dant is incompetent to waive his *Miranda* rights. The court also held that a mental age younger than 18, as determined by IQ, does not preclude the imposition of the death penalty.

Absolute Right to Privacy for Prison Inmates

Sara G. West, MD
Fellow in Forensic Psychiatry
University Hospitals, Case Medical Center

Stephen Noffsinger, MD
Chief of Forensic Services
Northcoast Behavioral Healthcare

Division of Forensic Psychiatry
Case Western Reserve University
Cleveland, OH

Washington State's Right to Privacy Does Not Permit a Fasting Inmate to Refuse Nutrition and Hydration

In *McNabb v. Department of Corrections*, 180 P.3d 1257 (Wash. 2008), Charles McNabb was forcibly fed after he refused nutrition and hydration while fasting in prison. McNabb sued, claiming that the force-feeding violated his privacy rights guaranteed by the Constitution of the State of Washington. The Supreme Court of Washington found for the Department of Corrections (DOC), noting that the right to privacy described in the Constitution is no greater than that provided by the U.S. Constitution; McNabb had no absolute right to privacy; and state interests outweighed McNabb's privacy rights. This case calls to mind several landmark cases that balanced individual privacy rights against state interests.

Facts of the Case

Mr. McNabb was incarcerated at Airway Heights Correctional Center (AHCC) in July 2004. He had arrived from the Spokane County Jail, where he had not voluntarily eaten for over five months. After two days of refusing to eat or drink at AHCC, Mr. McNabb was force-fed through a nasogastric (NG) tube for two days, after which he agreed to eat and drink on his own. He reported that previous force-feedings had resulted in his being "strapped into a chair for 28 hours straight, during which time it was impossible . . . to sleep." Mr. McNabb "suffered bleeding from the nose for a day, pain and nausea" due to the NG tube. In explaining his refusal of nutrition and hydration, he stated: "My only wish is for my personal decision not to eat to be respected and to be left in peace for my fast to take its course." Mr. McNabb filed suit shortly after his fast ended, stating that the DOC violated his right to privacy as guaranteed by the Washington State Constitution and his common law right to be free from bodily invasion. The superior court entered a summary judgment on behalf of the DOC, which the court of appeals upheld. Mr. McNabb appealed to the Supreme Court of Washington.

Ruling

The court ruled in favor of the DOC and upheld the decisions of the lower courts. Force-feeding a prison inmate does not violate the right to privacy as guaranteed by the Washington State Constitution.

Reasoning

The Supreme Court of Washington addressed three questions. The first was whether the court should consider the right to refuse nutrition and hydration in relation to the right to privacy guaranteed in the Washington State Constitution or that granted in the U.S. Constitution. Mr. McNabb argued that the state constitution's explicitly stated right to privacy is "far stronger than any federal law." In their analysis, the court determined that the privacy protections afforded by the Washington State Constitution "have an independent meaning from that provided by the federal Constitution." However, they concluded that the right to privacy in this case "is coextensive with, but not greater than, the protection granted under the federal constitution" (*McNabb*, p 1262).

The second question asked if the privacy rights guaranteed by the state of Washington allows an inmate who is fasting with an intent to die the absolute right to refuse nutrition and hydration, as asserted by Mr. McNabb. The DOC, in their argument, recognized the existence of these rights for those with a terminal or severely debilitating condition. The DOC argued that since Mr. McNabb had neither, he was attempting to assert a right to commit suicide. The Supreme Court of Washington concluded that the right to refuse nutrition and hydration is not absolute and that "compelling state interests may outweigh that right." The court added that "inmates' rights are more limited than those of nonincarcerated individuals because courts must consider the state's

additional interest related to incarceration" (*McNabb*, p 1263). Because of this, they concluded that Mr. McNabb retained only a limited, not absolute, right to privacy.

The third question inquired whether the state's interests outweighed Mr. McNabb's right to refuse nutrition and hydration. The five compelling state interests were:

> (1) the maintenance of security and orderly administration within the prison system; (2) the preservation of life; (3) the protection of interests of innocent third parties; (4) the prevention of suicide; and (5) [the] maintenance of ethical integrity of the medical profession" [*McNabb*, p 1265].

First, the court concluded that state prisons have a caretaking role, and part of that role involves providing nutrition to inmates. They added that allowing Mr. McNabb to refuse food and water is disruptive to their policy and unfavorably affects "orderly prison administration."

Second, Mr. McNabb argued that the state's interest in preserving life is meaningless if it "denigrates" that life by imposing invasive procedures on a person. The court noted that Mr. McNabb did not have a terminal condition and further stated that the DOC's intervention did "not merely temporarily relieve a chronic condition but restored McNabb to a naturally healthy condition" (*McNabb*, p 1266). Therefore, the Court deemed that the state had a compelling interest in preserving Mr. McNabb's life.

Third, the court agreed with Mr. McNabb that there was no compelling state interest in protecting third parties, because he did not have any dependents.

Fourth, the court determined that the state did have a compelling interest in preventing Mr. McNabb's suicide. They stated that, if they honored his refusal of nutrition and hydration, he would die of starvation, "a force that he set in motion," ultimately making his act a suicide.

Fifth, the court ruled that the state has a compelling interest in protecting the medical profession. The DOC argued that refusing nutrition and hydration is "tantamount to physician-assisted suicide and is therefore unethical" (*McNabb*, p 1266). The court agreed and stated, "We decline to place medical professionals in the ethically tenuous position of fulfilling the death order of an otherwise healthy incarcerated individual" (*McNabb*, p 1267).

Dissent

The opposition to the court's majority opinion made several interesting points. One judge, who concurred with the result of the majority opinion, dissented by stating that Mr. McNabb's privacy rights could not be violated, because they did not exist. She opined that, since he did not have a terminal or debilitating illness, he had no right to refuse life-sustaining treatment.

The dissenting judge stated that there was no indication that the state's interests outweighed privacy interests to a sufficient degree to allow for the force-feeding of Mr. McNabb, which she described as "a practice tantamount to torture." She stated that the majority opinion incorrectly framed the case as a demand for the right to commit suicide, whereas it should be more broadly considered as the "right to be let alone." She went on to state that privacy is an explicit right in the Washington State Constitution, which offers more protection than the federal constitution. She concluded that the authority of law must exist before the state may intervene in someone's private affairs, and she did not find such authority in this case. In addition, she noted that the right to bodily integrity is absolute, and there is no basis for the suggestion that those who are terminally ill have more rights than their nonterminally ill counterparts. Finally, she concluded that none of the state's interests were compelling. She stated that refusal to eat is a "private and personal choice" and noted that force-feeding is "degrading and cruel" and would not contribute to Mr. McNabb's welfare. She stated that the act of fasting is not an impulsive, suicidal act, but rather "a daily commitment and affirmation of belief." She put forth that Mr. McNabb was competent to make such a decision. She concluded by noting a lack of evidence of the deleterious effects of fasting on other inmates in the prison environment and the lack of Mr. McNabb's explicit suicidal intention.

Discussion

This case calls to mind several constitutional points and landmark cases. The United States Constitution does not explicitly guarantee the right to privacy, but rather suggests it in some of the amendments. The majority of the Supreme Court of Washington justices considered the state's explicit guarantee of these rights to provide no greater coverage than that offered by the federal government. This ruling stands in contrast to the Massachusetts Supreme

Court's 1977 decision in *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977), in which it recognized the right to privacy, ruled that it extended to acceptance or rejection of medical care, and noted that it applied even to incompetent individuals. The Massachusetts Supreme Court again supported the rights of the individual over the state in the 1983 case, *Rogers v. Commissioner of Department of Mental Health*, 458 N.E.2d 308 (Mass. 1983). It concluded that an incompetent individual has the right to a full adversarial hearing on the question of forced medication in a hospital setting. It added that no state interest could supersede this right unless it was an emergency, which was very narrowly defined.

In a 1990 case from Washington State, *Washington v. Harper*, 494 U.S. 210 (1990), the U.S. Supreme Court addressed an inmate's right to refuse psychiatric treatment. Of interest, in this case, the Supreme Court of Washington ruled that the DOC's procedures for forced medication did not provide enough protection for the inmate's rights. The U.S. Supreme Court reversed the decision, noting that the state has a legitimate interest in forcible medication to maintain safety in prisons. In coming to this decision, the Court used the test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which weighs the state's interests against those of an individual and determines the risk of harm due to error in deciding in favor of the government or the individual. This case is similar to *McNabb v. Department of Corrections*, without the explicit statement of the harm of either decision, which would be the possible death of the inmate or the possible violation of the inmate's privacy rights.

Competence to Waive Mitigation

Edward Poa, MD
Fellow in Forensic Psychiatry

Phillip Resnick, MD
Professor of Psychiatry
Director of Forensic Psychiatry

Case Western Reserve University
Cleveland, OH

Affirmed Denial of Postconviction Relief to an Inmate, Concluding That the Competency Standard for Waiving Death Penalty Mitigation Is the Same as the Standard for Competence to Stand Trial and That the Defendant Was Competent to Waive the Penalty Phase Despite His Narcissistic Disorder

In *Commonwealth of Pennsylvania v. Puksar*, 951 A.2d 267 (Pa. 2008), Ronald Puksar appealed the dismissal of his petition for relief under the Post Conviction Relief Act (PCRA). His petition came after he was convicted on two charges of first-degree murder and sentenced to death. He alleged that he had been incompetent to waive the presentation of mitigating evidence because his depression and personality disorder had rendered him incapable of assisting in his defense once he was convicted. The Supreme Court of Pennsylvania affirmed the dismissal of his petition.

Facts of the Case

Ronald Puksar was charged in 1993 with killing his brother, Thomas Puksar, and his sister-in-law, Donna Puksar. He was convicted of first-degree murder with death penalty specifications in both crimes. In the penalty phase, Mr. Puksar waived the presentation of mitigating evidence. The jury sentenced him to life in prison in the murder of Thomas Puksar. For the murder of Donna Puksar, the jury sentenced him to death after finding one aggravating factor and no mitigating factors.

On appeal, the Supreme Court of Pennsylvania affirmed Mr. Puksar's conviction and sentences. The U.S. Supreme Court denied *certiorari*. Mr. Puksar then petitioned for relief under the Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §§ 9541-9546.

Mr. Puksar argued that numerous errors were made in his case. The matter of interest to forensic psychiatrists is Mr. Puksar's contention that he had been incompetent to waive the presentation of mitigating evidence. He alleged ineffective assistance of counsel, since his trial attorney, Adam Sodomsky, knew he had a history of mental illness and should have had him undergo a competence evaluation before his waiver. In support of his argument, Mr. Puksar introduced the testimony of two prior attorneys, two mental health experts, and Mr. Sodomsky.

Mr. Puksar first presented the testimony of John Boccabella, his attorney during his grand jury ap-