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**KILLING TIME: THE PROCESS OF WAIVING  
APPEAL  
THE MICHAEL ROSS DEATH PENALTY CASES**

*Stephen Blank\**

INTRODUCTION

At approximately 2:00 am on Friday, May 14, 2005, Michael Bruce Ross waited to die. A tense crowd looked on with mixed feelings of anticipation, dread, and relief as the executioner swabbed Ross's inside arm with alcohol.<sup>1</sup> The attendant then readied the lethal injection and asked if Ross had any final words.<sup>2</sup> With eyes clenched Ross merely said, "No, thank you."<sup>3</sup> As the chemicals began to course through his veins he gasped for air and then shuddered for the last time.<sup>4</sup> At 2:25 am, Michael Ross was pronounced dead, and so marked the first New England execution in 45 years.<sup>5</sup>

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\* Brooklyn Law School Class of 2007; B.A., The Johns Hopkins University, 2004. The author wishes to thank his parents, family, and friends for their constant support and encouragement. He would also like to thank the journal staff for their guidance, dedication, and patience.

<sup>1</sup> R. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES, (1999), as cited on [Deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), *Descriptions of Execution Methods*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=479>.

<sup>2</sup> Shelly Sindland, *Connecticut Serial Killer Put to Death*, CNN.com, May 13, 2005.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> The only execution prior to Ross's in New England was that of Joseph "Mad Dog" Taborsky, on May 17, 1960, for a series of robberies and execution-style murders. See Michael Bruce Ross: A Compilation of Articles from the *Hartford Courant* and *Newsday*, <http://www.clarkprosecutor.org/>

The trial and execution of Michael Ross attracted mass-media attention and stirred up a host of controversy and intrigue.<sup>6</sup> First apprehended in the early 1980s, Ross was sentenced to death on June 13, 1984 for the rape and murder of four Connecticut girls.<sup>7</sup> After numerous appeals, on September 21, 2004 Ross's attorney, T.R. Paulding Jr., wrote a letter to the trial court indicating that the defendant intended to "volunteer" to waive any further appeals or collateral attacks on his death sentences, and that he wanted the court to set an execution date.<sup>8</sup> After 21 years of hearings and motions, Michael Ross waived his appeal of the death sentence.<sup>9</sup>

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html/death/US/ross966.htm. Mr. Ross's unlikely case pushed Connecticut toward its seventy-fourth execution since it adopted capital punishment in 1893. *Id.*

<sup>6</sup> See Sindland, *supra* note 2; Lynne Tuohy, *Ross Ruled Competent; Judge Says Serial Killer's Decision to Waive Appeals and be Executed is 'Rational Choice'*, HARTFORD CURRANT, Apr. 23, 2005, at A1; Lynne Tuohy, *State Supreme Court to Rule on Ross; Week Away From Execution, Justices Weigh Appeal Rights*, HARTFORD COURANT, May 6, 2005 at B1.

<sup>7</sup> Michael Ross confessed to eight murders in all, four occurring in New York. Ross's criminal behavior began when he was a senior at Cornell University. The eight victims, in chronological order were: (1) Ngoc Tu, (2) 17-year-old Tammy Williams, (3) 16 year-old Paula Perrera, (4) Debra Smith Taylor, (5) 19-year-old Robin Stavinsky, (6 & 7) 14-year-olds April Brunais and Leslie Shelley, and (8) Wendy Baribeault. The final murder occurred in 1984. Witnesses reported seeing a thin, white man with glasses following Baribeault on the day she disappeared, and led authorities to Ross. Ross confessed to six of the murders, but would only admit to murdering Ngoc Tu and Perrera years later. Niall Stanage, *Please Kill Me*, SUNDAY BUS. POST, Feb. 20, 2005.

<sup>8</sup> The term "volunteering for execution" is borrowed from Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM L. & CRIMINOLOGY 860, 861 (Fall 1983), as quoted in Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Punishment*, 30 AM. J. CRIM. L. 75 (2002). The Ross court emphasized that the defendant had not "waived" his right to further legal proceedings in the sense that he forfeited the ability to exercise that right in the future. The parties were in agreement that the defendant could exercise his right to file a petition for a writ of *habeas corpus* at any time and that, if he did, the execution would be stayed. *State v. Ross*, 272 Conn. 577, 580 (2005).

<sup>9</sup> Awaiting his second penalty phase hearing, Ross indicated that he wanted to proceed pro se. *Ross*, 272 Conn. at 583. A competency evaluation found Ross

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Defending his decision, Ross stated that he felt that the families of his victims had suffered enough.<sup>10</sup>

Ross's attempt to waive his appeal launched his friends, family, and opponents of the death penalty into a new sequence of litigation and emergency competency hearings.<sup>11</sup> In a series of subsequent legal actions, Ross's family and friends argued that Ross's decision was not spurred by a concern for his victims' families, but rather a lack of competency resulting from a host of mental illnesses and "Death Row Syndrome."<sup>12</sup>

Ross's waiver of appeal is not unique.<sup>13</sup> Since 1976 there have been 885 executions, 106 of which involved "volunteers."<sup>14</sup> In each

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competent. *Id.* The state's attorney indicated that he would not engage in discussions with the defendant unless standby counsel represented him. *Id.* Paulding agreed to take on that role. After extensive negotiations, the defendant and the state entered into a stipulation that an aggravating factor existed and no mitigating factor existed. *Id.* The trial court would not allow the stipulation. Paulding indicated that the defendant had then contacted him in February 2004 regarding his desire to waive further proceedings and that they had spoken together on numerous occasions over the course of the year. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Ross ex rel. Dunham v. Lantz, 408 F.3d 121 (Conn. 2005) (denying petitioner, Ross's sister, 'next friend' status); In re Ross, 272 Conn. 674 (2005) (denying Ross's father, Dan Ross, 'next friend' status); Ross ex rel. Smyth v. Lantz, 396 F.3d 512 (2d Cir. 2005) (holding that public defender did not have 'next friend' standing prior to proceedings to determine whether defendant was incompetent to forgo his right to bring *habeas corpus* proceedings).

<sup>12</sup> See *infra* Part II. Death Row Syndrome is a theory that posits that the conditions and long stay on death row cause inmates to lose mental competency and embrace death as an escape from death row. DEATH PENALTY INFORMATION CENTER [hereinafter DPIC], *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397> (last visited Nov. 23, 2005).

<sup>13</sup> John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 940 (2005).

<sup>14</sup> The number 885 is the number of executions until 2003. DPIC, *Searchable Database of Executions*, <http://www.deathpenaltyinfo.org/executions.php>, as quoted in Blume, *supra* note 13, at 940.

Prior to 1976, capital punishment was deemed unconstitutional. See *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Supreme Court ruled that a punishment would be "cruel and unusual" if it was too severe for the crime and was arbitrary. Georgia's death penalty statute, which gave the jury complete sentencing discretion, was found unconstitutional and in violation of the Eighth

of these cases, a court must determine whether the inmate is competent to understand and appreciate his decision and its consequence.<sup>15</sup> To this end, the court must scrutinize the facts, attributes, and circumstances of the particular inmate.<sup>16</sup> While this subjective standard allows judges to weed out illegitimate claims of incompetency, the standard also gives a judge considerable room to manipulate and interpret facts, testimony, and impressions, permitting personal biases and beliefs to factor into the decision.

Through a detailed examination of the Ross case, this Comment will argue that the notion of Death Row Syndrome complicates the issue of waiving appeal in death penalty cases, and that Death Row Syndrome could have been found present in the *Ross* case. In light of growing national and international recognition of Death Row Syndrome, the competency test currently employed by United States' courts does not adequately consider an inmate's motivation for "volunteering," and threatens a state's interest in having a non-arbitrary death penalty. Part I

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Amendment. Thus, on June 29, 1972, the Supreme Court effectively voided 40 death penalty statutes, thereby commuting the sentences of 629 death row inmates around the country and suspending the death penalty generally because existing statutes were no longer valid. DPIC, *History of the Death Penalty Part I, Introduction to the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?scid=15&did=410> (last visited Nov. 23, 2005). The first execution since 1976, Gary Gilmore, involved waiver of appeal. *Gilmore v. Utah*, 429 U.S. 1012, 1019 (1977). See also Blume, *supra* note 13, at 940.

<sup>15</sup> "Whether [one waiving appeal] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect may substantially affect his capacity." *Rees v. Peyton*, 384 U.S. 312, 314 (1966). See also *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (plurality opinion). In *Ford v. Wainwright*, the court concluded that the Eighth Amendment barred the execution of insane prisoners and considered whether the District Court was required to hold an evidentiary hearing to determine the defendant's insanity before ruling on the defendant's petition for *habeas corpus* on the ground that he was insane. *Id.* See DPIC, *Time on Death Row*, *supra* note 12. See also Jane L. McClellan, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201, 239 (1994).

<sup>16</sup> McClellan, *supra* note 15, at 232-33. See also *Rees*, 384 U.S. at 312.

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examines the procedural history of the Ross waiver and explores the court's rationale for declaring competency. Part II explores an inmate's possible motivation for waiving appeal, including the growing controversy of Death Row Syndrome, and the Syndrome's growing acceptance nationally and internationally. Part III describes the current tests and standards for waiving appeal and determining competency. Finally, Part IV proposes mandatory, non-waivable appeals as a solution to the problems arising from waiving appeal in a death penalty case.

*I. MICHAEL ROSS*

This section highlights how the Connecticut courts found Ross competent to waive appeal of his death sentence. The first part of this section describes the procedural history of the case. The second part is divided into three sections. The first of these sections highlights the state's arguments for finding competency. The second section presents Ross's supporters claims for incompetency and the final section describes how the court found competency by virtually ignoring the testimony of Ross's supporters because they were deemed "biased witnesses."<sup>17</sup>

*A. Road to Execution: A Brief Procedural History*

Michael Ross was indicted for eight counts of capital murder.<sup>18</sup>

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<sup>17</sup> *Ross*, 272 Conn. at 684.

<sup>18</sup> The trial court dismissed two counts for lack of territorial jurisdiction and, after a jury trial, the defendant was convicted of four counts of capital felony in violation of § 53a-54b(5) and two counts of capital felony violation of § 53a-54b(6). CONN. GEN. STAT. § 53a-54b.

The statute defines a capital felony as, among other things, murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; murder committed in the course of the commission of sexual assault in the first degree; murder of two or more persons in the course of a single transaction; murder of a person under sixteen years old.

The court could only prosecute Ross for the murders that occurred in Connecticut, namely Stavinsky, Brunais, Shelley and Baribeault. Ross admitted to murdering all four, and raping all but Shelley. Ross later asserted that he did

The Superior Court for the district of New London, Connecticut found that defendant kidnapped and killed four young girls, and sexually assaulted three of them, in a manner that was especially cruel, heinous or depraved.<sup>19</sup> The trial court imposed the death penalty on each of the six counts.<sup>20</sup> In 1994, the Supreme Court of Connecticut determined that certain evidentiary rulings by the trial court during the penalty phase impaired Ross's ability to establish a mitigating factor and therefore reversed the imposition of the death penalty.<sup>21</sup> On remand, a second penalty phase hearing was held before a jury that was not swayed by the newly admitted evidentiary findings and once more found an aggravating factor for each capital felony conviction and no mitigating factor. In accordance with the jury's findings, the court again imposed a death sentence.<sup>22</sup>

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not rape Leslie. Stanage, *supra* note 7. *See also* State v. Ross, 230 Conn. 183, 188, 194-95 (1994).

<sup>19</sup> CONN. GEN. STAT. §53a-46a(h)(4) instructs the court to impose the sentence of death on the defendant if the jury finds that the defendant committed the offense in an especially heinous, cruel or depraved manner. *See also* State v. Ross, 230 Conn. 183, 242 (1994). The Connecticut court interpreted the terms "heinous or depraved" to address the defendant's state of mind in intentionally inflicting on his victim extreme pain or torture above and beyond that necessarily accompanying the underlying killing. *Id.* at 261.

<sup>20</sup> *Ross*, 230 Conn. at 261.

<sup>21</sup> State v. Ross, 230 Conn. 183 (1994), 646 A.2d 1318, 1364. CONN. GEN. STAT. §53a-46a (2006) permits the presentation of "any information relevant to any mitigating factor." However, the trial court precluded the defendant from submitting to the jury a letter written by Robert Miller, a court appointed psychiatric expert who evaluated the defendant for the state and a report by Miller, which reflected his corroboration of the diagnosis of the defendant contained in the reports of defense psychiatric experts, on the grounds that it was not relevant to any mitigating factor and was unauthenticated hearsay and unreliable. *Ross*, 646 A.2d at 1364.

<sup>22</sup> Ross continued to feel that his mental condition should have served as a mitigating factor. Stanage, *supra* note 7. The defendant again appealed the sentences to the Connecticut Supreme Court, which affirmed the sentences of death. State v. Ross, 849 A.2d 648, 665 (2004). *See also* *Ross*, 272 Conn. at 579-80. In Ross's own words, "I was sentenced to death by a jury because the state's attorney had mocked the defense psychiatric witnesses as both hired guns and incompetent fools, while at the same time hiding the fact from the jury that his own expert concurred with the defense experts." Michael P. Ross, prisoner

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On September 21, 2004, Ross's lawyers sent a letter to the trial judge indicating Ross's desire to waive appeal of his death sentence.<sup>23</sup> On December 1, 2004, the public defender's office, which previously represented Ross, filed in the Superior Court a motion for permission to appear as next friend of the defendant, next friend referring to the ability of a third party to continue appeals on the inmate's behalf.<sup>24</sup> Thereafter, the state filed a motion seeking a determination as to whether the defendant was competent to waive his rights to seek post-conviction relief and whether his waiver was knowingly and voluntarily made.<sup>25</sup>

The public defender's office alleged in its motion that it had standing to appear as the defendant's next friend because the defendant was incompetent when he terminated the public defenders' representation.<sup>26</sup> In addition to the motion for permission to appear, the public defender's office filed a motion to stay Ross's execution pending a judicial determination as to whether the defendant was competent to waive appeal.<sup>27</sup>

At a December 9, 2004 hearing, the court ordered that the defendant undergo a competency examination.<sup>28</sup> In addition, a hearing on the public defenders' motion to appear on behalf of the defendant was scheduled to occur before that examination.<sup>29</sup> At that hearing, the court denied the next friend motion but noted that

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#127404, *Why I Choose Death Rather than to Fight for Life* [hereinafter Ross, *Why I Choose Death*], <http://www.ccadp.org/michaelross-whyichoose.htm>.

<sup>23</sup> State v. Ross, 863 A.2d 654, 656 (Conn. 2005).

<sup>24</sup> At the same time that the Public Defender's office was motioning to appear as next friend of the defendant, they simultaneously filed a motion to proceed in forma pauperis and a petition for writ of certiorari in the United States Supreme Court. The public defender's office represented in the filings that the defendant had refused to sign an affidavit of indigence in support of the motion because he was incompetent. The United States Supreme Court denied the motion on January 10, 2005. *Id.* at 657. Next friend standing is defined in *Whitmore v. Arkansas*, 495 U.S. 149 (1990).

<sup>25</sup> State v. Ross, 873 A.2d 131, 135 (Conn. 2005).

<sup>26</sup> State v. Ross, 863 A.2d 654, 657 (Conn. 2005).

<sup>27</sup> *Id.*

<sup>28</sup> The competency examination was to be done by Michael Norko, a psychiatrist. State v. Ross, 272 Conn. 577, 587 (2005).

<sup>29</sup> *Id.*



if the defendant were shown to be incompetent at a later date, the court would reconsider its decision.<sup>30</sup>

At the competency hearing that followed, the court found Ross competent.<sup>31</sup> The public defender's office claimed it possessed evidence, independent of the court-ordered evaluation, to prove Ross's incompetence.<sup>32</sup> The evidence presented at these competency hearings are the facts eventually considered by the Connecticut Supreme Court in deciding this case.

### *B. Michael Ross: Competent*

#### *1. The Evidence of Competency*

The Court's finding of competency was based upon Ross's examination by psychiatrist Michael Norko.<sup>33</sup> At the competency

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<sup>30</sup> *Id.* at 588.

<sup>31</sup> *Id.* at 591.

<sup>32</sup> The court then issued an order authorizing the public defender's office to file with the court a written offer of proof detailing the evidence that it would present at a competency hearing.

The public defender's office filed an offer of proof, attaching summaries of its witnesses. The list included summaries of the proposed testimony of Stuart Grassian, a psychiatrist; Eric Goldsmith, a psychiatrist; five attorneys with the public defender's office: Barry Butler, Karen Goodrow, Paula Montonye, Lauren Weisfeld and John Holdridge; Robert Nave, state death penalty abolition coordinator for the Connecticut branch of Amnesty International and executive director of the Connecticut Network to abolish the death penalty; and Dan Ross, the defendant's father.

*State v. Ross*, 273 Conn. 684, 690-91 (2005).

<sup>33</sup> After the initial competency hearing on December 9, 2004, the court decided that it needed an expert opinion. The court ordered the defendant to undergo a competency examination by Michael Norko and scheduled a competency hearing for December 28, 2004. Norko first evaluated Ross's competency in 1995, but had no contact with him between 1995 and his meeting with Ross on December 15, 2004. On December 15, 2004 Norko met with Ross for approximately three hours. He also spoke with two psychologists, a psychiatric social worker and a psychiatrist, all of whom had known Ross for many years. *State v. Ross*, 272 Conn. 577, 591 (2005).

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hearing, Norko testified that Ross could make a rational decision.<sup>34</sup> Norko found that Ross “had an excellent understanding of his legal position and the ramifications of his decision to forgo any further legal proceedings.”<sup>35</sup> Norko did not believe that Ross was trying to kill himself.<sup>36</sup> Rather, Norko believed that Ross’s decision was “based on [Ross’s] belief that it would be morally wrong to subject the families of his victims to the pain that would be caused by proceedings that could go on for years.”<sup>37</sup>

Norko’s evaluation found that Ross did not suffer from clinical depression.<sup>38</sup> Norko supported this assertion by pointing out that Ross was sleeping well, had a normal appetite and a good energy level.<sup>39</sup> Norko determined that Ross was able to concentrate and process thoughts, had no memory disturbances and expressed no suicidal thoughts, despite a past history of suicide attempts.<sup>40</sup> Norko did find that Ross was occasionally emotional, but he credited that to the reality of facing execution.<sup>41</sup>

Norko was next asked to determine whether any of Ross’s mental ailments affected his decision-making.<sup>42</sup> Norko stated that Ross suffered from several mental diseases, including: “a depressive disorder not otherwise specified,” sexual sadism, possibly “an anxiety disorder not otherwise specified,” and a personality disorder with narcissistic, borderline and antisocial traits.<sup>43</sup> Ross was treated for those ailments while in prison, and

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<sup>34</sup> *Id.* at 587.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 593.

<sup>37</sup> *Id.* at 589.

<sup>38</sup> *Id.*

<sup>39</sup> *State v. Ross*, 272 Conn. 577, 589 (2005).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 587.

<sup>43</sup> A depressive disorder not otherwise specified is a disorder with depressive characteristics, but which does not meet the criteria for major depression. *Id.* at 590. Norko’s diagnosis of sexual sadism was based on the reports of other psychiatrists. *Id.* at 589. Personality disorder with narcissistic, borderline and antisocial traits or a full blown narcissistic personality disorder with borderline and antisocial traits is an Axis II disorder according to the Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition (DSM-

took Depo-Lupron to reduce his sex drive, and Klonopin and Wellbutrin, which are anti-anxiety medications. Ross also took Vistaril, an anti-anxiety medication, on an as-needed basis.<sup>44</sup> Norko argued that any detrimental affects the diseases may have had on Ross's decision-making capacity were counteracted by the prescribed medications.<sup>45</sup> Furthermore, in Norko's professional opinion, the different medications probably improved Ross's ability to make decisions rather than interfered.<sup>46</sup>

Norko's analysis runs counter to Ross's own assertions about his mental condition and subsequent effect of his medications on his decision-making process.<sup>47</sup> Ross wrote that:

I was under the control of a mental illness. That monster lives in my head and it will always be there, somewhere hidden away in my mind. But that monster is not me. I was never really sure of that, even during my original trial, because that monster in my mind was so intertwined with who I was that even I had trouble making the distinction between it and me. It was only about three years after I went to death row, after I finally received approval for my medication—first weekly injections of Depo-Provera, and now monthly injections of Depo-Lupron that the monster in my mind started to lose its power and control over me and I was finally able to begin to see what it really was; who I really was; and what the difference was between that monster and myself.<sup>48</sup>

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IV). According to the experts' testimony, opinions can differ as to whether one has enough of the traits listed in a disorder in the DSM-IV to qualify as an actual disorder. For example, Norko opined that Ross only had some narcissistic traits as part of a general personality disorder, while Gentile concluded that Ross had enough of those traits to qualify for a full-blown narcissistic personality disorder diagnosis. There is no substantial difference. *See Ross Competency Ruling Analysis, A Public Defender: Protecting the Right to Effective Assistance of Counsel*, [http://publicdefender.typepad.com/public\\_defender\\_blog/2005/04/ross\\_competency.html](http://publicdefender.typepad.com/public_defender_blog/2005/04/ross_competency.html) (last visited Nov. 24, 2005).

<sup>44</sup> State v. Ross, 272 Conn. 577, 583 (2005).

<sup>45</sup> *Id.* at 590.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 591.

<sup>48</sup> Ross, *Why I Choose Death*, *supra* note 22.

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Despite “the monster losing power,” Ross later admitted on direct testimony that he continued to take Vistaril on an as-needed basis when he experienced episodes of intense anxiety and believed that he should not make important decisions during those moments of heightened anxiety.<sup>49</sup> Despite these discrepancies, Norko testified in his report that Ross’s motivation for waiving appeal was to save his victims’ families further pain.<sup>50</sup>

The court’s report contains discrepancies that challenge Ross’s alleged motivation.<sup>51</sup> For instance, at the hearing, Ross testified that he had occasional doubts about whether his execution would end the pain of the victims’ families. He also testified that he would accept a sentence of life imprisonment immediately if it were offered.<sup>52</sup>

Nonetheless, at the conclusion of the hearing, the court accepted Norko’s evaluation and found Ross competent within the meaning of *Rees*.<sup>53</sup> The court found that Ross was:

[n]ot making his decision on the basis of any threats, promises or coercion; he was lucid, educated, intelligent, insightful, knowledgeable, firm in his decision and understanding of the questions posed to him; had a grasp of the legal issues involved and was aware of his legal options; none of the medications taken by the defendant have affected his ability to understand the proceedings or to make rational decisions; the defendant is not motivated by a desire to commit suicide, but by concern for the victims’ families; and the defendant has the capacity to understand his choices.<sup>54</sup>

This explanation focused on Ross’s cognitive ability to understand the decision. The court found the decision to be Ross’s own, and held that he could understand the consequences and

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<sup>49</sup> Ross did note that the episodes of heightened anxiety were brief. *Ross*, 272 Conn. at 590.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 590-95.

<sup>52</sup> *Id.* at 595.

<sup>53</sup> *Id.* at 591.

<sup>54</sup> *Id.*

make rational choices.<sup>55</sup>

## 2. Arguments of Ross's Supporters

At the rehearing in the Superior Court of Connecticut, the public defender's office represented that it had evidence of Ross's incompetence that had not been presented to any court.<sup>56</sup> This evidence was presented at further competency hearings in April 2005.<sup>57</sup> While the Superior Court initially heard the evidence, its decisions were affirmed by the Supreme Court of Connecticut.

At the April 2005 hearings, the court heard from Dan Ross, Ross's father, Norko, and psychiatrists Stuart Grassian, Eric Goldsmith, and Suzanne Gentile.<sup>58</sup> The depositions of Martha Elliot, a journalist and friend, and Susan P., the defendant's girlfriend, were also read into the record.<sup>59</sup> Ross's supporters argued that Ross's decision to waive appeal was involuntary and also that Ross's decision was motivated by a desire to commit suicide.<sup>60</sup> Psychiatrist Stewart Grassian argued that "prisoners held in segregated confinement frequently develop mental disturbances."<sup>61</sup> Grassian went on to note that "these disturbances can affect the prisoners' ability to assist in their own defense; living under sentence of death can cause an overwhelming sense of helplessness and fear resulting in a desperate need to regain control by waiving further challenges to the death sentence."<sup>62</sup> The conditions of Ross's confinement may have exacerbated his pre-existing mental illnesses and resulted in suicidal ideation.<sup>63</sup>

Grassian testified that Ross's personality disorder and

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<sup>55</sup> *Id.* at 609-11.

<sup>56</sup> *State v. Ross*, 273 Conn. 684, 690 (2005).

<sup>57</sup> *Id.* at 696.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *State v. Ross*, 272 Conn. 577, 593 (2005).

<sup>61</sup> These mental disturbances include impaired alertness, attention and concentration, hyperresponsiveness to stimuli, withdrawal, obsessive preoccupation with trivial matters, sleep disturbances and psychotic delirium. *Id.*

<sup>62</sup> *Id.* at 593.

<sup>63</sup> *Id.*

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narcissism had rendered his decision to volunteer involuntary.<sup>64</sup> While Norko and Gentile testified that Ross's narcissism had no substantial effect on his ability to make rational choices, Grassian and Goldsmith believed that Ross's narcissism made it impossible for Ross to bear the perceived humiliation of backing down from his decision to volunteer.<sup>65</sup> Grassian and Goldsmith identified several narcissistic traits, including: grandiosity, inability to empathize, self-centeredness and arrogance.<sup>66</sup> These elements compelled Ross to posture as a good and noble person, who was waiving appeal to spare his victims' families further pain, when in reality, Ross was motivated by narcissism.<sup>67</sup>

This argument was supported by the testimony of Ross's own father.<sup>68</sup> Dan Ross stated that Michael Ross was extremely narcissistic and "not unlike a child before the age of reason."<sup>69</sup> He testified that Ross reveled in the attention that being a martyr brings, and therefore had an ulterior motive to proceed with his execution.<sup>70</sup>

Grassian and Goldsmith argue that Ross had an ulterior motive which they inferred from his attributes and actions.<sup>71</sup> The core of their argument was that Norko failed to recognize that the defendant's intelligence would make it possible for him to conceal his "hidden agenda."<sup>72</sup> Grassian argued that Norko did not recognize Ross's intelligence and thus failed to properly scrutinize Ross's words and actions.<sup>73</sup> Through analyzing Ross's words and actions, Grassian found Ross incompetent to make a rational

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<sup>64</sup> State v. Ross, 273 Conn. 684, 697 (2005).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> State v. Ross, 272 Conn. 577, 595 (2005).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 595-96.

<sup>71</sup> Norko specifically stated that in the past, Ross "has hidden things from the prison's mental health staff." *Id.* at 594. Ross was extremely intelligent and graduated from Cornell University. Pat Eaton, *After 45 Years, a U.S. State Executes Eight-time Killer*, THE ADVERTISER, May 14, 2005, at 60.

<sup>72</sup> State v. Ross, 272 Conn. 577, 594 (2005).

<sup>73</sup> *Id.* at 593.

decision because his decision to waive appeal was arguably uncontrollable and motivated by Ross's narcissism.<sup>74</sup>

There were two distinct instances to which Grassian called the court's attention. The first was when Ross was quoted as stating that the other prisoners on death row were brutal murderers who took no responsibility for their crimes and engaged in bravado and grandstanding, while he had the "real guts" to go forward with his execution.<sup>75</sup> Grassian believed that this undermined the claim that Ross was motivated by consideration for his victims' families.

The second piece of evidence is a letter, written by Ross to Martha Elliott, a journalist.<sup>76</sup> The letter indicated that Ross's decision was driven more by a desire to end his own pain than by concern for the families of his victims, and that Ross knew that he could not say that publicly.<sup>77</sup> The letter explicitly states that Ross believed he suffered from "Death Row Syndrome," which is the theory that a prolonged duration on death row creates depression in inmates and encourages inmates to seek death as an escape from death row.<sup>78</sup> Grassian suggests that Ross became incapable of bearing his distress and despair, and that suicidal ideation was a result of his time and conditions on death row, leading to his ultimate decision to volunteer.<sup>79</sup>

### 3. Competency Ruling

At the competency hearing, the court found Ross competent to waive appeal and found the analyses of Norko and Gentile more credible than the expert testimony of Grassian and Goldsmith and the opinions of Dan Ross, Susan P., and Martha Elliot.<sup>80</sup> The court concluded that Grassian's proposed testimony concerning the effect of segregated confinement on the defendant's ability to

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<sup>74</sup> *Id.* at 663-64.

<sup>75</sup> *Id.* at 664.

<sup>76</sup> *Id.* at 663.

<sup>77</sup> *Id.*

<sup>78</sup> *State v. Ross*, 873 A.2d 131, 139 n.8 (Conn. 2005).

<sup>79</sup> *Id.* at 138 n.6.

<sup>80</sup> *Id.* at 140.

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make a rational and voluntary choice was speculative.<sup>81</sup> However, the court determined that Ross did have some symptoms of depression, possibly caused by the isolation and prolonged stay on death row.<sup>82</sup>

The court also held that the testimony of Dan Ross, Susan P., and Martha Elliot was unpersuasive because they were biased witnesses.<sup>83</sup> The court disregarded the opinions of Dan Ross, Susan P, and Martha Elliot, because these witnesses were “opposed to the death penalty in general, are close friends or family of the [defendant], and do not personally support his decision to die.”<sup>84</sup> Ross’s supporters argue that the court never fully inquired into Ross’s possible suicidal tendencies or whether one of Ross’s mental illnesses could have affected his decision-making capability. After listening to all the testimony, the court put more weight on Norko’s testimony than that of Ross’s supporters and opted not to address the issue of Death Row Syndrome in its opinion.

## II. DEATH ROW SYNDROME

In the *Ross* case, Ross indicated that he was isolated for twenty-two or twenty-three hours a day, found the conditions of his confinement intolerable, felt helpless and out of control, and had a tendency toward obsessive thoughts.<sup>85</sup> These symptoms have all been associated with Death Row Syndrome.<sup>86</sup> Death Row Syndrome is the theory that the mental stress of prolonged exposure to death row can cause incompetency in inmates.<sup>87</sup> International courts first recognized the notion of Death Row

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<sup>81</sup> *State v. Ross*, 272 Conn. 577, 610-11 (2005). In his report, Norko found that the defendant had frequent visitors, corresponded with numerous people and regularly prayed, read, listened to music, watched television and did puzzles and word games. *Id.* at 610.

<sup>82</sup> *State v. Ross*, 273 Conn. 684, 696-97 (2005).

<sup>83</sup> *Ross*, 273 Conn. at 684.

<sup>84</sup> *Id.*

<sup>85</sup> *State v. Ross*, 272 Conn. 577, 663-64 (2005).

<sup>86</sup> DPIC, *Time on Death Row*, *supra* note 12.

<sup>87</sup> *Id.*



Syndrome in *Soering v. United Kingdom*,<sup>88</sup> but actually identified examples of the syndrome in *Pratt v. Attorney General for Jamaica* and *Pratt and Morgan v. Jamaica*.<sup>89</sup> United States judges and courts, however, have been reluctant to agree with the international courts regarding the pervasiveness of Death Row Syndrome.

*A. Death Row Syndrome Generally: Why an Inmate May Waive Appeal*

Many factors may lead an inmate to waive appeal of his death sentence. These factors can run parallel or counter to the state's overriding interest in preserving life and preventing suicide.<sup>90</sup> In some cases, inmates do not truly want to die, but waive appeal and expedite their death sentence because they accept the finality of their punishment.<sup>91</sup> In other cases, inmates may waive appeal

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<sup>88</sup> 11. Eur. Hum. Rts. Rev. 439 (1989).

<sup>89</sup> *Pratt and Morgan* were combined death penalty cases. *Pratt v. Att'y Gen. for Jamaica*, [1994] 2 App. Cas. 1, 22, cited in Natalia Schifrin, *Current Development: Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 A.J.I.L. 563, 565 (1998); *Pratt and Morgan v. Jamaica*, Communication Nos. 210/1986, 225/1987 (views adopted Apr. 7, 1987), UN Doc. CCPR/C.35/D.210/1986 and 225/1986 cited in Schifrin, *supra*, at 565.

<sup>90</sup> See *Grasso v. State*, 857 P.2d 802, 811 (Okla. 1993) (Chapel, J., specially concurring) (stating that the state has a strong interest in preventing defendants from manipulating the justice system; "the State must not become an unwitting partner in a defendant's suicide.") as quoted in McClellan, *supra* note 15, at 211. The state has an interest in preserving life; for example, if a death-row inmate goes on a hunger strike, Federal Bureau of Prisons regulations allow the inmate to be force-fed. McClellan, *supra* note 15, at 211.

<sup>91</sup> For example, in *Comer v. Stewart*, Ronald Charles Comer waived appeal of the death penalty and accepted his punishment. Upon examination, Comer was told that he had a good chance of getting a new trial, having his sentence mitigated to life imprisonment or at least substantially delaying his execution. However, Comer replied, "I did it" and refused to prolong his punishment on procedural grounds. *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1061 (D. Ariz. 2002). See also *State v. Ross*, 272 Conn. 577, 653 (2005). See Mathew T. Norman, *Standards and Procedures for Determining Whether a Defendant is Competent to Make the Ultimate Choice—Death; Ohio's New Precedent for*

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because of Death Row Syndrome: depression caused by extended tenure and conditions on death row.<sup>92</sup>

The easiest scenario for a court is when an inmate waives appeal to accept the finality of his punishment.<sup>93</sup> In such a situation, the inmate does not necessarily want to die, but rather takes responsibility for his or her actions. For example, in 1997, Scott Dawn Carpenter expedited his death sentence because he felt that the punishment fit his crime.<sup>94</sup> Carpenter was convicted of murdering a store clerk in 1994.<sup>95</sup> After the conviction, he sent a letter to the Oklahoma Supreme Court explaining why he wanted to waive appeal, stating, "I have never claimed innocence to the crime I committed, was charged with and found guilty of murder. The State affirmed their decision on the first step in the appellate process, and I feel and want the punishment of death carried out as soon as possible."<sup>96</sup> At the subsequent competency hearing, Carpenter defended his choice, indicating that the best he could hope for was commutation to life in prison and that he saw no future in spending sixty or seventy years locked up.<sup>97</sup> Content that his decision was motivated by acceptance of his punishment, the court found Carpenter competent.<sup>98</sup>

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*Death Row "Volunteers,"* 13 J.L. & HEALTH 103, 113-16 (1998-1999).

<sup>92</sup> Norman, *supra* note 91, at 113-16. An example of an inmate waiving appeal because of depression is Don Jay Miller, in *Miller v. Stewart*, 231 F.3d 1248, 1251-52 (9th Cir. 2000). Miller allegedly waived appeal because he became incompetent on death row. Miller first contested his death penalty sentence, but later decided to waive appeal. Experts in the case noted that Miller's history of physical, psychological and sexual abuse as a child make him highly susceptible to the effects of physical isolation on death row, which could cause psychological decompensation to the point of becoming incompetent. *Miller*, 231 F.3d at 1251-52. *See also Ross*, 272 Conn. 577.

<sup>93</sup> McClellan, *supra* note 15, at 211.

<sup>94</sup> Norman, *supra* note 91, at 113, *citing* Jean Pagel, *Slain Man's Hopes for Answers Before Execution*, THE DAILY OKLAHOMAN, May 7, 1997, at 01.

<sup>95</sup> Norman, *supra* note 91, at 113.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 114.

<sup>98</sup> Carpenter was executed by lethal injection five months later. *Id.* at 113-14. *See also id.* at 114, *quoting* Michael Graczyk, *Texas Executes Convicted Killer Benjamin Stone*, AUSTIN- AMERICAN STATESMAN, Sept. 26, 1997, at B4

In some cases, an inmate's impetus for waiving appeal conflicts with a state's interest in preserving life and preventing suicide. Opponents of capital punishment point to numerous studies citing Death Row Syndrome or "Death Row Phenomenon" as depression caused by being on death row for many years causing inmates to waive appeal.<sup>99</sup> Death Row Syndrome and Death Row Phenomenon are legal terms, not clinical ones.<sup>100</sup> The American Psychiatric Association does not recognize Death Row Syndrome or Death Row Phenomenon.<sup>101</sup>

When the United States Constitution was written, the time between sentencing and execution could be measured in days or weeks.<sup>102</sup> In the wake of the Supreme Court-mandated suspension of the death penalty from 1972 to 1976, numerous reforms have been introduced to create a less arbitrary system, arbitrary referring to ensuring that the process used to convict an inmate to death is accurate and thorough.<sup>103</sup> This has resulted in lengthier appeals, as mandatory sentencing reviews have become the norm, and continual changes in laws and technology have necessitated reexamination of individual sentences.<sup>104</sup> Today, death row inmates live in a state of constant uncertainty over when they will be executed. For some inmates this isolation and anxiety results in a sharp deterioration of their mental capacity and a desire to end the agony of each new day in prison.<sup>105</sup> Death row inmates typically

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(discussing a 1997 case where a court permitted Benjamin Stone to expedite his death sentence after killing his wife and stepdaughter because Stone rationalized that, "I'm not appealing anything, what's the point? I'm guilty. I feel like I'm doing the right thing. Why prolong it? . . . As far as I'm concerned, it's the only way I'll find peace of mind.").

<sup>99</sup> Strafer, *supra* note 8, at 869.

<sup>100</sup> David Wallace-Wells, *What is Death Row Syndrome? And Who Came Up With It?*, Feb. 1, 2005, <http://www.slate.com/id/2112901/>.

<sup>101</sup> Death Row Syndrome is also unrecognized in the American Psychiatric Association handbook and the Diagnostic and Statistical Manual of Mental Disorders. *Id.*

<sup>102</sup> DPIC, *Time on Death Row*, *supra* note 12.

<sup>103</sup> *Furman v. Georgia*, 408 U.S. 238 (1972); DPIC, *Time on Death Row*, *supra* note 12.

<sup>104</sup> DPIC, *Time on Death Row*, *supra* note 12.

<sup>105</sup> *Id.*

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spend over a decade awaiting execution; some prisoners having been on death row for well over twenty years.<sup>106</sup> During this time the inmates are generally isolated from other prisoners, excluded from prison educational and employment programs, and sharply restricted in terms of visitation and exercise, spending as many as twenty-three hours a day alone in their cells.<sup>107</sup> These conditions have prompted innocent and guilty inmates to waive appeal and raises the question of whether death row prisoners are receiving two distinct punishments: the death sentence itself, and the years of living in conditions tantamount to solitary confinement.<sup>108</sup>

*B. Death Row Syndrome in International Courts*

International courts first identified the existence of Death Row Syndrome. In fact, the term was first coined during extradition hearings in the United Kingdom for Jen Soering.<sup>109</sup> Soering was a German citizen who was arrested in England and charged with committing murders in Virginia in 1985.<sup>110</sup> Soering argued to the European Court of Human Rights that the conditions he would face during the lengthy period between sentencing and execution would be as psychologically damaging as torture.<sup>111</sup> Soering presented evidence that the prison conditions at Mecklenburg Correctional Center, where the majority of Virginia's death row prisoners were interned, were unduly harsh, and he submitted evidence as to the "extreme stress, psychological deterioration and risk of

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<sup>106</sup> Strafer, *supra* note 8, at 869-70. See also DPIC, *Time on Death Row*, *supra* note 12; State v. Ross, 863 A.2d 654, 659 (2005); 272 Conn. 577, 585 (2005). Ross spent twenty years on death row. *Id.*

<sup>107</sup> DPIC, *Time on Death Row*, *supra* note 12.

<sup>108</sup> Some have argued that an innocent person would never seek execution, but at least one such person, Isidore Zimmerman, willingly sought execution because of the intense psychological torture of being on death row. Zimmerman was later exonerated. Strafer, *supra* note 8, at 869 *as found in* McClellan, *supra* note 15, at 211.

<sup>109</sup> A psychologist in the extradition of Soering first coined the term "death row phenomenon." Soering v. United Kingdom, 11 Eur. Hum. Rts. Rev. 439 (1989).

<sup>110</sup> Wallace-Wells, *supra* note 100.

<sup>111</sup> *Id.* See also Soering, 11 Eur. Hum. Rts. Rev. at 439.

homosexual abuse and physical attack undergone by prisoners on death row.”<sup>112</sup>

The court recognized that the Council of Europe abolished the death penalty in times of peace and stressed that the “condemned prisoner must for many years endure the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.”<sup>113</sup> The court went on to note how prisoners who utilize the appeals process can be placed in the “death house” awaiting imminent execution several times during incarceration.<sup>114</sup> It was the inability to know when death would come that qualified the long wait for the death penalty as a cruel and unusual penalty under the European Convention.<sup>115</sup> Citing the possibility of Soering developing Death Row Syndrome as justification for its ruling, the court found that under the European Convention, Soering could not be sentenced to death under the current prison conditions.<sup>116</sup>

The *Soering* case identified the possibility of Death Row Syndrome, but in the *Pratt* and *Morgan* cases in 1993, Jamaica’s court of last resort, the London-based Judicial Committee on the Privy Council, was confronted with actual examples of Death Row Syndrome.<sup>117</sup> *Pratt* and *Morgan* had been convicted of murder and sentenced to death in January 1979.<sup>118</sup> They were held on death row for fourteen years.<sup>119</sup> Three times, their death warrants were read to them and they were placed in condemned cells adjacent to the gallows.<sup>120</sup> Several appeals were made over the years and

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<sup>112</sup> Ed Morgan, *On Art and the Death Penalty: Invitation to a Beheading*, 15 CARDOZO STUD. L & LIT. 279, 283-84 (2003).

<sup>113</sup> *Id.* (quoting *Soering*, 11 Eur. Hum. Rts. Rev., at n. 5 para. 106).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* See DPIC, *Time on Death Row*, *supra* note 12. See also Wallace-Wells, *supra* note 100.

<sup>117</sup> *Pratt v. Attorney General for Jamaica*, [1994] 2 App. Cas. 1, 22; *Pratt and Morgan v. Jamaica*, Communication Nos. 210/1986, 225/1987 (views adopted Apr. 7, 1987), UN Doc. CCPR/C.35/D.210/1986 and 225/1986.

<sup>118</sup> Schiffrin, *supra* note 89, at 565.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

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delays occurred throughout the process.<sup>121</sup> The British court found that it was “inhuman and degrading” to hang anyone who had spent more than five years on death row.<sup>122</sup> The court ruled that such prisoners must have their death sentences commuted to life imprisonment.<sup>123</sup>

Despite the *Soering* and *Pratt and Morgan* rulings, no uniformity currently exists among foreign courts that have considered the issue of Death Row Syndrome. For instance, in *Kindler v. Canada*, the Canadian Supreme Court ruled that extraditing a convicted capital fugitive to the United States, where the defendant would possibly be subject to Death Row Phenomenon, did not violate Canadian Law.<sup>124</sup> In contrast to *Soering*, the Canadian court did not refuse extradition based upon Death Row Syndrome.<sup>125</sup> However, the Canadian court acknowledged the existence of Death Row Syndrome and arguably strengthened the validity, scope, and influence of the Syndrome.<sup>126</sup>

Foreign courts vary as to the definition, application, and treatment of Death Row Syndrome. For instance, the court in *Pratt and Morgan v. Jamaica* considered the specific facts of the case but then determined that more than five years on death row essentially resulted in Death Row Syndrome per se.<sup>127</sup> In contrast, the court in *Soering* based its holding on an analysis of particular

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<sup>121</sup> One such delay occurred when legal papers were put in the wrong bundle and forgotten. *Earl Pratt and Another Appellant v. Attorney General for Jamaica and Another Respondents*, [1994] 2 A.C. 1, 1993 WL 963003, at \*22 (P.C.) (appeal taken from the Court of Appeal of Jamaica).

<sup>122</sup> *Id.* at \*35.

<sup>123</sup> *Id.* at \*35-36. “This resulted in the commutation of scores of death sentences in Jamaica, Bermuda, Barbados, and Trinidad and Tobago, cutting the death row population of English-speaking Caribbean nations by more than half.” DPIC, *Time on Death Row*, *supra* note 12 (citing Don Bohning, *Convicts Face Faster Trip to the Gallows; Caribbean Irked at Legal Delays*, MIAMI HERALD, Sept. 8, 1998, at 1A.)

<sup>124</sup> [1991] 2 S.C.R. 779. *See also* *Kindler v. Canada*, No. 470/1991, reported at 14 Hum. Rts. L.J. 307 (1993).

<sup>125</sup> *Kindler*, 2 S.C.R. 779.

<sup>126</sup> *Id.*

<sup>127</sup> *Pratt and Morgan v. Jamaica*, Communication Nos. 210/1986, 225/1987 (views adopted Apr. 7, 1987), UN Doc. CCPR/C.35/D.210/1986 and 225/1986.

facts.<sup>128</sup> However, despite these variations in the diagnosis and application of Death Row Syndrome, international courts have, at a minimum, acknowledged the detrimental effects that extended stays on death row can have on an inmate.

*C. The United States Death Penalty, the Eighth Amendment, and Death Row Syndrome*

The United States death penalty has a long and controversial history concerning whether the death penalty is unconstitutional as “cruel and unusual punishment” under the Eighth Amendment. This section begins with *Furman v. Georgia* to show the Supreme Court’s initial stance on the constitutionality of the death penalty.<sup>129</sup> This section then addresses *Roper v. Simmons* and how the Court has recently looked toward international courts for guidance on interpreting the Eighth Amendment in death penalty cases.<sup>130</sup> Finally, in the wake of growing international recognition of Death Row Syndrome, this section shows how some Supreme Court Justices and state courts have acknowledged the possible unconstitutionality of prolonged exposure to death row.<sup>131</sup>

In the United States, beginning in the 1960s, it was suggested that the death penalty was a “cruel and unusual punishment” that violated the Eighth Amendment of the United States Constitution.<sup>132</sup> In 1972, in *Furman v. Georgia*, the Supreme Court set the standard that a punishment would be “cruel and unusual” if

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<sup>128</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) (1989). *See contra* *Kindler v. Canada*, [1991] S.C.R. 779.

<sup>129</sup> *Furman*, 408 U.S. at 238.

<sup>130</sup> *Roper v. Simmons*, 543 U.S. 551 (2005), 125 S.Ct. 1183, 1198.

<sup>131</sup> *See* *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from a denial of certiorari); *Jones v. State*, 740 So. 2d 520, 525 (Fla. 1999).

<sup>132</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). This rationale evolved from *Trop v. Dulles*, which stated that the Eighth Amendment contained an “evolving standard of decency that marked the progress of a maturing society.” 356 U.S. 86, 101 (1958). *See also* DPIC, *History of the Death Penalty Part I*, *supra* note 14.

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it was too severe for the crime, if it was arbitrary, if it offended society's sense of justice, or if it was not more effective than a less severe penalty.<sup>133</sup> *Furman* was a direct challenge to a death sentence on Eighth Amendment grounds, and resulted in the voiding of forty different state death penalty statutes.<sup>134</sup> The holding in *Furman* was that specific death penalty statutes were unconstitutional because they were "arbitrary."<sup>135</sup> The Court opened the door for states to rewrite their death penalty statutes to eliminate the problems cited in *Furman*.<sup>136</sup> Soon, thirty-seven states enacted revised death penalty statutes.<sup>137</sup>

In the wake of European recognition of Death Row Syndrome, there remains an argument that prolonged tenure on death row may violate the Eighth Amendment,<sup>138</sup> and in recent years the Supreme Court has looked to international courts when interpreting the Eighth amendment.<sup>139</sup> In *Roper v. Simmons*, the Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty on juvenile offenders.<sup>140</sup> The court observed the "stark reality that the United States is the only country in the world that continued to give official sanction to the juvenile death penalty."<sup>141</sup> This case shows the suggestive impact and influence of international standards and law on United States jurisprudence, especially concerning the Eighth Amendment.<sup>142</sup>

The issue of the constitutionality of a long stay on death row

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<sup>133</sup> 408 U.S. 238 (1972). See also DPIC, *History of Death Penalty Part I*, *supra* note 14.

<sup>134</sup> DPIC, *History of Death Penalty Part I*, *supra* note 14.

<sup>135</sup> However, Justices Brennan and Marshall felt that the death penalty itself, as a punishment, was unconstitutional. *Furman*, 408 U.S. at 272, 275 (Brennan, J. concurring); *Id.* at 358 (Marshall, J., concurring); *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting the denial of certiorari).

<sup>136</sup> DPIC, *History of Death Penalty Part I*, *supra* note 14.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* See also *Lonchar v. Thomas*, 517 U.S. 314 (1996) (refusing to find the death penalty unconstitutional).

<sup>139</sup> *Roper*, 543 U.S. at 551.

<sup>140</sup> *Lackey*, 520 U.S. at 1198 (juvenile defined as under the age of 18).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*



was presented to the U.S. Supreme Court in *Lackey v. Texas*.<sup>143</sup> The case involved Clarence Lackey, who had spent seventeen years on death row when he petitioned the Supreme Court to decide whether such an extensive confinement constituted cruel and unusual punishment.<sup>144</sup>

While the Court denied certiorari to hear *Lackey*, Justice John Paul Stevens wrote an accompanying opinion to the denial, which questioned the constitutionality of the long delays between sentencing and execution.<sup>145</sup> Justice Stevens argued in the memorandum that the reinstatement of the death penalty in 1976 rested on its serving two principal societal purposes: retribution and deterrence. In his view, "It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death."<sup>146</sup>

Similarly, in his dissent in the Supreme Court's refusal to hear *Elledge v. Florida*, Justice Stephen Breyer noted that Elledge's argument that twenty-three years under a sentence of death is unusual and "especially cruel" was worth considering.<sup>147</sup> Breyer wrote that "after such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty."<sup>148</sup> In light of growing international concerns, Justice Breyer further noted that "British jurists have suggested that the Bill of Rights of 1689, a document relevant to the interpretation of our own Constitution, may forbid, as cruel and unusual, significantly lesser delays."<sup>149</sup>

The Florida and New Jersey state courts have held that prolonged tenure on death row can amount to cruel and unusual

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<sup>143</sup> *Lackey*, 514 U.S. at 1045.

<sup>144</sup> *Id.* See also *Lackey*, 520 U.S. at 1183.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* (Stevens, J. respecting the denial of certiorari).

<sup>147</sup> *Elledge*, 525 U.S. at 944 (Breyer, J., dissenting from a denial of certiorari).

<sup>148</sup> *Id.*; *Elledge v. Florida*, 142 L. Ed. 2d 303, 304 (U.S. 1998) Breyer, J., dissenting from a denial of cert.).

<sup>149</sup> *Elledge*, 525 U.S. at 944.

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punishment.<sup>150</sup> In *Jones v. State*, the Florida state courts tried and convicted Ronnie Jones of first-degree murder, and sentenced him to death in 1981.<sup>151</sup> In 1985, on appeal, Jones claimed that he was incompetent at the time of his trial.<sup>152</sup> The Supreme Court of Florida ordered the trial court to hold a competency hearing, which the trial court failed to conduct until 1997.<sup>153</sup> In 1999, the Florida Supreme Court held that it could not “accept any excuse or have any tolerance for the state placing a person on death row and allowing a person to linger there for the period of time, or even near the period of time, that has occurred in this case.”<sup>154</sup> Jones’s due process rights were impacted by the twelve-year delay in holding the competency hearing, and it was impossible to give him a retrospective competency determination that complied with due process.<sup>155</sup>

In New Jersey, Judge Reginald Stanton sentenced Thomas J. Koskovich to death for his role in the ambush and murder of two men in 1997, but only if the execution was carried out in five years.<sup>156</sup> The judge criticized the nation’s courts for delays in

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<sup>150</sup> *Jones v. State*, 740 So. 2d 520, 525 (Fla. 1999); Robert Hanley, *Judge Orders Death Penalty With a Five-Year Deadline*, N.Y. TIMES, May 8, 1999, at B5.

<sup>151</sup> *Jones*, 740 So. 2d at 521. Jones attached affidavits from psychologists and from lawyers who represented him at various stages of the trial who affirmed that appellant seemed incompetent. *Id.* at 522.

<sup>152</sup> *Id.*

<sup>153</sup> In 1995, Jones filed an amended motion for post-conviction relief. “The trial court then ordered an evidentiary hearing on the original competency issue.” *Id.*

<sup>154</sup> *Id.* at 526.

<sup>155</sup> *Id.* at 523-24.

<sup>156</sup> If the state did not carry out the execution by May 7, 2004, the judge ordered that the sentence automatically be changed to life in prison. DPIC, *International Perspective on the Death Penalty*, *supra* note 64, *citing* Hanley, *supra* note 149. Koskovich lured two deliverymen to an abandoned house in Franklin, New Jersey, through a false order for two pizzas, and then murdered them. *Id.* As of 2002, the state Supreme Court upheld the convictions but found that Stanton’s instructions to the jury in the penalty phase could have unfairly swayed its decision to impose the death penalty against Koskovich. Jury selection for a new penalty phase was set to start September 9, 2002. Mary P. Gallagher, New Jersey Defenders, *AG Seeks Freeze of Capital Case*, *National*

executions, noting that “the process has become unacceptably cruel to defendants . . . who spend long years under sentence of death while the judicial system conducts seemingly interminable proceedings which remind many observers of a cruelly whimsical cat toying with a mouse.”<sup>157</sup> Judge Stanton went on to mention that in capital cases around the country, an average of ten years elapses between the date of sentence and execution and that “if we [the United States] are to have a death penalty, then we should have the skill, the courage, and the decency to carry out the death sentence in a reasonably expeditious manner.”<sup>158</sup>

In both Florida and New Jersey, the respective state courts identified conditions amounting to Death Row Syndrome.<sup>159</sup> While never explicitly citing Death Row Syndrome, the courts recognized the potential psychological consequences of extended stays on death row.<sup>160</sup> In light of growing national and international concern and criticism over the death penalty and the Supreme Court’s acknowledgment of international perspectives concerning the death penalty and the Eighth Amendment in *Ropper*, mandatory appeals is a possible solution that could resolve some of the controversy and problems associated with competency tests and Death Row Syndrome.

### III. UNITED STATES COMPETENCY TESTS

Two landmark Supreme Court cases established the tests for

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*Association of Criminal Defense Lawyers*, [http://www.nacdl.org/sl\\_docs.nsf/A1BF9DDA21904164852566D50069B69C/5568DC0C9137AE7D85256C3A0052F38B?OpenDocument](http://www.nacdl.org/sl_docs.nsf/A1BF9DDA21904164852566D50069B69C/5568DC0C9137AE7D85256C3A0052F38B?OpenDocument) (last visited Jan. 27, 2006).

<sup>157</sup> Judge Stanton did not know of any similar rulings by trials judges in capital cases. DPIC, *International Perspective on the Death Penalty: A Costly Isolation of the U.S.*, <http://www.deathpenaltyinfo.org/article.php?scid=45&did=536> (last visited Nov. 3, 2005).

<sup>158</sup> Judge Stanton also suggested that the United States “be well advised to join most of the civilized countries of the world in abolishing the death penalty.” *Id.*

<sup>159</sup> *Id.* See also *Kindler* No. 470/1991, reported at 14 Hum. Rts. L.J. 307.

<sup>160</sup> *Jones*, 740 So. 2d at 524. See also DPIC, *International Perspective on the Death Penalty*, *supra* note 64, citing Hanley, *supra* note 149.

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waiving appeal in a death penalty case. *Rees v. Peyton*<sup>161</sup> established the competency test for death penalty cases and *Whitmore v. Arkansas*<sup>162</sup> created the requirements for “next friend” status.<sup>163</sup> In combination, these decisions arguably create a loose standard by which a court can prolong the appeals process in a death penalty case. On the other hand, under the standards created by these decisions, courts may still allow incompetent inmates to waive appeals.<sup>164</sup>

*A. Brief History of Competency in Death Penalty Cases*

Under the English Common Law, the mentally incompetent were not executed.<sup>165</sup> The reasons for the rule are less concrete than the rule itself, but one explanation is that the execution of a mentally incompetent person offends humanity.<sup>166</sup> Another explanation is that the execution of the mentally incompetent does little, if anything, to deter others.<sup>167</sup> As Sir Edward Coke wrote in 1680, “by intendment of Law the execution of the offender is for example . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream (sic) inhumanity and cruelty. And can be no example to others.”<sup>168</sup> Other bases for the rule included religious underpinnings, and the theory that madness is its own punishment.<sup>169</sup>

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<sup>161</sup> 384 U.S. 312 (1966) (establishing the test for deciding an inmate’s competence to waive appeal of a death penalty sentence).

<sup>162</sup> 495 U.S. 149 (1990).

<sup>163</sup> “Next friend” status refers to the ability to further an appeal of habeas corpus proceeding on behalf of one who is incompetent to do so on their own. *Whitmore*, 495 U.S. at 149; *Rees*, 384 U.S. at 312.

<sup>164</sup> See *Rees*, 384 U.S. at 312. See also *Whitmore*, 495 U.S. at 149.

<sup>165</sup> Kimberley S. Ackerson et al., *Judges’ and Psychologists’ Assessments of Legal and Clinical Factors in Competence for Execution*, 11 PSYCH. PUB. POL. AND L. 164, 165 (2005).

<sup>166</sup> *Ford*, 477 U.S. at 407.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (quoting E. COKE, 3 INSTITUTES 6 (6th ed. 1680)).

<sup>169</sup> *Id.*

At its founding, the United States embraced this ideology by excluding the mentally incompetent from execution on the basis of religious, humane, and societal reasons,<sup>170</sup> but the Supreme Court did not address the constitutionality of the issue until 1986, in *Ford v. Wainwright*.<sup>171</sup> Alvin Bernard Ford was convicted of murder and sentenced to death for shooting a police officer three times in the course of robbing a *Red Lobster* restaurant in Florida.<sup>172</sup> After approximately six years in prison,<sup>173</sup> Ford developed signs of serious mental disorders, which were later diagnosed by psychiatrist Jamal Amin, on the basis of 14 months of evaluation, as resembling “paranoid schizophrenia with suicide potential.”<sup>174</sup> Ford filed a habeas corpus petition seeking an evidentiary hearing, which the federal district court denied. The Eleventh Circuit affirmed the denial.<sup>175</sup>

The Supreme Court granted certiorari in order to resolve whether the Eighth Amendment prohibits the execution of the insane<sup>176</sup> and, if so, whether the District Court for the Southern District of Florida should have held a hearing on petitioner’s claim.<sup>177</sup> The Court found that the common law rationales for prohibiting the execution of the insane were still relevant, and questioned the retributive value of executing an insane person:<sup>178</sup>

The natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuiting that such an execution simply offends humanity is

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<sup>170</sup> *Ford*, 477 U.S. at 399 (where the court found execution of the insane unconstitutional under the Eighth Amendment).

<sup>171</sup> 477 U.S. 399, 429-30 (1986).

<sup>172</sup> *Ford v. State*, 374 So. 2d 496, 497 (Fla. 1979).

<sup>173</sup> *Ford*, 477 U.S. at 402-03.

<sup>174</sup> *Id.* at 403. The governor of Florida signed petitioner’s death warrant after soliciting reports from a panel of psychiatrists who deemed Ford competent. *Id.* at 404.

<sup>175</sup> *Id.*

<sup>176</sup> For the purposes of this Note, the terms “insane” and “mentally incompetent” shall be synonymous and used interchangeably.

<sup>177</sup> *Id.* at 409-10.

<sup>178</sup> *Id.* at 409.

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evidently shared across this nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.<sup>179</sup>

The Court held that the execution of the insane is “cruel and unusual punishment” prohibited by the Eighth Amendment.<sup>180</sup>

Accordingly, *Ford* thus required psychological evaluations for death row inmates with questionable mental conditions.<sup>181</sup> The Court held that when questions of competency for execution were raised, due process entitled the defendant to an evidentiary hearing.<sup>182</sup> However, the Court failed to specify the fact-finding procedures necessary for a determination of competency to be executed.<sup>183</sup> As the next section will illustrate, this vague mandate complicates the issue of competency in voluntary death cases, in part because *Rees* only requires a capacity to make a rational choice, and does not scrutinize an inmate’s impetus for waiving appeal.

*B. Competency in “Volunteer” Cases: The Principles of Rees v. Peyton*

Some legal scholars have argued that anyone who chooses to

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* See also U.S. CONST. amend. VIII.

<sup>181</sup> Ackerson, *supra* note 21, at 164.

<sup>182</sup> *Id.*

<sup>183</sup> Only Justice Powell, in his concurrence, addressed the legal test for competency for execution, and stated that the Eighth Amendment “forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.” *Ford*, 477 U.S. at 2608 (Powell, J., concurring).

waive appeals and submit to execution is incompetent.<sup>184</sup> While the Supreme Court has rejected a per se rule of incompetency for defendants who wish to waive their appeals,<sup>185</sup> it has found inmates incompetent to volunteer on an ad hoc basis, and laid out its standard for doing so in *Rees v. Peyton*.<sup>186</sup>

In 1961, Melvin Davis Rees Jr. was convicted of murdering three family members and sentenced to death by a state court in Virginia.<sup>187</sup> The judgment was affirmed on appeal in 1962.<sup>188</sup> Thereafter, a habeas corpus petition was filed in the United States District Court for the Eastern District of Virginia, alleging that the state court conviction had violated Rees's federal constitutional rights.<sup>189</sup> The District Court rejected these claims, and the Court of Appeals for the Fourth Circuit affirmed.<sup>190</sup>

Rees next filed a petition for certiorari to have the Supreme Court review the Fourth Circuit's decision on June 23, 1965.<sup>191</sup> However, one month later, Rees directed his counsel to withdraw the petition and forgo any further legal proceedings.<sup>192</sup> In a letter to his counsel on July 18, 1965, Rees wrote:

It is my mature & considered decision to withdraw from before the U.S. Supreme Ct., as well as from all further consideration, the petition you recently filed, & that Mr. Crismond, the clerk of Spotsylvania county ct. be notified that all legal proceedings have been abandoned.<sup>193</sup>

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<sup>184</sup> Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799 n. 115, 813 n.100 (1990).

<sup>185</sup> Justice Rehnquist rejected the argument that anyone who chooses to waive appeal and elect execution is incompetent. Rehnquist suggested that sometimes the preservation of one's own life is not the "highest good." *Lenhard v. Wolff*, 443 U.S. 1306, 1312-13 (1979) (Rehnquist, Circuit Justice).

<sup>186</sup> 384 U.S. 312, 312 (1966).

<sup>187</sup> *Rees v. Commonwealth*, 127 S.E.2d 406 (Va. 1962).

<sup>188</sup> *Id.*

<sup>189</sup> *Rees v. Peyton*, 225 F. Supp. 507 (E.D. Va. 1964).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Petitioner's counsel advised the court that since evidence cast doubt on his client's mental competency he could not conscientiously do so without a psychiatric evaluation of petitioner. *Id.*

<sup>193</sup> The letter went on to say:

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Ultimately, the Supreme Court heard Rees' case on the issue of waiving appeal, and on May 13, 1966, the Supreme Court remanded Rees's case to the district court and defined competency for execution and how that competency is to be determined.<sup>194</sup> Under *Rees*, to declare competency, the lower court must find that the inmate has the "capacity to understand his position" and "make a rational choice with respect to continuing or abandoning further litigation."<sup>195</sup> On the other hand, if the lower court finds that the inmate instead suffers from some type of mental illness that substantially affects his or her capacity to make such a choice, the inmate's competency to waive appeal is called into question.<sup>196</sup>

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In Dostoyevski's novel "The Bros. Karamozov" Father Zossimas [sic] elder Brother lay dying, sick & handicapped in many ways but there was joy in His heart & to those that attended him he asked how it was that we could go on holding grudges against one another & always trying to out do one another when we could be entering the Garden in a Spirit of Love & Friendliness & brotherhood to live a new & happy life in the Name of Jesus Christ.

Phyllis L. Crocker, *Not to Decide is to Decide: The U.S. Supreme Court's Thirty-Year Struggle with One Case About Competency to Waive Death Penalty Appeals*, 49 WAYNE L. REV. 885, 893 (2004). A transcript of Rees's note was found, verbatim, in a letter Rees's attorney wrote to John F. Davis, the clerk of the court. *Id.* at 892. Rees's lawyer included other evidence of Rees's mental state in his letter. He noted that in 1960, Rees's competence to stand trial on the federal charges had been questioned. Although the federal district court found Rees competent to stand trial, psychological evaluations noted that Rees's "judgment is relatively poor with respect both to grasp of conventional ideas and to independent action," and that at times "his distinction between fact and fantasy is poorly maintained and unrealistic ideas and actions are likely to be numerous." *Id.* at 893 (quoting the letter).

<sup>194</sup> The Court did not make a decision on the inmate's competency but rather determined that in aid of the proper exercise of the Supreme Court's certiorari jurisdiction, the Federal District Court in which the proceeding commenced should make a judicial determination as to Rees's mental competence and then render a report back to the Supreme Court. *Rees*, 384 U.S. at 314.

<sup>195</sup> *Id.* The analysis is done at the time the inmate "volunteers." This test does not take into account his condition when he perpetrated the crimes. *Id.* at 908. *See also Rees*, 384 U.S. at 314.

<sup>196</sup> *Id.* After laying out this standard, the court remanded the case to Judge Oren R. Lewis, of the United States District Court for the Eastern District of



This test has both cognitive and volitional aspects.<sup>197</sup>

This test highlights the uncertain relationship between mental illness and rational choice.<sup>198</sup> The test asked if Rees was “suffering from a mental disease, disorder or defect that may substantially affect his capacity.”<sup>199</sup> The imprecise nature of mental illness leaves open the possibility that Rees could have been mentally ill in a way that did not affect his judgment. At the same time, Rees could have been found incompetent even if a firm correlation could not be found.

The standard set forth in *Rees* is a difficult one because the two alternative findings mentioned by the Court are not mutually exclusive; a person with a mental disorder that “affects” his decision-making could still make a rational choice, and unequivocal cases of irrationality rarely arise.<sup>200</sup> For instance, in *People v. Haynes*, the defendant suffered from schizophrenia and instructed his attorney to forgo appeals because he believed that the future of civilization depended upon his death.<sup>201</sup> This is a unique case because the choice to waive appeal is clearly the result

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Virginia, in July 1966. The Judge ascertained that Rees understood the likely consequence of withdrawing his petition, but Rees’s response was insufficient to conclude that he was competent to waive his appeal. Judge Lewis concluded that Rees should be examined at the federal medical center in Springfield, Missouri, and over the next three months, a team of doctors evaluated Rees at the Springfield facility. Four doctors who examined him testified at an evidentiary hearing to determine Rees’s competence in October of 1966. The four doctors deemed Rees incompetent to withdraw his petition for writ of certiorari. On January 12, 1967 Judge Lewis filed his report on Rees’s mental competence with the Supreme Court. He concluded, “Melvin Davis Rees, Jr. cannot at this time make a rational choice with respect to continuing or abandoning further litigation in his behalf. He is suffering from a major mental disorder, schizophrenic reaction, chronic undifferentiated type, affecting his capacity in the premises.” Crocker, *supra* note 192, at 909-14.

<sup>197</sup> See *supra* note 195.

<sup>198</sup> *Id.*

<sup>199</sup> *Rees*, 384 U.S. at 313.

<sup>200</sup> Richard J. Bonnie, *The Death Penalty and Mental Illness: Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U.L. REV. 1169, 1186 (2005).

<sup>201</sup> 737 N.E. 2d 169, 178 (Ill. 2000).

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of a mental delusion.<sup>202</sup> However, the more typical case involves articulated reasons that may seem “rational” under the circumstances, including: a desire to take responsibility for one’s actions, a belief that one deserves the death penalty, or a preference for the death penalty over life imprisonment.<sup>203</sup> In many cases, “rational” choices may be rooted in suicidal motivations and it is up to a judge to weigh the facts of the specific case and identify the prevailing motivation.<sup>204</sup> If the judge does find incompetence, then a third party may be able to continue the appeal on the inmate’s behalf.<sup>205</sup>

*C. Standing to Appeal on the Defendant’s Behalf: “Next Friend” Status and the Principles of Whitmore v. Arkansas*

An important issue in many volunteer cases is determining who may further appeal on behalf of an incompetent inmate.<sup>206</sup> “Next friend standing” allows an interested party to continue an appeal on behalf of the inmate.<sup>207</sup> In *Whitmore v. Arkansas*, the Court determined whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal to the state’s highest court.<sup>208</sup>

On December 28, 1987, Ronald Gene Simmons shot and killed two people and wounded three others in the course of a rampage through the town of Russellville, Arkansas.<sup>209</sup> After police apprehended Simmons, they searched his home in nearby Dover, Arkansas and discovered the bodies of fourteen members of his family, all of whom had been murdered.<sup>210</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> Bonnie, *supra* note 200, at 1187.

<sup>204</sup> *Id.*

<sup>205</sup> *Whitmore*, 495 U.S. at 195.

<sup>206</sup> *Id.*

<sup>207</sup> *Whitmore*, 495 U.S. at 163.

<sup>208</sup> *Id.* at 151.

<sup>209</sup> *Id.* at 151-52.

<sup>210</sup> *Id.*

After being tried and convicted of capital murder and sentenced to death,<sup>211</sup> Simmons stated under oath: "I, Ronald Gene Simmons, Sr., want it to be known that it is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence."<sup>212</sup> Upon a competency hearing and application of the *Rees* test, the court concluded that Simmons's decision was knowing and intelligent.<sup>213</sup>

Jonas Whitmore, another inmate on death row, petitioned the Supreme Court of Arkansas to claim standing on Simmons's behalf or that, in the alternative, he qualified as next friend in furthering Simmons's appeal.<sup>214</sup> After quickly dismissing the standing argument, the Supreme Court presented considerable discussion on the history and procedure of "next friend" status.<sup>215</sup>

As an alternative basis for standing to maintain this action the petitioner tried to proceed as "next friend of Ronald Gene Simmons."<sup>216</sup> Next friend status is most often requested on behalf of detained prisoners who are unable, usually due to mental

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<sup>211</sup> Simmons was first tried for the Russellville crimes, and a jury convicted him of capital murder and sentenced him to death. *Id.* at 152.

<sup>212</sup> He further stated that he requested the sentence be carried out expeditiously. *Id.*

<sup>213</sup> The state subsequently tried Simmons for the murder of his fourteen family members and on February 10, 1989, a jury convicted him of capital murder and imposed a sentence of death by lethal injection. Simmons again notified the trial court of his desire to waive his right to direct appeal. After a hearing, the court found Simmons competent to do so. *Whitmore*, 495 U.S. at 153.

<sup>214</sup> Whitmore was an inmate who had already been convicted of murder and sentenced to death, had exhausted his direct appellate review and had been denied state post-conviction relief. *Id.* at 156.

<sup>215</sup> Whitmore's principal claim of injury in fact was that Arkansas has established a system of comparative review in death penalty cases, and that he had "a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by omission of any other capital case." He argued that the precedent set by hearing Simmons's appeal may benefit his own cause. The Court found this alleged injury too speculative. Even if petitioner could show that he would be retried, convicted, and sentenced, petitioner had not shown that Simmons' convictions would be pertinent to his proportionality review in the Supreme Court of Arkansas. *Id.*

<sup>216</sup> *Id.* at 161-62.

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incompetence or inaccessibility, to seek relief themselves.<sup>217</sup> A next friend does not himself become a party to a habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest.<sup>218</sup>

The Supreme Court made explicit that next friend standing is not granted automatically to whomever seeks to pursue an action on behalf of another.<sup>219</sup> The Court determined two prerequisites for next friend standing.<sup>220</sup> First, a next friend “must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—as to why the real party cannot appear on his own behalf.”<sup>221</sup> This prerequisite is not satisfied where an evidentiary hearing shows that the defendant has given a knowing, intelligent and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded.<sup>222</sup>

Second, the next friend must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate.<sup>223</sup> The court suggests that a next friend must have some significant relationship with the real party in interest.<sup>224</sup> The burden is on the

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<sup>217</sup> See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955) (prisoner’s sister brought habeas corpus proceeding while he was being held in Korea). Some courts have additionally permitted “next friends” to prosecute actions outside the habeas corpus context on behalf of infants, other minors, and adult mental incompetents. See also *Garnett v. Garnett*, 114 Mass. 379, 380 (1874) (“next friend” may bring action for divorce on behalf of an insane person); *Blumentahl v. Craig*, 81 F. 320, 321-22 (CA3 1897) (“next friend” was admitted by court to prosecute personal injury action on behalf of the plaintiff, who was a minor).

<sup>218</sup> *McClellan*, *supra* note 15, at 229-31.

<sup>219</sup> *Id.*

<sup>220</sup> *Whitmore*, 495 U.S. at 161.

<sup>221</sup> *Id.* at 163-64.

<sup>222</sup> *Id.* at 165.

<sup>223</sup> *Id.* at 163.

<sup>224</sup> *Id.* See also *Davis v. Austin*, 492 F. Supp. 273, 275-76 (N.D. Ga. 1980) (denying “next friend” standing to a minister and first cousin of prisoner because, other than being philosophically and religiously opposed to the death penalty, the minister and first cousin demonstrated little in the way of interest as next friend).

next friend to clearly establish the propriety of his or her status and justify the jurisdiction of the court by showing that he or she is not an intruder or uninvited meddler.<sup>225</sup>

The policy underlying these limitations is to prevent strangers to the action from circumventing the restrictions of traditional standing by claiming to be “next friends.”<sup>226</sup> Once incompetency is established the court only requires that the next friend be dedicated to the best interests of the inmate.<sup>227</sup>

In *Ross*, the court used the *Rees* test to find competence and avoided the issue of next friend standing.<sup>228</sup> The application of this test in the *Ross* case allowed a finding of competency without adequately addressing the testimony of *Ross*’s supporters and inquiring into *Ross*’s possible motivation for waiving appeal. The possible existence of Death Row Syndrome exposes problems with the efficiency and reliability of the *Rees* and *Whitmore* tests, which may be solved through nonwaivable mandatory appeals.

#### IV. ANALYSIS AND SOLUTION: MANDATORY APPEAL

One way to eradicate many of the discrepancies and controversies that accompany the use of the *Rees* and *Whitmore* tests, in light of the Court’s recent willingness to look toward the guidance of international courts in *Ropper*, is to institute mandatory, non-waivable appeals in death penalty cases.<sup>229</sup> Some states have interpreted *Faretta v. California* as creating a right to waive appeal.<sup>230</sup> In response, the New Jersey Supreme Court instituted nonwaivable mandatory appeals, which could solve the problems associated with Death Row Syndrome and the *Rees* and *Whitmore* tests.

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<sup>225</sup> *Whitmore*, 495 U.S. at 164.

<sup>226</sup> *Id.* at 178.

<sup>227</sup> *Id.* at 177.

<sup>228</sup> *See infra* Part I.

<sup>229</sup> *Rees*, 384 U.S. 312; *Whitmore*, 495 U.S. 173.

<sup>230</sup> *Faretta v. California*, 422 U.S. 806 (1975) (where the court allowed an inmate to control his own defense and waive assistance of counsel).

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A. *Faretta v. California*

The Supreme Court has not decided a case on the issue of volunteering for execution, but some Supreme Court Justices have favored mandatory appeal as a way to ensure the efficiency and fairness of a death penalty conviction.<sup>231</sup> In *Whitmore*, Justice Marshall stated that “a defendant’s voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice.”<sup>232</sup>

In the absence of a clear opinion, some state courts have interpreted *Faretta v. California*<sup>233</sup> as establishing a capital defendant’s constitutional right to waive the presentation of mitigating evidence at sentencing.<sup>234</sup> In *Faretta*, Anthony Faretta attempted to waive assistance of counsel, but the trial court appointed a public defender. The trial court found that Faretta had not intelligently and knowingly waived his right to counsel, and had no constitutional right to conduct his own defense.<sup>235</sup> The Supreme Court reversed, holding that the state could not constitutionally force a lawyer upon a petitioner who voluntarily exercised his informed free will.<sup>236</sup>

The *Faretta* Court recognized a right to self-representation under the Sixth Amendment and found that the trial court was barred from interfering with the accused’s right to present a defense in his own fashion.<sup>237</sup> Faretta had a constitutional right to proceed without counsel because States cannot “force a lawyer”

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<sup>231</sup> *Gilmore v. Utah*, 429 U.S. 1012, 1020 (1976) (Marshall, J., dissenting); *Whitmore*, 495 U.S. at 173 (Marshall, J., dissenting). See also *Casey*, *supra* note 8, at 86.

<sup>232</sup> *Whitmore*, 495 U.S. at 173 (Marshall, J., dissenting).

<sup>233</sup> *Faretta*, 422 U.S. at 806.

<sup>234</sup> Some courts allowing *Faretta* to be used to not present mitigating evidence, which amounts to offering no defense. Extrapolated, some have argued that this allows an inmate not to present a defense at all, thus letting them waive appeals. *Casey*, *supra* note 8, at 82-83.

<sup>235</sup> *Faretta*, 422 U.S. at 808-10.

<sup>236</sup> *Id.* at 835-36.

<sup>237</sup> *Id.* at 819.

upon a defendant.<sup>238</sup> However, arguably, *Faretta* only stands for the requirement that nothing interfere with the defendant's right to present his or her own defense; it does not establish an inmate's right to waive appeal.<sup>239</sup>

*B. New Jersey: Mandatory Non-Waivable Appeals*

Presently, only New Jersey has non-waivable appeals in all aspects of death penalty cases.<sup>240</sup> The New Jersey approach to mandatory appeals imposes, through judicial decision, a non-waivable application for post-conviction relief and the presentation of mitigating evidence.<sup>241</sup> In *New Jersey v. Martini*, the New Jersey Supreme Court concluded that certain important issues were better raised on application for post-conviction relief and not on appeal.<sup>242</sup> Thereafter, the court ordered that counsel be appointed for capital defendants who did not wish to pursue post-conviction relief and that the defendant must present some type of mitigating evidence at the sentencing part of the death penalty proceeding.<sup>243</sup> These requirements are unwaivable.<sup>244</sup>

The New Jersey approach is based upon a narrow interpretation of *Faretta*. Because the Supreme Court has yet to issue a decision dealing directly with the problem of volunteering for execution, some state courts have broadly interpreted *Faretta* as creating an

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<sup>238</sup> *Id.* at 807.

<sup>239</sup> See *Casey*, *supra* note 8, at 83.

<sup>240</sup> *Id.* at 87.

<sup>241</sup> *Id.*

<sup>242</sup> *State v. Martini*, 144 A.2d 1106, 1112-13 (N.J. 1996).

<sup>243</sup> *Id.* The New Jersey Supreme Court recognized that there "must be an end to the process" at some point and thus required an expedited procedure for the consideration of post-conviction relief applications when the capital defendant is opposed to the application. *Id.* The Supreme Court established that the capital sentencer must consider and weigh mitigating evidence when deciding whether to sentence a defendant to death. The result is that during a capital sentencing hearing, the prosecution presents evidence showing aggravating factors and the defendant is allowed to present evidence of mitigating factors. *Id.* at 1112.

<sup>244</sup> *Id.*

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inmate's right to waive appeal.<sup>245</sup> For example, the Florida Supreme Court relied on *Faretta* for the proposition that a trial court could not appoint outside counsel to argue against the death penalty because under the Sixth Amendment right to self-representation "all competent defendants have a right to control their own destinies."<sup>246</sup> These courts have extended the "right to representation" to stand for the decision to refuse representation.<sup>247</sup>

New Jersey has been able to constitutionally justify implementing nonwaivable mandatory appeals by narrowly interpreting *Faretta* to stand only for the proposition that a defendant can represent himself, not that a defendant can waive a defense all together.<sup>248</sup> In *Faretta*, the Court relied on the Sixth Amendment to find that a defendant had a right to represent himself and that the state could not interfere with the personal defense of the defendant.<sup>249</sup> *Faretta* never contemplated a defendant waiving his defense all together.<sup>250</sup> If the defendant raises no defense, then arguably the Sixth Amendment is not implicated.<sup>251</sup> Therefore, there would be no constitutional right prohibiting courts from imposing mandatory, nonwaivable appeals

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<sup>245</sup> Casey, *supra* note 8, at 82-83.

<sup>246</sup> Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1998) (where William Hamblen was indicted for first degree murder and allowed to represent himself and waive his right to have a jury consider whether he should be executed) *as quoted in* Casey, *supra* note 8, at 86.

<sup>247</sup> The Sixth Amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI. *See also*, John R. Mitchell, *Attorneys Representing Death Row Clients: Client Autonomy Over Personal Opinions*, 25 CAP. U.L. REV. 643, 652 (1996).

<sup>248</sup> Casey, *supra* note 8, at 87.

<sup>249</sup> *See generally Faretta*, 422 U.S. 806.

<sup>250</sup> *Id.*

<sup>251</sup> Casey, *supra* note 8, at 85.



in death penalty cases.<sup>252</sup>

New Jersey's nonwaivable appeals are further supported by two other principles. The first is derived from *Furman*: procedural waivers undermine the state's important responsibility for maintaining the consistent and appropriate application of the death penalty.<sup>253</sup> In *Furman*, the Supreme Court held that for a death sentence to be constitutional, the Eighth Amendment requires that the sentence be imposed in a non-arbitrary manner.<sup>254</sup> This guarantees to society at large that the integrity of the criminal justice system will be maintained.<sup>255</sup> Therefore, a defendant cannot waive appeal, and allow the state to impose a punishment that would otherwise violate the Eighth Amendment.<sup>256</sup>

The New Jersey Supreme Court's other consideration was the state's interest in restricting the risk of state-sponsored executions. This risk outweighs the interest of any single defendant to control his or her own fate.<sup>257</sup> This argument is once again founded in a state's interest in a non-arbitrary death penalty.<sup>258</sup> The state takes the position that allowing a defendant's possible death wish to determine if an execution occurs undermines a non-arbitrary death penalty. A death sentence applied appropriately and consistently cannot take into account a defendant's death wish, but rather only focus on the justness and fairness of the execution.<sup>259</sup>

### C. New Jersey, Death Row Syndrome, and the Ross Case

New Jersey has now stayed all executions via a moratorium,<sup>260</sup>

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<sup>252</sup> State v. Martini, 144 N.J. 603, 617 (N.J. 1996). See also Casey, *supra* note 8, at 64.

<sup>253</sup> Casey, *supra* note 8, at 94.

<sup>254</sup> *Furman*, 408 U.S. at 242.

<sup>255</sup> *Martini*, 144 N.J. at 617. See also Casey, *supra* note 8, at 95.

<sup>256</sup> *Martini*, 144 N.J. at 617. See also Casey, *supra* note 8, at 95.

<sup>257</sup> Casey *supra* note 8, at 95.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 96.

<sup>260</sup> 2005 N.J. ALS 321. New Jersey passed a one year moratorium on the death penalty while it considers abolishing the death penalty altogether. The moratorium began in January 2006. *Id.* Although 10 people are on New Jersey's

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so there will be no experience with non-waivable appeals for other states to draw upon. Nonetheless, the analysis conducted by the New Jersey courts is relevant to determining the effect of mandatory nonwaivable appeals on the emergence of Death Row Syndrome and how the syndrome affects how a state balances its interest in maintaining a non-arbitrary death penalty with an inmate's interest in controlling his own destiny. By considering how mandatory nonwaivable appeals would have affected the *Ross* decision, the hypothetical shows how mandatory nonwaivable appeals would virtually eliminate the dangers inherent with Death Row Syndrome.

The argument against mandatory nonwaivable appeals in light of the emergence of Death Row Syndrome is that mandatory nonwaivable appeals could actually lead to *more* cases of Death Row Syndrome.<sup>261</sup> Arguably, nonwaivable mandatory appeals would sufficiently lengthen the judicial process and the amount of time an inmate spends on death row. This could increase the chance of Death Row Syndrome and possibly create a cyclical and inefficient death penalty system.<sup>262</sup> Furthermore, these new procedures would substantially increase the cost to the state not only through the added appeals but also from the cost of caring for inmates who became incompetent while awaiting execution.

Proponents of mandatory appeals argue that the appeals would streamline litigation, and create a faster and more efficient death penalty. As illustrative from the *Ross* case, part of the reason for the long delay was the ancillary litigation that arose from friends, family and supporters once *Ross* elected to waive appeal.<sup>263</sup> This litigation was costly and added to the anguish of the victims, supporters, and all involved, and could have been significantly reduced if there were nonwaivable mandatory appeals. The nonwaivable mandatory appeals would create a finite number of court appearances and steps in order to concentrate the energies of

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death row, it has been 43 years since the last execution. Barbara S. Rothschild, *8<sup>th</sup> Limits Punishment, Bail*, COURIER-POST (Cherry Hill, New Jersey) Mar. 1, 2006.

<sup>261</sup> DPIC, *Time on Death Row*, *supra* note 12.

<sup>262</sup> *Id.*

<sup>263</sup> *See infra* Part II.

the court and resources of all the parties involved. While some cases in which inmates waive appeals at early stages will be made longer, this system would have reduced the amount of time Ross spent fighting the court system.

Proponents of mandatory appeals also argue that without mandatory appeals, given the existence of Death Row Syndrome, a state's interest in maintaining a non-arbitrary death penalty may be hindered. Arguably, the existence of Death Row Syndrome encourages courts to expedite executions to prevent further inmates from developing Death Row Syndrome. An expedited death penalty would undermine the reason for the appeals process in the first place and threaten the efficiency and arbitrariness of the death penalty.<sup>264</sup> Mandatory appeals ensure a uniform process and prevent courts from expediting sentences in order to prevent new cases of Death Row Syndrome.

The risk of an inmate developing Death Row Syndrome must be weighed against the possibility of executing an innocent person. Allowing inmates to waive their mandatory review of death penalty convictions jeopardizes the validity and efficiency of a conviction.<sup>265</sup> There are many instances in which defendants waive appeal not because of a calculated decision, but because of a mental illness or Death Row Syndrome.<sup>266</sup> For example, Isidore Zimmerman attempted to expedite his death sentence even though he was innocent. The psychological torture of being on death row pushed him to pursue death. However, immediately prior to his execution he was exonerated.<sup>267</sup>

Many of the complications in the *Ross* case due to Death Row Syndrome would have never arisen had there been mandatory nonwaivable appeals because the process ensures that every precaution has been taken.<sup>268</sup> In *Ross*, the courts did not adequately

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<sup>264</sup> DPIC, *Time on Death Row*, *supra* note 12.

<sup>265</sup> Sara L. Golden, *Constitutionality of the Federal Death Penalty Act: Is the Lack of Mandatory Appeal Really Meaningful Appeal?*, 74 TEMP. L. REV. 429, 430, 442 (2001).

<sup>266</sup> *See supra* Part I.

<sup>267</sup> Strafer, *supra* note 8, at 869 *as found in* McClellan, *supra* note 15, at 211.

<sup>268</sup> Golden, *supra* note 218, at 467-68.

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contemplate and examine Ross's underlying motivation for waiving appeal. The New Jersey approach to mandatory nonwaivable appeals would contemplate the existence of Death Row Syndrome in every volunteer and prevent an inmate from expediting the death penalty process. While the longer appeals process may result in more reported cases of Death Row Syndrome and increased costs, the mandatory nonwaivable appeals eliminates the risk of killing an innocent person who developed Death Row Syndrome and helps ensure a non-arbitrary death penalty.<sup>269</sup>

## CONCLUSION

On May 14, 2005, Michael Ross was put to death, ending 20 years of litigation. Ross was a rapist and murderer, and in the eyes of some, may have rightfully been put to death. However, the process by which he was ultimately executed is riddled with problems and inconsistencies.

There is a very thin line between state-sponsored executions and state-assisted suicide. States are forced to weigh the state interest in preventing suicide and maintaining the consistent and appropriate application of the death penalty with an inmate's interest in controlling his own destiny. In the wake of acknowledgment and identification of the adverse affects of living on death row for extended periods by international courts, United States Supreme Court Justices, and the New Jersey and Florida state courts, the Supreme Court of the United States should pay more heed to the possibility of Death Row Syndrome and more fully scrutinize Ross's motivation for waiving appeal.

Following New Jersey's lead, the adoption of non-waivable mandatory appeals would presume Death Row Syndrome in every inmate and eliminate the controversy and inconsistencies that accompany the *Rees* and *Whitmore* tests.<sup>270</sup> This would ensure efficiency and uniformity to an already convoluted and controversial issue.

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<sup>269</sup> *Id.*

<sup>270</sup> *See supra* Part II.