No. 06-6178

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARYL KEITH HOLTON
Petitioner-Appellant

v.

RICKY BELL
Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

RESPONSE TO MOTION FOR REMAND AND FOR CONTINUATION OF BRIEFING SCHEDULE OR, IN THE ALTERNATIVE, FOR SUPPLEMENTAL CERTIFICATE OF APPEALABILITY

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ARGUMENT

The appellant, Federal Defender Services of Eastern Tennessee, Inc. ("FDSET"), has filed a motion seeking to expand the certificate of appealability (COA) in this case to include the issue of "whether the district court erred in dismissing Mr. Holton's petition *in toto* after Mr. Holton expressly stated that his intention was not to dismiss all claims in the petition." FDSET argues that, contrary to the district court's actions in this case, "reasonable jurists" would have dismissed only certain claims, as opposed to the entire petition, and that the COA should be expanded to include this question. He also asks for a continuance of the briefing schedule entered on September 18, 2006.[1] However, FDSET misperceives the procedural posture of this case as well as the controlling legal standards, and reasonable jurists would so find. The motion should be denied.

The only issue properly before the district court was the threshold issue of third-party standing to file a federal habeas corpus proceeding on Daryl Holton's behalf in the first place. To satisfy that requirement, FDSET was required to demonstrate that "the real party in interest [*i.e.*, Holton] [was] *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). The petition filed by FDSET plainly failed to do that; the evidence before the district court overwhelmingly showed Holton's competency; and,

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[1]FDSET initially sought a remand to the district court for resolution of his Motion to Alter or Amend or for Relief from Judgment and for Order Staying Execution. After the district court denied that motion on September 21, 2006, FDSET withdrew its request for a remand in a supplement to his motion.

despite its persistent protestations below about Holton's alleged incompetence, FDSET now appears to concede as much. Where federal jurisdiction has not been properly invoked, no reasonable jurist would conclude that a district court is empowered to dismiss only a portion of the improper pleading.

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. *Parker*, 177 F.3d at 571. The court determined that there was not and dismissed the petition for lack of jurisdiction. FDSET requested and was granted a COA on the precise question of whether it "failed to demonstrate, under the standard established in [*Harper*], reasonable cause to believe that Mr. Holton is not competent to make a rational decision to dismiss his pending habeas corpus petition."[2]

If the district court was correct in its assessment that FDSET's showing was insufficient to warrant further evidentiary proceedings under *Harper*, the unauthorized petition was properly dismissed, and there is nothing further to litigate. If the petition was

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[2]As a point of clarification, the district court's characterization of the procedural posture of the case was not entirely accurate. To suggest that Holton was in any position to "dismiss his petition" overlooks two critical facts: (1) that Holton never invoked his right to petition for federal habeas relief in the first place; and (2) that the time for doing so expired on October 4, 2005. Thus, even if the district court believed that Holton was competent — a conclusion supported by the overwhelming weight of the evidence below — Holton's failure to invoke federal jurisdiction within the statutory time limit resulted in a forfeiture of his statutory rights under 28 U.S.C. § 2254, and any questions posed to Holton regarding his desire to "dismiss the petition" were immaterial to the threshold jurisdictional question.

not authorized at the time it was filed, it cannot be made so *nunc pro tunc* even if Holton were now to express a desire to make it so.[3]

If, on the other hand, this Court determines that the district court was incorrect in its assessment of FDSET's showing under *Harper*, the case may only be remanded for a full evidentiary hearing to determine Holton's competency at the time the petition was filed in order to determine whether the district court's jurisdiction was properly invoked in the first place. This is so because the evidence is undisputed, even by FDSET, that Holton neither signed nor authorized the instant habeas petition within the applicable limitations period.[4]

Indeed, on October 19, 2005, just 20 days after the filing of the unauthorized petition, 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 under oath in undisputed 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 with regard

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[3]In fact, Holton has expressed no such desire in this proceeding. Indeed, in his original habeas petition in the United States Supreme Court, Holton expressly repudiated the proceedings in this case. But even if he attempted to endorse them now, that gesture comes too late.

[4]Because Holton's state court judgment of conviction "became final" under 28 U.S.C. § 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, he was required to file a habeas petition within one year from that date, or by October 4, 2005. Through his own 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. Indeed, in his Original Petition for Writ of Habeas Corpus filed pro se in the United States Supreme Court, Holton made clear that his decision to do so was both intentional and calculated. *Holton v. Bell*, No. 06-6534 (U.S. Sept. 18, 2006).

to [his] convictions and sentence, Holton testified, "*Not at this time, no.*" (Id. at 26) That fact being established, only a finding of incompetency so as to justify third-party standing to proceed on Holton's behalf would permit the petition at issue to stand. In short, before the district court would be empowered to address any issues regarding any proposed amendments to the petition or even an eleventh-hour change of heart by Holton himself, it must first determine whether federal jurisdiction was properly invoked in the first place.

If the petition was not authorized when it was filed, it is now out of time. Likewise, if it was not authorized in the first place, there is nothing to relate back to for purposes of any amendment. The action must be dismissed. In sum, the only way the petition can survive in this case is with a finding that Holton suffered from mental incapacity or some similar disability at the time it was filed — a position FDSET now seems to have abandoned entirely.

The fact that Holton has filed an Original Petition for Writ of Habeas Corpus in the United States Supreme Court does not alter this analysis, as that action is likewise out of time. Moreover, FDSET's new-found reliance on Holton's stated position in *that* case represents a drastic shift in its position here and is evidence, in itself, that the district court's ruling was correct. When Holton refused the visits of Federal Defender Services of Eastern Tennessee, Inc. ("FDSET"), he was said to be incompetent. (R. 3, p. 7) After Holton was ordered to speak with FDSET but still refused to participate in or authorize proceedings filed in his name and without his consent, he was said to be incompetent. (R. 30: Transcript, pp.

5-6, p. 26) When Holton *did* choose to discuss possible legal options and his perception of his legal position with FDSET and attorney Kelly Gleason of the Tennessee Post-Conviction Defender's Office, FDSET argued that he "exhibited an irrational understanding of the key legal issues relevant to his case." (R. 44, Attachment 2) When the district court concluded otherwise and dismissed the unauthorized habeas petition, FDSET argued that "reasonable jurists" would conclude otherwise and obtained a COA on that point.

Now that Holton has chosen to file a separate pleading in a separate court, FDSET hopes to salvage its unauthorized and improper filing by suggesting that it was Holton's intention all along. Now, contrary to the position FDSET has maintained since July 2005, it urges this court to accord great significance to Holton's wishes. FDSET's position in this case has shifted like sand but still fails on all counts.

Because its current position is based upon a misperception of both the posture of this case and the applicable law, the motion of FDSET to expand the COA and continue the briefing schedule should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served by first class mail, postage prepaid, and by email, to Stephen Ferrell, Assistant Federal Community Defender, 530 S. Gay Street, Suite 900, Knoxville, TN 37902, on the 22nd day of September, 2006.

Jennifer L. Smith

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