be an independent forensic assessment by a nontreating forensic psychiatrist or psychologist. Such an approach would be one way to preserve the distinction between forensic assessments and therapeutic assessments.

Competence to Waive the Insanity Defense

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The Implications of a Frendak Inquiry

In *Phenis v. United States*, 909 A.2d 138 (D.C. Cir. 2006), Jamar Phenis, convicted of arson, malicious destruction of property, and second-degree cruelty to children in the Superior Court of the District of Columbia, appealed to the Court of Appeals of the District of Columbia, on the grounds (among others) that his bizarre behavior during the trial should have prompted the court to stop the trial and conduct an additional competency evaluation and that the court should have conducted an inquiry to determine whether he had intelligently and voluntarily waived the insanity defense.

Facts of the Case

In June 2000, Mr. Phenis set fire to his mother's apartment, where he lived with her and his six-year-old niece. Minutes before the fire, maintenance staff had observed Mr. Phenis arguing with his mother and threatening to break the balcony window. The staff then saw him throw a recliner that was afire from the balcony to the sidewalk below. Shortly thereafter, the niece came running out of the apartment, stating that her uncle had "gone crazy." The police apprehended him as he walked out of the complex.

The arresting police officer later testified that Mr. Phenis was behaving erratically at the crime scene. He did not exhibit "normal behavior," had rambling speech, and was singing in the back of the police car. During the initial interrogation, he admitted to having set his mother's apartment on fire, but gave a bizarre statement: "I feel it was an accident. But when I get the power I am going to do it right. The thing will—and I am not tripping" (*Phenis*, p 143). He was charged with arson, malicious destruction of property, and second-degree cruelty to children.

In the months preceding his trial, Mr. Phenis underwent a series of psychiatric examinations. Dr. Lawrence Oliver, a clinical psychologist, conducted a competency screening nine days after the offense but was not able to determine if the defendant's behavior was "the result of volitional characterological traits, mental illness, substance abuse, or some combination of these factors" (*Phenis*, p 144), and was ordered to conduct a complete evaluation of Mr. Phenis' competency to stand trial. Dr. Oliver's report of that (five-minute) evaluation noted that Mr. Phenis spoke in a rapid, disjointed manner, was malodorous and disheveled, and had refused to comply with treatment at the mental health unit. Dr. Oliver opined that Mr. Phenis' condition had deteriorated, and he was found not competent to stand trial and was transferred to St. Elizabeth's Hospital for restoration to competency.

In September 2000, Dr. Mitchell Hugonnet, a staff psychologist at St. Elizabeth's Hospital, completed the restoration evaluation and opined that Mr. Phenis was competent to stand trial. Dr. Hugonnet diagnosed "PCP dependence, PCP-Induced Psychotic Disorder, Alcohol Dependence and Personality Disorder NOS. . .with Antisocial Features" (*Phenis*, p 145). The report stated that Mr. Phenis was receiving treatment with Haldol and Cogentin and "should remain on medication pending trial to assure continued competency" (*Phenis*, p 145). After some pretrial motions, Mr. Phenis remained at St. Elizabeth's and in January 2001, he underwent a fourth competency evaluation and was again deemed competent.

At a status hearing in June 2001, the defense requested a criminal responsibility test. The defense counsel reiterated that because Mr. Phenis refused to consider an insanity plea but was willing to use it as a mitigating factor, the defense planned to use mental illness as a mitigating factor in a second defense, the first defense being his innocence.

In August 2001, the Forensic Inpatient Services Division issued the Criminal Responsibility Examination report by Dr. William Richie, a staff psychiatrist. It stated that at the time of the alleged offense,

Mr. Phenis "was not suffering from a mental disease or defect that substantially impaired his capacity to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of the law" (*Phenis*, p 148). Dr. Richie reiterated the diagnosis of PCP-induced psychosis and dependence and Mr. Phenis' need to remain on medication to assure continued competence. The court ruled Mr. Phenis criminally responsible for the charged offenses.

The defense counsel challenged the findings, including the diagnosis, on grounds that Mr. Phenis' urine toxicology was negative at the time of the arrest, that witnesses to the event described Mr. Phenis as having an impaired state of mind, and that the first two competency evaluations had found him incompetent to stand trial and in need of hospitalization and treatment. Counsel requested a bifurcated trial and that Mr. Phenis remain at St. Elizabeth's.

In October 2001, Mr. Phenis appeared before the court to enter a guilty plea. When canvassed about the specific events leading to the charges, however, Mr. Phenis did not admit that he intentionally set the fire; therefore, the trial court did not accept his plea.

The trial began in January 2002. While jurors were being interviewed, Mr. Phenis was noted to be "singing and swinging in his chair" (*Phenis*, p 150). During the trial, despite admonitions by the judge, he appeared to be talking to the jury but finally conformed his behavior appropriately. Mr. Phenis was found guilty. At the sentencing hearing, defense counsel requested an evaluation by an independent expert witness, citing disagreement with the government doctor's assessment that Mr. Phenis' mental illness was solely due to PCP.

The judge ruled that an independent expert was not necessary and ordered the Forensic Services Administration to conduct a presentencing examination. Mr. Phenis was examined at the mental health ward of the District of Columbia jail by Dr. Janet Fay-Dumaine, who reported that Mr. Phenis' "history suggests a psychotic disorder induced by substance abuse, with a history of Antisocial Personality Disorder that predates his psychotic disorder" (*Phenis*, p 152). The report also noted that Mr. Phenis at the time of evaluation was not suffering from acute psychiatric symptoms but suggested that he continue to receive intensive mental health and substance abuse treatment in view of decompensation in the past.

In March 2002, Mr. Phenis was sentenced to 9 to 27 years at the federal corrections center in Butner, North Carolina, a center with mental health facilities.

Ruling and Reasoning

The District of Columbia Court of Appeals rejected all but one of Mr. Phenis' claims and remanded the case to the trial court to determine whether the defendant knowingly and intelligently waived the insanity defense. We will discuss here only the appeal claims that relate to the psychiatric questions.

The appellate court ruled that the trial court had not erred in failing to order another competency hearing at mid trial when Mr. Phenis showed bizarre behavior. The court agreed that Mr. Phenis' behavior during the trial was "bizarre and inappropriate" but ruled that he was able to conform his behavior, that he had been found competent on the last two competency evaluations, and that defense counsel had reiterated that with treatment, Mr. Phenis became cooperative and was able to assist in his defense.

On the claim that the trial court erred in not conducting an inquiry regarding Mr. Phenis' rejection of the insanity defense, the appellate court agreed and remanded the case, citing *Springs v. United States*, 614 A.2d 1 (D.C. Cir. 1992), which relied on *Frendak v. United States*, 408 A.2d 364 (D.C. Cir. 1979). *Springs* held:

> Whenever evidence suggests a substantial question of the defendant's sanity at the time of the offense, the trial judge must conduct an inquiry designed to assure that the defendant has been fully informed of the alternatives available, comprehends the consequences of failing to assert an insanity defense, and freely chooses to raise or waive the defense [*Springs*, p 10].

In *Frendak*, the jury convicted Paula J. Frendak of first-degree murder and carrying a pistol without a license. The trial judge imposed the insanity defense on Ms. Frendak, over her objection. On appeal, the District of Columbia Court of Appeals held: "the trial judge may not force an insanity defense on a defendant found competent to stand trial *if* the individual intelligently and voluntarily decides to forego that defense" (*Frendak*, p 366, emphasis in the original). The court outlined a three-pronged inquiry if state of mind is an issue at the time of the crime to determine: competency to stand trial, capacity to waive the insanity defense intelligently and voluntar-

ily (the *Frendak* inquiry), and the need for the court, *sua sponte*, to impose the insanity defense.

In *Phenis*, the appellate court ruled that several factors raised the question of Mr. Phenis' state of mind at the time of the crime and his capacity to waive the insanity defense intelligently and voluntarily. The appellate court further held that the only countering evidence was Dr. Richie's evaluation one year after the offense that concluded that Mr. Phenis could be held criminally responsible. The court ruled the report was lacking in substantiation, collaterals, details, and diagnostic clarity.

The appellate court concluded that though Mr. Phenis was competent to stand trial, it was not clear whether he was fully informed of the possibility and consequences of raising the insanity defense and freely chose to waive it. The court remanded the case with instructions to conduct a *Frendak* inquiry to determine whether Mr. Phenis intelligently and voluntarily waived the insanity plea. If the court is so convinced, the conviction stands. If, however, the court finds that Mr. Phenis did not competently waive the insanity defense, it must then determine whether there is clear evidence for the insanity defense, which if present would require the court to void Mr. Phenis' conviction and impose a new insanity defense trial over his objections. In the absence of clear evidence for an insanity defense, Mr. Phenis' conviction would stand.

Discussion

This case raises important concerns about competency to stand trial and the court's requirement for a unique assessment to determine capacity to waive an insanity plea through the *Frendak* inquiry. Competency to stand trial focuses on the contemporaneous ability to consult with counsel and to understand proceedings, including legal options, and consequences.

In this case, Mr. Phenis had been found competent several times before the trial date, but at trial, he showed evidence of a possible exacerbation of psychiatric symptoms. The ruling indicates that, at times, the courts may not recognize competency to stand trial as a fluid state, which does not assure continued capacity in the face of the stress of trial.

The legal and psychiatric views are also at odds in the second and central issue in *Phenis*, the need for a *Frendak* inquiry. The ruling in this case, as in *Frendak* and *Springs*, indicated that the court views competency to stand trial more narrowly than do forensic psychiatrists. Indeed, the court's ruling that the waiving of an insanity plea must be an intelligent and voluntary decision puts that component of the defense process at a higher standard than for competency to stand trial itself, creating an artificial distinction difficult to apply to a forensic psychiatric evaluation. A psychiatric examination for competency includes an assessment of decision-making on both prongs of competency, and forensic psychiatrists may appropriately consider an assessment of a defendant's appreciation of an insanity plea. On the other hand, in a *Frendak* inquiry, the court has neither clarified who shall conduct the assessment nor provided the guidelines. The rulings in *Phenis* and *Frendak* are also puzzling in view of the ruling in *Godinez v. Moran*, 509 U.S. 389 (1993), because the capacity to waive representation by an attorney does not require a separate hearing, but waiving an insanity defense does. It is unclear how courts determine which rights can be waived without further scrutiny.

Termination of Limited Guardianship

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Time Limit Requirements for Guardianship Appointment Not Applicable to Its Termination

In *In re Guardianship of E.L.*, 911 A.2d 35 (N.H. 2006), the Supreme Court of New Hampshire affirmed the decision of the Merrimack County Probate Court to deny a motion to terminate a limited guardianship of E.L., a ward of New Hampshire state prison, ruling that guardianship was the least restrictive intervention to ensure that E.L. continued to take medication for his bipolar disorder.

Facts of the Case

The state convicted E.L. of sexual assault in 1994, but then deemed him not competent for sentencing