No. 06-6534
No. A-297

DEATH PENALTY CASE
Execution Scheduled: September 19, 2006

IN THE
SUPREME COURT OF THE UNITED STATES

DARYL KEITH HOLTON,
Petitioner

v.

RICKY BELL, Warden
Respondent

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR A STAY OF EXECUTION

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CAPITAL CASE
QUESTION PRESENTED

Is petitioner entitled to a writ of habeas corpus from this Court where all of the claims in the petition are procedurally barred from habeas corpus review by any federal court and where there are no exceptional circumstances warranting the exercise of this Court's original jurisdiction?

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STATEMENT OF JURISDICTION

Petitioner invokes this Court's original jurisdiction to entertain applications for a writ of habeas corpus under 28 U.S.C. § 2241(a) and 28 U.S.C. § 2254(a).

STATUTORY PROVISIONS AND RULE INVOLVED

28 U.S.C. § 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2254 provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State . . . .

Rule 20.4, Rules of the Supreme Court of the United States, provides:

> A petition seeking the issuance of a writ of habeas corpus shall comply

with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

STATEMENT OF THE CASE

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.[1] The Tennessee Supreme Court affirmed Holton's convictions and sentences on January 5, 2004, and denied rehearing on February 17, 2004. *State v. Holton*, 126 S.W.3d 845 (Tenn. 2004), *cert. denied*, 125 S.Ct. 62 (2004).

Holton did not seek post-conviction relief in the Tennessee state courts, and his

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[1]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.

time to do so expired on February 17, 2005. *See* Tenn. Code Ann. § 40-30-102(a) (post-conviction petition must be filed "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken. . . . Time is of the essence of the right to file a petition for post-conviction relief . . ., and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise.").

On April 29, 2005, attorneys with the Tennessee Post-Conviction Defender's Office, acting without Holton's authorization or consent, filed a petition in his name and obtained a stay of execution. On May 4, 2006, the Tennessee Supreme Court vacated the stay of execution and dismissed the petition, finding both that it was not timely filed and that the Defender had failed to establish a basis to proceed as "next friend."

> The petition filed by the Defender on behalf of Daryl Holton was insufficient on its face for several reasons. First, the petition was not signed by Holton, and the claims in the petition were not verified under oath by Holton. Tenn. Code Ann. § 40-30-104(d) and (e). Second, the petition was filed after the one-year statute of limitations had expired. *Id.* § 40-30-102(a). Finally, the petition did not allege a statutory exception to the statute of limitations. *Id.* § 40-30-102(b).
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> * * *
>
> [W]e 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.

Daryl Keith Holton v. State, No. M2005-01870-SC-S10-PD, 2003 WL 24314330 (Tenn. May 4, 2006). (Resp. App. 10) By order filed May 25, 2006, the Tennessee

Supreme Court re-set Holton's execution for September 19, 2006. (Resp. App. 12)

On July 26, 2005, while the state proceedings were ongoing, attorneys with the Federal Defender Services of Eastern Tennessee, Inc. ("FDSET") 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]. The motions were followed, on September 30, 2005, with an application in Holton's name for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Id.* [Doc. Entry No. 9]. The application was signed by counsel with FDSET but not by Holton.

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]. Thereafter, on July 10, 2006, after the state court proceedings were concluded, the district court held hearings on July 31, 2006, and September 5, 2006, to determine whether there existed a sufficient basis for third-party standing to proceed on Holton's behalf. At the conclusion of the evidentiary proceedings, which included the testimony of a court-appointed mental health expert who had evaluated Holton on August 26 - 27, 2006, and the testimony of Holton himself, the district court dismissed the petition.

> I have seen and heard you [Holton] 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.

(Resp. App. 20-21)

The district court's written order was entered September 6, 2006. (Resp. App. 22)

On September 18, 2006, one day before his scheduled execution and nearly a year after the expiration of the federal habeas statute of limitations under 28 U.S.C. § 2244(d), Holton filed a *pro se* petition for writ of habeas corpus in this Court, asserting, for the first time, a claim of ineffective assistance of trial and appellate counsel.

ARGUMENT

I. HOLTON'S PETITION IS UNTIMELY AND SHOULD BE DISMISSED.

Section 2241(a) of Title 28 provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." Section 2254(a), which specifically governs applications by persons in custody pursuant to a judgment of a state court, likewise provides:

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or the laws or treaties of the United States.

28 U.S. C. § 2254(a).

While both provisions provide statutory authorization for this Court to entertain "original" petitions for habeas corpus relief by prisoners in state custody, that authority is not unlimited, particularly in light of the procedural limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Felker v. Turpin*, 518 U.S. 651, 662 (1996) ("Our authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to a judgment of a state court.'"). This Court's own Rule 20.4, which sets forth the standards under which the Court will grant an original writ of habeas corpus, makes clear that even original petitions must satisfy the exhaustion requirement of § 2254(b).

> A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely

granted.

In addition, the procedural and substantive limitations imposed by AEDPA upon § 2254 petitions are applicable even to original actions in this Court. Of particular relevance here, 28 U.S.C. § 2244(d)(1) provides that "[a] 1-year statute of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court." Because § 2244(d) is applicable generally to petitions by state prisoners, it applies equally to habeas actions filed in the district court and in this Court. *Compare with* 28 U.S.C. § 2244(b)(3) (gatekeeping provision for successive habeas applications is specific to petitions "filed in the district court").

Holton's petition unquestionably challenges the legality of his confinement "pursuant to the judgment of a State court," *see* § 2254(a), and must, therefore, meet the one-year limitation requirement of § 2244(d)(1), running from the latest of:

> (A) The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) The date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) The date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Because Holton's state court judgment of conviction "became final" under 28 U.S.C. § 2244(d)(1)(A) on October 4, 2004, when this Court denied a petition for writ of certiorari on direct appeal from his convictions and sentences, he was required to file a habeas petition within one year from that date, or by October 4, 2005.[2] The petition in this case was not filed until September 18, 2006, nearly one year beyond the date on which the statutory limitation period expired.

Moreover, even if this case presented the rare circumstance where this Court might permit an "original" writ to proceed, the due process and Sixth Amendment claims he raises are necessarily fact-bound and would require a transfer to the appropriate district court under § 2241(b). Were it so easy to avoid to statute of limitations as to file a petition invoking this Court's "original" jurisdiction in order to obtain such a transfer, § 2244(d)(1) would be rendered a virtual nullity. This Court should not countenance such a manipulation.

Holton's petition is untimely on its face and should be dismissed.

II. EVEN IF NOT UNTIMELY, THE PETITION SHOWS ON ITS FACE THAT HOLTON'S SUBSTANTIVE CLAIMS HAVE NEVER BEEN FAIRLY PRESENTED TO THE TENNESSEE STATE COURTS AND ARE, THUS, BARRED BY PROCEDURAL DEFAULT.

Habeas petitions filed in this Court by a prisoner in state custody must also satisfy the exhaustion requirements of § 2254(b). By his own admission, Holton failed

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[2]Because Holton did not file any proper application for state post-conviction or other collateral review, no tolling of the one-year period occurred under § 2244(d)(2). *See Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

to present any of the constitutional claims raised in the instant petition in the Tennessee state courts, either on direct appeal or in post-conviction proceedings. Since there is no procedure now available under Tennessee law to present any claim raised in the instant petition, however, he is deemed to have exhausted his state remedies. But that does not end the inquiry. This Court has held that the exhaustion requirement is satisfied only when the highest state court has been "given a full and fair opportunity to rule on the claim." *O'Sullivan v. Boerckel*, 526 U.S. 838, 846-47 (1999). To ensure that the State has the necessary "opportunity" to correct alleged violations of a prisoner's federal rights, a habeas petitioner must "fairly present" his claims to the appropriate state courts for consideration before seeking federal relief. *Duncan v. Henry*, 513 U.S. 365, 365 (2004). *See also Baldwin v. Reese*, 541 U.S. 27 (2004) (state prisoner must "fairly present" his claim to each appropriate state court so as to alert that court to the existence and nature of the claim).

By Holton's own admission, the grounds raised in the instant petition have not been fairly or adequately presented to the state courts in satisfaction of § 2254(b)'s exhaustion requirement. As his petition makes clear, he made no attempt to alert the Tennessee courts to the existence of either claim, choosing instead to remain silent until after the statutory time for seeking post-conviction relief had expired. Because Holton's claims are now barred from presentation to the state courts by the statute of limitations under Tenn. Code Ann. § 40-30-102(a) and the "one petition" limitation of § 40-30-

102(c), review by the federal courts in habeas corpus proceedings is likewise barred by procedural default. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991).

Holton argues, however, that he exercised "due diligence" in exhausting his claims "by refusing to cooperate with intervening [state post-conviction] counsel, except to the extent ordered by any court." (Petition, p. 11) He suggests that any such cooperation would have permitted post-conviction counsel to "exclude [his] claims, or include[] claims with which [he] disagrees . . . in disregard of [his] wishes." (*Id.* at 9-10) According to Holton, he chose to "waiver" the issues preferred by counsel by allowing the state post-conviction statute of limitations to expire in order to preserve those claims he wished to raise.

Holton's contention is contrary to Tennessee law, which clearly provides that, while an indigent party is not entitled to counsel of his or her own choosing, he may refuse to accept the services of appointed counsel and act *pro se* in any post-conviction proceeding. Rule 13(f), Rules of the Supreme Court of Tennessee ("If an indigent party refuses to accept the services of appointed counsel, such refusal shall be in writing and shall be signed by the indigent party in the presence of the court. . . . The indigent party may act pro se without the assistance or presence of counsel only after the court has fulfilled all lawful obligations relating to waiver of the right to counsel."). Indeed, in this case, the post-conviction defender did not file any papers on Holton's behalf until *after* the state post-conviction statute of limitations had already expired. *See Holton*, No.

M2005-01870-SC-S10-PD, slip op. at 10 ("[T]he petition [filed by the Post-Conviction Defender on behalf of Daryl Holton] was filed after the one-year statute of limitations had expired."). Prior to that, Holton made no attempt to file any *pro se* petition asserting the ineffective assistance of counsel claims cited in this instant petition. Holton's post hoc justification for failing to file a timely post-conviction petition should be rejected.

III. THIS CASE PRESENTS NO EXCEPTIONAL CIRCUMSTANCES WARRANTING THE COURT'S EXERCISE OF DISCRETIONARY AUTHORITY TO GRANT HABEAS CORPUS RELIEF.

Even beyond the procedural hurdles noted above, the instant petition does not establish "exceptional circumstances" warranting the exercise of this Court's discretionary authority. Rule 20.4(a) of the Rules of this Court states that "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Holton suggests in his petition in this Court that he was forced to bypass the federal district court and make original application here "because any claims he filed in that court could be joined with claims he did not assert or endorse made in an unauthorized petition for habeas corpus relief filed by federal public defenders." (Petition, p. 3) According to Holton, his right to review of the constitutional claims of his choosing has been thwarted due to "the intervention of state and federal public defenders filing unauthorized

petitions on [his behalf] which have impeded his ability to raise only the claims he wishes to assert." Holton's contention is meritless and should be rejected. As with state post-conviction remedies, Holton made no attempt to file any habeas petition or any other papers in the federal district courts, let alone request to proceed in any such action pro se on limited grounds. It is because of Holton's own inaction that adequate relief on his claims "cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a). And for the reasons already stated, he now has no viable claim for relief in this Court either.

As in *Felker*, the ineffective assistance claims raised in the instant petition are not extraordinary by nature and "do not materially differ from numerous other claims . . . which [the Court has] had occasion to review on stay applications to this Court."[3] 518 U.S. at 665. This Court's own rule confirms that an "original" writ of habeas corpus is extraordinary and "rarely granted." In fact, this Court last granted an original writ of habeas corpus over 75 years ago in *Ex parte Grossman*, 267 U.S. 87 (1925) (writ granted where district court ordered defendant committed to United States custody despite issuance of a Presidential pardon).

Especially at the eleventh hour, capital cases present an "obvious" incentive to forum shop. *Spenkellink v. Wainwright*, 442 U.S. 901, 906 (1979) (Rehnquist, J.,

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[3]Petitioner asserts that counsel was ineffective on appeal and at trial for failing to challenge the Tennessee rule governing the burden of proof for assertions of diminished capacity and for presenting conflicting defenses at trial. (Petition, pp. 11-12)

dissenting). Tolerating the use of original habeas petitions in this Court to present both time-barred and procedurally defaulted claims would encourage just such forum shopping. Where, as in this case, a petitioner has made no attempt to present his constitutional claims in the appropriate forum, or provided any legitimate justification for failing to do so, this Court should reject a last-minute attempt to obtain a stay of execution under the guise of this Court's "original" jurisdiction.

IV. A STAY OF EXECUTION IS NOT WARRANTED

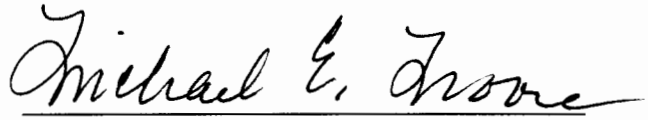
Under 28 U.S.C. § 2251(a), a justice or judge of the United States "before whom a habeas corpus proceeding is pending" may, before or after judgment or pending appeal, "stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." Here, however, as demonstrated above, because exercise of original jurisdiction is not warranted in this instance, neither is a stay of the state court judgment under § 2251(a)(1). Accordingly, Holton's application for a stay of execution should be denied.

CONCLUSION

The petition for writ of habeas corpus should be dismissed and the application for a stay of execution denied.

Respectfully submitted,

PAUL G. SUMMERS
Tennessee Attorney General



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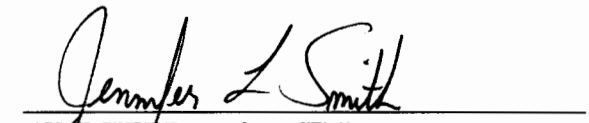

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CERTIFICATE OF SERVICE

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

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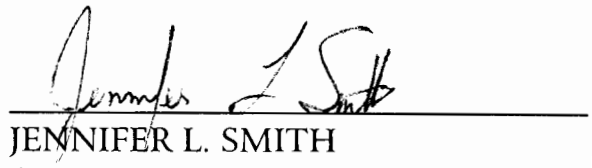

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