No. 19A237

IN THE
Supreme Court of the United States

BILLY JACK CRUTSINGER,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Application for Stay of Execution
Pending Disposition of Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

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

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BRIEF IN OPPOSITION

Respondent, Director Lorie Davis, 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 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).

[1] "ROA" refers to the record on appeal utilized by the lower court.

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; *Crutsinger v. Thaler*, No. 4:07-CV-703-Y, 2012 WL 369927 (N.D. Tex. Feb. 6, 2012) (*Crutsinger I*).[2] Crutsinger 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 (COA) and otherwise affirmed the district court. *Crutsinger v. Stephens*, 576 F. App'x 422 (5th Cir. 2014) (*Crutsinger II*). This Court declined to issue a writ of certiorari. *Crutsinger v. Stephens*, 135 S. Ct. 1401 (2015).

III. 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). About two weeks ago, Crutsinger moved—though he called it a "suggestion"—the CCA to 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*

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[2] The Director adopts the opinion numbering system utilized by Crutsinger. Pet. Writ Cert. 7.

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).

IV. 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). 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; *Crutsinger v. Davis*, No. 4:07-CV-00703-Y, 2019 WL 3749530, at *1–9 (N.D. Tex. Aug. 8, 2019) (*Crutsinger V*). 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 VI*).

From this decision—the fifth opinion from the Fifth Circuit—Crutsinger seeks a writ of certiorari and a stay of execution. Pet. Writ Cert. 1–29; Appl. Stay Execution 2–5. The Director opposes both, the latter opposition discussed below.

REASONS FOR DENYING THE STAY APPLICATION

Crutsinger seeks a stay of execution based on an untenable, daisy-chained argument—the denial of expert funding led to the denial of effective assistance by federal habeas counsel, which led to the denial of merits adjudication in the district court, which led to the denial of meaningful appellate review. The failure of any one of these assertions causes the argument to collapse, but the failure is absolute—each one is meritless. And without merit, there is no likely success, and without likely success, there is no basis for a stay, especially when all other factors favor the Director, including Crutsinger's lack of diligence. Accordingly, Crutsinger's execution should be permitted to proceed.

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 argues that, because he was not provided expert funding, he was denied "high-quality representation to investigate and prepare an initial federal habeas corpus petition." Appl. Stay 2. Because of this deprivation, he asserts that his petition was not "meaningfully adjudicated." *Id.* And that lack of adjudication means that appellate review—in the form of a COA proceeding—"cannot be met." *Id.* at 3. He is wrong on all fronts.

Crutsinger's argument, though not explicit, is an attempt to constitutionalize federal habeas representation. There can be no doubt that his complaint is in the form of ineffective assistance of counsel (albeit alleged to have been caused by a denial of resources rather than

professional incompetence). To be sure, Crutsinger states that he was denied "the means to conduct [a] reasonably necessary investigation into" possible claims. Appl. Stay 2. This sounds familiar because it is—it comes from the very standard for assessing counsel's effectiveness under the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). But once Crutsinger's argument is unmasked, it exposes its failure—any suggestion that there are "'substantial' 'constitutional questions'" implicated by the ineffectiveness of federal habeas counsel "is puzzling in light of the [fact] . . . that there is 'no constitutional right to counsel on habeas' and that 'there is no due process right to collateral review at all.'" *Ryan v. Gonzales*, 568 U.S. 57, 67 (2013) (citations omitted) (quoting *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 810, 814 (9th Cir. 2003)). Rather, it is "simply incorrect [to] suggest[] that, in this case, there might be a constitutional concern—much less a 'substantial' one—raised by" Crutsinger's assertion of ineffective assistance. *Id.*

Even if he was truly asserting a statutory right to effective assistance—assuming that such exists—he still loses. This is because funding under 18 U.S.C. § 3599(f) for experts, including investigators, is not guaranteed. *See Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018) ("Congress changed the verb from 'shall' to 'may,' and thus made it perfectly clear that determining whether funding is 'reasonably necessary' is a decision as to which district courts enjoy broad discretion."). Whether funding is granted is committed to a district court's "broad discretion." *Id*. And here, the district court, which has had "plenty of experience making the determinations that § 3599(f) contemplates," *id*. at 1095, alternatively found that Crutsinger failed to make the necessary showing to open the federal coffers, even post-*Ayestas*, ROA.1403–12; *Crutsinger V*, 2019 WL 3749530, at *6–9. Crutsinger was not denied an attorney, he was denied expert funding, and that is clearly permissible. *See Ayestas*, 138 S. Ct. at 1094 ("[Section] 3599(f) cannot be read to guarantee that an application will have enough money to turn over every stone.").

Given that expert funding is not guaranteed, Crutsinger was not denied a right, including his statutory right to counsel, as he has been,

and continues to be, "well-represented by his counsel." *Crutsinger IV*, 930 F.3d at 708. And it is not, as Crutsinger suggests, that the denial of discretionary expert funding renders his counsel ineffective. Such rationale would lead to a proliferation of ineffective-assistance-of-trial-counsel claims. For example, did the denial of a year-long continuance render an attorney ineffective? A month? A week? That is not how ineffective-assistance claims are reviewed as it is recognized that counsel must "balance limited resources," *Harrington v. Richter*, 562 U.S. 86, 107 (2011), including time and money. And that practice limitation is recognized at the time of trial, which "enjoys pride of place in our criminal justice system," *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017), whereas federal habeas, "while important[,] . . . is secondary and limited," *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). If there is an error, and there is not, it is not an attorney error, and Crutsinger cannot convert a funding decision into an ineffective-assistance claim.

Given that neither of the two predicate arguments is correct, Crutsinger's claim that he was denied meaningful review is not either. Rather, "[t]he district court engaged in an extensive review of the record to demonstrate that Crutsinger's representation at trial was not

egregious and that he was not precluded from receiving a merits-based review of his federal habeas claims, including his claim of ineffective assistance of counsel." Pet. Writ Cert. App'x 1, at 4; *Crutsinger VI*, 2019 WL 4010718, at *4. Indeed, "Crutsinger's 'assertions that the denial of funding precluded a true merits review and that trial counsel's representation was egregious[] border on frivolous.'" *Id.* (quoting ROA.1395; *Crutsinger V*, 2019 WL 3749530, at *3). And Crutsinger's argument again heads towards a slippery slope—any new evidence would render unadjudicated what clearly was. But new evidence does not erase the historical fact of adjudication. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) ("This backward-looking language requires an examination of the state-court decision at the time it was made."). The same is true if that adjudication was rendered by an appellate court. *See id.* Crutsinger thus received meaningful review at both the district and circuit court levels. That he wants more evidence to dispute those decisions does not mean they did not occur.

Though the Court would not know it from Crutsinger's stay application, it must be remembered the vehicle by which all these arguments were presented in the courts below—a Rule 60(b) motion to

reopen his federal habeas proceeding. ROA.751–81. "Rule 60(b) vests wide discretion in courts," but relief "is available only in 'extraordinary circumstances.'" *Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). A court considering such a motion "may consider a wide range of factors" in determining whether extraordinary circumstances exist. *Id.* at 778. This includes the "significant element" that there be "'a good claim or defense'" to justify reopening final judgment. *Id.* at 780 (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2857 (3d ed. 2012)). The decision to deny reopening a habeas proceeding is reviewed for an abuse of discretion. *Id.* at 777. Given the broad discretion vested in the courts below on Rule 60(b) matters, it is nearly impossible for Crutsinger to show an abuse so great that it would likely require review and reversal by this Court, especially because, even de novo, his arguments fail as shown above.

Equally important, Crutsinger fails to prove that there is "'a good claim or defense'" he can advance if his case was reopened, which is required or "Rule 60(b)(6) relief would be inappropriate." *Buck*, 137 S. Ct. at 780. But Crutsinger never gets that far because he insists that without

expert funding, he can never identify attorney error. *See* Pet. Writ Cert. 11. But if he cannot get that far, then he cannot get funding. *See Ayestas*, 138 S. Ct. at 1094 ("Proper application of the 'reasonably necessary' standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue."). And his protestation exposes the real reason behind his funding request—he believes there is *always* ineffective assistance. *See* Pet. Writ Cert. 22 ("This type of review frequently reveals deficiencies in the prior litigation efforts . . . thereby putting counsel on notice that more needs to be done."). That is simply contrary to the deference given counsel's representation. *See Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case."). And it in turn reveals what his funding request really is—an impermissible fishing expedition. *See Ayestas*, 138 S. Ct. at 1094 (favorably referencing a case prohibiting funding "to subsidize a fishing expedition" (quoting *United States v. Alden*, 767 F.2d 314, 319 (7th Cir. 1984))). A court does not abuse its discretion in denying such a request when a case is active, and it certainly does not do when viewed through the lens of Rule 60(b).

Also important is this Court's decision in *Gonzalez*. There, the Court noted that extraordinary "circumstances will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535. And "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of the federal habeas statute of limitations. *Id*. at 536. Thus, the inmate in *Gonzalez* was denied any review of his claims because his petition was untimely, whereas Crutsinger was simply denied funding. As the court below rightfully noted, "'if, as in *Gonzalez*, a change in law that *entirely* precluded merits review is not sufficient to warrant Rule 60(b)(6) relief,'" then (as is the case here) a change in law that did not preclude merits review does not merit such relief." Pet. Writ Cert. App'x 1, at 4; *Crutsinger VI*, 2019 WL 4010718, at *4 (quoting *Crutsinger IV*, 930 F.3d at 707). Try as he might to argue otherwise, Crutsinger's Rule 60(b) motion is fundamentally based on *Ayestas*'s change of the law in the Fifth Circuit, a scenario this Court has already confirmed is "hardly extraordinary." *Gonzalez*, 545 U.S. at 536. For this and the reasons described above, Crutsinger fails to prove a probable grant of certiorari

review and reversal of the Fifth Circuit's decision, and thus entitlement to stay of execution.

III. Crutsinger Fails to Prove Irreparable Injury.

Crutsinger's main complaint of harm is that he was not given funding to uncover a claim that may not exist. Appl. Stay at 3. 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 fails to identify any claim that he was precluded from advancing. *See* Pet. Writ Cert. 11. 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 collateral review. *See Martinez v. Ryan*, 566 U.S. 1, 14 (2012) (citing *Strickland*, 466 U.S. at 668). In other words, the prisoner must propose a claim that went unpresented because of 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 fails to identify a claim, his assertion of irreparable harm is "pure speculation," "mere possibility," and "nothing more than a

theoretical possibility." *Richter*, 562 U.S. at 100, 112. 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, IV. For another, he has received de novo review of the ineffective-assistance-of-trial-counsel claim he chose to advance. *See Crutsinger II*, 576 F. App'x at 425–28. 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." Pet. Writ Cert. App'x 1, at 5; *Crutsinger VI*, 2019 WL 4010718, at *6. And, as explained by the district court, he would have been denied funds even under the *Ayestas* standard had it prevailed at the time his federal habeas suit was initiated. ROA.1403–12; *Crutsinger V*, 2019 WL 3749530, at *6–9. Complaints about hypothetical harm from the denial of discretionary expert funding 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). While Crutsinger admittedly acted quickly after the Court handed down *Ayestas*, that is not the relevant measure for

diligence. That is because neither futility nor later changes in the law excuse a prisoner from objecting. *See Engle v. Isaac*, 456 U.S. 107, 130–34 (1982); *cf. Gonzalez*, 545 U.S. at 537 (holding that a "change in the law . . . is all the less extraordinary . . . because of [a] lack of diligence in pursuing" the issue on appeal before the change).

When Crutsinger applied for a COA from the Fifth Circuit to challenge the denial of federal habeas relief, he complained that the refusal to grant expert funds was inconsistent with the denial of relief (because the district court found the ineffective-assistance claim procedurally defaulted in the denial of funding order, but reviewed it de novo in its denial of relief order), and that denying funding was inconsistent with *Martinez*. Crutsinger's Brief in Support of Certificate of Appealability 6–13, *Crutsinger v. Stephens*, 576 F. App'x 422 (5th Cir. Nov. 8, 2012) (No. 12-70014); *see also Crutsinger II*, 576 F. App'x at 429–31 (addressing Crutsinger's funding complaints). That is a far cry from the daisy-chained argument now before the Court, and that argument was not presented in the district court until *Ayestas* issued. ROA.772–80; *see* Pet. Writ Cert. App'x 1, at 5–6; *Crutsinger VI*, 2019 WL 4010718, at *5–6 (addressing Crutsinger's funding complaints in the context of a stay

of execution review). So, either the denial of funding has always implicated the effectiveness of federal habeas counsel and court review, and the argument "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), or Crutsinger is simply relying on the change of law brought about by *Ayestas*, which is "hardly extraordinary," *Gonzalez*, 545 U.S. at 536. If it is the former, diligence is not shown. If it is the latter, then Rule 60(b) relief is not shown. Either way, a stay of execution should be denied.

CONCLUSION

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

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