"incongruous," since the mental health conditions on death row were "grossly inadequate." A 1994 report by Amnesty International ("Conditions of Death Row Prisoners in H-Unit, Oklahoma State Penitentiary," May 1994) also questions whether the ACA standards are adequate.

Although the court in this case affirmed the injunction related to mental health, the feasibility of the injunction's terms may be questionable. Regarding the injunction that MDOC must provide annual mental health evaluations and follow-up in a private setting, the feasibility of privacy in correctional facilities in general is questionable if they were not designed with accessible, soundproof interview rooms. The feasibility of housing death row inmates with psychosis separately from other inmates is also questionable. Perhaps this case, with others in which prisoners file suit to improve living conditions, will have an impact on the design of correctional facilities and raise the standards of the ACA, thereby facilitating the role of the correctional psychiatrist.

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## Competence to Waive Death Penalty Appeals

### *Prisoner's Decision to Waive Death Penalty Appeals Does Not Constitute Incompetence*

In *Dennis v. Budge*, 378 F.3d 880 (9th Cir. 2004), the court reviewed the denial of a "next friend" petition for *habeas corpus* and of a motion for stay of execution. The petition had been filed by the former attorney of an inmate who was scheduled to be executed, who had denied his appeals, and who had previously been found competent to waive appeals despite an opinion to the contrary by a state district court-appointed psychiatrist. The U.S. Court of Appeals for the Ninth Circuit affirmed the order and denied the stay of execution, ruling that, because the state's finding of competency to waive appeals had not been rebutted, "next friend" standing did not apply.

*Facts of the Case*

Terry Dennis pled guilty in state district court to first-degree murder, for which the state intended to seek the death penalty. After undergoing a psychiatric evaluation, Mr. Dennis was found by the court to be competent to stand trial and to enter a guilty plea. At the penalty phase, Mr. Dennis's background of family abuse and his history of bipolar disorder, posttraumatic stress disorder, and suicide attempts were presented. Mr. Dennis was sentenced to death, and the Nevada Supreme Court affirmed.

Mr. Dennis's petition for writ of *habeas corpus* was dismissed without an evidentiary hearing. With his appointed *habeas* counsel, Karla Butko, Mr. Dennis appealed to the Nevada Supreme Court. Before the appeal was heard, Mr. Dennis withdrew his appeal, explaining in a written letter to the court that he had met with his attorney and that "I no longer wish to pursue any appeals and want my sentence to be carried out."

Ms. Butko nevertheless filed an opening brief. Mr. Dennis then wrote the District Attorney to reiterate his wish to discontinue his appeals. Ms. Butko continued the appeals process because she was unsure whether Mr. Dennis was "ready to make a knowing, intelligent and voluntary relinquishment of his right to appeal." On October 22, 2003, the Nevada Supreme Court granted a motion for an evidentiary hearing on the question of Mr. Dennis's competency to waive his appeal.

On November 7, 2003, Ms. Butko moved to withdraw from Mr. Dennis's case because his desire to waive his appeal was "repugnant to her." The motion was granted.

On November 24, 2003, a court-appointed psychiatrist, Dr. Thomas E. Bittker, examined Mr. Dennis and obtained collateral information. In addressing questions posed by the court, Dr. Bittker's report indicated that Mr. Dennis had sufficient present ability to consult with his attorney with a reasonable degree of rational understanding; that Mr. Dennis had a rational and factual understanding of the proceedings, including the death penalty; and that, for his bipolar disorder, Mr. Dennis was taking appropriate medications that did not impair his capacity to make decisions. However, Dr. Bittker maintained with a reasonable degree of medical certainty that Mr. Dennis's desire to seek the death penalty and to refuse appeals were more likely to be based, not on a realistic desire for atonement, but on

his psychiatric disorder, namely, his "suicidal thinking and his chronic depressed state, as well as his self-hatred."

At the evidentiary hearing on December 4, 2003, the state and Mr. Dennis agreed that no testimony was necessary from Dr. Bittker. Mr. Dennis reiterated his desire to give up his appeal, which he claimed was voluntary and which was made after full disclosure of all options by his new attorney. He denied suicidal thoughts and attempts while in prison. When asked why he had changed his mind after filing his initial appeal, Mr. Dennis replied that he "would rather not live than to continue to live and be a doddering old man in prison."

The court found Mr. Dennis competent to make decisions. They took into account Dr. Bittker's report, but ruled that his findings were "somewhat troublesome," in that they addressed matters dating back to Mr. Dennis's childhood rather than those surrounding the current issue of competency. The court also accepted Mr. Dennis's statements at the evidentiary hearing that he was not suicidal, over Dr. Bittker's report that Mr. Dennis experienced depression and suicidal thinking. The court took into account many factors in its reasoning, including Mr. Dennis's lucid behavior at the evidentiary hearing, the consistency of his choice, his intelligence and insight, his awareness of every claim of relief in his petition for writ of *habeas corpus*, and his understanding that a waiver of appeals would lead to imposition of the death penalty. In addition, the court also took into account its own knowledge of Mr. Dennis over time.

On March 12, 2004, the Nevada Supreme Court granted Mr. Dennis's motion for voluntary dismissal of his appeals. On June 14, 2004, less than two months before the scheduled execution date, Ms. Butko filed a petition for *habeas corpus* in the federal district court and other motions, including a stay of execution. Ms. Butko's petition was filed as a "next friend" based on the standard outlined in *Whitmore v. Arkansas*, 495 U.S. 149 (1990). According to *Whitmore*, when a death sentence is imposed on a defendant who has decided to forgo appeals, the validity of the sentence may be challenged by a third party (next friend) who can provide an adequate explanation why the real party in interest cannot carry out the action himself, and who is truly dedicated to and has some significant relationship with, the real party in interest. In moving to dismiss the *habeas* petition, the state argued that Ms. Butko lacked standing.

A hearing on the petition and motions was held on July 1, 2004. Dr. Bittker testified at the hearing that Mr. Dennis's desire for the death penalty was not a volitional one, but rather was "a fixed decision that has been sustained since the instant offense and before" and that his "almost obsessive insistence that he does die," while not being delusional, was "not normal" and reflected the rigid thinking of his mental disorder. The court conducted an extensive canvass of Mr. Dennis in which he gave lengthy testimony that was consistent with his testimony at the evidentiary hearing on December 4, 2003.

On July 6, 2004, the district court granted the state's motion to dismiss Ms. Butko's petition. The court noted that the state had established Mr. Dennis's competence based on the standard of three questions posed by *Rees v. Peyton*, 384 U.S. 312 (1966), and *Rumbaugh v. Procunier*, 725 F.2d 395 (5th Cir. 1985): Is the person suffering from a mental disease; if so, does the disease prevent him from understanding his legal position and the options available to him; and if not, does the disease nevertheless prevent him from making a rational choice?

On the same day that the district court granted the motion to dismiss her next friend petition, Ms. Butko filed a timely notice of appeal, again as a next friend. The district court granted a Certificate of Appealability. On July 12, 2004, Ms. Butko filed a motion for stay of execution in the United States Court of Appeals for the Ninth Circuit. The motion argued that the state and federal courts had ignored uncontradicted evidence of Mr. Dennis's incompetence and that waiver of appeals must be made without the decision's being substantially affected by mental disorder. Ms. Butko acknowledged that Mr. Dennis had the intellectual ability to understand his decision to waive appeals, but that the unwavering nature of his stance amounted to a fixed decision that was not volitional.

#### *Ruling and Reasoning*

The court affirmed the dismissal of Ms. Butko's petition and held that she was not entitled to next friend status.

Ms. Butko was not entitled to next friend status because she did not prove by clear and convincing evidence that Mr. Dennis's capacity to make the decision to forgo appeals was substantially affected by

mental illness. The court disagreed with Ms. Butko's notion that Mr. Dennis chose to waive his appeals based on a mental condition involving "suicidal thinking" and a "chronic depressed state," because to accept this notion would be to argue that "Dennis is incompetent because Dennis's reason for choosing to die is that he wants to die."

The court also remarked that, even when a prisoner's decision is the product of a mental disease, it is not the disease itself that determines competence or lack thereof, but whether the disease affects the capacity to appreciate options and to make a rational choice. The court held that the *Whitmore* standard asks not whether the prisoner is making a rational choice but, rather, whether the capacity for rational understanding is present. Furthermore, the court held that a "rational choice" does not necessarily mean one that is sensible or one with which the next friend is in agreement. Also, citing *Godinez v. Moran*, 509 U.S. 389 (1993), the court observed that "rational choice" does not necessarily connote something different from "rational understanding."

In observing that Mr. Dennis had once filed for a state *habeas* petition before withdrawing it, the court disagreed with Ms. Butko's assertion that Mr. Dennis's decision to waive appeals was of a fixed nature that precluded its being a rational one. The court disagreed with Ms. Butko's suggestion that it is improper for judges to rely on their lay observations in making findings of competency. The court noted, "[J]udges who have an opportunity to observe and question a prisoner are often in the best position to judge competency, especially as in this case, where the judge has had more than one opportunity to observe and interact with the prisoner."

*Discussion*

This case appears to endorse the concept that, in determinations of competency to waive appeals for execution, the emphasis is on the cognitive rather than the volitional basis of a prisoner's thought process. In endorsing this concept, the court may be expressing its preference for concrete, over nuanced, elements of reasoning. First, for example, the court's reasoning may represent an application of *Godinez*, in which there is no distinction between "rational understanding" and "rational choice." Second, the court may have found it easier to consider concrete elements of reasoning. The court gave greater weight to Mr. Dennis's intellectual grasp of his waiver of appeals, over Dr. Bittker's nuanced opinion (which the court found confusing) that, even in the face of apparent cognitive awareness, a "fixed decision," while admittedly not meeting criteria for any DSM-IV-TR psychiatric diagnosis, may reflect an impairment in volition. Third, although acknowledging the points in Dr. Bittker's evaluation, the court considered its own courtroom observations of and experiences with Mr. Dennis and ascribed at least equal weight to them.

In conducting evaluations of competency to waive appeals for execution, forensic examiners may thus find that for the sake of clarity, opinions on cognitive capacity are more readily understood and accepted by the court. If opinions on volitional capacity are to be presented, they should be framed in as concrete a manner as possible. One way in which this could be achieved would be for opinions on volitional capacity to be expressed in the context of how specific DSM-IV-TR illnesses and symptoms affect one's decision-making abilities, taking into account that merely the presence of a desire to waive appeals is not indicative of clinical depression.

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## Extreme Emotional Disturbance

### *Judge's Role in Limiting Introduction of Marginally Relevant Evidence Is Upheld*

In *Baze v. Parker*, 371 F.3d 310 (6th Cir. 2004), the court examined a decision by the U.S. District Court for the Eastern District of Kentucky that denied an appellant inmate's petition for *habeas corpus* relief from his conviction and death sentence for the shooting of two police officers. Mr. Baze had argued that the trial court interfered with his right to present the defense that he acted under the influence of an "extreme emotional disturbance" (EED), stemming from a feud with his wife's family, thereby denying his due process rights. After the Kentucky Supreme