No. _____

DEATH PENALTY CASE
Execution Scheduled: September 19, 2006

IN THE
SUPREME COURT OF THE UNITED STATES

RICKY BELL, Warden
Petitioner

v.

DARYL KEITH HOLTON
Respondent

MOTION TO VACATE STAY OF EXECUTION OF DEATH SENTENCE

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INTRODUCTION

Daryl Holton stands convicted of the first-degree premeditated murders of his four children, ages four, six, ten and twelve. He was sentenced to death for each of the four murders. On May 25, 2006, the Tennessee Supreme Court set an execution date of September 19, 2006. (App. 1) Thirteen hours before his scheduled 1:00 a.m. execution, the United States Court of Appeals for the Sixth Circuit stayed execution of the Tennessee Supreme Court's order. (App. 3) The State respectfully moves this Court to vacate the Sixth Circuit's order.

Since his conviction and sentences were affirmed by the Tennessee Supreme Court in 2004, Holton has consistently and repeatedly refused to consent to further litigation challenging the state court judgment. Through inaction, Holton allowed the state post-conviction statute of limitations to expire, thus foreclosing collateral review of the criminal judgments by the Tennessee state courts. Likewise, through inaction, Holton allowed the time for seeking federal habeas corpus relief to pass without either filing or authorizing an application for relief on his behalf. When Holton chose not to file an application for writ of habeas corpus in the federal district court, attorneys with the Federal Defender Services of Eastern Tennessee, Inc. ("FDSET"), initiated federal proceedings and ultimately filed an application in his name despite having *never* communicated personally with Holton about his case or whether he wished to pursue federal habeas relief. Indeed, it was not until the district court ordered Holton to speak

with FDSET was any communication established between Holton and his would-be counsel. In an Original Petition for Writ of Habeas Corpus filed this day by Holton pro se in this Court, Holton made clear that his actions were both intentional and calculated. *Holton v. Bell*, No. 06-6534 (U.S. Sept. 18, 2006).

Before dismissing the unauthorized federal habeas petition filed by FDSET, the district court directed, over Holton's express objection, a psychological evaluation of Holton for the purpose of determining his competency to decide whether to waive his appeals, which resulted in a finding of competency.[1] The district court questioned Holton on two separate occasions and heard sworn testimony by the independent court-appointed psychologist concerning Holton's present mental state, after all of which the district court concluded that FDSET had failed to make a sufficient showing justifying third-party standing to proceed in Holton's stead. Addressing Holton in open court, the district court stated:

> I have seen and heard you explain your thought processes and the basis for your decisions. I don't think anybody in this courtroom who has seen or heard your testimony could doubt that you have the ability to reason and to think rationally. There may be those who disagree with your decision, but it is not up to them to make the decision for you. It is your decision and yours alone to make.

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[1]To suggest that Holton has "waived" collateral review of his state convictions and sentences is, in fact, incorrect. Holton has not affirmatively waived any rights. Rather, he has never invoked the right to file for post-conviction or federal habeas relief in either the state or federal courts. He has been subjected to unwanted attorney visits, unsought court appearances, and intrusive psychological evaluations based upon what he himself termed the "well-intentioned" but unwanted actions of attorneys seeking to proceed on his behalf.

> The court finds that there is no reasonable cause to believe that Mr. Holton is not competent to choose not to seek federal habeas review of his death sentence. There is thus no reason to have a full competency hearing on Mr. Holton's competence. Consequently, Mr. Holton, I find there is no indication that you are suffering from any mental disease, defect or disorder which substantially affects your ability to make decisions on your behalf. Based upon your own stated desire to not pursue a habeas corpus petition, I am going to dismiss the petition. Accordingly, the respondent's motion to dismiss the petition for writ of habeas corpus shall be granted.

(App. 30-31) The district court's written order dismissing the petition was filed on September 6, 2006. (App. 32)

Eight days after the court dismissed the action from the bench, and with less than one week before Holton's scheduled execution, FDSET filed a motion for stay of execution in the Sixth Circuit. Respondent filed a response two days later on September 14, 2006. On September 18, 2006, the Sixth Circuit granted a stay of execution, finding that an injunction against the State of Tennessee's orderly execution of its judgment in Holton's case was: (1) necessary to permit briefing on the issue of whether FDSET "failed to demonstrate, under *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999), reasonable cause to believe that Holton is not competent to make a rational decision to dismiss his pending federal habeas petition;"[2] and (2) "appropriate in light of the filing of an original petition for writ of habeas corpus in [this] Court, in which Mr. Holton himself requests a stay of execution and raises new issues." Further, despite indicating a need for formal

[2]Again, this is a mistatement of the procedural posture of this case. Holton's competence to dismiss federal habeas proceedings is irrelevant because they were never properly invoked in the first place.

briefing on the question of Holton's competency to initiate habeas proceedings in the first place, the court requested that Holton "personally advise this court, not later than September 25, 2006, whether it is his intent to pursue the instant appeal and, if so, whether he will do so *pro se* or through counsel." (App. 4)

Aside from being internally inconsistent by directing briefing by the parties on a competence issue while simultaneously requesting the participation of the alleged incompetent and instructions from him concerning the conduct of future proceedings, the Sixth Circuit's order contradicts this Court's decisions in *Whitmore v. Arkansas*, 495 U.S. 149, 164-66 (1990), and *Demosthenes v. Baal,* 495 U.S. 731 (1990), which hold that, before a federal court is authorized to grant a stay of execution on the basis of a third-party filing in a federal habeas proceeding, it must be clearly shown that the prisoner is *unable to litigate his own cause* due to mental incapacity, lack of access to court, or other similar disability. That showing is impossible on this record, and the Sixth Circuit's own order — directing Holton's personal participation in this matter — demonstrates its belief that Holton is fully capable of doing so. His wishes on the subject at this juncture, however, are of no import since he, by his own inaction, allowed the time for seeking federal habeas relief to expire without filing a proper petition. Any attempt at this point to pursue federal remedies are now time-barred in this or any other federal court. 28 U.S.C. § 2244(d)(1). Holton may not now revive an action that was never properly filed to begin with.

The State moves to vacate that order and carry out its lawful judgment in this case.

STATEMENT OF THE CASE

1. Procedural History - State Court Proceedings

Daryl Holton was convicted by a Tennessee jury in 1999 of the first-degree premeditated murders of his four children, ages four, six, ten and twelve. Following a sentencing hearing, the jury sentenced Holton to death for each of the four convictions, finding that the prosecution had proven beyond a reasonable doubt the existence of one or more aggravating circumstances and that the aggravating circumstances so proven outweighed any mitigating circumstances beyond a reasonable doubt.[3] The Tennessee Supreme Court affirmed Holton's convictions and sentences on January 5, 2004. *State v. Holton*, 126 S.W.3d 845 (Tenn. 2004), *cert. denied*, 125 S.Ct. 62 (2004).

Since his conviction and sentences were affirmed by the Tennessee Supreme Court in 2004, Holton has consistently refused to consent to further litigation challenging the state court judgment. After the Tennessee Supreme Court affirmed the judgment of the trial court and then denied rehearing of its decision in February 2004, Holton refused to sign the affidavit of indigency required by Rule 39.1, Rules of the

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[3]As to three of the convictions, the jury relied upon two aggravating circumstances in imposing the death penalty: the age of the victims and mass murder. Tenn. Code Ann. § 39-13-204(i)(1) & (12) (1997). As to the fourth, the jury based the death penalty solely on the mass murder aggravating circumstance.

United States Supreme Court, in order to petition for a writ of certiorari. Even then, counsel admitted that Holton refused to meet with them in order to sign the affidavit, forcing counsel to petition this Court for an order granting *in forma pauperis* status without the required affidavit. *Holton v. Tennessee*, No. 03M79 (U.S.). (App. 34) Ultimately, however, counsel secured sufficient funds to pay the required filing fee, thus allowing the matter to proceed in this Court without Holton's consent. The Supreme Court denied the petition for writ of certiorari on October 4, 2004. *Holton v. Tennessee*, 543 U.S. 816 (2004).

On April 29, 2005, the Tennessee Post-Conviction Defender (PCD) filed a petition for post-conviction relief in the state trial court seeking to challenge Holton's first-degree murder convictions and death sentence. Contrary to state law, the petition was signed by the PCD but not by Holton. *See* Tenn. Code Ann. § 40-30-104 (d) & (e) (requiring that petition for post-conviction relief and any amended petition be verified by petitioner under oath). Counsel with the PCD represented in an affidavit filed in the state court that "Mr. Holton has refused to meet with affiant or members of his staff." *Holton v. Bell*, E.D. No. 1:05-cv-202 [Doc. Entry No. 3, Attachment M: Petition for Post-Conviction Relief, Exh. 1, p. 2]. The circuit court granted a stay of execution pursuant to Tenn. Code Ann. § 40-30-120 ("Upon the filing of a petition for post-conviction relief, the court in which the conviction occurred shall issue a stay of the execution date which shall continue in effect for the duration of any appeals or until the post-conviction

action is otherwise final."), but the stay was vacated the the petition dismissed by the Tennessee Supreme Court following the State's extraordinary appeal pursuant to Tenn. R. App. P. 10. *Daryl Keith Holton v. State*, No. M2005-01870-SC-S10-PD, 2003 WL 24314330 (Tenn. May 4, 2006). (App. 37) In so doing, the state court expressly found the petition deficient in two respects — it was not timely filed and PCD had failed to establish a basis to proceed as "next friend." As to the latter, the court concluded:

> *The Defender's assertions regarding Holton's failure to meet with counsel and his failure to return letters fell short of demonstrating that Holton is mentally incompetent. See Nix*, 40 S.W.3d at 464. In addition, the trial court did not make findings as to the Defender's standing to proceed as "next friend." *See Whitmore*, 495 U.S. at 166. As a result, we hold that the post-conviction trial court lacked the authority to consider the petition filed on behalf of Holton where the petition was not signed or verified by Holton and where *the Defender failed to establish a "next friend" basis upon which to proceed.*

(App. 46) (emphasis added)

The State thereafter filed a motion in the Tennessee Supreme Court to re-set Holton's execution date. On May 15, 2006, Holton filed a *pro se* Response to State's Motion to Re-Set Execution Date, stating that he "does not oppose that State's motion to reset an execution date." By order filed May 25, 2006, the Tennessee Supreme Court re-set Holton's execution for September 19, 2006. (App. 1)

2. Federal Proceedings

On July 26, 2005, while the state proceedings were ongoing, attorneys with the Federal Defender Services of Eastern Tennesse, Inc. ("FDSET") — the petitioner here

— filed a motion in the United States District Court for the Eastern District of Tennessee seeking appointment to represent Holton in federal habeas proceedings. *Holton v. Bell*, No. 1:05-cv-00202 (E.D. Tenn.) (Judge Phillips) [Doc. Entry No. 2]. FDSET admitted in its motions to proceed *in forma pauperis* and for appointment of counsel that Holton had refused to meet or cooperate with them and had given no consent to initiate federal proceedings. [Doc. Entry No. 2, p. 1; Doc. Entry No. 3, p. 1] Indeed, the affidavit of attorney Stephen Ferrell, filed as Attachment L to the Memorandum in support of the motion [Doc. Entry No. 3], stated that he had had *no communication* with Daryl Holton prior to filing the motion either about the case or whether Holton wished to pursue habeas corpus relief.

> I tried to visit Mr. Holton on April 12, 2005 and June 15, 2005 at Riverbend Prison in Nashville where he is currently incarcerated. *Mr. Holton refused both of these visits*.
>
> I wrote letters to Mr. Holton on April 14, 2005, April 22, 2005, and June 17, 2005. His only response was to send back some caselaw I had enclosed in one of my letters.
>
> I have had *no communication from Mr. Holton about his case and whether he wishes to pursue habeas relief.* Mr. Holton has never told me he plans to waive his rights to pursue habeas relief.

Holton v. Bell, E.D. No. 1:05-cv-00202 [Doc. Entry No. 3, Exh. L] (emphasis added).

Nevertheless, on September 30, 2005, FDSET filed an application in Holton's name for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Holton v. Bell*, E.D. No. 1:05-cv-00202 [Doc. Entry No. 9]. The Warden moved to dismiss the unauthorized

petition because it failed to demonstrate either: (1) why Holton did not sign and verify the petition; or (2) the relationship and interest of any putative "next friend." [Doc. Entry No. 13]. On November 1, 2005, the district court stayed proceedings in the federal court pending disposition of the State's extraordinary appeal in the Tennessee Supreme Court. [Doc. Entry No. 19]

On July 10, 2006, after state post-conviction proceedings were concluded, the district court set a hearing on July 31, 2006, on "all pending motions," which included the motion for a competency hearing pursuant to *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999), filed by FDSET, the State's motion for reconsideration of the order appointing counsel, and the State's motion to dismiss the unauthorized petition.

The hearing commenced as scheduled. FDSET presented no live testimony, although counsel made reference during oral argument in the district court to an affidavit of Dr. George Woods, which had been filed on July 28, 2006. [Doc. Entry No. 27] According to counsel, Dr. Woods purportedly met with Holton for two "brief periods" in October 2005 and opined, based upon Holton's longstanding history of major depression, that there is reasonable cause to believe that he may be incompetent. However, counsel further stated that Dr. Woods "believes he needs to do a full, formal evaluation in order to come to a conclusion about his competency. . . . Because without a formal diagnosis, a formal conclusion from a mental health professional in this case, we really don't know what his state is." (App. 10-12) As to Holton's position, FDSET

stated:

> We have met with the Petitioner or met with Mr. Holton pursuant to this court's order to ascertain his position on these habeas proceedings. *He has informed me that he does not wish to proceed with the petition as I have filed it*, and I am here to renew my motion for a psychological evaluation.

(App. 9-10)

In support of the Warden's motion to dismiss, the State presented the testimony of Daryl Holton, who confirmed that he had not authorized the instant petition and did not wish to proceed with the federal habeas corpus application filed by FDSET. (App. 22, 48)) Holton testified to his understanding of his first-degree murder convictions and sentences, including his death sentences, his awareness of federal habeas as an available avenue to challenge his state court convictions, and his decision (including the reasoning behind it) to forgo federal review at this time. He further testified to his awareness of other potential avenues of relief, including executive clemency, although expressly withholding any opinion as to the likelihood of success as to any of those options.

Notwithstanding Holton's reasoned and unambiguous testimony, and over his express objection, the district court granted FDSET's motion for a psychological evaluation, appointing an independent psychologist selected by the court to perform a psychological evaluation to determine Holton's present competency under the standard set forth in *Rees v. Payton*, 384 U.S. 312 (1966). The district court specifically directed its expert, Dr. Bruce Seidner, to address three questions: (1) whether Holton suffers from a mental disease, disorder or defect; (2) whether a mental disease, disorder or

defect prevents Holton from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents Holton from making a rational choice among his options. [Doc. Entry No. 31] The court scheduled the matter for further hearing on September 5, 2006. (*Id.*)

Pursuant to the district court's order, Dr. Seidner performed a psychological evaluation of Holton, which included a review of medical and prison records and an interview with Holton spanning approximately nine hours over two days on August 26 - 27, 2006. As a result of the evaluation, Dr. Seidner concluded:

> Mr. Holton does not currently present with a mental disease, disorder or defect. . . . [T]here is no condition that affects Mr. Holton's competence. He is fully competent and especially informed about his legal position and the options available to him. . . . It is my opinion that Mr. Holton is fully rational. He is especially informed of his legal options. He is especially aware of the consequences of his legal options. He has no unusual beliefs about death and fully understands the legal reasons for and the consequences of his execution and death. He is not overborne by guilt, delusion or irrational thinking.

Dr. Seidner testified at the September 5 hearing, at which time FDSET had a full and fair opportunity for cross-examination. In addition, the district court, for a second time, directly questioned Holton. (App. 24) At the conclusion of the hearing, the district court dismissed the petition. The court specifically found that Dr. Woods' preliminary suggestion of incompetence was insufficient to raise a serious doubt or give reasonable cause to believe that Holton is not competent, particularly in light of the testimony of Dr. Seidner as noted in pertinent part above. Indeed, the court found that,

with the exception of Dr. Woods, every other psychiatrist and psychologist who had examined Holton as to competency in his prior and present legal proceedings had found him to be competent. In addition to Dr. Seidner's opinion, the district court noted its own observations of Holton's demeanor and testimony:

> I have seen and heard you explain your thought processes and the basis for your decisions. I don't think anybody in this courtroom who has seen or heard your testimony could doubt that you have the ability to reason and to think rationally. There may be those who disagree with your decision, but it is not up to them to make the decision for you. It is your decision and yours alone to make.
>
> The court finds that there is no reasonable cause to believe that Mr. Holton is not competent to choose not to seek federal habeas review of his death sentence. There is thus no reason to have a full competency hearing on Mr. Holton's competence. Consequently, Mr. Holton, I find there is no indication that you are suffering from any mental disease, defect or disorder which substantially affects your ability to make decisions on your behalf. Based upon your own stated desire to not pursue a habeas corpus petition, I am going to dismiss the petition. Accordingly, the respondent's motion to dismiss the petition for writ of habeas corpus shall be granted.

(App. 30-31)

The district court further granted a certificate of appealability as to its finding that FDSET failed to establish reasonable cause to believe that Holton is incompetent under *Harper v. Parker*, 177 F.3d 567, 572 (6th Cir. 1999). (App. 32)

3. Proceedings and Disposition Below

As previously stated, on September 12, 2006, eight days after the district court dismissed the unauthorized habeas petition from the bench, and with less than a week before Holton's scheduled execution, FDSET filed a notice of appeal to the Sixth Circuit

and a motion for a stay of execution to which the State objected. The State filed a response on September 14, 2006. On September 18, 2006, the Sixth Circuit granted the instant stay of execution.

REASONS FOR VACATING THE STAY OF EXECUTION

I. THE SIXTH CIRCUIT LACKED AUTHORITY UNDER 28 U.S.C. § 2251 TO STAY THE STATE COURT PROCEEDINGS AGAINST DARYL HOLTON BECAUSE NEITHER HE NOR ANY OTHER PERSON WITH STANDING HAS FILED A PROPER APPLICATION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254.

Under 28 U.S.C. § 2251(a), a federal judge "before whom a habeas corpus proceeding is pending" may, before or after judgment or pending appeal, "stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." § 2251(a)(1). "For purposes of this section, a habeas corpus proceeding is not pending until the application is filed." § 2251(a)(2). A stay of execution in this case is not authorized under § 2251 because no habeas corpus proceeding is, or ever has been, pending with respect to Holton's state court convictions and death sentences.

As a general rule, the party invoking federal subject-matter jurisdiction (in this case, FDSET) bears the burden of establishing that all of the requirements necessary to establish standing to bring a lawsuit have been met. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A necessary prerequisite for standing to file a petition for writ of habeas under 28 U.S.C. § 2254 is that a state prisoner actually invoke federal

jurisdiction either personally or through a qualified "next friend" under *Whitmore v. Arkansas*, 495 U.S. 149, 164-66 (1990). In order to proceed with a federal habeas corpus application and thus trigger the stay provision of 28 U.S.C. § 2251, FDSET was required to provide the district court with "a jurisdictional basis" to assume control of the State's criminal processes through federal habeas corpus review. It plainly failed to do so, a fact established by the district court's findings, *supra*, and its order granting the Warden's motion to dismiss the petition due to lack of standing. Indeed, the Sixth Circuit's order implicitly finds as much by giving credence to Holton's pro se petition for writ of habeas corpus and application for stay in this Court and by requesting his personal participation in the appeal in that Court.

"[O]ne necessary condition for 'next friend' standing in federal court is a showing by the proposed 'next friend' that the real party in interest is *unable to litigate his own cause* due to mental incapacity, lack of access to court, or other similar disability," *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990) (emphasis added), and "[t]he burden is on the 'next friend' clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." *Id.*, 495 U.S. at 165. The petition filed by FDSET stated merely: "This petition has been signed by Stephen Ferrell who has been appointed to represent Daryl Holton in this action and who is signing the petition on his behalf. See 28 U.S.C. Section 2242." *Holton v. Bell*, E.D. No. 1:05-cv-00202 [Doc. Entry No. 9, p. 16]. The explanation provided in this case — or, rather, the lack thereof — was clearly

insufficient to establish Holton's inability to sign the petition or the necessity for a "next friend" or other representative to proceed in lieu of his personal participation.

Even when counsel was given an opportunity to meet his burden in an evidentiary hearing, he failed to present sufficient evidence showing Holton's inability to seek federal habeas relief so as to justify third-party standing to invoke the provisions of 28 U.S.C. § 2254. Dr. Woods did not testify, nor did FDSET present any other testimonial proof demonstrating Holton's incompetence. To the contrary, all of the testimony presented at the hearing in this matter showed Holton's competence. Holton's own testimony, considered in conjunction with the testimony of Dr. Seidner — the only expert in this case who actually performed a full evaluation of Daryl Holton — led the district court to conclude, in no uncertain terms, that Holton was competent to decide his fate: "I don't think anybody in this courtroom who has seen or heard your testimony could doubt that you have the ability to reason and to think rationally. There may be those who disagree with your decision, but it is not up to them to make the decision for you. It is your decision and yours alone to make." (App. 30)

In order for a federal court to grant a stay of execution on the basis of a motion by a "next friend," it must be *clearly shown* that the prisoner does not have the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or . . . suffers from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S.

312, 314 (1966). *See also Whitmore,* 495 U.S. at 165. In the absence of such a showing, the federal courts lack jurisdiction to enter a stay. The requisite showing for "next friend" status is not satisfied "where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded." *Whitmore,* 495 U.S. at 165.

Holton was questioned by the district court on two separate occasions. He was subjected, over his own objection, to a psychological evaluation by an independent court-appointed expert, which resulted in a finding of competency. As the district court noted, Dr. Woods stood alone as the only expert *ever* to have opined in legal proceedings that Daryl Holton may be incompetent. And he did so here without having conducted a full psychological evaluation. In light of the overwhelming evidence that Holton is presently competent, the district court was correct in dismissing the unauthorized pleading. Indeed, given counsel's failure to establish a basis for third-party standing in the petition itself — a fact which alone would have justified dismissal for lack of jurisdiction — the district court took steps above and beyond what any decision of this Court, and certainly any decision of the United States Supreme Court, required. FDSET failed to provide the district court with a jurisdictional basis to proceed, the unsigned and unauthorized petition for writ of habeas corpus was properly dismissed for lack of standing, and the Sixth Circuit's interference with state judicial processes unjustified.

The State's motion to vacate that order is largely controlled by this Court's

decision in *Demosthenes v. Baal,* 495 U.S. 731 (1990), in which the Court vacated a stay granted by the Ninth Circuit Court of Appeals under similar circumstances. There, a state court determination had been made that the prisoner was competent to waive further appeals, and upon the filing of a "next friend" petition, the district court conducted a hearing and denied petitioner's application for a stay of execution, holding that petitioner had failed to establish that the court had jurisdiction to entertain the petition. The Court of Appeals stayed the execution, concluding that there had been some "minimal showing" of incompetence made, and that the evidence in the record provided an "arguable basis for finding that a full evidentiary hearing on competence should have been held by the district court." *Id.,* 495 U.S. 733-34. This Court granted the State's motion to vacate the stay, ruling that, because the district court had concluded that petitioner had failed to establish that Baal was incompetent, citing *Whitmore,* no basis existed for an exercise of federal jurisdiction to grant a stay of execution.

> We realize that last minute petitions from parents of death row inmates may often be viewed sympathetically. But *federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power.* In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention.

Id., 495 U.S. at 737 (emphasis added).

Likewise, because the district court's jurisdiction under 28 U.S.C. § 2254 was

never properly invoked, the court's grant of a certificate of appealability under 28 U.S.C.§ 2253(c)(1) does not change the analysis.[4] Similar to the stay provisions of § 2251, the requirement of a certificate of appealability under § 2253 arises only from an appeal in a "habeas corpus proceeding," a prerequisite that was never established in this case. Instead, as with other civil litigants aggrieved by an adverse decision of a district court on a threshold standing issue, FDSET possessed an appeal as of right under Fed. R. App. P. 3. But that right does not include the right to an injunction tying the hands of a separate sovereign in the execution of a final judgment, particulary in the absence of any finding of the likelihood of success on the merits of any such appeal, and even more so, where the Court of Appeals implicitly acknowledges the state prisoner's competence by requesting his personal input as to the course of future proceedings in that court.

Without express authorization by a federal statute or an exception to the Anti-Injunction Act, the Sixth Circuit was without jurisdiction to grant a stay of execution of a state court judgment. *See* 28 U.S.C. § 2283; *Mitchum v. Foster*, 407 U.S. 225, 226

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[4]Even if a COA were required in this case, the district court's grant would not necessitate a stay of execution. The Court made clear in *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983), that nothing in its prior decisions requiring a decision on the merits of an appeal prevents courts of appeals from adopting summary procedures to dispose of such cases. As stated in *Barefoot*, "a practice of deciding the merits of an appeal, when possible, together with the application for a stay, is not inconsistent with our cases." *Id.* at 889-90. FDSET was well aware of Holton's imminent execution date at the time the district court dismissed this case from the bench on September 5, 2006. Yet, it waited eight days before filing a notice of appeal. This Court has made clear that a federal court considering a stay of execution must apply "a strong 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 the entry of a stay." *Hill v. McDonough*, 126 S.Ct. 2096, 2103 (2006).

(1972). Nor is jurisdiction to issue a stay conferred by 28 U.S.C. § 1651 — the All Writs Act — which authorizes federal courts to "issue all writs necessary or appropriate or in aid of their respective jurisdictions." While the All Writs Act *is* a residual source of authority to issue writs, it only authorizes issuance of those that are not otherwise covered by statute. *Pa. Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Because § 2251 specifically addresses when a federal court may order a stay of state court proceedings, "it is that authority, and not the All Writs Act, that is controlling." *Id. See McFarland v. Scott*, 512 U.S. 849, 863 n.* (1994) (O'Connor, J., concurring and dissenting) ("[T]he All Writs Act . . . does not provide a residual source of authority for a stay.").

III. BALANCING THE EQUITIES WEIGHS STRONGLY IN FAVOR OF VACATING THE STAY OF EXECUTION.

Even if the Sixth Circuit had jurisdiction to grant a stay, its action in this case were unjusitified under the traditional four-factor test for preliminary injuctions, which focuses on: (1) the petitioner's likelihood of success on the merits; (2) the possiblity of irreparable harm to the petitioner in the absence of an injunction; (3) public interest considerations; and (4) potential harm to third parties. Although Holton is concededly threatened with irreparable harm, his interest must be weighed against the state's interest in carrying out its punishment. The "State's interests in finality are compelling" and the "powerful and legitimate interest in punishing the guilty" attaches to both "the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Even considering the countervailing interests of Holton and the State, the small likelihood of success on the merits of the appeal filed by FDSET tips the balance in the State's favor. In granting a stay of execution, the Sixth Circuit made no finding concerning the likelihood of success in the appeal before it — which is based entirely on the contention by FDSET that Holton is incompetent and, thus, requires an award of third-party standing. To the contrary, the Sixth Circuit affirmatively sought personal input from Holton himself and intimated that Holton may be permitted to proceed pro se in the Sixth Circuit is he chooses to do so. The Sixth Circuit's ruling in this point defies logic.

To be clear, this case does not present the situation faced by this Court in *Wilcher v. Epps*, No. 06-5147 (U.S.), in which this Court recently granted a stay of execution pending disposition of a petition for writ of certiorari. In *Wilcher,* a state inmate presented a last-minute request to the Fifth Circuit to reinstate a previously withdrawn habeas petition. The inmate's request was accompanied by an affidavit from the inmate indicating, in conclusory terms, a change of heart with respect to pursuing habeas remedies. *Wilcher v. Anderson*, 2006 WL 1888895 (5th Cir., July 10, 2006). Holton made no such statement in proceedings before the Sixth Circuit. Indeed, his filing in this Court clearly repudiates the Sixth Circuit proceedings and demonstrates the correctness of the district court's dismissal by showing his competency. *Holton v. Bell*, No. 06-6534 (U.S.). But even if he had, his change of heart comes too late. Without

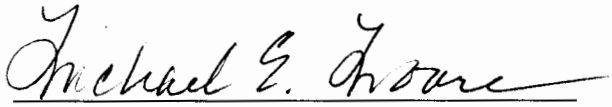
a showing that the district court's jurisdiction was properly invoked within the one-year limitation period under 28 U.S.C. § 2244(d)(1) — which expired in this case on October 4, 2005 — any habeas petition filed by or on Holton's behalf is now untimely and could not justify a stay of execution under 28 U.S.C. § 2251. Unlike Wilcher, who properly invoked federal jurisdiction before he attempted to withdraw his habeas petition, Holton has never done so. In short, Holton is no longer a "volunteer." His time to seek federal relief has now expired, and § 2254 provides no further refuge for him regardless of any decision he may now make. Given that there is no likelihood that FDSET will succeed on the merits of its appeal, equity dictates that the Sixth Circuit's stay of execution should be vacated.

CONCLUSION

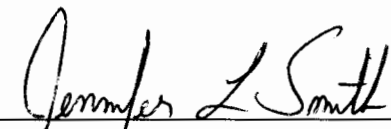
The motion to vacate the stay of execution should be granted.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee



MICHAEL E. MOORE
Solicitor General



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion to Vacate Stay of Execution has been forwarded by First-Class U.S. mail, postage prepaid, and by email on the 18th day of September, 2006, to:

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