

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**LINDA MARTINIANO
(Next Friend for Paul Dennis Reid)**

Petitioner-Appellee

v.

Ricky Bell, Warden

Respondent-Appellant

**RESPONSE IN OPPOSITION TO STATE’S MOTION TO
VACATE STAY OF EXECUTION**

The State’s motion to vacate the stay of execution entered in the lower court must be denied unless the State can demonstrate that the lower court abused its discretion in entering the stay. *See Dugger v. Johnson*, 485 U.S. 945, 945-48 (1988) (O’Connor, J., dissenting from denial of motion to vacate stay) (“standard under which we consider motions to vacate stays of execution is deferential, and properly so. Only when the lower courts have clearly abused their discretion in granting a stay should we take the extraordinary step of overturning such a decision”). The lower court acted properly.

After a four (4) hour preliminary, evidentiary, hearing in the lower court, and pursuant to this Court's precedent in *Kirkpatrick v. Bell*, 64 Fed.Appx. 495, 2003 WL 21054667 (6th Cir. 2003) and *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999), the lower court found that "there was sufficient evidence to raise a reasonable doubt about Reid's competence, and therefore, under the standard set in *Kirkpatrick*, the parties are entitled to a full evidentiary hearing on the issue." Order, p. 3. The preliminary hearing evidence consisted of the expert testimony of Dr. George W. Woods, and the materials upon which he relied. As the lower court noted, the State "called no experts and offered no countervailing proof, expert or otherwise." *Id.* at 2 (emphasis added).

Once the lower court found that there was sufficient proof to require a full evidentiary hearing, the lower court told the parties it "was fully prepared to proceed with the full evidentiary hearing *today*." *Id.* at 3 (emphasis added). Then, for the first time in three years of next friend litigation in this and a companion case (*Kirkpatrick, supra*), the State asked to be allowed to have its own mental health expert evaluate Reid. It was because of this belated State request, and the State's confession that "such an evaluation could not be completed prior to the scheduled execution," *id.* at 3, that the lower court entered a stay of the execution rather than

immediately conducting the full hearing required by circuit and Supreme Court precedent.

THE STATE WAS DILATORY

Counsel for the State advised the court that they had never had an opportunity to obtain an expert evaluation, which is patently untrue.¹

The State missed not days, but months, indeed years of opportunities to have Reid evaluated. The State waived countless opportunities to evaluate Reid up until the moment of the hearing below when the Court made a finding that a sufficient showing of incompetence had been made to trigger a full evidentiary hearing. The State has known since this Court's opinion in *Kirkpatrick* that a full competence hearing would likely be necessary for Mr. Reid. Yet in the three years since, no effort was made by the State to obtain an evaluation.

¹The District Court's Order is incorrect in stating that the Sixth Circuit Court of Appeals' opinion and order in *Kirkpatrick v. Bell, supra*, was predicated in part upon the State's inability to evaluate Mr. Reid. In fact, this Court notes in *Kirkpatrick v. Bell*, that "[t]he State *was given* the opportunity to evaluate Reid on short notice, but declined to present any expert testimony." In *Kirkpatrick*, the District Court conducted a hearing upon the stay motion on Friday, April 25, 2003, and ordered the State to respond by Saturday April 26, 2003 by 5 p.m.. Further, the Court ordered that "any mental evaluation of Paul Dennis Reid by Respondent shall take place before 5:00 p.m., Sunday, April 27, 2003." The District Court noted in its April 28, 2003 Order denying a stay that the "State, despite being given the specific opportunity by the Court to have Reid evaluated on Sunday, April 27, 2003, took no steps to do so." (Emphasis added).

Approximately five-hundred and seventy-five days ago, on November 29, 2004, Appellee's counsel filed a motion in Davidson County post-conviction case No. 97-C-1834 ("Reid I") for an order finding Mr. Reid incompetent to proceed in that case. Approximately five-hundred and twenty-six days ago, at a hearing in Reid I on January 17, 2005, the post-conviction court orally granted Appellee's oral motion for permission to appeal that court's orders regarding the standards and procedures to be used to assess competency to proceed in post-conviction.² Approximately one-hundred fifty days later, some three-hundred seventy-five days ago, June 27, 2005 the Tennessee Supreme Court granted Appellee's appeal of that order.

Some ninety days later, or approximately two-hundred eighty-five days ago, on September 23, 2005, undersigned counsel filed a Petition for Post-Conviction Relief, Motion for Appointment of Counsel, and Motion for a Stay of Execution in the Montgomery County Circuit Court on behalf of Mr. Reid in Reid II. Those motions and petition brought to that Court's attention the issue of Mr. Reid's competency and counsel's belief that Mr. Reid is presently incompetent and thus unable to rationally make decisions regarding pursuing further appeals, and/or execute legally binding documents on his own behalf. At the hearing conducted on or about September 29, 2005, the Montgomery County Circuit Court recognized that

² The order granting that appeal was entered on January 19, 2005.

counsel's filing was an effort to apprise the court of those concerns in a timely fashion:

The point I am making about reflecting on that [previous trial-level competency proceedings] is that Mr. Reid's competency has always been at issue from virtually the date of his arrest, so this Court knows that this assertion by Ms. Gleason and Mr. Hare is not some eleventh hour contention, that his competency has been in question for a long time.

(*Id.* at p. 22) . Six days later, on September 29, 2005, the post-conviction court in Reid II entered an Order appointing the Post-Conviction Defender as counsel for Mr. Reid in post-conviction proceedings, granted a motion for a stay of execution, and holding the proceedings in abeyance until the appeal in Reid I addressing competency issues was concluded. On October 13, 2005, the State appealed that order.

Some forty-five days later, on November 29, 2005, the Tennessee Supreme Court granted the State's appeal. Forty-four days ago, on May 4, 2006, that Court issued its opinion in Reid II, in which it dismissed the post-conviction petition filed by Appellee on September 23, 2005 and vacated the stay of execution, thereby reinstating Appellee's execution date of June 28, 2006. Thirty-four days ago, on May 23, 2006, a second timely post-conviction petition was filed in Reid II on Appellee's behalf, this time using the next-friend mechanism announced by the Tennessee

Supreme Court in its May 4, 2006, Order. That petition was not dismissed until June 13, 2006, twenty-one days after it was filed.

Not once during any of those proceedings did the state seek a mental evaluation, relying instead all the while on its argument that Petitioner could not present a prima facie case of incompetence.

LAST MINUTE REQUEST FOR AN EVALUATION TODAY

Today, hours before Reid's scheduled execution, the State declined to go forward with a full hearing evidentiary hearing in the District Court absent their own expert. In the middle of hearing, the State asked for time to get an expert, and opposed the stay of execution made necessary by all of these State actions. Worse, the State accused counsel for Petitioner of being dilatory and opposed the stay on that ground. The lower court judge heard the State and the defense arguments on whether Petitioner's counsel had been dilatory and did not accept the State's contentions. Indeed, Petitioner's counsel has pursued the litigation in this case conscientiously and in good faith.

What follows is a brief summary of the state post-conviction proceedings in this case, which ended just before the filing was made yesterday in District Court:

<u>DATE</u>	<u>ACTION</u>
5/24/05	TN SCT AFF'S ON DIRECT APPEAL – EXECUTION SET FOR 10/5/05
9/9/05	MOTION FOR STAY TN SCT

9/23/05 POST-CONVICTION PETITION FILED
9/26/05 TN SCT GRANTS STAY
9/29/05 MONTGOMERY CIRCUIT CT GRANTS STAY, APPTS CSL ON PC PET
5/4/06 TN SCT ISSUES OPINION VACATING ORDERS; ESTABLISHES NEXT FRIEND PROCEDURE
5/15/06 PETITION FOR REHEARING – *NIX* OR *REES*?
5/23/06 NEXT FRIEND PETITION, STAY, APPT CSL FILED CIRCUIT COURT
6/12/06 HEARING IN MONTGOMERY CIRCUIT COURT
6/13/06 PETITION DISMISSED
6/16/06 MOTION FOR STAY PENDING APPEAL FILED
6/20/06 NOTICE OF APPEAL/DESIGNATION RECORD
6/21/06 MOTION FOR STAY DENIED IN CIRCUIT COURT
6/22/06 MOTION FOR STAY IN CCA PENDING APPEAL
6/22/06 MOTION FOR STAY IN SCT – ORIG JURISDICTION
6/22/06 PET. REHEAR (5/4/06 OPINION) IN SCT DENIED: NO ANS. TO *NIX/REES*
6/23/06 M. REMAND – *FORD* FILED IN SCT
6/23/06 CCA DENIES STAY PENDING APPEAL
6/26/06 SCT M. REVIEW CCA DENIAL STAY FILED AND DENIED
6/26/06 M. REMAND – *FORD* DENIED
6/26/06 SCT ISSUES DAVIDSON REID OPINION – *NIX* STD
6/26/06 FILING IN FEDERAL COURT

CONCLUSION

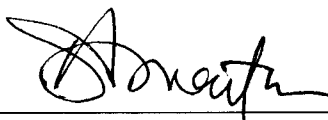
Wherefore, because the lower court did not abuse its discretion by entering a stay of execution, this Court should deny the State's Motion to Vacate Stay of Execution.



Henry Martin
Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Motion was delivered by facsimile and/or email to Jennifer L. Smith, Associate Deputy Attorney General, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202-0207 on this the 27 day of June, 2006.



Henry Martin