta]. However, [Fratta] and

Farah were at odds because [Fratta] wanted to restrict Farah's ability to change residences with the children to within a 100-mile radius, while Farah did not want a restriction on her ability to move, and [Fratta] wanted joint managing control over decisions about the children's lives, such as medical and educational decisions, while Farah wanted sole control.

As the divorce proceedings dragged on, [Fratta] grew increasingly bitter and angry toward Farah. He complained to friends that he was broke all the time because he had to pay child support, and he said he wanted primary custody of the children so that Farah would have to pay him. At other times, he said that he would not have to pay child support if he killed her. He complained that Farah would "win" because her parents had money. He regularly called her "the bitch."

During a deposition in December 1993, Farah explained why the divorce petition had been filed on grounds of cruelty. Afterward, [Fratta] told a friend that he was angry about the accusations she made against him, which he said were false, and he did not want other people to hear the things she had said. [Fratta] began actively seeking someone to kill Farah. He solicited many of his friends and acquaintances to kill her or

to recommend someone who could kill her. Initially, most of his friends thought that he was joking or blowing off steam, but as he continued to talk about it over time, some of them came to believe that he was serious.

Prystash was not part of [Fratta's] regular circle of friends, but on several occasions in the weeks leading up to the offense, the two men were observed speaking privately together at a health club where they were both members. Prystash's girlfriend, Mary Gipp, overheard Prystash communicating with [Fratta] by telephone. In addition, she often saw Prystash talking to her next-door neighbor, Guidry, on the balcony outside her apartment. On the evening that Farah was murdered, Gipp came home from work to find Guidry, dressed in black, sitting on the steps in front of her apartment. Prystash arrived a few minutes later but he soon left again. When he returned to Gipp's apartment that night, Guidry was with him.

The details of the offense were developed primarily through Gipp's testimony describing her observations and her conversations with Prystash, the testimony of some of Farah's neighbors who observed parts of the offense and saw a suspect leaving the scene,

witnesses who spoke with and observed [Fratta] around the time of the offense, and law-enforcement officers who investigated the crime scene. Further evidence included telephone and pager records showing the times and locations of communications between [Fratta], Farah, Prystash, and Guidry on the evening of the offense and autopsy and ballistics reports.

Fratta v. State, No. AP-76,188 slip op. at 2-5 (Tex. Crim. App. 2011).

II. Course of State and Federal Proceedings

Fratta was originally convicted of capital murder in 1997 for the murder of his estranged wife Farah Fratta. *Fratta v. State*, No. AP-72,437 (Tex. Crim. App. June 30, 1999). On federal habeas review, the district court granted Fratta relief, and the Fifth Circuit affirmed. *Fratta v. Quarterman*, 2007 U.S. Dist. LEXIS 72705 (S.D. Tex. Sep. 28, 2007); *id.*, 536 F.3d 485 (5th Cir. 2008).

Fratta was retried and resentenced to death in 2009. Fratta appealed to the CCA which affirmed his conviction. *Fratta v. State*, No. AP-76,188 (Tex. Crim. App. 2011); 2011 Tex. Crim. App. Unpub. LEXIS 759. This Court denied certiorari review. *Fratta v. Texas,* 566 U.S. 1036 (2012). Fratta also filed a state habeas application which the CCA also denied. *Ex parte Fratta*, No. 31,536-04, at cover, *cert. denied*, 574 U.S. 936 (2014). Fratta petitioned the federal district court for habeas relief but was denied. *Fratta v. Davis*, No. 4:13-CV-3438 (S.D.

Tex., Sep. 18, 2017). Fratta then sought and was denied a COA by the Fifth Circuit. *Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018). And Fratta filed a writ of certiorari in this Court which was also denied. *Fratta v. Davis*, 139 S.Ct. 803 (2019).

Omitting various pro se filings, Fratta through his court-appointed attorneys filed a Rule 60(b) motion before the district court. The district court denied the motion finding it to be an improperly filed successive petition and alternatively denying the merits of Fratta's motion. *Fratta v. Davis*, No. 4:13-CV-3438 (S.D. Tex., Jan. 21, 2021) (Ord. denying Rule 60(b) relief). Fratta unsuccessfully appealed to the circuit court. *Fratta v. Lumpkin*, No. 21-70001 (5th Cir. Jan. 5, 2022). Fratta filed a petition for rehearing en banc which was denied on February 28, 2022. *Fratta v. Lumpkin*, No. 21-70001, Ord. (5th Cir. 2022). Fratta's attorneys have petitioned this Court for a writ of certiorari from the Fifth Circuit's denial and applied for a stay of execution. *Fratta v. Lumpkin*, Nos. 22-94, 22A543. That action remains pending.

Fratta filed his own pro se state habeas writ which the CCA dismissed as an abuse of the writ. *Ex parte Fratta*, No. 31,536-05 (Tex. Crim. App. Jun. 30, 2021). Fratta also filed a pro se certiorari petition which this Court denied. *Fratta v. Lumpkin*, No. 21-6434 (Apr. 4, 2022). Fratta then filed a second pro se state habeas application which again the CCA dismissed as abusive. *Ex parte Fratta*, No. 31,536-06 (Tex. Crim. App. May 25, 2022). Fratta also

appealed this dismissal to this Court. *Fratta v. Texas,* No. 22-5785. That action remains pending. On November 4, 2022, this Court docketed a related pro se application for stay of execution. *Id.,* No. 22A486.

Fratta also intervened in a civil lawsuit in Travis County, Texas seeking to enjoin the State from carrying out his execution. *Ruiz v. Texas Dep't of Criminal Justice, et al*, D-1-GN-22-007149 (419th Dist. Ct., Travis Cnty., Tex.). The CCA subsequently issued a writ of prohibition holding that Judge Catherine A. Mauzy of the 419th Judicial District Court "is ordered to refrain from issuing any order purporting to stay the January and February executions of Harris County death row inmate Robert Alan Fratta, Dallas County death row inmate Wesley Ruiz, or Potter County death row inmate John Lezell Balentine." *In Re State of Texas Ex Rel. Ken Paxton*, No. WR-94,432-01, Slip Op. at 2-3 (Tex. Crim. App. Jan. 4. 2023) (per curiam) (unpublished). Despite the writ of prohibition, Fratta has filed an Amended Emergency Motion for Temporary Injunction and Declaratory Judgment in the same Travis County litigation. That action remains pending.

Finally, Fratta's attorneys filed another subsequent state habeas application. *Ex parte Fratta*, No. 31,536-07 (Tex. Crim. App. Jan 4, 2023); Pet. Appx. A. The present action is an appeal from the state court's dismissal

REASONS FOR DENYING CERTIORARI REVIEW

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. In the instant case, Fratta fails to advance a "compelling reason" for this Court to review his case and, indeed, none exists. The opinion issued by the lower court involved only a proper and straightforward application of established constitutional and statutory principles. Accordingly, the petition presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

Additionally, Fratta appeals from the dismissal of state habeas proceedings but fails to demonstrate that any aspect of those proceedings violated the Constitution. Moreover, Fratta's claim has long been available as evidenced by the fact that it was raised and rejected by the federal courts in his codefendant's case and that Fratta raised a related ineffective assistance of trial counsel claim in his own federal habeas proceedings. This petition for certiorari review is simply an attempt to avoid the restrictions on successive federal habeas proceedings.[1] Thus, Fratta's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction, and there is simply no basis for granting certiorari review in this case.

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[1] *See* 28 U.S.C. § 2244(b) (barring claims actually presented, and previously available claims not presented, in prior federal habeas petitions).

ARGUMENT

I. Certiorari Review Is Foreclosed by an Independent and Adequate State Procedural Bar.

Article 11.071 Section 5(a) of the Texas Code of Criminal Procedure forbids state courts to consider a prisoner's successive state habeas applications unless:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Here, the CCA dismissed the application as "an abuse of the writ without reviewing the merits of the claims," and declined to re-open his previous subsequent application. *Ex parte Fratta*, No. 31,536-07 slip op. at 3 (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)); Pet. Appx. A.

This Court has held on numerous occasions that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and

adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). There is no jurisdictional basis for granting certiorari review in this case.

However, even if the Court had jurisdiction to review Fratta's petition, the claims are waived and procedurally defaulted because the state court's disposition of the claims relies upon an adequate and independent state law ground, i.e., the Texas abuse-of-the-writ statute. *See*, *e.g.*, *Moore v. Texas,* 535 U.S. 1044, 1047-48 (2002) (Scalia, J., dissenting); *Balentine v. Thaler,* 626 F.3d 842, 857 (5th Cir. 2010) (recognizing that Section 5 is an adequate state law ground for rejecting a claim); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) ("Texas' abuse-of-the-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling."); *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004) ("the Texas abuse of the writ doctrine is an adequate ground for considering a claim procedurally defaulted."); *Barrientes v. Johnson*, 221 F.3d 741, 758–59 (5th Cir. 2000); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997).

Despite this long-standing precedent, Fratta now argues that Section 5 is not adequate and independent in regard to claims of *Brady* error where the petitioner discovers "new" exculpatory evidence after the conclusion of initial state and federal habeas review. Pet. at 9 Notwithstanding Fratta's failure to prove the alleged suppression and materiality as detailed below, Fratta's core belief that the mere allegation of *Brady* error is sufficient to undermine the State's sovereign application of its law and restore jurisdiction to this Court is in error.

First, Fratta argues that Section 5 is inadequate because "This Court has 'repeated[ly]' recognized that state procedural rules are not adequate if they 'operate to discriminate against claims of federal rights.'" Pet. at 11 (citing *Walker v. Martin*, 562 U.S. 307, 321 (2011)). But *Walker*—like many of the cases Fratta cites—is a federal habeas case. Federal habeas permits review of defaulted claims if a petitioner can make the requisite showing. But this is not an appeal from federal habeas proceedings. It is an appeal from an abusive state habeas petition wherein this Court lacks jurisdiction. Even so, the *Walker* Court defined "adequate" as a state rule that is "firmly established and regularly followed." 562 U.S. at 316 (citing *Beard v. Kindler*, 558 U.S. 53, 60-61 (U.S. 2009) (internal quotation marks omitted)). Fratta has made no showing that the Texas courts fail to regularly apply the Section 5 bar. Indeed, the CCA has applied it to Fratta no less than three times.

Second, Fratta asserts that Section 5 is not independent of federal law. Pet. at 18-19. Relying upon *Strickler v. Greene*, 527 U.S. 263 (1999)—yet another *federal* habeas case—Fratta asserts that, because Section 5's language resembles a portion of the *Brady* analysis, the bar fails to be independent of federal law. But the similarity of the two standards does not transform the CCA's express application of state procedural law into a merits determination of Fratta's underlying constitutional claim.

Even considering this Court's federal habeas jurisprudence—which does not apply to a jurisdictional bar—Fratta's arguments fail. In *Long*, the Court made clear that, in determining whether a state-court judgment is independent and adequate on direct review, it would first decide whether a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." 463 U.S. at 1040. If this predicate was met, the Court would presume that the state court's decision turned on federal law unless the "adequacy and independence of any possible state law ground" was "clear from the face of the opinion." *Id.* at 1040-41. This framework was imported into the federal habeas context in *Harris v. Reed*, 489 U.S. 255, 260-263 (1989), and it has since been called the "*Harris* presumption" when it is applied in such matters. *See, e.g., Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991).

The Court later made clear, in *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)), that a two-part, conjunctive test is required: "In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." 501 U.S. at 735. *Coleman* rejected the notion that *Harris* imposed a "clearly and expressly" requirement on all procedural default holdings. *Id*. at 736. Rather, the Court explained that the *Harris* presumption, and hence the "clearly and expressly" requirement, "appl[ies] only in those cases in which it fairly appears that the state court rested its decision primarily on federal law." *Id*. (internal quotation marks omitted); *see also id*. at 735 (describing this "predicate to the application of the *Harris* presumption"). Thus, there is no presumption of federal-law consideration unless it is first determined that the state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Id.* at 735. Where there is no "clear indication that a state court rested its decision on federal law, a federal court's task will not be difficult." *Id*. at 739–40.

In this case there is no indication that the CCA relied on any federal law in determining that Fratta failed to meet state law. Again, the CCA applied state procedural law and dismissed the application as "an abuse of the writ

without reviewing the merits of the claims." Pet. Appx A. at 3 (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)). The similarity of the state's abuse of the writ standard—whether the claim could "have been presented previously in a timely initial application or in a previously considered application"—is not based on *Brady* of any of its three essential elements. *Banks v. Dretke*, 540 U.S. 668, 691 (2004), (quoting *Strickler*, 527 U.S. at 281-82) ("'The evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'"). And Fratta's citation to the federal habeas case of *Strickler*—that the *cause* element of federal abuse-of-the-writ standard resembles *Brady's* suppression requirement—is inapposite. Pet. at 18. Additionally, the remaining elements of *Brady,* i.e., favorability and materiality, appear nowhere in the CCA's order. The CCA's application of state procedural law to dismiss Fratta's dilatory and abusive filing—without considering its merits—days before his scheduled execution is simply not an application of this Court's *Brady* precedent.

The Court may find the Fifth Circuit's parsing of the independent nature of Texas's Section 5 bar illuminating. In *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010), the circuit court considered the question in the federal habeas context. There the court of appeals concluded that "[a] state court does not undermine the independent state-law character of its procedural-default

doctrine by referring to a federal procedural-default standard to determine whether an otherwise defaulted successive habeas application should be permitted to bypass a procedural bar." *Id.* at 823-24. The court rejected Rocha's contention "that § 5(a)(1) is dependent on federal law in all cases." *Id*. at 835. Instead, the court noted that whether a § 5(a)(1) dismissal is independent of federal law turns on case-specific factors. *Id*. As the court held,

> If the CCA's decision rests on availability, the procedural bar is intact. If the CCA determines that the claim was unavailable but that the application does not make a prima facie showing of merit, a federal court can review that determination under the deferential standards of AEDPA.

Rocha, 626 F.3d at 835. But in this case, there is no need to assume. The CCA dismissed the application as "an abuse of the writ without reviewing the merits of the claims." Pet. Appx A. at 3 (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)). There was no prima facie merit analysis. *Id.* Fratta's attempts to conflate a state's statutes availability requirement with one prong of *Brady* is not supported by *any* law.

Finally, Fratta attempts to align his case with the facts and outcome of *Banks*. Pet. at 12-16. But unfortunately for Fratta, there remain significant distinctions. First, *Banks* is a pre-AEDPA federal habeas case. 540 U.S. at 689. This is an appeal from Fratta's third abusive state habeas petition which this Court lacks jurisdiction to consider. Indeed, Fratta has not attempted to file a successive federal habeas petition because he knows he cannot meet the

strictures of 28 U.S.C. § 2244(b). Second, Banks was able to demonstrate that the State actively suppressed evidence multiple times regarding a police informant. 540 U.S. at 694. Here, as further detailed below, Fratta represents that the State suppressed evidence identical to that presented in his co-defendant's federal habeas petition which was filed well before Fratta's federal petition. Moreover, the crux of Fratta's complaint is derived from a 9-1-1 call from the night of Farah's murder that Fratta has never claimed was suppressed. Pet. at 3-4. Simply put, this is not a case of the State hiding crucial evidence that puts Fratta's guilt in question. Rather, Fratta has known since before his retrial that Laura Hoelscher was hypnotized. He should have known her statements to the 9-1-1 operator. The slight, immaterial discrepancies between her call and her trial testimony do not overcome the evidence that Fratta actively sought to hire someone to kill his wife, contacted his codefendant Prystash through Mary Gipp's pager and cell phone multiple times from the church where he was with his children on the night of the murder, and supplied Guidry with the murder weapon. And, although unable to be used against him at trial, it is worth noting that Prystash confessed, implicating both Guidry and Fratta.

Fratta's invocation of *Brady* error is insufficient to overcome the jurisdictional default and there is simply nothing that compels this Court's review.

II. Fratta's Claim Is Not Only Defaulted and Foreclosed From Review But Lacks Merit.

Fratta contends the State improperly suppressed evidence relating to Laura and Dan Hoelscher regarding the fact that they had been hypnotized. Pet. at 19-20. But Fratta cannot invoke a talisman-like belief that a mere allegation of error under *Brady* is sufficient to overcome the default much less present a compelling question for this Court's review. Fratta's petition asserts that the State's procedure "discriminates against *Brady* claims that are suppressed by the State until after the conclusion of initial state and federal habeas review." Pet. at 11. But even assuming this argument to be meritorious, Fratta fails to demonstrate these facts apply to him. His petition fails to allege a specific date when he learned of the allegedly suppressed evidence, which existed before his original trial. But public records demonstrate that Fratta's codefendant Howard Paul Guidry raised this exact claim in his original federal habeas petition filed on June 26, 2013. *Guidry v. Stephens*, No. 4:13-cv-01885, Pet. at 205, ECF No. 1 (S.D. Tex). Fratta's federal habeas petition was not filed until February 12, 2015. *Fratta v. Davis*, No. 4:13-cv-03438, Pet., ECF No. 15 (S.D. Tex). It is beyond disingenuous to suggest that the State's alleged suppression of this evidence prevented Fratta from raising this claim for at least the past nine-and-a-half years. Indeed, Fratta raised a related ineffective assistance of counsel claim regarding this testimony in his federal petition.

Fratta v. Davis, No. 4:13-cv-03438, Mem. & Ord., ECF No. 80, at 59. And Fratta relied on Guidry's federal petition briefing for other claims in his petition which was filed well after Guidry's petition. *See Guidry v. Stephens*, No. 4:13-cv-01885, Mem. & Ord., ECF No. 113 at 37 ("Since the beginning of legal proceedings against the three co-conspirators, each has raised interconnected claims involving interwoven issues. Other federal courts have already reviewed some issues raised by Guidry's *Brady* claim, which his co-conspirators have replicated word-for-word in their own case. The adjudication of issues by other courts must be taken into consideration in this Court's review of identical claims."). Thus, it was not the actions of the State that prevented Fratta from raising this claim but choices he made about which claims to raise in federal habeas.

The hypnosis of the Hoelschers was previously litigated not only in Fratta's federal habeas petition as an ineffective assistance of trial counsel claim but also in Fratta's co-defendant Guidry's federal habeas petition. Indeed, Guidry tried to use the admission in the State's answer to Fratta's pre-retrial federal habeas proceedings as proof of suppression at his retrial. *Guidry v. Stephens*, No. 4:13-cv-01885, Amend Pet., ECF No. 60 at 105 (citing Pet. Ex. 12 (*Fratta v. Dretke*, No. 4:05-cv-03392, Resp. Ans. & Mot. Summ J., ECF No. 6 at 55)). The Fifth Circuit has explained that "evidence is not suppressed if the defendant knows or should know of the essential facts that would enable

him to take advantage of it." *United States v. Runyan*, 290 F3d 223, 246 (5th Cir. 2002) (internal quotations and citations omitted). Even assuming the State did not provide this evidence at retrial, given that Guidry's proof of suppression was a publicly filed document (the Fratta answer) dating from before Guidry's retrial, reasonable diligence would have revealed it long ago and—as shown above—before Fratta's federal habeas proceedings.

This is even more apparent when considering that the inconsistencies Fratta points to are from the 9-1-1 call the night of Fratta's murder. Pet. at 3-4. Fratta has never contended that the 9-1-1 call was suppressed, only the hypnosis of the witnesses. Thus, Fratta was free to impeach Laura Hoelsher's testimony with the 9-1-1 call at trial and at his retrial. And Fratta has not lacked opportunities to raise this claim as he has litigated a Rule 60(b) motion all the way to this Court and filed three subsequent, abusive petitions. There is no error in the CCA's determination that Fratta's claim could "have been presented previously in a timely initial application or in a previously considered application" and no reason that compels this Court's review. Tex. Code Crim. Pro. Art. 11.071 § 5(a)(1).

Further, Fratta has not shown that, whether suppressed or not, evidence about the hypnosis would have made any difference at trial. In his second federal proceeding, the Fratta court also considered whether the trial attorneys in that case should have used the hypnosis to impeach or exclude the

Hoelscher's testimony. Framed in the context of whether Fratta's state habeas counsel should have raised a *Strickland* claim on that basis, the federal district court found:

> Fratta challenges trial counsel's questioning of the Hoelschers because it did not address the fact that they had been hypnotized in an effort to add detail to their eyewitness accounts. In Fratta's first habeas proceedings, however, the state habeas court found that "the hypnosis attempt as not successful" and "no new information had been obtained." The state habeas court also found that "hypnosis did not elicit any new information from the Hoelschers; that hypnosis did not produce an identification of the shooter; and that the procedures used during the hypnosis are thus not relevant." Given those findings, state habeas counsel could reasonably decide not to challenge trial counsel's failure to object to the Hoelshers' testimony because they had been hypnotized. Impeaching the Hoelshers would have helped the defense little, because the hypnosis was not successful and did not alter their account of events.

Fratta v. Davis, 4:13-cv-03438, Mem. & Ord., ECF. No. 80 at 59 (internal citations omitted). Given that analysis, the Fratta court held that a reasonable trial attorney could review the hypnosis evidence and choose not to use it. The *Brady* materiality standard is the same as a *Strickland* prejudice review. *Johnson v. Scott*, 68 F.3d 106, 109-10 (5th Cir. 1995) ("The materiality standard under Brady . . . is identical to the prejudice standard under Strickland."). Thus, for the same reasons discussed by the lower court, Fratta has not made a strong showing of materiality under *Brady*.

This defaulted and meritless claim fails to present a compelling issue for this Court's review. There is no circuit split or issue of constitutional

importance. There is only Fratta's specious plea for this Court to review a claim available to Fratta to raise in multiple forums for years.

III. Fratta Is Not Entitled To a Stay of Execution.

Fratta is not entitled to a stay of execution because he cannot demonstrate a substantial denial of a constitutional right that would become moot if he were executed. "The party requesting a stay 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 utilizing that discretion a 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 (citations omitted) (internal quotation marks omitted). A stay of execution "is not available as a matter of right, and 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). "A court considering a stay must also apply '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.'" *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)); *see*

Gomez v. U.S. Dist. Court for N. Dist. of Cal., 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").

As discussed above, Fratta cannot demonstrate a strong likelihood of success on the merits. He has not preserved any claim alleging a violation of his constitutional rights. And even if his claims were preserved, they are unworthy of this Court's attention. Under the circumstances of this case, a stay of execution would be inappropriate.

CONCLUSION

For the foregoing reasons, the Court should deny Fratta's petition for writ of certiorari and application for a stay of execution.

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