

# Waiving Death Row Appeals: Whose Right Is It Anyway?

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Death row prisoners may elect to forgo appeals, thus hastening execution. There are many reasons for such a decision, including depression, psychosis, incompetence, conditions in prison, and others. Due to the gravity of the sentence, and the states' duty to ensure fairness, some jurisdictions impose restrictions on the waiver. An inmate who lacks trial competence may be subject to a *habeas corpus* hearing and the appointment of a "next friend," often a family member. Moreover, the Constitution forbids execution of the "insane." The decision, then, may be taken out of the inmate's hands. The author outlines the various tests for competence to waive appeals. The Pennsylvania case of Gary Heidnik (*In re Heidnik*, 112 F.3d 105 (3rd Cir. 1997); and *In re Heidnik*, 720 A.2d 1016 (Pa. 1998)) illustrates the issues surrounding waiver of appeals that concern psychiatrists, attorneys, and judges. Following a discussion of *Heidnik* and related cases, the author offers a proposal for a classification of types of inmates requesting waiver.

*Furiosus solo furore punitur* [Madness is its own punishment].—Blackstone

An inmate sentenced to death may not be executed while "insane," a condition usually construed as incompetent to understand the nature of the sentence and its implications. To do so would be contrary to the Eighth Amendment's ban on cruel and unusual punishment.<sup>1</sup> It is also unconstitutional for an incompetent prisoner to make critical legal decisions.<sup>2</sup> Consider, however, the following: an "insane" prisoner is never competent to assist counsel in raising the issue, whereas a competent prisoner is never "insane"

enough to stay an execution. Yet, these issues are litigated constantly. Among the more bizarre permutations is an inmate's request to let the execution go forward, perhaps striking the average citizen as "crazy." How these matters get sorted out is the subject of this article.

Forensic psychiatrists, within correctional facilities or as expert witnesses, may be called on to assess the mental state of a death row inmate wishing to stop the appeal process. In effect, the inmate is asking for a speedy execution. There is no automatic presumption that such a person be considered incompetent or "insane."\* Due to the gravity of the situation, extra caution is justified. There

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\* The reader will have to excuse the repeated use of the word *insane*; it appears regularly within the case law. Consider it to mean *not responsible* with respect to execution worthiness.

is no *right* to demand execution. In such cases, there are intersecting and often conflicting forces acting: the inmate's manifest desire to move toward execution; the state's duty to ensure fairness in carrying out the execution; and third parties—the inmate's family and lawyers opposed to capital punishment—who attempt to forestall or derail the process. This article examines those forces through a Pennsylvania case, that of Gary Heidnik, who sat on death row asking for execution, while two prongs of attack on his execution went on independently: the argument that he was incompetent to be executed, and the argument that he was incompetent to represent his own best interest. After a summary of the case, the discussion will move into a broader look at the psychiatric issues in postconviction relief and then at a proposed clinical typology of inmates who waive appeals.

### ***Commonwealth of Pa. v. Heidnik***

Gary Heidnik, notorious in Philadelphia for his "house of horrors," kidnapped and tortured six women in 1986 to 1987, killing two. In 1988 he was convicted of two counts of first-degree murder and sentenced to death on each. Though he petitioned the state courts *not* to appeal, he was the subject of a mandatory state review. The State Supreme Court affirmed the conviction and sentence. The governor at that time did not sign a death warrant. However, the present governor first signed one on March 20, 1997. Weeks later, attorneys seeking to halt the execution filed a petition for a stay in a state court in Philadelphia. They asserted that Heidnik was not

competent to be executed, claiming that to do so violated the Constitution's ban on cruel and unusual punishment.

Heidnik testified on April 14, 1997. He said several things that would tend to raise suspicion about his mental capacity—some contradictory, others clearly delusional. For example, he repeated that he did not wish to appeal, but asserted his innocence; he ascribed the murders to others, saying that the FBI could help establish his innocence. He asked to be executed, asserting—in a manner somewhere between political rhetoric and psychosis—that his death would help abolish capital punishment: "When you execute an innocent man. . . you know there will be no more capital punishment in this state and possibly anywhere else in this country."<sup>3</sup>

Dr. John O'Brien was appointed to conduct a psychiatric examination. He did so in the presence of attorneys on both sides. The judge heard testimony from Dr. O'Brien, who testified that Heidnik understood that he was to be executed and the reason for it. On this basis, the court denied a stay. The Center for Legal Advocacy and Defense Assistance (CLEADA), with Heidnik's daughter nominally as the petitioner, applied to the Pennsylvania Supreme Court for a stay of execution. The decision would not come for over a year. It is noteworthy that, for the appeals within the state, the petitioners were, at the lower court level, attorneys from CLEADA and attorney William Costopoulos, who were never retained by Heidnik nor appointed to represent him. In the state Supreme Court case, Heidnik's daughter was accepted as

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next friend without a formal adjudication (she had already been given standing in federal court).

Shortly before the state Supreme Court considered the request for a stay, Heidnik's daughter, as next friend, petitioned the federal district court for a stay (argued April 17, 1997; decided April 18, 1997). Rather than using an "insanity" argument, the petitioner sought to show that Heidnik could not rationally make the request to stop the appeals. Using this approach, the question was whether he had a mental disease that could substantially affect his decision-making capacity. If so, his daughter could be appointed to pursue the appeals on his behalf. To that end, the petitioners solicited opinions from two psychiatrists and a psychologist, Drs. Bernstein, McKenzie, and Wellman, who had examined Heidnik in prison. After hearing from the three experts that Heidnik was incompetent to assist counsel and from Dr. O'Brien that he was competent, the district court concluded on April 16, 1997, that Heidnik's daughter had *not* met her burden (on the competency issue, not the question of legal standing), and the court denied her petition.

In a flurry of last minute activity, an appeal was made to the Third Circuit Court of Appeals. This time, the testimony of the prison-based experts, to the effect that Heidnik lacked capacity, was given greater weight. Accordingly, the Third Circuit stayed the execution and appointed a next friend. The court's reasoning is reminiscent of Justice Marshall's in *Ford v. Wainwright*, citing the earlier decision in *Ake v. Oklahoma*<sup>4</sup>: be-

cause psychiatric opinions are often in disagreement, the factfinder should rely on the information gathered by the defendant's doctor and other reliable sources, rather than just the state-appointed expert's information and opinion. Thus, the likelihood of error is reduced. Following this ruling, the Philadelphia district attorney persuaded the United States Supreme Court to lift the stay, although the determination of incompetence was not addressed.

Returning to the case of Heidnik's competence to be executed, the appeal to the Pennsylvania Supreme Court was based on Heidnik's apparent "insanity." The case was argued on April 29, 1997, and decided on August 19, 1998. This Court concluded that the inmate was competent to be executed.<sup>5</sup> The basis for the decision was Heidnik's apparent comprehension of the reason for the death penalty and its implications, the standard suggested in *Ford*. There was also a discussion of the legal matter of Heidnik's refusal to appeal. The court was well aware of the paradox embedded in the issues before it: "If [the prisoner] cannot comprehend the reasons for the penalty or its implications, he cannot conceive of the need to take any measures to postpone it. Conversely, if he can conceive of such a need, by definition he must comprehend the implications of the penalty, and the very filing of the application would refute its substance."<sup>6</sup> However, the decision glossed over the obvious mental illness Heidnik had displayed, relying on the narrower test of what the inmate understood (concretely) about the punishment.

Pennsylvania had adopted the *Ford*

reasoning in *Commonwealth v. Jermyn*,<sup>7</sup> decided by the state's Supreme Court in 1995. *Jermyn* is consistent with case law dating to at least 1955,<sup>8</sup> to the effect that no insane person can be tried, sentenced, or executed. The court in *Commonwealth v. Moon*<sup>8</sup> had cited Blackstone's *Commentaries* as an authority rooted in English common law. The test for "sanity" in *Jermyn*<sup>9</sup> is simple: whether the person "comprehends the reason for the death penalty and its implications." In the *Jermyn* decision, the court had an opportunity to use a broader definition, borrowed from the Mental Health Procedures Act. There, a person charged with a crime (as opposed to someone on death row) would be incompetent if "substantially unable to understand the nature and object of the proceedings against him or to participate and assist in his defense."<sup>9</sup> The decision alluded to the idea that, because an inmate might be incompetent to handle his appeals, the only way to bring it to light would be to have someone act as next friend. The court deferred to the federal system for that piece of the litigation. Ultimately, neither the state nor the federal courts maintained the Third Circuit's ruling that Heidnik lacked the capacity to represent his own interest.

The 1998 state Supreme Court decision, therefore, endorses the minimal *Ford* standard, while acknowledging the issue of competence as it relates to functional capacities to assist counsel.

To summarize the case: Heidnik, proclaiming his innocence, manifestly refuses appeals; against his wishes, attorneys and his own daughter take up the cause, using a two-pronged approach; the

federal court of appeals sees the psychiatric issue, to the extent that it grants Heidnik's daughter next friend status; Pennsylvania's high court maintains that Heidnik meets the test for competence to be executed; and the U.S. Supreme Court lifts the Third Circuit's stay of execution. Last minute appeals to federal courts by Heidnik's daughter were not successful; because Heidnik was competent, the next friend lacked legal standing. Heidnik was executed on July 6, 1999.

### Can Two Prongs Make A Right?

As implied in the *Heidnik* decisions, parties seeking to stay the execution of an inmate make a variety of arguments. Often, postconviction relief is unrelated to psychiatric issues. On the other hand, given the realities of death row, mental health concerns become prominent as execution nears. When the inmate attempts to derail the appeal process, family members and death penalty opponents often use a two-pronged approach: incompetence to be executed and incompetence to assert a meaningful waiver of rights. In the first instance, the court relies on the minimal standard established in *Ford* or its local derivatives. In the second, the petitioning party must demonstrate that the inmate is not competent and that the petitioner has a genuine interest in the matter, following the U.S. Supreme Court's decision in *Whitmore v. Arkansas*.<sup>10</sup> Before discussing *Heidnik* further, a brief look at these decisions is in order.

***Ford v. Wainwright*** This landmark decision<sup>1</sup> examined the fate of a Florida death row inmate who became "insane" and the procedures used to hear evidence

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during trial. Alvin Ford, who was not mentally ill by history, became psychotic while incarcerated, about eight years after his conviction. He developed bizarre, persecutory delusions, receiving a diagnosis of paranoid schizophrenia from a defense-appointed psychiatrist. When Ford's attorney invoked Florida's procedure for assessing competence of a condemned inmate, three psychiatrists were appointed. Each arrived at a different diagnosis, but all three concluded that he was competent. The governor signed a death warrant. After a tortuous course, the case came before the U.S. Supreme Court in 1986.

A five-to-four majority decided the case. Justice Marshall delivered the opinion, concluding that the Constitution barred execution of the insane. The common law reasons for this are: questionable retributive value, no deterrence value, and that it "simply offends humanity."<sup>†</sup> The Court also found deficiencies in Florida's procedures to ensure that an insane prisoner was not executed. For example, there was insufficient opportunity for the defense to present a full range of psychiatric data<sup>4</sup> or to cross-examine state-appointed witnesses.<sup>11</sup> Concurring Justice

Powell did not think that full-scale insanity trials were necessary. Four justices did not believe that there was an Eighth Amendment issue at all. Justice O'Connor, with Justice White concurring, suggested that there was too much attention paid to the procedures, because a condemned prisoner's rights were upheld at earlier stages.<sup>12</sup> This suggestion contrasts with the Court's earlier standard of "sufficient doubt" of trial competence to trigger a hearing, in *Pate v. Robinson*.<sup>13</sup>

*Whitmore v. Arkansas* In this 1990 U.S. Supreme Court decision,<sup>14</sup> issues of waiver, competence and next friend status were considered. Whitmore, who was not the inmate in question, was another man on death row attempting to stand in as inmate Ronald Simmons' next friend. Simmons had been convicted of multiple murders. Consistent with Arkansas law at that time, he was permitted to waive direct appeal, after the trial court found he was competent to do so. The state Supreme Court affirmed the waiver as knowing and intelligent. Whitmore's argument to the U.S. Supreme Court was that the state's failure to conduct a mandatory review of the conviction and sentence was a violation of the Eighth and Fourteenth Amendments. As it turns out, Whitmore failed to demonstrate legal standing and was thus denied a hearing. For present purposes, however, a constitutional standard was implied for the adjudication of the psychiatric issues. If "the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded," then he may act in his own behalf.<sup>15</sup> This had been ad-

<sup>†</sup> Quoting Blackstone's 1769 *Commentaries*, Justice Marshall noted: "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

dressed in the celebrated 1976 case of Gary Gilmore.<sup>16</sup> His mother could not be appointed as next friend because the prisoner was competent. Generally, once standing is established, the issues are psychiatric and the court must hear evidence.

Thus, an inmate wishing execution may undergo a two-pronged attack on his/her autonomy. It is quite possible to be judged “Ford sane” and “Whitmore incompetent.”<sup>‡</sup> In this scenario, an inmate *incompetent* to assist counsel can be the subject of continued appeals—and then be executed at the end of the process, a *sane* person. Having determined whether the defendant has the capacity to understand the proceedings and assist counsel, essentially a *Dusky*<sup>17</sup> standard, there is a further question of whether the decision to waive rights was in fact *rational*.<sup>2, 18</sup> The presence of a mental condition that may substantially affect the inmate’s capacity to act rationally may satisfy the test under *Whitmore*. Whereas one might think that hastening execution is facially incompetent, courts definitely do not take this view. Indeed, the sentiment in some quarters for speedy executions is *au courant*.

Some states make it more difficult for a death row inmate to terminate appeals. For example, in New Jersey, John Martini attempted to waive postconviction relief (PCR).<sup>19</sup> Under New Jersey law, a defendant does not have the right to waive a sentencing hearing, to waive mitigating factors, or to waive an appeal. The *Martini* decision concerned whether a defen-

dant, having had the preliminary reviews, can then waive PCR. The New Jersey Supreme Court said *no*.<sup>19</sup> The chief reason is that certain issues can only be raised in PCR, for example, a reexamination of the evidence used to convict, new evidence, and issues of racial or other bias. Thus, the *Martini* decision asserts that the issues embedded in a properly fashioned PCR application are too fundamental to be disposed of by the defendant.

In conclusion, it appears as if death row inmates have a qualified “right” to waive appeals. This is different from saying that an inmate may demand and receive speedy execution, and it is legally distinguished from the “right to die.”<sup>20</sup> What about the defendant who wishes death over life in prison—a personal choice? A 1978 Pennsylvania decision addressed this situation: “The waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. . . . [T]o do so would result in state aided suicide.”<sup>21</sup> New Jersey also notes that the integrity and reliability of the death sentence transcends the preferences of individual defendants.<sup>19</sup> The states have various procedures to protect the inmate against misuse of capital punishment, thus placing some obstacles in the path to execution. And what of the inmate who becomes rehabilitated during the death row appeals process?<sup>22</sup> There is little to halt the machinery of state-sanctioned execution.

## Discussion

It is not uncommon for criminal defendants to use tactics that would tend to

‡ Indeed, this was true of *Heidnik*, although the *Whitmore* argument ultimately failed.

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**Table 1**  
**Shortening the Time to Execution:**  
**Defendants' Tactics**

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Defendant requests that, at trial, no mitigating evidence be presented.
Defendant requests that the jury return a sentence of death immediately after conviction.
Defendant requests that no appeal of the death sentence be undertaken.
Termination of the appeal process (generally after an automatic direct appeal and review).
Proffer of evidence of ( <i>Ford</i> ) competence to be executed; or rebuttal of psychiatric testimony claiming "insanity" (inmate may be the respondent here).
Proffer of evidence of ( <i>Whitmore</i> ) competence to represent one's best interest; or rebuttal of psychiatric testimony claiming the presence of a mental state that may substantially affect capacity to waive rights knowingly and intelligently (also as respondent).

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shorten the time to execution (see Table 1). The most famous case of waiver of appeals is that of the psychopathic serial killer Gary Gilmore, the subject of Norman Mailer's *The Executioner's Song*. Gilmore, who was executed by a Utah firing squad in 1977, was the first man to die after the death penalty was reinstated.<sup>23</sup> Gilmore was examined and found competent, thus barring his mother from interceding. Presumably, he would have been *Ford*-competent as well.

Heidnik, in contrast, had a genuine history of paranoid schizophrenia. Psychiatric testimony was proffered at the guilt phase but not at the penalty phase of his trial. His postconviction posture had been

that he was innocent, attributing the deaths to corrupt police and others. He was not permitted to forgo direct appeal and standard review. There was little activity in the case for nearly a decade, because former Governor Casey was reluctant to sign death warrants, unlike Governor Ridge. Heidnik conveyed some of the bravado reminiscent of Gilmore, but there is a clear difference: Gilmore, a classic sociopath, did not have manifest delusional thought, whereas Heidnik made little effort to hide it.<sup>24</sup> Various psychiatric conditions have been cited as bases for a competency evaluation; for example, congenital or acquired cognitive deficits, schizophrenia, depression, personality disorder, and posttraumatic stress disorder. Thus, there would appear to be ample opportunity for psychiatric input.

**Competency Algorithm** How can it be that the same man can be competent to be executed but incompetent to waive appeals? A facile, but largely true, answer is that such an anomaly is an artifact of chaos in the courts. That is, although some of the constitutional issues appear to be resolved, the methodology for determining mental capacity is, as always, more art than science. However, courts do not always hear exhaustive testimony, and the U.S. Supreme Court has been known to show reluctance in barring states from carrying out constitutionally sound executions.<sup>25, 26</sup> Nevertheless, a death row inmate requesting a *habeas corpus* hearing, even after years of ambivalence or at the hour before execution, must be heard.<sup>27</sup> Federal case law since the 1966 *Rees v. Payton* decision is clear that a waiver of appeals may be "the

product of a mental disease, disorder, or defect,"<sup>28</sup> and thus incompetent. However, once the court determines that the inmate is competent, there may be no basis for a stay when a next friend petitions,<sup>29</sup> as in Heidnik's case.

A defendant must be able to assist in his own defense.<sup>30</sup> A 1994 U.S. District Court decision, *In re Cockrum*,<sup>31</sup> provides, in the author's view, a sound algorithm for assessing competence to waive appeals, based on principles of trial competence. The standard, per *Cockrum*, requires that three questions be answered: "(1) Is the person suffering from a mental disease or defect? (2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him? (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?"<sup>32</sup> *Cockrum* had been noted to have depression, posttraumatic stress disorder, and possibly delusions. The standard endorsed here is a useful blueprint for forensic psychiatrists. It elevates the perfunctory, concrete test to a *functional* level; that is, it asks about whether the individual is able to *apply* knowledge in a rational fashion. In the case of Heidnik, he passes the first two questions but fails on the third: the basis for his choice is essentially delusional. Inmates with personality disorders are likely to pass the third test, despite their strangeness (e.g., in schizotypal personality dis-

order) or ambivalence (e.g., in borderline personality disorder).<sup>33</sup>

**RAPID-PC** The following is a proposal for a typology of death row inmates wishing to speed up execution (hence the acronym "RAPID-PC," for rapid postconviction; see Table 2). The list is not intended to be exhaustive, nor does it imply that there are either bright-line distinctions among the types or pure culture forms. For heuristic and practical purposes, these examples will alert expert witnesses to opportunities for presenting relevant testimony. The author will solicit case examples and revisions of the schema, and present a fleshed-out version in a future communication.

As hard as death penalty opponents and inmates' families may strain to make the waiver of appeals seem irrational by its very nature, we must first acknowledge the possibility that such an act may be *rational*.<sup>§</sup> Perhaps Gary Gilmore, going down in a macho blaze of glory, represents this archetype. Questioning the inmate's competence is often a part of the appeals process when waiver is requested. Potential expert witnesses must be prepared to arrive, sometimes, at the unhappy conclusion that the waiver is *not* the product of a mental condition. The genuinely *altruistic* inmate would seem to be rare, although one can easily envision such a man thinking, "The world would

<sup>§</sup> In *Martini*, 677 A.2d at 1118, dissenting Justice Coleman cites California Supreme Court Justice Broussard: "A man facing the awful alternatives of execution or life imprisonment without possibility of parole could rationally prefer execution, or at least feel that the comparative advantage of life imprisonment was not worth the humiliation and loss of dignity entailed in the presentation of mitigation evidence [at 1118]."

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**Table 2**  
**Proposed Subtypes of Waivers of Death Row Appeals (RAPID-PC)**

Type of Waiver	Description
<u>R</u> ational	Inmate believes penalty is appropriate; remorseful and weary of prison, but not depressed
<u>A</u> ltruistic	Inmate believes it is good to bring closure to the victim's family; endorses a general deterrence purpose to execution
<u>P</u> sycho <u>t</u> ic	Decision to die subserves a delusion, e.g., that when society sees an "innocent" man executed, it will end capital punishment
<u>I</u> ncompetent	Inmate is unable to appreciate risk-benefit analysis; may have dementia (e.g., AIDS), borderline, schizotypal, or narcissistic personality disorder, or mental retardation
<u>D</u> epressive <u>P</u> olitical	Inmate is suicidal, hopeless; "state-assisted suicide" A political terrorist might reject the legitimacy of the court or political system and therefore refuse to engage in or recognize the legitimacy of the legal process
<u>C</u> oerced	Inmate is under undue influence from others; a response to intolerable prison conditions but is not primarily depressed or psychotic

be a better place without me."<sup>¶</sup> At other times, contrite rhetoric is used to gain sympathy in eleventh-hour appeals. A condemned man's arguing that his execution will be a general deterrent may be a form of miseducated altruism.

Mr. Heidnik is a good example of the *psychotic* waiver, although it is not difficult to see how Pennsylvania courts at all levels have declared him death-competent (using the minimal *Ford*-type standard). Surely, no one takes seriously as a political posture his declaration of martyrdom in the name of stopping capital punishment. One could argue, on the other hand, that he was using a brilliant tactic of paradoxical intention—Go ahead and kill

me!—and therefore malingering. Here we have an abundance of delusional material and bizarre behavior. Indeed, the federal court of appeals acknowledged his functional deficits in representing himself. Thus, his waiver may have been functionally *incompetent*. A lack of competence may be subtle and capricious. For example, one Pennsylvania inmate refused to continue his appeals after his colored pencils were taken (it was his only way of communicating with his son, since pens and pencils were "weapons").<sup>34</sup>

The *depressive* waiver would appear prevalent, given prolonged social isolation, learned helplessness, and acquired hopelessness on death row. The author speculates that lowered brain serotonin (actually 5-HIAA in cerebrospinal fluid), which is common among violent offenders and suicide victims,<sup>35</sup> is present in this population as well. Because the death penalty is based on *lex talionis* and not on

<sup>¶</sup> Martini, in an affidavit, stated: "The longer I live, the more my family name is damaged by publicity about my crime. . . . In my view, the action that the public defender wishes to take on my behalf will only delay the time for my death, cause my victim's family more pain, and cause me to endure for a longer time the intolerable conditions I am living under in prison [677 A.2d at 1115]."

science, it is unlikely that a biological marker will work its way into the calculus of punishment in the near term.

The *political* waiver is listed as a theoretical type, if it is possible to distinguish a rational ideological decision from a distorted, desperate, or psychotic one. In one case, the inmate, claiming racial discrimination, waived his appeals and requested "to die as a prisoner of war."<sup>36</sup> Finally, the *coerced* waiver may be obscure, because the forces acting to strip the inmate's voluntariness are often subtle. The most common form would be actual prison conditions,<sup>37</sup> followed by a breaking of the will by correctional officers over time. Because coercion is judged by a reasonable person standard,<sup>38</sup> psychiatric testimony will likely focus on the effects, depression and psychosis.

### Conclusions

The constitutional, political, and moral issues embedded within capital punishment are far from resolved, notwithstanding important case law and commentary. By and large, states take seriously the need to review each case before affirming the verdict and sentence. When the condemned inmate requests truncation or cessation of the appeals, it is appropriate to conduct a search for meaning. This would necessarily include thorough psychiatric (as well as psychological and neurological) evaluation. The "right" to be executed must not be romanticized, as the internal forces that shape cognitive and emotional states are just as real as the external drama. Therefore, psychiatrists should be alert to opportunities for educating courts about these forces, lest

we give ground to the practice of exterminating individuals who have genuine deficits.

### References

1. Ford v. Wainwright, 477 U.S. 399 (1986)
2. Rees v. Payton, 384 U.S. 312 (1966)
3. *In re* Heidnik, 112 F.3d 105 (3d Cir. 1997)
4. Ake v. Oklahoma, 470 U.S. 68 (1985)
5. *In re* Heidnik, 720 A.2d 1016 (Pa. 1998)
6. *Id.* at 1019
7. Commonwealth v. Jermyn, 652 A.2d 821 (Pa. 1995)
8. Commonwealth v. Moon, 117 A.2d 96 (Pa. 1955)
9. Commonwealth v. Jermyn, 652 A.2d 821, 823 (Pa. 1995)
10. Whitmore v. Arkansas, 495 U.S. 149 (1990)
11. Barefoot v. Estelle, 463 U.S. 880 (1983)
12. Ford v. Wainwright, at 2612 (Justice O'Connor set up a type of Zeno's paradox (like the reason Achilles can never overtake the tortoise) as an argument against a preoccupation with due process protection: "By definition, this interest can never be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary.")
13. Pate v. Robinson, 383 U.S. 375 (1966)
14. Whitmore v. Arkansas, 495 U.S. 149 (1990)
15. *Id.* at 165
16. Gilmore v. Utah, 429 U.S. 1012 (1976)
17. Dusky v. United States, 362 U.S. (1960)
18. Mack v. Mississippi, No. 979-DP-00375-SCT (Miss. Sup. Ct., Mar. 12, 1998) (opinion withdrawn on grant of reh'g) (This case was recently reviewed in this Journal (J Am Acad Psychiatry Law 26:669, 1998). The court considered the question of a prisoner's waiver of appeals. Saying that such a person must be competent, and citing a Maryland standard, they required an examination and used a legal test essentially the same as the competency standard in *Dusky*: that the prisoner must possess "a present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.")
19. State v. Martini, 677 A.2d 1106 (N.J. 1996)
20. Cruzan v. Missouri Department of Health, 497 U.S. 261 (1990)

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21. Commonwealth v. McKenna, 383 A.2d 174 (Pa. 1978)
22. Pearlman T: The ethics of the Texas death penalty and its impact on a prolonged appeals process. *J Am Acad Psychiatry Law* 26:655-60, 1998 (In a scenario opposite from that of *Ford*, an inmate, during a prolonged appeals process, may regain capacity or actually become rehabilitated. This raises another troubling issue of executing a person (in the case of Texas law) who had been adjudicated permanently dangerous and not amenable to rehabilitation, but turns out to be the opposite. Such was the case of Karla Faye Tucker, executed in 1998.)
23. See *Gregg v. Georgia*, 428 U.S. 153 (1976), for the basis of how the imposition of death, in some instances, may not be violative of the Eighth and Fourteenth Amendments.
24. For examples of his thinking, see *In re Heidnik*, 112 F.3d 105 (3d Cir. 1997), at 108-9
25. *Demosthenes v. Baal*, 495 U.S. 731 (1990) (This is the Nevada case of Thomas Baal, who had evidenced mental instability prior to trial for murder and robbery in 1988. He was examined and found competent, later pleading guilty. A three-judge panel sentenced him to death. Baal contended later that he was not competent to plead guilty, but the Nevada Supreme Court affirmed the conviction and sentence. After filing for post-conviction relief, he changed his mind and asserted that he did not want additional appeals. Psychiatrists concluded that his waiver was knowing and intelligent. Hours before execution, Baal's parents filed for federal *habeas corpus* relief as next friend, claiming their son was not competent to waive his rights. The Ninth Circuit Court of Appeals found enough evidence to grant a stay for the purpose of having a full evidentiary hearing. The U.S. Supreme Court majority opined that there was insufficient evidence of present incompetence to appoint a next friend, thus paving the way for the execution. Justices Brennan and Marshall dissented.)
26. Similarly, in *Brewer v. Lewis*, 989 F.2d 1021 (9th Cir. 1993), an Arizona case, John Brewer's mother filed a petition for *habeas corpus* and was turned down by the district court. The case before the Ninth Circuit Court of Appeals was heard two days before the scheduled execution and decided the next day. Because Mrs. Brewer failed to establish why her son could not represent himself, her petition was denied. There was no *en banc* review; Brewer was executed. In a blistering dissent, *Brewer v. Lewis*, 997 F.2d 550 (9th Cir. 1993), Circuit Judges Reinhardt and Pregerson expressed outrage at the court's failure to acknowledge Mrs. Brewer's standing and failure to give the matter a full evidentiary hearing.)
27. *Lonchar v. Thomas*, 517 U.S. 314 (1996)
28. *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987)
29. *Franklin v. Francis*, 997 F. Supp. 916 (S.D. Ohio), vacated and remanded, 144 F.3d 429 (6th Cir.), cert. denied, 119 S. Ct. 451 (1998)
30. *Drope v. Missouri*, 420 U.S. 162 (1975)
31. *In re John Cockrum*, 867 F. Supp. 484 (E.D. Tex. 1994)
32. *Id.* at 485
33. *Franklin v. Francis*, 997 F. Supp. 916 (S.D. Ohio)
34. Personal communication, Robert B. Dunham, Esq, April 1999
35. Marzuk PM: Violence, crime, and mental illness: how strong a link? *Arch Gen Psychiatry* 53:481-6, 1996
36. *Rahman v. Bell*, 927 F. Supp. 262 (M.D. Tenn. 1996) (Rahman's position was more posturing than politics; he withdrew his affidavit and continued postconviction relief efforts.)
37. *Groseclose ex rel Harries v. Dutton*, 594 F. Supp. 949 (M.D. Tenn. 1984)
38. Weiss KJ: Psychiatric testimony and the "reasonable person" standard. *J Am Acad Psychiatry Law*, in press, 1999