No. 06-6178

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARYL KEITH HOLTON,

Petitioner-Appellant

v.

RICKY BELL, Warden,

Respondent-Appellee

On Appeal From the United States District Court for
the Eastern District of Tennessee at Knoxville

REPLY BRIEF OF APPELLANT, DARYL KEITH HOLTON

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

Stephen M. Kissinger
Stephen A. Ferrell
Assistant Community Defenders
530 S. Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel for Petitioner-Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES:

COURT OF APPEALS CASES:

RULES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARYL HOLTON,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	**No. 06-6178**
	)	**DEATH PENALTY CASE**
RICKY BELL, Warden	)	
	)	
Respondent-Appellee	)	
	)	

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

Petitioner-Appellant, Daryl Holton, respectfully submits this Reply Brief regarding the erroneous summary dismissal of his petition for writ of habeas corpus.

FURTHER STATEMENT IN SUPPORT OF ORAL ARGUMENT

Respondent opposes oral argument on the grounds that the Court is familiar with the legal issues in this case, the standard of review is clear, and the record complete. However, Respondent does not as much as acknowledge Petitioner's first issue.[1] As regards Petitioner's second issue, Respondent ignores, without

---

[1]Respondent jumps past whether the district court improperly raised the standard required to obtain a competency hearing and past whether the district court improperly denied Petitioner a competency hearing. Instead, Respondent

explanation, Mr. Holton's responses to the district court's inquiry as to his intent. Instead, Respondent suggests that a letter sent by Mr. Holton to counsel for Respondent, or his equivocal statements when first brought before the district court, somehow trump his other answers to the district court. Given these radically different views of the record and applicable law, it can hardly be said that the issues before the court are simple or that this Court's decision would not benefit from oral argument.

Respondent also alleges oral argument is not warranted because Mr. Holton has stated "unambiguously and directly to this Court that he does not wish to pursue this appeal." Mr. Holton's letter merely states that he cannot in good faith participate in proceedings regarding his own competency. That Mr. Holton shares Respondent's purported belief that there exists some conflict in him addressing his own competency[2] is not an "unambiguous statement that [Mr. Holton] does not

---

attempts to divert the Court's attention by claiming that Petitioner failed to meet the requirements for third party standing. Petitioner was never afforded the hearing required under *Pate v. Robinson*, 383 U.S. 375 (1966) and *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999). Whether Petitioner met the burden imposed only upon litigants who have been afforded a *Harper* hearing is irrelevant because Petitioner was never afforded such a hearing.

[2]Respondent was quick to point out this conflict to the Supreme Court of the United States in an effort to vacate this Court's stay of execution. *See* Motion to Vacate Stay of Execution of Death Sentence, *Bell v. Holton*, Case No. 06A302, Supreme Court of the United States, at 4 ("Aside from being internally

wish to pursue this appeal." Indeed, Respondent's assertion that it does is disingenuous, at best.

The propriety of the novel pre-*Harper* procedure utilized by the district court and Respondent's creative argument that Mr. Holton's responses to the district court's inquiry regarding his intent are overborne by a letter he wrote to Respondent's counsel are worthy of further examination by way of oral argument.[3]

STATEMENT OF ISSUES IN REPLY

I. Respondent presents no authority to either justify the district court's heightening of the *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999) standard or to demonstrate that, absent the improper imposition of that heightened standard, Petitioner failed to make the showing required by *Harper*.

II. Neither Mr. Holton's letter to Respondent, nor his equivocal statements during an earlier proceeding, negate Mr. Holton's in-court response, when asked by the district court whether he wished to waive counsel and dismiss the claims raised in his petition, that he intends to pursue certain claims raised in the petition.

---

inconsistent by directing briefing from the parties on a competency issue while simultaneously requesting the participation of the incompetent and instructions from him concerning the conduct of future proceedings . . .")

[3]Counsel notes that he will be out of the country from October 7-13, 2006.

ARGUMENT

I. Respondent presents no authority either justifying the district court's heightening of the *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999) standard or demonstrating that, absent the improper imposition of that heightened standard, Petitioner failed to make the showing required by *Harper*.

Astoundingly, Respondent defends the district court's raising of the *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999) standard. The district court imposed a higher standard by requiring that Petitioner also overcome the opinion of a court-appointed expert, Dr. Seidner, in order to receive a hearing on the issue of his competency. Respondent's position relies upon Petitioner's alleged failure to meet that improperly imposed obstacle. Respondent does not argue that Petitioner's showing of incompetence fails to satisfy the *Harper* standard. Instead, Respondent argues Petitioner failed to meet the district court's higher standard. According to Respondent, no harm was done by the imposition of this extra burden because the "evidence overwhelmingly shows that [Holton] was competent." Respondent's brief at 15.

It is hardly surprising that Petitioner would have a difficult time rebutting Dr. Seidner, who had the benefit of a court-order requiring Holton to submit to examination and testing, court-ordered access to any materials he felt he needed from both parties, and access to any person with whom he felt he needed to speak

(e.g., prison guards, etc.). The district court explicitly refused to allow Petitioner's expert to examine Mr. Holton, refused to order the State of Tennessee to provide him with the same materials, and refused to order the State of Tennessee to provide him with access to the same persons. Whether Petitioner overcame Dr. Seidner's opinion with one arm tied behind Petitioner's back, however, is not the issue. Similarly, whether the district court prohibited Petitioner from presenting evidence to overcome Dr. Seidner's opinion, see Respondent's brief at 20, or whether Petitioner was free to offer an expert opinion to rebut Dr. Seidner's opinion after being denied access to the information necessary to formulate such an opinion,[4] is not at issue. The issue is the district court's imposition of that burden to overcome Dr. Seidner's opinion in the first instance.

Because the imposition of that additional burden was not proper, the determinative question remains whether, in light of the record absent Dr. Seidner's improperly considered opinion, Petitioner established reasonable cause to believe Mr. Holton may be suffering from a mental disease or defect rendering him

---

[4]*See* Respondent's brief at 19-20 (faulting Petitioner's expert's opinion because he had not performed a full evaluation of Mr. Holton); at 20 (conceding that Petitioner had been denied discovery and "evidentiary processes"); at 21 ("And (*sic*) [Petitioner's expert] did so here without having conducted a full psychological evaluation."); and, at 22 (conceding that Petitioner was not allowed to use an expert of his choosing).

mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. This question is ignored by Respondent.

Respondent's reluctance to address whether the district court erroneously raised the bar on the *Harper* standard by forcing Petitioner to rebut Dr. Seidner is understandable, as is his failure to address the sufficiency of Petitioner's *Harper* showing. There is no authority to support either position. Respondent has not cited a single authority permitting a district court to enhance *Harper's* requirements. Respondent has not distinguished even one of those cases cited at pages 17-24 of Respondent's brief. Moreover, Respondent has failed to offer a single case to support the argument that, when the opinion of Dr. Seidner is properly excluded from consideration, Petitioner failed to make the showing required to obtain a competency hearing under *Harper*.

Petitioner met the *Harper* standard and is entitled to a hearing on his competency, the hearing the state courts of Tennessee denied him.

II. Neither Mr. Holton's letter to Respondent, nor his equivocal statements during an earlier proceeding, negate Mr. Holton's in-court response, when asked by the district court whether he wished to waive counsel and dismiss the claims raised in his petition, that he intends to pursue certain claims raised in the petition.

Respondent defends the district court's dismissal of Mr. Holton's September

30, 2005, habeas petition by asserting that Mr. Holton's letter to Respondent's counsel clearly demonstrates Mr. Holton never authorized that petition. Respondent apparently takes the position that this showing is so clear that Mr. Holton's refusal to acknowledge this supposed "fact" when asked by the district court to do so, should simply be ignored. Respondent vastly overstates the "clarity" of Mr. Holton's actions prior to September 6, 2006. Mr. Holton's ambiguous out-of-court behavior and his internally inconsistent testimony when first brought before the district court cannot negate his final statements to the district court in which he expressly retained his rights to continue to pursue certain claims contained in his September 30, 2005, habeas corpus petition.

On October 19, 2005, Mr. Holton did write a letter to counsel for Respondent. The letter said he did not authorize the filing of a federal habeas corpus petition on his behalf. On May 16, 2006, however, Mr. Holton filed his Pro Se Response to State's Motion to Re-Set Execution Date in the Tennessee Supreme Court in which he stated:

> In the spirit of comity, it is duly noted that, as of the time this response was prepared, the federal habeas corpus proceedings in this case are still pending. (Daryl Keith Holton v. Ricky Bell, Warden, No. 1:05-cv-00202 (E.D. Tenn)(Phillips\District Judge, Guyton\Magistrate.))

Pro Se Response to State's Motion to Re-Set Execution Date, Case No. M2000-

00766, SC-DDT-D, Supreme Court of Tennessee. *See also*, page 4-5, Respondent's Response to Motion for Stay of Execution.

In his pleading before the state court, Mr. Holton does not describe the federal habeas corpus proceedings as "unauthorized." In fact, he stated that the pendency of the habeas corpus petition gave rise to comity concerns. Assuming Mr. Holton's competency, he must be presumed to understand that the principles of comity are implicated only where the jurisdictions of differing tribunals are lawfully invoked. *See Lyons v. Stovall*, 188 F.3d 327, 334 (6th Cir. 1999) ("[federal] courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.") As the authorities upon which Respondent repeatedly relies recognize, see Respondent's brief, pages 16-17, the district court had jurisdiction over Mr. Holton's petition only if it was authorized. Mr. Holton's *pro se* state court pleading informed the court there was an authorized habeas petition pending in the district court.

It appears that at one moment, Mr. Holton told counsel for Respondent one thing, and at the next moment, he asserted the opposite in state court. The obvious difference between the two is that Mr. Holton is not legally bound by his letter to

Rcspondent, whereas he is bound by his court pleading. Even assuming that Mr. Holton's two representations should be accorded equal stature, they reveal that the question of whether Mr. Holton authorized the filing of a habeas corpus petition on is not nearly so clear as Respondent would have this Court believe.

Respondent also suggests that the September 30, 2005, petition could not have been authorized because Mr. Ferrell had not spoken to Mr. Holton. What Respondent ignores is that a lack of communication means only that. Mr. Ferrell told Mr. Holton a habeas petition would be filed. Mr. Holton had not told Mr. Ferrell whether he authorized the filing of the petition. Admittedly, Mr. Ferrell was forced to make a determination regarding Mr. Holton's intent based only upon his years of experience as a capital litigator, his conversations with Mr. Holton's state counsel (who had communicated with Mr. Holton), and his review of the state court record. Whether Mr. Ferrell correctly determined Mr. Holton's desires, however, is a question which can be resolved only by reference to Mr. Holton's own expressions of his intentions.

Mr. Holton's out-of-court representations to counsel for Respondent were not the only expressions of Mr. Holton's intent, nor were they legally binding, nor were they consistent with his representations to the Supreme Court of Tennessee. Given this ambiguity, whether Mr. Holton authorized the filing a federal habeas

corpus petition on September 30, 2005, must be determined by reference to the proceedings in federal court.

Respondent would have this Court believe that Mr. Holton's July 31, 2006, testimony ends this inquiry. It does not. It is merely evidence. It is evidence which must be viewed in light of his inconsistent positions prior to being brought before the district court. It is also evidence which must be considered in light of the other statements he made on July 31, 2006. Respondent ignores the fact that, even as Mr. Holton was purportedly expressing his intentions to forgo federal review, he also made the following statements:

> Q. And what decisions did you make?
>
> A. I decided that I wanted to procedurally default any previously determined issues raised in my direct appeal,[5] and I certainly didn't want any of the issues presented in my state post conviction, the putative petition, to be raised in a habeas petition, on my behalf.
>
> Q. Did you wish to present any issues to the federal court with regard to your conviction and sentence?

---

[5]Petitioner notes that the issue raised in Claim 7 of Mr. Holton's September 30, 2005, habeas corpus petition and in his *pro se* original habeas corpus petition before the Supreme Court of the United States was raised (arguably) *pro se* by Mr. Holton on direct appeal, but was not resolved by the Tennessee Supreme Court and therefore falls outside of the class of claims which Mr. Holton wished to procedurally default. R. 49, p. 71 (admits Exhibit 3, transcript of hearing on November 19, 1999 and January 14, 2000) (See p. 79, January 14, 2000, hearing transcript).

A. Not at this time, no.

Q. Do you understand that by making such a decision you could be executed by the State of Tennessee without the benefit of federal review of potentially meritorious claims for relief?

A. I'm not being sarcastic. I would be aware of that if I was aware of any potentially meritorious issues. But, yes, I do, I am aware that this could result in my execution.

Q. Okay. So you've made your decision - or have you made your decision with full knowledge of your right to have federal review?

A. It's an ongoing process, but , yes, so far.

Q. Okay.

A. Once again, I'm - may I elaborate?

THE COURT: You may. Go right ahead.

A. I don't believe this is the last shot. Mr. Ferrell, his intentions are generally characterized as well-intentioned. But I don't think that his petition is the last chance or last resort. There are a number of options, state options, left. I can name those. I believe there's even one federal option left. Additionally, there is always the option of presenting a claim, a theoretical claim, that would be entitled to equitable tolling. I'm not saying that I have such a claim; I'm just saying that the option exists. As far as state options, those are probably not relevant to this proceeding, but they are a petition for writ of error coram nobis; in other words, if I had some type of new evidence that might entitle me to a new trial I might be able to petition that. I'm not commenting on the likelihood that I will do that or the pos – you know, the probability of success. There is also the option for a petition for state habeas corpus relief. That would

be matters strictly limited to the record. Executive clemency, there is that avenue of relief, petition for executive clemency both at the state level and on the federal level. Once again, I'm not saying that that's what I'm going to do. I'm just stating that I am aware of those options. As far as the matter, I believe, that's before the Court today, a federal habeas petition, at this time I don't wish to have this petition pursued on my behalf, and I'm aware of the option to do that.

Q. It has been suggested in this proceeding that you are not able to make a rational choice because – due to a diagnosis of depression. Can you explain to the Court your reasons for choosing to forego federal habeas corpus at this time?

A. Well, number one, I don't – I don't think that any of the issues presented in the state post conviction petition nor the state direct appeal represented my position, and generally those will be the only issues that would be available to be raised in the federal habeas petition, at least to my understanding. None of them represent my position at all. I would not – It's been my aim to procedurally default those. Furthermore, likelihood is, I'm not going to file any further action. I'm satisfied with the finding of the state court's jury and the sentences of death. I believe that the death sentence is appropriate for the crime which I was convicted. I just don't have a problem with it. We could continue in the court or judicial process for a number of years and still arrive at the same result. I don't see that it's necessary. If I come up with anything new, I wouldn't hesitate to put it in a petition and send it to the Court, but I don't have that right now. I'm not going to waste the Court's time with frivolous issues. Like or not, you can have four convictions of first-degree murder and four death sentences and still have some scruples. I just happen to think I do.

R. 30, pages 26-28. Emphasis added.

Even as counsel for Respondent tried to corner Mr. Holton into saying that

his intent was to forgo all federal review, Mr. Holton repeatedly qualified his responses. Importantly, he made it clear that there were only a certain class of claims that he did not wish to present in federal habeas corpus, a class which did not include one of the claims presented in his September 30, 2005, habeas corpus petition. Contrary to Respondent's assertion, the record before this Court does not negate Mr. Holton's at least partially negative responses to the district court on September 6, 2006, when asked whether he wished for his federal habeas corpus petition to be dismissed. *See* Respondent's brief at Issue II. While the record leading up to the district court's inquiry may be rife with ambiguity, it is in no way sufficient to justify the district court's disregard for Mr. Holton's responses.

Mr. Ferrell, as counsel of record, presented a federal habeas corpus petition to the United States District Court for the Eastern District of Tennessee which, in accordance with Rule 2(c)(5), Rules Governing Section 2254 Cases in the United States District Courts, he signed on behalf of his client.[6] While Mr. Ferrell may not have known with certainty that Mr. Holton authorized any of those claims to be filed on his behalf, the record as a whole confirms that Mr. Holton did indeed

---

[6]*See also* Habeas Rule 2(c)(5) advisory committee notes, 2004 amendments ("thus, under the amended rule the petition may be signed by petitioner personally or by someone acting on behalf of the petitioner, assuming that person is authorized to do so, for example, an attorney for the petitioner.").

wish at least one of those claims to be pursued. Mr. Holton is entitled to the benefit of his counsel's timely actions. The district court erred in dismissing his federal habeas corpus petition *in toto*.

CONCLUSION

The decision of the United States District Court for the Eastern District of Tennessee should be vacated and this matter remanded with instructions that the district court conduct an evidentiary hearing pursuant to this Court's decision in *Harper v. Parker*. In the alternative, if Petitioner is competent, the decision of the district court should be vacated and this matter remanded with instructions that the district court reinstate Petitioner's September 30, 2005, petition.

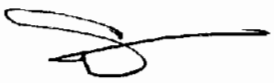
Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

Stephen M. Kissinger
Asst. Federal Community Defender
530 S. Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this reply brief complies with the requirements of the type-volume limitation of Rule 32(a)(7)(B), F.R.A.P., as it contains 3,277 words, excluding the corporate disclosure statement, table of contents, table of citations, statement in support of oral argument, any addendum, and the certificates of counsel. Certification is based on the word count of the word-processing system used in preparing the petitioner's brief, WordPerfect 12 for Windows.



Stephen M. Kissinger

CERTIFICATE OF SERVICE

I, Stephen M. Kissinger, hereby certify that a true and correct copy of the foregoing document was sent via e-mail and U.S. mail to:

Jennifer L. Smith, Esq.
Office of Attorney General and Reporter
Criminal Justice Division
P.O. Box 20207
Nashville, TN 37202

this the 4th day of October, 2006, by postage prepaid delivery.

Stephen M. Kissinger