Nos. 15-7769 &15A745

IN THE
Supreme Court of the United States

RICHARD ALLEN MASTERSON,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

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

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

Masterson seeks review in this Court following the denial by the Texas Court of Criminal Appeals of leave to file a petition for writ of prohibition. Masterson was convicted and sentenced to death for the strangulation death and robbery of Darin Honeycutt. Masterson has previously and unsuccessfully challenged the constitutionality of his state capital murder conviction and death sentence in both state and federal court. On January 12, 2016, approximately a week before his scheduled execution, Masterson filed two motions for leave to file petitions for writ of prohibition in the Texas Court of Criminal Appeals. In one, addressed herein, he claimed that his constitutional rights were violated based on the trial court's failure to charge the jury on the lesser-included offense of felony murder and that trial and appellate counsel were ineffective for failing to raise the issue. Masterson presents the same claims in the instant petition. The petition should be denied because it involves claims that are solely state law issues. Nevertheless, his claims are completely lacking in merit. Indeed, they are essentially frivolous because Masterson received multiple lesser-included offense instructions at trial.

STATEMENT OF THE CASE

I. Statement of Facts

On Saturday morning, January 27, 2001, Alfred Bishop, the manager of a Houston apartment complex, was approached by friends of Darin Honeycutt. 18 RR 18-19, 21, 34.[1] The friends were worried about Honeycutt because he had not shown up for work. *Id.* at 21. They asked to be let into his apartment. *Id.* After Bishop opened Honeycutt's apartment, they found Honeycutt's naked body in the bedroom. *Id.* at 38-39. And Honeycutt's car was not in the parking lot. *Id.* at 36, 135.

Houston homicide detective Sgt. R. Parish was assigned to the case. *Id.* at 131. Parish was contacted by Morgan Porter, who had heard of Honeycutt's death. *Id.* at 117-18. Porter knew Masterson because Masterson's brother, James, worked for him. *Id.* at 109. The day after Honeycutt's murder, Masterson came looking for his brother, who was not at work. *Id.* at 110-11. Masterson told Porter: "I think I really put somebody to sleep." *Id.* at 112-13. Porter saw that Masterson was driving a red Ford Escort. *Id.* at 114. Asked

[1] "RR" refers to the reporter's record of the trial testimony, preceded by volume number and followed by page number(s). "SX" refers to the numbered exhibits offered and admitted into evidence at trial by the State, followed by exhibit number(s). "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, preceded by volume number and followed by page number(s). "SHCR" refers to the state habeas clerk's record, followed by page number(s).

where he had gotten the car, Masterson failed to respond. *Id.* He said, however, that he was going back to Georgia. *Id.*

James Masterson also contacted Sgt. Parish and told the sergeant that he thought his brother had gone to Georgia. *Id.* at 168. James contacted Masterson and told him to call Sgt. Parish to clear up the circumstances surrounding Honeycutt's death, which was thought possibly to be the result of a heart attack. *Id.* at 169-71. Of the heart-attack theory, Richard Masterson told his brother, "[T]hat was bull shit" and that he "put [Honeycutt] down." *Id.* at 170-71. James understood Masterson's statement to mean that he had killed Honeycutt. *Id.* at 171. Masterson told James that he had Honeycutt in a headlock until he went limp. *Id.* at 174. Eventually, investigators found Honeycutt's red Ford Escort in Emerson, Georgia. *Id.* at 138.

Eight days after Honeycutt's death, Masterson met Steven Drew in a gay club in Tampa, Florida. 19 RR 201. The two left the club in Drew's vehicle and went to Drew's apartment. *Id.* at 203. There, Masterson jumped Drew and placed him in a headlock. *Id.* at 206. Drew said, "There was nothing sexual about it. . . . [I]t was really violent and I knew it had nothing to do with sex at all." *Id.* at 206-07. Drew fell to the ground; Masterson straddled him and continued to strangle him with both hands. *Id.* at 209. Drew lost consciousness, and when he came to, his wallet and car were gone. *Id.* at 209-

10. Drew had bruises around his throat, he lost his voice for a few days, and the blood vessels in his eyes were broken. *Id.* at 211.

On February 6, 2001, Deputy E. Thoreson, an officer with the Belleview, Florida, Police Department, was running tags in a mobile home park when he came across a Toyota—Drew's car—which had been reported stolen. *Id.* at 48-49, 226. After Masterson was identified as the driver of the Toyota, he was arrested. *Id.* at 48-49, 226-28; 18 RR 143-44.

While Masterson was in the Marion County, Florida, jail, he confessed both to the attack on Drew and Honeycutt's murder. 19 RR 59-89, 230-31. Houston Police Detective David Null recorded Masterson's statement, and the tape was played for the jury. *Id.* at 70-89; SX 2. In the statement, Masterson said he strangled and killed Honeycutt to steal his car. 19 RR 70-80; SX 2. Asked what happened with Drew, Masterson said: "Pretty much the same thing I did in Houston, except the person didn't die. . . . I didn't let the person get undressed this time." 19 RR 230.

At trial, Masterson testified at guilt-innocence. Although he acknowledged killing Honeycutt, he said the death was an accident that occurred during sex. *Id.* at 114-78. He said Honeycutt asked him to put his arm around his neck to perform erotic asphyxiation. *Id.* at 126-27. In the process, Honeycutt went "limp" from the "sleeper hold" and died. *Id.* at 128-29. Masterson said he fled because he had convictions. *Id.* at 130-31. To make

the incident appear to be a robbery, he took Honeycutt's VCR and car. *Id.* at 130-32.

Dr. Paul Shrode, an assistant Harris County medical examiner, conducted Honeycutt's autopsy. 18 RR 193. Dr. Shrode believed Honeycutt's death was caused by "external neck compression." *Id.* at 205, 208. Dr. Shrode said that Honeycutt had a narrowed coronary artery. *Id.* at 208. The doctor ruled out the narrow artery as the cause of death but said the condition may have hastened the death. *Id.* at 206-08. Dr. Shrode said Honeycutt's death was consistent with his having been subjected to a "sleeper hold," in which Masterson pressed the inside of his elbow against Honeycutt's windpipe and applied pressure. *Id.* at 201, 209.

II. Appellate and Postconviction Proceedings

Masterson was found guilty of the robbery-related capital murder of Darin Honeycutt and sentenced to death. 2 CR 318-19. His conviction and sentence were affirmed on appeal, *Masterson v. State*, 155 S.W.3d 167 (Tex. Crim. App. 2005), and certiorari review was denied, *Masterson v. Texas*, 546 U.S. 1169 (2006). His first application for state habeas corpus relief was denied, *Ex parte Masterson*, No. WR-59481-01, 2008 WL 3855113 (Tex. Crim. App. Aug. 20, 2008) (unpublished), and his second was dismissed as abusive, *Ex parte Masterson*, No. WR-59481-02, 2012 WL 6630160 (Tex. Crim. App. Dec. 19, 2012) (unpublished). The federal district court denied his petition for

habeas corpus relief and denied permission to appeal. *Masterson v. Thaler*, No. 4:09-CV-2731, 2014 WL 808165 (S.D. Tex. Feb. 28, 2014) (unpublished). The Fifth Circuit subsequently denied Masterson a certificate of appealability (COA). *Masterson v. Stephens*, 596 Fed. Appx. 282 (5th Cir. Jan. 9, 2015) (unpublished). This Court denied Masterson certiorari review. *Masterson v. Stephens*, 135 S. Ct. 2841 (2015).

On December 30, 2015, three weeks before his scheduled execution, Masterson filed a third state application for habeas corpus relief. The Texas Court of Criminal Appeals dismissed the application as an abuse of the writ pursuant to Texas Code of Criminal Procedure, Article 11.071, Section 5(a). *Ex parte Masterson*, 59,481-03 at Order (January 11, 2016). Masterson also sought authorization from the United States Court of Appeals for the Fifth Circuit to file a successive federal habeas petition, but the Fifth Circuit denied Masterson's motion on January 15, 2016. *In re Masterson*, No. 16-20031 (5th Cir. 2016) (unpublished).

On Tuesday, January 12, 2016, Masterson sought leave in state court to file two petitions for writ of prohibition. The Court of Criminal Appeals denied Masterson leave on January 15, 2016. *In re Masterson*, Nos. WR-59,481-04 &-05.

REASONS FOR DENYING THE WRIT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted for compelling reasons only. Sup. Ct. R. 10 (West 2014). In determining whether a compelling reason exists, this Court may consider whether the state court decided an important federal question in a way that conflicts with relevant decisions of this Court. *Id.* Masterson's claims pertain only to questions of state law: whether he was entitled to leave to file a petition for writ of prohibition. The state court determined that Masterson failed to satisfy the prerequisites for being granted leave to file a petition for writ of prohibition. *In re Masterson*, Nos. WR-59,481-04 &-05. Given the state court's decision, no compelling reason exists for this Court to grant Masterson certiorari review.

I. Certiorari Review Is Foreclosed by a Valid State Procedural Bar.

The issue in this case involves only the state court's proper application of state procedural rules governing motions for leave to file petitions for writ of prohibition. The state court denied Masterson leave and did not consider the merits of his claims. *In re Masterson*, Nos. WR-59,481-04 &-05. The state court's disposition, which pertains only to an interpretation of state law, forecloses certiorari review.

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

rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Indeed, Masterson fails to present *any* justification for not applying the Court's long-standing rule against reviewing claims denied by state courts on state law grounds, and none exists. There is no jurisdictional adequate basis for granting certiorari review in this case.

Although this is not a federal habeas proceeding in which the Court actually retains jurisdiction to review procedurally defaulted claims, as explained in *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997), and *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991), Masterson nonetheless cannot demonstrate cause or a fundamental miscarriage of justice that might excuse such a default. In the "cause" inquiry, the core issue is whether the legal basis of allegation was not "reasonably available" to him during the time his initial state habeas application was pending. *Reed v. Ross*, 468 U.S. 1, 16 (1984); *Engle v. Isaac*, 456 U.S. 107, 129 (1982). This is clearly not the case, however, because these claims have been available to Masterson for years. As a result, Masterson fails to establish that this claim was unavailable or novel within

the meaning of *Ross* and *Isaac* or that he could not have raised it earlier. On this record, Masterson has no basis on which to seek certiorari review.

II. Nevertheless, Masterson's Claims Are Without Merit.

The instant claims are merely a reiteration of previously urged and rejected claims. Specifically, Masterson complained on direct appeal that, while the jury was instructed on the lesser-included offense of manslaughter, the trial court erred in refusing to submit his requested instruction regarding the lesser-included offense of criminally negligent homicide. Now, Masterson complains that the trial court should also have *sua sponte* instructed the jury on the lesser-included offense of felony murder.

On direct appeal, the Court of Criminal Appeals overruled Masterson's challenge to the trial court's ruling and found that assuming, without deciding, that Masterson was entitled to the instruction on criminally negligent homicide, any such error was harmless. *Masterson v. State*, 155 S.W.3d at 171. In overruling that challenge, the Court noted that Masterson was given an instruction on the lesser-included offenses of manslaughter, murder, robbery, and aggravated assault, and explained:

> We held in *Saunders v. State* that the jury's failure to find an intervening lesser-included offense (one that is between the requested lesser offense and the offense charged) may, in appropriate circumstances, render a failure to submit the requested lesser offense harmless. This is so because the harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense

> in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer. The intervening lesser offense is an available compromise, giving the jury the ability to hold the wrongdoer accountable without having to find him guilty of the charged (greater) offense. While the existence of an instruction regarding an intervening lesser offense (such as manslaughter interposed between murder and criminally negligent homicide) does not automatically foreclose harm—because in some circumstances that intervening lesser offense may be the least plausible theory under the evidence—a court can conclude that the intervening offense instruction renders the error harmless if the jury's rejection of that offense indicates that the jury legitimately believed that the defendant was guilty of the greater, charged offense.

Masterson, 155 S.W.3d 171-72 (citing *Saunders v. State*, 913 S.W.2d 564, 572-74 (Tex. Crim. App. 1995)). The Court also pointed out that the fact that the jury did not convict Masterson of manslaughter after hearing his testimony, which indicated that the jury did not believe his story. *Masterson*, 155 S.W.3d at 172.

Masterson did not further pursue this claim in his initial state habeas petition. However, in federal habeas, he challenged the trial court's ruling denying his requested instruction on the lesser-included offense of criminally negligent homicide. In denying relief, the federal district court found that Masterson did not show that the state court's rejection of his claim was contrary to, or an unreasonable application of, federal law. *Masterson v. Thaler*, 2014 WL 808165, at *30 (S.D. Tex. Feb. 28, 2014).

While Masterson attempts to rely on *Beck v. Alabama*, 447 U.S. 625 (1980), his reliance on it is disingenuous and completely misplaced. The federal district court previously addressed Masterson's argument and pointed out that *Beck* criticized the use of an all-or-nothing policy where a jury faced only two choices: either convict a defendant of a capital crime or release him into society. *Masterson*, 2014 WL 808165, at *30. Specifically, this Court has held the central concern of *Beck*—eliminating the distorting effects on the fact-finding process of an all-or-nothing decision on guilt for capital murder—is not implicated where the jury is faced with a realistic option, *i.e.*, one supported by the evidence, of convicting the defendant of a noncapital offense. *Schad v. Arizona,* 501 U.S. 624, 646-48 (1991). Further, the Fifth Circuit has repeatedly rejected *Beck* claims where the jury was presented with the choice of convicting the defendant of a noncapital offense supported by the evidence. *See Pippin v. Dretke*, 434 F.3d 782, 791 (5th Cir. 2005) (capital murder defendant had no constitutional right to a jury instruction on felony murder where the jury was instructed on the lesser-included offense of aggravated kidnaping); *Livingston v. Johnson*, 107 F.3d 297, 312-13 (5th Cir. 1997) (capital murder defendant had no constitutional right to jury instruction on felony murder where jury was instructed on lesser-included offense of noncapital murder); *Allridge v. Scott*, 41 F.3d 213, 218-20 (5th Cir.1994) (capital murder defendant not entitled to jury instruction on felony murder where jury was instructed on the lesser-

included offense of noncapital murder); *Montoya v. Collins*, 955 F.2d 279, 285-86 (5th Cir. 1992) (capital murder defendant was not entitled to a jury instruction on involuntary manslaughter where jury was instructed on the lesser-included offense of criminally negligent homicide).

In this case, the federal district court found that the jury did not face the all-or-nothing dilemma condemned by *Beck* and, in fact, could have convicted Masterson of simple murder, manslaughter, or aggravated assault, each of which would have allowed the jury to consider whether Masterson was responsible for the victim's death, but without holding him to capital murder's high level of intent. *Masterson v. Thaler*, 2014 WL 808165, at *30; *see also* 2 CR 294-95. Therefore, the "central concern" of *Beck* was not present during the guilt-innocence phase of Masterson's trial. This Court has made clear that a capital murder defendant is not entitled to have his jury instructed on every lesser-included noncapital offense supported by the evidence. *See Schad*, 501 U.S. at 645-48 (holding a capital defendant whose jury was instructed on the lesser-included offense of noncapital murder was not constitutionally entitled to a jury instruction on the lesser-included offense of robbery).

Moreover, this Court has emphasized that even in capital cases, "due process requires that a lesser[-]included offense instruction be given *only when the evidence warrants such an instruction*." *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (emphasis added). "It is not enough that the jury may disbelieve crucial

evidence pertaining to the greater offense. Rather, there must be some evidence directly germane to a lesser-included offense for the factfinder to consider before an instruction on a lesser-included offense is warranted." *Dowthitt v. Johnson*, 230 F.3d 733, 757 (5th Cir. 2000) (citing *Jones v. Johnson*, 171 F.3d 270, 274 (5th Cir. 1999)).

The only evidence supporting an instruction on felony murder was Masterson's testimony. But his testimony was full of inconsistencies and contradictions. Clearly, the jury did not believe his story. On the other hand, Masterson confessed to intentionally murdering Honeycutt in order to steal his car. *See Masterson v. Thaler*, 2014 WL 808165, at *30. He also confessed that his crime against Steven Drew was the same in nature, which Drew confirmed when he testified. Both Morgan Porter and James Masterson testified that Masterson indicated he intentionally tried to hurt or kill Honeycutt. Therefore, contrary to Masterson's claim, sufficient evidence did not exist for a reasonable jury to conclude Masterson's act was one of felony murder.

Masterson further urges related claims of ineffective assistance of counsel based on the absence of a lesser-included offense instruction of felony murder in the jury charge. Dissatisfied with the four lesser-included offense instructions given at trial and the one that was denied, Masterson now argues that trial counsel were ineffective for not also requesting an instruction on

felony murder, and appellate counsel was ineffective for not raising a challenge to that particular aspect of trial counsels' representation.

The basis for Masterson's claim—at least to the Court of Criminal Appeals—was that, in Texas, felony murder is treated the same as "straight murder"; both are punishable by up to life in prison. *See* Masterson's petition for writ of prohibition at 7. Masterson asserted, "That is a vastly different choice for a juror than letting a man walk essentially free after a few years." *Id*.

This claim is without merit. Just as Masterson pointed out, the lesser-included offenses of "felony murder" and "murder" are governed by the same punishment range. Masterson does not show how giving the jury a choice of felony murder instead of murder would have changed the outcome of his trial—either offense would have given the jury the same choice of convicting Masterson of an offense punishable by up to life in prison. Masterson's attempt to make a distinction without a difference must fail. Neither trial nor appellate counsel had any duty to raise this issue, and Masterson certainly cannot demonstrate prejudice. Thus, the Court should reject his claim.

III. Masterson Is Not Entitled to a Stay of Execution.

Masterson is not entitled to a stay of execution because he cannot demonstrate a substantial denial of a constitutional right which would become moot if he were executed. In *Barefoot v. Estelle,* this Court explained that a

stay is appropriate only when there is a "reasonable probability" that certiorari will be granted, a "significant possibility" that the Court will reverse the lower court's decision after hearing the case, and a "likelihood" that the applicant will suffer irreparable harm absent a stay. 463 U.S. 880, 895 (1983). Masterson has met none of these requirements. As discussed above, Masterson's claims are procedurally barred from substantive review in this Court. Thus, there is no possibility that this Court could reverse the judgment of the Court of Criminal Appeals. Masterson's substantive constitutional claims are also without merit. Furthermore, the Court may also "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. United States Dist. Ct. for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*). Under the circumstances of this case, a stay of execution would be inappropriate and Masterson's motion should be denied.

CONCLUSION

For the above reasons, the Court should deny Masterson's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Response has been served electronically to Mandy Miller and Pat McCann, counsel for the Petitioner, on this the 19th day of January, 2016.

/s/ Erich Dryden
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