No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BILLY JACK CRUTSINGER,
Petitioner,

v.

STATE OF TEXAS, Respondent.

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

PETITION FOR WRIT OF *CERTIORARI*

CAPITAL CASE

EXECUTION SCHEDULED: September 4, 2019

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QUESTION PRESENTED

Whether the appointment by a convicting court of a lawyer, who was not competent to represent the indigent, death-sentenced prisoner at any stage of the initial state collateral proceeding, contrary to the state statute's guarantee of a right to competent counsel, results in a denial of a federal 14th Amendment right of access to courts, and is in conflict with *Johnson v. Avery* and *Wolff v. McDonnell*. U.S. Const. Amend. XIV.

PARTIES TO THE PROCEEDING

Although state habeas corpus proceedings in Texas are styled, "Ex parte [name of prisoner]," the parties to the proceedings are the State of Texas and the prisoner. The State of Texas in the state habeas proceeding was represented by the Assistant District Attorney of Tarrant County, Steven Conder.

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Petitioner, BILLY JACK CRUTSINGER, petitions for a writ of certiorari to review the denial, without order, of Petitioner Crutsinger's Suggestion That The Court Reconsider, On Its Own Motion, The Initial Application For Post-Conviction Writ of Habeas Corpus (Suggestion).

OPINION BELOW

The Texas Court of Criminal Appeals (TCCA) denied the Suggestion, in an email from Sian Schilhab, General Counsel for the Texas Court of Criminal Appeals. Appendix 1.

JURISDICTION

The Court has jurisdiction to review the denial of the Suggestion by the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257(a).

In his Suggestion in the TCCA, Mr. Crutsinger presented both a state statutory claim and a federal due process claim. The Suggestion reads:

> Mr. Crutsinger, an indigent inmate, was denied his statutory right, and federal constitutional due process right, to one full and fair opportunity to present his claims in a single, comprehensive post-conviction writ of habeas corpus. *Graves* at 117; U.S. CONST. amend. XIV; *Burns v. Ohio*, 360 U.S. 252 (1959). As Judge Price wrote: "In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court explained that: "[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id*. at 257, 79 S.Ct. 1164." *Graves* at 123 (Price., J. dissenting).

Suggestion at 66, 77, 81; *Ex parte Graves*, 70 S.W.3d 103, 123 (Tex. Crim. App. 2002) (Price, J., dissenting).

The TCCA through its General Counsel, Sian Schilhab in an August 23, 2019 email (and subsequent post-card notices) ruled as follows:

> "The Court is denying Applicant's suggestion to reconsider the initial state habeas application in this case. The Court is also denying Applicant's Motion to Stay his execution. No order will issue."

Appendix 1.

The TCCA failed to expressly and unambiguously state that it had based its denial on an adequate and independent state law ground, and instead answered the federal question (whether there was a violation of Mr. Crutsinger's due process rights) in the negative. Thus, this Court has jurisdiction under the presumption favoring the assertion of federal jurisdiction in ambiguous cases. *See Harris v. Reed*, 489 U.S. 255, 265 (1989) ("Having extended the adequate and independent state ground doctrine to habeas cases, we now extend to habeas review the "plain statement" rule for

determining whether a state court has relied on an adequate and independent state ground."); *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

This presumption is favored because "... it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), *citing Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

Accordingly, this Court has jurisdiction to decide Mr. Crutsinger's petition for writ of certiorari.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE WITH FACTS RELEVANT TO THE ISSUE

I. Statement of the Case: Prior Proceedings

State Trial Proceedings: In 2003, a Tarrant County jury convicted Crutsinger of capital murder and sentenced him to death. The conviction and death sentence was affirmed on direct appeal to the Texas Court of Criminal Appeals. *Crutsinger v. State*, 206 S.W.3d 607 (Tex. Crim. App. 2006).

Initial State Habeas Court Proceedings: In 2007, the Texas Court of Criminal Appeals denied state habeas relief.. *Ex parte Crutsinger*, No. WR-63,481-01, 2007 WL 3277524 (Tex. Crim. App. Nov. 7, 2007) (not designated for publication). On November 19, 2007, Richard Alley, state capital habeas counsel, filed a Motion to Withdraw in federal district court.

Initial Federal Habeas Corpus Proceedings: On January 15, 2008, the federal district court granted the motion and appointed undersigned counsel, Brandt, pursuant to 21 U.S.C. § 848(q)(4)(B).

In 2008, the federal district court denied a funding request and reconsideration motion for investigative and expert assistance to investigate and develop a *Wiggins/Strickland* claim. The district court denied funding for both investigative and expert assistance. [Doc 19, dated 8/5/2008; Doc 20, dated 8/19/2008]. *Crutsinger v. Stephens*, 576 Fed. Appx. 422, 428-29 (5th Cir. 2014). Thereafter, and without funding to develop his claims, Mr. Crutsinger filed a timely federal habeas petition.

On February 6, 2012, the district court entered its Memorandum Opinion and Judgment. All the claims were denied. *Crutsinger v. Stephens*, 576 F. App'x 422, 425-425 (5th Cir. 2014).

"After the district court's initial ruling on Crutsinger's federal habeas petition, the Supreme Court issued *Martinez v. Ryan*, which held that "[i]nadequate assistance of counsel at initial-review

collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." [On March 5, 2012], Crutsinger then filed a Federal Rule of Civil Procedure 59(e) motion to vacate the initial habeas judgment. The district court denied the request, concluding that "the claim of ineffective trial counsel raised by Crutsinger had no merit and was, therefore, not 'substantial' as required by *Martinez*." *Crutsinger v. Davis*, 929 F.3d 259, 262 (5th Cir. 2019). [3/5/2015 59(e) Motion; 4/13/2012 Order, Doc 56].

In 2012, Mr. Crutsinger filed a Certificate of Appealability (COA) in the Fifth Circuit, which the Fifth Circuit denied in 2014. The Fifth Circuit reviewed both the IATC claim and the related claim that the district court had abused its discretion in denying funding under § 3599. It denied COA and affirmed the district court's denial of the § 3599 claim. "In applying the statutory standard of whether an investigator's services were 'reasonably necessary for the representation of the defendant,' [the Fifth Circuit] construed '[r]easonably necessary in this context [to] mean[ ] 'that a petitioner must demonstrate 'a substantial need' for the requested assistance.'" *Crutsinger v. Davis*, 929 F.3d 259, 262–63 (5th Cir. 2019).

Thereafter, Mr. Crutsinger filed a petition for writ of certiorari in this United States Supreme Court. The petition was denied. *Crutsinger v. Stephens*, 135 S. Ct. 1401 (2015).

Additional Federal Court Proceedings

On March 21, 2018, the Supreme Court decided *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). "In *Ayestas*, the Supreme Court expressly cited [the Fifth Circuit]'s decision in Crutsinger with disapproval, and [the Fifth Circuit] agree[d] that [its] decision in Crutsinger was accordingly abrogated regarding its analysis and application of § 3599." *Crutsinger*, 929 F.3d at 264.

On May 9, 2018, Crutsinger then returned to federal district court, asserting in a Rule 60(b)(6) motion that there was a structural defect in the integrity of his initial federal habeas proceedings because the district court had incorrectly applied the law in assessing his request for funds under § 3599. He requested that the federal district court vacate its judgment and allow him to file a new § 3599 motion. *Crutsinger*, 929 F.3d at 264. [Doc 90].

On August 7, 2018, the district court determined that Rule 60(b) motion was a second-or-successive petition for habeas relief, which deprived the court of jurisdiction, and transferred the motion to the Fifth Circuit. *Crutsinger*, 929 F.3d at 264. Mr. Crutsinger took an appeal to the Fifth Circuit. [Doc 98].

On February 6, 2019, the state court judge signed an execution warrant setting the execution date of Mr. Crutsinger for September 4, 2019. [Doc 107].

In its July 3, 2019 panel opinion, the Fifth Circuit vacated the district court's order transferring Crutsinger's motion to the Fifth Circuit as a successive petition and remanded the case to the district court. *Crutsinger*, 929 F.3d at 266.

In his dissenting opinion, Judge Graves wrote: "I agree with the majority that the Supreme Court's decision in *Gonzalez* compels the conclusion that Crutsinger's Rule 60(b)(6) motion is proper and not a successive petition. However, I disagree with the majority's determination that *Gonzalez* appears to establish that a change in the law cannot constitute an extraordinary circumstance." *Crutsinger*, 929 F.3d at 269. Judge Graves stated that "Crutsinger has not abandoned this issue and has been extremely diligent," Id. at 271. He observed the district court required that "Crutsinger must prove his claim of ineffective assistance of counsel to be able to establish that "investigative, expert, or other services are reasonably necessary" to then be able to prove his claim of ineffective assistance of counsel. Such a circular application is illogical. It

heightens the standard required under 18 U.S.C. § 3599(f) and essentially makes it impossible for a defendant to ever obtain funding on such a claim. A defendant who has already proven his claim of ineffective assistance of counsel would have no need for additional investigative, expert, or other services." *Crutsinger*, 929 F.3d at 267. Judge Graves "conclude[d] that Billy Jack Crutsinger's motion under Federal Rule of Civil Procedure 60(b)(6) should be granted, I would vacate and remand for proper consideration of his funding motion." *Crutsinger*, 929 F.3d at 266.

In a published order, denying Mr. Crutsinger's Motion to Stay Execution, two of the panel members stated: "Though acknowledging that we were without jurisdiction to make a merits determination on his Rule 60(b)(6) motion, we underscored that Crutsinger was unlikely to establish that 'extraordinary circumstances' exist to justify the reopening of the final judgment because 'not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final.'" *Crutsinger*, 929 F.3d at 266, 2019 WL 2864445, at *4 (quoting *Gonzalez*, 545 U.S. at 536). Judge Graves again dissented and "would grant the stay of execution." *Crutsinger*, 930 F.3d at 709.

On August 8, 2019, the district court entered a Memorandum Opinion and Order Denying Rule 60(b) motion and, in the Alternative, Denying Authorization of Funds. The district court denied a certificate of appealability. [Doc 120].

Mr. Crutsinger filed a notice of appeal in the Fifth Circuit. The Fifth Circuit assigned case No. 19-77012. As of the date and time of the photocopy production of this petition, the appeal remains pending.

Additional State Habeas Proceedings

On August 17, 2019, Mr. Crutsinger filed a Suggestion That The Court Reconsider, On Its Own Motion, The Initial Application For Post-Conviction Writ of Habeas Corpus (Suggestion) in the Texas Court of Criminal Appeals (TCCA). The basis was that, despite the statutory guarantee of the right to competent counsel, Richard Alley, appointed in 2003 to represent Mr. Crutsinger, was not competent at any stage of the proceeding. Mr. Crutsinger submitted evidence consisting of 1.6GB of data (the legal papers from the 2000 federal disciplinary hearing of Richard Alley, and the legal papers in all six initial state collateral cases (*Carpenter*, *Williams*, *Reese*, *Scheanette*, *Kerr*, and *Crutsinger*), who Alley had been appointed to represent between 1999 and 2007. In the alternative, Mr. Crutsinger alleged that even if Alley was competent at the time of appointment and for the duration of the representation, his actions as an agent of Crutsinger were so meaningless as to constitute abandonment.

Mr. Crustsinger, an indigent death row inmate, alleged he was deprived of his Art. 11.071 statutory right and federal constitutional due process rights to one full and fair opportunity to present all claims concerning violations of his fundamental constitutional rights in a single, comprehensive post-conviction writ of habeas corpus, citing among other authority, U.S. CONST. amend. XIV, and *Burns v. Ohio*, 360 U.S. 252 (1959).

On August 23, 2019, the TCCA denied the Suggestion. *See* Appendix 1.

II. Statement of the Case: Facts Material to the Question Presented

On October 9, 2003, Richard Alley had been appointed to represent Billy Jack Crutsinger. The Crutsinger case was a matter beyond Alley's competence at the time of Alley's 2003 appointment and for the duration of the state habeas representation. An analysis of about 1.6 GB of documentation (appendices and exhibits supporting the Suggestion) demonstrates that from 1999 to 2007, Richard Alley had a substantial history in the state and federal courts of a lack of professionalism, unethical behavior, and an inability to competently represent capital habeas petitioners.

A. Federal Disciplinary Record of Alley: The *Lagrone* litigation

Mr. Alley had been appointed in federal court to represent Edward Lewis Lagrone, an indigent Texas capital federal habeas petitioner. In the year 2000, following a disciplinary evidentiary hearing at which Mr. Alley appeared and was represented by counsel, the U.S. Magistrate Judge entered FFCL in *Lagrone v. Thaler* (hereinafter "Lagrone") in the U.S. District Court, Northern District of Texas, Fort Worth Division (USDC Case No. 4:7cv521). The following findings were upheld on appeal, under the section 4 heading, titled Lack of Professionalism and Unethical Behavior.

The 2000 findings, upheld on appeal, found:

- "[Alley's work] is frequently 'sloppy' ... and [he] remains culpable for poor representation, ... of his clients."
- "Testimony from Judge David Ferris confirms that "Alley's reputation for sloppiness is not confined to the federal court system and has even achieved a level of abusiveness towards [state] courts and opposing counsel."
- "Compounding doubts about Alley's professionalism is his intentional deception or lack of regard for the accuracy of the information he furnishes to the courts."

- "And his false statements to the federal appellate court and state trial court plus his cryptic description of these incidents in response to a direct inquiry of the federal district court reflect unprofessional and unethical tendencies."

Suggestion Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL

These same federal FFCL in Lagrone also found Alley's work product was cut-and-paste, and it's worth "quickly approache[d] zero" because despite notice from the federal court of how to protect the client's claims, Alley failed to do so. The FFCL states:

- "The [federal habeas] petition [for Edward Lewis Lagrone, a capital defendant] overall is poorly done and of minimal assistance to the court."

- "Approximately half of [the federal habeas petition] appears to have been pulled nearly verbatim and indiscriminately from the state court papers and other briefs and documents Alley has prepared or collected in the course of his legal practice."

- "Moreover, the worth of the petition quickly approaches zero if, as it appears, the petition is time-barred under the AEDPA."

- "In appointing counsel for Lagrone, the court expressly cautioned that the petition should be timely filed and referred counsel to case law providing for equitable tolling."

- "The court cannot endorse Alley's failure to seek equitable tolling of the statute of limitations when Alley was cognizable of the fact that it may be his client's only chance to have his claims heard."

FFCL at 12, 13. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL.

Ultimately, in his September 4, 2002 Order on Appeal of Discipline, Chief Judge Fish accepted District Judge Kendall's order to reprimand Alley, remove Alley permanently from representation of Mr. Lagrone, a capital defendant, and not fine or require Alley to repay attorney fees, but modified Judge Kendall's order, reinstating the U.S. Magistrate's recommendation to suspend Alley from the bar of the district for one year. Suggestion Exhibit 1C: Lagrone 2002-09-04 Memorandum Order at p. 6, USDC Fish, C.J.

B. <u>All the state applications for writ of habeas corpus</u> (Writs) (*Carpenter*, *Williams*, *Reese*, *Scheanette*, *Kerr*, and *Crutsinger*) prove that the *Crutsinger* case was beyond the competence of Richard Alley

Mr. Alley had been appointed, pursuant to TEX. CODE PROC. Art. 11.071, to represent five (5) death-sentenced inmates prior to his appointment in 2003 to represent Mr. Crutsinger. The Texas statute provides that the Applicant "shall be represented by competent counsel, ..." Art. 11.071 § 2 (a) (c). The legal papers in all six cases prove that Alley was not competent as capital state-habeas counsel. The five (5) indigent, death-row inmates were:

2000-Aug 30	Carpenter, David (Dallas County, TX)
2001-Mar 15	Williams, Bruce (Dallas County, TX)
2002-Jul 16	Reese, Lamont (Tarrant County, TX)
2004-Jun 16	Scheanette, Dale (Tarrant, TX)
2004-Oct 20	Kerr, Cary (Tarrant County, TX)
2005-Mar 17	Crutsinger, Billy Jack (Tarrant County, TX)

1. <u>Earlier State Capital Writs</u>: Alley's legal experience and ability in five (5) capital state-habeas appointments (*Carpenter*, *Williams*, *Reese*, *Scheanette, Kerr*) preceding the *Crutsinger* appointment, prove Alley was not competent to represent a capital state-habeas petitioner

a. The earlier FFCL in *Carpenter* and *Scheanette* proved Alley's *unethical tendencies* toward "intentional deception or lack of regard for the accuracy of the information he furnishes to the courts," persisted

The FFCL from the 2000 *Carpenter* Writ & the 2004 *Scheanette* Writ showed Alley lacked even the most basic ability to study the trial record and make accurate *fact* representations of its content to the state court. In the 2000 *Carpenter* Writ, (# 19), Alley alleged that appellate counsel failed to file a timely and verified Motion for New Trial. The FFCL recited that the court's own "handwritten order expressly overrul[ed] the motion [and] demonstrates that counsel did present the motion to this court;" that "the motion ... was timely filed;" and "that the appellate rules do not

require verification of a motion for new trial." FFCL at 56, 57. Suggestion Exhibit 2D: Carpenter 2001–04-05 Adopted State Proposed FFCL.

Four years later in the June 16, 2004 *Scheanette* Writ, Alley pled that trial counsel was ineffective for failing "to oppose by pretrial motion or objection the charges made against" applicant. But the FFCL #6 found, "Applicant's counsel ***filed over 80 pretrial motions***, ..." (Emphasis supplied) Exhibit 6E: Scheanette 2005-08-29 District Court FFCL Order, FFLC #6 at 118.

Alley's experience and ability in this state habeas litigation is consistent with the U.S. Magistrate Judge's Disciplinary findings in 2000 in Lagrone. Suggestion Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL at 11 ("Compounding doubts about Alley's professionalism is his intentional deception or lack of regard for the accuracy of the information he furnishes to the courts").

b. The earlier writs proved Alley's *inability to investigate and plead a cognizable claim*. Alley's legal ability to plead a claim was stunted – reduced to a cut-and-paste of record-bound, IAC boilerplate claims from one writ into the next

It appears Alley had a collection of judicial opinions – many of which were not Texas case law, and not binding precedent – that held specific conduct was deficient in a particular way *(e.g.,* failed to file pre-trial motions; to develop a meaningful relationship with client; to be sufficiently familiar with the facts and law). Alley quoted from the opinion, sometimes alleging in very general terms counsel was ineffective in that way, or at other times relying on the trial record, a record already considered by the TCCA in the direct appeal, instead of providing extra-record evidence.

Alley pled this ineffective assistance boilerplate claim (IAC) (*e.g.*, failure to file pre-trial motions) in every writ, even in cases where the face of record made the falsity of the allegation obvious. *See supra* 2000 *Carpenter* Writ & the 2004 *Scheanette* Writ. Alley knew that IAC claims

had to be supported by adequate, extra-record evidence. At the beginning of each and every IAC boilerplate claim in each of the state writs, including that of Crutsinger's, Alley quoted from the dissent of Judge Benavides in *Craig v. State*, 825 S.W.2d 128, 130 (Tex. Crim. App. 1992) (Benavides, J., dissent). The quotation states that absence of extra-record evidence "could permanently foreclose appellant's right to relief to which he could otherwise be entitled."

Alley's experience and ability in the 2000-2005 state habeas litigation is consistent with the U.S. Magistrate Judge's Disciplinary findings in 2000 in Lagrone. Suggestion Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL at 12 ("Approximately half of [the federal habeas petition] appears to have been pulled nearly verbatim and indiscriminately from the state court papers and other briefs and documents Alley has prepared or collected in the course of his legal practice."

c. The earlier writs proved Alley's *inability to study the law and apply the facts*. Earlier FFCL put Ally on notice the wide variety of other non-IAC, record-bound claims he had pled were not cognizable. The FFCL cited established precedent, with a parenthetical explanation for the denial. Alley was unable to take corrective action; instead continuing to function as a word processor, cut-and-pasting these same claims into the next writ, and the next, and the next

Besides IAC boiler-plate claims, Alley also did a cut-and-paste of a wide-variety of other non-IAC, record-bound claims (factual and legal insufficiency, challenges for cause, to the admission of the evidence, to jury instructions, to rulings on parole law, cumulative error, and to a plethora of challenges to the Texas death penalty scheme and the special issues) from one client's pleadings into the next. At least as early as 2001, the *Carpenter* FFCL, 2001 *Williams* FFCL, and the 2003 *Reese* FFCL put Alley on notice the claims were not cognizable, cited established precedent and explained why. Alley took no corrective action. Alley continued to copy (verbatim or in substantially similar language) the claims and paste them into the next client's writ, even into the *Crutsinger* writ.

d. The earlier writs proved Alley's *continuing abuse of the state courts and opposing counsel*. Alley file 873 pages of pleadings, containing 158 non-cognizable claims. Even if the claims were not cognizable, the courts and opposing counsel were required to act on them

Alley abused the state courts and opposing counsel by filing 873 pages of pleadings, containing 158 non-cognizable claims. Even if the claims were not cognizable, the courts and opposing counsel were required to act on them.

Case	Total Pages	Number of Claims
2000 Carpenter Writ	232	41
2001 Williams Writ	165	33
2002 Reese Writ	161	19
2004 Scheanette Writ	157	29
2004 Kerr Writ	158	36
Total	**873**	**158**

Even though the claims were not cognizable, opposing counsel and the courts still had to act on the filings. Opposing counsel was required to respond in the State's Answer and file proposed FFCL. Likewise, the district courts and the TCCA had to rule on hundreds of pages of these meaningless claims.

Alley's experience and ability in the 2000-2005 state habeas litigation is consistent with the U.S. Magistrate Judge's Disciplinary findings in 2000 in Lagrone. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL at 11 ("Testimony from Judge David Ferris confirms that Alley's reputation for sloppiness is not confined to the federal court system and has even achieved a level of abusiveness directed towards the [state] courts and opposing counsel.").

CRUTSINGER: TABLE of CLAIMS COMPARISONS
The Point of Error (POE)/Issue in prior Applications or Direct Appeal Briefs (DA)
reproduced by Alley *verbatim* into, or were substantially similar to, those in the *Crutsinger* Writ

Crustinger (BJC) **3-17-05 Writ**	**18 POEs raised in Crutsinger Writ**	***Kerr*** **(CDK) 10-20-04 Writ**	***Scheanette*** **(DES) 06-16-04 Writ**	***Reece*** **(LR) 7-16-2002 Writ**	***Williams*** **(BW) 03-20-2001 Writ**	***Carpenter*** **(DLC) 8-30-2000**
POE 1	TCCP 37.071, §2(B)(1) unconst'l - State burden only "probable" on future danger instead of beyond rble dbt	10	1	10	10	9
POE 2 & 10	TX DP Scheme unconst'l: (2) Failure to define "operant term" (probability) spec issue "distinguish from chance," at p. 37 (10) Jury not given definition of probability; "distinguish from chance," at p. 82	11	2	11	10 & 14	10
POE 11	TX DP Scheme unconst'l - no requirement of "what amount of probability" State must prove future dangerousness issue	26	11 & 12	-	-	-
POE 3 in BJC DA Brief 3	TX DP Scheme unconst'l - 12/10 Rule juror vote	12	3	12	24	34
POE 4	TCCA refused to conduct sufficiency review of evidence of mitgn spec issue under any std Art. 37.01, sec (2)(e)	19	4	9	8	15
POE 5 in BJC DA Brief 5	Same as POE 4, but raises failure to review on direct appeal	19	5	-	-	-
POE 6	TX DP Scheme unconst'l - impossibility of restricting juror discretion to impose death, but unlimited discretion to consider all mitgn evidence	13	6	13 & from LR's DA Brief	25	35 &36

CRUTSINGER: TABLE of CLAIMS COMPARISONS
The Point of Error (POE)/Issue in prior Applications or Direct Appeal Briefs (DA)
reproduced by Alley *verbatim* into, or were substantially similar to, those in the *Crutsinger* Writ

POE 7	TX DP Scheme unconst'l - failure of notice in indictment on future dangerousness	-	-	-	-	-
POE 8	TX DP Scheme unconst'l - no BOP on State to prove mitgn spec issue s/b answered no	-	-	-	-	-
POE 9	TX DP Scheme unconst'l - dp imposed with "relaxed evid stds"	-	-	-	-	-
POE 12	TX DP Scheme unconst'l - no BOP on State of whtr evid is insufficient mitgn spec issue	-	-	-	-	-
POE 13	TX DP Scheme unconst'l - Likelihood of executing innocent persons	-	24	-	-	-
POE 14 in BJK's DA Brief 1	Wealth disparity among counties results in arbitrariness in seeking death	27	13	-	-	-
POE 15 (IAC)	IAC Boilerplate IAC Law: p. 124	15 Expert presentation challenge: Dr. Cunningham; & raised in CDK's DA 2 Boilerplate IAC Law: p.67-73	15 Expert presentation challenge: Dr. Kessner & raised in DA 3, 4 Boilerplate IAC Law: pp, 76-84	15 Boilerplate Case Law: pp. 111-117	31 Boilerplate IAC Law: pp. 151 - 161	13 & 14 Boilerplate IAC Law: pp. 92-121
POE 16 in BJC's DA 2	judge excused potential juor Enlow, not shown to be absolutely disqualified	-	-	-	-	-
POE 17 in BJC's DA Brief 4	admission of confession	-	-	-	-	-
POE 18	cumulative error	36	29	19	33	40 & 41

2. <u>The *Crutsinger* State Writ</u>. Alley's legal experience and abilities in Crutsinger, prove that Alley was not competent to represent Crutsinger at any stage in the capital state-habeas litigation

a. *Lack of Qualifications*. Alley was appointed to represent Mr. Crutsinger on October 3, 2003. On March 17, 2005, Alley filed the *Crutsinger* Writ. While the Writ was pending, the TCCA removed Alley from the list of qualified article 11.071 counsel

On October 3, 2003, the state court appointed Alley as Crutsinger's state habeas counsel. On March 17, 2005, Mr. Alley filed a state habeas application for writ of habeas corpus ("Writ"). The Writ was one-hundred forty (140) pages and raised eighteen (18) claims. *See Ex parte Crutsinger*, No. C-213-007275-0885306-A, in the 213th Judicial District Court, Tarrant County, TX. Suggestion Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

The district attorney filed a motion for court-ordered attorney affidavits, that was granted, a Reply to the Writ ("Answer"), and Proposed FFCL, relying on trial counsel's joint affidavit. Suggestion Exhibit 3A: Crutsinger Vol 7 Master Index Clerk Record at 1413, 1427, 1534.

In contrast, Alley did not seek a hearing or any other process to challenge or rebut the assertions contained in the joint trial-counsel affidavit, did not seek funding for any post-petition fact development as required by Art. 11.071 § 3(a), did not file a reply to the State's Answer. Alley did not file proposed FFCL, despite being required to do so by state law, Tex. Code Crim. Proc. Art. 11.071 § 8. (b), and court order. Suggestion Exhibit 3A: Crutsinger Vol 7 Master Index Clerk Record at 1533.

On November 7, 2005, the District Court adopted the FFCL and recommended relief be denied. Suggestion Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

At the time of appointment, Alley was licensed to practice law in Texas, issued on 05/14/1982. The State Bar website reports Alley is deceased. Suggestion Exhibit 3G: Crutsinger

Alley SBOT profile (deceased). Likewise, Alley also had been on the Approved Attorneys List for 11.071 Appointments. For unknown reasons, while the Writ was pending in state court, the TCCA removed Alley from the approved list with effective-date 12-18-2006. Suggestion Exhibit 3E: Crutsinger TCCA Appvd Appmt Lists Nov Dec 2006.

The TCCA did not replace Alley as Crutsinger's attorney. Alley did not seek to withdraw and have new counsel appointed. The TCCA simply adopted the trial court's findings and denied relief to Crutsinger on the basis of representation—or lack thereof—afforded by Alley, the very attorney it had stricken from the list of qualified habeas counsel months earlier. *See Ex Parte Crutsinger*, 2007 WL 3277524 (Tex. Crim. App. Nov. 7, 2007).

b. ***Inability to Study the Law, Apply the Facts and Plead a Cognizable Claim (Cut-And-Paste Claims)*: The Crutsinger Writ contained eighteen (18) claims. Five (5) were copied from the direct appeal brief, and nine (9) track claims in the *Scheanette* Writ, even down to the identical numbering of the claims. The rest of the claims were non-cognizable challenges to the Texas death penalty scheme**

Alley reproduced verbatim or in substantially similar wording all five (5) of the claims in the Crutsinger direct appeal brief, prepared by Crutsinger's trial counsel, into the *Crutsinger* Writ. *Crutsinger v, State*, No AP 74,769. *See* Table of Claims and Analysis (Appendix 1 & 2). Other claims appear to have been copied from the *Scheanette* writ – which appears to be the foundation document, even down to the identical numbering of the claims. The *Scheanette* Writ claims were themselves lifted from preceding writs that Alley had filed. *See also* Table of Claims.

CRUTSINGER: TABLE of CLAIMS COMPARE SCHEANETTE & BJC
The Point of Error in Scheanette Writ or Crutsinger Direct Appeal Briefs (DA) reproduced *verbatim* or were substantially similar to those in the *Crutsinger* Writ

Crustinger (BJC) 3-17-05 Writ POE's	18 POEs in Crutsinger Writ	*Scheanette* (DES) 06-16-04 Writ POE's
POE 1	TCCP 37.071, §2(B)(1) unconst'l - State burden only "probable" on future danger instead of beyond rble dbt	1
POE 2 & 10	TX DP Scheme unconst'l - (2) Failure to define "operant term" (probability) spec issue "distinguish from chance," at p. 37 (10) Jury not given definition of probability; "distinguish from chance," at p. 82	2
POE 11	TX DP Scheme unconst'l - no requirement of "what amount of probability" State must prove future dangerousness issue	11& 12
POE 3 in BJC DA Brief 3	TX DP Scheme unconst'l - 12/10 Rule juror vote	3
POE 4	TCCA refused to conduct sufficiency review of evidence of mitgn spec issue under any std Art. 37.01, sec (2)(e)	4
POE 5 in BJC DA Brief 5	Same as POE 4, but raises failure to review on direct appeal	5
POE 6	TX DP Scheme unconst'l - impossibility of restricting juror discretion to impose death, but unlimited discretion to consider all mitgn evidence	6
POE 7	TX DP Scheme unconst'l - failure of notice in indictment on future dangerousness	-
POE 8	TX DP Scheme unconst'l - no BOP on State to prove mitgn spec issue s/b answered no	-
POE 9	TX DP Scheme unconst'l - dp imposed with "relaxed evid stds"	-
POE 12	TX DP Scheme unconst'l - no BOP on State of whtr evid is insufficient mitgn spec issue	-
POE 13	TX DP Scheme unconst'l - Likelihood of executing innocent persons	24
POE 14 in BJK's DA Brief 1	Wealth disparity among counties results in arbitrariness in seeking death (from BJC direct appeal brief, issue 1)	13

CRUTSINGER: TABLE of CLAIMS COMPARE SCHEANETTE & BJC
The Point of Error in Scheanette Writ or Crutsinger Direct Appeal Briefs (DA) reproduced *verbatim* or were substantially similar to those in the *Crutsinger* Writ

Crustinger (BJC) **3-17-05 Writ**	**18 POEs raised in Crutsinger Writ**	***Scheanette*** **(DES) 06-16-04 Writ**
POE 15 (IAC)	IAC - Boilerplate IAC Law: p. 124	15 (IAC) Expert presentation challenge: Dr. Kessner & raised in DA 3, 4 Boilerplate IAC Law: pp, 76-84
POE 16 in BJC's DA 2	judge excused potential juor Enlow, not shown to be absolutely disqualified (from BJC direct appeal brief, issue 2)	-
POE 17 in BJC's DA Brief 4	admission of confession (from BJC direct appeal brief, issue 4)	-
POE 18	cumulative error	29

c. *Inability to Investigate*: The IAC boilerplate claim (#15) appears to be a cut-and-paste claim from *Scheanette*. It lacked meaningful, extra-record evidentiary support

In claim Fifteen (15), Alley purports to raise an IAC claim. It is the same IAC boilerplate claim, discussed, supra, whose wording was copied from Alley's collection of judicial opinions, many of which were not Texas case law, and not binding precedent. More particularly, the Crutsinger IAC claim #15 appears to track the language in the Scheanette Writ.

The IAC boilerplate claim # 15 in the *Crutsinger* Writ alleged trial counsel:

a. "failed to conduct any investigation, independent or otherwise into the facts of this case;" Writ at 125;

b. failed "to oppose by pre-trial motion or objection the charges made against the Applicant;" Writ at 126;

c. "made only the briefest attempts to communicate with the Applicant," Writ at 126; and

d. "attempted to coerce the Applicant to plead guilty both prior to and during the Applicant's trial;" Writ at 126;

e. "The counsel below did not have a firm command of the law and the facts necessary to effectively defend the accused;" Writ at 126; and

f. "failed to elicit facts beneficial to his client." Writ at 127.

Writ at 125-126. Suggestion Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

The IAC boilerplate claim #15 in the *Scheanette* Writ alleged that trial counsel:

a. "failed to conduct any pretrial investigation into the facts of the case or"

b. "to oppose by pretrial motion or objection the charges made against" applicant, Writ Application at 78-79;

c. "demonstrated an unfamiliarity with the law and the facts which prejudiced the presentation of Applicant's case," Writ Application at 81;

d. failed to elicit beneficial facts or take actions beneficial to his client, Writ Application at 82.

Suggestion Exhibit 6B: Scheanette 2004-06-16 Writ

Alley did not provide extra-record evidentiary support for the claim to show either (1) that the investigation by Crutsinger's trial counsel was unreasonable; or (2) what evidence could have been discovered through reasonable investigation. *See e.g.* FFCL at 1566. Suggestion Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order ("25. The applicant presents no evidence that Mr. Ray and Mr. Moore attempted to coerce him into pleading guilty. 26. The applicant did not plead guilty and received a full trial on the merits of this prosecution.").

An email from Mark Kratovil, Assistant District Attorney, Civil Division, who handles open records requests for the Tarrant County Auditor's Office confirmed that the Auditor's Office could not locate pay requests for investigative and expert assistance. There were only two requests for payments in the Crutsinger case from Mr. Alley, with no attached breakout out of date, time and tasks. *See* Emails Kratovil from/to Brandt. Suggestion Exhibit 3F: Crutsinger Alley Pay Sheets Open Records Email.

Alley was paid $6,000, for 44.3 hours, which appears to be for the Writ. The second request is for 24.4 hours of work (paid $2,440). Suggestion Exhibit 3F: Crutsinger Alley Pay Sheets Open Records Email. Because it is close in time to two filings by Alley (Motion to Withdraw and Affidavit) in federal court, the $2,440 payment would suggest the work was for these federal court papers. *Crutsinger v. Stephens*, Case No. 4:07cv703 [Docs 1, 5, 6, 7].

d. *Inability to Plead Accurate Factual Representations*: The Clerk's Record and Reporter's Record of the trial proceedings prove the obvious falsity of the IAC boilerplate claims in the *Crutsinger* Writ. Indeed, Alley even copied into the Crutsinger Writ, the substance of the pre-trial motion that Alley alleged trial counsel failed to file, and attached trial counsel's evidence

The analysis of the Crutsinger Clerk's Record reflects the frivolous nature of the five (5) conclusory trial-counsel-did-absolutely-nothing allegations. For example, the FFCL cited to the Clerk's Record ("C.R.") in rejecting the claim that trial counsel failed "to oppose by pre-trial motion or objection the charges made against the Applicant." Writ at 126. Suggestion Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order. The FFCL found:

> 12. Mr. Ray and Mr. Moore ***filed several motions*** to suppress the applicant's confession and the DNA evidence, and participated in a suppression hearing on these issues. See Counsel's affidavit, page 2; ***C.R. II:119–22, VII: 1197-1202; R.R. VII***: passim. ....
>
> 14. Mr. Ray and Mr. Moore researched and ***filed a motion*** regarding the disproportionate application of the death penalty. See Counsel's affidavit, page 2; ***C.R. III-IV***: passim. ....
>
> 17. Mr. Ray and Mr. Moore ***filed numerous other motions*** in this case, including:
>
> - motions for notice of extraneous offenses. (***C.R. I:21-25***)
> - motions for discovery. (***C.R. I:26-30***)
> - motions for the appointment of an investigator, a mental health expert, a DNA expert, and a mitigation expert. ***(C.R. I:35, 48-50, 61-64, 65-67***)
> - motions regarding jury instructions and challenges to the capital punishment statute. (***C.R. I:72-76, 78-81, II:138-40, 141-44, 162-64, VII:1204-35***).

(Emphasis supplied) FFCL at 1565-1566. Suggestion Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

Moreover, Alley even copied claims from the Crutsinger direct appeal brief written by trial counsel, which argued the substance of the several pre-trial motions, such as the disproportionate application of the death penalty based on the wealth of the county. Alley appended to Crutsinger's Writ, trial counsel's open records requests concerning the application of the death penalty in the various counties, and governmental response in support of the motion. *Compare* Direct Appeal POE 1 *with* Writ POE 14 and accompanying Appendix.

The FFCL similarly disposed of the allegations of trial counsel's "failure to conduct ***any*** investigation" in preparation of the guilt/innocence and punishment phases. (Emphasis supplied). The FFCL found, among other things, that "22. Counsel and their investigators interviewed family members and presented the testimony of those who would be helpful." Family member testimony was readily available to Alley if he had read the punishment transcripts of the trial record.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether the appointment by a convicting court of a lawyer, who was not competent to represent the indigent, death-sentenced prisoner at any stage of the initial state collateral proceeding, contrary to the state statute's guarantee of a right to competent counsel, results in a denial of a federal 14th Amendment right of access to courts, and is in conflict with *Johnson v. Avery* and *Wolff v. McDonnell*

The Texas Legislature in 1995, enacted TEX. CODE CRIM. PROC. Article 11.071. Section 1 provides: This "article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death." TEX. CODE CRIM. PROC. Art. 11.071 §1. The procedure requires that the convicting court shall appoint the Office of Capital and Forensic Writs (Writ Office) to represent the Applicant (unless he chooses to proceed *pro se*), or unless the Writ Office does not accept or is prohibited from accepting an appointment. If the Writ Office declines the appointment, the convicting court must appoint counsel from the TCCA's list of qualified attorneys approved for Art. 11.071 appointments.

In either instance, the Texas statute provides that the Applicant "*shall* be represented by *competent* counsel, ..." (Emphasis supplied) Art. 11.071 § 2 (a) (c). This language in not precatory.

As an overview, the State of Texas denied Mr. Crutsinger his initial right to one full and fair opportunity to present his claims concerning violations of his fundamental constitutional rights in a single, comprehensive post-conviction writ of habeas corpus as guaranteed him by state statute because in 2003 the convicting court appointed a lawyer, who was incompetent at all stages of the proceeding. In 2019, the State of Texas continued to deny Mr. Crutsinger his right of access to courts. He had no avenue to present the documented evidence of Richard Alley's incompetence in any proceeding before the TCCA (not in the Art. 11.071 § 5 proceeding because of TCCA's

interpretation of the statute, and not in the Suggestion proceeding because the TCCA denied his request). Thus, the initial collateral proceeding could not be reopened and new competent state habeas appointed so Mr. Crutsinger would finally have his right to one full and fair opportunity to present his claims concerning violations of his fundamental constitutional rights..

The denial of all access to courts from 2003 to the present day resulted in a federal constitutional due process violation, and is in conflict with *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). ("The right of access to the courts ... is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.").

A. The State of Texas denied Mr. Crutsinger access to courts in the 2003-2007 initial collateral proceeding

The State of Texas denied Mr. Crutsinger access to courts in his 2003-2007, initial collateral proceeding by appointing Richard Alley, who was not competent to represent Crutsinger at any stage of the proceeding. *Graves* held that "[t]he reference to 'competent counsel' in both subsections (a) and (c) concerns habeas counsel's qualifications, experience, and abilities at the time of his appointment;" *Ex parte Graves*, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002).

But *Graves* only gives lip service to consideration of counsel's qualifications, experience, and ability. In actuality, the *Graves*' "competence" is limited to a lawyer holding a Texas license to practice law at the time of appointment. *See Ex parte Graves*, 70 S.W.3d 103, 118 (Tex. Crim. App. 2002) (Price, J., dissenting) ("'Competent counsel' ought to require more than a human being with a law license and a pulse. Today the majority requires nothing more than that to ensure society's interest in fundamental fairness.").

So as applied in the *Crutsinger* case, the inquiry of whether a lawyer is competent is limited to whether Alley held a law license at the time of the 2003 appointment by the convicting court. Because he did, Alley was competent. It was of no consequence to the TCCA that the TCCA itself removed Alley in 2006 from the approved list while the Crutsinger Writ was pending. Nor does his final product of representation, the *Crutsinger* Writ, have any bearing on whether Alley was competent. *Ex parte Graves*, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002).

And in 2006 even though the TCCA removed Alley from the list of qualified attorneys to handle Art. 11.071 cases, the TCCA did not replace Alley with another lawyer. And Alley did not seek to withdraw and have new counsel appointed. In 2007, the TCCA simply adopted the trial court's findings on the Writ and denied relief to Crutsinger on the basis of representation—or lack thereof—afforded by Alley, the very attorney it had stricken from the list of qualified habeas counsel months earlier. *See Ex Parte Crutsinger*, 2007 WL 3277524 (Tex. Crim. App. Nov. 7, 2007).

The 2002 *Graves* holding remains entrenched to this day. *See Ex parte Alvarez*, 468 S.W.3d 543, 545 (Tex. Crim. App. 2015) (Yeary, J., concurring in which Johnson and Newell, JJ., joined) ("Graves held that the statute plainly refers to the qualifications of the appointed attorney at the time of the appointment – that the statutory guarantee of "competent counsel" only "concerns habeas counsel's qualifications, experience, and abilities at the time of his appointment... For these reasons, we ultimately concluded that Article 11.071, Section 2, while it assures the death row inmate of the "appointment of competent counsel," nevertheless provides him no basis for a subsequent writ application even if that competent counsel actually performs incompetently. *Id*. In my view, recent developments in federal habeas procedure, as well as, to a certain extent, the rationale underlying those new developments, counsel that the Court should revisit the holdings of *Graves*.").

Because Alley was not competent at any stage of the 2003-2007 initial collateral litigation, Crutsinger was denied his statutory right, and federal constitutional due process right, to one full and fair opportunity to present his claims concerning violations of his fundamental constitutional rights in a single, comprehensive post-conviction writ of habeas corpus. *Graves* at 117. That denial of access to courts by the State of Texas is in conflict with *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (" the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself.... In the case of all except those who are able to help themselves ... the prisoner is, in effect, denied access to the courts unless ... help is available).

B. The State of Texas denied Mr. Crutsinger access to court in an Art. 11.071 § 5 proceeding

In *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002), Mr. Graves filed a subsequent writ under Art. 11.071 § 5. Mr. Graves argued that the 1995 Habeas Corpus Reform Act created a statutory right to "competent" counsel in habeas proceedings. The *Graves* Court held: "We agree with that proposition." *Graves,* 70 S.W.3d at 113.

Mr. Graves further argued that the phrase "competent counsel" signifies the final product of representation, not the initial qualifications for appointment, and if counsel is not constitutionally effective, then an Applicant can proceed under Art. 11.071 § 5 complaining of counsel's deficient performance. *Id*. at 113. The TCCA disagreed with those propositions.

Graves held instead:

- "there is no constitutional right to effective assistance of counsel on a writ of habeas corpus," and the Texas 1995 Habeas Corpus Reform Act did not create one in death penalty cases. *Id.* at 110, 113;
- "Art. 11.071 establishes procedures for writs of habeas corpus in all Texas death penalty cases and creates a statutory right to representation." *Id*. at 114

- "The reference to 'competent counsel' in both subsections (a) and (c) concerns habeas counsel's qualifications, experience, and abilities at the time of his appointment;" *Id*. at 114;

- "The words of the statute themselves state that counsel shall be 'competent' at the time he is appointed." *Id*. at 114; and

- "All of these provisions concern the initial appointment of counsel and continuity of representation rather than the final product of representation." *Id*. at 114.

In denying the argument of Mr. Graves, the TCCA noted that the statute was enacted "to prevent repetitious writs, including variations on claims which had been previously rejected or claims which could have been brought in the prior application," and that a "claim of ineffective assistance of the prior habeas counsel would simply be the gateway through which endless and repetitious writs would resurrect." *Id*. at 115. The TCCA reasoned that if the legislature had intended constitutional IAC claims to be an exception to the bar on subsequent applications, the legislature would have, but did not, make that exception explicit, just as it had with the three statutory exemptions that it specified. *Id.* at 115.

So at bottom, *Graves* holds there is no constitutional or statutory right to effective assistance of counsel in an Art. 11.071§ 5 proceeding, and that the phrase "competent counsel" does not apply "to the final product or services rendered by that otherwise experienced and competent counsel." *Id*. at 116.

Further, the TCCA does not understand "competence" to mean that counsel must necessarily have applied his legal experience and ability while carrying out the responsibilities owed the client as set out in Art. 11.071 – *e.g.*, § 3 a (conducting the investigation); § 4(a) (pleading cognizable claims); § 8 (b) (filing proposed FFCL); § 2 (e) (moving for the appointment in federal court), *etc.* – and for the duration of the representation.

The practical effect of the TCCA's interpretation of the statute, was that Mr. Crutsinger could not, and thus did not, file a subsequent writ under Art. 11.071 § 5 to present his evidence of Alley's incompetence in the form of an IAC claim. Had Mr. Crutsinger filed an Art. 11.071 § 5 subsequent writ, it would have been met with "an abuse of the writ" order from the TCCA. *See Graves*, 70 S.W.3d at 115 ("We do not have the authority to judicially create a fourth exception [ineffective assistance of initial state habeas counsel] to the statute."). Alley's incompetence claim did not satisfy any one of the three exceptions to the statute. The State of Texas denied Mr. Crutsinger access to courts in an Art. 11.071 § 5 proceeding. *See Burns v. Ohio*, 360 U.S. 252, 257 (1959) ("[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty.").

C. The State of Texas denied Mr. Crutsinger access to courts in a Suggestion to Reconsider proceeding

In 1997, the TCCA had adopted TEX. R. APP. PROC. 79.2(d) by which the TCCA retained jurisdiction to reconsider on its own initiative the initial post-conviction application for writ of habeas corpus. *Ex parte Moreno*, 245 S.W.3d 419, 427 (Tex. Crim. App. 2008).[1]

Accordingly, on August 17, 2019, Mr. Crutsinger filed a Suggestion That The Court Reconsider, On Its Own Motion, The Initial Application For Post-Conviction Writ of Habeas Corpus

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[1] In *Ex parte Moreno*, the TCCA noted that Mr. Moreno filed an Art. 11.071 § 5 writ, raising a *Penry I* claim. *Ex parte Moreno*, 2007 WL 9683867, at *1 (Tex. Crim. App. 2007). "Equally divided as to how to dispose of the applicant's second subsequent writ application (four votes to allow the applicant to proceed versus four votes to dismiss), [the TCCA] issued an order on May 9, 2007, announcing that we declined to take any action. The next day, May 10, 2007, the date the applicant was scheduled to be executed, he filed a 'suggestion' that the Court reconsider ground ten of his initial habeas application on its own initiative...." *Ex parte Moreno*, 245 S.W.3d 419, 422 (Tex. Crim. App. 2008). The TCCA reconsidered and granted relief.

instead. (Suggestion). In the Suggestion, Mr. Crutsinger acknowledged that he was mindful that the TCCA had repeatedly held that the Texas Legislature had not intended ineffective assistance of habeas counsel claims to be an exception to the bar on subsequent applications. " *Ex parte Graves*, 70 S.W.3d 103, 113 (Tex. Crim. App. 2002). However, Mr. Crutsinger pointed out that the TCCA did stress that "the Legislature has consistently shown a great interest in the appropriate appointment of competent counsel in these very serious cases." *Graves* at 115.

To that end, Mr. Crutsinger asked the TCCA to look to the professional rules of conduct, as had the Texas Supreme Court, "to inform" the substantive law when a client has been injured by his former lawyer and seeks a remedy – and <u>not</u> to view his request as a "gateway" device to resurrect a procedurally defaulted claim. Suggestion at 2, 49. Indeed, Mr. Crutsinger filed *no* ineffectiveness claim at all. The Suggestion's focus was on proving that Alley lacked the qualifications, experience and ability at every stage in the *Crutsinger* representation. *See e.g., Gillespie v. Hernden*, 516 S.W.3d 541, 546 (Tex. App. – San Antonio, 2016) *citing Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 158 n.2 (Tex. 2004) ("The Disciplinary Rules are not binding as to substantive law regarding attorneys, although they inform that law."). *See also Gillespie*, 516 S.W.3d at 546 ("The Texas Supreme Court considered the client protections incorporated in [TEX. DISCIPLINARY R. PROF'L CONDUCT] RULE 1.15 to determine that a provision in a contingent fee contract was unconscionable as a matter of law"), *citing Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 563 (Tex. 2006).

Mr. Crutsinger brought to the attention of the TCCA that the phrase "competent counsel," found in Art. 11.071, also appears in the State Bar of Texas (SBOT) Rules of Professional Conduct. *See* SBOT Rule of Prof. Conduct Terminology, TEX. PROF. CONDUCT R. 1.01, and Comments to Prof. Conduct R. 1.01. The Scope of the Professional Conduct Rules recite the rules are "rules of

reason" and "the Comments ... provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules." Preamble: Scope 10.

For example, he discussed, among other things, TEX. R. PROF. CONDUCT 1.01, Comment 1, which states that "[c]ompetent representation contemplates appropriate application" of a lawyer's experience and abilities. *See* Suggestion at 55. He then addressed how the experience and abilities of the lawyer should be applied to the Art. 11.071 responsibilities owed the client. *See* Suggestion at 67-76. Mr. Crutsinger ultimately showed that the only application of Richard Alley's experience and ability was that of a word processor cut-and-pasting claims from one writ into the next.

In the Suggestion, Mr. Crutsinger argued that the TCCA should Reconsider the Initial Application, because Richard Alley was not competent (as informed by the professional conduct rules) at the time of the appointment, (Suggestion at 49-66); was not competent for the duration of the representation, (Suggestion at 67-76); and in the alternative, if the TCCA found Alley to be competent, then the actions of Alley, as an agent of Crutsinger, were so meaningless as to constitute abandonment (Suggestion at 78-81).

Mr. Crutsinger brought forward his evidence consisting of seventy-three (73) pages of Analysis of, and 1.6 GB of data consisting of, the federal court disciplinary record in *Lagrone*, and the legal papers in the *Carpenter*, *Williams*, *Reese*, *Scheanette*, *Kerr* and *Crutsinger* state habeas litigation that proved Alley was not competent at any time in the *Crutsinger* litigation.

Mr. Crutsinger alleged both a violation of state statutory and federal constitutional rights. He pled:

> "Mr. Crutsinger, an indigent inmate, was denied his statutory right, and federal constitutional due process right, to one full and fair opportunity to present his claims in a single, comprehensive post-conviction writ of habeas corpus. *Graves* at 117; U.S. CONST. amend. XIV; *Burns v. Ohio*, 360 U.S. 252 (1959). As Judge Price wrote: "In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court explained that: "[O]nce

> the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." Id. at 257, 79 S.Ct. 1164." *Graves* at 123 (Price., J. dissenting)."

Suggestion at 66, 77, 81. Mr. Crutsinger asked the TCCA on its own suggestion to reopen the initial state habeas proceeding, appoint new state habeas counsel, and allow Mr. Crutsinger to proceed anew.

The TCCA was intransigent. It denied Mr. Crutsinger access to courts in this proceeding as well.[2] *See* Appendix 1 Email from Sian R. Schilhab, General Counsel | Texas Court of Criminal Appeals, dated 8-23-2019 to Counsel @ 12:05 pm ("The Court is denying Applicant's suggestion to reconsider the initial state habeas application in this case. The Court is also denying Applicant's Motion to Stay his execution. No order will issue.").

D. The State of Texas has denied Mr. Crutsinger access to courts entirely – in the 2003 initial state habeas proceeding and in the 2019 additional state habeas proceedings – in violation of his U.S. Constitutional Fourteenth Amendment rights, and in conflict with *Johnson v. Avery* and *Wolff v. McDonnell*

"The right of access to the courts ... is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). The TCCA

[2] In federal habeas, Mr. Crutsinger has been equally stymied by the lower federal courts in vindicating his constitutional rights. Despite his extraordinary diligence for the preceding eleven (11) years, the lower federal courts persist in their refusal to provide § 3599 funding, which assures that Crustinger's claims will "never ... be heard"—and Congress presumably "did not intend for the express requirement" of investigative services "to be defeated in this manner." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). *See also Robertson v. Davis*, (SCT No. 19-70006 to be conferenced 10-1-2019)(same denial of funding issue); *Jones v. Davis*, petition for writ of certiorari due 9/16/2019, same denial of funding issue in *Jones v. Davis*, 927 F.3d 365, 373 (5th Cir. 2019).

is aware of this fundamental principle quoting this very statement in *In re Bonilla*, 424 S.W.3d 528, 531 (Tex. Crim. App. 2014).

This right of access to courts extends to collateral proceedings. The Supreme Court in *Wolff*, *citing Johnson v. Avery*, "emphasized that the writ of habeas corpus was of fundamental importance in our constitutional scheme, and since the basic purpose of the writ 'is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.'" *Wolff*, 418 U.S. at 578, *citing Johnson v. Avery*, 393 U.S. 483, 485 (1969). *See also Burns v. Ohio*, 360 U.S. 252, 257(1959) ("[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty.").

This Court has held there is a denial of access to courts when a State required prisoners to pay a $4 filing fee, *Smith v. Bennett*, 365 U.S. 708 (1961), or refused to provide a transcript or equivalent recordation of prior habeas corpus hearings for use in further proceedings when the prisoner was not otherwise able to obtain it. *Long v. District Court*, 385 U.S. 192 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956). More particularly, in *Johnson v. Avery*, 393 U.S. 483, 488 (1969), this Court wrote that "the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself.... In the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access to the courts unless such help is available." Having been appointed a word processor for a lawyer in 2003, Mr. Crutsinger too was denied access to the courts despite the Texas statute's guarantee of competent counsel to present his constitutional claims.

TEX. GOV'T CODE § 311.021(1) provides: "In enacting a statute, it is presumed that ... compliance with the constitutions of this state and the United States is intended[.]"). This provision

applies to Article 11.071, which was enacted by the 74th Legislature. *See* TEX. GOV'T CODE § 311.002(2) ("This Chapter applies to ... each amendment, repeal, revision, and reenactment of a code or code provision by the 60th or a subsequent legislature.").

However, Article 11.071 does not define competent. The *Graves* opinion identified only a single act of ineptness of counsel for which the Texas legislature provided a remedy. *Graves*, 70 S.W.3d at 114, and n.45 (TCCA authorized to appoint new counsel or hold habeas counsel in contempt if the appointed attorney fails to timely file a habeas application for his client, or fails to file an application at all, Art. 11.071, § 4A). Other than that section, the statute contains no provision to address and remedy Mr. Crutsinger's predicament – a convicting court appointing a lawyer who is incompetent at all stages of the proceeding, contrary to the statute's mandate in Art. 11.071, § 2 (a) (c).

When on August 23, 2019, the TCCA denied without order Mr. Crutsinger's Suggestion, the state court firmly and irrevocably denied all access to courts to Mr. Crutsinger, ensuring he will be executed on September 4, 2019 without any meaningful state habeas review. The TCCA did this, despite the TCCA's agreement in *Graves* that the 1995 Habeas Corpus Reform Act created a statutory right to "competent" counsel in habeas proceedings. *Graves*, 70 S.W.3d at 113. The denial was in conflict with *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

And the TCCA did this in conflict with *Wolff*, knowing that "[t]he right of access to the courts ... is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Bonilla*, 424 S.W.3d at 531, *citing Wolff*, 418 U.S. at 579.

Mr. Crutsinger neither has, nor has had, any opportunity in state habeas to present to the judiciary allegations concerning violations of fundamental constitutional rights because the State of Texas has denied him any avenue to access the state courts in habeas.

CONCLUSION

For all of the aforementioned reasons, Mr. Crutsinger respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

Appendix 1 Email from Sian R. Schilhab, General Counsel | Texas Court of Criminal Appeals, dated 8-23-2019 to Counsel @ 12:05 pm

Appendix 2 Crutsinger's Suggestion to Reconsider the Initial State Habeas Application, including the Appendix List, but w/o the Exhibits themselves