No. 19A226

IN THE
Supreme Court of the United States

BILLY JACK CRUTSINGER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Application for Stay of Execution
Pending Disposition of Petition for Writ of Certiorari
to the Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Should the Court utilize its equitable discretion to stay Crutsinger's upcoming execution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

BRIEF IN OPPOSITION

The State of Texas respectfully submits this brief in opposition to the application for stay of execution filed by Billy Jack Crutsinger.

STATEMENT

I. Initial State Court Proceedings

Almost sixteen years ago, Crutsinger was convicted of capital murder for the stabbing deaths of two elderly women, and he was sentenced to death. *Crutsinger v. State*, 206 S.W.3d 607, 608 (Tex. Crim. App. 2006). The Court of Criminal Appeals of Texas (CCA) affirmed on direct appeal. *Id.* at 613. This Court denied his petition for writ of certiorari. *Crutsinger v. Texas*, 549 U.S. 1098 (2006).

Crutsinger also engaged in state collateral review by filing an application for habeas relief. ROA.1076–219.[1] The application, however, was denied more than a decade ago. *Ex parte Crutsinger*, No. WR-63,481-01, 2007 WL 3277524, at *1 (Tex. Crim. App. Nov. 7, 2007).

II. Initial Federal Habeas Proceeding

Crutsinger then petitioned for federal habeas relief. ROA.192–338. The petition and relief were denied some seven years ago. ROA.425–57.

[1] "ROA" refers to the record on appeal utilized by the Fifth Circuit in *Crutsinger v. Davis*, No. 19-70012, 2019 WL 4010718 (5th Cir. Aug. 26, 2019).

Crutsinger then moved to alter or amend final judgment, but that too was denied. ROA.462–78, 537–44. The Fifth Circuit refused to issue a certificate of appealability and otherwise affirmed the district court. *Crutsinger v. Stephens*, 576 F. App'x 422 (5th Cir. 2014) (*Crutsinger I*). This Court declined to issue a writ of certiorari. *Crutsinger v. Stephens*, 135 S. Ct. 1401 (2015).

III. Postjudgment Federal Habeas Proceedings

About two and a half years ago, Crutsinger moved the district court for funding to employ a DNA expert. ROA.593–606. The request was denied and so was the motion for reconsideration of that denial. ROA.678–91, 692–706, 735–43. This decision was affirmed on appeal. *Crutsinger v. Davis*, 898 F.3d 584 (5th Cir. 2018) (*Crutsinger II*). The Court then denied Crutsinger's petition for writ of certiorari. *Crutsinger v. Davis*, 139 S. Ct. 801 (2019).

A little more than a year ago, Crutsinger moved for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure in light of this Court's decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). ROA.751–848. The district court found that Crutsinger's motion was, in fact, a second or successive petition, so it transferred the case to the court

of appeals for authorization proceedings. ROA.1254–64. The Fifth Circuit disagreed with the district court's characterization of Crutsinger's motion and remanded the case so that the district court could consider the motion under the traditional Rule 60(b) rubric. *Crutsinger v. Davis*, 929 F.3d 259 (5th Cir. 2019) (*Crutsinger III*). A couple weeks later, the Fifth Circuit denied Crutsinger's attendant motion for stay of execution. *Crutsinger v. Davis*, 930 F.3d 705 (5th Cir. 2019) (*Crutsinger IV*).

On remand, the district court entertained supplemental briefing on Crutsinger's motion for relief, ROA.1300–09, 1349–61, but ultimately denied the request to reopen the proceeding, ROA.1388–1413. The Fifth Circuit declined to issue a COA or stay his execution. *Crutsinger v. Davis*, No. 19-70012, 2019 WL 4010718 (5th Cir. Aug. 26, 2019) (*Crutsinger V*).

IV. Recent State Court Proceedings

On February 6, 2019, the state trial court set Crutsinger's execution for September 4, 2019. Order Setting Execution Date, *State v. Crutsinger*, No. 0885306D (213th Dist. Ct., Tarrant County, Tex. Feb. 6, 2019). Then, just over a week ago, Crutsinger moved—though he called it a "suggestion"—the CCA rehear, on its own motion, his initial state habeas case. Suggestion That the Court Reconsider, on Its Own Motion, the

Initial Application for Post-Conviction Writ of Habeas Corpus, *Ex parte Crutsinger*, No. WR-63,481-01 (Tex. Crim. App. Aug. 19, 2019) [hereinafter "Suggestion"]. He also moved to stay his execution. Motion to Stay Execution, *Ex parte Crutsinger*, No. WR-63,481-01 (Tex. Crim. App. Aug. 19, 2019). Both requests were denied without written order. Postcard from Deanna Williamson, Clerk, Tex. Court of Criminal Appeals, to Billy Jack Crutsinger, Movant (Aug. 23, 2019) (on file with the CCA).

From this postcard denial does Crutsinger seek a writ of certiorari and a stay of execution. Pet. Writ Cert. 1–37; Mot. Stay Execution 2–5. The State of Texas opposes both, the latter opposition discussed below.

REASONS FOR DENYING THE STAY APPLICATION

Crutsinger seeks a stay of execution based on a proceeding over which this Court lacks jurisdiction for two reasons—it is an entirely state-law matter, and it is not an appealable final decision. In any event, the Court should deny Crutsinger's request because he fails to prove likely success on the merits, that the equities favor him, or that he exercised diligence in bringing this case to the Court's attention.

I. The Stay Standard

A stay of execution is an equitable remedy and "[i]t is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). A "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). In 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). "The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be better than negligible." *Id.* The first factor is met, in this context, by showing "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). If the "applicant satisfies the first two factors, the traditional stay inquiry calls

for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435. "These factors merge when the [state] is the opposing party" and "courts must be mindful that the [state's] role as the respondent in every . . . proceeding does not make the public interest in each individual one negligible." *Id.*

"Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence" and courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Thus, "[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)). Indeed, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585.

II. Crutsinger Fails to Show Likely Success on the Merits.

Crutsinger initially fails in proving entitlement to a stay because he fails to prove this Court has jurisdiction to consider his petition for writ of certiorari. He claims jurisdiction is present because the CCA

denied the Suggestion without "expressly and unambiguously" applying "an adequate and independent state law ground," but "instead answer[ing] the federal question in the negative." Mot. Stay 3; *see also* Pet. Writ Cert. 2–3. Crutsinger takes well-worn, but ultimately inapplicable law to prove jurisdiction. He is wrong, however, and the Court lacks it.

Crutsinger discusses nothing in the way of his procedural vehicle in state court—his Suggestion. The reason it is titled as a suggestion, though it is undoubtedly a motion, is because "[a] motion for rehearing an order that denies habeas corpus relief . . . may not be filed," Tex. R. App. P. 79.2(d), though the CCA "may on its own initiative reconsider [a] case," *id*. Thus, Crutsinger's filing is not a proper one under state law, reflected in the pretense of its title.

The CCA's normal review process of habeas cases occurs in its role as the "ultimate factfinder" and arbiter of law after the trial court acts as "'the collector of evidence.'" *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) (quoting *Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004)). That happened in this case—more than a decade ago. *Ex parte Crutsinger*, No. WR-63,481-01, 2007 WL 3277524, at *1 (Tex.

Crim. App. Nov. 7, 2007). Crutsinger's Suggestion is nothing more than an attempt to rehear a case ten years too late.

This failure to conform with state law deprives the Court of jurisdiction. That is because, "[t]o lay the foundation for such right of review[,] it is necessary to bring the Federal question in some *proper* manner to the consideration of the state court whose judgment it is sought to review." *Chesapeake & Ohio Ry. Co. v. McDonald*, 214 U.S. 191, 192 (1909) (emphasis added). But "if this is not done, the Federal question cannot be originated by assignments of error in this [C]ourt." *Id.* at 192–93. Because Crutsinger's Suggestion did not comply with state law, jurisdiction is absent.

If the use of an improper state-law vehicle does not deprive the Court of jurisdiction, the consideration of only state law does. The CCA's ability to rehear a habeas case is wholly a matter of state law—it enjoys the unfettered prerogative to reopen long-dormant habeas proceedings. But that discretion is exercised only "under the most extraordinary" or "compelling circumstances." *Ex parte Moreno*, 245 S.W.3d 419, 427–28 (Tex. Crim. App. 2008). There is no federal law involved. And no federal law consideration means no federal jurisdiction. *See Foster v. Chatman*,

136 S. Ct. 1737, 1745 (2016) ("This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'" (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

Crutsinger's retort is that silence somehow equals federal law consideration. Mot. Stay 3. But there is no presumption that a state court passes upon a federal question in the postconviction context. Crutsinger's argument to the contrary, that state courts consider federal law unless they say otherwise, skips the "predicate" to finding federal law consideration—that "the decision" of the state court "fairly appear[s] to rest primarily on federal law or to be interwoven with federal law." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). "In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds," like here, where the postcard sent to Crutsinger by the CCA simply said the Suggestion was "denied," "it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *Id.* at 737. Indeed, 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. It is not difficult here—the word "denied" expresses no hint of federal law consideration,[2] so not only does Crutsinger fail to prove likely success on the merits, he fails to prove this Court can even reach the merits.

Crutsinger next fails in proving likely success because he raises no claim, but instead complains only of process. Mot. Stay 3–4. But that process is not constitutionally guaranteed as to substance or structure. *See Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). And his constitutional foundation, his "right of access" to the courts, does not require appointment of postconviction counsel. *Id.* at 11 (plurality opinion) ("[I]t would be a strange jurisprudence that permitted the extension of that holding to partially overrule a subsequently decided case such as [*Pennsylvania v.*] *Finley*[, 481 U.S. 551 (1987)] which held that prisoners seeking judicial relief from their sentence in state court proceedings were not entitled to counsel."). Indeed, the "right of access" does not protect the ability "to *discover* grievances, and to *litigate*

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[2] Even when a motion for rehearing may be entertained by the CCA, instead of the inherently state law authority by which the CCA may reconsider state habeas decisions on its own initiative, it provides no inkling of federal law consideration. *See* Tex. R. App. P. 79.2(c) ("A motion for rehearing . . . may be grounded only on substantial intervening circumstances or other significant circumstances which are specified in the motion.").

effectively once in court." *Lewis v. Casey*, 518 U.S. 343, 354 (1996). Indeed, "[o]ne is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation. Plaintiffs must plead sufficient facts to state a cognizable claim." *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). But without a "constitutional right to counsel," whatever its basis, "[Crutsinger] could not be deprived of the effective assistance of counsel." *Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) (per curiam). As such, he cannot prove a strong case of likely success (of claims that do not exist).

III. Crutsinger Fails to Prove Irreparable Injury.

Crutsinger's main complaint of harm is that he was provided a professionally incompetent state habeas attorney. Mot. Stay at 3–4. That claimed harm is wholly speculative and, assuming it to be true, has been abated in at least a couple of ways.

The harm is speculative because Crutsinger refuses to identify any claim that state habeas counsel should have raised but did not. *See* Pet. Writ Cert. 31 ("Indeed, . . . Crutsinger filed *no* ineffectiveness claim at all."). When attorney incompetence is alleged, there must be harm—that

the result of the proceeding would have probably changed but for deficient representation—even when that deprivation occurs during state collateral review. *See Martinez v. Ryan*, 566 U.S. 1, 14 (2012) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In other words, the prisoner must propose a claim that went unpresented because of constitutionally substandard performance. *See id.* ("[A] prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one."). But because Crutsinger eschews any semblance of raising a claim, his assertion of irreparable harm is "pure speculation," "mere possibility," and "nothing more than a theoretical possibility." *Harrington v. Richter*, 562 U.S. 86, 100, 112 (2011). This does not prove ineffectiveness any more than it proves irreparable injury.

But even if speculation were to substitute for actual harm, it has been abated. For one, Crutsinger has exceptionally capable representation now, and has had that caliber of representation for more than a decade. ROA.41. And that is not just the opinion of the State, but of the judiciary. *See Crutsinger IV*, 930 F.3d at 708 ("Crutsinger, however, has been well-represented by his counsel for approximately eleven years."). And not least of all reflected in the decade's worth of federal

habeas litigation punctuated by five opinions by the Fifth Circuit over that span. *See supra* Statement II, III.

For another, this Court has created a mechanism for reaching ineffective-assistance-of-trial-counsel claims—by which, arguably, a variety of underlying claims can be bootstrapped—for the very complaint that Crutsinger raises at present—the ineffective assistance of state habeas counsel. *See Trevino v. Thaler*, 569 U.S. 413, 428 (2013). And the federal courts have provided de novo review of the ineffective-assistance-of-trial-counsel claim Crutsinger chose to advance. *See Crutsinger I*, 576 F. App'x at 425–28. That is the remedy for inadequate state habeas counsel. *See Martinez*, 566 U.S. at 17 (the ineffectiveness of state habeas counsel "merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted," but it "does not entitled the prisoner to habeas relief"). For this and the above reasons, Crutsinger fails to prove irreparable injury absent a stay.

IV. The Equities Favor the State.

As noted above, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Crutsinger "entered the home of eighty-nine-year-old Pearl

Magouirk and her seventy-one-year-old daughter Patricia Syren and stabbed them both to death." *Crutsinger*, 206 S.W.3d at 609. Since those brutal murders, Crutsinger has litigated his conviction and sentence for almost sixteen years. And "he was given a full and fair opportunity to litigate the merits of his [federal] habeas petition." *Crutsinger V*, 2019 WL 4010718, at *3. Complaints about hypothetical harm from the appointment of allegedly ineffective state habeas counsel should not delay sentence any longer. *See Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.").

V. Crutsinger Has Failed to Exercise Due Diligence.

As also noted above, "[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.'" *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650). Crutsinger's execution was set approximately seven months ago, yet he waited one week to file his Suggestion in state court. *See supra* Statement IV. And he cannot profess ignorance of the current complaint—he claimed that his state habeas attorney was incompetent when he was before this Court nearly five years ago. *See,*

e.g., Petition for a Writ of Certiorari 10, *Crutsinger v. Stephens*, 135 S. Ct. 1401 (Nov. 3, 2014) (No. 14-6992) ("In the years prior to his work on . . . Crutsinger's case, [state habeas counsel's] integrity, litigation skills, candor and professionalism had been repeatedly questioned both by the Bar and by different courts of law."). Thus, Crutsinger's complaint "could have been brought [long] ago" and "[t]here is no good reason for this abusive delay." *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam).

CONCLUSION

For the above reasons, Crutsinger fails to demonstrate entitlement to a stay of execution and his request for one should be denied.

Respectfully submitted,

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