Nos. 18-5495 & 18A145

DEATH PENALTY CASE
Execution Scheduled: August 9, 2018

IN THE
SUPREME COURT OF THE UNITED STATES

BILLY RAY IRICK,
Petitioner,

v.

TONY MAYS, 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 when all of the claims in the petition are procedurally barred from habeas review by any federal court and 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 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 the 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(a), 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 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

Billy Ray Irick was convicted by a Tennessee jury in 1986 of the first-degree murder and aggravated rape of seven-year-old Paula Dyer while she had been entrusted to his care. The jury sentenced Irick to death on the strength of four aggravating circumstances, and the Tennessee Supreme Court affirmed. *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988), *cert. denied*, 489 U.S. 1072 (1989). Irick raised no claim on direct appeal that severe mental illness bars his death sentence.

He next sought state post-conviction relief, which was denied by the trial court. The Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied his application for permission to appeal. *Irick v. State*, 973 S.W.2d 643 (Tenn. Crim. App. Jan. 14, 1998), *perm. app. denied*, (Tenn. June 15, 1998), *cert. denied*, 525 U.S. 895 (1998). In that appeal, Petitioner did not claim that severe mental illness bars his death sentence.

Irick challenged his State court judgment in federal habeas proceedings under 28 U.S.C. § 2254, but the district court denied relief. *Irick v. Bell*, No. 3:98-cv-666, 2001 WL 37115951 (E.D. Tenn. Mar. 30, 2001) (Collier, J.). The Sixth Circuit affirmed, and this Court denied certiorari. *Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009), *cert. denied*, 565 U.S. 315 (2010), *rehearing denied*, 559 U.S. 1088 (2010). Petitioner again made no claim that severe mental illness bars his death sentence.

In 2010, when Petitioner's execution was first set, the Tennessee courts addressed Petitioner's claim that he was incompetent for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). On appeal, Petitioner argued that the Tennessee Supreme Court should apply *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), to prohibit the execution of "death-sentenced inmates who suffer

from severe mental illnesses." *State v. Irick*, 320 S.W.3d 284, 297 (Tenn. 2010), *cert. denied*, 562 U.S. 1145 (2010). That court declined the invitation:

> Notwithstanding the issues of timeliness and procedural propriety, we note that, while Mr. Irick has cited dissenting and concurring opinions in support of his argument, he has not cited, and research has not revealed, any majority court decision adopting a per se ban on the execution of severely mentally ill prisoners who are nonetheless competent to be executed. Furthermore, Connecticut appears to be the only state that has adopted a statute barring the execution of offenders who, at the time of the offense, had a "significantly impaired . . . ability to conform [their] conduct to the requirements of law." Conn. Gen. Stat. Ann. 53a-46a(h). One commentator who advocates for a rule barring the execution of the mentally ill has stated that "the categorical approach invoked by the Court in both *Atkins* and *Roper* would not be appropriate in the context of severe mental illness. Because mental illness varies considerably in its effects on those who experience it, a categorical exemption is not warranted."

Id. at 298 (footnotes omitted).

Having failed in state court, Petitioner returned to the federal district court with a motion for relief from the judgment in his federal habeas action under Fed. R. Civ. P 60(b). But there, Petitioner claimed that, due to newly-presented evidence establishing incompetency, he is actually innocent and, thus, excused from his procedural default of other claims. The district court rejected that argument, concluding that Petitioner is neither actually innocent of the crime nor actually innocent of the death penalty.[1] *Irick v. Bell*, 3:98-cv-00666, 2010 WL 4238768, at *2-*5 (E.D. Tenn. Oct. 21, 2010).

Now, two days before his scheduled execution, Petitioner has filed an original petition for writ of habeas corpus and a motion for a stay of execution in this Court.

[1]Petitioner also unsuccessfully moved to re-open his state-court post-conviction proceedings based upon this same newly-presented evidence. *Irick v. State*, No. E2010-01740-CCA-R28-PD (Tenn. Crim. App. Sept. 16, 2010), *perm. app. denied* (Tenn. Nov. 17, 2010) (orders attached). The State courts also denied a writ of error coram nobis based on that evidence. *Irick v. State*, No. E2010-02385-CCA-R3-PD, 2011 WL 1991671 (Tenn. Crim. App. May 23, 2011), *perm. app. denied* (Tenn. Aug. 25, 2011).

ARGUMENT

I. Petitioner's Eighth Amendment Claim Is Time Barred.

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 given 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.'"). Indeed, 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.

The procedural and substantive limitations imposed by AEDPA are applicable even to original actions in this Court. Specifically, 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").

Because Petitioner unquestionably challenges the legality of his confinement "pursuant to the judgment of a State court," s*ee* § 2254(a), he must meet the one-year limitation requirement of § 2244(d)(1). Petitioner's state-court conviction became final on March 6, 1989, when this Court denied certiorari on direct appeal from his convictions and sentence. Because Petitioner's conviction became final before AEDPA's enactment, his one-year limitation period ran for one year from the enactment of the limitations statute, or until April 24, 1997. Even considering tolling during the pendency of Petitioner's state post-conviction action, which concluded in June 1998, the current petition is plainly far out of time.

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 to obtain such a transfer, § 2244(d)(1) would be rendered a virtual nullity. This Court should not countenance such a manipulation.

II. Petitioner's Eighth Amendment Claim Is Procedurally Defaulted.

Petitioner claims for the first time in a federal habeas corpus action that his 1986 death sentence violates the Eighth Amendment due to his alleged severe mental illness. But he did not properly raise this constitutional claim in state court. Because he failed to exhaust state-court remedies on it, the claim is procedurally defaulted.

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). Sup. Ct. R. 20.4(A); *see also Felker v. Turpin*, 518 U.S. 651, 662 (1996) ("Our authority to grant habeas relief to state prisoners is limited by § 2254."). 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*, 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 (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).

Petitioner never properly or fairly raised his current claim in the Tennessee courts, a fact he does not genuinely dispute. Indeed, Petitioner's only half-hearted attempt to assert the claim

came while the Tennessee Supreme Court was reviewing Petitioner's separate claim of alleged incompetency for execution under *Ford* and *Panetti*. But the State court appropriately concluded that the issue was not properly before it in that proceeding. *Irick*, 320 S.W.3d at 298. The claim was not "fairly presented" at a time when the court had a "full and fair opportunity to rule on the claim." Because Petitioner failed to exhaustion state-court remedies when they were available to him, his claim is now barred by procedural default.

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 this Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

Petitioner suggests in his petition that he was forced to bypass the federal district court and make original application here because of the limitations on second or successive petitions within 28 U.S.C. § 2244(b). Petition, at 1-2. But those same limitations inform this Court's consideration of an original habeas corpus petition that is successive. *Felker*, 518 U.S. at 662-63. And Petitioner's own procedural default of the claim likewise bears on his need for relief. Indeed, even if Petitioner could overcome the requirements of 28 U.S.C. § 2244(b) to file a second or successive petition in the district court, relief would be foreclosed by binding precedent from the Sixth Circuit, on procedural-default grounds. *See Franklin v. Bradshaw*, 695 F.3d 439, 454-55 (6th Cir. 2012) (concluding that Eighth Amendment claim that death penalty is

barred due to mental illness was procedurally defaulted for failure to exhaust state-court remedies).

At to the merits of the claim, even if they could now be considered, Petitioner cannot show "exceptional circumstances" for relief on his defaulted claim. Petitioner argues that *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), support his claim that the Eighth Amendment, as extended to the states through the Fourteenth Amendment, prohibits the execution of a criminal defendant with severe mental illness. However, he has cited to no authority—and the State finds none—extending *Atkins* and *Roper* in this way. *See Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014) (discussing how neither *Atkins* nor *Roper* "created a rule of constitutional law making the execution of mentally ill persons unconstitutional"); *Franklin*, 695 F.3d at 455 (noting lack of authority that *Atkins* and *Roper* have been extended to prohibit execution of those with mental illness); *Cornwell v. Warden*, No. 2:06-cv-00705, 2018 WL 934542, at *129 (E.D. Cal. Feb. 15, 2018) (stating that neither this Court nor the Ninth Circuit have extended *Atkins*/*Roper* protections to mentally ill); *Faulkner v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460, at *84 (Tenn. Crim. App. Aug. 29, 2014), *no perm. app. filed* (citing cases that have declined to extend *Atkins* to those criminal defendants with mental illness).

Indeed, there is no general trend in banning executions for those with severe mental illness. *Underwood v. Duckworth*, No. CIV-12-111-D, 2016 WL 4059162, at *32 (W.D. Ok. July 28, 2016) (noting that it located one state barring execution of mentally ill, which later repealed capital punishment) (citing *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. Rev. 785, 798 & n.88 (2009); Conn. Gen. Stat. §

53a-35a.); *see also United States v. Sampson*, No. 01-10384, 2015 WL 7962394, at *13 (D. Mass. Dec. 12, 2015) (stating that "the defendant has not identified objective indicia sufficient to prove that current standards of decency are incompatible with imposing a death sentence on a person suffering from a severe mental illness").

In *Atkins* and *Roper*, this Court relied heavily on the number of jurisdictions that had legislation precluding the imposition of a death sentence on intellectually disabled and juvenile offenders. *See Atkins*, 506 U.S. at 313-16; *Roper*, 543 U.S. at 564-67. There is no such showing here. And none of the reasons now offered for this Court to entertain Petitioner's defaulted claim in the first instance outweigh these considerations and support relief. There are simply no "exceptional circumstances" for this Court to grant an original petition for writ of habeas corpus.

The 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 90 years ago in *Ex parte Grossman*, 267 U.S. 87 (1925) (writ granted when district court ordered defendant committed to United States custody despite issuance of 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., dissenting). Tolerating the use of original habeas petitions in this Court to present procedurally defaulted claims would encourage just such forum shopping. When, as in this case, a petitioner has made no attempt to present his constitutional claims in the appropriate forum and provides no legitimate justification for failing to do so during decades of appellate and collateral review, this Court should reject a last-minute attempt to obtain a stay of execution under the guise of this Court's "original" jurisdiction on an unfounded claim.

IV. 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." Here, however, as demonstrated above, because the exercise of original jurisdiction is not warranted, neither is a stay of the state court judgment under § 2251(a)(1). Petitioner's application for a stay of execution should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response was forwarded by United States mail, first-class postage prepaid, and by email on the 8th day of August, 2018, to the following:

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