No. 06-6178

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARYL KEITH HOLTON
Petitioner-Appellant

v.

RICKY BELL
Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

RESPONSE TO MOTION FOR STAY OF EXECUTION

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INTRODUCTION

The respondent, Ricky Bell, Warden, submits this response to the motion for stay of execution filed by Stephen Ferrell of the Federal Defender Services of Eastern Tennessee, Inc. ("FDSET") in the name of Daryl Keith Holton, a Tennessee inmate, who is scheduled for execution on September 19, 2006. The motion should be denied because this Court lacks authority under 28 U.S.C. § 2251 or any other statutory provision to stay the state proceedings against Holton, since there is not presently — nor has there ever been — a proper application for a writ of habeas corpus filed in the district court, either by Holton or any other individual with standing to invoke federal jurisdiction on his behalf.[1]

STATEMENT OF THE CASE AND FACTS

Holton was convicted in the Bedford County Circuit Court of the first-degree premeditated murders of his four children, ages four, six, ten and twelve. Following a

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[1]Although Daryl Keith Holton is styled in the papers filed with this Court as "Petitioner-Appellant," it is clear on the face of the record that the denomination is inaccurate on both counts. All of the papers filed in the district court, the representations, both written and oral, by counsel associated with FDSET, and the sworn testimony of Holton himself show that he has never authorized this proceeding. Nor, as discussed in more detail below, do the allegations in the unauthorized application for writ of habeas corpus, or any supporting documentation, motions or other proof presented in the two evidentiary proceedings in this matter demonstrate that the criteria for an award of next-friend status to any third party have been met. Indeed, aside from a May 5, 2005, affidavit of Ernest Holton, attached to the initial motion of FDSET to be appointed counsel in this matter [E.D. No. 1:05-cv-202, Doc. Entry No. 3, Attachment K], no putative "next friend," including Ernest Holton, has ever filed papers, offered testimony or made any court appearance in this matter.

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.[2] 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. Indeed, the district court specifically noted at the September 5, 2006, hearing in this case that, in a prior hearing only five weeks earlier, Holton had testified that: "I'm satisfied with the finding of the state court's jury and the sentence of death. I believe that the death sentence is appropriate for the crime for which I was convicted. I just don't have a problem with it. I'm not going to waste the court's time with frivolous issues. Like it or not, you can have four convictions of first degree murder and four death sentences and still have scruples. I just happen to think I do." (Attachment 1, Transcript of September 5, 2006, hearing, p. 4)

Holton's interaction with attorneys seeking to represent him and his

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[2]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.

representations to both federal and state courts since his convictions have been entirely consistent with that testimony. 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 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 the Supreme Court for an order granting *in forma pauperis* status without the required affidavit. *Holton v. Tennessee*, No. 03M79 (U.S.). (Attachment 2) Ultimately, however, counsel secured sufficient funds to pay the required filing fee, thus allowing the matter to proceed in the United States Supreme 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 Bedford County Circuit Court challenging Holton's first-degree murder convictions and death sentence. 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). As in the present case, 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 PCD's request for a stay of execution under the guise of 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."). From that order, the State filed an application in the Tennessee Supreme Court for an extraordinary appeal pursuant to Tenn. R. App. P. 10, and, on May 4, 2006, the state supreme court vacated the lower court's order and dismissed the petition. *Daryl Keith Holton v. State*, No. M2005-01870-SC-S10-PD, 2003 WL 24314330 (Tenn. May 4, 2006). (Attachment 3) 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.

(Attachment 3, p. 10)

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. (Attachment 4)

In the meantime, while the state proceedings were ongoing, 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]. 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 of FDSET, filed as Attachment L to the Memorandum in support of the motion [Doc. Entry No. 3], plainly stated that he had had *no communication* with Daryl Holton either about this 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] At the conclusion of the state post-conviction proceedings, as described above, 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 [Doc. Entry No. 2], the State's motion for reconsideration of the order appointing counsel [Doc. Entry No. 7], and the State's motion to dismiss the unauthorized petition. [Doc. Entry No. 13]

At that hearing, 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."[3] (Attachment 5, Transcript of July 31, 2006, hearing, p. 6-7) 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.

(Attachment 5, pp. 5-6)

As to 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. (Attachment 5, pp. 23-29) Holton specifically 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. (Attachment 5,

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[3]In the present motion for stay, FDSET claims to have presented "testimony by affidavit." (Motion, p. 1) The Warden specifically disputes this characterization, as the habeas rules do not provide for such a procedure with respect to a contested matter. In any event, it is clear from counsel's own representations at the July 31, 2006, proceeding in the district court that even Dr. Woods did not deem his "brief contacts" with Holton sufficient to reach a definitive conclusion as to his competence, a view apparently shared by the district court.

pp. 25-28) (Attachment 6, Exhibit to July 31, 2006, hearing) 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. (Attachment 5, p. 27)

Notwithstanding Holton's reasoned and unambiguous testimony, and over his express objection (Attachment 5, p. 30), the district court granted FDSET's motion for a psychological evaluation, appointing an independent psychologist selected by the court itself to perform a psychological evaluation to determine Holton's competency to decide whether to seek federal habeas review. The district court specifically directed its expert, Dr. Bruce Seidner, to address three questions: (1) whether Mr. Holton suffers from a mental disease, disorder or defect; (2) whether a mental disease, disorder or defect prevents Mr. Holton from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents Mr. Holton from making a rational choice among his options. [Doc. Entry No. 31] (Attachment 7) 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.

(Attachment 1, pp. 13-14)

Dr. Seidner testified at the September 5 hearing, at which time FDSET had a full and fair opportunity for cross-examination of the expert. 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. (Attachment 1, pp. 68-69). 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.

(Attachment 1, pp. 70-71)

Although FDSET requested and was granted a certificate of appealability as to the district court's competency finding under *Harper v. Parker*, 177 F.3d 567, 572 (6th Cir. 1999), FDSET did not seek a stay of execution from the district court pending any appeal of the court's decision.[4] Eight days after the district court dismissed the unauthorized petition from the bench, and with less than a week before Holton's scheduled execution, FDSET filed a notice of appeal to this Court from the district court's order as well as a motion for a stay of execution.

ARGUMENT

A STAY OF EXECUTION IS NEITHER AUTHORIZED NOR WARRANTED IN THIS MATTER.

FDSET asks this Court to stay Holton's scheduled September 19 execution pending an appeal from the district court's dismissal of the unauthorized application for

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[4]FDSET had previously sought a stay of the *district court* proceedings and a stay of execution pending disposition of the petition for writ of certiorari in *Wilcher v. Epps*, No. 06-5147 (U.S.). [Doc. Entry No. 26] That motion was among the pending motions denied as moot upon dismissal of this action. [Doc. Entry No. 46]

writ of habeas corpus filed in Holton's name by FDSET. Citing *Harper v. Parker*, *supra*, counsel argues that the district court improperly dismissed the petition despite a showing of reasonable cause to believe that Holton is presently incompetent. Counsel further argues that a stay is warranted pending the disposition of a petition for writ of certiorari in *Bobby G. Wilcher v. Epps*, No. 06-5147 (U.S.), a case which counsel asserts presents "similar proceedings" to this one. Neither contention justifies the relief requested. As shown below, FDSET failed to establish a jurisdictional basis for the exercise of federal injunctive authority directed to state court proceedings. But even if he had, the present request for a stay of execution pending appeal is not properly before this Court because counsel failed to request such relief in the district court in the first instance. *See* 6 Cir. R. 22(c)(4) ("All requests with respect to stays of execution over which the district court possesses discretion . . . must be presented to the district court by motion pursuant to FRAP 8(a)."). *See also* Fed. R. Civ. P. 8(a)(1)(C) ("A party must ordinarily move first in the district court for . . . an injunction while an appeal is pending."). In either event, the motion for stay of execution should be denied.

1. This Court lacks 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. *Courtney v. Smith*, 279 F.3d 455, 459 (6th Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). In *West v. Bell*, 242 F.3d 338 (6th Cir. 2001), this Court made clear that 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. *West*, 242 F.3d at 343. 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.

An application for a writ of habeas corpus shall be "signed and verified by the

person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. Furthermore, Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts requires that the petition "shall be signed under penalty of perjury by the petitioner." The language of § 2242 clearly anticipates that "next friend" petitions may be necessary. But the authority of one person to apply for the writ of habeas corpus for the release of another will be recognized only when the application for the writ demonstrates: (1) why the detained person did not sign and verify the petition; and (2) the relationship and interest of the would be "next friend." *Weber v. Garza*, 570 F.2d 511, 513-14 (5th Cir. 1978). "The application for the writ must establish some reason satisfactory to the Court showing why the condemned prisoner did not sign and verify the petition, as well as the relationship and interest of the would-be 'next friend.' If this explanation is missing from a petition, the Court lacks jurisdiction to consider it." *Hamblen v. Dugger*, 719 F.Supp. 1051, 1059-1060 (M.D. Fla. 1989).

The pleading filed in this case contained neither of the two prerequisites. Rather, in the space provided on the Form § 2254 Petition to explain the relationship of the signatory (if other than petitioner) to the petitioner and an explanation why the petitioner is not signing the petition, FDSET states: "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]. "[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 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. *Compare with Kirkpatrick v. Bell*, 64 Fed. Appx. 495 (6th Cir. 2003) (putative next friend presented testimony of an expert and several lay witnesses during preliminary hearing before the district court). 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." (Atachment 1, p. 71)

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.

Here, as in *Harper*, the district court held a preliminary hearing to inquire into whether there was "reasonable cause to believe that [Holton] may be suffering from a mental disease or defect rendering him mentally incompetent" to waive his appeals. *Parker*, 177 F.3d at 571. 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. (Attachment 1, pp. 68-69) And he did so here without having conducted a full psychological evaluation. (Attachment 5, pp. 6-7) Like *Harper*, Holton's history of mental disorder was insufficient to raise a reasonable doubt about his current competency, particularly in light of the overwhelming evidence that he is competent now. In dismissing the unauthorized pleading in this case, the district court correctly stated the governing legal standard and carefully detailed the evidence supporting its conclusions.[5] 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. Like the attorneys in *West*, FDSET failed to provide the district court with a jurisdictional basis to proceed, and the unsigned and unauthorized petition for writ of habeas corpus was properly dismissed for lack of standing.

As to the present request for a stay of execution, disposition of that question is largely controlled by the Supreme Court's decision in *Demosthenes v. Baal,* 495 U.S. 731

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[5]The determination of "reasonable cause to believe" a defendant may be incompetent so as to justify further evidentiary inquiry is left to the discretion of the district judge and should be disturbed only if the court relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard. *Harper*, 177 F.3d at 572.

(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. The Supreme 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.[6] As a point of clarification, respondent takes issue with the assertion of FDSET that the State "conceded a certificate of appealability is appropriate." The transcript of proceedings in the district court shows that respondent had "no objection" to its issuance. (Attachment 3, p. 72) Counsel for respondent expressed no position regarding either the substantive basis of the request or the propriety and/or necessity for such a ruling. But even if the State had conceded that a certificate of appealability should issue, that would be insufficient to confer federal jurisdiction to act where none exists. 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

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[6]Even if a COA were required in this case, the district court's grant would not necessitate a stay of execution. The Supreme Court made clear in *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983), that nothing in it prior decisions requiring a decision on the merits of an appeal prevents courts of appeals from adopting summary procedures to dispose of such cases. 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. The Supreme 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). 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. The issues before this Court are uncomplicated; the standard of review is clear; the record is complete; and, more importantly, as shown in this response, the likelihood of success on the merits of any appeal are minimal at best. Under these circumstances, that procedure should be employed in this case, and the motion for stay of execution should be denied.

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.

Without express authorization by a federal statute or an exception to the Anti-Injunction Act, this Court is 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 (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.").

2. The pendency of Wilcher v. Epps, No. 06-5147 (U.S.), does not warrant a stay of execution.

FDSET further argues that the case should be stayed pending the outcome of the petition for writ of certiorari in *Wilcher v. Epps*, No. 06-5147 (U.S.). But reliance on *Wilcher* is misplaced. 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). No such affidavit has been presented here, and there is no indication that Holton has experienced any similar about-face. But even if such an affidavit were to materialize in this case, it would be 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.[7] In short, Holton is no longer a "volunteer." His time to seek federal relief has now expired, and § 2245 provides no further refuge for him regardless of any decision he may now make.

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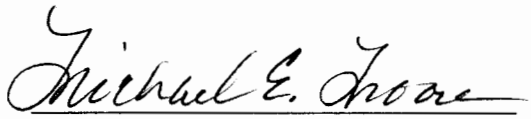
[7]In fact, Wilcher initiated invoked federal jurisdiction on March 27, 1998, with the filing of a motion for stay of execution and for appointment of counsel. Although the federal proceedings were initially held in abeyance pending disposition of state judicial proceedings, Wilcher ultimately filed an application for writ of habeas corpus on February 18, 2004. The matter was actively litigated, including motions for summary judgment and for an evidentiary hearing filed by Wilcher, until May 24, 2006, when Wilcher filed a *pro se* motion to drop all remaining appeals. The district court granted Wilcher's motion on June 14, 2006, and counsel appealed that decision to the Fifth Circuit Court of Appeals. Unlike this case, no evidentiary proceedings were conducted in the district court, nor does it appear that the petitioner was evaluated prior to the district court's dismissal of his claim. *Wilcher v. Anderson*, No. 3:98-cv-00236 (S.D. Miss.) (information derived from CM/ECF system).

CONCLUSION

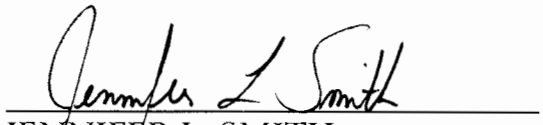
Appellant's motion for stay of execution should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter



MICHAEL E. MOORE
Solicitor General



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served by first class mail, postage prepaid, and by email, to Stephen Ferrell, Assistant Federal Community Defender, 530 S. Gay Street, Suite 900, Knoxville, TN 37902, on the 14th day of September, 2006.

Jennifer L Smith

JENNIFER L. SMITH
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