No. 19-7696, 19A912

IN THE
SUPREME COURT OF THE UNITED STATES

***In re* NICHOLAS SUTTON,**

Petitioner,

ON PETITION AND APPLICATION FOR ORIGINAL WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

RESPONDENT'S RESPONSE IN OPPOSITION TO ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether this Court should deny Sutton's original petition for writ of habeas corpus, following the state court's denial of collateral relief, when his due process claim concerning the use of shackles during trial does not qualify for consideration in a second or successive habeas corpus petition and is procedurally defaulted, and when there are no exceptional circumstances warranting the exercise of this Court's original jurisdiction.

II. Whether this Court should grant a stay of execution when Sutton cannot show a basis to grant the petition.

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RULE 15.2 STATEMENT OF PROCEDURAL HISTORY

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Sutton v. State, No. 03C01-9702-CR-00067, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999) (appeal from the denial of post-conviction relief).

Sutton v. State, No. 03C01-9702-CR-00067, 1999 Tenn. LEXIS 694 (Tenn. Dec. 20, 1999) (order denying application for permission to appeal in post-conviction appeal).

Sutton v. Tennessee, 530 U.S. 1216 (2000) (denying certiorari in post-conviction appeal).

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In re Sutton, No. 13-6190 (6th Cir. Nov. 25, 2013), D.E. 27 (order denying motion to file second or successive petition for writ of habeas corpus).

Sutton v. Carpenter, No. 13-8573 (Apr. 21, 2014) (denying certiorari in denial of motion to file second or successive petition).

In re Sutton, No. 16-5945 (6th Cir. Aug. 3, 2016), D.E. 10 (order denying motion to file second or successive petition for writ of habeas corpus).

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Sutton v. State, No. E2018-00877-CCA-R3-PD (Tenn. Crim. App. Jan. 31, 2020) (appeal from the denial of relief in a reopened post-conviction).

State v. Sutton, No. E2019-01062-CCA-R3-ECN (Tenn. Crim. App. Feb. 11, 2020) (appeal from the denial of petition for writ of error *coram nobis*).

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OPINIONS BELOW

The February 14, 2020, order of the Tennessee Supreme Court denying Sutton's application for permission to appeal the denial of his error coram nobis petition is unpublished and is provided in Respondent's appendix. *See* Resp. App. A. The February 11, 2020, judgment and order of the Tennessee Court of Criminal Appeals affirming the dismissal of the error coram nobis petition is unpublished and is provided in Petitioner's appendix. *State v. Sutton*, No. E2019-01062-CCA-R3-ECN, 2020 WL 703607 (Tenn. Crim. App. Feb. 11, 2020); *see* Pet. App. A.[1] The May 17, 2019, order of the Morgan County Circuit Court denying error coram nobis relief is unpublished and is provided in Petitioner's appendix. *See* Pet. App. B.

STATEMENT OF JURISDICTION

Sutton invokes this Court's original jurisdiction under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §§ 2241 provides in relevant 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.
>
> . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> > . . . .
> >
> > (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2244 provides in relevant part:

[1] Respondent will cite to Petitioner's appendices using the pagination within each appendix.

. . . .

(b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

. . . .

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

. . . .

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254 provides in relevant 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;

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

In January 1985, Sutton and Thomas Street stabbed Carl Estep, the victim, to death. *State v. Sutton*, 761 S.W.2d 763, 764 (Tenn. 1988). The victim suffered thirty-eight stab wounds, nine of which were potentially fatal. *Id.* at 765. At the time of the murder, Sutton, Street, and the victim were incarcerated at the Morgan County Regional Correctional Facility. *Id.* Sutton was serving a life sentence for the first-degree felony murder of his grandmother. *Id.* at 767 n.2 (citing *State v. Sutton*, No. 127 (Tenn. Crim. App. Feb. 27, 1981)).

A Tennessee jury convicted Sutton of first-degree murder and sentenced him to death. *Id.* at 764. To support enhanced sentencing, the jury applied three aggravating circumstances: (1) Sutton was previously convicted of one or more felonies, other than the present charge, which involved the use of violence to the person; (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) Sutton committed the murder while he was in lawful custody or in a place of lawful confinement. *Id.* (citing Tenn. Code Ann. § 39-2-204(i)(2), (5), (8) (1982) (repealed)). To support the prior-violent-felony aggravating circumstance, the State relied on Sutton's conviction for first-degree felony murder. *Id.* at 767.

The Tennessee Supreme Court affirmed Sutton's conviction and death sentence on direct appeal. *Id.* at 764, 767. Sutton then unsuccessfully sought post-conviction relief in state court. *Sutton v. State*, No. 03C01-9702-CR-00067, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), *perm. app. denied* (Tenn. Dec. 20, 1999). He next filed a petition for writ of habeas corpus in federal court. *Sutton v. Bell*, No. 3:00-cv-13 (E.D. Tenn. Dec. 4, 2002). The district court denied his petition. Resp. App. B; Resp. App. C. The Sixth Circuit affirmed. *Sutton v. Bell*, 645 F.3d 752 (6th Cir. 2011), *rehrg and rehrg en banc denied* (6th Cir. Aug. 26, 2011).

On June 8, 2016, Sutton filed a motion to reopen his post-conviction petition in state court, which the trial court granted on October 4, 2016. Thereafter, he amended his reopened post-conviction petition to include a claim that he was denied his right to a fair trial because he was shackled within view of the jury. On February 2, 2017, Sutton filed a petition for writ of error coram nobis, alleging newly discovered evidence in that he was visibly shackled and handcuffed during his capital trial and sentencing. *State v. Sutton*, No. E2019-01062-CCA-R3-ECN, 2020 WL 703607, at *1 (Tenn. Crim. App. Feb. 11, 2020), *perm. app. denied* (Tenn. Feb. 14, 2020). To support his claim, he provided affidavits from four trial jurors. *Id.*

On April 12, 2018, the trial court summarily denied Sutton's reopened petition for post-conviction relief. Regarding the shackling claim, the court found it lacked jurisdiction to adjudicate the claim. This decision was affirmed on appeal. *Sutton v. State*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169, at *1 (Tenn. Crim. App. Jan. 31, 2020), *perm. app. denied* (Tenn. Feb. 13, 2020).

On May 17, 2019, the trial court summarily dismissed the coram nobis petition. *See* Pet. Appx. B at 1-13. As the court explained, Sutton filed the petition well outside of the one-year statute of limitations period, and he could provide no basis for equitable tolling. *Id.* at 18-21. Specifically, facts surrounding the use of shackles were discoverable long before Sutton filed the petition. *Id.* at 19-20. Nothing prevented him from developing and presenting these facts in his repeated challenges to the security measures used during his trial. *Id.*

On February 11, 2020, the Tennessee Court of Criminal Appeals affirmed the dismissal of Sutton's coram nobis petition. *Sutton*, 2020 WL 703607, at *1. The court agreed that Sutton filed his petition well beyond the one-year statute of limitations period and that he was not entitled to equitable tolling. *Id.* at *3-4. In denying equitable tolling, the court rightly observed that issues

regarding courtroom security were addressed on both direct and post-conviction appeal. *Id.* at *3. The court found meritless the argument that Sutton's delay in raising the claim could be excused by the alleged ineffective assistance of counsel. *Id.* at *4. Finally, the court held that the claim is not cognizable in a petition for writ of error coram nobis. *Id.* On February 14, 2020, the Tennessee Supreme Court also denied Sutton's application for permission to appeal the dismissal of his coram nobis petition. *See* Resp. App. A at 1.

Instead of filing a petition for writ of certiorari from the state-court denial of the petition for writ of error coram nobis—as Sutton did regarding the rejection of his reopened post-conviction petition—he filed an original writ of habeas corpus in this Court.[2] He claims that the use of shackles at trial deprived him of due process.

[2] Sutton's petition for writ of certiorari is docketed as No. 19-7689.

REASONS FOR DENYING THE PETITION

I. Sutton's Claim Does Not Satisfy the Conditions Under 28 U.S.C. §§ 2244(b)(1)-(2) for Consideration in a Second or Successive Habeas Corpus Petition, and Exceptional Circumstances Do Not Exist to Grant Relief on the Procedurally Defaulted Claim.

Sutton has failed to satisfy any of the conditions that would ordinarily justify a second or successive habeas petition. The claim is procedurally defaulted. And Sutton has failed to identify extraordinary circumstances that warrant consideration of his original habeas petition. Accordingly, this Court should deny the petition.

An original petition for writ of habeas corpus is "rarely granted." Sup. Ct. R. 20.4(a). Both 28 U.S.C. § 2241(a) and 28 U.S.C. § 2254(a) authorize this Court to entertain "original" petitions for habeas corpus relief. But that authority is not unlimited—particularly given the procedural limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This Court's "authority to grant habeas relief to state prisoners is limited by § 2254" and "inform[ed]" by "the restrictions on repetitive and new claims imposed by §§ 2244(b)(1) and (2)." *Felker v. Turpin*, 518 U.S. 651, 662-63 (1996). And a petitioner seeking an original writ of habeas corpus "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." Sup. Ct. R. 20.4(a). Here, the statutory restrictions of §§ 2244(b)(1) and (2) and 2254 weigh against granting Sutton relief, and the case does not present exceptional circumstances warranting this Court's intervention.

As an initial matter, § 2244(b)(1) should limit this Court's consideration because the claim is merely a continuation of one raised in his prior habeas petition. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus action under section 2254 that was presented in a prior application shall be dismissed.") In his first § 2254 petition, Sutton challenged

the security measures undertaken at trial, just as he had raised that claim in the post-conviction proceeding. The district court rightly concluded that the claim specifically focused on Sutton's being shackled at trial was procedurally defaulted, after the state court deemed it waived under state law. Resp. App. B. at 17-20. In effect, Sutton attempts to relitigate the shackling portion of his courtroom-security claim. Dismissal is appropriate because the claim is not new under § 2244(b)(1).

Even if the claim is considered a new claim, Sutton still cannot satisfy 28 U.S.C. § 2244(b)(2), as he concedes. Pet. 2. He admits relief is not available under § 2244(b)(2)(A) because the claim is not based on a new rule of constitutional law made retroactive to cases on collateral review by this Court. Pet. 2. He also admits he is not entitled to relief under § 2244(b)(2)(B)(ii) because he cannot show that "but for constitutional error, no reasonable fact finder would have found [him] . . . guilty of the underlying offense . . . ." Pet. 2. For these reasons as well, and mindful that § 2244(b) "informs" this Court's consideration of the petition, this Court should deny the original petition.

Furthermore, relief on the newly-presented claim is not warranted generally because Sutton has procedurally defaulted the claim. A habeas petition filed in this Court by a prisoner in state custody must satisfy the exhaustion requirement in 28 U.S.C. § 2254(b). *See* Sup. Ct. R. 20.4(A); *see also Felker*, 518 U.S. at 662. 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*, 536 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, 29 (2004).

Because Sutton failed to exhaust state-court remedies when they were available to him, and because none currently remain, the claim is now barred by procedural default. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). Sutton never fairly raised his current claim in the Tennessee courts, a fact he does not genuinely dispute. Even if this Court were to conclude that the new claim is distinct from the claim previously asserted concerning general courtroom security, that new claim meets the same fate as the former. Sutton could and should have raised his shackling claim in the motion for new trial and on direct appeal. By not doing so, he failed to exhaust state-court remedies at a time when they were available to him. Even if he had raised this claim in the post-conviction proceedings when he raised a general courtroom-security claim, the state court would have deemed it waived under state law. *See* Tenn. Code Ann. § 40-30-106 (g) ("A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.") And its subsequent assertion in federal court would be deemed defaulted. Regardless, the claim was not "fairly presented" at a time when the state court had a "full and fair opportunity to rule on the claim." Recently, the Tennessee Court of Criminal Appeals correctly concluded that neither a reopened petition for post-conviction relief nor a coram nobis petition is an appropriate vehicle for Sutton to present his shackling claim. *Sutton*, 2020 WL 525169, at *8; *Sutton*, 2020 WL 703607, at *3-4.

Finally, Sutton has not shown "extraordinary circumstances" that would justify this Court's granting of an original habeas petition. He states that "the restrictions on second or successive habeas corpus applications prevent the lower federal courts from addressing this claim." Pet. at 9, 23. But those same limitations "inform" this Court's consideration of an original habeas petition that is successive. *Felker*, 518 U.S. at 662-63. Despite his indication to the contrary, they are not

irrelevant. And Sutton's own default of the claim likewise bears negatively on his need for relief, or lack thereof.

This claim has been available to Sutton since the time of his trial. Indeed, Sutton moved prior to trial to "require the Tennessee Department of Correction[] not to bring him within the presence of any juror or prospective juror while he is physically wearing any physical restraints . . . ." Resp. App. D at 98. And as he acknowledges, his co-defendant's counsel raised an objection during trial as to the use of shackles. Pet. at 12. Sutton continued to raise issues regarding courtroom security in state and federal court, which wholly undercuts his assertion that the shackling issue is somehow newly discovered.[3] Pet. at 18.

II. A Stay of Execution is Not Warranted

Under 28 U.S.C. § 2251(a), a judge or justice 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." But a "stay of execution is an equitable remedy." *Hill v.* McDonough, 547 U.S. 573, 583 (2006). That remedy "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. And a "court considering a stay must also apply a strong equitable 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 entry of a stay." *Id.*

[3] Respondent would note that the claim is also likely untimely under 28 U.S.C. 2254(d), as the claim was available to Sutton at the time he filed his initial habeas petition, but he did not raise it.

Sutton is plainly not entitled to a stay of his execution. As explained above, he cannot succeed on the merits of his original habeas petition because, as he acknowledges, he cannot satisfy the conditions imposed by 28 U.S.C. §§ 2244(a)(1)-(2) or 2254, nor does he or can he show exceptional circumstances that would warrant an exercise of this Court's original jurisdiction. Therefore, upon the dismissal of this petition, this Court should deny Sutton's application for a stay of execution.

CONCLUSION

This Court should deny Petitioner's Original Petition for Writ of Habeas Corpus and Application for Stay of Execution.

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