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Standards and Procedures for Determining Whether a Defendant is Competent to Make the Ultimate Choice - Death; Ohio's New Precedent for Death Row Volunteers

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STANDARDS AND PROCEDURES FOR DETERMINING
WHETHER A DEFENDANT IS COMPETENT TO MAKE THE
ULTIMATE CHOICE - DEATH; OHIO'S NEW PRECEDENT
FOR DEATH ROW "VOLUNTEERS"

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I. INTRODUCTION

Currently there are over 3,500 inmates on death row in the United States.¹ Since 1976, 500 defendants have been executed by means of either lethal injection, electrocution, the gas chamber, hanging, or the firing squad.² There are 38 states that authorize the death penalty for certain heinous crimes,³ and Ohio is one of those states.⁴ At the time of this writing, Ohio has approximately 190 defendants waiting to die in its execution chamber.⁵ For the past several years, one of Ohio's death row inmates stood out from the rest. His name was Wilford Lee Berry Jr. He was unique because, unlike any of the other Ohio inmates currently on death row, he was ready and willing to walk the 22 steps it takes to get from a holding cell to the execution chamber.⁶ While most of us would fight life and limb to avoid death, partly as a result of our innate human nature, Wilford Berry decided not to fight and instead to accept the ultimate fate the state of Ohio handed to him.

¹NAACP LEGAL DEFENSE FUND-DEATH ROW, U.S.A., DEATH PENALTY INFORMATION CENTER, (Jan. 1, 1999) <<http://www.essential.org/dpic>> [hereinafter NAACP, LDF, INFORMATION CENTER].

²RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, (Dec. 18, 1998) <<http://www.essential.org/dpic>> [hereinafter DIETER, INFORMATION CENTER]. As of July 1998, 314 executions occurred by lethal injection, 140 by electrocution, 10 by the gas chamber, 364 hanging, and two by firing squad. DIETER, INFORMATION CENTER, (July 13, 1998).

³DIETER, INFORMATION CENTER, (March 4, 1999). Although 38 states authorize the use of the death penalty, since 1976 Connecticut, Kansas, New Hampshire, New Jersey, New Mexico, New York, South Dakota, and Tennessee have *not* put anyone to death. *Id.*

⁴*Id.*

⁵NAACP, LDF, INFORMATION CENTER, (Jan. 1, 1999), *supra* note 1.

⁶Michael Hawthorne, *Request To Die Fuels Death Penalty Debate*, CINCINNATI ENQUIRER, June 26, 1997, at CO2.

Wilford Lee Berry Jr. wanted to be executed and actively fought for this punishment since his 1990 conviction for murder.⁷ On December 3, 1997, the Supreme Court of Ohio, by a 7-0 vote, granted Wilford Berry's wish.⁸ On February 19, 1999, Berry's death sentence was carried out and his fight to die finally ended.⁹ Berry's execution marked the first time Ohio had put someone to death since 1963.¹⁰

Berry is considered to be a death row "volunteer."¹¹ According to Webster's Dictionary the term volunteer means "a person who voluntarily offers himself or herself for a service or undertaking."¹² Accordingly, a death row inmate such as Berry, voluntarily offers himself for an undertaking, and in this circumstance the *undertaking* concerned is actual execution. The death row volunteer literally requests to be put to death.¹³ The volunteer orders that the state disregard any remaining appeals that are available to him, or, may command that those

⁷Mary Beth Lane, *Campaigning For Execution-Death Row Inmate Wants To Die*, PLAIN DEALER, Jan. 29, 1996, at 1A.

⁸State v. Berry, 686 N.E.2d 1097 (Ohio 1997).

⁹Bill Sloat & Mary Beth Lane, *'Volunteer' Given Lethal Injection*, PLAIN DEALER, Feb. 20, 1999, at 1A. The Ohio Supreme Court originally set Berry's execution date for March 3, 1998. State v. Berry, 686 N.E.2d 1097, 1108 (Ohio 1997). In late February 1998, Berry's mother and sister petitioned a U.S. District Court for a temporary stay of Berry's execution because they both believed that Berry was incompetent. T.C. Brown and Mary Beth Lane, *U.S. Court Postpones Execution of Berry*, PLAIN DEALER, February 28, 1998, at 1A. The District Court granted the temporary stay, and ordered that Berry undergo further psychological testing. *Id.* The Sixth Circuit U.S. Court of Appeals affirmed the District Court's temporary stay of Berry's execution, and set a later date for a full hearing to review the Ohio Supreme Court's determination of Berry's competence. Bill Sloat, *Court Sets March 24 Hearing in Berry case-Execution of Man Who Killed Bakery Owner Still on Hold*, PLAIN DEALER, Mar. 3, 1998, at 1A. At this hearing, the Sixth Circuit held that Berry's mother and sister did not have standing to contest Berry's competence because the Ohio Supreme Court previously held that Berry was competent. Franklin v. Francis, 144 F.3d 429, 433 (6th Cir. 1998). Additionally the Sixth Circuit stated that the Ohio Supreme Court's determination that Berry was competent "was not contrary to or did not involve an unreasonable application of clearly established federal law. . ." *Id.* Then, in August 1998, the public defender filed a Petition for Certiorari with the United States Supreme Court. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998), *petition for cert. filed*, (U.S. Aug. 25, 1998) (No. 98-6013). The U.S. Supreme Court refused to hear the public defender's contention that Berry was incompetent. Mary Beth Lane, *The Man Who Wants To Die*, PLAIN DEALER, Feb. 14, 1999, at 1A. On February 18, 1999, Ohio Governor Bob Taft refused to grant clemency to Berry, stating that he found "no compelling reason" to do so. Sandy Theis, *Taft Won't Spare Berry's Life*, PLAIN DEALER, Feb. 19, 1999, at 1A.

¹⁰Sloat & Lane, *supra* note 9, at 1A.

¹¹Hawthorne, *supra* note 6, at CO2.

¹²Random House Webster's College Dictionary, 1493 (3d ed. 1995).

¹³For example, in 1992, Ricky Lee Sanderson asked the North Carolina Supreme Court to end his automatic appeal and to grant him "the mercy of being put to death." Joseph Neff, *Death Wish Can Complicate Matters on Death Row*, THE NEWS & OBSERVER, May 5, 1997, at A1.

appeals already in progress be terminated. Once the volunteer's wish is granted, the court is left with nothing to determine with regard to possible challenges to the conviction and sentence of the defendant; and thus may expedite the defendant's execution date.

Although Berry's request was one of first impression in Ohio, surprisingly many other death row inmates throughout the United States have waived their available appeals and asked to be executed.¹⁴ In 1997 and 1998 combined, 17 "volunteers" were executed.¹⁵ Officials approximate that 10 percent of all the people executed in the past 20 years have requested to die.¹⁶ National experts estimate that the number of defendants who volunteer for death is increasing.¹⁷

Wilford Berry began his crusade for the death penalty when he entered the criminal justice system in 1989.¹⁸ After Berry confessed to the murder for which he was convicted, he told police that he wanted the death penalty.¹⁹ During his trial, he told the jury "You might as well sentence me to death row, because by the time I finish 20 or 30 years, I will be so institutionalized that I wouldn't hesitate to kill you for just looking at me."²⁰ After Berry's conviction, he arrived at his prison cell at the Mansfield Correctional Institution and continued his crusade for death.²¹ He wrote letters to the Cuyahoga County Prosecutor, the Attorney General of Ohio, and the Governor of Ohio, explaining his wish for an expedient execution.²² Berry even began one letter that he sent to the Chief Justice of the Ohio Supreme Court with an expletive to show his disdain for possible delays.²³

Berry's mother and sister could not comprehend why their loved one wanted to die, and had asked him to continue his appeals.²⁴ But, Berry did not see any point to continuing appeals, and said that "even if I had a second trial, I would be found guilty again, and sentenced to death again and ultimately executed."²⁵

¹⁴Craig Pittman, *Death Row Volunteers Don't Always Get Wish*, ST. PETERSBURGH TIMES, Jan. 4, 1998, at 1B.

¹⁵DIETER, INFORMATION CENTER, (March 4, 1999), *supra* note 2. In 1997 there were six "volunteers" executed. *Id.* In 1998 there were 11 "volunteers" executed. *Id.*

¹⁶Pittman, *supra* note 14, at 1B.

¹⁷*Id.*

¹⁸Lane, *supra* note 7, at 1A.

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³Lane, *supra* note 7, at 1A.

²⁴*Id.*

²⁵*State v. Berry*, 686 N.E.2d 1097, 1103 (Ohio 1997).

Berry explained that if his conviction was overturned, the result would only be "to wait around on death row for 20 years" to later be executed.²⁶

In addition to Berry's family, his public defenders also had a difficult time rationalizing his decision not to pursue any appeals.²⁷ His attorneys maintained that they were "'ethically obligated' to pursue further appeals, even against Berry's wishes, because society has a stake in ensuring the reliability and integrity of any death sentence."²⁸ The State of Ohio's Attorney General, who ironically advocated for Berry's position, took the stance that "He's a volunteer . . . and if a volunteer wishes to have the death penalty, we will concur in that."²⁹

The sides of this debate were chosen early on. The Supreme Court of Ohio sided with Berry, ruling that he could waive his further appeals.³⁰ But, before the supreme court could fulfill this man's desires, and before the supreme court set down its new precedent, the defendant had one major hurdle to overcome. The supreme court needed to determine whether Berry was competent to make this ultimate decision of death, to wit: whether Berry had "the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue further remedies."³¹ This Note will focus on the requirement that a death row volunteer, like Wilford Berry, be deemed competent in order to allow him to waive his appeals, and expedite his execution date.

Despite the fact that many states will allow a death row defendant to waive his legal appeals in order to hasten his execution date, there are inadequate standards and procedures for determining whether the "volunteer" is first competent to make this ultimate decision of life versus death. To provide background for this issue, this Note will discuss the events initially leading up to the nation's first death row "volunteer", then it will introduce subsequent volunteers of the present day. This Note then will look at what the United States Supreme Court has said about the standards and procedures that are necessary in order for a defendant to waive his appeals. This Note next will analyze the standards and procedures for competency that are utilized in the states that have allowed a defendant to waive his capital appeals and address the problems and questions that arise in using these standards and procedures. Finally, it will consider the public policy results of allowing a defendant to waive his death penalty appeals, if found competent.

²⁶*Id.* at 1104.

²⁷Editorial (no author listed), *Death Wish*, THE COLUMBUS DISPATCH, Dec. 19, 1997, at 10A.

²⁸*Id.*

²⁹Lane, *supra* note 7, at 1A.

³⁰State v. Berry, 686 N.E.2d 1097, 1108 (Ohio 1997).

³¹*Id.* at 1098.

II. EVENTS LEADING UP TO THE NATION'S FIRST DEATH ROW "VOLUNTEER"

A. *Origins of Capital Punishment*

The origins of capital punishment in our modern society can be traced back to Biblical times. In the Old Testament the death penalty was required for a wide range of offenses, including murder.³² In the King James version of the Bible, Genesis 9:6 states that "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."³³

Over 2000 years later, capital punishment is still being used in the United States. Capital punishment is rooted in our nation's English common law.³⁴ In the eighteenth century, England authorized capital punishment for numerous crimes, even crimes against property.³⁵ The American colonies continued this English tradition, and also included offenses less culpable than murder, such as, adultery, idolatry, witchcraft, and blasphemy.³⁶

Leading up to the time of the signing of our U.S. Constitution, the debate over whether the state should be allowed to take a man's life, because he took the life of another, began to take shape. In drafting a state constitution for Virginia, Thomas Jefferson provided capital punishment for the crimes of treason and murder.³⁷ But, James Madison believed that this provision in the state's constitution would "unduly tie the hands of Government."³⁸ Madison was concerned that juries would not be able to impose capital punishment in a fair and reliable manner and would have much difficulty determining who deserved the death penalty and who did not.³⁹

Ultimately, in crafting our United States Constitution, the Framers never clearly authorized capital punishment. However, the Fifth, Eighth, and Fourteenth Amendments to the Constitution have been used to provide a framework for states to enact procedures for their death penalty statutes. The Fifth and Fourteenth Amendments provide that the deprivation of life cannot

³²See *Leviticus* 20:10 (King James), adultery; See *Leviticus* 20:11 (King James), incest; See *Deuteronomy* 22:13-21 (King James), sexual activity before marriage.

³³*Genesis* 9:6 (King James).

³⁴HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* 6, (3d ed., 1982) (1964).

³⁵DOUGLAS HAY, *PROPERTY, AUTHORITY, AND THE CRIMINAL LAW*, IN DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 17, 17-18, 20-21 (1975).

³⁶WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982* at 133-34 (1984).

³⁷JAMES MADISON, *OBSERVATIONS ON THE "DRAUGHT OF A CONSTITUTION FOR VIRGINIA"*, IN 5 *THE WRITINGS OF JAMES MADISON, 1787-1790* at 284, 288-89 (Gaillard Hunt ed., 1904).

³⁸*Id.* at 288.

³⁹*Id.*

be taken without "due process of law," while the Eighth Amendment asserts that "cruel and unusual punishments" cannot be imposed.⁴⁰

Because the death penalty had become such an institutionalized practice in our system of criminal justice, it was not until many years after these constitutional mandates were enacted that the death penalty's administration was first called into question.⁴¹ With the backdrop of the civil rights movement of the 1960's, and with several recent victories for criminal defendants' rights in place,⁴² the issue regarding the constitutionality of the death penalty was ripe.

B. *Furman v. Georgia*

In 1972, the United States Supreme Court, as ultimate interpreter of our Constitution,⁴³ had to determine, in *Furman v. Georgia*, whether the states' administration of the death penalty violated the Eighth Amendment's ban on "cruel and unusual punishment."⁴⁴ The Court recognized that death is a kind of punishment different from any other that is available in our criminal justice system.⁴⁵ With the death penalty's uniqueness and inherent finality in mind, the Court's concern was that the states were not uniformly applying the death penalty in any reliable or consistent manner.⁴⁶

Specifically, the Court looked at how the schemes of states capital punishment statutes gave the sentencer, usually a jury, the power to make a decision about the defendant's fate with little or no guidance, and without any checks on the sentencer's possible abuse of this enormous power.⁴⁷ In a 5-4

⁴⁰U.S. Const. amend. V.; U.S. Const. amend. VIII.; U.S. Const. amend. XIV, § 1.

⁴¹Deborah W. Denno, "Death is Different" and Other Twists of Fate, 83 J. CRIM. L. & CRIM. 437 (1992).

⁴²See *Mapp v. Ohio*, 367 U.S. 643 (1961) (right to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized); See *Malloy v. Hogan*, 378 U.S. 1 (1964) (right to be free of compelled self-incrimination); See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

⁴³*Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

⁴⁴*Furman v. Georgia*, 408 U.S. 238 (1972).

⁴⁵*Id.* at 286-88 (Brennan, J., concurring).

⁴⁶*Id.* at 313. Justice White explained in his concurring opinion that the problem with the death penalty, as currently applied, is that "the death penalty is exacted with great infrequency even for the most atrocious of crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.*

⁴⁷*Id.* at 309-10. Justice Stewart reasoned in his concurring opinion that the death sentences reviewed by the Court were "cruel and unusual the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.*

decision, the Court concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."⁴⁸ The Court did not hold that the death penalty was 'per se' unconstitutional,⁴⁹ but did assert that "it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."⁵⁰

As a result of the *Furman* decision, over 600 inmates' death sentences were vacated to life in prison, and the states were left to restructure their death penalty statutes.⁵¹ Thirty-five states responded to the Supreme Court's decision by re-writing their death penalty statutes,⁵² however, several of these newly reformed statutes were soon challenged as *still* being unconstitutional. Therefore, the Court granted certiorari in five of these cases to consider a representative sample.⁵³

C. *Gregg v. Georgia*

In *Gregg v. Georgia*, decided in 1976, the Court upheld Georgia's new death penalty statute as constitutional because it made three major changes.⁵⁴ First, Georgia's statute provided for the bifurcation of the punishment and guilt portions of a capital trial, with the jury hearing additional evidence and argument before determining whether to impose the death penalty.⁵⁵ Second, the sentencing scheme mandated that the jury be instructed on statutory factors of aggravation and mitigation, and third, it provided that the state supreme

⁴⁸*Id.* at 310. Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by Justice White and Justice Stewart, who concurred in the judgments on the narrowest grounds. *Id.*

⁴⁹Justice Brennan concluded the death penalty was per se unconstitutional. *Furman*, 408 U.S. at 257 (Brennan, J., concurring). Justice Marshall also concluded the death penalty was per se unconstitutional. *Id.* at 314 (Marshall, J., concurring).

⁵⁰Justice Stewart clearly defined the Court's *Furman* holding in *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

⁵¹Six hundred twenty-nine inmates' death sentences were vacated to life in prison. Jack Greenberg, *Capital Punishment as a System*, 91 YALE L. J. 908, 915 (1982).

⁵²*Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

⁵³Georgia's new capital punishment statute was challenged in *Gregg v. Georgia*, 428 U.S. 153 (1976). Florida's new statute was challenged in *Proffitt v. Florida*, 428 U.S. 241 (1976). Texas's new statute was challenged in *Jurek v. Texas*, 428 U.S. 262 (1976). North Carolina's new statute was challenged in *Woodson v. North Carolina*, 428 U.S. 280 (1976). Louisiana's new statute was challenged in *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁵⁴*Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵⁵*Id.* at 154.

court automatically review each sentence of death, thus safeguarding against the random or arbitrary imposition of the death penalty.⁵⁶

The Court reasoned that under Georgia's new sentencing procedures the jury's attention is focused on the "particularized nature of the crime" and the "particularized characteristics of the individual defendant," because it has to weigh mitigating and aggravating factors.⁵⁷ Thus, the sentencer's discretion was now channeled, unlike Georgia's prior statute reviewed in *Furman* where the jury could "reach a finding of the defendant's guilt and then, without guidance or discretion, decide whether he should live or die."⁵⁸ The Court also recognized the extreme importance of appellate review of every death sentence, and in large part upheld Georgia's new capital statute because it expressly provided for such review.⁵⁹ The Court saw mandatory appellate review as a safety net to ensure against discriminatory or capricious sentencing.⁶⁰

After the *Gregg* decision, the states had some guidance concerning what the Supreme Court wanted in a capital sentencing scheme in order for the scheme to be constitutional.⁶¹ The stage was set for the re-awakening of executions in the United States.

D. The First Death Row "Volunteer" - Gary Gilmore

The first defendant executed after the *Gregg* decision was Gary Gilmore of Utah.⁶² But this was not Gilmore's only claim to infamy - he was also the nation's first death row "volunteer."⁶³ Despite the fact that Utah's death penalty had yet to be declared constitutional,⁶⁴ the United States Supreme Court was convinced that following Gilmore's conviction and sentence for murder, he made a knowing and intelligent waiver of his appeals.⁶⁵

⁵⁶*Id.*

⁵⁷*Id.* at 206.

⁵⁸*Id.* at 198.

⁵⁹*Gregg*, 428 U.S. at 197.

⁶⁰*Id.* at 206.

⁶¹The Supreme Court upheld Florida's new capital punishment statute in *Proffitt v. Florida*, 428 U.S. 241 (1976), and also upheld Texas's new statute in *Jurek v. Texas*, 428 U.S. 262 (1976). The Court struck down North Carolina's statute in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and also Louisiana's in *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁶²*Internight*, MSNBC, Jan. 16, 1997, available in WESTLAW, 1997 WL 10274073. Gilmore was executed by firing squad on January 17, 1977. *Id.*

⁶³*Id.*

⁶⁴*Gilmore v. Utah*, 429 U.S. 1012, 1018 (White, J., dissenting).

⁶⁵*Id.* at 1013.

Gilmore was sentenced to die for killing a motel clerk and a gas station attendant execution style.⁶⁶ Gilmore admitted to the murders throughout his trial, and even told the state supreme court that he was "prepared to die on the day [he] was sentenced to die, and on that day only."⁶⁷ Gilmore demanded that his attorneys not file an appeal, nor seek a stay of execution on his behalf, even though he was continually advised of his rights and the possible issues that could be raised.⁶⁸ Gilmore's decision was shocking to his family, to prosecutors, and to the media, but Gilmore seemed to relish in the frenzy and attention he had created.⁶⁹

Gilmore's mother asked the United States Supreme Court for next friend standing to claim that her son was incompetent to make the dire decisions he had chosen.⁷⁰ But, the Court reviewed the state of Utah's record concerning Gilmore's competency proceedings, and agreed with the state that Gilmore was competent to waive his appeals.⁷¹ The Court then explained that because of Gilmore's competence to make his own decisions, his mother did not have standing to litigate any claim on her son's behalf, and thus the Court was without the requisite jurisdiction.⁷² Without jurisdiction the Court also could not determine whether, as a matter of law, Gilmore was able to waive his right to state appellate review.⁷³

⁶⁶*Internight*, *supra* note 62.

⁶⁷*Id.*

⁶⁸*Gilmore*, 429 U.S. at 1015.

⁶⁹*Internight*, *supra* note 62. Journalist Lawrence Schiller interviewed Gilmore in prison for "The Executioner's Song," a movie based on Gilmore's death. Schiller explained that:

I sat across the hall, [Gilmore] was behind a door that had panes of glass. And I looked at him, and he was like playing with me. Because at this point, it was in December, and he was ready to be executed. And he loved holding court, you know, he loved having this attention. He loved it, and you know, the first thing he said to me, I think, at that time, was 'Who's going to play me in the movie?' He didn't even talk about anything else. *Id.*

Gilmore's prosecutor, Earl Dorius, explained his surprise at Gilmore's decision to waive his appeals. Dorius stated that:

Not only was I surprised, it was the manner in which I found about it. On November 1st, I get a call from the warden, who said he just had his transportation crew bring back an inmate on maximum security, and he didn't want to appeal. And I didn't think that was any big thing until he advised me that he was under a death sentence, and the sentence was to be carried out two weeks from there, November the 15th. And here it is November 1st, and the warden is trying to figure out, you know, how to put on an execution in two weeks. *Id.*

⁷⁰*Gilmore*, 429 U.S. at 1013.

⁷¹*Id.* at 1014-15 (Burger, J., and Powell, J., concurring).

⁷²*Id.* at 1016 (Burger, J., and Powell, J., concurring).

⁷³*Id.* at 1017 (Burger, J., and Powell, J., concurring).

A Utah jury convicted Gilmore in October 1976, and a mere three months later he was executed.⁷⁴ On the day of his execution, Gilmore's last words were "Let's do it."⁷⁵ What Gilmore in fact did was set a precedent for other death row "volunteers" to follow.

III. FOLLOWING IN GARY GILMORE'S FOOTSTEPS - OTHER "VOLUNTEERS" AND THE STATES WHO HAVE ABIDED BY THEIR WISHES

Over twenty years have passed since having our nation's first death row "volunteer." Today, many states will still allow a defendant to waive his remaining appeals, if found competent, and thus speed up his own execution process. In 1997 there were 74 executions in the United States,⁷⁶ but several of these executions probably would not have occurred so soon *but for* the fact that some defendants chose not to attack their conviction and sentence any longer.

A. Scott Dawn Carpenter

In early 1997, Scott Dawn Carpenter wrote a letter to the Oklahoma Supreme Court explaining why he wanted to have his remaining death sentence appeals waived, he said that: "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 appellant process, and I feel and want the punishment of death carried out as soon as possible."⁷⁷ Only five months later, Carpenter got his wish when he was executed by lethal injection.⁷⁸

Carpenter's death sentence resulted from his 1994 murder of a store owner.⁷⁹ Carpenter, after filling his truck with gas, entered into a small grocery and bait store in Porum Landing, Oklahoma.⁸⁰ He asked the owner for some minnows

⁷⁴*Internight, supra* note 62.

⁷⁵*Id.* Besides Gilmore's famous "Let's do it" quote, he also had other memorable passages. For example, in December 1976, he said:

I simply accepted my sentence that was given to me. I've accepted sentences all my life. I didn't know I had a choice in the matter. When I did accept it, everybody jumped up and wanted to start to argue with me. It seems that the people - especially the people of Utah, they want the death penalty, but they don't want executions. *Id.*

⁷⁶DIETER, INFORMATION CENTER, (March 4, 1999) *supra* note 2.

⁷⁷Jean Pagel, *Slain Man's Son Hopes for Answers Before Execution*, THE DAILY OKLAHOMAN, May 7, 1997, at 01.

⁷⁸Anthony Thornton, *State Fulfills Killer's Wish for Execution*, THE DAILY OKLAHOMAN, May 8, 1997, at 01.

⁷⁹Barbara Hoberock, *Killer Wants to Be Put to Death*, TULSA WORLD, Feb. 6, 1997, at A11. Carpenter entered a plea of no contest for the murder, and the trial judge determined that Carpenter's sentence should be death. *Id.*

⁸⁰*Id.*

and the two went to the back of the shop where the minnows were kept, and thereafter, Carpenter stabbed the owner in the neck.⁸¹

After Carpenter wrote his letter to the supreme court, the judge set a hearing date to determine whether Carpenter was competent to waive his appeals.⁸² At the hearing, Carpenter testified for about an hour defending his choice, and answering questions from the judge and attorneys about his mental and emotional status.⁸³ He indicated that the best he could hope for was commutation to life in prison and that he saw no future in spending 60 or 70 years locked up.⁸⁴ In legal briefs filed for this proceeding, a clinical psychologist opined that Carpenter had suffered a seizure in his brain at the time of the stabbing, and had a history of head injuries, but nevertheless the court found that Carpenter was competent, understood the choice between life and death, and knowingly waived his right to further appeals.⁸⁵ Thus, Carpenter's path to the execution chamber was cleared, and he later became, at the age of 22, the youngest person executed in the U.S. since 1976.⁸⁶

B. Benjamin Stone

Benjamin Stone, of Texas, also got his death wish fulfilled in 1997.⁸⁷ Stone strangled his ex-wife and his stepdaughter at their Corpus Christi home in 1995.⁸⁸ The day after Stone committed these horrific crimes, he called police from a pay phone at a highway rest stop and told the dispatcher of his killings.⁸⁹ When asked how he committed the killings, he replied: "With my hands."⁹⁰

⁸¹*Id.*

⁸²Thornton, *supra* note 78, at 01.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵Hoberock, *supra* note 79, at A11.

⁸⁶Thornton, *supra* note 78, at 01. Carpenter was declared dead at 12:22 a.m., May 8, 1997, shortly after a mix of chemicals entered his veins. *Id.* Carpenter made no final statement from the execution chamber. *Id.* The execution was witnessed by four relatives of Carpenter's victim. *Id.* The victim's son expressed doubts as to whether Carpenter comprehended what life and death meant; he stated "[a]t points, I've almost felt sorry for the guy, I think there's been times where we have looked for reasons to want to forgive him to some extent . . . to try to understand what happened here." Pagel, *supra* note 77, at 01.

⁸⁷Michael Graczyk, *Texas Executes Convicted Killer Benjamin Stone*, AUSTIN-AMERICAN STATESMAN, Sept. 26, 1997, at B4.

⁸⁸Associated Press, *Death Row Inmate Hoping to Get His Final Wish Today: Execution*, SAN ANTONIO EXPRESS-NEWS, Sept. 25, 1997, at 15A.

⁸⁹*Id.*

⁹⁰*Id.*

Stone told the dispatcher that he would be by his ex-wife's car, which is where he was in fact found and later arrested.⁹¹

From that day on, Stone advocated to be put to death.⁹² He offered no defense at his trial, and instead stood mute refusing to enter the not guilty plea his attorneys preferred.⁹³ A chemical dependency counselor testified that Stone had a history of drug and alcohol abuse, and that he had no ability to think rationally.⁹⁴ Despite this mitigating testimony, the jury took only seven minutes of deliberation to convict Stone, and only seven minutes to decide on his death sentence.⁹⁵

Thereafter, Stone refused legal help and did not want appeals filed on his behalf. He wrote letters to the judge, the court of criminal appeals, and also the Attorney General of Texas explaining his decision.⁹⁶ A few days before his execution, Stone was still satisfied with the course he had taken, asserting 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."⁹⁷ On September 26, 1997, Benjamin Stone got the peace of mind he hoped for, as he was executed after spending only 17 months on Texas's death row.⁹⁸

C. Wilford Lee Berry

Nineteen hundred and ninety seven was also the year in which Ohio's Wilford Berry was declared competent to waive his remaining appeals.⁹⁹ The circumstances surrounding Berry's life and case are compelling. When Berry was a baby, his father was committed to a state mental hospital for the criminally insane.¹⁰⁰ Berry's father claimed to have killed his family, and was

⁹¹*Id.*

⁹²Stone stated that: "From the day I turned myself in, I've said I wanted capital murder, I said I wanted the death penalty. I got it. And I said I wasn't going to fight for it. I was going to push for execution. And I got it." *Id.*

⁹³Associated Press, *supra* note 88, at 15A.

⁹⁴*Id.*

⁹⁵Graczyk, *supra* note 87, at B4.

⁹⁶*Id.* Stone said: "It took me a while to figure out how to [waive his appeals], I went through all of their games and here I am." *Id.*

⁹⁷Graczyk, *supra* note 87, at B4.

⁹⁸*Id.* Stone's 17 months on death row was the second shortest time a condemned Texas inmate has waited between conviction and execution. *Id.* Only convicted killer Joe Gonzales, imprisoned 252 days before execution in 1996, had a shorter stay on death row. *Id.* Gonzales, like Stone, volunteered for death. *Id.*

⁹⁹State v. Berry, 686 N.E.2d 1097 (Ohio 1997).

¹⁰⁰Lane, *supra* note 7, at 1A.

diagnosed with schizophrenia.¹⁰¹ Berry's mother was left to raise Berry and his two sisters, and they frequently moved from one Cleveland apartment to another.¹⁰² According to medical records, Berry's early childhood was marked by repeated sexual molestation and by beatings from his mother.¹⁰³

When Berry was 14 he was sent to an institution for children with severe emotional disturbances, and was diagnosed with 'severe schizoid personality disorder.'¹⁰⁴ While there, Berry often told staff psychologists that he wished he were dead.¹⁰⁵ Berry later left the institution and moved to Texas, where he was convicted of car theft and spent six years in prison.¹⁰⁶ Records from his incarceration in the Texas prison system indicate that Berry received psychiatric treatment after he said he was "hearing voices," seeing things and having delusions.¹⁰⁷ Berry was again diagnosed with various forms of schizophrenia.¹⁰⁸ After Berry's release, he moved to California, and then back to Cleveland where he was hired in late November of 1989 to wash dishes for an area bakery.¹⁰⁹

On Berry's second night working at the bakery, Berry and an accomplice waited for the owner (Berry's boss) to return from making deliveries to his customers.¹¹⁰ When the owner came back to the bakery, Berry's accomplice first shot the owner in the chest, and Berry then shot the owner in the head with a .22 gauge sawed-off rifle.¹¹¹ The two then took off in the owner's delivery van and looked for a spot to bury his body.¹¹² After burying the man's body and stealing his wallet, Berry and his accomplice were arrested three days later in Kentucky.¹¹³

In 1990, Berry was convicted at a jury trial for the murder of his former employer and was sentenced to death.¹¹⁴ Once his conviction and sentence

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵Lane, *supra* note 7, at 1A.

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.* Berry was diagnosed with "schizophreniform disorder," and "chronic undifferentiated schizophrenia" with delusions. *Id.*

¹⁰⁹*Id.*

¹¹⁰State v. Berry, 650 N.E.2d 433, 435 (Ohio 1995).

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Id.* at 436.

¹¹⁴State v. Berry, 686 N.E.2d 1097, 1098 (Ohio 1997).

were affirmed by the court of appeals and the Supreme Court of Ohio, Berry sought to terminate further challenges and submit to his execution.¹¹⁵ After he repeatedly explained to the supreme court and his public defenders that he wished to discontinue any further appellate litigation, the supreme court remanded the cause to the trial court with directions to: hold a hearing on the issue of Berry's competence to forego any and all challenges to his conviction and death sentence; to render findings of fact; and to return the case to the supreme court for further proceedings.¹¹⁶ In June 1997, the trial court conducted the hearing, which included testimony from several psychiatrists, and ultimately the judge found that Berry was competent to waive his appeals.¹¹⁷ Before the supreme court could determine whether it agreed with the trial court's findings, Berry was involved in a prison riot at the Mansfield Correctional Institution where he was being held.¹¹⁸ Subsequently, Berry's public defender filed a motion requesting that Berry's mental health be re-evaluated due to head injuries he suffered during the riot, but the supreme court denied the motion.¹¹⁹ Instead, the supreme court pressed Berry's cause forward and heard oral arguments in late September 1997.¹²⁰

The public defender argued that Berry was too mentally ill to fully comprehend the ramifications of his decision to waive his appeals,¹²¹ and that under the Ohio Constitution's 'cruel and unusual clause,' collateral review of all capital cases is required, regardless of the defendant's wishes and whether or not he is competent.¹²² The state, however, contended that Berry was competent to waive his appeals based on mental evaluations conducted by two psychiatrists.¹²³

In December 1997, the Supreme Court of Ohio rendered its opinion, concluding that Berry was competent to forego further challenges to his death sentence, and that the Ohio Constitution did not compel the court to force postconviction review upon a competent person, who for his own reasons, did

¹¹⁵*Id.*

¹¹⁶State v. Berry, 671 N.E.2d 1279 (Ohio 1996).

¹¹⁷State v. Berry, 686 N.E.2d 1097, 1099 (Ohio 1997); *See infra* note 193.

¹¹⁸Associated Press, *More Tests Sought on Death Row's 'Volunteer'*, PLAIN DEALER, Sept. 20, 1997, at 5B.

¹¹⁹State v. Berry, 686 N.E.2d 1071 (Ohio 1997). As a result of the riot, Berry suffered broken facial bones, a broken jaw, and was ultimately rendered unconscious. *Franklin v. Francis*, 144 F.3d 429, 431 (6th Cir. 1998). The public defender argued that Berry's mental condition should be re-examined due to the trauma to Berry's head. *Id.* at 432.

¹²⁰State v. Berry, 686 N.E.2d 1097 (Ohio 1997).

¹²¹*Id.* at 1103.

¹²²*Id.* at 1108.

¹²³*Id.* at 1099.

not seek it.¹²⁴ The court reasoned that based on the psychiatric evidence, Berry had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation."¹²⁵ The court also asserted that the public defender's reading of the Ohio Constitution's 'cruel and unusual clause' "reflects a radical paternalism outside the mainstream of American law and inconsistent with the human dignity of a competent adult."¹²⁶ Berry had three Ohio appeals and three federal appeals remaining.¹²⁷

D. From Furman to Berry

After the United States Supreme Court's decision in *Gregg*, it is clear that in order for a death penalty statutory scheme to be constitutional "some form of meaningful appellate review is required."¹²⁸ Today, every state, except Arkansas,¹²⁹ requires at least one mandatory non-waivable appeal, usually to the state supreme court.¹³⁰ But, beyond this initial appeal it is evident through the examples in Oklahoma, Texas, and now Ohio, that many states will allow a defendant to waive any remaining appeals if found competent.¹³¹ Given this fact, the standards and procedures for determining the defendant's competency must be critically analyzed to determine whether they adequately safeguard against *Furman's* prohibition of an "arbitrary" or "capricious" execution.

¹²⁴*Id.*

¹²⁵*Berry*, 686 N.E.2d at 1108.

¹²⁶*Id.* at 1107.

¹²⁷Sandy Theis, *Berry to Taft: Let Me Die*, PLAIN DEALER, Feb. 18, 1999, at 1A. The following description is in no way meant to detail the complexity of the death penalty appeals process in Ohio. Generally speaking, Berry waived his state postconviction appeals, which would have included: a decision by the original trial court, the Court of Appeals, and the Ohio Supreme Court. Berry also waived his Federal Habeas Corpus appeals, which would have included: a decision by the U.S. District Court, the U.S. 6th Circuit Court of Appeals, and the United States Supreme Court. *Id.*

¹²⁸*Gregg v. Georgia*, 428 U.S. 153, 198, 204-06 (1976).

¹²⁹*Franz v. State*, 754 S.W.2d 839, 847 (Ark. 1988). The Arkansas Supreme Court is the only state high court that has held that a competent capital defendant's waiver of his appeal precludes appellate review entirely. *Id.* But, Gary Gilmore is the only person who has actually been executed without any appellate review. *Gilmore v. Utah*, 429 U.S. 1012 (1976). Following Gilmore's execution, the state of Utah instituted at least some mandatory appellate review. UTAH CODE ANN. § 76-3-206(2) (1978).

¹³⁰JAMES J. STEPHAN & PETER J. BRIEN, U.S. DEPT OF JUSTICE, CAPITAL PUNISHMENT 1993, at 6, (1993).

¹³¹There are numerous other states that will allow a competent defendant to waive his death row appeals. *See State v. Clarke*, 672 A.2d 1004 (Del. 1995); *State v. Brewer*, 826 P.2d 783 (Ariz. 1992); *State v. Dodd*, 838 P.2d 86 (Wash. 1992); *State v. Torrence*, 451 S.E.2d 883 (S.C. 1994); *Judy v. State*, 416 N.E.2d 95 (Ind. 1981); *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993).

IV. STANDARDS FOR COMPETENCY TO WAIVE FURTHER DEATH SENTENCE
APPEALS ESTABLISHED

A. *The 'Rees Standard'*

In the United States Supreme Court's 1966 decision in *Rees v. Peyton*, the Court announced the basic standard to determine whether a defendant is competent to waive appeals of his death sentence.¹³² After the defendant in *Rees* was convicted of murder and sentenced to death by a Virginia state court, a series of appeals followed.¹³³ Ultimately, the defendant filed a petition to the U.S. Supreme Court seeking review of a federal court judgment denying habeas corpus relief.¹³⁴ Thereafter, the defendant decided to withdraw his petition, and forego any further challenges to his conviction and sentence.¹³⁵

The Supreme Court ordered the federal district court to determine the defendant's mental competence to make such a decision.¹³⁶ The Court asserted that the proper inquiry is "whether he 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 which may substantially affect his capacity in the premises."¹³⁷ Beyond this instruction, the Supreme Court gave little guidance as to exactly how the lower court should proceed in determining whether this standard was met,¹³⁸ and seemingly assumed that the lower court would decide for itself.¹³⁹

B. *The 'Gilmore Standard'*

In the Supreme Court's 1976 decision in *Gilmore v. Utah*, the Court presumably had the opportunity to expand, or more fully explain, its prior standard for competence announced in *Rees*.¹⁴⁰ Instead, the Supreme Court determined that Gary Gilmore was competent to waive his death sentence

¹³²*Rees v. Peyton*, 384 U.S. 312 (1966).

¹³³*Id.* at 313.

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Id.*

¹³⁷*Rees*, 384 U.S. at 314.

¹³⁸*Id.* The Supreme Court merely stated that "it will be appropriate for the District Court to subject Rees to psychiatric and other appropriate medical examinations . . ." *Id.*

¹³⁹*Id.* The Supreme Court plainly asserted that "The District Court will hold such hearings as it deems suitable, allowing the State and other interested parties to participate should they so desire . . ." *Id.*

¹⁴⁰*Gilmore v. Utah*, 429 U.S. 1012 (1976).

appeals without even making reference to the 'Rees Standard.'¹⁴¹ The Court, issuing only a brief Order, simply reasoned that Gilmore was competent to do so because it was "convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed, and, specifically, that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded."¹⁴²

It could be argued that the Court even retracted from its prior 'Rees Standard' for competence, and instead applied only a "knowing and intelligent" standard in *Gilmore*. The problem with determining exactly what jurisprudence came out of the *Gilmore* decision stems from the fact that the Court ultimately determined it was without jurisdiction to fully examine the issues surrounding Gilmore's decision to forego his appeals.¹⁴³

C. The 'Rumbaugh Version' of the 'Rees Standard'

In 1985, the U.S. Court of Appeals for the Fifth Circuit attempted, in *Rumbaugh v. Procnier*, to make the Supreme Court's 'Rees Standard' into a more manageable inquiry.¹⁴⁴ The Court of Appeals broke down the standard into the following series of questions:¹⁴⁵

1. Is the person suffering from a mental disease or defect?
2. If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?
3. If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?¹⁴⁶

¹⁴¹*Id.*

¹⁴²*Id.* at 1013.

¹⁴³*Id.* at 1016-17 (Burger, J., and Powell, J., concurring). Bessie Gilmore, the defendant's mother, attempted to intervene on her son's behalf because she believed her son was incompetent to decide to forego his appeals. *Gilmore*, 429 U.S. at 1013. The Court agreed with the evidentiary findings that Gilmore was competent, and thus held that Bessie Gilmore was without standing to petition the Court. *Id.* at 1016-17 (Burger, J., and Powell, J., concurring). Without her standing, the Court was without jurisdiction to address any further issues that Gary Gilmore's situation raised. *Id.* at 1017. One issue that was precluded was raised by Justice White when he suggested that Gilmore is "unable as a matter of law to waive his right to state appellate review." *Id.* at 1017-19 (White, J., dissenting).

¹⁴⁴*Rumbaugh v. Procnier*, 753 F.2d 395 (5th Cir. 1985).

¹⁴⁵*Id.* at 398.

¹⁴⁶*Id.*

The Court of Appeals reasoned that if the answer to 1.) is 'no,' the person is competent to waive further appeals.¹⁴⁷ If the answer to both 1.) and 2.) are 'yes,' then the person is incompetent.¹⁴⁸ If the answer to 1.) is 'yes' and the answer to 2.) is 'no' then 3.) is determinative; if 3.) is 'yes' the person is incompetent, if 3.) is 'no' the person is competent.¹⁴⁹ The Court of Appeals applied this reformed 'Rees Standard,' and held that despite the condemned inmate's mental illness, he did not lack the requisite mental competence to waive his further appeals.¹⁵⁰

The U.S. Supreme Court denied a petition for writ of certiorari to review the Court of Appeals decision in *Rumbaugh*,¹⁵¹ thus not addressing the Fifth Circuit's alteration of the 'Rees Standard'. Subsequently, other courts have relied on the 'Rumbaugh version' of the 'Rees Standard' to determine whether defendants before them are competent to waive death sentence appeals.¹⁵²

D. The 'Arkansas Standard'

In *Whitmore v. Arkansas*, the United States Supreme Court was again faced in 1990, as it was in *Gilmore* in 1976, with a third party seeking to prevent the execution of a capital defendant who waived his appeals.¹⁵³ The Arkansas Supreme Court previously held that a defendant sentenced to death could forego his appeals "only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence."¹⁵⁴ The state supreme court applied this standard to the defendant and determined that he possessed the requisite competence to do so.¹⁵⁵

In considering whether to grant the third party standing to challenge the defendant's prior waiver, the U.S. Supreme Court concluded that one necessary condition is that the third party demonstrate that the defendant is unable to litigate on his own behalf because of mental incapacity.¹⁵⁶ The Court further explained that "standing is not satisfied where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹*Rumbaugh*, 753 F.2d at 398.

¹⁵⁰*Id.* at 403.

¹⁵¹*Rumbaugh v. McCotter*, 473 U.S. 919 (1985).

¹⁵²*See In re Cockrum*, 867 F. Supp. 484, 485-86 (E.D. Tex. 1994).

¹⁵³*Whitmore v. Arkansas*, 495 U.S. 149 (1990). The third party seeking intervention was Jonas Whitmore, a fellow death row inmate of the defendant, Ronald Simmons. *Id.*

¹⁵⁴*Id.* at 152 (citing *Franz v. State*, 754 S.W.2d 839, 843 (Ark. 1988)).

¹⁵⁵*Id.* at 153 (citing *Simmons v. State*, 766 S.W.2d 422 (Ark. 1989)).

¹⁵⁶*Whitmore*, 495 U.S. at 165.

his right to proceed."¹⁵⁷ The Court was convinced that the evidentiary hearing the state of Arkansas conducted was sufficient to show the defendant's competence; thus, the third party was unable to meet the prerequisites for standing.¹⁵⁸

In *Whitmore*, the Court clearly accepted Arkansas's finding that the defendant was competent. However, several states interpreted the Court's opinion as also affirming Arkansas's standard for competency, and thereafter incorporated the 'Arkansas Standard' as their own state standard for competency.¹⁵⁹ The Court has never indicated whether it concurs in this approach. Instead, it has left the states with a confusing and conflicting line of cases concerning the standard to determine a defendant's competency to waive death penalty appeals. The states have been left to choose which standard they consider is best, or to create their own. As the next section demonstrates, states that adopt the 'Rees Standard' or the 'Arkansas Standard' must realize the problem that each poses.

E. Confusion Inherent in the 'Rees Standard'

In his dissent to the Fifth Circuit's majority opinion in *Rumbaugh*, Judge Goldberg asserted that the major problem with using the 'Rees Standard' for competence is that it hinges on whether the defendant can make a "rational choice," yet the Supreme Court left the meaning of rationality undefined.¹⁶⁰ Judge Goldberg explained that courts should evaluate whether the defendant has made a "rational choice with respect to continuing or abandoning his appeals" by looking at two elements.¹⁶¹ First, rational choice requires that a person choose means that relate logically to his ends.¹⁶² Second, rational choice requires that the ends of his actions are his ends, or in other words, that the defendant's choice is an 'autonomous' one.¹⁶³ Under *Rees*, if a defendant has a mental disease or defect that impairs his judgment, it may be logical to him to opt for the death penalty and waive his appeals. But, in this situation, if the

¹⁵⁷*Id.*

¹⁵⁸*Id.* Justice Rehnquist explained in the Court's majority opinion that "At oral argument, *Whitmore's* counsel questioned the validity of the waiver, but we find no reason to disturb the judgment of the Supreme Court of Arkansas on this point." *Id.*

¹⁵⁹See *State v. Dodd*, 838 P.2d 86, 97 (Wash. 1992); See *Grasso v. State*, 857 P.2d 802, 806 (Okla. 1993).

¹⁶⁰*Rumbaugh v. Procunier*, 753 F.2d 395, 404 (5th Cir. 1985). Judge Goldberg dissented from the majority's conclusion that the defendant was competent. *Id.* He described the meaning of "rationality" as "one of the most vexing and debated questions of contemporary philosophy . . . this black hole [the meaning of rationality] makes the *Rees* standard of competency far from self evident." *Id.*

¹⁶¹*Id.* (Goldberg, J., dissenting).

¹⁶²*Id.* (Goldberg, J., dissenting).

¹⁶³*Id.*

defendant's choice to waive his appeals would not have been made *but for* his mental illness, then this is not an *autonomous* choice and the defendant should fail the 'Rees Standard' for competence. In other words, the defendant's decision must not be controlled or coerced by a mental illness, and it must be made entirely out of his own free will.

Although the Fifth Circuit majority attempted to modify the 'Rees Standard' into a more manageable inquiry, the court still misapplied the standard in *Rumbaugh*. Here, four out of five doctors who examined the defendant found that: the defendant suffered from severe depression,¹⁶⁴ the defendant believed there was no hope of successful treatment which would reduce his discomfort,¹⁶⁵ and that if the defendant's medical situation were different, he might reach a different decision about continuing his appeals.¹⁶⁶ One of the psychiatrists opined that ". . . his [defendant's] own psychological pain may act as a coercive force that influences him not to want to . . . live in his current condition for an additional . . . six years to exhaust his further appeals . . ." ¹⁶⁷ Despite these findings, the court held that the defendant was competent.¹⁶⁸ The majority believed that Rumbaugh made a rational decision to waive his appeals because in the defendant's view he had one of two choices - either wait for a long time in prison and suffer with his intolerable illness, or waive his appeals and end his suffering.¹⁶⁹ Thus, in the court's view the defendant's choice to end his appeals was a logical one.¹⁷⁰

If courts are going to use the 'Rees Standard,' they must differentiate between a defendant's *logical choice*, which can be reflected in a realistic appreciation of one's legal and/or psychological status, and a defendant's *rational decision*, which by definition contemplates a goal that is the product of one's free will.¹⁷¹ The Fifth Circuit failed to make such a differentiation in *Rumbaugh*. The majority discounted the psychiatric evidence that demonstrated the defendant's mental disease substantially affected his ability to make an autonomous decision as to whether to waive his capital appeals. The defendant's decision to waive appeals may have been logical given his dire legal situation, but it was not rational because his mental condition obliterated and colored his free will.

¹⁶⁴*Id.* at 403 (Goldberg, J., dissenting).

¹⁶⁵*Rumbaugh*, 753 F.2d at 402.

¹⁶⁶*Id.*

¹⁶⁷*Id.* at 400.

¹⁶⁸*Id.* at 403.

¹⁶⁹*Id.* at 402.

¹⁷⁰*Rumbaugh*, 753 F.2d at 402.

¹⁷¹*Id.* at 405 (Goldberg, J., dissenting).

F. Problem With Using the 'Arkansas Standard'

In *Whitmore*, the Supreme Court made quite clear what issues it was deciding and not deciding. The Court expressly stated at the end of its opinion that it did not determine "whether a hearing on mental competency is required by the United States Constitution whenever a capital defendant desires to terminate further proceedings."¹⁷² The Court did however focus the majority of its opinion on "whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forego his right of appeal."¹⁷³ The Court decided that such 'standing' was not met in the case before it because the state of Arkansas had previously conducted a hearing and concluded that the defendant was competent.¹⁷⁴

The problem with adopting the 'Arkansas Standard' for competence is that it does not necessarily follow that just because the Court determined that the petitioner did not have standing, the Court also must have accepted the 'Arkansas Standard' for competency. It is not clear whether the Court accepted or rejected the 'Arkansas Standard,' but what is clear is that it simply left the standard undisturbed.¹⁷⁵ The Court obviously knows the influence its opinions have over the states' administration of the death penalty, so, if the Court intended to endorse the 'Arkansas Standard,' surely the Court would have expressly stated so. Instead, the Court devoted the first five pages of its majority opinion to the facts and procedural status of the case before it, and the last twelve pages of its majority opinion to issues and case precedent regarding 'standing' and its application to the Court's jurisdiction.¹⁷⁶ Therefore, if states adopt the 'Arkansas Standard,' they should not attempt to justify the standard's use based on the Court's analysis and acceptance of the standard in *Whitmore*. The fact of the matter is, there simply was no constitutional analysis of the 'Arkansas Standard' in *Whitmore*.

The appropriate standard for competency to waive death sentence appeals is unsettled. Until the Supreme Court more clearly defines the parameters of 'Rees', or expressly adopts another standard, the states will be left unguided with regard to determining whether a "volunteer's" waiver of appeals is consistent with the Constitution.

V. PROCEDURES TO DETERMINE COMPETENCY ESTABLISHED

While the Supreme Court's standard to determine competency for waiver of death penalty appeals is inadequate, the Court's procedures for making this determination are non-existent. In *Hamilton v. Texas*, four Members of the Court

¹⁷²*Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990).

¹⁷³*Id.* at 149.

¹⁷⁴*Id.* at 165.

¹⁷⁵*Id.*

¹⁷⁶*Id.* at 149-66.

voted to grant certiorari to review James Edward Smith's death sentence, but because the four could not garner one more vote, certiorari was denied.¹⁷⁷ Justice Brennan, joined by Justice Marshall, wrote a strong dissenting opinion to the Court's denial because the procedures necessary to make a competency determination were again left unresolved.¹⁷⁸

The lower courts had affirmed Smith's competency to waive his appeals, but, thereafter, his mother petitioned the Supreme Court to reconsider the competency of her son.¹⁷⁹ Justice Brennan was critical of the Court's denial of certiorari, asserting that "I believe that we shirk our responsibility if we do not articulate standards by which the adequacy of procedures in state competency hearings may be judged."¹⁸⁰ Justice Brennan realized that in *Whitmore v. Arkansas* the Court "did not have occasion in that case to decide the procedures that are required when a state court determines that a prisoner is competent to forgo further appeals in his case."¹⁸¹

Justice Brennan was appalled by the state trial court's hearing to determine Smith's competency for several reasons. First, the hearing was conducted without notice to Smith's mother, who had previously appeared on her son's behalf.¹⁸² Second, Smith was unrepresented by counsel at the hearing.¹⁸³ Third, there was no cross-examination during the hearing.¹⁸⁴ Fourth, no evidence was received at the hearing beyond the "bare" reports of a county psychiatrist and county psychologist.¹⁸⁵ Justice Brennan explained that these doctors did not perform psychological tests on Smith, and were not given access to several reports of the history of Smith's mental illness.¹⁸⁶ Justice Brennan concluded

¹⁷⁷*Hamilton v. Texas*, 497 U.S. 1016 (1990) (Brennan, J., and Marshall, J., dissenting from the Court's denial of certiorari).

¹⁷⁸*Id.*

¹⁷⁹*Id.* at 1017 (Brennan, J., dissenting).

¹⁸⁰*Id.* at 1016 (Brennan, J., dissenting).

¹⁸¹*Id.*

¹⁸²*Hamilton v. Texas*, 497 U.S. at 1016 (Brennan, J., dissenting).

¹⁸³*Id.* Although the trial judge had arranged for an attorney to be present in the event that Smith wished to consult one, the trial judge stated that "I'm not going to force a lawyer to represent you." *Id.* After Smith indicated that he did not wish to speak with an attorney, that was the end of the matter. *Id.* at 1017 (Brennan, J., dissenting).

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶*Id.* The doctors were unaware of the fact that Smith had been found not guilty by reason of insanity for a prior Florida robbery. *Hamilton*, 497 U.S. at 1018 (Brennan, J., dissenting). Other evidence of Smith's mental status that the doctors did not see included: Smith's attempted suicide and subsequent psychiatric care, the fact that he suffered several head injuries in car accidents and falls, symptoms of neurological damage and organic brain damage, and diagnoses for paranoid schizophrenia. *Id.* at 1018 n.*.

that Smith's case "presents the important legal question of the procedures required to determine the competence of a prisoner to forgo further appeals, a question which has relevance both for state courts and federal courts."¹⁸⁷

As a result of the United States Supreme Court's lack of initiative to first, clearly define a competency standard, and second, to address the procedures that need to be implemented to make this determination, states are left to determine whether a defendant is competent to waive his death row appeals without any uniform constitutional parameters in place.

VI. STATE STANDARDS FOR COMPETENCY AND THE PROCEDURES UTILIZED TO DETERMINE COMPETENCY

A. Ohio

The standard Ohio used to determine Wilford Berry's competency reflects a more specific definition of the general terms used in *Rees*.¹⁸⁸ The Supreme Court of Ohio articulated the standard as follows:

A capital defendant is mentally competent to abandon any and all challenges to his death sentence if he has the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue further remedies. The defendant must fully comprehend the ramifications of his decision, and must possess the 'ability to reason logically,' i.e. to choose 'means which relate logically to his ends.'¹⁸⁹

The supreme court ordered that the trial court apply this standard and conduct an evidentiary hearing to determine whether it was met.¹⁹⁰ The supreme court explained that the trial court should consider the report of a previously appointed doctor, and also any other relevant evidence or testimony.¹⁹¹ The supreme court permitted both the state and public defender to participate in the hearing, and ordered that Berry have separate counsel appointed if he so desired.¹⁹² This was the extent of explanation the supreme court gave with regard to the procedures required to conduct Berry's competency hearing.

The trial judge found that Berry was competent after hearing testimony from four experts—two who testified for the state, and two who testified for the

¹⁸⁷*Id.* at 1019 (Brennan, J., dissenting).

¹⁸⁸*State v. Berry*, 686 N.E.2d 1097, 1101 (Ohio 1997).

¹⁸⁹*Id.* at 1098.

¹⁹⁰*State v. Berry*, 671 N.E.2d 1279 (Ohio 1996).

¹⁹¹*Id.*

¹⁹²*Id.*

public defender.¹⁹³ The trial judge also based her conclusion on her observations of Berry, and her extensive colloquy with Berry.¹⁹⁴ The Supreme Court of Ohio agreed with the trial court's determination that Berry met the standard for competence.¹⁹⁵

B. South Carolina

South Carolina determined that its standard for 'competency to waive further death row appeals' should be the same standard it uses to determine 'competency to be executed.'¹⁹⁶ South Carolina's standard is as follows: "whether the defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, and whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel."¹⁹⁷ In announcing the standard, the state supreme court explained that the test is not whether the defendant in fact cooperates with counsel, but whether he has sufficient mental capacity to do so.¹⁹⁸ The supreme court asserted that this standard was more stringent than the 'Arkansas Standard.'¹⁹⁹

¹⁹³State v. Berry, 686 N.E.2d 1097, 1099 (Ohio 1997). The experts who testified at Berry's competency hearing are as follows. Dr. Phillip J. Resnick testified for the state about his evaluation of Berry which occurred in April 1996. *Id.* at 1098. Dr. Resnick opined that Berry was competent to waive his appeals, although he diagnosed Berry with a mixed personality disorder, with schizotypal, borderline, and antisocial features. *Id.* at 1102. Dr. Resnick explained that "the consistency of Berry's desire to drop his appeals and be executed indicates that this desire is not the result of any transitory mental state." *Id.* at 1103. Dr. Resnick interviewed Berry for about three hours and reviewed reports of his mental health history. *Berry*, 686 N.E.2d at 1102. Dr. Robert W. Alcorn also testified for the state and concurred with Dr. Resnick that Berry was competent. *Id.* Dr. Alcorn interviewed Berry for about an hour and a half, but did not review any materials concerning Berry's mental health history. *Id.* The public defender relied on testimony from Dr. Sharon L. Pearson, who interviewed Berry on three different occasions, administered several psychological tests, and reviewed an extensive amount of materials on Berry's mental history. *Id.* Dr. Pearson concluded that based on the "clinical definition of competence" Berry was incompetent. *Berry*, 686 N.E.2d at 1102. Dr. Jeffrey L. Smalldon also testified for the public defender and explained how having "schizotypal personality disorder" would affect one's competence. *Id.* at 1099.

¹⁹⁴*Id.*

¹⁹⁵*Id.* at 1106.

¹⁹⁶State v. Torrence, 451 S.E.2d 883, 884 (S.C. 1994). Michael Rian Torrence was convicted of armed robbery, burglary, and two counts of murder. *Id.* at 883. Torrence was sentenced to death, but the sentence was later reversed and remanded for a new sentencing proceeding. *Id.* Torrence was then resentenced to death, and he thereafter requested to waive any further appeals. *Id.*

¹⁹⁷*Id.* at 884.

¹⁹⁸*Id.* at 884 n.2.

¹⁹⁹*Id.*

The state supreme court also outlined the procedures that the trial court should follow in determining the defendant's competence.²⁰⁰ The trial court is to conduct a full evidentiary hearing allowing the introduction of testimony, exhibits, and evidence, to provide for a full record for the supreme court's evaluation, and in addition must conduct an in-depth colloquy with the defendant.²⁰¹

C. Oklahoma

When Thomas Grasso decided he wanted to waive his death row appeals, the highest Oklahoma state court adopted the 'Arkansas Standard' to determine his competency (i.e. "a defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence."²⁰²

To determine whether this standard was met, the Oklahoma Supreme Court ordered the trial court to hold a hearing.²⁰³ In deciding that the defendant was in fact competent, the supreme court relied on the findings of this hearing, along with several other factors. First, the supreme court relied on the reports of a psychologist who interviewed the defendant prior to the defendant's guilty plea.²⁰⁴ The court also took into account the affidavits filed by defendant's counsel which expressed that they had fully informed the defendant of his appellate rights and the consequences of waiving them, and that they believed their client was competent.²⁰⁵ The supreme court further took notice of the fact that "[t]he trial court's inquiry to ascertain the petitioner's competency began

²⁰⁰*Id.* at 884.

²⁰¹*Torrence*, 451 S.E.2d at 884. At Torrence's competency hearing, the trial court found that Torrence was in fact competent. *State v. Torrence*, 473 S.E.2d 703 (S.C. 1996). The Supreme Court of South Carolina then reviewed the trial court's decision and agreed that the defendant, Michael Rian Torrence, was competent to waive his death row appeals. *Id.*

²⁰²*Grasso v. State*, 857 P.2d 802, 806 (Okla. 1993). On December 24, 1990, Thomas Joseph Grasso went to the home of an 87-year old woman, with the intent to rob her. *Id.* at 804. Grasso knocked on the door and pushed his way in. *Id.* Thereafter, Grasso took an extension cord from the Christmas tree and choked the woman, and also struck her several times. *Id.* Grasso, believing she was dead, took a few dollars and a T.V. set, and he left. *Grasso*, 857 P.2d at 804. Later Grasso pled guilty, waived his right to have a jury determine punishment, and also refused to present evidence in mitigation during the sentencing stage. *Id.* Grasso then requested that there be no appeal of his guilty plea and sentence. *Id.* at 805. The Supreme Court of Oklahoma determined that sentence review was mandatory, but that Grasso could waive further appeals. *Id.* at 806, 808.

²⁰³*Id.*, at 807.

²⁰⁴*Id.* at 806.

²⁰⁵*Id.* at 806-07.

at the outset of the proceedings" and this included "repeated questions posed to the petitioner regarding his understanding of the proceedings."²⁰⁶

D. Washington

In *State v. Dodd*, the Washington Supreme Court also adopted the 'Arkansas Standard' for competency.²⁰⁷ The court, like the Oklahoma Supreme Court, chose the standard under the assumption that the U.S. Supreme Court "approved" it in *Whitmore v. Arkansas*.²⁰⁸

After Wesley Allan Dodd was convicted of three aggravated murders and sentenced to death, he objected to any appeals beyond the state's mandatory sentence review.²⁰⁹ To determine whether Dodd met the standard for competency to waive his further appeals, the supreme court ordered that the trial court conduct a fact-finding hearing.²¹⁰ Beyond this general procedure, the supreme court redesignated Dodd's prior attorneys as amici curiae and appointed new counsel to represent him during his competency hearing.²¹¹ When the supreme court reviewed the trial court's findings, it emphasized that several components of the trial court's hearing were beneficial in determining Dodd's competency. For one, the supreme court relied on the expert testimony of two doctors who opined that Dodd was not suffering from any psychosis which would effect Dodd's decision; furthermore, the court pointed out that no contrary evidence was presented.²¹² Second, the high court put weight on

²⁰⁶*Id.* at 806.

²⁰⁷*State v. Dodd*, 838 P.2d 86, 97 (Wash. 1992).

²⁰⁸*Id.*

²⁰⁹*Id.* at 90. Dodd addressed the court as follows:

The jury went out of its way in attempting to find a mitigating factor to merit leniency, but they found nothing and made the only possible decision according to the statutes of Washington. There is no reason to waste . . . time and money on what I firmly believe would be useless appeals. I again ask that I be allowed to waive all waivable rights to appeal and that the mandatory proportionality review be heard in a timely manner. *Id.*

²¹⁰*Id.*, at 90.

²¹¹*Id.* Dodd's prior attorneys were redesignated as amici curiae presumably because the court believed they could not ethically advocate for their client's position any longer (i.e. that Dodd was competent and thus able to waive his appeals). Instead, as amici curiae, they argued that allowing Dodd to limit the scope of his appeals would violate the Eighth Amendment's ban on cruel and unusual punishment. *Id.* at 92.

²¹²*Dodd*, 838 P.2d at 90-91. The two doctors both opined that Dodd was suffering from "pedophilia", but concluded that Dodd understands the consequences if he waives his right to appeal. *Id.*, at 90-91. A social worker, who had met Dodd on several occasions, also testified that Dodd was competent and that he was "coherent, oriented, intelligent, and . . . free of psychosis, delusions, or hallucinations." *Id.* at 91.

the fact that the trial court had the opportunity to closely observe Dodd's demeanor.²¹³ Third, Dodd was allowed to testify at the hearing,²¹⁴ and also was allowed to introduce evidence that was excluded at his trial.²¹⁵ Finally, Dodd's newly appointed attorney was allowed to testify during the proceeding, and the supreme court took notice of the fact that he stated that Dodd had made a rational decision.²¹⁶

After examining the previous states' standards and procedures for determining a condemned inmate's competency to waive further appeals, it is clear that because the U.S. Supreme Court has not instituted adequate constitutional guidelines, the states have had to proceed on an ad hoc basis. In the previous examples in Ohio, South Carolina, Oklahoma, and Washington, all of the defendants received some form of hearing to determine whether the state's standard for competency was met. Beyond this, the states' processes for making such a determination varied. In these states, and others, questions arise as to: whether the burden should be on the state or the defendant, whether it is constitutional for a state to use its competency to be executed standard to determine a defendant's competency to waive appeals, and whether a mental evaluation made *before* trial can be relied upon to determine the defendant's current mental competence to waive appeals. Finally, what happens to the adversarial nature of a proceeding when both the defendant's attorney *and* the state advocate that the defendant is competent to waive his appeals? The previous mentioned states struggled with some of these important questions. In fact, after Wilford Berry was found competent by the trial court, the Ohio Supreme Court's chief deputy clerk was asked what would happen next, she replied, "[w]e don't have any rules or procedures that apply . . . We have no way of knowing what the [Ohio Supreme Court] will do."²¹⁷

Due process is of paramount concern in this context because when a defendant is allowed to waive his appeals, he expedites, and may render certain, the imposition of death. The Supreme Court has not provided the states with much criteria of just what type of process, under the Eighth and Fourteenth Amendments, is *due* to a death row "volunteer".

²¹³*Id.*, at 97.

²¹⁴*Id.* at 91. Dodd asserted at his competency hearing that he understood he could die if he waived his right to appeal, and thus gave his decision a lot of thought. *Id.* Dodd concluded that he would rather die than live his life in a cell. *Id.*

²¹⁵*Id.* at 91. The supreme court believed this material confirmed that Dodd appreciated the consequences of his waiver. *Id.*

²¹⁶*Id.*

²¹⁷Paul Souhrada, *State Says Grant Killer His Request - Death*, PLAIN DEALER, July 25, 1997, at 5B.

VII. QUESTIONS/PROBLEMS CONCERNING THE PROCEDURES UTILIZED TO
DETERMINE A "VOLUNTEER'S" COMPETENCY

*A. Balancing the Defendant's Personal Interest With Society's Interest in
Meaningful Appellate Review*

The United States Supreme Court has consistently asserted in its death penalty jurisprudence that there is a need for special care and deliberation in decisions that may lead to the imposition of death.²¹⁸ In *Gregg*, the Court acknowledged that part of this special care includes some form of meaningful appellate review.²¹⁹ Appellate review in a capital punishment sentencing scheme serves two important fundamental interests.²²⁰ First, it serves the individual defendant's interest in having a safeguard against suffering 'cruel and unusual punishment.'²²¹ Second, it serves to protect society's interest in ensuring that the "coercive power of the State is not employed in a manner that shocks the community's conscience or undermines the integrity of our criminal justice system."²²²

Assuming that a defendant may waive his own interest in appellate review, because it is fundamentally 'personal' in nature,²²³ the question arises as to what happens to society's interest. In other words, how can society's need for assurance that the death penalty not be imposed arbitrarily possibly be fulfilled if the defendant waives appellate review? The answer lies in what replaces appellate review when the defendant requests to waive his interest. Competency proceedings ultimately replace appellate review. Thus, these proceedings must adopt adequate safeguards so that public confidence in our capital punishment system is not undermined. If society is assured that these proceedings will only allow the *truly* competent to waive appellate rights, then its interest can also be served.

²¹⁸See *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring); See *Zant v. Stephens*, 462 U.S. 862, 884 (1983) ("Because there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

²¹⁹*Gregg v. Georgia*, 428 U.S. 153, 198, 204-06 (1976).

²²⁰*Whitmore v. Arkansas*, 495 U.S. 149, 171-72 (1990) (Marshall, J., dissenting).

²²¹*Id.*

²²²*Id.*

²²³*State v. Berry*, 686 N.E.2d 1097, 1107 (Ohio 1997) ("Surely there is nothing in the plain English of the clause [the Eighth Amendment's prohibition against cruel and unusual punishment] that forbids a mentally competent person to waive those rights. The Public Defender's reading of the clause reflects a radical paternalism outside the mainstream of American law and inconsistent with the human dignity of a competent adult.").

B. Procedures that Should Be Adopted in State Competency Hearings

A proceeding to determine whether a defendant is competent to waive his death row appeals should adopt the following six elements. First, the supreme court of the state must direct the trial court to conduct a hearing, and then must review the trial court's findings. This allows the trial court to make a determination of fact, and then permits the supreme court to determine whether correct standards of law were applied. Such a process ensures that at least two independent bodies review a defendant's competence.

Second, before the competency hearing takes place, a court-appointed mental health professional must conduct a separate independent evaluation to specifically determine the defendant's competency to waive appeals.²²⁴ This evaluation should address the defendant's ability to comprehend his own death.²²⁵ The examiner should also determine whether the defendant understands all of his options and that his perception of those options is rational, coherent, and based on reality.²²⁶ The defendant's mental health history and I.Q. should be closely scrutinized, as should any paranoid or suicidal tendencies which distort the defendant's ability to make a rational decision.²²⁷

Third, the competency hearing must be adversarial in nature so that the court has the substantial benefit of probative information.²²⁸ The defendant's counsel may not be able to fulfill this requirement because arguing that her client is incompetent goes against her client's wishes.²²⁹ Thus, to provide for a true adversarial atmosphere, the court must consider assigning independent counsel to the defendant.

To further facilitate the adversarial nature of the proceedings, both the state and the defendant's counsel must be allowed to introduce their own expert testimony, followed by cross-examination of these experts.²³⁰ The purposes of the cross-examination, as Justice Brennan has pointed out, should be for:

[b]ringing to light the bases for each expert's beliefs, the factors that underlie those beliefs, any history of error on the expert's part, any personal bias the expert may have with respect to capital punishment,

²²⁴Grasso v. State, 857 P.2d 802, 813 (Okla. 1993) (Chapel, J., concurring).

²²⁵*Id.* at 812.

²²⁶*Id.*

²²⁷*Id.*

²²⁸Hamilton v. Texas, 497 U.S. 1016, 1018 (1990) (Brennan, J., dissenting).

²²⁹Richard C. Dieter, Note, *Ethical Choices For Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799 (1990).

²³⁰Hamilton v. Texas, 497 U.S. 1016, 1019 (1990) (Brennan, J., dissenting).

the expert's degree of certainty about his or her conclusions, and the precise meaning of ambiguous words used in his or her report.²³¹

Fourth, beyond expert testimony, the individual defendant must also be allowed to address the court and/or testify. The court should not rely on just observing the defendant's demeanor during the proceeding. Such observation is only "superficial" in the context of determining the defendant's competency.²³² To determine whether the defendant is making a rational decision, the trial judge should conduct a "probing inquiry" with the defendant.²³³

Fifth, the defendant's family or friends must be allowed to testify. This will contribute to the court's understanding of who the defendant really is, and of what his background consists. The trial court must also be aware that the competency proceeding may be the only opportunity for family or friends to present their views opposing their loved one's decision. If the trial court ultimately determines the defendant is competent, family members or friends will generally not have standing to later challenge the court's determination in the appellate courts.²³⁴ Therefore, the defendant's family or friends must be given ample time to offer evidence, or explain why they believe their loved one is not competent. In sum, the evidence and testimony presented during the hearing should be as "unrestricted as possible."²³⁵

The final element to the competency proceeding is that the state must carry the burden of proof.²³⁶ If a defendant wishes to waive his appeals, there should be a rebuttable presumption that he is incompetent.²³⁷ The state can overcome this presumption only by proving by clear and convincing evidence that the defendant is competent.²³⁸

These procedures will help ensure that the defendant's competency is correctly determined, and will allow him to waive his rights only under limited circumstances. Under these procedures, if a defendant is ultimately deemed competent, society can still be confident, even without appellate review, that the state is not executing in an arbitrary or capricious manner.

²³¹*Id.*

²³²*Rumbaugh v. Procnier*, 753 F.2d 395, 412 (5th Cir. 1985) (Goldberg, J., dissenting).

²³³*Id.*

²³⁴See Jane L. McClellan, Comment, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L. J. 201, 228-31 (1994).

²³⁵*Hamilton v. Texas*, 497 U.S. 1016, 1019 (1990) (Brennan, J., dissenting).

²³⁶*Rumbaugh v. Procnier*, 753 F.2d 395, 415 (5th Cir. 1985) (Goldberg, J., dissenting).

²³⁷*Id.*

²³⁸*Id.* Judge Goldberg asserted in his dissent in *Rumbaugh* that "Before casting these individuals voluntarily down the corridor of death, we should require no less than convincing proof that they have the capacity to invite the journey." *Id.*

C. Mental Diseases of Death Row "Volunteers" that Bring Into Question Their Competency

Many defendants on death row have mental diseases or disorders.²³⁹ If such a disease is exhibited in a death row "volunteer," it must be critically evaluated during the competency hearing to determine whether it prevents the defendant from making a rational decision. For example, in Wilford Berry's case, the public defender's expert opined that Berry suffered from "schizotypal personality disorder."²⁴⁰ She testified that Berry had a "rigid thought process" which rendered him "psychologically unable to absorb information from his attorneys if it conflicted with his preconceptions as to his chance of succeeding in further litigation."²⁴¹ For instance, she told Berry that if he continued his appeals there was a fairly good chance for success, but Berry was very closed to this idea and remained consistent with thinking he had no chance of prevailing.²⁴² The expert ultimately decided that as a result of Berry's mental disease, he was "rigid" in his lifelong compulsive desire to be dead.²⁴³

The Supreme Court of Ohio accepted the fact that Berry had a mental disorder, but did not believe the disorder "substantially affect[ed]" his ability to make a rational choice.²⁴⁴ The court asserted that Berry was not waiving his appeals to fulfill a death wish produced by his disorder.²⁴⁵ Instead the court

²³⁹Dan Malone, *View from Death Row-News Poll Takes a Comprehensive Look at Inmates Facing Execution*, THE DALLAS MORNING NEWS, Apr. 20, 1997, at 1A. The Dallas Morning News recently compiled a survey of death row inmates across the United States. *Id.* The News received over 700 responses from inmates which represented about a quarter of all those on death row at the time. *Id.* One category that the inmates were polled on was their treatment for psychiatric conditions. *Id.* About one-third of the inmates said that they had been treated for mental problems. *Id.*

²⁴⁰*State v. Berry*, 686 N.E.2d 1097, 1102 (Ohio 1997). Dr. Sharon Pearson conducted the most extensive interviews with Berry. *Id.* She reviewed an impressive amount of background material on Berry's mental health, talked with Berry several times, and also administered psychological tests, including, the Minnesota Multiphasic Personality Disorder test. *Id.*

²⁴¹*Id.* at 1103.

²⁴²*Id.* Dr. Pearson explained that people with schizotypal disorder "latch onto one issue which becomes the focus of the obsessive thinking and the compulsive behavior." *Id.* at 1104.

²⁴³*Id.* at 1104.

²⁴⁴*Id.* at 1106 ("Berry is unquestionably a moderately intelligent man with demonstrated reasoning ability. He suffers from a mental disorder, but is in touch with reality, and his mental disorder is not of such a nature as to preclude him from considering his options and making a voluntary rational choice between them.")

²⁴⁵*Berry*, 686 N.E.2d at 1106.

recognized that Berry preferred freedom to death, but preferred a speedy execution to incarceration on death row during a drawn-out appellate process.²⁴⁶

A mental disease *did* prevent John Cockrum from waiving his death row appeals in Texas.²⁴⁷ The federal district court found that Cockrum suffered from Post Traumatic Stress Disorder ("PTSD"), and the court explained that this disease prevented him from making a rational choice with regard to continuing or abandoning further appeals.²⁴⁸ The court believed that Cockrum's fatal shooting of his father was the stressor that caused the disease.²⁴⁹ Cockrum's symptoms of PTSD included amnesia, recurring nightmares, intrusive thoughts, and flashbacks.²⁵⁰ Cockrum also displayed a "restricted affect" throughout the court's proceedings and refused to discuss his father's life and death.²⁵¹

In an attempt to convince the court he was making a rational decision, Cockrum listed reasons for wanting to waive his appeals.²⁵² Several of these reasons stemmed from Cockrum's anger and disappointment with his attorneys for allegedly lying to him, and for putting facts which he considered untrue in his application for appeal.²⁵³ The court explained that Cockrum's decision was part of a "pattern of self-destructive behavior" which began when his father physically abused him as a child, and which "exacerbated immeasurably" when the defendant shot his father.²⁵⁴ The court concluded that Cockrum's reasons for waiving his appeals were irrational and illogical.²⁵⁵

From these two examples, it is clear that in some instances a defendant can suffer from a mental disease, and yet still have the capacity to make a rational decision. But, in other instances a defendant can have a mental disease which does in fact effect his ability to make a rational decision. Thus, when a defendant exhibits such a disease, it must be closely scrutinized to determine

²⁴⁶*Id.*

²⁴⁷In re Cockrum, 867 F. Supp. 484 (E.D. Tex. 1994).

²⁴⁸*Id.* at 487, 493.

²⁴⁹*Id.* at 486. Cockrum's father was an alcoholic who often abused Cockrum's mother. *Id.* at 485. When Cockrum was 17 he shot his father during one of his father's drunken abusive episodes. *Id.* A few weeks later his father died, but before he did he told authorities the shooting was an accident. *Id.* Thus, Cockrum never faced criminal charges. *Id.*

²⁵⁰*Id.* at 487.

²⁵¹*Id.* at 487.

²⁵²Cockrum, 867 F. Supp. at 488.

²⁵³*Id.*

²⁵⁴*Id.* at 493.

²⁵⁵*Id.* at 488. One of the experts who evaluated Cockrum, Dr. Grassian, explained Cockrum's irrationality by saying "If you don't like your attorneys, you don't kill yourself as a result; you change attorneys." *Id.* at 489.

whether it is still possible for the defendant to make a choice that is autonomous from his infirmity.

D. Motivations of "Volunteers" For Waiving Appeals

Besides examining the mental disease(s) that a volunteer may exhibit, courts holding a competency proceeding must also critically analyze the motivations which underlie the volunteer's decision. Motivations for wanting to waive appeals may include: desiring relief from depression caused by being on death row for so long, accepting responsibility for one's actions, or gaining relief from stress caused by not knowing exactly when the execution will occur.²⁵⁶

Other volunteers have different motivations. Anthony Lamarca, a death row volunteer in Florida, asked to be executed simply because he would rather die than spend the rest of his life in prison.²⁵⁷ In November 1997, Lamarca, convicted of shooting his son-in-law, told the trial judge "go ahead and fry me."²⁵⁸ Paul Hill, also a volunteer from Florida, gunned down a doctor at an abortion clinic.²⁵⁹ Hill's motivation is that he believes his execution "will galvanize the anti-abortion movement."²⁶⁰

Generally, a state must determine whether its own policies and philosophies regarding capital punishment are congruent with the volunteer's underlying motivations. When a defendant's motivation for waiving appeals is so that his own suicide will be carried out, the state's policy for execution is undermined, and some states simply will not grant the volunteer's wish. For example, in 1997, Philip Wilkinson confessed to three murders and two rapes in North Carolina.²⁶¹ Thereafter, Wilkinson advocated for his own execution and eventually the state supreme court complied with his request.²⁶² But, then prison officials found suicide notes in Wilkinson's cell indicating he was going to kill himself.²⁶³ The trial court judge halted Wilkinson's execution and ordered that he undergo a further psychiatric evaluation to determine his competency.²⁶⁴ In North Carolina it is legal to want to be executed, but not to

²⁵⁶McClellan, *supra* note 234, at 213.

²⁵⁷Pittman, *supra* note 14, at 1B.

²⁵⁸*Id.*

²⁵⁹*Id.*

²⁶⁰*Id.*

²⁶¹Joseph Neff, *Death Wish Can Complicate Matters on Death Row*, THE NEWS & OBSERVER, May 5, 1997, at A1.

²⁶²*Id.*

²⁶³*Id.*

²⁶⁴*Id.*

commit suicide; thus, the state had to examine whether Wilkinson's motivations abrogated this separate state policy.²⁶⁵

Bradley Knox took a more overt approach to evidencing his true motivation for waiving his appeals.²⁶⁶ Knox admitted to crafting his confession to guarantee a death sentence, and he later specifically asked to plead guilty to first degree murder so that he could get the electric chair.²⁶⁷ Knox, a failure at suicide, simply came out and said, "I figured, okay, if I can't do it myself, I'll get the state to do it."²⁶⁸ The state would not comply with Knox's wish, and instead sentenced him to 25 years in prison.²⁶⁹

Courts must be acutely aware of the "murder-suicide phenomenon," which as one commentator explained, "refers to the clinically recognized syndrome in which an individual intentionally commits murder in a state with a death penalty hoping that, once caught, the state will execute him and thereby accomplish the suicide that he himself cannot bring about by his own hand."²⁷⁰ Our nation's general policy of abhorring suicide is evidenced by the fact that 44 states have criminalized the practice of physician-assisted suicide.²⁷¹ It follows then, that a state also should not assist a volunteer in committing suicide. Thus, during the competency proceeding the court must examine the defendant's true motivations to determine whether he is in fact trying to manipulate the state in this manner.

VIII. PUBLIC POLICY RESULTS OF ALLOWING A DEFENDANT TO WAIVE HIS DEATH PENALTY APPEALS

The Supreme Court of New Jersey recently held that the public interest of its state in maintaining the reliability and integrity of a death sentence decision simply will not allow a defendant to waive his appeals.²⁷² New Jersey appears to be the exception to the rule as volunteers are increasingly being executed in other states.²⁷³ For the states that do allow for waiver, there are several public policy goals and results behind the state's decision.

²⁶⁵*Id.*

²⁶⁶Pittman, *supra* note 14, at 1B.

²⁶⁷*Id.*

²⁶⁸*Id.*

²⁶⁹*Id.*

²⁷⁰Grasso v. State, 857 P.2d 802, 813 (Okla. 1993) (Chapel, J., concurring).

²⁷¹Alexandra Dylan Lowe, *Facing the Final Exit*, ABA JOURNAL, Sept. 1997, at 52. Thirty-five states ban assisted suicide by statute, while nine states criminalize it by common law. *Id.*

²⁷²State v. Martini, 677 A.2d 1106 (N.J. 1996) (holding that the defendant could not waive postconviction review even if found competent to do so).

²⁷³Pittman, *supra* note 14, at 1B.

One goal or result is that, presumably, if a defendant waives his appeals the state will save an enormous amount of money. The state will not have to expend the costs on litigating in the appellate courts, and furthermore, will not have to pay to keep the defendant in prison any longer. For example, it reportedly costs the state of California over \$200,000 per year to keep a single inmate on death row.²⁷⁴ The death penalty costs the state of North Carolina \$2.16 million per execution *over* the costs of keeping an inmate in prison for life.²⁷⁵ The point is, it is not cheap to keep an inmate on death row, and allowing waiver would help defray some of the state's costs.

There are two obstacles though that sometimes stop a state from realizing the cost-saving measures that a defendant's waiver could provide. For one, the public defender, despite his or her client's own wishes, may continue to try and press appeals forward. In response to this, some state legislators have made proposals that would limit the public defender from doing so.²⁷⁶ Another obstacle is that it is possible the defendant may later change his mind about dropping his appeals.²⁷⁷ If the state expends resources on determining a defendant's competency, and then later the defendant decides he wants his appeals (and the state obliges), the state will not be able to capitalize on the defendant's waiver and will have wasted the money spent on his competency determination. If one of the public policy goals of the state is to save taxpayer's money, then it must realize that it can only do so if it provides solutions to these two obstacles.

Another public policy goal behind allowing a defendant to waive his appeals is that the victim's family will likely be appeased. One researcher estimates that the average time spent on death row is seven years.²⁷⁸ This amount of time,

²⁷⁴Alex Kozinski and Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 13 (1995).

²⁷⁵DIETER, INFORMATION CENTER, (July 13, 1998), *supra* note 2.

²⁷⁶See Jonathan Kerr, *New Jersey Legislation Allows Killers' Death Wishes*, WEST'S LEGAL NEWS, May 28, 1996, available in 1996 WL 283005. When John Martini, of New Jersey, sought to waive his appeals, George Geist, R-Camden, sponsored a state bill which prohibits the public defender from appealing the imposition of the death penalty in any case where a mentally competent defendant refuses appeals. *Id.*; See Legal News Staff, *Garcia Case Sparks Illinois Legislative Action*, WEST'S LEGAL NEWS, January 22, 1996, available in 1996 WL 258062. The Governor of Illinois decided to grant Guinevere Garcia clemency, although ironically Garcia had previously requested that her appeals be stopped and that she be put to death. *Id.* In response, several Illinois State Legislators announced reforms that would not allow appeals to be carried out when the defendant does not personally request them. *Id.*

²⁷⁷Neff, *supra* note 261, at A1. North Carolina inmate James David Rich wrote letters requesting the state to hasten his execution. *Id.* Rich later changed his mind about dropping his appeals, and explained that, "In the past I've lost control of myself and wrote things to you and the attorney general I did not want to write. Sometimes I get depressed and I want to die. But I do not want to die." *Id.*

²⁷⁸Dan Malone, *View From Death Row - News Poll Takes a Comprehensive Look at Inmates Facing Execution*, THE DALLAS MORNING NEWS, Apr. 20, 1997, at 1A.

coupled with the time spent initially looking for the killer and then eventually prosecuting him, takes its toll on the victim's family. Often family members need closure to their loved one's death, and the state can more speedily provide this if the killer waives his appeals.²⁷⁹

For the state of Ohio, there are several public policy results of executing Wilford Berry pursuant to his wishes. For one, some commentators believe that Berry's execution will "open the door for more executions."²⁸⁰ Ohio had not carried out the death penalty for 36 years.²⁸¹ Now that this lengthy timidity is overcome, the state will have a new precedent to fall back on when the next defendant's time elapses on death row. Other inmates on Ohio's death row believe that Berry's ground-breaking execution will speed up their *own* executions.²⁸²

Ohio's citizens furthermore have shown their strong support for the death penalty.²⁸³ In November 1994, voters approved an amendment to the Ohio Constitution which streamlines the appellate process so that capital appeals now go directly from the trial court to the state supreme court.²⁸⁴ Ohio's proponents of the death penalty may be further appeased in seeing that appeals will not be heard when a competent defendant wishes to waive them. Thus, Ohio's execution of Berry will give the majority what they want - a death penalty scheme that actually carries through on executions.²⁸⁵

Several public policy results and/or goals exist behind a state's decision to allow a defendant to waive his appeals. The level of importance the state assigns to these results can often be reflected in how difficult a state makes it for a defendant to waive his appeals.

²⁷⁹See Stephanie Innes, *Zosha's Killer: 'I'm willing to die.'*, THE TUCSON CITIZEN, May 18, 1996, at 1A. Darren Lee Bolton was convicted of kidnapping and killing a 2-year old Tucson girl. *Id.* Bolton requested to waive his appeals and the state allowed him to, moving up his execution date. *Id.* Leading up to Bolton's execution the victim's father explained, "It brings closure to probably the most disruptive thing that can happen to people's lives, this is essentially what we've been waiting for." *Id.*

²⁸⁰Hawthorne, *supra* note 6, at CO2 (quoting Diann Rust-Tierney, director of the American Civil Liberties Union's Capital Punishment project).

²⁸¹Sloat & Lane, *supra* note 9, at 1A.

²⁸²Associated Press, *supra* note 118, at 5B. Mansfield Warden Ralph Coyle explained that while Berry was in prison he was unpopular because inmates thought his execution would lead them closer to their own. *Id.* On September 5, 1997, Berry was the target in an inmate disturbance at the Mansfield Correctional Institution. *Id.* During the inmate uprising Berry suffered several injuries. *Id.*

²⁸³Mark Tatge, *Frustration Spurs Rise in Support for Death Penalty*, PLAIN DEALER, Feb. 22, 1998, at 1A.

²⁸⁴Editorial (no author listed), *supra* note 27, at 10A.

²⁸⁵Tatge, *supra* note 283, at 1A.

IX. CONCLUSION

From Gary Gilmore to Wilford Berry we have seen a steady stream of death row "volunteers" emerge in the United States over the past 20 years. In fact, Berry's execution has made Ohio the 10th state where the first person executed since 1976 was a "volunteer."²⁸⁶ In 1976, the United States Supreme Court reinstated the death penalty in large part because new capital punishment schemes provided for appellate review. A state may allow a competent defendant to waive his right to appellate review because such a right belongs to the particular person. So the question becomes - how can a state protect society's interest in maintaining a reliable and non-arbitrary system for the death penalty if the majority of a defendant's appeals do not occur?

Currently, society's interest is not being protected because there are inadequate standards and procedures for determining whether the "volunteer" is competent to waive appeals. The United States Supreme Court has not set forth any uniform constitutional guidelines for the states to follow in making a competency determination in this context. Until there are adequate measures and safeguards in place, society's interest is undermined. Thus, the executions of "volunteers" must stop until competency proceedings are overhauled. Today the risk of an execution being imposed wantonly or freakishly on an incompetent person is simply too great.

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²⁸⁶Hawthorne, *supra* note 6, at CO2.