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
KNOXVILLE DIVISION

FINAL BRIEF OF RESPONDENT-APPELLEE

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STATEMENT RE: SIXTH CIRCUIT RULE 26.1

Respondent-appellee, Ricky Bell, Warden, is an official of the State of Tennessee. Pursuant to Rule 26.1(a), a statement of disclosure of corporate affiliations and financial interest is not required.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this matter. The Court is familiar with the facts and legal issues in this case, the standard of review is clear; and the record is complete. Moreover, Daryl Holton, the real party in interest, has stated unambiguously and directly to this Court that he does not wish to pursue this appeal. Because oral argument would not substantially further the Court's understanding of the facts or the issues in the case and would only further extend the unwarranted federal interference with the State of Tennessee's legitimate criminal processes, the Court should decide this matter on the basis of the record before it and the written submissions of the parties.

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT
FACT SHEET FOR STATE HABEAS CORPUS APPEALS (§2254)

6th Cir. R. 28(c) requires that counsel for the appellant and for the appellee file a one-page fact sheet in all habeas corpus §2254 appeals. The fact sheet should be the same size as the pages in the brief. It should be placed in the briefs of the parties immediately following the table of contents and preceding the statement of issues presented for review. Use this form, 6CA-57.

Case Name and Number: Daryl Keith Holton v. Ricky Bell, Warden, No. 03-6404
Person Reporting: Jennifer L. Smith, Associate Deputy Attorney General

1. Has this conviction(s) been previously litigated in the United States Courts?

   ( ) Yes (X) No
   If yes, give brief history:

2. Constitutional violation claims (name constitutional provision and briefly recite facts asserted as violative):

   None. Federal Defender Services failed to establish the requisite standing to file a habeas corpus application or pursue any constitutional claims on behalf of Daryl Holton.

3. Have remedies been exhausted as to claims listed above?
   ( ) Yes ( ) No (X) Not applicable

4. Are there fact disputes concerning claims?
   ( ) Yes ( ) No See above.

   If "yes," were they resolved by the District Court
   ( ) at a hearing?
   ( ) by review of the state court record?
   ( ) by reference to a Magistrate?

5. Does the State argue that any constitutional violations, if found, were harmless beyond reasonable doubt?
   ( ) Yes ( ) No (X) Not applicable
   If "yes," briefly state why and cite to the district court record entry pages claimed as proof:

JURISDICTIONAL STATEMENT

This appeal follows the district court's dismissal of an action filed under the guise of 28 U.S.C. § 2254 by the Federal Defender Services of Eastern Tennessee, Inc. ("FDSET"), in the name of Daryl Keith Holton ("Holton"), a state prisoner in custody under a state-court judgment convicting him of four counts of first-degree murder and sentencing him to death. FDSET invokes this court's jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253 to appeal the final judgment of the district court. (R. 46: Order) Following entry of the order of dismissal on September 6, 2006, FDSET filed a notice of appeal on September 12, 2006. (R. 46: Order; R. 50: Notice of Appeal) This appeal is from a final judgment disposing of all claims with respect to all parties.

ISSUE PRESENTED FOR REVIEW

By order dated September 18, 2006, the Court directed briefing on the issue on which the district court granted a certificate of appealability, [1]namely:

Whether the Federal Defender Services "failed to demonstrate, under the standard established in *Harper v. Parker*, 177 F.3d 567, 572 (6th Cir. 1999), reasonable cause to believe that Mr. Holton is not competent to make a rational decision to dismiss his pending federal habeas corpus petition." (R. 46: Order)

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[1]Respondent maintains that a certificate of appealability is neither necessary nor appropriate in this matter, since the district court's jurisdiction under 28 U.S.C. 2254 was never properly invoked. Rather, the district court's dismissal of the petition for lack of jurisdiction triggers the court's general appellate jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE AND FACTS

1. State court proceedings

Daryl Holton was convicted by a Tennessee jury in 1999 of the first-degree premeditated murders of his four children, ages four, six, ten and twelve. Following a 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).

Holton did not seek post-conviction relief in the Tennessee state courts, and his time to do so expired on February 17, 2005. *See* Tenn. Code Ann. § 40-30-102(a) (post-conviction petition must be filed "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken").

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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.

On April 29, 2005, the Tennessee Post-Conviction Defender (PCD) filed a petition for post-conviction relief in the state trial court seeking to challenge Holton's first-degree murder convictions and death sentence. Contrary to state law, 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). 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." (R. 3: Memorandum, Attachment M [Petition for Post-Conviction Relief, Exh. 1, p. 2]) The circuit court granted a stay of execution pursuant to 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."); but the stay was vacated and the petition dismissed by the Tennessee Supreme Court following the State's extraordinary appeal pursuant to Tenn. R. App. P. 10. *Daryl Keith Holton v. State*, No. M2005-01870-SC-S10-PD, 2003 WL 24314330 (Tenn. May 4, 2006). In dismissing the petition, the state supreme court found both that it was not timely filed and that the state post-conviction defender had failed to establish a basis to proceed as "next friend."

> The petition filed by the Defender on behalf of Daryl Holton was insufficient on its face for several reasons. First, the petition was not signed by Holton, and the claims in the petition were not verified under oath by Holton. Tenn. Code Ann. § 40-30-104(d) and (e). Second, the petition was filed after the one-year statute of limitations had expired. *Id.* § 40-30-102(a). Finally, the petition did not allege a statutory exception to the statute of limitations. *Id.* § 40-30-102(b).
>
> * * *
>
> [W]e 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.
>
> *Holton*, No. M2005-01870-SC-S10-PD, slip op. at 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 the 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. *State v. Daryl Keith Holton*, No. M2000-00766-SC-DDT-DD (Tenn. May 25, 2006).

2. Federal court proceedings

On July 18, 2005, while the state proceedings were ongoing, attorneys with the Federal Defender Services of Eastern Tennessee, Inc. ("FDSET")—the appellant here—filed a motion in the United States District Court for the Eastern District of

Tennessee seeking appointment to represent Holton in federal habeas proceedings. (R. 2: Motion) 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. (R. 1: Motion, p. 1; R. 2: Motion, p. 1; R. 3: Memorandum, p. 1) Indeed, the affidavit of attorney Stephen Ferrell stated that he had had *no communication* with Daryl Holton prior to filing the motion either about the 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.

(R. 3: Memorandum, 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. (R. 9: Petition) 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." (R. 13: Motion) 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. (R. 19: Order Staying Case)

On July 10, 2006, after state post-conviction proceedings were concluded, the district court set a hearing on July 31, 2006, on "all pending motions," which included FDSET's motion for a competency hearing pursuant to *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999) (R. 2; Motion), the State's motion for reconsideration of the order appointing counsel (R. 7: Motion), and the State's motion to dismiss the unauthorized petition. (R. 13: Motion) The hearing commenced as scheduled. FDSET presented no live testimony, although counsel argued that the affidavit of Dr. George Woods, filed on July 28, 2006, established reasonable cause to believe that Holton may be incompetent.[3] (R. 27: Motion, Attachment 1) According to counsel, Dr. Woods purportedly met with Holton for "brief periods" in October 2005 and opined, based upon Holton's longstanding history of major depression, that Holton may be incompetent. However, counsel further stated that Dr. Woods "believes he needs to

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[3]FDSET argues that the affidavits of Ernest Holton and Kelly Gleason also raised questions of Holton's incompetency. But the proof established that Ernest Holton had last seen Daryl Holton on June 6, 2004, more than two years before the hearing in this case. And attorney Kelly Gleason of the state post-conviction defender's office, who opined by affidavit that Holton "exhibited an irrational understanding of key legal issues relevant to his case" (R. R. 44: Notice, Attachment 2), thought enough of Holton's legal theories to facilitate the filing of a *pro se* Orginal Petition for Writ of Habeas Corpus in the United States Supreme Court. (Pet. Appendix)

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." (R. 30: Transcript, pp. 6-8) 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.

(R. 30: Transcript, pp. 5-6)

In support of the Warden's motion to dismiss, the State called Daryl Holton, who testified that he had not authorized the instant petition and did not wish to proceed with the federal habeas corpus application filed by FDSET. (R. 30: Transcript, pp. 23-24, 26, and exhibit) Holton 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. 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. (*Id.*, pp. 26-28)

Despite Holton's reasoned and unambiguous testimony, and over his express objection, the district court granted FDSET's motion for a psychological evaluation, appointing an independent psychologist selected by the court to perform a psychological evaluation to determine Holton's present competency under the standard set forth in *Rees v. Peyton*, 384 U.S. 312 (1966). The district court specifically directed the expert, Dr. Bruce Seidner, to address three questions: (1) whether Holton suffers from a mental disease, disorder or defect; (2) whether a mental disease, disorder or defect prevents Holton from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents Holton from making a rational choice among his options. (R. 31: Memorandum) 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 his 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.

Dr. Seidner testified at the September 5 hearing, at which time FDSET had a full and fair opportunity for cross-examination. In addition, the district court, for a second time, directly questioned Holton. (R. 49: Transcript, pp. 65-66) 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. 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.

(R. 49: Transcript, pp. 70-71) The district court further granted a certificate of appealability as to its finding that FDSET failed to establish reasonable cause to believe that Holton is incompetent under *Harper v. Parker*, 177 F.3d 567, 572 (6th Cir. 1999). (R. 46: Order) On September 12, 2006, FDSET filed a notice of appeal to this court and a motion for stay of execution to which the State objected.

On September 12, 2006, eight days after the district court dismissed the unauthorized habeas petition from the bench, and with less than a week before Holton's scheduled execution, FDSET filed a notice of appeal to this court and a motion for a stay of execution to which the State objected.

On September 18, 2006, this court granted a stay of execution and directed expedited briefing by the parties. In granting the stay, the court found to be significant the fact that Holton himself had filed an original petition for writ of habeas corpus in the United States Supreme Court and requested that "Mr. Holton personally

advise this court . . . whether it is his intent to pursue the instant appeal and, if so, whether he will do so *pro se* or through counsel."

By letter dated September 21, 2006, Holton responded to the court's invitation and stated, "I cannot, at this time, in good faith, pursue the instant appeal filed by Federal Defender Services of Eastern Tennessee that challenges my own competency to forego federal habeas review of their claims."

SUMMARY OF ARGUMENT

Daryl Holton never filed, authorized or endorsed the filing of a petition for writ of habeas corpus in the district court. Because Holton himself did not file the action, any third party filing on his behalf—in this case, Federal Defender Services of Eastern Tennessee, Inc. ("FDSET")—was required to demonstrate that Holton was "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability" in order to establish standing to invoke federal jurisdiction. *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990). In assessing that threshold showing here, as in *Harper v. Parker,* 177 F.3d 567 (6th Cir. 1999), 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 so as to justify further evidentiary proceedings on Holton's competency. *Parker*, 177 F.3d at 571. The district court

determined that there was not and dismissed the petition for lack of jurisdiction. Because the evidence before the court, including Holton's own testimony and the testimony of a court-appointed mental health expert, overwhelmingly showed Holton's competency, the court did not abuse its discretion in refusing to hold further evidentiary proceedings and properly dismissed the unauthorized petition.

The propriety of the district court's competency determination is reinforced by Holton's own actions. Holton's separate filing in the United States Supreme Court confirms his intention to refuse all participation in the instant case, it demonstrates his understanding of his legal position, and it shows clearly his competence under *Rees*. His letter to this Court, submitted at the Court's own invitation, not only demonstrates that the district court's judgment must stand, but that this appeal should be dismissed outright.

FDSET complains that Holton's due process rights were violated, pointing to the "unprecedented" procedures employed by the district court. But those procedures were consistent with the discretion accorded the lower courts by *Harper;* they were designed to ascertain the truth; and they effectively did just that. FDSET's complaints about the procedures employed in this case, Holton's denied "opportunity for a full [competency] hearing," and the need for "additional expert evidence offered by both parties" are pure sophistry, because Holton's every word and deed

demonstrate his competence. And because he *is* competent, there can be only one outcome: the petition must be dismissed since the district court's habeas jurisdiction was never properly invoked. This is so even if Holton were to express a change of heart at this stage. If the petition was not properly filed, it cannot be made so after the fact. But Holton has expressed no such change of heart. To the contrary, he has repudiated these proceedings repeatedly in sworn testimony before the district court, in a *pro se* filing in the United States Supreme Court, and in correspondence directly to this Court. The judgment of the district court should be affirmed and the stay of execution vacated.

STANDARD OF REVIEW

The district court determined that FDSET failed to demonstrate reasonable cause to believe that Holton is incompetent to forgo his right to seek federal habeas corpus review. The determination of reasonable cause is left to the discretion of the district court and is reviewed for abuse of discretion. *Harper v. Parker*, 177 F.3d 567, 571-72 (6th Cir. 1999); *Streetman v. Lynaugh,* 835 F.2d 1521, 1525-26 (5th Cir. 1988). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Id.* at 572 (quoting *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995)). The court of appeals reviews *de novo* a district court's order dismissing a

complaint for lack of subject- matter jurisdiction. *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000).

ARGUMENT

I. WHERE THE EVIDENCE PRESENTED IN THE DISTRICT COURT OVERWHELMINGLY SHOWED THAT DARYL HOLTON WAS COMPETENT UNDER THE STANDARD SET FORTH IN *REES*, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE UNAUTHORIZED HABEAS PETITION WITHOUT FURTHER EVIDENTIARY PROCEEDINGS.

FDSET complains that the district court denied Holton due process in the procedures it employed in connection with preliminary proceedings to determine whether there was reasonable cause to believe Holton incompetent so as to justify a further competency hearing. As this Court recognized in *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999), however, the "determination of reasonable cause is left in large part to the discretion of the district court." *Id.* at 572. In this case, before dismissing the unauthorized habeas petition filed by FDSET, the district court held a hearing at which both parties were free to present evidence. The court directed, over Holton's express objection, a psychological evaluation by an independent court-appointed expert for the purpose of determining Holton's competency to decide whether to waive his appeals. That evaluation resulted in a finding of competency. The district court questioned Holton on two separate occasions and heard sworn testimony,

subject to cross-examination by FDSET, by the court-appointed psychologist concerning Holton's present mental state, after all of which the district court concluded that FDSET had failed to make a sufficient showing justifying third-party standing to proceed in Holton's stead. The district court correctly stated the governing legal standard for competency under *Rees,* and its findings are fully supported by the evidence. Under these circumstances, it cannot be said that the district court abused its discretion in concluding that there was insufficient evidence to raise doubt concerning Holton's competency.

As a general rule, the party invoking federal subject- matter jurisdiction (in this case, the petitioner) 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 corpus 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*, 495 U.S. at 164-66. Thus, in order to proceed with the present suit, 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 must be "signed and verified by the person for whose relief it is intended or by someone acting on 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 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 pleading filed in this case contained neither of the two prerequisites.

"[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

petition filed by FDSET stated merely: "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." (R. 9: Petition, p. 16) 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.[4]

In order for a federal court to interfere with state criminal processes on the basis of a petition filed by a third party as "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

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[4]Aside from the absence of any legitimate explanation for Holton's failure to initiate proceedings, the petition was not even filed by a putative next friend, *i.e.*, an individual with a significant relationship with the real party in interest. Mr. Ferrell surely did not fit that description, since he had not even met with Holton at the time the petition was filed. And, although Ernest Holton, Daryl Holton's father, executed a conclusory affidavit attesting to his opinion that Holton was not competent, the record shows that he had not visited Holton for over a year at the time he executed the affidavit (indeed, his authorization to do so had lapsed) (R. 30: Transcript, p. 24 and Exhibit), he filed *no pleading* on Holton's behalf, and he did not appear at either of the two hearings in the district court.

entertain the petition. 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. As this Court explained in *Franklin v. Frances,* 177 F.3d 429,433 (6th Cir. 1998), FDSET was required to present evidence sufficient to give the district court reasonable cause to believe that Holton either cannot appreciate his legal position or make a rational choice with regard to continuing (or in this case refusing to initiate) further litigation, or, alternatively, that Holton suffers from a mental disease, disorder or defect that may substantially affect his capacity to make that choice. *Franklin,* 144 F.3d at 433.

Because FDSET failed to present sufficient evidence showing Holton's inability to seek federal habeas relief so as to justify third-part standing to invoke the provisions of 28 U.S.C. § 2254, it failed to meet that burden. 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 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." (R. 49: Transcript, p. 70)

Moreover, the record belies FDSET's suggestion that it was prohibited from presenting evidence necessary to make the requisite showing for further evidentiary proceedings. In its July 10, 2006, order, the district court set a hearing on "all pending motions," which included FDSET's motion requesting a competency hearing under *Harper*. The court imposed no limitations upon the parties with respect to the presentation of proof, as evidenced by the fact that the State presented evidence in the form of live testimony in support of its motion to dismiss. Before concluding the hearing or making any determination concerning the need for a court-appointed expert, the district court specifically inquired whether FDSET "wish[ed] to present any evidence." (R. 30: Transcript, p. 30) FDSET declined to do so at that time. What the district court did not do, however, was allow FDSET to invoke federal jurisdiction and then employ its discovery and evidentiary processes in order to establish the very

fact, *i.e.*, incapacity of the real party in interest, which was a prerequisite to federal jurisdiction in the first place.

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, disorder or defect rendering him mentally incompetent" to waive his appeals. *Harper*, 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. And he did so here without having conducted a full psychological evaluation. After what FDSET described as two "brief" meetings with Holton (R. 30: Transcript, p. 6), Dr. Woods offered what he termed a "preliminary opinion" that Holton suffers from post-traumatic stress disorder and depression. (R. 27: Notice, Attachment 1, p. 3) As his affidavit makes clear, however, his opinion was based in large part upon a review of Holton's mental health history, which had already been rejected by the state courts as insufficient to raise a question about his competence to stand trial or to mitigate his punishment to a sentence less than death. Indeed, FDSET specifically argued that a "full, formal evaluation" was necessary in order to "come to a conclusion about

[Holton's] competency." (R. 30: Transcript, p. 7) And the district court, in fact, granted FDSET's request for an evaluation: "After considering the testimony of Mr. Holton, argument of counsel, and the record as a whole, the court finds that it is necessary for Mr. Holton to undergo psychological evaluation and testing by an independent psychologist, and the Federal Defender's motion is GRANTED to that extent." (R. 31: Memorandum and Order, p. 2) The fact that FDSET was not permitted the use of an expert of its own choosing does not constitute an abuse of discretion, let alone a denial of due process.

But like *Harper*, Holton's history of mental disorder was insufficient, in the district court's view, 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 conclusion. Indeed, 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.

II. HOLTON'S HABEAS PETITION IS TIME-BARRED EVEN ASSUMING, *ARGUENDO*, HE CHOSE TO PROCEED IN THE INSTANT CASE.

FDSET argues, alternatively, that even if the district court properly found Holton to be competent, he should have been permitted to proceed below on certain claims of his own choosing, and the district court erred in dismissing the petition in its entirety. That argument is flawed, however, because it overlooks two critical facts: (1) that Holton never filed or authorized the filing of a federal habeas petition in the first place; and (2) that the time for him to do so expired on October 4, 2005. That being the case, it matters not what Holton intended at the September 5 hearing during his exchange with the district court regarding his desire to dismiss his petition. Holton's failure to invoke federal jurisdiction within the statutory limitations period under 28 U.S.C. § 2244 resulted in a forfeiture of his statutory right to seek federal habeas review of his state court judgment. The district court was thus obligated to dismiss the petition regardless of whether Holton then desired to proceed.

Under 28 U.S.C. § 2244(d)(1), "[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." Here, the one-year period began to run from the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Holton's state court

judgment of conviction "became final" under § 2244(d)(1)(A) on October 4, 2004, when the United States Supreme Court denied a petition for writ of certiorari on direct appeal from his convictions and sentences. Therefore, he was required to file a habeas petition within one year from that date, or by October 4, 2005.[5] Although FDSET filed a petition in Holton's name on September 30, 2005 (R. 9: Petition), the proof below is uncontroverted that Holton neither filed nor authorized the filing of any petition, either prior to or after the expiration of his limitations period.

Attorney Stephen Ferrell with FDSET admitted that the initial invocation of federal jurisdiction in July 2005 was unauthorized: "I have had no communication from Mr. Holton about his case or whether he wishes to pursue habeas relief." (R. 3: Memorandum, Attachment L, p. 2) On October 19, 2005, just 20 days after FDSET filed a petition despite its admitted lack of communication with Holton on the subject, Holton stated in no uncertain terms in correspondence to the State Attorney General's Office, "*I did not and do not authorize the filing of a federal habeas petition on my behalf.*" He reaffirmed that position in sworn testimony before the district court on July 31, 2006. (R. 30: Transcript, Testimony of Daryl Holton, p. 23 and exhibit). When specifically asked whether he wished to present "*any issues* to the federal court

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[5]Because Holton did not file any proper application for state post-conviction or other collateral review, no tolling of the one-year period occurred under § 2244(d)(2). *See Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

with regard to [his] convictions and sentence," Holton testified, "*Not at this time, no.*" (*Id.* at 26) By then, however, the time for filing had long since passed.

Despite this evidence, FDSET suggests that the petition may be preserved if Holton secretly authorized even one of the claims in the petition despite the absence of his signature on the petition filed by FDSET or any other evidence that the petition was authorized at the time it was filed. Aside from being legally unsupportable, the record, including the affidavit of Stephen Ferrell and Holton's own testimony, belies FDSET's assertion that Holton agreed to the filing of any claim for relief by FDSET. Indeed, the very statement on which FDSET relies to support its quite remarkable assertion-- that Holton "desire(s) to pursue the September 30, 2006, habeas corpus petition with the assistance of counsel" (emphasis in original)-- demonstrates the opposite. The transcript plainly shows that Holton's refusal to "sign Mr. Ferrell's putative petition" was intentional and that he was well aware when he did so that the consequences of such refusal would be a statute of limitations bar. (R. 49: Transcript, pp. 65-66) If the petition was not authorized when it was filed—and every statement by Holton shows just that—it is now out of time.

Contrary to FDSET's assertion, there is nothing "cloudy" about the State's position. Indeed, the law is clear and the facts undisputed in all material respects. Through inaction, Holton allowed the state post-conviction statute of limitations to

expire, thus foreclosing collateral review of his criminal judgments by the Tennessee state courts. Likewise, through inaction, Holton allowed the time for seeking federal habeas corpus relief to pass without either filing or authorizing an application for relief on his behalf. When Holton made no attempt to invoke federal jurisdiction on his own, FDSET initiated federal proceedings solely because of Holton's status as a death-sentenced inmate, ultimately filing an application in his name, despite having *never* communicated personally with Holton about his case or whether he wished to pursue federal habeas relief. (R. 3 Memorandum, Attachment L) Indeed, it was not until the district court *ordered* Holton to speak with FDSET that any communication was established between him and his would-be counsel. The present suggestion by FDSET that Holton intended to proceed all along is wholly contrived and has no support in this record. Neither Holton nor FDSET may revive an action that was never properly filed to begin with, even if Holton wished to do so. Appellant's argument should be rejected.

CONCLUSION

The judgment of the district court should be affirmed and the stay of execution vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I hereby certify that this BRIEF OF APPELLEE complies with the type-volume limitation set out in Rule 32(a)(7)(B)(i), in that it contains 7231 words of proportionally spaced font.

Jennifer L Smith by Amy Tinsley

JENNIFER L. SMITH
Associate Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by email and first-class mail, postage prepaid to: Stephen Ferrell, Assistant Federal Community Defender, 530 S. Gay Street, Suite 900, Knoxville, TN 37902, on the 29th day of September, 2006.

Jennifer L. Smith by amy L. Zaubyte

JENNIFER L. SMITH
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