IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARYL KEITH HOLTON	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 06-_____
	)	DEATH PENALTY CASE
RICKY BELL, Warden	)	EXECUTION DATE
	)	September 19, 2006
Respondent-Appellee	)	

MOTION FOR STAY

Comes now Petitioner, Daryl Holton, through undersigned counsel and respectfully requests this Court to enter an order staying Holton's execution which is currently scheduled for September 19, 2006. (R.26, Att. A).

INTRODUCTION

On September 6, 2006, the district court dismissed the initial habeas petition filed on Holton's behalf and denied counsel's motion for an evidentiary hearing on whether he is competent to waive all appeals. (R.46). *See Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999). The district court did so despite testimony by affidavit from Dr. George Woods that Holton suffers from complex post-traumatic stress disorder and depression and that these mental illnesses may be preventing Holton from making a rational choice about his legal options. (R.27, R.45-2). Because the district court dismissed the habeas petition without providing the process due

under *Harper* despite a sufficient showing of reasonable cause to believe Holton is incompetent, this Court must grant a stay of execution and remand for an evidentiary hearing.

Further, this Court must stay Holton's case pending the outcome of similar proceedings before the United States Supreme Court. The Supreme Court has given a very strong indication it may review the standards and procedures to use in a case such as Holton's. The High Court recently voted 6 to 3 to stay the execution of a Mississippi death row inmate so that it can consider reviewing these very issues. *Bobby G. Wilcher v. Epps*, No. 06-5147 (5th Cir., July 11, 2006) (Attachment A). The petitioner in that case has presented questions regarding or about the process due when a death row inmate seeks to "abandon further appeals of his sentence" and how the standards for competency to do so should be applied. *Bobby Wilcher v. Anderson*, 2006 WL 1888895 (5th Cir., July 10, 2006). How the Supreme Court resolves the *Wilcher* case may have direct bearing on the proceedings currently before this Court.

FACTS

Daryl Holton has a well-documented history of significant mental illness dating back approximately twenty years to his time in high school. (R.3, Motion for Appointment, Att. A, Trial Transcript Vol. VI, p. 1006). On July 18, 2005, a

motion for appointment of counsel and for an evidentiary hearing pursuant to *Harper, supra*, was filed. (R.2). The motion was accompanied by 14 exhibits demonstrating Holton's twenty-year history of major mental illness and raising the issue as to whether this illness was preventing Holton from making rational decisions about federal habeas proceedings and preventing Holton from assisting in his defense and 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 to allow the state court to review Holton's competency to waive his appeals. (R.19).

The Tennessee Supreme Court refused to allow a hearing on 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. Following that ruling, habeas counsel submitted an affidavit from Dr. Woods as well as an affidavit from Holton's post-conviction counsel. (R.27; R. 44-2). On September 6, 2006, the district court found that Holton had not met the *Harper* standard and therefore, denied an evidentiary hearing on the issue of Holton's competence. The district court dismissed the petition as unauthorized. (R.46). The court did so, despite expert opinion by Dr. George Woods that Holton may suffer from complex Post-Traumatic Stress Disorder and

depression that may be making him irrational and that there was reasonable cause to believe that his mental disease was rendering him mentally incompetent. (R.27). The district court did, however, grant a certificate of appealability on whether the *Harper* standard had been met. (R.46). Respondent conceded that a certificate of appealability was appropriate. (R.49, Transcript 9/5/06 hearing, p.72).

ARGUMENT

This Court should grant a stay of Daryl Holton's execution, currently scheduled for September 19, 2006 at 1:00 a.m., because this appeal raises issues that are currently being debated amongst jurists in this country. One important factor in granting a stay is the likelihood of success. *In re: Holladay*, 331 F.3d 1169, 1176 (11th Cir. 2003)(citations omitted); *In re: Morris*, 328 F.3d 739, 741 (5th Cir. 2003)("we think Applicant has made a sufficient showing of likelihood of success on the merits that the public interest would be served by granting the stay."). This standard does not require a movant to demonstrate with certainty he will win. Rather, the stay should be granted where there is a likelihood of success.

Significantly, the district court granted a certificate of appealability on whether petitioner had met the *Harper* standard. (R.46). Respondent, on the record, conceded a certificate of appealability is appropriate. (R.49, Transcript

9/5/06 hearing, p.72). The grant of a certificate of appealability indicates the *Harper* issue is a substantial one and is "adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983). Since essentially the same standard exists for a certificate of appealability as for a stay of execution[1], the District Court has found a "substantial likelihood of success on the merits."

The Supreme Court has held that if a petitioner "persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits." *Barefoot v. Estelle*, 463 U.S. at 888 *citing Garrison v. Patterson,* 391 U.S. 464 (1968)*; Nowakowski v. Maroney,* 386 US. 542 (1967)*; and Carafas v. LaVallee,* 391 U.S. 234 (1968). A stay in this case would allow a careful consideration of whether the *Harper* standard was satisfied.

Petitioner presented a strong showing of reasonable cause to believe Holton may be incompetent. 18 U.S.C. § 4241. Dr. Woods opined that Holton very well could be suffering from complex Post-Traumatic Stress Disorder and depression and major mental illnesses affect his ability to think rationally. (R.27). Dr. Woods indicated a fuller evaluation was needed to cement this tentative diagnosis. *Id.*

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[1]*Compare Barefoot*, 463 U.S. at 893, n.4 with *id.* at 895-896.

The district court was troubled enough by Dr. Woods' affidavit that it ordered Holton, against his will, to submit to an evaluation by the court's own expert. (R.30, p. 30).

Indeed, the court's appointment of its own expert is inconsistent with a holding that the evidence failed to meet the *Harper* standard. The evidence raised a legitimate question of Holton's competence. The court's need for further inquiry demonstrates this.

Caselaw from this circuit shows that sufficient evidence to warrant a full evidentiary hearing on 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. This Court determined an adversarial hearing, with all the safeguards provided in *Harper*, was warranted. In the present case, Holton offered more proof than was presented in *Jackson*. He offered the affidavit from Holton's post-conviction attorney that she was unable to engage Holton in rational conversation about his legal options. (R.44-2, Affidavit of Kelly Gleason). Holton offered the affidavit of his father that he believed is son was irrational. (R.3, Exh. K, Affidavit of Ernest Holton). It is uncontested that

Holton has an extensive history of major mental illness. Finally, Holton offered the opinion of Dr. Woods that Holton suffers depression and complex PTSD and that these mental illnesses affect his thought processes about federal habeas corpus and available legal avenues for relief. (R.27). *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 invoke the *Harper* procedures.

Because the district court erred in holding that the evidence of incompetence did not meet the *Harper* standard, there is a substantial chance of succeeding on the merits. The district court's issuance and respondent's concession to the certificate of appealability show just such a chance of success. A stay therefore warranted.

Other factors to consider in granting a stay of execution are whether the movant will suffer irreparable injury if the stay is not granted, whether the stay would substantially harm respondent, and whether granting the stay would serve

the public interest. *In Re Holladay*, 331 D.3d at 1177 (granting stay to allow consideration of successive application for habeas corpus relief); *see also In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997) (applying the traditional four-factor standard for issuance of a stay in the capital context).

In cases where a prisoner is scheduled to be executed, irreparable harm is deemed "to be self-evident." *Holladay*, 331 F.3d at 1177.

Respondent will not be harmed by a stay. In fact, Respondent has conceded that this case is deserving of appellate review. This concession was not predicated on expedited review. It is significant to note that this is a first habeas petition. Holton would be entitled to a stay as a matter of course, were he to pursue habeas remedies. *McFarland v. Scott*, 512 U.S. 849 (1994). Moreover, petitioner initially sought an evidentiary hearing on the issue of Holton's competence in July, 2005. The hearing could have been had over a year ago, thus obviating the need for a stay, were it not for Respondent's opposition.[2] This stay motion is not a last minute stalling tactic. Petitioner has been diligently seeking an evidentiary

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[2]Respondent perfunctorily objected to hearings on both Holton and Paul Reid's competency. In a single opinion, the Tennessee Supreme Court denied both Reid and Holton a hearing on competency. *Holton v. State & Reid v. State*, ___ S.W.3d ___, 2006 WL 1726656 (Tenn., June 22, 2006) as amended on denial of reh'g. After appealing the grant of a hearing in Reid's case all the way to the United States Supreme Court, respondent ultimately conceded Reid's incompetence required appointment of a next friend. (Attachment B).

hearing on competence to waive appeals and has not just raised the issue at the last minute. A stay would serve the public interest. Of course, the public interest is served *a fortiori* by a stay to determine the constitutionality of Holton's execution. *In re: Holladay*, 331 F.3d 1169, 1176; *In re: Morris*, 328 F.3d at 741. But the public interest is particularly served in this case, where the United Supreme Court is poised to grant review on a case with very similar issues. *Bobby G. Wilcher v. Epps*, No. 06-5147 (5th Cir., July 11, 2006) (Attachment A). This is a significant factor to consider in granting a stay includes the pendency of similar issues in other cases before the Court. *California v. Hamilton*, 476 U.S. 1301, 1302 (1986); *Mikutaitis v. United States*, 478 U.S. 1306, 1308 (1986).

In *Wilcher*, the habeas petitioner sought to abandon all challenges to his death sentence. The district court conferred with Wilcher in open court and reviewed past medical records, before finding Wilcher competent to abandon his appeals. Wilcher subsequently sought to reinstate his petition. The Fifth Circuit affirmed the district court's findings and denied a stay of execution. *Bobby Wilcher v. Anderson*, 2006 WL 1888895 (5th Cir., July 10, 2006). The Supreme Court, however, by a convincing 6-3 margin, stayed Wilcher's execution so that it could consider his petition which raises issues about procedures used to determine competency to waive appeals. On September 25, 2006, the Supreme Court will

conference the *Wilcher* case. The Court is considering Wilcher's certiorari petition a mere six days after Holton's execution date.

It is likely that the Supreme Court will grant certiorari in *Wilcher*. The Court will stay an execution "only when there is a 'reasonable probability' that four Members of this Court will grant certiorari, a 'significant possibility' that the Court, after hearing the case, will reverse the decision below, and a 'likelihood' that the applicant will suffer irreparable harm absent a stay." *Barefoot v. Estelle*, 463 U.S. 880, 895(1983); see also *Rubin v. United States*, 524 U.S. 1301, 1302 (1998) (Rehnquist, C.J., in chambers). The grant of a stay in Wilcher's case strongly suggests certiorari will be granted and that Wilcher will prevail. Because the issues before the Supreme Court could directly affect the outcome of this case, all proceedings in this case should be stayed.

The Supreme Court itself has stayed cases until similar issues presented in other pending cases were resolved. In *Moore v. Texas*, 535 U.S. 1110, 122 S.Ct. 2350, 153 L.Ed.2d 154 (2002), the Supreme Court granted a stay in a capital case pending resolution of *Atkins v. Virginia*, 536 U.S. 304 (2002). See *also Mikutaitis v. United States*, 478 U.S. 1306 (1986) (court imposed stay of the proceedings where issue is "sufficiently similar" to the question presented by another case); *California v. Hamilton*, 476 U.S. 1301 (1986) (same).

This Court has also explicitly approved of a stay in the habeas context pending decision in a related case on procedural matters. *Cooey v. Bradshaw*, 338 F.3d 615, 616 (6th Cir. 2003) affirming 216 F.R.D. 408, 414-15 (N.D. Ohio 2003) (district court deferred ruling on inmate's 60(b) motion and granted motion for stay of execution); *Abdur'Rahman v. Bell*, Nos. 02-6547, 026548 (6th Cir. June 6, 2003) (R.26, Att. E).

Aside from the United States Supreme Court's interest in this issue, a judge on this Circuit has recently noted uncertainty as to the legal standards to be applied when a death-row inmate's competency to withdraw habeas proceedings is called into question. *Awkal v. Mitchell*, 2006 WL 559370 (6th Cir. March 8, 2006) (Gilman, J., concurring in part and dissenting in part). Judge Gilman expressed doubt that the standard from *Rees v. Peyton*, 384 U.S. 312 (1966), was the correct standard to apply in these cases. *Id.* at*3. The uncertainty within this Court and the fact that the Supreme Court is currently considering the issue presented in this case, warranting a stay of execution.

WHEREFORE Petitioner prays that this Court stay the execution of September 19, 2006. Petitioner also prays that this court stay proceedings until *Wilcher* is resolved by the Supreme Court.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

BY: Stephen Ferrell

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CERTIFICATE OF SERVICE

I, Stephen A. Ferrell, hereby certify that a true and correct copy of the foregoing document was sent via overnight mail to:

Jennifer L. Smith, Esq.
Office of Attorney General and Reporter
Criminal Justice Division
P.O. Box 20207
Nashville, TN 37202

this the 12th day of September, 2006.

Stephen Ferrell

Attachment A

TUESDAY, JULY 11, 2006

ORDER IN PENDING CASE

06A36
(06-5147) WILCHER, BOBBY G. V. EPPS, COMM'R, MS DOC

The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

The Chief Justice, Justice Scalia, and Justice Alito would deny the application for stay of execution.

Attachment B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

MRS. LINDA MARTINIANO Next Friend for Paul Dennis Reid	)	
	)	NO. 3:06-0632
v.	)	JUDGE CAMPBELL
	)	DEATH PENALTY
RICKY BELL, Warden	)	

ORDER

The Court held a status conference in this case on August 24, 2006. At the conference, Respondent withdrew his opposition to Mrs. Martiniano's request to represent Paul Dennis Reid as "next friend" in this matter. Accordingly, Mrs. Mariniano is authorized to represent Mr. Reid in this matter as "next friend."

The evidentiary hearing scheduled to begin September 5, 2006 is CANCELLED.

IT IS SO ORDERED.

Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE