IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, TENNESSEE

PAUL DENNIS REID, JR., by and through Linda Martiniano, Kelly Gleason, and Connie Westfall as next friend	)	**Trial Court No. 38887**
Petitioner,	)	**Post-Conviction No. _____**
	)	**Death Penalty Post-Conviction**
	)	**EXECUTION DATE: June 28, 2006**
STATE OF TENNESSEE,	)	
Respondent.	)	

PREHEARING BRIEF

Undersigned counsel herein submit this brief as an aid to the Court in determining the issues before the Court at the hearing scheduled for June 12, 2006. Assistant District Attorney Arthur F. Bieber has provided to counsel an unsigned copy of State's Answer to Petition for Post-Conviction Relief. Based upon the State's assertions in that document, it appears that several issues are presented for the Court's consideration, some of which are not contested. The following issues are before the Court:

1. **Does Linda Martiniano qualify as a next friend of Paul Dennis Reid, Jr.?**

This issue is not contested. The State admits that Linda Martiniano, Mr. Reid's sister, qualifies due to her "longstanding blood relationship" and annual visits to him. A putative next friend must show that she is acting in the best interests of the petitioner. *Holton v. State*, ____ S.W.3d ____, 2003 WL 24314330, *10 (Tenn. May 4, 2006). The State concedes Ms. Martiniano meets this requirement.

2. **Does Paul Reid have persistent delusions that the government is controlling his life and the legal process?**

This issue is not contested. The State concedes that "Reid has persistent delusions about government controlling his life and the legal process." *See* State's Response at p. 5, ¶ 5.

3. What is the legal standard for competency in a next friend post-conviction action?

This issue is contested. The State insists that the competency standard is found in *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001) ("inability to manage his personal affairs or understand his legal rights and liabilities"). The next friend asserts that the competency standard is the standard found in *Rees v. Peyton*, 384 U.S. 312, 314, 86 S.Ct. 1505, 1506, 16 L.Ed.2d 583 (1966) and its progeny:

> whether [the condemned person] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises.

This is the standard also found in Rules of the Tennessee Supreme Court, Rule 28, Section 11(B)(1) Competency:

> The standard for determining competency of a petitioner to withdraw a post- conviction petition and waive further post-conviction relief under this section is: 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.

This is also the same standard utilized in next friend cases. *See Whitmore v. Arkansas*, 495 U.S. 149, 165-166, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) ("meaningful evidence that he was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision").

The apparent source of the conflict between the State and the next friend on this issue is the lack of clarity in the Supreme Court's opinion in *Holton v. State*, ____ S.W.3d ____, 2003 WL 24314330 (Tenn. May 4, 2006). In the specific section titled "Standards in Tennessee" the Court does not explicitly state the standard for determining incompetence in a next friend post-conviction proceeding.

However, in the opinion the Court cites to *Rees v. Peyton* and to federal cases which apply this competency standard in next friend litigation, for example, *West v. Bell*, 242 F.3d 338, 341 (6th Cir. 2001) ("capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or . . . suffer[s] from a mental disease, disorder, or defect which may substantially affect his capacity in the premises"); *Brewer v. Lewis*, 989 F.2d 1021, 1026 (9th Cir. 1993) ("meaningful evidence that [the inmate] was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision"); and *Whitmore v. Arkansas*, 495 U.S. 149 (1990) ("meaningful evidence that he was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision").[1]

Application of the *Nix* standard of competency in this case would violate the U.S. Constitution, Amendments 5, 8, and 14. The *Nix* standard solely contemplates whether a

[1] The opinion also cites state next friend cases which apply the *Rees v. Peyton* standard or a higher standard, *e.g.*, *State v. Ross*, 863 A.2d 654, 662 (Conn. 2005) ("defendant is competent to waive further challenges to death sentence when 'he has [the] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation'");*Commonwealth v. Haag*, 809 A.2d 271, 279-80 (Pa. 2002) ("In discussing the judicial inquiry into the degree of competency that satisfies the *Whitmore* standard, we stated that it "is not dependent upon the use of certain magic words to describe the prisoner's competency or lack thereof, but instead requires that the fact-finder make a conscientious effort to determine whether the prisoner is capable of making a rational decision to forego the potential avenues of appeal that are available to him."); *Franz v. State*, 754 S.W.2d 839, 843 (Ark. 1988) (criticizing *Rees* and adopting "higher criterion" to include "capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence") (overruled on other grounds by *State v. Robbins*, 5 S.W.3d 51, 55 (Ark. 1999).

petitioner is unable either to manage his personal affairs or to understand his legal rights and liabilities. *Nix* at 463. This standard in no way attempts to assess whether a mental illness or defect is affecting a person's ability to exercise or waive his legal rights, which is an integral inquiry in *Rees v. Peyton* and Supreme Court Rule 28, § 11.[2]

The *Nix* standard applies in the context of a non-capital petitioner's[3] failure to file a post-conviction petition within the one year statutory time limitation in Tenn. Code Ann. § 40-30-106(b). A petitioner's cognitive ability regarding understanding when he must file a lawsuit is very different from the cognitive abilities required to make a knowing, intelligent, voluntary, and competent decision whether to pursue or waive available legal remedies. "*Competency* is a broad concept, encompassing many different legal issues and contexts." Kaplan & Sadock, *Comprehensive Textbook of Psychiatry*, 3981 (8th Ed. 2005). "In general, *competency* refers to some minimal mental capacity required to perform a specific, legally recognized act or to assume some legal role." *Id.* The specific acts and legal role of a capital post-conviction petitioner are those necessitated by the requirements of Tenn. Code Ann. § 40-30-107(b)(1) and Tenn. Sup. Ct. R. 28, § 6(C). So the standard must relate to those tasks.

The ability to understand one's legal rights and liabilities is a more minimal inquiry than the question of whether a mental illness or defect is affecting one's ability to

[2] It is instructive to examine the derivation of the *Nix* standard. That standard is derived from *Porter v. Porter*, 22 Tenn. (3 Hum.) 586, 589 (1842), finding that for purposes of a statute of limitations a person is of "unsound mind" if the person is "incapable of attending to any business, or of taking care of herself." *Id.* The holding in *Porter* addressed the parties' rights regarding ownership of a person, a slave named Henry. Henry was bequested as property in a will. *Id.* at 586. The Court concluded that the testatrix was incompetent to make a will because she was "incapable of attending to any business, or of taking care of herself, and had to break up keeping house and remove to the house of a relative to be taken care of by her friends." *Id.* at 589.

[3] Petitioner Nix was not under death sentence. The heightened need for reliability in capital cases should require a different tolling standard for a capital petitioner who files after expiration of the statute of limitations.

make a knowing, intelligent, and voluntary choice among legal options, and is akin only to the "knowing" prong of the latter standard. Further, the other component of the *Nix* standard -- ability to manage one's "personal affairs" -- generally relates to a person's ability to manage their money, conduct business, make decisions regarding their health care, associate with friends and family, and so forth. These are not issues with a clear nexus to a petitioner's ability to make rational, knowing, and voluntary decisions about capital post-conviction litigation.

Undersigned counsel filed on May 15, 2006 a Petition to Rehear in the Tennessee Supreme Court urging the Court to clarify this issue. To counsel's knowledge the Court has not yet ruled on the Petition to Rehear.

4. Do Kelly Gleason and Connie Westfall qualify as a next friend of Paul Dennis Reid, Jr.?

This issue is contested. The State asserts that an attorney or investigator cannot assume next friend status, citing the portion of the *Holton* opinion rejecting the notion that the Office of the Post-Conviction Defender (PCDO) had a duty to alert the courts to a default waiver of post-conviction. The Court ruled that the PCDO enabling statute did not confer third party standing to the PCDO on behalf of death-sentenced prisoners. The Court did not rule that an attorney who happens to be in the employ of the PCDO could not be a next friend if sufficient evidence is presented to meet the relationship prong of the *Whitmore* test exists. The inquiry is whether the person seeking next friend status is "truly dedicated to the best interests of the person on whose behalf [s]he seeks to litigate....and [she] must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. 163-164 (citations omitted).

The State's assertion that Gleason or Westfall cannot assume next friend status because the "relationship is strictly one of attorney-client and lacks the intimacy and trust of that of a parent or sibling or that of a close personal friend of many years" is belied by the evidence before the Court in the affidavits of Gleason and Westfall. Mr. Reid's family resides in Texas and can see him only on a limited basis. Gleason and Westfall see him regularly and do the small favors for him his family would if they could be here. This is not a situation where an advocacy group, outsider, or interloper is attempting to interfere in litigation due to a personal agenda.

Further, there is ample authority for permitting an attorney to act as next friend. *See In re Cockrum*, 867 F.Supp. 494, 495 (E.D.Texas 1994) (Petitioner's appointed counsel was sufficiently dedicated to petitioner's best interest and had sufficiently significant relationship with petitioner to be appointed his "next friend" for purpose of pursuing writ of habeas corpus.); *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003) (Attorney properly could act as inmate's "next friend" and file federal habeas petition on his behalf where attorney had been assigned to his case, had begun to advise him, met with his family, filed motions on his behalf, and argued his appeal.), *reversed on other grounds sub nom., Rumsfeld v. Padilla*, 124 S.Ct. 271 (2004); *Lenhard v. Wolff*, 443 U.S. 1306, 1310 (1979) (Rehnquist, Circuit Justice) ("it strikes me that from a purely technical standpoint a public defender may appear as 'next friend' with as much justification as the mother of [the defendant]"); *Dennis v. Budge*, 378 F.3d 880, 887 (9th Cir. 2004) (federal district court found former attorney who filed "next friend" petition for death-row volunteer "is dedicated to Dennis' best interests and has a significant relationship with him").

The established attorney-client relationship which Gleason and Westfall have with Mr. Reid is sufficient to convey third party standing to act as Mr. Reid's next friend in initiating litigation. *See, e.g., Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) and *Department of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990).

5. Has a prima facie showing of present incompetence been demonstrated?

This issue is contested. The State asserts that the affidavits of Dr. George Woods, Linda Martiniano, Kelly Gleason, and Connie Westfall "fail[] to raise a genuine disputed issue regarding petitioner's present sanity" under the *Nix* standard. The next friend asserts that a prima facie case of incompetence has been made under both the *Nix* standard and the correct standard, *Rees v. Peyton, supra.* Dr. Woods' affidavit contains his medical opinion that Mr. Reid is incompetent under either standard. The other affidavits set out in particular detail how specific delusional beliefs and memory impairments affect Mr. Reid's functioning in relation to his legal situation, as well as in his daily affairs, inclusive of events as simple as taking a shower or having a conversation with a fellow inmate or correctional officer.

The State acknowledges that Mr. Reid's delusional belief system has infected his views of his life and the legal process. The affidavits demonstrate that the delusions are so pervasive that they affect every single aspect of Mr. Reid's life. Further, Mr. Reid has developed new symptoms since the last state court competency hearing in 2000. He believes that events are repeating and has memories of events which have never occurred.

This Court has previously acknowledged that Mr. Reid's competency status has always been in issue. Competency is a temporal issue and severe mental illness can wax

and wane over time and with changes in conditions. The last state court competency hearing for Mr. Reid was over six years ago and the TDOC has chosen not to provide him any mental health treatment in the interim. The last competency hearing was in federal court and sufficient evidence of incompetence was presented to cause the Court of Appeals for the Sixth Circuit to order a full competency hearing.

When competency has been in doubt in the past, and present information indicates a genuine issue as to present competency, due process requires that a competency hearing be conducted. The information before the Court is more than enough to justify further inquiry. *See, e.g., Cogburn v. State*, 281 S.W.2d 38, 39-30 (Tenn. 1955) (a court must initiate an investigation into competency if it "has facts brought to its attention which raise a doubt of the then sanity of the accused"); *State v. Taylor*, 771 S.W.2d 387 (Tenn. 1989) (citing *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975)) ("irrational behavior," demeanor, and "any prior medical opinion are all relevant" to present competency); *Bishop v. Superior Court*, 724 P.2d 23, 27-28 (Ariz. 1986) ("It is counsel who spends time with a defendant in a manner which allows observation of the facts necessary to determine the issues to be decided at the competency hearing. Unlike any of the adversarial issues, on the question of competency to comprehend the proceedings and assist the attorney, the defense lawyer is often the most cogent witness."); *Wilcoxson v. State*, 22 S.W.3d 289, 310-311 (Tenn. Crim. App. 1999) (counsel ineffective for failing to raise client's competency as an issue when client had previously been diagnosed with schizophrenia and bipolar disorder, had previously taken antipsychotic medication, and claimed powers of mind control); *People v. Stankewitz*, 648 P.2d 578 (Cal. 1982) (competency hearing should have been conducted where

defense counsel voiced doubts about defendant's competency and a psychiatrist testified that defendant's delusional and paranoid thoughts prevented him from cooperating in the conduct of his defense); *Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991) (defendant with a factual understanding of the proceedings against him was incompetent as he lacked a rational understanding of the proceedings because of his paranoid delusional system); *Pate v. Smith*, 637 F.2d 1068 (6th Cir. 1981) (Petitioner was entitled to a competency hearing once the state trial court entertained doubts about his competency.); *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999) (State-provided collateral counsel properly represented the petitioner because once petitioner's competency was put in question, he could not waive his right to have his competence determined, and state-provided counsel were necessary to complete judicial review of issue; district court properly held a preliminary hearing to determine whether there was sufficient evidence of incompetency to require a full evidentiary hearing.); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975) (competency hearing should have been conducted in light of petitioner's suicide attempt combined with his history of bizarre behavior and diagnosis of "borderline mental deficiency" and "chronic anxiety reaction with depression").

6. Should the Court issue a stay of execution and appoint counsel upon finding a prima facie showing of present incompetence?

It is unknown whether these issues are contested since the State did not address them issues in its response. Counsel submit that a stay of execution and appointment of counsel are mandatory upon the finding of a properly filed next friend petition supported by a prima facie showing of present incompetence. Tenn. Code Ann. § 40-30-220(a); Tenn. Code Ann. § 40-30-107(b)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Prehearing Brief was delivered to Art F. Bieber, Assistant District Attorney General, 19th Judicial District, 101 N 3rd Street, Clarksville, TN 37040-3401 by facsimile on this the 9th day of June, 2006.

Kelly A. Gleason