IN THE
CIRCUIT COURT
19TH JUDICIAL DISTRICT
MONTGOMERY COUNTY, TENNESSEE
DIVISION III

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PAUL DENNIS REID, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Post-Conviction No. 38887**
	)	**(CAPITAL CASE)**
STATE OF TENNESSEE,	)	
	)	
Respondent.	)	

ORDER

This matter returned to this Court for a determination of petitioner's competency during the one-year statutory limitations period for filing a post-conviction petition for relief set out in Tennessee Code Annotated Section 40-30-112. Petitioner did not file a pro se post-conviction petition within the one-year period. Petitioner's sister, Linda Martiniano, filed a petition on his behalf essentially claiming the limitations period should be tolled due to petitioner's incompetence.

The Court conducted a competency hearing applying the Nix standard as directed by our appellate courts. Having heard the evidence and arguments of counsel, the Court finds the petitioner was competent during the statutory limitations

period to have filed a petition for post-conviction relief had he chosen to do so. Therefore, the petition filed on petitioner's behalf is dismissed or otherwise stricken.

BACKGROUND

Petitioner was convicted by a Montgomery County jury on two counts of first degree murder and received the death penalty on each count. Petitioner's convictions and sentences were affirmed by the Tennessee Supreme Court on May 24, 2005. State v. Reid, 164 S.W.3d 286 (Tenn. 2005). Pursuant to Tennessee Code Annotated Section 40-30-102, the petitioner had one year from said date to file for post-conviction relief. Petitioner never filed a pro se petition for post-conviction relief.

Within the one-year statutory period, the Post-Conviction Defender's Office filed a petition on petitioner's behalf claiming petitioner was incompetent to do so. The petition was rejected by our supreme court in Holton (and Reid) v. State, 201 S.W.3d 626 (Tenn. 2006). Petitioner later filed a petition for post-conviction relief by and through Linda Martiniano, petitioner's sister, who also sought to proceed as next friend.

According to the Holton case and the subsequent Reid v. State case, should a next friend allege petitioner is/was incompetent to file for post-conviction relief, said party is required to file a petition for post-conviction relief with attachments that

establish a threshold showing of petitioner's incompetency to file on his own behalf. Such a petition was filed here; however, this Court concluded the materials did not specifically comport with the types of documents described by our appellate courts. This Court's ruling was appealed to the Tennessee Court of Criminal Appeals.

In the meantime, petitioner's counsel sought a stay of the scheduled execution. When the Tennessee Supreme Court rejected the request for a stay, the parties filed a habeas corpus petition in federal court. This Court was not a party to those proceedings. The pleadings indicate petitioner was evaluated by Daniel Martell, Ph.D., who had been retained by the State for the purposes of determining competency under the Rees v. Peyton competency standard. The pleadings further indicate that Dr. Martell eventually concluded that, at that time, petitioner was not competent under the Rees standard. Transcripts indicate the State withdrew its opposition to Linda Martiniano serving as next friend in the federal habeas corpus action.

The Court of Criminal Appeals reversed this Court concluding that a threshold showing had been made and ordered a competency hearing applying the Nix standard. See Reid v. State, No. M2006-01294-CCA-R3-PD, 2007 Tenn. Crim. App. LEXIS 525 (Tenn. Crim. App. filed July 3, 2007, at Nashville). As noted above, the matter returned to this Court for the competency hearing.

In December 2007, these same parties challenged petitioner's competency to proceed on a federal Section 1983 action relating to lethal injection in petitioner's case known as "The McDonald's case." An assistant attorney general from the civil rights division eventually conceded competency [apparently under the Rees standard] for the purposes of the Section 1983 proceedings.

On or about the time of the instant competency hearing, petitioner's counsel filed a motion for summary judgment alleging petitioner's competency had already been determined in federal court as a matter of law. The motion was based primarily on the federal court proceedings. This Court denied the motion for summary judgment. The Court conducted the Nix competency hearing on May 14 and 15, 2008.

Following the hearing, the Court took the matter under advisement pending preparation of the transcripts.

COMPETENCY HEARING

The Court conducted a competency hearing at which it heard the testimony of Dr. George W. Woods, Connie Westfall, Dr. Daniel Martell, and Dr. William Bernet. The Court also heard rebuttal testimony from Dr. Michael First. Summaries of the testimony of each expert follow.

Dr. George W. Woods

George W. Woods testified that he is a licensed psychiatrist in California and is board certified in neurology. Dr. Woods was offered as an expert in neuro-psychiatry. Following presentation of his educational background and voir dire by the state, Dr. Woods was accepted as an expert witness.

Dr. Woods began his testimony with a historical overview of neuro-psychiatry. He then testified that he was first contacted by the Post Conviction Defender's Office ("PCDO") to evaluate petitioner and to look at medical materials that had been developed in the case. Dr. Woods acknowledged he had reviewed various documents in forming his opinions of petitioner in 2005 and 2006. He said they included a document by Xavier Amador and a May 2006 affidavit of Kelly Gleason. Dr. Woods explained that the Gleason affidavit (petitioner's post-conviction counsel) outlined Ms. Gleason's understanding of her experience and history with petitioner. He said the affidavit provided him with an understanding of how petitioner interacted with his defense team.

Dr. Woods said that he had reviewed May 2006 and June 25, 2006 affidavits prepared by Connie Westfall, an investigator with the PCDO. He noted that her affidavits indicated Ms. Westfall had been seeing petitioner since 2003. Dr. Woods reviewed an affidavit of Reverend Joe Engle dated June 25, 2006 that indicated

Reverend Engle had been seeing petitioner for approximately nine years at that time. Finally, Dr. Woods acknowledged his review of an affidavit dated June 11, 2006 that had been prepared by attorney Jim Simmons. He explained that he had also prepared an affidavit for submission to this Court in May 2006 which addressed the time period from August 2005 through June 2006.

Dr. Woods recalled that he first interviewed petitioner on August 18, 2005. He said he conducted a second interview on October 6, 2005. From these interviews he determined that petitioner was psychotic and suffered from delusions. Dr. Woods met with petitioner again on June 20, 2006 and several times after that date. He testified that from his meetings with petitioner in the fall of 2005 to May 2006 he had formed an opinion as to whether petitioner was either able to understand his legal rights and liabilities or unable to manage his personal affairs.

Dr. Woods opined that petitioner suffers from a fixed false belief system described as a delusion – a break from reality. He added that petitioner is not malingering or in other words making up this fixed false belief system. Dr. Woods explained there is a difference in seeing someone clinically and seeing someone forensically. He noted that in a clinical setting you take a person's word as they come in to be treated; however, in a forensic setting you want to determine whether there

may be some secondary gain in their presentation of symptoms or are minimizing symptoms.

From his review of the information related to the period from May 2005 to May 2006, Dr. Woods could find nothing inconsistent with his conclusion. As to the delusions, Dr. Woods explained that delusions can be relatively encapsulated or isolated in a person's life. He noted that in such circumstances, these delusions may or may not affect all of a person's life. Dr. Woods said that in some disorders the delusions may affect the person in ways that do not allow them to speak or to walk. However, in other situations, he added, the person can do certain things with the delusions always being present.

As to petitioner, Dr. Woods believed petitioner's delusions were more encapsulated before 2005; however, have now become less encapsulated and have spread into more of petitioner's life. Dr. Woods testified that petitioner's delusions relate to control. Specifically, he said petitioner's on-going delusion of control are rooted in petitioner's belief that he is controlled by a government agency called Scientific Technology. This technology monitors his every movement, videotapes his every action, audio tapes his every word, and controls much of his physical, emotional and intellectual functioning. The technology also impairs petitioner's ability to read and write.

Dr. Woods said that the delusional beliefs also affected his relationship with counsel by convincing petitioner that his attorneys are actors or actresses hired by scientific technology. Woods said petitioner also believed many of the people in his life, including correctional officers or court personnel, were agents of scientific technology or had been coached by the technology.

Dr. Woods testified that during the time period of 2005 and 2006, petitioner believed he was being recorded twenty-four hours, seven days a week, three hundred sixty-five days a year. He said that petitioner believed the tapes were going to be released. According to Dr. Woods, petitioner said the technology impaired his ability to sleep, his ability to remember and his ability to eat. During the 2005/2006 period, petitioner experienced "repeats" where he would believe the same person had come to him before or had told him the same things on a prior occasion.

In explaining petitioner's delusional system, Dr. Woods described it as a fixed and paranoid one and is complex in that it involves other people including his defense team, other inmates, correctional officers, court personnel and others. He noted that petitioner sees himself as being the focus of the system and as being persecuted. Dr. Woods also described it as a systematic belief system in that petitioner is able to step through this system and connect scientific technology to each of his paranoid ideations such as connecting any problem he has with eating or his memory to the

control of the technology. To some degree petitioner believed his trial was a mock trial and had been predestined, Dr. Woods noted.

Dr. Woods again testified that the delusions became less encapsulated during the 2005 to 2006 time period. However, Dr. Woods acknowledged that a delusion does not mean that a person is totally incoherent or that the person cannot do anything. He agreed that petitioner could do some things such as talking and interacting to some degree. However, he found that petitioner had a defective ability to understand and express language, including the use of neologisms described as nonsensical words often found in psychosis.

Dr. Woods testified that it was important to review the historical data, previous neuropsychological testing, brain scans and reports starting from age five indicating petitioner had brain injury and cognitive deficit. This historical review provided Dr. Woods with information regarding the source of any brain impairment.

Relating his findings to the Nix competency standard, Dr. Woods opined that the core delusion of scientific technology interferes with petitioner's mind and body. As stated before by Dr. Woods, the technology also interfered with petitioner's view of his attorneys, prosecutors, judges, doctors, inmates, family members and others because petitioner believed all were controlled by technology.

Dr. Woods said that petitioner has structural brain impairment because his left temporal lobe, much of which controls language and to some degree memory, is atrophied or "withered away." He explained in more detail the nature of the left frontal lobe and the results of a PET scan.

Dr. Woods also reviewed historical neuropsychological testing conducted by Dr. Pamela Auble in 1998 or 1999. He was aware that Dr. Martell had conducted psychometric or personality testing or Minnesota Multiphasic Personality Inventory ("MMPI") in August 2006. Dr. Woods reviewed a letter dated August 21, 2006 from Dr. Martell to an assistant district attorney. Dr. Woods said that the delusions referenced in Dr. Martell's letter were substantially similar to those he was seeing from May 2005 to May 2006. He agreed that Dr. Martell's testing was conducted closest in time to the relevant period. Dr. Woods said he found the results consistent with his clinical impressions.

Citing Dr. Martell's letter to the district attorney, Dr. Woods agreed with Dr. Martell's conclusion that the delusions were no longer encapsulated. He further agreed with Dr. Martell's finding that petitioner's thought content was remarkable for the presence of both grandiose and persecutory delusions, including the false belief that he had been a person of importance. He explained that he observed similar beliefs in petitioner during the relevant competency time period. Finally, Dr. Woods

recited Dr. Martell's finding at that time of the worsening of petitioner's delusional system. Addressing the specific Nix standard applicable in the instant proceedings, Dr. Woods first explained that he could not determine the legal meaning behind each term in the Nix standard. Therefore, he used the Webster's Dictionary to gain an understanding of the terms, including the word "understanding." After consulting the dictionary, Dr. Woods tried to look at how, if at all, petitioner's delusions affected his "understanding" of his legal rights and liabilities. From his review of the documents from the May 2005 to May 2006 time period, he opined that petitioner's delusions affected petitioner's understanding.

Specifically, Dr. Woods testified that petitioner did not believe his trials were real during the time period. Woods said petitioner did not believe his attorneys were real attorneys but instead were actors and actresses participating in "mock trials." Dr. Woods said petitioner believes all of the participants had been coached. He added that petitioner believed post-conviction counsel were agents of scientific technology.

Dr. Woods next addressed whether the delusions during May 2005 and 2006 affected petitioner's ability to manage his personal affairs. Again, Dr. Woods reviewed the term "manage" in the Webster's Dictionary. He concluded that due to petitioner's delusional system, petitioner could not manage his personal affairs. Dr. Woods stated that petitioner can brush his teeth and can buy a candy bar at the

commissary. However, Dr. Woods said petitioner believes money goes into his commissary account only when scientific technology allows it to occur. According to Dr. Woods, petitioner also believed scientific technology caused him to have health issues, including hearing impairment.

Dr. Woods said it was his understanding that petitioner was housed at Brushy Mountain during the 2005 to 2006 time period. Woods recalled that petitioner was on lock-down twenty-three hours per day with only one hour of freedom. He also noted that petitioner was relatively isolated from other inmates.

Petitioner displayed other signs of psychosis, Dr. Woods added, including thought insertion or thought withdrawal. He testified that petitioner believed scientific technology could either insert certain thoughts into his head or similarly withdraw them. Further, he said petitioner explained how the technology would radiate his body and record the activities of his brain.

Dr. Woods found that petitioner was occasionally what Dr. Woods termed "passively suicidal" because he felt he could not escape the torture of scientific technology. In concluding his direct examination, Dr. Woods opined that to a reasonable, medical, psychiatric certainty, petitioner was unable to understand his legal rights and liabilities or manage his personal affairs during the May 2005 to May 2006 time period.

On cross-examination, Dr. Woods said he was first retained to evaluate petitioner during late 2004. He stated that his fee is typically three hundred fifty dollars per hour but that for the instant proceedings he was earning two hundred fifty dollars based on the established court rate. Dr. Woods said he had never been retained by the prosecution. Dr. Woods testified that he had interviewed petitioner on various occasions. He agreed that he had not recorded any of the interviews. When asked about the various lectures and seminars, Dr. Woods conceded that all of them were essentially defense oriented.

Dr. Woods was asked about the materials he considered in reaching his diagnosis. He agreed that he had considered, among other things, Dr. Turner Graham's evaluation dating back to the trial, Jerry Perlman's testimony, MTMHI records, TDOC records, and records from state hospital in Texas. Dr. Woods admitted that petitioner denied any major distress when evaluated by Dr. Perlman and that Dr. Perlman noted petitioner was cooperative and that his interaction was appropriate.

Dr. Woods said he did not speak with anyone from TDOC during the May 2005 to May 2006 time period. He recalled that at some point during this period petitioner was taking Elavil for depression. Dr. Woods further agreed that Dr. Perlman noted petitioner was doing okay under the circumstances. When asked about Texas

Department of Correction records, Dr. Woods vaguely recalled some of the records including those from Ellis II Unit. Some of the first records reviewed by Dr. Woods dated back to 1978 and continuing into the 1980s. He could not remember the nature of the records dating back to 1964 but surmised that these records must have been those of Dr. Patsy Allen, who noted petitioner's hearing tests and behavior in school.

Dr. Woods was questioned about his use of the term "neologism" and petitioner's use of neologisms. When presented with the Oxford English Dictionary's definition of neologism (i.e., a newly coined word or expression), Dr. Woods expressed doubt that petitioner deliberately coined new terms. However, he added that petitioner used certain permutations of words or paraphasias and created new words. Dr. Woods said these types of word alterations occur in those with mental illness or other language problems secondary to their temporal lobe but not in someone with a learning problem.

Dr. Woods agrees that petitioner has delusions and that the delusions have waxed and waned but disagrees with the diagnosis of delusional disorder. He concludes there may be a more neurological basis for petitioner's delusions, that would encompass delusional disorder. Dr. Woods acknowledged that petitioner has frequently indicated to mental health professionals that he is making up the delusions but noted that these responses were before 2001. However, he agreed that the

delusions from the earlier time period are very similar to the delusions described in the 2005 to 2006 time period.

Next, Dr. Woods was asked about his knowledge of petitioner's copy of a book entitled "Warrior's Edge." Dr. Woods said he had read excerpts from the book but had not read the entire book. He added that "Warrior's Edge" is a book that describes experiments believed to have occurred in Russia relating to mind control and the ability to make an individual perform certain behaviors via governmental control. Dr. Woods noted that this is a very consistent theme with petitioner and agreed that petitioner's delusions and the topics covered in the book are remarkably similar. He said that while he had no knowledge that petitioner owned a heavily underlined copy of the book, he and petitioner had discussed the book.

From his review of records dating back to 1964, Dr. Woods recalled that petitioner had been able to hold down a job; was able to live on his own; and managed his financial affairs. Dr. Woods agreed that he relied heavily upon an unrecorded prison interview he conducted. Dr. Woods said he was aware that petitioner put more emphasis on the delusions at some times more than others. However, he opined that this result had to do with the evolution of psychosis and the fact that the psychotic illness went untreated. Dr. Woods noted that someone with

encapsulated delusions could function in society by having jobs and families and attending school.

Dr. Woods testified that he was not aware petitioner had purchased a car on credit at Crown Ford but recalled that petitioner had earned his GED and was taking what he termed remedial classes at Vol State Community College, including a course in criminal justice. Dr. Woods said he thought petitioner had been married before and possibly had a relationship with a woman named Linda Patton. He did not know if Ms. Patton had visited petitioner in Nashville.

When asked about his knowledge of the two Baskin-Robbins killings, Dr. Woods said he recalled the motive was financial. Dr. Woods acknowledged that in his experience in forensic psychiatry, a lot of people kill for money and are charged and convicted for it. Dr. Woods recalled that petitioner had told mental health professionals he had lied about his delusions to get a not guilty by reason of insanity verdict in Texas. Dr. Woods said he was aware petitioner lived on his own after the verdict. While he could not recall specifics, Dr. Woods remembered there was an incident for armed robbery in Texas and that petitioner again made claims of the delusions.

Dr. Woods would not agree that petitioner's delusions wax when he has a lot of legal problems and wanes when he does not. Dr. Woods explained that petitioner has always had legal problems during the time he has known him.

On re-direct examination, Dr. Woods recalled that he had heard Dr. Jerry Perlman's testimony during September 2007 hearings in Judge Blackburn's courtroom. He learned that Dr. Perlman had never provided treatment to petitioner and had conducted his visits every ninety days for a mental status exam. Dr. Woods did not recall Dr. Perlman indicating he had ever done a competency assessment on petitioner. He did remember Dr. Perlman's mention of a MMPI administered in 2004 and a referenced elevated "L" scale. Dr. Woods explained that the "L" scale is a measure of inaccurate, often defensive reporting. More specifically, Woods added that the defensive reporting indicates petitioner was trying to minimize his symptoms. Dr. Woods testified about other aspects of the MMPI.

Reviewing past diagnoses in light of the claim that petitioner had commented to various mental health professionals that he malingered, Dr. Woods recalled the earlier diagnosis of bipolar disorder, among others, in the Texas criminal justice system. Dr. Woods said it is difficult to sort through the alleged symptoms of the time due to medication being given to petitioner. He concluded that it was not likely a professional would have prescribed such drugs had the person not believed

petitioner suffered from the noted mental illness at the time. Dr. Woods said petitioner does not want to be found incompetent or mentally ill.

Dr. Woods recalled petitioner had written letters to Judge Campbell in 2004 and 2005 with attached portions of the "Warrior's Edge." These letters also included references to scientific technology. Next, Dr. Woods noted his recollection of various instances in petitioner's history during which petitioner exhibited the delusional behavior even when not facing legal jeopardy.

Connie Westfall

Connie Westfall testified that she recently retired from the Post-Conviction Defender's Office, where she served as an investigator. She explained that she was hired in May 1996 at which time she had no prior criminal law experience. Ms. Westfall testified that because she was usually assigned to the difficult clients, it became her area of expertise. She said she testified in the Mann case in Dyersburg to criticize the trial attorney's failure to investigate the case and to highlight the responsibilities of an investigator.

Ms. Westfall said she had never testified about a client until the instant hearing. She testified that she became involved in the petitioner's case in May 2003 and continues to be involved in the case. Even though the attorneys for the case changed

from its inception as a post-conviction case, Ms. Westfall remained on the case. She added that in addition to the regular responsibilities of an investigator, she also became involved in trying to interface with prison officials and family. Ms. Westfall said she was instructed to monitor petitioner and to record what she observed.

The visits with petitioner began in May 2003, Ms. Westfall noted. She said she saw petitioner every two weeks. The visits usually occurred at Brushy Mountain State Prison where petitioner was incarcerated. Ms. Westfall described the vast difference between Brushy Mountain and Riverbend, noting the 23-hour lockup at Brushy and the incentive-driven levels system at Riverbend. While the Riverbend system allows for advancement in privileges, the Brushy Mountain setting resulted in little or no interaction with others.

Ms. Westfall described in more detail the task given her as petitioner's observer. Her understanding was that she was to take notes of changes she observed in petitioner's physical condition, mental condition, and emotional state. She said she tried to be as accurate as possible. Ms. Westfall testified that she took the notes during the sessions but then later put them in memo form.

The majority of Ms. Westfall's testimony mirrored the summaries provided in her affidavit. Ms. Westfall often gave her personal interpretation of petitioner's remarks or behavior. The affidavit was made an exhibit to her testimony.

On cross-examination, Ms. Westfall was asked about petitioner's concern about a hearing aid. Ms. Westfall said a hearing aid was not a good idea at Brushy Mountain due to the acoustics. She said they offered a headset instead but that petitioner did not want a headset. Ms. Westfall denied making that decision for petitioner.

Ms. Westfall denied that she would ever make a decision for petitioner. She further denied doing so in her lengthy affidavit and denied that she minimized certain things in her affidavit.

She recalled Ms. Gleason explaining to petitioner his then pending October 5 execution date and his legal options. When asked whether petitioner descended into imbecilic hallucinations or delusions, Ms. Westfall said petitioner was always encompassed in the delusions but agreed that petitioner was not an imbecile. During the discussions, Westfall recalled that petitioner said he was not going to sign anything she had, including a petition for post-conviction relief.

Ms. Westfall said she did not believe petitioner understood anything about his legal rights because when he said he would not sign anything he also referenced scientific technology. According to Westfall, petitioner said he felt execution was the only way to be free from the technology. Ms. Westfall responded that she was testifying at the hearing because she was called as a witness. She said she did not

know if she was petitioner's friend but admitted that she called him by his first name. She explained that she called all of her clients by first name.

Ms. Westfall said she did not say anything in her notes about technology after petitioner said he would not sign anything because in her opinion petitioner does not care about the legal issues. Instead, she opines, he cares only about scientific technology and being free from the technology.

When asked about an entry in her affidavit indicating petitioner has never been able to discuss any aspect of his case or the legal issues in her presence, Ms. Westfall noted that this notation does not contradict petitioner's response that he would not sign anything. Ms. Westfall testified that in her opinion "discussing the case" requires an exchange of information between petitioner and his attorneys. She concluded that her perception, from a lay perspective, was that petitioner had descended completely into his delusion.

On re-direct examination, Ms. Westfall offered an interpretation of the meeting between petitioner and Ms. Gleason about the October 5 execution date. She explained that Ms. Gleason discussed the legal ramifications and status of the case. However, she noted petitioner never asked questions or responded or took an interest in what Ms. Gleason said.

Daniel Martell, Ph.D.

Daniel Martell testified that he has his Ph.D in clinical psychology. After reciting his educational background, training and experience, prior court appearances, along with an explanation of his current employment, Dr. Martell was accepted as an expert witness without objection.

Dr. Martell said that he was first retained in petitioner's case in 1999. He added that he was first retained by the district attorney general in Nashville on the McDonald's and Captain D's cases and had some involvement in the Baskin-Robbins case. Dr. Martell said he conducted one examination to cover all three cases. The examination was recorded.

Dr. Martell stated that he was later retained in 2000 in the McDonald's case. He explained that an issue had arisen about petitioner's competency to stand trial. Dr. Martell conducted an evaluation and testified before Judge Blackburn on that issue. In 2006, Dr. Martell was retained by Jennifer Smith, assistant attorney general, for an evaluation of petitioner under the Rees v. Peyton standard. Dr. Martell examined petitioner on August 15 and 16, 2006 for those purposes.

Dr. Martell said he did not personally conduct any kind of evaluation on petitioner for competency during the period of May 2005 to May 2006. Reflecting back on the 1999 evaluation, Dr. Martell said he reached a diagnosis under the DSM-

IV. At that time he concluded that petitioner had a delusion disorder with grandiose and paranoid features that at the time was in substantial remission. He also noted petitioner had minimal brain dysfunction and antisocial personality disorder.

Moving forward to the 2006 evaluation, Dr. Martell said he reached essentially the same diagnosis for petitioner as in 1999; however, he noted that the delusional disorder was no longer in substantial remission. He described it in 2006 as being an accurate exacerbation. Dr. Martell used an analogy to Pandora's box explaining that if you do not open the lid the delusions stay encapsulated and therefore do not interfere with the person's functioning as in 1999. However, he noted that in 2006 the lid was open and the delusions were no longer encapsulated and were actively influencing petitioner's thinking and behavior. Dr. Martell testified that the significant difference from 1999, 2000 and 2006 was that the disorder had gone from remission to exacerbation.

Dr. Martell agreed that writing letters to authority figures could be involved in a delusional disorder. He explained that petitioner's delusion is that the government monitors his activities and controls him with scientific technology. Dr. Martell added that the surveillance was so distressing that petitioner wrote letters to a governor and others demanding that it stop. These letters played a role in the resulting delusional disorder diagnosis. Dr. Martell testified that petitioner has an elaborate history of

making up symptoms and malingering. It becomes, he adds, a diagnostic nightmare using the analogy to the "boy who cried wolf."

With this background, Dr. Martell said he was faced with trying to determine whether the delusional disorder was a real psychiatric problem or just a figment of fantasy or malingering. Because he concluded that some of the letters would result in no secondary gain, and based on his testing, Dr. Martell concluded that petitioner has a delusional disorder.

Dr. Martell recalled that petitioner had told mental health professionals that he made up the scientific technology delusion. Dr. Martell agreed that he had also diagnosed petitioner with antisocial personality disorder and that petitioner's untruthfulness plays a role in that diagnosis. He added that deceitfulness or lying is one of the diagnostic criteria for antisocial personality disorder. The lying unique to this disorder may relate to the frequency with which it occurs in the service of manipulating others.

Dr. Martell stated that he was familiar with the various standards of competency employed in a criminal case. He noted the Dusky standard relating to competency to stand trial. Dr. Martell said he had not been asked on a prior occasion to evaluate petitioner under the Nix standard. When asked if he could apply the Nix standard to petitioner during the time period of May 2005 to May 2006 (to a

reasonable degree or medical certainty), Dr. Martell said he would qualify his answer due to the fact that he had a history with the petitioner but had not evaluated him within the time period. Further, he indicated he had seen petitioner prior to the dates in question and some three months after the expiration of the limitations period. He said it is possible the condition could have been worse or could have been better during the relevant time period versus when he observed petitioner in 2006.

Against this backdrop, Dr. Martell said petitioner's condition was worse than it had been when he saw him in 2006. However, at that time he made a notation in his report which indicated (three months outside the statutory window), petitioner retained a substantial capacity to appreciate his legal position. Dr. Martell testified that on every occasion he has seen petitioner, petitioner had an eloquent and rich understanding of the charges against him and what is going on in his cases. He added that the delusions have never interfered with petitioner's capacity to understand the process or the charges. However, he submits the delusions interfere with some of petitioner's thinking about evidence he might put into play such as using the surveillance tapes to prove his innocence.

Dr. Martell opined that petitioner has always had a fundamental understanding of the charges against him, of his attorneys, of the process, of the judges, and the appellate process. Petitioner told Martell in 1999 that after his automatic appeals he

did not want to pursue any post-conviction appeal. Martell conceded that this statement was made outside the relevant statutory time window. He noted, however, that petitioner had a detailed and rational understanding of what was going on in court in terms of his legal rights and liabilities and the process. Petitioner's distorted beliefs about his attorneys and what scientific technology was doing to him led Dr. Martell to the conclusion of incompetence in 2006 under the Rees standard.

Dr. Martell testified that he had reached an opinion regarding competency under the Nix standard but first noted that he had not yet addressed petitioner's capacity to manage his personal affairs during the relevant period. Even though he did not see him during the statutory window, Dr. Martell said he would have expected the condition to be minimally different. He noted that petitioner has always been very concerned about his physical appearance, his physical fitness, and his diet. Because these have been constant, Dr. Martell opined that at the relevant time period petitioner was able to manage his personal affairs and retained a substantial capacity to appreciate his legal rights and liabilities.

Dr. Martell concluded his direct examination by stating that he had recorded the August 15 and 15, 2006 interviews. However, he noted a technology malfunction which resulted in a portion of the interviews being lost.

On cross-examination, Dr. Martell noted that his hourly rate is four hundred dollars. He said the state had not requested additional evaluations during the remainder of 2000 to August 2006. He noted in his forensic practice he does not treat patients.

Dr. Martell recalled being contacted jointly by attorneys about the August 2006 report. He remembered reviewing the evaluation conducted by Dr. Bernet and writing a letter to Tom Thurman in Nashville. According to Dr. Martell the contents of the letter indicated the August 2006 report had a "use-by date." However, he conceded that the letter indicated petitioner continues to suffer from delusional disorder which exacerbates and goes into remission over time and in response to stress.

Reflecting on the 2006 report, Dr. Martell agreed that his Axis I diagnosis under the DSM-IV was delusional disorder mixed type with persecutory and grandiose themes in acute exacerbation. He admitted that Axis I did not include malingering because he did not believe petitioner was malingering at that time. Dr. Martell said he performed three tests including the MMPI - II, Personality Assessment Inventory (PAI), and a Structured Interview of Reported Symptoms Instrument (SIRS). All three tests are designed to detect malingering in some way.

The SIRS is specifically structured for the purpose of detecting malingering. At the time of the August 2006 evaluation, all scores were in the honest range.

In the summary and clinical forensic opinion portion of the 2006 report, Dr. Martell concluded that petitioner was suffering from an acute exacerbation of his delusional disorder and that his mental state was worse than in 1999. He noted that the delusions noted in 1999 were no longer encapsulated. Petitioner had indicated that he did not want to pursue his appeals because he had endured abuse from the government surveillance since 1985.

Dr. Martell also affirmed other portions of his 2006 report that petitioner believes others are trying to turn petitioner into a homosexual and convince him that he had sex with his mother. The report also contained references to petitioner's belief that he has suffered abuse and torture by inmates and guards at Brushy Mountain as directed by government surveillance. Dr. Martell further agreed that at the time of the report he noted that petitioner was suffering as a result of his psychotic condition and needed to be treated to potentially restore his fitness pursuant to Rees v. Peyton. Dr. Martell again noted that delusional disorder is one of the most difficult and intractable mental disorders to treat.

Dr. Martell testified that the scientific technology (and being under constant surveillance and recording by the technology) is at the core of petitioner's belief

system. He agreed that petitioner believes all movements, acts, and conversations have been recorded by scientific technology since the 1980s but notes that petitioner has not identified the technology or method used for the recording. Dr. Martell did not recall that petitioner had ever said the recordings had been released. He did recall that petitioner told him the tapes would prove his innocence.

Dr. Martell also agreed that petitioner believes the technology can affect him personally by causing him physical pain and discomfort, by messing up his mind and memory including mental torture, by inserting thoughts into his mind, and by controlling his environment. Dr. Martell acknowledged petitioner's recent belief that the trials were mock trials and that the participants are coached by technology.

In preparation for the Montgomery County hearing, Dr. Martell testified that he reviewed Judge Blackburn's order, the Tennessee Supreme Court Reid opinion addressing the Nix standard, the Doe v. Coffee County Board of Education opinion, and the State v. Nix opinion. From his reading, Dr. Martell learned that the Nix standard was comprised of two prongs. Reciting Nix, he stated that in order to be incompetent under the Nix standard, the petitioner needs to be unable either to attend to his personal affairs or unable to understand his legal rights and liabilities.

When asked about testimony he had given in Davidson County before Judge Blackburn, Dr. Martell recalled addressing the pro se petition purportedly filed by

petitioner on the eve of his earlier scheduled execution date. Dr. Martell recalled various portions of his testimony given earlier in the week in Davidson County; however, he did not believe he concluded that the decision not to forego pursuing an amended post-conviction petition was not a rational decision. Dr. Martell agreed that he did not factor into the Nix standard anything about petitioner's capacity to have rational consultation or discussion with his attorneys about his case and his decisions. He noted that it was his belief such analysis fell outside the scope of Nix.

Dr. Martell testified that he was aware a next friend petition had been filed in the Montgomery County case. However, he had no knowledge of the various attachments to the next friend petition, this Court's ruling or the results in the Tennessee Court of Criminal Appeals. Dr. Martell said he could have reviewed the case and that it might have been helpful to him.

Recalling the August 2006 interview, Dr. Martell noted that petitioner's speech was "extremely loud and mild - - mildly to moderately pressured." He explained that pressured speech means an accelerated flow of words to such an extent they become difficult to interrupt. Dr. Martell said the speech was often circumstantial or overly detailed. Dr. Martell said petitioner was always overly polite with him. He agreed that these types of speech patterns are possible signs of thought disorder, which is an area of psychopathology.

Dr. Martell also noticed that petitioner would go off on tangents or jump from topic to topic with only somewhat loose connections between the first topic and the next. He has noticed petitioner's use of paraphasias, described as difficulties in pronouncing words, to reflect his intelligence but indicates petitioner does so incorrectly. Dr. Martell recalled that another doctor in the case had opined that petitioner used neologisms. He said at first glance he gave some thought as to whether petitioner used neologisms but concluded that these words were more accurately characterized as paraphasias.

Dr. Martell agreed that he had been present in the courthouse hallway since the first day of the hearing. He admitted that he was in the courthouse but did not come into the courtroom to hear Connie Westfall's testimony.

During re-direct examination, Dr. Martell was asked about the Oxford Dictionary definition of neologism which indicated it refers to newly coined words or expressions. With that definition, Dr. Martell said such a term does not accurately define petitioner's language issues.[1]

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[1] Petitioner made an objection to Dr. Martell's testimony claiming Dr. Martell did not see petitioner during the relevant time period and further did not apply the correct formulation of the Nix standard. The Court noted that the matter would be taken under advisement. Upon review, the Court has accepted Dr. Martell's testimony and has given it the weight to which it is entitled.

Dr. William Bernet

William Bernet testified that he specializes in psychiatry and more particularly in forensic psychiatry. Dr. Bernet testified about this educational background including his graduation from Harvard Medical School. Similarly, Dr. Bernet outlined his employment background up to his present position as full-time faculty member at Vanderbilt University, where he is a professor in the department of psychiatry. He is also director of the Vanderbilt Forensic Services program.

Dr. Bernet said he has evaluated a number of individuals (now likely in excess of one thousand) who had been charged with a crime for both insanity and competency. He estimated he had testified as an expert perhaps three hundred times, including prior qualification as expert in this Court. Without objection, Dr. Bernet was accepted as an expert in the field of forensic psychiatry.

Dr. Bernet said he was retained by the Montgomery County's District Attorney's Office to evaluate petitioner in the Baskin-Robbins case. The initial evaluation took place in January 1999 with a follow up evaluation being performed in September 1999. Dr. Bernet testified that he conducted no subsequent evaluations of petitioner until February 2007 when he interviewed petitioner on February 13 and 27, 2007.

Dr. Bernet said the original evaluations performed in January 1999 were concerned more with the mitigation phase of the capital trial while the September 1999 evaluation addressed petitioner's competency to stand trial under the Tennessee version of the Dusky standard. In February 2007, he said he used the standard set out by Judge Blackburn in her order known as the Rees v. Peyton standard.

Dr. Bernet testified that he could give an opinion to a reasonable degree of medical certainty petitioner's competency under the Nix standard during the time period from May 2005 to May 2006. Dr. Bernet said he pulled the Nix standard from Judge Blackburn's order and from the Reid case. Specifically, he said his competency evaluation was performed with his understanding that the Nix standard indicates a petitioner is incompetent if he is unable to manage his personal affairs or to understand his legal rights and liabilities.

Dr. Bernet said that even though he did not examine petitioner during the time period, he could give an opinion based on his understanding of petitioner's mental condition, his mental makeup and his external situation. Dr. Bernet said these factors have been the same in petitioner for several years. Therefore, he concludes petitioner would have given essentially the same answers during the time period as he did during a 2008 interview.

Dr. Bernet's Axis I diagnoses were adjustment disorder with repressed mood, mixed receptive expressive language disorder and malingering. His Axis II diagnosis was antisocial personality disorder while his Axis III diagnosis is hearing impairment left hear and history of closed head injuries. Dr. Bernet's Axis IV diagnosis is psychosocial stressors include prison confinement and prospect of the death penalty. With respect to Axis IV and Axis III, Dr. Bernet said nothing had changed significantly from 1999 to 2005. Relating to Axis II, Dr. Bernet said antisocial personality disorder is a very stable condition and tends to persist through a person's adult life. Finally, as to Axis I, Dr. Bernet said a person can malinger on some occasions while not on others. He opined that petitioner had malingered illnesses since 1978; therefore, is a ongoing phenomenon.

With respect to the Axis I diagnosis of mixed receptive expressive language disorder, Dr. Bernet testified that petitioner has had problems with certain types of learning and use of language since his childhood. Similarly, Dr. Bernet found the continued presence of adjustment disorder with depressed mood. Dr. Bernet noted his prior review of records including those from the Texas Department of Corrections. He said those records included diagnoses of antisocial personality disorder, language disorder, and malingering. He also noted prior diagnoses of bipolar disorder and schizophrenia.

Based upon his lengthy knowledge of the case, Dr. Bernet opined that petitioner was competent under the Nix standard during the time period from May 2005 to May 2006. He said his April 2008 evaluation indicated if he extrapolated backwards petitioner's answers would have been similar or the same as during the 2005 to 2006 period. Dr. Bernet added that petitioner described feeling depressed over a period of several years. After reviewing petitioner's prison psychiatric records and treatment with Elavil, Dr. Bernet said the diagnosis by prison mental health staff indicated adjustment disorder with depressed mood. The diagnosis made sense to Dr. Bernet because petitioner is in a stressful situation anticipating the death penalty.

Dr. Bernet also looked at petitioner's mixed receptive expressive language disorder. He noted that petitioner has some difficulty in using words often using the wrong word or uses words in the wrong way when he tries to express himself. Dr. Bernet said petitioner has been tested as a child and up through his homicide trials regarding his language disorder. Dr. Bernet also attributed the language disorder to brain damage in the left temporal area.

Dr. Bernet disagreed that petitioner used neologisms. Having met with petitioner for over 13 hours over time, Dr. Bernet agrees that petitioner uses wrong words but notes it is always possible to figure out when he meant.

Dr. Bernet next addressed his diagnosis of malingering which he defined as the fabrication of either a medical or psychiatric condition. He said petitioner has a long history of fabricating psychiatric conditions dating back to 1978. Dr. Bernet said petitioner admitted to him that he made up a series of conditions when he was in the Texas hospital. According to his review of the records, Dr. Bernet noted that petitioner also told Dr. Auble, Dr. Craddock, Dr. Farooque and perhaps others. He added that petitioner told him several different times that he made up psychiatric symptoms in Texas and did so successfully when a jury returned a verdict of not guilty by reason of insanity.

Dr. Bernet said petitioner malingered when he was again arrested in Texas. He told Dr. Bernet that he and other inmates would talk about how to make up symptoms. Bernet said petitioner even gave specific examples of how he made up symptoms, including an instance where petitioner introduced himself as Dr. Reid from Baylor University. This fabrication convinced a mental health professional that petitioner exhibited a symptom of grandiosity.

Another basis for Dr. Bernet's malingering diagnosis is petitioner's lengthy history (including the relevant time period) of talking about government surveillance monitoring his every word and deed. Dr. Bernet said petitioner has told him and other people that he made up that specific information. According to Dr. Bernet,

petitioner told him in 1999 that he had never been the subject of government surveillance and that he could explain how the whole story started and why he was using it. He noted that petitioner also had an explanation as to his motivation for making up the surveillance. Dr. Bernet said petitioner's explanation made sense, noting petitioner's recent resurrection of the symptoms.

Dr. Bernet said petitioner told him the government surveillance idea started when he was in prison. When petitioner was sent to the psychiatric unit, he looked better and was in better shape than all the other people in the unit. Petitioner told Bernet that in fact someone asked him if he was with the FBI. Dr. Bernet said this incident lead petitioner to believe that he could be someone else but transformed into the idea of government surveillance.

Dr. Bernet testified that petitioner spoke of his letter writing to then Governor Richards of Texas. Petitioner told Bernet that he was writing the letters to draw attention to himself because he believed he was wrongly convicted of armed robberies and served prison time from 1982 to 1990 and wanted the convictions reversed. He believed he should not have been convicted on the robbery charges but should have been declared insane. Petitioner claimed he was trying to get the attention of the Governor and others by having a crazy story. Once he got their attention he hoped to prove he was mentally ill at the time of the convictions and get

his convictions reversed. Dr. Bernet explained that even though petitioner was not in prison at the time of the letter writing, petitioner nonetheless had a legal purpose.

Dr. Bernet also believed petitioner was malingering due to his course of his psychiatric illness. He explained that when petitioner was initially arrested in 1977 at 20 years old, he had never been diagnosed with a significant psychiatric disorder (even though at that time he had seen various mental health professionals and had undergone psychological testing). When petitioner was arrested in 1978, he suddenly developed flagrant symptoms that looked psychotic and resulted in the not guilty by reason of insanity verdict. Dr. Bernet notes that petitioner was released and back on the streets between 1980 and 1982 during which time he had no psychiatric symptoms. Bernet said petitioner functioned normally on the streets by getting a job, attending school and getting married.

Dr. Bernet opined that petitioner revived the symptoms when it became necessary or convenient to do so. He noted that the schizophrenic and bipolar symptoms he exhibited served petitioner well because he would be placed in the more pleasant surroundings of the psychiatric ward of the prison rather than in the general population.

Dr. Bernet said he specifically asked petitioner why he had no symptoms once he was released from prison. According to Bernet, petitioner told him he was a free

man and did not need to have mental problems. As noted, the only reason he resurrected his mental disorder in the early 90s was to reverse his robbery convictions during a time period he was trying to turn his life around. When the tactic did not work, petitioner essentially let the ideas die out, but not completely. Bernet said petitioner periodically mentioned the ideas to people; however, during the first few months of 1997 petitioner did not have any of the symptoms when he was going to college at Vol State, had friends and was working.

Dr. Bernet said he reviewed the grades from Vol State along with the actual papers petitioner wrote. He said he found no indication of any kind of psychotic thinking. However, when petitioner was arrested in Ashland City and transported to Nashville by Detective Postiglione, the symptoms returned. Petitioner said in the initial interview with authorities that he was under government surveillance and that the tapes would clear him.

According to Dr. Bernet, he concluded that there is a very direct connection between petitioner's legal issues and his psychiatric symptoms. Dr. Bernet also noted other considerations such as those who have paranoid delusions usually keep to themselves and do not tell everyone else them. Dr. Bernet said that while this is not always true, it can be a red flag.

The nature of the delusions also led Dr. Bernet to the conclusion that the petitioner is malingering. As previously mentioned, he noted petitioner's uncharacteristic openness about the delusions. Secondly, Dr. Bernet said the idea that the delusions had a bizarre quality, i.e. things that are totally implausible, points to malingering. He added that malingerers are more likely to talk about having bizarre delusions rather than acting bizarrely. Dr. Bernet indicated that people who truly have bizarre delusions are usually very, very disturbed. The third and final consideration is that Dr. Bernet simple does not believe petitioner acts like a delusional person. He described petitioner as friendly, outgoing, affable and helpful and contrasted delusional people who are typically argumentative, irritable and even hostile. Dr. Bernet reiterated his position that petitioner uses these ideas that sound like delusions when he is in some type of legal trouble.

As to antisocial personality disorder, Dr. Bernet said petitioner had a long history (dating back to adolescence) of violating the rights of other people, including his arrests for robberies, car theft and eventually armed robberies and murder. In addition, he opines that petitioner exhibits other features of antisocial personality disorder including lying on different document, lying about his age, and forging people's names to documents.

In the Axis III diagnosis, Dr. Bernet explained in more detail about the hearing impairment in petitioner's left ear. Gathering some history from the petitioner himself, Dr. Bernet said petitioner had a congenital problem or atrophy to the part of the brain that affects language and also had injury to the external ear itself. He also learned from petitioner and his Texas records that petitioner had a minibike or bicycle accident at age 13 which resulted in closed head injury involving skull fracture to the right side of his head. This accident caused an injury to the left side of petitioner's brain. Dr. Bernet concluded that petitioner ended up with both congenital and traumatic injury to the left side of the brain. He opined that the closed head injuries and hearing impairment played some part in his diagnosis in that the injuries and hearing problem are related to petitioner's language disorder. However, he noted that they do not relate to the adjustment disorder, depressed mood or malingering.

On cross-examination, Dr. Bernet testified that he had been hired by the district attorney in January 1999 but was asked by the Court to assess petitioner's competency in September 1999. In 2007 he was appointed along with Dr. Woods by Judge Blackburn in Davidson County to evaluate petitioner's competency in a separate proceeding. In 2008, Dr. Bernet was hired by both Tom Thurman of the Davidson County District Attorney's Office and by Art Bieber of the Montgomery

County District Attorney's Office. Dr. Bernet said he was not contacted by anyone during the period between 2000 and 2007 about the case.

Dr. Bernet testified that he was called as a witness earlier in the week (of the instant competency proceedings) in Davidson County competency proceedings in the Captain D's and McDonald's cases. In preparation for those hearings relating to competency under the Nix standard, Dr. Bernet interviewed petitioner in April 2008.

Addressing his diagnosis, Dr. Bernet opined that petitioner did not suffer from any kind of delusional disorder or psychosis and had not suffered from either at any point in his life. Dr. Bernet again noted that he could give a diagnosis retrospectively because the things with which he diagnosed petitioner were stable and would have been consistent over the last several years.

Referring back to his 2007 evaluation, Dr. Bernet agreed that he characterized petitioner's psychiatric, legal, medical and social histories as very complicated. He further agreed that in the 2007 report he stated that the most important diagnostic consideration is whether petitioner actually has a serious mental disorder manifested by paranoid delusions or is pretending to have a serious mental disorder or put another way either petitioner is a non-psychotic but prevaricating individual who sometimes pretends to be delusional or he is a severely psychotic delusional man who

pretends to be totally free of delusions. Dr. Bernet testified he noted in the 2007 report that if petitioner was indeed psychotic he would be less likely to be competent.

Recalling his testimony from the Davidson County proceedings conducted earlier in the same week as the instant hearing, Dr. Bernet recalled telling Judge Blackburn that if petitioner were delusional Dr. Bernet would have a more difficult time finding him competent. Dr. Bernet acknowledged his 2007 findings that petitioner's statements appeared to be an example of a syndrome known as pathological lying or "pseudologia fantastica." However, based on the challenge at the Davidson County hearing, Dr. Bernet said the term "pseudologia fantastica" or "pseudologue" seemed to upset people and confuse the discussion. Therefore, he added he was prepared to remove that term from the discussion. Dr. Bernet replaced the term with the core basis of his diagnosis, i.e. petitioner is a frequent and recurrent fabricator and malingerer.

Again referring to the 2007 report, Dr. Bernet adhered to his position that petitioner clings to the government surveillance story as a psychological defense mechanism. Dr. Bernet explained that this mechanism shields petitioner from the harsh reality that is hard for him to accept that he murdered seven men and women. The government surveillance fabrication, indicating the tapes of his every move would exonerate him, allows petitioner to boost his self-esteem and perpetuate a

better opinion of himself. Dr. Bernet adopted the 2007 findings as his current findings with the caveat about the term "pseudologia fantastica." He again agreed that his report indicated that petitioner used the scientific technology as s defense or mental mechanism and in a therapeutic capacity. As such, he does not believe it is necessary to force him to give up these defenses.

Dr. Bernet agreed that his 2007 and 2008 diagnoses were essentially the same but differed from him 1999 and 2000 diagnoses. He acknowledged that in 1999 and 2000 he originally thought petitioner suffered from delusional disorder. Dr. Bernet agreed that his 1999 report indicated petitioner had a psychiatric condition of delusional disorder, persecutory type that had waxed and waned over the years. Dr. Bernet said he eventually withdrew that diagnosis when he concluded that petitioner's statements were fabricated and that petitioner malingered.

Next, Dr. Barnet was questioned about an article he co-authored in 2003 with Dr. Caruso, Dr. Benedek, and Pamela Auble. He noted that the focus of the article was simulators (those individuals who pretend symptoms or pretend illness that they don't really have) and dissimulators (those individuals who try to hide or minimize symptoms or illnesses they have). The authors compiled 27 cases involving both types of individuals, including petitioner's case. Dr. Bernet agreed that petitioner was used in the study because he, Dr. Caruso, and Dr. Auble had evaluated him in his

criminal matters. Dr. Bernet could not recall but said it was possible petitioner was classified in the article as a psychotic dissimulator.

Dr. Bernet was asked about the past experts who had evaluated petitioner either on behalf of the defense or the prosecution. He could not recall who had ruled out psychosis completely but indicated that even he did not rule it out completely. Dr. Bernet explained that in his write-up he considered both of the possibilities but eventually concluded that malingering is the much greater possibility. He said that several of the other doctors failed to identify petitioner as being actively psychotic. Dr. Bernet acknowledged that there is some possibility that petitioner is delusional but again stressed that of the possibilities, it is his opinion that petitioner is fabricating and malingering.

Dr. Bernet again discounted his use of the term "pseudologia fantastica" and reiterated that the term was unnecessary in his diagnosis. He said he mentioned that petitioner had a handicap (delusional belief system employed by petitioner) which can get in the way and take center stage during an evaluation or assessment. He added that if the evaluator allows these delusional thoughts to get in the way of the evaluation then the evaluator is not going to be able to determine whether or not petitioner is competent.

Dr. Bernet testified that one of the important considerations he used in reaching his conclusions was the history of the case. He was first asked about two Texas mental health professionals, Dr. Brown and Dr. Ray, who concluded petitioner was malingering. However, he agreed that some of the several mental health professionals who saw petitioner thought he was actively psychotic. In Dr. Bernet's opinion the majority of doctors thought petitioner was not actively psychotic in Texas.

Dr. Bernet recalled that some doctors at Russ State Mental Hospital diagnosed petitioner as suffering from psychosis and prescribed various medications for petitioner. He also recalled petitioner was housed at a facility operated by the Texas Department of Corrections. While housed at that facility, petitioner was diagnosed by mental health professionals as being bipolar. The psychotic and delusional diagnosis again appeared at the Ellis II Psychiatric Center in Texas. Dr. Bernet agreed it was unlikely a mental health professional would have prescribed the drugs noted in petitioner's record had they not believed petitioner was psychotic. However, he opined that truly thought he was psychotic at that time.

When counsel read the DSM-IV definition for malingering, Dr. Bernet agreed with the definition. He noted that professionals talk about malingering sick and malingering well (typically defensiveness). Dr. Bernet said when a person malingers well they are being defensive and not endorsing symptoms the person actually has.

He agreed that malingering is usually in the direction of fabricating symptoms that a person does not really have. As to petitioner, Dr. Bernet believes petitioner engages in frequent lying which, at times, takes the form of malingering.

Dr. Bernet believes the government surveillance stories fulfill both a malingering motive and an unconscious protection motive. Some acts could fulfill both of those functions, he added. However, Dr. Bernet did not want to label petitioner's actions as a "belief system." Instead, he characterized petitioner's government surveillance statements as thoughts, fantasies, ideas and lies.

For the purposes of the discussion, Dr. Bernet said the "belief system" (which Dr. Bernet established as meaning statements, fantasies, ideas and lies in this context) encompasses recording of petitioner's every word and movement since 1985 by means other than cameras or microphones; release of the tapes to the public showing his innocence; and infliction of physical, mental or emotion pain by the technology. Dr. Bernet said the belief the tapes could exonerate petitioner is part of the malingering motive. He also acknowledged petitioner's representations that the technology could control his environment and those around him and that the trials were really mock trials or proceedings at which everyone is coached.

Dr. Bernet again noted the use of the fantasies as a defense mechanism and an escape from the horrible acts he committed. He said defense mechanisms are usually

unconscious but do not have to be. They are historically used by people to protect themselves against very unpleasant feelings. Given a number of examples from a Kaplan and Sadock text book, Dr. Bernet agreed that denial is one classification of defense mechanisms, which can be either psychotic or not psychotic depending on the degree to which the person used the mechanism. He said he was also familiar with other defense mechanisms such as distortion and projection.

Dr. Bernet said petitioner is very strongly motivated to keep up his idea of the surveillance. In fact, this desire is more important to him than looking fully competent. Dr. Bernet agreed that petitioner's conduct could thwart petitioner's own attempts to stop his appeals. Dr. Bernet concluded cross-examination by indicating the examiner/evaluator must figure out a way to work around a strong defense mechanism. He said here he tried to do so.

The Court inquired into Dr. Bernet's opinion as to why petitioner persists in the expressions of scientific technology all the while wanting to abandon all possible legal remedies and face the death penalty. Within this inquiry, the Court questioned whether petitioner perhaps wanted to maintain the surveillance remarks to prevent others from finding out petitioner was lying the entire time. Dr. Bernet responded that petitioner has a high opinion of himself and wants others to have a high opinion of him and not focus on the horrible things that have happened. He noted that all of

the horrible things are inconsistent with the other part of petitioner that wants to be intelligent and friendly to people. Dr. Bernet said the defense mechanism here falls essentially within the category of denial and enables petitioner to make himself feel better by believing these fantasies. According to Dr. Bernet it is a form of maintaining self respect in that petitioner believes that it is better to die with this lie than to admit to the horrible offenses he committed.

The Court further asked whether the two things must be mutually exclusive, i.e., can petitioner persist in the fabrication all the while being competent under the Nix standard to understand his legal rights and liabilities and choose not to go forward with any other legal efforts. Dr. Bernet said both phenomena serve the same purpose. He explained that the reason for the fabrication is to protect petitioner from all these horrible bad thoughts and feelings but noted that this is also the reason petitioner gives for not wanting to go back and have a new trial. Petitioner does not want to resurrect these witnesses who said very bad things about him or family members who had to say things about him he did not like.

Dr. Bernet said petitioner is willing to do so even if it means he dies as a consequence of his decision. He explains that petitioner makes very rational remarks. For example, petitioner states that even if he was granted a new trial the outcome or end result would be the same. Petitioner has also said that the three different juries

have spoken. While he does not like what they said, he nonetheless accepts their verdicts.

On re-cross-examination, Dr. Bernet agreed that during the 2007 and 2008 interviews petitioner never disclaimed his beliefs in scientific technology. Dr. Bernet disputed findings from Dr. Martell's 2006 testing that petitioner was honest with regard to his symptoms. He added that his office gave the SIRS tests which revealed petitioner was not honest on it. Dr. Bernet did not believe Dr. Martell administered the SIRS correctly.

Dr. Michael First

Michael First testified that he resides in New York City where he is presently employed at the New York State Psychiatric Institute (NYSPI) and is on the Department of Psychiatry faculty at Columbia University. Dr. First said he works at NYSPI and at New York Presbyterian Hospital, which is the teaching hospital for Columbia University. Dr. First testified as to his educational credentials and his role as editor of the DSM-IV and the DSM-IV-TR. Dr. First is also working on the DSM-V. He also acknowledged his other employment and writing accomplishments.

Dr. First agreed that he was first contacted about petitioner's case in September 2007. Dr. First was involved in the federal habeas corpus proceedings relating to the

Baskin-Robbins case. He acknowledged that the Post-Conviction Defender's Office retained him for the purposes of the instant competency hearing.

Dr. First submitted a list of materials he had received and reviewed in preparation for his testimony. He also added the recent (2008) reports of Dr. Bernet and Dr. Martell (and related DVDs), interview conducted by Dr. Bernet, and voluminous hospital and institutional records including all records from the Texas prison system to the list of materials he reviewed. Dr. First also said he had interviewed petitioner on March 24 and 25, 2008.

Dr. First said when he prepares to do a diagnosis of an individual, he reviews all of the materials but maintains an open mind to make his best clinical judgment. Having done so here, Dr. First opines that the diagnosis most consistent with petitioner's situation is either delusional disorder with persecutory and grandiose type or psychotic disorder N-O-S. He noted that the issue is the question of the causal relationship between the temporal lobe damage and delusional system. Dr. First said he is one hundred percent certain petitioner has a delusional system. If the temporal lobe problems are causal, the DSM indicates you cannot give that diagnosis with another medical condition.

Dr. First testified that the diagnosis here is "very very difficult" to make. While he said he might never be sure in this case, he leaned toward delusional

disorder without ruling out temporal lobe damage as the causal factor. Citing the DSM definition for delusion, Dr. First said it is a false belief based on incorrect inference about external reality that's firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. He added that the key thing is the belief is based on an incorrect inference about external reality.

Dr. First said a delusion is actually a defect on how people process information and form beliefs. He added that perhaps the most important element of a delusion is the definition that it is firmly sustained despite almost everyone else's beliefs. As a result, delusional people make poor decisions. He notes that a normal person faced with a problem examines their belief based on new information and rethinks the issue. A delusional individual believes it no matter what information is provided.

Next, Dr. First testified as to how he reached the conclusion that petitioner is delusional. He met with petitioner and wanted to test the strength of petitioner's belief. Dr. First noted the issue of repeats in that petitioner said the two had met before. Even though it was their first meeting, petitioner said they had met four times. When Dr. First insisted he had not even been in the state, petitioner maintained his belief that the two had met on at least four prior occasions.

Dr. First said he pressed petitioner about the claim of having met on the prior occasions. He said petitioner informed Dr. First he was being coached. Dr. First said he presented petitioner with four following possible options as to why he believed they had met before: (1) scientific technology was putting the memory of having met in petitioner's head; (2) the brain damage could have affected memory; (3) Dr. First is mistaken; and (4) Dr. First is being coached by technology. He said petitioner looked at him and said he was being coached. Based on his interchange with petitioner, Dr. First finds it is consistent with the presence of a delusion.

When asked to comment on Dr. Bernet's conclusions, Dr. First responded that he could not really comment because Dr. Bernet's only Axis I diagnosis was malingering, adjustment disorder with depressed mood and mixed expressive receptive language disorder. He adds that such a diagnosis implied that everything Dr. First calls delusions are covered by the word malingering because the other parts of that diagnosis have nothing to do with beliefs.

Dr. First said Dr. Bernet's conclusion that petitioner is malingering would have to include all of the beliefs described by Connie Westfall during her visits with petitioner. Such a result, he adds, cannot be imagined "in his wildest dreams." While he conceded that a mental health professional must always be concerned with

malingering, he stated that the external motivation for petitioner's fabrication is completely elusive.

Dr. First also questions Dr. Bernet's conclusion that the scientific technology story makes the petitioner feel better. He drew distinctions between external and internal gain, indicating we do things internal to make us feel better. Dr. First stated that malingering applies to secondary gain which he finds is not present in petitioner's case. His disagreement also extends to Dr. Bernet's relative dismissal of what he termed "a very, very complex delusional system" again alluding to the lengthy testimony of Connie Westfall. Dr. First said only one small piece of the scientific technology tapes (the existence of the tapes) protected petitioner from the horrible thoughts as mentioned by Dr. Bernet. He notes that if the entire delusion system were restricted to that one piece, Dr. Bernet's argument would be stronger. Dr. First claims such a finding is not an accurate characterization of the delusional system, indicating that in his opinion the vast majority of the facets of the delusion system cannot characterized as serving a comforting function.

Dr. First testified that from a psychoanalytic perspective everything is a defense mechanism of sorts. He conceded, however, that delusions are often defense mechanisms because they make people feel better. As an example, Dr. First referenced petitioner's records from 1985 and noted petitioner's belief that he was

identified as special while in jail. According to Dr. First, this example indicates how an element of the delusional system elevated petitioner's self-esteem thereby illustrating that just because it is a defense mechanism does not mean it is not a delusion. However, he stated that the crucial question is the potential for the delusion to impair functioning.

Dr. First questioned Dr. Bernet's hesitancy in using the word "belief" when explaining petitioner's utterances. He said that the definition of delusion contains the word belief and that Dr. Bernet used the word belief because it was the appropriate word. When asked about Dr. Bernet's logic in weighing malingering with delusional system, Dr. First said Dr. Bernet's conclusion that the historic course supported malingering was in error. He disputed Dr. Bernet's finding that the delusions surface when petitioner faces legal challenges. Dr. First cited various examples of conduct or communications by petitioner in support of his disagreement with Dr. Bernet, including a reference to letters written by petitioner to Linda Patton. Not only did Dr. First challenge the lack of a motivation to malinger in the letters, Dr. First also questioned why petitioner would suggest that Ms. Patton was being coached. Dr. First insists that Patton's apparent remarks to petitioner that she was not being coached and that it was in his head caused petitioner to realize he should "shut the hell up." Dr. First said petitioner is smart enough to realize Ms. Patton would think

he is crazy. He added that petitioner is able to control the delusion when "he needs to and wants to."

Next, Dr. First addressed Dr. Bernet's testimony that people who are truly delusional usually keep the delusions to themselves. He noted that no two psychiatric patients are the same and that no two delusional systems are the same. Dr. First found petitioner's actions in disseminating his delusional beliefs were completely understandable under his specific delusional system. He further indicated that many times people with delusional disorder take various public actions including filing lawsuits or stalking other people.

Dr. First disagreed with Dr. Bernet's statement that petitioner's delusions have a bizarre quality and that this characterization is a tip-off to malingering. He said that people with real psychiatric disorders may have bizarre delusions. Dr. First admitted that the issue of bizarre delusions and what constitutes a bizarre delusion is a controversial one. He explained that even the DSM definition causes problems because one person's bizarre is another person's every day. He said the definition must necessarily look to that person's culture and background.

Dr. First mentioned the book "Warrior's Edge" referenced during earlier testimony. He said he was surprised that the book was commercially available and first thought it must only be available on a "fringe" or other "weird" website. In his

opinion, Dr. First surmised that petitioner found the book and then focused on the pages which seemed to mirror his experience rather than gaining his idea for a delusion from the book as suggested. Due to the nature of things referenced in the book, Dr. First thought what at first seemed rather bizarre were actually from petitioner's frame of reference. In conclusion of this analysis, Dr. First said he would not classify petitioner's delusional system as bizarre in any conventional sense.

Next, Dr. First questioned Dr. Bernet's statement that petitioner does not act like a delusional person because he is polite, friendly and affable. Citing the DSM-IV, Dr. First said a person suffering from delusional disorder keeps their personality intact.

Dr. First said petitioner's reactions to Ms. Westfall's (and Ms. Gleason's) challenge of the delusions were typical of delusional disorder. He stated that when you challenge a delusion the person often gets irritated and very angry. When asked whether petitioner's case is a "classic case" of delusional disorder, Dr. First said he was not sure because he did not know what classic was in the case of delusional disorder. He said that so few cases of delusional disorder exist. However, he concluded that petitioner's presentation fits very well within the DSM description of delusional disorder.

Dr. First also called into question Dr. Bernet's statements that petitioner's own denial of delusions warranted a departure from a diagnosis of delusional disorder. Dr. First said petitioner repeatedly denies that he is mentally ill though conceding some brain damage or depression. However, he said petitioner has enough insight to know that people are questioning what he says about scientific technology and think it is crazy. According to Dr. First, petitioner then attempts to minimize the delusionality and even reason away the delusional statements as lies. Dr. First said he could not understand why Dr. Bernet believes petitioner is lying but apparently gives no weight to the fact that petitioner lied about the delusions.

Dr. First said some people have no insight into their illness. Therefore, he questioned Dr. Bernet's belief that petitioner has some insight into his illness. Using the Linda Patton example again, Dr. First said petitioner realizes his comments look crazy but does not realize they are crazy. Dr. First said from his review of the records he was unaware of any instance in which petitioner denied he had delusions.

Finally, Dr. First addressed whether delusions have a life history, changing (becoming worse or better) over time. Dr. First said like most psychiatric illnesses, the delusions vary over time. He said the current (as of the hearing date) focus of the delusions is different than the focus of the delusions in 2005 and 2006. Secondly, he noted that the intensity can be different in the sense of the extent petitioner is

preoccupied about them. As an example, Dr. First said in reviewing the records that Dr. Amador noted it took five hours before petitioner mentioned the delusions. Dr. First said it took him thirty seconds after he walked into the room with petitioner. He opined that the delusional disorder is always present but that the intensity can wax and wane over time. Dr. First stated that in his treatment of individuals with delusional disorder he does not try to make them stop believing in the delusion but tries to move them past them. Dr. First said that, based on the Connie Westfall notations, the delusions were intense during the 2005 to 2006 year.

DISCUSSION

The sole issue before this Court is whether the petitioner was competent under the Nix standard to file for post-conviction relief during the one-year statutory limitations period.[2] If petitioner was competent during that period, the time period

[2] Because the appellate court found the threshold showing had been made, we do not concern ourselves with those preliminary issues. However, as the background summary provided above indicates, this Court reviewed certain documents attached to the next-friend petition filed by Linda Martiniano. At that time the Court concluded the attachments were insufficient to make a threshold showing of incompetence. This Court was reversed by the Court of Criminal Appeals who found the submissions were adequate to establish such a showing. Because the issue had not previously been addressed by our appellate courts, this Court at that time attempted to address the legal sufficiency of the submissions. Perhaps implicit in the appellate court's opinion is its conclusion that credibility issues should not play a role in the examination of the submissions but should best be addressed at the actual competency hearing.

Regardless of the reasons for the reversal of this Court's earlier finding, the Court has now heard the testimony and can assess the credibility of the witnesses (some of whom submitted materials attached to the next-friend petition) and weigh the evidence in light of the Nix

has elapsed. Any subsequent post-conviction petition is time barred. If petitioner was not competent, the statute of limitations is tolled and petitioner's sister, Linda Martiniano, may seek post-conviction on his behalf as next friend.

Competency Standard

Although the Court has referenced the Nix standard, it is useful to initially review the procedural backdrop of the competency standard relating to tolling of the statute of limitations. In Seals v. State, 23 S.W.3d 272 (Tenn. 2000), our supreme court examined whether mental incompetency tolls the one-year statute of limitations for filing a post-conviction petition under either a savings provision or constitutional due process. Although it concluded that a statutory savings provision did not toll the limitations period, the Seals court concluded that, while the one-year statute of limitations does not violate due process on its face, due process may require tolling to ensure that a petitioner has a meaningful opportunity to present claims in a reasonable time and manner. Id. at 279 (*citing and reaffirming* Watkins v. State, 903 S.W.2d 301 (Tenn 1995) (reaching the same conclusion that due process requires tolling during incompetence but considering the issue under the prior three-year

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competency standard.

statute of limitations period)). However, neither Watkins nor Seals resolved what standard of mental incompetence a petitioner must satisfy before due process requires tolling of post-conviction statute of limitations.

Less than one-year later in an issue of first impression, the supreme court addressed the standard of mental incompetence that a petitioner must satisfy before due process requires tolling of the post-conviction statute of limitations. State v. Nix, 40 S.W.3d 459 (Tenn. 2001). In Nix (which combined petitioners Scott Houston Nix and Ralph Dean Purkey), next friends of Nix and Purkey claimed respectively each had never been competent and was not currently competent. Id. at 461. The Court noted the "criminal"/"civil" dichotomy of a post-conviction proceeding recognizing such proceedings are "criminal" in nature for some purposes but "civil" in nature for others. Citing Watkins, the Nix court reiterated the earlier holding that with respect to statute of limitations issues, a post-conviction proceeding is civil in nature. Id. at 463. Accordingly, it held that "due process requires tolling of the post-conviction statute of limitations only if a petitioner shows that he ***is unable either to manage his personal affairs or to understand his legal rights and liabilities.***" Id. (citing the origin of the civil competency standard in Porter v. Porter, 22 Tenn. (3 Hum.) 586, 589 (1842)(emphasis added)).

The applicability of the Nix standard was cited again in Holton & Reid v. State, 201 S.W.3d 626 (Tenn. 2006). Further, its specific applicability in the instant case was further affirmed in Reid v. State, M2006-01294-CCA-R3-PD (Tenn. Crim. App. filed July 3, 2007, at Nashville).[3]

Analysis

Tennessee Code Annotated Section 40-30-102 provides that "a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken . . . ." Tenn. Code Ann. §40-30-102(a). In the instant case, the Tennessee Supreme Court affirmed petitioner's convictions and sentences by opinion filed on May 24, 2005. See State v. Reid, 164 S.W.3d 286 (Tenn. 2005). Therefore, our concern narrows to the one-year time period beginning on May 24, 2005 and ending on May 23, 2006.[4]

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[3] This Court recognizes the existence of a different competency standard (Rees v. Peyton) employed in federal court proceedings and in Tennessee Supreme Court Rule 28, Section 11 proceedings. While petitioner has suggested or insinuated that Rees is the appropriate standard, our courts have drawn a distinction between the two and have nonetheless held that the Nix standard should be applied in circumstances such as the present case. See e.g. Reid v. State, M2006-01294-CCA-R3-PD (Tenn. Crim. App. filed July 3, 2007, at Nashville).

[4] The Court notes and agrees to some extent that the "most relevant" inquiry as to competency under this scenario would be petitioner's competency on May 23, 2006 when the statute of limitations was set to expire. As noted by counsel, under the facts of this case, it is likely not a specific issue.

In Nix, the Court stated that "the petitioner bears the burden of proving by clear and convincing evidence that the statute of limitations should be tolled for incompetence, and that as a result of the tolling, the petition is timely." Nix, 40 S.W.3d at 464.[5] Unless this burden is satisfied, the petition should be dismissed as time-barred. Id. at 465.

Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Hicks v. State, 983 S.W.2d 240 (Tenn. Crim. App. 1998). Evidence satisfying this standard will produce in the fact-finder's mind a firm belief or conviction regarding the truth of the factual propositions sought to be established by the evidence. Fruge v. Doe, 952 S.W.2d 401, 412 (Tenn. 1997).

Initially, it does not appear that a substantial body of case law in Tennessee provides a more expansive interpretation of the civil competency standard. However,

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[5] Although addressing competency in a slightly different context (competency to proceed on a previously filed *pro se* post-conviction petition but claims of incompetency to sign and verify an amended petition versus competency to toll statute of limitations where no petition was filed), the Tennessee Supreme Court affirmed the applicability of the "clear and convincing" burden in Reid v. State, 197 S.W.3d 694 (Tenn. 2006). In In the matter of: The Conservatorship of Ellen P. Groves, 109 S.W.3d 317 (Tenn. App. 2003), the Court noted the absence of language in the conservatorship statute as to burden of proving competency but noted the general rule that the party with the affirmative of an issue has the burden of proof. Id. at 330. It added that placing the burden on the petitioning party "is entirely consistent with other states' statutory allocation of the burden of proof." Id. The Groves court applied the "clear and convincing evidence" standard. Id.

a case cited with approval by the petitioner provides an insightful dissection of the standard's various components. In the Matter of: The Conservatorship of Ellen P. Groves, 109 S.W.3d 317 (Tenn. 2003) [hereinafter "Groves"], Judge Koch (now Justice Koch) addressed the standard against the factual backdrop of an elderly woman involved in a conservatorship proceeding; however, the core mental health concepts and interpretations are equally applicable here. The Court finds it useful to cite extensively to these core concepts as outlined by the Groves court. This Court's application of the Grove considerations to the facts of the present case follow.

In Groves, the Court defined incapacity as: "the legal status that occurs when a person's autonomy become either partially or totally impaired. " Id. at 328-29. A person may also be incapacitated "when he or she cannot control his or her actions or behavior." Id. at 329. "A person lacks the ability to be autonomous – to exercise free will – when he or she lacks the ability to absorb information, to understand its implications, to correctly perceive the environment, or to understand the relationship between his or her desires and actions." Id. "When a person's autonomy becomes impaired, public policy justifies others stepping in to make choices on the person's behalf to promote the person's best interests and to protect the person from harm." Id. "However, public policy also favors allowing incapacitated persons to retain as much autonomy as possible . . . ." Id.

While a capital case certainly presents different variables than those in a conservatorship action, these baseline concepts and public policy considerations can be shared. For example, petitioner's autonomy is still important here even though he is literally making a life or death decision. The purpose in determining capacity does not include ignoring the desires of the petitioner and supplanting them with those of the Court or other interested parties.

Obviously, proceedings such as the instant competency hearing provide the forum for determining whether petitioner is incapacitated, and if so, to what degree. In the civil context, the law presumes that adult persons are capable rather than incapable. Id. at 329-30.

The Groves court conducts an extensive analysis of the concept of "capacity" and its various sub-parts indicating:

> Capacity is not an abstract, all-or-nothing proposition. It involves a person's actual ability to engage in a particular activity. Accordingly, the concept of capacity of task-specific. A person may be incapacitated with regard to one task or activity while retaining capacity in other areas because the skills required in one situation may differ from those required in another.

Id. at 333-34. The Court added that:

> Capacity is also situational and contextual, and it may even have a motivational component. It may be affected by many variables that constantly change over time. There variables include external factors such as the time of day, place, social setting, and support from relatives, friends, and supportive agencies. It may also be affected by neurologic, psychiatric, or other medical conditions . . . Finally, capacity is not necessarily static. A change in surroundings may affect capacity, and a person's capacity may improve with treatment, training, greater exposure to a particular type of situation, or simply the passage of time.

Id. at 334.

Functional Capacity and Decision-Making Capacity

Capacity can encompass two concepts: (1) functional capacity and decision-making capacity. Id. The Groves court explained that "[f]unctional capacity relates to a person's ability to take care of oneself and one's property" and that "[d]ecision-making capacity relates to one's ability to make and communicate decisions with regard to caring for oneself and one's property." Id. It adds that the distinction is somewhat artificial because functional capacity can depend on decision-making capacity.

Functional capacity to care for oneself involves a person's ability to perform basic daily activities, including personal hygiene, obtaining nourishment, mobility, and addressing routine healthcare needs. An examination of the functional capacity

inquires into whether a person has some type of functional impairment that "endangers physical health or safety by rendering the person unable, either wholly or partially, to care for him or herself." Id. at 335. The analysis must focus on that person's ability to carry out these essential activities in his everyday environment as opposed to a laboratory, doctor's office or courtroom setting. Id.

Based on the nature of the proof, it is clear that the crux of the inquiry here is petitioner's decision-making capacity. "Decision-making capacity involves a person's ability (1) to take in and understand information, (2) to process the information in accordance with his or her own personal values and goals, (3) to make a decision based on the information, and (4) to communicate the decision. Id. at 335. The requirement that the decisions be tested against the person's own personal values and goals acknowledges the importance of determining capacity in light of the person's own values versus the standards and values of others. Id.

The Groves court notes:

> [a] person does not lack decision-making capacity merely because he or she does things that others do not understand or find disagreeable. Foolish, unconventional, eccentric, or unusual choices do not, by themselves, signal incapacity. However, choices that are based on deranged or delusional reasoning or irrational beliefs may signal decision-making incapacity.

Id. at 335-36. The court stated that when evaluating a person's decision-making capacity, the primary focus is on the process the person uses to make a decision. The decision itself is secondary. Id. "It analyzes a person's ability to understand pertinent information and to reason and deliberate about choices particular to a specific decision." Id.

The Groves court also referenced a 1978 Tennessee Court of Appeals opinion in which the court characterized this capacity as the "mental ability to make a rational decision." Id. (*quoting* State Dep't of Human Servs. v. Northern, 563 S.W.2d 197, 209 (Tenn. Ct. App. 1978)). The adjective "rational" was used to connote a decision based on a process of reasoning not a decision viewed as acceptable, sensible or reasonable by the prevailing majority. Id.

When conducting this analysis, the Groves court acknowledged that "[a] person may be simultaneously capable and incapable with respect to different types of decisions." Id. "[C]apacity should be determined on a decision-specific basis." Id.

Having established the parameters of this inquiry as discussed in Groves, the Court will examine the petitioner's competency based on the proof adduced at the competency hearing.

Nix Analysis

The Court must determine whether the petitioner was incompetent to either manage his personal affairs or to understand his legal rights and liabilities during the statutory limitations period. Before examining each prong, the Court finds it useful to examine generally the diagnoses of the expert witnesses. However, in doing so, the Court will not attempt to restate all of the testimony summarized above.

Initially, the Court notes, as reflected in the hearing testimony, that none of the experts conducted an examination of petitioner during the relevant time period to assess petitioner's competency under the Nix standard. Dr. Woods interviewed petitioner during the time period but for other purposes. However, each expert testified that he was able to reach a conclusion (to a reasonable degree of medical or psychiatric/psychologic certainty) as to petitioner's competency during the statutory period.

Dr. Woods testified that petitioner's condition has deteriorated over time and that petitioner has always been incompetent. Dr. Martell indicated he had a long history with petitioner dating back to the time of petitioner's trial. Even though he did not examine petitioner during the statutory period, he conducted an evaluation just months after the expiration of the period. Dr. Martell added the proviso that the actual condition could have been slightly different (better or worse) but in his opinion

would not have varied significantly. Dr. Bernet testified that he had known petitioner since the time of trial. He too (like Martell) admitted that he had not evaluated petitioner during the statutory limitations period but conducted another evaluation in February 2007. Dr. Bernet said the consistent nature of petitioner's condition enabled him to offer an opinion as to petitioner's competency during the relevant one-year period.[6] He said he could also give an opinion as to petitioner's competency during this period based on his understanding of petitioner's mental condition, his mental makeup and his external situation.

In light of the testimony, the Court concludes that none of the experts' testimony will be excluded simply due to a failure to examine petitioner during the one-year time period. Having concluded that each expert is qualified to give an opinion as to petitioner's competency during the statutory time period, the Court briefly reviews each experts' findings.

According to the testimony, Dr. Woods believes he has an adequate historical perspective of petitioner's mental health due to his involvement in state and federal court proceedings. Dr. Woods concluded that petitioner is psychotic and suffers from delusions. The core delusions relate to what petitioner refers to as "scientific

[6] It is clear Dr. First did not have a connection to petitioner prior to his recent entry into the case. However, the considerations are slightly different since Dr. First testified in a rebuttal capacity.

technology" or "government surveillance." Dr. Woods said the technology monitors his every movement, videotapes his every action, audio tapes his every word and controls much of his physical, emotional and intellectual functioning.

Dr. Woods testified that the delusions were at one time encapsulated but over time have expanded into more areas of the petitioner's life. The delusional beliefs now encompass his attorneys and court personnel. According to Dr. Woods, petitioner believes his trials were mock trials and that his attorneys are actors and court personnel are coached by scientific technology. Petitioner believes the tapes recorded by scientific technology have been released or are going to be released.

Dr. Martell diagnosed petitioner with delusional disorder. This recent diagnosis essentially mirrored his conclusions reached at the time of trial. He too believes petitioner exhibits delusions based on "scientific technology" and has witnessed essentially the same types of beliefs or statements from petitioner about the effects of the technology on him. Dr. Martell observed these delusions at the time of trial and found them to be encapsulated. He noted that during his interview in 2006 the delusions were no longer encapsulated and had expanded in their scope.

Dr. Bernet testified that petitioner is a repetitive or habitual liar and malingers mental illness. He said even though he originally diagnosed petitioner with delusional disorder at the time of trial, the passage of time and wealth of information

now available caused him to reexamine his earlier position and reach the present result. Dr. Bernet referred to these thoughts as fantasies or stories but refused to characterize them as a belief system or delusional system. He said he is not sure if petitioner even believes what he is espousing, noting that petitioner may have told the lies for so long that he no longer can make the distinction between the truth and a lie. Dr. Bernet agreed that the content of the petitioner's fantasies relate to scientific technology and the purported effects of the technology on petitioner. However, he notes that petitioner utilizes the scientific technology stories when he is involved in the legal system. Dr. Bernet also opined that petitioner uses the stories as a defense mechanism to protect himself from the harsh realities of his cases.

Dr. First testified in rebuttal to primarily challenge Dr. Bernet's conclusions; therefore, his testimony is reviewed in that light. He wholly disagreed with Dr. Bernet's findings and reached his own conclusion that petitioner suffered from delusional disorder. He found the core delusion to be about "scientific technology" and its effects on petitioner.

Ability to Manage Personal Affairs

First, the Court must consider the testimony in light of the first prong of the Nix (civil competency) standard. Here, petitioner was incompetent under Nix if he

was unable to manage his personal affairs during the statutory limitations period. The Groves considerations cited above contemplate functional and decision-making capacity. Functional capacity relates to a person's ability to perform basic daily activities in an everyday environment rather than in a laboratory or courtroom setting. On the other hand, decision-making capacity refers to that person's ability to take in the information, process it against the person's goals and values, make a decision based on the information and communicate the decision.

The petitioner's permanent residence at the state penitentiary, whether Riverbend or Brushy Mountain, greatly restricts the freedoms relating to his every day life. Therefore, many of the Groves considerations underlying petitioner's capacity translate differently in the prison environment. However, it is clear petitioner carries out essential activities including his nutrition and personal hygiene. Petitioner also consistently engages in a workout routine during his designated yard time. Without question petitioner has little property or holdings to manage; however, he maintains an account with the prison commissary through which petitioner makes decisions about which items he will purchase with his account balance.

Even in light of the structured setting, both Dr. Bernet and Dr. Martell opine that petitioner is able to manage his personal affairs. From their conversations with the petitioner, they conclude that petitioner makes daily decisions, however minimal,

about his nutrition, his recreation time, and his television time. Dr. Woods, on the other hand, admits that petitioner may be able to make certain basic decisions about his daily activities, but does so only at the direction of scientific technology. Dr. Woods explained that the nature of the technology delusions are so invasive that petitioner believes technology plays a part in every decision he makes. As an example, Dr. Woods noted that petitioner believes money goes into his commissary account only when the technology allows. In his opinion these technology delusions affect petitioner's ability to manage his personal affairs.

Dr. Martell and Dr. Bernet conclude that petitioner was competent during the statutory time period to manage his personal affairs. Dr. Woods found that petitioner was not competent to do so. Notwithstanding the limitations presented by prison life, the Court finds no basis to find a significant impairment, if at all, in petitioner's functional or decision-making capacity to manage his personal affairs. Taking the petitioner where we find him, he has the ability to make daily decisions about his nutrition, his appearance (including physical fitness) and his television viewing choices. Nothing in the testimony indicated petitioner had any true difficulty in performing these daily activities or in his decisions related to performing those activities.

Petitioner bears the burden of proving his incompetence during the statute of limitations period by clear and convincing evidence. As to this first Nix prong, the Court finds he has failed to meet his burden.

Understanding of Legal Rights and Liabilities

The more difficult analysis relates to the second prong of Nix which provides that petitioner was incompetent during the statutory period if he was unable, during the one-year period, to understand his legal rights and liabilities. The Court similarly utilizes the Groves considerations in this discussion.

According to the testimony of Dr. Martell and Dr. Bernet, petitioner has a grasp of his present legal position. Dr. Martell, who interviewed petitioner at the time of trial, in 2006 and then in 2008, testified that petitioner's condition has changed over time but that petitioner retains a substantial capacity to appreciate his legal position. He said that on every occasion he visited with petitioner, petitioner had an eloquent and rich understanding of the charges against him and what is going on in his cases. Dr. Martell stated that petitioner had a fundamental understanding of the charges against him, of his attorneys, of the process, of the judges and of the appellate process. He said petitioner's position had always been (since 1999) that after his automatic direct appeals were completed he did not wish to pursue any post-

conviction appeal. Dr. Martell said petitioner maintains that position.

Dr. Martell discussed his finding of incompetency (under the Rees v. Peyton standard) in federal court proceedings in 2006. He explained that petitioner's condition had changed dramatically from the time of trial to his transfer to from Riverbend to Brushy Mountain. Dr. Martell said during the 2008 interview, petitioner had improved since the 2006 interview.

Dr. Martell's interviews revealed essentially the same delusions petitioner has explained over time. Petitioner still refers to scientific technology and its effects on him. The testimony summarized above illustrates a number of examples of petitioner's "beliefs" about how scientific technology controls his life. However, Dr. Martell did not seem surprised or bothered by any of petitioner's responses relating to scientific technology.

Even having observed the contrast in petitioner's mental health from the time of trial to the 2006 and 2008 interviews and noting the continued presence of scientific technology delusions, Dr. Martell concluded petitioner was competent under Nix during the one-year statutory period to understand his legal rights and liabilities.

Dr. Bernet similarly testified that petitioner has an understanding that he is in the post-conviction phase and has completed his direct appeals. Dr. Bernet first saw

petitioner in 1999 and concluded petitioner suffered from delusional disorder. However, in 2007 when he conducted an interview for Davidson County proceedings, Dr. Bernet found petitioner to be in essentially the same condition but Dr. Bernet retreated from his earlier diagnosis. He said that with the additional information available to him and the passage of time, he was able to conclude petitioner does not suffer from delusional disorder. Instead, he opines petitioner's representations about scientific technology are lies, fantasies or stories but not delusions. Dr. Bernet testified that petitioner has repeatedly malingered mental illness and uses these stories as a defense mechanism to protect himself from the horrible facts of his crime. He noted that petitioner may have repeated the lies so frequently and for such a duration that he now believes them to be true. He added, however, that he could not determine whether petitioner actually "believes" the stories he tells.

Dr. Bernet said petitioner also evidences an understanding that the direct appeal was mandatory but that the post-conviction procedure required some action by him to initiate the proceedings. According to Dr. Bernet, petitioner has weighed the pros and cons of possibly being granted a new trial. Dr. Bernet stated that petitioner can list very logical reasons as to why he does not want to have a new trial, including having to hear the witnesses (including family members) say bad things about him again. Petitioner also believes a new trial would be senseless because the

outcome would be the same. Dr. Bernet said petitioner said three juries have spoken and that he accepts their verdicts. Dr. Bernet opined that petitioner is competent under Nix to understand his legal rights and liabilities.

Dr. Woods's relationship with petitioner did not extend back to the time of trial; however, he interviewed petitioner in August 2005 apparently for a federal court proceeding. He conducted a second interview on October 6, 2005 and had another meeting on June 20, 2006. Dr. Woods testified that from his observations and review of materials he found petitioner to be psychotic and suffering from delusions. In his opinion, petitioner's condition continually deteriorates because he is not receiving treatment. He placed significance on petitioner's brain injury or atrophy and made a direct connection between the injury or malformation and petitioner's mental state.

Dr. Woods spoke of the nature of the delusions and noted petitioner's core belief that scientific technology monitors petitioner's every move. He places significance on petitioner's remarks that the tapes recorded by the technology will reveal his innocence and that the technology controlled his attorneys, participants and court personnel during his "mock" trials. Dr. Woods disputed any findings that indicate petitioner is malingering.

Dr. Woods stated that the delusions are so invasive that petitioner believes they control his every thought and action. As such, petitioner can only accomplish what

technology will allow him to do. Dr. Woods indicated petitioner has no true sense or understanding of his legal rights and liabilities. Dr. Woods opined that the very nature of petitioner's mental condition renders him incompetent to understand his legal rights and liabilities.

Finally, Dr. First testified in rebuttal that Dr. Bernet's diagnosis is erroneous. He challenged many aspects of Dr. Bernet's findings. Having conducted his own evaluation in recent months, Dr. First concluded petitioner suffered from delusional disorder. However, he conceded that delusional disorder is difficult to diagnoses and indicated few cases are known. Dr. First noted the nature of the delusions. His findings substantially matched the core belief and offspring thoughts of petitioner about scientific technology. However, he believes petitioner's delusions rendered petitioner incompetent under Nix during the one-year period.

Even though Dr. First conducted his own relatively recent interview, he relied upon the affidavits of Connie Westfall and Kelly Gleason. While not discounting these submissions, the Court recognizes the advocacy capacity in which both Ms. Westfall and Ms. Gleason serve. However, because they are attempting to save their

client's life, complete reliance upon them by Dr. First must also weigh into his findings.[7]

The Court finds from the testimony that the petitioner perpetuates these thoughts, fantasies or delusions about scientific technology. Certainly, it is troublesome when petitioner references the role of technology in his legal process by telling a given expert that the trials were mock or that his lawyers and participants were actors. It appears petitioner goes into more detail with some experts than he does with others and dwells on the technology thoughts or delusions to a differing degree depending on his audience.

However, the Court finds that, even with these references to technology and mock trials and actors, the petitioner has a firm grasp on the procedural posture of his cases and did so during the limitations period. He understood the direct appeals process describing it as automatic and understood that the post-conviction phase required some action. Admittedly, petitioner's understanding of his recent procedural history is erroneous in some respects but the errors are not based on some mental disorder or defect. These "honest" errors are similar to those errors attributable to the

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[7] The Court also heard from Connie Westfall who is part of the petitioner's defense team. Again, while the Court can certainly appreciate Ms. Westfall's advocate role, the Court must weigh the evidence and make credibility determinations. Ms. Westfall attempted to give what she believed to be objective responses to the questions propounded. However, she also (in her affidavit and testimony) drew her own conclusions or provided her individual interpretation of some of the responses.

various parties involved in the procedural journey into substantially unchartered territory. The Court places no significance on petitioner's technical errors relating to his recent competency and related proceedings in his three cases in two different courts.

It is interesting to note that Dr. Martell said petitioner has maintained for years that he would not pursue post-conviction "appeals." These long-held choices are supported in the record. Petitioner has a great ability to recite the specifics of his cases, including the present Baskin-Robbins case. Petitioner has also discussed pros and cons of having a new trial. He explained to Dr. Bernet that he did not want a new trial and did not want the witnesses to come back in and say those things about him.

Even though Dr. Woods (and to some degree Dr. First) concede petitioner has the ability to make certain minimal decisions, they do so against the backdrop of the scientific technology delusion. Of course, as noted, not all of the experts conclude petitioner is suffering from delusions. Both Dr. Martell and Dr. Bernet indicate petitioner has, even with repeated references to the delusions or fantasies of scientific technology, an understanding of his legal rights and liabilities. The Court accredits their testimony in this regard.

Viewing the record as a whole, the Court concludes petitioner has consistently spoken of scientific technology over the years, including his years in the Texas legal

system and at the time of the instant trial. Therefore, claims of delusions are not new to petitioner's history. While varying diagnoses were made in Texas, petitioner was deemed competent to stand trial in the instant case. The Court recognizes that competency can change over time. Our appellate courts also understand that competency can not only evolve but may, when questioned, require different considerations at different levels of a criminal case. Here, they found the Nix civil competency standard most aptly fits the present circumstances.

When applying the facts of this case to the considerations described in the Nix standard, the Court must conclude that petitioner has failed to meet his burden of establishing (by clear and convincing evidence) that he is either unable to manage his personal affairs or understand his legal rights and liabilities.

Accordingly, petitioner's one-year statutory limitations period for filing for post-conviction relief has expired. Further, because petititioner was competent during the one-year period, the next-friend petition is dismissed.

CONCLUSION

For the reasons cited above, the Court finds petitioner has failed to meet his burden of establishing his incompetency during the statutory limitations period under the Nix standard by clear and convincing evidence. Because the statute of

limitations period is not tolled, petitioner has failed to timely file for post-conviction relief. The next-friend petition is dismissed or otherwise barred.

IT IS SO ORDERED, this the 18th day of December, 2008.

John H. Gasaway, III
Circuit Judge