

ATTACHMENT 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE, TENNESSEE**

Daryl Keith Holton,	:	
	:	
Petitioner,	:	
	:	Case No. 1:05-cv-202
vs.	:	
	:	Motions Hearing
Warden Ricky Bell,	:	
	:	
Respondent.	:	

Transcript of proceedings before the Hon. Thomas W. Phillips, U. S.
District Judge, and the Hon. H. Bruce Guyton, U. S. Magistrate Judge, on
July 31st, 2006.

Appearances:

On behalf of the Petitioner:

Stephen A. Ferrell, Esq.
Susanne Bales, Esq.
Federal Defender Services, Inc.
Knoxville, Tennessee

On behalf of the Respondent:

Jennifer L. Smith, Esq.
Elizabeth Turney Ryan, Esq.
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1 (Whereupon, Monday, July 31st, 2006, Court convened in the
2 following matter at 9:00 a.m.)

3 THE COURT(Judge Phillips): Well, good morning,
4 ladies and gentlemen. Madam Clerk, if you will call the first case
5 for us, please.

6 COURTROOM DEPUTY: This is a motion hearing in
7 1:05-cv-202, Daryl Keith Holton versus Warden Ricky Bell.
8 Stephen A. Ferrell and Susanne Bales are here on behalf of the
9 Petitioner. Is the Petitioner ready to proceed?

10 MR. FERRELL: Yes, we are.

11 COURTROOM DEPUTY: Jennifer Smith and Elizabeth
12 Ryan are here on behalf of the—

13 THE COURT: Petitioner.

14 COURTROOM DEPUTY: Yes, the warden. Are you
15 ready to proceed?

16 MS. SMITH: Yes, we are.

17 THE COURT: Okay. Mr. Ferrell, perhaps you can tell
18 us exactly where this case stands procedurally so we can determine
19 what, if anything, we need to do.

20 MR. FERRELL: Well, procedurally, there are several
21 matters before the Court, several motions that have been filed. First
22 of all—

23 THE COURT: I'm sorry, Mr. Ferrell. I notice that you
24 did file your motion for mental examination under seal?

25 MR. FERRELL: Yes.

1 THE COURT: And I understand that you wish to
2 withdraw that motion at this time; is that correct?

3 MR. FERRELL: To withdraw the aspect of it being
4 under seal.

5 THE COURT: Under seal, that's correct.

6 MR. FERRELL: Yes, yes. Not the motion itself.

7 THE COURT: And you've also requested an ex parte
8 hearing, which I understand that you are at this time willing to
9 waive; is that correct?

10 MR. FERRELL: The ex parte aspect, yes.

11 THE COURT: Yes. Okay. Then you may proceed.

12 MR. FERRELL: The procedural posture is, basically,
13 as I said in our motion for appointment, this case came up on our
14 radar screen as a potential habeas petitioner who had not contacted
15 us, had not officially waived any habeas proceedings, had not done
16 anything and had refused all contact.

17 We felt that, as federal public defender for this district, that we
18 should try to make sure that his rights were protected, that he was
19 competent to forego any habeas proceedings, if that was his wish,
20 and so, therefore, we filed the motion for appointment setting out all
21 of the relevant facts as we knew them at that time.

22 This court did appoint us. We continued to seek input from the
23 Defendant, and because the litigation in state court was unresolved
24 at that time, we didn't know if there would be a properly filed state
25 court post conviction petition to toll the statute of limitations under

1 the AEDPA.

2 Therefore, when the statute of limitations was nearly up, under
3 a worst case scenario that all state court proceedings were invalid,
4 we went ahead and filed his habeas petition without his signature,
5 but on his behalf and as appointed counsel; and also with the
6 suspicions and the indications that we indicated to this court all
7 along, that there was evidence of his incompetence, and seeking all
8 along to have his competency evaluated so that we would know
9 exactly how to proceed in this matter.

10 Subsequent to that filing, the state court dismissed all post
11 conviction proceedings and set an execution date. Once the
12 execution date was set, we notified the Court through an ex parte
13 letter— because we were proceeding ex parte at that time— and
14 reminded the Court that the motion for— the order of visitation as
15 well as the psychological evaluation were still pending.

16 Subsequent to that, this court ordered this hearing. The State
17 has filed motions to dismiss our petition, as well as a motion to
18 reconsider the appointment, largely based on the fact that nothing
19 was authorized by Mr. Holton himself. Mr. Holton has written to
20 the State a letter in which he stated that he did not want to proceed
21 with us as his counsel in habeas.

22 We have met with the Petitioner or met with Mr. Holton
23 pursuant to this court's order to ascertain his position on these
24 habeas proceedings. He has informed me that he does not wish to
25 proceed with the petition as I have filed it, and I am here to renew

1 my motion for a psychological evaluation.

2 I submitted on Friday an affidavit by Dr. George Woods, who
3 met with Mr. Holton for brief periods of time back last October and
4 formed the opinion that he is— there is reasonable cause to believe
5 that he may be incompetent due to his longstanding history of major
6 depression as well as a possibility of complex post traumatic stress
7 disorder brought on by the stressors of the situation involving his
8 children before they were murdered and the actual crime itself; that
9 that may be inhibiting him from considering all of his legal options
10 in a competent manner.

11 For that reason, we would be asking that this court order an
12 evaluation of Mr. Holton if it is indeed his position at this time to—
13 that he would want me to withdraw the petition I've filed; that
14 before we proceed, that there is reasonable cause to believe that he
15 may be incompetent; that this court's appointment was authorized
16 by the evidence.

17 And that, under Sixth Circuit case law, Harper v. Parker
18 controls this case and says that when evidence has been presented to
19 raise a reasonable cause to believe that the Defendant or the
20 Petitioner, potential Petitioner, may be incompetent, that this court
21 needs to order an evaluation as well as a hearing.

22 And the evidence that we have presented in favor of that are
23 the evidence from his trial in which three mental health experts
24 testified that he did suffer from major mental illness, a long history
25 of major depression. That fact was uncontested. All three also

1 found that he was competent at the time of trial.

2 But that has been at least eight years in the past now and
3 should be re-examined at this time, especially given the fact that Dr.
4 Kenner, who testified at his trial, provided us with an affidavit to
5 support our motion for appointment, saying that this type of mental
6 illness is potentially ongoing, could very well be manifesting itself,
7 and the fact that Mr. Holton was refusing visits could be an
8 indication that the depression is active again and could be affecting
9 his mental health.

10 Also we provided Mr. Holton's father's affidavit in which he
11 averred that he would be willing to stand in as his next friend if Mr.
12 Holton was indeed incompetent and that he suspected he may be
13 incompetent as well.

14 And, finally, Dr. Woods' affidavit that we just submitted and
15 that we— a letter, we had also submitted a letter from Dr. Woods
16 back in October, in which he had talked about meeting briefly with
17 Mr. Holton, how he believes he needs to do a full, formal evaluation
18 in order to come to a conclusion about his competency and that he
19 would be able to complete that work in a very short period of time.

20 In fact, he has told me that he's blocked out August the 9th,
21 he's available, if this court should order that the evaluation take
22 place, and he could give a report within two days. Therefore, we
23 would know exactly where we are in this case. Because without a
24 formal diagnosis, a formal conclusion from a mental health
25 professional in this case, we really don't know what his state is.

1 But we do have reasonable cause to believe that there may be a
2 problem. I think the evidence and the history, as well as his state
3 trial, as well as the current observations, at least as current as eight
4 months ago, support that, that possibility, and we would ask that
5 this court order that hearing.

6 THE COURT: Let me ask you this, Mr. Ferrell. I
7 understand that your counterparts on the state side have attempted
8 to have Mr. Ferrell (sic) examined and to have, I guess, his father
9 appointed as his guardian ad litem, his guardian?

10 MR. FERRELL: Well, it was mainly they were
11 attempting to have him examined, and they had raised that issue in
12 the state courts. There was a hearing scheduled, and, in fact, Dr.
13 Kenner was appointed for that and a hearing was scheduled for, I
14 believe it was, November the 14th when the state attorney general
15 filed a motion with the state supreme court to halt all those
16 proceedings in light of an interlocutory appeal or an extraordinary
17 appeal to the Tennessee Supreme Court that the post conviction
18 defender had no jurisdiction to proceed in that matter.

19 And all of that was granted so that the state court proceeding
20 never did take place. It was stayed and eventually dismissed by the
21 Tennessee Supreme Court.

22 THE COURT: Thank you, Mr. Ferrell. Okay. Ms.
23 Smith, do you want to respond?

24 MS. SMITH: Certainly, your Honor. May I approach
25 the podium, your Honor?

1 THE COURT: You may, certainly.

2 MS. SMITH: I think that Mr. Ferrell's recitation of the
3 cases is largely accurate. I don't disagree with that. And it's true
4 that we have contested from the beginning not only the appointment
5 of counsel when we were made aware of it, but also the filing of the
6 petition in the case.

7 Our basis for both of those motions, which are still pending
8 before the Court, is the same and our position remains that the
9 jurisdiction of this court has not been properly invoked. As Mr.
10 Ferrell said, Mr. Holton has never authorized the filing of any
11 petition in his behalf.

12 And as we stated in our motion to dismiss, we do not believe
13 that the filings before the Court demonstrate the prerequisites for
14 next friend standing or third-party standing under either Harper vs.
15 Parker or West vs. Bell, which we believe control this case.

16 In addition, it's our position that the Court's decision today on
17 the question of whether there is to be any competency hearing needs
18 to be guided by a couple of over-arching principles that arise by
19 virtue of the posture of this case, being a petition on behalf of a
20 state prisoner in federal court.

21 The first is that Mr. Holton comes to this court with a
22 presumption of competence. He was deemed to be competent in
23 state proceedings as a result of the fact that he was either found to
24 be competent specifically or there was no question raised as to his
25 competence, and that presumption is established in Ford vs.

1 Wainwright.

2 A lot of the proof that has been presented in attachments to this
3 court are actually evidentiary matters from the state trial court. So
4 given the fact that that presumption had already attached by virtue
5 of that conviction, we don't think that that evidence has any bearing
6 whatsoever, because that evidence was insufficient in state court to
7 support a finding of incompetent to stand trial.

8 So that, that history of mental illness and that trial proof,
9 really has no bearing on Mr. Holton's present competence in this
10 court and shouldn't be given weight, if any, in regard to the request
11 that this court essentially disregard state court findings of
12 competence.

13 As well, then, as recently as May of 2006 the Tennessee
14 Supreme Court made a specific finding that there was insufficient
15 evidence presented to demonstrate Mr. Holton's incompetence, and
16 that was in a state post conviction proceeding in which an attempt
17 was made to proceed through a next friend in that case.

18 So there is this over-arching principle of deference under
19 2254(e)(1) that we think controls with regard to the competency
20 determination, and that deference, we submit, applies both to trial
21 and appellate courts and, as well, to explicit and implicit findings.

22 So with regard to the competence at trial, to the extent they
23 were implicit conclusions that he was competent at that level—
24 which is indeed a much higher level of competence than is required
25 here— that certainly should carry a lot of weight.

1 With regard to the petition itself, our reading of the case law is
2 essentially that the filings before a court to establish next friend
3 standing must establish in and of themselves and must state on the
4 face of the petition the two requirements necessary to establish the
5 jurisdiction of the Court.

6 First of all, that there is a next friend who is willing to proceed
7 on behalf of the Petitioner and that that requirement, that actually
8 includes a requirement of a significant relationship and a desire to
9 proceed in the best interests of the Petitioner.

10 Given correspondence that I have received from Mr. Holton
11 and also in addition to the argument today, we are going to be
12 asking the Court to be able to present some brief proof on the
13 matter. We question whether Mr. Ernest Holton would even meet
14 that first qualification, given his lack of any contact with Mr.
15 Holton since 2004, the fact that his visitation has now lapsed at the
16 prison, and he has not made any attempt to renew it.

17 He's had no contact whatsoever with Daryl Holton, and it's
18 very difficult for us to see— I'm not even aware; he may not even be
19 in the courtroom today. I'm not sure whether or not he is; I don't
20 think he is. Given that, I question whether he would even satisfy the
21 requirements for that significant relationship and that interest in
22 doing what's in the best interests of the Petitioner.

23 But even more to the point, I think, of Mr. Ferrell's
24 presentation, is that there must be an affirmative showing of an
25 inability to file the petition; in this case, the inability that is alleged

1 is mental incompetence.

2 And I agree with Mr. Ferrell, that the two cases that control are
3 Harper vs. Parker and West vs. Bell. But I disagree that they aid his
4 case. In fact, I think what Harper did was— actually supports the
5 position that the State takes in this case. In Harper, the Court
6 approved the district court’s analysis in that case on a similar claim
7 of incompetence, it approved the Court’s application of general
8 principles of incompetency procedures under the federal statute, 18
9 U.S.C. Section 4241.

10 And what they said was, in order to subject a state prisoner or a
11 federal prisoner to an evaluation, an involuntary evaluation and/or a
12 competency hearing, there must be reasonable cause to believe that
13 the petitioner or the individual is not competent.

14 In Harper, the Court found that insufficient evidence had not
15 been presented to establish that reasonable cause. Like this case,
16 the petitioner in Harper relied very heavily on evidence of past
17 mental illness. That is almost predominantly what Mr. Ferrell and
18 his colleagues rely upon in this case.

19 In addition, like this case, the petitioner in Harper presented
20 some speculative testimony about the possible reasons that the
21 petitioner in that case may be foregoing his right to challenge his
22 convictions, and, like this case, we think it was clear in Harper that
23 the petitioner in that case understood the consequence of his
24 actions.

25 Under those circumstances, the Sixth Circuit affirmed the

1 district court's dismissal of the petition and denied a stay of
2 execution in that case.

3 The other case that I think is also very important to this case
4 and I think is probably the most analogous case to the one as any
5 that have been cited is the West vs. Bell case. In that case, the
6 Court, the Sixth Circuit, rejected the notion of the ability of a
7 putative next friend and/or counsel to file a protected petition,
8 which is essentially what Mr. Ferrell has done in this case.

9 As I understand the presentation in my communications with
10 Mr. Ferrell, I think that the Federal Defender is faces with what they
11 believe to be an ethical dilemma, and they have filed things that
12 they believe are things that will protect Mr. Holton's rights.
13 Whether or not he's agreed to them, they feel like they've got to do
14 that.

15 I think West made clear that in order to proceed through the
16 next friend, the putative next friend must be able to demonstrate on
17 the face of the petition the incompetence. It's not appropriate to file
18 a petition to invoke the federal processes in order to obtain
19 additional evidence to then justify the initial filing, and that's what
20 we have in this case.

21 Essentially, Mr. Ferrell has invoked this court's jurisdiction
22 and now seeks to use the authority of this court to obtain an
23 evaluation that Mr. Holton has never agreed to. This is a very
24 different situation in this case than the Reid case, for example,
25 which was just before the Sixth Circuit. In that case, Mr. Reid had

1 agreed to be evaluated several times before the filing of the petition.

2 This is a very different situation. Absent a concrete showing
3 of present incompetence, which is completely lacking in this case—

4 THE COURT: Let me ask you about that, Ms. Smith.
5 I'm looking at this affidavit of Dr. Woods, which, admittedly, we
6 didn't receive until late Friday. But unless I am misreading his
7 conclusion, it says that, "It is my professional opinion that there is
8 reasonable cause to believe that Daryl Holton may be suffering from
9 a mental disease or defect rendering him mentally incompetent."

10 Now, what do you expect me to do with that, just ignore it?

11 MS. SMITH: Well, your Honor, I think that the Court
12 has to look at that affidavit in its entirety. And what I think is clear
13 from that affidavit is that that opinion is based in large part on the
14 history of mental illness and basically what has proceeded before.
15 While there is some indication that there was a brief meeting,
16 there's no indication that there was any formal evaluation done, and
17 I believe that—

18 THE COURT: Says he met with him on two occasions,
19 October the 5th and 7th, 2005. That's less than a year ago.

20 MS. SMITH: Our position is, that is insufficient, that
21 conclusory allegation which seems to be based in large part on the
22 previous history of mental illness, is insufficient. Otherwise, you
23 can get any expert to come in and give a conclusory opinion and get
24 an automatic stay or an automatic evaluation.

25 There is no specific factual basis for that conclusion, there is

1 no basis of any behaviors, of any diagnoses that specifically impairs
2 the ability and any support for that. Our position is, that's simply
3 too conclusory to support the-- basically what the West court
4 described as dragging an unwilling petitioner through the federal
5 process and through evaluations and the like that he does not wish
6 to proceed with.

7 Mr. Holton, in our view, has been very clear and very
8 consistent in what he wishes to do and ought to have the opportunity
9 to express that desire to the Court, and given the history of the case
10 and the findings made by the state court, that conclusion of Dr.
11 Woods is simply not sufficient to overcome the consistent history of
12 the state court's rejecting competency claims, it's certainly not
13 clear and convincing evidence of that.

14 And we don't think that, under Harper, it would justify any
15 further proceedings.

16 THE COURT: Well, Ms. Smith, as I understand the
17 Petitioner's-- or, I should say, the Federal Defender Services'
18 petition, all they want to do is have this man examined. Don't you
19 think it would be a good idea to find out if he's competent before
20 you put him to death?

21 MS. SMITH: Your Honor, I think that Mr. Holton is
22 entitled to make decisions on his own behalf without, as is stated in
23 the West case, without being dragged through this federal process.
24 Mr. Holton is well aware--

25 THE COURT: I'm not going to drag him through the

1 habeas corpus process. We're talking about having him examined to
2 see if he's competent to make a decision.

3 MS. SMITH: I think that runs contrary to the decision
4 in West vs. Bell, yes, sir, I do, because there is insufficient
5 evidence, insufficient definitive evidence, of anything that has not
6 already been rejected by the state courts to support a finding of
7 competence before this court now.

8 There is nothing materially different before this court that has
9 not already been considered and rejected by the state courts. This
10 man has been found competent time and time again, and he has very
11 clearly expressed, expressed his wishes. He knows what his options
12 are, he knows what the consequences of his decisions are, and that is
13 what Rees vs. Peyton requires.

14 It does not require— We do not read Harper vs. Parker as
15 requiring a mental evaluation in every case. There must be a
16 showing that would cause— that would raise a reasonable doubt.
17 There is simply nothing before this court that would raise a
18 reasonable doubt in light of the totality of the proof in light of the
19 state court findings and in light of the deficiencies in the findings.

20 THE COURT: In order for this court to agree with that
21 statement, Ms. Smith, I would have to assume that Dr. Woods is a
22 charlatan, that he doesn't know what he's talking about. Do you
23 have any proof to that effect?

24 MS. SMITH: Your Honor, I'm not suggesting that Dr.
25 Woods is a charlatan. What I'm suggesting is that the allegations in

1 his affidavit are insufficient to raise a reasonable doubt given the
2 basis of those, of those assertions.

3 And by that, I mean, if you look through that affidavit, that
4 affidavit is based in large part on the very same evidence that has
5 already been presented to the state courts and rejected to support a
6 finding of competence. The state courts have already looked at the
7 depression issue, the state courts have already rejected that.

8 All of this evidence and these identical allegations were
9 presented in the state proceedings, and the Tennessee Supreme
10 Court found, in May of this year, that there was insufficient
11 evidence to raise a question about Mr. Holton's competence.

12 THE COURT: Thank you, Ms. Smith. Mr. Ferrell, do
13 you wish to respond?

14 MR. FERRELL: Yeah, a couple things, your Honor.
15 First of all, I wanted to distinguish a couple things in West v. Bell
16 relied on by the Respondent in this case. That case involved a stay
17 of execution at the last minute, and the actual issue there was
18 whether the district court abused its discretion in ordering a stay.

19 In that case, the Court emphasized that there had been no effort
20 to evaluate Mr. West and find out about his competence; merely the
21 attorneys purporting to act on his behalf came forward nearly at the
22 last minute with some history and some evidence that was certainly
23 not fresh and no. even, allegations that they were attempting to
24 come up with fresh evidence. In that case, the Sixth Circuit held
25 that the district court abused its discretion in ordering a stay.

1 I also want to distinguish a few facts in the Harper case which
2 clearly control this, this matter, because really the facts are almost
3 indistinguishable in that there are allegations coming from a public
4 defender organization based on a history of potential mental illness.

5 But, in that case, Dr. Edelman was presented, was appointed by
6 the district court, did an evaluation and came out with a bad
7 conclusion, and the public defender organization in Kentucky was
8 seeking another evaluation. Clearly, that's very distinguishable
9 from the case here before this court now where we're looking for the
10 first evaluation.

11 And any presumption of— or any presumption of correctness of
12 the state court proceedings must be seen in light of the fact that no
13 evaluation or hearing took place in those state court proceedings.
14 Instead, before such an evaluation— such a hearing could take place,
15 the attorney general intervened, preventing a hearing, through the
16 state supreme court, which found in part that the public defender
17 office in Nashville had no standing to raise the issues.

18 So that's different than in a case where a full evidentiary
19 hearing had taken place and all the facts were analyzed and a
20 contrary conclusion was made. In the state court proceedings here,
21 there has been no current evaluation and certainly no current
22 presentations as to what that evaluation might have brought.

23 And in looking at the history here, the fact that there were so
24 many questions about competency at trial, first of all, the first red
25 flag, even if it turned out that the state court found he was

1 competent, the fact that they were looking into it shows that it was
2 an issue.

3 That's been a number of years ago, and there is no current
4 evaluation, and certainly anyone would recognize that a number of
5 years on death row is often not very helpful to a person's mental
6 state. Given those facts, it's imperative before execution that this
7 court or somebody with the qualifications to do so look into this
8 matter and look into Mr. Holton's competency.

9 And we certainly, unlike in West and in other cases, have not
10 been waiting to the last minute to have some eve of execution
11 drama. We want this matter settled for our conscience, for the
12 state's conscience, for everybody's conscience, to know that we are
13 doing the right thing before this man is executed.

14 And one other matter, your Honor, that I apologize for not
15 bringing up in my initial address to this court; is that we filed a
16 motion for stay, that the stay of all proceedings and stay of
17 execution that the Attorney General hasn't had the time to respond
18 to yet.

19 But I just wanted to emphasize that as we can see from
20 Holton's case in state court, the Christa Pike case in state court, the
21 Tennessee State Courts have been hashing through this process of
22 what to do in these cases, because it's just not clear. It's not clear
23 what entities, such as the Public Defender, should be doing, it's not
24 clear what the Attorney General should be doing and not clear what
25 the courts should be doing.

1 In Holton's case, as well as Christa Pike's case, the state court
2 stayed all proceedings to explore those issues and come up with the
3 answers. We believe that in the Wilcher case, where cert. has not
4 yet been granted, but where a stay has been granted based on a
5 finding of cert.— or based on the possibility of cert., that the U. S.
6 Supreme Court may well be doing the same process.

7 And since this case is scheduled to be conferenced on
8 September the 25th and we'll know the answer and we'll know what
9 issues they're looking in, that it would be prudent to stay all
10 proceedings, to hold off until the United States Supreme Court has
11 had a chance to look at this and could possibly be exploring this
12 thorny issue.

13 If you look at the law in all of the circuits, you will see that it's
14 a very thorny issue and not a clear one for anyone to navigate. And I
15 think the United States Supreme Court may well be recognizing that
16 and taking it in hand, and it would be prudent for us to wait. Thank
17 you, your Honor.

18 THE COURT: Thank you, Mr. Ferrell. Judge Guyton,
19 do you have any questions of Mr. Ferrell or Ms. Smith?

20 JUDGE GUYTON: No, your Honor.

21 THE COURT: Okay. Ms. Smith, I understand you want
22 to put on some evidence; is that correct?

23 MS. SMITH: I do, your Honor. I'd also like to respond
24 briefly to the motion--

25 THE COURT: You may.

1 MS. SMITH: –to stay that Mr. Ferrell just referred to
2 on the Wilcher case. We don't think that provides any basis for a
3 stay in this case. And just to reiterate what we were saying earlier,
4 the only way that this court is empowered to stay the state execution
5 in this case would be if it's authorized to do so under Section 2253,
6 which would require a proper habeas petition, which would require
7 a proper establishment of jurisdiction to act in the first place.

8 The Wilcher case does not support a stay in this case. It is a, in
9 fact, a completely different situation than the one before this court.
10 In Wilcher, the petitioner in that case actually filed his own habeas
11 petition or authorized the filing of it. This is not a situation where
12 he chose to forego it completely.

13 In that case, he attempted to withdraw an already filed petition.
14 So the federal court at that point already had jurisdiction and
15 authority in that matter. The question in that case actually involved
16 proceedings that occurred after he attempted to withdraw that
17 petition.

18 He was allowed to withdraw it, and then at the last minute he
19 tried to withdraw his withdrawal. So the issue in the Wilcher case
20 deals with that last-minute change of heart and that about-face that
21 the Court referred to, not to the standard of competence. It referred
22 to the procedural aspects. It really didn't have any bearing on this
23 case whatsoever.

24 THE COURT: I'm sorry. Judge Guyton, did you have
25 any questions of Ms. Smith?

1 JUDGE GUYTON: No, I don't.

2 THE COURT: Ms. Smith, you wish to put on some
3 evidence, do you?

4 MS. SMITH: I do, your Honor. We actually wish to call
5 Mr. Holton.

6 THE COURT: Okay. Mr. Holton, if you would please
7 stand to be sworn.

8 COURTROOM DEPUTY: Do you solemnly swear that
9 the testimony that you will give in the matter before the Court today
10 will be the truth, the whole truth, and nothing but the truth, so help
11 you God?

12 MR. HOLTON: Yes, I do.

13 THE COURT: Let's let him just testify where he is, Ms.
14 Smith, rather than having him come to the witness seat.

15 MS. SMITH: All right, your Honor.

16 THE COURT: Just have a seat, Mr. Holton. Yes, please,
17 if you would, push the microphone over in front of him so we can all
18 hear him clearly.

19 DIRECT EXAMINATION

20 by Ms. Smith:

21 Q. Would you state your name for the record, please?

22 A. Daryl Keith Holton.

23 Q. Thank you. Mr. Holton, I'd like to hand you a document and
24 see if you can identify this document.

25 MR. FERRELL: Your Honor, if I may just real quickly,

1 I'd be willing to stipulate that this letter was written by Mr. Holton.
2 I have no reason to believe that it wasn't, and, in fact—

3 THE COURT: Let's let Mr. Holton answer the question.

4 MR. FERRELL: Okay.

5 Q. Mr. Holton, can you identify the document, please?

6 A. The parts that I can see do appear to be my handwriting, and it
7 does appear to be the letter that I wrote.

8 Q. Sir, you can take it out of the covering. It's just a protective
9 covering—

10 A. Just trying to be cautious.

11 Q. —and Mr. Ferrell can assist you with that.

12 A. It does appear to be the letter that I wrote.

13 Q. What is the date of that letter, please, sir?

14 A. It would be the 9th of— rather the 19th, excuse me, of October of
15 2005.

16 Q. And your signature does appear at the end of the letter?

17 A. It does.

18 Q. I'd ask, if you would, just to glance through the contents of the
19 letter and to tell whether or not the contents remain true and
20 accurate to the best of your information and belief. Can you read
21 through that letter and—

22 A. I did glance through it and they do— they are the same.

23 Q. Okay. There's nothing materially changed from today from
24 when you wrote that letter—

25 A. No.

1 Q. –in terms of the facts? Okay. When was the last visit that you
2 received from Ernest Holton?

3 A. It would be the 6th of June in 2004.

4 Q. Okay. Is Mr. Ernest Holton currently on your approved list of
5 visitors at Riverbend Maximum Security Institution?

6 A. There are two ways to answer that question. Someone who has
7 an approved visitation application will be on a list. However, if it's
8 not renewed within a certain period of time, I think, at last count,
9 was every three years, then they remain on the list, but they're not
10 allowed to visit.

11 Q. Is Mr. Ernest Holton currently authorized to visit you at
12 Riverbend Maximum Security Institution?

13 A. Not to my knowledge, no.

14 Q. Have you received any other contact from Mr. Ernest Holton,
15 either by telephone or letter, since June of 2004?

16 A. His wife, who had recently died in December of 2005, had sent
17 me a money order for Christmas, and I believe that he was the one
18 that wrote the salutation on the card.

19 Q. Okay.

20 A. I don't believe she was able to write that. It appeared to be his
21 handwriting.

22 Q. And do you recall the date of that?

23 A. That would have been, I believe, the third week of December,
24 2005.

25 Q. 2005. Have you had any other contact– and you don't need to

1 name them, but have you had any other visits from other family
2 members?

3 A. Yes.

4 Q. In the last year, since last summer, for example?

5 A. Yes.

6 Q. Okay. How many visits have you had from your mother, for
7 example?

8 A. I believe it's a little-- a little more than once a month.

9 Q. So once a month you receive a visit from her?

10 A. At least.

11 Q. Okay. Any other family members visit you on a regular basis?

12 A. Yes.

13 Q. Okay. Mr. Holton, do you understand that you stand convicted
14 of four counts of first-degree murder?

15 A. Yes, I do.

16 Q. Do you understand that you received as part of the state court
17 judgment a sentence of death on each one of those convictions?

18 A. Yes, I do.

19 Q. Okay. Do you understand that at least until the running of your
20 federal statute of limitations back in October of 2005 you had the
21 option to come into federal court and challenge your state court
22 convictions through the federal habeas corpus process?

23 A. I was very aware of that.

24 Q. Okay. Did you make any decisions up before the running of
25 the statute of limitations regarding whether you intended to seek

1 habeas review with regard to your convictions?

2 A. I did.

3 Q. And what decisions did you make?

4 A. I decided that I wanted to procedurally default any previously
5 determined issues raised in my direct appeal, and I certainly didn't
6 want any of the issues presented in my state post conviction, the
7 putative petition, to be raised in a habeas petition, federal habeas
8 petition, on my behalf.

9 Q. Did you wish to present any issues to the federal court with
10 regard to your convictions and sentence?

11 A. Not at this time, no.

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

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

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

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

21 Q. Okay.

22 A. Once again, I'm— may I elaborate?

23 THE COURT: You may Go right ahead.

24 A. I don't believe this is the last shot. Mr. Ferrell, his intentions
25 are generally characterized as well-intentioned. But I don't think

1 that his petition is the last chance or last resort. There are a number
2 of options, state options, left. I can name those. I believe there's
3 even one federal option left.

4 Additionally, there is always the option of presenting a claim,
5 a theoretical claim, that would be entitled to equitable tolling. I'm
6 not saying I have such a claim; I'm just saying that the option exists.

7 As far as state options, those are probably not relevant to this
8 proceeding, but they are a petition for a writ of error coram nobis;
9 in other words, if I had some type of new evidence that might entitle
10 me to a new trial I might be able to petition that. I'm not
11 commenting on the likelihood that I will do that or the pos- you
12 know, the probability of success.

13 There is also the option for a petition for state habeas corpus
14 relief. That would be matters strictly limited to the record.
15 Executive clemency, there is that avenue of relief, petition for
16 executive clemency both at the state level and on the federal level.
17 Once again, I'm not saying that that's what I'm going to do. I'm
18 just stating that I am aware of those options.

19 As far as the matter, I believe, that's before the Court today, a
20 federal habeas petition, at this time I don't wish to have this petition
21 pursued on my behalf. and I'm aware of the option to do that.

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

1 A. Well, number one, I don't-- I don't think that any of the issues
2 presented in the state post conviction petition nor the state direct
3 appeal represented my position, and generally those will be the only
4 issues that would be available to be raised in the federal habeas
5 petition, at least to my understanding. None of them represent my
6 position at all. I would not-- It's been my aim to procedurally
7 default those.

8 Furthermore, likelihood is, I'm not going to file any further
9 action. I'm satisfied with the finding of the state court's jury and
10 the sentences of death. I believe that the death sentence is
11 appropriate for the crime which I was convicted. I just don't have a
12 problem with it.

13 We could continue in the court or judicial process for a number
14 of years and still arrive at the same result. I don't see that it's
15 necessary. If I come up with anything new, I wouldn't hesitate to
16 put it in a petition and send it to the Court, but I don't have that
17 right now.

18 I'm not going to waste the Court's time with frivolous issues.
19 Like it or not, you can have four convictions of first-degree murder
20 and four death sentences and still have some scruples. I just happen
21 to think I do.

22 MS. SMITH: Thank you. I don't have any further
23 questions, your Honor.

24 THE COURT: Thank you, Ms. Smith. Any questions,
25 Mr. Ferrell?

1 MS. SMITH: Well, actually, I'm sorry, your Honor, I
2 forgot to move to admit into evidence the original letter with the
3 envelope that Mr. Holton identified. If I could, I'd like to move that
4 into evidence, please, your Honor.

5 THE COURT: It will be received and made a part of the
6 record in this case

7 MS. SMITH: Thank you.

8 (Respondent's Exhibit No. 1 received.)

9 THE COURT: Mr. Ferrell, do you have any questions?

10 MR. FERRELL: No, your Honor, at this time I don't
11 have any questions.

12 EXAMINATION BY THE COURT

13 by Judge Phillips:

14 Q. Mr. Holton, how old are you, please?

15 A. Sir, I'm 44.

16 Q. And when is your birth date?

17 A. The 23rd of November, 1961.

18 Q. How far did you go in school, Mr. Holton?

19 A. I've got about 60 credit hours in college, no degree, no major.

20 Q. You mentioned that you had several options. You do realize,
21 of course, that your execution date is September the 19th of this
22 year, 2006?

23 A. Yes, sir.

24 Q. That's not a lot of time to pursue those options that you have
25 enumerated, even if you decided you wanted to do that. Do you

1 understand that what you are facing is your execution? Do you
2 understand that?

3 A. I'm aware of that, yes, sir.

4 Q. Do you understand further that this court would like to make
5 sure that you are competent to comprehend that decision before the
6 execution—before the state goes forward with the execution? Do
7 you understand that?

8 A. I'm getting that impression, yes, sir.

9 Q. Well, do you have an objection to being examined by a
10 psychiatrist or a psychologist to determine if you are mentally
11 competent to rationally make the decision to end your own life?

12 A. Yes, sir, I do.

13 THE COURT: Judge Guyton, do you have any questions
14 of Mr. Holton?

15 JUDGE GUYTON: No.

16 THE COURT: Thank you, Mr. Holton. Do you have
17 other evidence you'd like to present, Ms. Smith?

18 MS. SMITH: Nothing further, your Honor.

19 THE COURT: Mr. Ferrell, do you wish to present any
20 evidence?

21 MR. FERRELL: Not at this time, your Honor, no, other
22 than what was attached to our pleadings.

23 THE COURT: Okay. Ladies and gentlemen, we'll take
24 a 15-minute recess, and we'll reconvene at ten o'clock.

25 (Recess had at 9:44 a.m. and Court reconvened 10:27 a.m.)

1 THE COURT: You may be seated ladies and gentlemen.
2 Well, it appears to the Court that the Defendant needs to be
3 evaluated prior to this execution taking place. The execution date is
4 September the 19th, 2006.

5 Mr. Holton, you are obviously a very intelligent person, and it
6 may very well be that the psychiatrist or the psychologist who
7 examines you determines that you are rational and that you are
8 competent to understand the nature, full extent of the proceedings
9 against you and to fully understand and comprehend that on
10 September the 19th, unless a stay is extended— is granted in this case,
11 the State of Tennessee will seek to put you to death.

12 Before that happens, the Court wants to make sure that you
13 fully understand what's taking place here. Now, the Court will
14 appoint an independent psychiatrist or psychologist to examine you
15 and to make that determination or make a recommendation to the
16 Court as to their findings.

17 The Court will then issue its opinion as to what further
18 proceedings, if any, should take place in this case. We are in the
19 process of locating an independent psychologist or psychiatrist to
20 conduct that evaluation, and we will let you know when that is to
21 take place and the identity of that individual.

22 I understand that Dr. Woods has spent some time in this case.
23 The State does not feel comfortable with Dr. Woods' evaluation. At
24 the same time, I am sure that the Public Defender's office would not
25 feel comfortable with a recommendation made by the State. So in

1 order to have an independent evaluation, I'm going to get someone
2 who does not have an agenda one way or the other in making this
3 determination.

4 Anything further we need to take up this morning on behalf of
5 the Petitioner, Mr. Ferrell?

6 MR. FERRELL: Your Honor, I just have a couple of
7 questions, since I've never been in this type of situation. I'm not
8 sure what the protocol is as far as the Court will obviously choose a
9 psychologist/psychiatrist who will then examine Mr. Holton.

10 Would we have any contact or input with this psychologist?
11 Could we provide some materials for him or her to review? I'm just
12 not real sure. I'd like to, you know, be as forthcoming as possible,
13 but not step on the Court's territory if the Court wouldn't want me
14 contacting this person or being involved.

15 THE COURT: Okay. First of all, you will not be
16 contacting the psychologist or the psychiatrist unless the
17 psychologist or psychiatrist needs something from you, in which
18 event that individual will work through the Court, because this is
19 the Court's witness, not yours.

20 Now, we will inquire of the psychologist or psychiatrist what
21 information they would like to have, and if you are in possession of
22 some of that information we will let you know and we'll get it to the
23 doctor. Does that answer your question, Mr. Ferrell?

24 MR. FERRELL: It does, your Honor. Thank you.

25 THE COURT: Okay. Do you have any questions, Ms.

1 Smith?

2 MS. SMITH: No, your Honor.

3 THE COURT: Now, we have the question of the
4 execution date, September the 19th, 2006. We're going to try our
5 best to get this accomplished before then. The Court will reserve
6 the right to issue a stay in the event that we cannot accomplish the
7 task before September the 19th.

8 But at this point in time the Court will not issue a stay. Judge
9 Guyton, do you have anything that you would like to add today?

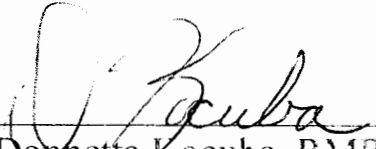
10 JUDGE GUYTON: No. No, thank you.

11 THE COURT: Thank you very much, ladies and
12 gentlemen. We'll stand in recess.

13 (Hearing concluded at 10:31 a.m.)

CERTIFICATION

I certify that the foregoing is an accurate transcript of the record of
proceedings in the titled matter.



Donnetta Kocuba, RMR
Official Court Reporter
U. S. District Court
Knoxville, Tennessee

8-2-06
Date