

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70035

RAPHAEL HOLIDAY,
Petitioner-Appellant,
v.

WILLIAM STEPHENS, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee,

Appeal from the United States District Court for the
Southern District of Texas, Houston Division
4:11-cv-1696

**RESPONSE TO MS. SWEEN’S REPLY TO RESPONDENT-APPELLEE’S
OPPOSITION TO STAY PURSUANT TO TEXAS DISCIPLINARY RULE OF
PROFESSIONAL CONDUCT 3.03**

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Comes now SETH H. KRETZER and JAMES VOLBERDING, CJA
Counsel for Petitioner, Raphael Holiday, and respond to Ms. Sween’s Reply
to Respondent-Appellee’s Opposition to Stay, as follows:

1) Texas Disciplinary Rule of Professional Conduct 3.03,
comment 2 instructs, “There are circumstances where failure to make a
disclosure is the equivalent of an affirmative misrepresentation.” While Ms.

Sween's Reply brief insultingly describes the proceedings before this Court as a "Kafkaesque scenario" (Reply Br. at 2), her recent communications with Texas' Court of Criminal Appeals implicates the undersigned counsels' duties of candor to the Fifth Circuit.

2) Specifically, Ms. Sween has affirmed to the Texas Court of Criminal Appeals that she will not file any successor writ on behalf of Mr. Holiday. Nor has Ms. Sween filed any amended clemency petition. Nor has Ms. Sween identified what legal or factual deficiency she perceives in the clemency petition we did file.

3) To confirm, on November 10, 2015, the General Counsel of Texas's Court of Criminal Appeals, Ms. Sian Schilhab, called both Mr. Kretzer and Ms. Sween to inquire if either counsel would file any pleading in state court between now and Holiday's execution. Both Mr. Kretzer and Ms. Sween replied that neither will do so. Ms. Schilhab's confirmation email is reproduced on the following page:

Seth Kretzer

From: Sian Schilhab <Sian.Schilhab@txcourts.gov>
Sent: Tuesday, November 10, 2015 4:14 PM
To: Seth Kretzer; 'gsween@beckredden.com'
Cc: 'brian.risinger@madisoncountytexas.org'
Subject: Raphael Deon Holiday

Mr. Kretzer and Ms. Sween,

Per our conversations earlier today, both of you have represented to me that you do not intend to file any pleadings in state court on Mr. Holiday's account prior to his November 18, 2015, scheduled execution. If this changes, please notify me immediately so that I may notify my Court. Note that any pleadings filed in state court within the seven days prior to a scheduled execution must comply with this Court's Miscellaneous Rule 11-003.

Thank you,

Sian R. Schilhab
General Counsel
Texas Court of Criminal Appeals
(direct) 512-463-1597
sian.schilhab@txcourts.gov

4) Therefore, when Ms. Sween states, “[t]he record does not indicate why CJA Counsel failed to pursue these now ripe claims they had raised in Mr. Holiday’s habeas petition” (Reply Br. at 10), she is representing to this Court that such a pursuit would be non-frivolous. Yet, Ms. Sween has made clear to a different court that she will not pursue these claims, either.

5) Similarly, when Ms. Sween accuses us of “actively resist[ing] Holiday’s efforts to obtain substitute appointed counsel in time to seek

various forms of relief still available to him,” (Reply Br. at 2), she implies that these various “forms of relief” actually exist in a non-frivolous condition.

6) Consequently there are two possibilities. Either: (A) Ms. Sween believes there are legal avenues available to Holiday that she has simply chosen not to pursue, or (B) she will not put her own imprimatur on a frivolous filing despite her protestations in this Court that we, or some other CJA lawyer she wishes Judge Lake had chosen in our stead, should have done so.

If the former is true, Ms. Sween is standing by while her client is facing an execution she believes she could have stopped [or could still] with the requisite filing.

But if the latter is true, Ms. Sween necessarily falls back on her self-deprecating representation that she is not qualified to handle this stage of a capital habeas proceeding, which, it must be said, has not dissuaded her from twice seeking an execution stay, repeatedly contending the existence of meritorious relief claims, and persistently evaluating the validity of Holiday’s clemency petition.

7) With regards to these self-expressed inabilities, it is striking that as of November 11, exactly three weeks have elapsed since she filed her

Notice of Appeal on October 21. In that period of time, Ms. Sween's estimable writing abilities have generated approximately 300 pages of briefing in this case.

Ms. Sween is both a periodic adjunct faculty member of the University of Texas School of Law's capital habeas clinic and a member of Texas Defender Services' Board of Directors. Certainly, in the past 21 days, Ms. Sween could have acquired the skills she claims to lack to author a successor writ in state court. Or she could have enlisted the bevy of professors, law students, and fellow TDS Board Members with whom she is affiliated to assist in this regard. We submit that none of those things happened for the reasons Ms. Sween expressed to Ms. Schilhab in her statement on November 10. There is only one conclusion: no non-frivolous ground for relief remains. It is this undeniable deduction that compels us to bring that statement to the attention of this Court.

Respectfully submitted this 11th day of November 2015,

James W. Volberding

Seth Kretzer

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COURT-APPOINTED ATTORNEYS FOR APPELLANT / PETITIONER,
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing unopposed motion was forwarded to all counsel of record on this 11th day of November 2015 through the ECF system.

/s/ Seth Kretzer

Seth Kretzer