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

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

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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 Brief regarding the erroneous summary dismissal of his petition for writ of habeas corpus.

JURISDICTIONAL STATEMENT

This is an appeal of the dismissal of a petition for writ of habeas corpus. Since Mr. Holton is in custody due to a state conviction, the district court had jurisdiction of this petition under 28 U.S.C. § 2254. Because the district court granted a certificate of appealability, this Court has jurisdiction of this appeal under 28 U.S.C. § 2253(c)(1)(A). Mr. Holton's petition was dismissed on September 6, 2006. Notice of appeal was given on September 12, 2006. This

appeal is from the district court's dismissal of Mr. Holton's petition as unauthorized and from the denial of an evidentiary hearing pursuant to *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999).

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Rule 34(a) of the Rules of the United States Court of Appeals for the Sixth Circuit, Mr. Holton submits that oral argument is necessary to better allow the Court to make an appropriate ruling given the factual and legal nature of this appeal. Oral argument is also necessary to protect Mr. Holton's constitutional rights and liberty interests at stake in this capital appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court denied Petitioner the process due under *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999) where he established reasonable cause to believe Mr. Holton may be suffering from a mental disease or defect rendering him 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?

II. If Petitioner was competent, whether the district court erred in dismissing Petitioner's petition for writ of habeas corpus in its entirety as unauthorized after Petitioner expressly authorized his cause of action as to certain claims.

STATEMENT OF THE CASE

On July 18, 2005, a motion for appointment of counsel and for an evidentiary hearing pursuant to *Harper, supra*, was filed. (R.2)[1]. The motion was accompanied by 14 exhibits demonstrating Mr. Holton's twenty-year history of major mental illness. The motion and exhibits raised the issues of whether this illness was preventing Mr. Holton from making rational decisions about federal habeas proceedings and preventing Mr. Holton from assisting in his defense and

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[1]References to the district court are labeled (R.___) and refer to the number assigned to each filing in the district court docket number 1:05-cv-202.

assisting habeas counsel. (R.3). On July 26, 2005, the district court granted the motion for appointment of counsel. (R.5). On November 1, 2005, the district court held federal proceedings in abeyance pending state court review of Mr. Holton's competency to waive his appeals. (R.19).

The Tennessee Supreme Court refused to allow a hearing on Mr. Holton's mental competency to forgo challenges to his death sentence, *Holton v. State*, ___ S.W.3d ___, 2006 WL 1726656 (Tenn. 2006), and set an execution date of September 19, 2006.

On July 31, 2006, after reviewing Petitioner's motion for a *Harper* hearing, and after hearing argument from counsel, the district court ordered Mr. Holton to submit to a mental evaluation by the court's own expert, Dr. Bruce Seidner. (R. 31). The court ruled two separate times that further evaluation by Petitioner's expert, Dr. Woods, would not be permitted. From the bench, the court stated, "I understand that Dr. Woods has spent some time in this case. The State does not feel comfortable with Dr. Woods' evaluation ... I'm going to get someone who does not have an agenda one way or the other...." (R.30 Hearing Transcript 7/31/06 p.31-32; *see also* R. 34 denying motion for further evaluation by Dr. Woods). The court ordered Dr. Seidner to file his written report on Friday, September 1, 2006, and scheduled a preliminary hearing on Tuesday, September 6,

the day after Labor Day.

Counsel filed a discovery motion requesting that Dr. Seidner provide raw data and interview notes to counsel's expert. (R. 33). The court denied the motion. (R.34). Counsel also asked that the hearing be continued so that he would have at least one working business date between receipt of the report and the hearing to consult with his expert. (R.33). The court denied that request as well. (R.34).

The court found Mr. Holton competent and found counsel did not carry the burden of showing reasonable cause in light of Dr. Seidner's testimony.[2] (R.30 Hearing Transcript 7/31/06 p.68). The district court then asked Mr. Holton how he wished to proceed with the pending petition for writ of habeas corpus. When the district court attempted to elicit a waiver of all rights to pursue habeas relief, Mr. Holton objected:

> The Court: Do you still wish to waive your right to have the Federal Courts review your conviction by habeas corpus petition?
>
> Mr. Holton: Not totally, sir.
>
> The Court: What do you mean by that, Mr. Holton?

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[2]At the in-court proceeding on September 6th, Dr. Seidner testified. The district court conducted a direct examination of Dr. Seidner and elicited an opinion that Mr. Holton was competent.

Mr. Holton: It is my understanding that by declining to sign Mr. Ferrell's putative petition, the one that the statue of limitations ran on the 3rd of October of last year, that I did in my mind waive all of the statutory exceptions to the statute of limitations. In other words, direct appeal issues and any issues that were raised in state post appeal conviction. It's my understanding I waived those issues and those issues alone.

* * *

The Court: Okay. Is it your desire to waive your right to have Mr. Ferrell file a petition for you for habeas corpus review that would allow the court to review the proceedings in your case, is that your desire?

Mr. Holton: In regard to those issues, yes, sir.

R.49, p.65-66 (emphasis added).

The court then dismissed the entire petition as unauthorized. (R.46). The district court did, however, grant a certificate of appealability on whether the *Harper* standard had been met. (R.46). Respondent explicitly agreed to the issuance of a certificate of appealability. (R.49 Hearing Transcript 9/5/06 p.72).

On September 12, 2006, counsel filed a motion for stay of execution with this Court. On September 18, 2006, this Court entered a stay of the September 19th execution date and ordered expedited briefing on the issue of whether "the Federal Defender Services has failed to demonstrate, under the standard established in *Harper v. Parker*, [ ], reasonable cause to believe that Mr. Holton is not competent

to make a rational decision to dismiss his pending federal habeas corpus petition."

On September 18, 2006, Mr. Holton filed a *pro se* original petition for writ of habeas corpus with the United States Supreme Court, Docket Number 06-6534. (Attached as Exhibit 1). In the *pro se* petition, Mr. Holton requested that "the Court stay his execution now scheduled for 1 a.m. CDT, September 19, 2006, entertain this original petition, order an evidentiary hearing to resolve any disputed facts, and grant relief from Mr. Holton's convictions and sentences." (Exhibit 1, last page). The claim which Mr. Holton sought to pursue in his *pro se* petition was, for all intents and purposes, identical to one of the claims in his September 30, 2005, petition. *Compare* R.9, Claim 7, p.14-15, with attached Exhibit 1.

Later on September 18, 2006, Petitioner filed a Rule 59 Motion to Alter or Amend or for Relief from Judgment and for Order Staying Execution in the district court questioning whether the district court improperly dismissed Mr. Holton's petition in its entirety after Mr. Holton had stated that he only wished to dismiss a certain set of claims. (R.51)

On September 20, 2006, Petitioner filed Motion to Remand and for Continuation of Briefing Schedule or, in the Alternative, for Supplemental Certificate of Appealability to include the issue of if "Mr. Holton failed to meet the *Harper* standard, the district court improperly dismissed Mr. Holton's habeas

petition *in toto*." (Motion to Remand and for Continuation of Briefing Schedule or, in the Alternative, for Supplemental Certificate of Appealability, p.1).

On September 21, 2006, the district court entered an order denying Petitioner's Rule 59/60 motion so that Petitioner could "raise the issue with the Sixth Circuit." (R.54).

On September 21, 2006, Petitioner filed a notice with this Court advising of the district court's order on the Rule 59/60 motion. In light of the district court's order indicating it would not consider the motion on its merits, Petitioner amended the motion to expand the Motion to Remand and for Continuation of Briefing Schedule or, in the Alternative, for Supplemental Certificate of Appealability to request only that the certificate of appealability be expanded.

On September 25, 2006, a notice of appeal of the district court's order on the Rule 59/60 motion was filed. (R.55).

As of September 25, 2006, the date this brief is due, there has not been a ruling on Petitioner's request to expand the certificate of appealability. Because of the expedited nature of this proceeding, Issue Two addresses the substance of the pending request.

STATEMENT OF THE FACTS

Evidence of Mental Illness in the State Court Record

At trial, three experts, two for Mr. Holton and one for the state, all agreed Mr. Holton suffered from Major Depressive Disorder. (R.3, Attachment B, Dr. Kenner's report dated 11/16/98; R.3, Attachment A, TT Vol.VI, pp.991, 1101, R.3, Attachment C, Dr. Auble's report dated 10/21/98; R.3, Attachment D, Dr. Martell's report dated 5/7/99). Major Depressive Disorder, itself, is associated with a high suicide rate. DSM-IV-TR p. 371 (AMA 2000).

During the guilt phase, William D. Kenner, M.D., testified that Mr. Holton suffered from major depression. (R.3, Attachment A, TT Vol.VI, p.989, 1101). Dr. Kenner testified this illness may have psychotic features, *id.* p.992, and could cause Mr. Holton's "grasp of reality [to be] severely lacking." *Id.* Mr. Holton may have a "difficult time distinguishing between what are thoughts and feelings [he has] in [his] own mind and what is coming in from the outside as external stimuli." *Id.*

Dr. Kenner testified Mr. Holton has an extensive history of depression and that his first significant "depressive episode" occurred "when he was a senior in high school." *Id.* p.1006. Dr. Kenner noted that Mr. Holton's depression recurred in college. *Id.* Military records from 1994 document Mr. Holton's depression.

As one military doctor observed, "he was confused, speaking in sentence fragments with dysphoric affect and mood. He disassociates when he has the opportunity." *Id.* (Dr. Kenner relating contents of military records he reviewed).

Dr. Kenner further testified that Mr. Holton's major depression is recurrent and medical records dating as far back as 1994, before the crime, contain references to Mr. Holton's desire to kill himself. *Id.* p.1011. Dr. Kenner aptly predicted the prospects of Mr. Holton becoming severely depressed in the future were very high. *Id.* p.1100.

Pamela Auble, Ph.D., another defense expert who examined Mr. Holton's mental state, also found Mr. Holton has a history of major depression. (R. 3, Attachment C; R.3, Attachment A, TT Vol.V, p.865).

Dr. Daniel Martell, the state's expert, agreed Mr. Holton has major depression. (R. 3, Attachment D; R.3, Attachment A, TT Vol.VII, p.1175, 1177). Dr. Martell testified as follows: "So when I look at all of these things: his history, his testing, the way he interacted with me during the [testing], it all comes together to tell me this man has depression." *Id.* p.1178. Dr. Martell confirmed that severe depression may "affect one's judgment and thought processes." *Id.* p.1222. He agreed with Dr. Kenner that if "major depression ... goes high enough, [that it] can cause a person to have delusions." *Id.* p.1263. Dr. Martell also agreed that major

depression can "distort judgment" and cause a person to "have faulty judgment." *Id.* p.1271. According to the state's attorney, it is "no secret that [Dr. Martell] found [Holton] to have major depression." *Id.* p.1291.

The testimony concerning Mr. Holton's mental illness was so strong at trial that even the Tennessee Supreme Court, upon reviewing a cold record observed, "The critical issue at trial was the defendant's mental state at the time of the killings." *State v. Holton*, 126 S.W.3d 845, 850 (Tenn. 2004).

Medical records dated well before the crime confirm Mr. Holton's significant history of major depression. Military records from December 1982 through February 1983 show lengthy inpatient hospitalization in the psychiatric ward at USAF Regional Hospital Elgin AFB, Pensacola, Florida. (R. 3, Attachment E). Testing and observation of Mr. Holton revealed "the presence of an acute disturbance in an individual with intact defenses, or it would suggest a severely disturbed individual who is trying to be defensive but is not being very successful at it .... Possibility of a thought disorder, confusion, strange thoughts, beliefs, and actions exist and should be ruled out carefully. Depressive symptoms ... are indicated." *(Id.* bates no.642).

Medical records from Alvin C. York Medical Center in Murfreesboro, Tennessee, show Mr. Holton's persistent struggle with major depression. Progress

notes, dated July 15, 1994, show Mr. Holton "speaking in sentence fragments, with dysphoric affect and mood. He disassociates when he has the opportunity .... [has] feelings of impending death and doom ... Helplessness and hopelessness ... Affect depression occasionally has suicidal thoughts .... Severe adjustment disorder with major depression." (R. 3, Attachment F, bates no.830).

Other documentation of his mental illness includes: (1) a July 31, 1995, evaluation by Scott McCrery, M.A., indicating Mr. Holton suffered a "depressive mood." (R. 3, Attachment G, bates no.1073); (2) an October 4, 1995, medical record from Alvin C. York Medical Center acknowledging previous treatment wherein "to rule out major depression ... he was treated with Imipramine" (R. 3, Attachment H, bates no.995); and (3) a May 14, 1998, Mental Health Evaluation conducted by Dr. Felix Adetunji, M.D., noting that although Mr. Holton denied depression, his "mood appeared depressed with flat affect" (R. 3, Attachment I, bates no.1030).

A key feature of Daryl Holton's mental illness is suicidal tendencies. (R. 3, Attachment A, TT Vol. VI, p.1011,). At trial, Dr. Kenner found medical records document Mr. Holton's suicidal tendencies dating back to 1994. *Id.*

Shortly before the 1997 crime, Mr. Holton unsuccessfully solicited his father's aid in a suicide attempt. (R. 3, Attachment A, TT Vol. VI, p.1012). These

suicidal tendencies affected Mr. Holton as he planned to commit the crime and then kill himself. He succeeded in committing the crime but abandoned his suicide attempt. He turned himself in to the police, gave a full confession, and was promptly charged with capital murder. Immediately after his arrest, he was placed on suicide watch. (R. 3, Attachment A, TT Vol.VII, p.1218).

Suicidal tendencies were also manifest at trial, where Mr. Holton refused to allow his attorneys to present meaningful mitigation evidence. Despite overwhelming mitigation evidence, including lengthy honorable military service, favorable character witnesses, no prior criminal history, and major mental illness, Mr. Holton directed that the only mitigation evidence presented would be that after the crime, he was a cooperative inmate at the local jail. (R. 3, Attachment A, TT Vol.VII, pp.1383-86).

Evidence of Mental Illness Presented in the District Court

Lay opinions of Mr. Holton's current mental state are consistent with Mr. Holton's extensive history of mental illness. Holton's father, Ernest Holton, believes his son suffers from a mental illness which is causing him to seek his execution. (R. 3, Attachment K). Assistant Post-Conviction Defender Kelly Gleason, who has met with Mr. Holton on numerous occasions since May 16, 2005, averred that despite "repeated efforts, [she] has been unable to get [Holton]

to engage in a rational conversation about his legal options." (R.44-2).

Dr. George Woods, a licensed psychiatrist, submitted an affidavit in support of Petitioner's request for a *Harper* hearing. Dr. Woods considered Mr. Holton's extensive history of mental illness and current observations by family and counsel. Dr. Woods opined there was reasonable cause to believe that Mr. Holton may presently be suffering a major mental illness rendering him unable to make rational choices about his execution. (R.27, Dr. Woods affidavit). Dr. Woods offered a preliminary opinion based on two interviews with Mr. Holton, Mr. Holton's trial record, Mr. Holton's armed services record, and records of his family. Dr. Woods' preliminary opinion is that Mr. Holton suffers from complex Post Traumatic Stress Disorder and Depression. *Id.* p.3. It is Dr. Woods' preliminary opinion that these mental illnesses render Mr. Holton incompetent to manage further litigation. *Id.* p.5.[3]

ISSUES

I. Whether the district court denied Petitioner the process due under *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999) where he established reasonable cause to believe Mr. Holton may be suffering from a mental disease or defect rendering him 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?

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[3]Because Dr. Seidner's opinion was not properly considered, *see infra.*, the details of his opinion are not included in this Statement of Facts.

A. Introduction

The procedures the district court used in this case were unprecedented and denied Petitioner the process he is due under *Pate v. Robinson*, 383 U.S. 375 (1966), *Rees v. Peyton*, 384 U.S. 312 (1966), and *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999). Instead of determining whether Petitioner's submission of evidence established reasonable cause to believe Mr. Holton is incompetent, the court retained an expert and required Petitioner to rebut that expert's opinion of competency.

B. Argument

In July 2005, counsel filed a motion for appointment and for an evidentiary hearing to determine Mr. Holton's competency to waive federal habeas proceedings. (R.2, 3). The motion was accompanied by medical records demonstrating Mr. Holton's twenty-year struggle with major mental illness and his suicidal tendencies, and affidavits containing current observations of his irrationality. Counsel offered the expert opinion by Dr. Woods who had interviewed Mr. Holton on two different dates, that Mr. Holton may be incompetent due to complex Post-Traumatic Stress Disorder and Depression that are affecting his ability to rationally consider his legal options. (R.27). Affidavits of Dr. Kenner, Dr. Auble, post-conviction counsel, habeas counsel and Mr.

Holton's father also supported a reasonable cause to believe Mr. Holton is incompetent to waive his appeals, assist in his defense and assist counsel.

Instead of determining at this point whether counsel's submissions met the showing required by *Pate*, *Rees* and *Harper* the district court decided to conduct proceedings for which there is no precedent. The district court appointed its own expert, Dr. Seidner, and ordered Mr. Holton to submit to another evaluation. (R.31, 34). The district court expressly ruled that it had not determined whether counsel had made the *Harper* showing and that it would not do so until it had considered Dr. Seidner's evaluation. The court also stated that Mr. Holton would receive none of the process required under *Rees* and *Pate* as determined by this Court in *Harper v. Parker*. The district court twice ruled there would not be further evaluation by Dr. Woods. (R.30, p.31-32; R.31) The court denied counsel's motion for discovery, including his request for access to Dr. Seidner's raw data and notes. (R.34). In fact, counsel was ordered to have no contact with Dr. Seidner. (R.30, p.32) ("you will not be contacting the psychologist ... because this is the Court's witness, not yours").

The court then conducted a proceeding at which the only evidence permitted would be that of Dr. Seidner, the court's own witness. (R.49, September 5, 2006 transcript). The court questioned its expert and elicited an opinion that Mr. Holton

was competent. At the conclusion of the hearing, the court stated that Petitioner had not carried his burden of showing reasonable cause to believe Petitioner is incompetent, "in light of the testimony of Dr. Seidner." (R.49, p. 68).

Petitioner's initial submissions entitled him to an evidentiary hearing on competency to waive habeas proceedings. Instead of ordering an adversarial hearing, the court shifted an additional burden onto Petitioner by eliciting a new opinion from Dr. Seidner and requiring Petitioner to also rebut Dr. Seidner's testimony before he would be allowed to contest his competency.

The additional burden imposed by the district court upon Petitioner exceeds the burden imposed in *Rees v. Peyton*, 384 U.S. 312 (1966), *Pate v. Robinson*, 383 U.S. 375 (1966) and *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999). In *Rees v. Peyton*, 384 U.S. at 314, the petitioner was not required to overcome the opinion of a court's expert before he was entitled to an evidentiary hearing. Instead, based upon counsel's assertion of a question of incompetency and submission of an expert report, *Rees*' case was remanded to the district court for an evidentiary hearing where all parties could participate. In *Harper*, the district court did not impose the requirement that petitioner overcome the court's independent expert before a hearing would be conducted. In *Comer v. Stewart*, 215 F.3d 910 (9th Cir. 2000), the court remanded for an evidentiary hearing on competency to waive

appeals; the court did not require petitioner to overcome the opinion of its independent expert before allowing a hearing. In *Mrs. Leo H. Hays, as next friend for Thomas Lee Hays, v. Murphy*, 663 F.2d 1004, 1009 (10th Cir. 1981), the district court appropriately "gave an opportunity for a full hearing and the presentation of evidence available," but the case was nonetheless remanded for consideration of additional expert evidence offered by both parties; the petitioner did not have to overcome the opinion of a court appointed expert before he was entitled to an evidentiary hearing on competency. In *Mata v. Johnson*, 210 F.3d 324 (5th Cir. 2000), the court did not require the petitioner to overcome the opinion of the court's expert before a hearing would be held.

The correct standard is found in *Rees*, *Pate* and *Harper*.[4] In *Harper v. Parker*, 177 F.3d at 571, this Court noted there "is no specific federal statute which controls a case in this procedural posture" but determined the issue should be governed by 18 U.S.C. §§ 4241-4247. Section 4241(a) states

> . . . if there is *reasonable cause* to believe that the defendant may presently be suffering from a mental disease or defect rendering him 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.

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[4]The United States Supreme Court is considering a certiorari petition raising the issue of standards and procedures in cases such as this one. *Wilcher v. Epps*, No. 06-5147 (July 11, 2006).

(Emphasis added).

The evidence presented to the district court satisfied *Rees*, *Harper*, 18 U.S.C. §§ 4241-4247, and the ABA standards.[5]

Instead of holding a hearing pursuant to *Rees* and *Harper* the district court created an additional condition precedent for a hearing. The court violated *Rees*, *Pate* and *Harper* when it required petitioner to overcome the opinion of its expert; an opinion obtained by the court after Petitioner's initial submission of evidence of a reasonable cause to believe Mr. Holton is incompetent.

Absent that additional hurdle, Petitioner presented more evidence than is required to establish his right to a competency hearing.

Petitioner submitted medical records, expert opinion, lay opinion and

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[5] The American Bar Association has promulgated guidelines on this issue. ABA Resolution 122A, approved Aug. 8, 2006. The ABA guidelines state,

> 3(a) *Grounds for Precluding Execution*. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation . . . .

attorney opinion to show there is reasonable cause to believe Mr. Holton is incompetent. Dr. Woods opined Mr. Holton could be suffering from complex Post-Traumatic Stress Disorder and Depression which affect his ability to think rationally. (R.27). Dr. Woods indicated a fuller evaluation was needed to cement this tentative diagnosis. *Id.* The district court was troubled enough by Dr. Woods' affidavit that it ordered Mr. Holton, against his will, to submit to an evaluation by the court's own expert. (R.30). The district court's action in obtaining a separate expert opinion shows Petitioner's evidence created reasonable cause to believe Mr. Holton is incompetent.

Case law shows that sufficient evidence to warrant a full evidentiary hearing on Mr. Holton's competence was presented to the district court. In *United States v. Jackson*, 2006 WL 1208077 (6th Cir. May 4, 2006), this Court found reasonable cause to believe the defendant may be incompetent based upon counsel's observations of the defendant, talks with the defendant's mother, social worker observations, and prior history of mental illness. The Court determined an adversarial hearing was warranted. *Id.* In this case, Mr. Holton offered more proof than was presented in *Jackson*. He not only presented medical records establishing a history of mental illness but he also offered the affidavit from Mr. Holton's post-conviction attorney that she was unable to engage Mr. Holton in

rational conversation about his legal options, the affidavit of Mr. Holton's father that he believed his son was irrational, and the opinions of three experts from trial and one expert who had recently met with Mr. Holton and found reasonable cause to believe he may be incompetent. *See also United States v. Walker*, 301 F.2d 211 (6th Cir. 1962) (request by counsel for evaluation and allegations of past institutionalization were relevant in finding reasonable cause); *United States v. Nichols*, 661 F.Supp. 507 (M.D.Mich. 1987) (attorney claim that client did not respond appropriately to discussions of risk concerning charges, defendant's bizarre statements to U.S. Attorney, and defendant's depression were all relevant in finding reasonable cause). This evidence was sufficient to entitle Mr. Holton to an evidentiary hearing.

"[E]vidence of a defendant's irrational behavior ... and any prior medical opinions ... are all relevant " in determining whether further inquiry is needed. *Drope v. Missouri*, 420 U.S. 162, 180 (1975) (explaining the "import" of the rule in *Pate v. Robinson*, 383 U.S. 375 (1966), that the defendant cannot waive his right to a hearing on competency to stand trial). In *Drope*, counsel's observation that the defendant is "not a person of sound mind and should have a further psychiatric evaluation," was also relevant. *Id.* at 177. *See e.g., United States v. Crosby*, 739 F.2d 1542, 1546 (11th Cir. 1984) (defense counsel statement that he

could not communicate effectively with defendant relevant in showing reasonable cause); *United States v. Nichelson*, 550 F.2d 502, 504 (8th Cir. 1977) (defense counsel statement that defendant unable to intelligently discuss facts concerning case established reasonable cause); *United States v. Johnson*, 527 F.2d 1104, 1105-06 (4th Cir. 1975) (hearing warranted where defendant refused to cooperate with counsel, did not want his attorney to cross-examine witnesses and actively sought maximum sentence); *United States v. Burgin*, 440 F.2d 1092, 1094 (4th Cir. 1971) (defense counsel statement that defendant was incoherent and vague and unable to assist counsel established reasonable cause). "Even one of these factors standing alone may ... be sufficient" to warrant further inquiry into the defendant's competency. *Drope*, 420 U.S. at 180. Mr. Holton's case presents evidence of all of these factors (irrational behavior, prior medical opinion, counsel's observations) and more (medical records, family observation, current expert opinion).

Standing alone, Mr. Holton's twenty-year history of major mental health problems, including instances of hospitalization in mental institutions, and prior clinical observations of "thought disorder, confusion, strange thoughts, beliefs,

and actions"[6] establish reasonable cause to believe incompetency. Testimony of three trial experts that Mr. Holton suffered Major Depression also supports a finding of reasonable cause. *See e.g. United States v. McEachern*, 465 F.2d 833 (5th Cir. 1972) (evidence that during a previous confinement, medical officers reviewed prisoner's medical records and believed defendant should be committed to a state institution were sufficient to show reasonable cause); *Morris v. United States*, 414 F.2d 258 (9th Cir. 1969) (prior history of mental illness and treatment and evidence that defendant had previously suffered from psychotic condition established reasonable cause); *United States v. Fogarty*, 558 F.Supp. 856, 857-58 (E.D.Tenn. 1982) (defendant's assertions of repeated hospitalizations relative to mental conditions establish reasonable cause).

Standing alone, Dr. Woods' preliminary opinion that Mr. Holton suffers complex Post-Traumatic Stress Disorder and Depression and that these mental illnesses render him incompetent establishes reasonable cause. *See e.g. United States v. Jones*, 336 F.3d 245 (3d Cir. 2003) (doctor's report finding impairment relevant in finding reasonable cause); *United States v. Renfro,* 825 F.2d 763, 767 (3d Cir. 1987) (physician testimony that defendant's ability to confer with counsel

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[6]Medical records from lengthy inpatient hospitalization at USAF Regional Hospital Elgin AFB. (R.3, Attachment E, bates no. 642).

was impaired showed reasonable cause); *United States v. Crosby*, 739 F.2d at 1546 (personal physician's report that defendant suffers cortical atrophy and expressing concern about competency, established reasonable cause for hearing, even though physician specifically declined to give definitive opinion on competency).

Considered together, the evidence presented by Petitioner establishes reasonable cause to believe Mr. Holton is incompetent. Nevertheless, there has never been an evidentiary hearing on Mr. Holton's competence. The state court denied a hearing. *Holton v. State*, _____ S.W.3d _____, 2006 WL 1726656 (Tenn. 2006). The district court denied an evidentiary hearing. Given the showing made by Mr. Holton, a hearing should have been held.

The judgment of the district court should be vacated and this matter should be returned to the district court with instructions to afford Petitioner an evidentiary hearing under *Harper* and *Rees*.

II. If Petitioner is competent, whether the district court erred in dismissing Petitioner's petition for writ of habeas corpus in its entirety as unauthorized after Petitioner expressly authorized his cause of action as to certain claims.

A. Introduction

There is a certain perverseness in the district court's order dismissing Mr.

In the midst of this collection of skilled legal minds, of well-intentioned people trying to do what they thought needed to be done, sat the one man whose thoughts were the only ones that mattered, Daryl Keith Holton. On September 6, 2006, when undersigned counsel's, the State of Tennessee's, and the district court's opinions on what Mr. Holton wanted came face to face with Mr. Holton's own opinion, it was Mr. Holton's opinion that was cast aside.

The Court substituted its opinion about Mr. Holton's intent for Mr. Holton's expressed intentions. This plainly violated *Faretta, Rees,* and *Pate* each of which allow competent litigants proceeding *pro se* to control the course of litigation. Mr. Holton stated he wanted to dismiss certain claims from the pending petition. If he was competent, the district court erred when it dismissed Mr. Holton's entire cause of action.

B. Argument

On September 6, 2006, the district court dismissed Mr. Holton's petition for writ of habeas corpus as unauthorized. (R.46). In so doing, the court held:

> 1. Mr. Holton, this court must determine whether or not you are competent to make the decision to forgo any federal review of your case by a petition for habeas corpus. In this setting, that means deciding whether or not you have the capacity to appreciate your position and to make a rational decision and choice to abandon any further litigation concerning your conviction and sentence of death. (R.46, p. 66);

Holton's petition for writ of habeas corpus *in toto*. If indeed Mr. Holton is competent, he has been brutally stripped of that little piece of human dignity which our judicial system guarantees to *pro se* litigants, *see, Faretta v. California*, 422 U.S. 806, 828-829 (1975), by a succession of self-assured interlopers who have substituted their judgment and objectives for his.

Undersigned counsel cannot exclude themselves from this cabal. Believing Mr. Holton to be incompetent to make his own decisions regarding the course of federal habeas corpus litigation, undersigned counsel used the crystal ball of their legal acumen and judgment to decide what Mr. Holton "really" wanted. They decided which claims to pursue and which not to pursue in his habeas petition. But they were nowhere near alone.

The Respondent, purporting to step up as champions of Mr. Holton's rights, announced that it was not undersigned counsel who knew what Mr. Holton "really" wanted. The Respondent claimed that it was they who possessed that intimate knowledge and they "knew" that Mr. Holton did not want to pursue any claims in federal habeas and that undersigned counsel was acting against Mr. Holton's desires. *See, e.g.*, R.7-1, p. 4, 12.

Even the district court "knew" what Mr. Holton wanted and that was to dismiss his pending cause of action. (R.46, p. 66, 70, 71).

2. 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 . (R.46, p. 70);

3. Based upon your own stated desire to not pursue a habeas corpus petition, I am going to dismiss the petition. (R.46, p. 71).

In making each of these determinations, the court mis-perceived the record and facts before it. The record is clear that Mr. Holton had no desire to abandon federal review. The transcript reveals Mr. Holton only sought to waive certain issues. When the district court attempted to elicit a waiver of all rights to pursue habeas relief, Mr. Holton objected:

The Court: Do you still wish to waive your right to have the Federal Courts review your conviction by habeas corpus petition?

Mr. Holton: Not totally, sir.

The Court: What do you mean by that, Mr. Holton?

Mr. Holton: It is my understanding that by declining to sign Mr. Ferrell's putative petition, the one that the statue of limitations ran on the 3rd of October of last year, that I did in my mind waive all of the statutory exceptions to the statute of limitations. In other words, direct appeal issues and any issues that were raised in state post appeal conviction. It's my understanding I waived those issues and those issues alone.

* * *

The Court: Okay. Is it your desire to waive your right to have Mr.

> Ferrell file a petition for you for habeas corpus review that would allow the court to review the proceedings in your case, is that your desire?
>
> Mr. Holton: In regard to those issues, yes, sir.

R.46, p.65-66 (emphasis supplied)

By Mr. Holton's express words, he wished to waive only "direct appeal issues and any issues that were raised in state post appeal conviction." While Respondent may maintain that these are the only issues Mr. Holton is entitled to pursue in federal habeas, it is axiomatic that Mr. Holton is permitted to pursue issues that were never presented in state court provided that he establishes "cause and prejudice." The classic examples of "cause and prejudice" are state interference which prevents him from presenting claims in state court, or a "substantial miscarriage of justice." *See generally*, *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Mr. Holton told the district court he wished to waive only a specific set of claims. The record further reflects that he wished Mr. Ferrell's assistance, just not in regards to that specific set of claims. Whether Mr. Holton's desired claims for federal review were among those contained in the petition filed by Mr. Ferrell was not determined by the district court. As importantly, if Mr. Holton wished to amend the petition and proceed on *pro se* claims of his choosing, the district court did not determine whether the

chosen claims arise from the same body of operative facts as those alleged in the September 30, 2005 petition (and, therefore, relate back to that date for statute of limitation purposes). *See, Mayle v. Felix*, 545 U.S. 644 (2005). Instead, the court dismissed the petition *in toto*.

Mr. Holton's desires to seek federal review are also illustrated by the fact that he filed a *pro se* original petition for writ of habeas corpus with the United States Supreme Court, Docket Number 06-6534. (Exhibit 1). In the *pro se* petition, Mr. Holton requests that "the Court stay his execution now scheduled for 1 a.m. CDT, September 19, 2006, entertain this original petition, order an evidentiary hearing to resolve any disputed facts, and grant relief from Mr. Holton's convictions and sentences." (Exhibit 1, last page). The claim which Mr. Holton sought to pursue in his *pro se* petition was, for all intents and purposes, identical to one of the claims in his September 30, 2005, petition. *Compare* R.9, Claim 7, pp. 14-15, with attached Exhibit 1.

It is indisputable that Mr. Holton did not, as the district court held, "[choose] to abandon any further litigation," or that he, "[chose] not to seek federal habeas review of his death sentence," or that he had "stated [a desire] . . . not to pursue a habeas corpus petition." What Mr. Holton chose, as evidenced by the record and by his subsequent action, was to not have the course of his

litigation determined by anyone but himself. The district court found Mr. Holton is competent to make his own decisions. It should have allowed Mr. Holton to proceed with this habeas action raising the issue(s) he wishes to raise.

The district court abused its discretion in dismissing *in toto* Mr. Holton's first petition, after Mr. Holton explicitly refused to waive his right to seek habeas relief and affirmed, at least partially, his desire to pursue his September 30, 2005 habeas corpus petition with the assistance of counsel. In *Lonchar v. Thomas*, the United States Supreme Court held that the federal courts may not dismiss a first petition "for special ad hoc 'equitable' reasons not encompassed within the framework" of the Habeas Rules and the controlling statute. 517 U.S. 314, 322 (1996). Dismissal of a first federal habeas petition "is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely...." *Id.* at 324. After Mr. Holton refused to waive federal review, there was no basis for the district court to slam the courthouse doors shut.

Respondent attempts to cloud this simple issue by submitting that, even if Mr. Holton adopted the September 30, 2005 petition in open court, that adoption came after the expiration of the statute of limitations. *See*, Response to Motion to Remand. What Respondent conveniently ignores is that, to the extent Mr. Holton wished to pursue the September 30, 2005, habeas corpus petition even as to

merely one issue (a wish born out by the record), the petition was authorized when filed. Section 2242, 28 U.S.C., does not require the petitioner's signature, just his authorization. *See also* Habeas Rule 2, and there is no proof that this authorization did not occur before the running of the statute of limitations.

The prejudice to Mr. Holton from the district court's decision cannot be overstated. Respondent now asserts that Mr. Holton does not exist in the eyes of the law. (Motion to Vacate Stay, p.4). Respondent has already begun to use the district court's improper dismissal of Mr. Holton's cause of action to assert that Petitioner has no available federal remedies because any subsequent petition would be barred by the statute of limitations. (Motion to Vacate Stay, p.20-21). If the district court had acted properly and allowed Mr. Holton to pursue his chosen claims contained within the petition, and allowed him to amend the petition to include any additional claims arising out of the same set of operative facts, he would still be able to pursue them through his timely filed September 30, 2005, petition. *Mayle v. Felix, supra.*[7] Due to the district court's disregard for Petitioner's wishes, even as it purported to be acting in accordance with those wishes, the district court stripped Mr. Holton of any opportunity to seek the review

[7]Petitioner notes that he does not, by asserting the timeliness of the September 30, 2005 petition, waive any claims of equitable tolling or other remedies which might render a subsequently filed petition timely as well.

of his federal claim(s).

Furthermore, not only does the Respondent assert that Mr. Holton does not exist in the eyes of the law but it also claims undersigned counsel should not litigate on behalf of Mr. Holton. (Motion to Vacate Stay, p.14). The district court, in denying the Rule 59/60 motion, said counsel was without standing to litigate the motion. (R.54, p.2). This position ignores both the record and caselaw.

The record clearly shows, notwithstanding the district court's proclamation that Mr. Holton chose not to pursue a habeas petition, that Mr. Holton specifically rejected this assertion. In light of Mr. Holton's unambiguous testimony and actions demonstrating his desire to pursue federal review of some claims, counsel had standing to file the Rule 59/60 motion. This is not a third-party filing.

Additionally, *Harper v. Parker*, holds counsel has standing "under the authority of *Pate v. Robinson*, 383 U.S. 375 (1966), [because] once Harper's competence was put in issue, Harper could not waive his right to have his competence determined." *Id.* at 571. Finding the case should receive appellate review, this Court in *Harper* determined that counsel from the district court proceedings was "the only entity available to pursue an appeal of the district court's judgment." *Id.* The Court found that "the State's challenge to counsel's participation in the appellate process is not supported by controlling authority."

Id. Therefore, this portion of the district court's Rule 59/60 decision, which finds to the contrary, is wrong.

This matter should be remanded to the district court with instructions to reinstate Mr. Holton's September 30, 2005 petition for writ of habeas corpus, to determine whether Mr. Holton wishes to proceed *pro se* or with the assistance of counsel, and to allow Mr. Holton to pursue any claim in the September 30, 2005 petition, including, but not limited to, the claim contained in both the September 30, 2005 petition and his original petition in the United States Supreme Court for habeas corpus relief.

CONCLUSION

On the basis of the forgoing points and authorities, 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,

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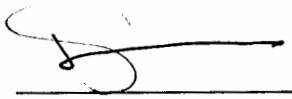
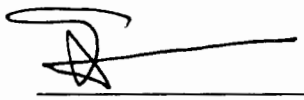
OF EASTERN TENNESSEE, INC.



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 brief complies with the requirements of the type-volume limitation of Rule 32(a)(7)(B), F.R.A.P., as it contains 7,170 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.



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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:

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Criminal Justice Division
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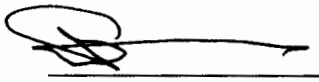

Stephen M. Kissinger