No. 19A226

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

REPLY
TO BRIEF IN OPPOSITION (BIO)
TO APPLICATION FOR STAY OF EXECUTION

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The Petitioner, BILLY JACK CRUTSINGER, files this Reply to the Brief in Opposition (BIO) to Mr. Crutsinger's Application for Stay of Execution. Because Respondent makes the identical arguments that she raised in the BIO to Mr. Crutsinger's Petition to Writ of Certiorari, Mr. Crutsinger incorporates his Reply to the BIO to the Petition herein, and provides a shortened Reply.

I. Mr. Crutsinger has shown likely success on the merits.

A. The TCCA denial of the Suggestion is a final order. This Supreme Court has jurisdiction to review it

Contrary to the BIO at 4, and 6, this Court has jurisdiction. The denial of the state Rule 79.2(d) Suggestion in *Crutsinger* is a final order reviewable by this Court pursuant to 28 U.S.C. § 1257(a). The statute does not limit jurisdiction to "final judgments." *See* BIO to Cert. Pet. at 9.

A TEX. R. APP. PROC. 79.2(d) proceeding is akin to a FED. R. CIV. PROC. 60(b)(6) proceeding. Both are equitable proceedings. TEX. R. APP. PROC. 79.2(d) provides: "The Court may on its own initiative reconsider the case." The TCCA reconsiders "an initial writ *after* federal proceedings have been resolved against the applicant." *Ex parte Moreno*, 245 S.W.3d 419, 428 (Tex. Crim. App. 2008). Mr. Crutsinger followed the Rule 79.2(d) procedures articulated in *Moreno*. Mr. Crutsinger styled his pleading a "Suggestion," pled his state and federal claims, and timely-filed the Suggestion after federal proceedings were resolved against him. *See* Cert. Pet. at 2, 32-33, 25-36; Suggestion at 66, 77, 81.

The TCCA denied Mr. Crutsinger's Rule 79.2(d) Suggestion on the merits of the federal claim. If the TCCA wanted to deny the Suggestion without a merits ruling, it would have expressly stated so, as it did in the August 2019 *Johnson* case, and in the April 2019 *King* case, and in the March 2016 *Ward* case, and in the Nov 2014 *Ruiz* case. *See* Appendices 4-7 (TCCA's orders

appended to the Reply to the BIO to the Petition for Writ of Certiorari).

B. Because the TCCA did not make a "plain statement" that its denial of the Suggestion was based on independent and adequate state law grounds, this Court has jurisdiction under the presumption favoring the assertion of federal jurisdiction in ambiguous cases

Choosing not to follow the "plain statement rule" articulated by this Court in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), which was extended to habeas review in *Harris v. Reed*, 489 U.S. 255, 265 (1989), the TCCA failed to expressly and unambiguously state that it had based its denial of the federal access-to-courts claim on an adequate and independent state law ground. Instead the TCCA answered the federal question (whether there was a violation of Mr. Crutsinger's due process rights of access to courts) in the negative.

Contrary to the Respondent's assertion, it is not "Crutsinger's retort that silence somehow equals federal law consideration." BIO at 9. It is this Court's presumption arising from the fact that the TCCA did not make a "plain statement" – a presumption the Respondent failed to rebut.

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).

II. Mr. Crutsinger proved irreparable injury.

The BIO asserts Mr. Crutsinger raised no claim, but complains only of process. BIO at 10. This is not correct. In his Suggestion, Mr. Crutsinger pled a state statutory claim that because the convicting court appointed incompetent counsel, Mr. Crutsinger was denied his guaranteed right in Art. 11.071 to one full and fair opportunity to present all cognizable claims concerning violations of his fundamental constitutional rights in a single, comprehensive post-conviction writ of habeas corpus. He also pled that because of the incompetent-counsel appointment, Mr Crutsinger was denied his federal 14th amendment due process rights, citing to Judge Price's dissent in *Graves* and to *Burns v. Ohio*, 360 U.S. 252, 257 (1959) ("[O]nce the State chooses to establish appellate review in criminal cases, [which it did in enacting Art. 11.071], it may not foreclose indigents from access to any phase of that procedure because of their poverty."). Both were pled in the Rule 79.2(d) Suggestion timely-filed immediately "after federal proceedings ha[d] been resolved against the applicant." *Ex parte Moreno*, 245 S.W.3d 419, 428 (Tex. Crim. App. 2008). *See* Cert. Pet. at 2, 32-33, 25-36; Suggestion at 66, 77, 81.

Mr. Crutsinger did suffer actual harm. He was "denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). *See* BIO at 11 (erroneously asserting harm is speculative).

III. The equities favor Mr. Crutsinger

Toward the end of the BIO, the Respondent impermissibly cites to, and argues the rulings of the Fifth Circuit and federal district court in Case No. 19-5755, as a reason to deny review in this case, No. 19-5715. Her arguments are misplaced. Mr. Crutsinger did not cite or argue the federal court rulings in this Case No. 19-5715, challenging the TCCA's denial of the Suggestion.

All that said, the melding of the two proceedings by the Respondent, reveals why this Supreme Court should grant certiorari in *both* cases, No. 19-5715, and No. 19-5755, and stay the execution of Mr. Crutsinger. The big-picture view reveals the grave injustice to Mr. Crusinger when the state-habeas half (Case No. 19-5715) and the federal-habeas half (Case No. 19-5755) are reviewed in combination.

Wedded as the lower state and federal courts are to finality, they have churned Mr. Crutsinger through the habeas system denying habeas relief, § 3599 representation services, and a stay of execution – even when the rulings are premature, contradictory and defy logic.

Compare

> The July 19, 2019 published order of two judges denied a stay of execution because "Crutsinger ... has been well-represented by his counsel [Brandt] for approximately eleven years, and there is no indication that, as in McFarland or Battaglia, 'he would be deprived of meaningful counsel absent a stay.'" *Crutsinger v. Davis*, 930 F.3d 705, 708 (5th Cir. 2019). Judge Graves dissented writing he would grant the stay. *Id*. at 709.

with

> The work product of that very same counsel was characterized in the August 8, 2019 Order of the district court as "border[ing] on frivolous," "completely false;" and "leave[s] a false impression," to support the denial of § 3599 representation services. *Crutsinger v. Davis*, 2019 WL 3749530, at *3 (N.D. Tex. 2019). The same two Fifth Circuit judges, who had lauded the representation for purposes of denying a stay, affirmed the district court's order as "both helpful and, more importantly, correct" for purposes of affirming the denial of funding. *Crutsinger v. Davis*, __ F.3d __, 2019

WL 4010718, at *4 (5th Cir. 8/26/2019).

Again, Judge Graves dissented and cited his dissents in earlier opinions. In one of them, Judge Graves described the district court's ruling in denying § 3599 representation services as a "circular application [that] 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 v. Davis*, 929 F.3d at 267.

and with

Even before the district court had ruled (8-8-2019), the July 19, 2019 denial-of-stay order from the same two judges prematurely dictated the outcome of the 60(b)(6) remand (Graves, J., dissented). It recites:

> "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...." Crutsinger, 930 F.3d at 707.

The lower state and federal courts are tethered to "finality." Their results-oriented rulings are in conflict with *Buck*, which rejected the notion that finality is the overriding concern in equitable proceedings in habeas. Rejecting the finality approach of th Fifth Circuit in *Haynes*, Judge Dennis wrote: "'the whole purpose of Rule 60(b) [and R.79.2(d)] is to make an exception to finality.' *Id*. (cleaned up)." *Haynes v. Davis*, 733 Fed. Appx. 766, 776 (5th Cir. 2018) (Dennis, J., dissenting), *citing Buck v. Davis*, 137 S.Ct. 759, 779 (2017).

IV. Mr. Crutsinger exercised diligence

The Respondent mistakenly asserts Crutsinger was not diligent and waited one week before his execution to file the Suggestion. BIO at 14. Mr. Crutsinger followed the 79.2(d) procedure in *Moreno*. The TCCA reconsiders a Rule 79.2(d) Suggestion on "an initial writ *after* federal proceedings have been resolved against the applicant." *Moreno*, 245 S.W.3d at 428. Hence, Mr. Crutsinger complied with state procedure at the earliest possible time in the habeas litigation.

CONCLUSION

WHEREFORE, Petitioner Crutsinger respectfully requests that this Court stay his execution scheduled September 4, 2019 pending consideration and disposition of Mr. Crutsinger's petition for writ of certiorari.

Respectfully submitted,

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