perfectly good explanation. Petitioner told Dr. Bernet that he had gotten released from prison in 1990 after serving several years for armed robberies. Upon petitioner's release an examining mental health professional found no mental disorders and no need for treatment. However, approximately one year or so later, petitioner initiated a plan to get his life straightened. The plan included an attempt to get the armed robbery convictions reversed because petitioner believed he should have been found not guilty by reason of insanity as in past convictions. To that end, petitioner began writing letters to the governor and circulating information about surveillance. He said he hoped to get people's attention and in turn get his convictions reversed. Dr. Bernet said petitioner told him the plan did not work or did not fly.

Dr. Bernet noted another occasion that petitioner mentioned surveillance though not facing legal troubles. He noted petitioner's mention of technology or surveillance in a letter to Linda Patton. Apparently, when Ms. Patton told him it was not true and that he should not be writing about it, petitioner did not mention it to her anymore. Dr. Bernet said petitioner brings up different topics depending on the audience. If the audience seems interested in hearing about it he will talk about the fabricated ideas; however, if the audience does not want to hear it, petitioner will talk about other things.

Dr. Bernet was asked how other topics such as the presidential race and Coach Summitt worked themselves into the conversation. He explained that during a camcorder malfunction, petitioner brought up these other topics. Dr. Bernet said government technology was not mentioned while discussing the current events and topics. However, he noted that petitioner enjoys talking about scientific technology if he has a receptive audience.

Addressing petitioner's ability to manage his personal affairs, Dr. Bernet spoke with petitioner about his basis daily activities. He said petitioner went to great lengths about how he plans his day and makes daily decisions including his exercise regimen, selection of nutritious foods, and suitable television programs. Dr. Bernet said they also talked about petitioner's medical care including bouts with depression for which he took an antidepressant. Dr. Bernet said petitioner indicated he was most depressed because of government surveillance but most elated when speaking of his fiancee Susan.

Dr. Bernet turned back to the discussion about petitioner's references to Susan. Dr. Bernet said petitioner uses fantasy to make up stories as a psychological defense or defense mechanism to protect him from unpleasant feelings or thoughts. In the same way Dr. Bernet believes the surveillance stories are useful to petitioner, Dr. Bernet believes the fantasy about Susan is useful to petitioner in thinking about his future, noting the reality that petitioner will either remain in prison or will be executed. Dr. Bernet said making up the idea of a woman is a perfectly sensible and adaptive mechanism. Dr. Bernet said he found it interesting that one fantasy focuses on the past (government surveillance) while the other focuses on the future (fiancee Susan). Dr. Bernet said these are petitioner's thoughts and fantasies rather than delusions in part because he shares them with others.

When asked about Dr. Woods' testimony that Elavil could be detrimental in a person who is psychotic, Dr. Bernet conceded that some times antidepressants can cause side effects and cause people to be manic or psychotic. However, he did not believe such was happening with petitioner and noted he hoped petitioner would remain on his Elavil because it appears to be having the desired effect. Noting petitioner's mention of the government surveillance upon his arrest in 1997, Dr. Bernet said petitioner was using the

story at that time and was not yet taking Elavil.

Dr. Bernet was asked what type of methodology exists or should be utilized in analyzing whether a person is delusional. He testified that there are a number of things to do including interviewing the person and conducting different types of testing. Dr. Bernet noted here that petitioner has brain scans which revealed some atrophy of the anterior part of his left temporal lobe. While he agreed that some people with brain damage do have delusions, Dr. Bernet cited a recent article which indicated about five percent of the people who have brain injury (in most cases much more severe than petitioner's injury) will have delusions.

Dr. Bernet said he also believes certain types of psychological testing could be helpful. He added that petitioner has been tested many times with varied results. Dr. Bernet said the most recent testing given to him by Dr. Martell indicated exaggeration of psychiatric symptoms. He said the person's history is really helpful in determining whether it is more consistent with the alleged mental disorder or more consistent with malingering. Citing a book by Richard Rogers on the subject of psychiatric malingering, Dr. Bernet noted the idea that people with delusions don't usually talk about them with others and the idea that people with delusions usually act on them in some way. For example, he noted that a person who makes claims of surveillance will typically try to find out the method of surveillance in an attempt to make it go away.

As to petitioner, Dr. Bernet opined what is most important in petitioner's case is putting together all of the different evaluations and accumulated information. Dr. Bernet found it significant that petitioner himself described how he made up the symptoms since 1977. Dr. Bernet said this thirty years of fabricating symptoms is very important as

petitioner has gotten better and better. Not only did petitioner tell Dr. Bernet that he made up the symptoms but similarly told Dr. Auble, Dr. Turner-Graham, Dr. Craddock and Dr. Farooque. According to Dr. Bernet each mental health professional in different interviews that he made up the surveillance idea. Petitioner also told a friend in Texas named Dana about the surveillance, describing it as "brain tease."

Dr. Bernet disagreed with Dr. Woods that petitioner's condition has gradually worsened. He said if you took the records at face value, petitioner was much worse in Texas. On the other hand, if you look at the course of petitioner's illness, it is extremely consistent with malingering, citing the recurrence of symptoms when in legal trouble. Dr. Bernet concedes that some aspects first look like delusions but when looking at the whole picture he concludes it is more likely fabrication than delusion.

Dr. Bernet said his opinions were to a reasonable degree of medical/psychiatric certainty. He concludes that petitioner did not meet the standard for incompetency.

On cross-examination, Dr. Bernet was asked about his conversation with Officer Slaughter. He said he was not present when Officer Slaughter testified at an earlier hearing that he had only brief contact with petitioner. Dr. Bernet agreed that Slaughter did not have more extensive conversations with petitioner than mentioned in the earlier testimony. However, Dr. Bernet explained it was his impression that Slaughter has occasional contact directly with petitioner and also heard about petitioner from other officers. Dr. Bernet said Ms. Wolfenbarker may not actually have seen petitioner but that it was his impression that she occasionally saw him and knew about his care from the records. He conceded she was not the primary treatment provider.

Dr. Bernet was asked about a portion of his 1999 evaluation of petitioner and agreed

that delusional disorder was his diagnoses at that time in January 1999. He also agreed that the report indicated at that time that Dr. Bernet believed some of the other mental problems, other than schizophrenia, were legitimate. Dr. Bernet was asked to read from a portion of his 2007 report which indicated the belief system was useful to petitioner as a defense mechanism.

When asked about the recent report and the single reference to the term "pseudologia fantastic" as mentioned in the 2007 report, Dr. Bernet explained that he thought the concept of pathological lying would be helpful to the court and everyone else in explaining petitioner's condition. He said the term "pseudologia fantastica" instead became a diversion from the fundamental issues of the case. In an attempt to avoid the unnecessary discussion, Dr. Bernet removed the term and described it as unnecessary to his conclusions. He replaced the term with repetitive lying and persistent lying.

Dr. Bernet first agreed he used the term "belief system" and that the term related to petitioner's claims of scientific technology. However, he clarified the term to indicate he was not necessarily positive petitioner actually believes these things. Although he agreed to use the term as a label, Dr. Bernet said he was not using the term in agreement that petitioner actually believes all of the things he says about scientific technology. Dr. Bernet was then questioned about a number of references to the term "believes" or "belief system" in his report. Dr. Bernet acknowledged he used those terms but again explained the terms could more appropriately be described as "lying," "fabrication," "deception," and "fantasy." Dr. Bernet said petitioner seems to have insight as to some of his lies but possibly does not as to others. However, Dr. Bernet said he did not want the term "belief system" to be used to indicate an acknowledgment that petitioner has no insight at all.

As an example of petitioner's insight, Dr. Bernet referenced a point in the interview during which Dr. Bernet was explaining how he thought petitioner used the idea of government surveillance to help him feel better and to cover up unpleasant thoughts. Dr. Bernet said petitioner seemed to be agreeing with him. He added that this discussion arose during petitioner's questioning as to what Dr. Bernet thought about his condition.

Dr. Bernet acknowledged that petitioner does not like for people to say he is mentally ill. Dr. Bernet said petitioner does not get defensive when he speaks of certain aspects of his mental condition, such as the atrophy in his brain. However, Dr. Bernet noted that petitioner gets defensive about certain other things. Dr. Bernet was again questioned about each and every reference to the term "belief" or "belief system" in is report. He agreed that on each instance these terms were used he did not give the lack of insight explanation.

Dr. Bernet said that regardless of the term used, scientific technology is a part of petitioner's thoughts. He agreed that the system involves scientific technology and surveillance even though petitioner cannot determine the technology method used. Dr. Bernet also agreed that petitioner's "belief system" or "fantasy" includes, among other things, petitioner's belief that tapes of his every move have been released to the public; that the technology can cause him physical pain and discomfort; and that the technology can affect his mind and his memory.

When asked about his 2007 testimony, Dr. Bernet recalled only generally the previous discussion about bizarre and non-bizarre delusions. He explained that some delusions fall cleanly into either category while others fall within a gray area. Dr. Bernet said a delusion that radiation or electromagnetic waves may affect a person's thoughts would fall into this middle category but recognized that other professionals disagree on

what constitutes bizarre or non-bizarre delusions. He acknowledged that petitioner's thoughts are that technology causes petitioner physical torture such as ringing in his ears and can control his environment such as the court proceedings, which petitioner has some times described as mock. Dr. Bernet said he did not know if the story about "Susan" was part of the belief system or was just simply a false statement. Dr. Bernet recalled generally Dr. Woods' prior testimony that Elavil could affect or exacerbate delusions.

Dr. Bernet agreed that his diagnosis diverges from Dr. Martell and Dr. Woods in that he does not believe petitioner operates in a delusional system at all. Further, Dr. Bernet adhered to his diagnosis that the petitioner is a persistent liar and uses the stories or fantasies as a defense mechanism. Speaking generally about delusions, Dr. Bernet said delusional people often realize other people don't agree with them. He added that at times a delusional individual will deny their delusions or deny they really thought a particular way. However, as to petitioner, Dr. Bernet said this type of denial is not present in petitioner. Instead, Dr. Bernet opines that petitioner actually meant he had made up the stories about government surveillance or scientific technology.

When asked whether he believed pseudologia fantastica and delusional disorder are mutually exclusive, Dr. Bernet recalled being asked the question in 2007 but again responded that he saw no particular reason why both could not be present. He added that he simply had never heard of anyone describing the co-existence of the two or having studied it but indicated it was theoretically possible.

When asked about conclusions in his 2007 report, Dr. Bernet recalled having earlier found that the thoughts serve as a defense mechanism and can be helpful to petitioner in that it allows petitioner not to think about the horrible crimes he committed. Dr. Bernet then

again responded to a series of questions about his diagnosis including whether these thoughts are delusional or are fabricated. He was also again asked about the aspects of a defense mechanism and how petitioner uses these thoughts to protect himself. Counsel then challenged Dr. Bernet on a number of varying thoughts about defense mechanisms. Counsel questioned Dr. Bernet about the mental health records beginning in Texas, including the prior diagnoses and medications prescribed.

Dr. Bernet was directed to his assessment of petitioner's competency under the Nix standard. Counsel questioned Dr. Bernet as to why he attempted to explain petitioner's present position as to the McDonald's case if he was actually trying to determine petitioner's understanding. Dr. Bernet responded that such questioning (or education of petitioner) can be part of the competency assessment. Dr. Bernet said that while he employed those methods to some degree here, he also allowed petitioner to relate his own understanding of the nature of the legal proceedings.

Dr. Bernet said he tried to develop a good understanding of his own as to petitioner's present legal status but admitted he did not know if he was completely correct. He could not recall if he reviewed the pro se petition filed in the Captain D's case. Dr. Bernet also cited the materials he reviewed to reach his understanding of the Nix standard. He said he had read the case law and understood that Nix had been referred to as the "civil standard." Dr. Bernet said he had been involved in civil competency matters, including competency to make a will. He said he could not recall the distinction between functional capacity and decisional capacity. Dr. Bernet said he did not combine the personal affairs and legal affairs analysis.

Dr. Bernet gave examples of what he believed to be petitioner's "personal affairs."

He said he had an understanding of petitioner's living conditions at Brushy Mountain. When counsel presented an example of an Alzheimer's patient residing in an assisted living facility making certain basic decisions, Dr. Bernet agreed that a person could make those basic decisions (in the hypothetical) and still be incompetent under the civil incompetency standard. He also recalled petitioner's story about Susan and the discussion about his will.

Dr. Bernet conceded that petitioner has some confusion about the recent status of his cases. However, he found petitioner understood the basic principles and basic issues. He also agreed that petitioner was confused about the December 2007 decision of the Court. Dr. Bernet attributed the confusion to petitioner's complicated legal situation and noted that even he (Dr. Bernet) had difficulty some times following the legal status of the various cases.

Next, Dr. Bernet was questioned about his conversation with petitioner about the pros and cons of proceeding with the post-conviction hearing and perhaps getting a new trial. He acknowledged that petitioner's first response related to scientific technology but he noted that his job was to determine whether petitioner could coherently and logically discuss the pros and cons where he is not being controlled by the technology. Dr. Bernet found that petitioner could do so without significant reference to his fantasy life. Counsel questioned Dr. Bernet about each entry of his 2008 interview and report. Even though Dr. Bernet agreed that certain portions could be subject to a different interpretation, he said he adhered to his findings.

Dr. Bernet agreed one possibility is that petitioner's delusions are true delusions and his desire to drop his case is a true desire. He also agreed that a second possibility could

be that the delusions are true delusions but that his desire to end his appeals is not a true desire. The third possibility acknowledged by Dr. Bernet is that delusions are made up but that his desire to stop the legal processes is true. A final possibility presented to Dr. Bernet is that petitioner's delusions are not real and that the desire to stop his appeals is not real. Dr. Bernet said he did not agree all possibilities were equal.

Dr. Bernet reached the conclusion that petitioner's delusions are not real but that his desire to stop his appeals (post-conviction proceedings) is real. Dr. Bernet noted that petitioner has been insistent on dropping his appeals. He said petitioner's mention of scientific technology helps him cope with the horrible facts of the case but notes that avoiding a new trial accomplishes the same purpose. Both avenues prevent petitioner from dealing with the bad things that happened.

Dr. Bernet was not deflected from his opinion that petitioner used these stories when in legal trouble. He noted the letter writing campaign instituted by petitioner to Governor Richards of Texas even though he was no longer in prison and the letter(s) to Linda Patton. Dr. Bernet said petitioner told him he wrote the letters in an attempt to clear his name on the prior convictions upon release from prison.

At the conclusion of the cross-examination, the Court asked Dr. Bernet a series of questions relating back to the testimony at the Rule 28 hearing conducted in 2007 but in light of the updated examination in 2008 and the Nix competency standard. Dr. Bernet essentially concluded again that either petitioner is a non-psychotic prevaricating individual who sometimes pretends to be delusional or petitioner is severely psychotic delusional and sometimes pretends to be totally free of the delusions.

As to whether petitioner can manage his personal affairs or understand his legal

rights and liabilities and whether petitioner is lying about his understanding about whether or not he wants to drop his appeals, Dr. Bernet opined that petitioner is honest in his opinion about the appeals and the opinions about a new trial. When asked how Dr. Bernet reached this conclusion after describing petitioner as an individual who repetitively lies, Dr. Bernet said petitioner's understanding and desire fits the big picture that he is able to explain. According to Dr. Bernet, petitioner is able to articulate various logical reasons for his position that he desires to drop his appeals. He said petitioner understands what happened at the original trials and what might happen if he is granted a new trial. Dr. Bernet said these responses fit logically into petitioner's personality style in that he wants others to think well of him. Petitioner does not want all of those matters rehashed at a new trial.

Dr. Bernet said that even if the delusion were real, petitioner nonetheless was able to give logical responses as to why he did not want a new trial. He noted that petitioner was able to discuss the pros and cons of a new trial in a logical way without reference to the delusion or belief system. Dr. Bernet said that if petitioner were delusional it would be more difficult to find him to be convinced petitioner is competent. Even though he would still likely arrive at the conclusion that petitioner is competent, Dr. Bernet said he was unsure as to how convinced he would be.

Exploring the alternative that petitioner is an individual who as lied so many times that he does not know when he is telling the truth, Dr. Bernet said it supports the idea that petitioner holds to this defense mechanism. Dr. Bernet said petitioner is able to put the surveillance story away and talk coherently about his situation. He believes petitioner is saving face by not having to rehash the information revealed at trial.

Next, the Court asked specifically about each case. First, the Court inquired into the Captain D's case in which petitioner has already filed a pro se petition. Dr. Bernet concluded that petitioner is competent to proceed on that petition. As to the McDonald's case in which petitioner failed to timely file his own post-conviction petition for relief, Dr. Bernet testified that he would find petitioner competent during the statutory limitations period because petitioner has been consistent in his responses.

During re-direct examination, Dr. Bernet was questioned about whether petitioner has ever failed to bring up scientific technology in a forensic setting. Dr. Bernet said in distinguishing between clinical and forensic settings, he had no recollection of petitioner bringing up these "delusions" with any other psychiatric treaters with the exception of possibly on occasion. Dr. Bernet recalled that the files may contain one occasion at Brushy Mountain wherein petitioner mentioned government surveillance. He added that the TDOC nurse he spoke with had no record of such a mention. Dr. Bernet said he found it significant since petitioner picks his audience by talking about government surveillance to people who are interested in it.

On re-cross-examination, Dr. Bernet said he did not recall certain TDOC records that mentioned Dr. Arney and scientific technology. Dr. Bernet agreed that petitioner tries to save face by trying to appear sane and competent.

April 23 2008 Report

Dr. William Bernet prepared a document entitled "Forensic Psychiatric Evaluation" based on an April 11, 2008 interview conducted at Riverbend Maximum Security Prison in Nashville, Tennessee. Dr. Bernet indicated that on the given occasion he had been

contacted by Deputy District Attorney General Tom Thurman for the purposes of conducting a forensic psychiatric evaluation of petitioner.

According to the report, Dr. Bernet said he was asked to examine petitioner's competency relating to two post-conviction cases – Captain D's case and the McDonald's case. As to the Captain D's case, Dr. Bernet notes petitioner's filing of a post-conviction petition but later attempt to withdraw it. The report erroneously indicates Judge Blackburn found petitioner incompetent to withdraw his petition. Dr. Bernet narrowed the issue on the Captain D's case to whether petitioner is currently competent to proceed on his previously-filed pro se post-conviction petition.

As to the McDonald's case, Dr. Bernet frames the issue as to whether petitioner is competent to timely file a post-conviction petition. More specifically, whether the statute is tolled since petitioner has not yet filed a post-conviction petition in that case.

Dr. Bernet indicated he was provided with Judge Blackburn's February 25, 2008 order and a related decision (Reid v. State - February 2, 2006 Session). From these documents, Dr. Bernet surmised that the applicable competency standard was that standard enunciated in State v. Nix, 40 S.W.3d 459 (Tenn. 2001) – "a petitioner is incompetent if he is unable to manage his personal affairs or to understand his legal rights and liabilities." He also correctly noted that the petitioner bears the burden of proving he is incompetent by clear and convincing evidence. Dr. Bernet commented that the civil standard found in Nix is less stringent than the standard for a defendant to be competent to stand trial, noting as an example that petitioner does not have to have the capacity to consult with his attorney and assist in preparing his case.

Dr. Bernet described his procedure for conducting the evaluation on April 11, 2008

at Riverbend which lasted for 2.4 hours. Dr. Bernet said he informed petitioner that the interview was being conducted on behalf of Mr. Thurman and would not be confidential. In addition, Dr. Bernet noted that he had a telephone conversation with Unit Manager Michael Slaughter and another telephone conversation with Ms. Sharon Wolfenbarger, the nurse in charge of the mental health clinic at Riverbend.

Dr. Bernet's report contained summaries of past interviews with the petitioner. Dr. Bernet briefly summarized his January and September 1999 evaluations. He also referenced the February 2007 evaluations discussed elsewhere in this Order. Dr. Bernet noted that in January 1999 that petitioner was evaluated in the Baskin-Robbins case in Montgomery. The focus of the interview was the penalty phase of the capital trial. At that time, Dr. Bernet concluded that petitioner suffered from delusional disorder, persecutory type. The delusions noted at that time related to government surveillance. Dr. Bernet noted at that time that petitioner was probably born with cerebral dysfunction which was aggravated by head injuries. He described petitioner as friendly, outgoing and talkative. Dr. Bernet briefly noted a prior hospitalization in 1984-87 following a diagnosis of bipolar disorder, manic. He also noted antisocial personality disorder. The summary of the January 1999 evaluation also noted petitioner's apparent fabrication of schizophrenia symptoms during Texas evaluations in the 1980s.

Next, the report summarized the September 1999 evaluation conducted by Dr. Bernet just prior to the Montgomery County trial. He explained that the purpose of the evaluation was to assess petitioner's competency to stand trial. Dr. Bernet concluded that petitioner was competent to stand trial, noting that his mental problems were not serious enough to affect his competency to stand trial. He noted that petitioner malingered "sick"

and malingered "well." He remarks that when he interviewed petitioner in September 1999, petitioner actually admitted that he had fabricated the delusions about government surveillance. Dr. Bernet stated that the explanation made sense in the context of his history of lying and antisocial activities. The explanation given by petitioner was that he used mental illness of some type when he faced legal troubles.

When Dr. Bernet asked him during that interview why he persisted with the government surveillance idea, petitioner explained that he was not able to separate fantasy from reality since he had told it so many times. Dr. Bernet said petitioner told him specifically that he had never been under government surveillance. Petitioner admitted he has various learning and hearing problems. He also admitted he had joked about the government surveillance idea including the time he was arrested in Ashland City, Tennessee.

Dr. Bernet indicated in his report that he had also reviewed a letter from Kelly Gleason to Tom Thurman; a statement by Dr. George Woods; a summary report and addendum from Dr. Ruben Gur; and a letter from Dr. Robert Kessler to Henry Martin.

In the portion entitled "Mental Status Examination," Dr. Bernet noted petitioner was well nourished and healthy appearing. He described his physical appearance and noted petitioner was polite and cooperative. The report indicates petitioner was alert and oriented as to place, person and purpose of the interview. Dr. Bernet noted petitioner's occasional mispronunciation of various words but expressed his belief that these were not neologisms.

Dr. Bernet said that petitioner was logical and coherent with no evidence of thought disorder or psychosis. Petitioner's memory was noted as intact as to remote and recent

events. Petitioner did not exhibit loose associations or tangential thinking. As to content of thoughts and speech, Dr. Bernet noted that petitioner mentioned the same story he had on other occasions relating to government monitoring. Petitioner told Dr. Bernet of his understanding of his legal rights and liabilities and his management of his daily affairs.

The report described petitioner's mood at euthymic, noting a postive upbeat manner despite facing the death penalty. Dr. Bernet also indicated that petitioner manifested partial insight into his use of the government surveillance story as a defense mechanism and its use to help him feel better about his situation and himself.[7]

Following Dr. Bernet's summary of his April 11, 2008 interview, the report contains a section entitled "Collateral Information." In this section, Dr. Bernet describes telephone conversations/interviews he had with Unit Manager Michael Slaughter (the officer in charge of Unit 2 at Riverbend) and with Sharon Wolfenbarger (nurse in charge of the Riverbend mental health clinic). Mr. Slaughter told Dr. Bernet that he had not noticed any problem with petitioner's behavior, describing petitioner as quiet, cordial and friendly. Mr. Slaughter explained that petitioner eats his meals and cooperates with he has attorney meetings. When asked if petitioner talked about government surveillance or television monitoring, Mr. Slaughter said he heard something like that years ago but not since then.

Ms. Wolfenbarger gave Dr. Bernet a summary of petitioner's file. The file indicated Dr. Glenn saw petitioner in August 2006 at which time petitioner related a history of depression since 1997. Dr. Glenn diagnosed adjustment disorder with depressed mood and antisocial personality disorder. Dr. Glenn treated petitioner with Elavil. The most

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[7] Dr. Bernet also summarized his April 11, 2008 interview with petitioner. The Court's summary of the interview is set out in this Order below.

recent appointment at the clinic was noted as April 21, 2008 with psychiatrist, Laura d'Angelo, M.D. Dr. d'Angelo continued the diagnosis of adjustment disorder with depressed mood and continued the Elavil.

Ms. Wolfenbarger said that petitioner was seen by a psychiatrist or other mental health professional every two months. The progress notes indicated petitioner was "doing well," "was well groomed," "bright affect," and "happy." In July 2007, petitioner told the mental health staff he some times slept with his light on when he had weird dreams. Nothing in the progress notes (from Riverbend or Brushy Mountain) referenced paranoid thoughts or government surveillance. Ms. Wolfenbarger said she had not heard about those topics even in an informal manner.

Dr. Bernet next outlined his current diagnoses under Axis I through Axis 5 as follows:

Axis I:	Adjustment disorder with depressed mood Mixed receptive-expressive language disorder Malingering
Axis II:	Antisocial personality disorder
Axis III:	Hearing impairment in left ear History of closed head injuries
Axis IV:	Psychosocial stressors include prison confinement and prospect of death penalty
Axis V:	Global assessment of functioning - 55 (current)

Next, Dr. Bernet expressed his conclusions to a reasonable degree of medical certainty.

First, Dr. Bernet described what he termed "a long history of lying about a variety of mental symptoms." He noted that persistent lying is a common feature of both antisocial personality disorder and psychopathy. Referring to his earlier reports, Dr. Bernet described

a life-long history of lying dating back to a history of malingering mental disorders during his 1978 evaluations. Dr. Bernet said some of the early Texas mental health professionals also noted malingering. He added that petitioner told him (Dr. Bernet) and other professionals that he made up the delusion about government surveillance. Dr. Bernet found it notable that while petitioner has told his attorneys about the scientific technology, he has not shared those ideas with the treating psychiatrists at Riverbend.

Dr. Bernet referred back to his February 2007 evaluation and the extensive discussion as to how petitioner's stories about government surveillance were much more consistent with lying and malingering than with organic psychosis, delusional disorder or paranoid schizophrenia. As noted in the 2007 report, Dr. Bernet recognized that the most significant factor was the course of petitioner's "illness." He noticed that the psychotic symptoms were almost completely related to petitioner's involvement with the legal system. Dr. Bernet noted that petitioner had no history of mental illness until his arrest for armed robbery in 1978 at age 20. At that time he used the symptoms and was found not guilty by reason of insanity and released.

While in the community, petitioner had no psychotic symptoms at all through his employment and marriage. However, when arrested in 1982 for multiple armed robberies, petitioner promptly had a recurrence of dramatic psychiatric symptoms. He again hoped to be found not guilty by reason of insanity; however, this second attempt to do so failed. When he was eventually released from prison, petitioner was declared free of mental illness. When arrested in 1997, petitioner began talking to the arresting officers about government surveillance.

In the next section of his report, Dr. Bernet indicated that there are clear

psychodynamic explanations for petitioner's fabrication accounts of government surveillance and his engagement to "Susan." Dr. Bernet noted that with the history of antisocial personality disorder and psychopathy, petitioner was accustomed to lying about many topics as long as it served his best interest. Dr. Bernet stated that petitioner has strong narcissistic traits; therefore, much of his behavior is for the purpose of improving his self image. Dr. Bernet cited as examples past expenditures for body building and plastic surgery and lying on records about his high school and his age.

Dr. Bernet said the story about government surveillance started in the 1980s and took a life of its own. The story was resurrected in 1997 upon his arrest. Dr. Bernet said the story was enlarged upon and adapted to fit his current situation. He said petitioner used the story as a defense mechanism to prove to himself and other people that he did not kill seven people. Petitioner reasoned that he obviously would not have committed a crime while under constant surveillance by scientific technology.

The story about a woman named "Susan" started after his arrest in 1997. During the February 2007 interview, petitioner referred to her as "April." The instant evaluation revealed more details about the relationship outlining petitioner's future plans with her after his release. Dr. Bernet indicated that the story of fantasy about Susan is a defense mechanism that protects petitioner from the unpleasant thoughts of spending the rest of his life in prison.

Dr. Bernet opined that these stories/fantasies/lies protect petitioner from a depressing, hopeless and helpless situation. With these stories in place, petitioner is able to be cheerful and optimistic. Dr. Bernet concluded that even though these stories are an important part of petitioner's mental make-up, they do not prevent him from being

competent to proceed with a post-conviction hearing.

Next, Dr. Bernet addresses both prongs of the Nix competency standard. First, he discussed the prong dealing with petitioner's ability to manage his personal affairs. Dr. Bernet said the most important source of information for this analysis originated with the personal interview. Even though petitioner has had extensive psychological and neuropsychological testing and neurological assessments and brain scans, none directly address the competency issue now before the Court. During the interview, Dr. Bernet asked petitioner questions about his ability to manage his personal affairs. Although confined in prison, petitioner made it clear that he makes a number of daily decisions. Petitioner spoke at length in a coherent, logical and sensible manner about his current medical and financial decisions. Petitioner also explained how he would make a valid will. Petitioner also stressed the importance of maintaining a health lifestyle including a nutritious diet and exercise. From this information, Dr. Bernet concluded that petitioner is competent to manage his personal affairs.

As to the next Nix prong, Dr. Bernet examined whether petitioner understood his legal rights and liabilities. Referring to the interview, Dr. Bernet said petitioner understood basis facts about the scheduled competency hearing and the post-conviction hearing that may occur. Petitioner understood that if he lost the post-conviction hearing and subsequent state and federal appeals, an execution date would be set. Petitioner also understood that if he won at the post-conviction hearing, he could receive a new trial. Petitioner reasoned that even if he received a new trial, the outcome would be the same as the first trial. Petitioner told Dr. Bernet that a new trial would be frustrating and unpleasant as it would force him to hear witnesses saying negative things about him.

Petitioner clearly and strongly expressed the opinion he did not want a new trial.

Dr. Bernet noted that some of petitioner's understanding of the legal process was not completely correct. Dr. Bernet expressed some uncertainty himself as to the subsequent procedures. He stated that he would not expect petitioner to know and understand every facet of his legal situation. However, he said petitioner appeared to have the capacity to understand the information that was explained to him.

In conclusion, Dr. Bernet found petitioner competent under the Nix standard. He also noted that it would be harmful to petitioner to try to treat his mental condition. Because the stories about government surveillance and the engagement to Susan do not affect petitioner's functioning, Dr. Bernet finds no need to remove these stories from petitioner's repertory of mental mechanisms. He again explained that these serve as defense mechanisms and protect petitioner from very unpleasant thoughts and feelings. The stories do not compromise petitioner's ability to manage his affairs or understand his legal rights and liabilities.

April 11, 2008 Interview with Petitioner

As cited in his report, Dr. Bernet conducted an interview of petitioner on April 11, 2008 at Riverbend. At the outset, Dr. Bernet asked petitioner to write down certain responses on paper including his name, date of birth, location of interview along with petitioner's understanding of the purpose of the interview. Petitioner indicated that he understood Dr. Bernet's purpose was to discuss petitioner's mental status.

Petitioner recalled the last interview with Dr. Bernet and also recalled the name of Rebecca Ezuble, a young lady who assisted Dr. Bernet during the prior interview. Dr.

Bernet explained to petitioner that even though Judge Blackburn was responsible for the interview in 2007, the present interview was requested by Deputy District Attorney General Tom Thurman. Dr. Bernet informed petitioner that the contents of their discussion would not be confidential. Dr. Bernet further explained to petitioner that the purpose generally of the current interview was to examine petitioner's competency to participate at this stage of the proceedings including both the Captain D's and McDonald's cases.

When asked what he recalled about the prior interview in 2007, petitioner remembered being in Judge Blackburn's courtroom accompanied by counsel. He also recalled that the court had appointed an attorney ad litem or an independent attorney. Petitioner said the proceedings lasted for hours with the last part of the "meeting" occurring on September 4 and 5, 2007. Petitioner explained that Dr. Bernet had testified for a long time along with Dr. Glen from Riverbend. He recalled being asked about waiving the privilege with Dr. Glen. Even though he knew the matter had been taken under advisement, petitioner said he never received any papers from the hearing.

In summarizing Dr. Bernet's testimony from the 2007 hearing, petitioner said that Dr. Bernet talked about waxing and waning and petitioner's mental status. Petitioner's understanding was that Dr. Bernet concluded petitioner had some type of mental dysfunction. Dr. Bernet explained that in 2007 he had been asked to determine whether petitioner was competent to withdraw his post-conviction petition in the Captain D's case. Petitioner originally thought both Dr. Woods and Dr. Bernet found him not to be competent. However, Dr. Bernet explained that only Dr. Woods found him incompetent while Dr. Bernet found him competent. Dr. Bernet expressed his belief that the Court had found petitioner incompetent to waive his post-conviction petition.

Dr. Bernet explained that the case had returned on the issue of petitioner's competency to proceed or move forward with the Captain D's petition. Petitioner recalled writing a letter requesting permission to withdraw his petition. He recalled the issue coming up on more than one occasion.

When asked about the status of the McDonald's case, petitioner recalled an execution date had been set in January 2007; however, but that all executions had been postponed while the issue of the legality of the chemicals was addressed. Petitioner said he had never personally filed a post-conviction petition in the McDonald's case but that someone had filed one on his behalf. Dr. Bernet explained to petitioner that the Captain D's case and McDonald's case were in different phases indicating a petition was filed in the Captain D's case while none had been filed in the McDonald's case.

Dr. Bernet asked petitioner specifically about his understanding of the Captain D's case. Petitioner said if Judge Blackburn upheld the convictions (or if he lost) he would be assigned an execution date; he would eventually be placed on death watch for 72 hours and then be executed. Petitioner expressed his understanding that there could be an appeal to the United States Supreme Court and that there would be other federal appeals.

Petitioner said he understood the direct appeals process and that it was automatic. Petitioner further knew that the next series of appeals would relate to claims Mr. Engle (trial counsel) gave "insufficient counseling" during his representation. When asked if he understood what would happen if he held the post-conviction hearing and the court determined that he did not have qualified counsel, petitioner said a new trial could be granted.

Dr. Bernet asked petitioner if he wanted to go forward with the post-conviction

hearing once he got through the competency hearing. Petitioner responded that he totally opposed proceeding with the post-conviction. He explained that he accepted the outcome of the first trial and did not wish to make any inquiries or requests whatsoever for a new trial. Petitioner acknowledged the possibility of some benefit but maintained that he did not want a new trial even if there was exculpatory evidence that could vindicate him.

Dr. Bernet asked petitioner to list the pros and cons of a new trial. Petitioner cited the existence of the surveillance tapes held by scientific technology. He said the tapes would show his whereabouts during the times of the homicides. However, he did not want to sit through a trial and be subjected to the humiliation a second time. He recalled that at the first trial various things were spoken about him some of which was true and others that were false or fabricated. Petitioner said he did not want to engage in any of those activities again. He said the first jury found him guilty and sentenced him to death.

When asked specifically about the humiliating aspect of the trial, petitioner referenced his sister's testimony that he had tried to molest her. Petitioner said he never tried to molest her but that the testimony injured his reputation and hurt his chances of being in country music or attending college. He also mentioned other testimony about him having a ponytail in 1997 and references to letters he had written to other people. Petitioner did not want people to say things about him that were incorrect.

Petitioner next spoke of the testimony at trial about the large amount of coins he kept in apple cider jugs, along with the related testimony that a large sum of money had been taken at Captain D's. He next took issue with the testimony about the tennis shoes he owned and the shoe tread. Petitioner said trial counsel failed to challenge the testimony about the large sum of change and the tennis shoes. Among other things he wanted Mr.

Engle to have the photo enlarged so as to compare the shoe print and tread.

Dr. Bernet summarized these claims and told petitioner these were ineffective assistance claims that could be used at a post-conviction hearing and possibly result in a new trial. Again, petitioner said he agreed but opposed a new trial. Petitioner said he did not want to sit through another trial while false testimony was presented about him. Petitioner agreed with Dr. Bernet's summary of petitioner's position that a new trial would not likely change the outcome.

Dr. Bernet asked petitioner if his position would be different if by a long shot he was found not guilty. Petitioner said he acknowledged that possibility but said he would not venture there. He said he had a trial and that while he did not appreciate the outcome of the trial, he will live with the results.

Petitioner next talked about sports including the back-to back national titles for the Lady Vols under Coach Pat Summit. He explained that finding a coach like Coach Summit was like uncovering a gold needle in a haystack. Petitioner said the gamble of trying a young untested Pat Summit paid off in the form of eight championship titles. He added that he believed she would win at least three more during her tenure at the University of Tennessee, surpassing John Wooden's string of championships with UCLA. Petitioner concluded that even though Coach Summit lost a number of star players to the draft, he still believed she would recruit another powerhouse team.

Dr. Bernet recapped their discussions about the pros and cons of proceeding with the post-conviction petition. Petitioner agreed that even if he is found competent in the Captain D's case, his attorneys will still pursue the pro se post-conviction petition because Judge Blackburn would not permit him to withdraw it. Petitioner erroneously thought that

if he is found incompetent his post-convictions would stop until he is deemed competent to continue. Dr. Bernet corrected the confusion and told petitioner the court would appoint a guardian ad litem or next friend to pursue the matter. When reminded, petitioner recalled that his sister, Linda Martiniano, desired to proceed on his behalf. Petitioner believed that in the federal proceedings his sister did not initiate the next friend petition on her own due to her lack of knowledge on the law. He opined that the federal attorneys sought out his sister and asked her to volunteer her signature on the necessary documents.

As to any appointment of Linda Martiniano as next friend, petitioner characterized her as a "fair weathered friend" explaining that she had not been in touch with him for a number of years. He noted that the two had the same mother but described their relationship as "estranged." Petitioner said they had not been in touch for over twenty years.

Addressing the specific applicable competency standard, Dr. Bernet asked petitioner about managing his personal affairs. First, petitioner described the process whereby he requests medical care when needed. During this conversation, the petitioner turned the interview to a discussion about Elavil and the effects of Elavil on him, including alleviation of depression and suicidal thoughts. When asked when or if he has ever felt elated, petitioner again mentioned his relationship with Susan. The discussion of Susan and their future plans also included mention of scientific technology. While on the medicine discussion, petitioner said he had been housed at Brushy Mountain since February 2001. He said his medical files moves with him from place to place.

Returning to the inquiry into his ability to manage his personal affairs, the petitioner explained maintenance of his inmate account. He said he receives money from various

individuals and places it in his account. Each week he completes a commissary form and makes choices as to what he wants to order. He regularly orders toothpaste, soap, shampoo and other hair products, writing material, stamps, or writing instruments. He can also choose from a wide variety of candy and cookies and other food products. Petitioner said he realizes at any given time how much money is in the account and knows how to prioritize the items he needs or wants. He compared the account to a checkbook for those in the free world or society. At the time of the interview, petitioner said he maintained approximately $112 in the account with the highest balance approaching $238 and the lowest dipping to $5. Petitioner said his family occasionally sends money for the account and that the investigator, Ron Lax, also sends money.

Petitioner commented that he is thrifty and manages money well. He said he does not spend his money on junk or unnecessary luxury items. Petitioner indicated he understood the importance of saving money.

Petitioner said he also makes decisions about his health and nutrition. He said he makes a conscious decision each day to wake up 10 to 20 minutes prior to his breakfast arriving. He said many inmates will not accept their meal trays but that he makes the decision each day to arise for breakfast. He said once the food arrives he makes the decision to eat the healthy items including the food with the most nutrition and protein.

Next, petitioner said he makes the choice every day to do exercise. He added that he loved exercise and worked hard to maintain his physical appearance. Petitioner pointed out various developed muscles on his body and described various muscle groups. He told Dr. Bernet that the muscles have to be earned through hard work and discipline.

Petitioner then summarized these daily activities as arising before breakfast arrives,

eating a healthy breakfast, showering to maintain good hygiene, and engaging in a disciplined exercise routine. Petitioner said other inmates stand around and engage in untruthful conversation about getting rich when they get out or selling drugs when they get out. According to petitioner, he said he can make the choice to participate in these discussions or exercise. He said he always chooses the exercise.

Petitioner added that he makes the daily choice not to violate TDOC rules. He gave examples of laws individuals in society must follow including obeying a stop sign or traffic lights or carrying a gun without a permit. He reasoned that you must have laws in a civilized society. By analogy, petitioner noted his controlled environment but referenced the rules and regulations within his confines such as the prohibition against tobacco products, matches, some pens and pencils, scissors or other cutting instruments. Petitioner said he followed the rules and had not had a disciplinary case since 2002 or 2003 when he said he was bullied by two officers at Brushy Mountain. Even though he was handcuffed and pushed around, the guards indicated in the report that petitioner provoked them. Petitioner concluded that he made a conscious decision each day to obey the rules.

Dr. Bernet asked petitioner if he had a will. Petitioner said he thought he had written a will but may have mailed it to Judge Campbell. He said the will left everything he owned materially to his fiancee Susan (who he had earlier referred to as April but noted on that occasion that April was not her real name) even though he had given some thought to giving it to his sister. He explained that the will was mailed to Judge Campbell when he was on death watch. Petitioner said he did not expect Judge Campbell to act upon it but wanted it to be filed somewhere.

Petitioner said the appropriate method would be to go to an attorney who drafts wills.

He explained that you complete certain legal forms indicating how you want your assets divided between named individuals. As an example, petitioner mentioned Mr. Spelling, a director in Hollywood who had left a will to dispense with over $250 million dollars. Petitioner commented on Mr. Spelling's decision to leave his daughter $800,000 while leaving the balance to his wife. He said the decision to leave his daughter this amount prevents her from being able to protest that she deserves more. Petitioner said for him to complete a valid will he would contact a lawyer and fill out the appropriate forms.

Dr. Bernet told petitioner they had covered the necessary areas [of the Nix standard]. Petitioner inquired of Dr. Bernet whether he is better now than during the 2007 interview. Dr. Bernet told petitioner he was doing about the same but that he seemed to be taking care of himself, that he understands what is going on with his case, and has maintained contact with various people. However, Dr. Bernet explained to petitioner that something that he talks about makes him sound not very competent.

Petitioner said he understood what Dr. Bernet was talking about but insisted they were the truth. Dr. Bernet reminded petitioner of his 2007 diagnosis and the conclusions that Dr. Bernet believed the surveillance stories/beliefs were helpful to him but were not events that actually happened. Dr. Bernet told petitioner he does not talk about the scientific technology relentlessly, noting the one hour interview period during which the stories/beliefs were minimally discussed. Petitioner acknowledged Dr. Bernet's opinion that petitioner is fabricating the government surveillance stories to help him. Petitioner said all of the mental health experts have the common denominator – that petitioner manufactured the belief about the technology.

Petitioner told Dr. Bernet that Dr. First and Dr. Gur had interviewed him. Petitioner

suggested all of the experts are on the same page. Dr. Bernet replied that all of the experts have the same underlying thought but he explained to petitioner that the difference between Dr. Bernet's diagnosis and the other experts' diagnoses is that the other doctors conclude the beliefs about scientific technology prevent petitioner from being competent while Dr. Bernet acknowledges petitioner has these beliefs he nonetheless concludes petitioner is competent to participate in his case. Petitioner also recalled that a Dr. Griffin examined him.

Petitioner attempted to explain whether he agreed with Dr. Bernet's conclusions that petitioner gave these thoughts a mind of their own. Petitioner said he would need to view it from this new perspective but noted he would see how he might try to act better and be a better person if he knew others with higher education were watching and listening to him. He added that when you stop and think about it if the scientific technology monitors could hear his every word and watch his every movement, they would have to be some very intelligent people to put all of that together. Petitioner spoke of ringing in his ears and mind fluctuating.

Petitioner acknowledged that the beliefs about technology and that technology could release tapes to exonerate him make him feel better about himself. He added that Judge Blackburn and Judge Gasaway and the district attorneys from both Montgomery and Davidson County were coached to say certain things. He said he thought these three trials were real trials and that they had really found him guilty and sentenced him to death. It was only in 2003 that he received information that the trials were not real.

Dr. Bernet gave the petitioner his opinion that these thoughts about surveillance makes the bad memories go away. He said he did not believe petitioner wanted to dwell

on the fact that the trials were real. When Dr. Bernet told petitioner he used the surveillance idea to get rid of the unpleasant feelings and thoughts. Petitioner expressed doubt that he would get rid of them but conceded he would minimize them with the thoughts about the existence of tapes to vouch for his whereabouts. Petitioner said the bad thoughts were not about something he had done but about something others said he had done and for which they were going to execute him. Petitioner did acknowledge that he could not face anyone in the USA if there were no tapes.

Next, petitioner began speaking of Barack Obama and his presidential run. Petitioner referenced Obama's pastor who said God D-A-M-N not God Bless America. He noted that Obama was trying to distance himself from these controversial remarks but also noted the comment made by Obama's wife about finally being happy to be an American in 2008. Petitioner inquired as to whether they were happy or proud when they were attending Harvard, Princeton or Yale. Petitioner also referenced the controversial television commercials based on George Bush's release of Willie Horton. At the end of this explanation, petitioner said Obama had a right to his belief.

In the same vein, petitioner said he had the right to his belief that if scientific technology is a reality and can be proven then it is great for him. He said some people, including the judges and prosecutors, believe it has been proven and have much more knowledge about it then he does.

Petitioner inquired as to how Dr. Bernet came to conduct the present interview. Dr. Bernet told petitioner that he had been contacted by Tom Thurman. Dr. Bernet explained that another hearing will be conducted to examine petitioner's competency to participate in his post-conviction hearing. Dr. Bernet told him that Dr. Woods and possibly Dr. Gur will

also be present to testify. Petitioner said he enjoyed his meetings with Dr. Bernet and hoped Dr. Bernet would come away from that particular visit that petitioner has grown since the past visit.

Dr. Bernet said he thought petitioner was doing pretty good in spite of his rough situation. Dr. Bernet told petitioner he thought petitioner had found a way to deal with it that seems to work for him. Petitioner responded that he had only two choices – to cope with it or exit plant Earth. Therefore, he had chosen to cope with it the best he could.

Petitioner told Dr. Bernet he hoped he had conducted himself well in the interview. He pressed the issue a number of times. At some point Dr. Bernet told petitioner he thought he had done fine. Petitioner said he appreciated that statement.

Petitioner and Dr. Bernet exchanged general pleasantries as the interview came to a close. In the final moments, petitioner spoke of John McCain and Hillary Clinton. He also inquired whether others would be interviewing him for the upcoming competency hearing. Dr. Bernet said he thought Dr. Martell would likely be conducting an interview. He told petitioner Dr. Martell had also been contacted on behalf of the State.

C. Dr. Daniel Martell

Dr. Martell conducted an interview and testing of petitioner at Riverbend in 2008. He also testified on the second day of the Davidson County competency hearing. Summaries of the interviews, report and testimony follow.

May 13, 2008 Nix Hearing

Daniel Martell, Ph.D. testified that he is board certified in forensic psychology. He

gave a summary of his educational and employment background along with references to the number of times he has testified. Dr. Martell said he has testified on a number of times for both the prosecution and defense.

Dr. Martell said he had interviewed petitioner a number of times over the years with the latest interview occurring on April 22, 2008. The interview (which was taped) and testing lasted approximately six and one half hours. Dr. Martell explained that he videotapes his examinations for a number of reasons, including preservation of the record. He added that the videotapes are more accurate than notes and protect the defendant. Further, any other experts are then provided the opportunity to review his work. Taping has been his practice and the way he was trained twenty-five years ago. Dr. Martell could think of no professional organization that prohibits or discourages the taping of interviews.

Dr. Martell enumerated the items he considered in performing the evaluation and explained the testing he conducted. He administered the Minnesota Multiphasic Personality Inventory, second edition (MMPI-2) and the Personality Assessment Inventory (PSI). He explained that because petitioner for some reason did not complete the PSI, the test was rendered unusable.

Before discussing the results, Dr. Martell said he had a long history with the petitioner. He said when he saw petitioner in 2006 he was "acutely disturbed;" however, during the 2008 interview he found petitioner to be in better condition but still evidencing delusional disorder. Dr. Martell described petitioner as being fit, well nourished and well groomed and indicated petitioner displayed his typical obsequious and overly friendly interpersonal style. He said petitioner also continued his attempted use of large vocabulary words but with frequent mispronunciations or erroneous word choice. Dr. Martell indicated

that petitioner inserted what he termed "paraphasias."

According to Dr. Martell, petitioner continues to express grandiose, narcissistic ideas about himself relating to government surveillance or scientific technology. He noted that petitioner experienced "repeats" or thoughts that events transpiring were happening again. Dr. Martell said to some degree the events were recurring in that he was having another competency evaluation. Petitioner continued to exhibit paranoid idea such as the claim that he was handed a blank piece of paper in order to get his fingerprints on the paper.

Dr. Martell testified that compared to 2006, petitioner was less focused on beliefs that his attorneys were trying to turn him into a homosexual which was an obsession in 2006. Dr. Martell noted that petitioner had the idea during the 2008 interview that he was serving a 10 to 12 year sentence and was scheduled to be released from prison upon the service of 85 percent. He also indicated petitioner's claim that the trials were mock trials and that he would be put on death watch and taken off again to be placed in Riverbend or Brushy Mountain. Petitioner also told Dr. Martell about his engagement to a woman named Susan and expressed his erroneous belief that she had accompanied them during the examination in 2006.

Dr. Martell recalled petitioner telling him he was taking Elavil and that the Elavil seemed to help his depression. Dr. Martell said petitioner was absolutely oriented as to person, place and time and could speak in detail about current events. He said petitioner spoke rationally and intelligently about another inmate on death row who had been exonerated by DNA; the presidential election and his opinion about which democratic candidate had more experience; the Olympic games including human rights issues in China; and the U.S. Supreme Court decision relating to lethal injection. As to the lethal

injection case, petitioner was able to talk about what the court held, what they had considered and what they decided in accurate detail.

Addressing the tests he conducted, Dr. Martell explained the MMPI-2 and petitioner's results. He said petitioner's F scale and Fp scale, which measure malingering or exaggeration, were elevated, indicating petitioner was exaggerating symptoms during the 2008 interview. Dr. Martell said these results were in contrast to the 2006 testing when the F scale was only mildly elevated and the Fp was in the normal range. The results led him to conclude that petitioner does have a mental disorder but nonetheless exaggerates his symptoms. Dr. Martell explained that the two are not mutually exclusive.

Dr. Martell testified that the F scale is the single best predictor of what is going on with petitioner on the occasions he is tested. He noted that at the time of trial petitioner produced a completely valid MMPI with no evidence of psychopathology. As a result, Dr. Martell concluded at that time that while petitioner had a delusional disorder, it was in remission. However, he contrasted the 2006 results which showed a delusional disorder but with acute exacerbation of his disorder. However, he described the present condition as "murky" because he still believes petitioner suffers from delusional disorder but notes the simultaneous presence of symptoms and exaggeration. Dr. Martell explained that in such a circumstance it is difficult to ascertain which of the symptoms are true and which are manipulations. Dr. Martell said certain symptoms such as pressured speech and the repeated phrases such as his "8 to 12 year sentence" are usually not something a person can malinger. On the other hand, he observed that some of petitioner's stories, whether believed or not by petitioner, make it less clear. He added that he could not rule it in and could not rule it out.

Dr. Martell said his diagnosis remained the same after the 2008 interview. He reiterated his earlier position that he does not believe petitioner is schizophrenic but suffers from delusional disorder with both persecutory and grandiose content. He opined that the disorder is not as intense as it had been during the 2006 interview but was not in complete remission. Dr. Martell stated that he also believed petitioner has a mild neurocognitive disorder and antisocial personality disorder. He said he had reviewed the conclusions of other experts but still believed he had the right answer.

Next, Dr. Martell described his understanding of the Nix competency standard. As to the first prong relating to petitioner's ability to manage his personal affairs, Dr. Martell noted the difficulty in assessing petitioner's abilities in light of the institutional setting. However, with that caveat, Dr. Martell said petitioner reported he could manage his daily activities including dressing himself, grooming himself, maintaining good personal hygiene, making use of the commissary, making healthy nutritional choices and maintaining his physical fitness and appearance. He added that petitioner makes choices with regard to his recreation time (whether to take advantage of yard time) and his leisure time (whether to read a book or watch television). Petitioner also engaged in exercise in his cell, kept a journal and managed his inmate account. Dr. Martell found all of these things to be positive indications of his capacity to manage his personal affairs. The only weakness found by Dr. Martell was petitioner's decision to will all of his personal effects to Susan. Even acknowledging this one weakness, Dr. Martell said on balance the things petitioner can do outweigh the will issue (as to recipient), particularly in light of the fact petitioner may be exaggerating at the time. Dr. Martell admitted that he had no way of knowing how much of the story is delusional versus real including whether petitioner actually corresponds with

a female or has a real photo of a woman.

As to the second Nix prong, Dr. Martell said he found the standard a little vague as to what the court means by rights and liabilities. However, he found that petitioner understood his rights and was able to articulate his fundamental rights to have counsel and to appeal his capital convictions. Petitioner was also able to describe the procedural history and current status of each of his three cases. Petitioner knew the names of the judges and prosecutors and his attorneys and investigators and was cognizant of who was on each side and what they were doing. Dr. Martell said petitioner understood that if he won he could be granted a new trial or perhaps have the charges dropped. Petitioner similarly knew that if he was unsuccessful in his appeal he would proceed toward the death penalty. Petitioner also understood the potential outcomes depending on whether he is found competent or incompetent.

Petitioner was able to discuss what he termed "inefficient assistance of counsel" and recited several potential issues including eyewitness testimony, forensic accounting issues relating to the sum of money taken, and physical evidence relating to the shoe prints. Petitioner described to Dr. Martell the nature of each challenge that could be made. Petitioner accurately recited the Rees standard and discussed his legal rights and liabilities. When asked about liabilities relating to the competency proceedings, petitioner responded that it might affect the court's perception of him if the court believed he was mentally ill.

The Court interjected a question about an allegation of petitioner seeing Tinkerbell. Dr. Martell said had petitioner actually experienced such a delusion some behavior would have supported it. He noted that petitioner had been exaggerating and had no history of hallucinations. Dr. Martell said he could not completely dismiss it but recognized that it was

inconsistent with petitioner's history. He analogized it to the boy who cried wolf and explained that at times it is difficult to tell when the wolf is in the room and when it is not. The Court also discussed with Dr. Martell the narrowed focus of petitioner's competency presently in the Captain D's case and during the relevant statutory time period in the McDonald's case (December 2006 to December 2007). Dr. Martell indicated he had perhaps erroneously misconstrued the focus of the inquiry but indicated he would reflect on the Court's statement of the law and respond during his testimony.

Dr. Martell attempted to explain his understanding of the Nix standard indicating his belief that the Nix standard was not quite as stringent as the Dusky standard. Following an objection by post-conviction counsel, the Court again clarified the procedural postures of both cases. The Court again informed Dr. Martell that if petitioner is found incompetent under Nix, he will proceed with the next friend petition in both the McDonald's and Captain D's cases. The Court further explained that if petitioner is found competent, he failed to timely file a post-conviction petition in the McDonald's case and would be permitted only to proceed on the pro se petition in the Captain D's case. Based on these clarifications, Dr. Martell said he clearly found petitioner competent for the purposes of the Captain D's case but wanted to give more thought during a break due to his 2006 finding that petitioner was more acutely ill.

Reflecting back on his history with petitioner, Dr. Martell recalled that petitioner's long held position had been that he would go through his mandatory automatic appeals but if he failed on direct appeal he would not pursue further appeals. He described petitioner as "clear as a bell" at the time of making such statements. Dr. Martell said petitioner has consistently maintained he did not want to pursue his post-conviction rights; however, Dr.

Martell said he thought during the interview in 2006 that it was for delusional reasons.

During cross-examination, Dr. Martell testified that he was engaged in petitioner's case beginning in 1998 or 1999 first by the Davidson County District Attorney's Office then by the Montgomery County District Attorney. He again became involved in the case in 2006 during federal court proceedings related to the Baskin-Robbins case at the request of the Attorney General's Office. Dr. Martell agreed that he was retained for the purpose of evaluating petitioner's competency under the Rees standard in habeas corpus proceedings. Dr. Martell expressed his recognition of the differing competency standards such as competency to stand trial and the Rees standard. He agreed that Rees did not contain a consideration for petitioner's ability to assist his attorneys.

Dr. Martell testified that he administered the MMPI-2, PAI and SIRS tests. He agreed that his 2006 report reflects the results were honest and valid. Dr. Martell responded to a series of questions comparing the 2006 results and report to the 2008 results and report. He again noted that in 1999 he found the delusions to be present but in remission but in 2006 were no longer encapsulated. However, in 2008 he indicated the delusions had diminished but were still active. Similarly, Dr. Martell found the delusions had expanded in 2006 to include his attorneys and the judges. However, in 2008 he noted less of a sense that his attorneys were part of the technology. Dr. Martell explained that the 2008 interview revealed more of a belief that the Court endorsed scientific technology and that he was serving an 10 to 12 year sentence. He agreed petitioner had said his attorneys were actors and were being manipulated by scientific technology.

According to Dr. Martell petitioner attributed every physical symptom to scientific technology. Dr. Martell said his 2006 report in most respects was consistent with his

findings and diagnosis contained in the 2008 report. He agreed that he found petitioner was incompetent in 2006 under the Rees standard. Dr. Martell also recalled submitted a letter during the 2007 Rule 28 proceedings in which he noted petitioner suffered from delusional disorder which follows a chronic course of exacerbations and remissions over time and in response to stress.

Turning to the 2008 report, Dr. Martell was asked about each and every paragraph of his report. He confirmed the report contained his findings. He further discussed each aspect of petitioner's delusions including the effects of technology on his counsel and the judges. Dr. Martell again explained the new components of petitioner's delusions relating to a negotiated 10 to 12 year sentence and his fiancee Susan. Dr. Martell agreed that in his report he recognized that even persons suffering from delusional disorder can simultaneously talk about other topics. Counsel returned the questioning to various historical aspects of the testing performed by Dr. Martell.

Dr. Martell agreed that he did not include "legal proceedings" in his definition of "personal affairs." Dr. Martell said petitioner has a remarkable ability to recall dates relating to his cases. He admitted that he did not check out each and every date for accuracy but noted that petitioner could be factually inaccurate in some parts but that petitioner gets the "big broad brush picture." Dr. Martell said he was careful in his questioning of petitioner about his legal rights and liabilities.

Dr. Martell refused to agree that petitioner's response that a new trial would be a waste of time is consistent with his delusional idea that the parties are scripted. Dr. Martell testified that simply stating that he does not want a new trial or that another trial is a waste of time is not consistent with a delusion. Dr. Martell said he had not reviewed the pro se

petition filed in the Captain D's case for the instant proceedings but expressed his struggle to some extent as to how a person incompetent under Rees could nonetheless proceed pro se under the Nix standard. He said he left that issue to the courts.

During re-direct examination, Dr. Martell agreed that a person suffering from delusional disorder would manage their personal affairs and understand their legal rights. He said such an analysis turns on a case-by-case basis. Dr. Martell said without question petitioner had the capacity at the time of trial, even though he had delusional disorder.

When questioned by the Court, Dr. Martell recalled his example of a delusional person carrying a suitcase with the delusions packed tightly inside the suitcase. He explained that in 2006, the suitcase was no longer closed. Dr. Martell testified that the natural course of delusional disorder is that it waxes and wanes. As with most mental disorders they are not in a constant steady state.

Dr. Martell said that stress could exacerbate petitioner's symptoms. For example, Dr. Martell cited to the 2006 time period when petitioner indicated he was exceedingly uncomfortable at Brushy Mountain and did not like that facility. Dr. Martell opined that this stress played into his symptoms getting worse as evidenced at the 2006 interview. He also indicated that an impending execution date could heighten the stress, and therefore, the severity of the symptoms.

Returning again to the suitcase example, Dr. Martell said at the time of trial the suitcase was closed; however, in 2006 it was open. At the present time, he said petitioner is attempting to put everything back into the suitcase. Dr. Martell said petitioner's exaggeration makes the analysis more difficult presently. Even though petitioner's condition may change, such changes are not typically that abrupt. For the purposes of the

Captain D's proceeding, Dr. Martell found petitioner to be competent under Nix.

Upon reflection, Dr. Martell said he was also prepared to render an opinion as to petitioner's competency during the McDonald's statutory limitations period. Dr. Martell recalled that petitioner has consistently understood his legal position. His problem under the Rees standard related to the prong dealing with petitioner's ability to make rational choices. When asked by the Court whether it was rational for petitioner to choose to proceed on a pro se petition containing significant references to scientific technology, Dr. Martell indicated such a decision would not see rational.

Dr. Martell recalled reviewing Dr. Bernet's conclusions that petitioner's stories about scientific technology are lies. He said he respected Dr. Bernet's opinion and noted that it is a very difficult differential. Dr. Martell attributed his psychological testing as the most compelling support for his own conclusions. He said he could not predict how petitioner would progress in the future. Dr. Martell explained that such a disorder changes over time and that it is necessary "to take his psychiatric temperature at every point in order to make that an accurate diagnosis."

During final questioning by the Court, the Court clarified its earlier question about petitioner's insistence on proceeding with the pro se petition which makes significant references to scientific technology. The Court explained that technically petitioner himself is not standing on the pro se petition but instead wants to withdraw it. The Court added that it had refused to permit him to withdraw it under the Rees standard. The Court informed Dr. Martell that presently the petitioner would have an opportunity to amend the original petition but has chosen not to do so.

Dr. Martell noted the distinction and indicated how striking it was to him during the

examination that when asked about his appeals issues, petitioner said nothing about scientific technology or that tapes were being withheld. Dr. Martell said this indicates petitioner has a rational basis even though he might have the idea in the back of his mind that maybe the tapes exist and could prove his innocence.

Dr. Martell recalled that petitioner has previously discussed his desire not to pursue further legal proceedings after the direct appeals process. He said petitioner included in his reasons that he did not want to put the victims or his family through it again. Dr. Martell explained that petitioner carries a rational suitcase and an irrational suitcase. He added that the balance between the two will always be petitioner's issue.

Next, the State referenced the pro se petition but highlighted other issues it claimed were not related to scientific technology. Dr. Martell responded that the petition reflects petitioner's personality with the co-existence of a rational side and an irrational side. He noted it is difficult to parse them out unless the suitcase is closed. Dr. Martell admitted that he had no way of knowing whether petitioner actually prepared the *pro se* petition. He said he had heard the petition was signed by petitioner in the moments before his scheduled execution but did not know the facts.

April 24, 2008 Report

In his report dated April 24, 2008, Dr. Martell summarized his evaluation of petitioner, including approximately 6.5 hours of interview and testing conducted on April 22, 2008. Dr. Martell noted that his evaluation was being performed pursuant to this Court's February 25, 2008 order and that he was considering petitioner's competency in both the Captain D's and McDonald's cases under the Nix standard.

Dr. Martell indicated that he advised petitioner of the purpose of the examination and informed petitioner, among other things, that he had been retained by the district attorney's office, that the examination was being videotaped, that nothing would be kept confidential. As to materials he reviewed, Dr. Martell noted this Court's February 25, 2008 order, Reid v. State opinion, Report of Ruben C. Gur, Ph.D. dated December 17, 2007, Report of George W. Woods dated December 17, 2007 and Draft Report of William Bernet dated April 22, 2008. Dr. Martell administered the MMPI-2, PAI, Mental Status Exam and Clinical Forensic Interview.

Dr. Martell's report indicated petitioner presented for testing appearing fit, well nourished, neatly groomed and clean shaven. He noted petitioner's age and described his attire. Dr. Martell thought petitioner was overly polite and ingratiating throughout the day and was cooperative. Petitioner told Dr. Martell he had been taking Elavil for depression and that he believed it to be beneficial to him. Dr. Martell observed that petitioner appeared less acutely distressed than he had during the previous examination in 2006.

Petitioner was described as well oriented to place, time and situation. As to his speech, petitioner was noted as being hyper-verbose with pressured speech that was repetitive, tangential and highly circumstantial. Dr. Martell noted that petitioner's speech included the continuing use of an overreaching vocabulary which resulted in occasional inappropriate word substitutions, mispronunciations, paraphasias and (rarely) nelogisms.

As with past examination, petitioner expressed grandiose and narcissistic ideas about himself. Petitioner also continued to relate his beliefs about government surveillance and the use of technology to manipulate his life and the lives of those around him, including other's use of "repeats" or repeating events or behaviors that have occurred in the past.

Petitioner also expressed paranoid ideation including the example that he had been given blank paper so that his fingerprints could be forged.

Comparing the 2008 interview with his 2006 evaluation of petitioner, Dr. Martell noted petitioner was less focused on beliefs that his attorneys were attempting to make him homosexual. However, he recognized two new beliefs: (1) that he was given a 10-year term with an agreement that he would serve 80 percent of the sentence, and therefore, that his release is overdue and that his trials were mock and would not result in the death penalty; and (2) that he is engaged to a woman named Susan, who he claims was present at the last examination in 2006. Petitioner believes he can pursue lawsuits against the State, the individual jurors, and the media outlets.

Dr. Martell indicated that at the same time petitioner was able to speak rationally and intelligently about a wide range of topics including another capital case (Paul House), the Obama/Clinton contests and superdelgates, human rights issues in China and their impact on the upcoming Olympic Games and the recent U.S. Supreme Court opinion with regard to lethal injection.

Dr. Martell detailed the testing he completed in April 2008. First, he explained his administration of the MMPI-2. He indicated petitioner completed the test without incident; however, due to petitioner's failure to complete two pages the test was rendered unusable. Under the heading "Data validity," Dr. Martell said the MMPI-2 was invalid due to gross symptom exaggeration; however, he re-ran the data using a different protocol (Correctional). Under this protocol, petitioner was described as having an elevated F score and relatively low VRIN scale score, suggesting that his endorsement of extreme items is the result of careful item responding rather than inconsistent response pattern. Petitioner's

self description as extremely disturbed required further consideration because petitioner claimed more psychological symptoms than most patients do. Dr. Martell said the two likely possibilities require further evaluation because it is possible he is exaggerating his symptoms in order to gain attention of services (sometimes present in an individual involved in litigation) or has unusually severe psychological problems.

In resolving these two possibilities, Dr. Martell said the F(p) score is informative. At the time of the 2006 testing, Dr. Martell noted his F scale was elevated but his F(p) score was not elevated; therefore the profile was interpretable. At the time of the instant evaluation, both the F and F(p) scales were significantly elevated. Dr. Martell's report indicates petitioner falls in a category of patients with actual psychiatric problems but who also exaggerates the problems at times when they perceive a benefit from doing so.

In a section entitled "Test findings," Dr. Martell noted the automated report refused to provide an interpretation due to petitioner's symptom magnification. However, when he re-ran the data using the "correctional" protocol, a description returned which Dr. Martell cautioned must be interpreted with extreme caution due to petitioner's exaggeration of his symptoms. The report sets out the detailed description.

Next, the report sets out the DSM-IV-TR diagnostic impression including Axis I, Axis II and Axis III diagnoses. As to Axis I, Dr. Martell concluded that petitioner suffers from delusional disorder, mixed type with persecutory and grandiose themes. Axis II diagnosis includes cognitive disorder, not otherwise specified (mild neurocognitive disorder). Axis III noted congenital malformation of the left temporal lobe.

Noting little legal precedent interpreting the Nix standard, Dr. Martell summarized the two primary substantive prongs of Nix: (1) unable to manage his personal affairs; or (2)

unable to understand his legal rights and liabilities. Dr. Martell cited petitioner's strength and weaknesses under each prong.

Regarding petitioner's ability to manage his personal affairs, Dr. Martell initially acknowledged the limited opportunity to demonstrate personal autonomy due to the prison setting. Nonetheless, he noted petitioner's dressing, grooming, hygiene, use of commissary, making health nutritional choices, recreation time, book reading and television viewing, exercise and personal fitness, correspondence, journal writing and money management as positive attributes. The only weakness cited under this prong was petitioner's remark that he intended to will his remaining funds and belongings to an apparently delusional girlfriend.

Next, as to petitioner's ability under the second prong of the Nix standard, Dr. Martell notes several strengths including:

* He was able to articulate his fundamental legal rights, including the right to counsel, and his right to appeal his capital convictions;

* He was able to articulate the procedural history and current status of each of his three cases.

* He knew the names of the judges and prosecutors in each of his cases and in his federal appeals. He could relate the names of his attorneys and investigators.

* He understood what would happen if he were to be successful in his appeal (i.e., he was to be granted a new trial or have the charges dropped).

* He understood what would happen if he were unsuccessful in his appeal (i.e., proceed with the death penalty).

* He understood what would happen if he were found competent (i.e., his appeals would proceed).

* He understood what would happen if he were found incompetent (i.e., suspend proceedings, more evaluations by doctors).

* He was able rationally to discuss ineffective (he use the term "inefficient") assistance of counsel as an appeal issue, as well as specific areas that might be pursued on appeal, including challenging eyewitness testimony, physical evidence regarding his shoes, and exculpatory evidence.

* He was able to articulate the competency standard in *Rees v. Peyton* accurately.

* When asked about his legal liabilities, he expressed his perception that he did not have any liabilities with regard to his appeal issues.

* When asked about his liabilities with regard to his upcoming competency hearings, he was able to reflect on his past testimony before Judge Blackburn and how it might affect the Court's perception of him if she believed he was mentally ill.

The weaknesses cited by Dr. Martell is that the delusions, to the extent they are real and active, may affect petitioner's judgment and behavior with regard to decisions he makes going forward with his appeals even though they do not appear to impair his basis understanding of his legal rights and liabilities.

Based upon the analysis contained in the report, findings from the present examination, and the new materials reviewed, along with Dr. Martell's past experience with petitioner, Dr. Martell opined to a reasonable degree of forensic psychological certainty that petitioner is not unable either to manage his personal affairs or to understand his legal rights and liabilities.

April 22, 2008 Interview

On April 22, 2008, Dr. Martell interviewed and tested petitioner at the Riverbend Maximum Security Prison at Nashville, Tennessee. Petitioner introduced himself and called Dr. Martell by name. Dr. Martell informed petitioner that he had been retained by the

district attorney and was conducting the interview for the purposes of preparing a report for Judge Blackburn. He also told petitioner that the interview would be videotaped and that the petitioner had no expectation of privacy or confidentiality.

Petitioner knew that the competency hearing had been set for May 12, 13, 14 and 15, 2008. He said he understood the hearing would address his competency in his post-conviction appeals. Petitioner added that he had put in a request years ago to drop his appeals and that he had gone through a series of competency hearing. He thought he had "passed them all" but said "they just keep reinventing those issues and they keep resurrecting those issues of my mental competency and I just keep participating."

When Dr. Martell asked petitioner about an initial comment that petitioner was disappointed to see Dr. Martell there, petitioner said he had received a 10 to 12 year sentence at 80 percent and was serving time for something he had not done. Petitioner described it as a nightmare ordeal and referenced "three mock trials" for seven homicides and three aggravated robberies. Petitioner spoke of a 1997 apprehension by the Ashland City Police for having a physical altercation with his former employer. He said he appeared before Judge Sue Evans for a dispute about his car but then reappeared before Judge Evans being charged with seven homicides.

Petitioner explained that in 1998, his Washington lawyers negotiated with then Attorney General Paul Summers for a sentence of 10 to 12 years at 80 percent. However, he said he had no knowledge of the deal. Returning to his original thought about why he expressed disappointment in seeing Dr. Martell at the interview, petitioner said based on the agreed sentence, his sentence had expired but yet he was not set free. He said that Kelly Gleason, Connie Westfall, Rose Lee Cramp, his mother, Jonnie Sole, Linda

Martiniano, Janet Kirkpatrick, Mike Engle, David Baker, Michael Jones and Dawn Deaner had all conveyed to him the 10 to 12 year sentence at 80 percent. He added that Kelly Gleason, Rosa Lee Cramp and Connie Westfall all told him they had been informed that he would have to serve a little more time past June 2007.

Petitioner spoke of how he had hoped to return to society on a peaceful note and had tried to get along with the various individuals in his life while awaiting release. He indicated that certain legal documents had been taken from him when he was transferred back to Brushy Mountain. He said scientific technology worked in conjunction with the Tennessee Department of Corrections to take these items so that petitioner would go ballistic.

Petitioner described his typical day at Brushy Mountain, including getting up every morning and attending to proper hygiene, including daily exercise. He spoke of watching Jack "Lane" since he was young and recognized the benefits of exercise. He said at no point was he about to go ballistic. Petitioner described a meeting with Connie Westfall and Kelly Gleason in which they expressed their surprise that he had not yet gone ballistic. Petitioner reasoned that while incarcerated it is better to follow the rules. He made the decision that going ballistic would benefit him in no way because neither the guards nor other prisoners could do anything to secure his release after serving 80 percent of his sentence. Petitioner explained that he may have expressed such behavior as a teenager but he had matured.

Petitioner said he was meeting with Dr. Martell on April 22, 2008, some eleven months from his date of freedom yet he continues to do the same things day in and day out. He said he did not really live a reclusive lifestyle but has no interaction with the

inmates in the rec yard or cell since 2003. When asked why he had no contact, petitioner told of his incarceration at Riverbend and Brushy Mountain and explained that the other inmates really don't have anything constructive to talk about. He said they talk about things that concern them including getting out of prison and how they will not get caught the next time. The inmates speak of committing other felonies upon release such as selling drugs and making lots of money. Petitioner said that after some time he gets tired of hearing that type of language. As a result, he disconnects himself from being in involved in that kind of behavior.

When petitioner goes to the rec yard with other inmates, he minds his own business and does his exercise. He said he has the same pattern each day but besides his exercise watches television. Petitioner said at one time he had a relationship with Linda Patton at Fort Worth, Texas, who once testified that petitioner was not a television person. He also recounted Mike Engle's questioning of Ms. Patton during the Clarksville trial as to what petitioner liked to do in his spare time. He said that even though Gleason and Westfall thought he would go ballistic on June 1, 2007 because scientific technology was sharing his thoughts with others, he said it would be out of character for him to do so. He added that he is capable of such conduct but that he makes a conscious choice not to engage in it.

When asked about his death sentences, he explained that everyone around him including counsel, families, guard, and other individuals were going to go along with it as if he were a death row inmate even though they know about the 10 to 12 year sentence. However, he agreed that the 10 to 12 year sentence was not something he had agreed to or have ever signed any document to accept. In fact, he said he could not recall why he

received that sentence. He again stated that he had not signed a document but that likely they could have passed him a blank sheet of paper to get his fingerprints then retype on the paper what they want. Petitioner said Ms. Gleason surmised that someone could have gotten his signature under the pretense of getting other records for him requiring a signature. He said he was in college with a 4.0 GPA and would have been a very good lawyer or would have had a good country music career. He added that he would not have thrown that away for a 10 to 12 year sentence.

Petitioner again described the deal between the Washington lawyers and Paul Summers and said the deal resulted when they told Attorney General Summers that he knew who had committed these crimes. However, petitioner said had he known he would have contacted CrimeStoppers, as he had done in the past in Houston. He gave details of an incident he personally witnessed two young boys breaking into a van.

Petitioner reasoned that scientific technology had observed his every move, including at the health center, and that they would have notified authorities should something have happened. Even though he had no information about the homicides, the deal was made for the 10 to 12 year sentence. Within this discussion, petitioner spoke of the Oklahoma City bombings and the participation of Timothy McVeigh.

Petitioner said scientific technology had blocked some of his thoughts and therefore he could not recall the names of his Washington lawyers. He could not explain why he would have attorneys from Washington rather than from Tennessee. Petitioner described how the best lawyers come from Washington, D.C. and that they primarily practice federal law because they are in a federal district.

When again asked about the death sentences, petitioner mentioned lethal injection

and his knowledge of the U.S. Supreme Court case upholding lethal injection. He said that even though he heard the news reporters mention that serial killer Paul Reid could face lethal injection, he paid no attention to it. He said it meant nothing because he received a 10 to 12 year sentence and that the trials were mock trials. Petitioner said he has a right to sue the State for the three mock trials as well as the individual jurors. He said he could also sue the television stations who perpetuate the story that he is a serial killer.

However, even though he could sue, petitioner said he wanted to get out on a peaceful note as evidenced on the log of May 2007. Furthermore, he knew scientific technology was going to reach a financial settlement for undisclosed millions of dollars. He would likely use New York lawyers because they bring large lawsuits with large awards indicating Tennessee has no power law firms.

Petitioner spoke of his college sweetheart, Susan, and their plans to marry in the next six months when he gets out. They planned to buy a starter home and have children. He also plans to attend Vanderbilt and get some plastic surgery, including laser surgery. Petitioner explained laser surgery and the process called dermabrasion. Therefore, on June 1, 2007 (release date) he had the mindset that he would wait and see what scientific technology had to offer him financially and not sue anyone.

Petitioner returned to the theme that everyone thought he would go ballistic but that it was not in his nature. He said he knew of different methods to get that out of himself or a process. He said that it would be silly to yell out 10 years of abuse and aggravation. He reasoned that if it were that easy he would put the psychologists of American out of business.

He said he planned to accept the apologies from Texas, Oklahoma, Tennessee and

scientific technology and forgive them. Petitioner said he planned to settle for the sum of money that would be offered to him by scientific technology, which petitioner said was described to him by Gleason and others as an amount he could live with.

Petitioner recalled being in Judge Blackburn's court on September 4 and 5, 2007 with attorney Gleason and Brad McLean. He also recalled the dates May 12, 13 or 14 and 15th 2008 at being dates he would return to court to continue where they left off. However, petitioner noted he was being facetious because he said they keep having competency hearings following by Judge Blackburn's ruling that he is competent. Nonetheless, they keep resurrecting it, he added.

When asked what would happen if he is found competent, petitioner said he understood TDOC would process him as a death row inmate and set an execution date. He said if he signed no appeal or any post-conviction, he would be placed on death watch where he would stay for approximately 72 hours. However, he said he would then be placed back at Riverbend or Brushy Mountain and not executed because of the 10 to 12 year sentence.

Petitioner said he had an execution date and that he would not sign anything. He added that he will go to deathwatch, be executed, and "go home to heaven." Petitioner said he would not participate in a bogus appeal or anything of that nature.

When asked why he would not participate in an appeal, petitioner commented on the large number of people involved and the impossibility of expecting all of them to remain quiet and do as instructed. Petitioner said in 1999 and 2001 some death row inmates asked him why he was on death row when they knew he had a 10 to 12 year sentence. According to petitioner, the death row inmates told him all of the death row inmates and

guards knew petitioner had a 10 to 12 year sentence. He also said inmates at Brushy Mountain told him the same thing about his sentence. Based on these representations, petitioner began to understand in 2003 that he actually had a 10 to 12 year sentence. Petitioner recalled that perhaps his trial counsel had been telling him he had such a sentence but indicated that they told him in roundabout ways rather than directly telling him he had the 10 to 12 year sentence.

Petitioner recalled being in Judge Blackburn's courtroom where he engaged in a conversation with her about various aspects of his case. He said Judge Blackburn told him he was serving a 10 to 12 year sentence and that his post-conviction counsel Gleason was an actor. Petitioner said he answered questions asked by the Court even though he understood his attorney/client privilege. He added that he did so out of respect for the process.

Petitioner said that he and Judge Blackburn spoke in another "interchange" about his trials. He said he enjoyed speaking with her and that she brought out the "very best of me." He recalled Judge Blackburn asking him about his college sweetheart. Petitioner said he loved women with all of his heart and loved Susan with 100 percent of his heart. He described himself as gentle and friendly. Petitioner added that he and Susan planned to live together but explained he would first go to Vanderbilt to remove acne scars so that he would feel better about himself.

Next, petitioner spoke of his past relationships with women dating back to age 13 to the time he was imprisoned illegally for seven homicides. He mentioned his prior marriage which followed a 14-month courtship. Petitioner said he practiced fidelity, even with girls he never planned to marry.

Petitioner again turned the conversation to Susan explaining that they would not engage in a sexual relationship until after the marriage. He said that on the day he and Susan they would fold their hands, bow their heads, get down on their knees and give grace and glory to Jesus Christ. Petitioner explained that this would occur before they "consummated the marriage with swine." When asked how he would consummate a marriage with swine, petitioner said swine was another word for intercourse. Petitioner said swine was not commonly used in that context but that it was contained in the dictionary. He said his post-conviction counsel admonishes him for using such terms and advises him to use words more familiar to everyone.

Dr. Martell asked petitioner about the last time they had met and petitioner's expressed desire at that time to drop his appeals and proceed with the death sentence. Petitioner said he had totally abandoned all of the appeal processes as far as his participation. He said he was told to go along with it all and has done so. Petitioner said everything or everyone around him is a repeat or a repeat process. He said he does not blame the inmates or staff at TDOC for the repeats.

After experiencing some audio problems during the interview, the conversation continued with Dr. Martell asking petitioner about his comment that Tom Thurman and the prosecutors understand scientific technology better than he does. He attributed this to the prosecutors' education by the people who actually conduct scientific technology. When asked how they communicated with him, petitioner said "they" share with the people in his life at any given time such as Ms. Gleason, Ms. Westfall or Ms. Cramp, who in turn relay the information to him.

Petitioner again spoke of being placed on deathwatch in April 2003. He said while

on deathwatch everyone began to educate him about his actual 10 to 12 year sentence. Petitioner referenced earlier testimony about how others expected him to "go off" in June 2007 when he was not actually released as had been promised. He said he was told they took back the promise to release him on that date. Petitioner believed the deal was broken because he did not accept their (scientific technology) apology.

Petitioner said he was back to doing the same thing day in and day out. He testified that he was not going to participate in appeals and did not care for the appeals. Petitioner added he did not believe in them and would rather go to deathwatch and receive lethal injection. Petitioner concluded he would rather get out of this nightmare.

Dr. Martell informed petitioner he was going to conduct some testing. In preparation for the testing, petitioner acknowledged he had blurred vision occasionally as a side effect of taking Elavil. He explained that he had taken Elavil on three separate occasions since 2004. While he did not know the dosage, petitioner recalled that he was originally taking it twice per day but had reduced it to one pill in the evening. Petitioner explained that the Elavil prevented certain symptoms including lonely feelings and suicidal thoughts. He also believed Elavil gave him a vigorous appetite and made him more optimistic. It also allows him to participate his daily physical activities.

Petitioner described his appetite as good indicating he had lost a couple of pounds due to increased exercise. He also described his sleep as fair to good the past few month; however, petitioner indicated the preceding night's sleep was sporadic. He blamed the sleeplessness on scientific technology and the scheduled meeting with Dr. Martell. Petitioner said being recorded during such interviews disturbs his sleep schedule.

Petitioner said he occasionally engages in a few pleasantries with the inmates in

cells on either side of his cell. He said he had a good relationship with the officers. He said his level of interaction had not changed significantly. Petitioner said his sex drive remained about the same though he noted that technology can mess it up from time to time. He said he believed his motor skills and strength had increased but that his eyes were blurred probably due to the Elavil. Petitioner said his vision gets worse by the end of the day. He denied that he had ever seen things others do not see.

Petitioner described his hearing as a 5 or 6 on a scale of 1 to 10. He explained that he was legally deaf in his left ear but had about 75 percent hearing in his right ear. When asked if he ever heard things other people did not hear, petitioner indicated he did not but mentioned that his future wife Susan and he would get him a hearing aid. Petitioner said he has had strange smells or tastes in the past but explained that scientific technology caused the problems. Petitioner described other physical effects including detailed comments about itching around his anus. When asked how he doing emotionally, petitioner said he thought he was doing good, adding that technology had been turned down.

Following a question about his hobbies, petitioner said he was deprived of hobbies but indicated that those on death row were permitted to make craft items for their wives and girlfriends. Next, he discussed the apology offered by scientific technology and his delay in accepting the apology. He said they "murdered" 23 years of his life.

Petitioner described his typical day including, among other things, breakfast, exercise (explaining in detail his exercise regimen), and television viewing. He said he typically went to bed between 10 and 11 and liked to watch various news programs to keep up on current events.

Petitioner discussed extensively the merits of Hillary Clinton and Barack Obama. He gave details of the delegate process and highlighted the experience of Hillary Clinton. When directed back to his daily schedule, petitioner indicated he kept a journal and liked to read. During his explanation, he detailed his relationship with Susan. He described what he and Susan planned to do and his preparation of a will. Petitioner said his contact with Susan is through the attorneys rather than correspondence. He said Susan visited him on August 16, 2006 noting it was the same day Dr. Martell had interviewed him previously. He said they listed possible boy's and girl's names for their children. He said he did not call her even though he has telephone privileges because they have a mutual understanding that they will wait out this "nightmare ordeal."

Petitioner responded to questions about his age and education. When asked by Dr. Martell about the status of the Captain D's case, petitioner mentioned an April 18, 2003 competency hearing in Judge Todd Campbell's court. He said after being found competent he was returned to death watch. He recalled that the Sixth Circuit granted a stay of execution. Petitioner said another execution date was set but that he was never taken to death watch. Petitioner said other execution dates were set in subsequent years.

Petitioner did not know specifically about the status of the McDonald's case other than it was in the post-conviction stage. He referenced an identification made by Gonzales and discredited by noting differences in his appearance and that of the person described by Gonzales. He said he occasionally heard on the radio that a January 2007 execution date had been set in the McDonald's case.

Regarding the Baskin-Robbins case, petitioner said he had returned to Judge Gasaway's courtroom for a hearing and that both the Montgomery County and Davidson

County courts had planned a follow up hearing. Petitioner recited various claims of ineffective assistance of counsel including the financial records and related information about the sum of money taken from Captain D's and his purchase of an automobile. He also recognized an issue relating to the shoe prints and the overall idea of the existence of the tapes that would exonerate him.

Petitioner understood that a competency hearing was going to be conducted. He named various mental health professionals he anticipated would be involved. Petitioner recited his understanding of the criteria of an incompetent person. He also referenced the United States Supreme Court decision about lethal injection. In explaining the process petitioner noted that death is final.

Dr. Martell asked petitioner what he believed to be his greatest liabilities with respect to the competency hearing. Petitioner referenced scientific technology and the effects it has on his mind, including his alleged bizarre and peculiar behavior while in Judge Blackburn's courtroom. He said when he was on the witness stand he pretend to be looking through binoculars, waiving at the representatives from the District Attorney's Office. He said he also mentioned that Tinker Bell was sitting next to him. Petitioner said he told Tinker Bell to leave him alone because he was talking to Judge Blackburn. He explained that he did these things because they had scientific technology on his mind.

Petitioner said he was aware the Dr. Bernet believes he is lying about the scientific technology. He responded that he believed there are many audio and video tapes of him. He again referenced Susan, who he had previously called April to protect her identity, and stated that she had been the person operating the video camera during the interview. After a lengthy departure relating to Susan among other things, petitioner returned to the claims

of malingering made by Dr. Bernet. Petitioner replied that there is no malingering, noting they have the science to do this. He acknowledged that he told Dr. Bernet in 1999 that there was no technology and that he had made it up. However, he said more and more are finding out about the technology. Petitioner said they can alter his brain and cause him to act in different ways.

Petitioner said he had no liabilities with respect to his post-conviction appeals. He noted that the money and shoes issue work to his advantage. He later explained that the only thing working against him is scientific technology. Petitioner expressed his belief that the trials were mock and that the parties were coached. He reasoned that Judge Gasaway and Judge Blackburn could only have known about his past in Texas by being coached. He said "they" came to him in 2003 and told him the trials were not real and that he was actually serving a 10 to 12 year sentence. He maintained that he had no legitimate counsel because present counsel are not actual lawyers.

When asked specifically about his personal affairs, petitioner recognized his controlled environment and that certain tasks are automatic. However, he noted that he was in charge of his hygiene, commissary account and contacting people. Petitioner said he had no difficulty in managing his affairs but indicated scientific technology can be annoying. He attributed ringing in his ears to scientific technology, explaining how technology is able to accomplish it. He said it would affect anything he does because it is part of his body.

Petitioner told Dr. Martell that the technology can also block memories such as his earlier marriage. He said he was also unable to recall various past conversations with post-conviction counsel and staff when they later questioned him about those earlier meetings.

Petitioner said in addition to the memory blocking, the technology also caused him to act bizarrely during his testimony in front of Judge Blackburn. Dr. Martell asked petitioner if he was using scientific technology as an excuse for being a goofball on the stand. Petitioner responded that it was not an excuse because it was his desire to act educated and mannerly in front of these professionals. As an example, he said that if Dr. Martell had whispered in his ear to act like a cartoon character he would resist such urging. However, he said that the scientific technology blocked his mind from experiencing embarrassment or shame. He added that the sky is the limit under the technolog.

When asked how anyone would know whether he is faking or really experiencing scientific technology, petitioner said he can be called a liar or be deemed a dubious character but that the experts would have to return to their respective offices and sort it out. He told Dr. Martell he would have to make those decisions and find those answers on his own. He concluded Dr. Martell would have to make his own judgement call.

Petitioner said that if he wanted to lie or act like he was malingering he would probably be unable to do so. He said he had been around a few mental patients and concluded that if you are schizophrenic you are always going to be schizophrenic or bi-polar you are always going to be who you are. Petitioner said you can malinger on the witness stand and noted that many inmates probably do. However, when you return to the controlled environment where your actions are observed by others you may be seen as a completely different person than the one on the witness stand. He noted that this is what technology can do.

As part of the malingering topic, Dr. Martell referenced petitioner's admissions to faking mental illness in Texas and other places. Dr. Martell said he noted from the records

that petitioner had faked on psychological testing much like the boy who cried wolf. Petitioner explained that people are now being educated about the technology. He said his counsel Gleason had informed him that everyone now knew about the technology and that they all knew petitioner was actually telling the truth because that was not his normal character. Petitioner testified that his biggest personal weakness is that he is a little shy with girls at first.

Dr. Martell administered another test and followed it with additional interview questions. He asked petitioner about his money management. Petitioner said he is given money (including by attorney Gleason) for his commissary account. He said he uses the money to buy toiletries and that the account balance stays in the $20 to $25 range a month. He said he tried to carry money over from one month to the next to build up a reserve. Petitioner explained that to purchase items he fills out a commissary form which includes inmate information and choices for purchases. He said he makes his choice and enters a total for the items selected. Petitioner said he ordered mayonnaise and hot sauce to bring taste to his food. He also ordered toothpaste, soap and a bag of coffee.

When asked what he would like to see happen in his case, petitioner said he realized he had a 10 to 12 year sentence. Dr. Martell asked petitioner if he had any questions of him. Petitioner asked Dr. Martell whether he was leaning toward competency or incompetency. Dr. Martell told petitioner he was a little bit on the fence but wanted to review the testing. He said he had listed the supporting reasons why petitioner is competent but had also noted weaknesses under each prong. Dr. Martell told petitioner he might leave it up to the judge and not offer a final opinion. Petitioner told Dr. Martell he understood Dr. Martell would likely list scientific technology as a weakness. Petitioner said

he was glad people were beginning to understand about scientific technology.

Petitioner expressed his belief that President George Bush has had scientific technology put on him because at times he will be speaking and suddenly forget what he had intended to say. Petitioner said Connie Westfall of the Post-Conviction Defender's Office had expressed to him that she believed they put it on her one time. Petitioner said he did not oppose scientific technology but did not want it on himself, his wife or his children. He indicated that he might be forced to move to Russia or somewhere to escape it. Petitioner told Dr. Martell that his counsel Gleason explained how they would use satellites to disseminate the technology to a larger number of individuals around the world.

In closing, petitioner talked about the Olympic torch being passed through various states and noted the human rights issues in China.

IV. DISCUSSION

The sole issue before the Court is whether petitioner is incompetent, as alleged, under the Nix competency standard to proceed with his post-conviction petition for relief. If petitioner is not competent under Nix, Linda Martinano would proceed on the amended petition on petitioner's behalf in a next friend capacity. On the other hand, if petitioner is competent, his amended petition would not be valid due to petitioner's refusal to sign or verify it. Under those circumstances, the Court would proceed to a post-conviction hearing on the previously-filed pro se petition.

Competency Standard

As indicated throughout this Order, the Court conducted a Rule 28 competency hearing in late 2007 to determine petitioner's competency to withdraw his post-conviction petition. In those Rule 28 proceedings, the Court applied the Rees v. Peyton standard explicitly adopted by our supreme court in Rule 28.

In the instant proceedings, the Court is again required to assess petitioner's competency in the post-conviction setting. However, this re-visiting of the petitioner's competency relates to petitioner's competency to proceed on his post-conviction petition. As evidenced by the record, this type of challenge posed an issue of first impression in Tennessee. This Court adopted a procedure for determining competency in such a setting and granted a Rule 9 interlocutory appeal for the purposes of appellate review of the established procedure. In Reid v. State, 197 S.W.3d 694 (Tenn. 2006), our supreme court adopted this Court's procedure but with certain modifications. Upon remand, this Court employed and is employing the procedures approved by the supreme court in Reid.

The Reid court concluded that the civil standard for mental incompetence adopted in State v. Nix, 40 S.W.3d 459 (Tenn. 2001) applies to a competency determination during post-conviction proceedings. In reaching this result, our supreme court examined the evolution of the Nix standard from Burford to Watkins to Seals to Nix and the underlying due process concerns implicated even in a post-conviction setting.

The Burford court first recognized the potential for due process violations relating to post-conviction review. Burford v. State, 845 S.W.2d 204 (Tenn. 1992). Later, the Watkins court concluded that post-conviction petitions were civil in nature and held that the savings statute in effect at that time applied to toll the three-year statute of limitations in

cases where a petitioner was incompetent. Watkins v. State, 903 S.W.2d 301 (Tenn. 1995). During this time the legislature enacted the 1995 Post-Conviction Procedure Act which significantly reduced the time for filing a petition from three years to one year and originally provided that the statute of limitations shall not be tolled for any reason. Based on Watkins, the statute was amended to provide for three limited exceptions. Subsequently, in Seals, the Court examined whether mental incompetency tolls the one-year statute of limitations under either the savings provision or constitutional due process. The Seals court concluded that the statutory savings provision did not toll the statute of limitations but that due process may require tolling to ensure the petitioner has a meaningful opportunity to present claims in a reasonable time and manner. Seals v. State, 23 S.W.3d 272 (Tenn. 2000).

This evolution was important in dealing with mental incompetency and the post-conviction statute of limitations. However, the courts had not addressed the standard of mental incompetence that a petitioner must satisfy before due process requires tolling of the post-conviction statute of limitations until Nix. In determining the appropriate standard, the Nix court again examined its previous analysis of the nature of post-conviction proceedings. The Court, citing Watkins, reiterated its conclusions that while post-conviction proceedings are considered "criminal" in nature for some purposes, with respect to the statute of limitations issues, a post-conviction proceeding is civil in nature. State v. Nix, 40 S.W.3d 459, 463 (Tenn. 2001). Citing Porter v. Porter, the Nix court noted the long-held civil standard of incompetency and found it appropriate to adopt it in the post-conviction setting. Id. (citations omitted). In doing so, the Court rejected claims that the civil standard of incompetency does not satisfy constitutional due process noting that a petitioner has no

fundamental right to collaterally attack a conviction. Id. The Nix court indicated due process requires only that a petitioner be provided an opportunity for the presentation of the claim at a meaningful time and in a meaningful manner. Id. It concluded the civil competency standard satisfied those due process concerns and held that "due process requires tolling of the statute of limitations only if a petitioner shows he is unable either to manage his personal affairs or to understand his legal rights and liabilities." Id.

Returning then to the Reid analysis and the appropriate competency standard when a petitioner has filed for post-conviction relief but claims of incompetence arise during the pendency of the proceedings, the Reid court again highlights the "nature of the right" in light of the procedural status of the case. It rejected petitioner's claim that due process required a standard more akin to the standard of competency to stand trial. Reid, 197 S.W.3d at 701-02. The Reid court referenced the court's long-held recognition that post-conviction procedures are not constitutionally required indicating "[m]any of the rights applicable to trial no longer attach." Id. at 700. (citing as an example that there is no constitutional right to counsel in post-conviction proceedings, even capital cases). It added that while at trial a defendant must make fundamental decisions that require the advice of counsel but are ultimately personal to the defendant, counsel "retains" the right to make strategic and tactical decisions based on counsel's professional judgment. Id. at 702. (citations omitted). Based on its analysis, the Reid court concluded that "[a] petitioner is, therefore, incompetent to pursue post-conviction proceedings only if he is unable to either manage his personal affairs or to understand his legal rights and liabilities." Id.

This Court recognizes Tennessee's adoption of different competency standards within the post-conviction setting. While the Nix standard has been accepted as the

appropriate competency standard for both tolling the statute of limitations and proceeding on a post-conviction petition as in the instant case, our supreme court adopted the Rees v. Peyton standard in the Supreme Court Rule 28 context (competency to withdraw a petition that has been filed).[8] The latter standard is applied in the federal court setting when a petitioner alleges incompetence to file or proceed in habeas corpus proceedings.

While it is perplexing that the two standards co-exist, the question of whether these two standards can be reconciled or whether they are functionally equivalent is not an issue to be resolved by this Court. The Reid court referenced the Rees standard in its analysis of the appropriate standard applicable in the instant case. Reid, 197 S.W.3d at 702. (stating that the standard in Rule 28, Section 11, which parallels Rees v. Peyton, is limited to the unique circumstances involved in a petitioner withdrawing a petition already filed and waiving further post-conviction relief). Therefore, our supreme court is certainly aware of the two standards but chose to adopt the Nix standard here. This Court will apply the Nix competency standard in its analysis conducted below.

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[8] Rule 28 set out the following competency standard (adopting Rees v. Peyton standard): "whether the petitioner possesses the present capacity to appreciate the petitioner's position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether the petitioner is suffering from a mental disease, disorder, or defect which may substantially affect the petitioner's capacity." Rule 28 makes no reference as to which party has the burden of proof. Additionally, though not directly related to the post-conviction context, the Court recognizes our appellate courts have adopted a different competency standard for competency to be executed. Under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it. Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999); see also Panetti v. Quarterman, 127 S.Ct. 2842 (2007). Petitioner is presumed competent to be executed and bears the burden of overcoming this presumption by a preponderance of the evidence.

Burden of Proof

In Reid v. State, 197 S.W.3d 694, 703-05 (Tenn. 2006), the Tennessee Supreme Court concluded that in the instant setting the petitioner bears the burden of proving by clear and convincing evidence that he is incompetent to proceed in a post-conviction action. In reaching this conclusion, it rejected arguments that either no burden should be placed on any party or that the burden at most should be preponderance of the evidence. The Reid court noted the constitutional rights on the issue of competency to stand trial and competency to be executed are distinguishable from competency to proceed in a post-conviction action. The Court analogized the burden of proof necessary to ensure due process in the context of tolling the post-conviction statute of limitations as determined in Nix. Considering the consequences of both procedural settings, the Reid court found that the clear and convincing standard was equally applicable in this instant proceedings.[9]

The "clear and convincing evidence" standard is more exacting than the preponderance of the evidence standard but does not require such certainty as the beyond a reasonable doubt standard. O'Daniel v. Messier, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995) (citations omitted). "Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." Id. "It should produce in the fact-finder's mind a firm belief or conviction with regard to the truth of the allegations sought to be established." Id.

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[9] By analogy, our appellate courts have noted that even though the conservatorship statute was silent as to which party carried the burden of proof, the court reasoned that the general rule dictates that the party with the affirmative of an issue has the burden of proof. In the Matter of: The Conservatorship of Ellen P. Groves, 109 S.W.3d 317, 330 (Tenn. Ct. App. 2003). It concluded that the person seeking the appointment of a conservator must prove by clear and convincing evidence that the person requires a conservator.

Therefore, in the instant case, petitioner's purported next friend bears the burden of proving his incompetency by clear and convincing evidence.

Analysis

Against this backdrop, the Court must determine whether petitioner is incompetent to manage his personal affairs or to understand his legal rights and liabilities. As noted by the parties, Tennessee case law interpreting the Nix civil competency standard is scant. However, a reported decision from the Tennessee Court of Appeals provides a thorough and informative analysis of the civil competency standard.

In In the Matter of: The Conservatorship of Ellen P. Groves, 109 S.W.3d 317 (Tenn. Ct. App. 2003), Judge Koch (now Justice Koch) examined in detail each prong of the civil competency standard (as adopted in Nix). Although the Groves case examines competency in the context of a conservatorship proceeding, the analysis of the competency standard is equally applicable here.

Autonomy and Capacity

The Groves court initially discussed the concept of autonomy and an adult person's right to live life consistent with his or her personal values. In fact, it described autonomy as "one of the bedrocks of a free society." Id. at 327-28. When a person's autonomy becomes partially or totally impaired, the legal status that occurs is called incapacity. Id. at 328-29. "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. at 329. A person may also be deemed "incapacitated" when he cannot control his actions or behavior. Id.

Although recognizing the strong policy toward recognizing a person's right to be autonomous, the Court noted that public policy may also justify others stepping in to make choices on a person's behalf or to promote the person's best interests and to protect them from harm when their autonomy becomes impaired. Id. On the other hand, public policy also favors allowing incapacitated persons to retain as much autonomy as possible. Id. For these reasons and with this recognition, the well-settled law presumes that "adult persons are sane, rather than insane, and capable, rather than incapable, to direct their personal affairs until satisfactory evidence to the contrary is presented." Id. at 329-30.

Capacity

Although the analysis in a conservatorship proceeding, as discussed in Groves, diverges somewhat from the question now before the Court, the discussion is nonetheless useful in examining an individual's competency. In discussing capacity, the Groves court recognized that "[c]apacity is not an abstract, all-or-nothing proposition." Id. at 333. It noted:

> It [capacity] involves a person's actual ability to engage in a particular activity. Accordingly, the concept of capacity is task-specific. A person may be incapacitated with regard to one task or activity while retaining capacity in other areas because the skills necessary in one situation may differ from those required in another.

Id. at 333-34.

The Court also explained that capacity is situational and contextual and may have

a motivational component. Id. Capacity may be affected by a number of variables that constantly change including external factors such as time of day, place, and social setting. Id. It may also be affected by neurologic, psychiatric or other medical conditions. Id. Finally, the Groves court noted that capacity can be fluid rather than static and therefore can fluctuate moment to moment. Id. Capacity can also be affected by a change in surroundings 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.

Functional Capacity and Decision-Making Capacity

Capacity can encompass two distinct concepts: functional capacity and decision-making capacity. Id. at 334. While functional capacity relates to the person's ability to take care of himself and his property, decision-making capacity relates to the person's ability to make and communicate decisions with regard to caring for oneself and one's property. Id. The Groves court indicated that "[t]he distinction between cognitive capacity and competence in actual performance is somewhat artificial because functional capacity depends, in part, on the decision-making capacity." Id.

Functional Capacity

The functional capacity of a person to care for himself includes a person's ability to perform basic daily activities including personal hygiene, obtaining nourishment, mobility, and addressing routine healthcare needs. Id. The person's ability to carry out these essentially daily tasks should be examined in the person's everyday environment over time and not in the laboratory, doctor's office or courtroom on a few specific occasions. Id. at

335.

On the other hand, the functional capacity to care for property involves a person's ability to manage his personal property, real property and finances. Id. Of course as discussed below, the petitioner is incarcerated and therefore has minimal property to manage; however, the Court may nonetheless assess petitioner's ability to make or communicate decisions about any property.

Decision-making Capacity

The Groves court stated that "[d]ecision-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. Testing the decisions against the person's own values and goals "reflects the importance of determining a person's capacity in light of his or her own habitual standards of behavior and values, rather than the standards and values of others." Id.

The court observed that "[a] person does not lack decision-making capacity merely because he or she does things that others either do not understand or find disagreeable." Id. "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 footnotes, which cite to various articles relied upon by the Groves court, indicate the decision-making capacity also requires "the ability to reason and to deliberate about one's choices." Id. at 336 n. 61.

In evaluating decision-making capacity, the focus is chiefly on the process a person uses to make a particular decision and then only secondarily on the decision itself. Id. "It analyzes a person's ability to understand pertinent information and to reason and deliberate about choices particular to a specific decision." Id. Citing State Dep't of Human Servs. v. Northern, 563 S.W.2d 197, 209 (Tenn. Ct. App. 1978), the Groves court noted that in 1978 the court characterized this capacity as the "mental ability to make a rational decision" using the term "rational" to "connote a decision based on the process of reasoning, not necessarily a decision that the prevailing majority would view as acceptable, sensible, or reasonable." Groves, 109 S.W.3d at 336 n. 66 (citing authorities defining a rational decision as "one that flows logically from whatever reasons are offered").

It is interesting to note that Groves stated "[p]ersons frequently display different levels of decision-making ability. A person may be simultaneously capable and incapable with respect to different types of decisions." Id. at 336.

Nix Analysis

Again, the Court's focus here is whether petitioner is incompetent either to manage his personal affairs or to understand his legal rights and liabilities. At the competency hearing, the Court heard from three mental health professionals (as summarized above) and reviewed their respective reports and affidavits. The varying diagnoses reflects the complex nature of this matter.

Initially, the Court notes it is intimately familiar with the record in this case having presided over both the Captain D's and McDonald's trials. This familiarity extends to the subsequent post-conviction proceedings in both cases. Mental health issues arose to

some degree at the trial level (Captain D's - sentencing phase; McDonald's - competency to stand trial and sentencing phase) but have again moved to the forefront in the post-conviction stage. Therefore, the information available to the Court on petitioner's overall competency comes not only from the May 2008 Nix hearing but also from the 2007 Rule 28 proceedings.

As the record indicates both Dr. Woods and Dr. Bernet testified in the Rule 28 proceedings as "court-appointed" experts. However, their respective opinions were based on the Rees v. Peyton competency standard adopted in Rule 28. In the instant Nix proceedings both experts essentially adhered to their 2007 diagnoses with minimal additional elaboration. Therefore, the Court's analysis of Dr. Bernet and Dr. Wood will necessarily pull from both the 2007 and 2008 information. Even though Dr. Martell was referenced in the 2007 Rule 28 proceedings, his primary testimony and findings were presented to the Court for the first time in the May 2008 Nix proceedings. Of course each experts' conclusions were tested during cross-examination as contained in the record and as summarized above.

Underlying each diagnosis is the characterization of petitioner's descriptions of his thoughts, beliefs, fantasies or delusions (as they have been termed by the various experts) about what petitioner refers to as "government surveillance" or "scientific technology." As summarized extensively above in this Order, the petitioner has maintained over the years that he has been the subject of a surveillance operation conducted by the government. Petitioner reports that this "technology" records his every thought and action. Depending on which testimony is examined, the degree of the surveillance and resulting effects on petitioner vary.

Other than the general concern about these described delusions or thoughts, perhaps the most significant concerns must necessarily relate to petitioner's stated belief that his trials were mock trials; that the court, counsel and other parties are actors or are scripted; and that he is serving a 10 to 12 year sentence at eighty percent.[10] Each expert spoke to the described delusions or beliefs and the effects, if any, they have on petitioner's competency. Each expert's findings as to the veracity of petitioner's claims and the effect, if any, on his ability to make certain relevant legal decisions are set out below.

The Court will briefly summarize the diagnosis of each expert and apply those findings to the Nix competency considerations. Because the respective testimonies and reports are detailed above, the Court will not attempt in this analysis to provide every explanation offered by the experts. Instead, these summaries will set out the basic diagnosis of each expert followed by the respective opinions as to competency under Nix.

Dr. George Woods

In the 2007 Rule 28 proceedings Dr. Woods opined that petitioner was incompetent under the Rees v. Peyton standard. His opinions resulted from his conclusions that petitioner suffers from psychosis secondary to a general medical condition (i.e., left temporal lobe damage) and cognitive disorder not otherwise specified. Dr. Woods believes petitioner's delusions are real and relate directly to petitioner's mental disease or defect. In his opinion, petitioner's condition continues to decline as is characteristic of psychotic

[10] The Court notes that throughout the testimony and various transcripts reference is made to petitioner's belief that he is serving an 10 to 12 year sentence at eighty percent. At times the sentence is referred to as an 8 to 10 year sentence. These differences have no bearing on the analysis. For the purposes of this discussion, the Court will refer to said sentence as a 10 to 12 year sentence.

deterioration.

At the Nix hearing, Dr. Woods maintained his earlier findings and reached the same diagnosis. In much the same way as he analyzed the Rees standard, Dr. Woods said petitioner has no appreciation of his present position because his capacity is impaired by the delusions. Dr. Woods also testified that the delusions prevent petitioner from being able to work with his attorneys or even have an appreciation for the nature of the proceedings. He noted that because petitioner believes scientific technology controls every aspect of his life, including certain aspects of his bodily functions, he cannot proceed beyond what the technology will allow.

Dr. Woods described the delusions as unshakable. He said petitioner told him technology can even impair his ability to read and write. Dr. Woods again noted petitioner's insistence that his attorneys are not really attorneys and that the trials were scripted. He also mentioned petitioner's belief that he is serving a 10 to 12 year sentence negotiated by Washington or New York lawyers. Dr. Woods said the delusions have now expanded to include a fictitious fiancee named Susan.

Even though Dr. Woods acknowledges that petitioner can report accurately as to some past events, he believes petitioner is only "parroting" what he has been told with no real understanding. Dr. Woods stated that petitioner spends no real time on thinking about his case and has done no significant reading on his case. Dr. Woods described petitioner's pro se petition in the Captain D's as an important example of petitioner's delusions.

As discussed more specifically below, Dr. Woods concluded that petitioner was incompetent under both prongs of Nix in both the McDonald's and Captain D's cases.

Dr. William Bernet

Dr. William Bernet also testified during the 2007 Rule 28 proceedings. Dr. Bernet concluded at that time that petitioner evidenced a phenomenon called "pseudologia fantastica" otherwise known as pathological lying. Dr. Bernet cited petitioner's lengthy involvement in the criminal justice system and the first manifestation of the "scientific technology" story when petitioner was arrested in Texas. Based on his review of the records, Dr. Bernet said he was able to match the appearance and reappearance of the surveillance stories with a corresponding run-in with the legal system. He said petitioner revives the scientific technology stories when it benefits him to do so.

Dr. Bernet conceded that when he examined petitioner in 1999 and 2000 relating to the Baskin-Robbins matter in Montgomery County, he concluded that petitioner suffered from delusional disorder but nonetheless found him competent to stand trial. However, he explained that with the lengthy history and substantial materials now available to him, he now concludes his earlier diagnosis was in error. Dr. Bernet stated that upon reexamination he considered the possibility that the delusions were real along with the possibility that the stories were fabrications. After conducting his 2007 evaluations, Dr. Bernet determined that the stories were more likely than not lies rather than delusions based on a mental disease or defect. In so finding, Dr. Bernet found it significant that petitioner had the ability to set aside the alleged delusional thoughts and speak intelligently about his case.

At the Nix hearing, Dr. Bernet essentially adhered to his 2007 findings but withdrew the use of the term "pseudologia fantastica" because he said the term was not necessary to his diagnosis and only seemed to result in confusion (noting the legal challenge based

on the absence of such a diagnosis in the DSM-IV). Dr. Bernet said persistent or repetitive lying would adequately describe petitioner's conduct without causing undue strife over the psychiatric terminology.

In conducting an updated evaluation in light of the Nix standard, Dr. Bernet again noted petitioner's ability to speak specifically about his case without significant reference to the "scientific technology." Dr. Bernet refused to characterize the references to scientific technology as a delusional or belief system because first he did not believe them to be delusions and further because he had not concluded that petitioner actually believes the stories himself. Instead, he substituted the terms "story" or "fantasy" to explain petitioner's comments.

During the Nix hearing, Dr. Bernet was confronted about his earlier stance that the petitioner revived these stories when he found himself in legal trouble. He was questioned about petitioner's letters to then Texas Governor Richards. According to the testimony, these letters and public campaign began some months after petitioner was released from prison for armed robbery convictions. However, Dr. Bernet said petitioner told him he began the letter writing because upon his release from prison he was trying to get his life back. These past convictions stood in petitioner's way of trying to make a new start. Dr. Bernet said petitioner explained that he hoped to convince others that he should have been found not guilty by reason of insanity at the armed robbery trial (as had been successfully argued at a previous trial). Dr. Bernet found no reason to depart from his diagnosis based on this critique of his theory.

Dr. Bernet noted that these stories or fantasies about scientific technology serve as a defense mechanism and can be useful to the petitioner. He explained that petitioner uses

this story to mask the horrible facts of the crimes he committed. Dr. Bernet said petitioner would rather believe that the technology can prove his innocence instead of facing the harsh reality that he killed seven people.

Though the detailed findings on each Nix prong will be addressed below, Dr. Bernet found petitioner competent under both Nix competency considerations as to the McDonald's and Captain D's settings.

Dr. Daniel Martell

Dr. Daniel Martell, a neuro-psychologist, testified at the Nix hearing on behalf of the State. As explained at the hearing, Dr. Martell evaluated petitioner as early as 1999 and 2000 in the Montgomery County Baskin-Robbins proceedings and in the Davidson County Captain D's and McDonald's proceedings. At that time he concluded that defendant/petitioner suffered from delusional disorder but found defendant/petitioner competent to stand trial in the McDonald's case. Dr. Martell was later asked to evaluate petitioner on behalf of the State in federal habeas corpus proceedings. At that time, Dr. Martell concluded that petitioner's delusions were no longer encapsulated (as they had been at the time of trial) and found him incompetent under the federal Rees standard. The resulting report served as the basis for the state's withdrawal of opposition to Ms. Martinano proceeding as next friend on petitioner's behalf in the federal court proceedings.

Although Dr. Martell's federal court findings were discussed at the 2007 Rule 28 proceedings, Dr. Martell did not testify in that hearing. The referenced report from the federal court proceedings was presented at the Rule 28 hearing. The report indicated delusional disorder and the intensity of the underlying delusions could "wax and wane" over

time. A follow-up letter by Dr. Martell tendered to the Court in the Rule 28 proceedings by agreement of the parties indicated the earlier report had a "use-by" date because competency can be fluid.

Notwithstanding these earlier submissions, Dr. Martell testified before this Court on the post-trial issues on May 13, 2008 at the Nix competency hearing. Dr. Martell conducted a lengthy interview and testing in April 2008. Dr. Martell opined that petitioner still suffers from delusional disorder, abiding by his earlier findings in 1999 and 2000. Dr. Martell explained his earlier statements that the delusions were encapsulated at the time of examination in 1999 and 2000. He noted that the core subject of the delusions had remained essentially constant but that the delusions had expanded to include more individuals.

Dr. Martell said petitioner maintained his beliefs in the scientific technology and on this occasion made reference to his fiancee Susan. Petitioner also indicated that his trials were mock and that he had the right to sue the State of Tennessee. At the same time, Dr. Martell noted petitioner was able to speak rationally and intelligently about a wide range of topics including a fellow death row inmate with multiple sclerosis, the relative merits of Hillary Clinton and Barrack Obama as presidential candidates, the super-delegates process, human rights issues in China and the impact on the Olympic games, and the United States Supreme Court decision with regard to lethal injection.

Even though he reported that petitioner's delusions rendered him incompetent under Rees in the federal court proceedings, Dr. Martell concluded that petitioner is presently competent under the Nix standard for the purposes of the Captain D's case and was competent under Nix during the relevant statutory limitations period in the McDonald's

case.

Ability to Manage His Personal Affairs

Even though all three experts reach different conclusions, the Court must analyze their respective diagnoses under the Nix competency standard. The Nix standard in the instant context first provides that the petitioner is incompetent to proceed with his post-conviction proceedings if he is unable to manage his personal affairs.

As noted above, the Court is aware that little legal precedent exists to guide the Court in this analysis. However, the considerations set out in Groves (cited above) are a useful starting point. The Groves decision indicated the analysis includes both functional capacity and decision-making capacity components.

Again, functional capacity relates to a person's ability to take care of oneself and one's property. This includes the person's ability to perform basic daily activities including personal hygiene, nourishment, mobility and routine healthcare needs. Relating to care for property, this capacity involves a person's ability to manage personal and real property and finances. The decisions-making capacity focuses on the process a person uses to make a decision.

Here, the Court acknowledges that petitioner's structured prison environment alters, in some respects, the analysis of petitioner's ability to manage his personal affairs. However, the petitioner's daily activities give insight into his thought processes as evidenced in his interviews with the various experts.

When asked by Dr. Bernet about his personal affairs, the petitioner himself recognized his institutional setting at Brushy Mountain and the minimal opportunity for

deviation from the established procedures. Nonetheless, petitioner asserted that even in this environment, he has choices to make on a daily basis. He explained that he makes the choice to rise early every morning to retrieve his breakfast tray. Although he described this task as minimal he noted that other inmates choose not to awaken for breakfast. On the other hand, petitioner said he gets out of bed a few minutes early so he can dress and be prepared for the arrival of the guards serving breakfast.

Next, petitioner talked about his choice to effectively utilize his one hour of recreation time. He explained that he is in lockup for twenty-three hours and that he takes advantage of the hour. Petitioner reminded Dr. Bernet that he liked to stay in good physical shape by working out and maintaining a daily exercise regimen. Petitioner said a majority of the other inmates stand around during recreation time and talk about other crimes they plan to commit upon release. However, petitioner chooses not to engage in such discussions and spend that time exercising. Petitioner explained the importance of good physical health and continued development of his muscle groups. He told Dr. Bernet about the various muscle groups and his attempts to develop certain groups.

Petitioner next described his choices relating to watching television. He indicated that most of the programs shown on television are not beneficial. However, he said he chose to watch public television in most instances due to the historical or scientific shows.

As to his nutrition, petitioner said he made wise choices about the types of food he eats. Even though he had limited fare from which to choose, petitioner tries to select nutritious foods with lots of protein rather than sugar-based foods. He said he further limits his food choices available through his commissary account. Even though he could buy candy bars through his commissary account, he chooses not to indulge in these practices.

With respect to the commissary account, petitioner explained that he gets money from various individuals and places the money into his account. From the account he can purchase toothpaste or soap or other toiletry items. As noted, even though he can purchase other food items, he typically chooses not to do so. He also maintains a positive balance in the commissary account and essentially described himself as frugal.[11]

During the hearing, testimony was presented that petitioner had executed a will naming his fiancee Susan as beneficiary of his estate. Numerous comments were made about this fictitious person and the unreasonableness of petitioner naming her in his will. According to petitioner, he mailed the will to Judge Campbell because he knew if something happened to him the will had at least been filed somewhere. No will was presented at the hearing. During cross-examination, Dr. Woods admitted that he had not investigated to determine whether Susan was an actual person who had had contact with petitioner.

Dr. Martell's interview with petitioner essentially mirrored that of Dr. Bernet's interview. Petitioner exhibited a slightly different tone in that he said he had little to manage because he was incarcerated. Nonetheless, his explanations as to his daily choices did not depart substantially from his comments to Dr. Bernet. Dr. Martell added that petitioner also reads books and maintains a journal.

Both Dr. Bernet and Dr. Martell conclude that petitioner is competent to manage his personal affairs. Dr. Bernet found petitioner's responses very logical and rationally based.

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[11] On November 21, 2008, during the pendency of this order, petitioner filed a pro se document with the Court complaining of a TDOC fee being taken from his commissary account. Copies were forwarded to counsel and the original placed in the file. The document included a handwritten letter explaining what petitioner believed to be an inappropriate deduction from his account for an offender fee. The accompanying commissary account logs accurately reflect petitioner's complaints. This filing further evidences petitioner's ability to manage his commissary account.

Of course, both Dr. Bernet and Dr. Martell note that if Susan is fictitious, the naming of her as his beneficiary would not be a reasonable decision. Notwithstanding the testimony about his will, petitioner spoke of his daily activities relating to, among other things, his hygiene, fitness and nutrition, correspondence and journal writing. These responses illustrate petitioner's understanding of his personal affairs and the limitations placed on such an analysis by his incarceration. When assessed by the Groves considerations and general legal principles, petitioner demonstrates a remarkable understanding of his daily choices and the reasons behind the choices he makes.

Dr. Woods testified that petitioner can accomplish certain basic tasks but noted that these functions are impaired by scientific technology. He said the technology affects petitioner's bodily functions, his ability to eat, his ability to sleep and his reading. When asked how he reached these conclusions, Dr. Woods could not recall his source or reference point. He said petitioner may have told him but then recalled that perhaps petitioner's post-conviction counsel had told him or had related these opinions in affidavits prepared by counsel and staff. The Court notes that Dr. Martell's interview contained references by petitioner to the effects of scientific technology on his daily activities. Dr. Woods concluded that "personal affairs" also includes "legal affairs." He testified that petitioner does little to manage his legal affairs, including petitioner's decision not to read anything about his case or otherwise assist in his case. He said any understanding petitioner exhibits is merely petitioner parroting what he has been told or has heard. Based on these conclusions, Dr. Woods opined that petitioner was incompetent under Nix to manage his personal affairs.

In weighing these various perspectives, the Court places significance on the

consistency in petitioner's responses to both Dr. Bernet and Dr. Martell. It is interesting to note that during his interview with Dr. Bernet, petitioner made little or no mention of the effects of technology on his daily activities, his thinking or his hearing. However, during his interview with Dr. Martell, petitioner referenced the pervasive nature of the scientific technology in most aspects of his life. As noted Dr. Woods insists petitioner has no abilities other than what scientific technology permits him to do.

Viewing the record as a whole, the Court finds the petitioner is not incompetent under Nix to manage his personal affairs. The Court finds petitioner's self-asserted responses to Dr. Bernet to be well informed and well reasoned. Though the scope of his activity is limited, petitioner understands he has choices to make and reasons through each choice. Petitioner illustrates a rational understanding of his personal affairs and applies a rational decision-making process in making his choices.

Dr. Woods' broad brush is disingenuous under this first Nix prong; therefore, the Court finds his testimony not to be credible on this specific issue. Rather than giving a concession when a response by petitioner was genuine, Dr. Woods explains away objectively reasonable testimony as being rendered at the hand of scientific technology. The record does not bear out such a conclusion. Certainly, Dr. Martell's interview contained certain references to certain daily activities being affected by technology though perhaps not to the degree recited by Dr. Woods. However, Dr. Martell, who has also has a lengthy history with the petitioner and has seen petitioner at perhaps his worst (2006 federal habeas corpus) and his best (1999 - 2000 trial), concluded petitioner is competent to manage his personal affairs. He reached this conclusion even though petitioner exhibited the type of conduct (and delusional thoughts) in the interview conducted by Dr.

Martell as that conduct described by Dr. Woods as being the basis for finding petitioner incompetent.

As to Dr. Woods' conclusions that "personal affairs" include "legal affairs," the Court finds no support for such a combination. However, even if the term "legal affairs" is implicitly included in the Nix prong related to management of personal affairs, no testimony was presented to convince the Court that petitioner was unable to manage his "legal affairs." Therefore, the Court finds petitioner (via next friend applicant Linda Martiniano) has failed to meet his burden of establishing that petitioner is incompetent under Nix to manage his personal affairs.

Ability to Understand His Legal Rights and Liabilities

The second prong or consideration of Nix is that petitioner is incompetent if he is unable to understand his legal rights and liabilities. Again, Groves provides a helpful framework for conducting this analysis. As with the first prong, capacity in this context seems to involve both functional and decision-making capacities. However, the Court finds the second type to be most significant when viewing this prong of Nix.

The Court must examine closely whether petitioner has the decision-making capacity described in Groves, including the injection of the adjective "rational" to describe the quality and character of the decisions being made. Again, 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. Groves, 109 S.W.3d at 335. These decisions must be tested against a person's own values and goals rather than those

of others. In addition, a person does not lack this decision-making capacity merely because others do not understand or disagree. Id.

In the instant case, this analysis is made more difficult by the diverging opinions/diagnoses of the mental health professionals. However, the Court examines the experts' findings in light of the autonomy recognized by our appellate courts (as in Groves) and the clear and convincing standard enumerated in Reid.

As summarized, Dr. Woods concluded petitioner is psychotic with a complex and entrenched delusional system. Dr. Woods stated that the delusions of government surveillance or scientific technology are so pervasive that each and every decision made by petitioner is founded in this delusional system. As maintained by Dr. Woods throughout these proceedings (Rule 28 and Nix), petitioner has no ability to make a rational decision about his legal rights and liabilities because the technology underlies each decision made by petitioner. Dr. Woods does not believe that petitioner has any ability to remove himself from the delusions or to step aside from the delusions to gain an understanding of his legal position.

Dr. Woods bases his conclusions in large part upon his multiple evaluations of petitioner. Since becoming involved in petitioner's case, Dr. Woods notes the constant core delusion that petitioner is being monitored in thought and action by this scientific technology. However, in addition to the core delusions, Dr. Woods identifies additional delusions or at least expansion of the primary delusion. As an example he cites to petitioner's belief in what Dr. Woods concludes is a fictitious fiancee named Susan to whom petitioner has purportedly left his bounty in a will.

In addition to the expanded topics, Dr. Woods described the most significant and

basic feature of the delusions is that his trials were mock trials and that the participants were scripted or coached as actors. Dr. Woods said petitioner similarly believes his present counsel are actors. Based on these beliefs, Dr. Woods finds that petitioner has no ability to understand his legal position much less make a rational decision about how or whether to proceed. Dr. Woods also cites to petitioner's belief that attorneys in Washington or New York negotiated a 10 to 12 year sentence for him and that he should have been released in June 2007.

Dr. Bernet has recorded some of the same core thoughts. In fact, during the April 2008 interview, petitioner again mentioned scientific technology. He specifically mentioned the 10 to 12 year sentence and explained that his counsel thought he would "go off" when he was not released in June 2007 as expected. Petitioner also referenced "mock trials" and that the parties were scripted. As noted above, Dr. Bernet also heard about the fiancee named Susan.

Dr. Bernet nonetheless questioned petitioner about his current legal status. Without significant mention of the scientific technology, petitioner explained his general understanding of his present position. Dr. Bernet was also able to engage petitioner in a discussion about the pros and cons of winning or losing. Petitioner momentarily acknowledged the possibility that he could be granted a new trial; however, he quickly dismissed it and said he could not allow such thoughts.

Petitioner explained that he did not want a new trial in any event because the witnesses would come in and tell those lies on him again. Petitioner characterized some of the testimony as lies (including his sister's testimony that she had been molested by petitioner) and some as truthful. Petitioner took issue with the evidence relating to the

athletic shoe prints and shoe patterns and also questioned the testimony about the sum of coins found in his apartment. Despite these potential challenges, petitioner said he chose not to proceed with his "appeals."

Dr. Bernet testified that he found petitioner was able to set aside the stories or fantasies about scientific technology and give rational responses to his questions about his legal rights and liabilities. Dr. Bernet opined that petitioner had lied about the technology stories for so long that he perhaps believed them to be true. He concluded that petitioner uses these stories as a defense mechanism to protect himself from the realities of the crimes he committed. Dr. Bernet said in that respect the stories were useful to petitioner and found no reason to take those from petitioner.

Dr. Martell testified about petitioner's long held delusions. As noted, Dr. Martell previously testified in trial testimony that petitioner suffered from delusional disorder. At the May 2008 hearing, he agreed that the core delusion about scientific technology remains essentially the same but now encompasses more people. Dr. Martell acknowledged that he found petitioner incompetent under the Rees standard in a federal court proceeding in 2006. He found in that matter that the delusions were no longer encapsulated as he had found in 1999 and 2000. However, during the 2007 Rule 28 proceedings, Dr. Martell gave no lasting significance to his 2006 report, indicating that it had a "use-by date" in light of the ever changing nature of competency.

Dr. Martell was certainly aware of the various nuances of the delusions he found. He had been told by petitioner that the trials were mock and that the parties were actors. Dr. Martell also noted petitioner's reference to the 10 to 12 year sentence, his belief that he would not be executed, his fiancee named Susan, and his right to sue the State of

Tennessee. On the other hand, Dr. Martell found that petitioner was, at the same time, able to speak rationally and intelligently about a number of current events topics.

Dr. Martell concluded from his 2008 interview that petitioner understands his legal rights and liabilities even though he is delusional. However, he noted that the delusions "may well effect his judgment and behavior with regard to decisions he makes going forward with his appeals." At the Nix hearing, Dr. Martell was again asked about these findings and informed the Court that he could state to a reasonable degree of medical certainty that petitioner is competent under the Nix standard as to both the Captain D's and McDonald's cases.

As with the discussion under the first Nix prong, the analysis is made more difficult by the experts' different conclusions. Here, the Court must decide whether the petitioner understands his legal rights and liabilities. In the present context of the Captain D's case, petitioner's primary legal "rights" include an ability to file an amended post-conviction petitioner with the aid of appointed counsel. Typically, an amended petition includes an expansion of some of the issues raised in the pro se petition along with additional issues. Of course, the "liabilities" could include, among other things, not being able to supplement his pro se petition and be limited in some respects as to the scope of his post-conviction review. Obviously "liabilities" could include the consequences of not seeking adequate post-conviction review and eventually facing lethal injection should he not prevail in the courts.

Reflecting on the initial Rule 28 inquiry, the Court engaged petitioner in a series of questions about his understanding of his cases. As the transcript illustrates, the petitioner had a remarkable grasp of his three complex capital cases. As an example, the petitioner

was asked why he was choosing to withdraw his pro se post-conviction petition in the Captain D's case. First, he recognized that his direct appeals were mandated by law. He then responded that he had given some initial thought to withdrawing his petition but understood that he had an execution date set in the subsequent McDonald's case. He recognized that because he had an execution date in the McDonald's case (and assuming he filed no post-conviction petition in the McDonald's case) his desires would be accomplished. However, when the McDonald's execution date did not materialize, he recognized the need to withdraw the Captain D's petition so as to put that case on the execution track. The responses reflected a rational understanding by petitioner of his legal position.

Turning to the instant matter, petitioner was asked by Dr. Bernet about his legal position. Although some of his responses were erroneous he essentially understood the nature of the "appeals" in a post-conviction setting. He also erroneously indicated that both experts at the Rule 28 proceedings had found him incompetent. The Court finds no significance in these errors.

Many of the post-conviction competency proceedings in this series of cases have been issues of first impression in Tennessee. On many occasions the parties have had an incomplete or inaccurate understanding of the rulings and/or proceedings. It is not surprising then that petitioner was erroneous about his understanding of how the federal habeas proceedings were instituted and his sister's role in those proceedings. Similarly, petitioner erroneously believed both experts found him incompetent in the Rule 28 proceedings. Because even the parties have had some difficulty in sorting through these new challenges and in interpreting the Court's Orders, the Court cannot overly interpret

petitioner's technical misunderstanding of the posture of his case. It is clear from the reading of the experts' reports and/or interviews that they did not have a complete grasp of the current legal proceedings. However, any ambiguity was clarified at the competency hearing with each expert being informed of the present posture and being asked their respective opinions in light of that posture.

What is clear from the testimony and evidence presented is that petitioner had a basic understanding of the post-conviction phase. He knew post-conviction proceedings followed the mandatory direct appeals process and he knew that the post-conviction proceedings were initiated by him by the filing of a petition. Petitioner expressed some confusion about how the post-conviction hearing would progress or the possible results of the Court's finding as to competency. Petitioner knew that at some point he could face electrocution again and "go on to heaven."

Petitioner also expressed some understanding of the nature of a post-conviction hearing when he said he recognized errors in trial counsel's performance relating to the shoe prints and the change taken from his residence. He indicated counsel should have challenged the shoe print evidence and the issue relating to the money found at his home versus the sum of money taken in the robbery. These examples reflect petitioner's understanding of two relevant and valid post-conviction issues.

Even with this recognition and the potential for a new trial, petitioner maintained his desire not to proceed with the post-conviction. Dr. Bernet discussed with petitioner in great detail the pros and cons of having a new trial. Petitioner cited both pros and cons but eventually concluded that he did not wish to have a new trial. In his explanation to Dr. Bernet he said he did not want the witnesses to come in and say those things about him

again. Dr. Martell said petitioner has always maintained (since the time of trial) that he would permit the direct appeals process to continue because it was mandatory in a capital case. However, Dr. Martell noted that petitioner maintained even then that he would choose not to file for post-conviction relief.

Without reference to delusions or scientific technology, the petitioner has some understanding of his legal rights and liabilities. Further, without using the precise legal terms, he understands a post-conviction proceeding is in some form an "appeals" process. He also understands he could be granted a new trial if he wins during post-conviction. Petitioner also knows that he could face lethal injection if he loses his post-conviction or chooses not to proceed with his post-conviction.

One of the concerns before the Court centers around petitioner's responses relating to the 10 to 12 year sentence (also referred to as 8 to 10 year sentence), the mock trials and actor participants, actual implementation of the death penalty. Certainly, peripheral issues exist including petitioner's fiancee Susan and petitioner's purported will designated her as beneficiary. However, these issues relating to his legal position and his legal rights and liabilities present the most significant inquiry.

On this definitive issue, the Court is faced with three different opinions. Based on the evidence presented, Dr. Woods opines that petitioner is delusional and therefore has no ability to understand his legal rights and liabilities due to the deep entrenchment of the delusional system. Second, Dr. Martell opines that petitioner is delusional but concludes that the delusions do not impair petitioner's basic understanding of his legal rights and liabilities. Finally, Dr. Bernet opines that petitioner is not truly delusional but instead is a repetitive or habitual liar. Dr. Bernet also concludes that even if petitioner has lied to such

an extent that he now believes the lies to be truth, the petitioner is nonetheless competent to understand his legal rights and liabilities.

The Court was faced with a similar dilemma in the Rule 28 proceedings. The Court was faced with two diverging opinions about petitioner's competency either of which was supported by the evidence. In this proceeding, the Court is again faced with the same two experts adhering to essentially the same opinions as rendered in the Rule 28 proceeding. Of course here the interviews and examinations focused on the Nix competency standard rather than the Rees competency standard. Further, in these proceedings the Court heard from a third mental health professional who, as noted, believes petitioner is delusional but that the delusions do not affect his understanding of his legal rights and liabilities. Again, there is evidence to support all three positions.

As perplexing as the present scenario seems, the Court notes distinct differences. In the instant case, our appellate courts have clearly adopted the Nix competency standard to not only apply in these types of proceedings but to this specific case. Further, the Tennessee Supreme Court also provided that the petitioner has the burden of proving incompetency by clear and convincing evidence, i.e., that there is no substantial doubt about the correctness of the conclusion drawn.

In this case, the Court concludes that petitioner has an understanding of his legal rights and liabilities. This is evidenced in his responses to both Dr. Bernet and Dr. Woods. However, the interplay between his understanding and the effects, if any, of the delusions or thoughts or fantasies about scientific technology on his understanding when inserting the descriptive term "rational" creates what this Court believes to be the seminal issue — does petitioner have a rational understanding (in light of the delusions or fabricated stories

that perhaps have become the "truth" to petitioner) of his legal rights and liabilities? Does this interplay eliminate any serious or substantial doubt concerning the correctness of the conclusion that petitioner is incompetent based on the evidence?

The Court finds that all three experts present arguably viable theories as to petitioner's mental competency even though none are in agreement. This Court cannot discount petitioner's underlying thoughts relating to scientific technology. These representations have been made since the time of trial at which petitioner was deemed competent to stand trial (McDonald's) even in light of these thoughts or delusions. Dr. Woods believes the delusions have existed since the time of trial and continue to expand thereby resulting in a further deterioration of petitioner's mental competency. Dr. Bernet opines that the scientific technology references are fabrications that have taken a life of their own but do not interfere with petitioner's competency under Nix. Dr. Martell's findings provide an interesting contrast between these two diagnoses.

Dr. Martell, as do Dr. Bernet and Dr. Woods, has a significant historical relationship with petitioner's case. Dr. Martell concluded in 2000 that petitioner suffered from delusional disorder but was competent to stand trial under the Dusky standard (McDonald's). In 2006, Dr. Martell examined petitioner's competency under the Rees standard and concluded that petitioner continued to suffer from delusional disorder but that the condition was exacerbated since the time of trial to such a degree he was at that time incompetent. Now, Dr. Martell finds petitioner to be competent under the Nix competency standard.

All three experts provide an interesting examination of petitioner's mental health status over time. Dr. Martell is somewhat unique in that he has observed petitioner during the best of times but also in the worst of times. He has conceded various points but has

maintained his position on many aspects of petitioner's competency. An objective expert provides useful assistance to the Court when he or she can step out of the advocate role to serve as a aid to the fact-finder. To some degree all have attempted to do so. However, Dr. Martell's analysis of petitioner's condition was illustrated in a meaningful way with a simple but poignant analogy.

Dr. Martell said he described petitioner's delusions at the time of trial as being present but being wholly contained in a suitcase that petitioner carried with him. When he examined petitioner in 2006, he said the suitcase had been opened and the delusions were no longer contained. He attributed the opening of the suitcase to stressful situations encountered by petitioner at that time including perhaps his move to Brushy Mountain, a facility despised by petitioner. The opening of the suitcase allowed the delusions to greatly affect petitioner's thought processes and as found by Dr. Martell affected his competency at that time to make rational decisions. Dr. Martell said that in 2008 petitioner's condition has improved since 2008. Using his analogy, he explained that petitioner was trying to close the suitcase back. He later described it as two suitcases – one with rational thoughts in one hand and one with irrational thoughts in the other.

Dr. Martell has witnessed perhaps a greater dynamic than any other expert involved in that he has the benefit of the long history with the petitioner since the time of trial. This dynamic provides useful insight for the Court in making this competency determination. Of course Dr. Woods maintains the delusions are so pervasive petitioner has essentially no ability to make decisions. Dr. Bernet, who also has a long history with the petitioner, has weighed the possibility of these thoughts being delusions or lies and obviously concluded they are lies but nonetheless do not affect petitioner's ability to make rational decisions.

It is interesting that Dr. Martell having observed this dynamic, including a time when petitioner's thoughts were completely consumed by the scientific technology thoughts and recognizing the continued presence of those same thoughts, nonetheless finds he is now competent to make rational choices about his legal rights and liabilities even with the presence of the delusions.

The issues of delusions or thoughts (verbalization, fantasies or stories) of scientific technology upon the petitioner's mental process have existed since the time of trial. Therefore, the Court is not addressing a mental health problem suddenly unearthed. What has changed is petitioner's present legal posture, the legal competency standard (applicable at this stage), and the experts' opinions as to how these scientific technology references should be characterized and what affect they have on petitioner's ability to have a rational understanding of his legal rights and liabilities.

The Court does not easily dismiss some of petitioner's responses relating to technology and his capital case matters. It is troublesome of course that some of his references, if believed, indicate he possibly does not understand his legal position claiming the trials were mock, that the participants were actors and that he may be under a 10 to 12 year sentence rather than the death penalty. Taken in isolation these remarks reflect why Dr. Martell had difficulty in reaching his conclusions under the second prong of Nix. During his testimony, Dr. Martell was quick to assert that his findings were based on the Nix competency standard. Implicit in that insistence is the possibility that the result may have been different under a different competency standard. The Court is of the same opinion.

Notwithstanding these concerns, the Court understands there may always be

differing opinions about the petitioner's competency. However, the Court's obligation here is to weigh the evidence in light of the Nix competency standard. While the evidence is not completely settled, the Court must conclude that in light of the applicable Nix standard[12] and the petitioner's burden of proving by clear and convincing evidence his incompetency to proceed on his Captain D's petition, the petitioner (here through his next friend) has failed to meet his burden on both prongs. That is, the Court cannot eliminate any serious or substantial doubt concerning the correctness of the conclusion of petitioner's incompetence based on the evidence. There is substantial credible evidence before the Court that petitioner is competent. Therefore, based on the evidence, there is substantial doubt that the petitioner is incompetent under Nix.

V. CONCLUSION

For the reasons cited above, the petitioner through his next friend has failed to meet his burden of establishing incompetency under Nix by clear and convincing evidence. As the fact finder, the Court does not have a firm conviction that the petitioner is incompetent. Because the burden has not been met, petitioner is considered competent for the purposes of this proceeding. Accordingly, the next-friend petition filed by Linda Martiniano, but not signed by petitioner, cannot be accepted by the Court. The Court shall proceed on petitioner's pro se petition at a time and date to be announced by the Court in a separate

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[12] The Court notes that the result could be different under a different competency standard or a different burden or proof. However, the Court recognizes that our appellate courts have noted that different competency standards apply at different stages of a criminal matter.

scheduling order.

ENTERED this the 12 day of December, 2008.

Cheryl Blackburn

Cheryl Blackburn,
Judge

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