

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: STEVE HENLEY) Jackson County
) No. 87-73-I
)

**EXPEDITED MOTION TO RECALL MANDATE
TO EXECUTE STEVE HENLEY**

**THIS IS A DEATH PENALTY CASE
MR. HENLEY IS SCHEDULED TO BE EXECUTED
ON FEBRUARY 4, 2009 AT 1:00 A.M.**

Pursuant to Tenn. R. App. P. 42(d), Steve Henley respectfully requests that this Court immediately recall its Mandate of execution, currently set to be carried out at 1:00 A.M., Wednesday, February 4, 2009.

INTRODUCTION

In support of his Motion, Mr. Henley submits the Declaration of former Tennessee Commissioner of Revenue, Joe Huddleston as Exhibit A. Mr. Huddleston, currently serving as Executive Director of the Multistate Tax Commission in Washington, D.C. attended Mr. Henley's trial as an observer when he was an Assistant District Attorney for the Thirteenth Judicial District. His Declaration has not previously been available to this or any other Court. His sworn statement shows that even this Court is

fallible when determining issues of prejudice. With utmost respect and humility, Mr. Henley comes now at this last moment and argues that Joe Huddleston's Declaration demonstrates that the finding of three members of this Court (Frank Drowota, E. Riley Anderson, and Janice Holder) that Mr. Henley was not prejudiced by his trial counsel's ineffective assistance of counsel at the sentencing phase was a mistake. Contrary to the majority opinion, Mr. Henley's mother did effectively refuse to testify openly in front of the jury and the impact of her refusal was "shocking and highly prejudicial." The Court also made a mistake in finding that there was no prejudice because of instructions given to the jury by the trial judge. As shown below, no such corrective instruction was given.

Given the fact that six (6) other judges having heard Mr. Henley's appeals agree that he was denied effective assistance of counsel and that he was prejudiced, Mr. Henley asks this Court, as the supreme judicial authority in Tennessee, and his Court of last resort, to take into account the Declaration of Mr. Huddleston and carefully consider whether it is possible mistakes were made by the majority in its prior ruling. Mr. Henley should not be put to death where there is such a high possibility of mistake. In the interest of making sure justice prevails, this Court should exercise its inherent, supreme judicial power under Article VI § 1 of the Tennessee

Constitution (In Re Burson, 909 S.W. 2d 768, 772 (Tenn. 1995)) and its undisputed “broad conference of full, plenary, and discretionary inherent power” under Tenn. Code Ann. §§ 16-3-503 and 504(Id. at 772-73) to vacate Mr. Henley’s death sentence and modify it to life, or otherwise order a new sentencing hearing.

I. Statement of the Case

Steve Henley is a condemned Tennessee inmate scheduled for execution this evening at 1:00 a.m., February 4, 2009. Mr. Henley was tried and convicted of aggravated arson and two counts of first-degree murder in February 1986. At the sentencing hearing, the State relied on a single aggravating factor. The Tennessee Supreme Court affirmed the conviction and sentence on direct appeal. State v. Henley, 774 S.W.2d 908, 910 (Tenn. 1989). Direct review concluded in 1990. Henley v. Tennessee, 497 U.S. 1031 (1990)(denying certiorari).

Henley filed a state post-conviction petition in 1990, which the trial court denied. The Tennessee Court of Criminal Appeals, in a unanimous decision, reversed on the ground that Mr. Henley received ineffective assistance of counsel, but this Court reversed by a three to two margin. Henley v. State, 960 S.W.2d 572 (Tenn. 1997). State collateral review concluded in 1998. Henley v. Tennessee, 525 U.S. 830 (1998). On federal

habeas review, the Sixth Circuit denied Mr. Henley relief by a divided vote. Henley v. Bell, 487 F.3d 379 (6th Cir. 2007). Federal habeas review concluded in 2008. See Henley v. Bell, 128 S. Ct. 2962 (June 23, 2008) (denying certiorari); 129 S. Ct. 19 (Aug. 18, 2008) (denying rehearing).

On September 11, 2008, the State filed its motion to set Mr. Henley's execution date. On October 20, 2008, this Court issued its Order directing that the execution proceed. The Order set the execution date for February 4, 2009. Mr. Henley asks this Court to immediately recall that Order.

II. The Order Should be Recalled to Insure Justice Prevails

This Court should recall the Mandate and enter a stay of execution. The fact that Jimmy Reneau (Henley's court-appointed and now deceased) attorney, did not prepare for Mr. Henley's sentencing hearing remains uncontroverted. On state post-conviction review, Henley presented testimony that there had been a "*total* lack of preparation" and that Reneau "*had done absolutely no preparation whatsoever* with regard to mitigation." Post-conviction TR. 96 (emphasis added)¹. Reneau commissioned no "psychological or psychiatric evaluation," "did not speak with Henley's family members" or "members of the community familiar with Henley," and

¹ Jimmy Reneau was publicly censured on October 15, 1984 for having been convicted of failing to file his taxes and was temporarily suspended from practice in 1990 for committing malpractice (see attached Exhibit B). These two disciplines bookend his representation of Mr. Henley.

did not “investigate Henley’s educational background” or “employment history.” In lieu of an actual case in mitigation, Reneau delivered an impromptu presentation that covered barely thirty (30) transcript pages. TR. 1448-80. Reneau’s opening gambit was to call Henley’s mother in open court, without ever having spoken to her before. TR. 1448. Startled and unprepared, she refused and left the courtroom, never to return. A majority of judges considering these facts have found them to be highly prejudicial. The finding by a majority of this Court that Henley was not prejudiced may not have been correct.

Joe Huddleston, then serving as an Assistant District Attorney for the Thirteenth Judicial District, observed the entire trial. He states in his Declaration (that has not been previously available to this or any other court): “that the case against Steve Henley was primarily based upon the testimony of a co-defendant, Terry Flatt, and a limited amount of circumstantial evidence.” Mr. Huddleston continues: “After Steve Henley was convicted, the case went immediately to the penalty phase.” “Attorney Jimmy Reneau represented Henley in both the guilt and the sentencing phase of the trial.” “In front of judge and jury, Mr. Reneau attempted to call Henley’s mother to the stand as his first witness.” “Mrs. Henley, sitting towards the rear of the courtroom, diagonally across from the jury, stood up

and indicated that she wanted to talk to Mr. Reneau outside the courtroom.”
“She did not take the stand as requested.”

Mr. Huddleston then observes that “everyone in the courtroom, including Mr. Reneau, was visibly shocked that Mrs. Henley did not positively respond to Mr. Reneau’s call to the witness stand.” “After indicating that she wanted to speak to Mr. Reneau, Mrs. Henley simply walked out of the courtroom.” “Mr. Reneau asked the court for permission to follow her.” “His request was granted.” “Within a minute or two of his departure from the courtroom, (Reneau) returned and called Steve Henley’s grandmother, who had already testified at the trial.” “Steve Henley’s mother never returned to the courtroom.” The only witness to appear on Steve Henley’s behalf during the sentencing phase of the trial, other than Steve Henley himself, was his grandmother.

Mr. Huddleston states in paragraph 8 of his Declaration, “in my opinion, based on my observation of everyone in the courtroom (including Mr. Reneau’s reaction and the jury’s), Mrs. Henley’s refusal to testify on Steve Henley’s behalf was shocking and highly prejudicial.” “There is no question in my opinion that Mrs. Henley’s refusal to testify on her own son’s behalf severely damaged Steve Henley’s chance at a life sentence.”

As this Court knows, on May 9, 1996, the Court of Criminal Appeals unanimously reversed Steve Henley's death sentence and remanded the case for resentencing. Writing for the Court, Judge Peay faulted Reneau for his total lack of investigation, and for calling Henley's mother to the stand without notice or preparation. The Court explained that "of all the people that Reneau had available to him, the only two that testified were arguably the two least helpful." The Court of Criminal Appeals had no difficulty finding that Henley was prejudiced by Reneau's failure to investigate and present evidence in mitigation. Nor did the Court "think it is assuming too much to conclude that a jury is going to be prejudiced against a Defendant upon that person's own mother refusing to testify on his or her behalf." The Court noted a juror's statement presented at post-conviction, that "if a man's own mother won't testify on his behalf, then we know what we have got to do."

This Court, however, reversed on a 3-2 vote on December 15, 1997. Joe Huddleston's Declaration puts Mrs. Henley's refusal to testify in context and demonstrates that it would be a mistake to find that Reneau's ineffective assistance of counsel was in fact not highly prejudicial. Mr. Huddleston states that it was in fact "shocking."

The majority of this Court also may have mistakenly found no prejudice when it said the jury was instructed “to base its sentencing decision on the evidence presented, not upon speculation about why a particular witness did not testify.” See Henley, 960 S.W.2d at 581. In actual fact, the trial judge instructed only as follows: “[y]ou have now heard all of the evidence . . . all of which you will carefully weigh and consider.” TR. 1485. The jury was never instructed not to speculate why a particular witness did not testify.

Finally, the majority’s decision that Reneau was not ineffective for failing to discover Mr. Henley’s severe mental problems because Henley maintains that he is innocent and denies using drugs is clearly incorrect when viewed in light of the United States Supreme Court’s decision in Rompilla v. Beard, 125 S.Ct. 2456, 2468-69 (2005). In Rompilla, the Supreme Court concluded that despite counsel’s investigation “to develop mitigating evidence from various sources,” counsel was ineffective when they failed to obtain readily available evidence about his background and mental state. Id. In Rompilla, defense counsel interviewed their client’s large family, and retained three mental health professionals to evaluate him. Id., 125 S.Ct. at 2462-2463. Even so, the Supreme Court still found them to be ineffective because counsel failed to discover readily available critical

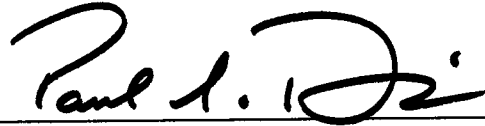
mitigation evidence, and provide that information to their mental health experts. Id., at 2469. Had they done so, counsel would have found the evidence presented here: “undiscovered `mitigating evidence, taken as a whole, [that] ‘might well have influenced the [sentencer’s] appraisal’ of [Petitioner’s] culpability.” Id., quoting Wiggins v. Smith, 539 U.S. 510, 538 (2003); Earp v. Ornoski, 431 F.3d 1158, 1176 (9th Cir. 2005)(evidentiary hearing needed where petitioner alleged counsel ineffective for failing to present evidence that “of medical evaluations evincing organic brain damage which may have exacerbated” petitioner’s behavioral problems).

CONCLUSION

This Court should recall its Mandate and grant a stay of execution. Recognizing the fallibility of judges, especially when it comes to determining issues of prejudice, Mr. Henley should not be executed where the majority of judges hearing his case disagree with the Court’s majority and the Huddleston Declaration shows that an impartial Assistant District Attorney witnessing the trial believes that the prejudice was so clear: Henley’s mother’s refusal to testify in open court was “shocking” even to Henley’s own lawyer. Under these unusual circumstances, and in the interest of justice, Steve Henley respectfully requests that this Court

immediately exercise its supreme judicial authority to recall its Mandate, issue a stay, and either modify the death sentence to life, or order a new sentencing hearing.

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the foregoing has been served by hand delivery and email upon the following individuals:

Jennifer Smith
Mark A. Hudson
Joseph F. Whalen
Elizabeth T. Ryan
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this 31 day of February, 2009.



Paul S. Davidson

EXHIBIT A

Declaration of Joe Huddleston

I, Joe Huddleston, hereby declare as follows:

1. I currently serve as Executive Director of the Multistate Tax Commission. The Commission, with its headquarters located in Washington, D.C., is an organization of forty-seven (47) participating state governments that work to promote equitable and efficient administration of tax laws that apply to multistate enterprises.
2. From 1989 to 1995, I served as Commissioner of the Tennessee Department of Revenue. After leaving the Department of Revenue, I became the Chief Financial Officer for the Metropolitan Government of Nashville and Davidson County. In that position, I was responsible for all of Nashville and Davidson County's financial affairs, including more than One billion dollars in annual expenditures.
3. Before becoming a lawyer, I served as an Internal Revenue officer in Chattanooga, Tennessee and Columbia, South Carolina.
4. From 1984 to 1987, I served as Assistant District Attorney for the 13th Judicial District based in Cookeville, Tennessee. Because I was appointed lead prosecutor in an upcoming capital murder case in the 13th Judicial District, I decided to attend the capital trial of Steve Henley as an observer.
5. I observed that the case against Steve Henley was primarily based upon the testimony of a co-defendant, Terry Flatt, and a limited amount of circumstantial evidence. I remember at the time thinking that the physical evidence against Steve Henley was thin. There was very little forensic evidence and, in my opinion, it was a close question on whether the physical evidence of a 22 rifle murder weapon should have been admitted into evidence.



6. After Steve Henley was convicted, the case went immediately to the penalty phase. Attorney Jimmy Reneau represented Henley in both the guilt and the sentencing phase of the trial. In front of Judge and jury, Mr. Reneau attempted to call Henley's mother to the stand as his first witness. Mrs. Henley, sitting towards the rear of the courtroom, diagonally across from the jury, stood up and indicated that she wanted to talk to Mr. Reneau outside the courtroom. She did not take the stand as requested.

7. Everyone in the courtroom, including Mr. Reneau, was visibly shocked that Ms. Henley did not positively respond to Mr. Reneau's call to the witness stand. After indicating that she wanted to speak to Mr. Reneau, Mrs. Henley simply walked out of the courtroom. Mr. Reneau asked the Court for permission to follow her. His request was granted. Within a minute or two of his departure from the courtroom, he returned and called to Steve Henley's grandmother, who had already testified at the trial, as his first witness. Steve Henley's mother never did return to the courtroom. The only witness to appear on Steve Henley's behalf during the sentencing phase of the trial, other than Steve Henley himself, was his grandmother.

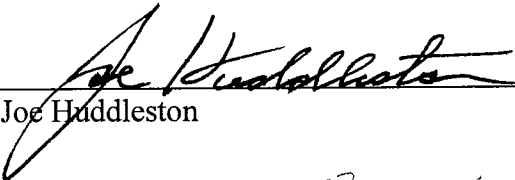
8. In my opinion, based on my observation of everyone in the courtroom (including Mr. Reneau's reaction and the jury's), Ms. Henley's refusal to testify on Steve Henley's behalf was shocking and highly prejudiced. There is no question in my opinion that Mrs. Henley's refusal to testify on her own son's behalf severely damaged Steve Henley's chance at a life sentence.

9. It is further my opinion, based on my observation of the trial and the thinness of the evidence, that the Henley case had all the ear markings of a non-death penalty case.



I declare under penalty of perjury that the foregoing is true and correct to the best of my memory of the events at Steve Henley's trial.

Executed this 26 day of January, 2009 in Washington, D.C.



Joe Huddleston


**My Commission Expires
June 14, 2012**

EXHIBIT B



**BOARD OF PROFESSIONAL RESPONSIBILITY
of the
SUPREME COURT OF TENNESSEE**

1101 KERMIT DRIVE, SUITE 730
NASHVILLE, TENNESSEE 37217
TELEPHONE: (615) 361-7500
(800) 488-5714
FAX: (615) 367-2480
E-MAIL: ethics@tbpr.org

RENEAU, JAMES H. III

BPR # 003270

October 15, 1984

County:Clay

District:4

Public censure on October 15, 1984. He was convicted of knowingly and willfully failing to file an income tax return.



**BOARD OF PROFESSIONAL RESPONSIBILITY
of the
SUPREME COURT OF TENNESSEE**

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RENEAU, JAMES H. III

BPR # 003270

July 19, 1990

County: Clay

District: 4

Suspended for sixty (60) days by order entered July 19, 1990, retroactive to July 1, 1990. In his representation of a client in a personal injury case, he failed to file suit within the time allowed to file suit and failed to appropriately inform her of his malpractice and that she should consult with an attorney regarding the matter. He subsequently negotiated and settled the malpractice claim with her.