

No. 08-8464

IN THE

SUPREME COURT OF THE UNITED STATES

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STEVE HENLEY,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

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PETITIONER'S REPLY BRIEF

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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Respondent's assertion that the denial of a COA means that Henley's claims have no merit misses the mark. The whole point of his petition is that the COA standard involves an assessment of the merits of a constitutional challenge to a state court action, but Henley has not challenged the state court action. Of course he wouldn't meet the COA standard; his motion involves the fairness of the federal proceedings. Where the federal courts have applied a standard of review that is inapplicable, it is hard to see how, by concluding that Henley shows no constitutional deprivation in state court, one can say he has no case for fraud in federal court. The whole point is that the COA standard is not relevant to whether fraud has been shown, which is why §2253 doesn't apply, which is why this Court should grant review to undo this anomaly.

As a final note, Respondent goes to great length to scold Henley and his counsel for both "defaulting" his claim in state court and raising it too late in federal court, such that he should be denied a stay. But the facts are clear: (1) Flatt told the jury he didn't have a deal; (2) the prosecution didn't correct his false testimony and represented that they had no exculpatory evidence under *Brady*; (3) the state didn't answer the petition truthfully; and (4) Henley only finally got the truth when Flatt finally told the truth in 2008.

So, who is at fault? Is it Henley, whose jury was lied to and whose federal

judgment was tainted by a misleading answer? Or is it the state who presented false testimony, withheld exculpatory evidence, misled Henley and the courts about the existence of the deal? The answer is obvious. This Court has said as much in *Banks*.

Henley is entitled to a stay of execution so that the federal courts can fairly address his substantial allegations of fraud which the state did not deny or contradict in in the district court, and which the state has not meaningfully denied here either.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply was served upon Elizabeth Ryan, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 3<sup>rd</sup> day of February, 2009.

/s/Paul R. Bottei