Cleveland State University
EngagedScholarship@CSU

Cleveland-Marshall
College of Law Library

Law Faculty Articles and Essays | Faculty Scholarship

2004

Not to Decide Is to Decide: The U.S. Supreme Court's Thirty-Year Struggle with One Case about Competency to Waive Death Penalty Appeals

Phyllis L. Crocker
Cleveland State University, p.crocker@csuohio.edu

How does access to this work benefit you? Let us know!
Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

Part of the Criminal Law Commons, and the Criminal Procedure Commons

Original Citation
Phyllis L. Crocker, Not to Decide is to Decide: The U.S. Supreme Court's Thirty-Year Struggle with One Case about Competency to Waive Death Penalty Appeals, 49 Wayne Law Review 885 (2004)

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

HEINONLINE

Citation: 49 Wayne L. Rev. 885 2003-2004

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Thu Dec 5 16:10:53 2013

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0043-1621

THE WAYNE LAW REVIEW

VOLUME 49 WINTER 2004 NUMBER 4

NOT TO DECIDE IS TO DECIDE: THE U.S. SUPREME COURT'S THIRTY-YEAR STRUGGLE WITH ONE CASE ABOUT COMPETENCY TO WAIVE DEATH PENALTY APPEALS

PHYLLIS L. CROCKER[†]

"What is past is prologue. Study the past"[1]

Table of Contents

[†]Associate Professor of Law, Cleveland-Marshall College of Law. B.A., Yale College; J.D., Northeastern University School of Law. During my sabbatical in 2000-2001, I was privileged to receive an Enhancing Full-time Faculty Research Development grant from Cleveland State University that enabled me to conduct research for this article. I thank the University for its support. I also thank the Cleveland-Marshall Summer Grant program for its support. Many people provided invaluable research assistance for this article. I thank my research assistant, Ali Lombardo, and librarians Ellen Quinn, Jessica Mathewson, and Tom Hurray at the Cleveland-Marshall College of Law Library for their tireless efforts in locating historical material. I am especially indebted to S. White Rhyne, the attorney who represented Melvin Davis Rees, Jr. in the U.S. Supreme Court. Mr. Rhyne provided me with documents in the case that were not in the U.S. Supreme Court file, but many of which had been sent to the Court. More important, he graciously spent time talking to me about the case and answering my questions over the last two years. I also thank Justice William J. Brennan, Jr.'s Literary Executors for permission to read his papers on *Rees* and related cases. Justice Brennan's papers, as well as Justice Thurgood Marshall's papers, are housed at the Collections of the Manuscripts Division, Library of Congress. Members of the staff at the Manuscripts Division were extremely helpful and knowledgeable about the Justices' papers and I thank them. Also, Robert Ellis, Archivist at the National Archives, was instrumental in locating the *Rees* U.S. Supreme Court file. I am also grateful to the individuals who read and commented on earlier versions of this article: Susan Becker, Jeffrey Alan Coryell, Kathleen Engel, Daniel Givelber, Margery Malkin Koosed, Elizabeth Rapaport, Jeffery J. Pokorak, and S. White Rhyne.

1. These lines are carved at the base of two statues outside the National Archives in Washington, D.C. The first is from WILLIAM SHAKESPEARE, THE TEMPEST act II, sc. I, lines 253-54 (1611) ("Whereof what's past is prologue, what to come/In yours and my discharge.").

I. INTRODUCTION

In 1995, the U.S. Supreme Court dismissed *Rees v. Peyton*,[1] a case that had been on its docket since 1965.[2] *Rees* was a death penalty case in which the petitioner sought to withdraw his petition for writ of certiorari so that he could be executed.[3] The Court stayed the proceedings after Rees was found incompetent to waive his appeal,[4] but the Court did not dismiss the case until after Rees died of natural causes.[5] *Rees* pended in the Court during the terms of three Chief Justices. Even though the Court underwent major changes in personnel and philosophy during those years, the Court's treatment of *Rees* was essentially the same—to hold the case in abeyance. This article chronicles the extraordinary history of *Rees* in the U.S. Supreme Court for those thirty years.

Rees's case in the Supreme Court began as an ordinary request from a

1. Rees v. Superintendent, 516 U.S. 802 (1995).
2. Rees v. Peyton, 384 U.S. 312 (1966).
3. *Id.* at 313.
4. Rees v. Peyton, 386 U.S. 989 (1967).
5. *Rees*, 516 U.S. 802; *see* Bill McKelway, *Slayer of Louisa Family in '59 Dies in Prison*, RICHMOND TIMES-DISPATCH, Aug. 4, 1995, at B1.

death row inmate to review the federal appellate court's affirmance of the district court's denial of his petition for writ of habeas corpus challenging the constitutionality of his conviction and sentence. Within one month, however, Rees wrote a letter informing his attorney of his "mature & considered" decision to withdraw the petition for writ of certiorari and abandon all legal proceedings.[6] Rees's attorney notified the Court and opposing counsel for the Commonwealth of Virginia of Rees's position; at the same time, however, he raised his own concern that Rees was incompetent to make this decision.

By 1965, it was well established that a defendant in a criminal case had to be competent both to stand trial and, if sentenced to death, to be executed. The constitutional standard for competency to stand trial was "'whether [the person] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'"[7] For competency to be executed, the common law required that the person understand his impending punishment and the reason for it.[8] But *Rees* presented the Court with a different issue: what kind of competency was required to abandon or continue with an appeal pending before the Court? *Rees* appears to be the first case in which the Court confronted this issue.

Despite the fact that *Rees* became a case of first impression for the Court once Rees sought to waive his appeal, the official published court orders reveal little about what happened in this case substantively or procedurally.[9] In a 1966 order, the Court retained jurisdiction and remanded

---

6. Letter from S. White Rhyne, Attorney for Petitioner, to John F. Davis, Clerk, U.S. Supreme Court (Aug. 3, 1965) (citing Letter from Melvin Davis Rees, Jr., Petitioner, to S. White Rhyne, Attorney for Petitioner (July 18, 1965) (U.S. National Archives). See *infra* note 16 explaining document sources.

7. Dusky v. United States, 362 U.S. 402 (1960) (citation omitted). In 1966, while the Court was figuring out how to proceed in *Rees*, it clarified its ruling in *Dusky*. In *Pate v. Robinson*, 383 U.S. 375, 385 (1966), the Court held that due process required that the trial court must hold a hearing when evidence raised a "'bona fide doubt' as to a defendant's competency to stand trial." *Id.*

8. *See* Ford v. Wainwright, 477 U.S. 399, 406-10 (1986) (discussing the long standing religious and societal reasons why the common law prohibited the execution of a person who was no longer sane; noting that every state prohibited executing the insane).

9. Newspaper inquiries in 1965 suggest that, despite the Court's silence, *Rees* was a noteworthy case from the start. *See* Letter from Alfred Friendly, Managing Editor, THE WASH. POST, to John F. Davis, Clerk, U.S. Supreme Court (Sept. 1, 1965) (seeking permission for a reporter to review Rees's letter withdrawing his appeal and Rhyne's letter to the Court, noting "[p]ublicity about the [documents] is inevitable") (U.S. National Archives); Letter from John Goolrick, Reporter, THE FREE LANCE STAR, to John F. Davis, Clerk, U.S. Supreme Court (Jan. 1, 1965) (stamped rec'd Jan. 1966) (asking about present

the case to the federal district court for an initial determination of whether Rees was competent to decide to abandon or continue his appeals.[10] Subsequently, in 1967, without explanation, the Court issued an order staying the case pending further order of the Court.[11] In 1995, the Court dismissed the case.[12]

Even though the Court's decisions do not tell us how or why the Court acted as it did, one piece of *Rees* has endured—the standard the Court crafted in 1966 for assessing when a person is competent to waive his or her appeals.[13] To this day, lower courts apply the *Rees* test to determine whether an inmate who has been sentenced to death is competent to abandon his or her appeals.[14] Ironically, the Court itself never applied its own test in *Rees*. It articulated the standard in the context of remanding the case to the federal district court for its assessment of Rees's competency. Upon receipt of the lower court's report on Rees's competency in 1967, and briefing by the parties, the Court, without written comment, stayed further proceedings. The 1967 decision did not reflect the federal district court's conclusion, made on remand, that Rees was incompetent to abandon or continue the litigation. One could surmise that, in issuing a stay, the Court accepted the way in which the district court inquired into Rees's competency and applied the test. Still, without any stated basis for its decision, the case provided no guidance for future cases.[15] Why the Court stayed *Rees* in 1967, and why that stay remained in effect until 1995, has remained a mystery until now.

Archival research shows that the Court struggled with this case not only in issuing its initial remand order in 1966 and its stay order in 1967, but also in reconsidering the status of the case years later in 1971 and 1988.[16] At

---

status of case) (U.S. National Archives).

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

11. Rees v. Peyton, 386 U.S. 989 (1967).

12. Rees v. Superintendent, 516 U.S. 802 (1995).

13. The test for determining a person's "mental competence in the present posture of things" is whether he has the "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." *Rees*, 384 U.S. at 314.

14. *See infra* note 131 and accompanying text.

15. *But see* Epilogue, *infra* notes 280-86 and accompanying text (discussing the U.S. Court of Appeals for the Ninth Circuit's recent application of the *Rees* documents).

16. My primary source of information was the public U.S. Supreme Court file housed at the U.S. National Archives. Throughout the article, these documents will be designated by a parenthetical citation, U.S. National Archives. I found additional documents when I read Justice William J. Brennan, Jr.'s and Justice Thurgood Marshall's papers at the Library of Congress. Throughout the article, documents from the Justices will be designated by a parenthetical citation that will indicate the Justices initials (WJB or TM) and the Box and File number that contain the document. Finally, Rees's appellate attorney, S. White Rhyne,

each juncture the documents, including correspondence, motions and responses, and internal Supreme Court memos from the Clerk of the Court, show the Court considering numerous ways to proceed with the case. Although the Court revisited the case during the thirty years, once it decided to stay the proceedings, it never deviated from that decision.

It is worthwhile to study and reflect on the history of *Rees* for a number of reasons. First, the documents give a rare glimpse into some of the internal operations of the Court. This is especially illuminating because it appears that the Court found the case troubling and was unsure how to proceed. For example, on several occasions, Chief Justice Warren called on the Clerk of the Court to consult with the attorneys for Rees and the Commonwealth of Virginia both as to how the Court might proceed and whether the parties could reach an informal resolution. Eventually the Court charted its own course, but only after fairly lengthy consultation with the parties.

Second, the Court's handling of the case is significant because *Rees* was a death penalty case. By the mid-1960s, executions were steadily declining and constitutional challenges to the death penalty were mounting in cases across the country.[17] In the late 1960s and early 1970s, the Court decided several significant constitutional challenges to death penalty statutes. These culminated in 1972, with *Furman v. Georgia*,[18] in which the Court held the death penalty unconstitutional.[19] In the midst of these developments, the Court first issued (in 1967) and then decided to retain (in 1971) a stay of the proceedings in *Rees*. These actions may indicate some of the Justices' growing concerns about the death penalty; apparently they did not want to put Rees back into the legal process, where he might face execution, until the constitutional landscape of the death penalty was resolved. When the Court revisited *Rees* a final time in 1988, it still appeared unwilling to reactivate legal proceedings, but perhaps for different reasons. While the death penalty was again constitutional,[20] the Court was treating cases where the inmate waived his death penalty appeals far more summarily than it had in *Rees*. The Court appears to have thought it better to maintain the status quo in *Rees* rather than give the impression that it might now give other waiver cases more considered scrutiny.

---

provided me with information and court papers that shed yet new light on the Court proceedings. These documents will be designated S.W. Rhyne. All documents are on file with the author.

17. *See infra* notes 199-204 and accompanying text.

18. 408 U.S. 238 (1972).

19. *Id.* at 239-40.

20. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Finally, *Rees* is noteworthy because the Court stayed the proceedings after the federal district court found Rees incompetent to decide whether to abandon or continue the litigation.[21] Since *Rees*, and to this day, a judicial determination that a person is incompetent to waive appeals does not necessarily mean that a court will stay the litigation. In some instances, courts allow the case to proceed by appointing a "next friend" to litigate the case on the person's behalf.[22] This allows the case to proceed to its conclusion, which may include execution.[23] In *Rees*, it appears that the Court was reluctant to allow the case to go forward in this manner.

Rees was a difficult case for the Court from beginning to end. For the first time, a petitioner sought to waive the appeal of his conviction and death sentence while the case was pending before the Court.[24] The Court, therefore, had to establish a procedure by which it would determine whether a petitioner was competent to waive his appeal. This was an unusual situation for the Court, one with which it seemed both uncomfortable and uncertain. Throughout the course of the proceedings, the Court seemed reluctant to take any action that could be considered precedential.

For thirty years *Rees* remained on the Court's docket, but no one, outside of some Court personnel, knew why. Perhaps that is how the Court wanted it. But now we have the opportunity to learn a fuller version of *Rees v. Peyton*, to appreciate the issues the Court had to resolve, and to reflect on their significance.[25] The documents available in *Rees* shed light on how the Court handled the case procedurally, but consideration of the broader legal and historical context helps us understand why the Court acted as it did. This article traces the legal developments in *Rees* chronologically,

---

21. Rees v. Peyton, 386 U.S. 989 (1967).

22. *See infra* notes 193-94 and accompanying text (discussing next friend litigation).

23. *See, e.g., In re* John Cockrum, 867 F. Supp. 484 (E.D. Tex. 1994). In this case, federal district court found John Cockrum incompetent to waive his appeals. *Id.* at 485. The case proceeded with his attorney acting as next friend and the U.S. Court of Appeals for the Fifth Circuit denied relief on the merits of his petition for writ of habeas corpus. Cockrum v. Johnson, 119 F.3d 297, 298 (5th Cir. 1997). The State of Texas executed Cockrum in 1997. *See* DEATH ROW U.S.A. REP. 19, NAACP Legal Defense Fund (Winter 2004), *available at* http:/www.naacpldf.org (accessed from homepage by selecting Publications and Death Row U.S.A.) (last visited Mar. 19, 2004).

24. Rees v. Peyton, 384 U.S. 312, 314 (1966).

25. As E. Barrett Prettyman, Jr., law clerk to U.S. Supreme Court Justices Jackson, Frankfurter, and Harlan, wrote:

> [T]he self-imposed silence of the Justices must not prevent the rest of us from acquiring as much knowledge as we legitimately can about the most important court in the land. The Supreme Court should be written about and talked about, dissected and analyzed, so that when we come to make up our free minds about it, we act on the basis of fact and not on warped, distorted and biased half-truths.

E. BARRETT PRETTYMAN, DEATH AND THE SUPREME COURT 4 (1961).

interweaving observations about the historical and legal context of the case.

II. PROCEEDINGS IN THE 1960S

In 1961, Melvin Davis Rees, Jr. was convicted of killing three members of one family.[26] First, he was convicted in federal court of transporting, kidnapping, and murdering a mother and daughter, Mildred Ann and Susan Ann Jackson, in Maryland.[27] The federal jury did not recommend the death penalty, so he received two life sentences.[28] Six months later, he was tried and convicted in the Circuit Court of Spotsylvania County, Virginia of the first-degree murder of the father, Carroll Vernon Jackson, Jr.[29] The Virginia jury sentenced Rees to death for this crime.[30]

Rees embarked on the usual course of appeals to challenge the constitutionality of his state conviction and death sentence.[31] He first sought a writ of error in the Virginia Supreme Court of Appeals. That court denied the writ, thus affirming his conviction and sentence, and the U.S. Supreme Court denied Rees's petition for writ of certiorari.[32] Beginning with this appeal to the U.S. Supreme Court, Rees was represented by S. White Rhyne, a lawyer from Washington D.C., retained for Rees by his parents.[33] Rhyne represented Rees through all of the subsequent litigation related to

---

26. United States v. Rees, 193 F. Supp. 849, 860 (D. Md. 1961); Rees v. Commonwealth, 127 S.E.2d 406 (Va. 1962), *cert. denied*, 372 U.S. 963 (1963).

27. *Rees*, 193 F. Supp. at 850-51. According to the court, the evidence showed that on the night of January 11, 1959, Rees forced the Jacksons' car off of the road in Louisa County, Virginia. *Id.* at 851. Near Fredericksburg, Virginia, Rees shot Carroll Jackson in the head and injured his one-year-old daughter Janet, who died of suffocation and exposure. *Id.* Rees then drove Mildred and five-year-old Susan to Maryland where he beat both of them to death. *Id.* Rees was never prosecuted for the death of Janet Jackson.

28. *Id.* at 851; Rees v. Peyton, 341 F.2d 859, 864 (4th Cir. 1965).

29. *Rees*, 127 S.E.2d at 407.

30. *Id.*

31. The trial court judge deferred setting an execution date until all legal challenges, including post-conviction review in the federal courts, were complete. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit at 3, Rees v. Peyton (Misc. No. 321) (S.W. Rhyne). This became critical because as long as the case pended in the U.S. Supreme Court, no execution could take place.

32. *Id.*

33. S. White Rhyne received his undergraduate degree from Roanoke College in 1952, his LL.B. from the University of Pennsylvania Law School in 1955, and his LL.M. from Georgetown University Law Center in 1961 where he was an E. Barrett Prettyman Fellow in Trial Advocacy. He was admitted to the bar in 1955 and began to practice in the District of Columbia in 1957. Rhyne went on to have a distinguished career as an attorney specializing in telecommunications law. He served on the Board of Directors of the Bar Association of D.C. for many years and on the Executive Committee of the Federal Communications Bar Association.

his state conviction and death sentence. After exhausting his state appeals, Rees filed a petition for writ of habeas corpus in the U.S. District Court for the Eastern District of Virginia, again challenging the constitutionality of his state conviction and death sentence. The federal district court, and the U.S. Court of Appeals for the Fourth Circuit, denied the petition.[34]

In June 1965, Rhyne filed, with his client's consent, a petition for writ of certiorari in the U.S. Supreme Court.[35] Rees's case ceased to follow the standard path after this point. Prior to the Commonwealth of Virginia filing its response to the petition for writ of certiorari, Rhyne notified the Clerk of the Court, and the Commonwealth,[36] that Rees had instructed him to abandon all legal proceedings.[37] From this point on, all those involved with Rees' case—the parties, the lawyers, the psychiatrists, and the courts—proceeded on untravelled ground.

A. Rees's Demand to Withdraw His Certiorari Petition and His Lawyer's Concerns About Rees's Competency to Do So

On July 18, 1965, Rees wrote to Rhyne stating that he wanted to abandon all legal proceedings in his case. Rhyne traveled to the state penitentiary to talk to Rees about his letter, but Rees was not dissuaded. Rhyne then wrote to the Court.[38] This first letter to the Clerk of the Court, John F. Davis, did much more than merely inform the Court of Rees's decision: Rhyne told the Clerk that he did not believe Rees was competent to make this decision, provided the basis for that belief, and indicated a further course of action to assess Rees's mental state. The letter to the Court included a verbatim recitation of Rees's letter:

---

34. Rees v. Peyton, 225 F. Supp. 507, 514 (E.D. Va. 1964), *aff'd*, 341 F.2d 859, 864 (4th Cir. 1965).

35. Petition for Writ of Certiorari, *supra* note 31. The petition raised three issues: prejudicial pretrial publicity; illegal search and seizure of the contents of a locked accordion case that belonged to Rees but was found in his parents' attic; and implied coercion in obtaining consent from Rees's father to search the house. *Id.* at 2-3.

36. The named representative of the Commonwealth was C.C. Peyton, the Superintendent of the Virginia State Penitentiary. Reno S. Harp, III, Assistant Attorney General for the Commonwealth of Virginia represented Virginia in all proceedings in this case. Harp received his undergraduate and law degrees from Washington and Lee University in 1954 and 1956, respectively. He was an assistant attorney general for twenty-one years and then chief counsel to the Virginia Judicial Inquiry and Review Committee until he retired in 1997. Among other awards he received the Virginia State Bar Association Harry L. Carrico Professionalism Award and a Distinguished Alumni Award from Washington and Lee.

37. *See* Letter from Rhyne, *supra* note 6.

38. *Id.*

> Dear Mr. Rhyne,
>
> It is my mature & considered decision to withdraw from before the U.S. Supreme Ct., as well as from all further consideration, the petition you recently filed, & that Mr. Crismond, the clerk of Spotsylvania county ct. be notified that all legal proceedings have been abandoned.
>
> I would express my appreciation to you & gratitude.
>
> In Dostoyevski's novel "The Bros. Karamozov" Father Zossimas [sic] elder Brother lay dying, sick & handicapped in many ways but there was joy in His heart & to those that attended him he asked how it was that we could go on holding grudges against one another & always trying to out do one another when we could be entering the Garden in a Spirit of Love & Friendliness & brotherhood to live a new & happy life in the Name of Jesus Christ.
>
> Sincerely & Cordially,
> M.D. Rees

This letter documented Rees's decision, but it also demonstrated, on its own, that Rees's reasoning process was somewhat incoherent. Rhyne included other evidence of Rees's mental state in his letter. He noted that in 1960, Rees's competence to stand trial on the federal charges had been questioned. Although the federal district court found Rees competent to stand trial, psychological evaluations noted that Rees's "'judgment is relatively poor with respect both to grasp of conventional ideas and to independent action,' and that at times 'his distinction between fact and fantasy is poorly maintained and unrealistic ideas and actions are likely to be numerous.'"[39] Rhyne also explained that in 1963 Rees "gave indications of mental disability."[40] While Rees's "bizarre and unrealistic" complaints stopped in 1964, Rhyne observed that Rees became increasingly detached from reality and showed less and less interest in his legal proceedings. Rhyne noted that when he went to the state prison to talk to Rees about his letter of instruction to abandon the litigation, Rees

> was verbose and discursive. His explanation of his decision to

---

39. *Id.* at 2. In addition, a psychiatrist found "no evidence at this time [December 1960] of a psychosis" and Rees's "contact with reality is certainly not so tenuous that he would be unable to assist his counsel in adequately defending himself against criminal charges." *Id.* (quoting Report of Manfried S. Guttmacher, M.D.).

40. *Id.* at 3. For example, Rees complained that the prison was drugging him. At Rees's request, Rhyne had samples of his aspirin, coffee, and tobacco tested. They were not toxic. *Id.*

> terminate legal proceedings was marked by numerous attenuated analogies based on occurrences in the Bible, in secular literature, in current world events, and in his personal experiences. He indicated a total absence of concern about whether he lived or died. His mood, for [sic] the most part serious, at one point alternated almost instantaneously between laughter and convulsive sobbing.[41]

Based on all of these indices—Rees's letter, history, and current mental state, in addition to Rhyne's belief that waiving one's appeals was "inconsistent with the strong instinct of self-preservation normally present in sane persons"—Rhyne expressed considerable doubt about his client's competence to waive his appeal.[42] Although he felt obliged to inform the Court of Rees's instructions, he also felt obligated to seek psychiatric advice about Rees's mental status in order to ascertain whether he was bound to follow Rees's instructions.

While Rhyne arranged for Rees's evaluation, Rees persisted in his efforts to stop the litigation. Rees wrote to the Clerk of the Court asking that the petition for writ of certiorari be "accted null + Void + the Circuit court of Spotsylvania county be so notified. . . ."[43] He wrote to Rhyne asking him to withdraw as his attorney since Rhyne was not carrying out his decision to abandon the legal proceedings. In this letter he stated his objection to Rhyne having him evaluated, writing, "competency determinations are wholly irrelevant . . ." and concluding, "[t]he only judgment I seek is that of Christ, to live eternally in His Spirit."[44] Rhyne forwarded this letter to the Clerk of the Court, along with a progress report of his efforts on Rees's behalf. These included arranging for a psychiatrist, Dr. Oscar Legault, to evaluate Rees; requesting that medical officers at a federal prison examine Rees since he was also a federal prisoner; and informing the Commonwealth that he did not object to its own evaluation of Rees.[45]

---

41. *Id.*

42. *Id.* at 4.

43. Letter from Melvin Davis Rees, Jr., Petitioner, to John F. Davis, Clerk, U.S. Supreme Court (N.D., stamped rec'd Sept. 27, 1965) (U. S. National Archives).

44. Letter from Melvin Davis Rees, Jr., Petitioner, to S.White Rhyne, Attorney for Petitioner (N.D., hand marked rec'd Sept. 21, 1965) attached to Letter from S. White Rhyne, Attorney for Petitioner, to John F. Davis, Clerk, U.S. Supreme Court (Sept. 24, 1965) (U.S. National Archives).

45. Letter from Rhyne, *supra* note 44. The Commonwealth, on learning of Rees's stated intention, agreed that a psychiatrist should examine Rees. Letter from Reno S. Harp, III, Assistant Attorney General for the Commonwealth of Virginia, to S. White Rhyne, Attorney for Petitioner (Aug. 17, 1965) (U.S. National Archives). Harp indicated that he understood the Commonwealth would be given the opportunity to approve of the examining psychiatrist. *Id.* Harp stated that he did not know if the Commonwealth would conduct its

On September 30, 1965, Rhyne sent the Clerk of the Court Dr. Legault's evaluation of Rees. Dr. Legault's diagnosis was that "Mr. Rees is at the present time psychotic, suffering from a schizophrenic disorder of a mixed type with conspicuous paranoid characteristics, and severe disorganization of thought processes."[46] He concluded: "[t]his man is not competent to assist in his defense because he is under the influence of a delusional system which influences his judgement, and also because the disorganization of his thought and his preoccupation with psychotic matters prevents his giving sufficient attention to his defense."[47]

Dr. Legault essentially applied a "competency to stand trial" standard in assessing Rees's competence to waive his appeals.[48] He focused on Rees's ability to confer with counsel in making decisions about the litigation, and concluded Rees was not able to do so.[49]

---

own examination. *Id.* I expect that if the first psychiatrist found Rees competent, Harp thought that the Commonwealth would not need to seek additional psychiatric opinions.

46. Letter from Dr. Oscar Legault, M.D., to S. White Rhyne, Attorney for Petitioner (Sept. 29, 1965) attached to Letter from S. White Rhyne, Attorney for Petitioner, to John F. Davis, Clerk, U.S. Supreme Court (Sept. 30, 1965) (U.S. National Archives).

47. *Id.*

48. *See* Dusky v. United States, 362 U.S. 402 (1960). Dr. Legault's test differed from the one the Court eventually announced in this case. *See infra* notes 131-37 and accompanying text. The Court, in Rees's case, focused on the individual's "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation." Rees v. Peyton, 384 U.S. 312, 314 (1966). While the Court emphasized the individual's ability to make the decision himself as to whether to continue or end the litigation, Dr. Legault considered Rees's ability to confer with counsel in making that decision. As Dr. Legault concluded in his report, "[Rees] was not competent, . . . he was so preoccupied with spiritual matters that he had no time to pay attention to the world of reality, and thus could not appropriately assist his counsel in his defense, which was one of the requirements for competency." Notes of Dr. Oscar Legault on the examination of Melvin Davis Rees at the Richmond Penitentiary 6 (Sept. 29, 1965) attached to Letter from Rhyne, *supra* note 46.

49. In order to assess Rees, Dr. Legault had to go beyond the typical procedure of having an inmate come to a designated area in the prison for the evaluation. *See* Notes of Legault, *supra* note 48, at 1. When Dr. Legault arrived at the prison, Rees refused to leave his cell, so Dr. Legault went to see him there. *Id.* When Rees told him he did not want a psychiatric examination or interview, Dr. Legault asked if he minded talking to him. *Id.* Rees reluctantly agreed, and eventually agreed to go to the room assigned by the prison for this purpose. *Id.* at 1-2. Dr. Legault was then able to engage him in conversation by telling him, after some initial observation, that he had serious doubts about his competency and if Rees wanted to change Dr. Legault's mind, he would have to talk with him. *Id.* at 2. This seemed to work. *Id.* Based on the ensuing conversation, Dr. Legault observed "external evidences of serious mental disturbance" as well as "extreme disorganization" of thought. *Id.* "He smiles and laughs very inappropriately; his facial expressions are stiff and manneristic; he also has a manneristic, stereotyped behavior with his tongue, which he shakes rapidly back and forth inside his mouth, his mouth partly opened, while he blocks in

Although Dr. Legault was able to examine Rees, he recommended hospitalizing Rees for a more thorough evaluation.[50] In addition, Dr. Legault believed that there was an "obvious question of malingering" because Rees was "a highly intelligent man, well educated, who has had one course in psychology, has read some psychiatry, and therefore could be expected to give a fairly sophisticated performance if he chose to malinger."[51] Dr. Legault did not believe that Rees was feigning his mental illness, but he did believe that psychological testing during the period of hospitalization could lead to a more accurate assessment of his capacities.[52]

Based on this report, Rhyne informed the Court, in his letter of September 30, 1965, that he no longer considered himself bound by Rees's instructions to withdraw the petition. Further, he intended to file a motion suggesting how the Court should proceed.[53]

B. The U.S. Supreme Court's Initial Efforts to Determine Whether Rees Was Competent

On October 4, 1965, at its weekly Friday Conference,[54] the Court considered how to proceed in *Rees v. Peyton*.[55] Justice Brennan's handwritten notes on a Conference List for October 4 indicate that his vote was to "Hold" the case.[56] His notes show that the Conference voted to "Grant," but "Hold" was also written in smaller letters to the upper right of Grant. It is unclear what the Conference thought it would "Grant." A petition for writ of certiorari had been filed, but the State had not responded

---

the middle of a sentence." *Id.* at 2-3.

50. Letter from Dr. Legault, *supra* note 46. This would allow qualified personnel to evaluate Rees over an extended period of time in order to obtain objective evidence of his disorder. *Id.* Dr. Legault also noted the following:

> ([A]ctual objective evidence of hallucinatory activity, for example, sometimes occurs only at night and occasionally.) The personnel in such a setup also have opportunity to observe how the patient goes about doing many of the simple tasks of everyday maintenance of himself; how much does he move about, what does he do all day, etc., in the performance of which clear objective evidence can be gathered as to what can be going on with the patient.

Id.

51. *Id.* at 1-2.

52. *Id.* at 2.

53. Letter from Rhyne, *supra* note 46.

54. The Justices meet every Friday to discuss and vote on pending cases. An excellent description of these conferences may be found in ANTHONY LEWIS, GIDEON'S TRUMPET 38-41 (1974).

55. Justice William J. Brennan, personal Conference List at 16 (Oct. 4, 1965) (Library of Congress WJB B132 F3).

56. *Id.*

on the merits. Rees's attorney had neither filed a motion to stay the proceedings nor requested any other formal action by the Court. Rees had requested the Court to consider his petition null and void, but only in a handwritten letter to the Clerk of the Court—not by way of motion to the Court. Whatever the Court thought it would "Grant," the result was that the Court held the case.

On October 5, 1965 the Court received another letter from Rees.[57] Rees again asked the Court to notify his attorneys that he no longer desired their representation, to withdraw his petition, and to advise the Circuit Court of Spotsylvania County that it had done so. The Clerk of the Court responded to Rees, stating that he had brought both of Rees's letters to the Court's attention and would let him know when the Court acted on them.[58]

On October 13, 1965, Harp, the Assistant Attorney General for the Commonwealth of Virginia, asked Dr. Joseph R. Blalock, the Superintendent at the Southwestern State Hospital in Virginia, and Dr. Harry Brick, a Neuropsychiatrist at the Virginia State Penitentiary, to examine Rees.[59] Harp requested that they determine, in light of Dr. Legault's report, whether "[Rees] is mentally ill."[60] Harp enclosed a copy of Dr. Legault's report with the letter, but he provided the doctors no other information about the purpose of the examination. Harp asked for a report

---

57. Letter from Melvin Davis Rees, Jr., Petitioner, to John F. Davis, Clerk, U.S. Supreme Court (N.D., stamped rec'd Oct. 5, 1965) (U.S. National Archives). The letter states, in part:

> I had dismissed my attys from any further obligation or responsibility in the case, a decision not capriciously arrived at but as a culmination of mature reflection + consideration + I believe you have been to some extent apprized [sic] of the interchange between Mr. Rhyne + myself regarding the continuation of the legal proceedings. My Attys have been very conscientious + look forward to a legal redress based on prior and present efforts + I am grateful to them + would that their disappointment were turned to joy + blessing, but they have notified me that they intend to persist + to disregard my wishes.
>
> Therefore I am writing you in the exercise of my Constitutional rights as an American Citizen, requesting you to kindly advise my Attys of my prerogative of choice + representation + confirm my instructions to them that our lawyer-client relationship has been dissolved, and at the same time withdrawing the petition from the docket + so advising the Spotsylvania Circuit Court—if you haven't already done so.

Id.

58. Letter from John F. Davis, Clerk, U.S. Supreme Court, to Melvin Davis Rees, Jr., Petitioner (Oct. 5, 1965) (U.S. National Archives).

59. Letter from Reno S. Harp, III, Attorney General for the Commonwealth of Virginia, to Joseph R. Blalock, Superintendent, Southwestern State Hospital (Oct. 13, 1965) (U.S. National Archives).

60. *Id.*

based on a "thorough examination."[61] This was not to be.

When Drs. Blalock and Brick went to examine Rees on November 15, 1965, Rees refused to leave his cell, as he had initially with Dr. Legault.[62] Unlike Dr. Legault, however, Drs. Blalock and Block succeeded only in speaking to Rees at his cell door, where he "refused to enter into conversation beyond a few words that were noncommittal and evasive, usually making no reply."[63] Unlike Dr. Legault's report, Drs. Blalock and Brick's letter to Harp provided no specific examples of his words or actions. Nonetheless, they concluded that "[n]o overt symptoms of a mental illness were elicited" and that, based on their limited observation, "we can only express the impression that he was not psychotic or insane at the time we examined him."[64] They recommended additional observation at a hospital for the mentally ill.[65]

Meanwhile, on October 14, 1965, Rhyne filed a Motion for Stay of Proceedings with the Court.[66] Based on Dr. Legault's report, Rhyne stated that Rees was "presently insane."[67] Rhyne proposed two possible courses of action for the Court: one, grant the petition for writ of certiorari and stay the proceedings, or two, grant the petition and allow Rhyne to continue to represent Rees or appoint a guardian (Rees's father or Rhyne) to represent Rees.[68] In no event, Rhyne argued, should the Court deny the petition.[69]

Rhyne based his suggestion to grant the petition and stay the proceedings on a Supreme Court case from the prior term, *Anderson v. Kentucky*, in which the Court had granted certiorari[70] but stayed the proceedings indefinitely by agreement of the parties.[71] The Court, Anderson's attorney, and the Kentucky Attorney General deemed a stay

---

61. *Id.*

62. *See supra* note 49.

63. Letter from Joseph R. Blalock, Superintendent, Southwestern State Hospital and Harry Brick, Neuropsychiatrist, Virginia State Penitentiary, to Reno S. Harp III, Assistant Attorney General for the Commonwealth of Virginia (Dec. 29, 1965) (U.S. National Archives).

64. *Id.*

65. *Id.*

66. Attorney for Petitioner's Motion for Stay of Proceedings or Other Appropriate Relief, Rees v. Peyton (Misc. No. 321) (U.S. National Archives).

67. *Id.* at 1.

68. *Id.* at 6-8.

69. *Id.* at 7.

70. Anderson v. Kentucky, *cert. granted*, 371 U.S. 886 (1962). The Court granted certiorari on the question, "[d]id petitioner in a capital case intelligently waive his right to counsel?" Supreme Court Docket Sheet regarding *Anderson v. Kentucky* (S-1) (U.S. National Archives).

71. Anderson v. Kentucky, 376 U.S. 940 (1964).

appropriate after three psychiatrists concluded Anderson was "insane and incompetent to assist in his own appeal."[72] Thus, some precedent existed for the Court to grant certiorari in Rees's case and stay the proceedings.[73]

In the alternative, Rhyne proposed that the Court appoint a guardian ad litem for Rees and then hear the case.[74] This could be an appropriate course of action, Rhyne argued, because the certiorari petition arose in a habeas corpus case, which is a civil proceeding.[75] As Rhyne noted, in most civil cases the litigation does not end because a party becomes insane; rather, a guardian ad litem is appointed.[76] Indeed, the federal habeas corpus statute, under which Rhyne filed the case, authorized a case to be litigated by someone acting on the inmate's behalf.[77]

While suggesting that the Court could hear the case with Rhyne acting as Rees's guardian ad litem, the far preferable course, according to Rhyne, was to grant the petition and stay the proceedings.[78] Rhyne acknowledged that, if competent, Rees might prefer to proceed with the litigation, but felt "unable to urge this course of action absent petitioner's knowledgeable

---

72. The history of *Anderson* is as intriguing as *Rees*. Henry Roger Anderson represented himself at trial, even though psychiatrists concluded he was mentally ill. Andrew Wolfson, *Mentally Ill Killer has Spent 31 Years on Death Row*, THE COURIER-JOURNAL, June 30, 1991, 1991 WL 6858537 at 3. When he refused to file his own appeal, the Kentucky Supreme Court appointed attorneys to represent him. *Id.* at 4. The attorneys are the ones who sought review in the U.S. Supreme Court. *Id.* Apparently, after the Court agreed to hear the case, Anderson himself contacted the Court because he wanted to argue the case. *Id.* Wolfson reports that at Chief Justice Warren's request, the attorneys for Anderson and the State agreed to additional psychological testing and eventually a stay in light of the results of that testing which found that Anderson was incompetent to represent himself. *Id.* at 4-5; *see also* Paul J. Larkin, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 768 n.23 (1980) (explaining Anderson's history).

Like *Rees*, *Anderson* stayed on the Court's docket until Anderson died and the Court dismissed the case. Anderson v. Kentucky, 515 U.S. 1155 (1995).

73. Rhyne cited one other case in support of his proposition to grant and stay: U.S. v. Washington, 6 U.S.C.M.A. 114, 19 C.M.R. 240 (1955). In *Washington*, the Court of Military Appeals struck Washington's appeal and stayed further proceedings in the case until "Washington regains his sanity." *Id.* at 125. While both cases supported the proposition that a court may stay proceedings because of an inmate's mental state, neither involved an individual who was seeking to waive his appeals.

74. Motion for Stay, *supra* note 66, at 8.

75. *Id.* at 6.

76. *Id.*

77. *Id.* (citing 28 U.S.C. § 2242 (1964)); *see infra* notes 193-94 (discussing next friend litigation).

78. Motion for Stay, *supra* note 66, at 7. "Counsel feel that an indefinite stay would be in petitioner's best interest." *Id.*

advice, which he is of course unable to give."[79] Indeed, Rhyne's inability to consult with Rees also informed his position that the Court could not deny the petition for writ of certiorari because he would then have to consult with Rees about whether to file a petition for rehearing, and Rees was incompetent to participate in any legal decisionmaking.[80]

A month after receiving the Motion for Stay, the Court again considered how to proceed with *Rees* at its Friday Conference.[81] Justice Brennan's notation on his November 12, 1965 Conference List indicates that the Court decided to "Ask AG of VA."[82] The evident meaning of this notation was that the Court would ask the Virginia Attorney General for a formal response to Rhyne's motion. However, letters and notes of telephone conversations between the Clerk of the Court and the parties suggests that the goal of the Clerk, and presumably the Court, was an informal agreement, without further briefing or court order, to have Rees evaluated in a state hospital.[83] The prior term, in *Anderson*, the Court had followed a comparable procedure: At Chief Justice Warren's initiation the attorneys had agreed to, and the Governor of Kentucky had arranged for, a new series of psychiatric evaluations.[84] It appears the Court was hopeful a similar outcome could ensue here.[85] But, unlike in *Anderson*, the parties could not reach an agreement to have Rees evaluated.

Rhyne had no objection to further evaluation in a state hospital and was willing to cooperate in transferring Rees from the federal prison. Initially it appeared that Harp was also willing to cooperate as he informed the Clerk of the Court that, "if the Court desires, Rees can be transferred [to one of

---

79. *Id.* "It may well be that if petitioner were able intelligently to make the election he would feel that it was in his best interest to proceed to the conclusion of the case with the expectation that the decision would be reversed and the specter of a death sentence would be removed." *Id.*

80. *Id.* at 6.

81. *See* Justice Brennan's personal Conference List at 5 (Nov. 12, 1965) (Library of Congress WJB B132 F3).

82. *Id.*

83. *See infra* notes 85-89 and accompanying text.

84. *See* Wolfson, *supra* note 72, at 1.

85. In a telephone conversation with Rhyne, the Clerk of the Court suggested that "the Court . . . thought it was desirable that there be a period of observation in a mental institution, but that whether this was done or how this was done would be left to the parties." Notes of Telephone Call from John F. Davis at 1 (Jan. 13, 1966) (S.W. Rhyne).Then, in a letter to Harp, the Clerk stated, a bit cryptically, "If it is necessary that he be hospitalized in order to carry out the necessary examination, I certainly believe that this is a wise procedure to take. . . ." Letter from John F. Davis, Clerk, U.S. Supreme Court, to Reno S. Harp, III, Assistant Attorney General for the Commonwealth of Virginia (Jan. 13, 1966) (S.W. Rhyne).

two state hospitals] for observation."[86] By the end of January 1966, however, Harp's position had shifted: he still agreed that Rees should be transferred, but now maintained that under Virginia law, transfer could occur only by "order of a court of competent jurisdiction."[87] In February it looked like progress had been made. Rhyne, after consulting with the Clerk of the Court, sent the Court an order, signed by both parties, for the Court to order Rees's temporary transfer to a state hospital for observation.[88] But the process deteriorated from this point on. Following a telephone call from the Clerk, Rhyne wrote to Harp informing him that, "[I]t is my understanding that the Chief Justice feels the Court would be hesitant, even with the consent of the parties, to issue such an order running to the state, and feels that if a court order is needed application should properly be made to a state court."[89]

Harp's response was firm: The state court was "without jurisdiction under the circumstances of this case to transfer Rees to a state hospital."[90] He maintained that a state court could order a transfer to a state hospital only under the commitment statute, but since the Commonwealth's doctors did not believe that Rees was mentally ill, no basis on which to transfer Rees existed.[91] According to Harp, only the U.S. Supreme Court had jurisdiction at this point to order a psychiatric evaluation.[92] As a new twist, Harp added that Rees's sanity could be fully tested in the state courts after the Supreme Court adjudicated the pending certiorari petition.[93] Harp's

---

86. Letter from Reno S. Harp, III, Assistant Attorney General for the Commonwealth of Virginia, to John F. Davis, Clerk, U.S. Supreme Court (Jan. 12, 1966) (referring to the Central State Hospital at Petersburg, Virginia, or the Southwestern State Hospital in Marion, Virginia) (S.W. Rhyne).

87. Letter from Reno S. Harp, III, Assistant Attorney General for the Commonwealth of Virginia, to S. White Rhyne, Attorney for Petitioner (Jan. 26, 1966) (S.W. Rhyne).

88. Letter from S. White Rhyne, Attorney for Petitioner to John F. Davis, Clerk, U.S. Supreme Court (Feb. 23, 1966) (attaching signed consent order) (U.S. National Archives).

89. Letter from S. White Rhyne, Attorney for Petitioner to Reno S. Harp, III, Assistant Attorney General for the Commonwealth of Virginia at 1 (Mar. 4, 1966) (S.W. Rhyne). No explanation for the Court's hesitancy is provided. The Court may have thought it would exceed its authority to order the Commonwealth to transfer a state prisoner to a state institution. Rhyne's letter stated that Davis "suggested that if the state court is concerned about entering an order" because the case was pending in the U.S. Supreme Court, the Court could indicate its consent on the state court transfer order. *Id.* at 2; *see also* John F. Davis, Memorandum for Files (Mar. 3, 1966) (reporting on conversation with Chief Justice that it would be "preferable for parties to approach a state court.") (U.S. National Archives).

90. Letter from Reno S. Harp, III, Assistant Attorney General for the Commonwealth of Virginia, to S. White Rhyne, Attorney for Petitioner (Mar. 8, 1966) (S.W. Rhyne).

91. *Id.*

92. *Id.*

93. *Id.*

response apparently ended the Clerk's attempt to arrange informally for Rees's full mental examination.

The Commonwealth formally responded to Rhyne's Motion for Stay on March 21, 1966, four months after the Court decided to "Ask AG of VA."[94] First, the Commonwealth cast doubt on Rees's incompetence. It argued that Dr. Legault suggested Rees could be malingering, and that Drs. Blalock and Brick saw "no overt . . . mental illness."[95] While acknowledging that all of the doctors agreed that further observation was required, the Commonwealth argued, "this is not the proper forum to determine whether or not this murderer of an entire family is insane."[96]

The Commonwealth then addressed how the Court could proceed. The Court should not grant a stay of proceedings, it argued, but should expeditiously dispose of the case.[97] It refused to agree to a continuance as had the Kentucky Attorney General in *Anderson*.[98] Alternatively, it considered three actions that the Court could take. First, it suggested that the Court could order that Rees be evaluated in a state hospital.[99] This would keep the case within the Court's jurisdiction, so it is unclear how this course of action squared with the Commonwealth's contention that the Supreme Court was "not the proper forum" to determine competency. Second, the Commonwealth proposed that the Court "act" on the petition for writ of certiorari. Presumably this meant that the Court should deny the petition, although the State did not explicitly say that. It did, however, point out that after such action, "there is an available remedy in Virginia whereby

---

94. Respondent's Answer, Rees v. Peyton (U.S. Supreme Court, Mar. 22, 1966) (Misc. No. 321) (U.S. National Archives).

95. *Id.* at 2.

96. *Id.* at 3.

97. *Id.*

98. *Id.* (noting that an indefinite continuance "is not appropriate in this situation").

99. *Id.* For the first time, the Commonwealth cited legal authority for the Court to issue such an order. The Commonwealth cited *Snider v. Smith*, 263 F.2d 372 (4th Cir. 1959), *on remand*, 187 F. Supp. 299 (E.D. Va. 1960), where the Fourth Circuit remanded a petition for writ of habeas corpus, filed by an inmate on Virginia's death row, in order for the district court to explore more fully the inmate's mental state at the time of the crime and at present. Pursuant to the remand and "in cooperation with the authority of the Commonwealth of Virginia, petitioner was transferred" from the Virginia penitentiary to a state hospital for the criminally insane. *Snider*, 187 F. Supp. at 301. My reading of these cases suggests that the federal district court did not issue an order of transfer, but that Virginia authorities cooperated in implementing the transfer, just as the Court wanted them to do here. The Clerk of the Court may have agreed with this reading: In his April 26, 1966 Memorandum to the Court he stated "neither [party] has submitted any legal argument sustaining our authority to take that action [to order Rees's temporary transfer]." Memorandum from John F. Davis, Clerk, U.S. Supreme Court, to Justices, U.S. Supreme Court at 3 (Apr. 26, 1966) (U.S. National Archives).

petitioner can test his sanity prior to execution."[100] Presumably this meant that once an execution date was set, Rees's attorneys could seek a judicial determination as to whether Rees was competent to be executed. If insane, Rees could not be executed. This was a different question than whether Rees was competent to abandon his appeals. Given that Rees was seeking to be executed it was fairly obvious that he would not seek a determination of his "sanity prior to execution."[101] The Commonwealth's reasoning here began to reveal its more fundamental argument that Rees was attempting to avoid execution, not attempting to seek it.

Finally, the Commonwealth acknowledged that the Court could stay the proceedings.[102] However, the Commonwealth adamantly opposed this course of action for two reasons: "it would provide an avenue for a sophisticated and educated prisoner to escape the final adjudication of his sentence" and it would "lead[] to a denial of the rights of the people of the Commonwealth of Virginia in this matter."[103] The Commonwealth's attorney apparently thought that Rees was engaged in a clever and duplicitous ploy to stay alive, rather than seek execution. Specifically, as a "sophisticated and educated prisoner," Rees could *say* that he wanted to abandon his appeals, but then feign a mental illness that would cause psychiatrists to find him incompetent to carry out his stated wish.[104] This would result in a stay of execution. The Commonwealth did not distinguish between Rees and his counsel but saw only that delay benefitted the defense writ large: "It is well settled that delay is an asset to the defense and a hindrance to the prosecution." As long as the case remained in the U.S. Supreme Court, the Commonwealth concluded, "the prisoner cannot test his sanity and the people cannot secure a final adjudication."[105]

Rhyne's reply, filed a week later, maintained that, to date, the only credible evidence before the Court indicated that Rees was incompetent.[106] He argued that the Commonwealth's psychiatrists' report was of no value because it lacked factual support for even its "hazy" impression of Rees's mental state.[107] Nonetheless, he still agreed that the Court should order further evaluation of Rees in a state hospital.[108] He was confident that this

100. Respondent's Answer, *supra* note 94, at 3.
101. *Id.*
102. *Id.* at 4.
103. *Id.*
104. *Id.*
105. *Id.* at 5.
106. Attorney for Petitioner's Reply at 4, Rees, (Misc. No. 321) (U.S. National Archives).
107. *Id.* at 3.
108. *Id.* at 5.

evaluation would result in the Commonwealth's doctors concluding that Rees was incompetent and that the Commonwealth, therefore, would agree to a stay of the proceedings.[109] However, Rhyne conceded that if the psychiatrists found Rees competent and provided a factual basis for that opinion, a hearing would be appropriate.[110] Rhyne proposed that such a hearing occur before a federal district court judge. This was the first suggestion that the Court should remand the case to federal district court to hear evidence on whether Rees was competent to withdraw his petition for writ of certiorari.

Finally, Rhyne emphasized that the competency question at issue was Rees's ability to participate in the U.S. Supreme Court proceedings.[111] This was not the same, as the Commonwealth had suggested, as whether he was sane enough to be executed or even competent to stand trial a second time should the Court reverse his conviction and sentence. Thus he maintained that the Court should determine Rees's competency to litigate in *this* Court, and should grant the petition and proceed to consider the merits of the case or grant the petition and stay the proceedings.[112]

C. The U.S. Supreme Court's Decision to Remand the Case for an Assessment of Rees's Competency

By April 1966, the Court had been fully briefed by the parties on how to proceed in this matter. But the Court again tried to encourage an agreement on the procedure to follow, short of an order from the Court.[113] At Chief Justice Warren's instructions, the Clerk of the Court met personally with Rhyne and Harp to discuss "the possibility of there being an independent determination of Mr. Rees's competence to carry on his defense at the present time."[114]

---

109. *Id.*

110. *Id.* at 6. Rhyne was particularly concerned that the examining doctors provide factual support for their conclusions because Drs. Blalock and Brick did not. As Rhyne observed "[t]he 'report' was notable for its brevity and complete lack of any factual basis for even the hazy 'impression' which it expressed." *Id.* at 3. Thus Rhyne believed that a hearing should occur only if "there is a clear issue as to petitioner's mental competency. . . ." *Id.* at 6.

111. *Id.* at 7.

112. *Id.*

113. Memorandum of telephone conversation with S. White Rhyne, Attorney for Petitioner, and John F. Davis, Clerk, U.S. Supreme Court (Apr. 13, 1966) (S.W. Rhyne). Indeed, in one telephone call between Davis and Rhyne, it appears that Davis suggested that Rhyne's motion had put the Court in a quandary and he wanted to find an alternative solution. *Id.*

114. Memorandum from John F. Davis, Clerk, U.S. Supreme Court, to the Chief

The meeting resulted in a set of convoluted proposals. As explained by the Court Clerk in his memo summarizing the meeting, Harp maintained that the Commonwealth had no authority to transfer Rees from a state prison to a hospital for an evaluation because the state commitment processes did not apply to prisoners, and a prisoner's competence could be evaluated only if prison officials believed the prisoner was incompetent, which they did not.[115] The Court, however, did not want to order the transfer. Therefore, the parties and the Court had to consider other possible procedures. As outlined by the Clerk, the first alternative was that the Commonwealth could file a declaratory judgment action seeking a determination of Rees's competence in the state court.[116] This might require a letter from the Clerk of the U.S. Supreme Court stating that such a judicial determination was appropriate.[117] Second, the Court could order Rhyne to seek a state court determination of Rees's competence.[118] Or, finally, the Federal Bureau of Prisons could transfer Rees to the Medical Center for Federal Prisoners in Springfield, Missouri where doctors would examine him.[119] If the doctors found Rees incompetent, this might provide a basis for the Court to then order a judicial determination of Rees's competence. The Clerk recommended the declaratory judgment action as the most advisable step,[120] perhaps because it was the most direct route to a judicial determination of Rees's competence that did not require any action by the Court.[121]

Over the next month, *Rees* appeared on the Court's Friday Conference

---

Justice, U.S. Supreme Court (Apr. 19, 1966) (U.S. National Archives). The contents of this memo also appear in an expanded form. *See* Memorandum from John F. Davis, Clerk, U.S. Supreme Court (Apr. 26, 1966) (U.S. National Archives). It may be that the Clerk wrote this longer memo for the other Justices.

115. Memorandum from Clerk, Apr. 19, 1966, *supra* note 114, at 1. The Commonwealth's position seems obstructionist. Harp had made clear that the Commonwealth did not believe Rees was incompetent and that this proceeding was a ruse to avoid execution, thus thwarting the will of the people of Virginia. Harp may have hoped that in light of the complexity and uncertainty over how to determine Rees's competence, the Court would tire of the case, deny the petition, and be done with the matter.

116. *Id.* at 1-2.

117. *Id.*

118. *Id.* at 2.

119. *Id.* at 3.

120. Memorandum from Clerk, Apr. 26, 1966, *supra* note 114, at 4.

121. The need for a judicial determination of competency appears as a new concern in the April 26, 1966 memo. *Id.* at 2. Previously, however, on April 13, 1966, in a telephone conversation between Davis and Rhyne, Davis suggested that Rhyne should consider obtaining a court adjudication of incompetence rather than rest on the documents on file with the Court. *See* Rhyne Memorandum, *supra* note 113.

list almost every week.[122] On May 13, 1966 Justice Brennan's notation under "Conference Vote" read, "Send back to DC for hearing on competency."[123] Finally, on May 24, 1966, Justice Harlan circulated a Memorandum to the Conference with a proposed order that "attempts to reflect our Conference discussion as to an appropriate disposition of this matter."[124] The Conference voted to issue a per curiam order on May 26, 1966[125] and issued the Order on May 31, 1966.[126]

In its per curiam order the Court charted its own course of action both by defining the question of competency that was at issue and how it would be resolved. The Court observed that the fundamental issue was whether Rees should be allowed to withdraw his pending petition for writ of certiorari.[127] The Court decided that "in aid of the proper exercise of this Court's certiorari jurisdiction" the federal district court should make an initial determination of Rees's competence and the Court would make the final decision as to how to proceed in the case. The Court, significantly, had concluded that it, not a state court, would decide the issues at hand. Nonetheless, the U.S. Supreme Court, in general, is a court of appellate jurisdiction, so it was not in a position to hear evidence and make an initial determination.[128] The Court, therefore, remanded the case to the federal district court where this proceeding—i.e., the petition for writ of habeas corpus—had begun. It directed the district court "to render a judicial

---

122. *See* Justice Brennan's personal Conference List at 4 (Apr. 29, 1966) ("over until 5/2"); Justice Brennan's personal Conference List at 5 (May 13, 1966); Justice Brennan's personal Conference List at 2 (May 20, 1966) ("over"); Justice Brennan's personal Conference List at 2 (May 26, 1966) (Library of Congress WJB B132 F3).

123. Justice Brennan's personal Conference List at 5 (May 13, 1966).

124. Memorandum to the Conference from J.M.H., Supreme Court Justice to Justices, U.S. Supreme Court (May 24, 1966) (Library of Congress WJB B133 F2). No order was attached to the memorandum in Justice Brennan's file. It is an assumption on my part that the order the Justices voted on and issued is the same as the one Justice Harlan proposed.

125. Brennan's personal Conference List at 2 (May 26, 1967) (Library of Congress WJB B132 F3).

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

127. "Whether or not Rees shall be allowed in these circumstances to withdraw his certiorari petition is a question which it is ultimately the responsibility of this Court to determine, in the resolution of which Rees' [sic] mental competence is of prime importance." *Id.* at 313.

128. The Court has original jurisdiction over few matters, principally suits between two states. *See* U.S. CONST. art. III, § 2 (limiting the Court's original jurisdiction to "all cases affecting Ambassadors, other public ministers and Consuls and those in which a state shall be a party"); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 461-90 (7th ed. 1993) (explaining the cases over which the Court has exercised its original jurisdiction). Even when the Court has original jurisdiction, it usually refers the case to a specially appointed master to hear evidence on factual disputes and report back to the Court. *Id.* at 487-88.

determination as to Rees' [sic] mental competence and render a report on the matter to us."[129]

The Order then stated the standard for determining "Rees' [sic] mental competence in the present posture of things":[130] "[W]hether 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."[131] While not a model of clarity,[132] the question posed sought the district court's assessment of whether Rees was able to understand the current situation and make a rational choice about the pending litigation or whether he was mentally ill in a way that might impair his ability to do so.[133] First, this query was directed at determining whether Rees could make a rational judgment about abandoning the litigation, i.e., his instruction to the Court to withdraw his pending petition. But the Court went beyond the narrow question of whether it should honor Rees's request to withdraw the petition.[134] It also inquired as to his ability to make a considered judgment about continuing the litigation.[135] This suggests that if the district court found Rees incompetent, the Court could decide that litigation would not proceed at all because he would not be able to make rational choices as it continued.

---

129. *Rees*, 384 U.S. at 314.

130. *Id.*

131. *Id.* This test continues to be the standard for assessing competency to waive appeals in death penalty cases. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 400-01 (4th ed. 2001). As Hertz and Liebman note, "subsequent adjudications refine both aspects of this formulation and recognize the propriety of analogies to the well-developed legal standards governing a defendant's competency—and the Voluntariness of any decision he makes—to confess, plead guilty, or waive other constitutional rights." *Id.* at 401.

132. *See* HERTZ & LIEBMAN, *supra* note 131, at 401 n.68 (noting that "[t]he *Rees* standard, the relationship between its two clauses, and the degree to which it poses purely factual, or mixed factual-legal, questions has occasioned uncertainty"). *Compare, e.g.*, Franklin v. Francis, 997 F. Supp. 916, 927 (E.D. Ohio 1998) (holding that the Ohio Supreme Court misapplied *Rees* because it did not consider the second part of the test: "if the affecting condition is serious enough to raise substantial doubt as to the unfettered capacity of a person to make a rational choice, then the *Rees* standard requires a court, in the exercise of caution and for the protection of that person's constitutional rights, to find the person to be incompetent.") and Franklin v. Francis, 144 F.3d 429, 433 (6th Cir. 1998) (reversing the district court decision and holding that the Ohio Supreme Court correctly applied *Rees*: "The test is not conjunctive but rather is alternative. Either the condemned has the ability to make a rational choice with respect to the proceeding *or* he does not have the capacity to waive his rights as a result of his mental disorder.").

133. *Rees*, 384 U.S. at 313.

134. *Id.* at 314.

135. *Id.*

Second, the query acknowledged the uncertain relationship between mental illness and rational choice. The question asked whether Rees is "suffering from a mental disease, disorder or defect that *may* substantially affect his capacity" in this situation, not whether the mental disease, disorder or defect has conclusively done so.[136] This formulation left open the possibility that Rees could be mentally ill in a way that did not affect his judgment about the litigation. More important, however, it acknowledged the possibility that one could find Rees incompetent, based on his mental illness, even if a firm correlation could not be established.[137]

---

136. *Id.* (emphasis added).

137. Courts disagree about the assessment the district court is to make under *Rees*. In *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir. 1985) the majority distinguished between a mental disease that impaired one's cognitive function from one's volitional function, which it considered "[t]he person's ability to make a rational choice among available options." *Id.* at 399. Judge Goldberg, in dissent, maintained that the majority misapplied *Rees* with respect to rational choice which he read to mean logical and autonomous choice: "If a person takes logical steps toward a goal that is substantially the product of a mental illness, the decision in a fundamental sense is not his: He is incompetent." *Id.* at 404 (Goldberg, J., dissenting); *see also* Matthew T. Norman, Note, *Standards and Procedures for Determining Whether a Defendant is Competent to Make the Ultimate Choice—Death; Ohio's New Precedent for Death Row "Volunteers,"* 13 J. L. & HEALTH 103, 123 (1998-99) ("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.").

Rees has been criticized on a number of issues. Some have criticized *Rees* for not inquiring into the individual's ability to consult with his attorney. *See, e.g.*, State v. Torrence, 451 S.E.2d 883, 884 (S.C. 1994) (stating the test for waiver of state court appeals as "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").

Others have found fault with the test because it does not inquire into the individual's capacity to choose between life and death. *See* Welsh White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 867 (1987) (noting that the *Rees* standard is comparable to the competence to stand trial test, even though "the decisions involved in the two situations are entirely different," and positing that the waiver test should encompass the defendant's "capacity to choose between life and death"). At least three states have incorporated the capacity to choose between life and death into their state competence to waive appeals test. *See* Franz v. State, 754 S.W.2d 839, 843 (Ark. 1989) ("A defendant 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."); State v. Dodd, 838 P.2d 86 (Wash. 1992) (adopting the Arkansas standard); Grasso v. Oklahoma, 857 P.2d 801 (Okla. 1993) (adopting the Arkansas standard).

Some scholars argued for a different test altogether. *See* Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1922 (1998) (arguing that competency to waive one's appeals should be higher than competency to stand trial and proposing that the

Based on the directives in its opinion, the Court remanded the matter to the federal district court with directions to have Rees examined, and if necessary, temporarily hospitalized in a federal facility for that purpose.[138] Further, it permitted the Commonwealth to examine Rees at its own institutions should it so choose. Thus, whatever obstacles the Commonwealth perceived in obtaining its own evaluation at a state facility were now the Commonwealth's, not the Court's, to work out. Finally, the Court ordered the district court to hold hearings "as it deem[ed] suitable," permitting the Commonwealth and all interested parties to participate "should they so desire,"[139] and then to report its findings and conclusions to the Court.[140]

The official record of U.S. Supreme Court proceedings in *Rees* contains only two more citations: one, its decision in April 1967 to hold the case,[141] and the other, in October 1995, dismissing the petition.[142] But before and between those two official notations, much more occurred.

D. The Proceedings on Remand

1. Federal District Court Hearings

In July 1966, in the United States District Court for the Eastern District of Virginia, Judge Oren R. Lewis held the first hearing after the Supreme Court's remand.[143] At this hearing Judge Lewis sought to establish whether

---

standard should "provide a presumption of incompetence"); G. Richard Strafer, *Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 876-79 (1983) (maintaining that the test is "inadequate, however, to protect either the individual's or the State's interests in administering the death penalty," and proposing that "those who because of mental illness, would be likely to make decisions about their own interests which would result in substantial damage to their mental or physical well-being" be deemed incompetent to waive their appeals).

138. The Court cited "cf. 18 U.S.C. §§ 4244-4245" as authority for the district court to subject Rees to these examinations. *Rees*, 384 U.S. at 314. These statutory provisions authorize the district court to order an evaluation of an individual's competency to stand trial. Given the unique nature of this proceeding, that was, apparently, close enough for the Court.

139. *Id.* Presumably, Rees was an interested party who might desire to participate. This reference is the closest the Court came to recognizing Rees's separate interest in the proceedings. On remand, the district court judge asked Rees if he wanted his own attorney. *See infra* notes 144-45.

140. *Rees*, 384 U.S. at 314.

141. Rees v. Peyton, 386 U.S. 989 (1967).

142. Rees v. Superintendent, 516 U.S. 802 (1995).

143. Transcript of Proceedings, *Rees v. Peyton* (E.D. Va. July 6, 1966) (No. 2970-M) (S.W. Rhyne).

Rees wanted the assistance of counsel.[144] This was the only time in the entire case that a court officer queried Rees about his legal position in the case. Rees never directly responded. Instead, he provided a meandering statement about the role of God in the search for justice and his desire for the Supreme Court, without inquiring into his competence or motives, to grant his request to withdraw the certiorari petition.[145] Judge Lewis did ascertain that Rees understood the likely consequence of withdrawing his petition: the Commonwealth of Virginia would execute him. Rees's response, however, was insufficient to conclude that he was competent to waive his appeal: the standard announced by the Court was whether Rees's choice was rational, not solely whether he understood its consequences. Judge Lewis concluded that Rees should be examined at the federal medical center in Springfield, Missouri.[146] The Commonwealth complied with Judge Lewis's order and, over the next three months, a team of doctors evaluated Rees at the Springfield facility.

In October 1966, Judge Lewis held an evidentiary hearing to determine whether Rees was competent to abandon the litigation challenging his conviction and death sentence.[147] Dr. Legault and three doctors, who were part of the team that had observed and examined Rees at the federal medical center, testified.[148] Each doctor concluded that Rees was suffering from schizophrenia and was not competent to make the decision to withdraw his petition for writ of certiorari.[149] In large measure, they based their assessment on Rees's preoccupation with God to the exclusion and meaninglessness of anything in this world, including the present litigation.[150] At one point during the Commonwealth's cross-examination

144. *Id.* at 3.

145. *Id.* at 3-9.

146. *Id.* at 10.

147. Transcript of Proceedings, Rees v. Peyton (E.D. Va. Oct. 17, 1966) (No. 2970-M) (S.W. Rhyne).

148. *Id.* at 2. The doctors at the Medical Center for Federal Prisoners were: Milton Herbert Buschman, Staff Psychiatrist; Arthur McLean Hildreth, Staff Psychiatrist; and Howard C. Wilinsky, Acting Chief of Psychiatry. *Id.* Each doctor from the federal medical center submitted a written report to the Court. *See* Buschman, Report of Psychiatric Examination, Aug. 3, 1966; Hildreth, Report of Psychiatric Examination, July 25, 1966; Wilinsky, Report of Psychiatric Examination, Aug. 11, 1966 (S.W. Rhyne). In addition they submitted a joint report. *See* Joint Report of Psychiatric Staff Examination regarding Melvin Davis Rees, Jr. (S.W. Rhyne).

149. *See* Transcript, Oct. 17, 1966, *supra* note 147, at 27 (Hildreth); at 62 (Wilinsky); at 75 (Buschman); at 87 (Legault).

150. As Dr. Hildreth testified: "his pre-occupations with religiosity are of such magnitude that they exclude his ability to assess reality. . .in a logical manner." *Id.* at 26. The doctors' reports also stated this. As Dr. Wilinsky wrote, "[w]hen asked if he knew the implications of his current legal actions he blocked. When pressed on this issue the patient

of one of the doctors, Rees interrupted and the court allowed him to speak on this matter:

> MR. REES: And into a new creation where judgment has been rendered, where judgment overall [sic] heaven and earth has been established. . . . That is not a matter of superfluous judgment but is a matter of very meaningful judgment and as consequences for all men, as all men are in life in the same spirit enjoying the same benevolence, the same presence of God as God Himself has intended and as given.[151]

The court took this opportunity to ask Rees about his decision to withdraw his petition.

> THE COURT: Now, Mr. Rees, while you are standing, I will again ask you, do you want to withdraw your petition from the Supreme Court of the United States?
> MR. REES: The petition is a superfluous thing. I (pause) find that the petition is irrelevant to the purposes of judgment, that is, that judgment comes from the universe, from the God of the universe, from the sources of grace and life and is not a matter of –
> THE COURT: As I understand it, then, you prefer to be judged by God than by the Supreme Court, is that correct?
> MR. REES: Well, yes.[152]

The Commonwealth presented no witnesses at the hearing. However, Harp, the Commonwealth's attorney, used his cross-examination of each

---

finally stated that it was 'revealed' that he would be judged by a higher court, thus making procedures by 'earthly courts as compared with Godly courts' irrelevant." Wilinsky, *supra* note 148, at 1-2. The Psychiatric Staff Report stated:

> He has been noted to be consistently delusional with respect to his receiving devine [sic] revelation and being one with God, perhaps God himself. Because of this, Mr. Rees has repeatedly stated that legal procedures and judgments by any court of law have no relation to him. He stated, "I have had certain revelations made to me that have informed direction of my thought in the light of which I have reconstrued my view of the world, my place in the world . . . not only nationally but internationally as well. I dismissed my attorney because I recognized that my advocate was Christ Himself." Thus any choice that he has made with respect to continuing or abandoning further litigation is based entirely on delusional thinking.

Joint Report of Psychiatric Staff Examination, *supra* note 148, at 2.

151. Transcript, Oct. 17, 1966, *supra* note 147, at 70.

152. *Id.* at 70-71.

psychiatrist to hone in on the Commonwealth's basic contention that Rees was malingering. As in its Answer filed with the Supreme Court, Harp persisted in trying to show that Rees was feigning mental illness "in an effort to escape the electric chair."[153]

One month after the hearing, Harp filed a motion requesting the federal district court to order Rees evaluated in the Virginia Central State Hospital.[154] Immediately after the October hearing, the federal prison had transferred Rees to the state hospital to serve his concurrent state and federal sentences. Thus, whatever difficulties the Commonwealth had perceived in transferring Rees to the state hospital no longer existed. Rhyne objected on the grounds that the court had given the Commonwealth numerous opportunities to evaluate Rees prior to the hearing.[155] Nonetheless, the court granted Harp's request.[156]

The examinations at the Central State Hospital did not aid the Commonwealth's position that Rees was malingering. The two doctors who evaluated Rees agreed that he "is not fully competent to make a rational choice with respect to continuing or abandoning further litigation in his behalf."[157] As had the other psychiatrists who evaluated Rees, these doctors believed that "Rees appears to be suffering from a rather fixed pattern of thinking that the whole matter of his future is in the hands of God and that he doesn't care or appreciate the significance of any decisions made by anyone."[158]

---

153. *Id.* at 22-23. Despite the fact that every doctor concluded that he did not believe Rees was malingering, Harp repeatedly asked each doctor whether it was possible that he was. Of course, each had to state that it was possible, because medical science does not concern itself with absolutes but with degrees of medical certainty. The judge had expressed his own frustration with the limits of medical science on this issue. At one point he asked, "[w]hat I want to know is, can't you tell with reasonable medical certainty—I mean whether the person by his consistency and by truth serums and all these other drugs that you have whether he is fooling you or not—I mean is there any doubt in your mind about it?" *Id.* at 79. Dr. Buschman replied, "I feel there is reasonably no doubt . . . ." *Id.* This seemed to satisfy the judge but not the Commonwealth, as Harp again raised the possibility of feigning mental illness with the next doctor who testified. *Id.* at 88-90.

154. Respondent's Motion, Rees v. Peyton (E.D. Va. Nov. 14, 1966) (No. 2970-M) (S. W. Rhyne).

155. Opposition to Defendant's Motion to Reopen the Record at 2, Rees v. Peyton (E.D. Va. filed Nov. 17, 1966) (No. 2970-M) (S. W. Rhyne).

156. Order, Rees v. Peyton (E.D. Va. Nov. 23, 1966) (No. 2970-M) (S. W. Rhyne).

157. Letter from Dr. Milton H. Kibbe, Superintendent, Central State Hospital, and Dr. Joseph R. Blalock, Superintendent, Southwestern State Hospital, to Judge Oren R. Lewis (Dec. 16, 1966) (S.W. Rhyne).

158. *Id.* The doctors noted that, "[n]one of his reactions while under observation here have been indicative of an overt or definite psychosis"; rather, they though he suffered from "Transient Situational Personality Disturbance, Adult Situational Reaction." *Id.* Three days

2. Federal District Court Report Concluding Rees Was Incompetent

Judge Lewis filed his "Report on Petitioner's Mental Competence" with the Supreme Court on January 12, 1967.[159] He concluded: "Melvin Davis Rees, Jr. cannot at this time make a rational choice with respect to continuing or abandoning further litigation in his behalf. He is suffering from a major mental disorder, schizophrenic reaction, chronic undifferentiated type, affecting his capacity in the premises."[160]

Judge Lewis based his conclusion on the reports and testimony of doctors who examined Rees at three institutions,[161] as well as his own observations of Rees at the federal district court hearings. Judge Lewis noted that at the first hearing in July 1966, Rees had appeared coherent, if a bit dazed (this was his first time off of death row in five years).[162] However, he had to be "forcibly put on the airplane" for transfer to the federal medical center in Missouri.[163] At the medical center, he was suspicious and incoherent and refused to wear any clothing.[164] Eventually the doctors ordered Rees tranquilized so that they at least could physically examine him.[165] Initially, however, the only result of tranquilizing Rees was that he began to wear pajamas.[166] Over the next three months, Rees slowly grew less suspicious of the doctors and began speaking to them.[167] The judge summarized Rees's mental state during those months:

> He was aware that he was under sentence for murder and that his attempt to end litigation would result in his execution. It took many interviews, however, to discover this because he would answer

later Dr. Kibbe wrote a follow-up letter because Dr. Blalock and he thought, "there may be some question regarding our statements on the competency and mental state of Mr. Rees." Letter from Dr. Milton H. Kibbe, Superintendent, Central State Hospital, to Judge Oren R. Lewis (Dec. 19, 1966) (S.W. Rhyne). In this second letter they opined that, "Rees is not psychotic." *Id.* However, they immediately reiterated that, "[b]ecause of his extreme negativistic attitude and because of his ideas of a religious nature, it is highly improbable that he would adequately cooperate with counsel." *Id.*

159. Report on Petitioner's Mental Competence at 1-2, Rees v. Peyton (E.D. Va. Jan. 12, 1967) (No. 2970-M) (U.S. National Archives).

160. *Id.* at 1-2.

161. *Id.* at 2 (Dr. Legault at the Virginia State Penitentiary; Drs. Hildreth, Buschman, and Wilinsky at the Medical Center for Federal Prisoners in Springfield, Missouri; and Drs. Blalock and Kibbe at the Central State Hospital in Petersburg, Virginia).

162. *Id.*

163. *Id.* at 4.

164. *Id.*

165. *Id.*

166. *Id.* at 5.

167. *Id.*

> questions piecemeal, often drifting off into incoherencies and meaningless thoughts.
>
> Rees has many delusions of grandeur. He feels in an exalted state because he feels he has had certain special revelations from God. He has allowed his fantasies to supersede a rational assessment of reality and has developed a marked inappropriateness of thought, feeling and behavior.[168]

At the evidentiary hearing, Rees "was unkempt and required constant attention lest he take his clothes off in the courtroom."[169] He repeatedly interrupted the proceedings with "unrelated and incoherent statements."[170] The combination of the doctors' medical opinions and his own observations led the judge to report that Rees was not competent to make the choice to continue or abandon the litigation.[171]

E. The Court's Decision to Stay the Proceedings in Rees

1. The Parties' Positions on how the Court Should Proceed in Light of Rees's Incompetency

Following the district court's submission of its report to the U.S. Supreme Court in January 1967, Rhyne and Harp submitted memoranda stating how each thought the case should proceed.[172] They agreed that the Court could not follow Rees's wishes to withdraw the petition, but they diverged from that point on. Rhyne proposed, as he had previously, that the Court grant the petition for writ of certiorari and stay the proceedings.[173] This step would require no action by Rees, would notify the Fourth Circuit

---

168. *Id.*

169. *Id.* at 5-6. During the hearing itself, Dr. Hildreth testified that the hospital had taken Rees off of the tranquilizers so that the drugs would not "obscure the issue" for the court. Transcript, Oct. 17, 1966, *supra* note 147, at 40. This proved to be an important action because the judge was quite attentive to Rees throughout the evidentiary hearing. Many years later, the U.S. Supreme Court recognized the importance of an individual appearing before the trier of fact in an unmedicated condition when his mental state is at issue. *See* Riggins v. Nevada, 504 U.S. 127 (1992) (holding that a defendant could not be medicated against his will at trial when his mental state at the time of the crime was an issue at trial).

170. Report on Petitioner's Mental Competence, *supra* note 159, at 6.

171. *Id.* at 1-2.

172. Attorney for Petitioner's Memorandum Re Proper Procedure Following Judicial Finding of Petitioner's Mental Incompetence, Rees v. Peyton (U.S. Supreme Court, Feb. 16, 1967) (Misc. No. 9) (U.S. National Archives); Respondent's Memorandum, Rees v. Peyton (U.S. Supreme Court, Mar. 14, 1967) (Misc. No. 9) (U.S. National Archives).

173. Petitioner's Memorandum, *supra* note 172, at 5.

Court of Appeals that its denial of Rees's habeas petition was under review, and would be consistent with the Court's treatment of *Anderson v. Kentucky*.[174] Rhyne maintained that to deny the petition for writ of certiorari, or grant it without a stay, would require a response by Rees.[175] Given that the district court found that Rees was incompetent to decide to abandon *or continue* the litigation, Rhyne argued, it was untenable to take any action that would require a response from Rees because any decision he might make would be influenced by his mental illness.[176]

The Commonwealth, on the other hand, urged the Court to dispose of the case either by granting or denying the petition, and contended that in no event should the Court stay the proceedings.[177] The Commonwealth felt that it was imperative that the Court decide the merits of the appeal, i.e., whether the trial court's judgment to convict and sentence Rees to death was correct.[178] Denying the petition would do this without delay. If the Court granted the petition and then granted relief, the Commonwealth wanted it done immediately "while the witnesses [were] still available."[179]

If the litigation ended in the Supreme Court, Rees would return to the Virginia state courts. If the Court denied the certiorari petition, no legal barrier would exist to the Commonwealth seeking an execution date. The Commonwealth did not say it would do so, but it alluded to the possibility by stating, "[s]hould this Court deny certiorari it is obvious that his attorney would ask Virginia not to execute this man because of his mental condition."[180] Rhyne would have no cause to do that unless Rees was facing an actual execution date. The Commonwealth was quick to note, however, "[i]t is obvious that Virginia does not desire to execute an insane defendant."[181] Apparently as some assurance, the Commonwealth indicated that as long as Rees remained at the hospital for the criminally insane, he would not be executed.[182] Still, by raising the possibility that it might seek to execute Rees, the Commonwealth seemed to affirm its long-held opinion that Rees was, or would be found, competent in a state court proceeding.[183]

---

174. *Id.*

175. *Id.* at 5-6.

176. *Id.* at 6.

177. Respondent's Memorandum, *supra* note 172, at 2. As the Commonwealth unknowingly, yet presciently put it, "[t]o do otherwise will leave the case in legal limbo which could continue until the Petitioner's demise by natural causes." *Id.* at 2-3.

178. *Id.* at 3.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* The possibility of a new trial, "[s]hould this man regain his sanity," also

2. The Court's Deliberations

Once both parties submitted memoranda on how the Court should proceed, the Court placed *Rees* on the March 24, 1967 Conference List.[184] According to Justice Brennan's notes, he voted to "Grant" and "Stay," but the Conference voted that "further consideration of petition for certiorari is postponed."[185] We gain some insight into the Justices' concerns from a Clerk's Memorandum written to Chief Justice Warren after the Conference vote.[186] On instructions to the Clerk, presumably from Chief Justice Warren, the Clerk again conferred with Rhyne and Harp about the Court's proposed disposition of the case.[187] It appears from the memo that, as the Conference vote indicated, the Court intended to hold the case and not take any action on the pending petition for writ of certiorari.[188] The Clerk's memo concluded that neither Harp nor Rhyne objected to this, "but neither of them accept[ed] it with enthusiasm."[189]

According to the Clerk's memo, Harp reiterated his concern about the delay in retrying Rees, if so required. He stated that the trial evidence was available now, and might be difficult to reassemble later. As in its Memorandum to the Court, the Commonwealth appeared to acknowledge that it would not retry Rees unless he was competent. The Clerk wrote, "[s]ince the State certainly would not try Rees at a time when he would not be competent to defend himself, it seems that this delay results, not so much from the Court's failure to act, as from the underlying circumstances of the case."[190]

Rhyne still thought the Court should grant the petition and then stay the proceedings. The Clerk noted, "[h]e has no suggestion as to the propriety of the Court considering the petition if it does not feel free to deny it as well

---

suggests that the Commonwealth did not believe that Rees would remain incompetent for long. *Id.*

184. Justice Brennan's personal Conference List at 2 (Mar. 24, 1967) (Library of Congress WJB B145 F4).

185. *Id.* The Court's Conference List noted that, in addition to the District Court's Report, the transcript of the hearings and associated papers were on file in the Clerk's office, as were the memoranda from both attorneys. Conference List for March 24, 1967 (List 1, Sheet 2). (Library of Congress WJB B147 F3).

186. Memorandum from John F. Davis, Clerk, U.S. Supreme Court, to the Chief Justice (Mar. 31, 1967) (Library of Congress WJB B148 F3).

187. *Id.*

188. *Id.*

189. *Id.* at 2.

190. *Id.* at 1.

as grant it."[191]

The Clerk's notation highlights the dilemma facing the Justices: if they were to take any action, they could not simply grant the petition. Rather, they had to fully decide, based on the underlying merits of the case, whether to grant or deny it. The Court's decision about how to proceed, consistent with its responsibility as a Court, had to be unhindered. It would be untenable for the Court to decide to grant the petition without considering whether to deny it. The district court, however, had determined that Rees was incompetent to choose whether to abandon or continue the litigation. If the Court initiated the process of deciding whether to grant or deny the petition, it would necessitate doing exactly what the district court concluded Rees was incompetent to do—decide whether to proceed. As Rhyne argued, if the Court denied the petition, Rhyne would have to consult with Rees about filing a petition for rehearing. Yet, Rees's incompetence precluded a rational choice about taking that step. So too, if the Court granted the petition, Rees was incompetent to decide to allow his attorney to proceed.[192] This conundrum suggested that the case should not proceed at all because Rees's mental illness would substantially affect any decision he made regarding the litigation.

One other option existed—that Rhyne continue with the litigation on Rees's behalf. As Rhyne observed in his Motion for Stay of the Proceedings, the federal habeas statute contemplated that the petition for writ of habeas corpus could be brought by the petitioner or someone acting on his behalf. A "next friend" may litigate on someone's behalf if the person has been found mentally incompetent, as had Rees.[193]

As Rees's next friend, Rhyne could continue the litigation challenging the constitutionality of Rees's conviction and sentence. This would allow the Court to complete its consideration of Rees's certiorari petition.[194] The

---

191. *Id.*

192. Because Rhyne thought that the Court should grant the petition and immediately stay the proceedings, he did not see a problem with the Court taking these two steps. Combined, they posed no issue on which Rhyne would need to consult with Rees.

193. *See* Whitmore v. Arkansas, 495 U.S. 149, 161-66 (1990) (discussing the historical basis of, and prerequisites for, proceeding by next friend, including the reason the prisoner cannot seek his own relief, such as mental incompetence); HERTZ & LIEBMAN, *supra* note 131, at 384-401 (explaining the requirements for proceeding by next friend and noting that the device has been used primarily in death penalty cases where the inmate is seeking to end legal proceedings and be executed).

194. From 1976 through 2002, 820 executions occurred in the United States. Death Row U.S.A., *supra* note 23, at 11-27. Of those, 97 were inmates who were found competent to waive his or her appeals and then were executed. *See id.* (showing those who waived their appeals by designated them with *). In contrast, I have documented only seven instances, since 1976, where a court determined that an inmate was incompetent to waive his appeals.

Court, however, never seemed to give this procedure much consideration; at least the Clerk of the Court never raised it as a possible way to proceed. It may have been that larger concerns about death penalty cases contributed to the Court's judgment about how to proceed in *Rees*.[195] The combination of those concerns and Rees's incompetence may have made the Court reluctant to proceed at all, at this point in time. At the April 7, 1967 Conference, the Justices considered how to proceed in *Rees*. The Court voted to hold the case.[196] The order, officially entered on April 10, 1967,

---

In five of these cases the litigation continued through a next friend. John Cockrum's attorney litigated his case as next friend. *See In re* John Cockrum, 867 F. Supp. 484 (E.D. Tex. 1994) (finding Cockrum incompetent to waive his appeals); Cockrum v. Johnson, 934 F. Supp. 1417 (E.D. Tex. 1996) (granting relief on habeas petition with attorney proceeding as next friend), *rev'd on merits*, 119 F.3d 297 (5th Cir. 1997). Michael Robert O'Rourke's attorney litigated his case as next friend. *See* O'Rourke v. Endell, 153 F.3d 560 (8th Cir. 1998) (denying relief on the merits). O'Rourke later died of natural causes. E-mail from Jeff Rosenzweig (May 1, 2001) (on file with author). Colin Clark was found incompetent to waive his appeals by the U.S. Court of Appeals for the Fifth Circuit. (E-mail correspondence on file with author). Later, the court granted relief on his petition for writ of habeas corpus. *See* Clark v. Louisiana State Pen., 697 F.2d 699 (5th Cir. 1983) (reversing conviction due to improper jury instruction on proof beyond a reasonable doubt). Kevin Scudder was found incompetent by a magistrate in the U.S. District Court for the Southern District of Ohio. Kevin Scudder's attorney litigated his case as next in friend. Shank v. Mitchell, No. C2-00-0017 (S.D. Ohio Sept. 12, 2001). The case is proceeding with his attorney as next friend. Author conversation with attorney. Kenneth Stewart was found incompetent by the Circuit Court, Bedford County, Virginia and counsel was ordered to file a petition for writ of habeas corpus. Commonwealth v. Kenneth Manuel Stewart, Jr., No. 194621, slip op. at 1 (Cir. Ct. Bedford Cty. Apr. 4, 1995) (finding Stewart lacked the "requisite capacity to waive legal remedies," and ordering counsel to file petition for writ of habeas corpus). Stewart later decided to proceed with his appeals and was executed in 1998. E-mail from Michele Brace (May 1, 2001) (on file with author).

In two cases the litigation ceased either by agreement of the parties or court order. *See* Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981) (remanding for thorough assessment of competency to waive appeals). On remand the lower court found Hays incompetent and the attorneys for Hays and the State agreed to not proceed with the case. *See* Editorial, THE TULSA TRIBUNE, June 14, 1991, at A8 (noting that "in 1981 Hays plea to be executed was placed on indefinite hold because of his delusionary state."). Hays died of natural causes in 1997. Discussion list correspondence (on file with author). In *Council v. Catoe*, the court found petitioner incompetent, stayed the proceedings, appointed a guardian ad litem for Council, ordered petitioner evaluated annually to determine if he had regained his competency, and allowed the prosecution to take depositions to preserve witness testimony. Council v. Catoe, No. 00-CP-02-187, slip op. at 1, 3, 18-20 (Aiken Cty. Ct. of Common Pleas July 31, 2001).

195. *See infra* Section II.

196. Justice Brennan's personal Conference List at 4 (Apr. 7, 1967) (Library of Congress WJB B147 F4). Brennan noted "Discuss" next to *Rees v. Peyton* on the official Conference List. Conference for April 7, 1967 (List 3, Sheet 1) (Library of Congress WJB B147 F3).

stated only "held without action on the petition for certiorari until further order of the Court."[197]

The order does not state the basis on which the Court decided to hold the case.[198] Archival documents reveal that the federal district court found Rees incompetent to decide to abandon or continue with the litigation. Certainly this informed the Court's decision to stay the proceedings. And, while speculation about the reasons for Court actions may be risky, at times it is useful to consider not only the actual historical record, but also the broader historical context in which the events occurred.

3. The Legal Milieu in Which the Court Decided to Stay Rees

By April 1967, when the Court was deciding how to proceed in *Rees*, it was not certain that society or the courts would continue to support the death penalty. The size of death row had steadily grown during the prior five years—from 273 in 1962 to 415 in 1967,[199] but the execution rate had dropped precipitously—47 in 1962, 21 in 1963, 15 in 1964, 7 in 1965, 1 in 1966.[200] When the Court voted to hold *Rees* in early April 1967, no executions had occurred that year. The first execution of 1967 took place five days after the Justices held *Rees*.[201] Two months later, on June 2, 1967,

---

197. Rees v. Peyton, 386 U.S. 989 (1967).

198. This puzzled lower courts for years. *See* Smith v. Armontrout, 812 F.2d 1050, 1057, 1056-57 n.7 (8th Cir. 1987) (noting that no Supreme Court opinion applies *Rees* and no further orders had been entered since 1967 although the case was still pending); Rumbaugh v. Procunier, 753 F.2d 395, 403 n.1 (5th Cir. 1985) (Goldberg, J., dissenting) (commenting that since the Court had not applied *Rees*, "lower federal courts should be reticent to apply elusive standards of competency that have been enunciated in cases whose ultimate resolution remains similarly elusive.").

199. U.S. Dep't of Justice, National Prisoner Statistics: Executions 1962, 14 tbl. 5 (1963) (listing 273 prisoners under sentence of death as of Jan. 1, 1962); U.S. Dep't of Justice, National Prisoner Statistics: Executions 1930-1967, 14 tbl. 6 (1968) (listing 415 prisoners under sentence of death as of Jan. 1, 1967).

200. National Prisoner Statistics: Executions 1962, *supra* note 199, at 14 tbl. 5 (47 executions in 1962); U.S. Dep't of Justice, National Prisoner Statistics: Executions 1930-1963, 14 tbl. 5 (1964) (21 executions in 1963); U.S. Dep't of Justice, National Prisoner Statistics: Executions 1930-1964, 14 tbl. 4 (1965) (15 executions in 1964); U.S. Dep't of Justice, National Prisoner Statistics: Executions 1930-1965, 14 tbl. 6 (1966) (7 executions in 1965); U.S. Dep't of Justice, National Prisoner Statistics: Executions 1930-1966, 13 tbl. 14 (1967) (1 execution in 1966). The one execution in 1966 was James French, in Oklahoma, who sought to be executed. *See also* MICHAEL MELTSNER, CRUEL AND UNUSUAL PUNISHMENT: THE SUPREME COURT AND CAPITAL PUNISHMENT 146 (1973).

201. On April 12, 1967 California executed Aaron Mitchell. *See* MELTSNER, *supra* note 200, at 135-36.

the last execution until 1977 took place.[202] A confluence of factors contributed to the decline and then cessation of executions: public support for the death penalty was waning, and perhaps most importantly for the Court, appeals of death sentences were on the rise throughout the country.[203] These appeals, raising systemic challenges to the constitutionality of the death penalty, were demanding the Court's attention.[204]

In the midst of this significant downturn in executions and the rising questions about the constitutionality of the death penalty,[205] the Commonwealth of Virginia's filings with the Court implied the possibility of seeking to execute Rees. In its Answer to Rhyne's Motion for Stay, the Commonwealth had argued that the failure to dispose of the case prevented the people of Virginia from securing a final adjudication of the case—in other words, executing Rees.[206] The Commonwealth reiterated this stance in its final Memorandum to the Court urging the Court to act on the petition so that it would bring finality to the state court judgment. Once the litigation in the Supreme Court was over, the stay imposed by the trial court judge would be lifted, and the Commonwealth could proceed to seek an execution date. Of course, the issue of Rees's incompetence would continue, but in a different context and a different judicial forum. The Commonwealth had conceded Rees's incompetence in light of the district court's report, but it

---

202. Colorado executed Luis Jose Monge on June 2, 1967. *See id.* at 113. Monge asked to be executed. *Id.* Gary Gilmore was the first person executed in 1977 after the U.S. Supreme Court found new death penalty statutes constitutional. DEATH ROW USA, *supra* note 23, at 11. Two of the last three individuals executed prior to the moratorium waived their appeals. *See* MELTSNER, *supra* note 200, at 113, 146 (Monge and James French). Four of the first five, after the moratorium ended, waived their appeals and sought to be executed. See DEATH ROW USA, *supra* note 23, at 10 (referencing Gary Gilmore, Jan. 17, 1977, Jesse Bishop, Oct. 22, 1979, Steven Judy, Mar. 9, 1981, Frank Coppola, Aug. 10, 1982. John Spenkelink, executed May 25, 1979, did not waive his appeals).

203. *See* STUART BANNER, THE DEATH PENALTY—AN AMERICAN HISTORY 244-247 (2003) (describing the indicia of changes in public support and reasons for the increase in appeals).

204. *Id.* at 247-57 (explaining the development of a national legal strategy to raise systemic challenges and the Court's response). As Banner notes, the NAACP Legal Defense Fund played a key role in "getting the arguments against the constitutionality of the death penalty before the Supreme court in a context in which they would be taken seriously." *Id.* at 253; *see* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 431-36 (2000) (discussing the role of the NAACP LDF in stopping executions and bringing the issue of the constitutionality of the death penalty to the forefront); *see also* MELTSNER, *supra* note 200, at 106-25 (explaining the NAACP LDF's strategy to create a moratorium on executions).

205. Virginia's last execution had been in 1962. National Prisoner Statistics: Executions 1962, *supra* note 199, at 14 tbl. 5.

206. Respondent's Answer, *supra* note 94, at 4.

also raised the expectation that Rees would regain his competence if the case were reversed and retrial became necessary.[207] Short of that, Rees's attorney could litigate the issue of Rees's competence in state proceedings on the ground that he was incompetent to be executed. That litigation would occur in the state courts of Virginia, on the Attorney General's home turf. The Commonwealth agreed that it would not execute an insane person, and that as long as Rees was detained in the state mental hospital, it would not seek an execution date. But it is unclear what was to keep Rees in the state hospital.[208] If Rees returned to the state penitentiary, the Commonwealth would not be bound by its promise. Yet, the record in this case documented a seriously mentally ill man. It may have seemed too perilous to the Justices to send Rees back into the throes of the Virginia courts,[209] especially when the Commonwealth's representative before the Court spoke of the possibility of execution.

III. RECONSIDERATION IN THE 1970S

The Court took no further action in *Rees* until April 2, 1971. At that time E. Robert Seaver, the new Clerk of the Court, raised with Chief Justice Warren Earl Burger the possibility of removing both *Rees v. Peyton* and *Anderson v. Kentucky* from the Court's docket.[210] Seaver was concerned that the Court could be perceived as supervising Rees's mental state, when that should be a state responsibility, as Rees was in the Commonwealth's custody.[211] To that end, Seaver drafted a proposed order for the Court that denied the petition subject to the condition that the case be remanded to the Virginia Supreme Court of Appeals, which would stay judgment until, after appropriate hearings, it was determined that Rees was competent to present his petition for writ of certiorari to the U.S. Supreme Court.[212] According to Seaver's memo, at the April 2, 1971 Conference, the Court "decided not

---

207. Respondent's Memorandum, *supra* note 172, at 3.

208. Other than the fact that all of the doctors who evaluated Rees concluded that he was mentally ill, no reason existed for him to stay in the state hospital. Arguably, the Commonwealth could rely on the clarification by two of the doctors that "Rees was not psychotic," *see supra* note 158, to obtain his transfer back to the state penitentiary.

209. If the Justices had this concern, it may have been augmented by the fact that the only execution in 1966 was a man who waived his appeals, and similarly, one of the only two forthcoming executions in 1967 was a man who waived his appeals. *See* MELTSNER, *supra* note 200, at 113, 146.

210. Memorandum to the Files from E. Robert Seaver, Clerk, U.S. Supreme Court at 1 (Apr. 16, 1971) (U.S. National Archives).

211. *Id.*

212. *Id.* at 2.

to take any action with respect to this case at this time."[213]

Again, it is worthwhile to consider why the Court chose this course of action. First, the denial of the petition for writ of certiorari itself would instigate the need for Rhyne to consider filing a petition for rehearing—on the substantive issues as well as the terms of the remand—and that would require consulting with Rees, who was still incompetent as far as anyone knew. Second, as a strictly procedural matter, the Clerk's proposed disposition could have been seen as a complicated and unworkable step. The Clerk suggested remanding the case to a Virginia state court, but the case was not an appeal from a state court judgment, it was an appeal from a judgment of the federal court of appeals on Rees's federal petition for a writ of habeas corpus. It would be highly unusual, if not impossible, to remand a federal habeas appeal to a state court. If, as the Clerk proposed, the Virginia Supreme Court of Appeals eventually determined Rees was competent to present his certiorari petition to the U.S. Supreme Court, the petition would seek review of a federal court decision (on the constitutionality of his conviction and sentence) as well as, possibly, the state court decision (on his competency).

In the broader context of the Court's consideration of death penalty cases generally, the suggestion to remand Rees to a state court came at a particularly intense, precarious, and tumultuous time.[214] From 1968 to 1972, the Court heard and decided several important death penalty cases.[215]

---

213. The memo notes that the Chief Justice thought that the case could go on the newly designated list of suspended cases, separate from the active cases. *Id.* at 1. Apparently this is the point at which *Anderson* was given the case number S-1, and *Rees*, S-2.

214. *See, e.g.*, BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 205 (1979) (reporting that during the 1971 Term, Justice Marshall found that "the Court's curious handling of death [penalty] cases in the last several years . . . reflected a deep ambivalence among his colleagues"). During this time, the composition of the Court underwent rapid, unexpected, and numerous changes - from 1969 to 1972 four of the nine justices changed. *Id.* at 9-26, 86-91, 156-63 (recounting how Warren and Fortas were replaced by Burger and Blackmun, and Black and Harlan were replaced by Powell and Rehnquist). Woodward and Armstrong discuss how the change in Justices, among other factors, affected the outcome in one death penalty case, *Maxwell v. Bishop*. *Id.* at 205-06. The Court granted certiorari in the case in 1968 on two issues: (1) the constitutionality of absolute jury discretion in deciding whether to sentence a person to life or death, and (2) single verdicts in which the jury decided guilt and punishment at the same time. Maxwell v. Bishop, 393 U.S. 997 (1968). The first vote of the Justices in 1968 was 6-2 to find the single verdict unconstitutional. Due to ensuing problems with drafting and changes in the Court's composition, the decision was not finalized. By 1970, the Court reversed and remanded *Maxwell* on a completely different issue. Maxwell v. Bishop, 398 U.S. 262 (1970) (finding the jury selection process unconstitutional). While *Maxwell* was pending, the Court held all death penalty cases in abeyance. MELTSNER, *supra* note 200, at 148.

215. *See, e.g.*, United States v. Jackson, 390 U.S. 570 (1968) (finding unconstitutional

Although the Court first agreed to hear a direct Eighth Amendment challenge to the death penalty in 1969,[216] it did not hold that the death penalty violated the Eighth Amendment of the U.S. Constitution because it was cruel and unusual punishment until 1972.[217]

In early April 1971, when the Clerk inquired about *Rees*, the Court was one month away from issuing its opinion in the consolidated cases of *McGautha v. California* and *Crampton v. Ohio*.[218] These cases addressed two key constitutional issues in death penalty trials: (1) the validity of unitary proceedings in which the jury decided guilt and punishment at the same time, and (2) the absence of standards to guide the jury's sentencing decision.[219] While the cases did not present Eighth Amendment challenges to the constitutionality of the death penalty, the Court's decisions would affect the fate of individuals across the country who had been sentenced to death. Indeed, some feared that if the Court upheld the death penalty

---

the federal kidnapping statute because it encouraged the defendant to plead guilty to avoid the death penalty); Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding death sentences, but not convictions, unconstitutional when potential jurors were excused for cause because they opposed or had religious or conscientious scruples against the death penalty). *See also* MELTSNER, *supra* note 200, at 115-25 (discussing the significance of both cases for the ongoing moratorium); POWE, *supra* note 204, at 432-35 (discussing the impact of *Jackson* and *Witherspoon*, observing "*Witherspoon* was a bombshell because everyone assumed that without a death-qualified jury the death penalty was an impossibility").

216. In *Boykin v. Alabama*, the Court granted the petition for writ of certiorari on two issues: (1) whether the death penalty was cruel and unusual punishment, and (2) whether Boykin's guilty plea was invalid because the judge failed to inquire on the record whether Boykin understood his plea. MELTSNER, *supra* note 200, at 169-70. The Court decided the case on the second issue. *See* Boykin v. Alabama, 395 U.S. 238 (1969). As Meltsner observed, although the Court did not decide the case on the Eighth Amendment issue, the "seed had been planted." MELTSNER, *supra* note 200, at 184.

217. *See* Furman v. Georgia, 408 U.S. 238 (1972); *see also infra* notes 230-31 and accompanying text.

218. 402 U.S. 183 (1971).

219. In a unitary proceeding the jury heard all evidence related to guilt and punishment at the same time and returned one verdict on both issues (for example, guilty without capital punishment). It was argued that this was unconstitutional because it created a tension between the defendant's right to remain silent as to guilt and his right to be heard on punishment. If a defendant testified with respect to punishment, his testimony might include facts about the crime. Thus, he would be forced to become a witness against himself as to guilt. *Id.* at 210-11, 213. (Today, death penalty trials are bifurcated. First, the jury hears evidence as to guilt. Then, if the jury finds the defendant guilty of a murder for which the death penalty is a possible punishment, the jury hears additional evidence from both sides, in a separate proceeding, that may be unrelated to guilt but is directly related to determining the appropriate punishment, such as information about the defendant's character or background.) The unitary trial exacerbated the second constitutional issue - unguided jury decisionmaking. Here, the argument was that without guidance, the jury's decision could be based on arbitrary factors, including racial prejudice. *Id.* at 195.

statutes at issue in *McGautha* and *Crampton*, the unofficial moratorium on executions in effect since 1967 would end.[220]

On May 3, 1971 the Court announced its decision, holding 6-3 that neither unitary proceedings nor unguided jury decisionmaking violated the Fourteenth Amendment due process clause.[221] That same day, Governors in Ohio and Maryland announced that no execution would occur in their states until the Court resolved whether the death penalty itself was constitutional.[222] The NAACP Legal Defense Fund immediately filed supplemental briefs in pending cases urging the Court to decide the fundamental Eighth Amendment issue.[223] The time was ripe for the Court

---

220. *See, e.g.*, MELTSNER, *supra* note 200, at 240 (describing a column by Anthony Lewis, concluding that the United States "faced the brutalizing effect of a mass slaughter if McGautha and Crampton lost their cases"); *Suspension or Abolishment of the Death Penalty, Hearings on H.R. 8141 et al., Before Subcommittee No. 3 of the House Comm. on the Judiciary*, 92d Cong. 221 (1972) (Hugo Adam Bedau, The Death Penalty in America—Review and Forecast, in Appendix) (reprinted from Federal Probation 1971) (remarking that media reports suggest that, post-*McGautha*, executions are significantly more likely in some states but not in others). The fear, apparently, was not unfounded. In THE BRETHREN, Woodward and Armstrong report that after the Court announced the decision in McGautha, the justices met to decide who "could now be executed." *See* WOODWARD & ARMSTRONG, *supra* note 214, at 206. According to Woodward and Armstrong, Justice Stewart "balk[ed]," maintaining that the fundamental issue of "whether the death penalty was cruel and unusual" punishment under the Eighth Amendment still had to be decided. *Id.*

221. *McGautha*, 402 U.S. at 183. The Court held that unitary proceedings did not violate due process because the defendant is not required to testify as to either guilt or punishment. *Id.* at 213-20. Therefore, he must bear the risk involved in waiving one right (to remain silent as to guilt) in order to assert another (the right to be heard as to punishment). *Id.* at 210-17. Unguided jury decisionmaking did not violate due process because:

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death is capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Id. at 207-08 (footnote omitted).

222. MELTSNER, *supra* note 200, at 245. In California, Governor Reagan announced a "wait and see policy." *Id.* As Meltsner observed, "no one was eager to be the first to press the button." *Id.*

223. *See* JACK GREENBERG, CRUSADERS IN THE COURTS 448-49 (1994) (noting that the brief told the Court about 120 capital cases pending before it on a plethora of death penalty issues and that "the Court could not allow people to be executed without resolving these issues"); MELTSNER, *supra* note 200, at 245 (noting that LDF made a "back-to-the-wall plea

to decide this question.

On June 28, 1971, two months after issuing its decision in *McGautha*, the Court announced that it would hear the appeals in four cases, all of which involved the question of whether the death penalty was cruel and unusual punishment in violation of the Eighth Amendment.[224] A June 8, 1971 Memorandum to the Conference from Justices Brennan and White showed that the Court carefully considered how to proceed in the many pending death penalty cases.[225] It appeared that in deciding which cases to hear, the Court reviewed the full range of cases in which the death penalty had been imposed[226] and selected cases based on how cleanly the issues were presented and decided by the lower courts,[227] as well as the quality of counsel who would represent both the petitioners and the states.[228]

In light of this sustained activity in the Court regarding bedrock issues about the constitutionality of the death penalty, it is significant that the Court did not take any action in *Rees* in 1971. Rees's presumed continued incompetence certainly held the Court to its initial position of not being able to decide whether to grant or deny certiorari. That may have been enough for the Court to decline to act. Yet it also may have been reluctant to consider whether some other course of action—such as remanding it to a state court—would be appropriate given the Court's state of flux regarding

---

to decide the cruel and unusual punishment issue").

224. Aikens v. California, *cert. granted*, 403 U.S. 952 (1971); Branch v. Texas, *cert. granted*, 403 U.S. 952 (1971); Furman v. Georgia, *cert. granted*, 403 U.S. 952 (1971); Jackson v. Georgia, *cert. granted*, 403 U.S. 952 (1971). The Court eventually dismissed *Aikens* after the California Supreme Court held the California death penalty statute unconstitutional. Aikens v. California, *dismissed as moot*, 406 U.S. 813 (1972); *see* People v. Anderson, 493 P.2d 880 (Cal. 1972) (holding the California death penalty statute unconstitutional under California's cruel or unusual punishment clause).

225. Memorandum to the Conference from Justices William J. Brennan and Byron White (June 8, 1971) (Library of Congress TM B64 F5). The initials WJB, Jr. and BW are typed at the end of the memo. The memo concludes, "[i]f we decide to grant these cases, it will be necessary to hold at least 148 cases for their decision." *Id.* at 4.

226. For example, the Court looked at cases where the crime was rape or robbery as well as homicide. *Id.* at 1-3.

227. Noting that in *Branch* and *Jackson* "[t]he Eighth Amendment issue was squarely presented and decided by the state courts," whereas *Miller v. Georgia* "is a bad case because it also raises the issue of the retroactivity." *Id.* at 2-3.

228. Observing that, as to the rape cases, the NAACP Legal Defense Fund represented the petitioner in *Jackson*, so he would have satisfactory counsel, but "[o]n the other hand, we'd probably get better representation from Texas in *Branch* than we would from Georgia in *Jackson*." *Id.* at 3. As to the homicide cases, "[o]ur preference is clearly for the latter [*Aiken* as opposed to *Furman*] since California is always well represented and the petitioner is represented by both [Tony] Amsterdam and Bill Douglas' former clerk, Jerome Falk." *Id.* at 4.

the death penalty. It is also possible that some of the Justices remembered the State's repeated references to the possibility of executing Rees and may have preferred to have the case sit quietly until the direction of the Court was resolved.[229]

In 1972, in *Furman v. Georgia*, the Court held, in a 5-4 per curiam opinion that "the death penalty in these cases constitutes cruel and unusual punishment."[230] Each Justice wrote separately; the opinions cover over two hundred pages of the official U.S. Reporter.[231] The result was that the death sentences of all persons on death row across the country were vacated.[232] In Virginia, the twelve men on death row were resentenced to life terms.[233] Curiously, Rees was not included as one of those on Virginia's death row. By 1972, Rees was back at the federal Springfield Medical Center where he had been sent for psychiatric treatment.[234] The Commonwealth of Virginia,

---

229. As had occurred prior to the decision in *McGautha*, many persons were concerned that if the Court upheld the death penalty in *Furman*, a wave of executions would occur. *See, e.g., Suspension or Abolishment of the Death Penalty, House Hearings*, *supra* note 220, at 1 (Statement of Hon. Emanuel Celler) (commenting that a moratorium is necessary because "concerned citizens everywhere" do not want executions to resume while the courts and state and federal legislatures "are engaged in a profound reexamination of the efficacy of the death penalty"); *Id.* at 58 (Testimony of Prof. Anthony G. Amsterdam) (stating that "the effect [of finding the death penalty constitutional] may be to subject to imminent execution a staggering, positively staggering, number of condemned men"); *Id.* at 435 (citing Prof. Charles L. Black, *The Crisis in Capital Punishment*, in Appendix (reprinted from 31 MARYLAND L. REV. 289 (1972)) (noting that "we are in crisis" because if the judicial stay ends, "many may be executed in the next year").

230. 408 U.S. 238, 238 (1972) (per curiam) (cases consolidated).

231. Three of the five justices in the majority (Douglas, Stewart, and White) found the then existing statutory death penalty schemes arbitrary and capricious, albeit for different reasons. *Id.* Douglas focused on racial disparities. *Id.* at 240-57. Stewart concentrated on the random application of the death penalty. *Id.* at 306-10. White was concerned with the infrequent imposition of death sentences. *Id.* at 310–14. Justices Marshall and Brennan found the death penalty unconstitutional in all respects, not just as presently constituted. *Id.* at 314-75, 257-306. As Chief Justice Burger observed in dissent, new death penalty statutes that addressed the plurality's concerns might be found constitutional. *Id.* at 375-403. Indeed, four years later that is exactly what occurred when the Court held constitutional newly adopted death penalty statutes. *See infra* note 244 and accompanying text.

232. *See* MELTSNER, *supra* note 200, at 293 (noting that 631 persons were on death row across the country).

233. *See* Frank Green, *12 Virginians on Death Row were Saved*, RICHMOND TIMES-DISPATCH, June 29, 1997, at A1.

234. Progress and Psychological Report from the Federal Bureau of Prisons, MCFP-Springfield 2 (May 18, 1987) (noting that in June 1968 Rees "was returned" to the Springfield facility "for psychiatric treatment") (U.S. National Archives). The Virginia Attorney General's office forwarded this report to the Court. *See* Letter from Jerry P. Slonaker, Senior Assistant Attorney General, to Frank Lorson, Chief Deputy Clerk, U.S. Supreme Court (June 3, 1987) (U.S. National Archives).

apparently, forgot about him.[235]

Once the Court decided *Furman*, the uncertainty over the status of the death penalty could no longer explain the Court's inaction in *Rees*. Paradoxically, Rees did not receive the benefit of the Court's resolution of that issue. *Rees* was not held pending the decision in *Furman*, so the Court did not act to vacate his sentence. Technically the case was pending in the federal court system, so a state court would not have acted on his death sentence. Thus, Rees remained under sentence of death; a sentence he had once sought to have carried out, but which no longer would or could be.

IV. RESOLUTION IN THE 1980S AND 1990S

In 1988 Governor Baliles finally commuted Rees's death sentence to life imprisonment.[236] Baliles's motivation was to treat Rees "consistently with other similarly situated death row inmates whose sentences were commuted by former Governor Godwin."[237] The commutation prompted the Court to reconsider the case one more time.[238] At the direction of Chief Justice Rehnquist, Francis J. Lorson, Chief Deputy Clerk, wrote a memorandum to the Conference proposing that the Court review the case.[239] Lorson attached a memo from one of the Justice's clerks that evaluated the merits of the questions presented in the original 1965 petition for writ of certiorari.[240] Lorson suggested, however, that before any consideration of the merits of the petition, the Court seek supplemental briefing on four issues: (1) the district court's 1966 findings and conclusions in response to

---

235. *See* McKelway, *supra* note 5, at 3 (noting that "Virginia officials apparently had forgotten about him because he was in the federal prison system").

236. *See* Letter from Jerry P. Slonakar, Senior Assistant Attorney General, to Frank Lorson, Chief Deputy Clerk, U.S. Supreme Court (Jan. 6, 1988) (U.S. National Archives).

237. Letter from Sandra D. Bowen, Secretary of the Commonwealth, to Melvin Davis Rees, Jr. (Jan. 4, 1988) (U.S. National Archives). Rees may have prompted this action. Rees reported to the psychologist, in 1987, that he had written several letters to the Commonwealth asking that his death sentence be vacated, as occurred with other Virginia death row inmates. Federal Bureau of Prisons, *supra* note 234, at 2. His letters grew out of a news reporter talking to him about his case. *Id.*

Henry Anderson's death sentence was never commuted. Wolfson, *supra* note 72, at 8A. Indeed, the Kentucky Attorney General's office still believed in 1987 that his death sentence was valid. *Id.*

238. The Virginia Attorney General's office notified the Court of the commutation. *See* Letter from Slonakar, *supra* note 236.

239. Memorandum from Francis J. Lorson, Chief Deputy Clerk, U.S. Supreme Court to the Conference (N.D., the memo states that papers in the case were distributed to the Court for the April 1, 1988 Conference) (U.S. National Archives).

240. Preliminary Memorandum from Rob Werner (Mar. 21, 1988) (U.S. National Archives).

the Supreme Court's initial remand; (2) the developments in the law since 1965 when the petition was filed; (3) the effect of the commutation on the petition; and (4) any other relevant matters.[241] The Court took neither of these steps. It is not even clear that the Court discussed the case at its Friday Conference. Justice Marshall's notation on the Conference List for April 1, 1988 shows a line drawn through the case number and name.[242] It may be that the Court agreed with the conclusion reached by the law clerk who wrote: "I can think of no procedure the Court might establish for monitoring the case that might not establish an unwarranted precedent."[243]

A final consideration of the broader context of death penalty cases may help explain the Court's reluctance to take any action in Rees's case. By 1988 the legal climate surrounding death penalty cases was vastly different that in the late 1960s and early 1970s. In 1976 the Court had found that new death penalty statutes adopted by states in *Furman*'s wake were constitutional.[244] By the end of 1987, 1,984 people were on death row across the country[245] and executions were on the rise.[246]

---

241. Memorandum from Lorson, *supra* note 239, at 2.

242. Conference List for Friday April 1, 1988 (List 1, Sheet 1) (Library of Congress TM B434 F10).

243. The law clerk recommended first ascertaining if Rees was still incompetent. If he was, the law clerk recommended retaining the case on the special docket. Preliminary Memorandum from Werner, *supra* note 240, at 13.

244. In *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), the Court upheld the new statutes adopted in, respectively, Georgia, Florida, and Texas. According to the plurality opinions of Justices Stewart, Powell, and Stevens, these statutes were constitutional under the Eighth Amendment because they addressed the Justices concerns in *Furman*: they narrowed the class of crimes for which a defendant could be sentenced to death; they guided the jury's punishment decision, and they provided for individualized consideration of whether the death penalty was the appropriate punishment for the particular defendant. Each of these new death penalty schemes utilized a bifurcated trial process rather than a unitary one. The Court also held that new statutes adopted in North Carolina and Louisiana were unconstitutional because they imposed mandatory death sentences for certain crimes. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). The Court held that these statutes violated the Eighth Amendment proscription against arbitrary and capricious sentences because they did not permit individualized sentencing.

245. *See* Size of Death Row by Year, Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org (accessed from home page by selecting The Facts, Death Row) (last visited Mar. 25, 2004).

246. The first execution was in January 1977. *See* DEATH ROW U.S.A., *supra* note 23, at 11. Thereafter, between 1977 and 1983, ten persons were executed. *Id.* The numbers of executions then began to rise: twenty-one in 1984, eighteen in each of 1985 and 1986, twenty-five in 1987. *Id.* at 10-11. By April 1988, three more individuals had been executed. *Id.* at 12.

Of the ninety-six persons who had been executed from 1976 to April 1988, thirteen were individuals who had waived their appeals and sought to be executed.[247] Unlike Rees, none of the individuals sought to waive his appeal for the first time while his case was pending before the U.S. Supreme Court. Indeed, six of the thirteen individuals did not seek review of their case in the Court.[248] The cases that came to the Court did so through a person acting as next friend seeking a stay of execution.[249]

The Court's response to the next friend petitions was quite different than it had been to Rhyne's Motion for Stay in *Rees*. While it is true that in these cases some assessment of the inmate's competence to waive his appeals had been made in the lower courts, usually that assessment failed to come close to the careful examination that occurred in the federal district court in *Rees*.[250] Nonetheless, in the three instances where the Court, or the

---

247. *See id.* (listing Gary Gilmore (Utah, Jan. 17, 1977), Jesse Bishop (Nevada, October 22, 1979), Steven Judy (Indiana Mar. 9, 1981), Frank Coppola (Virginia, Aug. 10, 1982), John Evans (Alabama, April 22, 1983) (later changing his mind, *see infra* note 252), Stephen P. Morin (Texas, Mar. 13, 1985), Charles Rumbaugh (Texas, Sept. 11, 1985), William Vandiver (Indiana, Oct. 16, 1985), Carroll Cole (Nevada, Dec. 6, 1985), Jeffery Barney (Texas, Apr. 16, 1986), Ramon Hernandez (Texas, Jan. 30, 1987), Eliseo Moreno (Texas, Mar. 4, 1987), Robert Streetman (Texas, Jan. 7, 1988)); *see also* Amnesty International, The Illusion of Control: "Consensual" Executions, The Impending Death of Timothy McVeigh, and the Brutalizing Futility of Capital Punishment (2001), *available at* http://www.amnestyusa.org (accessed from homepage by entering "illusion of control" into search space) (last visited Oct. 15, 2003) (providing brief descriptions of each of the men and his case). Neither LDF nor Amnesty lists Robert Streetman. I include him among the twelve because one day before his execution the Fifth Circuit opinion affirmed the lower court finding that Streetman was competent to waive his appeals. *See* Streetman v. Lynaugh, 835 F.2d 1521 (5th Cir. 1988).

248. Stephen P. Morin, William Vandiver, Carroll Cole, Jeffery Barney, Eliseo Moreno, Robert Streetman.

249. Gary Mark Gilmore by his mother, Bessie Gilmore as next friend. *See* Gilmore v. Utah, 429 U.S. 1012 (1976) (terminating the stay of execution). John Lewis Evans, III by his mother, Betty Evans as next friend. *See* Evans v. Bennett, 440 U.S. 1301 (1979) (Rehnquist, Circuit Justice, granting a temporary stay of execution). Jesse Walter Bishop by Clark County Deputy Public Defenders Kirk B. Lenhard and George E. Franzen as his next friends. *See* Lenhard v. Wolff, 443 U.S. 1306 (1979) (Rehnquist, Circuit Justice, granting a temporary stay of execution). Steven T. Judy, by Larry Williams as his next friend. *See* Williams v. Indiana, 450 U.S. 971 (1981) (denying stay application). Frank Coppola by his attorney J. Gray Lawrence as his next friend. *See* Mitchell v. Lawrence, 458 U.S. 1123 (1982) (vacating stay of execution). Charles Rumbaugh by his parents, Harvey and Rebecca Rumbaugh as his next friends. *See* Rumbaugh v. McCotter, 473 U.S. 919 (1985) (Marshall and Brennan, JJ., dissenting from denial of certiorari). Ramon Pedro Hernandez, by his attorney Richard Lovelace as his next friend. *See* Lovelace v. Lynaugh, 479 U.S. 1071 (1987) (denying stay application).

250. In *Gilmore*, the evidence of competency to waive his appeals consisted of the pre-trial determination that he was competent to stand trial, and two reports, one from a prison

designated Circuit Court Justice, explained its action, it found no error in the lower court's determination of competency.[251] In each of those three

psychiatrist based on a one hour post-trial psychological evaluation, and one from two prison psychologists, and a supplemental report after Gilmore attempted suicide in which the prison psychiatrist reported no change in his mental state. *See Gilmore*, 429 U.S. at 1015 n.5 (Burger, C.J. concurring). Justice Marshall dissented from the termination of the stay of execution on several grounds, including that no adversary hearing on Gilmore's competency had occurred, the lower court transcript presented to the Court was missing that portion where Gilmore's trial attorney talked about whether he thought Gilmore was competent, and the entire time frame—five months from the crime and two from sentencing—was too quick to allow for Gilmore's "mature consideration" of his waiver. *Id.* at 1019 (Marshall, J., dissenting).

In *Evans*, it does not appear that any hearing took place regarding Evans's competence to waive his appeals. Justice Rehnquist quoted from the federal district opinion that referred to evidence the court considered. *Evans*, 440 U.S. at 1304-05. The district court concluded that Betty Evans had not shown any change from the pretrial finding that her son, John Evans was competent to stand trial despite the fact that Evans presented an affidavit from a psychiatrist who concluded Evans was not rational. *Id.* at 1304. The affidavit was based on conversations with persons who knew him because Evans refused to see the psychiatrist. *Id.*

In Jesse Bishop's case, Justice Rehnquist noted that, beyond the pretrial evidentiary hearing at which Bishop was found competent to plead guilty and represent himself, "[t]here has been no subsequent *judicial* determination of his competence to waive further litigation." *Lenhard*, 443 U.S. at 1311. The only additional information the courts had was a report from the only psychiatrist Bishop agreed to see, who concluded that Bishop was competent, and the judge's personal observations of Bishop in court. *Id.* Justice Marshall's dissent disputed the competency finding noting that Bishop presented no mitigating evidence in support of a life sentence at trial, he was a drug addict still heavily medicated on tranquilizers, he said he would rather die than live under the inhumane prison conditions, and he was hopeless about his case and thought it undignified to ask for mercy. Lenhard v. Wolff, 444 U.S. 807, 812 n.2 (1979) (Marshall, and Brennan, JJ., dissenting from denial of stay).

The judicial determination that Frank Coppola was competent was made at a nonadversarial hearing. *See supra* notes 244-47 and accompanying text.

Rumbaugh is the one case in which the federal district court appeared to conduct a thorough assessment of competency. It ordered Rumbaugh evaluated at a federal facility for thirty days, and at an evidentiary hearing heard testimony from psychiatrists and psychologists presented by both the State and Rumbaugh's parents. *See* Rumbaugh v. Procunier, 753 F.2d 395, 399 (5th Cir. 1985). Justice Marshall observed, however, that the lower courts failed to properly apply the *Rees* standard. *Rumbaugh*, 473 U.S. at 920 (Marshall, J., dissenting from the denial of cert.) ("This Court should not allow the erosion of the standard set in *Rees*, and it should certainly prevent such erosion in the context of capital punishment.").

251. *See Gilmore*, 429 U.S. at 1014 (Burger, C.J., concurring) ("I am in complete agreement with the conclusion expressed in the [Utah Supreme] court's order that Gary Mark Gilmore knowingly and intelligently, with full knowledge of his right to seek an appeal in the Utah Supreme Court, has waived that right"); *Id.* at 1017 (Stevens, J., concurring) (finding that the record "supports the conclusion that Gilmore was competent to waive his right to appeal"); *Evans*, 440 U.S. at 1303-06 (Rehnquist, Cir. J.) (reviewing with approval the lower court's assessment of competency); *Lenhard*, 443 U.S. at 1310-13

cases the Court, or Justice, initially granted a stay application to allow the State to respond, and then terminated the stay with alacrity.[252] In other cases the Court denied the stay application or certiorari petition without written opinion.[253]

The Court's treatment of Virginia death row inmate Frank Coppola's case is especially striking in comparison to how the Court handled Rees's case. In April 1982 Coppola discharged his attorney, sought to withdraw his petition for writ of habeas corpus pending in federal court, and asked that the Commonwealth set an execution date for him.[254] In response, in May 1982, the state court judge appointed a new attorney for Coppola "[f]or the

---

(Rehnquist, Cir. J.) (same).

252. In *Gilmore*, the Court (6-3) granted a stay of execution on Dec. 3, 1976 to allow the State to respond to the application for stay and to file the transcript of the state court proceedings. *See* Gilmore v. Utah, 429 U.S. 989 (1976). On Dec. 13, 1976 the Court (5-4) terminated the stay finding that Gilmore was represented by counsel and that the state court transcript showed that Gilmore knowingly and intelligently waived his right to appeal. *Id.* at 1012. Justices White, Brennan, and Marshall dissented on the ground that Gilmore should not be able to waive the state court's determination of the constitutionality of its death penalty statute. *Id.* at 1018 (White, Brennan, & Marshall, JJ., dissenting). Marshall separately dissented on the ground that the state court determination of Gilmore's competency was wholly inadequate. *Id.* at 1019 (Marshall, J., dissenting). Justice Blackmun dissented on the ground that the Court gave too little consideration to the important questions regarding Bessie Gilmore's standing as next friend and the constitutionality of the Utah death penalty statute. *Id.* at 1020 (Blackmun, J., dissenting).

Three years later, in *Evans*, Justice Rehnquist, as the designated Circuit Court Justice, granted an application for stay of execution so that the state could respond and the full Court could consider the matter at its Friday conference seven days hence. Evans v. Bishop, 440 U.S. 1301 (1979) (noting that, were the matter up to him, he would deny the application, but out of deference to the concerns of other Justices, he granted it). The full Court then vacated the stay, in part because, in the intervening days, Evans changed his mind and decided to continue litigating his case and no new execution date had been set. *See* Evans v. Bishop, 440 U.S. 987 (1979) (Brennan, J., concurring). In Jesse Bishop's case, Justice Rehnquist, on Aug. 25, 1979, granted a stay of execution so that the State could respond and the full Court consider the matter. *Lenhard*, 443 U.S. at 1306. On Oct. 1, 1979 the Court denied the stay application, 7-2. *See* Lenhard v. Wolff, 444 U.S. 807 (1979) (Marshall and Brennan, JJ., dissenting). Justice Marshall dissented on the ground that "the procedure the Court approved today amounts to nothing less than state-administered suicide." *Id.* at 815 (Marshall, J., dissenting).

253. *See* Williams (next friend for Steven Judy) v. Indiana, 450 U.S. 971 (1981) (denying stay application) (Brennan and Marshall, JJ., would grant); Rumbaugh (next friend for Charles Rumbaugh) v. McCotter, 473 U.S. 919 (1985) (Marshall and Brennan, JJ., dissenting from denial of certiorari); Lovelace (next friend for Ramon Hernandez) v. Lynaugh, 479 U.S. 1071 (1987) (denying stay application) (Marshall and Brennan, JJ., dissenting from denial of stay).

254. Statement of Fact and Proceedings at 3, Commonwealth v. Coppola (Newport News Cir. Ct., Va. June 25, 1982) (No. 4072-78) (reconstructed on Aug. 3, 1982) (U.S. National Archives).

purposes of setting an execution date . . . ."[255] In June, the state court judge held a non-adversarial hearing at which the new counsel reported to the judge that he had met with Coppola, that Coppola reiterated his decision to drop his appeals and seek execution, and that he (new counsel) believed Coppola understood his choices and the consequences of his decision.[256] Based on the attorney's representations, and a report prepared by two state psychiatrists at the request of the court, the judge found Coppola competent to forego his appeals.[257] Coppola was not present at this hearing and neither was anyone who might challenge whether Coppola was competent.[258] The only participants were the judge, the new attorney representing Coppola, and the Commonwealth's attorney.[259] The judge set an execution date of August 10, 1982.[260]

Thereafter, one of Coppola's original attorneys, J. Gray Lawrence, sought to stay Coppola's execution and filed a petition in the federal district court to appear as Coppola's next friend on the ground that he was not competent to waive his appeals.[261] At a hearing the day before the scheduled execution, a federal district court judge found that the state court hearing was adequate and that Coppola was competent.[262] She, therefore, denied Lawrence's petition to appear as next friend and denied the application for stay of execution.[263] On August 10, Lawrence renewed his motion for stay of execution in the Fourth Circuit Court of Appeals.[264] After reviewing the papers presented by both Lawrence and the Commonwealth, Judge Butzner issued a stay of execution at 2:40 p.m.[265]

---

255. *Id.*

256. *Id.* at 3-5.

257. *Id.* at 7-8. None of the participants ever referred to the *Rees* standard. The psychiatrists' conclusion appears to utilize a test that is vaguely related to *Rees*: "Mr. Coppola failed to yield any evidence of the existence of a mental disorder which might have acted to impair his capacity to appreciate the appellate procedures available to him or the meaning and consequences of electing to withdraw from further appellate action." *Id.* at 7 (citing June 15, 1982 Report from William D. Lee, Forensic Clinical Psychologist and Miller M. Ryan, Forensic Psychiatrist, to Judge Douglas M. Smith, Circuit Court Judge for the City of Newport News (U.S. National Archives)).

258. *Id.* at 2.

259. *Id.*

260. *Id.* at 7.

261. Transcript of Proceedings at 3, Gray (sic) v. Mitchell (E.D. Va. August 9, 1982) (No. 82-0509-R).

262. *Id.* at 11-17.

263. *Id.* at 17-18.

264. Memorandum in Support of Application for Stay of Execution Pending Appeal, Lawrence (individually and as next friend) v. Mitchell (4th Cir. Aug. 10, 1982) (No. 82-6495) (U.S. National Archives).

265. Order, Lawrence v. Mitchell (4th Cir. Aug. 10, 1982) (No. 82-6495) (U.S.

At 7:25 p.m. the Commonwealth filed a motion to vacate the stay in the U.S. Supreme Court.[266] The Court conferred via conference call at 9:10 p.m. This was one hour before Lawrence, as Coppola's next friend, filed his opposition to the motion to vacate at 10:22 p.m.[267] The Court entered the order granting the State's motion at 10:30 p.m., eight minutes after receiving the papers in opposition.[268] At 11:05 p.m. Lawrence filed a handwritten request to reconsider the order vacating the stay on the ground that his papers had not yet been filed with the Court when the Court conferred about the case.[269] The Court never acted on this motion.[270] Coppola was executed that night.[271]

Between the Court vacating the stay of execution in Coppola's case in 1982 and reconsidering Rees's case in 1988, eight men waived their appeals and were executed.[272] Of those eight, only two persons acting as next friend sought review or a stay of execution from the Court. In 1985, Charles Rumbaugh's parents filed a petition for writ of certiorari seeking review of the lower court proceedings in which Rumbaugh was found competent to

---

National Archives). Sometime later that day Judge Butzner denied the Commonwealth's Motion to Vacate the Stay.

266. *See* Docket Sheet and Motion to Vacate Order Granting Stay of Execution marked "application filed (7:25 p.m.)," Mitchell v. Lawrence (No. A-147) (U.S. National Archives).

267. *See* Docket Sheet, *supra* note 266. The Court conferred by telephone because only four of the Justices were in town. Justice O'Connor was out of the country and did not participate. *See* Mitchell v. Lawrence, 458 U.S. 1132 (1982).

268. *See Lawrence*, 458 U.S. 1123. Justice Stevens wanted to call for petitioner's response. Justices Marshall and Brennan dissented. *Id.*; *see also* Docket Sheet, *supra* note 266 (noting time of decision and receipt of papers); Opposition to Motion to Vacate the Order of the Hon. J.D. Butzner, Jr., Circuit Judge, United States Court of Appeals, Granting a Stay of Execution, Lawrence v. Mitchell (No. A-147) (U.S. National Archives).

269. *See* Application for Stay Pending Consideration of Opposition to Motion to Vacate by the full Court, Lawrence v. Mitchell (U.S. National Archives). At 11:35, the Court received a telegram requesting that the Court stay the execution pending circulation and reconsideration of Lawrence's papers in opposition to vacating the stay. Docket Sheet, *supra* note 266.

270. To this day, the Court has not addressed what type of hearing is constitutionally required in order to determine if a person is competent to waive their death penalty appeals. *See* Hamilton (as next friend to James Smith) v. Texas, 498 U.S. 908 (1990) (Stevens, J., concurring in denial of cert.) (objecting to the process in case by which the Court granted certiorari on the issue of what standards due process requires of a hearing to determine whether a death row inmate is competent to waive appeals, but no fifth Justice stepped forward to vote for a stay of execution, so James Smith was executed and the case was now moot).

271. *See generally* Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, *in* THE KILLING STATE 148 (Austin Sarat, ed., 1999) (presenting a blistering analysis of how the Court's treatment of Coppola shows that the Court had abandoned any sense of reason or decorum in ruling on death penalty cases).

272. *See supra* note 247.

waive his appeals. The Court denied the petition in July, over a vigorous dissent by Justices Marshall and Brennan.[273] The State of Texas executed Rumbaugh in September 1985.[274] In 1987, Richard Lovelace, as next friend to Ramon Pedro Hernandez, filed an application for stay of execution on January 30th, the day Hernandez was scheduled to be executed. That same day the Court denied the application without written opinion and Hernandez was executed.[275]

It was in this new context of how it was handling cases where the death row inmate sought to waive his appeals, that the Court revisited *Rees* in 1988. The Court once again faced the dilemma of how, or whether, to act in this case that had troubled it from the start. It appeared that Rees was still incompetent to decide whether to abandon or continue the litigation of his case.[276] If the Court sought to ascertain Rees's current mental state, arguably it would have had to request new psychological evaluations itself or again remand the case for additional inquiry. Either approach might have created the impression (or precedent) of greater involvement than the Court wanted in a death penalty case where the inmate was seeking to waive his appeals. Any action taken in *Rees* would have been inconsistent with the Court's otherwise expeditious treatment of other death penalty cases where the inmate's competency to waive his appeals was at issue.

Thus, while the Court's inaction in 1988 might appear to be a mere continuation of the stay entered in 1967 and continued in 1971, the

---

273. Marshall argued that the lower courts failed to apply *Rees* correctly, "so that they, in essence, allow[ed] a state capital punishment scheme to become an instrument for the effectuation of suicide by a mentally ill man." Rumbaugh v. McCotter, 473 U.S. 919, 919 (1985) (Marshall and Brennan, JJ. dissenting from denial of cert.).

274. *See* DEATH ROW, U.S.A., *supra* note 23, at 12.

275. Lovelace v. Lynaugh, 479 U.S. 1071 (1987) (Marshall and Brennan, JJ., dissenting from denial of stay). *See* Lovelace v. Lynaugh, 809 F.2d 1136 (5th Cir. 1987) (recounting that the state court judge determined Hernandez was competent based on a telephone conversation with him).

276. As the 1988 Preliminary Memorandum stated, "[Petitioner] remains confined to a federal mental institution for the criminally insane. It would appear that [petitioner] is no more capable of making a rational decision now than he was in 1967. . ." Preliminary Memorandum from Werner, *supra* note 240, at 12. This conclusion was probably based on the 1987 Progress Report that the Virginia Attorney General's office sent to the Court in June 1987. Federal Bureau of Prisons, *supra* note 234. The staff psychologist concluded that Rees's schizophrenic condition was in remission and that his "condition has substantially improved from the time of the 1965 Virginia State Court ruling that the defendant was unable to make a rational choice with respect to continuing or abandoning further litigation." *Id.* at 3. He stated, Rees was "presently not actively psychotic." *Id.* However, the Progress Report documented a long history of Rees being transferred from regular prisons back to the medical center due to the reemergence of psychiatric problems. Thus, even if Rees had "substantially improved" it did not mean he was competent.

underlying policies and concerns in 1988 were quite different from those previously motivating the Court. In 1967 and 1971, when the constitutionality of the death penalty was in question and concerns for the rights of the defendant were paramount, the Court apparently strove to avoid any step that might expose Rees to the risk of execution. In 1988, when the number of executions was rising and the Court was ruling summarily in waiver cases, the Court seems to have declined to act in *Rees* for the opposite reason—to avoid injecting heightened scrutiny of possible incompetency into other death penalty cases where the defendant was seeking to waive his appeals in order to be executed.

Ironically, while the Court's handling of *Rees* in 1988 had potential consequences for other death penalty waiver cases, the consequences for Rees himself had practically vanished. As of 1988, Rees was no longer under sentence of death. He was serving three life sentences, still in a federal medical center for the mentally ill. The stakes associated with whether he could continue or abandon his litigation pending before the Court no longer existed.[277]

The Court took its final action in *Rees v. Peyton* in 1995. On July 10, 1995 Rees died of a heart attack while still at the federal medical center in Missouri.[278] The Court dismissed the case on October 2, 1995.[279]

V. CONCLUSION

Rees v. Peyton is a small but noteworthy U.S. Supreme Court case. It is the only time the Court has addressed the substantive standard that federal courts must apply to determine whether a death row inmate is competent to abandon or continue litigating his appeals. Yet, the Court provided so little information about the case, substantively and procedurally, that it has remained an enigma.

The archival documents elucidate the difficulties the Court had with

---

277. Heightening the irony, it appears that developments in Supreme Court jurisprudence over the twenty years since Rees had filed his certiorari petition made it highly unlikely that the Court would have agreed to hear his case. On both issues, prejudicial pretrial publicity and illegal searches, subsequent Supreme Court decisions effectively eviscerated the certworthy nature of the questions presented. *See* Preliminary Memorandum from Werner, *supra* note 240, at 12-13 (citing Stone v. Powell, 428 U.S. 465 (1976) (precluding federal habeas corpus review of Fourth Amendment claims when the State provided a full and fair opportunity for hearing); Patton v. Yount, 467 U.S. 1025 (1984) (finding no manifest error in trial judge determination that the jury was impartial; extensive pretrial publicity had been before the first trial, not the second trial four years later)).

278. McKelway, *supra* note 5, at 1.

279. Rees v. Superintendent, 516 U.S. 802 (1995).

Rees throughout its thirty-year pendency on the Court's docket. Despite significant changes in the Court's composition and the leadership of three Chief Justices, at every juncture the Court avoided taking any action that might be construed as precedential. Initially the Court was hesitant to issue an order transferring Rees to a state hospital for a psychological evaluation, even though all of the doctors and lawyers agreed that this was a necessary step. The Court instigated repeated attempts at an informal resolution, all of which failed. Only then did the Court issue its one substantive decision, remanding the matter to the federal district court for a determination of whether Rees was competent to abandon or continue the litigation. After remand, the Court's published order staying the proceedings did not contain the basis for its decision, and thus provided no guidance for future cases. Twenty years later, in 1988, one of the Court clerks cautioned against taking a step that might establish an unwarranted precedent.

Perhaps, in some ways, the Court succeeded in keeping *Rees* a singular case on its docket. But the historical context in which the Court made its decisions suggests that more than issues unique to Rees informed the Justices' actions. From 1965 to 1995 the legal landscape of the death penalty underwent enormous change. In 1966 and 1967, when the Court was first deciding how to proceed in *Rees*, the number of executions across the country had dwindled to less than a handful. Yet, the Court was faced with a man who sought execution. The doctors who evaluated him, and the federal district court that held an evidentiary hearing on the matter, agreed that he was mentally ill and not competent to decide to abandon or continue the litigation of his case. In light of this, the Court took its most important step in the case: it stayed the proceedings. While placing the case in a state of indeterminacy, the Court's order was the appropriate response to the determination that Rees was incompetent to decide to abandon or continue the legal challenges to his conviction and death sentence. At the same time, it protected him from being subject to execution.

When the Court reconsidered *Rees* in 1971, reason still existed to hold the case. The Court was embroiled in a series of cases that challenged the constitutionality of the death penalty itself. It made no sense to reactivate Rees's case while the Court evaluated the very basis of Rees's sentence. By 1988, when the Court visited Rees's case for the final time, the constitutionality of the death penalty had been resolved and executions were on the rise. The Court itself seemed to be on firmer, and more hurried, footing in ruling on death penalty cases where inmates sought to waive their appeals. To reopen Rees's case would prompt a host of questions about how the Court would determine his present competency. By this time, the Court did not seem to want to be in the business of making that kind of

assessment.

The history of *Rees v. Peyton* allows us to see some of the internal operations of the Court as it struggled with a small, but important, case. Whether Rees was competent to waive his appeals was, literally, a matter of life or death for him. Once the federal district court concluded that Rees was incompetent to abandon or continue the litigation of his death sentence, the U.S. Supreme Court insulated Rees from being executed by staying the proceedings in the case. Although Rees's risk of execution eventually became moot, the Court's internal dilemmas about how to handle the case persisted. Thus Rees's case stayed on the Court's docket until his natural death.

EPILOGUE

The Court documents in *Rees* are historically significant because they reveal, for the first time, how the Court resolved the difficult issues it faced regarding how to determine whether Rees was competent to decide whether to abandon or continue litigating his case, and whether to proceed once the federal district court found Rees incompetent. A recent decision by the U.S. Court of Appeals for the Ninth Circuit shows that these documents are of present day import as well.

In June 2003, the Ninth Circuit held, in a death penalty case, that the federal district court must stay post-conviction proceedings challenging the constitutionality of the death row inmate's state conviction and death sentence as long as the inmate is incompetent, i.e., "unable to communicate rationally with counsel."[280] The lower court, while finding Gates (the death row inmate) incompetent, had refused to stay the proceedings, and instead appointed a next friend to represent Gates's interests in the litigation. In reversing the district court, Judge Kozinski, writing for the three-judge panel, reasoned that a next friend cannot stand in the client's stead and protect her interests because the next friend does not know what the client knows, and in order for an attorney to meaningfully represent her client, she needs access to information relevant to the case that only the client possesses.[281] Thus, as long as Gates was incompetent, the proceedings must be stayed because he was unable to communicate rationally with his

280. Rohan *ex rel.* Gates v. Woodford, 334 F.3d 803, 807 n.2 (9th Cir. 2003), *cert. denied*, 234 S. Ct. 809 (2003).

281. *Id.* at 816. The court concluded that the federal statutory right to counsel in a federal post-conviction proceeding includes a "statutory right to competence," *id.* at 814, because counsel must be able to communicate with her client in order to provide meaningful assistance, *id.* at 812-14.

lawyer.[282]

In reaching this decision, the Ninth Circuit panel considered how other courts, including the U.S. Supreme Court, had treated the issue of staying proceedings in a death penalty case when the inmate is incompetent. Citing *Rees*, the panel found that "[w]hat little Supreme Court authority exists on this point also supports our conclusion."[283] The panel took judicial notice of the unpublished and heretofore unknown record in *Rees* and found that it explained the Court's summary order staying the proceedings in a way that the panel found "persuasive."[284] In particular, it pointed to the arguments that Rees's lawyer and the Commonwealth of Virginia made to the Court as to how it should proceed once the district court had found Rees incompetent. Rees's lawyer argued that the Court should grant certiorari and stay the proceedings because Rees's incompetence made him unable to make any decisions about the case. The Commonwealth argued that the case should not be stayed under any circumstance. As the panel noted, "[t]he Court's stay evidently constitutes a rejection of the State's position."[285] The panel concluded that the *Rees* record "shows that incompetence is a grounds for staying habeas proceedings."[286]

The *Rees* court documents provide insight into a previously opaque Supreme Court order staying proceedings in a death penalty case. This is historically important. But, as *Rohan* demonstrates, the *Rees* documents have contemporary value as well. For litigators and courts seeking guidance in how to proceed in death penalty cases when the death row inmate may be incompetent, the *Rees* documents establish a strong historical model for thoroughly examining an inmate's mental capacity and staying court proceedings when the inmate is deemed incompetent.

---

282. *Id.* at 819.

283. *Id.* at 815.

284. *Id.* at 815, n.7.

285. *Id.*; *see supra* notes 172-83 and accompanying text (describing the lawyers' positions).

286. *Rohan*, 334 F.3d 803, 815 (9th Cir. 2003).